Adrift in the Intertext: Authorship and Audience Recoding Rights - Comment on Robert H. Rotstein, Beyond Metaphor: Copyright Infringement and the Fiction of the Work

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ADrift in the Intertext: Authorship and Audience "Recoding" Rights—Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work"*

Keith Aoki**

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I. INTRODUCTION

This Comment briefly summarizes Robert H. Rotstein's article, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work," then moves on to make short points in two areas: (1) that the death of the author, to paraphrase Mark Twain, may have been greatly exaggerated; and (2) problems of conservative opposition, perverse First Amendment effects of audience-oriented "recoding" rights, and com-

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modification may arise from employing the textual strategies suggested in Rotstein’s article—a recharacterization of copyright’s subject from a static reified “work” to a dynamic “text,” or “event of speech,” turning copyright’s emphasis from a property regime into a regime of speech regulation.

II. Summary

Whatever relevance contemporary literary criticism may have to legal hermeneutics in general, in the area of copyright law—the law pertaining to literary texts—interpretive theory has many insights to impart. Robert Rotstein’s article, “Beyond Metaphor: Copyright


3. I use the words “text” and “work” in the manner of Hal Foster, who defines the relationship thusly:

This theoretical redefinition of the artifact can also be seen as a passage from a modernist “work” to a postmodernist “text.” I use these terms heuristically: “work” to suggest an aesthetic, symbolic whole sealed by an origin (i.e., the author), and an end (i.e., a represented reality or transcendent meaning), and “text” to suggest an a-aesthetic, "multidimensional space in which a variety of writings, none of them original, blend and clash." The difference between the two rests finally on this: for the work the sign is a stable unit of significator and signified (with the referent assured or, in abstraction, bracketed), whereas the text reflects on the contemporary dissolution of the sign and the released play of the signifiers.

Infringement and the Fiction of the Work," is a thoughtful examination of some of the gaps between poststructuralist literary theory and copyright law. The metaphor Rotstein would like to move beyond is the idea/expression dichotomy, that much-maligned and infamous mediator between private property and free information flow permeating copyright jurisprudence. The means for us to move beyond this metaphor, Rotstein suggests, is assimilating the idea of the "text" into copyright law. Rotstein claims that the raw materials to do so are already there. He also proposes recharacterizing current copyright law's troubled subject as a process (constructing and reconstructing dynamic texts) rather than as a product (producing a "thingified" work).

Rotstein begins with a fascinating "fast-forward" historical summary of modes of literary criticism from antiquity to postmodernity, in part to demonstrate the social construction and historical contingency of our concepts of Romantic authorship, literary "originality," and the autonomous "work." Along the way we encounter the rise and fall of the post-war New Critics, the death of the author, as well as the puzzling concept of the "corporation."
zling persistence of the idea of the autonomous "work" in copyright law. Despite and counter to the pervasive rise of poststructuralist literary theories of open-ended texts, the idea of the "work" gives rise to multiple, inconsistent interpretations.\(^1\) Rotstein argues that, in spite of the possibility of radical textual indeterminacy which importing poststructural literary analysis into copyright doctrine may facilitate, such potential boundlessness may be constrained by characterizing "texts" as utterances or "events of speech" (with the determinacy of an activity) occurring within particular "interpretive communities."\(^14\) Furthermore, accurate legal acknowledgement and recognition of the intertextual\(^15\) nature of audience participation in the creation of texts generates further constraining analytic tools such as "convention,"\(^16\) "genre,"\(^17\) and "code."\(^18\)

This recharacterization of the "work" as a "speech activity" or practice, parallels the legal treatment of speech events in other areas of the law, such as defamation, First Amendment, and obscenity law.\(^19\) Legal determinations and regulations of these other areas are highly relational and context-bound, tied to specific temporal, spatial, economic, political, and social contexts in which "speech events" or "texts" occur.\(^20\) Thus depicted, copyright law's treatment of dynamic visual, literary, or musical texts as "thingified works" is a peculiar anomaly. For the sake of consistency and clearer adjudication, Rotstein suggests that copyright law should be refocused as a species of regulation pertaining to acts of speech,\(^21\) rather than a peculiar subspecies of property law pertaining to objectified works.

Having laid out a justification for why copyright law should assimilate the idea of the "text," Rotstein then examines closely four particularly troubled areas of copyright jurisprudence: (1) entitlement to copyright;\(^22\) (2) scope of copyright;\(^23\) (3) substantial similarity.
larity; and last but not least, (4) fair use. Using a historically broad range of leading cases from each of these areas, Rotstein argues that the surreptitious packing in of the New Critical concept of the autonomous "work" has resulted in an ungrounded, ad hoc spate of inconsistent cases. In each of these areas, Rotstein discusses and gives examples of how assimilating the idea of the "text," along with a cluster of related ideas such as "genre," "convention/modulated convention," "formulas," and "code" into copyright law would work to clarify underlying policy issues at stake.

While Rotstein criticizes aspects of contemporary doctrine thoroughly, articulating clearly how the application of literary theory to copyright law might operate, he takes pains to disclaim a prescriptive or normative agenda. However, Rotstein does offer examples of the types of policies, purposes, and principles which would be clarified by absorbing poststructuralist insights, such as advancing the legal system's interest in consistency and clarity in adjudication (legitimacy); accurately mirroring how "works of authorship" operate (bringing law in line with life); facilitating speech by recognizing and accommodating the "audience's" interpretive interests; and ensuring that generic conventions remain available to the public for construction of further texts.

I agree with Rotstein's observation that copyright law is a mess, full of incoherent decisions and fundamental disagreements over a broad range of issues, and I also think that the assimilation of a broader contextual approach has much to recommend it. However, I would like to make a few points, expanding on each briefly. First, I think proclamations of the death of the author and recognition of the myth of originality may be somewhat exaggerated, and that underestimating the persistence of such author-based reasoning may have serious consequences on speech. Second, there may be some problematic aspects in implementing

24. Id. at 776-93.
25. Id. at 793-803.
26. Id. at 746-49.
27. Id. at 749-58, 766-76, 784-93.
28. See, e.g., id. at 729 ("the Article is descriptive rather than prescriptive"); id. at 754 ("I stress again that the above examples of how 'originality' could be approached from the perspective of contemporary literary criticism are not necessarily suggestions about how copyright should be, but are merely examples of how it might be."); id. at 774 ("Again, the point here is not to suggest that one approach is more appropriate than another."); id. at 776 ("[T]he discussion here has not called for any particular new system of copyright that would grant more (or less) protection than the current system provides.").
29. Id. at 739-42.
30. Id. at 1.
31. Id. at 801.
32. Id. at 775-76.
a strategy which characterizes a "text" as a "speech event," not least of which is considerable opposition from conservative academics and judges (not to mention media-based copyright industries conditioned to conceive of a copyright as private property).

To make these points, however, requires "recoding" Rotstein somewhat, and I wish to make a few qualifications and disclaimers. I use the term "audience 'recoding' rights" to represent one way of thinking about the implications of the textual strategies Rotstein discusses. "Recoding" has been described by Rosemary Coombe as a set of subcultural practices and activities in which "the consumption of commodified representational forms is productive activity in which people engage in meaning-making to adapt signs, texts, and images to their own agendas." By talking about audience "recoding" rights, I realize I am engaging in my own sort of "mini-reification," because: (1) an audience is no more stable than a "text" (there is no "there" there); and (2) the meaning of the word "rights" is extremely ambiguous. However, to explore implications of some aspects of these textual strategies, I, the intertextual producer, am placing the metaphysical idea of "recoding" rights into our "textual" toolkit, so please bear with me as we nomadically wander into the intertext.

33. See Coombe, supra note 1, at 1863. Hal Foster notes:

Subcultural practice differs from the countercultural (e.g., '60's student movements) in that it recodes cultural signs rather than poses a revolutionary program of its own . . . . [T]he subcultural must be grasped as a textual activity. Plural and symbolic, its resistance is performed through a "spectacular transformation of a whole range of commodities, values, common-sense attitudes, etc." through a parodic collage of the privileged signs of gender, class and race that are contested, confirmed, "customized." In this *bricolage* the false nature of these stereotypes is exposed as the arbitrary character of the social/sexual lines that they define. At the same time these signs . . . are made over into "genuinely expressive artifice," one that resists, at least in its first moment, the given discursive and economic circuits.

FOSTER, supra note 1, at 170 (quoting DICK HEBBIDGE, SUBCULTURE 116 (1979)). See also the comments of David Harvey:

Both producers and consumers of "texts" (cultural artifacts) participate in the production of significations and meanings . . . . Minimizing the authority of the cultural producer creates the opportunity for popular participation and democratic determinations of cultural values, but at the price of a certain incoherence, or more problematic, vulnerability to mass-market manipulation.

Harvey, supra note 7, at 51.

III. THE AUTHOR IS DEAD, BUT WHO SIGNS THE DEATH CERTIFICATE

A. Jaszi on Authorship and Copyright

Claims about the death of the author are somewhat overstated. Despite Roland Barthes, Michel Foucault, Jacques Derrida, the demise of the New Criticism, and the rise of poststructuralist literary theory, the author concept is far from legal expiration. Whether or not it should be abandoned is an entirely different question from whether or not it has been abandoned (in copyright circles at least). To make this point, I will discuss some recent cases, the upsurge of interest in state and federal moral rights statutes, and the pervasiveness of author-type reasoning in other areas of the law. These examples indicate that the construct of Romantic authorship and its accompanying image of originality is far from extirpated, but definitely is in need of a major overhaul.

