Washington University Law Review

Volume 84 | Issue 3

2006

Semiotic Disobedience

Sonia K. Katyal

Follow this and additional works at: http://digitalcommons.law.wustl.edu/lawreview

Part of the First Amendment Commons, Intellectual Property Commons, and the Jurisprudence Commons

Recommended Citation
Sonia K. Katyal, *Semiotic Disobedience*, 84 Wash. U. L. Rev. 489 (2006).
Available at: http://digitalcommons.law.wustl.edu/lawreview/vol84/iss3/1

This work is brought to you free of charge by the Wash U Law Repository. To explore the repository, click here (http://digitalcommons.law.wustl.edu/). For more information, contact repository@wulaw.wustl.edu

Washington University
Law Review

VOLUME 84 NUMBER 3 2006

SEMIOTIC DISOBEDIENCE

SONIA K. KATYAL*

"[T]he nation and the world are in dire need of creative extremists."[1]
—Dr. Martin Luther King Jr., Letter from Birmingham Jail

INTRODUCTION

Nearly twenty years ago, a prominent media studies professor, John Fiske, coined the term "semiotic democracy" to describe a world where audiences freely and widely engage in the use of cultural symbols in response to the forces of media.[2] A semiotic democracy enables the audience, to a varying degree, to "resist," "subvert," and "recode" certain

---

* Associate Professor, Fordham University School of Law. This Article was awarded an Honorable Mention in the 2006 Scholarly Papers Competition, American Association of Law Schools. For helpful comments and conversation at various stages in this project, the author thanks Amy Adler, Ann Bartow, Barton Beebe, Christine Bohannan, Devon Carbado, Julie Cohen, Elizabeth Cooper, Reza Dibadj, Matthew Diller, Graeme Dinwoodie, Christine Farley, John Farmer, Robin Feldman, Llew Gibbons, Abner Greene, Laura Heymann, Hugh Hansen, Justin Hughes, Neal Katyal, Sudhir Krishnaswamy, Roberta Kwall, Michael Landau, Lawrence Lessig, Lawrence Liang, Michael Madison, Eduardo Peñalver, Achal Prabhala, Margaret Jane Radin, Lisa Ramsey, Joel Reidenberg, Darren Rosenblum, Rebecca Tushnet, Gerald Torres, Siva Vaidhyanathan, Fred von Lohmann, Rob Walker, the Intellectual Property Scholars Conference at Cardozo Law School (August 2005), the participants of the Intellectual Property Seminar at Boalt Law School (Fall 2005), and the Alternative Law Forum in Bangalore, India (December 2005). The author wishes to thank Susan Freiwald, John Adler, and the faculty and administration at University of San Francisco Law School for being such generous hosts during the fall of 2006, as well as Pamela Samuelson and Boalt Law School for welcoming me as a visiting scholar during that time. Genevieve Blake provided extraordinarily helpful research assistance, as did Alan Avorgbedor, Ru Bhatt, Rachael Braswell, Natsuko Fujiu, Ethan Notkin, Robert Pierson, Allison Schilling, and Mary Sewell. I particularly thank Esther Lucero for drawing the work of AIM (American Indian Movement) and other examples of semiotic disobedience to my attention.

1. Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), *in* WHY WE CAN'T WAIT 77, 92 (1964).

2. JOHN FISKE, TELEVISION CULTURE 239 (Routledge 1999) (1987).

Wash U Law Repository

cultural symbols to express meanings that are different from the ones intended by their creators, thereby empowering consumers, rather than producers.[3] At the time, Fiske's concept was revolutionary; it promised a complete reversal of the monopolistic hierarchy of the author and the presumed passivity of the audience in receiving meaning. The term "semiotic democracy" offered an interesting juxtaposition of ideals—political liberty, freedom of expression, and creation—alongside a basic disruption of the common assumptions that inhere in authorial control.

Although Fiske originally referenced the audience's power in viewing and interpreting television narratives, today, his vision of semiotic democracy has become perhaps the single most important ideal cited by scholars who imagine a utopian relationship between law, technology, and democratic culture.[4] Within a semiotic democracy, individuals can become both producers *and* creators, able to reinscribe and recode existing representations, thereby expanding the rich cultural fabric of our nation. Instead of relegating the audience to passive spectatorship, a semiotic democracy would empower individuals to add to the rich and expansive cultural fabric of a *true* public domain, where everyone participates equally in the ongoing process of cultural production.[5]

Today, the term has become as ubiquitous as it is utopian, permeating commentaries on the relationship between intellectual property and freedom of expression.[6] Typically, scholars who embrace this ideal note that the grand and sweeping vision offered by semiotic democracy profoundly conflicts with the central precepts of exclusive ownership, which has traditionally enabled authors to direct and dictate a wide degree of control over an original image or text.[7] Lawrence Lessig, for example,

---

3. Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 139 (1993).

4. *See* Madow, *supra* note 3, at 143–48.

5. *See generally* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (2004) (explaining the problems of copyright protection in the context of new technology) [hereinafter Fisher, PROMISES]; *see also* William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217–18 (1998) [hereinafter Fisher, *Property*].

6. *See, e.g.*, Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1265 (2003); Anupam Chander, *Whose Republic?*, 69 U. CHI. L. REV. 1479, 1491 (2002); Giselle Fahimian, *How the IP Guerrillas Won: ®™ark, Adbusters, Negativland, and the "Bullying Back" of Creative Freedom and Social Commentary*, 2004 STAN. TECH. L. REV. 1, ¶ 1-2 (2004), *available at* http://stlr.stanford.edu/STLR/Articles/04_STLR_1/article_pdf.pdf; Madow, *supra* note 3, at 145–46; Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 539 n.7 and accompanying text (2004).

7. *See* Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1334–35 (2004); Madow, *supra* note 3, at 145–47.

has claimed in a recent book that a semiotic democracy must be nurtured, protected, and secluded from the authorial control of intellectual property ownership.[8] Terry Fisher, echoing this view, has explained semiotic democracy as a corollary of political democracy: if "political democracy" describes a system in which individual citizens are able to participate in the exercise of political power, then "semiotic democracy" describes a system in which individual citizens are able to participate in the creation of cultural meaning.[9]

Although Fiske's vision is both brilliant and indelibly important, it is also somewhat incomplete. In this Article, I seek to introduce another framework to supplement Fiske's important metaphor: the phenomenon of "semiotic disobedience." Three contemporary cultural moments in the world—one corporate, one academic, and one artistic—call for a new understanding of the limitations and possibilities of semiotic democracy and underline the need for a supplementary framework.

Now more than ever, the continued production of popular culture rests on the continued presence of corporate sponsorship in many aspects of both public and private life. The marketplace of ideas has rapidly morphed into a vehicle for corporate speech. As public spaces have become converted into vehicles for corporate advertising—ads painted onto sidewalks and into buildings, schools, and other public spaces[10]—product placement has soared to new heights of power and subtlety.[11] And throughout, the law has generously offered near-sovereign protection to such symbolism through the ever-expanding vehicle of intellectual property protection. Principles of trademark and copyright ownership have allowed corporations to consecrate their symbols and images, allowing for a particularly robust form of incontestability. Equations between real

---

8. *See generally* LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004).

9. Scott Rosenberg's Links & Comment, http://blogs.salon.com/0000014/2003/07/08.html (July 8, 2003, 14:58 PST) (describing Terry Fisher's talk at the Stanford/Harvard ILaw Seminar).

10. *See* NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES 280 (1999); HERBERT I. SCHILLER, CULTURE, INC.: THE CORPORATE TAKEOVER OF PUBLIC EXPRESSION (1989) (discussing how private entities have gained control over formerly public physical spaces); ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 51–57 (2001) (discussing how fast-food chains have successfully targeted public schools with marketing efforts since the 1990s); Pedro Domingos, *Mining Social Networks for Viral Marketing*, IEEE INTELLIGENT SYS., Jan.–Feb. 2005, at 80, 80–82, *available at* http://www.cs.washington.edu/homes/pedrod/papers/iis04.pdf (discussing the use of social networks on the Internet as a means for productive viral marketing); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. (forthcoming 2007) (discussing rise of covert advertising in mass media); Eyal Press & Jennifer Washburn, *The Kept University*, THE ATLANTIC MONTHLY, Mar. 2000, at 39, *available at* http://www.aaas.org/spp/rd/ch26.pdf (discussing corporate control of university research).

11. *See* KERRY SEGRAVE, PRODUCT PLACEMENT IN HOLLYWOOD FILMS: A HISTORY (2004).

Wash U Law Repository

property and intellectual property are ubiquitous.[12] Underlying these themes is a powerful linkage between intellectual and tangible property: as one expands, so does the other.

In addition to the corporate moment, a second cultural moment has emerged within the legal academy, flowing quite obviously from the first: many scholars have vociferously decried the growing effect of intellectual propertization on artistic creativity and First Amendment freedoms.[13] The traditional argument goes something like this: because of the expansion of intellectual property, artists and activists have been forced to abandon artistic projects for fear of being sued for infringement.[14] The specter of property rights has thus ushered in an unprecedented era of self-censorship, where artists, activists, and corporate critics are routinely threatened with lawsuits over samplings of imagery or music and are unequivocally silenced as a result. There are undeniable truths to this story: The Chilling Effects Clearinghouse demonstrates the extent to which corporations exert their influence in silencing the criticism and creativity of others.[15] Through these commentaries, semiotic democracy becomes the cause célèbre of intellectual property theorists, crystallized into an ideal vision of culture's relationship to media and meaning.[16]

Yet at the same time, there is a third facet that is often left out of the picture, involving the increasing response of artists who have chosen to expand their activities past the boundaries of cultural dissent and into the boundaries of asserted illegality. For every movement toward enclosure

---

12. *See, e.g.*, Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112–13 (1990); Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 28 (2005) (drawing a parallel between intellectual property and tangible property rights); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 219.

13. *See, e.g.*, James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 49 (2003); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 397–99 (1990); *cf.* Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 198 (2003); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1880 (1991); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 319–20 (1992); David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147, 165 (1981); David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 475–83 (2003).

14. *See* MARJORIE HEINS & TRICIA BECKLES, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL (2005), *available at* http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf.

15. *See* Chilling Effects Clearinghouse, http://www.chillingeffects.com (last visited Sept. 16, 2006).

16. *See* Fisher, *Property*, *supra* note 5, at 1217–18.

that the law facilitates, there is an opposite, underappreciated movement toward liberation from control—a moment where social activism exposes the need for alternative political economies of information. Today we have moved into a framework of semiotic *disobedience*, a world which importantly differs from, and yet remains, in the shadow of semiotic democracy. As I argue, the recurrence of market failures within intellectual property has not silenced the marketplace of expression, but merely *divided* it into two coexisting and ultimately converging markets—one legal, and formally protected by the laws of property; the other illegal, and therefore vulnerable to criminal and civil sanction.[17] And yet the difference between these marketplaces of speech—one protected, one prohibited—both captures and transcends the foundational differences between democracy and disobedience itself.

Just as previous discussions of civil disobedience focused on the need to challenge existing laws by using certain types of public and private property for expressive freedoms, today's generation seeks to alter existing intellectual property by interrupting, appropriating, and then replacing the passage of information from creator to consumer. In many cases, the object of artistic attention is the appropriation and occupation of intellectual, tangible, or even bodily property. I call these recent artistic practices examples of 'semiotic disobedience' because they often involve the conscious and deliberate re-creation of property through appropriative and expressive acts that consciously risk violating the law that governs intellectual or tangible property.[18]

---

17. A recent art exhibit, titled "Illegal Art," made its way across the United States, highlighting examples of art that consciously tests the boundaries of property and freedom of expression. *See* Christine Brenneman, *'Illegal' Art at SFMOMA Artists Gallery*, ARTWEEK, Sept. 2003, at 17; *Illegal Art Exhibit*, STAY FREE MAG., Fall 2002, at 14, *available at* http://www.stayfreemagazine.org/archives/20/index.html.

18. This Article defines semiotic disobedience to include a number of different approaches to visual, actual, and verbal representation, including vandalizing, subverting, and "recoding" certain kinds of intellectual, real, government, and private property for public use and expression. *See* Paul Baines, *A Pie in the Face: Culture Jammers Re-Code, Hijack, Subvert, Un-Cool, De-Myth and Reclaim the Cultural Sphere*, ALTERNATIVES J., Spring 2001, at 14, 14–15 (describing "cultural jamming"); David Darts, *Visual Culture Jam: Art, Pedagogy, and Creative Resistance*, STUD. ART EDU., Summer 2004, at 313, 319 (describing ways in which "culture jammers" and socially engaged artists have helped to undermine and expose cultural, political, social, and religious mechanisms that inform the actions of individuals); Christine Harold, *Pranking Rhetoric: "Culture Jamming" as Media Activism*, 21 CRITICAL STUD. MEDIA COMM. 189, 190 (2004) (same); Robert V. Kozinets & Jay M. Handelman, *Adversaries of Consumption: Consumer Movements, Activism, and Ideology*, 31 J. CONSUMER RES. 691, 693–94 (2004) (describing methodology and findings of consumer movements that look to transform the ideology and culture of consumerism); Dennis Harvey, *Popaganda: THE ART & CRIMES OF RON ENGLISH*, VARIETY, July 11–17, 2005, at 31 (reviewing a documentary detailing the billboard exploits of culture jammer and artist Ron English).

Wash U Law Repository

Although public-spirited lawbreaking in the United States can be traced back to incidents such as the Boston Tea Party,[19] semiotic disobedience has created new and particularly vexing problems for lawyers and law enforcement officials, both of whom are often bemused by artists' increasingly creative and confrontational approaches.[20] In San Francisco, a group known as the Billboard Liberation Front routinely "liberates" and "improves" billboard advertising by vandalizing and altering messages and logos.[21] The group's tactics are anonymously and meticulously arranged and deployed, paying tremendous attention to mimicking actual ads by matching paint colors, letter fonts, and other graphics to the original.[22] Other billboard alteration projects are designed to highlight problems of social justice and exclusion for minorities.[23] Countless other artists follow these trends and repaint sign imagery, mutilate slogans, replicate legal notices,[24] scrawl responses on ads,[25] and "jam" broadcast

---

19. *See* Barbara J. Katz, Comment, *Civil Disobedience and the First Amendment*, 32 UCLA L. REV. 904, 904 (1985). *See generally* RONALD DWORKIN, *Civil Disobedience*, *in* TAKING RIGHTS SERIOUSLY 206 (1978); ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968); MOHANDAS K. GANDHI, NON-VIOLENT RESISTANCE (1951); JOHN RAWLS, A THEORY OF JUSTICE *passim* (1971); HENRY DAVID THOREAU, *Civil Disobedience*, *in* THE ESSAYS OF HENRY D. THOREAU 123 (Lewis Hyde ed., 2002); Martin Luther King, Jr., *Three Statements on Civil Disobedience (1961–1968)*, *in* CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY 211 (David R. Weber ed., 1978).

20. *See* KLEIN, *supra* note 10, at 282 (examples of semiotic disobedience). For a list of major culture jammers, see Google Directory, Culture Jamming, http://directory.google.com/Top/Society/Activism/Media/Culture_Jamming/ (last visited Nov. 18, 2006).

21. *See* Billboard Liberation Front Creative Group, The Art and Science of Billboard Improvement: A Comprehensive Guide to the Alteration of Outdoor Advertising, http://www.billboardliberation.com/guidebook.html (last visited Nov. 18, 2006); *see also* Matthew Kauffman, *Bushwhacked Billboards; San Francisco Pranksters Ambush Outdoor Ads with Wit*, HARTFORD COURANT, Sept. 25, 2002, at E1. For excellent studies of billboard tactics, see Shannon Skarphol Kaml, Talking Back: The Rhetoric of Billboard Liberation (Aug. 2003) (unpublished Ph.D. thesis, University of Minnesota) (on file with University of Minnesota) and LIZ MCQUISTON, GRAPHIC AGITATION: SOCIAL AND POLITICAL GRAPHICS SINCE THE SIXTIES (1993).

22. *See* Kauffman, *supra* note 21.

23. In the 1990s, in Harlem, Chicago, Detroit, and Dallas, parishioners led "billboard-busting blitzes" in which they would paint over the tobacco advertising surrounding their church. KLEIN, *supra* note 10, at 290. *See also id*. (mentioning Australia's BUGA-UP, or "Billboard Utilizing Graffitists Against Unhealthy Promotions," which caused approximately one million dollars of damage to tobacco billboards); Kaml, *supra* note 21, at 39–50 (discussing the Cicada Corps of Artists, who deface tobacco and other types of billboards); *id*. at 45 (discussing the English group COUGH UP—Citizens Organized Using Graffiti Hits on Unhealthy Products); *id*. at 54–55 (describing work by Operation Clean, which painted over the surfaces of more than one thousand tobacco billboards in minority neighborhoods by 1990); Popaganda, The Art and Subversion of Ron English, http://www.popaganda.com/billboards/index.shtml (last visited Nov. 18, 2006); Smashing the Image Factory, A Complete Manual of Billboard Subversion & Destruction, http://www.urban75.com/Action/factory.html (last visited Nov. 18, 2006); Sniggle.net, Vandalism, http://www.sniggle.net/vandalism.php (last visited Nov. 18, 2006) (describing a variety of targeted vandal projects).

24. *See But Wait, There's More*, AUTOWEEK, May 27, 2002, at 48 (describing Brooklyn group

messages in the media.[26] Others organize massive interruptions in public space,[27] fund projects that are directed toward corporate sabotage,[28] alter products in the marketplace before they are sold,[29] and vandalize preexisting works of art.[30] Still others actively hijack domain names, appropriate online identities, and hack into private corporate spaces in cyberspace.[31]

In this Article, I argue that it is too reductionist and simplistic to dismiss these actions as adult pranks, devoid of legal and political meaning. Indeed, the stark number of contemporary projects that offer sophisticated critiques of the relationship between culture and corporate commodification makes it impossible to do so. Rather, this Article suggests that the phenomenon of semiotic disobedience offers a radically different vantage point than Fiske's original vision, one that underlines the importance of distributive justice in intellectual property.[32] While

---

that labeled SUVs with authentic-looking parking tickets to educate drivers about the environmental costs of their cars); Stayfreemagazine.org, Park Slope Public Works, http://www.stayfreemagazine.org /suv (same) (last visited Nov. 18, 2006).

25. *See* KLEIN, *supra* note 10, at 289–90 (detailing work of Carly Stasko, who defaces advertising).

26. *See* Adbusters Culturejammer Headquarters, http://www.adbusters.org/ (describing groups that create related types of anti-corporate art) (last visited Nov. 18, 2006); Urbanize.org, Reclaiming the City, http://www.urbanize.org/ (last visited Nov. 18, 2006).

27. For examples of organized interruptions in public space, see Critical Mass, http://www.critical-mass.org/ (last visited Nov. 18, 2006); Leander Kahney, *E-Mail Mobs Materialize All Over*, WIRED NEWS, July 5, 2003, http://www.wired.com/news/culture/0,1284,59518,00.html (describing "flash mobs"); Reclaim the Streets (London), http://rts.gn.apc.org/ (last visited Nov. 18, 2006).

28. The artist-activist group ®™ark (pronounced "artmark") imitates the operation of a corporation and has created a host of anti-corporate projects and parody websites at www.gatt.org, www.gwbush.com, and www.microsoftedu.com. The group has received cease-and-desist letters from its corporate targets. *See* ®™ark, http://www.rtmark.com (last visited Nov. 18, 2005); *see also* Rachel Baker, TM Clubcard, http://www.heise.de/tp/r4/artikel/6/6168/1.html (last visited Nov. 18, 2006) (describing creation of a false website that utilized a well-recognized trademark in order to create a fake membership network); Irational.org, http://www.irational.org (last visited Sept. 16, 2006) (hosting and supporting work of corporate-critical artists).

29. *See* Barbie Liberation, http://www.sniggle.net/barbie.php (last visited Nov. 18, 2006) (describing the Barbie Liberation Organization, a group funded by ®™ark, which switched the electronic voiceboxes of several Barbie and GI Joe dolls and returned the modified dolls to toy stores).

30. *See* DARIO GAMBONI, THE DESTRUCTION OF ART: ICONOCLASM AND VANDALISM SINCE THE FRENCH REVOLUTION (1997).

31. For excellent discussions of these tactics, see Caroline Auty, *Political Hacktivism: Tool of the Underdog or Scourge of Cyberspace?*, 56 ASLIB PROCEEDINGS 212 (2004); Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119 (2001) (discussing First Amendment considerations in electronic protest); and Stephen Wray, *Electronic Civil Disobedience and the World Wide Web of Hacktivism: A Mapping of Extraparliamentarian Direct Action Net Politics*, SWITCH, http://switch.sjsu.edu/ web/v4n2/stefan (setting forth a typology of electronic "hacktivist" projects) (last visited Nov. 18, 2006).

32. *See* Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535,

Wash U Law Repository

contemporary projects of semiotic disobedience bear some similarity to the previous visions offered by such distinguished theorists as Fiske, Lessig, and Fisher, they also reveal some important limitations that are inherent in semiotic democracy itself.

As I argue, semiotic disobedience suggests there is another story that needs to be told, one that emanates from the shadow of the limits of law's governance. The goal of semiotic democracy—the legislation of certain types of speech—is intimately linked to the presumed legitimacy of the democratic process and collective self-governance.[33] Within this framework, scholars seek to expand the marketplace of protected speech through a resuscitation of fair use and First Amendment defenses. Yet, in doing so, they draw overly emphatic parallels between the nature of intellectual property and speech at the cost of overlooking its complex relationship to tangible properties—land, products, and merchandise. By overemphasizing the nonrivalrous, expressive character of intellectual property, scholars often miss how intellectual property becomes embodied and manufactured into a material, tangible product that bears an equally intimate relationship to the law of property as well. Thus, instead of interrogating the limits of First Amendment freedoms, as many scholars have already done,[34] I argue that a study of semiotic disobedience reveals an even greater need to study both the core boundaries *between* types of properties—intellectual, real, personal—and how propertization offers a subsidy to particular types of expression over others.

Thus, the primary goal of this project is to provide a brief introduction to the theory and practice behind semiotic disobedience and to propose some ways that this body of work might be applied more fruitfully to the study and application of intellectual property doctrines. Throughout, I will suggest that the dynamic interaction between tangible property and speech forms part of the background for the divergence between semiotic democracy and disobedience. This interaction offers us an important and insightful story that demonstrates how private parties can offer a corrective

---

1538–39 (2005).

33. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (Greenwood Press, Inc. 1979) (1948); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986).

34. *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Neil Weinstock Natanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002).

overlay to the failures of distributive justice in intellectual property.[35] For, as various social movements have shown, every movement towards democracy has been accompanied by civil disobedience, the willingness of a few stalwart believers to openly challenge the laws in favor of some alternative moral order.[36] As our First Amendment jurisprudence has aptly demonstrated, speech does not always have to be protected in order to be powerful; indeed, some of the most meaningful language of our time has been that which falls outside of law's protective boundaries.[37]

Viewed through this prism, intellectual property law is no different. It creates boundaries that enfranchise certain types of speech at the expense of others. And, in doing so, it enables certain types of legal and illegal dissent, conferring legitimacy on some types of speech through the prism of fair use, but often excluding other types of expression from protection. Drawing on insights both from media and semiotic theory, I argue that intellectual property law tends only to protect appropriative expression that occupies the extreme poles of audience interpretation—works that either adopt, oppose, or completely transform the cultural meaning of an original commodity. Because the law fails to protect appropriative works that fall short of these poles, the marketplace of speech remains locked in a perpetual dance of opposites rather than protecting true expressive diversity. Rather than expanding the marketplace of protected speech, as the First Amendment attempts to do, intellectual property law tends to narrow its boundaries, thereby expanding the boundaries of the prohibited marketplace of speech instead.

