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Cultural (Re)Codings: Copyright, Trademarks and the Right of Publicity

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Abstract

In his critique of consumption, Jean Baudrillard contends that the consumer no longer relates to a particular object in its specific utility, but to a set of objects in its total signification. Thus, increasingly, when consumers make their purchases, they do not simply select goods and services purely for their functional or utilitarian values, but are buying into the significations of these commodities in the construction of their self-identities. Objects of intellectual property (IP), in particular copyrighted works, trademarks and the celebrity personality, represent far more than a bundle of legal rights. They are invariably associated with a set of cultural narratives and semiotic meanings which are ultimately consumed.

A well-known literary or artistic work does much more than simply educate, inform or entertain; it also functions as a signifier of a set of signified meanings. A trademark does not only designate the source or origin of goods. Famous brands like Louis Vuitton, Apple and Nike possess particular configurations of meanings that offer peculiarly powerful affirmations of belonging and recognition in the lives of their customers around the world. Celebrities, whose identities may be protected against commercial appropriation by the right of publicity, have become common points of reference for millions of individuals who may never interact with one another, but who have, by virtue of their participation in a mediated culture, a shared experience and a collective memory. This essay explores how the encoded narratives in certain objects of IP may be read as polysemous texts that invite playful semiotic recodings, culture jamming and poststructural disruptions. It also suggests how audiences who engage with works of copyright, trademarks and celebrities via such textual signification may avail themselves of a number of legal defenses under the current legal regime.

I. Introduction

Over thirty years ago, Roland Barthes observed that "narrative is present in every age, in every place, in every society … narrative is international, transhistorical, transcultural".[1] Confronted with an infinite plurality of narratives from spoken/written words to fixed/moving images, Barthes struggled to articulate a unifying analytical framework but suggested that linguistics could be a founding model for a structural analysis. In deconstructing a narrative as "a hierarchy of instances"[2], Barthes acknowledged that although the narrative situation is heavily coded, "narration can only receive its meaning from the world which makes use of it".[3]

Copyright law is often premised on the identification of an author of a literary, dramatic, musical or artistic work, and then giving this author monopoly rights for a limited

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1 Roland Barthes, 'Introduction to the Structural Analysis of Narratives' in *Image-Music-Text* (trans Stephen Heath) (1977) 79, 79.

2 Ibid at 87. Barthes posits that there are three levels of description in the narrative work – functions, actions and narration – which are bound together by a mode of progressive integration. Ibid at 88.

3 Ibid at 115.

period to control the commercial exploitation of his or her intellectual creation. However, the hegemonic position of the authorial text has been challenged by scholars like Barthes, who argues that "a text's unity lies not in its origin but in its destination" and that "the birth of the reader must be at the cost of the death of the Author".[4] Barthes' work, controversial at the time of publication with its assault on modernity and the primacy of authorial control, has nonetheless laid the groundwork for an important body of scholarship on interpretive communities. Interdisciplinary legal writings, especially in the area of intellectual property and personality rights, have also actively engaged such themes in recent years.[5] For example, Nathaniel Noda contends that copyright law ought to "keep pace with changing times and practices by recognizing that an author implicitly cedes certain interpretive rights to the general public when he or she introduces a work into the stream of public discourse."[6] However, Brian Holland cautions that

> [c]ertain critical theorists, particularly those aligned with the law and literature movement, challenge the dominance of the romantic ideal and the Lockean theory in copyright doctrine … [but often] these critical theories are simply too radical to be useful in the formulation of copyright law and policy.[7]

A well-known literary or artistic work does much more than simply educate, inform or entertain; it also functions as a *signifier* of a set of *signified* meanings. The representative fictional characters from the iconic works may function as signifiers of both individualized and a shared set of meanings. A "myth" is thereby created when meaning within a semiological system is transformed into form as represented by a sign;[8] each sign becomes naturally associated with a set of meanings or "historical intention"[9] which is ultimately consumed. Like famous trademarks, the copyrighted character signifier/signified relationship would have become universally codified for the audience; the audience will automatically and consistently think of the coded meanings and values (the signified) when they are exposed to the character signifiers. In other words, the fictional character becomes a sign for a predetermined set of cultural codes and audience experiences associated with the work or the author of the work.[10] In Barthesian terms, the celebrity image is also seen to be a "cultural narrative" or signifier that is synonymous with the dominant culture.[11] Due to the meticulously constructed public personae of many

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4 Roland Barthes, 'The Death of the Author' in *Image-Music-Text* (trans Stephen Heath) (1977) 142, 148.

5 Eg Rebecca Tushnet, 'Judges as Bad Reviewers: Fair Use and Epistemological Humility' (2013) 25 *Law & Literature* 20; David Tan, 'Political Recoding of the Contemporary Celebrity and the First Amendment' (2011) 2 *Harvard Journal of Sports & Entertainment Law* 1; David Tan, 'The Fame Monster Reloaded: The Contemporary Celebrity, Cultural Studies and Passing Off' [2010] *Singapore Journal of Legal Studies* 151; Justin Hughes, '"Recoding" Intellectual Property and Overlooked Audience Interests' (1999) 77 *Texas Law Review* 923.

6 Nathaniel T Noda, 'Copyright Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities' (2010) 57 *Journal of Copyright Society of USA* 987, 991.

7 H Brian Holland, 'Social Semiotics in the Fair Use Analysis' (2011) 24 *Harvard Journal of Law & Technology* 335, 358.

8 Roland Barthes, *Mythologies* (Annette Lavers trans, 1972) (1957) 131.

9 Ibid at 142.

10 See generally David Tan, 'The Semiotics of Alpha Brands: Encoding/Decoding/Recoding/Transcoding of Louis Vuitton and Implications for Trademark Laws' (2013) 32 *Cardozo Arts & Entertainment Law Journal* 221, 227.

11 Patrick Fuery and Kelli Fuery, *Visual Cultures and Critical Theory* (2003) 93, 101.

celebrities – particularly the movie stars and sport icons[12] – the semiotic sign of these well-known individuals is usually "decoded" by the audience to represent a defined cluster of meanings and subsequently "recoded" in different expressive ways.

Cultural perspectives on law are a growing part of contemporary legal scholarship, paralleling the emergence of cultural studies as an academic discipline. For instance, Barton Beebe, in his writings on a semiotic account of trademark doctrine,[13] has persuasively demonstrated that "semiotic concepts can be applied to clarify and ameliorate fundamental areas of trademark doctrine and policy".[14] His analysis of "sign value" as a "Saussurean structural value" that involves a "conspicuous display of distinctions, of 'marginal differences"'[15] has a parallel relevance to well-known literary, dramatic, musical and artistic works. Beebe also suggests that historically societies impose sumptuary laws in an effort to regulate and enforce their sumptuary codes which have hitherto facilitated the construction of individual and group identity:

> A society's sumptuary code is its system of consumption practices, akin to a language (or at least "a set of dialects), by which individuals in the society signal through their consumption their differences from and similarities to others.[16]

Sumptuary laws exist in their contemporary form as intellectual property law, which conserves or reproduces "our system of consumption-based social distinction and the social structures and norms based upon it".[17] Similarly, Jeremy Sheff notes that the modern brand is "a social phenomenon" and "[a]s consumers, we use brands [or trademarks] as tokens of social differentiation, identification, and expression."[18]

This article posits that it is a useful endeavor to approach certain objects of intellectual property (IP) – such as copyrighted works, trademarks and the celebrity persona as protected by the right of publicity – as "narratives" or "signs", but in a manner that permits a more nuanced application of existing intellectual property laws.

II. DECONSTRUCTING NARRATIVES IN INTELLECTUAL PROPERTY

Much of cultural studies research concentrates on how a particular phenomenon relates to matters of ideology, race, social class and gender; it departs from the *text* (which can be seen as the law's main concern) to undertake a discursive analysis of the *context* to consider how power in society is distributed and contested through processes of production,

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12 Eg Richard Dyer, *Stars* (1979); Richard DeCordova, *Picture Personalities: The Emergence of the Star System in America* (1990); Gary Whannel, *Media Sport Stars: Masculinities and Moralities* (2002); Barry Smart, *The Sport Star: Modern Sport and the Cultural Economy of Sporting Celebrity* (2005).

13 Eg Barton Beebe, 'The semiotic account of trademark doctrine and trademark culture' in Graeme B Dinwoodie and Mark D Janis (eds), *Trademark Law and Theory: A Handbook of Contemporary Research* (2008) 42 ('Semiotic Account'); Barton Beebe, 'The Semiotic Analysis of Trademark Law' (2004) 51 *UCLA Law Review* 621 ('Semiotic Analysis').

14 Beebe, Semiotic Account, ibid 42.

15 Ibid 62.

16 Barton Beebe, "Intellectual Property Law and the Sumptuary Code" (2010) 123 *Harvard Law Review* 809, 812.

17 Ibid at 814.

18 Jeremy N Sheff, "Brand Renegades" (2011) 1 *NYU Journal of Intellectual Property & Entertainment Law* 128, 129.

circulation and consumption.[19] The origins of cultural studies may be traced back to the Frankfurt School, whose most ardent proponents Max Horkheimer and Theodor Adorno postulated a neo-Marxian passive and resigned audience in a society where certain cultural products and practices in the culture industry reproduce ideological domination.[20] Frankfurt School theorists generally view mass-mediated popular culture as a field in which autocratic and dominant meanings are systematically reproduced and reinforced by the culture industries.[21] In contrast to the Frankfurt School, the highly influential Birmingham Centre for Contemporary Cultural Studies ("Birmingham School"), established in 1964 by Richard Hoggart, and later headed by Stuart Hall, tends to see popular culture as a contested terrain in which individuals make and establish their own cultural meanings, and in the process, resist and even subvert the preferred meanings that are generated and circulated by the culture industries.[22] The Birmingham School has been regarded as producing some of the foundational texts of cultural studies. Their signature approach assigns a less important role to cultural producers, and is focused on how culture is made and practised by different groups and classes in society struggling for cultural domination.[23] The Birmingham view on encoding and decoding in culture suggests a distinction between cultural texts and subtexts: culture conveys meanings and values explicitly through the text, and it also conveys them implicitly via the subtext, in which obscured messages and values are *encoded* in cultural gestures, and these are *decoded* by the audience to yield specific meanings. The encoding and decoding may not be symmetrical in the sense that the audience may not interpret a text in the manner that is intended by its author or producer.