An engrossing recent issue of the Cardozo Arts & Entertainment Law Journal was devoted to papers from a symposium on Intellectual Property and the Construction of Authorship. These papers focused on the social, historical, and legal construction of authorship and its relationship to a broad range of topics from Helen Keller as putative plagiarist to digital sound sampling technology and Hip-Hop music. However, I would like to single out and discuss some aspects of a particular piece: Peter Jaszi’s “On The Author Effect: Contemporary Copyright and Collective Creativity.”

After noting the convergence of Michel Foucault, Benjamin Kap-
lan, and the spate of recent literary and legal scholarship on the emergence of the Romantic author in late-eighteenth century Europe, Professor Jaszi incisively analyzes and criticizes some recent copyright cases to show that, far from being dead, contemporary courts, from the Supreme Court on down, continue using an individualist model of "author-reasoning" in deciding copyright cases. Furthermore, Jaszi argues that the image of the clearly individuated Romantic author blinds our copyright jurisprudence from recognizing, rewarding, or protecting alternate modes of creative cultural production such as serial, collaborative, and corporate (and by implication, audience-as-textual-co-creator type of authorship, which Rotstein's approach implies) forms of authorship.

Jaszi contends that, despite the lack of legal recognition, these deviant forms of multiple authorship are nonetheless proliferating. To demonstrate the curious persistence of the individualist Romantic author construct (along with its tendency to devalue corporate, serial, or collaborative production of intellectual works), Jaszi introduces the 1991 Feist case as "Exhibit A." In Feist, the Supreme Court held that copyright protection was unavailable for an alphabetically organized white pages phone directory because its producers had expended, "insufficient creativity to make it original." Justice O'Connor, writing for an unanimous Court, reasoned that copyright should only protect those works which "are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor . . . ."

Jaszi points out that by denying copyright protection to the producers of the white pages, the Court discounted the collaborative and collective nature of fact-gathering reflected in the assembly and composition of a white pages directory in favor of a particular vision of clearly individuated authorship and originality. Commentators have remarked that the Supreme Court's embrace of author-reasoning in Feist

43. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT (1967).
44. Jaszi, Author Effect, supra note 4, at 304.
45. Id. at 318-19.
47. Feist, 111 S. Ct. at 1296 ("[Rural lacked] the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient effort to make the white pages directory useful, but insufficient creativity to make it original."); see also Jaszi, Author Effect, supra note 4, at 300.
48. Feist, 111 S. Ct. at 1288 ("[W]hile the word writings may be liberally construed . . . it is only such as are original, and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor . . . .") (quoting the Trade-Mark cases, 180 U.S. 82, 94 (1879)); see also Jaszi, Author Effect, supra note 4, at 301.
eclipsed other policy bases on which the judgment might have turned.\textsuperscript{49} To the \textit{Feist} court, because only clearly individuated authors can possess sufficient creative originality to justify copyright protection, the absence of such an authorial subject foreclosed copyright protection for the white pages.

In \textit{Feist}, the white pages were consigned by the Court to the status of being mere "source" materials "out there" for the taking, presumably waiting to be put to some useful purpose by a future "author" (in spite of the way the production process of compiling the white pages exemplified a complex form of collective writing).\textsuperscript{50} This, in part, is what Jaszi calls "The Author Effect": by focusing on a highly individualized model of cultural production, types of alternate cultural practices are downgraded and made invisible "mere 'sources' " (set up for over-exploitation and eventual exhaustion).\textsuperscript{51}

Jaszi next cites the 1992 Second Circuit case, \textit{Rogers v. Koons},\textsuperscript{52} as displaying further troubling aspects of author-reasoning.\textsuperscript{53} At issue in \textit{Koons} was the unauthorized adaptation by postmodernist sculptor Jeff Koons of a copyrighted black-and-white notecard photograph taken by photographer Art Rogers of a couple holding a litter of puppies, entitled "Puppies." Koons used "Puppies" to create a garishly-colored 3-dimensional sculpture called "String of Puppies" which was displayed at the 1988 "Banality Show" in New York City. From the outset, the Second Circuit's opinion casts the parties into a set of polarities defined by a particular vision of creativity as exemplified by the Romantic author: (1)

\begin{itemize}
\item \textsuperscript{49} Jaszi, \textit{Author Effect}, supra note 4, at 301, 303 ("As a matter of information policy, the Court may have been right to cut back on . . . legal protection for compilations of data . . . There is no indication, however, that the Court gave this . . . any consideration . . . ."); see generally Gordon, supra note 4, at 94 ("Though I entirely concur with the denial of copyright, the opinion's reasoning was deeply flawed."); contra, Abrams, supra note 46, at 44 ("By insisting that the constitutional requirement of authorship embodied in the standard of originality have some meaningful minimum, the Supreme Court has given the issues in \textit{Feist} a resolution that is sound both in doctrine and practice, and has done so in an opinion that bodes well for the future.")."
\item \textsuperscript{50} Jaszi, \textit{Author Effect}, supra note 4, at 314.
\item \textsuperscript{51} \textit{Id.} at 302 ("[T]he law often proves ungenerous to non-individualistic cultural productions, like 'folkloric' works, which cannot be reimagined as products of solitary, originary 'authorship' on the part of one or more discrete and identifiable 'authors' . . . . Such works are marginalized or become literally invisible within the prevailing ideological framework of discourse in copyright . . . .")."
\item \textsuperscript{52} Rogers v. Koons, 960 F.2d 301 (2d Cir.), cert. denied, 113 S. Ct. 365 (1992) ("Plaintiff, Art Rogers, a 43 year-old professional artist photographer, has a home and studio at Point Reyes, California, where he makes his living by creating, exhibiting, publishing and otherwise making use of his rights in his photographic works."); see also Jaszi, \textit{Author Effect}, supra note 4, at 305-12; Lynne A. Greenberg, \textit{The Art of Appropriation: Puppies, Piracy and Postmodernism}, 11 CARDOZO ARTS & ENT. L.J. 1 (1992).
\item \textsuperscript{53} Jaszi, \textit{Author Effect}, supra note 4, at 305-12.
\end{itemize}
characterization of the parties ("pure" artist/photographer\textsuperscript{54} v. conniving and cynical art world rook),\textsuperscript{55} (2) methods of working (solo production of photographs\textsuperscript{56} v. fabrication to specification by different workshops of skilled laborers),\textsuperscript{57} and (3) subject matter (photo from life\textsuperscript{58} v. parodistic treatment of pre-existing cultural material).\textsuperscript{59}

By thus casting the dichotomies between the works or texts produced by Art Rogers, earnest artist/photographer, and Jeff Koons, cynical postmodernist sculptor, the judicial calculus was freighted to come out in Rogers' favor on the question of substantial similarity and to reject Koons' puntative fair use defense to infringement liability on the grounds of parody.\textsuperscript{60}

Here, the court searched for a genuine author (not an author-manque like Koons) and finding such a figure in Rogers, penalized Koons whose use of Rogers' photographic image was literally "un-authorized."\textsuperscript{61} This case highlights copyright's bias toward rewarding clearly demarcated individual authorship with property rights enforceable against later deviant authors who attempt to trespass without "authorization" on those rights. Koons' work deviated from the individual author model because: (1) it was a form of collective authorship, being fabricated by different groups of art workers; and (2) it was a form of serial collaboration, using pre-existing materials (such as Rogers' photo), re-fashioning them in the manner of a bricoleur\textsuperscript{62} to new parodistic ends.

\textsuperscript{54} Koons, 960 F.2d at 304 ("Defendant Jeff Koons is a 37-year-old artist and sculptor residing in New York City. . . . While pursuing his career as an artist, he also worked until 1984 as a mutual funds salesman, a registered commodities salesman, and broker, and a commodities futures broker . . . . He is a controversial artist hailed by some as a 'modern Michelangelo,' while others find his work truly offensive."); Jaszi, \textit{Author Effect, supra} note 4, at 306.

\textsuperscript{55} Koons, 960 F.2d at 303 ("[Rogers] makes his living by creating, exhibiting, publishing and otherwise making use of his rights in his photographic works."); Jaszi, \textit{Author Effect, supra} note 4, at 306.

\textsuperscript{56} Koons, 960 F.2d at 305 ("[Koons] gave his artisans one of Rogers' notecards and told them to copy it."); Jaszi, \textit{Author Effect, supra} note 4, at 308.

\textsuperscript{57} Koons, 960 F.2d at 304-05; Jaszi, \textit{Author Effect, supra} note 4, at 308.

\textsuperscript{58} Koons, 960 F.2d at 303, 308 ("a typical American scene—a smiling husband and wife holding a litter of charming puppies . . . [with a] charming and unique character . . . ."); Jaszi, \textit{Author Effect, supra} note 4, at 308-09.

\textsuperscript{59} Koons, 960 F.2d at 305 ("[Koons] viewed [Rogers' photo] as part of the mass culture—'resting in the collective sub-consciousness of people regardless of whether the card had actually been seen by such people.'"); Jaszi, \textit{Author Effect, supra} note 4, at 308. See generally, John Carlin, \textit{Note, Culture Cultures: Artistic Appropriation and Intellectual Property Law}, 13 \textit{COLUM.-VLA J.L. & ARTS} 103, 111 (1988) ("The referent in post-Modern Art is no longer 'nature' but the closed system of fabricated signs that make up our environment.").

\textsuperscript{60} Koons, 960 F.2d at 308, 310 ("The problem . . . is that even given that 'String of Puppies' is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph 'Puppies' itself."); Jaszi, \textit{Author Effect, supra} note 4, at 311-12.