And though scholars give abundant attention to the ways in which propertization protects intellectual expression and ideas, the literature devotes scant attention to the ways in which the act of propertization, by its very act of exclusion, actually and unwittingly perpetuates prohibited speech as a result. Thus, just as civil disobedience challenges basic conceptions of political democracy by drawing attention to

---

35. *See* Van Houweling, *supra* note 32, at 1559.

36. *See* ROBERT COVER, *Nomos and Narrative*, *in* MARTHA MINOW, NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1995).

37. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (holding that law criminalizing destruction of draft card was constitutional as applied to defendant's symbolic act of burning draft card because law was narrowly tailored to further an important governmental objective unrelated to the suppression of speech); Schenck v. United States, 249 U.S. 47 (1919) (upholding conviction of defendant under Espionage Act as constitutional when defendant circulated fliers to recent draftees encouraging them to assert opposition to the World War I draft); United States v. Crosson, 462 F.2d 96 (9th Cir. 1972) (upholding conviction for flag burning even though the burning was public and may have been symbolic expression of protest against Vietnam War); Monroe v. State, 295 S.E.2d 512 (Ga. 1982) (upholding conviction under state statute for flag burning despite the act taking place in public space as form of protest against U.S. involvement in Iranian affairs).

Wash U Law Repository

disenfranchised minorities, semiotic disobedience challenges notions of semiotic democracy by drawing attention to disenfranchised types of expression. These alternative political economies of expression operate largely outside of law's protective enclosures, even though they represent powerful examples of the expressive diversity that the First Amendment is supposed to protect. However, by becoming the symbolic representation—indeed, the "broken window" of the *failure* of Fiske's vision—the laws of intellectual property may unwittingly stimulate the expansion of prohibited speech in the process.[38]

As a result, the spirit of semiotic disobedience reflects some of the same classic goals and interests of traditional civil disobedience. The individuals I am speaking of do not expressly seek to reclaim the protection of the law; rather, their very objective is to demonstrate the expressive value of transgressing its limits.[39] If our First Amendment jurisprudence has taught us anything, it has taught us the importance of recognizing the value of symbolic dissent, even when unpopular, as a key mediating tool in integrating the marketplaces of prohibited and protected expression. Toward this end, I present an alternative, supplementary framework that balances the need for distributive justice in copyright with the need for the protection of property.

This Article will proceed in three parts. Part I describes the phenomenon of semiotic disobedience—its history, tactics, and links to the study of language and power. Part II turns specifically to intellectual property and focuses on the law's role in both enabling and silencing semiotic disobedience. Part III addresses the normative implications of situating semiotic disobedience within the boundaries of the First Amendment. Drawing from our jurisprudence on flag burning and symbolic speech, I argue that if intellectual property law aims to deter law-

---

38. In this way, the phenomenon of semiotic disobedience also suggests the need to rethink one of the more powerful themes within the study of criminality and disorder—the metaphor of the "broken window." This metaphor refers to a causal relationship between the visibility of minor crimes like graffiti and vandalism, and the occurrence of more serious and more violent crimes. *See, e.g.*, BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 185–86 (2001) (quoting former New York City Mayor Rudolph Giuliani, who posited a relationship between a "climate of disorder" and "serious antisocial behavior," and further observed, "murder and graffiti are two vastly different crimes. *But they are part of the same continuum*."). For the origins of the broken window theory, see James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. This theory has given rise to much discussion, both inside and outside criminal law. *See infra* notes 47, 200–08 and accompanying text.

39. *See, e.g.*, Brenneman, *supra* note 17 (describing art that consciously tests the boundaries of property and freedom of expression).

breaking, it must commit itself to honoring a much more dynamic form of semiotic democracy than currently exists.

I. BETWEEN SEMIOTIC DEMOCRACY AND SEMIOTIC DISOBEDIENCE

On Thanksgiving Day 1970 a group of approximately two hundred Native American activists, part of the American Indian Movement (AIM), proceeded to converge on Massachusetts at Plymouth Rock, the historically venerated site of the birth of the New America.[40] Although they were invited as official guests to take part in the Thanksgiving celebration, the activists secretly planned to perform a traditional ceremony to symbolically inaugurate Thanksgiving Day as a day of national mourning for the Native American population.[41] Beneath a statue of Massasoit, the Wampanoag Indian chief of the region when the pilgrims arrived, AIM leader Russell Means proclaimed, "*Plymouth Rock is red*. Red with our blood. The white man came here for religious freedom and he has denied it to us. Today you will see the Indian reclaim the Mayflower in a symbolic gesture to reclaim our rights in this country."[42]

After burying Plymouth Rock under several inches of sand, about twenty-five protesters symbolically boarded an official replica of the Mayflower, detached its colonial flag, and decamped, nonviolently, shortly thereafter.[43] Later that night, armed with little more than a paintbrush, John Trudell (an AIM spokesperson) and others returned to the site of the demonstration and proceeded to paint Plymouth Rock a deep, solid red color to symbolize the presence of Native Americans long before colonization.[44]

---

40. *See Mourning Indians Dump Sand on Plymouth Rock*, N.Y. TIMES, NOV. 27, 1970, at 26 [hereinafter *Mourning Indians*].

41. The original plan, led by the descendants of the Wampanoag tribe (those who first met the Pilgrims nearly four hundred years ago), was to perform a traditional mourning ceremony before the annual Pilgrim festival. At Plymouth, one of the first major AIM demonstrations took place, launching a nationwide movement that literally changed the face of the Native American political movement. *See id.*; *see also* AMERICAN INDIAN ACTIVISM: ALCATRAZ TO THE LONGEST WALK (Troy Johnson et al. eds., 1997); PAUL CHAAT SMITH & ROBERT ALLEN WARRIOR, LIKE A HURRICANE (1996); DENNIS BANKS & RICHARD ERDOES, OJIBWA WARRIOR: DENNIS BANKS AND THE RISE OF THE AMERICAN INDIAN MOVEMENT (2004); TROY JOHNSON, WE HOLD THE ROCK: THE INDIAN OCCUPATION OF ALCATRAZ, 1969 TO 1971 (1997); PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE (1991); RUSSELL MEANS WITH MARVIN J. WOLF, WHERE WHITE MEN FEAR TO TREAD (1995); RED POWER (Alvin M. Josephy Jr. et al. eds., 1999); Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 AM. SOC. REV. 947 (1995); Ward Churchill, *The Bloody Wake of Alcatraz: Political Repression of the American Indian Movement during the 1970s*, http://civilrightsteaching.org/Handouts/BloodyWakeofAlcatraz.pdf (last visited Nov. 18, 2006).

42. *Mourning Indians*, *supra* note 40 (emphasis added).

43. *Id.*; *cf.* MEANS, *supra* note 41, at 177–78 (describing the activities that took place).

44. MEANS, *supra* note 41, at 178.

Wash U Law Repository

The demonstration brought AIM enormous media attention and created great controversy, just as many of their other symbolic occupations would subsequently do.[45] Some undoubtedly considered the act of painting Plymouth rock to be a brazen example of vandalism, an unparalleled act that consciously challenged (indeed occupied) the symbolic birthplace of American civilization. For others, however, especially those in the Native American community and their sympathizers, the act typified—and personified—the previously unexpressed rage of a community subjected to historical erasure, broken treaties, and widespread discrimination for centuries.[46]

But even aside from the broader historical and social context behind their motivations, AIM's simple, symbolic act forces us to contemplate the complex implications of the line between protected expression and prohibited destruction, between the absence of a symbolic terrain that provides a comparable expressive platform and the presence of property rules that prohibit such transgression. There is no analogue in criminal law to adequately capture this type of expressive criminality because its very existence challenges the implicit hierarchy within our law that actively favors tangible property over expression. Our current theories of criminal law fail to capture the event's complexity; potentially, AIM's act represents a "broken window," a symbolic expression of social disorder, and relatedly, a failure of the promise of the order of law.[47] Irrespective of

---

45. During the 1970s, AIM activists symbolically occupied a number of national sites, including the island of Alcatraz, Mount Rushmore, and the Bureau of Indian Affairs. Because of these activities, they were labeled an "extremist" group by the federal government and subjected to a protracted campaign of repression. *See* sources cited *supra* at note 41; THE FBI FILES ON THE AMERICAN INDIAN MOVEMENT AND WOUNDED KNEE (Rolland Dewing ed., 1986).

46. *See generally* STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); ROBERT BURNETTE & JOHN KOSTER, THE ROAD TO WOUNDED KNEE (1974); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983); VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974); VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS (1969); MARK GROSSMAN, THE NATIVE AMERICAN RIGHTS MOVEMENT (1997); EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT (1991); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1997); KENNETH S. STERN, LOUD HAWK: THE UNITED STATES VERSUS THE AMERICAN INDIAN MOVEMENT (2002) (all detailing various historical and legal aspects of the U.S. government's relationship with the Native American community).

47. The "broken window" theory of criminal policing, stemming from an enormously influential article by James Q. Wilson and George R. Kelling, views vandalism as a largely monolithic phenomenon, which, along with the visibility of other signs of minor criminal activity (like public drunkenness, prostitution, begging, etc.), suggests a greater tolerance for disorder and more serious crimes. *See* Wilson & Kelling, *supra* note 38. They argued as follows:

> Social psychologists and police officers tend to agree that if a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken. This is as true in nice

the expressive dynamics behind such activities, they are never viewed as legitimate speech under the laws of property, intellectual property, or First Amendment theory. Instead, these activities are viewed purely through the lens of criminal conduct, a label that excises them of any symbolic or expressive value.

At the same time, however, somewhat paradoxically, AIM's act cannot be construed as anything other than pure expression: to call it an act of vandalism strips it of its semiotic value entirely. While it is true that AIM's act impinged on property in the tangible sense, it was also an intimately expressive act, capturing an overlapping significance to property in the metaphysical sense, particularly regarding the intellectual property of national symbols.

In essence, by recoding an object of property—Plymouth Rock—AIM's act implicitly suggested the need for a similar "rewriting" of the intellectual property of history; the act crossed the divide between property and speech in a single, profound moment of symbolic capture. By marking the preexisting presence of Native Americans on Plymouth Rock, the act sharply brought into focus the link between *presence* and *absence*—here, the artistic occupation of a landmark in American history was used to symbolically represent the absence of millions of Native Americans due to historical erasure and genocide. At the precise nexus of the paintbrush touching solid matter, and at the socially constructed nexus between speech and criminality, the AIM movement asked the public to do

---

> neighborhoods as in run-down ones. Window-breaking does not necessarily occur on a large scale because some areas are inhabited by determined window-breakers whereas others are populated by window-lovers; rather, one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing. . . .
>
> . . . .
>
> We suggest that "untended" behavior also leads to the breakdown of community controls.

Id. at 31. For other discussions of this theory, see generally HARCOURT, *supra* note 38; CRIME, DISORDER AND COMMUNITY SAFETY: A NEW AGENDA? (Roger Matthews & John Pitts eds., 2001); GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996); Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 COLUM. L. REV. 551 (1997); Toni Massaro, *The Gang's Not Here*, 2 GREEN BAG 2d 25 (1998); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999). For other discussions of the role of social meaning and crime control, see Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); and Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

Wash U Law Repository

something deeper than venerate property: it offered the audience the chance to recode a national symbol, demonstrating that the story was far more complicated than the monument itself suggested.

Examples like this have existed ever since expression and property intersected through legal regulation. But they are generally fully prohibited, and often rightly so.[48] No one could possibly deny the import of AIM's powerful act of expression, just as no one could possibly defend its legality under today's legal standards. But AIM's conscious choice to engage in prohibited speech through symbolic occupation helps us to understand where semiotic democracy ends and where semiotic disobedience begins.

Today countless movements have replicated these tactics, engaging in a series of symbolic occupations of various properties, both tangible and intangible, temporary and permanent. Indeed, in the thirty-plus years since AIM's demonstration, the differences between yesterday's civil rights movements and today's forms of semiotic disobedience highlight the global shifts in power that have taken place since then. There has been a notorious rise in the power of non-state actors—corporations are now as powerful as governments.[49] Our information society now operates virtually; we live surrounded by the constant circulation of abstract images fed to us by advertising. Given the powerful elevation of the corporation within public life, it is no surprise that, for many activists, the ultimate authoritarian regime—ripe for subversion—comprises the law of property and intellectual property.[50]

Since the dominant industry today is information, not products, today's semiotic disobedience reflects an international, global cosmopolitanism that varies widely from the earlier local or regional character of civil disobedience.[51] As one of the major proponents of the "electronic civil disobedience" movement, Critical Art Ensemble (CAE) has argued:

---

48. *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968) (upholding conviction for burning selective service registration card). *But cf.* Texas v. Johnson, 491 U.S. 397 (1989) (invalidating state statute that prohibited any person from desecrating the American flag in a way that will seriously offend others).

49. *See* JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER (2004); The Hacktivist, What Is Electronic Civil Disobedience?, http://www.thehacktivist.com/?pagename=ecd (last visited Nov. 18, 2006). As many theorists have argued, the sovereign boundaries of nationhood are swiftly disappearing, to be replaced by greater internal heterogeneity. *See* Ken Booth, *Security in Anarchy: Utopian Realism in Theory and Practice*, 67 INT'L AFF. 527, 542 (1991); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 497–98 (2001); The Hacktivist, *supra*.

50. *See generally* CRITICAL ART ENSEMBLE, ELECTRONIC CIVIL DISOBEDIENCE AND OTHER UNPOPULAR IDEAS (1996).

51. The Hacktivist, *supra* note 49.

> CAE has said it before, and we will say it again: as far as power is concerned, the streets are dead capital! Nothing of value to the power elite can be found on the streets, nor does this class need control of the streets to efficiently run and maintain state institutions. For [civil disobedience] to have any meaningful effect, the resisters must appropriate something of value to the state. Once they have an object of value, the resisters have a platform from which they may bargain for (or perhaps demand) change.[52]

For this reason, followers of semiotic disobedience usually target information, brands, and advertising in order to challenge the boundaries of corporate identity in public space. Consider four contemporary examples, taken from both real space and cyberspace:

A. The California Department of Corrections

During the summer of 1997, dramatic alterations to a host of billboards began appearing throughout San Francisco, often targeting the corporation that had purchased the billboard.[53] A group called the California Department of Corrections (CDC)[54] took responsibility, circulating a satirical press release that claimed its mission was to "protect the public" by, among other things:

> 1. Altering California's most criminal advertising in a secure, safe and disciplined setting.
>
> 2. Providing work, academic education, vocational training, and specialized treatment utilizing California's billboards.
>
> 3. Providing supervision, surveillance, and specialized services with the aim of subverting billboards in the community and continuing some of the educational, training, and counseling programs that were initiated during alteration.[55]

Since its debut, the CDC has altered over forty-five billboards, criticizing a variety of corporations, the criminal justice system, the war in Iraq, gentrification in San Francisco, and environmental degradation.[56]

---

52. CRITICAL ART ENSEMBLE, *supra* note 50, at 11.

53. *See* The California Department of Corrections, http://www.geocities.com/billboardcorrections/index.html (follow "media" hyperlink) (last visited Nov. 18, 2006).

54. The name is actually a shortened spoof of the government agency California Department of Corrections and Rehabilitation. *See id*. (follow "works" hyperlink).

55. *Id*. (follow "mission" hyperlink).

56. *See id*. (follow "works" hyperlink).

Wash U Law Repository

Their work (including their deceptively "official" website for the California Department of Corrections) has attracted a large amount of media attention, generating a host of discussions about authenticity within advertising.[57]

B. Jonah Peretti

In 1999, Nike launched a promotional program that allowed consumers to personalize their shoes with a word or short phrase placed next to the Nike "swoosh" logo.[58] So, in early 2001, Jonah Peretti filled out the form and selected to have the word "sweatshop" stitched onto his shoes.[59] In response, Nike wrote that his order was cancelled "for one or more of the following reasons":

> 1) Your Personal iD contains another party's trademark or other intellectual property.
>
> 2) Your Personal iD contains the name of an athlete or team we do not have the legal right to use.
>
> 3) Your Personal iD was left blank. Did you not want any personalization?
>
> 4) Your Personal iD contains profanity or inappropriate slang, and besides, your mother would slap us.[60]

In response, Peretti argued that the word "sweatshop" did not violate any of these restrictions and that he "chose the iD because I wanted to remember the toil and labor of the children that made my shoes."[61] Nike, in turn, then claimed that the order was cancelled because the iD contained "inappropriate slang."[62] Frustrated, Peretti wrote back, pointing out that according to Webster's Dictionary, "sweatshop" is "in fact part of standard English," not slang:

---

57. *See id*. (follow "media" hyperlink) (listing articles and excerpts discussing billboard alterations).

58. *See* Nikebiz, Get Personal with Nike iD (Nov. 5, 2001), http://www.nike.com/nikebiz/news/pressrelease.jhtml?year=2001&month=11&letter=b.

59. *See* Jockbeat, *Making Nike Sweat*, VILLAGE VOICE, Feb. 14–20, 2001, *available at* http://www.villagevoice.com/news/0107,jockbeat,22274,3.html.

60. *Id*.

61. *Id.*

62. *Id.*

> The word means: "a shop or factory in which workers are employed for long hours at low wages and under unhealthy conditions" and its origin dates from 1892. So my personal iD does meet the criteria detailed in your first email.
>
> Your Web site advertises that the NIKE iD program is "about freedom to choose and freedom to express who you are." I share Nike's love of freedom and personal statement. The site also says that "If you want it done right . . . build it yourself." I was thrilled to be able to build my own shoes, and my personal iD was offered as a small token of appreciation for the sweatshop workers poised to help me realize my vision.[63]

In the end, Nike continued to refuse, and Peretti finally gave up,[64] but not without sending the colloquy to millions of individuals via email and copious media attention.[65]

C. The Yes Men

On December 3, 2004, on the twentieth anniversary of the Bhopal gas crisis, a man appeared on BBC World News as "Jude Finisterra," a Dow Chemical spokesman, and claimed that Dow had finally opted to accept full responsibility for the disaster.[66] He also claimed that Dow planned to liquidate Union Carbide and use the resulting twelve billion dollars to pay for medical care, waste removal, and research into the hazards of Dow products in the future.[67] Within twenty-three minutes of this announcement, Dow's share prices had allegedly fallen more than four percent, a loss of more than two billion dollars in market value.[68] After two hours of wide coverage, "Dow" issued a press release denying the statement, calling it an "elaborate hoax."[69] Eventually, Finisterra was discovered to be Andy Bichlbaum, cofounder of the Yes Men, an

---

63. *Id*.

64. Peretti's final response was curt but thoughtful: "I have decided to order the shoes with a different iD, but I would like to make one small request. Could you please send me a color snapshot of the 10-year-old Vietnamese girl who makes my shoes?" *Id.*

65. *See* Deidre Macken, *Chain Reaction*, AUSTL. FIN. REV., Apr. 21, 2001, at 3.

66. *See* Democracy Now!, *Yes Men Hoax on BBC Reminds World of Dow Chemical's Refusal to Take Responsibility for Bhopal Disaster*, Dec. 6, 2004, http://www.democracynow.org/article.pl?sid=04/12/06/1453248; *see also* The Yes Men, *Routledge Just Says "Yes" to Dow: The Collaboration of a Progressive Academic Press and a Large Chemical Corporation*, http://www.theyesmen.org/dowtext/ (last visited Nov. 18, 2006) (explaining the Dow Chemical spokesman hoax and the subsequent "press release" in the guise of Dow, which was a hoax as well).

67. The Yes Men, *supra* note 66.

68. Democracy Now!, *supra* note 66.

69. The Yes Men, *supra* note 66. Of course, the purported press release was also a hoax. *Id*.

Wash U Law Repository

"affiliation of media pranksters . . . that specializes in what it calls 'identity correction'" (a variation of the idea of "identity theft"), wherein individuals "appropriate the identities of corporations or government bodies in order to speak truths that, ostensibly, those entities dare not."[70] Previously, the Yes Men had created satirical web sites for Dow Chemical corporation and the WTO, and they used these sites to gain invitations to WTO-related speaking engagements. At these engagements, the Yes Men delivered speeches extolling the virtues of cheap labor from the Third World, along with other uniquely expository observations.[71]

D. Label This

In the United States, a group called Label This has decided to inform consumers about the genetically modified ingredients in various products.[72] The group performs research to determine which products include genetically engineered ingredients and then prints up labels which members independently attach to products in grocery stores before they are sold.[73] Other "shopdropping" projects include the work of Ryan Watkins-Hughes, an artist who travels throughout supermarkets worldwide, altering the packaging of products with his own artistic work in an attempt to subvert commercial space for artistic expression.[74]

Each of the above examples, though very different, highlights the emerging relationship between democracy and disobedience in terms of symbols, brands, and cultural meaning. One magazine, *Adbusters*, says, "We believe [this movement] can be to our era what civil rights was to the 60s, what feminism was to the 70s, what environmental activism was to the 80s."[75] In each example, an individual actively transgresses the private,

---

70. Tom Vanderbilt, *Affirmative Action*, ARTFORUM, Feb. 2005, http://www.artforum.com/imprint/id=8261; *see also* Jen Haberkorn, *Yes Men Pull Halliburton Hoax*, WASH. TIMES, May 12, 2006, at A1, *available at* http://washingtontimes.com/business/20060511-110534-5777r.htm; Democracy Now!, *supra* note 66; Andrew Walker, *WTO Falls Victim to Spoof Website*, BBC NEWS, May 24, 2002, http://news.bbc.co.uk/1/hi/business/2006536.stm.

71. Working closely with ®™ark, the Yes Men have created parody websites at www.gatt.org and www.dow-chemical.com. *See* C. Carr, *Dow v. Thing: A Free-Speech Infringement that's Worse than Censorship*, VILLAGE VOICE, Jan. 17, 2003, http://www.villagevoice.com/news/0304,carr,41320,1.html; Joyce Slaton, *Bhopal Bloopers: How Dow and Burston-Marsteller Made a Big Stink Even Stinkier*, S.F. GATE, Jan. 9, 2003, http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/article/2003/01/09/bhopl.DTL; The Yes Men, *Dow*, http://www.theyesmen.org/hijinks/dow (last visited Nov. 18, 2006).

72. *See* Sniggle.net, *supra* note 23.

73. *Id*.

74. *See* C100, THE ART OF REBELLION 2: WORLD OF URBAN ART ACTIVISM 39 (2006).

75. Laura Barton, *A Job for Consumers: Try to Buy Nothing*, GUARDIAN EDUC., Nov. 20, 2001, at 55.

sovereign boundary of corporate property—a billboard, a domain name, an identity, a tangible product—and transforms it into a sort of "public" property open for dialogue and discussion, an entity that is non-sovereign, borderless, and thus incapable of excluding alternative meanings.

And that is the story of disobedience: the making of meaning in the shadows of democracy, sometimes outside the protections of the law. I use the term "semiotic disobedience" to purposefully capture two overlapping elements: *authorial disobedience*—referring to the creation of texts that consciously diverge from the original meaning intended by an author and *proprietary disobedience*—referring to the willingness of these artists and activists to challenge the boundaries of property protections. Since the social norms of semiotic disobedience often favor the alteration of another's property, rather than its independent reproduction, the types of semiotic disobedience I study in this Article, like AIM's repainting of Plymouth Rock, tend to fall outside of legal protection.[76]

Although semiotic disobedience fails to capture all of the elements of classical forms of civil disobedience,[77] it does replicate its performative, dissenting character.[78] As some authors have observed, civil disobedience, at its most general level, is defined as "doing legally reprehensible things in public, at times in an exhibitionist manner, for the purposes of political or social protest."[79] As defined by Carl Cohen:

> Civil disobedience is an act of protest, deliberately unlawful, conscientiously and publicly performed. It may have as its object the laws or policies of some governmental body, or those of some private corporate body whose decisions have serious public

76. This is not to say that all types of semiotic disobedience are illegal, or that they should be. In other work, I draw attention to forms of semiotic disobedience involving parody and fan fiction that strongly implicate fair use protection. *See, e.g.*, Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U.J. GENDER SOC. POL'Y & L. (forthcoming 2006); Sonia K. Katyal, Anti-Branding (manuscript in progress) (on file with author).