Referring to Barthes' work on modern myths,[24] Stuart Hall discusses the politics of signification[25] and how ideological discourses of a particular society are classified and

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19 Eg Douglas Kellner, 'The Frankfurt School and British Cultural Studies: The Missed Articulation' in Jeffrey T Nealon and Caren Irr (eds), *Rethinking the Frankfurt School: Alternative Legacies of Cultural Critique* (2002) 31. Kellner points out that cultural studies 'operates with a transdisciplinary conception' in understanding how texts are 'articulating discourses in a given sociohistorical conjuncture' and one 'should move from text to context, to the culture and society that constitutes the text and in which it should be read and interpreted.' Ibid 43.

20 Max Horkheimer and Theodor W Adorno, *Dialectic of Enlightenment* (John Cumming trans, 1998 ed); Theodor W Adorno 'Culture Industry Reconsidered' in Theodor W Adorno, *The Culture Industry: Selected Essays on Mass Culture* (J M Bernstein ed, 1991) 98, 101 ('individuality itself serves to reinforce ideology … its ideology above all makes use of the star system').

21 The term 'Frankfurt School' was first used in the 1960s to refer to the key works of Horkheimer and Adorno. Later theoreticians used the label 'Critical Theory' to describe their writings in this area. Rolf Wiggershaus, *The Frankfurt School: Its History, Theories and Political Significance* (Michael Robertson trans, 1994 ed) 1-8. See also Tony Bennett, 'Theories of the Media, Theories of Society' in Michael Gurevitch, Tony Bennett, James Curran & Janet Woollacott (eds), *Culture, Society and the Media* (1982) 30, 41-47; Jürgen Habermas, *The Philosophical Discourse of Modernity* (Frederick Lawrence trans, 1990); Stuart Ewen, *All Consuming Images: The Politics of Style in Contemporary Culture* (1988). Generally, the Frankfurt School has its roots in the dialectical materialism of Marxism.

22 Eg Stuart Hall, 'Encoding/Decoding' in Stuart Hall, Dorothy Hobson, Andrew Lowe and Paul Willis (eds), *Culture, Media, Language* (1980) 128; Iain Chambers, *Popular Culture: The Metropolitan Experience* (1986); John Fiske, *Reading the Popular* (1989).

23 For Hall, popular culture is one of the sites where the 'struggle for and against a culture of the powerful is engaged … It is the arena of consent and resistance.' Stuart Hall, 'Notes on Deconstructing the "Popular"' in Raphael Samuel (ed), *People's History and Socialist Theory* (1981) 228, 239.

24 Roland Barthes, *Mythologies* (Annette Lavers trans, 1972) (1957).

25 Stuart Hall, 'The Rediscovery of "Ideology": Return of the Repressed in Media Studies' in Michael Gurevitch, Tony Bennett, James Curran & Janet Woollacott (eds), *Culture, Society and the Media* (1982) 56, 70-4.

framed through semiotic signs.[26] Like Barthesian myths, cartoon characters such as Mickey Mouse and Snow White, well-known superhero characters such as Superman, Captain America and Wonder Woman, as well as fictional characters from popular television series like Star Trek, contain subject positions and models for identification that are heavily coded ideologically.[27] Due to their repeated and consistent propagation in a panoply of media by their creators and right owners, these narratives tend to acquire a stable set of meanings that is decoded (or downloaded) by audiences worldwide in a way desired by the encoders, as evidenced by their mass popularity. For instance, Eleanor Byrne and Martin McQuillan argued that the "Disney [text] has become synonymous with a certain conservative, patriarchal, heterosexual ideology which is loosely associated with American cultural imperialism";[28] indeed many of Disney's texts present fertile opportunities for opposite or subversive readings that disrupt the hegemony of a hyperrealist utopian escapism.

Semiotics is located within this broader analytical framework of cultural studies that blends different theoretical disciplines like critical theory, literary theory, cultural anthropology, film/video studies, art history/criticism, women's studies, sociology and consumer studies in its appreciation of the phenomena of popular culture. Semiotics is fundamentally the study of signs.[29] It seeks to understand the operation of a given system or process by observing the function of signification, expression, representation and communication.[30] Umberto Eco describes semiotics as a social science discipline that studies "everything that can be taken as a sign".[31] A sign is simply a thing that stands for something else. Although it has its origins in the study of language, semiotic analysis is a trans-linguistic activity[32] that can be applied to the inquiry of "[a system] of structural codes … that engages with culture, consumption, and communication in the marketplace."[33] It has been said that there are "two general components to the functioning of a semiotic sign: signification and value. Signification represents the process by which a signifier evokes a signified, which in turn can lead to the identification of a referent or object … Value is described as the horizontal relation among subparts and involves differentiating among subparts (that is, for example, signifiers from other signifiers or signifieds from other signifieds)."[34]

In his oft-cited work on the semiotic analyses of consumer cultures, *Mythologies*, Barthes explains that "any semiology postulates a relation between two terms, a signifier

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26 Ibid 74. See also David Tan, 'Harry Potter and the Transformation Wand: Fair Use, Canonicity and Fan Activity' in Dan Hunter, Ramon Lobato, Megan Richardson and Julian Thomas (eds), *Amateur Media: Social, Cultural and Legal Perspectives* (2012) 94.

27 See generally David Tan, 'The Transformative Potential of Countercultural Recoding in Copyright Law: A Study of Superheroes and Fair Use' in Irene Calboli and Srividhya Ragavan (eds), *Diversity in Intellectual Property: Identities, Interests and Intersections* (2015) 403; David Tan, 'Taking the Mickey out of Disney: A Cultural Approach to the Transformative Use Doctrine in Copyright Law' in Rochelle Cooper Dreyfuss and Elizabeth Ng Siew Kuan (eds), *Framing Intellectual Property Law in the 21st Century: Integrating Incentives, Trade, Development, Culture and Human Rights* (2019) (forthcoming).

28 Eleanor Byrne and Martin McQuillan, *Deconstructing Disney* (1999) 1-2. See also Henry A Giroux, *The Mouse That Roared: Disney and the End of Innocence* (1999) 30-32.

29 Ferdinand de Saussure, *Course in General Linguistics* (Wade Baskin trans., 1959) 113-114.

30 Michael Pulos, 'A Semiotic Solution to the Propertization Problem of Trademark' (2006) 53 *UCLA Law Review* 833, 844.

31 Umberto Eco, *The Theory of Signs* (1979) 7.

32 Roland Barthes, *Elements of Semiology* (trans Annette Lavers and Colin Smith) ([1964] 2000) 11.

33 Laura R Oswald, *Marketing Semiotics: Signs, Strategies, and Brand Values* (2012) 47.

34 Pulos, above n 30, 845.

and a signified"[35] and that a sign "is the associative total of the first two terms."[36] A cursory reading of Barthes' denotational-connotational framework[37] suggests that one may locate a clear coded iconic message, but on closer investigation, Barthes did point out that "all images are polysemous; they imply, underlying their signifiers, a 'floating chain' of signifieds, the reader able to choose some and ignore others."[38] Some scholars have posited two forms of oppositions to modernism: neoconservative postmodernism and poststructural postmodernism.[39] The former "advocates a return to representation … tak[ing] the referential status of its images and meaning for granted' while the latter "rests on a critique of representation … question[ing] the truth content of visual representation … and explores the regimes of meaning and order that these different codes support."[40] The former tends to view the sign as "a stable unit of signifier and signified", whereas the latter reflects on the text as "a contemporary dissolution of the sign and the released play of signifiers."[41] Regardless of which form of postmodern theory one prefers, semiotics nonetheless is a useful methodology for any scholar attempting to discern the meaning or a kaleidoscope of meanings that is signified by a copyrightable work or trademark or celebrity persona (these objects of intellectual property will be collectively referred to as "IP narratives or signs").

III. INTELLECTUAL PROPERTY NARRATIVES – ENCODING, RECODING, TRANSCODING

In his critique of consumption, Jean Baudrillard contends that the consumer "no longer relates to a particular object in its specific utility, but to a set of objects in its total signification."[42] Thus, increasingly, when consumers buy goods, they buy into the significations of these commodities in the construction of their self-identities. Artifacts from popular culture play a quintessential role in the process of self-definition, and "human beings rely on use of tangible cultural symbols to articulate and understand a view of themselves."[43] Mark Bartholomew observes that we "begin the process of arriving at a stable self-narrative through categorization."[44] We tend to construct a social narrative of ourselves as part of a particular social group and the use of specific IP narratives or signs help to reify group identity in a particular way.

