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COPYRIGHT LAW AND ITS PARODY DEFENSE:  
MULTIPLE LEGAL PERSPECTIVES

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*In the United States, whether a disputed work qualifies as a parody is critical, if not determinative, to the success of a fair use defense in copyright lawsuits. How can different schools of legal thought contribute to copyright law and its fair use doctrine, particularly its contentious parody exception? By drawing upon different legal theories, this article argues that courts, in determining whether new creative works that build upon existing works constitute fair use, should focus heavily on the possible harm that the new works would bring to owners, and the copyright system of financial incentives as compared to their potential social benefits.*

*Part I will offer an overview of the American copyright regime by discussing the Copyright Act of 1976 and the Supreme Court's application of the fair use doctrine, especially its definition of parody and its dichotomization of parody and satire. Because Lockean natural rights informed the Framers' understanding of intellectual property law, and courts have a long history of using natural law justifications in intellectual property cases, Part II will examine the nature of copyright through the lenses of natural law theories to discover the inherent conflict between copyright and free speech as a basic liberty. This will pave the way for Part III, which, by drawing upon relational feminism as well as other feminist theories, will substitute the idea of the "relational author" for the isolated, individuated, and proprietary author on which the current copyright regime is premised. By arguing that authors are social creatures who write from*

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*within vast networks of pre-existing texts, it will call for the recognition and embrace of creative transformations of these pre-existing works as original expressions of authorship.*

*Part IV will turn to the potential of law and economics in reforming the copyright regime so that it can fully accommodate the “relational author” and his/her right to free speech. Although intuitive cost-benefit analysis, rather than efficiency principles, has facilitated judicial decision-making in fair use claims, these methods both reinforce a narrow definition of parody that privileges owners’ rights over the social benefits of transformative works. Courts, therefore, should shift their focus from the parody/satire dichotomy to the likelihood that the new works would pose harm to owners and the copyright system versus their social benefits. Although the current copyright law is flawed, Part V will adopt legal realist perspectives to explore how courts have turned copyright law “in the books” to copyright law “in action,” and how legal realism enables courts to utilize a flawed law to better accommodate the rights of the public. This Part will then offer new insights into the Salinger holdings and examine how the dispute between Beastie Boys and GoldieBlox would and should have been adjudicated if it had gone to court. The article concludes that the purpose of deconstructing the parody/satire dichotomy is to help courts stimulate creativity and, ultimately, to serve justice.*

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### INTRODUCTION: THREE COPYRIGHT DISPUTES

In 2001, Alice Randall published *The Wind Done Gone*, an alternative account of Margaret Mitchell's classic novel *Gone with the Wind* (1936).<sup>1</sup> While Mitchell's novel focuses on the life of a wealthy Southern woman who lives through the American Civil War and the Reconstruction Era, Randall's novel recreates the story from the viewpoint of the woman's slave girl.<sup>2</sup> Mitchell's estate sued Randall and her publishing company for copyright infringement. After the United States District Court for the Northern District of Georgia blocked the publication of *The Wind Done Gone*, defendants appealed the preliminary

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<sup>1</sup> See, e.g., Indira Karamcheti, *Re: Wind*, 18 WOMEN'S REV. BOOKS 22 (2001) (reviewing Randall's novel).

<sup>2</sup> See, e.g., *id.*

injunction. The United States Court of Appeals for the Eleventh Circuit vacated the injunction barring publication of the book, holding that Randall's new work was a parody seeking to rebut the "romantic, idealized portrait of the antebellum South" in Mitchell's original novel.<sup>3</sup> The case ended with a settlement one year later, with Randall's publishing company agreeing to make an unspecified donation to Morehouse College.<sup>4</sup>

The Eleventh Circuit declared what seemed to be a victory for parodists. Yet, due to the failure of the parody doctrine as well as the pitfalls of the parody/satire distinction, this encouraging precedent failed to redeem Swedish American author Fredrik Colting, who published under his pseudonym, John David California, what he sarcastically called an "unauthorized sequel" to Jerome David Salinger's *The Catcher in the Rye* (1951), almost sixty years after this American classic was first published.<sup>5</sup> Entitled *60 Years Later: Coming through the Rye*, Colting's work portrays both how Salinger's teenaged protagonist finally changes his uncompromising worldview as an old man, and also critiques Salinger's equally uncompromising, but persistent control over his own novel and protagonist.<sup>6</sup> The U.S. District Court for the Southern District of New York ruled in favor of Salinger on his claims of copyright infringement, holding that Colting's novel was a satire that targeted Salinger and society at large, but did not sufficiently critique the original work.<sup>7</sup> Because it neither fit the definition of parody nor was transformative enough, the court held it was not fair use.<sup>8</sup> In April 2010 – three months after Salinger's death – the Second Circuit upheld the

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<sup>3</sup> SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1270, 1279–80 (11th Cir. 2001).

<sup>4</sup> E.g., David D. Kirkpatrick, *Mitchell Estate Settles Gone With the Wind Suit*, N.Y. TIMES, May 10, 2002, at C6, available at <http://www.nytimes.com/2002/05/10/business/mitchell-estate-settles-gone-with-the-wind-suit.html>? (describing details of the lawsuit and its eventual settlement).

<sup>5</sup> JOHN DAVID CALIFORNIA, *60 YEARS LATER: COMING THROUGH THE RYE* (2009); see also Amy Lai, *The Death of the Author: Reconceptualizing 60 Years Later: Coming through the Rye as Metafiction in Salinger v. Colting*, 15 INTELL. PROP. L. BULL. 19 (2010) (providing a detailed analysis of this lawsuit by taking a very different—though not contradictory—approach from the one in this article).

<sup>6</sup> E.g., Lai *supra* note 5, at 20 n.8 (giving as an example the fact that Salinger prohibited any attempt to make his novel into a movie).

<sup>7</sup> Salinger v. Colting, 641 F. Supp. 2d 250, 258-59, 261 (S.D.N.Y. 2009).

<sup>8</sup> *Id.* at 262.

injunction granted by the lower court.<sup>9</sup> In 2011, Colting settled the case by agreeing not to publish or distribute his book in the U.S. or Canada until the original novel enters the public domain.<sup>10</sup>

One wonders to what extent Salinger's victory influenced GoldieBlox's decision to settle with Beastie Boys over their copyright dispute in 2014. A startup company that creates innovative toys for girls, GoldieBlox made a commercial by reworking hip-hop band Beastie Boys' 1987 song "Girls" with new lyrics conveying a girl-power message.<sup>11</sup> It filed a pre-emptive lawsuit against Beastie Boys to claim fair use of the "Girls" track; Beastie Boys sued GoldieBlox in return by claiming copyright infringement.<sup>12</sup> While commentators were still debating whether the song was a parody or satire, GoldieBlox unexpectedly settled with Beastie Boys by pulling the song from the video, posting a public apology on its website, and agreeing to donate a portion of its revenue to science education charities selected by the band.<sup>13</sup>

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In the United States, whether a disputed work qualifies as a parody is critical, if not determinative, to the success of a fair use defense in copyright lawsuits. This question is ultimately tied to the idea of authorship and the right associated with it. Because authors who are copyright owners have rights in their works, using their works without their permission presumptively infringes upon this right, unless one can offer a defense to the claim of copyright infringement. Yet, distinguishing between legitimate and illegitimate forms of copying poses a challenge. Equally challenging are attempts to define parody and satire. How can different schools of legal thought contribute to copyright law and its fair use

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<sup>9</sup> *Salinger v. Colting*, 607 F.3d 68, 83-84 (2d Cir. 2010).