\textsuperscript{61} Jaszi, \textit{Author Effect, supra} note 4, at 312.

\textsuperscript{62} Id. at 308 n.52, 312. Jacques Derrida notes that:
quite different from those of the prior existing materials. Here, the court would not let Rogers be turned into a mere “source,” because he was so clearly an author. Conversely, Koons could not be a legally sanctioned author because he lacked the proper kind of “originality.”

In the 1991 case, Basic Books, Inc. v. Kinko’s Graphics Corp., another (and then quite prevalent) form of serial authorship, the later anthologizing of pre-existing materials by professors into tailored packets for classroom use, came under fire as a group of eight publishers sued the Kinko’s copy shop chain. Jaszi points out that Kinko’s involved a paradoxical abstracting of authorship by the court because none of the professors who had decided what such photocopied packets would contain (the putative serial authors) were defendants in the case. This authorial vacuum made it easier for the Kinko’s court to invoke the image of the author (in the abstract) to find infringement on Kinko’s part, because “[I]n this case, there was absolutely no literary effort made by Kinko’s to expand upon or contextualize the materials copied. . . . The excerpts in the suit were merely copied, bound into a new form, and sold. The plaintiffs refer to this process as “anthologizing.” . . . [I]t required the judgment of the professors to compile it, though none of Kinko’s.” This disassociation between the “judgment” of the absent professors and “literary effort” (of which Kinko’s possessed none), underlines the degree to which the Kinko’s court failed to focus on the substantial added social value (to students, professors, universities, etc.) by the serial nature of the author-like editorial decisions involved in tailoring, re-assembling, and distributing particular groupings of materials to students in a new form. The court’s concentration on the individualized author model made it virtually impossible to see, let alone acknowledge the value of the contributions made through such modes of deviant authorship.

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63. See Jaszi, Author Effect, supra note 4, at 314.


65. Kinko’s, 758 F. Supp. at 1532; Jaszi, Author Effect, supra note 4, at 313 n.70.

66. Kinko’s, 758 F. Supp. at 1530-31; Jaszi, Author Effect, supra note 4, at 313.

67. Kinko’s, 758 F. Supp. at 1530 (“The copying was just that—copying—and did not ‘transform’ the works in suit, that is, interpret them or add any value to the material copied . . . .”); Jaszi, Author Effect, supra note 4, at 314.

68. For a discussion of some of the significant social benefits which might attend “unauthor-
tinuing our author/source analogy, because the professors were not named defendants, there was no remotely plausible solitary authorial candidate behind whom Kinko's could hide, whereas the publishers who brought the suits were more convincing author-proxies because they possessed their "reified" copyrights. The persistent judicial reliance on author-reasoning as a method of resolving ambiguity and suppressing the complexity of the world will have to be addressed by chastened copyright scholars as a necessary preliminary to importation of the textual strategies suggested by the Rotstein article.

B. Authorship, Moral Rights, and “Tilted Arc” as Textual Event

Another front on which the image of the Romantic author (and related vision of clearly individuated originality) is reascendant can be seen in the increased legal interest in artists' “moral rights” legislation (both on the federal and state levels). Traditionally, American copyright law has not separately protected an author's or artist's “moral rights” of integrity or attribution because, theoretically, an exclusive copyright allowed authors and artists to bargain for these rights contractually. The "reified" copying like that at issue in Kinko's, such as increased competition bringing about lower consumer prices and more widespread dissemination and use of intellectual works, see Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281 (1970). Breyer also argues that:

[S]pecial consideration for authors rests upon an intuitive, unanalyzed feeling that an author's book is his “property.” But why do we have such a feeling? An intellectual creation differs radically from land and chattels. Since ideas are infinitely divisible, property rights are not needed to prevent congestion, interference, or strife. Nor does the fact that the book is the author’s creation seem a sufficient reason for making it his property. We do not ordinarily create or modify property rights, nor even award compensation, solely on the basis of labor expended. Id. at 288-89. See also Arnold Plant, The Economic Aspects of Copyright in Books, 1 Economica 167 n.5 (1934).

69. Jaszi, Author Effect, supra note 4, at 298-99; Jaszi, Metamorphoses, supra note 4, at 496-500; see also Chisum, supra note 19, at § 4E[6][a][b]; Robin A. Morris, Expanding Proprietary Entitlements and the Public Interest in Dissemination of Art, 7 Cardozo Arts & Ent. L.J. 269 (1989).

70. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128, 5128-5129 (1990) [hereinafter Visual Artists Act] (defining the right of integrity as “any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation,” and the right of attribution as a right to claim authorship of a work and prevent use of his or her name on visual art works he or she did not create, and the right to prevent use of his or her name on a work “in the event of a distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation.”).

71. The Second Circuit has noted that:

[A]n author's economic right to control preparation of derivative works could be used in such a way so as to prevent mutilation of such works: “American copyright law, as presently written, does not recognize moral rights . . . since the law seeks to vindicate the economic, rather than the personal rights of authors . . . . Thus courts have long granted relief for misrepresentation of an artist's work by relying on theories outside the statutory law of copyright, such as contract law . . . or the tort of unfair competition . . . . Gilliam v. American Broadcasting Co., 538 F.2d 14, 20-21, 24 (2d Cir. 1976) (citations omitted).
rise of "moral rights" legislation in the U.S. is interesting because, unlike the other sticks in the marketable "bundle of rights" comprising a copyright, "moral rights" are inalienable (but may be waived). When coupled with the copyright monopoly, this upsurge of interest in artists' "moral rights" seems to indicate that we doubly reward the creativity and originality of the clearly individuated artist (here, as a proxy for the Romantic author) first, with copyright as an economic reward for disclosing her creative labor to society, and, second, with inalienable "moral rights" arising from recognition of the uniqueness of her personality.72

In 198873 the U.S. acceded to the Berne Convention but took an extremely minimal posture towards compliance, partly because of the strong opposition of the copyright industry.74 Article 6bis of the Berne Convention requires member countries to recognize certain baseline "moral rights" of creators, such as rights of attribution and integrity.75 The minimalist U.S. posture towards "moral rights" manifested itself in a very ambivalent attitude towards how, if at all, attribution or integrity rights of authors should develop in American intellectual property law.76 This vacillation was exemplified by a Congressional statement accompanying the Berne accession that: (1) accession to the Berne Convention neither created nor affected any existing federal, state, or common law rights of attribution or integrity;77 and (2) the "totality of U.S. law provide for the rights of paternity and integrity sufficient [for compliance

72. 1 JOHN H. MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS, AND THE VISUAL ARTS 145 (2d ed. 1987) ("The primary justification for the protection of moral rights is the idea that the work of art is the extension of the artist's personality, an expression of his most innermost being. To mistreat the work of art is to mistreat the artist ... to impair his personality.").


75. Article 6bis reads in part:
(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work, and to object to any distortion, mutilation or other modification of, or any other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.


77. The statement explains that:
The law relating to the rights of paternity and integrity is intended to be the same the day before, and the day after, adherence. Courts remain free to apply common law principles, to interpret statutory provisions, and to consider the experience of foreign countries to the same extent as they would be in the absence of United States adherence to Berne.

with the Berne Convention]."\textsuperscript{78}

However, despite this marked equivocality toward the question of "moral rights," Congress enacted the Visual Artists Rights Act of 1990,\textsuperscript{79} providing limited attribution and integrity rights for visual artists who create graphic, sculptural, or photographic works, either in original or limited editions.\textsuperscript{80} Eleven states currently have some type of "moral rights" statute,\textsuperscript{81} which may be partly pre-empted by the federal Visual Artists Rights Act.\textsuperscript{82} However, these statutes show there is some support for the idea that the "moral rights" of creators in their original works are somehow "special."\textsuperscript{83}

The reaffirmation of the importance of the relationship between the author and her work represented by the upsurge of interest in "moral rights" statutes inveighs against claims of the death of the author and the dissolution of the idea of the work. Indeed, these statutes seem not only to reaffirm the property-based "thingification" of an author's work, but also justify a hierarchy, in which the author is empowered to "freeze" a specific interpretation of a work's meaning, even following transfer of her property rights in the work.\textsuperscript{84}

While not a copyright case, the controversy surrounding Richard Serra's public sculpture entitled "Tilted Arc," illustrates some problems arising at the intersection (more like collision) of "textual indeterminacy," audience-oriented "recoding" rights, and the elevation of individual authorship as exemplified by the idea of artists' "moral rights." Briefly, in 1979 Serra was commissioned by the General Services Admin-

