The Value of Recoding Within Reason: A Review of Justin Hughes' "Recoding" Intellectual Property and Overlooked Audience Interests

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THE VALUE OF RECODING WITHIN REASON:
A REVIEW OF JUSTIN HUGHES'
"RECODING" INTELLECTUAL PROPERTY AND
OVERLOOKED AUDIENCE INTERESTS

I. INTRODUCTION

In his Article, "Recoding" Intellectual Property and Overlooked Audience Interests, Justin Hughes inspires readers to consider more broadly all aspects of audience interests. Hughes introduces the valid theory that the vast majority of listeners craves stability in cultural objects and does not want the responsibility to recode. This majority opinion, according to Hughes, negates the need for greater recoding freedom to alter the meanings of messages. Hughes’ Article presents a provocative analysis of the debate between high-protectionists and Deconstructionists. He


2. At the time of publication, Justin Hughes served as Advisor to the United States Patent and Trademark Office, Department of Commerce. He received his Juris Doctor in 1986 from Harvard. See id. at 923.

3. For the purposes of this Review, “cultural object” does not have a strictly tangible definition. An intangible work such as a persona or a cartoon may qualify as a cultural object.

4. For the purposes of this Review, “recode” refers to the alteration by secondary users of intellectual property’s primary intended meaning. In his Article, Hughes often questions whether certain behavior is actually recoding. See Hughes, supra note 1, at 943-44 (questioning whether gay men recoded Judy Garland’s image or whether they simply relied on Garland’s then-current image of a troubled, misunderstood person).

5. In the realm of intellectual property law, “high protectionists” generally...
challenges Deconstructionists who advocate narrower intellectual property protections to further justify their stance.\(^7\) This work is undoubtedly valuable to the discussion of the future course of U.S. intellectual property protections. Unfortunately, however, Hughes overlooks the importance of some recoding freedom as a tool necessary for valuable cultural revolution.

Part II of this Review summarizes "Recoding" Intellectual Property and Overlooked Audience Interests, highlighting Hughes' assertions that most people prefer stability of meaning of cultural objects and his critique of Deconstructionist arguments for restriction of intellectual property protections. Part III of this Review analyzes Hughes' main arguments, supporting the possibility that the majority of audience members initially prefers that intellectual property ("IP") retain its predictable meaning, and challenges some of Hughes' themes where he may have unfairly dismissed valid Deconstructionist arguments. Part IV also challenges Hughes' ideas by providing a case example of how recoding freedom can spur a passive audience into reconsidering its initial stance and to see, upon further examination, the value of recoding. The medium for this message is the past controversy surrounding publication of Alice Randall's *The Wind Done Gone*, an "unauthorized parody"\(^8\) of Margaret Mitchell's wildly popular classic, *Gone With the Wind*.\(^9\) Finally, Part V of this Review advocate strong protections for intellectual property owners while "low protectionists" advocate narrower protections to allow for greater access to works, ideas, and expression.

6. See supra note 5. Deconstructionists fall into the realm of "low protectionists."

7. Other authors support Hughes' critique of the Deconstructionist view that intellectual property laws grant unhealthy control to individual owners, e.g. R. Polk Wagner, Information Wants to be Free: Intellectual Property and the Mythologies of Control, 103 COLUM. L. REV. 995 (2003) (concluding that control conferred by intellectual property laws results in a richer public domain, as opposed to draining the public domain as critics of intellectual property rights contend).

8. The term "unauthorized parody" appears on *The Wind Done Gone* book jacket.

9. ALICE RANDALL, THE WIND DONE GONE (2001) (retelling Margaret Mitchell's *Gone With the Wind*).
acknowledges the validity of arguments presented by both low and high protectionists and, to strike a balance, proposes a system of “Recoding within Reason.” To achieve a measured system in which freedom to recode exists while the stability of meaning is not completely vulnerable, U.S. legislators should clarify copyright Fair Use, further develop Fair Use legislation in the realm of trademark law, and expand the Public Figure Doctrine.

II. ARTICLE OVERVIEW

This overview of “Recoding” Intellectual Property and Overlooked Audience Interests recapitulates Hughes’ global themes. First, this section introduces Hughes’ underlying thesis and motivation. It then focuses on Hughes’ explanation of the personhood interests inherent in intellectual property. Thirdly, this Part discusses Hughes’ contention that Deconstructionist arguments overlook the interests of recipients as cultural listeners, as opposed to re-issuers of cultural messages. This section next outlines Hughes’ arguments that audiences both gain and lose utility in the recoding of cultural objects. Then, this section highlights Hughes’ exploration of our current intellectual property protections and a hypothetical legal system in which the reliance interests of listeners would frustrate owners’ valid interests. Finally, this overview illustrates Hughes’ discussion of Lockean philosophy of real property and how the “Enough and as Good” principles apply to intellectual property.

A. Adding to the Dialogue: Consider the Silent Majority

Hughes’ impetus for writing this article was to add commentary to an ongoing academic dialogue regarding the appropriate level of

Mitchell’s southern epic Gone With the Wind from the viewpoint of Scarlett’s biracial, half-sister Cynara, a slave).

10. This overview does not represent a detailed, systematic analysis of Hughes’ entire work; rather, it focuses on global themes.
control granted to intellectual property owners in the United States.\textsuperscript{11} Responding to several Deconstructionists, Hughes suggests that, to find the correct balance, the interests of all affected parties must be considered, including those of the audience—or recipients of the owners’ messages.\textsuperscript{12} Hughes introduces the concept that a majority of listeners prefers the meanings of cultural objects to remain steady and does not want the responsibility to recode messages.\textsuperscript{13} To support his theory, Hughes considers several aspects of audience interests.

1. Personhood Interests

Hughes cites how some intellectual property laws serve as protection of a creator’s “personality interest[s]” or “personhood.”\textsuperscript{14} Hughes recognizes that authors often consider their creations to be an extension of themselves, a reflection of their person and, therefore, deserving of intellectual property protection.\textsuperscript{15} Hughes connects this “personality theory” to the legal structures of moral rights\textsuperscript{16} for authors and right of publicity

\begin{itemize}
  \item 11. See Hughes, supra note 1, at 924-27.
  \item 12. See Hughes, supra note 1, at 924-27.
  \item 13. See Hughes, supra note 1, at 957.
  \item 14. See Hughes, supra note 1, at 923-24. Many authors have explored the concept of personhood interests; see Margaret Jane Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982); Steven Cherensky, Agreements, Property, and Personhood, 81 CAL. L. REV. 595, 646, 646-53 (1993) (suggesting that authors have a “personality stake in their inventions”).
  \item 15. See Hughes, supra note 1, at 924.

(a) Rights of attribution and integrity. Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art (1) shall have the right (A) to claim authorship of that work, and (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create; (2) shall have the right to prevent the use of his or her name as the author of the work of

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protection for celebrities,\textsuperscript{17} which grant creators and authors some degree of control over the flow and manipulation of their works.\textsuperscript{18}

visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and (3) subject to the limitations set forth in section 113(d), shall have the right (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

(b) Scope and exercise of rights. Only the author of a work of visual art has the rights conferred by subsection (a) in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are co-owners of the rights conferred by subsection (a) in that work.

\textit{Id.}

\textsuperscript{17} See Hughes, supra note 1, at 924.


\textit{§ 8D.01 Introduction}

\textbf{A—Types of Moral Rights}

Certain countries of the world have long recognized rights personal to authors, and as such viable separate and apart from the economic aspect of copyright. Their separate viability is such that a full transfer of copyright may suffice for all economic purposes, but may exert no impact on the assertion
of these claims.

In France, home country to the doctrine, these rights are known as le droit moral, or moral rights. "The adjective 'moral' has no precise English equivalent, although 'spiritual', 'non-economic' and 'personal' convey something of the intended meaning."

It is beyond the scope of this treatise to treat moral rights under the laws of their European homelands. Some may overlap others, and perhaps no country affords every conceivable species of moral right. In brief, the following summary encompasses the various rights that can be grouped together under this rubric. First, there are numerous variations on the attribution right (droit au respect du nom; also, droit a la paternite):
- the right to be known as the author of his work;
- the right to prevent others from falsely attributing to him the authorship of a work that he has not in fact written;
- the right to prevent others from being named as the author of his work;
- the right to publish a work anonymously or pseudonymously, as well as the right to change his mind at a later date and claim authorship under his own name;
- the right to prevent others from using the work or the author's name in such a way as to reflect adversely on his professional standing.

In addition, there are several distinct categories that comprise the classic droit moral:
- the right to prevent others from making deforming changes in his work (droit au respect de l'oeuvre);
- the right to publish a work, or to withhold it from dissemination (droit de divulgation); and
- the right to withdraw a published work from distribution if it no longer represents the views of the author (droit de retrait; also, droit de repentir).

Under French law, the moral right is conceived as perpetual, inalienable, and imprescriptible. In theory, therefore, even today in France, an outrageous stage or film version of Le Medecin Malgre Lui could be challenged and subjected to the full range of sanctions for violation of the moral right.
After establishing the base of personhood interests from which springs moral rights and right of publicity protections, Hughes identifies an academic movement that advocates lesser intellectual property protections to make way for greater dissemination of ideas, the Deconstructionist critique of intellectual property.

2. Deconstructionist Theory

To set up his Article, Hughes identifies several Deconstructionist academics of the 1990s, systematically criticizing their cases for reduced intellectual property rights. Hughes summarizes the core of the Deconstructionist argument: "[O]wners’ rights to control their intellectual property are really rights about who controls social meaning," therefore society must scrutinize closely who garners such power. He further clarifies the Deconstructionist perspective:

[C]hanges in meaning are welcome and property rights should be limited to give non-owners greater breadth to shape their own messages and, thereby, increase the personhood benefits that intellectual creations bring to those non-owners. In other words, true solicitude for personal development calls for weakening of the barriers created by intellectual property.

This increased freedom to recode, according to Deconstructionists,

Moreover, even if Moliere’s line has long since expired in the three centuries since that play was penned, the French state might still be able to protect the integrity right under a parens patriae (emphasis in original) theory.

Id.
19. See Hughes, supra note 1, at n.7. Throughout the article, Hughes critiques theories proposed by Keith Aoki, Rosemary J. Coombe, and Michael Madow, as well as other theorists.
20. See Hughes, supra note 1, at 924.
21. See Hughes, supra note 1, at 924.
will shift exclusive control of intellectual property away from owners, thawing the flow of cultural messages to allow for a freer exchange of ideas and more space for "talking back." Generally, Deconstructionists contend that First Amendment freedoms should trump intellectual property restrictions, allowing secondary users to stamp their new, unique meaning on another's intellectual property before passing it along.23

i. Deconstructionists Argue that Recoding Restrictions Hinder Marginalized Groups

A central tenet of Deconstructionist critique is the negative effect of strict intellectual property laws on marginalized groups, such as homosexuals, Native Americans, adolescents, and feminists.24 Deconstructionists argue that limiting the freedom of marginalized groups to recode others' intellectual property stifles valuable expression that may "challenge or subvert the 'preferred

22. Hughes uses the works of Rosemary Coombe and Michael Madow to lay the foundation of the Deconstructionist movement; he cites these authors' strong personhood arguments against the right of publicity. Hughes states: "Madow's thesis is that the right of publicity has become a de facto control mechanism for meaning in popular culture." See Hughes, supra note 1, at 929. Hughes also cites Coombe's assessment of the problems prompted by strict intellectual property controls, "Intellectual Property laws stifle dialogic practices - preventing us from using the most powerful, prevalent, and accessible forms to express identity, community and difference." See Hughes, supra note 1, at 931 (quoting Rosemary J. Coombe, Objects of Property and Subjects of to Politics: Intellectual Property Laws and Democratic Dialogue, 69 TEX. L. REV. 1853, 1855 (1991).  