<sup>10</sup> *E.g.*, Andrew Albanese, *J.D. Salinger Estate, Swedish Author Settle Copyright Suit*, PUBLISHER WKLY. (Jan. 11, 2011), <http://www.publishersweekly.com/pw/by-topic/industrynews/publisher-news/article/45738-j-d-salinger-estate-swedish-author-settle-copyright-suit.html> (describing the settlement terms ending the dispute).

<sup>11</sup> *E.g.*, Jon Blistein, *Beastie Boys Settle Lawsuit Over 'Girls' Toy Commercial*, ROLLING STONE (Mar. 18, 2014), <http://www.rollingstone.com/music/news/beastie-boys-settle-lawsuit-over-girls-toy-commercial-20140318> (providing the background of the lawsuit and the settlement terms).

<sup>12</sup> *E.g.*, *id.*

<sup>13</sup> *E.g.*, *id.*

doctrine, particularly its contentious parody exception? By drawing upon different legal theories, this article argues that courts, in determining whether new creative works that build upon existing works constitute fair use, should refrain from forcing these expressions into arbitrary categories of parody or satire. Courts should instead focus more heavily on the possible harm that the new works would bring to owners, and the copyright system of financial incentives as compared to their potential social benefits.

Part I of this article will offer an overview of the American copyright regime by discussing the Copyright Act of 1976 and the Supreme Court's application of the fair use doctrine, especially its definition of parody and its dichotomization of parody and satire. Because Lockean natural rights informed the Framers' understanding of intellectual property law, and courts have a long history of using natural law justifications in intellectual property cases, Part II will begin by examining the nature of copyright through the lenses of natural law theories. Using John Locke's theory of property and John Rawls' "justice as fairness" model, this Part will discover the inherent conflict between copyright and free speech as a basic liberty. The reminder that copyright is not an absolute right, and the caution against expanding authors' rights at the expense of the public, will pave the way for a re-evaluation of authorship in Part III. Drawing upon relational feminism as well as other feminist theories, Part III will substitute the idea of the "relational author" for the isolated, individuated, and proprietary author on which the current copyright regime is premised. Because authors are social creatures who write from within vast networks of pre-existing texts, creative transformations of these pre-existing works should be recognized and embraced as original expressions of authorship.

Part IV will turn to the potential of law and economics in reforming the copyright regime so that it can fully accommodate the "relational author" and his/her right to free speech. It will explain how intuitive cost-benefit analysis, rather than efficiency principles, has facilitated judicial decision-making in fair use claims. This Part will then illuminate the common mistake of these two methods, which is to reinforce a narrow definition of parody that privileges owners' rights over the social benefits of transformative works. Courts, therefore, should shift their focus from the parody/satire dichotomy to the likelihood that the new works would pose harm to owners and the copyright system versus their social benefits. Although the

current copyright law is flawed, Part V will adopt legal realist perspectives to explore how courts have turned copyright law “in the books” to copyright law “in action,” and how legal realism enables courts to utilize a flawed law to better accommodate the rights of the public. After offering new insights into the *Salinger* holdings, this Part will examine how the dispute between Beastie Boys and GoldieBlox would and should have been adjudicated if it had gone to court. The article concludes that the purpose of deconstructing the parody/satire dichotomy is to help courts stimulate creativity and, ultimately, to serve justice.

## I

### COPYRIGHT LAW: THE PROBLEMATIC PARODY/SATIRE DICHOTOMY

The U.S. Constitution grants Congress the authority to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors ... the exclusive Right to their [works.]”<sup>14</sup> Under Section 102 of the Copyright Act, copyright protection extends to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>15</sup> The several exclusive rights to copyright holders, as defined in Section 106, include the rights “to reproduce the copyrighted work[,]” to prepare derivative works of the original, and to distribute its copies to the public by various means.<sup>16</sup> These rights, which are subject to a time limit, generally expire seventy years after the author's death.<sup>17</sup>

#### A. *Fair Use, Parody, and Satire*

Section 107 of the Copyright Act imposes limitations on section 106, providing that the “fair use” of a copyrighted work does not constitute infringement.<sup>18</sup> While fair use explicitly applies to such uses as criticism, news reporting, teaching or research, the fair use defense is by no means limited to these areas.<sup>19</sup> A four-factor test determines whether a particular use is fair: “(1) the purpose and character of

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<sup>14</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>15</sup> Copyright Act, 17. U.S.C. § 102(a) (2006).

<sup>16</sup> *Id.* § 106.

<sup>17</sup> *Id.* § 302(a).

<sup>18</sup> *Id.* § 107.

<sup>19</sup> *Id.*

the use, including whether” it is for commercial or nonprofit educational purposes; “(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion” of the original work used; and (4) the effect of the use upon the original’s market or potential market.<sup>20</sup> The Supreme Court defined parody for the first time in *Campbell v. Acuff-Rose Music, Inc.* Following the Sixth Circuit’s definition of parody as “the art of creating a new literary, musical, or other artistic work that both mimics and renders ludicrous the style and thought of an original[.]”<sup>21</sup> the Court held that a commercial parody may be fair use.<sup>22</sup> The inquiry concerning fair use generally turns on factor one of the fair use test, examining “whether the new work merely supersede[s]” the original, or whether and to what extent it is “transformative” by altering the original with “new expression, meaning, or message[.]”<sup>23</sup> The more transformative the work is, less will be the impact of other factors, “like commercialism, that may weigh against a finding of fair use.”<sup>24</sup> In contrast, a satire, which makes broad comments on society, “can stand on its own two feet and so requires justification for the very act of borrowing.”<sup>25</sup> Hence, it is more difficult for a defendant to prove fair use in a satirical work.<sup>26</sup>

Throughout the years, courts continue to use the parody/satire distinction. However, *Blanch v. Koons* is an example of a recent case where a federal court deemphasized this distinction.<sup>27</sup> While affirming that artist Jeff Koons’ incorporation of a copyrighted photograph into a collage painting was fair use, the Second Circuit minimized the parodic justification for granting fair use.<sup>28</sup> The disputed painting “Niagara,” which was commissioned by Deutsche Bank and the Guggenheim Museum, depicted four pairs of women’s feet superimposed upon images of “confections ... with a grassy field and Niagara Falls in the background,” borrowing one set of legs from the published work of the plaintiff, a professional photographer.<sup>29</sup> Koons explained that he aimed to use popular images

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<sup>20</sup> *Id.*

<sup>21</sup> *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1441 n.4 (6th Cir. 1992).