\textsuperscript{78} Id. at 20.
\textsuperscript{79} Visual Artists Act, supra note 70, § 101 (excluding a broad listing of commercial materials produced for a mass market).
\textsuperscript{80} Id.
\textsuperscript{81} CAL. CIV. CODE §§ 980-990 (West Supp. 1993); CONN. GEN. STAT. ANN. §§ 42-116s to 42-116t (West 1992); 815 ILCS 320/1-320/8 (1992); LA. REV. STAT. ANN. §§ 51:2151 to 51:2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); MASS. GEN. LAWS ANN. ch. 231, §§ 85s (West 1988); N.J. STAT. ANN. §§ 2A: 24A-1 to 2A:24-8 (West 1989); N.M. STAT. ANN. §§ 56-11-1 to 56-11-3 (Michie 1988); N.Y. ARTS & CULT. AFF. LAW §§ 11.01-16.01 (McKinney Supp. 1993); PA. STAT. ANN. tit. 73, §§ 2101-2110 (Supp. 1992); R.I. GEN. LAWS § 55-62-2 to 5-62-6 (1987); see CHISUM, supra note 19, at § 4E[6][a].
\textsuperscript{83} See Wojnarowicz v. American Family Ass'n, 745 F. Supp. 130 (S.D.N.Y. 1990) (New York Artists' Authorship Rights Act used by court to grant artist injunctive relief against the American Family Association which had reprinted decontextualized fragments of David Wojnarowicz's work in an anti-NEA funding pamphlet).
\textsuperscript{84} In a somewhat similar, but not altogether congruous fashion, in the context of trademark laws, state anti-dilution laws grant the owners of a mark a similar strong power to "freeze" a mark's meaning, even in the absence of consumer confusion. See Coombe, supra note 1, at 1855; see also CHISUM, supra note 19, at § 6G[3][a]; Robert C. Denicola, Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols, 1982 Wis. L. Rev. 158.
istration (GSA) to create a site-specific sculpture for Federal Plaza in lower Manhattan, next to where the Jacob Javits Federal Building was to be built. Over the next few years, Serra developed the idea for Tilted Arc, which was to be made of 3-inch thick Cor-Ten steel (which acquires a permanent coat of rust). Tilted Arc was to be 12-feet high and 120 feet long, and would stretch diagonally at a tilt of 1 foot off its vertical axis across the space of Federal Plaza. In 1981, Tilted Arc was installed. Soon after, thousands of office workers and neighborhood residents began complaining about and protesting its presence. These protests culminated in a series of petitions for the removal of Tilted Arc, signed by 1,500 workers from the area surrounding the plaza.

Objections to the Serra's work focused on: (1) its aesthetics ("ugly, brutal and intimidating"); (2) its placement (Tilted Arc destroyed Federal Plaza as an open pedestrian space by diagonally bisecting it, cutting off views of the surrounding historical Foley Square area); (3) safety (the work invited graffiti and was a security hazard, supposedly providing muggers and vagrants places to hide); and (4) the "moral rights" of the Federal Plaza architects were violated because Serra had not worked in conjunction or consultation with the architects (Serra had deliberately set out to confront the architectural concept of the plaza as an open space).

In 1988, following years of various public hearings on the propriety of Tilted Arc's existence in situ, the GSA ordered the work's removal. Serra argued in federal court for an injunction against Tilted Arc's removal on the grounds that such removal abridged his First Amendment speech rights, his Fifth Amendment due process rights and his artist's "moral rights." However, the court refused to issue an injunction and Tilted Arc was hauled away to a government-owned motor storage area in Brooklyn in March, 1989.

While Serra, and by extension, the idea of artists' "moral rights,"

85. See, e.g., MERRYMAN & ELSEN, supra note 72, at 358-63; ALVIN KERNAN, THE DEATH OF LITERATURE 96-97 (1990); Calvin Tomkins, "Tilted Arc," THE NEW YORKER, May 20, 1985, at 95-101; Alvin S. Lane, Public Art v. Public Sentiment, N.Y. TIMES, July 13, 1985, at 21; Richard Serra, "Tilted Arc" Destroyed, ART IN AM., May 1989, at 34. 86. MERRYMAN & ELSEN, supra note 72, at 358. 87. Id. at 360. 88. Id. at 361. 89. Id. 90. Id. 91. KERNAN, supra note 85, at 96. 92. Id. 93. Id. See also Serra v. General Services Administration, 847 F.2d 1045, 1049 (2d Cir. 1988) (Affirming denial of injunction against removal of Serra's sculpture on the grounds that Serra had relinquished any speech rights related to Tilted Arc when he sold the work unconditionally to the
suffered a setback in this situation, it is important to note that while the broad-based expansion of such artists' "moral rights" (including use of copyright law to protect an author's unpublished writings\(^9\)) may benefit some artists or authors, the other side of such expanded legal protections is that one only benefits from such heightened protections if one is legally categorized as an author or an artist. If one does not fit the authorial model it may be difficult (though as Tilted Arc shows, not impossible) to articulate how expansion of an author's legal autonomy may negatively impact the equally valid interests of an audience in having input as to the interpretation and disposition of such a work.\(^9\)

These events show that the image of the Romantic author-genius who creates an original work is still a potent, but extremely problematic image in our intellectual property law (that is in the clash of Serra's and the architect's "moral rights," whose claim is more privileged? Will the "real" author please stand up?). However, this situation also shows how the interests of producers of works and audiences may diverge sharply on the terrain of a "text." Furthermore, Tilted Arc indicates how a narrow conception of individual authorship, such as that exemplified by the concept of artists' "moral rights" may collide with audience-oriented "recoding" rights, turning the "intertext" into a hotly contested battle zone of opposed and competing interpretations battling for control of a context's meaning (in this situation to "recode" the work meant imposing a particular audience's negative interpretation of Tilted Arc thereby transforming the "text" of Federal Plaza by having Tilted Arc removed).\(^9\)

GSA, and the GSA was entitled to do what it wished with the sculpture, including removing it from Federal Plaza); See also Morris, supra note 69, at 277 n.40.

\(^9\) See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985); New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152 (2d Cir. 1990); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987); Lish v. Harper's Magazine Found., 1993 WL 7576 (S.D.N.Y. Nov. 24, 1992). But cf. Wright v. Warner Books, Inc. 953 F.2d 731 (2d Cir. 1991) (holding that defendant's unauthorized takings from unpublished letters and diaries of the writer Richard Wright were partially a fair use—some of the materials (out of ten items, six were "authorial" and protected, four were mundane and non-copyrightable) were held by the court to only contain mundane details which were not the subject matter of copyright.). See also the 1992 Amendment to Section 107 of the Copyright Act of 1976; H.R. REP. No. 836, 102d Cong., 2d Sess. 9 (1992) (amending the fair use provision to read, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.").

\(^9\) Boyle, Law and Information, supra note 4, at 1532 n.304.

\(^9\) Although defining an audience as a delimited entity may be similarly problematic. There were at least four or five "interpretive communities": the workers and residents; the government administrators and bureaucrats who were petitioned for the work's removal; the contemporary art world; the media; the hypothecated community of vandals, vagrants, and graffiti artists; as well as the presumable minority of workers and residents who either liked or were indifferent to Tilted Arc.
C. Authorship, Texts, and Boyle on Spleens

James Boyle has suggested that one reason why author-reasoning has proved to be so resilient is that it manages to do a fairly good job of suppressing the messiness of the world. In a recent article, Boyle discusses how author-reasoning has been deployed in legal areas outside copyright law, showing how these areas (for example, insider trading law, blackmail, publicity rights, and the law of property in genetic materials) use slightly modified forms of the copyright triumvirate—the author, originality, and the idea-expression dichotomy—to generate ostensibly stable justifications for patterns of property rights and entitlements. Boyle's fascinating article is far too elegantly reasoned and richly textured to summarize here, however, I would like to mention one particular example which he discusses (at much greater length) to demonstrate the pervasiveness of author-reasoning.

The question Boyle raises is: who owns the property rights to genetic information encoded in a particular person's cellular DNA? The particular person? A doctor who discovers a new use for such information? No one? Everyone? For an answer to this question, Boyle uses the 1990 California case, Moore v. Regents of The University of California, to show how the image of originary Romantic authorship can justify, as well as deny, property rights in genetic information. In Moore, doctor-researchers at the University of California Medical Center excised a cancerous spleen from John Moore in the late 1970s during the course of treating Mr. Moore for a rare form of hairy-cell leukemia. Without informing Moore of their plans, the doctors established and patented (in

97. See Boyle, Law and Information, supra note 4, at 1461.
98. Boyle, Law and Information, supra note 4, at 1461-70, 1525-34.
101. Moore, 793 P.2d at 482; Boyle, Law and Information, supra note 4, at 1430; Maureen S. Dorney, Comment, Moore v. Regents of the University of California: Balancing the Need for Biotechnology Innovation Against the Right of Informed Consent, 5 HIGH TECH. L.J. 333, 339 n.36 (1990) (noting that while a normal human spleen weighs a half pound, Mr. Moore's weighed twenty-two pounds).
the university’s name) a lucrative cell line of T-lymphocytes from a section of the excised spleen.\textsuperscript{102} When Moore eventually found out about the huge commercial value of his excised spleen cells, he filed a state law claim for the tort of conversion (amongst others) against the doctors and the university.\textsuperscript{103}

In rejecting Moore’s conversion claim and reaffirming the university’s property rights in the patented cell line, Boyle argues that the California Supreme Court used a close analog to author-reasoning to (1) deny property rights in products literally composed of Moore’s own genetic material because he was a mere “source” (that is, he lacked sufficient “originality” to qualify as an author, and therefore, owner, of the genetic material in question);\textsuperscript{104} and (2) affirm the patent property rights of the university in Moore’s genetic materials because its researchers exercised “ingenuity,” artistry, and “inventive effort” (in other words, authorial originality) to create something original from “naturally occurring raw materials,”\textsuperscript{105} which in Moore’s case happened to be the genetic information encoded in his spleen cells.

