From the SelectedWorks of Meghan M. Lydon Ms.

April 24, 2013

DECODING AND RESISTING CULTURE: RECEPTION THEORY AND COPYRIGHT LAW

Meghan M. Lydon, Ms.

Available at: https://works.bepress.com/meghan_lydon/1/
DECODING AND RESISTING CULTURE: RECEPTION THEORY AND COPYRIGHT LAW

By Meghan Lydon

Though there has been much academic treatment of the author’s role in copyright law, few academic articles have been published about the reader’s role. Of those articles, only one has examined copyright law through the lens of reader response theory. In her article “Everything is Transformative: Fair Use and Reader Response,” 31 Colum. J.L. & Arts 445, Laura Heyman relied on English professor Stanley Fish’s famous reader response theory to argue that all works are transformative because readers naturally interpret texts from their own perspectives and that copyright law’s transformative use test should measure the use that a community of readers makes of derivative works instead of the degree to which derivative authors alter originals. This Article argues, however, that Fish’s theory is not the best vehicle for enlarging transformative use through reader-oriented theory because it is impossible to measure Fish’s communities of readers and because Fish’s work deals with different readers’ passive response to original texts and not derivative texts. This Article argues, by contrast, that Stuart Hall’s reception theory, a form of cultural studies theory that examines how readers actively resist meaning in texts that do not align with their cultural positions, provides a much better means for examining the effect of reader-oriented theory on copyright law. Ultimately, this Article suggests that if the derivative author is fashioned as the reader of the original text, derivative works resisting cultural domination in the original should be permitted as transformative fair use. Because the reader is easily defined and because a limited number of derivative works would fit the criteria, this approach can actually be applied to real legal cases. This Article also contributes to the broader discussion of how reader rights can be expanded in an age of increased copyright protection following the 1998 Copyright Term Extension Act by locating a strong theoretical basis for enlarging reader rights.

1 University of Pennsylvania Law School, JD candidate 2012.
Introduction

[T]hose who do not have power over the story that dominates their lives, the power to retell it, rethink it, deconstruct it, joke about it, and change it as times change, truly are powerless, because they cannot think new thoughts. —Salman Rushdie

If you keep telling the same sad small story, you will keep living the same sad small life. —Jean Houston

In John Edgar Wideman’s lyrical insightful novel *The Cattle Killing*, a vision appears to the struggling Xhosa people of Africa assuring the end of European domination if they kill their cattle. The Xhosa believe the voice emanates from an ancestor, though it is the voice of despair bred by white settlers. When the Xhosa heed the voice’s message, they destroy their livelihood, only further advantaging white invaders. Of that message, Wideman writes, “Though the prophecy promised paradise, a terrible future lived in the words.” With this word choice, Wideman emphasizes that language can deleteriously affect the real world. Later, another spirit warns the narrator, “Beware. Beware. Do not kill your cattle. Do not speak with your enemy’s tongue. Do not fall asleep in your enemy’s dream.” Here, Wideman articulates that survival requires resisting the version of reality conjured by enemy discourse.

Reader response theory, an offshoot of poststructuralist literary theory popularized by English professor Stanley Fish, similarly exemplifies that writing and art
do not have universal meaning, but rather signify differently to different people.\(^9\) In 2008, Laura Heyman introduced reader response theory to the ongoing academic conversation regarding what place in copyright law scholarship the humanities should occupy in her “Everything is Transformative: Fair Use and Reader Response” appearing in the *Columbia Journal of Law and the Arts*.\(^{10}\) In her article, she proposes that copyright’s transformative use test implemented by Justice Souter in *Campbell v. Acuff-Rose* should measure not the degree to which the derivative author alters the original, but rather the use readers make of the derivative work.\(^{11}\) She suggests that all works are transformative in an artistic sense because readers alter all texts when viewing them from personalized perspectives and that whether law deems a derivative work legally transformative should depend on whether a new discursive community arises around the work.\(^{12}\)

Heyman’s thesis, however, cannot be profitably applied to copyright law because Fish’s theory deals with how readers unintentionally react to the same, as opposed to derivative, texts and because Fish’s communities of readers are impossible to define. This Article will critique Heyman’s article and instead explore insights gained from examining copyright law in light of Stuart Hall’s reception theory. Stuart Hall’s 1970s reception theory, an audience response theory that fueled cultural studies, especially highlights an audience’s active ability to discern media messages that do not describe its

---


\(^{11}\) Id. at 448.

\(^{12}\) Id. at 455.
reality and to resist that interpretation. The first critic to question the perfect communication loop, Hall suggested that readers read texts from three main perspectives. The first way of reading is the dominant or hegemonic reading in which the reader shares the writer’s perspective and reproduces the author’s preferred meaning. The second way of reading is the negotiated reading in which the reader largely accepts the writer’s preferred meaning but sometimes disagrees with the preferred reading in order to accommodate the reader’s personal experience. The third way of reading is the oppositional or counter-hegemonic reading in which the reader grasps and then rejects the preferred reading because the preferred reading describes reality too differently from the way the reader experiences it. This Article argues that the derivative author should be fashioned as the reader of the original text and that derivative works providing an oppositional reading of an original should pass copyright’s transformative use test. Stuart Hall’s reception theory can be more profitably applied to copyright law than Fish’s reader response theory because the reader is easier to define, rendering the theory easier to apply to actual legal disputes, and because the theory provides a stronger rationale for enlarging reader rights. In Fish’s theory, readers have no agency, but in Hall’s theory, readers have agency that can be used to release some of the hold that the original can coercively exercise over public imagination. Despite the power of stories to control our minds, our self-esteem, our world outlook, and therefore our actions, modern copyright law has not incorporated any cultural studies insights, and

13 Stuart Hall, Encoding and Decoding, in CULTURE, MEDIA, LANGUAGE 128, 128-38 (Stuart Hall et al. eds., 1980).
14 Id. at 136.
15 Id.
16 Id. at 137.
17 Id. at 137-8.
there has been no academic treatment of how Stuart Hall’s reception theory might affect interpretations of copyright law.