One of the key relevance of semiotics to intellectual property doctrine lies in the investigation of how different groups in society can use myriad IP narratives or signs in a variety of ways to represent their cultural identities and convey their political ideologies. Scholars like John Fiske have extended popular resistance beyond that of oppositional groups like subcultures to the potential of audience reconstruction with dominant symbols of a culture. Fiske coined the term "semiotic democracy" to describe a world where empowered audiences freely and widely engage in the use of cultural symbols or narratives

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35 Roland Barthes, *Mythologies* (Annette Lavers trans, 1972) (1957) 111.
36 Ibid.
37 Roland Barthes, *Image-Music-Text* (Stephen Heath trans) (1972) 32-51.
38 Ibid at 38-39.
39 Eg Hal Foster, *Recodings: Art, Spectacle, Cultural Politics* (1985) 128-129.
40 Ibid.
41 Ibid at 129.
42 Jean Baudrillard, *The Consumer Society: Myths and Structures* (Chris Turner trans, first published 1970, 1998 ed) [trans of: *La Société de Consummation*] 27.
43 Mark Bartholomew, 'Advertising and Social Identity' (2010) 58 *Buffalo Law Review* 931, 938.
44 Ibid at 952.

to express meanings that are different from the ones intended by their creators.[45] Within the framework of semiotic democracy, linked to the presumed legitimacy of the democratic process and collective self-governance, one seeks to expand the marketplace of protected speech through fair use and First Amendment defenses. However, the notion of "semiotic disobedience" suggests that the interruption of the codes of copyrighted artistic expression or trademarks can be legitimized by vandalism, destruction of properties, massive interruptions in public space and corporate sabotage.[46] The term "culture jamming" has also been used to describe this form of consumer activism undertaken by individuals or groups to contest or disrupt the corporate domination of consumerist culture.[47] The term is inspired by the technique of interfering with or "jamming" radio or television broadcast signals, and like Umberto Eco's "semiological guerrillas",[48] culture jammers seek to introduce noise to the signal. Culture jamming, as a strategy of "rhetorical protest",[49] is usually aimed at major global brands and trademarks, and is said to be a "rhetorical process of intervention and invention, which challenges the ability of corporate discourses to make meaning in predictable ways"[50] The acts range from parodying or satirizing corporate communications, artifacts and images using a *détournement* technique to more aggressive acts of hacking.

Stuart Hall has defined the taking of an existing meaning and reappropriating it for new meanings as "trans-coding"[51] and explained that repressed groups may use trans-coding strategies to reverse stereotypes, substitute negative portrayals with positive ones or contest subordinate representations from within.[52] Such a description possibly falls within Hal Foster's description of the countercultural movement with seeks to counter the myth; such "'myth-robbery' seeks to restore the original sign for its social context *or* to break apart the abstracted, mythical sign and to reinscribe *it* in a countermythical system."[53] However, Foster views the "subcultural" practice to be different from the countercultural in that it "recodes signs rather than poses a revolutionary practice of its own."[54] IP narratives may be read and re-read, deconstructed and reconstructed in infinite ways. Subcultural movements such as bricolage or parodic collage – which may include shanzhai practices – differ from the countercultural and countermythical agenda which tend to pose

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45 John Fiske, *Television Culture* (1987) 239. See also Sonia K Katyal, 'Semiotic Disobedience' (2006) 84 *Washington University Law Review* 489, 489-90; Michael Madow, 'Private Ownership of Public Image: Popular Culture and Publicity Rights' (1993) 81 *California Law Review* 127, 139.

46 Katyal, ibid.

47 Culture jamming is often linked to the legacy of the Situationist International (1957-1972), a Paris-based organization of artists and intellectuals that pioneered creative tactics to subvert the intended meanings of corporate consumerist messages. See Eleftheria J Lekakis, 'Culture Jamming and Brandalism for the environment: The logic for appropriation' (2017) 15 *Popular Communication* 311, 314-315.

48 Umberto Eco, *Travels in Hyperreality* (1986) 135.

49 Christine Harold, 'Pranking Rhetoric: "Culture Jamming" as Media Activism' (2004) 21 *Critical Studies in Media Communication* 189. *Adbusters* is seen to be at the forefront of this insurgent political movement that seeks to undermine the marketing rhetoric of multinational corporations through practices such as subversive advertisement parodies (commonly known as "subvertisements"), media hoaxing, billboard liberation and trademark infringement. Ibid at 190.

50 Ibid at 192.

51 Stuart Hall, 'The Spectacle of the "Other"' in Stuart Hall (ed), *Representation: Cultural Representations and Signifying Practices* (1997) 223, 270. The term 'transfunctionalize' has also been used to describe how subcultures assign new and often contradictory meanings to signs as understood by mainstream society. Paul Nathanson, *Over the Rainbow:* The Wizard of Oz *as a Secular Myth of America* (1991) 241.

52 Hall, ibid at 270-5.

53 Foster, above n 39, at 169.

54 Ibid at 170.

a revolutionary program. The former may aim to confuse or play with cultural codes while the latter will resist dominant narratives.

Sheff implicitly acknowledges the multiplicity of recodings in his analysis of the "brand renegade", which he defines as "a consumer who uses branded products out of affiliation with some aspects of the image cultivated by the brand owner, but whose conspicuous consumption of the brand generates social meanings that are inconsistent with that image."[55] Despite the differences, both countercultural and subcultural recodings, essentially different forms of poststructural disruptions, are arguably applicable to: (i) the likelihood of confusion analysis in trademark infringement, as well as the fair use and non-commercial use exception in trademark dilution; (ii) the transformative use doctrine in copyright law; and (iii) right of publicity law.

A. Copyright

The US Supreme Court in both *Golan v Holder* and *Eldred v Ashcroft* has held "the 'traditional contours' of copyright protection, *i.e.*, the 'idea/expression dichotomy' and the 'fair use' defense … are recognized in our jurisprudence as 'built-in First Amendment accommodations'."[56] In particular, the fair use defense as codified in 17 USC §107 "allows the public to use not only facts and ideas contained in a copyrighted work, but also [the author's] expression itself in certain circumstances."[57] It is unsurprising that in the context of a robust free speech culture emboldened by the First Amendment, US courts have interpreted the notion of transformative use liberally – and consequentially the fair use defense – when the freedom of speech would be unduly constrained by the enforcement of the rights of copyright or trademark owners. In copyright fair use, the pertinent inquiry is whether the secondary work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message".[58]

In *Suntrust Bank v Houghton Mifflin Company*,[59] the narrative of the iconic literary work *Gone With The Wind* (*GWTW*) was recoded by Alice Randall, the author of *The Wind Done Gone* (*TWDG*), who claimed that her novel was a critique of *GWTW*'s depiction of slavery and the Civil-War era American South. Randall had appropriated the characters, plot and major scenes from *GWTW* into the first half of *TWDG*, but many of these characters are renamed in *TWDG*: for example, Scarlett becomes "Other," Rhett Butler becomes "R.B." While the Eleventh Circuit Court of Appeals found clear copyright infringement, *TWDG* was nonetheless highly transformative and was fair use: "It is principally and purposefully a critical statement that seeks to rebut and destroy the perspective, judgments, and mythology of *GWTW*. Randall's literary goal is to explode the romantic, idealized portrait of the antebellum South during and after the Civil War."[60] In construing the original literary work as an encoded sign(s) or cultural narrative, Randall's recoding to offer different meaning or message from the original falls squarely within the transformative use doctrine. For literary works, it is easier to discern a "transformation" to the extent that "a parodic character may reasonably be perceived"[61] when the objective of

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55 Sheff, above n 18, at 130.
56 *Golan v Holder*, 132 S Ct 873, 890 (2012); *Eldred v Ashcroft*, 537 US 186, 219 (2003).
57 Ibid.
58 *Campbell v Acuff-Rose Music Inc*, 510 US 569, 579 (1994).
59 *Suntrust Bank v Houghton Mifflin Company*, 268 F 3d 1257 (11th Cir. 2001).
60 Ibid at 1270.
61 *Campbell v Acuff-Rose Music Inc*, 510 US 569, 582 (1994).

a subsequent literary work is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work. But when confronted with visual images – such as photographs and paintings – as seen in cases like *Blanch v Koons* and *Cariou v Prince*, it is more challenging to locate a definitive meaning in the original work from which a transformation may be confidently discerned.

Brian Holland finds that certain aspects of the critical theories aligned with the law and literature movement are useful to a more expansive model of transformative fair use that addresses both monopoly incentive and accommodation concerns. He explains:

> First, these critical theories shift the focus away from works of authorship and toward audience engagement with the text. This mitigates the tendency to overvalue, through a monopoly interest, those who most closely fit the image of the romantic author and to undervalue both prior works and the audience. Second, these critical theories acknowledge that an author does not control the meaning of a work. Instead, meaning is determined, at least in part, through intertextual processes. This opens the door to a reconsideration of meaning-making and the role of audiences in that process, with significant implications for copyright doctrine.[62]

Holland postulates that "the prevailing conception of transformativeness [in copyright fair use] is one of romantic authorship, evidenced by a defendant's authorial purpose or activity" and proposes an approach "grounded in social semiotic theory [that] attempts to account for the multiple and divergent meanings created as various interpretive communities engage a particular work".[63] However, contrary to Holland's observations that the US courts currently focus on the degree to which a defendant has engaged in authorial activity in the fair use analysis,[64] the current approach of the US Second and Ninth Circuit Courts of Appeals appears to be able to accommodate the shifting of the transformativeness inquiry from locating an authorial presence or authorial activity, to one of reader interpretation, i.e. whether one might reasonably perceive the creation of "new information, new aesthetics, new insights and understandings".[65] Rebecca Tushnet seems more pessimistic, commenting that "the transformative user will readily be subject to the criticism that she didn't say anything we … did not already know. Without recognizing that works mean different things to different people, transformativeness as a concept is at war with itself."[66]

As Laura Heymann points out, ultimately, the question is whether the resulting work "is transformative in its meaning – that is, whether the reader perceives the second copy as signifying something different from the first."[67] Potentially when one analyses a

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62 H Brian Holland, "Social Semiotics in the Fair Use Analysis" (2011) 24 *Harvard Journal of Law & Technology* 335, 358

63 Ibid at 348.

64 Ibid at 354-356.

65 Eg *Cariou v Prince*, 714 F.3d 694 (2nd Cir. 2013); *Blanch v Koons*, 467 F.3d 244 (2nd Cir. 2006); *Seltzer v Green Day*, 729 F.3d 1170 (9th Cir. 2013).