24. See Hughes, supra note 1, at 931. Deconstructionists do not focus solely on the group effects of intellectual property laws. Individuals also suffer under intellectual property restraints, according to low-protectionists.
THE VALUE OF RECODING

meaning.25 Specifically, intellectual property laws may bar marginalized groups from employing a famous persona as an effective medium to convey a valuable, minority viewpoint.26 One Deconstructionist commentator supports this type of recoding by marginalized groups, which subverts a carefully constructed persona. A celebrity's right of publicity could become "power to deny others the use of her persona in the construction and communication of alternative or oppositional identities and social relations; power, ultimately, to limit the expressive and communicative opportunities of the rest of us."27


In his Article, Hughes challenges the Deconstructionist notion that corporations, not individuals, are the primary benefactors of intellectual property laws. According to Deconstructionists, intellectual property regimes work to increase corporate control over the flow of information through the creation of "media giants" that transmit homogenous, whitewashed messages.28 This practice, some Deconstructionists warn, could lead to a vast,

25. See Hughes, supra note 1, at 931.

26. Hughes introduces real-life examples of two famous movie stars, John Wayne and Clark Gable, who underwent makeovers on greeting cards with gay themes, such as John Wayne sporting bright pink lipstick. According to Hughes, the heirs to John Wayne's and Clark Gable's estates objected to the implications of homosexuality. See Hughes, supra note 1, at 931.

27. See Hughes, supra note 1, at 931 (citing Michael Madow, Private Ownership of the Public Image: Popular Culture and Publicity Rights, 81 CAL. L. REV. 125, 145-46 ((1993)). Madow's Deconstructionist work has become a seminal article in the academic debate over the relevance of intellectual property protection.

28. See Hughes, supra note 1, at 932. Hughes is replying to Keith Aoki's assertions that communication company mergers of the 1990s, in tandem with Internet and digital media advances create "giant companies premised on copyright control of intellectual property from conception to delivery via media links to consumers, and presents us with the distinct prospect of creation of private domain." (internal quotations omitted) citing Property and Sovereignty, supra note 23, at 1347.
Hughes counters this belief, noting that the “conception phase of intellectual productions,” such as song or script writing, is geared towards independent creators. Drawing on his own experience with the entertainment trade, he argues that, within the music industry, artists still “form bands, write their own material, play gigs in small venues, struggle to survive, make demo tracks, and hope to ‘get signed.’” In the motion picture world, Hughes says, people continue to turn out original scripts.

Hughes articulates the commonly understood fear that creators may lose their intellectual property to a corporate thief who will “steal” their ideas upon submission of a proposal, a script, or a song. Hughes places this scenario in an intellectual property context: “They are concerned that the company will reject their expression, but embrace the underlying unprotected ideas.”

Hughes uses this fear as a springboard for his response to Deconstructionists in which he asserts that individuals still need the shield of intellectual property laws: “It is difficult to believe that these people—the ones who are truly at the conception of intellectual works—would benefit by weakening the limited protections they now have.”

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29. See Hughes, supra note 1, at 932.
30. See Hughes, supra note 1, at 932-33.
31. See Hughes, supra note 1, at 933.
32. See Hughes, supra note 1, at 933.
33. See Hughes, supra note 1, at 934.
34. See Hughes, supra note 1, at 934.
35. Hughes asserts that the realities of lawsuits that involve recoding issues provide evidence for his contention that individuals, not companies, receive a greater benefit from strong intellectual property protections. Hughes supports his argument with a specific, highly-visible case example: controversy surrounding the motion picture The Devil's Advocate. In 1997, the artist Frederick Hart sued Warner Brothers for the unauthorized recoding of Hart's work in the motion picture, The Devil's Advocate. Hart's sculpture, Ex Nihilo, welcomes visitors to the National Cathedral in Washington, D.C. In The Devil's Advocate, Satan, a New York attorney, had a sculpture very similar to Ex Nihilo decorating his office wall. At the movie's climax, the sculpture comes to life dramatically. Eventually, Warner Brothers was forced to settle with the sculptor to go forward with video distribution of the film. See id.; see supra note 1, at...
asserts, are vital to protect individual and small group creators in
the entertainment industry against aggressive, avaricious business
practices designed to facilitate corporate agendas. Therefore,
according to Hughes, intellectual property laws may benefit
individuals more than they benefit corporations.

3. Non-Owners' Social Utility Interests in Stable Cultural Objects

In "Recoding" Intellectual Property and Overlooked Audience Interests, Hughes notes that courts have explored the stability
interests of intellectual property owners at length; Hughes
challenges his readers to take the next step by considering the audience's interest in stability of cultural objects. Claiming that Deconstructionists ignore this relevant side of the issue, Hughes supports his central thesis that intellectual property and recoding discourse overlook audience interests in stable meanings of cultural objects. He frames the tension:

The problem is that putting the focus on the need of some non-owners to recode the cultural object de-emphasizes how much all non-owners rely on the


36. Hughes provides other examples of lawsuits where individuals used intellectual property laws as tools to fight corporate abuse. Id. For examples of musicians who resisted corporate attempts to pass off sound-alikes in commercials, see Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992) (awarding recording artist Tom Waits a multi-million dollar settlement because Frito-Lay employed an unauthorized sound-alike in commercials); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988) (holding liable defendant-car manufacturer for employing a voice sound-alike to misappropriate a celebrity's voice).

37. In this vein, Hughes argues that copyright laws serve as protector of language, stepping in to preserve meaning where the human memory would otherwise fail. See Hughes, supra note 1, at 941.
same cultural object having a stable, commonly understood set of meanings. This need for stability exists both for the non-owners who want to recode and for a vast, (literally) silent majority who derive utility from the object’s stable meanings. 38

Hughes argues that there are significant audience benefits to a cultural object maintaining stable meaning, including both informational and non-informational social utility. 39

i. Social Utility Derived from Stable Meanings

Comporting with his central thesis that Deconstructionists overlook audience interests when criticizing intellectual property laws, Hughes raises the concept of “true listeners,” people who will listen passively with no desire to recode a message. 40 Hughes claims that listeners have a high stake in meaning stability because they derive information from conveyed intellectual property; consumers rely on a trademark’s message to provide a capsule of information about the quality and consistency of a product or that consumers trust valid celebrity product endorsements. 41

38. See Hughes, supra note 1, at 941.

39. As a primary point, Hughes implies that greater recoding freedom will weaken the evolution of cultural messages. The ability of a secondary user to recode depends on the image first having obtained “underlying stability.” Without stability, recoding of a particular object would be impossible and secondary users would have no raw material with which to work. To support his argument, Hughes lists five case examples, both real and hypothetical situations, of how the lack of a stable meaning would disserve society. He cites the possibility of Aryan extremists seizing on Madonna’s “platinum” image to peddle their message of hate, which disallowed a college girl the opportunity of liberating self-expression via t-shirt because Madonna’s meaning had lost stability. See Hughes, supra note 1, at 941-47.

40. See Hughes, supra note 1, at 952.

41. In this discussion, Hughes specifically attacks Madow’s debatable premise that right of publicity laws do not focus on limiting public deception. Hughes calls Madow’s point that the right of publicity does little to shield consumers’ informational interests “empirically unproved.” See Hughes, supra note 1, at 952.
believes, despite Deconstructionist counterclaims, that consumers likely do rely on endorsements to make purchasing decisions; therefore, recoding freedom that encourages unauthorized manipulation of these messages could injure consumers. 42

According to Hughes, listeners also derive a type of emotional, non-informational social utility from the stability of cultural meanings. To provide evidence for his contention, Hughes attempts to peer into passive listeners' consumer desires. Hughes claims that, beyond informational utility, passive listeners derive utility by identifying and communicating with cultural objects. 43 Listeners may privately recode a meaning of a cultural object; yet they refrain from any public recoding. 44

To illustrate, Hughes notes that several people seek stability in commonly known cultural objects, such as designer labels or luxury cars, in an effort to fit in with their peers. 45 Most people seize on a stable cultural object and, instead of attempting to redefine it, hope that the image will "redefine them." 46 Hughes pushes this further, claiming that the "average American" rejects the responsibility of recoding messages and is comfortable instead with passively consuming the information he or she receives. 47 Therefore, Hughes argues that we should consider the personality needs of passive non-users at least as much as the concerns of active secondary users. 48

42. At the very least, Hughes argues it is not fact that consumers simply disregard endorsements as fluff because, in our current society, celebrities will readily lend their image to any product (for the right price). See Hughes, supra note 1, at 953-55.
43. See Hughes, supra note 1, at 955.
44. To illustrate his point that consumers identify with certain cultural objects, Hughes discusses an early 1970's poster of Farrah Fawcett-Majors that was displayed ubiquitously in "workshops, locker rooms, [and] men's dorm rooms" across the country. See Hughes, supra note 1, at 955.
45. See Hughes, supra note 1, at 956.
46. See Hughes, supra note 1, at 957.
47. See Hughes, supra note 1, at 957. Hughes points to the case of the unpopularity of hypertext novels as a classic deconstructionist example of recoding. See Hughes, supra note 1, at 957.
48. See Hughes, supra note 1, at 957-59.
Due to the popular demand for cultural stability in certain objects or symbols, Hughes argues that, while some recoding may increase utility for secondary users, it can also rob others of the social utility they find in the object’s original meaning. 49 Hughes claims that several non-owners are unhappy with certain recodings; he uses the example of American Airlines adopting George Gershwin’s *Rhapsody in Blue* as theme music in the 1990s. 50 Hughes believes that a disutility accompanied any cultural gains made through this particular recoding:

There were gains in utility: a beautiful tune more often on the airwaves and perhaps some special pride instilled in United’s management, employees, and frequent flyers. But was there a decrease in overall utility as a classic, soaring melody that symbolized America’s coming of age was recoded to mean a 777 banking toward O’Hare? Does everyone gain or lose when a Cole Porter classic is recoded by a toilet bowl cleaner to be I’ve Got You Under My Rim? 51

Hughes proposes the idea that certain cultural messages, if open to rampant recoding, could easily lose their ability to attract listeners through overexposure. 52

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49. See Hughes, *supra* note 1, at 959.
50. See Hughes, *supra* note 1, at 959.
51. See Hughes, *supra* note 1, at 959.
52. See Hughes, *supra* note 1, at 959. Conceding that some cultural objects are impervious to dilution of meaning (i.e. the Statue of Liberty or the Eiffel Tower), Hughes contends that some recodings may overpower the original message. As examples of recoded messages that have overpowered the original, Hughes notes Saturday Night Live’s *I Love Sodom* parody of the *I Love New York* song. See Hughes, *supra* note 1, at 961.
Deconstructionists advocate thinner intellectual property protections to allow for a richer marketplace of ideas. Hughes recognizes the importance of diverse discourse; however, he chooses to measure the pool of ideas in terms of quality as well as quantity. Hughes proposes the idea that greater recoding freedom could also allow for the muffling of valuable, extreme messages that contribute to a heterogeneous marketplace of ideas. To support his argument, he recounts a case in which an offbeat British comedy troupe successfully enjoined ABC from broadcasting a watered down version of the amusingly crude *Monty Python's Flying Circus.* Corporate ABC wished to recode
the series to its more vanilla comedic taste, an act the individual authors successfully opposed using current intellectual property protections.