<sup>22</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>23</sup> *Id.* at 579.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 581.

<sup>26</sup> *Id.* at 580 n.14.

<sup>27</sup> *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 247.

as “commentary on the social and aesthetic consequences of mass media.”<sup>30</sup> The Court, analyzing the transformative nature of Koons’s work, held that the collage painting passed the transformative test “almost perfectly” by changing the original copyrighted picture’s “colors, the background against which it is portrayed, the medium, the size of the objects pictured, [and] the objects’ details[.]”<sup>31</sup> More “crucially,” the painting had an “entirely different purpose and meaning—as part of a massive painting commissioned for exhibition in a German art-gallery space.”<sup>32</sup> While addressing the distinction between parody and satire as laid down by *Campbell*, the Second Circuit minimized the parodic justification for granting fair use to Koons, stating that “[t]he question is whether Koons had a genuine creative rationale for borrowing Blanch’s image, rather than using it merely ‘to get attention or to avoid the drudgery in working up something fresh.’”<sup>33</sup> Nevertheless, by relying upon the same wordings that the *Campbell* Court employed to describe satire (“to get attention or to avoid the drudgery in working up something fresh”), and emphasizing that such uses would not be fair, the Second Circuit maintained the parody/satire distinction.<sup>34</sup>

### B. Rethinking “Parodies”

The Supreme Court’s working definition of parody corresponds roughly to its understanding within popular conception.<sup>35</sup> However, scholars have not agreed on what works fall into the parody classification due to its antiquity and the range of practices to which it alludes, let alone its national and cultural usages.<sup>36</sup> In fact, the first reference to “parodia,” found in Aristotle’s *Poetics*, defines it as a “narrative poem ... treating a light, satirical, or mocking-heroic subject.”<sup>37</sup> Scholars have also noted how parody and satire often intersect.<sup>38</sup> These scholars warn against any attempt to dichotomize parody and satire. Moreover, while some conceptions of parody insist that the work critiques the original (“target parodies”),

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<sup>30</sup> *Id.* at 253.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 255 (citation omitted).

<sup>34</sup> See *Campbell*, 510 U.S. at 580–81.

<sup>35</sup> See, e.g., Graham Reynolds, *Necessarily Critical? The Adoption of a Parody Defence to Copyright Infringement in Canada*, 33 MANITOBA L. J. 243, 245 (2009).

<sup>36</sup> E.g., *id.* at 246.

<sup>37</sup> E.g., *id.*

<sup>38</sup> E.g., PAUL SIMPSON, ON THE DISCOURSE OF SATIRE: TOWARDS A STYLISTIC MODEL OF SATIRICAL HUMOUR 219 (2003).

other conceptions permit it to critique something other than the work itself (“weapon parodies”).<sup>39</sup> These different conceptions cast the Court’s definition in further doubt.

Although copyright law aims to advance the public good by encouraging creativity and disseminating knowledge, the Court’s narrow definition of parody and its determination that satire is not protected to the same degree as parody, have arguably served to expand owners’ rights to the detriment of creative citizens. For example, it would be fair to say that Colting’s use of Salinger’s novel to critique the protagonist’s worldview and Salinger’s control over his own work is not something that Salinger would likely have done, and Colting’s new work cannot be said to supersede any potential sequel written by Salinger. Why, then, should the District Court and the Second Circuit rely upon a narrow definition of parody to determine that such use was not fair? The questions concerning what uses are fair, and how the fair use doctrine should be applied, hinge upon the very natures of copyright and authorship. It is helpful, therefore, to begin by examining copyright from natural law perspectives.

## II

### NATURAL LAW THEORIES: THE COPYRIGHT-LIBERTY CONFLICT

Natural law theories, whether derived from observations of nature, divine inspiration, or human reason, hold that there are universal principles of justice with which all individuals have a moral responsibility to comply.<sup>40</sup> In the secular natural law tradition, laws derived their validity from their promotion of natural rights, inherent and inalienable, enjoyed by all citizens.<sup>41</sup> English philosopher John Locke, for instance, contended that individuals are born “free, equal, and independent” in a “state of nature,” and that the government must protect their natural rights to life, liberty, and possessions.<sup>42</sup> Not only did the idea of natural rights as natural law inspire the American and French revolutions,<sup>43</sup> but Lockean natural rights also informed the Framers’ understanding of intellectual property law.<sup>44</sup>

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<sup>39</sup> *E.g.*, Reynolds, *supra* note 35, at 245.

<sup>40</sup> ROBERT L HAYMAN, JR., NANCY LEVIT & RICHARD DELGADO, *JURISPRUDENCE CLASSICAL AND CONTEMPORARY: FROM NATURAL LAW TO POSTMODERNISM* 1–2 (2d ed. 2002).

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> *Id.* at 5–6.

<sup>44</sup> *E.g.*, Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 *YALE L. J.* 1179, 1179 (2003).

A. *Locke, Property, and Copyright*

Locke was the most famous proponent of the natural law theory of property. Assuming that people possess their bodies and have a natural right of property in them, Locke reasoned that they also possess the labor of their bodies.<sup>45</sup> Hence, people claim rightful ownership in the fruits of their labor, regardless of whether their creative activities lead to any economic gain.<sup>46</sup> However, there is one important condition for the right to ownership: the fruits of labor must be capable of permanent and individual possession, meaning that they are not temporary usages, or something shared by all people, like the air or sunlight.<sup>47</sup>

Although Locke did not mention intellectual property, scholars have noted that the modern American copyright regime evolved from Lockean thinking.<sup>48</sup> This is most obvious in the copyright doctrine of “originality” and its “idea/expression” dichotomy. Just as Locke regarded property as the necessary moral consequence of one’s creative labor, copyright law, by granting protection to all “original works of authorship,” also protects works of the most accidental or humble origin, and works for which there are no economic incentives for their creation.<sup>49</sup> Just as the natural law tradition limits the right of ownership to fruits that can be permanently and individually possessed, the idea/expression dichotomy restricts the reach of copyright law to expressions that are sufficiently concrete, while specifically excluding more abstract and incorporeal ideas from the concept of property.<sup>50</sup> One good example confirming the deep influences by natural law theory upon the idea/expression dichotomy is the judicial precedent that Judge Learned Hand relied on in *Nichols v. Universal Pictures Corp.* Explaining that copyright protection cannot be extended to the characteristics of stock characters in a story, Judge Hand cited to *Holmes v. Hurst*, in which the Supreme Court stated: “[t]he right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight.”<sup>51</sup>

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<sup>45</sup> JOHN LOCKE, *The Second Treatise of Civil Government* § 27, in TWO TREATISES OF GOVERNMENT (1698) (P. Laslett ed. 1970); e.g., Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO St. L. J. 517, 523 (1990).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> E.g., Yen, *supra* note 45, at 536–37.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 538–39.