66 Tushnet, above n 5, at 27.

67 Laura A Heymann, "Everything is Transformative: Fair Use and Reader Response" (2008) 31 *Columbia Journal of Law & the Arts* 445, 455. However, this observation is not unproblematic. Holland notes that: "Courts have come to assume, however, that those messages and meanings reside in the mind and intentions of the 'author,' that those messages and meanings are transmitted from the author to the audience, and that certain segments of the audience either 'get it' or do not. But this paradigm

work of copyright, one can read it semiotically as embodying a unity of modern cultural meanings capable of being opposed or resisted (through "countercultural" means such as parody), or one can regard it as possessing polysemous qualities which may be contested or disrupted (through "subcultural" practice such as bricolage or pastiche).

However, Tushnet astutely notes that judges are asked to produce definitive answers about the meanings of texts, and as a result, fixing meaning is necessary for the court to do its job.[68] She comments that:

> Unfortunately, copyright fair use cases rarely acknowledge multiplicity of meaning. Instead, even a defendant-favorable fair use case tends to fix one meaning to the plaintiff's work and another meaning or purpose to the defendant's work, and then declare them different enough that the defendant's use is transformative and therefore fair. When the defendant loses, the court tends to determine that the meaning of the works is the same, taking a universalist perspective that denies that different observers might generate different meanings from the same view.[69]

Tushnet further urges that "[t]o work as an expression-promoting concept, transformativeness must be recognized as highly variable and even audience-specific"[70] and "courts should assess transformativeness from multiple perspectives, with attention to what different audiences might see in a work and in an allegedly transformative remix of that work."[71]

In *Cariou v Prince*, the trial judge Batts J ignored the infamous appropriation artist Richard Prince's deposition that his Canal Zone series was open to myriad interpretations. Batts J erred in finding that there was a lack of transformation under the first factor of fair use because "Prince testified that he doesn't 'really have a message' he attempts to communicate when making art. … In creating the Paintings, Prince did not intend to comment on any aspects of the original works or on the broader culture."[72] However it was clearly shown in the Defendants' Memorandum, that Prince's creation of the Canal Zone series was informed by certain core meanings or messages he intended to convey through them:[73] (i) Prince's concept of a fantastical post-apocalyptical world, where music was the only redeeming thing to survive, as shown through repetitive use of the guitar, figures as band members, and rhythm as expressed through various painterly and collaging techniques; (ii) an ongoing exploration of the relationships that exist in the world, which are men and men, men and women, and women and women; (iii) equality between the sexes, as shown though their nudity and roles as band members.

Moreover, Batts J completely missed the point in Prince's testimony. Prince testified that "in any artwork I don't think there's any one message",[74] consistent with how

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misconceives the process by which 'meaning' is realized. Meaning is not controlled, transmitted, or even consistent. It is, instead, negotiated and actualized in engagement with the audience, or, more appropriately, audiences." Holland, above n 62, 361.

68 Tushnet, above n 5, at 20-21.

69 Ibid at 22.

70 Ibid at 27.

71 Ibid at 29.

72 *Cariou v Prince*, 784 F Supp 2d 337, 349 (S.D.N.Y. 2011).

73 Memorandum of Law In Opposition to Plaintiff's Motion for Summary Judgment, Case 1:08-CV-11327-DAB, filed 14 June 2010, at 12-13.

74 Ibid at 13.

contemporary artists often prefer to let the audience debate the multiplicity of meanings that may be attributed to a particular work of art.[75] Citing its previous decision in *Blanch v Koons,*[76] the Second Circuit Court of Appeals overturned the lower court's decision. The notion of transformative recoding as ultimately perceived by the audience prominently figures in Parker J's holding:[77]

> What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work. Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so. Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may "reasonably be perceived" in order to assess their transformative nature.

There is much similarity between Jeff Koons' and Richard Prince's intent in reproducing original photographs in order to successfully convey new meanings through repurposing preexisting works. Robert Kausnic hints at this postmodern turn in copyright law:

> Koons expressed the purpose of allowing the viewer to create the meaning from his or her own 'personal experience with these objects, products, and images and at the same time gain new [and unspecified] insight into how these affect our lives. In a sense, Koons carefully refused to infuse particular meaning to the work, but rather empowered the viewer with establishing his or her own relative meaning.[78]

Similarly, Peter Jaszi suggests that *Blanch v Koons* "may signal a general loosening of authors' and owners' authority over, by now, not quite so auratic works, allowing greater space for the free play of meaning on the part of audience members and follow-up users who bring new interpretations."[79] *Cariou v Prince* has certainly placed greater on emphasis on the reasonable perception of audiences as to "the creation of new information, new aesthetics, new insights and understandings".[80] This kind of art – typical of the oeuvre of contemporary artists like Andy Warhol, Koons and Prince – has been termed "nonpropositional art" because it conveys "no single representation or message".[81] Randall Bezanson contends that such art yields "a message or meaning that is the creation not of the artist's propositional intention but the viewer's independent construction",[82] implicitly endorsing the theory of the polysemous nature of texts. Referring to Warhol's Campbell's

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75 Eg Emily Meyers, 'Art on Ice: The Chilling Effect of Copyright on Artistic Expression' (2007) 30 *Columbia Journal of Law & the Arts* 219, 219 ("Many artists now use existing images and objects, both from fine art as well as from advertising and mass media, to challenge the viewer's conceptions of art and iconography.").

76 *Cariou v Prince*, 714 F 3d 694, 706 (2nd Cir. 2013).

77 *Cariou v Prince*, 714 F 3d 694, 707 (2nd Cir. 2013). The Ninth Circuit has also applied this new standard. *Seltzer v Green Day Inc*, 729 F 3d 1170, 1176-1178 (9th Cir. 2013) ('*Seltzer*').

78 Robert Kausnic, 'The Problem of Meaning in Non-Discursive Expression' (2010) 57 *Journal of Copyright Society of USA* 399, 421.

79 Peter Jaszi, 'Is There Such a Thing As Postmodern Copyright?' (2009) 12 *Tulane Journal of Technology & Intellectual Property* 105, 116.

80 *Cariou v Prince*, 714 F 3d 694, 706 (2nd Cir. 2013); *Blanch v Koons*, 467 F 3d 244, 251-2 (2nd Cir. 2006) (quoting *Castle Rock Entertainment Inc v Carol Publishing Group Inc*, 150 F 3d 132, 142 (2nd Cir. 1998) (quoting Pierre N Leval, 'Toward a Fair Use Standard' (1990) 103 *Harvard Law Review* 1105, 1111) (internal quotations omitted).

81 Randall P Bezanson, *Art and Freedom of Speech* (2009) 280.

82 Ibid.

Soup Cans and Prince's Marlboro Man series, Bezanson argues that "their 'message' is their value as an instrument that unleashes the viewer's own, perhaps idiosyncratic, leap of imagination and perception."[83]

A countercultural or counterpublic agenda may be best communicated to mainstream society through the use of widely recognized semiotic signs to which the public have ascribed particular representative values or characteristics.[84] Parodies, fan fiction and appropriation art are the best examples of trans-coding practices where an irreverent portrayal of an iconic literary, dramatic, musical or artistic work has recoded its semiotic meanings to express a different or counter-viewpoint that creates new insights and understandings, thus rendering the secondary use "transformative" in nature.[85]

Axel Bruns sees a paradigm shift in the nature of production in the digital age, coining the term "produser", arguing that

> within the communities which engage in the collaborative creation and extension of information and knowledge … the role of "consumer" and even that of "end user" have long disappeared, and the distinctions between producers and users of content have faded into comparative insignificance.[86]

In his study of digital fandom, Paul Booth advances his thesis of a "philosophy of playfulness" which he observes to be prevalent in fan's use of today's digital technology.[87] Drawing on Mikhail Bakhtin's writings, Booth postulates that on the internet, individuals entering into a 'carnivalesque atmosphere subsume their identities, join a collectivity, and participate in a textual freedom.' [88] Blog fan fiction thus become a contemporary representation of the digital carnivalesque wherein everyone playfully participates. Using Alternate Reality Games as an illustration, Booth concludes that fans' treatment of copyrighted works on new media "transgress the line between production and consumption, and more importantly, alter our interpretation of that boundary."[89] Through the process of re-reading within a digital community, "fans identify with the [copyrighted] object as a part of that community's own self-identification, and reproduce that fan community by applying the mores and socialization of fandom via other contexts."[90]

Many fan works – whether as fanvids or fanfic prose and images – may reasonably be perceived as practices where the fan's portrayal of an iconic literary, dramatic, musical

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83 Ibid at 285.