77. For example, whereas civil disobedience traditionally requires the actor to accept punishment for her actions, many participants in semiotic disobedience try to actively avoid detection and punishment. *See, e.g.*, Hakim Bey, The Temporary Autonomous Zone, Ontological Anarchy, Poetic Terrorism, http://www.hermetic.com/bey/taz_cont.html (follow "Poetic Terrorism" hyperlink) (last visited Nov. 18, 2006) ("The best [poetic terrorism] is against the law, but don't get caught. Art as crime; crime as art.").

78. Howard Zinn, for example, defines civil disobedience as "the deliberate, discriminate, violation of law for a vital social purpose." HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY 119 (1968); *see also* Morris Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507, 508–11 (1965); *cf.* PETER SINGER, DEMOCRACY AND DISOBEDIENCE 84 (1973), *reprinted in* CIVIL DISOBEDIENCE IN FOCUS § 122 (Hugo Adam Bedau ed., 1991); Brian Smart, *Defining Civil Disobedience*, 21 INQUIRY 249, 267 (1978), *reprinted in* CIVIL DISOBEDIENCE IN FOCUS, *supra*, at §§ 189, 211.

79. Jerome B. King, *Book Reviews*, 86 HARV. L. REV. 468, 469 (1972) (reviewing books on civil disobedience).

Wash U Law Repository

> consequences; but in either case the disobedient protest is almost invariably nonviolent in character.[80]

Unlike traditional lawbreaking, which usually involves situations where individuals assert their will "against the will of the majority" for selfish reasons,[81] civil disobedience involves breaking the law for expressive purposes. Civil disobedience usually involves a political message of dissent and an individual fairly willing to accept punishment; the willingness to accept punishment communicates some respect for the overall rule of law even if the individual disagrees with a particular legal provision or policy.[82] "[T]he dissenter views what he does as a civic act, an act that properly belongs to the public life of the community."[83]

As a result, civil disobedience has always enjoyed a complicated relationship with the law. It is usually characterized as one of two types: direct or indirect.[84] With regard to the former, "the law disobeyed is itself the object of protest"; for example, in the 1960s African Americans performed "sit-ins" at lunch counters legally restricted to white citizens to demonstrate their refusal to obey laws they deemed unjust.[85] With indirect civil disobedience, however, "the law broken is not itself the object of protest," though it typically relates in some manner to the issue animating the action.[86] For example, anti-trespass or disorderly conduct ordinances are generally not the object of protest, but are usually disobeyed for instrumental reasons.

Semiotic disobedience, in contrast, collapses this distinction. Here, the law being disobeyed usually involves a combination of intellectual and real property protections, and is being broken for a host of instrumental, expressive, and symbolic reasons. The point of semiotic disobedience is to expose how classical legal rules protect certain types of property—mostly tangible, corporate property—at the expense of other, intangible types of expressions within the marketplace of speech.

---

80. CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 39–40 (1971) (emphasis omitted).

81. Leslie Gielow Jacobs, *Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance*, 59 OHIO ST. L.J. 185, 231 (1998).

82. *See id.* at 231–32; Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 71–80 (1990) (narrating a short history of civil disobedience); *see also* COHEN, *supra* note 80, at 39; RAWLS, *supra* note 19, at 366.

83. Hugo A. Bedau, *On Civil Disobedience*, 58 J. PHIL. 653, 656 (1961).

84. Katz, *supra* note 19, at 906.

85. *Id.*

86. *Id.*

For this reason, semiotic disobedience represents both an outgrowth of, and a departure from, traditional forms of civil disobedience. However, it differs from classical forms of civil disobedience in three major respects: first, the object of protest is not the law itself, but usually a corporate or advertising target; second, many participants (unlike their predecessors in the Civil Rights Era) actively avoid getting caught by using the mantle of anonymity; and third, it can (though not always) involve the destruction or alteration of tangible property. There is another important difference between civil disobedience and semiotic disobedience as well. With the latter, the object of protest is not just the state or federal laws that surround the expanding sovereignty of intellectual property, but also the private and corporate forces that rely on their existence.

In this Part, I use two different lenses—one artistic and one semiotic—to descriptively explore the dynamics and theory behind semiotic disobedience. The first focuses on semiotic disobedience's interesting overlap with art, vandalism, and criminality, aptly demonstrating how semiotic disobedience encompasses what semiotic democracy cannot. The second lens explores how semiotic disobedience draws upon theories of symbols and language to capture the power of the audience and consumer in redefining meaning within the marketplace of expression, particularly within advertising.

1. *The Art of Disobedience*

A piece in the *New York University Law Review* by Jack Balkin quite eloquently explores the relationship between digital culture and democracy, and extols the virtues of a semiotic democracy in the process.[87] "A democratic culture," Balkin writes, "is the culture of a democratized society; a democratic culture is a participatory culture."[88] For Balkin, a wide range of forces engage in the process of democratization—"institutions, practices, customs, mannerisms, speech, and dress"—all of which involve forms of social life that empower "ordinary people [to] gain a greater say over the institutions and practices" that govern and shape them.[89] A semiotic democracy is an integral part of this process because it empowers the art of conversation: it enables individuals to fashion productive and protected responses to the forces of culture which shape and constrain them.

---

87. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004).

88. *Id.*

89. *Id.*

Wash U Law Repository

By empowering access to these multiple forces, a semiotic democracy inherently reduces the monopolistic power of an author, allowing the audience to respond by utilizing the same channels and symbols as an original owner.[90] Digital technology has revealed the interactive and appropriative features of freedom of expression—in this way, it implicates both individual liberty and collective self-governance.[91] Consider Balkin on this point:

> Freedom of speech is appropriative because it draws on existing cultural resources; it builds on cultural materials that lay to hand. Dissenters draw on what they dislike in order to criticize it; artists borrow from previous examples and build on artistic conventions; even casual conversation draws on common topics and expressions. . . . In a democratic culture people are free to appropriate elements of culture that lay to hand, criticize them, build upon them, and create something new that is added to the mix of culture and its resources.[92]

Note, however, that most of Balkin's observations suggest a culture that appropriates through the copying of information, rather than the subversion of its circulation. As digital technology reduces the costs of copying and distribution, Balkin details, it allows others to modify certain cultural products and illustrates how copying enables annotation, innovation, and collage.[93] But Balkin's examples are limited entirely to the principles of "nonexclusive appropriation"—the idea that any cultural product is open to comment, alteration, and innovation so long as it is premised on copying the document first.[94] The end result that is sought is clear: the expansion of First Amendment and fair use principles to support the existence of a semiotic democracy.[95] Through nonexclusive appropriation, the marketplace of speech expands and grows in both character and diversity.

Like yesterday's civil rights activism, and as our body of First Amendment jurisprudence has plainly recognized, semiotic disobedience demonstrates that there are spaces for political expression carved outside the boundaries of protected speech. Like semiotic democracy, the

---

90. *Id.* at 3. A democratic culture ensures that "individuals have a fair opportunity to participate in the forms of meaning making that constitute" and construct identity. *Id*.

91. *See id.* at 6–9.

92. *Id.* at 4–5.

93. *See id.* at 7–9.

94. *See id.* at 11.

95. *See id.* at 55.

phenomenon of semiotic disobedience aims to create a dialogue where one is absent[96] and tries to reclaim the inducement of passivity among modern consumers.[97] Further, both semiotic democracy and semiotic disobedience seek to reverse the privileged position of the speaker or author and make the audience an active participant instead of a generally passive spectator.

However, although semiotic disobedience arguably shares many of the same goals of semiotic democracy, there are important differences between the two concepts. First, semiotic disobedience deliberately situates itself outside the boundaries of protected speech for the purpose of challenging those boundaries altogether. Second, unlike semiotic democracy's willingness to place consumers and corporations on an equal playing field, semiotic disobedience is largely substitutive: it attempts to occupy and "recode" the sovereignty of corporate space for the purpose of restoring a sort of critical balance between consumer and corporation. In this way, the tactics utilized by semiotic disobedience activists offer an interesting convergence of property and speech by targeting—and challenging—the "sovereignty" of advertising. As these activists are well aware, vandalism, defacement, cyber-squatting, and property mutilation or alteration enjoy little protection under the law; the end sought is not protection, but protest.

Today's projects of semiotic disobedience stem in part from a world of activism known as "culture jamming," which originally meant illegally interrupting a signal.[98] The jammer's method is to "introduce noise into the signal as it passes from transmitter to receiver, encouraging idiosyncratic, unintended interpretations. Intruding on the intruders, they invest ads, newscasts, and other media artifacts with subversive meanings; simultaneously, they decrypt them, rendering their seductions impotent."[99] According to Mark Dery, culture jamming constitutes an "elastic

96. *See* Baines, *supra* note 18.

97. *See* Alexander Barley, *Battle of the Image: Subvertising*, NEW STATESMAN, May 21, 2001, at 45.

98. Baines, *supra* note 18, at 14. Umberto Eco uses the term "semiological guerrilla warfare" to refer to various subversive practices which involve the resignification of various signs. UMBERTO ECO, *Towards a Semiological Guerrilla Warfare*, *in* TRAVELS IN HYPERREALITY: ESSAYS 135, 143–44 (William Weaver trans., Harcourt Brace Jovanovich 1986) (1983); *see also* KLEIN, *supra* note 10, at 289–92 (detailing the work of Carly Stasko, who defaces advertising); Reverend Billy and the Church of Stop Shopping, http://www.revbilly.com/index.php (last visited Nov. 18, 2006) (describing Reverend Billy, who institutes street disturbances to convince individuals to avoid mass consumption); The Space Hijackers Homepage, http://www.spacehijackers.org (last visited Nov. 18, 2006) (a group dedicated to reclaiming public space); Jeffrey Toobin, *Girls Behaving Badly*, NEW YORKER, MAY 30, 2005, http://www.newyorker.com/talk/content/articles/050530ta_talk_toobin (detailing the work of the Guerrilla Girls, who stage demonstrations to protest male dominance in the arts).

99. Mark Dery's Pyrotechnic Insanitarium, Culture Jamming: Hacking, Slashing, and Sniping in the Empire of Signs, http://www.levity.com/markdery/culturjam.html (last visited Nov. 18, 2006).

Wash U Law Repository

category" that comprises "a multitude of subcultural practices," "directed against an ever more intrusive, instrumental technoculture whose operant mode is the manufacture of consent through the manipulation of symbols."[100] As part of the endeavor, some culture jamming projects, simultaneously creative and interruptive, risk violating some law or license in an effort to communicate the message the individual is trying to send, and, in doing so, rise to the level of semiotic disobedience. Consider the following observation by Johann Hari, building off the work of Umberto Eco, who coined the term "semiotic guerrilla warfare":

> [Eco proposes] an action [which would] urge the audience to control the message and its multiple possibilities of interpretation. When corporate interests go so far as to employ viral marketing—where, for example, two good-looking, trendy people are employed to walk around public places talking loudly about how great Stella Artois is—subverting these acts seems to some activists the only meaningful way to protest.[101]

By reoccupying the symbol, and then reinscribing it with a new meaning, semiotic disobedience creates a modality that shifts the character of the speech in two major ways: first, the identity of the speaker shifts from a corporation to a potential consumer; and second, the identity of the brand shifts from a commercial commodity into an expression of political significance.

Unlike semiotic democracy, semiotic disobedience actively challenges the boundaries of fair use and First Amendment expression by offering up a vision that thrives on the outskirts of legality. While semiotic democracy focuses on expanding the marketplace of ideas, semiotic disobedience focuses on actually "correcting" the marketplace by subverting some ideas in favor of others. Moreover, unlike the goal of semiotic democracy, which focuses on legalizing a self-created parody alongside an original work, the theory behind semiotic disobedience focuses on the occupation, alteration, and mutilation of owned property itself by actually interrupting an original message with another one—warranting (and sometimes inviting) criminal sanction. In doing so, semiotic disobedience forcibly reclaims privately owned intellectual property for a sort of alternative domain that aims to place a pro-consumer, anti-corporate view at the center of its discursive space.

---

100. *Id.*

101. Johann Hari, *How to Beat the Adman at his Own Game*, NEW STATESMAN, June 17, 2002, at 22 (quoting ECO, *supra* note 98, at 143 (first alteration added) (internal quotation marks omitted)).

For a semiotic democracy, the ideal involves a culture rich in reproductive images, creating more speech (and thus more property) in the marketplace of ideas. Semiotic disobedience challenges these categories by creating expressions that are tangible, rivalrous, and substitutive; its governing theory makes it more costly for corporations to advertise and protect the identity behind their products and images. Unlike parodies that focus on reproducing and then altering an original text or image, the forms of semiotic disobedience I study in this Article often appropriate or occupy the tangible image itself in the marketplaces of products or advertising. Here the existing image is not borrowed within the traditional paradigm of non-exclusive appropriation. The appropriation is material: something is subtracted from, and something is substituted for, the original work. The message is "jammed," instead of added to or extended.

a. Between Appropriation and Occupation

While it is widely held that some types of recoding, like parody, can constitute a fair use defense to claims of intellectual property infringement,[102] some acts of semiotic disobedience seek to challenge, not to embrace, this traditional defense. That is not to suggest they are not deeply imbued with artistic expression; many projects appropriate other works for artistic, as well as political, purposes. Such projects reflect a complex merging of the bipolarities between art and criminality, between "high" and "low" forms of art, and between appropriation and authenticity.[103] While I discuss semiotic disobedience's linkages to postmodernism in the following section, it is important, at the outset, to situate semiotic disobedience along the veins of what art historian Hal Foster describes as the "anti-aesthetic," which is the practice of actively

102. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (holding that use of Roy Orbison's copyrighted rock ballad "Pretty Woman" in rap song by 2 Live Crew as parody was protected under fair use despite commercial gain); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001) (vacating injunction that prohibited publisher from publishing and distributing "The Wind Done Gone," a novel parodying "Gone With the Wind" and told from the perspective of a slave); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998) (holding that movie advertisement incorporating copyrighted photo of a pregnant Demi Moore with the face of movie's star, Leslie Nielsen, was a parody protected under fair use despite commercial purpose and use); Blanch v. Koons, 396 F. Supp. 2d 476, 482 (S.D.N.Y. 2005) (holding painter's appropriation of photograph of women's crossed legs in sandals was sufficiently transformative to merit fair use, especially since the appropriated elements were "banal rather than creative").

103. As one commentator on postmodernism observes, "[i]f popular culture signs and media images are taking over in defining our sense of reality . . . then any meaningful distinction between art and popular culture can no longer be maintained." Dominic Strinati, *Postmodernism and Popular Culture*, 1 SOC. REV. 2, 2–7 (1992), *reprinted in* CULTURAL THEORY AND POPULAR CULTURE: A READER 428, 429 (John Storey ed., 1994).

Wash U Law Repository

questioning (and, in some cases, actively denying) the legitimacy and privileging of certain cultural forms over others.[104]

Through this complex transition, semiotic disobedience demonstrates an important rupture in the linear, dialogic process that Fiske describes in his vision of semiotic democracy.[105] Semiotic disobedience attempts to create an alternative system of meaning that both appropriates and interrupts the protected associations within the marketplace of ideas. In many examples, an advertisement becomes transformed from a declarative statement of commercial seduction into an open text for transgressive commentary. And, in doing so, semiotic disobedience creates a new, converging marketplace of speech that is largely designed to interrupt and interfere with the "codes" of the previous one. The result is a world in which the powerful purchase properties—billboards, domain names, and the like—only to have their messages exposed, occupied, and thus interrupted by their disenfranchised counterparts. The idea behind semiotic disobedience is not to permit a marketplace of speech where the answer to objectionable speech is more speech, but rather where the goal is to interrupt, disrupt, and replace the speech of the corporate entity with that of the disenfranchised consumer.

As a result, an advertisement moves from being a legally fixed space of private property into a public space that invites the unauthorized commentary to sit beside—or to replace—the authorized one. Many of these methods are crucially distinct from vandals and graffiti-artists for one simple reason: as author Naomi Klein explains, whereas graffiti seeks to leave "dissonant tags" on the slick face of advertising, today's semiotic disobedience seeks to mesh its subversive message with its targets, thereby borrowing "visual legitimacy" from the original advertising itself.[106] Billboard advertising tends to be the favored method of disruption in real space.[107] The audio-collage band Negativland observed, "[t]he skillfully reworked billboard . . . directs the public viewer to a consideration of the original corporate strategy."[108] Naomi Klein described this interplay as follows:

---

104. *See* Hal Foster, *Postmodernism: A Preface*, *in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE ix, xv (Hal Foster ed., 1983) (describing the anti-aesthetic as "a practice, cross-disciplinary in nature, that is sensitive to cultural forms engaged in a politic (e.g. feminist art) or rooted in a vernacular—that is, to forms that deny the idea of a privileged aesthetic realm").

105. *See* FISKE, *supra* note 2, at 239.

106. KLEIN, *supra* note 10, at 285; *see also* MCQUISTON, *supra* note 21, at 182 (noting a transition from "defacing" billboards to "refacing" them in the late 1980s and early 1990s).

107. *See* Kauffman, *supra* note 21.

108. KLEIN, *supra* note 10, at 281 (as stated on the album *Jamcon '84*).

> The most sophisticated culture jams are not stand-alone ad parodies but interceptions—counter-messages that hack into a corporation's own method of communication to send a message starkly at odds with the one that was intended. The process forces the company to foot the bill for its own subversion, either literally, because the company is the one that paid for the billboard, or figuratively, because anytime people mess with a logo, they are tapping into the vast resources spent to make that logo meaningful.[109]

In 1977, an advertising executive who calls himself Jack Napier decided to found the Billboard Liberation Front (BLF).[110] The BLF is committed to "roadside advertising enhancement" using canvas overlays, rubber cement, and subversive wit.[111] Interestingly, "the group never damages the billboards, and typically leaves a note for the company explaining how to remove the overlays."[112] Billboards are, according to Napier, "the only unavoidable mass advertising medium," because they cannot be cancelled or unplugged and because they represent a modicum of once public, now private, space.[113] Similar projects are often undertaken

---

109. KLEIN, *supra* note 10, at 281.

110. Kauffman, *supra* note 21.

111. Kauffman, *supra* note 21. In over twenty-five years, the BLF has "liberated" billboards belonging to Apple Computers, Levi Jeans, Marlboro, and Exxon. *Id*. One of their latest projects, deemed a "code installation," involved rewiring a neon tobacco sign affixed to a billboard. *Id*. By switching off two letters and blocking part of a third, "CAMEL" became "AM I." *Id*. At the bottom of the billboard, the group installed new neon letters to ask the question, "Am I Dead Yet?" *Id*. They then attached a light-up neon skull over Joe Camel's face. *Id*. In the ensuing press release, the BLF proclaimed:

> The Billboard Liberation Front has undertaken this action as a gesture of public support for the heroic executives of R.J. Reynolds in their valiant struggle against the dark forces of regulatory oppression . . . . By dramatizing the plight of Joe Camel, outdoor advertising's most endangered species, we express our outrage at those who would plot Joe's extinction.

Brad Weiners, *Long Live Joe!*, WIRED, Apr. 1996, at 50, *available at* http://www.wired.com/wired/archive/4.04/scans.html?pg=5 (quoting Blank De Coverly, BLF's acting minister of propaganda).

For other projects similar to those of the BLF, see Subvertising.org, http://www.subvertising.org (last visited Nov. 18, 2006), and Irational.org, http://www.irational.org (last visited Nov. 18, 2006). For other discussion, see Editorial, *Spoiling Their Own Message*, DENVER POST, Oct. 10, 2002, at B6; Nic Fleming, *Keep Us Posted: Demos Are One Thing, But Some Anti-Capitalists Are Turning to a More Subtle Form of Protest*, GUARDIAN (London), May 1, 2002, at G2; Chris Mooney, *Billboard Protest Tells Firms Where to Stick Capitalism*, EVENING NEWS (Edinburgh), May 14, 2003, at 19; Richard Nangle, *Pair Use Sign Language: Message Added to City Billboard*, TELEGRAM & GAZETTE (Worcester, Mass.), May 14, 2003, at A1; Fergus Shiel, *The Art of Culture Jamming*, THE AGE (Melbourne), Jan. 10, 2001.

112. Kauffman, *supra* note 21.

113. Kauffman, *supra* note 21; *see* Sam McManis, *Massaging the Message: Using Urban Guerilla Tactics, Billboard Liberation Front 'Adjusts' Ads*, S.F. CHRON., Aug. 24, 2003 at E1; *see also* MCQUISTON, *supra* note 21, at 182 ("As the voice of commercial 'programming,' billboards are an authoritative and exploitative device, a one-way form of communication. Defacing and graffiti magically transform this into a two-way conversation: the voice of authority is overtaken by the voice

Wash U Law Repository

online, though they also involve the "jamming" of a sponsored website in favor of an alternative message.[114]

In this way, the audience places a value on the contestation of the good itself, rather than on its ability to create a one-way transmission of meaning from the producer to the consumer. Along these lines, true transgression requires contesting the values and symbolic seduction of advertising as one tactical part of this revolution.[115] Consequently, the goal involves appropriating "authoritarian means and turning them against themselves"—it is a negotiated resistance that is occupational, tangible, semiotic, and appropriative, all at the same time.[116]

b. Détournement *and Disobedience*

Although semiotic disobedience, as I define it, has probably existed throughout history, its contemporary roots are often linked to a movement called the Situationist International that took place during the 1960s in France after the advent of Dadaism.[117] The Dadaists focused on a type of "studied degradation" of their artwork by strewing their pieces with obscenities, buttons, and tickets, ostensibly in order to suggest a kind of devaluation of art that became part and parcel of the work itself.[118] As Walter Benjamin explains, the Dadaists "intended and achieved . . . a relentless destruction of the aura of their creations . . . ."[119] By doing so, the Dadaists ensured that their creations received attention, not as works of

---

of resistance, and commercial power is subverted to people power.").

114. *See, e.g.*, FreeMartha.org, http://freemartha.org/index.php (last visited Nov. 18, 2006) (now defunct parody of Martha Stewart website); Gatt.org, http://www.gatt.org (last visited Nov. 18, 2006) (parody site of the World Trade Organization); Landover Baptist Church, http://www.landoverbaptist.org (last visited Nov. 18, 2006) (spoof of Evangelical Christian sites); Microsith.com, www.microsith.com (now defunct site combining Microsoft and Star Wars themes); Microsoftedu.com, http://microsoftedu.com/ (last visited Nov. 18, 2006) (now defunct parody site of Microsoft); Welcome to the White House, http://www.whitehouse.net (last visited Nov. 18, 2006) (recently "hacked" parody of the White House website at www.whitehouse.gov).

115. Vincent Kauffman, *Angels of Purity*, *in* GUY DEBORD AND THE SITUATIONIST INTERNATIONAL: TEXTS AND DOCUMENTS 285, 293 (Tom McDonough ed., John Goodman trans., 2002).

116. CRITICAL ART ENSEMBLE, *supra* note 50, at 25.

117. *See* SIMON SADLER, THE SITUATIONIST CITY (1998); WHAT IS SITUATIONISM?: A READER (Stewart Home ed., 1996); Edward Ball, *The Great Sideshow of the Situationist International*, 73 YALE FRENCH STUD. 21, 25 (1987); Tom McDonough, *Introduction* to GUY DEBORD AND THE SITUATIONIST INTERNATIONAL, *supra* note 115, at ix–x; Mikkel Bolt Rasmussen, *The Situationist International, Surrealism, and the Difficult Fusion of Art and Politics*, 27 OXFORD ART J. 365 (2004).

118. Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (1936), http://www.marxists.org/reference/subject/philosophy/works/ge/Benjamin.htm (last visited Nov. 19, 2006).