<sup>51</sup> *Id.*; *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 292 U.S. 902 (1931), which cited to *Holmes v. Hurst*, 174 U.S. 82, 86 (1898).

Although the modern intellectual property doctrine has been utilitarian in focus, attempting to disavow its association with natural law justifications leads many to question the ability of courts to adjudicate copyright claims without consulting natural law principles.<sup>52</sup> Yet Locke's natural law theory of property, logical as it might seem, raises doubts when applied to less tangible goods. Given Locke's belief in the natural right to liberty, one cannot help asking whether such a liberty would entitle people to use others' fruits of labor without their permission, so long as such uses will not likely harm the owners or the public. This question is significant because copyright, and intellectual property in general, can protect the ownership of goods that are less tangible and can be enjoyed simultaneously by an indefinite number of people. Indeed, intellectual property can easily come into conflict with basic notions of liberty because the right in less tangible goods can restrict a wider range of actions, such as creating copies of copyrighted works for further distribution among peers and friends, and even actions taking place in the privacy of one's own home. Further, as these goods are often informative, restricting the right to enjoy them may simultaneously limit free speech. The potential conflict between intellectual property and basic liberty, therefore, is a reminder that authors' rights are not absolute.

### *B. Rawls, Basic Liberty, and Creativity*

American natural law theorist John Rawls' idea of "justice as fairness" offers more insight into the above conflict. Here, Rawls imagines a hypothetical situation – the "original position"—in which free and rational people choose behind a "veil of ignorance," without knowing their place in society or natural assets and abilities.<sup>53</sup> Their choices lead to two principles of justice: first, each person would have an equal right to basic liberty; second, although social and economic inequalities exist, the distribution of wealth and income must be to everyone's advantage, and positions of authority and offices of command must be accessible to all.<sup>54</sup> Basic liberties enjoyed by all citizens include political liberty, freedom of speech and assembly, freedom of the person, along with the right to hold (private) property and freedom from arbitrary arrest and seizure.<sup>55</sup> While the second principle – the "difference principle" – does not ask society to even out

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<sup>52</sup> John Tehranian, for instance, goes so far as to argue that the fair use doctrine, far from protecting the public common, has played a key role in the triumph of a natural law vision of copyright that privileges the authors' inherent property interests over the utilitarian goal of progress in the arts. John Tehranian, *Et Tu, Fair Use? The Triumph of Natural Law Copyright*, 38 U.C. DAVIS L. REV. 465, 466 (2005).

<sup>53</sup> JOHN RAWLS, A THEORY OF JUSTICE 118 (1999).

<sup>54</sup> *Id.* at 266.

<sup>55</sup> *Id.*

resources among citizens, it does demand that those who have been socially or economically favored gain from their good fortune only on terms that improve the situations of the less favored.<sup>56</sup> The privileged, by improving the lives of the less privileged, thereby contribute to the public good.

Would those in Rawls' "original position" have chosen copyright as a basic right? On the one hand, those behind the "veil of ignorance" may imagine that benefits derived from creative endeavors would fall quite disproportionately, if not exclusively, upon those who work in creative professions. Thus, even though they will consider the right to create a basic liberty, they may be far less inclined to consider copyright that "basic" as a right. On the other hand, people in this hypothetical position may reason that even granting copyright to a limited group of creative professionals would stimulate creativity and contribute to a better society.<sup>57</sup> Moreover, because the "difference principle" does not require society to even out resources among privileged and less privileged citizens, the fact that copyright may initially benefit a small group of creative professionals would not make society unjust or unfair, so long as these professionals exercise their creativity to benefit citizens not as talented or privileged as they are.

Rawls, nonetheless, would have cautioned against an infinite expansion of copyright. While emphasizing the right to hold (private) property, he does not specifically refer to the ownership of intangible goods and therefore does not specify any special conditions that should exist for such ownerships. Moreover, Rawls' prioritization of personal freedom and free speech as basic liberties implies that such liberties would entitle citizens to appropriate intangible creations by others for speech purposes, so long as such uses do not harm the owners or society. In addition, because the "difference principle" requires that privileged citizens contribute to the greater good, creative professionals, while reaping benefits from their creative endeavors, should allow other people to appropriate their works for productive purposes. Endlessly expanding copyright to the detriment of the public, such as by raising the "fair use" standard and by creating narrow, unrealistic definitions of parody, must go against the Rawlsian principles and the public good.

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<sup>56</sup> *Id.*

<sup>57</sup> ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 110–12 (2012).

### III

#### FEMINIST LEGAL THEORIES: “RELATIONAL AUTHOR” AND TRANSFORMATIVE WORKS

Having explored copyright from natural law perspectives, this article now turns to feminist legal theories and their implications for fair use. The two focuses are seemingly unrelated, as copyright law governs the right to intangible properties, while feminist legal criticism addresses the gendered aspects of legal systems. Yet, copyright law’s theoretical framework is premised upon certain assumptions about the self. If some feminist legal theorists posit a different and more realistic conceptualization of the self, then this could inspire lawmakers to re-think what authorship is and accordingly reform the copyright regime.

##### *A. Relational Feminism and Authorship*

Copyright scholar Carys Craig offers interesting perspectives on the idea of authorship by bringing these two seemingly unrelated fields together. As Craig explains, at the core of copyright law are concepts of individualism, private rights, property, ownership, and exclusion.<sup>58</sup> Even though copyright attaches to the most mundane of works without any concern for their quality or creativity, the romantic idea of an individuated and independent author entitles “authors-as-originators” to rightful ownerships of their “original, stable, and propertizable” intellectual labors.<sup>59</sup> This idea of authorship has persisted over the years, despite Roland Barthes’ pronouncement of the “death of the author” in 1968, which demystified authorship by declaring all new expressions as reproductions of old ones.<sup>60</sup> Yet, the idea of the author as the sole origin of her labor is not merely outdated. It has perpetuated simplistic “dichotomies of creation/reproduction, author/user, laborer/free-rider,” glorifying authors while stigmatizing those who copy substantially from authors as “infringers.”<sup>61</sup> Craig thus criticizes the copyright regime for failing to recognize the communal and communicative nature of cultural expressions and to fulfill its original goal in fostering creativity among citizens.<sup>62</sup>

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<sup>58</sup> Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 J. GENDER, SOC. POL’Y & L. 207, 208 (2007).