4. Recoding within Current and Potential Intellectual Property Regimes

After establishing that current IP laws can be used effectively to discourage different types of recoding, Hughes notes that this same set of laws simultaneously allows for adequate recoding freedom. This section now explores Hughes' implication that US property regimes work in harmony to provide both proponents of stability and recoders with some coverage. Hughes also concedes that weighing audience stability interests too heavily could unfairly impede owners' rights.

infringement. See id. at 36. Plaintiffs also brought a Trademark Infringement action under the Lanham Act. Id. at 27. The Court's rationale for restricting ABC's right to recode deflects Deconstructionists arguments, reiterating the importance of owner control:

The rationale for finding infringement when a licensee exceeds time or media restrictions on his license—the need to allow the proprietor of the underlying copyright to control the method in which his work is presented to the public—applies equally to the situation in which a licensee makes an unauthorized use of the underlying work by publishing it in a truncated version. Whether intended to allow greater economic exploitation of the work, as in the media and time cases, or to ensure that the copyright proprietor retains a veto power over revisions desired for the derivative work, the ability of the copyright holder to control his work remains paramount in our copyright law. We find, therefore, that unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright.

Id. at 21.
i. Sufficient Freedoms to Borrow Exist under Current Intellectual Property Laws

Not all celebrities are unique. As one Deconstructionist theorist explains, several pop culture stars borrow heavily from existing artists and, therefore, strict intellectual property laws should not bar later artists from following a similar path to inspiration. Hughes argues that this logic is faulty as several artists who “borrow” from past celebrities have not been limited by existing intellectual property constraints: “Madonna, Prince, and Elvis Costello have drawn heavily from Marilyn Monroe, Jimi Hendrix, and Buddy Holly, respectively—heavily, successfully, and apparently without debilitating legal obstacles.”

Hughes charges Deconstructionists with exaggerating the degree to which intellectual property laws freeze the process of changes to meaning. He claims that U.S. law supports the type of borrowing in which Madonna, Prince, and Elvis Costello engage. In this era, meanings change at a “wonderfully dizzying pace” and a set of legal doctrines work to protect these types of recoding, Hughes states.

As evidence of a sufficiently accessible public domain, Hughes cites the existence of the scenes a faire doctrine, parody options,
general fair use, and the basic "thinness of copyright." He opines that artists have great freedom to pull inspiration from their surroundings in order to create original works. Hughes goes into depth on the value of *scenes a faire*:

Although not the most rigorously formulated doctrine, the scenes a faire principle permits authors to use scenes, incidents, or elements in their story that "flow naturally from a basic plot premise" even though those elements may come close to elements in existing, copyrighted works. In some sense, the scenes a faire doctrine is a shadow of the more fundamental proposition that there is no copyright in facts: scenes a faire are akin to abstract "facts" about particular times and places.

Thus, Hughes says, creators are free to employ common themes without fear of infringement actions.

Hughes also calls his readers' attention to room for recoding found within right of publicity statutes. California, according to Hughes, has a highly evolved system of publicity protections due to the state's active entertainment industry. California's law carves out specific exceptions that allow for free use of anyone's likeness or voice for "news, public affairs, ... or any political campaign." Hughes concludes that the present set of intellectual property laws "stabilizes meaning to some degree but does not fence off as much as some think."

Even though Hughes advocates considering audience interests in stability when debating appropriate levels of intellectual property


62. See Hughes, *supra* note 1, at 949.
63. See Hughes, *supra* note 1, at 949 (internal citations omitted).
64. See Hughes, *supra* note 1, at 951.
65. See *CAL. CIV. CODE* 3344(d) (West 1997).
66. See Hughes, *supra* note 1, at 951.
protections, he does not advocate shifting too much control from owners' hands into the hands of audiences. This section next outlines Hughes' explanation of how a legal structure built on audience reliance interests in stability would clash with some U.S. legal fundamentals.

**ii. Listeners v. Owners: Caution Regarding Laws Catering to Audience Reliance Interests**

Generally, Hughes encourages weighing non-owners' interests in maintaining stable meaning against secondary users' desires to recode.67 In "Recoding" *Intellectual Property and Overlooked Audience Interests*, Hughes presents another tension—when owners of cultural objects wish to recode but face resistance from an audience dedicated to the object's original, stable meaning. In his in-depth exploration of listener interests in cultural stability, Hughes introduces several key examples:

People who read a particular novel may not want to see it turned into a movie; fans of a book, movie, or play may oppose the creation of a sequel. How many devotees of *Gone with the Wind* were opposed to the 1990s sequel *Scarlett*? How many fans of the book *Dune* were opposed to the movie version? How many comic book readers of old have been saddened as the look and feel of Batman or Spiderman have changed over the years? It is probably accurate to say that these situations in which the owner desires to recode tend to occur when there is an effort to reap greater commercial advantage from an existing cultural object... As one commentator noted, "Fans also see themselves as guardians of the texts they love, purer than the owners in some ways because they seek no profit."68

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67. See Hughes, *supra* note 1, at 988.
68. See Hughes, *supra* note 1, at 988-99 (internal citations and quotations
Despite Hughes’ assertions that audience interests are key to the debate between high-protectionists and Deconstructionists, he recognizes that these audience reliance interests may not comport with intellectual property laws. 69

Audiences have a reliance interest in a variety of cultural objects protected by trademark or copyright laws. Hughes uses the case of *Adams v. Dream Day Publishing, Inc.* 70 to illustrate a situation where this audience interests in stability may serve to “fix” the meaning of a cultural object. The *Adams* court estopped a publisher from issuing posters under the name Ansel Adams because the publisher only photocopied Adams prints; it did not adhere to Adams’ signature method of printing. 71 The judge in the case went a step further, setting out the requirements for a print to be labeled a true Ansel Adams. 72 Hughes argues that the judge’s decision can be viewed as an attempt to “fix the meaning of an ‘Ansel Adams’ photograph as roughly what it meant at the time

omitted). It is convenient to this Article Review that Hughes himself introduced the issue of Gone With the Wind fans’ interests in stabilizing the novel’s original meaning conveyed by Margaret Mitchell. Hughes suggests that this brand of interests should be considered more seriously in the discourse between high protectionists and deconstructionists. See Hughes, *supra* note 1, at 988-99. Later, in Part III, this Review will challenge some of Hughes’ contentions using the case of a controversial 2001 recoding of *Gone With the Wind* as a vehicle for analysis.

69. Famous people, Hughes analogizes, are like “public resources;” non-owners draw on those stable public images to extract a certain feeling and to assert their own self-expression. When a famous person’s true, less-than-perfect selves emerge, audiences revolt. As an example, Hughes tells the story of Mary Pickford, an actress famous for playing a young girl even after age 30. Audiences were indignant when the actress chose to shear her trademark curls. “Once the real figure beneath the image started to surface, when Chaplin’s outspokenness was deemed un-American, or Pickford went through a messy divorce, the audience was scandalized at this threat to their perception of the star.” See Hughes, *supra* note 1, at 988-99.


71. See Hughes, *supra* note 1, at 990-91.

72. See Hughes, *supra* note 1, at 990-91.

https://via.library.depaul.edu/jatip/vol14/iss2/2
Adams ended his career. This decision protects Ansel Adams purists yet, Hughes asserts, the decision places the interests of non-owners above the interests of owners in recoding the cultural object.

Hughes ponders what would happen if a steady trend of upholding non-owners' interest in stability over owners' desires to recode were to emerge. If owners choose to alter the goods they sell under a certain brand, such as selling no-frills, budget automobiles under the upscale ACURA trademark, could they face charges as if they were infringers for causing consumer confusion? While arguing for consideration of audience interests in stability, Hughes warns against laws that grant non-owner interests too much control. As Hughes notes, non-owners have built in protections—if they do not like the recoded image, they do not have to consume it.

In his Article, Hughes does not fixate solely on the future state of U.S. intellectual property protections. He also looks to the past, applying eighteenth century philosophy of real property to the dialogue between high-protectionists and Deconstructionists.

5. Applying Real Property Philosophy to Intellectual Property: Enough and As Good

Another major theme of "Recoding" Intellectual Property and Overlooked Audience Interests considers the "cumulative effect of property rights over cultural objects" and its impact on expression. Overall, Hughes argues that, often, people have other

73. See Hughes, supra note 1, at 990.
74. See Hughes, supra note 1, at 990.
75. See Hughes, supra note 1, at 991.
76. Hughes notes "There is no question that people in America use cars for self-expression. Could people who bought the new, inferior cars have any claim based on their reliance on the established meaning of 'Acura'?" Hughes goes on to say that, in a legal system that over-values audience interests, owners of the traditional Acura may have a dilution claim against the intellectual property owners. See Hughes, supra note 1, at 991.
77. See Hughes, supra note 1, at 1008.
78. See Hughes, supra note 1, at 966.
options for creation and need not recode another’s intellectual property, and that there are not enough secondary users deprived of material by intellectual property laws to justify a change in the system.\textsuperscript{79} He contends that consumers benefit when artists are more industrious, as opposed to simply recoding another’s efforts, when rooting for creative inspiration.

\textit{i. Locke’s Theory of “Enough and As Good” Explained}

Hughes borrows from philosopher John Locke’s theory of private property to examine justifications for granting owners exclusive rights to their intellectual property. Hughes contends that Deconstructionist arguments require a reexamination of Lockean notions. Locke was a proponent of communal property ownership.\textsuperscript{80} Therefore, the notion of excluding others from property forces two of Locke’s central philosophies to bend in order to work together: (1) that each individual “plots a course for his own preservations,” and (2) that everyone is “under a natural obligation to ensure that this [course] conduces to the preservation of all.”\textsuperscript{81} Locke justifies the notion of appropriating property for exclusive use if, even though property rights are communal in a Lockean world, “enough and as good” land remains available for propertization by others.\textsuperscript{82} This compromise allows Locke’s two

\textsuperscript{79} See Hughes, \textit{supra} note 1, at 969-72. To provide evidence for his theories, Hughes turns to the courts. Hughes supports a case decision in which a civic group against gay bashing was refused access to the name “Pink Panther Control.” On the other hand, Hughes questioned the Supreme Court’s controversial award of control to the Olympic Committee over term “Olympic,” a word that has been part of world vocabulary for centuries. Hughes notes that “Olympic” has a specific meaning with no sufficient substitute; this produces a clear enough and as good problem. \textit{See} Hughes, \textit{supra} note 1, at 969-72. Yet, Hughes asserts that the majority of creators will find a way to work around the problem: The question is whether there are enough secondary users to justify shaping the legal system to respond to their needs?” \textit{See} Hughes, \textit{supra} note 1, at 987.