This paper will begin with an overview of literary criticism and its relationship with copyright law. Next, it will offer an assessment of Laura Heyman’s article, the only published article addressing copyright law and reader response theory, before addressing Stuart Hall’s reception theory and its greater potential impact on copyright’s fair use doctrine. Next, the Article will examine how Hall’s reception theory might apply to *Suntrust v. Houghton Mifflin*, the case in which the estate of Margaret Mitchell sued Alice Randall and Houghton Mifflin Company for publishing *The Wind Done Gone*, a derivative work of Mitchell’s *Gone With the Wind* that mocks and critiques the original from the perspective of a slave.\(^{18}\) The Article will conclude by advocating a broadening of the transformative use aspect of the fair use doctrine in order to permit revisions of artistic works if the revised works resist cultural domination. This conclusion contradicts the standard United States approach that copyright should be driven solely by economic concerns by suggesting that copyright law should be fueled at least by some cultural studies values as well as by economic considerations.

**Copyright and Culture**

Critical and literary theory outpaced modern copyright law with the rise of poststructuralism and postmodernism in the 1950s and 1960s. A half-century later, the two fields, one the study of culture itself and the other the legal doctrines policing

---

culture, remain substantially misaligned. Further complicating interdisciplinary conversation, legal scholars and cultural theorists differ tremendously in personality, values, and life outlooks. While legal scholars value the logical, the impersonal, and the practical, humanists trust idealism, individuality, and intuition. The two fields differ as strongly as the characters of Mary Poppins and Mr. Banks in Walt Disney’s 1964 film Mary Poppins, based on the novel by P.L. Travers. While idealistic Poppins chides practical Banks for assuming “graphs that show the profits up” will cause his small children’s “cup of joy to overflow,” Banks berates Poppins for taking those children “popping in and out of chalk pavement pictures” and “having tea parties on the ceiling.”

In exactly the same manner, humanists are likely to decide law lacks imagination’s intuitive insights and sensitivity to the human spirit, while legal scholars are likely to disparage humanists for being insufficiently down to earth and unlikely to change the everyday world.

Two scholars who have done important work in attempting to bridge the gap between copyright law and cultural studies generally are Rosemary Coombe and Madhavi Sunder. The first scholar to unite copyright law and cultural studies, Coombe decried the “forms of cultural power the law affords holders of copyright, trademark, and publicity rights” because the law temporarily sanctions one meaning and use of a work over all others. In her article, she draws heavily on semiotic theory and cultural studies. Though her work creatively unites the two fields of inquiry, she does not really offer any normative arguments for how legislatures and judges might accommodate cultural studies

---

19 MARY POPPINS (Walt Disney Pictures 1964).
20 Id.
in law. In contrast, Sunder more specifically argues that fan fiction should be considered fair use because it resignifies dominant culture.\textsuperscript{22} She also suggests that intellectual works should not be restricted by excessive copyright protection because they should be considered the means by which readers create further meaning and not ends in themselves.\textsuperscript{23} In making the second suggestion, she relies on de Certeau’s concept of \textit{bricolage}, which he borrows from anthropologist Levi-Strauss, in which de Certeau casts meaning making as an activity during which one combines cultural materials extant in one’s cultural environment and uses them in new ways.\textsuperscript{24} She believes, like Habermas, that the ability to share, comment on, and combine existing cultural works are what characterizes meaning making.\textsuperscript{25} Postmodern artists have believed this concept for decades, but copyright law has not kept up. In general, Sunder’s arguments are both very similar to Coombe’s because both writers argue that copyright law dampens individual ability to resignify culture, which, as postmodern theorists and artists have argued, is necessary for resisting dominant culture.

In his 1984 book \textit{The Practice of Everyday Life}, de Certeau offers an interesting look at how everyday practices work to undermine cultural hegemony.\textsuperscript{26} Examples de Certeau offers are making a personal phone call while at work, changing the look of a rented apartment, and enjoying window-shopping when one lacks the ability to purchase.\textsuperscript{27} Graeme Turner described the work of de Certeau:

\begin{quote}
In \textit{The Practice of Everyday Life} (1984), de Certeau emphasizes the tactics
\end{quote}

\textsuperscript{24} \textit{Id.} at 57.
\textsuperscript{25} \textit{Id.} at 45-46.
\textsuperscript{26} GRAEME TURNER, BRITISH CULTURAL STUDIES, 182 (2003).
\textsuperscript{27} \textit{Id.}
employed by subordinated groups to win small victories from larger, more powerful and ultimately determining systems. De Certeau argues that, while members of popular culture cannot gain control of the production of culture, they do control its consumption – the ways in which it is used. Like ethnographic audience researchers, de Certeau emphasizes how creative popular culture is, how its members continually seek out ways of operating that serve their own interests while appearing to acknowledge the interests of the dominant group.28

De Certeau nicely adds support to Sunder’s argument that it is important to turn old culture to new ends, and certainly it would be easier to do that if copyright protection was not too broad or too long. De Certeau himself, though, does not write about any use of culture in a way that would be currently illegal according to modern copyright law. Also, de Certeau does not advocate an active strident resistance to the meaning in a work of art or that consumers might gain control of production. Rather, de Certeau’s bricolage (like Levi-Strauss’s before him) is an ad hoc, almost unthinking, form of meaning making in which one makes do with slightly personalizing, in a legal way, the elements of existing culture.