<sup>59</sup> *Id.* at 208, 213–15; see THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi ed., 1994) (a collection of works by legal scholars and post structural literary critics calling into question the validity of the traditional romantic concept of authorship).

<sup>60</sup> *Id.* at 216–17.

<sup>61</sup> *Id.* at 233.

<sup>62</sup> *Id.* at 250.

Craig contends that copyright theory should get inspiration from feminist scholarship to re-imagine the author/self and the nature of copyright itself.<sup>63</sup> Drawing upon relational feminism, she fashions the concept of the “relational author,” who is never isolated but “always-already situated within, and constituted by” her communities.<sup>64</sup> Entering a cultural conversation that has been going on long before she appeared and will continue long after she leaves, this “relational author” necessarily works from within a network of social relations and discourses through the processes of “reinterpretation, recombination, and . . . transformation,” both to connect with others and to establish her own identity.<sup>65</sup> Because authorship is participatory and dialogic, the normative copyright regime should focus less on the rights of authors as owners, and more on ways to structure relations amongst authors and between authors and the public, so as to foster creativity among citizens.<sup>66</sup> In addition, because authors can in fact generate meaning only by using the texts, discourses, and experiences that they have encountered, copyright law should recognize the transformation of pre-existing texts as an important component of original authorship.<sup>67</sup>

Craig borrows heavily from relational feminist Jennifer Nedelsky in her thesis concerning on the relational author. Fellow relational feminist Robin West adds further depth to Craig’s concepts. West’s argument differs slightly from Nedelsky’s analysis of autonomy-via-relationships in that it explores the fundamental “contradiction” in women’s subjective life.<sup>68</sup> Reconciling the views of cultural feminists and radical feminists, West points out that women value intimacy and nurturance, yet crave privacy and fear intrusion.<sup>69</sup> However, the legal system, which privileges autonomy, neglects women’s needs that arise out of their appreciation for nurturance.<sup>70</sup> Moreover, its male-centric version of autonomy fails to adequately protect women from intrusion.<sup>71</sup> West’s call for a reconstruction of the “masculine jurisprudence” can be analogized to a call for a reconstruction of the copyright regime:<sup>72</sup> A copyright regime that upholds a narrow vision of creativity resembles a “masculine” legal system that neglects traditionally feminine values in favor of an “autonomy” that fails to accommodate the full spectrum of

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<sup>63</sup> *Id.* at 252–253, 262–263.

<sup>64</sup> Craig, *supra* note 58, at 261–63.

<sup>65</sup> *Id.* at 263, 265.

<sup>66</sup> *Id.* at 263–64.

<sup>67</sup> *Id.* at 265–66.

<sup>68</sup> See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 15, 55 (1988).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 58–59.

<sup>71</sup> *Id.* at 58–61.

<sup>72</sup> See *id.* at 68–70.

experiences of all citizens. All the while, the “relational author,” like the silenced and objectified woman of West’s “masculine jurisprudence,” remains unrecognized and mistreated. Both the outdated copyright regime and the “masculine” legal system therefore require reform.

*B. “Connection,” Other Feminists’ Support, and Implications*

While Craig’s “relational author” theory is based upon relational feminism, some other schools of feminism arguably lend support to this idea. West argues that, because women’s “subjective, phenomenological and existential state” is grounded in their “potential for physical, material connection to human life,” this shared conception of women’s experience draws together feminists whose views otherwise differ markedly.<sup>73</sup> Radical feminists regard such a “connection” as intrusive, while cultural feminists wholeheartedly embrace it. One should note that liberal feminists,<sup>74</sup> unlike their radical counterparts, do value this “connection” and seek to accommodate it. As the rest of this subsection will explain, liberal feminists impliedly support the idea of the “relational author,” rather than unquestionably accepting the “autonomy” privileged by the legal system.

In view of Craig’s emphasis on human relations and West’s idea of “connection”—which derives substantially from motherhood and childrearing—the likelihood that liberal feminism supports the idea of the “relational author” is apparent in Wendy W. Williams’ advocacy of an “equal treatment model” for pregnancy and work place discrimination issues.<sup>75</sup> People who support “special treatment” for women believe that an “equal treatment model” precludes recognition of pregnancy’s uniqueness. Williams, in contrast, contends that the “equal treatment” model redefines pregnancy as a basic need that the legal system must accommodate.<sup>76</sup> In other words, though liberal feminists do not embrace childbearing and rearing as cultural feminists do, they believe that the system should accommodate traditionally female duties by recasting them as responsibilities that penetrate the “core of the workplace” and thus, that should be

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<sup>73</sup> *Id.* at 14.

<sup>74</sup> Liberal feminists aim to reform the legal system to achieve greater gender equality, in contrast to radical feminists who, regarding the oppression women face as the most fundamental kind of social oppression, aim for more revolutionary changes to eliminate gender categories. *See, e.g.,* West, *supra* note 68, at 13; *see also* CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

<sup>75</sup> *See* Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 326–28 (1985).

<sup>76</sup> *Id.* at 351–52.

shared by all citizens.<sup>77</sup> In both Williams' view and the liberal feminist perspective, the legal system – and a normative copyright regime – should value both human connections and autonomy. By virtue of such, liberal feminism then supports Craig's notion of the nature of authorship.

In seeking to substitute the “relational author” for the isolated and individuated author, Craig seeks not to disparage the merit of authorship itself, but rather to more accurately describe the creative process that copyright law is meant to encourage.<sup>78</sup> She is correct that the copyright regime should embrace creative transformations of pre-existing texts as examples of original authorship.<sup>79</sup> Indeed, not only parody imitates older works, but satire, a great literary genre in the Anglo-American tradition, has often – or “always” – borrowed from art and from life.<sup>80</sup> Craig nonetheless does not explain further where the new boundary should lie between lawful and unlawful borrowings.

#### IV

#### LAW AND ECONOMICS: FLAWED MODELS AND NEW DIRECTIONS

While seemingly bearing no relation to feminist legal theories, law and economics provide strong rationales for justifying a more inclusive fair use application, by urging courts to rethink current case law definitions of parody and satire, to tip the balance in favor of transformative works, and to better accommodate the “relational author” and transformative works produced by such authors. Copyright ownership is, among other things, an economic matter. When dealing with copyright disputes, judges have often relied upon their intuitive cost-benefit reasoning to determine whether granting an author's fair use claim will foster more creativity. In contrast, the utility of two commonly adopted economic models, Pareto efficiency and wealth maximization (derived from the Kaldor-Hicks efficiency principle)<sup>81</sup>, have often been doubted. This section argues that, while economic theories have flaws, what is known as intuitive reasoning also fails to adequately balance the rights of owners and the public. By identifying their common mistake in reinforcing the Supreme Court's narrow parody definition, this section suggests how courts should re-interpret and re-apply copyright law to fully accommodate Craig's “relational author” and his/her transformative works.