119. *Id.*

art, but as incidents of public scandal, designed and calibrated to outrage the public.[120]

In transforming art from a passive, fixed, declarative, bounded work of expression into a permeable catalyst for conversation between audience and artist, the Dadaists offered two main insights. First, the process of creating art became equally as valuable as the act of destroying the aura surrounding art. Second, the conversation that a work created became equally valuable to the art itself. A third insight, however, focused on the importance of rupturing distinctions between art and life. Following this philosophy, Guy Debord, the leader and founder of the Situationist International, aimed his movement towards a "mutual destruction and fulfillment of art" and sought to pick up the leftover pieces from Dadaism.[121]

Many followers of today's semiotic disobedience take Debord as their inspiration.[122] Debord wrote a powerful essay called *The Society of the Spectacle* that comprised a series of vignettes on contemporary society and the role of the media in everyday life.[123] In an observation that is central to the Situationist philosophy, Debord argued that "[a]ll that once was directly lived has become mere representation."[124] Individuals continually and passively consume the spectacle, so much so that it becomes a replacement for ordinary life activities.[125] The Situationists, like many semiotic disobedients today, were motivated in part by a desire to expose the "emptiness of everyday life in the modern world," which they attributed, following Marx, to the rise of consumption.[126] Consumption, from their point of view, had eclipsed alternative definitions of happiness,

---

120. *Id.*

121. McDonough, *supra* note 117, at ix.

122. *See, e.g.*, Rebecca Schneider, *Nomadmedia: On Critical Art Ensemble*, 44 DRAMA REV. 120, 126 (2000); Duncan Campbell, *Subvertise, Don't Advertise*, GUARDIAN, Oct. 9, 2000, at 8.

123. GUY DEBORD, THE SOCIETY OF THE SPECTACLE (Donald Nicholson-Smith trans. Zone Books 1999) (1967).

124. *Id*. at 12; *see also* Ball, *supra* note 117, at 28 ("One does not buy objects: one buys images connected to them. One does not buy the utility of goods; one buys the evanescent experience of ownership. Everywhere, one buys the spectacle.").

125. "It is not just that the relationship to commodities is now plain to see—commodities are now *all* that there is to see; the world we see is the world of the commodity." DEBORD, *supra* note 123, at 29.

126. Greil Marcus, *The Long Walk of the Situationist International*, *in* GUY DEBORD AND THE SITUATIONIST INTERNATIONAL, *supra* note 115, at 1, 3; *see also* Ball, *supra* note 117, at 28 ("The first phases of the domination of the economy over social life had brought into the definition of all human realization an obvious degradation of *being* into *having*. The present phase of total occupation of social life by the accumulated results of the economy leads to a generalized sliding of *having* into *appearing*, from which all actual 'having' must draw its immediate prestige and its ultimate function.") (quoting the 1970 anonymous translation of THE SOCIETY OF THE SPECTACLE, thesis no. 17).

Wash U Law Repository

freedom, and selfhood.[127] In passively consuming spectacles, they argued, one is separated from actively producing one's life.[128] By this process, workers become separated from the products of their labor, art is separated from life, and spheres of production become separated from consumption.[129]

Consequently, in May 1968 the Situationists called for a new type of political engagement, a "*détournement*," which they defined as an image, statement, or action that was lifted from its preexisting context and given new meaning by the activities of the artist.[130] *Détournement*, which was also defined as a turnaround or diversion of subversion, concentrated upon the reuse of old concepts in a new formation. The idea was that "nothing was inevitable because everything could be hijacked."[131] Using this principle, they used manifestos, broadsheets, montages, pranks, disinformation, and disruption to their advantage.[132]

Debord's statements have powerfully influenced semiotic disobedience.[133] In order for semiotic disobedience to be truly effective, some argue, there is a particular need for the puncturing of the tangible as opposed to the intangible. If society has become organized based on image and appearance, the singular mode of resistance becomes, as the Situationists suggest, "the puncturing of appearance," that is, the ability to transform speech and action into a new meaning.[134] Borrowing or copying

---

127. *See* Marcus, *supra* note 126, at 3.

128. *See id.*

129. *Id.* at 113.

130. KLEIN, *supra* note 10, at 282.

131. Anthony Paul Farley, *The Poetics of Colorlined Space*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 135 (Francisco Valdes et al. eds., 2002) (citing GUY DEBORD, THE SOCIETY OF THE SPECTACLE 123 (1967)).

132. Charles Shaar Murray, *Books: Never Mind the Boulevards*, INDEPENDENT, July 14, 2001, at 11 (reviewing ANDREW CAPE, THE GAME OF WAR: THE LIFE AND DEATH OF GUY DEBORD). For example, working with another artist, Asger Jorn, Guy Debord produced a work, *Mémoires*, that consisted of an entire book of elements copied from other works, replete with sentence fragments, superimposed texts, with the print in all directions, and bound in a sandpaper cover so as to injure adjoining works. *See* Ball, *supra* note 117, at 32 (describing *Mémoires*).

133. *See* Ball, *supra* note 117, at 25, stating as follows:

> What's more, the situationist program of cultural infidelity and sabotage has, over a relatively brief period of time, been massively incorporated into styles of discursive production (art, literature, cinema) and even, in wider areas of exchange, into methods of product development and marketing strategies in the consumer economy. It sounds like a familiar story: what was once subversive now turns a profit. Yet there is more. The situationists, as we will see, did not themselves become marketable; rather, they taught an ensuing generation how to recycle the detritus of official learning; how to reinscribe texts, figures, and artifacts so as to empower them with new meanings; and, despite their precautions, how to make new products out of the leftovers of the commodity economy.

134. Marcus, *supra* note 126, at 12.

an image is not enough, a true semiotic disobedient would say; true resistance requires the very puncturing of the sign itself. "We do not want to work toward the spectacle of the end of the world," Debord wrote, "but toward the end of the world of the spectacle."[135]

In many ways, semiotic disobedience follows this basic expressive trajectory—converting privately owned property into openings for further conversation. For some forms of semiotic disobedience, however, altering the tangible message is a necessary facet of subverting it. In each example, a law is actively transgressed, a tangible border destroyed, a property assertively converted without apology and with no recourse or remedy. A message is interrupted, subverted, and then recoded. These works are not self-created; they rely upon altering, and transgressing, the tangible borders of privately owned property.

Consider, for example, a representative perspective that helps us to theorize semiotic disobedience, an essay entitled *Vandalism Is Art*,[136] which widely circulated the Internet a few years ago. In this essay, Andrew Stillman describes the day after the memorable protests in Seattle against the World Trade Organization as a "post-capitalist gallery," and (almost reverently) describes a series of acts of vandalism, imbuing each with immense expressive significance.[137] While contemporary definitions of vandalism focus on the element of intentional defacement, Stillman exhorts the reader to look deeper, to recognize that vandalism, too, carries expressive elements.[138] "Everywhere," Stillman writes, "there are flags adorned with new symbols . . . dozens of acts of destruction, each loaded with aesthetic and social importance."[139] While vandalism is traditionally defined as the defacement of property owned by others, Stillman argues that through these acts of re-creative criminality, vandalism becomes a way to challenge dominant commercial meaning and consumer culture.[140] "Vandalism is art," he writes, "when art can no longer rescue meaning from the overwhelming absurdity of present material conditions."[141] He continues, "Could any art form of our age offer a shred of hope for escape without a direct confrontation with property, the core value around which

135. *Editorial Notes: The Meaning of Decay in Art*, *in* GUY DEBORD AND THE SITUATIONIST INTERNATIONAL, *supra* note 115, at 93.

136. *See Vandalism Is Art*, ADBUSTERS MAG., Spring 2000, at 45 (based on a philosophical essay by Andrew Stillman).

137. *Id*.

138. *See id.*

139. *Id.*

140. *See id.*

141. *Id*.

Wash U Law Repository

each of us is driven to build a sense of self."[142] For Stillman, much like Debord, vandalism becomes a form of *détournement*, a way to recapture the self that has been lost or commodified by advertising and the pull of seductive marketing.

By actively reinscribing privately owned property—indeed, by exposing the "true" message of the corporation—semiotic disobedience (of the kind Stillman suggests) attempts to convert a private act of criminal rebellion into a publicly declarative act of consumer rehabilitation. Each act of vandalism, Stillman suggests, complicates the line between speech and conduct, between authentic speech and commodification, and between speaker and audience.[143] Each act of vandalism, therefore, openly challenges authority through its perceived elevation of speech over tangible property.[144]

Although I raise Stillman's essay as a representative example of the theory behind semiotic disobedience, I do not necessarily agree with his premises or his conclusions. Nevertheless, Stillman's points are deeply relevant to exploring how semiotic disobedience occupies a place that destabilizes the seemingly "natural" division between the law of property and intellectual property. As Stillman's observations suggest, and as the AIM painting of Plymouth Rock demonstrated, the label "vandalism" suggests an important choice between overlapping properties, between tangible property and intangible expression. We use the label of vandalism in traditional terms to describe expression that is, ironically, devoid of any expressive value; work that is deemed "vandalism" or "graffiti" is considered to be a symptom of public blight, a sign of angry, wayward youth and criminality. Rarely are such projects explored—or even valued—for their expressive significance. And this is what makes Stillman's essay so poignant. Stillman imbues these acts with a value that is deeply and intimately linked to dialogue and resistance. The difference between his account and the account of others is that his theory requires a sublimination of tangible property in favor of the intangible essence of expression, instead of the reverse. Indeed, for Stillman, the location of expression on privately owned property is yet another emblem of its transgressive potential, a *tabula rasa* that both enables, and creates, its intended message of subversion.

---

142. *Id.*
143. *See id.*
144. *See id.*

2. *The Semiology of Disobedience*

As I suggested earlier, it is far too simplistic to write off these projects as examples of anarchic pranksterism alone, even though the urge to do so is seductive in its simplicity. While I do not take issue with the law's decision to penalize such behavior in appropriate cases, I also want to suggest the need for a different vantage point from which to rethink the relationship between semiotic disobedience, criminal law, and expression. Instead of merely characterizing semiotic disobedience as a clever "broken window" of criminality, it might be far more instructive for scholars to dissect and pull apart the various facets—discursive, legal, artistic, and semiotic—that operate beneath its subtext. Perhaps the most critical facet involves understanding how it simultaneously decodes and recodes certain signs through its manipulation of both tangible and intangible properties within language itself. As one commentator has argued, these practices might be considered a kind of "guerrilla semiotics" that deciphers "the signs and symbols that constitute a culture's secret language."[145] While Part II discusses the specific role of intellectual property law in facilitating the creation of semiotic disobedience, this section aims to capture the linguistic structure behind semiotic disobedience, and to situate it within a context that helps us better understand its importance within contemporary discourse and thought.[146]

The great linguist Ferdinand de Saussure offered a useful taxonomy of language wherein all language is context; relationships between signs, images, and the meanings that they suggest are entirely arbitrary.[147] Although the full complexity of de Saussure's work is beyond the scope of this Article, it is important to identify his central theoretical contributions since they form the basis for the study of both structural and post-

---

145. Mark Dery's Pyrotechnic Insanitarium, *supra* note 99, and stating further:

> That is not to say that all of the jammers . . . knowingly derive their ideas from semiotics or are even familiar with it, only that their ad hoc approach to cultural analysis has much in common with the semiotician's attempt to 'read between the lines' of culture considered as a text.

Id.

146. Semiotics involves the study of signs in society and focuses on exploring the question of how both verbal and visual signs communicate certain meanings. *See generally* ROLAND BARTHES, ELEMENTS OF SEMIOLOGY (Annette Lavers & Colin Smith trans., Hill & Wang 2d prtg. 1977) (1964); ROLAND BARTHES, MYTHOLOGIES (Annette Lavers trans., 1972); UMBERTO ECO, A THEORY OF SEMIOTICS (1976); FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally et al. eds., 1966) (1916).

147. *See* DE SAUSSURE, *supra* note 146, at 67. De Saussure has long been considered one of the founders of structuralist thought; his work concentrates on the underlying relationships between cultural texts and language. *See* ROBERT GOLDMAN, READING ADS SOCIALLY 5 (1992).

Wash U Law Repository

structural means of analyzing language and signs, and ultimately play a key theoretical role in the study of semiotic disobedience.

In order to create differentiations between signs, Saussure argued that cultural products act to break meanings down into signifieds and signifiers.[148] The *signifier* is the trademark or brand; it can be a word, picture, sound, or object, like the term "cat."[149] In contrast, the *signified* is a meaning, mental image, or concept that is suggested by the signifier, like the image of a cat itself.[150] There is, however, no essential connection between signifiers and signifieds, according to de Saussure; meanings are suggested by the process of referencing other meanings and values that already exist.[151]

Since a product, at least initially, has no "meaning," it must acquire value through an association with a person or object that already has some meaning to the consumer.[152] To protect this association, then, advertising uses intellectual property—trademarks, copyrighted works, and the like—as a visual vehicle or code to evoke common threads of emotions and thereby connect consumers to the psychological essence at hand.[153] Intellectual property law, as I discuss further in Part II, operates as a vessel that protects the commodification of the social meaning behind a brand, product, or corporation. As some theorists have argued, advertising also serves as a vehicle to add value to products; ads "arrange, organize, and steer meanings into signs that can be inscribed on products."[154] As Robert Goldman writes, "[a]ds tend to invite us to step into the 'space' of the ad to try on the social self we might become if we wore the product image."[155] This process has operated largely like a miniature political economy. Advertising commodifies certain signs in order to build a "currency" of sign values, thereby permitting the value of one thing to be expressed in terms of another.[156] And, in turn, an advertisement suggests that by purchasing a good one acquires the symbolic properties of that good as well.[157] As a result, various advertising theorists have argued that

148. DE SAUSSURE, *supra* note 146.
149. *See id.* at 65–67.
150. *See id*. at 65–67.
151. *See id*. at 67.
152. JUDITH WILLIAMSON, DECODING ADVERTISEMENTS: IDEOLOGY AND MEANING IN ADVERTISING 31 (1978).
153. *See* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 681–82 (2004).
154. GOLDMAN, *supra* note 147.
155. *Id*. at 3.
156. *See id*. at 6, 18.
157. *See id*. at 18.

commodities have no fixed meanings defined by financial value; instead, they have become commodity-signs.[158] A commodity-sign is the image that is attached to a product. Goldman offers, for example, a Rolex watch supplemented by an image of affluent status.[159] As the Rolex watch becomes a sign of affluence, rather than a functional instrument, its sign value eclipses its utility as a timepiece.[160]

This system has both economic and discursive implications—advertising comprises a system of commodity-sign production that is designed to increase the exchange value of commodities by differentiating the meanings associated with each commodity.[161] Meanings and psychological associations are subtly encoded within these systems, encompassing both the institutional systems that produce meaning, as well as the language, style, and performance of the advertisement itself.[162] As other authors observe:

> Constructing this currency of commodity images requires that advertisements take the form of semiotic equations into which disconnected signifiers and signifieds are entered and then recombined to create new equivalencies. Ads invite viewers to perceive an exchange between otherwise incommensurate meaning systems, and they must be structured to steer interpretation in that direction if they are to fulfill their purpose.[163]

As a result of these consistent themes, appearing over and over again in common language, the consumer is guided by an underlying structure that results from a series of homogeneous conventions that, over time, continue to create stable associations between the signifier and the signified.[164] Regarding traffic lights, for example, there is no necessary relationship

---

158. *See id.* at 18.

159. *See id.* at 5–6.

160. *See id.* at 6.

161. *Id.* at 5. For an excellent treatment of semiotics in trademark law that reaches similar conclusions, see Beebe, *supra* note 153.

162. *See* Stuart Hall, *Encoding/Decoding*, *in* CULTURE, MEDIA, LANGUAGE (Stuart Hall et al. eds., 1980), *reprinted in* MEDIA AND CULTURAL STUDIES 166 (Meenakshi Gigi Durham & Douglas M. Kellner eds., 2001).

163. ROBERT GOLDMAN & STEPHEN PAPSON, SIGN WARS: THE CLUTTERED LANDSCAPE OF ADVERTISING 2 (1996).

164. *See* John Storey, *Introduction* to CULTURAL THEORY AND POPULAR CULTURE, *supra* note 103, at 101, 102. As Storey writes on de Saussure, "[i]t is the homogeneity of the underlying structure which makes the heterogeneity of the performance possible." *Id.* at 101. Storey here is referring to the need for consistency regarding the ordering principles, norms, and symbols of language and communication, what de Saussure referred to as "*langue*." *Id.* In contrast, de Saussure used the term "*parole*" to refer to the actual utterance, the actual language itself. *Id.* The relationship between these two underlying entities, *langue* and *parole*, contributes to the creation of meaning in society. *See id.*; DE SAUSSURE, *supra* note 146, at 9.

Wash U Law Repository

between the command "go" and the color green; the audience creates these associations through the consistent association between the two, and through distinguishing the color green from other possible substitutes.[165] Our system of language operates through this double action of relying both on the consistency of established conventions and on the oppositional effect of creating a sense of differentiation between the terms themselves (e.g., green becomes distinguished from other colors, further entrenching its command-like meaning).[166] This is the structural basis of semiology, a system that remains exploited by the advertising producer, and then actively challenged and dismantled by semiotic disobedience.

a. Decoding the Myths of Advertising

Our system of advertising operates largely via private, sovereign systems that lie wholly within the authority of the corporate producer. As a result of the copious use of signs and symbols through branding, we learn to associate certain *consumer* identities with certain *corporate* identities.[167] Thus, understanding the seductive pull of signs, particularly within advertising, constitutes the first step in decoding a politic of semiotic disobedience because such excavations lay the groundwork necessary to actively dismantle the seemingly "natural" pull of brands and consumer associations. In the 1950s, building on Saussurean logic, Roland Barthes, in a seminal book titled *Mythologies*, took on this central question and argued for the existence of an additional organizing principle that depended on the circulation of myth for the inculcation of meaning within advertising.[168] This additional level of meaning, Barthes argued, circulates underneath this primary system, turning something culturally unstable like images and expression into something that seemed "natural" or "taken-for-granted."[169]

Consider this example, where Barthes describes the following image from a magazine:

> On the cover, a young Negro in a French uniform is saluting, with his eyes uplifted, probably fixed on a fold of the tricolour. All this is

165. Storey, *supra* note 164, at 102.
166. *Id.* at 102.
167. *See* Katyal, Anti-Branding, *supra* note 76.
168. BARTHES, *supra* note 146; *see also* Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1394–95 (2005).
169. Roland Barthes, *Myth Today*, *in* MYTHOLOGIES, *supra* note 146, *reprinted in* CULTURAL THEORY AND POPULAR CULTURE, *supra* note 103, at 107, 107–12.

> the *meaning* of the picture. But, whether naïvely or not, I see very well what it signifies to me: that France is a great Empire, that all her sons, without any colour discrimination, faithfully serve under her flag, and that there is no better answer to the detractors of an alleged colonialism than the zeal shown by this Negro in serving his so-called oppressors. I am therefore again faced with a greater semiological system: there is a signifier, itself already formed with a previous system (*a black soldier is giving the French salute*); there is a signified (it is here a purposeful mixture of Frenchness and militariness); finally, there is a presence of the signified through the signifier.[170]

The notion of myth, Barthes writes, circulates throughout the image, propagating a notion that rewrites the notion of empire, just as it posits the very *notion of empire itself* as a natural statement of fact.[171] The advertisement's underlying myth has an intentional force behind its naturalizing tendency. As Barthes points out, it is "a frozen speech: at the moment of reaching me, it suspends itself, turns away and assumes the look of a generality: it stiffens, it makes itself look neutral and innocent."[172] This moment of suspension within the advertisement, coupled with its generalizing tendencies, contributes to the circulation of myth, but it depends on consumer motivation for its success. As Barthes writes, "[m]otivation is necessary to the very duplicity of myth: myth plays on the analogy between meaning and form, there is no myth without motivated form."[173]

It is the notion of myth, both the production and circulation of it, that semiotic disobedience aims to decode and then dismantle. Barthes, like many others writing within this school, is careful to delineate between the passive reader and an active one—a point of exigency that captures the possibility of semiotic disobedience.[174] In most cases, the reader (referred to by Barthes as a "myth-consumer") passively inculcates the myth in consuming the image, solidifying its "naturalizing" tendencies as an image of pure, depoliticized representation.[175]

---

170. *Id.* at 111.
171. *Id.* at 112.
172. *Id.*
173. *Id.*
174. *See id.* at 114.
175. *Id.* at 115 ("Myth does not deny things, on the contrary, its function is to talk about them; simply, it purifies them, it makes them innocent, it gives them a natural and eternal justification, it gives them a clarity which is not that of an explanation but that of a statement of fact.").

Wash U Law Repository

Yet this need not always be the case. As Barthes suggests, a consumer can both decode—and then recode—the advertisement. Returning to the image of the French soldier, for example, Barthes observes, "[i]f I read the Negro-saluting as symbol pure and simple of imperiality, I must renounce the reality of the picture, it discredits itself in my eyes when it becomes an instrument."[176] Similarly, Barthes observes that "if I decipher the Negro's salute as an alibi of coloniality, I shatter the myth even more surely by the obviousness of its motivation."[177] As Barthes suggests, the audience has a choice to make: to propogate or to resist the advertising's mythologizing tendencies. To read the advertisement as an imperial or colonizing force is to irreducibly eliminate its mythologizing qualities and excise it of its seductive potential, thereby decoding its subtle message.

b. Recoding the Signs of Advertising

Like the active consumer discussed above, semiotic disobedience aims to decode the impurities within visual culture, uncovering the motivational impetus behind corporate creations and activating the notion of audience participation. As soon as the moment of broadcast or publication occurs, it is up to the viewer to actively decode these meanings; the viewer actively receives and interprets the encoded meanings within a given text.[178] This opens the door for a recoding of the advertisement based on audience participation.

However, whereas de Saussure identified an underlying structure to language and meaning, and Barthes excavated its mythologizing tendencies, semiotic disobedience takes most of its inspiration from post-structuralist thought, which takes issue with the whole notion of "meaning" itself.[179] According to post-structuralist theory, visual signs are susceptible to a wide variety of interpretations—they are never fixed, but always dependent on the response of the viewer, who engages in a complex process of decoding the meanings that are often suggested by the producer.[180] Whereas structuralist thought tended to ascribe far more power and motivation to the dominant forces that govern language, post-structuralist thought lends a particularly pronounced support in favor of

176. *Id*. at 114.
177. *Id.*
178. *See id.*
179. *See* Storey, *supra* note 164, at 103–05 (explaining poststructuralism).
180. *See* Stephen Bean, The Efficacy of Non-Verbal Images in Multimedia (manuscript on file with author).

the audience's agency in receiving, resisting, transforming, and deciphering particular meanings.

According to prominent media theorist Stuart Hall, a consumer can choose between three possible modes of interpretation.[181] First, a consumer can choose to adopt the dominant (or "hegemonic") reading and fully accept, adopt, and reproduce the preferred reading of the producer or author.[182] Second, a consumer might choose to adopt an oppositional (or "counter-hegemonic") reading whereby the reader understands but then rejects the proffered interpretation—e.g., a situation where a person watches a television show produced by a political party that they normally vote against.[183] A third possibility in Hall's framework involves a reader who adopts a *negotiated* reading, whereby the reader might choose to adopt the preferred reading, but also might resist and modify the code to reflect his or her "own positions, experiences, and interests."[184] A final type of audience response is offered by the semiotician Umberto Eco, who adds the possibility of *aberrant decoding*, which involves a situation where an audience member might read the text in an unpredicted manner that produces a deviant meaning.[185] Aberrant decoding is largely unintentional, as compared to the active, subversive forms of resistance that occupy some of Hall's defining categories.[186]

Enter semiotic disobedience, which both transcends and challenges this formulation. Semiotic disobedience adopts Hall's third position of negotiation, but it does so in a way that simultaneously "decodes" and "recodes" a given text or image. On the one hand, it seeks to *decode* along the lines Barthes suggests, by revealing a hidden message. But, on the other, it also seeks to *recode* by focusing on the importance of

---

181. *See* Hall, *supra* note 162, at 174–75.