\textsuperscript{80} \textit{See} Hughes, \textit{supra} note 1, at 967.

\textsuperscript{81} \textit{See} Hughes, \textit{supra} note 1, at 968-69.

\textsuperscript{82} \textit{See} Hughes, \textit{supra} note 1, at 967.
central philosophies to coexist. Locke states that, when surrounded by vast resources, people can fence off the fruits of their labor without interfering with others’ rights to do the same. 83

Hughes believes that this enough and as good theory applies to the Deconstructionist critique of intellectual property:

Cast in Locke’s light, the deconstructionist argument could say that once all the controls over images now inherent in copyright, trademark, and the right of publicity are recognized, there will not be enough and as good cultural “material” to be used by others (propertized or not) for their own self-expression. 84

Hughes contests this Deconstructionist argument that intellectual property laws result in a depletion of resources for others. 85 In

83. Hughes explains Lockean justifications in more detail:
The enough and as good condition harmonizes some potentially conflicting propositions in Locke’s philosophy. First, each person both “plots a course for his own preservation” and “is under a natural obligation to ensure that this conduces to the preservation of all.” The condition ensures that actions taken for self-preservation, in other words, seizing natural resources, do not disturb the prospects of others for self-preservation. Locke also posits that things in nature belong to all in common, but if the common is owned by everyone, then universal consent would be needed to justify an act of privatization; Locke overcomes this issue by understanding the community right in the commons as a right of opportunity, so that consent is not needed to take property from the commons as long as enough opportunities remain for others.

See Hughes, supra note 1, at 967.

84. See Hughes, supra note 1, at 968.

85. To provide evidence for his theories, Hughes turns to the courts. Hughes supports a case decision in which a civic group against gay bashing was refused access to the name “Pink Panther Control.” On the other hand, Hughes questioned the Supreme Court’s controversial award of control to the Olympic Committee over term “Olympic,” a word that has been part of world vocabulary
fact, Hughes argues that a narrower public domain from which to "borrow" has clear benefits to consumers.

### ii. How Cultural Consumers Benefit from Intellectual Property Restraints on Artists

In his exploration of Lockean philosophy, Hughes presents an interesting notion about how we, as consumers, have benefited from constraints imposed on artists by intellectual property laws. He claims that, in the spirit of enough and as good, perhaps artists such as Madonna and Buddy Holly were pushed to go beyond their comfort zones for inspiration:

> Perhaps Prince started out his career really only wanting to be a Jimi Hendrix clone; perhaps for a time Madonna wanted only to be a Marilyn Monroe imitator; if intellectual property laws actually pushed these people away from existing cultural objects, are we not pleased, both for them and for us?[^86]

Hughes seems to say that conceivably, with greater recoding freedom, performers would be content with simply performing others' work as opposed to going to the trouble of original creation. Hughes’ reasoning also applies to parodies and satire.

### iii. Enough and As Good in Parody Situations

In this section, Hughes views the instance of parody through a Deconstructionist enough and as good lens. Hughes claims that, in fact, parody case law limits parodies that are more diffuse,[^87] noting

[^86]: See Hughes, supra note 1, at 981.

[^87]: Hughes’ discusses artist Jeff Koons’ parodies of society at large using the copyrighted image of Odie, the dog character from the Garfield cartoon. Courts
that current parody law requires artists to expressly and directly reply to certain works or situations (as opposed to parodying society in general by using some protected works as tools to convey the message). Hughes claims that, while some artists will indeed be handicapped by these recoding restrictions, several other enterprising artists will find a successful way to work around the problem. In line with his central tenet that the majority of listeners craves stability, Hughes questions whether intellectual property laws should bend to make things easier for only a small group of secondary users.

6. Overview Conclusion

Hughes concludes his Article with a call to consider in the scholarly dialogue regarding justifications for intellectual property laws a broader spectrum of interests, specifically, audience

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88. Hughes provides his definition of parody:

A parody is a reply which acknowledges both the original coding of the subject work and the original work’s social place; as the district court in Elsmere wrote, “Parody is an acknowledgment of the importance of things parodied.” For Saturday Night Live’s I Love Sodom to be an effective parody of the song I Love New York, the former has to do more than conjure up the latter: the parody song is funny only as much as it reminds you that the original song promotes New York City with a Prozac-upbeat, unrealistic image of the Big Apple.

See Hughes, supra note 1, at 985 (internal citations omitted).

89. See Hughes, supra note 1, at 987.

90. In Hughes’ words: “The question is whether there are enough secondary users so deprived to justify shaping the legal system to respond to their needs.” See Hughes, supra note 1, at 987.
interests in cultural stability.91 This Article Review will now move into an analysis of Hughes’ points, focusing in Part III on his underlying critique of greater recoding freedoms; this Review argues that, while Hughes has presented valid themes and proposals, he has overlooked some values inherent in recoding.

III. ANALYSIS

This Part analyzes Hughes’ global themes, either supporting his contentions or revealing flaws in his reasoning or examples. Generally, this Article Review concludes that Hughes introduces novel, valuable issues regarding overlooked audience interests to the ongoing debate between high-protectionists and Deconstructionists. On the other hand, “Recoding” Intellectual Property and Overlooked Audience Interests itself overlooks the value of recoding as a powerful tool to achieve cultural revolution. This Part is broken down into two sections. The first section offers support for some of Hughes’ contentions and the second criticizes some of Hughes anti-deconstructionist assertions.

A. Support for Hughes

Hughes’ Article has been a valuable contribution to the debate over the proper levels of intellectual property protection in U.S. law. He presents valid arguments for increased intellectual property protections, including the listener’s interests in stability, the social utility value of stable cultural objects, and interests in preserving diversity of messages.

1. Adding to the Dialogue—Consider Recipients as Listeners as well as Secondary Users

Hughes’ central thesis that Deconstructionists must consider the “silent majority” of audience members as well as the minority that

91. See Hughes, supra note 1, at 1010.
wishes to recode is sound. He adds another strand to the debate concerning appropriate levels of intellectual property laws that had been previously overlooked (as the title of his work suggests).

Since the publication of Hughes’ work, other authors have continued his exploration of the interests of a passive audience. One commentator on the role of consumer in intellectual property laws advocates, as Hughes does, considering more seriously how consumer interests drive litigation:

To be sure, the interests of consumers of copyrighted works are represented throughout the Copyright Act. After all, the overall purpose of the Copyright Act is not to reward authors for the authors’ sake, but to reward authors to benefit consumers and society more generally. Copyright doctrines are thus shaped to keep this ultimate goal in mind. Yet, despite this recognition of a general consumer interest, rather little has been written about the precise shape and scope of this interest.

Hughes’ work has tipped other commentators to a valid line of questioning—whether audience interests deserve analysis and evaluation. As a result of Hughes thinking beyond the interests of only owners and secondary users, the discussion of the best form of intellectual protections now boasts another layer.

2. Hughes’ Illustrates that Non-Owners Derive Social Utility in Stable Cultural Objects

Hughes’ discussion of the ways in which non-owners derive social utility from stability of meanings is persuasive and insightful. In the realm of informational utility, he successfully

93. Id. at 398-99.
94. See supra notes 37-52 and accompanying text.
counters a powerful Deconstructionist argument that consumers do not rely on the validity of celebrity endorsement to make purchasing decisions. Deconstructionists claim that consumers do not believe that celebrities use the products they endorse; therefore, deregulating intellectual property laws connected to right of publicity and sponsorship would not injure the consumer. Hughes concedes that, perhaps, Deconstructionists are correct, however, without evidence, there is no way to know for certain.

Further, Hughes argues that consumers would be extremely vulnerable immediately following a deregulation of the use of celebrity personas:

Assuming [this argument] is correct - that any current linkage between endorsement and information transfer is the result of the legal background - that does not lessen the initial loss in utility that consumers could suffer from denying celebrities their right of publicity. Is it likely that during the considerable amount of time in which consumers would still link images with endorsement (information), advertisers - mainly large corporations - would be milking celebrity images for all that they were worth?

Hughes' argument prevails because Deconstructionists lack solid evidence showing consumers disregard celebrity sponsorships.

96. See Hughes, supra note 1, at 952-54.
97. See Hughes, supra note 1, at 954.
98. See Hughes, supra note 1, at 954.
99. For evidence that consumers do, in fact, rely on celebrity endorsements, see Matt Schiering, Red Carpet Branding, BRANDWEEK 44, no. 33, p. 28-30 (Sep 15, 2003). Schiering notes:
   From intimate testimonials in TV commercials to waving freebies at the Oscars, marketers have masterminded myriad ways for their products to reach us through our famous
The Value of Recoding

His prediction for corporate abuse in a world with no celebrity image regulation outweighs the Deconstructionist dismissal of consumer reliance on sponsorships.

Hughes also convincingly argues that non-owners derive substantial non-informational utility from cultural objects. In his analysis of the human connection to goods, Hughes asserts that people rely on an object's stable meaning to "redefine them". Hughes does not reveal new truths; psychologists have long supported the theory of consumers' emotional connection to certain brands or cultural objects. Businesses rely on this common knowledge of the consumer mind; advertisers invest billions of dollars annually based on the assumption that consumers will purchase a certain brand for its self-expression value.

Independent psychological articles support Hughes' theories. After conducting a focus group regarding brands, one psychological researcher summarized this nexus between the consumer's notion of self and the cultural images: "Having a regular relationship with a brand can be habit. It is reassuring to buy known quality." Also, as Hughes notes, consumers identify

citizens. And with good reason: Celebrities wield considerable power to influence consumer purchases. According to a 1999 study by Illinois State University, approximately 20% of all television advertising features a well-known individual from the world of sports, TV, movies or music. Other recent academic studies have concluded that customers are more likely to choose goods and services endorsed by celebrities than those that are not, and that the more familiar the pitchman, the more likely consumers are to buy the product.

Id. at 28. See also Chung-kue and Daniella McDonald, An Examination on Multiple Celebrity Endorsers in Advertising, JOURNAL OF PRODUCT & BRAND MGMT. 11, no. 1 p. 19-29 (2002) (concluding that the got milk? campaign's use of several celebrities at www.whymilk.com contributed to the campaign's overall success).

100. See Hughes, supra note 1, at 955-63.

101. See Hughes, supra note 1, at 957.


103 See Kelly Scermach, What Consumers Wish Brand Managers Knew,
with brands and use them for self-expression. One respondent said about Coca Cola, "We've grown up with it. Coke has always been the family friend." According to the researcher, pinnacle brands—such as Rolex or Armani—serve as icons to consumers. One focus group respondent admitted that he would consider himself more successful if he were able to afford those brands. This psychological evidence supports Hughes theory of a non-owner reliance interest in brand stability for social utility purposes.