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<sup>77</sup> *See id.* at 353.

<sup>78</sup> Craig, *supra* note 58, at 208–09.

<sup>79</sup> *See id.* at 265–66.

<sup>80</sup> *E.g.*, CHARLES A. KNIGHT, *THE LITERATURE OF SATIRE* 32 (2007).

<sup>81</sup> HAYMAN, LEVIT & DELGADO, *supra* note 40, at 304. Richard Posner proposed the wealth-maximization model by adopting the Kaldor-Hicks efficiency criterion.

A. *Intuitive Cost-Benefit Analysis vs Efficiency Principles*

Copyright scholar Alfred Yen explains the process in which courts, generally lacking empirical evidence, engage in intuitive cost-benefit reasoning to apply the fair use doctrine. According to cost-benefit reasoning, in order to qualify as a parody, the new work must contain some criticism of the original work and must not function as a substitute for it.<sup>82</sup> The first requirement ensures that the fair use treatment reaps a positive benefit for the public, while the second requirement lessens the harm posed by the fair use doctrine to the financial incentives of production.<sup>83</sup> Convinced that granting the fair use claim will foster rather than hinder creativity, courts would then allow the parodist to freely borrow materials “reasonably necessary to conjure up the original.”<sup>84</sup> It is believed that such a cost-benefit analysis has yielded efficient results.<sup>85</sup>

Yen contends that intuitive reasoning is not translatable into efficiency models, namely Pareto efficiency and Kaldor-Hicks efficiency, neither of which help to adjudicate fair use disputes.<sup>86</sup> A fundamental proposition of modern economics is that rational and self-interested individuals in a free market will pursue mutually beneficial transactions until they reach a Pareto efficient state of affairs, in which no individual will gain without harming others’ welfare.<sup>87</sup> Courts thus simply need to enforce the status quo in fair use claims to avoid presumptively undesirable interference with the market, and consider a fair use defense only when they identify imperfect market conditions.<sup>88</sup> Shifting to the Kaldor-Hicks efficiency principle, courts would declare that certain use is “fair” if the gains by society through fair use outweigh any losses imposed upon authors, so that “winners,” meaning parodists and whoever benefits from the parody, could fully compensate “losers,” or authors, in dollar terms.<sup>89</sup> However, Yen cites to empirical evidence to

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<sup>82</sup> Alfred C. Yen, *When Authors Won’t Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 87 (1991).

<sup>83</sup> *Id.* at 88–89.

<sup>84</sup> *Id.* at 94.

<sup>85</sup> *Id.* at 84.

<sup>86</sup> *Id.* at 94–98, 103–06.

<sup>87</sup> *Id.* at 94–95; see also Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1216 (1991) (arguing that strict Pareto “superior changes,” or those which make no one worse off and at least one person better off, are of no general use as a normative guide to social and legal policy: “For if strict or fanatical Pareto is the criterion, why wouldn’t any change that belonged in the set have already been made? . . . . [I]f Pareto optimality means a place where no improvement can be made without ex ante creating the possibility that there will be some losers, then we are always there.”).

<sup>88</sup> Yen, *supra* note 82, at 96–98.

<sup>89</sup> *Id.* at 103–04.

argue that authors very likely prefer good reputation and freedom from the emotional stress caused by parodies to any amount of monetary compensation.<sup>90</sup> Due to problems with compensation, parody as fair use cannot be justified by efficiency principles.<sup>91</sup>

### *B. Wealth Maximization and Its Flawed Assumptions*

Interestingly, Richard Posner's economic analysis of fair use, based upon his wealth-maximization model, differs from Yen's by assuming that copyright owners would be willing to accept monetary compensations from parodists for all their losses, including harmed reputations and emotional damages. He contends that courts should consider parody as fair use because it must quote extensively from the original to be recognizable as such, and authors who fear ridicule of their works will not permit parodists to use them without paying high fees.<sup>92</sup> Should the law require prospective parodists to seek prior permission from copyright owners, the costs of transaction would reduce incentives to produce this valuable art form.<sup>93</sup> Likewise, forcing parodists to later compensate owners for losses incurred would discourage their original production.<sup>94</sup> By making a different assumption about owners' willingness to accept monetary compensations, Posner thus apparently eliminates the biggest flaw in the economic model.

Even if Posner's assumption about compensation is correct, his economic analysis of fair use is nonetheless rendered inadequate by insistence upon a narrow definition of parody based on a flawed rationale. He carefully distinguishes between a parody that uses a copyrighted work as a "weapon" to criticize a third-party, and one that uses the copyrighted work itself as a "target."<sup>95</sup> Posner assumes that owners would not mind licensing those works that borrow their originals as "weapons" aimed at something else, and so no parody defense should be invoked in the absence of a license.<sup>96</sup> Although owners tend to disapprove of parodies that target their works, the likelihood that these parodies provide useful commentaries justifies their coerced transfer when owners refuse to grant licenses.<sup>97</sup> Therefore, Posner agrees with the Supreme Court's reasoning, that the fair use doctrine should

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<sup>90</sup> *Id.* at 105.

<sup>91</sup> *Id.* at 105–06.

<sup>92</sup> Richard Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 63 (2005).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Richard Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 71 (1992).

<sup>96</sup> *Id.* at 72.

<sup>97</sup> *Id.* at 72–73.

provide a defense to infringement only if the new work targets the original and does not substitute it – two criteria that define a true parody.<sup>98</sup>

Posner's narrow definition of parody and his rationale behind it are based upon a flawed assumption about copyright owners that they would only prohibit derivative works that directly criticize their original works and therefore would find no reason to prohibit other works. Although they should have less reason to prohibit the public from borrowing their works as "weapons" against third-parties, they may refuse to grant licenses for other reasons. One reason would be the fear that their works will not be shielded from criticism. After all, artistic or literary works have multilayered meanings open to different interpretations, and works that intend to make broad criticisms of society – what the Supreme Court regarded as pure "satires" – may end up criticizing the originals, at least from readers' perspectives. Take seventeenth-century English poet John Milton's *Paradise Lost* as an example: while *Paradise Lost* is generally regarded as a social satire, some readers have interpreted it also as a parody of the Christian Bible due to its extensive appropriations of Biblical stories. That new works, despite targeting third-parties, may end up criticizing the originals puts Posner's narrow definition of parody in doubt. One cannot help but ask: should courts consider as fair use works that inadvertently criticize the originals and works that do so in very subtle manners? If the answer is indeterminate, then parody needs to be redefined, and the clear boundary between parody and satire no longer holds. Further, owners who do agree to let borrowers use their works may charge exorbitant fees, which then discourage the appropriation of existing works for social criticism. Hence, it will not be in society's interest to insist that writers obtain prior approval from copyright owners before appropriating their works for broad social criticisms.