Because of the premium that the concept of Romantic authorship places on originality, Boyle, like Jaszi, claims that sources become discounted, obscured, invisible, and are conceived of as being “up for grabs” for the industrious and inventive.\textsuperscript{106} On the tendency of author-reasoning to cut up the world into deserving, original “authors” and undeserving, unoriginal “sources,” Boyle writes:

\begin{quote}
[T]he Moore case may indicate both the contentious value judgments loaded into the conceptual apparatus of authorship and the way that discussions of entitlement to control information are carried out through the metaphor of “authorship,” even in fields far from copyright. Seen this way, Mr. Moore’s case almost seems to be designed to fail the authorship test. The court thinks that his rights are already too limited to be property, that his genetic information is too natural to be a creation, that it is neither private enough to be protected by the
\end{quote}

\textsuperscript{102} Moore, 793 P.2d at 482; Boyle, \textit{Law and Information}, supra note 4, at 1430.
\textsuperscript{103} Moore, 793 P.2d at 492; Boyle, \textit{Law and Information}, supra note 4, at 1431.
\textsuperscript{104} Moore, 793 P.2d at 490 (pointing out the lack of originality in Moore’s excised genetic material by characterizing it as “no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.”); Boyle, \textit{Law and Information}, supra note 4, at 1432 n.37.
\textsuperscript{105} Moore, 793 P.2d at 492-93 (citation omitted). Boyle notes that:

\begin{quote}
[T]he subject matter of the Regents’ patent—the patented cell line and the products derived from it—cannot be Moore’s property.... Federal law permits the patenting of organisms that represent the product of “human ingenuity,” but not naturally occurring organisms. Human cell lines are patentable because [l]ong-term adaption and growth of human tissues and cells in culture is difficult—often considered an art . . . .” It is this inventive effort that patent law rewards, not the discovery of naturally occurring raw materials.
\end{quote}

Boyle, \textit{Law and Information}, supra note 4, at 1528.
\textsuperscript{106} Boyle, \textit{Law and Information}, supra note 4, at 1533-34.
law of privacy nor original or creative enough to be protected by the rights of publicity. . . . The scientists, however, with their transformative, Faustian artistry, fit the model of original, creative labor. For them, property rights are necessary to encourage research.107

What does the preceding discussion of author-reasoning in the copyright, "moral rights," and property rights in human genetic material have to do with importation of poststructuralist textual strategies of contemporary literary criticism into copyright law? For one, these examples show the depth and breadth to which the author concept is entrenched.108 Simply ignoring or dismissing authorship as a mere peculiar historical formation whose time has long since come and gone would be a mistake in trying to reconstruct a chastened regime of copyright which assimilates the insights of contemporary literary theory. Because such literary theory takes the disappearance of the author as a given, assimilating such theory into copyright tends to underestimate the extent to which images of clearly individuated, orginary authorship is deeply embedded in our legal system. Contemporary literary theory qua copyright law must first recognize this pervasiveness, if only to demystify authorship. Authorship as a justification for granting exclusive monopoly-type rights (in the midst of a system such as ours, which is supposedly premised on competition) disables our ability to recognize the contribution of "sources" (as in Feist and Moore) and discounts the interpretative and other interests of "audiences" and other downstream uses (as in Koons, Kinko's and Tilted Arc). Authorship must be accounted for if it is to be criticized and reformulated.109

Thus, Peter Jaszi argues that courts adjudicating copyright cases

107. Boyle, Law and Information, supra note 4, at 1519.
108. David Lange states:
I think Foucault has it exactly backward. I think [that] authorship . . . will survive, though in radically personal form, and the constraining figure of societal (or state) authority that will vanish—and with it, in all likelihood, intellectual property as we know it. . . . Authorship as an artifact of authority is indefensible; it deserves to die. But authorship in the preliminary sense of identifying, merely entre nous, the “person to whom something owes its origin” is not only defensible, but inevitable as well. Indeed, I would venture to say it has been an essential requirement of human existence from our earliest beginnings.
Lange, At Play, supra note 4, at 148.
109. James Boyle claims that:
[T]here are a number of things the authorship vision does well. It conceals the indeterminacy of much of the utilitarian analysis. . . . Authors and inventors often do need to be encouraged, protected, lauded, and rewarded. The romantic vision of authorship offers an attractive idea of creative labor—transcending market norms, incorporating both work and play, and entailing a world in which workers have a real connection to and control over the fruits of their labors. This is a vision that we might want to expand far beyond the limited realm of property in information. As currently constructed however, intellectual property in particular and information issues in general seem to be in the thrall of an idea that is taken as truth where it should be questioned as dogma.
Boyle, Law and Information, supra note 4, at 1534.
should consider a wider range of alternate constructions of authorship. A more expansive vision of authorship would be able to more coherently account for the increasingly common multiple, collective, and serial forms of authorship which already exist, or are only now coming into being, made possible in part by the introduction of new information, storage, communication, and processing technologies. Jaszi and Boyle converge on the notion that our traditional model of clearly individuated, originary Romantic authorship has had a nasty way of making contributions and contributors (including readers and audiences reconceived as textual co-authors, collaborators, and co-creators) that cannot be conceived of as possessing authorial originality into passive "sources." This makes certain potentially valuable cultural and social activities illegal, as in *Kinko's* or *Koons*, or simply seem non-existent, as in *Feist*. If it turns out to be that "sources" have been, can be, and are also authors, the concept of authorship begins diffusing and the "author"-itarian (in the sense of one who polices a text's meaning) character of authorship begins losing much of its occlusive power.

Closely examining and criticizing current formulations of legal authorship relates to Rotstein's suggestion that copyright law should adopt a textual strategy focused on "texts" as dynamic processes rather than static "works." Radically expanding the concept of authorship by ac-

110. For example, lawyers at large firms frequently collect and freely exchange both firm-approved and non-approved forms of corporate documents and briefs. These are exchanged within the firm and with lawyers in other firms. These documents are marked up and tailored to the specifics of a particular case or client. Who is the author? And when does a mark-up of a prior document assume a new identity? The existence of such a serial, collective, scribal practice at the heart of the legal profession is surprising. See also Kaplan, supra note 43, at 64-65 (discussing Continental Casualty Co. v. Beardsley, 253 F.2d 107 (2d Cir. 1958), in which a court upheld copyright in legal forms used by an insurance company. Kaplan wrote, "[T]he effect of the decision may be to force users to awkward and possibly dangerous recasting of legal language to avoid infringement actions." Id. at 65.) See also Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L.J. 287, 321 (1988) (observing that certain kinds of legal language should be beyond privatization).


112. Jaszi, *Author Effect*, supra note 4, at 302 (discussing folkloric works); Boyle, *Law and Information*, supra note 4, at 1529-33 (discussing dire environmental and cultural costs of failing to recognize the contributions of "sources" which do not fit a Western individualist authorship model).
counting and arguing for legal acknowledgement of a wider range of alternate authorship possibilities works to break up the image of the individuated Romantic author, opening up the possibility that a chastened copyright regime may then be able to reconceive of texts as fluid events, with dynamic inputs coming in, feeding back and intersecting at multiple loci.

This section has discussed the resurgence of author-reasoning in recent statutes and cases arising in the areas of copyright, "moral rights," and patent rights. The author is a powerful metaphor as well as a metaphor for power ("author"-ize, "author"-ity, "auth"-entic, etc.), and as James Boyle, Peter Jaszi, Martha Woodmansee, Mark Rose and many others have stressed in many ways, to transform the valence of that power, we must first understand how the figure of the author continues working to constrict what legal thought considers to be a threatening proliferation of meaning.

IV. EVENTS OF SPEECH AS AUDIENCE "RECODING" RIGHTS

Copyright has been frequently and repeatedly characterized as property, and, indeed, is grouped and generally taught under the rubric of intellectual property. This does not necessarily make it so, but it affects the texture of copyright discourse, in part because the idea of property is itself problematic. Like the author, the idea of property has been discussed, dichotomized, dissected, deconstructed, and declared dead; defended, debunked, proclaimed to be no more than a bundle of rights; been revived like Frankenstein; been justified as dessert, incentive,

113. Boyle, Law and Information, supra note 4.
114. Jaszi, Author Effect, supra note 4; Jaszi, Metamorphases, supra note 4.
115. Woodmansee, supra note 4; Woodmansee, supra note 38, at 17.
116. Rose, supra note 38.
118. For a particularly incisive discussion on how patterns of entitlement in copyright (in spite of intangibility) closely resemble such patterns in the law pertaining to physicalist property and tort law, as well as an insightful application of Wesley Hohfeld's jural correlatives (rights, privileges, duties, and powers) to the entitlement structures of copyright law, see Gordon, An Inquiry into the Merits of Copyright, supra note 117, at 1365-77.
an internalization of externalities, shield against the state, shield against other people, constitutive element of personhood; and seen as public, private, relative, real, personal, physicalist, absolute, pre-political, and so on.119 This Rorschach-like tendency of the idea of property becomes exacerbated in the realm of intellectual property.

Rotstein presents us with an interesting approach to copyright: depropertize it to a great degree by deobjectifying what has been its central focus, the discrete “work,” and reconceive copyright’s subject as a fluid “text.”120 Thus, to the extent that “texts” are to be depropertized, they would assume a greater “public” character. The idea of text-as-speech-event is like the sword cutting through the Gordian knot that copyright as costive regime of property has wound itself into, transforming copyright into a chastened regime of speech regulation. This approach has many advantages. For one, in the area of copyright, trademark, and publicity rights, the characterization of an interest as private property seems to bring about great judicial deference along with the tendency to discount the relevance of competing public First Amendment speech values. This is particularly so if the context of the claimed expressive use is commercial, which is judicially conceived of as occurring in the realm of “private” market relations, and therefore not subject to the same scrutiny as actions occurring in the “public” realm of the polity.121 By diluting the “property-ness” of interests protected by copy-

119. The literature on justifications for and arguments against property rights is so voluminous that I could not even begin citing it here. However, there are a few pieces I would like to single out, see, e.g., LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS (1977); Cohen, supra note 6; Morris R. Cohen, Property and Sovereignty, 13 CORNELL L.Q. 8 (1927); Duncan Kennedy & Frank I. Michelman, Are Property and Contract Efficient?, 8 HOFSTRA L. REV. 711 (1980); Duncan Kennedy, The Structure of Blackstone’s Commentaries, 28 BUFF. L. REV. 209 (1979); Joseph W. Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld, 1982 Wis. L. REV. 975; Kenneth Vandevelde, The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, 29 BUFF. L. REV. 325 (1980); Charles A. Reich, The New Property, 73 YALE L.J. 733 (1964).