Though modern copyright doctrine incorporates no cultural studies insights and inclusion of cultural studies texts in copyright courses at law schools is controversial and rare, law and the humanities are more synchronized than some scholars think. Neither deploys the level of objectivity boasted by science, and both frequently pursue public wellbeing. In fact, though modern copyright law does not reflect cultural studies, it does echo earlier notions of art and art theory. In his 1953 The Mirror and the Lamp, M.H. Abrams described earlier art theory that better matches current copyright law.29 In that book, Abrams described a work of literature as existing in the middle of a triangle

28 Id.
marked by the universe, the artist, and the audience.\textsuperscript{30} Abrams argued that most literary criticism emphasized the work’s relation to one corner of the triangle.\textsuperscript{31} According to Abrams, mimetic theory emphasized the relationship between a work of art and the universe, establishing literature as a mirror in which readers might glimpse fixed, universal reality.\textsuperscript{32} Turning to a different triangle corner, he found that expressive theory underscored the degree to which a literary work mirrored the artist’s personality and how the reader could find the artist behind the looking glass of the work (not unlike how readers could find God in the \textit{Bible}).\textsuperscript{33} Thirdly, Abrams believed that the didactic theory of literature emphasized literature’s ability to teach knowledge and values to an audience.\textsuperscript{34} Abrams felt that before the Romantic era, criticism focused on the work’s relation to the universe and the audience, during the Romantic era on the relationship between the work and the artist, and in the twentieth century to the work itself.\textsuperscript{35} Though viewing literature as mimetic, expressive, or didactic does not account for much modern literary criticism, such as feminism and deconstruction, these early notions still comprise significant quotidian understanding of literature. For example, many readers primarily assume that exploring Gogol’s novels will largely reveal Gogol’s personality, life in nineteenth-century Russia, and several important lessons.

None of these assumptions clash extraordinarily with the strong property rights held by authors in modern copyright law. For instance, if an author’s work is primarily a vision of reality and perception of that reality does not vary according to who experiences

\begin{flushleft}
\textsuperscript{30} \textit{Introduction to Literary Theory and Criticism}, in \textit{The Norton Anthology of Theory and Criticism} 1, 4 (Vincent B. Leitch, et al. eds., 2nd ed. 2010).
\textsuperscript{31} \textit{Id.} at 5.
\textsuperscript{32} \textit{Id.} at 4-5.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.} at 5.
\end{flushleft}
it, there is no need for a derivative work to revise and offer a new perspective on that reality. Furthermore, the romantic emphasis on the relationship between the author and the work can easily strengthen arguments for expansive author rights because writers embed so much of themselves in a work.\textsuperscript{36} There would be no need for a derivative work to revise authors’ views of themselves because authors would doubtless understand themselves better than would any derivative writer. Lastly, if literature is primarily instructive, presumably the reader has already learned the lessons to be gained from the work, and if other writers wanted to impart different lessons, they could just write an entirely new story instead of a derivative work.

Unlike theories of the artistic work’s relation to the universe, the audience, or the artist, twentieth-century formalist literary criticism focused on the literary nature of the work itself.\textsuperscript{37} Disregarding outside influences and extolling internal poetic effects such as “alliteration, assonance, metaphor, and paradox to rhythm and rhyme,” formalism was an attempt to valorize literature above other forms of writing and to remove literature from the race to portray reality most clearly, which it was beginning to lose to science, journalism, and photography.\textsuperscript{38} Copacetic with formalism, New Criticism, the close study of a work’s artistic form, became the main mode of literary analysis in the mid-twentieth century and is still used in high school and college English classes.\textsuperscript{39} New Critics famously advocated the affective fallacy, which indicated that works should not

\textsuperscript{36} Many scholars have argued that current copyright law reflects Romantic notions of authorship and creative original genius. Mark Rose observes that the discourses of originality and personality coincided and merged with the discourse of property in the eighteenth century, which strengthened arguments for strong copyright protection since works were seen as closely resembling their creators. MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT, 120-122 (1993).

\textsuperscript{37} Introduction to Literary Theory and Criticism, supra note 30, at 5.

\textsuperscript{38} Id. at 4.

\textsuperscript{39} Id. at 3.
be judged by emotional response evoked from readers, and the intentional fallacy, which suggested that works should not be approached by guessing authorial purpose. Because this analytical method denies the social forces feeding a text’s creation and any differing interpretations readers bring to texts, this view of art is also compatible with copyright law’s tendency largely to ignore a work’s social effects. Those effects are largely ignored because economic incentive drives current copyright law with the exception of the fair use doctrine. The fair use doctrine, however, does not consider the social effect that a work has on the public imagination outside of permitting parody, works that criticize or make fun of an original work. Moreover, it is often difficult to determine what constitutes parody or the degree of criticism necessary to invoke a parody defense. Because it is a mainstay of high school and undergraduate literary instruction due to ease of use, formalism also looms large in public conceptions of art and artist rights causing many people not to realize that art is deeply entangled with culture.