3. Value of Diversity—Hughes' Theory that Greater Recoding Freedoms Could Stifle Diverse Messages

Throughout his Article, Hughes deftly plays the role of devil's advocate, spinning possibilities that Deconstructionists have overlooked. For example, Hughes asserts that, if Deconstructionists were to win the fight for greater recoding freedom, the victory could backfire and actually result in the suppression of extreme messages. To support this theory, Hughes uses a prime example in which ABC attempted to muffle Monty Python's unique British brand of humor during an American rebroadcast of the Monty Python's Flying Circus Series.

Hughes also looks to European history to prove his point that greater recoding freedom exposes all works, conservative and extreme, to plundering. Hughes points to the French Revolution; in Paris, copyright protection virtually disappeared in the name of

MARKETING NEWS TM p.9-17 (Jun 9, 1997).

104. Id.
105. Id.
106. Id.
107. See Hughes, supra note 1, at 964-66.
108. See Hughes, supra note 1, at 964-66.
free speech—leaving all works vulnerable to copying. One commentator noted that, in fact, a society with no copyright restrictions produced "homogenous" works, therefore diversity suffered for greater recoding freedom.

This historical lesson contradicts Deconstructionist arguments that greater recoding freedom would usher in diversity of ideas to enrich the marketplace of ideas. One Deconstructionist argues for expansion of Fair Use in the context of visual arts to promote such diverse discourse:

In order to challenge traditional assumptions of artistic individuation, the artist incorporates the images of another into his own work in a conscious attempt to produce a radical, communal discourse. Thus, the act of appropriation gives meaning to the expression embodied in the creative work; the mere simulation of images would reduce, if not eliminate, the impact of the expression. In order to protect such politically motivated expression, the law should accommodate the appropriation of reproduced images when used for expressive purposes.

The above argument is convincing and thought-provoking; however, it is some-what one-sided when compared to Hughes' arguments. Hughes acknowledges that intellectual property may restrain some radical speech, yet he takes the next crucial step in

110. See Hughes, supra note 1, at 965 (citing Carla Hesse, Publishing and Cultural Politics in Revolutionary Paris, 1789-1810, at 3-4, 98, 125-27 (1991)). After the government abolished copyright protections, twenty-one French publishers and booksellers declared bankruptcy. See id. at 73-76, 98-99. Copyright laws were restored in 1793. See id. at 120.


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the thought process. Hughes cautions, through both current and historical examples, that greater recoding freedom could subvert the intentions of Deconstructionists and “muffle extreme messages” through a homogenization process.\textsuperscript{113}

4. Recoding under Current and Potential Intellectual Property Regimes\textsuperscript{114}

This section commends Hughes’ ability to analyze both current and potential laws in a creative, yet realistic manner. Hughes’ in-depth survey of current intellectual property laws successfully trumps popular Deconstructionist claims that current intellectual property regimes do not provide ample room to recode.\textsuperscript{115}

A leading Deconstructionist scholar, Rosemary Coombe, evinces that celebrities are not truly unique: “[S]tars and their fame are never manufactured from whole cloth—the successful image is frequently a form of cultural bricolage that improvises with a social history of symbolic forms.”\textsuperscript{116} She explains that celebrities have always borrowed from existing or past celebrities when constructing their images or developing their styles.\textsuperscript{117} This process should be allowed to continue, unfettered by restrictions on recoding, Coombe argues.\textsuperscript{118} She gives several examples, including Madonna’s use of Marilyn Monroe-esque elements, to support her claim.\textsuperscript{119}

Hughes considers Coombe’s strong, thoughtfully-presented
arguments, yet deflects them with common sense:

[M]any of the examples she gives have not been circumscribed by existing laws: Madonna, Prince, and Elvis Costello have drawn from Marilyn Monroe, Jimi Hendrix, and Buddy Holly, respectively - heavily, successfully, and apparently without debilitating legal obstacles. But there is a great difference between Elvis Costello and a Buddy Holly impersonator. Few confuse Prince with Jimi Hendrix, just as few confuse Picasso's Las Meninas with the Velazquez painting that inspired it.120

Hughes' commentary supports his theory that Deconstructionists "hyperbolize" the extent to which current intellectual property laws limit individuals' recoding options.

Hughes challenges another well-known and respected Deconstructionist regarding this issue. Keith Aoki contends that intellectual property laws corner cultural imagery, discouraging borrowing for recoding purposes.121 He envisions a world in which recoding is taboo:

Through drawing the conceptual boundaries of authorial property so expansively, these legal borders demarcating the lines between ideas and expression, between public good and private property, between information as a commodity and information as a noncommodifizable constitutive process, a troubling geographic dynamic emerges. Increasing aspects of our cultural imaginary are being fenced "off-limits," as intellectual property, marked with the equivalent of "no-trespassing"

120. See Hughes, supra note 1, at 947.
121. Property and Sovereignty, supra note 23, at 1337.
Aoki is not alone in his assertions that granting authors exclusive control may damage society's cultural evolution, yet Hughes' treatment of Aoki's warnings forces readers back into reality, as opposed to Aoki's speculative realm.

Hughes asserts that the right to recode is alive within current U.S. intellectual property regimes. He highlights certain tools that recoders may use to carve out exceptions to exclusive owner control of intellectual property. Hughes' lists under the copyright regime *scenes a faire*, parody, artistic freedom, general Fair Use, and availability under "thin" copyright. He notes trademark law also has Fair Use and parody exceptions. Recoders may rely on the public figure doctrine within the law of publicity to recode. Hughes' persuades readers that perhaps Deconstructionists undervalue the channels currently available for recoding within US intellectual property laws.

Although Hughes argues that audience stability interests deserve more attention in the debate between high-protectionists and low-protectionists, he does not advocate recklessly placing audience interests above those of owners. In "Recoding" Intellectual Property and Overlooked Audience Interests, Hughes warns that basing intellectual property laws on audience reliance interests could have negative effects. This tempered viewpoint lends

122. *Id.*


124. *See Hughes, supra* note 1, at 949.

125. *See Hughes, supra* note 1, at 949.

126. *See Hughes, supra* note 1, at 949.

127. *See Hughes, supra* note 1, at 949.

128. *See Hughes, supra* note 1, at 987-1008. *See also supra* notes 67-77 and
credence to Hughes' arguments; he foresees a situation in which his own theories could subvert when taken too far. This Part now turns to a critique of Hughes's assertions in "Recoding" Intellectual Property and Overlooked Audience Interests. Despite his valuable contributions, Hughes has dismissed too readily some persuasive Deconstructionist arguments and rationale for greater recoding freedom.

B. Critique of Hughes

This section challenges a series of Hughes' themes, suggesting that some Deconstructionist notions of greater recoding freedoms may, in fact, benefit society. First, this section addresses Hughes' hasty dismissal of Deconstructionist arguments that recoding limits hinder marginalized groups. Next, this section confronts Hughes' conclusions that individuals may gain more than corporations do from intellectual property laws. Regarding Hughes discussion of Locke's "Enough and as Good" philosophy, this section concludes that Hughes did not advance his analysis to the level necessary to fully appreciate Deconstructionist warnings that the public domain may be shrinking.

1. Marginalized Groups and Recoding – Survival of the Fittest

Hughes implies that Deconstructionists tend to focus too much on the needs of marginalized groups, such as homosexuals and racial minorities, to recode. He does not give adequate respect to the truth that marginalized groups' voices are often drowned out and that recoding can provide an excellent means for disseminating minority messages that would otherwise go unheard. Rosemary Coombe provides a real-life example of a marginalized group successfully recoding intellectual property:

The women of Smith College experienced a fair

accompanying text.

129. See Hughes, supra note 1, at 932.
degree of internal social turmoil in the fall of 1990 as the college dealt with demands for increased commitment to issues of multiculturalism and greater sensitivity to minority experience. In a show of community and solidarity, a number of women made, wore, and sold T-shirts parodying the internationally known Benetton logo. "United Colors of Smith" were proudly proclaimed.  

Glossing over the benefits provided by marginalized groups’ recoding of images and the notion that these groups do not have an adequate voice in the U.S., Hughes provides a provocative example of his own: a gay-themed greeting card boasting the image of American film legend John Wayne. Why, asks Hughes, should we have concern for a gay artist’s recoding freedom to "print postcards of John Wayne wearing pink lipstick but no concern for the young, heterosexual army recruit who wants to identify with a stable image of John Wayne?" This author counters with, "How does the recoded image of Wayne dilute the army recruit’s preferred stable meaning?" Both the recoded "gay" image and the American macho image of Wayne currently coexist. Due to Wayne’s enormous and lasting popularity, there is little danger of Wayne’s image as the frontier...
cowboy evolving exclusively into a coded homosexual image. It is unlikely that traditional Wayne fans will abandon their hero simply because his image appears in some recoded messages.

Further, if a recoded gay image of Wayne were to overpower Wayne's original, macho image, perhaps that would reflect only a natural evolution—a market-driven survival of the fittest. The only way for an image to lose its meaning would be for the majority to cease asserting the predominant "stable" meaning, bowing instead to a new recoded image. If the majority were to abandon an image in this manner, it is only fair to expect recycling. Throughout his Article, Hughes argues that, in most instances, the desires of the majority should control; perhaps he would appreciate this Darwinian logic as applied to recoding.

2. Who is the real winner—Corporations or Individual Creators?

When faced with Deconstructionist claims that "intellectual property laws have become principally the instruments of large corporations," Hughes chooses to pass over that argument and to turn, instead, to his argument that individual creators need intellectual property laws to shield them from corporate appropriation of their work.134 With this choice, Hughes steps into his own trap. He criticizes Deconstructionists for failing to consider all aspects or possibilities of their own proposals. Here, Hughes' skimpy consideration of the nexus between corporate control and intellectual property laws weakens his argument.

The homogenization of message output due to corporate broadcast consolidation is a very real threat,135 one that Hughes should not shrug off so readily. One author claims the passing of the telecommunication deregulation has spurred a "merger wave"

134. See Hughes, supra note 1, at 931.
that has permanently redefined the concept of radio. This commentator also notes that many station owners have benefited because, under deregulation, they can now "capture economies of scale" that would not comport with a regulatory scheme that limited how many stations any one entity could own. The author explains the negative effects of this type of hoarding:

These greater operational efficiencies, however, have come at a price. Fewer owners have led to fewer choices for radio listeners and hence reduced content diversity. The consolidation wave has also reduced ownership diversity; a smaller percentage of radio stations are now owned by blacks and Hispanics. Increased emphasis on the bottom line has led many stations to abandon local programming in favor of nationally syndicated shows starring personalities such as Imus or Howard Stern.

Keith Aoki ties the theme of broadcast deregulation to the intellectual property debate between high-protectionists and Deconstructionists. He notes that, when major media entities

137. Id.
138. Cavanaugh begins his commentary with a comment on the loss of consumer choice due to media consolidation. He chose this poem, which artfully demonstrates what is lost when media giants are born:

There goes the last DJ
Who plays what he wants to play,
Says what he wants to say,
Hey! Hey! Hey!
There goes your freedom of choice.
There goes the last human voice.
There goes the last DJ.

Id.
merge, they “create giant companies premised on copyright control of intellectual property from conception to delivery via media links to consumers, and presents us with the distinct prospect of creation of private domain.” Hughes does acknowledge, in passing, that corporate intellectual property benefits derived from deregulation should prompt “scrutiny,” but this brief nod is inadequate.