120. I realize I am using a very strong form of Rotstein’s points. Insofar as he is interested in de-reifying the “work,” I am assuming that a de-reified “work” is de-propertized to the extent that it becomes more difficult in determining boundary-crossings (or violations of exclusivity, which is the intellectual property equivalent of boundary-crossing). It is the strong form of textual strategies that I am using to imagine how copyright would look as a speech-regulation set of rights or entitlements, rather than a property regime.

right, an approach focusing on texts-as-speech-events would begin allowing space for a judicial consideration of “recoded” cultural productions and enhanced respect for free speech values.

There are, however, at least three problematic areas to such an approach (which I will only briefly touch on here): (1) conservative opposition (the “when I hear the word deconstruction, I reach for my gun” approach); (2) potential for abuse and perverse application (the “sword cuts both ways” argument); (3) commercialization of intertextual expressions (the “opening up of new areas for exploitation only sets the stage for a gold rush” argument). All of these problematic areas, however, have more than one side—that is, they also present opportunities for development.

A. Conservative Opposition

The first objection to such potential de-propertization and recognition of audience “recoding” rights, which poststructuralist approaches may seem to imply, is put this way by Richard Posner:

The thread that connects the various schools of poststructuralism is their determination to reverse the traditional primacy of author over reader in the interpretation of texts. From such a reversal the advocates of free interpretation of legal texts draw aid and comfort, while believers in the objectivity of law are discomfited. A related feature of poststructuralism is that most of its practitioners are political radicals, who see their attack on objective interpretation as part of a broader campaign against bourgeois thought, one element of which is belief in the rule of law . . . .


122. POSNER, supra note 2, at 216 (citations omitted); see also the comments of Owen Fiss: Nihilism is also fashionable in literary criticism today and is represented there by what I referred to as the deconstruction movement . . . . Deconstructionists reject the idea of objectivity in interpretation . . . . For them interpretive freedom is absolute . . . . There can be many schools of literary interpretation, but . . . . in legal interpretation there is only one school and attendance is mandatory.

Owen Fiss, Objectivity and Interpretation, in INTERPRETING LAW AND LITERATURE, supra note 2, 234-35. Compare the comments of Pierre Schlag:

Many commentators see postmodernism as lacking any particular politics. In fact, however, they are unable to recognize or identify the politics of postmodernism because they try and locate postmodernism within the orthodox matrices of a very traditional conception of politics—a conception that accepts at face value the traditional characterizations of right and left, a conception that implicitly and automatically equates politics with making
In other words, when Judge Posner hears the word "deconstruction," he is (perhaps rightly) suspicious of subversive agendas which have apparently arrayed themselves in a dispersed constellation around post-structuralism. My point is that arguments over interpretive methodology in the law in general have been intensely politicized, fracturing into opposing "interpretive communities" of originalists, intentionalists, deconstructionists, and who knows what else. Because of this polarization and unruly pluralism of approaches to the idea of law as literature, it seems likely that consensus would be hard to reach among judges and academics about whether and to what degree copyright should assimilate poststructuralist literary criticism, even when dealing with literature as literature.

Even poststructuralism itself is profoundly contradictory and divided as to the types and extent of textual strategies and practices to be deployed in interpreting a text. We are looking at a highly fragmented, internally fractured, and politically charged methodology (consensus should not be presumed), and we are also facing considerable and likely conservative political and legal opposition to the use of poststructural literary techniques and likely copyright courts in ways that cut back, restrict, transform, reshape, or otherwise recharacterize what proprietors had come to think of as "their" property. Conservatives and libertarians are likely to look with abject horror on such value choices . . . . Within the matrices of this traditional—indeed fundamentalist—conception of politics, it is easy to miss the politics of postmodernism precisely because the politics of postmodernism are to decenter and displace this traditional conception of politics.


124. Consensus may not even exist within the same person, for example Richard Posner argues "that it is possible to be a New Critic when interpreting literature and intentionalist when interpreting law." POSNER supra note 2, at 211.

125. I am using the word "poststructuralism" as polymorphously overlapping some of the practices associated with "postmodernism." FREDERIC JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM xxii (1991) ("As for postmodernism itself, I have not tried to systematize a usage or to impose any conveniently coherent thumbnail meaning, for the concept is not merely contested, it is also internally conflicted and contradictory . . . . [F]or good or ill, we cannot not use it."); see, e.g., HUTCHEON supra note 7, at 11 (discussing the coreless-ness of postmodernism (from Frederic Jameson to Jean-François Lyotard to Brian McHale, and so on) and asking the question, "Whose Postmodernism?").
The second objection is, as Judge Posner pointed out, that there is an oppositional spin in textual approaches that want to dethrone the author's primacy over a work and reconstitute readers as co-creators of a "textual event." However, insofar as deconstructionalist textual approaches are imported into copyright law, practitioners of such approaches risk being defanged and co-opted, or as Pierre Schlag puts it,

If traditional legal discourse succeeds in transforming deconstruction into just another technique, just another theory, just another method for making arguments, ... [d]econstruction will become powerless to subvert and displace the categorical regime ...—the one that systematically transforms intellectual endeavors into just another method. ... But to transform deconstruction into any of these things is to turn deconstruction into precisely what it seeks to resist and displace. To transform deconstruction into a theory, etc. is to relocate deconstruction and confine it to the already logcentric matrices of traditional legal thought ... The error here is the homogenization and neutralization of the different subversiveness of deconstruction through its assimilation with approaches that have already been reduced to the status of mere theories, techniques, methods, etc. 127

Thus, to the extent that deconstructionist approaches to the text become domesticated and are placed in service of the Rule of Law, 128 they stand to lose the very ability to subvert traditional legal thought which may have made them appealing (to oppositionalists, at least) in the first place.

Additionally, the media and copyright-based industries are unlikely to sit quietly by as audience "recoding" rights are advanced, which would erode the value of their media properties due to decreased exclusivity. It is precisely the "property" aspect of intellectual property, that is, the right to exclude (actually the right to prohibit unauthorized downstream uses), that keeps the barely-suppressed "public goods" problem (the impossibility of exclusion and jointness of supply) of intangible goods from popping out. 129 Implementing poststructuralist textual strat-

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126. See, e.g., AYN RAND, CAPITALISM: THE UNKNOWN IDEAL 128 (1966) ("[P]atents are the heart and core of property rights, and once ... they are destroyed, the destruction of all other rights will follow automatically, as a brief postscript."); Easterbrook, supra note 117; Kitch, supra note 117. For a staunch libertarian defense of private property rights in general, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).


egies in copyright law may shrink the areas from which producers may legitimately prevent unauthorized "recodings." The "lack of sufficient incentives" to creators and producers argument will inevitably be deployed by the mass-media and copyright industries to staunch any perceived threat to the value of their intellectual properties brought about by increasing the scope of legally permitted, but unauthorized uses of such properties.

The power of the copyright and media industries should not be underestimated. Ben Bagdikian has noted that by the 1980s, while there are more than 25,000 outlets for the mass media, "the majority of all major American media—newspapers, magazines, radio, television, books and movies—were controlled by fifty giant corporations."130 This trend towards concentration of media control accelerated during the 1980s, as already large corporations became conglomerates through diversification or merger (for example, MCA/Universal, Time Warner, Inc., and Disney) or by absorption (for example, Twentieth Century Fox by News, Ltd., and MGM/UA by the Quintex Group, Paramount by Gulf & Western and Columbia by Coca-Cola).131 Maintaining strong copyrights and trademarks is considered essential to the continuing competitive economic strength of these conglomerates, so, ironically, the more widely their properties are disseminated to the public, the more "privatized" becomes the control over possible uses of such products.

I am not suggesting that media conglomerates are involved in a sinister conspiracy to do anything, but I am suggesting that if changes in our intellectual property laws seem headed in ways which will reduce legal protections of their properties, these powerful proprietors have ample resources to oppose such changes. I might add, that while such media industry opposition is not unprecedented, it is not always completely su-

130. Ben H. Bagdikian, The Media Monopoly xv, xvi, 4 (1983). See also American Media and Mass Culture: Left Perspectives (Donald Lazere ed., 1987); Herbert I. Schiller, Culture, Inc.: The Corporate Takeover of Public Expression 35 (1989) ("A prediction made in the mid-1980s that by 1995 almost 90 percent of all communication facilities (including newspapers, broadcast outlets, cable systems, telephone lines, relays and satellites) would be in the hands of fifteen companies is close to realization well before that date."). See also the comments of Allan Hutchinson:

From McDonald’s to General Motors and Sears to CBS, corporations are the primary loci for socio-economic decisions and policymaking; how we put food on the table, what food we put on the table, what we pay to put food on the table, what food we think we should put on the table are all questions that are shaped by corporations.... Large sections of the ruling elite... remain beyond the reach of popular control and the grasp of electoral accountability.