182. *See id.*; *see also* Daniel Chandler, Semiotics for Beginners, http://www.aber.ac.uk/media/Documents/S4B/index.html (last visited Nov. 19, 2006) (follow "Encoding/Decoding" hyperlink).

183. Chandler, *supra* note 182.

184. *Id.*

185. ECO, *supra* note 146, at 150 n.27; *see also* Philip J. Hanes, *The Advantages and Limitations of a Focus on Audience in Media Studies* (Apr. 2000), http://www.aber.uk/media/Students/pph9701.html. Author John Fiske offers the example of a young man who shows up to a job interview wearing blue jeans, thinking that they symbolize his social status, but then faces the interpretation of the interviewer, who regards his sartorial choice as a sign of resistance to convention. JOHN FISKE, INTRODUCTION TO COMMUNICATION STUDIES 78 (2d ed. 1990); *see also* Gary Genosko, *Communication and Cultural Studies*, http://www.chass.utoronto.ca/epc/srb/cyber/geo5.html (last visited Nov. 19, 2006).

186. Genosko, *supra* note 185. Eco uses these dynamics to argue for a strategy of "semiotic guerrilla warfare," which he interprets in ways that mirror Fiske's account of semiotic democracy. ECO, *supra* note 146, at 150 n.27. Eco argues for the audience to choose its own manner and mode of interpretation in opposition to a strategy of coding, which, in Eco's view, "strives to render messages redundant in order to secure interpretation according to pre-established plans." ECO, *supra* note 146, at 150 n.2.

Wash U Law Repository

reinterpreting signs and images in ways that subtly reveal the need for consumers to actively "talk back" to the hidden codes within a text.

According to Michel de Certeau, author of the text, *The Practice of Everyday Life*, consumers are forever in the process of actively reworking seemingly established rules and conventions.[187] To explain this process, de Certeau draws upon the experiences of indigenous individuals during the period of Spanish colonization, who continued to reflect a kind of modified interpretation of the colonial conventions that they were expected to imitate:

> [T]he ambiguity that subverted from within the Spanish colonizers' 'success' in imposing their own culture on the indigenous Indians is well known. Submissive, and even consenting to their subjection, the Indians nevertheless often *made of* the rituals, representations, and laws imposed on them something quite different from what their conquerors had in mind; they subverted them not by rejecting or altering them, but by using them with respect to ends and references foreign to the system they had no choice but to accept. They were *other* within the very colonization that outwardly assimilated them; their use of the dominant social order deflected its power, which they lacked the means to challenge; they escaped it without leaving it.[188]

De Certeau's observations serve as the critical foundation for Fiske's own creation of the notion of "semiotic democracy." Fiske captures the power of the semiotic system, describing it as a homogenizing force that, like conventions within language, continually attempts to centralize its power by maintaining a system that suggests coherence and consensus.[189] But, like de Certeau, Foucault, and others, Fiske is careful to protect the notion of resistance by suggesting the power of the reader to construct meanings and interpretations that differ from those proposed by the dominating structure.[190] "[T]he origins of resistance," Fiske writes, "lie not just in the social experience of subordination, but in the sense people make of it."[191]

Both Fiske and de Certeau, quite masterfully, capture at least part of the ongoing struggle underlying AIM's pronounced, proprietary

---

187. MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE xii (Steven F. Randall trans., 1984).

188. *Id.* at xiii.

189. John Fiske, *The Popular Economy*, *in* CULTURAL THEORY AND POPULAR CULTURE, *supra* note 103, at 495, 502.

190. *Id.*

191. *Id.* at 503.

disobedience, and today's strategies of consumer resistance. Although de Certeau focuses mostly on the tactics of consumer recoding and reappropriation in the everyday lives of consumers, his observations also extend to the work of today's semiotic disobedience, which demonstrates a similar departure from the mythologizing tendencies of consumerism. These practices of reappropriation, de Certeau is careful to observe, are not meant solely to decode the disciplinary processes that consumers are subjected to, "but rather to bring to light the clandestine forms taken by the dispersed, tactical and makeshift creativity of groups or individuals already caught in the nets of 'discipline.'"[192]

Similarly, rather than honoring the power of intellectual property protections to define certain meanings, semiotic disobedience demonstrates precisely the value of contesting them entirely. "The more [social meanings] appear natural, or necessary, or uncontested, or invisible," Lawrence Lessig has written, "the more powerful or unavoidable or natural social meanings drawn from them appear to be."[193] However, Lessig is also careful to note that the converse is true as well: "the more contested or contingent, the less powerful meanings appear to be."[194] Thus, in the paradigmatic example of semiotic disobedience—billboard occupation—the alteration of property, through appropriation or vandalism, is used in order to propagate an expressive message that weakens the "authorized codes" of meaning.[195] As subculture expert Dick Hebdige observes:

> [C]ommodities can be symbolically 'repossessed' in everyday life, and endowed with implicitly oppositional meanings, by the very groups who originally produced them. The symbiosis in which ideology and social order, production and reproduction, are linked is then neither fixed nor guaranteed. It can be prised open. The consensus can be fractured, challenged, overruled, and resistance to the groups in dominance cannot always be lightly dismissed or automatically incorporated.[196]

Semiotic disobedience draws its legitimacy from replacing or mutilating a sign, but it does so in order to communicate an intangible, expressive message by occupying a previous one. It subverts the intended signal that is offered by the advertising agency—the use of technological overlays,

192. DE CERTEAU, *supra* note 187, at xiv–xv.
193. Lessig, *supra* note 47, at 960–61.
194. *Id*. at 961.
195. *See* DICK HEBDIGE, SUBCULTURE: THE MEANING OF STYLE 2, 91 (1981).
196. *Id.* at 16–17.

Wash U Law Repository

clever design, and ingenious semantic twists are all employed in creating a new interpretation of the existing advertisement. It pierces the merging of the signifier and the signified, and instead attempts to create an alternative system of meaning in the process, one that flourishes in the absence of legal protections.

II. AESTHETIC DISCRIMINATION IN INTELLECTUAL PROPERTY

Law—intellectual property, property, speech, and the like—is inexorably tied to the emerging relationship between semiotic democracy and disobedience.[197] In this Part, I will highlight how the laws of intellectual property both enable and silence these different formulations. As I will show, the laws that govern artistic creativity—copyright, moral rights, trademark law, and the like—are silently animated by an almost mystical reverence for intellectual property's sovereign boundaries, as well as the sovereign "code" or "meaning" contained in the original work. Contrary to what many had hoped, intellectual property protections have largely failed to democratize the marketplace of speech; instead, they have permitted the boundaries of democratic culture to become deeply shadowed by the proprietary reach of copyright and trademark ownership.[198] As systems of private ownership over symbols expand, fair use defenses become narrowed, leaving more and more individuals without recourse to a system of expression that protects the diversity of audience response.

The dominant theme within real property law, as I have already suggested, implicitly draws upon the broken window theory, which suggests that expression that falls outside of the boundaries of commodified property (along the lines of AIM's painting of Plymouth Rock) represents the breakdown of the order of law, and as such, must be suppressed in favor of keeping some semblance of control over the urban population. One book, implicitly supporting this view, begins with the observation: "We all know the vandal. He is somebody else. . . . The stereotype . . . is that of a working-class male adolescent, and his act is the 'wanton,' 'senseless,' or 'motiveless' destruction of property, usually public property of some kind."[199]

---

197. *Cf.* GOLDMAN, *supra* note 147, at 20.

198. *See, e.g.*, Neil Weinstock Natanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996); Van Houweling, *supra* note 32, at 1537–38.

199. Colin Ward, *Introduction* to VANDALISM 13, 13 (Colin Ward ed., 1973). Yet not all rules prohibiting deliberate destruction of property are enforced, and not all deliberate destruction of

Yet this position, when viewed through another vantage point, reveals itself as far too simplistic and reductive. One of the most powerful critiques of the broken window hypothesis has been eloquently articulated by Bernard Harcourt, who argues, along Foucaultian lines, for a deeper interrogation of the oppositional bipolarity between order and disorder.[200] In his rethinking of the broken windows hypothesis, Harcourt asks the reader to decode the mythologizing tendencies that operate as a subtext beneath the common signifiers of criminality. Consider, at the outset, James Q. Wilson's description of the "classic" cues of public disorder:

> A noisy drunk, a rowdy teenager shouting or racing his car in the middle of the night, a loud radio in the apartment next door, a panhandler soliciting money from passersby, persons wearing eccentric clothes and unusual hair styles loitering in public places—all these are examples of behavior which "the public" (an onlooker, a neighbor, the community at large) may disapprove of.[201]

> A teenager hanging out on a street corner late at night, especially one dressed in an eccentric manner, a Negro wearing a "conk rag" (a piece of cloth tied around the head to hold flat hair being "processed"–that is, straightened), girls in short skirts and boys in long hair parked in a flashy car talking loudly to friends on the curb, or interracial couples—all of these are seen by many police officers as persons displaying unconventional and improper behavior.[202]

While Wilson penned his observations in 1968, many of his observations still suggest a penetrating tendency to divide the world into categorical distinctions between "orderly" and "disorderly" forms of representation.[203] As Harcourt observes, Wilson fails to interrogate the adequacy, or even the necessity, of categorization itself.[204] Harcourt then forces the reader to perform the interrogation that Wilson avoids, asking:

---

property falls under the singular category of "vandalism." As Stanley Cohen, an expert on vandalism, writes:

> While the rule breaker himself might be looked upon as deviant or pathological, this is because of the sort of person he is thought to be or the sort of views he is thought to hold, rather than because of his act of writing about himself or his views on a public wall. Thus the person who indicates on the wall of a public toilet his desire for an obscure sexual fetish, is regarded as a 'pervert' and not as a vandal."

Stanley Cohen, *Property Destruction: Motives and Meanings*, *in* VANDALISM, *supra*, at 23, 27.

200. *See* HARCOURT, *supra* note 38, at 14–55.
201. *Id.* at 16 (quoting Wilson).
202. *Id.* at 16 (quoting Wilson).
203. *Id.* at 17.
204. *Id.* at 17.

Wash U Law Repository

> But how is it that the line between the disorderly and law abiders is drawn? . . . Why is it that eccentric clothes, youthful exuberance, or loitering is disorderly? What are the distinctions between difference, eccentricity, disorder, and criminality?[205]

Along these same lines, Harcourt suggests that Wilson's categorization is both underinclusive and overinclusive in its causal relationship between disorder and criminality. He points out, for example, that Wilson fails to explain why he focuses on street disorder, rather than other, equally destabilizing forms of criminality (such as avoiding taxes or paying individuals under the table).[206] At the same time, as Harcourt suggests, the meaning of the signifiers suggested by Wilson—boys with long hair, girls in short skirts, rowdy teenagers, drunks, and the like—could also signal, not criminality, but an alternative subculture, an oppositional movement, or, in Harcourt's words, "artistic ferment."[207] Following Harcourt's insights, inasmuch as the "broken window" hypothesis operates as a symbol of disorder, it also operates, simultaneously, both as a symptom and response to a perceived need to divide the world into polarities between "orderly" and "disorderly" forms of expression.

The same tendency operates within intellectual property law as well. "Orderly" forms of expression receive protection through copyright and trademark law, whereas "disorderly" forms of expression (like infringing speech, unauthorized derivative works, or other forms of appropriation) are often relegated to a category that actively refrains from according them any expressive value. However, just as Harcourt's observations entreat us to rethink the metaphor behind the broken window in criminal law, we might also recognize how intellectual property law's own categorizing tendencies might also elide a richer and more contextual consideration of the ways in which these polarities, collectively, may tend to narrow the boundaries of semiotic democracy, while expanding the boundaries of semiotic disobedience as a result.

As this section argues, as much as copyright and trademark law premise themselves on bipolar distinctions between tangible and intangible properties, the law's treatment of semiotic democracy actually reveals something that directly conflicts with the principles of our First Amendment: copyright and trademark law actually silence some forms of

---

205. *Id.* at 17.
206. *Id.* at 17.
207. *Id.* at 17; *see also id.* at 131 (applying his critiques directly to a study of vandalism in particular).

dissent in favor of a reverence for tangible properties over intangible speech. In other words, in failing to recognize a possible transition from property into speech, the law actively overlooks an important dialectical dimension in the relationship between real and intellectual property, subverting the latter for the former.

At the same time, intellectual property's allegiance to authorial sovereignty also necessarily generates an oppositional effect that takes its shape in the form of semiotic disobedience. As Michel Foucault famously observed, "[w]here there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power," signifying that disciplinary forces always unwittingly engender the forces of disobedience.[208] Within this context, the phenomenon of semiotic disobedience consciously draws attention to the underexplored linkages between civil disobedience and those who challenge intellectual property's frameworks. These moments of resistance become transformative, not merely because they expose the limits of legal regulation, but because they force us to confront the question of where expression ends and criminality begins. Relatedly, these moments also call upon us to explore the embedded marketplaces of expression within each paradigm and to dissect in particular ways how legal protection quietly orders and privileges certain kinds of metaphor and meaning over others.

In the first section, I will show how copyright law tends to offer a robust degree of protection both for the sovereignty of the message and the tangible work, despite the existence of limiting principles like the fair use and the first sale doctrines. In the second section, I demonstrate how these outcomes unwittingly pervert the regime of copyright by widening the boundaries of semiotic disobedience rather than democracy. The occurrence of market failures in these contexts allows works to take on a "broken window" effect where they become the tangible illustrations of the failures of semiotic democracy, potentially encouraging semiotic disobedience as a result.

A. The Sovereign Boundaries of Copyright

Typical accounts of property law are founded upon drawing persistent binary divisions: real and personal property are tangible, concrete, and material, in stark contrast to intellectual property, which is intangible, immaterial, and even ethereal in nature. These binary divisions have

208. *See* Michel Foucault, *Method*, *in* CULTURAL THEORY AND POPULAR CULTURE, *supra* note 103, at 163.

Wash U Law Repository

powerful legal consequences. Whereas property is considered exclusive, and thus rivalrous in nature, intellectual property premises its existence on unfixed boundaries, both spatially and reproductively. Yet, despite the fact that the original architecture of real, personal, and intellectual properties is premised upon drawing clear and oppositional distinctions between these categories, recent developments in intellectual property have tended to blur these divisions and to actively integrate theories of real property into the development of intellectual property.[209] In a famous essay written nearly eighty years ago, entitled *Property and Sovereignty*, Morris Cohen observed that ownership of private property involves far more than a tangible product or piece of land, but, instead, encompasses claims or entitlements over third parties, future income streams, and significant bargaining power.[210] His theory contributed to a robust vision of property rights, enabling owners to control the activities of third parties, and to exclude others from access except in limited, clearly circumscribed situations.[211]

Today, it might be said that the nonrivalrous nature of intellectual property has become steadfastly overshadowed by the quiet incorporation of Cohen's vision, enabling owners of intellectual property to control access to an ever-widening degree. For example, copyright law is premised on the rather tenuous balance of narrowly defining originality while expansively embracing the protection of derivative rights.[212] In recent years, copyright law has expanded both horizontally (through multiplication of the scope of derivative rights that apply to a single work) and vertically (as the length of time protecting such works has been extended into the future and past).[213] Such developments, as Neil Netanel has pointed out, have fostered a "speech hierarchy" that enables corporate entities to hold vast inventories of expressive works, and has placed a disproportionate burden on individuals and non-conglomerate speakers to obtain permission to use existing works.[214] Partly as a result of these developments, today's copyright owner, for example, has an increasingly

---

209. *See generally* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

210. *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8–14 (1927), *reprinted in* AMERICAN LEGAL REALISM 109, 112 (William W. Fisher III et al. eds., 1993).

211. *See id.*

212. *See* Note, *Originality*, 115 HARV. L. REV. 1988, 1994 (2002) (stating that appropriation art "blurs the line between originality and copying"); *see also* Niels B. Schaumann, *An Artist's Privilege*, 15 CARDOZO ARTS & ENT. L.J. 249, 254 n.16 (1997).

213. *See* Balkin, *supra* note 87, at 17.

214. *See* Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879, 1884 (2000).

robust right to exclude others from access,[215] to enjoy longer terms of protection,[216] to utilize a wider degree of ownership over derivative markets,[217] and to control the creation of derivative works that are based on a primary work.[218]

Part of the explanation for the emerging convergence between intellectual and real property stems from the genesis of copyright, which was predicated on a commitment to concepts of certainty, objectivity, and closure, all of which function principally to "delineate" and circumscribe particular objects of control.[219] The governing principle of copyright, advocates argue, is that it is designed specifically to encourage and promote the arts by creating legal and criminal barriers against unscrupulous pirates.[220] By protecting against free riding, it is said, copyright affords owners an ex ante incentive to create, since they can then reap profits from their creations, and protect their investments.[221] At the same time, however, copyright is limited by its own utilitarian imperative, set forth in Article I, Section 8, of the Constitution, which grants Congress the authority "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[222] Consequently, copyright's threshold requirements center on originality and fixation and then classify creations into one of several different types: pictorial, photographic, graphic, sculptural, applied or literary works.

Each of these categories, however, sows the seeds for the divergence between democracy and disobedience in intellectual property by drawing sovereign boundaries around copyrighted property. Even at the onset, the law extends its boundaries of copyright protection to certain types of material, expressive goods, and leaves other areas unprotected, even when they involve the same degree of creativity, tangibility, and fixation as any protected work. The former group becomes enfranchised—and therefore protected—and works that fall outside such protections are left bereft of any legal recognition.

---

215. *See* Julie E. Cohen, *DRM and Privacy*, 18 BERKELEY TECH. L.J. 575 (2003); Julie E. Cohen, *A Right To Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 1019–30 (1996); Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297 (2003).

216. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186 (2003).

217. *See infra* text accompanying notes 268–90.

218. *See* Anne Barron, *Copyright Law and the Claims of Art*, 4 INTELL. PROP. Q. 368, 381 (2002).

219. *Id.*

220. *See* Lemley, *supra* note 209, at 1052.

221. *See id*. at 1058–65.

222. U.S. CONST. art. I, § 8, cl. 8.

Wash U Law Repository

Consider originality. Definitions of originality stem from Lockean conceptions of labor, which provide a foundation for property ownership.[223] The basic structure of Locke's reasoning is that labor belongs to a particular person and when a person uses her labor to appropriate objects from the public commons, she has attached an ownership right to the objects in question.[224] Because of the intermingling of her labor with these objects, she may be said to have obtained a "property right" in the objects themselves.[225] European law, for example, developed a powerful notion of literary creations as the function of the author's personality, a projection of the author's being.[226]

Yet, curiously, the law recognizes only a one-sided form of creativity; creativity is only recognized, and therefore rewarded, to the extent that it produces a sovereign entity—a fixed, tangible artwork that bears the name of a clearly delineated author.[227] The creativity that inheres in works that fall outside of these categories—an unlicensed improvement to a preexisting work, for example—can be unrecognized by the laws of property, copyright, and even speech.[228] The result is an unspoken triumph of property over expression, but one that goes largely unrecognized and overlooked in the laws of each realm.

As many authors have observed, one of copyright's primary functions, along these lines, is to give voice to the "romantic" author. This involves an ideology in which authors are regarded as "uniquely sensitive souls, valiantly transcending the prosaic routines and necessities of everyday life to express their genius in works of the imagination . . . ."[229] Copyright law reflects these values by exchanging its proprietary protections for a showing of originality and fixation in a tangible medium.[230] The result is an unspoken emphasis on the sovereignty of an artwork—it is afforded a

---

223. *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993).

224. *Id.* at 1544–45.

225. *Id.* at 1545.

226. In England and the United States, literary property was considered to be "personal property," like chattels, rather than real property, like land or buildings. SUSAN STEWART, CRIMES OF WRITING 16 (1991).

227. Heymann, *supra* note 168.

228. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1000–29 (1997).

229. Barron, *supra* note 218, at 368. As Barron argues, it is "because of its commitment to the *genus*, as opposed to the *genius*—that copyright law is now so frequently confounded by contemporary practices in the visual arts that exceed the categories of painting and sculpture." *Id.* at 372 (citation omitted); *see also* Lemley, *supra* note 228, at 877.

230. *See* Barron, *supra* note 218, at 369 (citing Jaszi & Woodmansee, *infra* note 231, at 947–77).

kind of structural, artistic, and moral integrity that is both directly and indirectly supported by the copyright regime.

As Peter Jaszi and Martha Woodmansee have pointed out, the notion of the romantic author, with its requisite emphasis on fixation and originality, has tended to "reward certain producers and their creative products while devaluing" the creative work of others.[231] As Anne Barron observes, commenting on this observation, the trajectory of copyright law focuses almost wholly—indeed, excessively so—on the concept of authorship, to the exclusion of other forms of creative energy and expression.[232] Within this regime:

> [N]o copyright can exist in a work produced as a true collective enterprise (rather than by one or more identifiable or anonymous 'authors'); a work cannot be copyrighted unless it is 'fixed' [which excludes body art, land art, and performance art in general]; copyright does not extend to works that are not 'original' [which rules out the art of the readymade and appropriation art in general]; and copyright does not protect 'basic' components of cultural productions [and so radically limits the protection awarded to minimalist and conceptual art].[233]

As Barron has eloquently observed, copyright law's judgments have flowed from a dictionary of limited reference to determine the scope of protection, with no reference to whether these entities actually can claim the status of "art" itself.[234] If they are classified as "art," Barron observes, it is because their making or doing is accompanied by the strident argument that "this is art," inducing the audience towards assent.[235]

Fixation, another key requirement, is similarly exclusionary; "it has the consequence that any form of artistic endeavor which does not yield some *tangible* thing, or some record of an event, performance, or 'happening,' cannot be or generate anything that constitutes a work in law."[236] Barron attributes this failure directly to the power of certain interest groups to influence the range of protections afforded by copyright drafting and legislation.[237] However, as a result of this myopia, copyright law fails to

---

231. Peter Jaszi & Martha Woodmansee, *The Ethical Reaches of Authorship*, 95 S. ATLANTIC Q. 947, 948 (1996).
232. Barron, *supra* note 218, at 369.
233. *Id.* at 369 (quoting Jaszi & Woodmansee, *supra* note 231, at 369) (alterations in original).
234. *Id.* at 373–74.
235. *Id.* at 372.
236. *Id.* at 381.
237. *Id.* at 374.

Wash U Law Repository

accommodate artistic gestures that escape classification.[238] Despite the creative impulse that inspires the appropriation and reuse of various works, the laws of intellectual property—copyright, trademark, and the like—provide remarkably thin or negligible areas of protection for such negotiated readings to occur. These two factors—fixation and originality—contribute to a limited picture of protection for any kind of expressive appropriation, and pose significant hurdles for art that incorporates actual, original pieces into a new creation.

B. The Sovereign Boundaries of Art

Since its inception, copyright law has suffered from an internal paradox regarding the interaction of tangible and intangible property. On one hand, copyright law has limited the owner's ability to control the tangible product after it is sold because of doctrines like the first sale doctrine, which has permitted the resale of copyrighted items like books and movies.[239] On the other hand, however, the law establishes a wide berth of protection for the copyright owner with respect to the governance of derivative works—copyright law has slowly expanded the boundaries of derivative works to cover both tangible and intangible properties.[240] The widening arena of control afforded an author through copyright's expansion to derivative and moral rights affects the breadth of potential defenses that can be relied upon in negotiated recodings of copyrighted works.

1. Negotiating and Appropriating Resistance

As Part I explained, Stuart Hall's work revealed that individuals can respond to language by either adopting, opposing, or negotiating particular meanings.[241] Yet copyright and trademark law is almost startlingly focused on protecting the extremes of audience response: the law tends to protect individuals who either adopt or oppose (transform) particular meanings, with little attention paid towards negotiation. For example,

238. *Id.* at 379.