Until the mid-twentieth century, literature and art theory marched more or less in step with copyright law. Toward the latter part of the twentieth century, however, the common ground between law and art theory fissured and art theory shifted in a new direction. In the latter part of the twentieth century, poststructuralist theorists recharacterized language by adopting such deconstructive notions as textuality, rhetoricity, and intertextuality. Textuality described Saussure’s semiotics theory, in which Saussure argues for the lack of a connection between the signifier (the sound of a word) and the signified (the ideal Platonic concept indicated by a word). If the signifier and the signified have no relation, then language floats free from reality and new readers

---

40 Id. at 19.
41 Id. at 22.
42 Id.
Rhetoricity refers to figurative language that does not relate back to reality, such as describing the lives of immigrant laborers as part of the fulfillment of the American dream. Intertextuality questions the boundaries between texts and suggests that texts frequently refer to each other and enable each other to make sense. If texts contain no fixed meaning, arguments for strong author rights and expansive copyright protection weaken because, in a certain sense, the reader also created, and therefore should own, the text.

A subdivision of poststructuralism, reader response theory stems from that divorce between the signifier and the signified. According to reader response theory, readers create texts as much as writers do because interpretation ultimately gives words meaning. Describing reader response theory, Jane Tompkins wrote, “Reading and writing join hands, change places, and finally become distinguishable only as two names for the same activity.” Encompassing many other theories such as feminism and postcolonialism, reader response theory began with Stanley Fish, the first theorist to believe texts did not cause all reader responses to literature. Wolfgang Iser, an earlier German theorist, thought readers responded to texts in ways not explicitly written in the text, but still believed reactions were conditioned by the text and were the text’s ultimate fulfillment. In his 1976 *Interpreting the Varorium*, however, Stanley Fish suggested

\[
\text{\textsuperscript{43}} \text{Id.} \\
\text{\textsuperscript{44}} \text{Id.} \\
\text{\textsuperscript{45}} \text{Id. at 23.} \\
\text{\textsuperscript{46}} \text{Those who subscribe to Lockean property views of copyright law might argue that readers mix their labor with the story and therefore should own some of the text, too.} \\
\text{\textsuperscript{47}} \text{Jane Thomkins, *An Introduction to Reader Response Criticism*, in Reader Response Criticism: From Formalism to Post-structuralism, ix, x (Jane Thomkins, ed. 1980).} \\
\text{\textsuperscript{48}} \text{Id.} \\
\text{\textsuperscript{49}} \text{Id. at xvi.} \\
\text{\textsuperscript{50}} \text{Id. at xv.}
\]
that readers create meaning in a limited number of interpretive communities by bringing a set of group values and habits of interpretation to a piece of writing or art.\(^{51}\) Fish does not provide any information for how people enter and exit these interpretive communities, though, and people do not actively choose to belong to them. Ultimately, this theory does not empower readers with agency any more than did New Criticism because the reader’s intent is always to discern the author’s meaning,\(^{52}\) though it might suggest a weakening of author rights because reading communities inadvertently add something of themselves when they read and the experience of reading is not entirely directed by the original artist.

Unlike Fish’s brand of reader response theory, which is unallied with cultural studies, Stuart Hall’s reception theory heavily influenced cultural studies. In his 1973 article “Encoding and Decoding,” Stuart Hall promulgated the notion that readers negotiate and oppose texts.\(^{53}\) According to Hall, together the text and the reader make meaning. Heavily influenced by Althusser, a Marxist critic who believed that ideological state apparatuses, such as education, religion, the church, and the court system, exerted hegemonic control over subjects, Hall believed that language and art could be used in service of those brainwashing organizations.\(^{54}\) Unlike Althusser, Hall believed that the subjects of ideological state apparatuses were not passive, but could proactively resist messages promulgated from on high.\(^{55}\) Hall believed that messages and communication generally could be broken into five key steps, production, circulation, distribution, production, circulation, distribution,

\(^{51}\) Id. at xxi.
\(^{52}\) Jane Thomkins, *The Reader in History*, in Reader Response Criticism: From Formalism to Post-structuralism 201, 201 (Thomkins ed. 1980).
\(^{53}\) Hall, *supra* note 13, at 128-38.
\(^{54}\) *Stuart Hall*, in The Norton Anthology of Theory and Criticism 1779, 1780 (Vincent B. Leitch, et al. eds., 2nd ed. 2010).
\(^{55}\) Id.
consumption, and reproduction, and that communication could be broken at any step along that path. He referred to the first step as the moment of encoding and the last step as the moment of decoding. Unlike formalist critics, Hall did not believe that the encoded and decoded messages necessarily matched. From the moment of decoding, he construed three different ways of reading the text. The first was the dominant or hegemonic reading, in which the reader shares the text’s code and replicates the writer’s preferred reading. The second was the negotiated reading during which time readers largely accept the preferred reading, but sometimes modify it in ways reflecting personal experiences and values. The third reading, the oppositional or counter-hegemonic reading, occurs when the reader’s social situation directly conflicts with the dominant code. In this reading, the reader understands the preferred reading, but rejects it because it does not describe the version of reality with which the reader identifies and in which the reader believes. Ultimately, reception theory weakens justifications for strong author rights. New works by derivative writers are important in providing another perspective on the subject matter so that readers are not coerced into one view of the world by a particular cultural narrative. Since counter-hegemonic readings are important for social critique and justice, the original author should not have excessive control over derivative works.