3. Depletion of the Public Domain—Soon There May No Longer be “Enough and As Good”

As established in Part II of this Article Review, Hughes rebukes the Deconstructionist argument that, after recognition of all controls granted by trademark, copyright, and right of publicity laws are aggregated, there will no longer be “enough and as good” materials available to non-owners to shape their own self-expression. Hughes recognizes that intellectual property laws will narrow the availability of some material to others; however, he views this as a positive thing. He argues that intellectual property laws disallow certain “borrowing” or copying, which encourages artists to seek out novel, entertaining concepts.

Hughes’ argument is sound on one level. It is logical to assume

139. Aoki, supra note 23, at 1347 (quoting Herbert I. Schiller, The Global Information Highway: Project for an Ungovernable World, in Resisting the Virtual Life: The Culture and Politics of Information 17, 22 (James Brock & Iain A. Boal eds., 1995)).

140. See Hughes, supra note 1, at 932-33.

141. Instead, Hughes focuses his energies on explaining that individual creators use intellectual property laws to protect their conceptions from corporate raiding. Drawing from his personal experience with the entertainment industry, this discussion is enlightening and rings true. Yet, it does not quite cure the defects imposed on his analysis when he merely skimmed the Deconstructionist warnings that communications mergers may rob the public of diverse informational channels. See Hughes, supra note 1, at 933.

142. See Hughes, supra note 1, at 968. See also notes 78-90 and accompanying text. For another application of Lockean “enough and as good” principles to intellectual property, see Adam D. Moore, A Lockean Theory of Intellectual Property, 21 Hamline L. Rev. 65, 78-84 (1997).

143. Id.
that many artists may choose to utilize a proven concept as opposed to dedicating the time and energy necessary to conceive of an original plan. Yet, to accept Hughes’ reasoning, one must also accept an implied stipulation running beneath his argument—that, in the realm of intellectual property as opposed to real property, there is an infinite amount of “material” that can never be permanently depleted. This author rejects that proviso. Logically, one assumes that ideas and modes of expression are infinite, unlike parcels of real property, which are clearly finite. However, monopolization of forms of expression may grow to such an extent that creators are effectively fenced out of the public domain. Ideas indeed may be infinite, but valuable, effective forms of expression may not be.144

144. Returning to Hughes’ opinion that the public gains from celebrities being forced to leave their comfort zones to seek truly novel source material, there is a valid contrasting argument. Perhaps strict intellectual property laws that force creators to enter new territory may have a negative societal impact as well. The simplest way to achieve original expression is to do something that has never been done before. Often, an artist can provide novelty of expression by shocking audiences with previously untested sexual or violent content. Video games are an excellent example where designers consistently push violence levels in the name of “newness.” See Michele Norris, Child’s Play? Grand Theft Auto III Provides Video Gamers With a Virtual World of Extreme Violence, ABC NEWS, available at http://abcnews.go.com/sections/wnt/DailyNews/videogames020701.html (last visited Sept. 20, 2004). An ABC news commentary critiques Grand Theft Auto 3, a mainstream, best-selling videogame:

In the video game called Grand Theft Auto III, players enter a virtual world called Liberty City and assume the role of an escaped criminal who hijacks cars, guns down pedestrians, has sex with a prostitute and then earns extra points by killing her so he can take back his money.

Id.

Grand Theft Auto 3 was the best-selling video game in both 2001 and 2002, according to annual U.S. video game statistics, available at http://retailindustry.about.com/library/bl/03q1/bl_npd012703.htm (last visited Sept. 20, 2004). See also the National Organization for Women’s (NOW’s) scorching criticism of the game’s content, available at http://www.now.org/issues/media/roundup/20020124.html (last visited Sept. 20, 2004). This example is not to imply that the only remaining novelty lies in the
This Article Review now turns to a case example in which recoding freedoms served as a tool for valuable minority-viewpoint expression. Without the option to recode, Alice Randall would not have been able to pierce with such precision certain myths perpetrated by Margaret Mitchell’s *Gone with the Wind*.

**IV. THE WIND DONE GONE – RECODING DONE RIGHT**

The debate over publication of the parody *The Wind Done Gone* fits squarely into Hughes’ example of cases when a secondary user wishes to recode over the objections of both the passive audience and the owner, both of whom seek stability of meaning in the cultural object. The cultural object at issue is Margaret Mitchell’s *Gone With the Wind*, a classic and well-loved 1936 American novel, which was adapted into a 1939 award-winning movie. To distinguish the real-life characters in this drama in a recoding context, Alice Randall, author of *The Wind Done Gone*, is the secondary user who wished to recode another’s intellectual property. The owner in this case is Margaret Mitchell’s estate, represented by Suntrust Bank, which owns the copyright to *Gone With the Wind*. The estate fought a battle in the courtroom and in the press to halt publication of Alice Randall’s unique take on *Gone With The Wind*. The millions of dedicated *Gone With The Wind* fans comprise, in Hughes’ words, “vast, (literally) silent majority who derive utility from the object’s stable meanings.”

As established in Parts II and III of this Article Review, Hughes’ central thesis suggests that the needs of this majority interest in

“shock zone” or that there is no place in pop culture for gruesome, explicit material. Yet, advocates of reducing recoding freedoms, and thereby diminishing materials available to authors, should consider that, perhaps, a race for novelty might result in an unwelcome wave of low-value or even harmful expression.

stability of meaning should perhaps trump a minority, secondary user’s desire to recode. If we were to adopt Hughes’ theories without deeper inquiry, intellectual property laws would have permanently shelved The Wind Done Gone. This section argues that this type of recoding is an invaluable tool to promote cultural revolution, especially when the majority, in the name of protecting the stability of a cultural object, resists other forms of critique. Alice Randall, via recoding, exposed the long-ignored revisionist subtext of Gone With the Wind. Perhaps this revelation was uncomfortable for her bevy of fans, yet targeting an American classic in this manner proved the best tool to spur this particular awakening.

This Part first reviews Gone With the Wind and its immense popularity. Next, it summarizes The Wind Done Gone, revealing why Mitchell purists were disturbed by this retelling of life on Tara (the plantation at the heart of Gone With the Wind). This section then outlines the case that granted Alice Randall the recoding freedom to publish her unauthorized parody. Finally, this Part explores how this narrowly-won victory spurred a cultural revolution that would have been lost if The Wind Done Gone had never been published.

A. Gone With the Wind—An American Classic

Gone With the Wind focuses on Scarlett O’Hara, an engaging, stubborn, Southern coquette who rises to the crippling challenges

146. While many fans may have ignored the flaws at the heart of the novel, Mitchell’s Gone with the Wind has long been criticized by journalists and academics for its romanticized notions of Southern race relations and plantation life. Even mainstream media classify the novel and the movie, which many claim was gentrified, as blatantly racist. See tvguide.com, at http://www.tvguide.com/movies/database/ShowMovie.asp?MI=28759 (last visited Sept. 20, 2004). This movie review of Gone With the Wind labels the film’s discourse as “essentially racist.” Id. See also DARDEN ASBURY PYRON, SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL 460 (Oxford University Press 1991). Upon the fiftieth anniversary celebration of Gone With the Wind, the Mayor of Mitchell’s native city, Atlanta, recognized publicly that Black America had “little to celebrate in the anniversary . . . .” Id.
dealt by the Civil War and by her tenuous romance with the equally stubborn Rhett Butler. Due to the 19th century timeframe, slavery was a background theme of the book; Scarlett’s family, rooted on the plantation “Tara,” owned several slaves. This evocative, compelling tale is arguably the most popular literary fiction in American history—America’s dedication to Scarlett, Rhett, and the host of characters from “Tara” is evidenced by the astronomical sales figures. Since its 1936 publication, Gone With the Wind book sales have been eclipsed only by sales of the Bible.

Some argue that Margaret Mitchell’s story romanticized notions of slavery and race relations in the Civil War era South. For example, biracial slave children fathered by plantation owners were commonplace in the South, yet Gone With the Wind eclipsed this reality. One wife of a Confederate leader addressed the issue of slave owners’ biracial children in her journal:

Like the patriarchs of old, our men live all in one house with their wives and their concubines; and the mulattoes one sees in every family partly resemble the white children. Any lady is ready to tell you who is the father of the mulatto children in everybody else’s household but her own. Those,

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147. See generally MARGARET MITCHELL, GONE WITH THE WIND (1936 Macmillian).
148. Id.
149. Suntrust Bank v. Houghton Mifflin Company, 268 F.3d 1257 (11th Cir. 2001). The Internet has provided a welcome medium for Gone With the Wind devotees, see the following active fan sites from around the globe: at http://www.jah.ne.jp/~stamp/GWTW.html (last visited Mar. 30, 2004); http://www.shucks.net/shucks/HOMEPAGE/GWTW.htm (last visited Sept. 20, 2004).
150. Experts on women in slavery note: “Wherever a white wife knew or sensed that her husband had sexual contact with black women, she was likely to feel humiliated. Often the white wife lived in close proximity to her husband’s mistress and the mulatto half sisters and brothers of her own children.” CAROL HYMOWITZ AND MICHELE WEISSMANN, A HISTORY OF WOMEN IN AMERICA 61 (Bantam Books 1978).
she seems to think, drop from clouds.\textsuperscript{151}

Alice Randall was driven by Mitchell's exclusion of such hard realities to produce her own parody, \textit{The Wind Done Gone}.

\textbf{B. The Wind Done Gone—Cynara's Voice}

Randall explains her motivation for crafting \textit{The Wind Done Gone} succinctly in her Acknowledgements, "Margaret Mitchell's novel \textit{Gone With the Wind} inspired me to think."\textsuperscript{152} And Randall's book encouraged \textit{Gone with the Wind} fans to think as well, over the objections of Mitchell's estate. The publication of this book catapulted a small cultural revolution; this would not have been possible had Alice Randall not won the power to recode a classic novel.

\textit{The Wind Done Gone} retells Mitchell's story\textsuperscript{153} from the perspective of a biracial slave.\textsuperscript{154} Cynara, the protagonist, is Scarlett's half-sister and Mammy is Cynara's birth mother. Scarlett and Cynara share a father—the white plantation owner whom Cynara calls "Planter." Cynara is proud, beautiful, and watchful. She refers to Scarlett only as "Other," implying that Scarlett is a dramatic, spoiled soul who unfairly monopolizes Mammy's attentions:

Even Other called Mammy out of her name. Other, who loved my mother; Other, who ran to her Mammy like I never seen nobody run to anybody, or anything, for the more significant the matter, ran to Mammy like she was couch and pillow, blanket and mattress, prayer and God.\textsuperscript{155}

\textsuperscript{151} See id. at 61 (discussing the sexual triangle of slavery between white women, white men, and black slave women).
\textsuperscript{152} ALICE RANDALL, THE WIND DONE GONE 210 (Houghton Mifflin 2001).
\textsuperscript{153} MITCHELL, supra note 145.
\textsuperscript{154} See generally RANDALL, supra note 152.
\textsuperscript{155} RANDALL, supra note 152, at 7.
Cynara and Scarlett have other loves in common as well.