239. *See* 17 U.S.C. § 202 (2000) (explaining doctrine); Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F.3d 477 (9th Cir. 1994) (under the first sale doctrine, once the holder of an intellectual property right consents to the sale of particular copies of his or her work, he or she may not thereafter exercise distribution rights with respect to those copies); Indep. News Co. v. Williams, 293 F.2d 510 (3d Cir. 1961); Fawcett Publ'ns, Inc. v. Elliot Publ'g Co., 46 F. Supp. 717 (S.D.N.Y. 1942).

240. *See* text accompanying notes 268–90.

241. Hall, *supra* note 162.

copyright has an internal bias that is oriented specifically toward opposite poles: assimilation and transformation. Works that assimilate previous texts are considered derivative; works that transform previous texts are considered to be fair uses. Yet the law has little to say about encouraging the kind of creativity that falls between these two poles. The comparable narrowness of the fair use and first sale doctrines, particularly as compared to the widening array of cultural products that fall under the definition of derivative works, thus shrinks the boundaries of protected speech while expanding the universe of unprotected speech.[242]

The result is a perpetual dance of polarities within the marketplace of protected speech—one representation assimilates, the other transforms. While the fair use doctrine offers some protection for transformative works, the law offers no protection for works that appropriate or assimilate previous texts in more limited ways, which are usually considered to be unauthorized derivative works. Under the law's treatment of creativity, Hall's third category, that of *negotiation*, receives no protection even though it represents an important facet of audience participation and creative interactivity.[243]

This tension has remained hidden until recently, when it surfaced in a series of cases that involved works either that reproduced an image, or borrowed the material components of a preexisting work for use in a new creation. Consider satire as one example. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that some types of parody could be protected if they transformed the original work.[244] Yet the Court drew a firm line between parody and satire, noting that whereas "[p]arody needs to mimic an original to make its point . . . satire can stand on its own two feet and so requires justification for the very act of borrowing."[245] In practice, however, this distinction is practically unworkable. As Christine Bohannan points out, in the case of famous works it becomes impossible to distinguish whether the appropriative work is meant to comment on the original work (as in parody), or is used to comment on broader social issues (as in satire).[246]

---

242. *See, e.g.*, Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1401 (9th Cir. 1997) (finding that a book about the O.J. Simpson trial did not transform Seuss's original work); MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d. Cir. 1981) (noting that a parody of a song was not transformative of the original).

243. *See* Hall, *supra* note 162 and accompanying text.

244. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

245. *Id.* at 580–81.

246. *See generally* Christine Bohannan, Copyright Dilution (Aug. 10, 2005) (unpublished manuscript on file with author).

Wash U Law Repository

This distinction also means that works that serve classical First Amendment functions are left unprotected, particularly those that use trademarks and copyrighted works as instrumental tools in offering their criticism and commentary. As Robert Merges has persuasively argued, using a copyrighted work as a vehicular tool rather than as a target for commentary and criticism is even more deserving of fair use protections because it serves the goal of promoting more commentary on larger social issues.[247] Yet, curiously, copyright law draws a firm line between parody and satire, dividing the marketplace into two oppositional polarities, one protected and one prohibited. The first marketplace is characterized by the black and white polarity of protected derivative and transformative works; the second is characterized by "grey area" works like satire that fall between the two poles and are rendered unprotected by the laws of copyright.

Even aside from satire, the marketplace of speech reflects a strained shift towards assimilation, rather than diversification. A more productive way to think about this shift is in terms of three overlapping, and sometimes conflicting, property interests—those of the purchaser, the author, and the "appropriator" of a single work. Our English law system is premised on the idea that property is alienable; this principle is coupled with copyright's utilitarian rationale, which assumes that authors' and publishers' awards are determined by the marketplace.[248] Together, these principles support the idea that a copyrighted product is a commodity that is an integrable part of the private property system, which awards a private property interest to the purchaser of a work.[249] At the same time, however, this perspective can be viewed as in conflict with the Lockean labor-desert theory, which suggests that products of the mind should be governed by a robust property right owned by an original creator or author.[250] There is also a third, often overlooked, property interest that tends to appear in the law—that of the "appropriator" who seeks to utilize a work for expressive or transformative purposes.

Yet here, paradoxically, recent case law on the doctrinal limitations of copyright—fair use and the first sale doctrine—often permits the author or

---

247. Robert P. Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AM. INTELL. PROP. L. ASS'N Q.J. 305, 311–12 (1993); *see also* Sheldon N. Light, *Parody, Burlesque, and the Economic Rationale For Copyright*, 11 CONN. L. REV. 615 (1979); Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992).

248. Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 365–66 (1993).

249. *See id.*

250. *Id.* at 367–70.

creator to retain primary control over the other property interests at stake through the expansion of derivative rights to protect his or her interests.[251] Moral rights, additionally, can trump the purchaser's property interest, and the property interest of an appropriator is almost completely unrecognized in copyright law, unless it is for the purposes of transformative parody.[252]

Consider, for example, the law's treatment of appropriation art, which has been recognized as one of the most significant bodies of postmodern art.[253] In the 1970s, a number of artists, including performance artists, began to challenge basic categories of copyright law by reframing their work into a much more interactive experience between the audience and the artist through the use of readymade objects, mixed media, and video.[254] In most forms of appropriation art, an image (usually copyrighted) is borrowed from mass media, advertising, or other works of art and then recycled into a new work of art.[255] One common example is Andy Warhol's Campbell soup can; the image of a consumer label is taken, copied, and then radically expanded onto a canvas painting.[256] Many of these artists developed a politic based on the notion of oppositionality that actively interrogated the lines between legal and illegal art.[257] As art historian Gregory Sholette explains, "oppositional art actually dances in and out of dominant culture;" it comprises a series of fragmented moments in opposition that help to complicate the line between high and low art.[258]

---

251. *See* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 Mich. L. Rev. 1197, 1217 (1996) ("Derivative-works protection extends the copyright monopoly without generating significant incentives for creative activity."); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1269 (1997) ("Broad derivative rights ignore originality and personality interests of the appropriator in favor of the copyright owner, even when the copyright owner has little personality interests or even when the appropriator shows her creative 'genius' in her work.").

252. Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from* Campbell v. Acuff-Rose Music, Inc., 60 BROOK. L. REV. 1653, 1653–54 (1995); *see also* Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 291–93 (1988); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1730 (1988).

253. *See* ART AFTER MODERNISM: RETHINKING REPRESENTATIONS (Brian Wallis ed., 1984); Arjun Gupta, Comment, *"I'll Be Your Mirror"—Contemporary Art and the Role of Style in Copyright Infringement Analysis*, 31 U. DAYTON L. REV. 46 (2005); *see generally* Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1 (1992); E. Kenly Ames, Note, *Beyond* Rogers v. Koons*: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473 (1993).

254. *See* Netanel, *supra* note 248, at 371–72.

255. *See* William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1 (2000).

256. Ernst Beyeler & Georg Frei, *Introduction* to ANDY WARHOL: SERIES AND SINGLES 11, 23 (Fondation Beyeler ed., 2000); ANDY WARHOL, 365 TAKES: THE ANDY WARHOL MUSEUM COLLECTION (Staff of the Andy Warhol Museum eds., 2004).

257. *See* Richard Bolton, *Enlightened Self-Interest: The Avant-Garde in the '80s*, *in* ART, ACTIVISM, AND OPPOSITIONALITY 36 (Grant Kester ed., 1998).

258. Gregory Sholette, *Waking Up to Smell the Coffee: Reflections on Political Art Theory and*

Wash U Law Repository

Again, one might also note the profound parallel between these artists and the experiences of other individuals (often from a postcolonial vantage point) who challenged and altered the codes they were expected to adhere to, as the work of AIM and de Certeau suggests.[259] Despite its creative contribution and rich commentary on our cultural landscape, appropriation art has often fallen prey to a number of critical judgments. Sampling, either in collage or in music, has been found infringing in a host of contexts[260] due to its status as a derivative work of art.[261] In one famous case, the sculptor Jeffrey Koons was found to have infringed upon a photographer's depiction of a line of puppies in a notecard.[262] Rejecting Koons's fair use defense, the court observed: "[T]he essence of Rogers' photograph was copied nearly *in toto*, much more than would have been necessary even if the sculpture had been a parody of plaintiff's work. In short, it is not really the parody flag that appellants are sailing under, but rather the flag of piracy."[263]

Activism, *in* REIMAGING AMERICA: THE ARTS OF SOCIAL CHANGE 30 (Mark O'Brien & Craig Little eds., 1990).

259. *See supra* notes 44, 187 and accompanying text. The parallel between consumer and colonial resistance extends even to some appropriation artists. Consider the artist Coco Fusco, who commented in her essay accompanying the 1993 Whitney Biennial on the role of artists of color in reworking Western art history, which she described as a kind of "guerrilla warfare" that "articulates itself through semantic reversals . . . the process of infusing icons, objects and symbols with different meanings." *See* Coco Fusco, *Passionate Irreverence: The Cultural Politics of Identity*, *in* 1993 WHITNEY BIENNIAL 82–83 (1993). She also stated:

> [T]he best result of the cultural climate of the past decade has been the flourishing of a variety of artistic practices and perspectives, which testifies to the impossibility of reducing cultural identity to a simplistic paradigm. [These artists] look at Western . . . art history not to excise its racism but to excavate and play with symptomatic abuses and stereotypes, creating a counter-history by bouncing off negative images and teasing out hidden stories.

Id.

260. *See* Robert G. Sugarman & Joseph P. Salvo, *Sampling Litigation in the Limelight*, N.Y. L.J., Mar. 16, 1992, at 1. The first case in which sampling was definitely found to be an infringing activity was *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991). For more discussion of this case, see Randy S. Kravis, Comment, *Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 235–36 (1993).

261. 17 U.S.C. § 101 (2000) ("A 'derivative work' is a work based upon one or more preexisting works, such as a . . . musical arrangement . . . ."); *see generally* Amy B. Cohen, *When Does a Work Infringe the Derivative Works Right of a Copyright Owner?*, 17 CARDOZO ARTS & ENT. L.J. 623, 623–24 (examining the circuit split on art reproduction derivative works by discussing the different holdings in *Mirage Editions v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988), and *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997)); *see also* Anderson v. Stallone, 11 U.S.P.Q.2d (BNA) 1161, 1165 (C.D. Cal. 1989) (holding that Anderson had created a derivative work and infringed Stallone's copyright in the "Rocky" movies by writing a treatment using characters from the Rocky films).

262. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

263. *Id*. at 311.

As I argued in Part I, the study of semiotics suggests that the verbal and visual signs within language are entirely arbitrary—meanings can be unpacked, reframed, and pierced in new and inventive ways.[264] Yet in contrast, as the Koons case illustrates, copyright law consecrates these images according to the creator's original vision, allowing both verbal and visual works to attain an iconic status of mythic proportion.[265] Although the fair use doctrine does a fair amount to mitigate the harms of silencing verbal commentary and parody, it fails to protect visual works that are not completely transformative, or works that fall within a grey area of commentary regarding the appropriation of the original work, like the Koons example.[266] Such postmodern, appropriative works are not protected by fair use unless they transform the original work.[267] These works occupy a pole that neither opposes nor adopts the original creator's position, but negotiates it in a way that explores and responds to the original creator. Yet the expressive value of these appropriations goes unrecognized, even though they tend to be the works most in need of a robust structure of protection.

2. *Derivative Works and Democracy*

Certainly, part of the instability over appropriation art stems from a fundamental crisis that it causes regarding the sanctity of the original, versus its overlapping copy.[268] As art historian Rosalind Krauss suggests,

---

264. *See supra* notes 148–97 and accompanying text.

265. *See generally* BARTHES, MYTHOLOGIES, *supra* note 146.

266. For example, a court recently protected a novel based on the book *Gone with the Wind*—the story was told from the perspective of a slave—on the grounds it was transformative because it utilized new characters, new events, and added a new perspective. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269–70 (11th Cir. 2001). For an excellent discussion of this case, see Tushnet, *supra* note 6, at 551–55. *See infra* note 267.

267. The Supreme Court has noted that courts must inquire into the purpose and character of a new work in order to explore whether it is sufficiently "transformative" and is not merely "supplanting" the original. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). "[T]he more transformative the new work," the Court has observed, "the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Id.*

268. Consider, for example, Rosalind Krauss's thoughtful treatment of a 1981 exhibition at the National Gallery, which was billed as "the largest Rodin exhibition, ever." One of the works, however, included a brand new cast of "The Gates of Hell," a work that had just been created nearly sixty years after Rodin's passing. Was the new cast an original, as the exhibit implied, or a copy? As Krauss explains, the answer is somewhere in between: since Rodin left all of his estate to the nation of France, the Chambre des Deputes, in acceptance, opted to limit any posthumous editions to twelve casts for each plaster, raising the obvious question of its status as an "original" work of art. As Krauss deftly explains, at the time of Rodin's passing, "The Gates of Hell" remained a very much unfinished work, as its fragments were constantly being recomposed and rearranged; indeed, it was not actually cast until three years after Rodin's death. *See generally* Rosalind Krauss, *The Originality of the Avant-Garde: A Postmodernist Repetition*, *in* ART AFTER MODERNISM: RETHINKING REPRESENTATION 13,

Wash U Law Repository

art is often embroiled in a kind of "aesthetic economy" that valorizes the sanctity of the original, while discrediting and devaluing its repetition, its copy, or its reduplication.[269] Yet part of the genius of appropriation art lies not in its self-conscious critique of the content of a particular work, but in its critique of the very notion of *originality itself*.[270] In this sense, appropriation art acts as a transgressive force that destabilizes the very pillars of copyright, originality, and romantic authorship, and leaves nothing—no underlying ideology—in its stead.

But this evisceration, perhaps, is precisely why appropriation art remains so vulnerable. Instead of being protected, works of appropriation art are treated as though they subtract from the marketplaces of speech by serving as substitutes for the original work. As a result, intellectual property law skews the marketplace of speech so that it only protects works that either assimilate or transform copyrighted works. Works that fall between these poles—works that are only partly appropriative, or which reproduce a preexisting work for the purposes of satire or commentary on a topic other than the critique of the original—become excluded from the marketplace of protected speech, thus falling within the descriptive confines of semiotic disobedience, rather than democracy.[271] As a result, the law places a primary value on the sovereignty of the product (and hence the sovereignty of the message of a copyrighted work) and devalues the creativity inherent in the message or product of the appropriative work. Consequently, language and visual signs within the marketplace of speech fail to evolve—they occupy proprietary polarities that are built on opposition and assimilation, rather than a dialogic process of negotiation.

13–15 (Brian Wallis ed., 1984). Krauss continues:

> Like Cartier-Bresson, who never printed his own photographs, Rodin's relation to the casting of his sculpture could only be called remote. Much of it was done in foundries to which Rodin never went while the production was in progress; he never worked on or retouched the waxes from which the final bronzes were cast, never supervised or regulated either the finishing or the patination, and in the end never checked the pieces before they were crated to be shipped to the client or dealer who had bought them."

There is no 'authenticity' to the cast, Krauss suggests; it fails to satisfy any impulse towards the romantic author, given that Rodin left most works unfinished in their plaster form and usually played only a minimal role after the cast was created. For more commentary on the role of reproduction in modern economy, see Benjamin, *supra* note 118.

269. Krauss, *supra* note 268, at 19.

270. Krauss, *supra* note 268, at 27 (discussing work of photographer Sherry Levine and painter Robert Rauschenberg, both of whom utilize photographic reproductions in their work).

271. *See* Bohannan, *supra* note 246 (arguing that copyright law acts to protect against the dilution of the original concept).

Further, as Krauss suggests above, the law implicitly valorizes the notion of originality, even though a derivative right is supposed to be balanced against the first sale doctrine, which typically affords an individual purchaser the right to own a tangible object and lend, resell, or display the copyrighted work.[272] For example, the Ninth Circuit, in *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, found that an individual who removed selected images from a book of art prints and then pasted them individually onto ceramic tiles for sale created an infringing derivative work.[273] There, it rejected the applicability of the first sale defense on the grounds that the right to distribute and display did not include the right to prepare derivative works.[274] The court concluded that the acts of borrowing and mounting the preexisting copyrighted images onto the tiles without permission constituted actionable infringement, squarely rejecting the contention that the defendant should escape liability because he had not actually reproduced the work:[275]

> What appellant has clearly done here is to make another version of Nagel's art works . . . and that amounts to preparation of a derivative work. By borrowing and mounting the preexisting, copyrighted individual art images without the consent of the copyright proprietors . . . appellant has prepared a derivative work and infringed the subject copyrights.[276]

The court admitted that the defendant did not actually reproduce the copyrighted works but, instead, explained that the process of mounting the works on the tiles either "recast or transformed" the work such that it fell into the boundaries of a derivative work.[277]

In stark contrast to the Ninth Circuit's view, the Seventh Circuit reached the exact opposite conclusion in the same type of case. In *Lee v. A.R.T. Co.*, the court decided that the new tiles were not infringing for two reasons: first, the retiled pages qualified for protection under the first sale doctrine; and second, they were not sufficiently transformative to merit recognition as a derivative work.[278] The court began by observing that this should be "an open and shut case" under the first sale doctrine, given that

---

272. *See* Tyler T. Ochoa, *Copyright, Derivative Works, and Fixation: Is* Galoob *a* Mirage*, or Does the* Form(Gen) *of the Alleged Derivative Work Matter?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 991, 1008 (2004).

273. Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1344 (9th Cir. 1988).

274. *Id.*

275. *Id.* at 1343–44.

276. *Id.* at 1343.

277. *Id.* at 1344.

278. Lee v. A.R.T. Co., 125 F.3d 580, 581–82 (7th Cir. 1997).

Wash U Law Repository

A.R.T. bought the work, mounted it on a tile, and then legitimately resold what it had already purchased.[279] Further, there was no economic interference with the new, secondary market that had been created: citing economists William Landes and Richard Posner, the court explained that the original artist had already captured the value of the art's contribution in the purchase price of the original transaction.[280]

The court went on to discuss derivative rights, noting that the right to prepare derivative works comprised an exclusive right enjoyed by the copyright owner.[281] Although the court said little about the relationship between the first sale and derivative rights doctrines, it reached the opposite conclusion from the Ninth Circuit, and analogized the tiling process to framing, mounting, or changing the display of a picture, which were all unactionable.[282] It then noted that the tiling process lacked the requisite degree of originality required to comprise a derivative work and that, under the plaintiff's definition of derivative work, any alteration to a work would require the author's permission.[283] The court continued:

> We asked at oral argument what would happen if a purchaser jotted a note on one of the note cards, or used it as a coaster for a drink, or cut it in half, or if a collector applied his seal (as is common in Japan); Lee's counsel replied that such changes prepare derivative works, but that as a practical matter artists would not file suit. A definition of derivative work that makes criminals out of art collectors and tourists is jarring despite Lee's gracious offer not to commence civil litigation.[284]

Consider, for a moment, what this division between the Ninth and Seventh Circuits actually translates into. On one hand, the Ninth Circuit rejects any notion of an ownership-based defense, in favor of an expanded vision of originality—it effectively concludes that gluing pictures onto tiles represents the creation of an infringing "original" piece of work.[285] On the other hand, the Seventh Circuit embraces an ownership-based defense, but then rejects an expanded view of creativity that would favor

---

279. *Id.* at 581.

280. *Id.* (citing William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. LEGAL STUD. 325, 353–57 (1989)).

281. *Id.* at 581.

282. *Id.* at 582.

283. *Id.*

284. *Lee*, 125 F.3d at 582.

285. Interestingly, when A.R.T. tried to obtain a copyright in these works, the Copyright Office rejected them, informing them that the tiled cards could not be independently copyrightable outside of the art on the note card itself. *Id.*

the appropriator. In *Lee*, the court squarely rejected any modicum of creativity in the tiled piece of work, deciding that the new placement of the work was not sufficiently creative to merit recognition.[286]

Such case law produces a complicated divergence—not merely between individuals who retile and affix postcards to tiles—but between future artists who might seek to utilize tangible pieces of purchased artwork for future creations. What this divergence suggests, simply, is that works that contribute to, but do not transform, the original copyrighted work receive no protection from either the fair use or first sale doctrines under existing analysis. Recall that the Seventh Circuit utterly rejects any suggestion of originality in mounting the tiles,[287] and the Ninth Circuit's definition of originality is so narrow that it winds up penalizing not just the individual who retiled the artworks, but all others who might seek to create new works based on their purchased, copyrighted products.[288] Conceivably, an owner could argue that the revised work assimilates its original, thereby creating a derivative work. Or, an owner might argue that a modification of an existing work is not sufficiently transformative to fall into the realm of parody or other protected fair uses. In either case, the person who creatively appropriates the work loses.

There are several reasons why this conclusion seems to misapprehend the nature of artistic creativity. As I suggested, there are at least three competing property interests at issue in such cases—those of the original author or artist, those of the purchaser or owner of a work, and those of the secondary creator (the appropriator) who utilizes and contributes to the existing work.[289] Yet the outcomes of both cases ignore the interests of the third in favor of a greater emphasis on the first two. Works that appropriate escape protection—either because they are classified as derivative works (in the case of *Mirage*), or because they are too transformative to qualify for protection under *Lee*. The result is that the original author retains perpetual control over the copyrighted work, even trumping the first sale doctrine, despite a showing of creativity and innovation.

Moreover, the divergence between both cases demonstrates a critical problem in copyright law—the problem of mistaken substitution. As I have suggested, appropriation art that is based on the principle of non-exclusive appropriation (i.e., purchasing a reproduction of a work, and then adding something creative to it, along the lines of *Lee* and *Mirage*)

286. *Lee*, 125 F.3d at 582.
287. *Id*.
288. Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1344 (9th Cir. 1988).
289. *See supra* text accompanying notes 248–51.

Wash U Law Repository

should fall into the category of semiotic democracy because the work aims to contribute to the marketplaces of speech, just as Jack Balkin and others have suggested. Works of semiotic democracy are wholly unlike classic cases of piracy because they are not completely "substitutive" in the classic sense; the reworked product acts to supplant, but not replace, the original, and the work does not aim to replace the market that an original work serves. Yet many courts rejecting fair use or first sale defenses assume that such appropriative works aim to substitute for the market of the original product, and therefore extend derivative rights to a variety of new markets in the process. The result is an almost wholesale consolidation of the marketplaces of expression to protect the original creator, rather than the creative improver or appropriative artist.[290] The undervaluing of such creativity, unfortunately, means the creation of fewer commodities, and fewer markets, that embrace the creativity inherent in such appropriations.

As a result, copyright law—inasmuch as it attempts to protect the intangible—actually winds up subverting its very purpose through its overbroad recognition of the tangible. I want to focus on this problem, not merely as a theoretical matter, but because I believe it demonstrates a profound divergence between the nature of creativity and contemporary treatments of originality, authorship, and property. And this divergence, too, illuminates the tradeoffs between semiotic democracy and disobedience. The law's undervaluing of appropriative art may perpetuate a "broken window" effect that inescapably draws attention to the ways in which the law both silences and enables a particular type of dissent that operates outside of, rather than within, our systems of protected expression.

If the boundaries of legalized speech become narrowed through a reluctance to enlarge the public domain or to apply the protections of fair use, two things may occur. First, some individuals may be deterred from speaking, particularly if their speeches or texts draw from copyrighted works. This is the story told by most scholars like Lessig, Balkin, and Fisher, who have offered cogent critiques of the copyright laws and their effects on freedom of expression. Yet, as I have suggested, there is also another widely overlooked phenomenon. Expanding the boundaries of copyright protection—like any other form of property—can only provoke a wider range of dissenting speech, particularly from individuals whose social norms refuse to be deterred by those expansions. The result is not an

290. *See* Lemley, *supra* note 228.

outright silencing of dissent, but a protracted division of the marketplace of speech—one a formally protected realm of commodities, the other a prohibited realm that draws on legal sanction for its communicative impact. Market failures in such instances may lead to the development of two parallel, and ultimately converging, markets, one attempting to interrupt the other.