Allan C. Hutchinson, Talking the Good Life: From Free Speech to Democratic Dialogue, 1 Yale J.L. & Lib. 28 (1989)

cessful. For example, despite the opposition of the copyright and media industries (exemplified by a lobbying group such as The Coalition to Preserve the American Copyright Tradition) to the U.S. accession to the international Berne Convention—primarily because of Berne’s baseline “moral rights” requirement—the U.S. became a Berne member in 1988, albeit with a firmly minimalist posture. The point here is that any broad judicial or legislative approach incorporating aspects of audience “recoding” rights will face a struggle on the social field of the law, however, such a struggle over contested cultural meaning may not be altogether a bad thing.

B. Speech Regulation as Two-Edged Sword

The second problematic area in applying textual strategies to copyright arises from the way that, in Benjamin Kaplan’s words, “copyright has the look of being gradually secreted in the interstices of censorship.” Assimilation of aspects of contemporary literary criticism into copyright law does not necessarily translate into increased First Amendment speech rights, particularly given the tendency for what J.M. Balkin has termed “ideological drift.” Assuming that such a speech regulation regime (as opposed to the current property-based regime) were implemented, it does not follow that all copyright decisions would be in favor of audience-based “recoding” rights. In fact, the legitimacy of such a regime would turn, in part, on the prohibition of certain “prohibited” speech events such as plagiarism. The scope of such prohibitions would undoubtedly be influenced by pre-existing patterns of wealth, power, and access to media resources (as they are today), and given the extant skewed power imbalances, could result in more firmly entrenching concentrations of media power, rather than dispersing them.

132. Berne Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st and 2d Sess. 331-84 (1988) (statement by David Ladd on behalf of the Coalition to Preserve the American Copyright Tradition, which is an lobbying organization of copyright industries such as publishers and other media producers).


134. J.M. Balkin describes “ideological drift” as observing how: political and legal ideas can change their political valence over time from progressive to conservative and back again. . . . Ideological drift occurs because political, moral, and legal ideas are and can only be made through signs that must be capable of iteration and reiteration in a diverse set of new moral, legal and political contexts.


135. First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (protecting corporate speech in striking down state statute that prohibited corporations from communicating on any topic other than those issues materially affecting the corporation); Buckley v. Valeo, 424 U.S. 1 (1976) (holding that the part of the Federal Election Campaign Act which limited independent campaign expenditures was unconstitutional). Taken together, Buckley and Bellotti indicate the degree to which the
Rotstein himself points out when discussing Superman that legal arguments utilizing textual concepts such as "convention" or "genericity" and "modulation of convention" have the potential for deployment on both sides of a case. Similarly, there is nothing in the "toolkit" of textual strategies which would necessarily prevent them from yielding results which impact negatively on free speech interests.

For example, trademark law ostensibly has a much greater deference to context, convention, and genre, stressing the need to prevent consumer confusion between commercial marketplace goods. However, despite trademark law's contextually sensitive character, a trademark owner's increasingly concretized property-like rights in a mark have frequently trumped free speech concerns in several state law anti-dilution cases which have ruled against "recodings," or subsequent unauthorized uses of marks, even in the absence of consumer confusion. These rul-

legal backdrop already favors powerful "private" speech of corporations and PACs; See generally David Kairys, Freedom of Speech, in The Politics of Laws: A Progressive Critique 237 (David Kairys ed., 1990); Hutchinson, supra note 130, at 28.

136. Rotstein, supra note *, at 773-74; see also Gaines, supra note 38, at 208-28.

137. Trademark law employs a hierarchy of genericity (from least to most protected): generic marks; descriptive marks; suggestive marks; and arbitrary and fanciful marks. See Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1430 (7th Cir. 1985), cert. denied, 475 U.S. 1147 (1986) ("There are but a limited number of words and images suitable for use in describing a product, and sellers own neither the English language nor common depictions of goods."); 20th Century Wear, Inc. v. Sanmark-Stardust Inc., 747 F.2d 81, 89 (2d Cir. 1984), cert. denied, 407 U.S. 1052 (1985) ("Descriptive terms deserve less protection than suggestive terms both because descriptive terms normally do not distinguish among similar products and because such terms 'should not be monopolized by a single user.')" (citations omitted); In re DC Comics, Inc., 689 F.2d 1042, 1044 (C.C.P.A. 1982) ("Trademark law has traditionally imposed restrictions on the right to exclude others from using certain 'descriptive' symbols to ensure that the opportunity for all to associate such symbols with their common referents remains unencumbered."); Chisum, supra note 19, at § 5C[3][a] ("A mark's classification depends on the relationship between the mark and the goods or services upon which it is used... a mark's distinctiveness may change due to shifts in usage [and]... may fit into one category for one user group and into another for a another user group.").

ings have been based on the rationale that unauthorized, but non-competing uses of a mark "dilutes" the value of the mark in the mind of the public. These antidilution cases amount to a kind of privatized censorship which ostensibly does not implicate state action, because the trademark proprietor is conceived of as merely preventing "tarnishment" to a "private property-like" interest (a symbol, sign or mark) and is not seen as stepping on First Amendment speech rights. This line of antidilution cases have drawn extensive fire from commentators, criticizing the impact on First Amendment issues. Thus, even in a more "audience" oriented, relational, and "textual" area such as trademark, free speech issues may arise regularly and just as regularly have their speech aspects suppressed. However, foregrounding "speech events" as a central metaphor in such a regime may dissipate some of the occlusive force of the idea of property, only to exacerbate barely submerged tensions existing in liberal legal thought regarding the supposedly value-neutral classification of "speech activities" as either occurring in public or private contexts.\(^{139}\)


Relational doctrines like secondary meaning, in which a merely descriptive mark acquires protection through use in specific contexts, is a distant relative of the idea of "modulated convention" as construed by a generically competent audience.

See, e.g., Security Center, Ltd. v. First National Security Centers, 750 F.2d 1295, 1299 (5th Cir. 1985):

First, we must inquire how much imagination is required on the consumer's part in trying to cull some indication from the mark about the qualities, or ingredients of the product or service. . . . Second, we determine whether sellers of similar products are likely to, or actually do use, the term in connection with their goods. Id.; see also CHISUM, supra note 19, at § 5C[3][a] ("A claimant seeking to establish secondary meaning must carefully marshal evidence showing consumer perception of the mark as indicating the source of the product or service.").

139. There is insufficient space to explore the matter fully here, but First Amendment speech regulation has repeatedly been plagued by problems of defining impartial, content-neutral speech restrictions in the areas of enhanced penalties for hate crimes and bans on pornographic materials. In a contextualist copyright regime as implied by Rotstein, serious problems arising from viewpoint neutrality (or lack thereof) may be expected to crop up as well. See e.g., R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) (striking down ordinance criminalizing display of symbols such as burning crosses or swastikas which arouse "anger, alarm or resentment in others on the basis of race, color, creed religion or gender"); State v. Mitchell, 485 N.W.2d 807 (Wis. 1992), cert. granted, 61 U.S.L.W. 3435 (Dec. 14, 1992), rev'd, 61 U.S.L.W. 4575 (June 11, 1993) (review of state statute providing enhanced penalties for crimes committed because of the victim's race, religion or national origin); American Booksellers Association v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (striking down
The third problematic area arises on two levels: (1) legal recognition of intertextual value may encourage increased commodification of such newly recognized "resources," as has occurred with celebrity publicity rights; and (2) formal legal recognition may remove a constitutive oppositional element from appropriationist art communities who view unauthorized uses of copyrighted and trademarked works as political speech. As we have seen, a copyright regime informed by contemporary literary theory—regarding the open-ended nature of texts and concepts of intertextuality—would recognize some form of limited and context-bound textual rights in an audience to "recode" and transform "speech events," or texts. However, such "recoding" rights may result in commodification of such intertextual materials because of intellectual property law's tendency to conflate and confuse economic use and social use values.140 The circular way that legal recognition of an intangible's value leads to enhanced exchange value which then justifies further legal protection, etc., was noted by Felix Cohen in the 1930s when he asked: do we legally protect something because it is valuable, or is something valuable solely because it is legally protected?141

Thus, if copyright law assimilates certain poststructuralist constructs such as the text-as-speech-event, thereby providing legal status and protection to creators or producers of those constructs, it is by no means inevitable that such intertextual events (and their artifactual embodiments) will be allowed to proliferate and circulate more freely. But, given the late capitalist mass-media saturated environment we currently occupy,142 legal recognition of intertextual meaning may only facilitate
commodification of such "intertexts," as has occurred in the area of publicity rights of celebrities, with similar distortions.

Such commodification of "intertexts" has been discussed in great depth and rich detail by both Jane Gaines and Rosemary Coombe, who have examined and described practices of celebrities, their "handlers," and audiences regarding publicity rights,\(^{143}\)—the legal protection of the "text" of a star's persona.\(^{144}\) Coombe writes:

The law of publicity rights, by prohibiting reproductions of the celebrity image for another's advantage, promotes the mass circulation of celebrity signifiers by ensuring they will have a market value. If the image were freely available for mass reproduction, there would, presumably, be less of an incentive to engage in the investments necessary to disseminate it through media channels. Ironically, then, the law ... produces fixed, stable identities authored by the celebrity subject, but simultaneously creates the possibility of places of transgression in which the signifier's fixity and the celebrity's authority may be contested and resisted. Authorized and unauthorized identities are both, therefore, engendered in relation to this juridical regime.\(^{145}\)

Note that legal protection of such interests simultaneously creates zones of authorized and non-authorized user activities.\(^{146}\) The examples Coombe uses to illustrate unauthorized textual "recodings" are the use of assorted trademarked, copyrighted, and otherwise legally "locked-up" media icons by subordinated subcultures, such as lesbian, hermaphroditic refashioning of unauthorized likenesses of James Dean;\(^{147}\) pre-Stonewall era gay male camp impersonations of female movie stars like Bette Davis, Joan Crawford, or Judy Garland;\(^{148}\) and the Star Trek fan community reformulations of stories, songs, and images employing aspects of trademarked characters from the copyrighted TV show.\(^{149}\)

Coombe makes the point that the lack of legal recognition for these creative intertextual practices creates situations where the images, texts, characters, stories, and symbols of the dominant culture are "recoded" by such marginalized subcultures to their own agendas. However, the mass-cultural intellectual properties with which these subcultures constitute themselves, end up being owned and controlled by large, extremely

\(^{143}\) See CHISUM, supra note 19, at § 6G[3][a].