56 Hall, supra note 13, at 128.
57 Id. at 130.
58 Id. at 131.
59 Id. at 136.
60 Id.
61 Id. at 137.
62 Id. at 138.
63 Id.
Partly influenced by Stuart Hall, cultural studies generally draws on poststructuralist and Marxist theory in order to redefine culture. No longer is culture disconnected from the real world and cloistered away in a quiet library or museum, but culture is refigured as the process of mixing the ideas, feelings, beliefs, and values of a particular culture or group into a work of art. Like Marxists, cultural critics believe that the arts can further the dominant social order, though cultural critics believe the dominant social order can be actively resisted. Cultural critics and postmodernists question high dominant culture and objective universal truth and instead focus on mass, popular, and everyday materials in a wide array of discourses. In that culture, they search for subjective truths that describe the different lives of people whose existences cannot be described by dominant hegemonic cultures. In locating these alternate stories and substitute versions of reality, cultural theorists hope to help people in subordinate social positions to make better sense of their lives and, after more deeply understanding those lives and situations, to take active steps in improving them.

**Reader Response and Copyright Law**

In her article “Everything is Transformative: Fair Use and Reader Response,” Laura Heyman applies Stanley Fish’s reader response theory to copyright law. She argues that since modern art theory divorces art from the reality it seeks to represent, that

---

64 *Introduction to Literary Theory and Criticism, supra* note 30, at 31.
65 *Id.* at 31.
66 *Id.* at 30.
all art is really unoriginal. Rather, she writes, that every artistic work is transformative either of real life or of the past art from which it derives inspiration. Consequently, Heyman believes that the transformative use aspect of the fair use doctrine should not be considered a binary concept used to determine whether or not the derivative author changed the work or did not change the work, but should be viewed instead as a continuum along which new communities of readers might form. Section 106(2) of the U.S. Copyright code assigns the right to create derivative works, or works “based upon one or more preexisting works” in which is the preexisting work is “recast, transformed, or adapted,” to the original author. The exception to this rule is located in the Section 107 fair use defense, which permits use of copyrighted material in certain situations that benefit the public. The first prong of the fair use test involves determining the purpose and character of the work. Under that prong, courts consider whether the work is transformative, whether it serves the same purpose as the original or whether it adds “a further purpose or different character, altering the first with new expression, meaning or message.” Adopting Fish’s interpretive communities from Interpreting the Varorium, Heyman argues that if there is a distinct and separate community around a derivative work, that work is more likely to be transformative and should be legalized by copyright doctrine. Her argument appears mainly to rely on the economic incentives justification for copyright law, since she mentions that if there is a new community of readers, more

---

68 Id. at 449.
69 Id.
70 Id.
72 17 U.S.C. § 107
73 17 U.S.C. § 107(1)
75 Id.
people derive utility from the work and then putatively a new derivative writer needed to be incentivized to write the work for a new audience.\textsuperscript{76}

Though Heyman’s idea to apply reader response theory to law was creative, her article feels as though she has taken reader response theory and haphazardly merged it with law. This is because in many ways, Stanley Fish’s reader response theory is not the best theoretical vehicle for her argument. Unlike her article, Fish’s theory describes how different readers react differently to the same text, not how different readers react to derivative as opposed to original texts. If different readers react differently to the exact same text, then according to Fish’s theory, the exact same text could simultaneously provide different meaning for different interpretive communities. If multiple communities can arise around an original, how then does one make the argument that the presence of a new community indicates a derivative work? Because section 102(a) of U.S. copyright law avers that copyright protection applies exclusively to works that are fixed and not those that exist in readers’ imaginations, Fish’s theory cannot truly be applied to copyright law.\textsuperscript{77}

Perhaps some of the problems with using Fish to support this article derive from the fact that, as Jane Thomkins points out in her article “The Reader in History,” Fish’s brand of reader response theory does not ultimately differ significantly from formalism.\textsuperscript{78} In her article, Thomkins avers that Fish’s reader response theory is still focused on the act of interpretation and on the meaning of the text.\textsuperscript{79} Fish just questions whether “meaning

\textsuperscript{76} Heyman, supra note 10, at 448-449.
\textsuperscript{77} 17 U.S.C. § 102(a).
\textsuperscript{78} Thomkins, supra note 39, at 201.
\textsuperscript{79} Id. at 223.
is to be located in the text or in the reader.” In other words, the goal of Fish’s reader response theory is not to empower the reader, but still to shed light on the meaning of the text itself. Thomkins describes reader response criticism’s specious attack on formalism:

In the literature of the reader-response movement, this attack sometimes claims for itself the status of a critical revolution: formalism is pronounced dead, and the responses of individual readers are declared the true object of literary study. In short, reader-response critics define their work as a radical departure from New Critical principles, but I believe that a closer look at the theory and practice of these critics will show that they have not revolutionized literary theory but merely transformed it into a new key.

Thomkins argues that language was actually more divorced from the act of interpretation in the classical and Renaissance eras, when language was meant to move an audience to action and to satisfy the wishes of the patron respectively. In the twentieth-century, writers do not write for such specific audiences but have a solely economic relationship with their readers, and formalism and reader response theory are both focused back on the text itself. Thomkins also argues that just as formalism vied with science to divine reality most accurately, reader response theory still jousts with science, this time by questioning the very objectivity upon which science rests. Fish’s reader response theory, then, is not meant to empower readers but to substantiate the humanities’ place in the academy. When Laura Heyman turns to Fish’s theory for support, she does not reach for a flexible, reader-oriented theory easily applied to the broadening of copyright doctrine, but rather to a theory bearing much similarity to formalism that is, on some level, only a love letter from an English professor to his cherished books whose social worth he feared was steadily endangered by increasingly professionalized science.