Perhaps most vexing to Gone With The Wind fans is Randall’s revealing of a love triangle between Rhett, Scarlett, and Cynara.\textsuperscript{156} Cynara refers to her devoted lover only as “R.” According to Cynara, Rhett had always loved her first and was willing to cast aside Scarlett for Cynara without hesitation. The passionate, tense love between Scarlett and Rhett is a mainstay of Gone With the Wind. By introducing the possibility that Rhett never truly cared for Scarlet and was merely using her deflates Mitchell’s epic, which understandably upsets fans who would like the meaning of Gone With the Wind to remain stable.

Another “revelation” of life on Tara also skewed Mitchell’s version. Cynara tells tales of her unorthodox, close relationship to “Lady,” Scarlett’s birth mother. In Cynara’s version, she was forced to seek comfort from Lady because Scarlett had monopolized Mammy. Lady also yearned to be a mother:

\begin{quote}
Lady made herself comfortable in her rocking chair.
“Are you hungry?” I nodded. She handed me the glass of milk. I hesitated. “You can drink it.” I took the glass and drank. She took the glass from my hand and drank right after me. I was surprised. Really I was astounded.\textsuperscript{157}
\end{quote}

Cynara goes on to explain how she started nursing from Lady regularly,\textsuperscript{158} forming an uncommon bond with the legal wife of her own father.\textsuperscript{159}

\begin{flushleft}
\textsuperscript{156} See discussion of slavery’s sexual triangle \textit{supra} notes 150 and 151.
\textsuperscript{157} RANDALL, \textit{supra} note 152, at 15.
\textsuperscript{158} The character Cynara notes that:
She pulled me on to her lap and I suckled at her breast till her warm milk filled me. As always, it was a cheering surprise for both of us. We had been sharing these little spurred-by-envy suppers all my memory... Later, when I slept beside her, she said, ‘You’re my little girl, aren’t you?’
\end{flushleft}

\begin{flushleft}
RANDALL, \textit{supra} note 152, at 16.
\textsuperscript{159} See discussion \textit{supra} note 152.
\end{flushleft}
Suntrust Bank resisted Randall’s blatant recodings. The efforts were successful at the district court level; a judge issued a preliminary injunction against publication of *The Wind Done Gone*. Later, the Appellate Court reversed, freeing Randall and Houghton Mifflin to publish. In the midst of appeal, Suntrust and Houghton Mifflin settled the lawsuit, cementing *The Wind Done Gone*’s place in literary history.


In *Suntrust*, Margaret Mitchell’s estate claimed that *The Wind Done Gone* infringed the copyright of *Gone With the Wind*. Suntrust objected to Randall’s copying of core characters, character traits, and relationships from *Gone With the Wind*. Suntrust also claimed that Randall infringed by copying famous scenes, plot elements, and verbatim dialogues. Randall successfully countered this claim, convincing the court that her novel critiques (not copies) Mitchell’s depiction of slave politics and the atmosphere of the American South during the Civil War.

Randall sought shelter in the Fair Use Doctrine found within the Copyright Act. The Appellate Court first established that *The

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161. Id.
164. Houghton Mifflin denied that *The Wind Done Gone* employed verbatim, copied dialogue. *Id.*
165. *Id.*
166. 17 U.S.C. § 107 codifies the Fair Use exception to copyright. The Section provides:

§ 107. Limitations on exclusive rights: Fair use
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by
Wind Done Gone was of a “parodic character,” as required by Supreme Court precedent. The court grappled with the definition of “parody,” finally adopting this standard: a work is a “parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work.” Under this standard, the court held that The Wind Done Gone clearly qualified as of “a parodic character.” The court next weighed the four elements of a Fair Use analysis.

Under the first factor, the purpose and character of the use, the court noted that Randall chose a form of publication that would generate profit, making this work of a commercial nature. Yet, the court stated that the highly transformative nature of Randall’s novel downplays the commercial element. Randall used a first-

reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

168. Id. at 1268-69.
169. Id. at 1269.
170. Id. at 1269.
171. The Court cited Campbell, 510 U.S. 569, 579 (1994): “The more transformative the new work, the less will be the significance of other factors, like commercialism, that may way against a finding of fair use. The goal of
person viewpoint of a slave to tell her story; she employed an abbreviated writing style different from Mitchell's. The court concluded that this first factor fell in favor of a finding of fair use.

In consideration of the second factor, the nature of the copyrighted work, the Suntrust court held that the nature of the copyrighted work was not key to the analysis. The nature of the copyrighted work recognizes that original, creative works shall receive a greater scope of protection from copying than derivative works or factual compilations. Courts give little weight to this factor when considering a parody defense "since parodies almost invariably copy publicly known, expressive works." The third factor, however, is central to a parody analysis.

The court faced a difficult task when considering the third factor; it admitted that it could not determine conclusively whether the quantity and quality of the borrowed material reasonably related to the purpose of the copying. The Wind Done Gone goes past the point of merely conjuring up Gone With the Wind, the Court noted; however, how far past this point of "conjuring up" may a parody wander without entering infringement territory? The law does not limit parodists to taking the "bare minimum" required to conjure up the original work. Yet, Suntrust did not answer whether Randall's copying would have tipped this factor in favor of copyright infringement; hence, this factor did not favor either side. Instead, the court turned to the fourth factor to cinch its case for fair use.

To review the fourth factor, the effect on the market value of the copyright, to promote science and the arts, is generally furthered by the creation of transformative works."
original, courts ask whether the publication of the parody will negatively impact the market for the original work, including potential harm for future derivative works.\textsuperscript{179} Suntrust claimed that \textit{The Wind Done Gone} would harm the market for future derivative works of \textit{Gone With the Wind}. To buttress its argument, Suntrust pointed to its history of authorizing derivative works, such as the well-known movie and book, \textit{Scarlett: The Sequel}.\textsuperscript{180} Yet, the court dismissed Suntrust’s evidence as too diffuse because it skirted the primary issue—whether \textit{The Wind Done Gone} would serve as a “market substitution” for \textit{Gone With the Wind}. The Court relied on Houghton Mifflin’s evidence that \textit{The Wind Done Gone} was unlikely to displace sales of \textit{Gone With the Wind}. Thus, the fourth factor of the Fair Use analysis weighed in favor of a finding of parody.\textsuperscript{181}

The Court concluded that \textit{The Wind Done Gone} was a fair use of a copyrighted work and reversed the lower court’s preliminary injunction against publication.\textsuperscript{182} This decision, coupled with the settlement between Houghton Mifflin and Suntrust, guaranteed that readers would hear Cynara’s tale of life on Tara.

\textbf{D. Cultural Change Spurred by Recoding in}
\textit{The Wind Done Gone}

After Cynara officially found her voice, critics were prolific in the review of \textit{The Wind Done Gone} and offered Randall’s work a mix of praise and cutting reviews. One reviewer called \textit{the Wind Done Gone} “unimaginative, trite, filled with literary clichés.”\textsuperscript{183} The reviewer continues her criticism:

\begin{quote}
Alice Randall’s “Unauthorized Parody” of \textit{Gone with the Wind} is nothing a parody should be. It
\end{quote}

\textsuperscript{179.} \textit{Id.}  
\textsuperscript{180.} \textit{Id.} at 1274-75.  
\textsuperscript{181.} \textit{Id.} at 1276.  
\textsuperscript{182.} \textit{Id.} at 1277.  
\textsuperscript{183.} The Wind Done Gone, \textit{The Virginia Quarterly Review} Vol. 78, Issue 1 (Winter 2002).
is... narrated in a style entirely unsuited to the material. While there are some passages with vivid descriptions and truly lyrical prose, they are, sadly, few and far between. The book's stated purpose is to "explode the mythology perpetrated by a Southern classic," but this is not accomplished. The fact that Cynara, the heroine of the book, is the illegitimate daughter of Scarlett's (in this book, "Other's") father by Mammy raises some interesting questions about racial identity, but these questions are not explored to the extent that would make them provocative.\footnote{184}

Perhaps this reviewer was an audience member hoping to preserve the book's original, stable meaning. Other reviewers were kinder in their assessments of Randall's endeavors.

Regardless of whether readers believed the book to be a literary success, Randall's use of recoding did ingénue a small cultural revolution regarding a classic American novel. She forced readers to consider Mitchell's passing racist narrative, for example, that both whites and blacks benefited from a system of slavery. The Suntrust court highlighted one such passage from Gone With the Wind:

\begin{quote}
The more I see of emancipation the more criminal I think it is. It's just ruined the darkies," says Scarlett O'Hara. Free blacks are described as "creatures of small intelligence... like monkeys or small children turned loose among treasured objects whose value is beyond their comprehension, they ran wild - either from perverse pleasure in destruction or simply because of their ignorance.\footnote{185}
\end{quote}

Undoubtedly, Mitchell was a beloved and talented author; fans

\footnotesize
\textsuperscript{184} Id.  
\textsuperscript{185} Suntrust Bank, 268 F.3d at 1273 (citing MITCHELL, 654).
extol her work through a variety of forms. Yet, her racist leanings have often been dismissed as merely a product of the time. As noted by Mr. Carlton Moss in an open letter to *Gone With the Wind*’s movie producer, David O. Selznick, Mitchell’s epic reiterates two themes common to anti-abolitionist theory: (1) that black men and women did not actually want freedom; and (2) that black men and women did not possess the “innate” ability to manage their own affairs independently.¹⁸⁶ Now, due to the recoding found within *The Wind Done Gone*, perhaps Mitchell’s audience will face an uncomfortable truth: *Gone With the Wind*, while an engaging story, is considered by many to be insulting revisionist history.¹⁸⁷

The type of recoding freedom exhibited by *The Wind Done Gone* is vital to a healthy discourse of ideas. In his Article, Hughes overlooked or simply did not anticipate the good that could come from this type of recoding. To ensure that future recodings similar to Randall’s *The Wind Done Gone* are able to reach the marketplace, legislators should clarify and expand doctrines of Fair Use throughout intellectual property regimes.


¹⁸⁷. Margaret Mitchell was a Southern woman in the early 20th Century and, as we all are, was a “product of her time.” However, Mitchell may not deserve the full coverage of this convenient shield. There is well-documented evidence that, beyond her novel, Mitchell espoused bigoted beliefs in her personal life. See Thomas Cripps, *Winds of Change*, in *RECASTING: GONE WITH THE WIND IN AMERICAN CULTURE* 140 (Darden Asbury Pyron ed., 1983) (claiming that Margaret Mitchell revered the racist Thomas Dixon and, despite loving her own black servants, “believed the Ku Klux Klan to be a historic necessity.”). See also DARDEN ASBURY PYRON, *SOUTHERN DAUGHTER: THE LIFE OF MARGARET MITCHELL* 84 (Oxford University Press 1991) (relating a story in which “Peg” Mitchell, then a student at the northern Smith College, transferred out of her history class to avoid sharing the classroom with one of Smith’s few black students). But see PYRON, *supra*, at 414-17 (relating praise for Mitchell’s kindness and generosity, given by Mitchell’s servant Bessie Johnson).
V. PROPOSAL: STRIKING A BALANCE THROUGH “RECODING WITHIN REASON”

In our litigious, pro-property society, authors may hesitate before publicly issuing critique or commentary of another’s work. As Part IV of this Article Review established, dynamic criticism is fundamental to preserving a healthy dialogue. This is not true only for literary circles. Beyond copyright, critics may choose to target works protected by trademark or publicity rights. To encourage parodies and other commentary on works protected by intellectual property laws, lawmakers should expand the current copyright Fair Use Doctrine, clarify the boundaries of the Public Person Doctrine, and further develop a statutory Fair Use exception for trademark law. This, coupled with a healthy respect for discourse, will clear room for “recoding within reason.”