### C. Fair-Use Test and Its New Emphases

While popular economic models are flawed, intuitive cost-benefit analysis that courts have relied upon to resolve fair use claims has also fallen short of its purpose. Certainly, the threshold criterion that the new work must not supersede the original is reasonable, for it minimizes any harm posed by the fair use doctrine to the financial incentives for creative productions. Yet, the other threshold criterion that the new work must target the original was not necessary, because it has no bearing at all on the social benefits of the works. It is this flawed intuitive reasoning that led courts to dichotomize parody and satire.

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<sup>98</sup> See *Campbell*, 510 U.S. 569, 580–81 (1994).

Intuitive cost-benefit reasoning and economic analysis thus converge at their common mistake of narrowly defining parody and of treating parody and satire as disparate literary forms. This convergence points to better ways to interpret copyright law that can fully accommodate Craig's "relational author." As Craig suggests, the copyright regime should recognize creative transformations of pre-existing texts as original works.<sup>99</sup> Courts, rather than trying to fit allegedly infringing works into categories like parody or "satire," should focus more heavily on factor four of the fair-use test: whether the new works undermine current or potential markets for their copyrighted originals. Here, one should return to Salinger's claims against Colting. Despite the holdings of both Courts (the District Court and the Second Circuit), Colting's new work is arguably a parody according to the law, because it critiques Salinger's original novel, his protagonist, and Salinger himself. Yet, a far more important question should have been the harm that Colting's work would pose to Salinger and the copyright's system of financial incentives, versus the potential benefits that it would offer the public. Nevertheless, both Courts should have easily found that Colting's work did not supersede Salinger's original and, moreover, would very unlikely undermine a potential market for a real sequel of Salinger's work. Moreover, because its use of Salinger's novel to critique the protagonist's worldview and Salinger's control over his own work is not something that Salinger would likely have done, it would very unlikely undermine a potential market for a real sequel by Salinger. The question of whether it is parody or satire thus becomes far less significant.

## V

### LEGAL REALISM: COPYRIGHT LAW IN ACTION

The public, nonetheless, is stuck with the Supreme Court's narrow definition of "parody," at least for the present. Hence, this section adopts legal realist perspectives not only to shed light on how courts decided wrongly on fair use claims, but also to offer suggestions on how they may reach better, or more just, decisions on similar disputes. Contending that law is not a system of rules but rather a multidisciplinary project, legal realists are skeptical about the usefulness of formal rules, abstracted from the real world, in predicting what problem-solvers would do and prescribing what they should do.<sup>100</sup> When judicial decision-making is subject to an array of extralegal factors, is uncertainty all that remains? What could have motivated the Courts to rule in favor of Salinger instead of Colting? Imagine Beastie Boys' lawsuit against GoldieBlox had gone forward – how would/should the Court rule?

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<sup>99</sup> Craig, *supra* note 58, at 263–65.

<sup>100</sup> HAYMAN, LEVIT & DELGADO, *supra* note 40, at 157.

A. *Salinger's Victory and Literary Experts' Opinion*

Legal realist Jerome Frank offers an inspiring perspective on judicial decision-making. Quoting Justice Holmes, Frank contends that law does not consist of rules and principles, but is better characterized as “specific decisions in concrete cases.”<sup>101</sup> To illuminate that there is not much correspondence between “artificial, rule-worded, published opinions” and “undisclosed,” “real” reasons for these opinions, he cites as an example, *In re Hang Kie*, which involved the first victory of a zoning ordinance in California.<sup>102</sup> Although, as Frank argues, racial prejudice against Chinese laundry owners was the true basis of the holding, the opinion states “in due form, rules which are syllogistically linked to facts so as seemingly to compel the decision.”<sup>103</sup> Later on, these same published reasons were used by other judges to sustain zoning ordinances that were not motivated by prejudice against Asians.<sup>104</sup> Frank concludes that, because judges are “humans” and have different abilities, temperaments, and even moral standards, the relation between the exactness of legal rules and its predictability of future decision can only remain uncertain.<sup>105</sup>

The tendency for conventionally popular litigants to win in fair use disputes makes one wonder if Salinger’s victory was, in large part, due to his legendary status in the American literary scene, as compared to his unestablished and no-name opponent.<sup>106</sup> As explained already, despite the Supreme Court’s rather restrictive definition of parody, Colting’s critique of Salinger’s novel and the author himself – similar to how Randall’s *The Wind Done Gone* critiques Mitchell’s *Gone with the Wind* – may well have qualified as parody and fair use according to the law. Thus, the holding that it is a “satire,” not “parody,” compels a “rule-skeptic” perspective. The Court, in its “rule-worded” opinion, held that Colting’s new work, rather than critiquing the original, targeted Salinger’s alleged “iron-clad control” over his work and so was not a parody.<sup>107</sup> In similarly rule-laden language, the Court held that Colting’s work was not “transformative” enough to pass the fair use test, because the amount and substantiality of the original work borrowed was more than necessary to criticize Salinger and his

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<sup>101</sup> Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 18 (1931).

<sup>102</sup> *Id.* at 37.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 42, 48.

<sup>106</sup> See Andrew Giden & Timothy Greene, *Fair Use for the Rich and Fabulous?* 80 U. CHI. L. REV. DIALOGUE 88 (2013).

<sup>107</sup> See *Salinger v. Colting*, 641 F. Supp. 2d 250, 261 (S.D.N.Y. 2009).

character.<sup>108</sup> In doing so, the Court ignored the fact that Colting's novel did not copy the original's language beyond the use of certain catchphrase and that only four characters from the original reappeared in his new work, which has a host of other characters.<sup>109</sup> If Salinger's fame really played a significant role in the outcome,<sup>110</sup> then the published opinions do not correspond to, but only camouflage the real reasons for his victory.

Given law's multidisciplinary nature, the District Court should have given more weight to relevant extralegal factors available. Because this case involves literature, for example, it could have weighed heavily the advice of literary experts Martha Woodmansee, an English Professor, and Robert Spoo, a lawyer with a PhD degree in English Literature. When asked to assist Colting's attorneys in assessing the extent to which his work had made "creative and transformative" use of the original, both declared that it was a critical commentary on Salinger's novel similar to conventional scholarly articles.<sup>111</sup> Similarly, the Second Circuit should have heeded these experts' advice, considered the lack of evidence that the publication of Colting's work – merely a critical commentary – would do any harm to Salinger, and reversed the injunction against its publication. While plaintiff's fame and status might have been difficult to dismiss, openness to expert advice and awareness that any harm done to plaintiff would be minimal would have persuaded the Courts to hold for defendant.