---

80 Id. at 201.  
81 Id.  
82 Id. at 202-211.  
83 Id. at 214.  
84 Id. at 222.
Trying to apply that theory to arguments advancing the importance of free culture is nearly impossible.

On a smaller picture level, Heyman’s article has some other deficiencies as well. To begin with, Heyman’s article offers nearly impossible criteria for determining when a new community has arisen around a work. How does one measure where a new community begins and ends? If fans of Margaret Mitchell’s Gone With the Wind also purchase, read, and enjoy Alice Randall’s The Wind Done Gone, has a new community not arisen? Fish himself also does not think interpretive communities can be discerned.85 Like a true philosopher, he argues, “any evidence brought forward to support the claim would itself be an interpretation.”86 He further remarks airily, “The only ‘proof of membership is fellowship, the nod of recognition from someone in the same community, someone who says to you what neither of us could ever prove to a third party: ‘we know.’”87 Here, Fish’s theory does not align with Heyman’s argument, which relies heavily on the proposition that interpretive communities can be identified.

Heyman also believes that a new community of readers will be present at the time of publication of the derivative work,88 which is problematic. She writes, “Most texts released to the public create, at the moment of their release, a discursive community around those texts. The community comprises those who engage with the work, whether deliberately or unwillingly, and the discourse is formed as that community begins to offer its interpretive views of that text.”89 In this account, however, Heyman neglects to consider that many copyright disputes arise before publication and, at the exact moment

85 Fish, supra note 9, at 173.
86 Id.
87 Id.
88 Heyman, supra note 10, at 455.
89 Id.
of publication, that a new community has not yet formed and may arise much later. It seems highly unlikely, rather than likely, that a new community will have arisen at the moment of publication. Any possible trial evidence will therefore probably be completely unavailable. She does mention, though, that how an author asks readers to interpret a work can be used as evidence of how a work might be received because readers often pay attention to the author’s direction of how to read a work.\textsuperscript{90} In this observation, Heyman seems to be echoing Roland Barthes in \textit{The Death of the Author}, in which Barthes argues that an author’s opinion of a work can be taken into consideration in determining its meaning, but is no more valid than any other interpretation.\textsuperscript{91} Writers might also be inhibited from attempting to publish a derivative work if the rise of a new community is so uncertain. Fear of a lawsuit may silence many writers. If a new community arises later, especially if much later, writers will also not be incentivized to create, even though Heyman’s article seems to rely on the economic justifications for copyright law.

Heyman, too, neglects the consideration that an original artist could easily target a derivative work at a different community from that to which he directed the original work. Is a new author needed to create a new community? It seems not necessarily. Parody is only permitted fair use by current copyright law because it is unlikely that original writers will make fun of their own work. It is not unlikely that original writers will switch target audiences, though. Many writers, for example, write for both children and adults or write in different genres.

\textsuperscript{90} \textit{Id.} at 456-457.
\textsuperscript{91} \textit{Id.} at 446.
Another more intangible problem with her article is that it reads as though Heyman still views culture as an object distinct from real life, just one that should be legalized if a new community arises around it. After reading her article, one still feels as though culture could be construed as a silly luxury that is not as important as the economy. When viewed through the lens of Heyman’s paper, any greater economic considerations clashing with a new use by a new community of readers could easily trump the new use. Many examples of art from which she draws throughout her article, such as artists merely reframing the art of another artist, are not the most compelling for her argument. Artists are not people who merely create diversion and entertainment, and derivative artists are not people who are interested merely in offering a revised work to entertain a new audience or in reframing the artwork of another artist as a cute gimmick. Rather, artists show us how to make meaning out of our lives, and the messages art sends us affect the ways we view the world. We work in the “real world” and study the economy in order to survive physically, but art influences how we go about doing that. For example, in response to the recent release of *The Harrow and the Harvest*, a new CD by American roots revivalist Gillian Welch, one internet commentator remarked that when listening to Welch sing the line “Hard times ain’t gonna rule my mind,” he feels new hope in his personal situation, and when she reaches the last “no more,” he writes nothing short of the words, “I feel a little like my life has been ennobled.”92 Since culture is the medium through which we think about and communicate every aspect of our lives, the art we consume and the music and stories we listen to become the mindset and

jumping-off point from which we make all of our decisions in the real world, a serious enterprise indeed.

**Reception Theory and Copyright Law**

Considering the aforementioned downsides of applying Stanley Fish’s reader response theory to law, Stuart Hall’s reception theory, a cultural studies brand of reader response theory, is more profitably applied to copyright’s fair use doctrine. Like cultural studies generally, Hall’s reception theory empowers readers to resist the messages handed to them from a work of art, which can often be an instrument of a culturally dominant group. Traditionally, reader response theory does not give readers such agency.

Reception studies mainly originated with theorist Hans Robert Jauss in 1960s Germany. Jauss famously argued that the expectations and assumptions that readers bring to texts heavily alter the experience of those texts. Jauss called those expectations and assumptions, “the horizon of expectations,” and he believed, unlike Fish, that horizons change over time. For example, Jauss observes that sexual references in Gustave Flaubert’s *Madame Bovary* rendered the book utterly shocking in its time, but modern readers, whose horizon of expectations has been altered by books such as *Madame Bovary*, find the book much less outrageous. Jauss refers to the difference between audience expectations and how a work breaks those expectations as “aesthetic

---

93 Hall, *supra* note 13, at 513.
95 *Id.*
96 *Id.*
97 *Id.* at 1404.
Jauss felt as though aesthetic distance distinguished great works of art from lesser works of art; great works, he argued, foil audience expectations, while lesser works uphold them. Jauss believes that expectations are shared by historical sets of readers and that there are no individual differences in reception beyond that.