A. Clarifying Copyright Fair Use

As evidenced by the court’s maneuvering of the copyright Fair Use doctrine in Suntrust, the parameters of this exception are not entirely clear. The current four-factor test is valuable and instructive, yet, especially when testing parodies, it causes confusion. The Suntrust court noted that reviewing alleged parodies presents courts with a problem because parody’s brand of humor requires that viewers be able to conjure up the original. A parody gains effectiveness as it moves closer to copying the original. A parody would lose its punch, be it humorous or satirical, if it only managed to refer indirectly to an original. Parodic success depends on the ability to appropriate a substantial portion of the original work.

As society, courts, and the legislature currently acknowledge that parody is a valuable form of responsive criticism, the copyright Fair Use analysis should recognize its unique nature. The third copyright Fair Use factor, the amount and substantiality of the portion used, should expressly provide greater freedom to

188. Suntrust Bank, 268 F.3d at 1271-72.
THE VALUE OF RECODING

appropriate from the original for the situation of parodies, without injuring the potential for a finding of fair use.

B. Expanding the Statutory Trademark Fair Use Exception

Trademarks are the primary means of corporate communication; they are omnipresent in this age of marketing and mass consumption. The meaning behind trademarks often evolves beyond the original intention of its corporate parent to represent a more global theme. For example, many argue that Coke’s trademarks represent globalization or that the Benetton trademark represents racial and cultural unity beyond the Benetton product line. Yet, when secondary users attempt to recode these images to disseminate a different message, even if it is social commentary, they will likely face trademark infringement actions. 189

Perhaps trademark owners, like celebrities, should accept a degree of intrusion as a price for their fame. The Public Figure Doctrine awards celebrities, who court fame and attention, only a narrow screen of protection from public scrutiny. As celebrities invest time, money, creativity, and effort to formulate a public persona, trademark owners do the same to produce famous, well-known marks. The public, through consumerism, makes trademarks famous; therefore, perhaps the public should have greater latitude to critique, satirize, or parody these powerful signals, especially where there is negligible danger of consumer confusion. 190

This author does not advocate unfettered freedom to recode; instead, she believes US laws should expand and more clearly

189. See Coombs, supra note 131 and accompanying text (relating attempts by Smith College students to recode the Benetton trademark as a social message).

190. See infra Part V.3 and the accompanying notes for a discussion on expansion of the public figure doctrine. Also, it is important to note that intellectual property owners do not have proprietary rights equivalent to the rights of real property owners; the touchstone of trademark rights is consumer confusion. Therefore, if consumers are unlikely to be confused, courts should offer more leeway for trademark parodies.
delineate the boundaries of acceptable recoding. Secondary users should be able to discern from trademark law whether their use is likely to be held an infringement of a trademark owner’s rights. The Lanham Act does currently provide a narrow statutory Fair Use exception for descriptive uses of a trademark, 15 U.S.C. §1115 (b)(4) provides that use is not infringement in cases:

(4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party’s individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin.

Case law has clarified this trademark Fair Use exception somewhat, but the perimeters are still murky and subjective. A primary case regarding this trademark Fair Use exception, Zatarains, Inc. v. Oak Grove Smokehouse, Inc., concluded that this defense was “available only in actions involving descriptive terms and only when the term is used in its descriptive sense rather than its trademark use.” This narrow statutory defense restricts

193. Current U.S. trademark law does address Fair Use exceptions to infringement claims. These defenses include a statutory defense, a parody defense, a nominative use defense, and permissive comparative advertising. The narrow statutory allowance and extensive case law, however, does not combine to form a logical path for courts to take when assessing trademark fair use. For an illustrative discussion of all realms of trademark Fair Use, see Baila H. Celadonia, Trademark Fair Use (Sep. 1, 1996) at http://www.cll.com/articles/article.cfm?articleid=32 (last visited Sept. 20, 2004).
194. 698 F.2d 786 (5th Cir. 1983).
195. Id. at 791 (citing Soweco, Inc. v. Shell Oil Co., 617 F. 2d 1178, 1185
unfairly those who wish to recode within reason.

An expanded statutory trademark Fair Use doctrine could possibly mimic the base of the copyright Fair Use doctrine, with appropriate tweaking to accommodate for the change in the types of intellectual property at issue. For example, the first factor, the purpose and the character of (the allegedly infringing) work could ask two questions when considering the use: (1) Does this use respond directly to activity perpetrated by the mark’s owners? or (2) Does the use employ the image in a broader manner to combat ideals not associated to the trademark owner? Uses responding directly to the trademark owner should be given greater fair use latitude, yet a positive answer to the second should not absolutely preclude Fair Use.

The second factor, the nature of the copyrighted work, would not necessarily be instructive in a trademark Fair Use analysis. As with copyright and parody, the work employed will almost always be well-known and protected by state and federal trademark laws.

The third factor, the amount and substantiality of portion used, is key to the analysis. As in copyright Fair Use considerations, courts could look to whether the secondary users injected transformative elements into the mark’s contextual setting to convey their particular message. The more transformative a work is, the more likely it should be labeled trademark Fair Use.

The fourth and final factor, the effect on the market value of the original, should be the most heavily weighted factor in a trademark Fair Use analysis. The central inquiry in a copyright Fair Use analysis is whether the allegedly infringing work might serve as a market substitute for the original. 196

In a trademark Fair Use analysis, courts could ask whether the defendant’s widespread conduct could potentially harm the livelihood of plaintiff’s business. To apply this reasoning to a trademark situation, courts should first look to the range of distribution. Is this a national campaign or a local uprising? Smaller, localized uses should point to Fair Use. National uses

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196. *Suntrust Bank*, 268 F.3d at 1274-75 (citing MITCHELL, 654). 

(5th Cir. 1980).
may also qualify as Fair Use, yet they should be scrutinized for potential damage to defendant through consumer confusion. Beyond trademark Fair Use, legislators should clarify the public figure doctrine to acknowledge recoding within reason.

C. Expansion of the Public Figure Doctrine

Famous people generate public interest, therefore current intellectual property laws allow for the exhaustive reporting, criticisms, and day-by-day accounts of celebrity activities. Yet, if one is not a superstar, in the sphere of Madonna, Jennifer Aniston, or Brittany Spears, it may not be entirely clear whether that person is fair game for public criticism.

A recent case exemplifies this fine line. In December of 2003, the Texas Supreme Court heard oral arguments in the case of New Times, Inc. v. Isaaks. This case examines the issue of parody in the context of ridiculing judges and prosecutors. When using the parody format to criticize these public servants, who are not superstars accustomed to the intrusive commentary, what rules must publishers follow? The law is unclear, as The New York Times recently discovered.

In 1999, Texas Judge Darlene Whitten responded to 13-year-old Christopher Beamon’s Halloween essay outlining the shooting of a teacher and classmates with a 5-day jail sentence. District Attorney Bruce Isaacks made the decision to charge Beamon for his gruesome prose.

In response to the unorthodox case, the New York Times published a parody criticizing both Whitten’s and Isaacks’ actions. The story was titled, “Stop the Madness” and reported that Isaacks had brought charges against a six-year-old girl for

198. Id.
199. Id.
200. Id.
writing a book report on "Where the Wild Things Are." According to the report, Whitten had jailed the girl for this offense, after detaining her in handcuffs and shackles.

Plaintiffs argued the public could easily have taken the fictitious account as truth, damaging the plaintiffs' reputations. Plaintiffs also contended that defendants' retraction was inadequate. On November 18, the paper published the following article retraction in response to requests from Whitten's attorney: "Here's a clue for our cerebrally-challenged readers who thought the story was real: It wasn't. It was a joke. We made it up. Not even Judge Whitten, we hope, would throw a 6-year-old girl in the slammer for writing a book report. Not yet, anyway."

The defendants did not back down after the plaintiffs ran this comment. Instead, the two sides battled in court over the line between free speech and libel regarding a parody.

The Public Figure Doctrine should contain ample room for criticism of public servants, including judges and prosecutors. Public servants realize their calling will thrust them into the public eye and expose them to criticism. While the particular retraction in this Texas case may have been in bad taste, and therefore the catalyst to subsequent litigation, the parodic nature of the original publication should not be forgotten. Instead of relying on standard reporting techniques, this journalist employed a more creative and powerful form of criticism: the parody. Those public figures that fall short of superstar status should certainly be able to deflect invalid criticism or false statements with a shield of libel laws. Yet, the Public Figure Doctrine should clarify what factors could lead to libel via parodic criticism as opposed to muffling potential parodists of public servants with the threat of litigation.

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201. Id.
202. Id.
203. Hilden, supra note 197.
204. Hilden, supra note 197.
205. Hilden, supra note 197.
206. Hilden, supra note 197.
VI. Conclusion

Justin Hughes' "Recoding" Intellectual Property and Overlooked Audience Interests is a valuable work to the discourse between high protectionists and Deconstructionists. As a whole, Hughes' assertions that most people prefer stability of meaning of cultural objects and his critique of Deconstructionist arguments for restriction of intellectual property protections are thought provoking and well-grounded. Yet, in his Article, Hughes dismisses some valid Deconstructionist arguments for recoding rights that deserve further consideration. The case example of The Wind Done Gone illustrates how recoding freedom can spur a passive audience into realizing a previously unacknowledged viewpoint valuable to social discourse.

In the spirit of recoding within reason, this Article Review concludes that U.S. legislators should expand copyright Fair Use, allowing parodists greater latitude to borrow from the primary source in order to criticize, mock, and comment effectively. As The Wind Done Gone exemplifies, borrowing heavily from the original work in a direct response allows for sharper, more effective parody and does not unfairly usurp the copyright owner's potential market.

Due to the omnipresence and power of trademarks, legislators should also expand the statutory trademark Fair Use exception, using a refined form of the copyright Fair Use test as a model. This trademark Fair Use expansion would recognize the rights of the public, within reason, to criticize and make social commentary using the marks that their own consumerism has made famous. Specifically, allowing localized, transformative works such as the Smith College women's trademark-borrowing t-shirt to protest accepted school standards contributes to useful social commentary and protects the marginalized minority recognized by Deconstructionists. This type of commentary using a mark to send a message does not pose a serious threat to the trademark's strength, to the owner's rights, or to consumers.

Finally, lawmakers should clarify the Public Figure Doctrine to allow for reasonable critique of public servants, such as judges and...
commentators, which is in accordance with their level of responsibility to the public.

These proposed amendments to current intellectual property protections and other doctrines will not leave owners vulnerable to unfair uses of their intellectual property or leave consumers vulnerable to confusion. Instead, these proposals consider a range of interests, noted by both Hughes and Deconstructionists, to strike a balance that allows recoding within reason.

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