84 Michael Warner's analysis of the struggles that bring individuals together as a public postulates that "subaltern counterpublics" usually articulate alternative power relations with the dominant public defined by race, gender, sexual orientation and other subordinated status. Thus counterpublics are "counter" to the extent that they try to supply different ways of imagining participation within a political or social hierarchy by which its members' identities are formed and transformed. Michael Warner, *Publics and Counterpublics* (2002) 44-63, 117-122.

85 See generally David Tan, "What Do Judges Know About Contemporary Art?: Richard Prince and Reimagining the Fair Use Test in Copyright Law" (2011) 16 *Media & Arts Law Review* 381; William M Landes and Richard A Posner, "The Legal Protection of Postmodern Art" in *The Economic Structure of Intellectual Property Law* (2003) 254.

86 Axel Bruns, *Blogs, Wikipedia, Second Life, and Beyond: From Production to Produsage* (2008) 2.

87 Paul Booth, *Digital Fandom: New Media Studies* (2010) 2.

88 Ibid at 60. See also Paul Booth, *Playing Fans: Negotiating Fandom and Media in the Digital Age* (2015) 136-149.

89 Ibid at 180.

90 Ibid at 129.

or artistic work has recoded its narrative to express a different or counter-viewpoint in a manner that satisfy the broader test of "transformed in the creation of new information, new aesthetics, new insights and understandings".[91] The internet became a global platform upon which fans of myriad fictional worlds can communicate about their favorite shows, characters, music or novels and share related works of fan fiction. I have previously argued that a more nuanced approach to the new media paradigm that posits fandom as a form of "transformative play" within an interactive social and cultural space offers exciting collaborative possibilities to authors and fans.[92] Others have also suggested that the law be more accepting of the antics of the "prankster" in culture jamming where resistance is effected "less through negating and opposing dominant rhetorics than by playfully and provocatively folding existing cultural forms in on themselves."[93] The use of semiotics to discern a different purpose or character that a recoded or subverted sign offers is undoubtedly valuable to the transformative use inquiry in copyright fair use.

B. Trademarks

A trademark is as symbolic as it is functional: it does much more than designate source or origin of goods. Judicial and scholarly treatment of trademark law are increasingly making reference to the semiotic nature of trademarks. Recent applications of semiotics tend to adopt the triadic model in order to explain trademark law. According to this model's structure, trademark is broken down into three component parts: (1) the word or symbol (signifier), (2) the firm's goodwill associated with the word or symbol (signified), and (3) the good or service sold (referent). For example, the LOUIS VUITTON marks can be understood semiotically thus: The word "Louis Vuitton" and/or the "LV" or "LV Monogram" symbols comprise(s) the signifier, the goodwill of Louis Vuitton Malletier, is the signified, and the products being sold (handbags, clothes, fashion accessories etc) are the referents. Beebe, one of the leading scholars in this field, observes that "trademark producers have made a mockery" of the assumptions underlying this triadic structure, noting that "the triadic structuration is being attacked . . . by the granting of protection to trademarks as products themselves".[94] So it appears that when courts grant trademark protection to words or symbols that are not used to identify products, but rather are the products themselves, the courts are merging the referent and the signified. In respect of trademark dilution, Beebe is of the view that dilution relies on a recognition of semiotic notions of value, and "necessarily involves global intermark relations of value in addition to local intramark relations of signification."[95] Essentially, in according a trademark the status of a "famous" mark,[96] one is implicitly recognizing that it is the differential distinctiveness of signifiers from other signifiers that "makes possible the signifier's distinctiveness of its signified and referent."[97]

It has been said that well-known brands like Louis Vuitton, Apple and Nike are *alpha brands* that carry significant "semiotic freight," and like the most influential celebrities, they possess particular configurations of meanings and can "offer peculiarly

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91 *Cariou v Prince*, 714 F 3d 694, 706 (2nd Cir. 2013); *Seltzer v Green Day*, 725 F 3d 1170, 1177 (9th Cir. 2013).

92 David Tan, "Fair Use and Transformative Play in the Digital Age' in Megan Richardson (ed), *Research Handbook on Intellectual Property in Media and Entertainment* (2017) 102, 130.

93 Harold, above n 49, at 191.

94 Beebe, Semiotic Analysis, above n 13, at 656-657.

95 Ibid at 701.

96 Lanham Act § 43(c), 15 U.S.C.A. § 1125(c).

97 Beebe, Semiotic Analysis, above n 13, at 702.

powerful affirmations of belonging, recognition, and meaning in the midst of the lives of their [consumers]."[98] It is precisely this symbolic nature of the Saussurean sign which "embeds structural semiotics in the culture of consumers"[99] that will drive consumption behavior in modern society. Oswald contends that semiotics

> does not stop with a structural analysis, but identifies ways brand meanings are embedded in broad cultural myths, social organization, and beliefs of the target market. The brand system resembles *la langue*, the term that Saussure gives to the system of linguistic codes that defines the range of possibilities for producing discourses.[100]

For well-known trademarks, the brand signifier/signified relationship would have become universally codified for the consuming public; these consumers will automatically and consistently think of the coded brand meanings and values (the signified) when they are exposed to the signifiers such as the logo. Thus the brand logo or trademark becomes a sign for a predetermined set of cultural codes and consumer experiences associated with the brand.

A famous brand like Louis Vuitton transcends clothing, bags, and accessories to take on political, pedagogical, and cultural meanings, much in the same way that McDonald's transcends ground beef and potatoes.[101] Similarly, the Disney mark is not a source designation for cartoons and family entertainment, but has become "synonymous with the notion of childhood innocence" and a semiotic sign for "a pristine never-never land in which children's fantasies come true, happiness reigns, and innocence is kept safe through the magic of pixie dust."[102] Beebe points out that shanzai (山寨) practices – the term given to "a wide array of sometimes licit but usually illicit copying and appropriationist practices in China" – can openly challenge the inequalities in power and wealth that establishment culture perpetuates or work to reinforce established hierarchies.[103] Shanzhai practices often fall short of the level of outright identical-mark-on-identical-goods counterfeiting; for example, shoes bearing something resembling the Nike swoosh and the word mark "Like", the marks "Channel", "Dolce & Banana", "Prapa" or "Rurrebry" written in the same typeface as the original marks Chanel, Dolce & Gabbana, Prada and Burberry.[104] Veblen brands[105] are often the target of such shanzhai practices. In this kind of recoding,

> the widespread propagation of, for example, inauthentic Louis Vuitton bags creates widespread desire for the authentic. In this way, shanzhai status goods simply

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98 David Tan, "The Semiotics of Alpha Brands: Encoding/Decoding/Recoding/Transcoding of Louis Vuitton and Implications for Trademark Laws" (2013) 32 *Cardozo Arts & Entertainment Law Journal* 221, 224.

99 Oswald, above n 33, at 48.

100 Ibid at 50.

101 Tan, above n 98, at 227.

102 Henry A Giroux & Grace Pollock, *The Mouse That Roared: Disney and the End of Innocence* (2010) 17.

103 Barton Beebe, "Shanzhai, Sumptuary Law, and Intellectual Property Law in Contemporary China" (2014) 47 *UC Davis Law Review* 849, 852, 862-863.

104 Brand owners are nonetheless frequently intolerant of such practices. According to Beebe, "[t]he persuasive imitation of distinctive goods has proved to be especially threatening to the sumptuary order because the circulation of such imitations impairs the ability of the imitated goods to yield relative utility, which in many cases is the only form of utility that they have to offer." Beebe, above n 16, at 833.

105 Jeremy N Sheff, "Velben Brands" (2012) 96 *Minnesota Law Review* 769, 772-776.

> promulgate the new sumptuary code, and as Chinese consumers grow wealthier, they will shift their consumption from the simulation to the real.[106]

Semiotics is a useful methodology to show that a mark has acquired distinctiveness (i.e. the sign has acquired a set of stable coded meanings after a period of use that distinguishes it from other signs),[107] that a mark has been recoded to express meanings different from the original mark whether as a parody,[108] as critical commentary,[109] or as political speech.[110] Beebe notes that:

> Dilution is one of the most elusive concepts in all of intellectual property law …because it is an essentially semiotic rather than economic or political concept, one that is concerned not so much with the construction of identity, which is relatively easy to understand, as with the construction of difference, which is not.[111]

The universally coded narrative of Barbie – both the doll and the trademark – has been discussed by the Ninth Circuit Court of Appeals on a number of occasions.[112] In particular, in *Mattel Inc. v. Walking Mountain Productions*, the court found that "Barbie, and all the associations she has acquired through Mattel's impressive marketing success, conveys these messages in a particular way that is ripe for social comment."[113] Generally, the US decisions have demonstrated a willingness on the part of the courts to accept a semiotic reading of trademarks as cultural signs when assessing likelihood of confusion for trademark infringement or evaluating the availability of the non-commercial use exception in a trademark dilution claim for the purposes of parody, satire or political speech. US Circuit Courts of Appeals have consistently declined to find liability against defendants who engaged in non-illegal cultural jamming: Aqua's *Barbie Girl*,[114] Thomas Forsythe's Barbie photographs,[115] Haute Diggity Dog's Chewy Vuiton dog toy[116] and My Other Bag's tote bags depicting drawings of Louis Vuitton bags.[117]

In a recent US Supreme Court decision which declared that the disparagement clause of Lanham Act[118] violated the First Amendment, Justice Alito held that trademarks

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106 Ibid at 863.