A reception theorist who followed Jauss, Stuart Hall was the first cultural studies critic to question the phenomena of the perfect communication loop, in which the audience is considered to receive the exact same message that the sender intended. Prior to Hall’s theory, message reception was analyzed from a behavioral perspective, in which the receiver was thought merely to react to the sender as a leg responds to a tap on the kneecap. In his article “Encoding and Decoding,” dealing primarily with messages from television media, Hall draws on Saussure’s semiotics to emphasize the disconnect between language and reality. Saussure theorized that we can only know something through language and so language lends existence to things. For example, we see trees and flowers as separate things because we have separate names for them. Conversely, Australian Aboriginal cultures have many names for what white Australian culture sees as empty desert. Similarly, Hall writes that “A ‘raw’ historical event cannot, in that form, be transmitted by, say, a television newscast. Events can only be signified within the aural-visual forms of the televisual discourse.”

98 Id.
99 Id.
100 Id. at 1405.
101 TURNER, supra note 81, at 73.
102 Hall, supra note 13, at 131.
103 Id.
104 TURNER, supra note 81, at 11.
105 Id.
106 Id.
107 Hall, supra note 13, at 129.
process, during which a sign (composed of the sound of the word and the platonic concept of the object) is associated with the referent (the object itself), as coding. When events are coded into discourse, they draw on the “topics, treatments, agendas, events, personnel, images of the audience, ‘definitions of the situation’ from other sources and other discursive formations within the wider socio-cultural and political structure of which they are a differentiated part.”

In a way, the audience even partially creates the message because the discourse used by the audience feeds into the formation of the original message.

Through this use of semiotics, Stuart Hall makes room for a more active, conscience resistance on the part of an audience member. Hall believes that the codes of the encoder and the codes of the decoder do not always match, giving rise to distortions and misunderstandings. Hall also argues that messages are all encoded in various socially constructed ways, and when codes appear universally accepted, it is only because they have been very widely distributed, or naturalized, over time.

Hall also feels that “codes are the means by which power and ideology are made to signify in particular discourse,” that signs are mapped onto the meanings of particular cultures. Hall believes that when oppositional readings or misunderstandings take place, social, economic, and cultural forces cause audiences not to accept the codes and to contradict the preferred reading. Though he acknowledges that there will always be “private, individual, variant readings,” he also thinks that the “patterns exhibit . . .

108 Id.
109 Id. at 130.
110 Id. at 131.
111 Id. at 132.
112 Id. at 134.
113 Id. at 138.
significant clusterings,” so that an endless number of very different readings is unlikely.\textsuperscript{114} Also, Hall believes that there are some limits to the ways audiences many interpret messages or we would never have any communicative processes at all.\textsuperscript{115}

In his essay, Hall outlines three main positions a reader can take when reading a message. The first is the dominant of hegemonic reading in which the viewer decodes the message with the dominant code and largely reproduces the encoder’s meaning.\textsuperscript{116} The professional code of the television broadcaster or popular artist may operate within the dominant code in order to present the information as natural and not as encoded.\textsuperscript{117} This coding occurs, as Hall notes, “’behind men’s backs.’”\textsuperscript{118} The second reading position is the negotiated position, in which readers largely use the encoder’s codes, but also refrain from applying the dominant message to every situation, particularly in their personal lives.\textsuperscript{119} The last reading position is that of the oppositional reader, in which the reader understands the intended message, but decodes “the message in a globally contrary way. He/she detotalizes the message in the preferred code in order to retotalize the message within some alternative framework of reference.”\textsuperscript{120} For example, the reader might read every reference to “’national interest’” as “’class interest.’”\textsuperscript{121} Hall feels that this moment when a message is decoded in an oppositional way is a significant political moment.\textsuperscript{122} This opposition to the version of reality encoded in particular language is very similar to the work of John Edgar Wideman from the paper’s opening.

\textsuperscript{114} Id. at 135.
\textsuperscript{115} Id. at 136.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 137.
\textsuperscript{120} Id. at 137-8.
\textsuperscript{121} Id. at 138.
\textsuperscript{122} Id.
In applying reception theory to copyright law, it makes sense to fashion the derivative author, rather than readers of the derivative work, as the audience of the original novel. The derivative work then becomes the reading of the original. A derivative work that reproduces the preferred reading of the original would not count as fair use, a negotiated reading may or may not count as fair use, but an oppositional reading would always count as fair use. During a trial, instead of determining how much of the content is changed, a jury would determine how much the viewpoint is changed, whether a reasonable person would believe readings to be oppositional, negotiated, or preferred. The artist can give direct testimony concerning any intentions before publication, and there is no need to wait for a discursive community to arise or to measure where that community begins and ends.