While the First Amendment has governed similar market disjunctions in other spheres,[291] it curiously has failed to address this emerging divergence between the first sale and derivative rights doctrines, particularly with respect to mediating the interests of the purchaser, creator, and appropriator of a work. Consider the latest emanation of this phenomenon, the Visual Artists Rights Act (VARA), which was passed by Congress in 1990 to amend the 1976 Copyright Act.[292] VARA represents the latest attempt in the United States to protect artists' moral rights, which comprise a constellation of rights that are well-recognized throughout Europe and many developing nations.[293] Moral rights are thought to be both economic and non-economic in nature; that is, they are designed to protect both the reputation of the artist, as well as his personality interest in the work.[294] The concept of moral rights traditionally includes three different facets—the right to disclosure (which allows a creator to decide when a work is ready for public dissemination by affording him or her sole rights in an incomplete work); the right of integrity (which protects against alterations that would interfere with the work's spirit and character); and the right of attribution (which protects a creator's right of recognition and authorship for a work).[295] Along these lines, VARA allows an artist to "prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation."[296]

---

291. *See supra* Part III.

292. Visual Artists Rights Act, 17 U.S.C. § 106A (2000).

293. *E.g.*, Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221; Copyright, Designs and Patents Act, 1988, c. 48 (Eng.); French Intellectual Property Code, Law No. 92-597 of July 1, 1992, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 3, 1992, p. 8801; Urheberrechtsgesetz [Copyright Law], Sept. 9, 1965, Bundesgesetzblatt, Teil I [BGBl. I] at 1273; The Italian Copyright Act Law No. 633 of Apr. 22, 1941, Gazzetta Ufficiale della Repubblica Italiana [Gazz. Uff.], July 16, 1941, No. 166. *See generally* Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353 (2006) (discussing moral rights in European copyright law).

294. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 103 (1997); Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998); Roberta Rosenthal Kwall, *The Attribution Right in the United States: Caught in the Crossfire Between Copyright and Section 43(A)*, 77 WASH. L. REV. 985, 1003 (2002).

295. *See* Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 16–29 (1997).

296. Visual Artists Rights Act, 17 U.S.C. § 106A(a)(3)(A) (2000).

Wash U Law Repository

Yet the law's treatment of appropriation art and moral rights, I think, aptly describes how the law's governance of semiotic democracy can unwittingly expand the boundaries of semiotic disobedience.[297] By effectively deterring the appropriation of *both* the original and the reproduction of a work, the law fails to recognize the importance of enabling alternative modes of creative expression that would ensure protection of the original, while allowing for the recoding of the reproduction.

Further, by allowing tangible property considerations to remain paramount, the law also tends to devalue creative expression as a result. Consider this example. In a VARA case involving the artist Ron English, a court summarily rejected the notion that art was protectable if it was installed illegally.[298] In that case, a number of artworks, including murals and sculptures, were installed in a small community garden by a variety of local artists.[299] The artists argued that planned development of the site meant that the sculptures would have to be moved, and the murals obstructed.[300] However, because the works were illegally installed, the court reasoned, there was no need to determine whether or not they were protected under VARA.[301] Instead, the court argued that recognizing VARA-type protections in the illegally placed murals would allow illegal

297. *See supra* notes 105–36 and accompanying text. Consider the Daubist movement in Australia, which sought to use other paintings as raw materials for future projects, and which demonstrates an oppositional reaction to the culture of moral rights. In the first Daubist exhibition, which took place in 1991, artist Jet Armstrong painted a "crop circle" onto a landscape painting by artist Charles Bannon and then called the resulting work "Crop Circles on a Bannon Landscape." In other projects, Armstrong inserted an inverted crucifix on another landscape (renaming the work the "Crop Circle Conspiracy Landscape"). Other Daubists utilized other paintings and chopped them into smaller pieces for the purposes of collage, relying on other individuals' artworks as raw materials for their own artistic expression. In response, the original artist, Bannon, championed the idea of romantic authorship, arguing that his work had been violated by the unwanted addition, and that Armstrong had done the equivalent of "adding some drivel to Shakespeare's Macbeth and calling it your own." The resulting artworks created a storm of controversy, culminating in Bannon filing suit on the grounds of defamation and false attribution. The media, too, jumped into the fray, calling the Daubists "vandals," "graffitists," and "thieves." In the end, the debate prompted Australian officials to consider enactment of moral rights protections to prevent the harming of artworks under similar circumstances. Matthew Rimmer, *Daubism: Copyright Law and Artistic Works*, 9 MURDOCH U. ELECTRONIC J.L. 1 (2002), *available at* http://www.murdoch.edu.au/elaw/issues/v9n4/rimmer94.html (quoting Bannon in *Court Grants Injunction over Changing Landscape*, THE AGE, Sept. 28, 1991, at 3).

298. *See* English v. BFC&R E. 11th St. LLC, No. 97 Civ. 7446 (HB), 1997 U.S. Dist. LEXIS 19137, at *9–*12 (S.D.N.Y. Dec. 2, 1997). *See also* William M. Landes, What Has the Visual Arts Rights Act of 1990 Accomplished? (Univ. Chi. Law & Econ., Olin Working Paper No. 123, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=270985.

299. *English*, 1997 U.S. Dist. LEXIS 19137, at *2.

300. *Id*. at *7.

301. *Id*. at *10.

art to essentially "freeze" city development.[302] Further, the court reasoned that protecting the artists would require the city to expend enormous resources in protecting and patrolling vacant lots—a cost that the Court deemed unnecessary and undesirable.[303]

In this case, we see two competing perspectives on the VARA: one that suggests that it is the tool of the recognized artist to protect the sovereignty, integrity and property of her work; and the other, suggesting that VARA has no role in protecting the work of the unrecognized artist who deals in placing his work without permission. In other words, the applicability of VARA is just as limited by absolutist property-like considerations as the rest of copyright law.

Such cases suggest the importance of stepping back and considering the choices the law has just made, even if we agree with the ultimate result. Typical accounts cast such projects, at best, as public art, at worst, as "vandalism." Under this interpretation, the law permits a real property owner to win over an artist, recognized or unrecognized, irrespective of the value that the work adds to the original site. In choosing to protect a real property owner, rather than an artist, the court sends the message that the protection a work deserves—whether it be a Warhol, a Picasso, or a Basquiat—depends more fully on the locus of its installation, rather than the nature of the work itself.

Yet, the law can appreciably take a more mediated position to relativize the different property interests at stake and to think more creatively about how to protect the utilitarian calculus that is so foundational to our intellectual property laws. A much stronger regime would relativize the three property interests I listed earlier—those held by the creator, the buyer, and the appropriator—and attempt to reach a result that maximizes, rather than shrinks, the protected marketplace of expression. What would this more complicated inquiry look like? First, the law might attempt to ensure, in the English case, that the artist has the right to remove the work at his own cost. In this way, the law continues to value creativity, but still puts some cost on the artist to take responsibility for her transgressive placement. Or, as I discuss further below, in the case of appropriation art, the law might protect works that alter reproductions of the original, instead of the original itself. But the law, as it is currently applied, does neither, thereby narrowing the boundaries of its protection.

---

302. *Id*. at *11.
303. *Id*. at *14.

Wash U Law Repository

III. THE COMMODITY, THE CRIME, AND THE SIGN

For obvious reasons, and like other types of civil disobedience, part of the richness of the message of semiotic disobedience inheres in its transgression of the operative boundaries that govern both property and intellectual property. In other words, its illegal character can also be part and parcel of its message; thus, legalizing such forms of disobedience might actually degrade the message the artists are trying to send.[304] In the following sections, however, I will sketch out a few basic ideas to demonstrate how and why the First Amendment's jurisprudence shows us a variety of ways to balance the categories of disobedience and democracy in the context of appropriations of intellectual property. This Article suggests that a richer and more complicated endeavor involves exploring how the law can and should value the persistence of *overlapping property* interests, particularly when there exists a tension between intellectual and tangible property.

To date, few have explored this possibility. Consider, for example, George Kelling's angry reaction to critics of his broken windows thesis who questioned the need to treat minor offenses like "begging, prostitution, public drinking, graffiti, and so on" as serious crimes:

> The far left—including a good share of sociologists, criminologists and civil rights lawyers and advocates—not only does not want anything done about such offenses, it views perpetrators of minor offenses as victims of a corrupt/unjust society who are 'enriching' society with their messages. Thus, begging is elevated to the status of a political message about the inequitable distribution of wealth; graffiti is the 'folk art' of disenfranchised youth who have no other means to express their beliefs; and 'squeegeeing' (the unsolicited washing of car windows) is the 'work' of unemployed and homeless youth. Liberal enlightenment in this world means that, short of violence—and even this may be questionable—there are no outrages that are not 'understandable' and deserving of toleration given society's inequities and pathology. 'Tolerating the intolerable' in America's great cities is the acid test of one's true

304. In a later article authored with Eduardo Peñalver, we explore this risk in greater detail. *See* Edwards Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 150 U. PENN. L. REV. (forthcoming 2007), *available at* http://ssrn.com/abstract=745324.

> commitment to civil rights and social justice. Every 'in your face' indignity is someone's constitutional 'right' and must be endured.[305]

Kelling's passionate outburst, therefore, must be understood in the context of someone who cares deeply about the persistence of violent crime, and who remains convinced that such causal markers of disorder serve as the hallmarks of a deeper tolerance of criminality.

Yet when viewed through the lens of traditional First Amendment protections, we see that our jurisprudence has already offered lessons that other areas of our jurisprudence have, so far, failed to learn. The point of this section is not to retread the fabled narratives of First Amendment theory, but simply to suggest starting points for building a more inclusive marketplace of speech that mediates the boundaries between protected and prohibited speech. This involves, in part, reconsidering some of the distributive principles I outlined earlier regarding the need for protection of appropriation art, as well as recognizing the role of overlapping properties in challenging the boundaries of both tangible and intangible expression.

More generally, however, our First Amendment jurisprudence provides a valuable framework for integrating the markets of speech we have discussed—one formally protected, the other informally created (and sometimes prohibited) in response to the first. Not surprisingly, case law on flag burning and other mutilations of symbolic property suggests a completely different picture than that offered by the world of intellectual property.[306] Here, we see a world that actively expands the boundaries of democracy to protect certain acts of disobedience, and thus encourages individuals to choose democracy over disobedience in the process.

In this section, therefore, I focus on three governing cases—*United States v. O'Brien*,[307] *Wooley v. Maynard*,[308] and *Texas v. Johnson*[309]—in order to demonstrate how the law can and must restore a balance between semiotic democracy and disobedience that compels individuals to choose the former, rather than the latter. In each case, I demonstrate how First Amendment principles carefully separated the issue of symbolic speech from physical violation of property, and managed to protect the former while penalizing the latter. In so doing, I suggest that each case managed

---

305. George L. Kelling, *'Broken Windows': A Response to Critiques*, *in* CRIME, DISORDER, AND COMMUNITY SAFETY, *infra* note 344, at 124–25.

306. *See infra* note 344.

307. 391 U.S. 367 (1968).

308. 430 U.S. 705 (1977).

309. 491 U.S. 397 (1989).

Wash U Law Repository

to recognize the persistence of overlapping interests that comprised both tangible property considerations and intangible expression.

By focusing on building a potential jurisprudence of "overlapping properties," I argue that we can dramatically alter the marketplaces of speech to reflect a vibrant, colorful public domain that offers a fertile building ground for dialogue and communication. In support of this theory I offer, in these two sections, two somewhat discordant principles, each stemming from basic principles of distributive justice in governing the marketplace of expression. The first principle, as I have suggested, focuses on creating incentives that encourage semiotic participation and dissent *within* the marketplace of protected speech. The second principle recognizes, at times, the necessity for the law to protect an expressive message of destruction, as our case law on flag burning suggests.

The First Amendment traditionally serves as a potential lightning rod that mediates the relationship between semiotic democracy and disobedience. Along these lines, this section suggests we must provide fertile ground for the marketplace of speech that integrates the protected and prohibited marketplaces, ground which (1) allows individuals to appropriate and alter reproductions, not originals, so that the marketplace expands, rather than contracts; and (2) when that avenue is unavailable, allows owners to alter their own purchased property where the message carries the same symbolic value. That is why the distinction between semiotic democracy and disobedience matters—if we expand democracy, we deincentivize disobedience.

A. Democratizing Public Symbols: Protecting Appropriative Reproduction

In this context, part of rethinking the balance between semiotic democracy and semiotic disobedience requires the law to recalibrate its interaction between tangible and intangible properties, and to construct a jurisprudence that recognizes their overlapping nature in its protection of a diverse marketplace of speech. In an important recent article, Professor Lior Strahilevitz explored the contours of the expressive implications of a right to destroy in case law.[310] In one section, he notes that it should hardly be surprising to anyone that property destruction has enjoyed a historical notoriety for its effectiveness at communicating ideas, citing the Boston Tea Party as a notable example.[311] Indeed, the Supreme Court has largely

310. Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 827 (2005).
311. *Id.* at 824.

echoed this observation, finding that in order to be communicative, a destructive act must demonstrate much more than "mindless nihilism," but instead has to convey a "particularized message" that is also likely to be understood by the audience.[312] Noting this test, Strahilevitz largely restricts his observations to the right of an owner to destroy property, but then explains why traditional First Amendment doctrine might view such acts as low-value speech:

> [T]he destructive act is unlikely to contribute to a healthy public discourse or point society toward truth . . . . Under a collectivist reading of the First Amendment, then, the government could regulate destructive acts. Destroying a unique, irreplaceable piece of property is, in some ways, closer to heckling a speaker than to responding to what he has to say. It also may deter others from devoting the necessary time and resources to future creative activities. So the law might differentiate between *A*, who gives a speech, and *B*, whose contribution to the debate is to ensure that no record of *A*'s speech survives. All the government is doing by privileging creation over destruction is establishing a procedural rule that the artist who intends to make a lasting aesthetic contribution cannot have her speech cut off without her consent.[313]

Strahilevitz argues that the law should view property destruction as low-value speech that should be restricted in order to facilitate the deliberative process inherent in democracy, and applauds the doctrine of moral rights for taking this approach.[314] His view is, of course, the standard rationale given by scholars examining the question of property destruction.[315]

Yet his observations also highlight another, implicit point regarding the need for law to create incentives that compel individuals to choose democracy over disobedience. Under both collectivist and individualist theories, his commentary notes that the First Amendment should rightfully deter the destruction of property owned by another person.[316] As this section argues, our First Amendment jurisprudence is premised on this recognition, as it actively distinguishes between the expressive value of destroying property that is owned by the speaker and property that is

312. *Id.* (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)).
313. *Id.* at 827–28 (citations omitted).
314. *Id.*
315. *See, e.g.*, Daniel B. Bogart, James C. Smith & William G. Baker, *Keeping Current—Property*, 16 PROB. & PROP. 19, 19 (2005); Stephen E. Sachs, Comment, *Saving Toby: Extortion, Blackmail, and the Right to Destroy*, 24 YALE L. & POL'Y REV. 251, 257 (2006).
316. Strahilevitz, *supra* note 310, at 829–30.

Wash U Law Repository

owned by someone else.[317] Both types of properties have been valued differently, according to the expressive value of the message, and each type carries special significance for the interaction between semiotic democracy and disobedience.

Consider "pure," non-destructive, symbolic speech. At the heart of our venerated jurisprudence on symbolic speech lies an important, even primary, area of protection for the expressive uses of property in adding to democratic discourse. The idea of symbolic speech was first endorsed in 1931 in *Stromberg v. California* when the Supreme Court struck down a California statute prohibiting the display of a Communist flag.[318] The Court invalidated a statute that prohibited the display of a red flag as a symbol of "opposition to organized government," recognizing that the First Amendment protects certain types of ideas that are expressed nonverbally.[319] The Court reasoned that the statute might be read to prohibit some types of public opposition to organized government and found the display of red flags to be speech protected by the First Amendment.[320] Similarly, in *Tinker v. Des Moines Independent Community School District*,[321] the Court found the wearing of armbands by schoolchildren to protest the Vietnam War to be speech protected by the First Amendment.[322] Because the school could offer no particular reason for its ban on the wearing of such armbands, the Court found students could not be prohibited from wearing them.[323]

This critical recognition—that some uses of property might be more expressive of an idea than certain types of verbal representations—animates the heart of First Amendment jurisprudence regarding individuals' power to express political messages through certain types of conduct. The Supreme Court takes a different approach, however, in exploring symbolic speech where the property involved is owned by another private party. Here, First Amendment case law tends to inquire whether or not the occupation or alteration of property involves a breach of the peace.[324] As such, the law has stopped short—and vociferously so—

317. *Id.* at 787–95.
318. Stromberg v. California, 283 U.S. 359 (1931).
319. *Id.* at 369–70.
320. *Id.* at 369.
321. Tinker v. Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
322. *Id.* at 504, 514.
323. *Id.* at 514.
324. *E.g.*, Spence v. Washington, 418 U.S. 405, 414–15 (1974); Black v. Commonwealth, 553 S.E.2d 738 (Va. 2001), *aff'd in part, vacated in part, and remanded sub nom.* Virginia v. Black, 538 U.S. 343 (2003).

of allowing any protection or recognition for property defacement or mutilation for expressive purposes. Any type of intentional, lasting damage to property or persons is not considered to be within the ambit of First Amendment protection, even if it has the potential to communicate expressive activity.[325] As applied to anti-graffiti and anti-vandalism ordinances, courts have recognized state interests stemming from a desire to maintain property values, to "deter[] illegal activity," and to protect the "aesthetic character" of various neighborhoods "from the devastation of graffiti vandalism."[326] Typically, graffiti and vandalism are prosecuted under "criminal mischief, malicious mischief, intentional destruction of property or criminal trespass statutes."[327]

Yet, at the same time, the Court has been careful to proportionally weigh and distinguish the value of an expressive message from the degree of infringement on the property rights of another. In *Brown v. Louisiana*,[328] for example, five individuals were arrested for violating a breach of peace statute for taking part in a library sit-in to protest segregation.[329] The Court held that Brown's speech was protected by the First Amendment, since it caused no disturbance to others and did not violate any library regulations.[330] Lunch counter sit-ins also have been protected as long as they do not cause any "disturbance."[331] Labor picketing, too, has been protected so long as it is "peaceful" in nature.[332]

Here, we see that the Court's jurisprudence has been careful to recognize that some elements of property disobedience, when coupled with expression, can play a key role in fostering democratic dialogue. The expressive import of a temporary occupation of property can often go much further than a verbal defense of the principle at stake.[333] And while the Court has also been careful to balance this principle where permanent

---

325. *See* Riely v. Reno, 860 F. Supp. 693, 703 (D. Ariz. 1994); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.").

326. Nat'l Paint & Coatings Ass'n v. City of Chicago, 803 F. Supp. 135, 143–44 (N.D. Ill. 1992) (upholding anti-graffiti ordinances regulating sale and possession of paint cans and large markers containing non-water soluble fluid).

327. Lori L. Hanesworth, Note, *Are They Graffiti Artists or Vandals? Should They Be Able or Caned?: A Look at the Latest Legislative Attempts to Eradicate Graffiti*, 6 DEPAUL-LCA J. ART & ENT. L. & POL'Y 225, 232 (1996).

328. 383 U.S. 131 (1966).

329. *Id.* at 137–38.

330. *Id.* at 142.

331. Garner v. Louisiana, 368 U.S. 157, 170 (1961).

332. Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).

333. *See* Peñalver & Katyal, *supra* note 304, at 19.

Wash U Law Repository

or lasting alteration or mutilation of another's property is concerned,[334] it has still retained an almost ethereal optimism in seeking out ways to protect the expressive value of the message at hand.[335]

Consider the best-known case analyzing the relationship between speech, property, and conduct under the First Amendment, *United States v. O'Brien*.[336] In that case, the Court held that when conduct contains both "speech" and "nonspeech" elements, a sufficient governmental interest in regulating the nonspeech elements can justify an infringement (incremental or otherwise) on free speech.[337] In other words, the Court placed primary value on the inviolability of government property, rather than the expressive message of draft-card burning.

Viewed from this vantage point, the facts of *O'Brien* are a striking example of the principles of semiotic disobedience. In *O'Brien*, the defendant burned his draft card during a demonstration on the steps of a Boston courthouse in order to protest the draft system and the Vietnam War.[338] He was indicted and convicted for violating a federal statute prohibiting the intentional destruction of selective service cards, and the First Circuit overturned his conviction, finding the federal law unconstitutional as an impermissible restriction on free speech.[339] The magic of the case, however, turned on whether the draft card could reasonably be construed as private, rather than public property. The Court emphatically chose the latter characterization, though recognizing that the desecration or mutilation of government property communicated a political or expressive message as well.[340]

The Supreme Court upheld his conviction, recognizing that the property issue was patently unrelated to the message O'Brien was communicating—by merely destroying the draft card, O'Brien would have been in violation of the statute, irrespective of the communicative message that he was trying to express.[341] One might argue that O'Brien was

334. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 437–38 (1911) (holding that an injunction against a boycott was not an abridgement of speech, but was a prohibition against continuing a boycott that caused irreparable harm).

335. Marsh v. Alabama, 326 U.S. 501, 502–09 (1946) (holding that Jehovah's Witnesses had a First Amendment right to distribute literature in the town despite its private ownership); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 311–18 (1968) (holding that peaceful picketing on the privately owned land of a store located in a large shopping center was protected under the First Amendment).

336. 391 U.S. 367 (1968).

337. *Id.* at 376.

338. *Id.* at 369.

339. *Id.* at 370–71.

340. *Id.*

341. *Id.* at 376.

convicted, not for the symbolic import of his expression, but for the fact that it affected tangible government property.[342] Further, because the statute did not prohibit O'Brien from expressing his beliefs in another manner, the Court justified its prohibition on the burning of draft cards on the grounds that it was not an impermissible regulation of free speech because it left open the possibility of alternative means to express disagreement with the draft.[343] While *O'Brien* was an admirable attempt by the Court to separate speech from its non-speech elements, it was also resoundingly criticized by scholars who argued that such a distinction was impossible to make and called for a clarification of the line between symbolic speech and conduct.[344]

The important point for our purposes, however, is that the result in *O'Brien* nicely tracks the difference between semiotic democracy and disobedience. Note that the Court in *O'Brien* strongly emphasized the importance of incentivizing *alternatives* to the destruction of government property and recognized the expressive nature of his actions.[345] Writing on this point, Akhil Amar observed that a "key tipoff" to the state's interest in protecting property, but not in silencing speech, "was that it would have been no crime to make a lifesize or postersize copy, a replica—a symbol—of the draft card and burn *the symbol* as a purely ideological protest."[346]

I would argue that the exact same principles raised in *O'Brien* are at issue in the relationships I have identified between semiotic democracy and disobedience. Here, we may want to discourage individuals from engaging in independent correction of the marketplace of speech through semiotic disobedience. Critics might rightly point out that legalizing semiotic disobedience would suggest a radical evisceration of the role of tangible property rights in protecting expressive messages—it would allow individuals, everywhere, to attack, "jam," and recode messages wherever they were found. But this also requires that the law allow negotiated

342. In *O'Brien*, the Court found that the government had a substantial interest in preventing the destruction of selective service cards in the statute at issue, given that the destruction of the draft cards would interfere with the government's power to raise an army. *Id.* at 377, 382.

343. *Id.* at 381.

344. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975) (arguing that activity in *O'Brien* was "100% action and 100% expression"); Louis Henkin, *The Supreme Court, 1967 Term—Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 79 (1968) ("A constitutional distinction between speech and nonspeech has no content. . . . Speech *is* conduct, and actions speak."); Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111 (1989); Joshua Waldman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1844–45 (1997); Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968).