\(^{144}\) Coombe, supra note 140, at 366-76; GAINES, supra note 38, at 84-104, 175-107.

\(^{145}\) Coombe, supra note 140, at 387.

\(^{146}\) Id. ("Power may not produce resistance in the Foucauldian sense, but it does not determine the content of the practices that transgress its strictures.").

\(^{147}\) Id. at 381; see also Sue Golding, James Dean: The Almost Perfect Lesbian Hermaphrodite, in SIGHT SPECIFIC: LESBIANS AND REPRESENTATION 49 (Dione Brand ed., 1988).

\(^{148}\) ESTHER NEWTON, MOTHER CAMP: FEMALE IMPERSONATORS IN AMERICA (1979); Coombe, supra note 140, at 380-81.

\(^{149}\) Coombe, supra note 140, at 386; see also HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE (1992).
proprietary mass-culture producers who are hostile to unauthorized and uncompensated uses of their properties.\footnote{150} Coombe and others argued that the monologic nature of a steadily increasing and technologically sophisticated media output has grave implications for a democratic society in which dialogic practices are theoretically foundational.\footnote{151} The shift of emphasis entailed by implementing the textual strategies implied by Rotstein's article would be a step towards encouraging such dialogic practices, as individuals and groups would be able to legally engage in "recoding" texts which had heretofore been "frozen," freeing up more materials and opening up more cultural space for "talking back" at, or through, the pervasive and dense media languages which constitute much of our social environment.

Jane Gaines has described how celebrities become "a kind of Foucauldian 'intertext,'" constructed through publicity and promotion, exploitable through merchandising and licensing.\footnote{152} Gaines argues that our intellectual property laws treat these celebrity "intertexts," or commercial "languages" interchangeably as products of intellectual labor and units of exchange-value \(\text{returning} \) us to the classic description of the commodity, to the masking feature of commodity fetishism, whereby humans are unable to see that the product they have created is their own and that they are entitled to the value stored in it because it is their own congealed labor \ldots \) \cite{152} and transforms works of culture into economic units and economic units back into works of culture \ldots If there is a theoretical antidote to this (and I believe there is) it is in the social uses of the sign. \ldots [A]lthough the sign may have an existence as a commodity, it may have \ldots a separate history not canceled out by its life as a commodity \ldots and because the same sign may have significantly different meanings to [diverse social] groups, it may become the center of conflict, an ideological "struggle over

\footnote{150}{Coombe, supra note 1, at 1861-69; see also Gordon, supra note 4, at 99 ("To depict their reality accurately, and deal with the power others' images would otherwise have over them, audiences may need to reproduce artifacts in which copyright subsists. This need is legitimate.").}

\footnote{151}{Coombe, supra note 140, at 389-95; Coombe, supra note 1, at 1857-61, 1877-80; see also Hutchinson, supra note 130: The project of dialogic democracy requires an acknowledgment of the substantive value of public discourse as an expression of power. While the world of the sixteenth century may have been "a stage./And all the men and women merely players," all the world of late twentieth century is an advertisement and all the men and women merely consumers in the sprawling marketplace. Id. See also Drucilla Cornell, Toward a Modern/Postmodern Reconstruction of Ethics, 133 U. Pa. L. Rev. 291 (1985); Frank I. Michelman, The Supreme Court, 1985 Term: Foreward: Traces of Self Government, 100 Harv. L. Rev. 4 (1986); Frank I. Michelman, Law's Republic, 97 Yale L.J. 1493 (1988).}

meaning." 153

While celebrity publicity rights do not equate completely with the poststructuralist textual strategies proposed by Rotstein for copyright law, there a few parallels. Even a chastened copyright regime which acknowledged and legitimated certain intertextual "recoding" rights might encounter a similar problem to that encountered in the publicity rights realm, that is, the rapid and broad commodification of such intertextual modulations of convention (conflation of economic and social uses) due to the already in-place disproportionate wealth, access, and economic power of large corporate media producers. However, as Coombe points out, the very means of implementing such legal rights, also creates further spaces and opportunities for undermining, opposing, and subverting such commodification. 154

Michel de Certeau described the reader as a subject who is actively engaged in "poaching:" "Far from being writers . . . readers are travelers; they move across lands belonging to someone else, like nomads poaching their ways across fields they did not write, despoiling the wealth of Egypt to enjoy it themselves." 155 De Certeau's picture of the reader/media-consumer as a text-shattering nomadic poacher, collaging splinters of texts into new, unstable configurations of meaning has a distinctly oppositional character, particularly when posited in contradistinction to pharonic proprietors of frozen textual meaning. 156 It is this contrast between nomad and proprietor which brings us to our second, somewhat paradoxical point, which is also related to the earlier point about domesticating deconstruction. Legally sanctioning the practices of such textual poachers through some kind of audience "recoding" rights may also have the curious effect, in certain circumstances (such as appropriationist art communities) of drastically changing a constitutive element of such practices binding such patchwork subcultures together, thereby draining the oppositional character out of such "poaching."

Discussing the dilemma of post-modernist artists such as Sherry Levine, 157 David Salle, 158 Barbara Kruger, 159 Mike

153. GAINES, supra note 38, at 198.
154. Coombe, supra note 140, at 387.
155. MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE xvii, 174 (1984) ("Marginality is today no longer limited to minority groups, but is rather massive and pervasive. . . . Marginality is becoming universal. A marginal group has now become a silent majority."). But cf. Stuart Hall, Encoding/Decoding, in CULTURE, MEDIA, LANGUAGE (Stuart Hall et al. eds., 1980).
156. DE CERTEAU, supra note 155, at 175 (There is also a slight Romantic (although ironic) content in De Certeau's choice of imagery).
157. FOSTER, supra note 1, at 28, 36, 58.
158. Id. at 52-57, 134-35.
159. Id. at 106-08, 111-15, 117.
Bidlo,\textsuperscript{160} Dara Birnbaum,\textsuperscript{161} Jenny Holzer,\textsuperscript{162} Louise Lawler,\textsuperscript{163} and Martha Rosler\textsuperscript{164} to whom the practice of appropriating elements of copyrighted imagery is central to their work, Elizabeth Wang has argued that appropriationist art and copyright law are theoretically irreconcilable, and furthermore, that such artistic (mis)appropriation may also be constitutively an act of political speech.\textsuperscript{165} By legalizing such appropriationist practices, whether through expansion of the fair use doctrine, expanding the political speech defense to infringement liability, contracting for appropriation rights\textsuperscript{166} or, by extension, importing poststructural literary theory into copyright theory, "legitimization eviscerates appropriation as a form of political discourse."\textsuperscript{167} Such legal endorsement or approval removes the illicitness and oppositional character of such practices, forcing artists who desire political opposition as a crucial contextual element of their "texts" to abandon such appropriationist practices.

V. CONCLUSION

This Comment has only briefly touched some of the many issues raised in Robert Rotstein's paper. The textual strategies which Rotstein advocates assimilating into copyright law should be enhanced by an expanded critique of authorship. Insofar as reimagining the audience as "co-creators" of a text, a redefinition and broadening of the concept of authorship is also relevant. Secondly, I have made three brief observations of problems which might confront such a chastened, newly contextualized copyright regime: (1) conservative political opposition and entrenched powerful interests would not like to see their intellectual properties de-commodified to the extent that recharacterizing such properties as texts emphasizes such texts as speech acts and not private intellectual property; (2) that textual strategies which reconceive of copyright as speech regulation can potentially cut both ways, particularly

\begin{itemize}
\item \textsuperscript{160} Id. at 36, 38.
\item \textsuperscript{161} Id. at 99-100.
\item \textsuperscript{162} Id. at 109, 110-11, 116.
\item \textsuperscript{163} Id. at 98, 99-100, 103-04.
\item \textsuperscript{164} Id. at 99-100, 118, 153.
\item \textsuperscript{165} Elizabeth H. Wang, (Re)Productive Rights: Copyright and the Postmodern Artist, 14 COLUM.-VLA J.L. & ARTS 261 (1990); see also Carlin, supra note 59, at 110-11 ("To understand Appropriation as transcending... one must accept that our social environment is increasingly determined by simulated signs, and that the realm of the 'imaginary' has supplanted that of the 'real' in determining our sense of self and nature.") (citations omitted); Greenberg, supra note 52, at 1.
\item \textsuperscript{166} Wang, supra note 165, at 276-80.
\item \textsuperscript{167} Id. at 281. But compare Patricia Krieg, Note, Copyright, Free Speech and the Visual Arts, 93 YALE L.J. 1565, 1568 (1984) ("The absence of a definitive legal standard for appropriation of visual images results in a chilling of freedom of speech interests. Artists, will hesitate to experiment with creative modes if such experimentation may result in liability for copyright infringement.").
\end{itemize}
given already extant wide disparities of wealth, power, and access to media; and (3) as with the case of celebrity publicity rights, the opening up and legal recognition of a new resource (such as intertextual expression) may also put that resource up for rapid commodification, over-exploitation, and distortion.