It might also be helpful to replace the parody versus satire distinction in current copyright law with the distinction of whether a reading is culturally oppositional or not, or at least to add that distinction. After all, the distinction between parody and satire can be unclear to artists and chill potential works. For example, Alice Randall’s *The Wind Done Gone*, which seems definitely an oppositional reading of Margaret Mitchell’s *Gone With the Wind*, was taken to court, where Randall’s publisher, Houghton Mifflin Company, eventually settled with the Mitchell estate. Even though the appellate court reversed the district court’s preliminary injunction enjoining Randall from publishing her novel, writers must be uncertain about what constitutes parody and might be afraid to write works questioning entrenched works such as Mitchell’s.\textsuperscript{123}

Further complicating the distinction between parody and satire, parody was originally a polite homage to a work by means of humorous exaggeration. For example,

\textsuperscript{123} Suntrust, *supra* note 18.
Don Quixote, a famous parody of knight tales, does not excoriate the meaning behind knight tales, but rather pays them a sort of tribute in loving spoof. A parody versus satire distinction in law was therefore originally often meant to maintain the political status quo. In the Bishops’ Ban of 1599, the Archbishop of Canterbury and the Bishop of London banned the printing of satires, epigrams, and unlicensed histories and plays due to concern that some forms of satire were very ideologically destabilizing. Furthermore, the Licensing Act of 1737 in England was also probably established to prevent certain forms of political satire from taking the stage. British bishops and government officials originally permitted the publication of parody rather than satire because parody was capable of much less criticism of the government. Even though definitions of parody have morphed somewhat over the years and courts currently interpret parody to be broader and more subversive than original definitions would have it, permitting only parody is still much more confusing than just permitting works that resist cultural domination through oppositional readings. This confusion partially stems from the muddy definitional line between the two literary genres.

Applying Stuart Hall’s reception theory to cases such as Suntrust v. Houghton Mifflin, the Eleventh Circuit opinion considering the validity of the district court’s injunction against the publication of Alice Randall’s The Wind Done Gone, would provide much less ambiguous results than those reached by the district and appellate courts. In that case, the district and appellate courts disagreed with each other, further exemplifying the unclear nature of the law and contributing to possible future confusion.

---

Though the appellate court reversed its decision, the district court seemed unclear about the definition of parody and seemed to feel that Alice Randall borrowed more plot and characters from *Gone With the Wind* than was necessary for conjuring up an image of *Gone With the Wind* in order to lampoon it.\(^{126}\) The court did not seem to think *The Wind Done Gone* was a parody, writing, “While the fact that it is told from someone else’s perspective transforms the work, this fact does not necessarily make it a parody.”\(^{127}\) Instead, the court seems to think the book is a derivative work and a satire because it criticizes “general concepts and ideas about the way black Americans have been and are treated in the South.”\(^{128}\) Though the appellate court argued that *The Wind Done Gone* sufficiently criticized *Gone With the Wind* to qualify as parody, if the test for determining a sufficiently transformative use was whether a derivative decoded an original in an oppositional way, it would be irrelevant whether a derivative author borrowed much content or little content from an original and changing the perspective to an oppositional viewpoint would definitely count as fair use. That test even provides greater support to an author borrowing a larger amount of material. In borrowing so much content from Margaret Mitchell’s *Gone With the Wind*, Alice Randall perfectly recreates the experience of reading the original while disagreeing with its basic import, exactly the viewpoint of the oppositional reader and one that will loosen the cultural chokehold the original has over the imaginations of the reading public. The oppositional decoding of an already published work in a critical derivative is important for releasing some of the hold the original has over the public imagination. As Toni Morrison testified in that trial, “Who gets to say how history is imaged? Who gets to say what slavery was like for

\(^{127}\) *Id.* at 1377.
\(^{128}\) *Id.* at 1378.
slaves?” If oppositional decodings take place because of cultural disjunction then presumably an oppositional reading will aid other readers in that culture, as well. There is, probably, too, something important about seeing Randall’s shiny cover alongside Mitchell’s on the sacrosanct shelves of bookstores and pages of Amazon.com, for publishing venues can be seen as one of Althusser’s ideological state apparatuses that sanction some meaning, some voices, and some lives over others.

Conclusion

As John Edgar Wideman’s novels compellingly remind us, storytelling is cultural power. Wideman’s novels themselves embody nothing more than the tilting, whirling, spinning, and interlocking stories of various characters as they desperately try to articulate the realities of their lives through language. Often his characters, like Scheherazade in the One Thousand and One Nights, seem to be staving off death itself with story upon story after story. Seemingly, if Wideman’s characters can effectively communicate their truths with each other, something vital about their lives will transcend mortality.

Wideman emphasizes that storytelling must be done by everyone and not only by a privileged few. Oftentimes, his characters reach out to each other, asking each other to help them to tell those stories, and frequently it is difficult to tell who is speaking. As Wideman writes “The question remains. When I stumble, will you assist me, abide with me. Will you share the story with me, dream it all again in your own words. The parts I

129 Id.

29
say, the parts I don’t or can’t.”\textsuperscript{130} This language used to describe storytelling echoes language usually used to describe helping someone to walk or survive physically, indicating Wideman’s concern with the real effects of not being able to tell one’s story. It also suggests that storytelling is a joint enterprise and that one writer must commence where another leaves off. Wideman fears that only one version of a story, which is only part of the whole truth, will get told and that the one version of a story will be that of the Philadelphia police, the upper class, of white invaders. He fears it will not be the voice of the African American population of West Philadelphia, of the economically disadvantaged, of those mistreated by law. In contrast, he writes in \textit{The Cattle Killing}, “I believed each story. My way of reckoning learned from the old African people, who said all stories are true.”\textsuperscript{131} After all, it is readers who listen carefully to stories and adopt from them a mindset with which to make all decisions in the real world, and any reader who decodes an original story in an oppositional way enables other readers to live a new life. Modern copyright law should account for this power to change the future in the fair use doctrine by legally sanctioning the voices of resisting readers in derivative works.

\textsuperscript{130} WIDEMAN, \textit{supra} note 4, at 40.
\textsuperscript{131} \textit{Id.} at 53.