345. 391 U.S. at 382.

346. Akhil Reed Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 138 (1992).

Wash U Law Repository

"recoding" of symbols within a robust semiotic democracy. This means, in part, respecting and protecting the interests of property owners. But this also means that we must ensure that alternative channels of communication are not being closed off by legal sanction, particularly when people seek to add to, rather than subtract from, the existing marketplace of speech. Access to the "sign," or even the billboard, is equally important in the realm of semiotic disobedience as it is in the realm of semiotic democracy.[347]

Viewed in this light, the law can play a powerful role in the construction of meaning by protecting recodings that expressly and assertively disagree with the propertized message. If the law of copyright seeks to deter interruptions, it must embrace the vision offered by Fiske, Lessig, and others that celebrates the principle of "non-exclusive appropriation"—that is, allowing individuals to copy from the original for the purposes of appropriative commentary. Further, it must allow space for the audience to *negotiate* cultural meanings, rather than simply adopt or transform them alone.

Consider this example, which nicely tracks the dynamic transition from semiotic disobedience to democracy in terms of the overlapping relationship between tangible and intangible properties. In a district court case in New York, the company Mattel, which owns the copyright to the doll "SuperStar Barbie," sued a woman for copyright infringement who created and sold a series of dolls known as "Dungeon Dolls."[348] The Dungeon Doll was comprised of a Barbie doll's head on a repainted and recostumed Barbie doll, adorned with Bavarian bondage gear, and an accompanying storyboard that was based upon "Lily," the character of a dominatrix.[349] Given the tremendous divergence between the two dolls, the court observed that the Dungeon Doll comprised a "patently transformative" use of a Barbie doll.[350] Importantly, the Court applied a

347. The government could also provide subsidies to ensure that artists are able to respond to the advertising messages that they see. Consider, for example, some of the art projects by the Los Angeles-based artist Anne Bray, whose substantial public art projects aim to use the same instruments as commercial mass media in order to aid viewers in assisting their abilities to distinguish "reality from illusion," a skill that she believes has atrophied from consumers' reliance on virtual entertainment. In a project funded by the Public Art Fund, Bray created a forty-second anti-consumer animation that appeared every six minutes on an electronic billboard in Times Square. *See* Anne Bray, *The Community Is Watching and Replying: Art in Public Places and Spaces*, 35 LEONARDO 15, 15–21 (2002).

348. Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 (S.D.N.Y. 2002).

349. The court observed that the purpose of the Dungeon Doll, according to the defendant, was to resurrect a German character named "Lili," who was a woman of "easy virtue," rather than a children's toy. *Id*. at 322.

350. *Id*.

broad definition of transformative work, finding that the absence of an existing competitive market sponsored by Mattel justified its protection of the work under fair use principles.

However, perhaps most significant for our purposes is the court's refusal to distinguish between a work that utilized an original copyrighted work and a work that modified a *reproduction* of a famous photograph by Annie Liebowitz that involved a pregnant Demi Moore.[351] In that case, a background and context similar to that of the Liebowitz photograph was used, but Ms. Moore's head was replaced with that of the actor Leslie Nielsen; the goal was to advertise the film *The Naked Gun*. The court then continued, in stark contrast to *Mirage*:

> Defendant's dolls present a variation of the *Leibovitz* fact pattern in that Defendant used actual Barbie dolls (or at least actual Barbie heads) in her creations as opposed to dolls resembling Barbie but slightly altered. Defendant here used the entire copyrighted work—the unadorned doll's head—but changed substantially the decoration of the head and body of the doll. Defendant's customizing appears to have evoked the image of Barbie while transforming the Barbie doll sufficiently that the quality and quantity of her copying weigh against judgment as a matter of law in favor of Plaintiff.[352]

Given all of these differences, the court did not find any evidence of potential market substitution, observing that the differences between a SuperStar Barbie and a Dungeon Doll were so significant that there was little chance that the markets would ever overlap.[353] Indeed, the Seventh Circuit in *Lee* echoed this view, observing that "[a]n alteration that includes (or consumes) a complete copy of the original lacks economic significance."[354] Again, the economic rationale is that the original creator has already reaped the value of his or her investment in the completion of the original transaction. While the Dungeon Dolls case is but one promising example of the utility of fair use in such circumstances, it is important to note the utter lack of clarity regarding the preparation of derivative works and their relationship to the first sale doctrine, which remains unsettled in the wake of *Lee* and *Mirage*. Nevertheless, the case suggests that courts should permit the purchaser of a piece of property—whether a Barbie doll, trademarked product, or website—to use and

351. *Id*. at 321–23.
352. *Id*. at 323.
353. *Id*. at 324.
354. Lee v. A.R.T. Co., 125 F.3d 580, 581 (7th Cir. 1997).

Wash U Law Repository

appropriate that piece of property in a way that responds to the "codes" of an original author or creator, particularly if it offers an expressive message that contributes to the marketplace of speech in a socially productive fashion.

B. Restoring Democracy over Disobedience

Further, the First Amendment already favors semiotic democracy over disobedience where national symbols are concerned. It has attempted to strike a balance by allowing individuals to destroy or alter their own property, particularly when their activities carry strong public implications. Consider the example of the abolitionist William Lloyd Garrison, who, in 1854, burned his copy of the Constitution to protest its original bias toward slavery.[355] In this way, such acts of semiotic disobedience add a classically new focus to the old regime of civil disobedience, because they force the democratic and judicial processes to grapple with the alteration of properties that fall outside traditional realms of protected speech and intellectual property.

As I have suggested, the law has provided a wide berth of protection for such activity through its substantial jurisprudence protecting those who dissent from symbols of national leadership.[356] Consider, for example, the dominant themes in *Wooley v. Maynard*, the celebrated case that held that the First Amendment solidly protects the temporary alteration and mutilation of license plates for expressive purposes.[357] In that case, the Court clearly honored a transition from semiotic disobedience to democracy—it allowed individuals to alter the message contained in government-sponsored license plates.[358] While the case turned largely on protecting individuals from compelled speech,[359] the Court also focused strongly on the importance of fostering a rich marketplace of ideas:

> New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty, as Maynard already has. . . . The First Amendment protects the right of individuals to hold a point of view

355. Amar, *supra* note 346, at 137 (citing HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW 93 (1982)).

356. *See supra* note 330.

357. Wooley v. Maynard, 430 U.S. 705 (1977).

358. *Id.* at 708.

359. For further discussion of compelled speech, see Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 464 (1995).

> different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.[360]

The principles at stake in *Wooley* are intricately linked to the "grey areas" identified between semiotic democracy and disobedience, given the citizens' complicated negotiation of the tangible and intangible license plate. But here, the Court made a choice that honored semiotic democracy by protecting the private property owner's right to alter or mutilate symbols that carry public import for the purposes of dissent.

Indeed, a series of the most powerful antecedents of this tradeoff involve flag burning, which represents a perfect—though implicit—configuration of the first sale doctrine and freedom of expression. On the one hand, a flag is properly considered the property of the owner who purchases, receives, or creates it. But on the other hand, the American flag is an amalgam of different symbolic values—it is both a citizen's private property and public property in the sense that it carries a special significance as our national symbol. In the case of the flag, this special reverence has justified regulation and protection even though it remains private property; here, the expressive value of the symbol overshadows its character as owned property.[361] Justice Rehnquist echoed these sentiments in his opinion, which observed that "[t]he American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. . . . Millions and millions of Americans regard it with an almost mystical reverence . . . ."[362] The Supreme Court itself has observed that the flag is a symbol of national strength in the truest sense.[363] Put best, it is the trademark of the United States.

And, of course, this is precisely why someone would want to deface, mutilate, or alter the flag—it is because of the flag's symbolic value that some individuals gravitate toward exercising this hard-won option. In this manner, laws governing flag burning might be viewed to suggest that some kinds of property are so sacred, and carry such public importance, that it makes sense to regulate them in order to advance public benefit.[364]

---

360. *Wooley*, 430 U.S. at 715.

361. As Justice Stevens observed in his *Johnson* dissent:

> A country's flag is a symbol of more than 'nationhood and national unity.' It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. . . . So it is with the American flag. . . . The value of the flag as a symbol cannot be measured.

Texas v. Johnson, 491 U.S. 397, 436–37 (1989) (Stevens, J., dissenting).

362. *Id*. (Rehnquist, C.J., dissenting).

363. Halter v. Nebraska, 205 U.S. 34, 42 (1907).

364. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2023 (1996); *see also* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 8–11 (1993).

Wash U Law Repository

Those who support the prohibition of flag burning believe that there is something deeply sacred about America's national symbols, even if an American flag is also an item of owned private property as well.[365]

At the same time, our flag-related jurisprudence aptly demonstrates the law's fierce protection of the First Amendment values at stake in dealing with the expressive import of the interaction between tangible and intangible property regarding art and public protest. Consider, for example, an art installation performed by the artist Dread Scott at the Art Institute of Chicago in 1990.[366] Entitled "What is the Proper Way to Display a U.S. Flag?", the conceptual artwork consisted of three parts: a single, sixteen-by-twenty-inch silverprint, mounted at eye level, which contained a photocollage of a South Korean flag-burning demonstration, along with a series of flag-draped coffins; a blank book placed on a shelf underneath the photo, inviting the audience to record its comments and reactions; and finally, on the floor before the shelf, a three-by-five-foot American flag, spread plainly on the floor before the book.[367] As art historian Stephen Dubin remarked, "[t]he piece *seemed* to entice the audience to step on the flag to register their reactions in the book."[368]

Almost instantly, Scott's piece became a firebrand of controversy, joining a chorus of cases exploring the boundaries of acceptable behavior regarding the American flag. A few days after the exhibit opened, a series of veterans "stormed the exhibit and attempted to confiscate the flag and close the show."[369] Thousands turned out in protest of the work, and students and faculty rallied in support of the work, at times offering to guard the work from interference, despite the presence of bomb threats.[370] Eventually, several veterans sought to obtain an injunction against the work, but lost before a judge who found that the exhibit did not violate any state or federal laws regarding the proper treatment of a U.S. flag.[371] The

365. *See* Sheldon Nahmod, *The Sacred Flag and The First Amendment*, 66 IND. L.J. 511, 530 (1991).

366. For more information on this artwork, see Art on Trial, http://www.tjcenter.org/ArtOnTrial/flag.html (last visited Nov. 19, 2006) (describing work), and STEPHEN DUBIN, ARRESTING IMAGES: IMPOLITIC ART AND UNCIVIL IMAGES 102–24 (1992).

367. DUBIN, *supra* note 366, at 103 (describing work).

368. Later, in an interview with Andres Serrano (another postmodern artist who also caused some controversy during this period), Dread, speaking on the flag piece, admitted, "I meant for it to do everything it's done." *Id.* at 103.

369. *Id.* at 108–09.

370. *Id.* at 108–09, 120. One state senator, Walter Dudcyz, attempted to step forward in order to protect the flag—at one point, removing the flag in an attempt to affix it to a flag pole, and, on other occasions, folding the flag and placing it in a mail envelope, addressed to President Bush at the White House. *Id.* at 110–11.

371. *Id.* at 111.

judge who ruled on the case observed that "[t]his exhibit is as much an invitation to think about the flag as it is an invitation to step on it," and found the work to be fully protected under the First Amendment.[372]

In these cases, we see the operative principles that are at stake in the divide between semiotic disobedience and democracy. Like the flag, or a government license plate, commodities have both private and public implications—they may be privately owned as alienable objects, but they are often suffused with inalienable interests like personhood, identity, or expression that give rise to claims that are markedly similar to moral rights considerations.[373] But these claims, while powerful, can often mask equally persuasive interests that inhere in the appropriator of a work as well, who may seek to reframe or recode a work in ways that respond to the 'myth' of the original.

Nevertheless, our case law on flag burning and mutilation suggests that property that is privately owned (like a flag) can be burned or mutilated for expressive reasons, and that the laws of the First Amendment are designed precisely to protect, rather than interrupt, such activities. In the case of flag burning, for example, the Court has never fully answered the question of which characteristic of the flag matters most—the private or the public. Instead of definitively answering this question, the Court has mostly opted to choose democracy over disobedience—it has allowed for the recoding of national symbols in the absence of demonstrations of a breach of the peace.

In this sense, the Court has attempted to balance the public and private interests by favoring enabling speech over silencing it. A few years after *O'Brien*, the Supreme Court clarified the line between private property and public significance when it handed down *Spence v. Washington*, a case that involved an appellant who displayed an American flag outside a window with a peace symbol affixed to it.[374] Three officers charged him under Washington's "improper use" statute, which prohibited the public display of an American flag with figures, marks, or designs affixed to it.[375] After his conviction and ensuing guilty verdict before a Washington jury, Spence challenged the improper use statute on First Amendment grounds, arguing that it violated his right to free speech, and the Court agreed with

372. Judge Gillis is quoted at Dread Scott's Proper Flag, http://www.cd.sc.ehu.es/FileRoom/documents/Cases/329dread.html (last visited Nov. 19, 2006).

373. *See* Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 329–30 (1988); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

374. Spence v. Washington, 418 U.S. 405 (1974).

375. *Id.* at 406–07.

Wash U Law Repository

him.[376] One commentator, studying the range of case law on flag burning, has observed that the Court has treated all flag-related conduct the same:

> When the Court examines flag-related conduct, it does not make any constitutional distinctions based on whether that conduct is flag burning, flag saluting, flag displaying, or flag alteration. The Court has also intimated that even more outlandish flag-related conduct would be viewed in essentially the same manner: for example, cutting the flag onto the shape of a vest and wearing it, sewing the flag into the seat of one's pants, and displaying the flag in the form of the male sexual organ. This holds true whether the flag-related conduct violates an antidesecration statute or an improper use statute. Furthermore, the symbolic-speech analysis remains the same whether the context of the conduct is a public political demonstration, a children's summer camp, an art gallery, or a public street.[377]

However, despite the powerful reach of cases like *Spence*, courts have generally cast a reproachful eye over artistic representations that are designed to provoke thought regarding cultural or legal regulations of civility, sexuality, and war. For example, just two years after *O'Brien* was handed down, the Court supported an extremely different analysis undertaken by the New York Court of Appeals in *New York v. Radich*.[378] The defendant in *Radich* was the proprietor of an art gallery in New York City who was convicted of violating a New York flag desecration statute for displaying a flag that was in the form of a male sex organ.[379] In response to his conviction, the New York Court of Appeals observed that the state may legitimately restrict a number of different forms of conduct, and that "no exception is made for activities to which some would ascribe

---

376. *Id*. at 414–15. Since there had been no evidence of a breach of the peace in the record, the Court held that preventing such a breach had not really been a concern. "Anyone who might have been offended could easily have avoided the display," it observed. *Id.* at 412. It also declined to decide whether the State had a valid interest in compelling respect for the flag. *Id.* at 413.

377. Waldman, *supra* note 344, at 1864–66 (citing cases); *see, e.g.*, Kime v. United States, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting) (rejecting attempt to distinguish flag burning from flag alteration and observing that "[s]o long as petitioners were engaged in expressive conduct . . . it is entirely irrelevant what specific physical medium petitioners chose for their expression"); *Spence*, 418 U.S. at 410, 420 (analogizing flag alteration to flag displaying and flag saluting but rejecting distinction between flag burning and flag alteration); Smith v. Goguen, 415 U.S. 566 (1974) (provision of state flag misuse statute that subjects to criminal liability anyone who publicly treated flag with contempt is void for vagueness).

378. New York v. Radich, 26 N.Y.2d 114 (1970), *aff'd*, 401 U.S. 531 (1971).

379. *Id.* at 117.

symbolic significance."[380] Interestingly, because the art display was distributed to such a wide community, the court held that a trier of fact might find the potential for a breach of the peace.[381] In other words, since the state offered a reason for regulation that was unrelated to expression—preserving the peace—the courts opted to affirm the conviction rather than explore the apparently tenuous link between displaying the flag and a potential breach of the peace.[382] It is this questionable relationship between outlawing certain types of expression and keeping the public safe, so to speak, that has animated several cases exploring the boundaries of protection for symbolic speech.

The latest analysis of the relationship between peaceful protest and flag burning, however, suggests that courts are rather critical of the notion that symbolic flag destruction automatically translates to a breach of the peace. In *Texas v. Johnson*, the Supreme Court struck down a regulation governing flag burning.[383] In applying the four-pronged *O'Brien* test, the Court found that the asserted state interest was the preservation of the flag as a symbol of nationhood and national unity.[384] However venerable the interest offered purported to be, the Court observed, it was still "related to expression," because the state's "concerns blossom only when a person's treatment of the flag communicates some message."[385] "Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct," the Court pointed out.[386] Yet there was no evidence that a breach of the peace might result after Johnson's flag-burning; the state instead merely assumed that offending members of an audience would result in a breach of the peace.[387] Since the state had failed to make any showing that a breach of the peace was likely to occur, the Court decided that preserving the peace was not implicated by the facts in the record.[388]

In reaching its conclusion that the statute was a content-based restriction on expression, the Court importantly recognized that Johnson was convicted for displaying his dissatisfaction with the policies of the Reagan administration, and not merely for failing to protect the physical

380. *Id.* at 118.
381. *Id.* at 119.
382. *Id.* at 124.
383. Texas v. Johnson, 491 U.S. 397 (1989).
384. *Id.* at 410.
385. *Id.*
386. *Id.* at 411.
387. *Id.*
388. *Id.* at 408–09.

Wash U Law Repository

integrity of the flag.[389] Writing on this point, Akhil Amar observed that critics of *Johnson*, most notably the dissenters, inappropriately conflated the physical and symbolic import of the flag:

> Again and again, [participants in the flag-burning debate] confused the physical and the symbolic in speaking of their desires to protect the 'physical integrity' of the flag. But *the* flag is, in its deepest sense, not physical. Like a word, it is a symbol, an idea. It cannot be destroyed; it is fireproof. One can destroy only single manifestations, iterations, or copies of the symbol.[390]

As Amar points out, analogizing flag burning to spray painting the façade of the Lincoln Memorial (as Stevens's dissent does[391]) is inapposite; a better comparison involves mutilating a toy model, a replica, or a symbol of the Lincoln Memorial.[392] Amar concludes, almost as if by common sense, that the latter expressions would be "wholly protected," while the former would not.[393] Yet, as I have shown throughout this article, Amar's conclusions in the First Amendment context, surprisingly, do not always ring true in the context of copyright law. Indeed, in the case of moral rights and appropriation art, the law effectively prohibits alterations of copies *and* originals, despite their profoundly expressive character. The result venerates the property rights of the idea of the symbol over its tangible qualities, eviscerating any First Amendment-style protection for appropriative expression. However, as I have suggested, it only engenders further dissent in the process.

CONCLUSION: TOWARDS A TRUE PUBLIC DOMAIN

In his recent book, *Promises to Keep*, author William Fisher argues that "[r]eversing the concentration of semiotic power would benefit us all. People would be more engaged, less alienated, if they had more voice in the construction of their cultural environment. And the environment itself . . . would be more variegated and stimulating."[394] Just as the passage of the Civil Rights Act led to profound inclusion within the spheres of democracy, the state has a profound interest in building greater access to the marketplace of speech.

---

389. *Id.* at 404, 406; *see also* United States v. O'Brien, 391 U.S. 367, 376 (1968).
390. *See* Amar, *supra* note 346, at 135 (citations omitted).
391. Texas v. Johnson, 491 U.S. 397, 438 (1989) (Stevens, J., dissenting).
392. Amar, *supra* note 346, at 135.
393. *Id.* at 135.
394. *See* Fisher, PROMISES, *supra* note 5, at 30–31.

As I have suggested throughout this Article, the conflict between intellectual property, property, and speech protections masks an underlying conflict between different types of markets—one a marketplace of protected expression, and the other a marketplace of prohibited response. And, as I have shown, this tension also roughly translates into a series of conflicts between democracy and disobedience. Semiotic disobedience is a vastly underappreciated phenomenon that underlies the dynamic relationship between art and law. Projects of semiotic disobedience are undeniably significant—they shatter the law's presumed distinction between speaker and audience, between protected speech and unprotected conduct, and between the expressive functions of real and intellectual property. The aim of this paper is not to invalidate intellectual property or First Amendment doctrines that draw a line between protected and unprotected speech, but rather for us to descriptively contemplate how these boundaries unwittingly foster the creation of semiotic disobedience and, more normatively, how we can fashion a more robust, rather than fragile, semiotic democracy in the process.

Consider a parting example. In 2001, librarians at the main branch of the San Francisco Public Library discovered that hundreds of books in their collection that covered lesbian and gay issues, HIV/AIDS, and female sexuality had been willfully and violently slashed with a sharp object.[395] In all, over 600 books were destroyed before the vandal was finally apprehended by the police.[396] Virtually all of them had been so seriously damaged that they were beyond repair, and had to be withdrawn from use entirely.[397] Yet rather than retiring the collection, two staff members decided instead to undertake a massive art project enlisting the work of artists nationwide. They sent the books out to hundreds of artists, asking them to recreate something from the destroyed remains of the ruined books.[398] Almost one thousand artists responded, and, "alone or in pairs," they created hundreds of new works, which eventually brought forth the "Reversing Vandalism" exhibit.[399]

In some images in the collection, the artists have "literally sewn or bandaged the sliced pages" back together, a simultaneous act of creation, expression and destruction.[400] Consider this commentary by the art critic

395. *See* Richard Meyer, *Exhibition Review: "Reversing Vandalism" at the San Francisco Public Library*, QUEER CAUCUS FOR ART NEWSL., May 2004, *available at* http://artcataloging.net/glc/qcan042/qcan042e.html.

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

Wash U Law Repository

Richard Meyer, who described an artist responding to the slashing of *Representing Women*, a volume by the art historian Linda Nochlin.[401] Instead of using the original title, Meyer describes, the artist retitled the work in declarative form, calling it "Represent Women: A Primer."[402] Meyer writes:

> In fainter print, [the artist] has inscribed the word 'erasure' and then partially occluded it beneath a brushy patch of red pigment. Like the 'Reversing Vandalism' show of which it is part, the work challenges the vandal's violent act of erasure both by rendering that erasure visible and by creating something entirely different from it.[403]

The artist then signed his or her name along with the original author of the book.[404]

I would posit that the same creative impulse—the desire to recode through dual actions of creation and destruction—is at work in semiotic disobedience. An artist's desire to create, as many have argued, often springs from a desire to transform existing images. But this process of transformation requires, like the "Reversing Vandalism" exhibit itself, a careful balancing of preservation and destruction, a more complicated recognition of the notion of overlapping properties, rather than a single proprietary interest. Through this more complicated approach, the tangible markers of a preexisting work—a book, a billboard, a product—become reworked through an application of the intangible impulse to create, to transform, and, ultimately, to recode the existing message. A new marketplace of speech is created, one that involves the recycling of images that respond to previous images and to one another.

The importance of this conversation—to public expression, to private ownership—cannot be overstated, for it is the very reason why each area of intellectual property has attempted to reconcile itself with the First Amendment at all. But courts have lost sight of this important conversation in assessing the boundaries of real and intellectual property, allowing one to overshadow the other all too often. However, the richness of semiotic disobedience involves its willingness to interrogate the overlapping relationships between creation and destruction; semiotic disobedience suggests that the interruption of the "codes" of copyrighted

401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.*

artistic expression can be just as intimately demonstrative of creativity as self-created work, even though it elides legal protection.

In this way, semiotic disobedience offers a cautionary lesson for intellectual property enforcement: as law attempts to suppress creativity, it may also give rise to an even more innovative process of comment and criticism than was previously imagined. Thus, as I have argued, courts must balance the value of semiotic democracy with the risk of engendering semiotic disobedience. The answer, then, is to focus on the interactivity between the tangible and the intangible; for, in recognizing the multi-dimensional aspects of semiotic democracy, we can transcend the binary divisions that render such commentaries unprotected.

Wash U Law Repository