107 E.g. Angel Alonso-Cortes, "A Case Study of Semiotic Distinctiveness in Brand Names" (2016) 29 *International Journal for the Semiotics of Law* 635; *Christian Louboutin SA v Yves Saint Laurent America Inc*, 696 F.3d 206 (2nd Cir. 2012).

108 E.g. *Hormel Foods Corporation v Jim Henson Productions*, 73 F.3d 497 (2nd Cir. 1996); *LL Bean Inc v Drake Publishers Inc*, 811 F.2d 26 (1st Cir. 1987).

109 E.g. *Radiance Foundation v National Association for the Advancement of Colored People*, 786 F.3d 316 (4th Cir. 2015); *Louis Vuitton Malletier SA v Haute Diggity Dog LLC*, 507 F.3d 252 (4th Cir. 2007).

110 E.g. *Lucasfilm Ltd v High Frontier*, 622 F.Supp 931 (DDC 1985); *San Francisco Arts & Athletics, Inc v United States Olympic Committee*, 483 US 522 (1987); *Matal v Tam*, 137 S Ct 1744 (2017); *In re Brunetti*, 877 F 3d 1330 (Fed Cir. 2017).

111 Beebe, above n 16, at 845.

112 *Mattel Inc v MCA Records Inc*, 296 F.3d 894 (9th Cir. 2002); *Mattel Inc v Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

113 *Mattel Inc v Walking Mountain Productions*, 353 F.3d 792, 802 (9th Cir. 2003).

114 *Mattel Inc v MCA Records Inc*, 296 F.3d 894 (9th Cir. 2002).

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

116 *Louis Vuitton Malletier SA v Haute Diggity Dog LLC*, 507 F.3d 252 (4th Cir. 2007).

117 *Louis Vuitton Malletier SA v My Other Bag Inc*., 674 Fed. Appx. 16, No. 16-241-cv (22 Dec 2016).

118 Lanham Act 15 U.S.C. § 1052(a). The disparagement clause prohibits the registration of trademarks that may disparage or bring into contempt or disrepute any persons, living or dead.

are private speech,[119] and the prohibition of the registration of such offensive trademarks constituted constitutionally impermissible viewpoint discrimination.[120] More explicitly, in a separate judgment by Justice Kennedy, with whom Justices Ginsburg, Sotomayor and Kagan joined, it was noted that

> [i]n the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality … These marks make up the expression of everyday life.[121]

The political agenda of brand renegades, counterpublics or subaltern groups may be best communicated to mainstream society through the use of widely recognised trademarks – as semiotic signs – to which the public have ascribed particular representative values or characteristics. Even the public act of "consuming" a brand can in itself be a form of commentary on or critique of the coded social meanings in that brand thus rendering it an "expressive" act.[122] Kozinski J in *Mattel Inc. v. MCA Records, Inc.*, opined that

> [t]rademarks often fill in gaps in our vocabulary and add a contemporary flavor to our expressions. Once imbued with such expressive value, the trademark becomes a word in our language and assumes a role outside the bounds of trademark law … Were we to ignore the expressive value that some marks assume, trademark rights would grow to encroach upon the zone protected by the First Amendment. Simply put, the trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function.[123]

This evolving judicial attitude toward embracing a more expansive reading of the noncommercial use exception under the US Lanham Act (15 USC § 1125(c)(3)(C)) has the effect of overprotecting so-called expressive uses which nonetheless take advantage of the commercial success of famous marks. Examining the action of dilution by tarnishment, Alexandra Olson cautions that the free speech rights of artists tend to trump the property rights of the mark holder as the noncommercial use and nominative fair use/parody defenses under the Trademark Dilution Revision Act will immediately shield defendants when applied to artistic works.[124] But protecting a trademark against dilution can be said to mimic patent and copyright infringement protection in the sense that it is aimed at protecting the mark owner's rights regardless of consumer confusion, and more robust statutory defenses would have to be enacted to balance this powerful protection.[125] In *LL*

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119 *Matal v Tam*, 137 S Ct 1744, 1760 (2017).

120 Ibid at 1763.

121 Ibid at 1768. The applicant Simon Tam has argued that he wanted to use "The Slants" to "supplant a racial epithet, using new insights, musical talents, and wry humor to make it a badge of pride", thus subverting "an offensive term for the positive purpose of celebrating all that Asian-Americans can and do contribute to our diverse Nation." Ibid at 1766-1767. The First Circuit has also pointed out that "[f]amous trademarks offer a particularly powerful means of conjuring up the image of their owners, and thus become an important, perhaps at times indispensable, part of the public vocabulary. Rules restricting the use of well-known trademarks may therefore restrict the communication of ideas." *LL Bean Inc v Drake Publishers Inc*, 811 F.2d 26, 30 (1st Cir. 1987).

122 Sheff, above n 18, at 153-158.

123 *Mattel Inc v MCA Records Inc*, 296 F.3d 894, 900 (9th Cir. 2002).

124 Alexandra E Olson, 'Dilution by Tarnishment: An Unworkable Cause of Action in Cases of Artistic Expression' (2012) 53 *Boston College Law Review* 693.

125 Justin J Gunnell, 'Evaluation of the Dilution-Parody Paradox in the Wake of the Trademark Dilution Revision Act of 2006' (2008) 26 *Cardozo Arts & Entertainment Law Journal* 441, 450.

Bean Inc v Drake Publishers Inc, the First Circuit Court of Appeals noted that such anti-dilution statutes may provide legitimate regulations on speech when the expression relates "*solely* to the economic interests of the speaker and its audience."[126] In a number of culture jamming cases where the defendant engaged in semiotic recodings or playful disruptions of famous marks, such as in *Mattel Inc. v. MCA Records, Inc* and *Louis Vuitton Malletier SA v Haute Diggity Dog LLC*, the Circuit courts have found the defendant not to be liable; however, in some parody advertisements scenarios, the commercial defendant who was a *direct competitor* was found liable because the cases involved products and services that are similar and are in competition.[127]

Nevertheless, there are many intriguing possibilities of how analyses of different recodings of trademarks may be plugged into current legal doctrine. In his study of shanzhai practices, Beebe postulates:

> Far from being cool, ironic, and dismissive, this attitude is marked by a fervid, even carnivalesque engagement with and irreverence towards the norms and hierarchies of global consumerism. At times, it seeks illicitly to partake of these hierarchies; at other times, it seeks to ridicule them; at other times still, it is not at all clear what its point, if any, is. But at its best, it reduces this system of consumption-based distinction to so much unintelligible noise, overloading it with hybridized re-codings, mounting an argument ad absurdum against its claims of distinction.[128]

When the commercial parodist draws on the semiotic meanings encoded in a famous mark to disrupt the myths or provide social commentary, the US courts appear willing to construe the defenses more generously. For instance, the Ninth Circuit Court of Appeals upheld a commercial song parody directed at Mattel's Barbie Doll observing that "with Barbie, Mattel created not just a toy but a cultural icon . . . [and] with fame often comes unwanted attention."[129]

C. Right of Publicity

In my critique of the celebrity phenomenon in contemporary culture, I postulated that the celebrity individual, the audience and the producers work in concert, although not necessarily in a coordinated conscious fashion, to create what is known as the "celebrity" semiotic sign.[130] According to Richard Dyer, P David Marshall, Graeme Turner and many other cultural studies scholars, the celebrity is a sign that is encoded with and embodies particular meanings for the majoritarian public.[131] At the heights of their popularity, male action movie stars like Sylvester Stallone, Arnold Schwarzenegger and Tom Cruise share similar cultural narratives that appeal to the masses. A celebrity persona is like a well-

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126 *LL Bean Inc v Drake Publishers Inc*, 811 F.2d 26, 32 (1st Cir. 1987) (quoting *Central Hudson Gas & Electricity v Public Service Commission*, 447 U.S. 557, 561 (1980)) (emphasis added). The "core notion of commercial speech is that it 'does no more than propose a commercial transaction."' *Hoffman v Capital Cities*, 255 F.3d 1180, 1884 (9th Cir. 2001)

127 E.g. *Deere & Co v MTD Products, Inc*, 41 F.3d 39 (2nd Cir. 1994); *Conopco, Inc. v 3DO Co*., 53 U.S.P.Q. 2d 1146 (S.D.N.Y. 1999).

128 Beebe, Semiotic Analysis, above n 13, at 871.

129 *Mattel Inc v MCA Records Inc*, 296 F.3d 894, 898-899 (9th Cir. 2002).

130 David Tan, *The Commercial Appropriation of Fame: A Cultural Analysis of the Right of Publicity and Passing Off* (2017) 4, 17-18.

131 E.g. Richard Dyer, *Stars* (2nd ed, 1998); P David Marshall, *Celebrity and Power: Fame in Contemporary Culture* (1997); Graeme Turner, *Understanding Celebrity* (2nd ed, 2013).

known brand; each advertisement featuring a celebrity can be viewed as "a contributory iteration of the brand" and its function is to attach the "brand idea to advertised product or service in appropriate style".[132] While the signs of movie stars are often encoded as objects of aspiration, glamour and desire, the celebrity athlete signifies heroism, human transcendence and a love for the pure authentic game.