### *B. Imagining Beastie Boys v. GoldieBlox*

The literary experts' advice, overlooked by the *Salinger* Courts, nevertheless points to a positive direction in judicial decision-making. The uncertainty within formal legal rules can become beneficial in cases where courts must interpret and apply flawed laws. On the one hand, what Frank calls "human" judges may not recognize a flawed law or a badly decided precedent. On the other hand, given law's multidisciplinary nature, judges whom Frank describes as "strong" and "honest" may choose to interpret and apply bad laws, or flawed legal concepts, by drawing upon multidisciplinary resources and with creativity and flexibility so as to arrive at just holdings.<sup>112</sup> Hence, the fact that the law does not dictate judicial

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<sup>108</sup> See *id.* at 261–62.

<sup>109</sup> See CALIFORNIA, *supra* note 5 at 18, 89-97, 249-72; 125-33. See also Lai, *supra* note 4 at 25-30.

<sup>110</sup> See Giden & Greene, *supra* note 105 at 42, 48.

<sup>111</sup> Decl. of Martha Woodmansee at 3, *Salinger*, 641 F. Supp. 2d 250 (No. 09 Civ. 05095); Decl. of Robert Spoo at 5–7, *Salinger*, 641 F. Supp. 2d 250 (No. 09 Civ. 05095).

<sup>112</sup> See Frank, *supra* note 100, at 35, 42. .

decision-making offers certain leeway for capable judges to steer towards just decisions as they turn “law-in-the-books” to “law-in-action.”<sup>113</sup>

If the dispute between GoldieBlox and the Beastie Boys had gone forward, how would or should the Court rule? GoldieBlox’s commercial featured three little girls assembling a huge Rube Goldberg machine out of a disparate collection of toys and household items, while singing to the tune of the Beastie Boys’ 1987 track “Girls,” changing the lyrics to say, “Don’t underestimate girls.”<sup>114</sup> The company argued that this video is a parody aimed to “make fun of the Beastie Boys song, and to further the company's goal to break down gender stereotypes and to encourage young girls to engage in activities that challenge their intellect, particularly in the fields of science, technology, engineering and math.”<sup>115</sup> Because the Supreme Court in *Campbell* held that a commercial parody may qualify as fair use, GoldieBlox’s appropriation of the Beastie Boys’ sexist song to convey a strong feminist message should indeed be “fair” according to the law.<sup>116</sup> Yet, a number of extralegal factors might well come into play. If popular litigants have a tendency to win in such disputes, the Beastie Boys would benefit from its contribution to American popular music, with seven platinum albums and three Grammy Awards and admission into the Rock and Roll Hall of Fame.<sup>117</sup> Moreover, the Beastie Boys explained in an open letter to GoldieBlox that they made a conscious decision to respect the wishes of Adam Yauch, their late member who died in 2012, not to permit their music and/or name to be used in commercials.<sup>118</sup> This letter, which had no bearing at all on whether the video’s use of the old song would pass the fair-use test would nonetheless cast GoldieBlox, a relatively new startup company, in a negative light.

The “fame” factor aside, the Court might find that GoldieBlox’s strong commercial motivation in using the Beastie Boys’ track to promote its toy products outweighed its purported comment on the original. Yet, the Court could, and

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<sup>113</sup> Originating from Roscoe Pound’s 1910 essay, the “law in the books” vs. “law in action” has been evoked many times. One example is Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

<sup>114</sup> E.g., Eriq Gardner, *Beastie Boys, 'Girls' Viral Video in Copyright Infringement Fight*, HOLLYWOOD REP. (Nov. 22, 2013, 2:22 P.M), <http://www.hollywoodreporter.com/thr-esq/beastie-boys-girls-viral-video-659308>.

<sup>115</sup> *Id.*

<sup>116</sup> *See Campbell*, 510 U.S. 569.

<sup>117</sup> *Obituary: Adam 'MCA' Yauch*, BBC NEWS (May 4, 2012), <http://www.bbc.com/news/world-us-canada-17959743>.

<sup>118</sup> Goldie Blox, *Our Letter to the Beastie Boys*, GOLDIE’S FIELD NOTES (Nov. 27, 2013), <http://blog.goldieblox.com/2013/11/our-letter-to-the-beastie-boys/>.

should, take a far broader view of parody and apply the fair use test by focusing on the economic harm that GoldieBlox would pose to the Beastie Boys and the financial incentives of the copyright regime. Certainly, GoldieBlox's commercial aimed more at selling products rather than at presenting its parody as an artwork. However, the Supreme Court's definition and examples of parody, though making no mention at all of parodies that are set in commercials, do not expressly exclude them from fair use.<sup>119</sup> Moreover, the Court should find that parodies are mostly commercial. With this conclusion, the Court should focus more heavily on the likelihood that GoldieBlox's commercial would supersede the Beastie Boys' work. Because the new song, with its girl-power lyrics, would very unlikely supersede the band's original and harm their current or future market,<sup>120</sup> it should qualify as fair use. A "strong" and "honest" judge would find it unjust to deny GoldieBlox's fair use claim and to hold for the Beastie Boys instead, because of their fame, their late member's wish, or both.

### CONCLUSION: TWO LITERARY CONCEPTS AND ONE LOGOS

This article has argued that to balance copyright with basic liberty and to accommodate the "relational author," courts should determine whether a work is fair use, not with reference to the dual parody/satire categories, but by looking at its possible harm to the copyright owner and society. This new approach, which subverts the Court's ruling and blurs the parody/satire boundary, is reminiscent of the deconstructive strategies that many disparage as nihilist and useless. Thus, this article draws to a close by bringing in Jack Balkin's inspiring view on deconstruction and tradition. Balkin contends that to respect tradition is to "betray," "submerge," or even "extinguish" other existing and competing traditions, and the enshrinement of one respectable tradition means the submergence of its "less respectable opposite."<sup>121</sup> In the same vein, it would be fair to say that courts, by upholding one narrow, traditional conception of parody, betray other broader, equally valid definitions of parody. Further, they marginalize the long-standing tradition of satire by rendering it less respectable and excluding it from legal protection. If, as Balkin argues, to deconstruct is a form of logocentric practice with a "logos," or rationale behind it,<sup>122</sup> then there is nothing nihilistic in deconstructing parody and to redeem satire from submersion – because doing so

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<sup>119</sup> See *Campbell*, 510 U.S. 569.

<sup>120</sup> Concerning whether the video's use of the song would harm Beastie Boys' future market for licensing the song for use in commercials, users who do not make fair use of the song, such as by parodying it in some ways, would still need to obtain licenses from the band.

<sup>121</sup> J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1620, 1623, 1630 (1990).

<sup>122</sup> *Id.* at 1627, 1636.

would facilitate better applications of the fair use doctrine, encourage more creativity, and enable just rulings by courts. Justice then becomes the “logos.”