In the US state jurisdictions that recognize the right of publicity which protects against commercial appropriation of the celebrity personality, there appears to be an established practice that courts will first apply the "newsworthiness" test where an individual's identity is used in relation to a matter of public interest. If the use is not newsworthy, then courts will proceed to apply what is commonly called the First Amendment defense to balance the right of publicity with the constitutional free speech guarantee under the First Amendment. This First Amendment defense can take the form of different judicial tests such as the "transformative use" test or the "predominant purpose" test. Regardless of the judicial test ultimately used, the Circuit and state courts agree that if the defendant's use of the plaintiff's identity is categorized as protected "core" First Amendment speech – such as political speech, entertainment or art – then the defendant *may* be immune from liability; but if it is classified as commercial speech, the defendant will be liable for the commercial exploitation of the associative value of the plaintiff's identity. The "transformative use" test, also known as the "transformative elements" test, was initiated by the California Supreme Court in 2001.[133] It draws from the first factor of the fair use doctrine in copyright law: an unauthorized use of celebrity identity would be permitted if it was "transformative". Transformativeness, according to this approach, protects creative works when their market value is derived primarily from the creativity added by the artist rather than from the celebrity's fame. It is possibly the most widely used test by courts across the US when attempting to resolve this property right versus free speech conflict. Most notably, the Third, Sixth and Ninth Circuit Courts of Appeals have embraced this test.[134] According to Daniel Gervais and Martin Holmes, "[t]he transformative use test is elegant and relatively simple to understand … it allows individuals to assert natural rights in their identity when speech does not contribute to the marketplace of ideas, but merely free rides on an individual's identity."[135] However, the test has its fair share of detractors, especially in the aftermath of the Electronic Arts video game decisions rendered by Third and Ninth Circuits.[136]

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132 Ian MacRury, *Advertising* (2009) 50.

133 *Comedy III Productions Inc v Saderup Inc*, 25 Cal 4th 387 (2001).

134 See *Hart v Electronic Arts Inc*, 717 F 3d 141 (3rd Cir, 2013); *ETW Corp v Jireh Publishing Inc*, 332 F 3d 915 (6th Cir, 2003); *Hilton v Hallmark Cards*, 599 F 3d 894 (9th Cir, 2010); *Davis v Electronic Arts Inc*, 775 F 3d 1172 (9th Cir, 2015); *In re NCAA Student-Athlete Name & Likeness Licensing Litigation, Keller v Electronic Arts Inc*, 724 F 3d 1268 (9th Cir. 2013).

135 Daniel Gervais and Martin L. Holmes, 'Fame, Property, and Identity: The Scope and Purpose of the Right of Publicity' (2014) 25 *Fordham Intellectual Property, Media & Entertainment Law Journal* 181, 213.

136 Eg Justin L Rand, 'Transformative Use and the Right of Publicity: A Relationship Ready for Revision' (2015) 37 *Hastings Communications & Entertainment Law Journal* 335; Geoffrey F Palachuk, 'Transformative Use Test Cannot Keep Pace with Evolving Arts: The Failings of the Third and Ninth Circuit "Transformative Use" Tests at the Intersection of the Right of Publicity and the First Amendment' (2014) 16 *University of Denver Sports & Entertainment Law Journal* 233; Thomas E Kadri, 'Fumbling the First Amendment: The Right of Publicity goes 2-0 against Freedom of Expression' (2014) *Michigan Law Review* 1519; Michael Schoeneberger, 'Unnecessary Roughness: Reconciling *Hart* and *Keller* with a Fair Use Standard befitting the Right of Publicity' (2013) 45 *Connecticut Law Review* 1875; Dora Georgescu, 'Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity' (2014) 83 *Fordham Law Review* 907.

The key question for courts adopting the transformative use test is "whether the depiction or imitation of the celebrity is the very sum and substance of the work in question" (in which case the defendant is liable for commercial appropriation of identity) or "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness" (in which case the First Amendment trumps the plaintiff's claim).[137] While this test tends to privilege visual transformations of the image,[138] it is possible that a transformative use of identity may be determined by reference to the content, form and context of the expression, and hence take into account recoded uses.[139]

The concept of celebrity – with its attendant notions of well-knownness, adulation and popularity – is signified through, for example, an entertainer or athlete, and the resulting product is a semiotic sign replete with meaning in everyday culture. A particular well-known individual, like David Beckham (the signifier), may be viewed as a sign that denotes "celebrity" (the signified). The widespread media narratives and other forms of commercial and non-commercial circulation of the celebrity sign also result in a particular celebrity sign garnering certain connotations which make it distinctive vis à vis other signs, much like a trademark. Thus a celebrity sign like David Beckham is able to differentiate itself from other celebrity signs with an ascribed set of connotations; for example, the Beckham sign can connote attributes of sexual desirability and over time, the Beckham sign "develops into a *metalanguage* and becomes a significant resource for cultural expression and critique."[140]

The celebrity, as a widely recognized semiotic sign, can encourage the public who identify with such attributed ideological values to consume the celebrity itself as a commodity (eg by watching the movies of a particular actor or by following on Twitter and Instagram) or products associated with the celebrity (eg by purchasing celebrity-endorsed products). On the other hand, the celebrity sign, as a result of its publicly identifiable encodings, also presents rich opportunities for alternative codings to challenge these "typical ways of behaving, feeling and thinking in contemporary society"[141] representative of majoritarian ideals. Apart from their economic significance, reading celebrities semiotically can reveal how celebrity signs can "reproduce the existing social struggles in their images, spectacle, and narrative."[142] First mentioned in *Stars*, and later more thoroughly explored in *Heavenly Bodies*, Dyer's analysis of the use of the Judy Garland semiotic sign by the gay community provided a valuable foundation for subsequent studies on the use of celebrity personalities by subcultural groups in their identity formation.[143] Dyer claims that "[s]tars articulate what it is to be a human being in contemporary

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137 *Comedy III Productions Inc v Saderup Inc*, 25 Cal 4th 387, 406 (2001).

138 For a critique, see Rebecca Tushnet, 'A Mask that Eats into the Face: Images and the Right of Publicity' (2015) 38 *Columbia Journal of Law & the Arts* 157, 173-175.

139 Tan, above n 130, at 170 and 176. See also Tushnet, ibid at 174.

140 Jason Bosland, 'The Culture of Trade Marks: An Alternative Cultural Theory Perspective' (2005) 10 *Media & Arts Law Review* 99, 107. See also David Tan, 'The Unbearable Whiteness of Beckham: Political Recoding of Celebrity Signs in First Amendment Jurisprudence' in Vijay K Bhatia, Christoph Hafner, Lindsay Miller and Anne Wagner (eds), *Transparency, Power & Control: Perspectives on Legal Communication* (2012) 217.

141 Richard Dyer, *Heavenly Bodies: Film Stars and Society* (2nd ed, 2004) 15-6.

142 Douglas Kellner, *Media Culture: Cultural Studies, Identity and Politics Between the Modern and the Postmodern* (1995) 56.

143 Chris Rojek, *Celebrity* (2001) 70.

society."[144] Most celebrities may be seen "as representing dominant values in society, by affirming what those values are in the 'hero' types (including those values which are relatively appropriate to men and women)" or as alternative or subversive types "that express discontent with or rejection of dominant values."[145] His work on the politics and cultural dominance of whiteness[146] also exposes an Anglo-Saxon hegemony said to be characteristic of American society. According to Dyer's pioneering analyses, celebrities can have an ideological function of not only reiterating dominant values, but also concealing prevalent contradictions or social problems.

Consider David Beckham. The dominant coding for the Beckham sign may be construed to represent not just sexual desirability, but also reinforcing the hegemony of *white heterosexual* desirability (thus excluding the representation of the *non-white non-heterosexual*). The same may be said for Marilyn Monroe – the quintessential Hollywood iconic sex symbol. Viewed in this manner, those opposing this majoritarian signification may want to recode the Beckham or Monroe sign to highlight their subordinate or hidden status in society, and to increase the visibility of their political participation through the use of the celebrity symbol. In the words of Garry Whannel, known for his writings on the signification of sporting celebrities, a recoded image of Beckham that departs "from the dominant masculinised codes of footballer style" may also represent "a challenge to the heterosexual conformity of sport's modes of male self-presentation."[147]

Thus, if one accepts that ideological challenges may be effected through certain recoded uses of the celebrity sign, then one could use a celebrity sign like Beckham to interrogate

> the categories of whiteness, men, ruling class, heterosexuality, and other dominant powers and forms that ideology legitimates, showing the social constructedness and arbitrariness of all social categories and the binary system of ideology.[148]

This also means that those who *support* the prevailing hegemony may also use the celebrity sign in an appropriate manner to express their ideological positions. According to US constitutional scholar Robert Post, in First Amendment jurisprudence, the ultimate purpose of the constitutional concept of public discourse is "to enable the formation of a genuine and uncoerced public opinion in a culturally heterogeneous society."[149] Although Post does not discuss the point further, he observes that

> Speech about prominent celebrities may therefore influence in subtle and indirect ways public deliberation of public policy: it may provide common points of reference for debate, or crystallize common concerns, or shape common metaphors of understanding.[150]

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144 Dyer, *Heavenly Bodies*, above n 141, at 7.
145 Dyer, *Stars*, above n 131, at 52.
146 Richard Dyer, *White* (1997).
147 Garry Whannel, *Media Sport Stars: Masculinities and Moralities* (2002) 202.
148 Kellner, above n 142, at 61.
149 Robert C Post, 'The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v Falwell*' (1990) 103 *Harvard Law Review* 601, 639 (referring to Jürgen Habermas, *The Theory of Communicative Action* (Thomas McCarthy trans, 1987) 81-2).
150 Post, ibid at 674.

The deconstructive agenda usually encounters much hostility in legal doctrine which tends to seek solutions to problems in the form of myriad formulations and frameworks. Legal commentators who invoke cultural studies as an analytical tool usually phrase their arguments in the language of commodification and the contestation of meanings within the public domain; however these postmodern or poststructural approaches rarely seek to engage with the orthodoxy of First Amendment doctrine and risk alienating such writings from judges and lawyers. In this respect, I have noted that "[w]hen faced with the possibility of a right of publicity claim, those who wish to use recodings of celebrity signs as an expression of their social identities need to reframe the dialogic practice as political speech in the form of a *legal* argument within the context of a First Amendment defense."[151]

The recoding practices of subaltern groups,[152] as Rosemary Coombe astutely points out, may "seem distant, if not utterly divorced from the legal regime of personality rights"[153] and "are neither readily appreciated using current juridical concepts nor easily encompassed by the liberal premises that ground our legal categories."[154] But closer inspection reveals that through different modes of expressing the celebrity personality – like adulation, parody, satire and burlesque – subaltern groups are able to advance their political ideologies and assert alternative identities that "affirm both community solidarity and the legitimacy of their social difference by empowering themselves with cultural resources that the law deems the properties of others."[155]

The participatory theory of the First Amendment supports the protection of the making of "representations about self, identity, community, solidarity, and difference" or the articulation of political and social aspirations using the celebrity sign within a "dialogic democracy"[156] as political speech. In First Amendment doctrine, such recoded circulations can be viewed as a form of political activism akin to *Raymen v United Senior Association Inc*,[157] characterized by their ability to "reverse perceptions of social devaluation or stigma, articulate alternative narratives of national understanding, and challenge exclusionary imaginaries of citizenship."[158]

In this light, the recoding of celebrity signs by gay and lesbian counterpublic groups, for instance, may be conceived as political speech expressing an opposition to "heteronormativity"[159] that embodies "a constellation of practices that everywhere

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151 Tan, above n 130, at 37.

152 The term "subaltern" or "subculture" is frequently used in cultural studies to denote the subordination of particular identities by a dominant ideological hegemony; the "subaltern's place [in society] is subsumed within … an experience of oppression which privileges particular exemplars as the 'proper' figures of identity." Warner, above n 84, at 92.

153 Rosemary J Coombe, 'Author/izing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders' (1992) 10 *Cardozo Arts & Entertainment Law Journal* 365, 386.

154 Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (1998) 6.

155 Coombe, above n 153, at 366.

156 Coombe, above n 154, at 248-9.

157 409 F Supp 2d 15 (D.D.C. 2006).

158 Ibid 32. See also McLeod's explanation of how communities may use celebrity signs – like John Wayne – that represent a certain ideal in mainstream society as a 'resistive reading'. Kembrew McLeod, 'The Private Ownership of People' in P David Marshall (ed), *The Celebrity Culture Reader* (2006) 649, 658.

159 Heteronormativity has been defined as "the institutions, structures of understanding, and practical orientations that make heterosexuality seem … privileged." Warner, above n 84, at 188 fn 3.

disperses heterosexual privilege as a … central organizing index of social membership".[160] Similar arguments may be made for other subaltern categories of race, gender or class. For example, the celebrity signs of Tiger Woods or Jacqueline Onassis, as articulated through widely distributed photographic and televisual images, especially in advertising, embody certain values/ideals for the majoritarian public.[161] Therefore, their recoding, like an ironic use of the Tiger Woods image by National Association for the Advancement of Colored People (NAACP) to highlight the discrimination of colored people or on t-shirts "as an extensive … message of social advocacy" to express their pride in being associated with a successful African-Asian American icon in a festival or parade,[162] can be categorized as political speech because of their pertinent viewpoints that significantly contribute to democratic participation and debate. Michael Bennett concurs that "[a]s commodified and commercial symbols occupy more and more terrain in public imaginaries … critical appropriation of these celebrity persona should be recognized as privileged forms of political activity."[163]

In the context of the application of the transformative use/elements test under the First Amendment defense in a right of publicity action, the California Supreme Court emphasized that:

> the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism.[164]

The court also stressed that "in determining whether the work is transformative, courts are not to be concerned with the quality of the artistic contribution – vulgar forms of expression fully qualify for First Amendment protection."[165] The court's reference to the transformative nature of Andy Warhol's celebrity silkscreen depictions was endorsed by the Sixth Circuit, who commented that "[t]hrough distortion and the careful manipulation of context, Warhol was able to convey a message that went beyond the commercial exploitation of celebrity images and became a form of ironic social comment on the dehumanization of celebrity itself."[166] Although virtually a literal depiction of celebrities like Marilyn Monroe, Elizabeth Taylor, Elvis Presley and James Dean, these silkscreens created by Warhol are universally accepted by the US courts as being highly transformative, perhaps influenced to some degree by the interpretations of art critics,[167] largely attributed to the social commentary as intended by the artist.

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160 Ibid at 195.

161 Eg *ETW Corp v Jireh Publishing Inc.*, 332 F 3d 915 (6th Cir, 2003); *Onassis v Christian Dior-New York*, 472 NYS 2d 254 (N.Y. Sup Ct 1984).

162 Eg *Ayres v City of Chicago*, 125 F 3d 1010, 1014 (7th Cir, 1997); *One World One Family Now v City & County of Honolulu*, 76 F 3d 1009, 1012 (9th Cir, 1996); *Heffron v International Society for Krishna Consciousness Inc*, 452 US 640, 647 (1981).

163 Michael G Bennett, 'Celebrity Politicians and Publicity Rights in the Age of Obama' (2014) 36 *Hastings Communications & Entertainment Law Journal* 339, 351.

164 *Comedy III Productions Inc v Saderup Inc*, 25 Cal 4th 387, 406 (2001).

165 Ibid at 407.

166 *ETW Corp v Jireh Publishing Inc*, 332 F 3d 915, 936 (6th Cir. 2003)

167 Eg John Coplans, Jonas Mekas and Calvin Tomkins, *Andy Warhol* (1970) 50-2 (as cited in *Comedy III Productions Inc v Saderup Inc*, 25 Cal 4th 387, 406 (2001)).

IV. A FUTURE OF TRANSFORMATIVE PLAY, CULTURE JAMMING AND POSTSTRUCTURAL DISRUPTIONS

An analysis of the codings and subsequent recodings of IP signs and narratives is intimately intertwined with the freedom of speech. However, this does not mean that IP laws should always trigger constitutional scrutiny.[168] Free speech rights can be comfortably and internally accommodated within existing IP doctrine – such as the fair use defense in copyright or the non-commercial use exception in trademark dilution – but many other challenges to the authorial narrative may fall outside constitutional protection. As Sonia Katyal has observed:

> [IP law] creates boundaries that enfranchise certain types of speech at the expense of others. And, in doing so, it enables certain types of legal and illegal dissent, conferring legitimacy on some types of speech through the prism of fair use, but often excluding other types of expression from protection. … intellectual property law tends only to protect appropriative expression that occupies the extreme poles of audience interpretation – works that either adopt, oppose, or completely transform the cultural meaning of an original commodity. Because the law fails to protect appropriative works that fall short of these poles, the marketplace of speech remains locked in a perpetual dance of opposites rather than protecting true expressive diversity.[169]

Famous trademarks, well-known copyrighted works and celebrity personalities can function like Barthesian myths with universal ideological codings that are recognized globally, enabling them to be read as polysemous texts that invite semiotic recodings. In the global trademark system, Beebe argues that it is populated "by globally famous 'hypermarks' that are not so much designations of source as commodified simulations of such designations, simulations that are themselves the focus of consumption rather than the underlying product, if any, to which they are affixed."[170] Audiences inevitably engage with copyrighted works, trademarks and celebrities via "textual signification" and "connect with [them] through interpretive and affective processes of semiotic engagement."[171]

The future that lies ahead is one of transformative play, cultural jamming and poststructural disruptions where authors and brand owners interact with audiences and consumers in new ways made possible by a digital renaissance. For instance, in an era of digital fandom, many fan activities on the internet are both an appreciation and a reappreciation of the object of that fandom existing in an atmosphere of the carnivalesque where it is simultaneously subversive of the established hierarchy and supportive of the hegemony of the original semiotic text. Fans write in order to be read and to be interpreted by a community of fans who have a shared understanding of the original text; digital fandom thrives on intertextuality where every text that is written is written with the knowledge of every other text written before. Indeed "cultural texts can serve as vehicles

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168 E.g. *Golan v Holder*, 132 S Ct 873, 890 (2012); *Eldred v Ashcroft*, 537 US 186, 219 (2003). Contra *Matal v Tam*, 137 S Ct 1744 (2017); *In re Brunetti*, 877 F 3d 1330 (Fed Cir. 2017).

169 Katyal, above n 45, at 497.

170 Beebe, above n 16, at 884.

171 MacRury, above n 132, at 190.

for questioning or critiquing something in the real world."[172] Consumption goes beyond an acquisition of commodities to an active shaping of a sense of self through using the meanings embodied in the objects of IP. There is a kaleidoscope of exciting opportunities that consumptive cosmopolitanism is offering to transnational antibrand activists, brand renegades, culture jammers and pranksters.[173] At the same time, courts will have to balance the value of semiotic democracy with the risk of engendering semiotic disobedience.[174] The challenge now is for legal scholars and practitioners is to connect these contemporary narratives with the language of legal doctrine, constitutional imperatives and legislative provisions.

[172] Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (2012) 69. Sunder further argues that more recoding of popular icons is a good thing and will not destabilize culture. Ibid at 124-125.

[173] E.g. Sonia K Katyal, 'Trademark Cosmopolitanism' (2014) 47 *UC Davis Law Review* 875; Sheff, above n 18; Harold, above n 49.

[174] Katyal, above n 169, at 571.