

Reading the Readers

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I. INTRODUCTION

Reading is fundamental. It is the human experience at the heart of copyright’s commitment to cultural progress. It represents the primary consumer market that launched copyright protections in the 18th century. And, as Professor Zahr Said illuminates, it is central to the interpretive processes that determine copyright infringement.

Professor Said’s article, *A Transactional Theory of the Reader in Copyright Law*,¹ places the reader front and center in the efforts both to understand how questions of copyright infringement are actually decided and to develop concrete strategies to steer juries away from widely-derided verdicts like in the *Blurred Lines* trial. Rather than approach jury deliberations as existing in a hermetically-sealed black box, Professor Said removes the walls from the jury room and reveals it to be, at its most basic, a reading room. In copyright trials, jurors often are asked to engage deeply with creative works in order to compare whether their “total concept and feel”² are sufficiently similar to impose liability. As much as we might try to distinguish courtroom engagement with creative works from our everyday engagement with such works—e.g., in classrooms, libraries, and coffee shops—there are important continuities in how reading is shaped by personal experience, moral

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1. See generally Zahr K. Said, *A Transactional Theory of the Reader in Copyright Law*, 102 IOWA L. REV. 605 (2017).

2. See *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 133–34 (2d Cir. 2003); *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977).

intuitions, and external prompts.³ Accordingly, to better understand the copyright juror, we must better understand the reader, and Professor Said usefully bridges the law-and-humanities divide between copyright scholarship and well-developed literary theories of readership.

Professor Said's presentation of readership theory, in particular her discussion of Louise Rosenblatt's theory of transaction reading,⁴ provides both an engaging introduction of this work to a legal audience and impressively translates scholarly insights into practical guidance for courts to better instruct jurors on how to comparatively read creative works. Professor Said attributes many of the problems with copyright jury trials—such as their highly unpredictable outcomes and seeming disconnect from orthodox copyright policy—to ordinary challenges facing readers: What am I “looking for” when I read this book or listen to this song? What part of these books and songs should I really pay attention to? Do I read slowly and carefully or quickly and impressionistically? Should I just sit back and let the works speak for themselves? These questions can shape both the processes and outcomes of copyright jury deliberations, and Professor Said's insights deserve close attention from judges, lawyers, and lawmakers normally disinclined to look to the humanities for help.

Rather than extol the many virtues of Professor Said's article or provide a contrary interpretation of the sources she examines, in this Response I want to broaden the interpretive lens and look at another form of readership, omnipresent yet unacknowledged, within her work: Professor Said's own reading of the deliberative processes she discusses. The readership theories presented in her article are not, of course, objectively set forth for lawyers and judges to cut and paste into jury instructions. They instead are deeply shaped by Professor Said's own reading of readership—a reading that embodies her perspective as a scholar of both copyright and literature. In many parts of her article, these two sets of scholarly commitments dovetail powerfully to diagnose substantive and procedural failings in copyright law. In other parts, however, these commitments intriguingly clash just below the surface.

The rich, engaged processes of reading that Professor Said exquisitely and, dare I say, lovingly presents stand somewhat at odds with copyright scholars' general skepticism towards jurors, as well as with the article's ultimate prescriptions. The more Professor Said drew me into the mind of the engaged reader, the more I found myself enchanted and intrigued by the underexplored *wisdom* of the juror–reader. Rather than “limiting or narrowing”⁵ the role of readership in copyright litigation—as Professor Said suggests—we might instead listen and learn from it. The juror–reader she examines could provide a forceful intervention into the current, conflicted

3. See Said, *supra* note 1, at 608–10.

4. *Id.* at 624–28.

5. *Id.* at 635.

state of copyright law, and this Response will use Professor Said's reading of readership to more explicitly flesh out this uncomfortable—but alas incredibly important—conversation between copyright and literary theory.

In the spirit of literary theory and the humanities, it is important to recognize that “reading” is not solely an act of consumption, but also an act of critique. In queer cultural traditions, “‘reading’ means taking someone down, exposing what fails to work at the level of appearance, insulting or deriding someone.”⁶ As captured in the film *Paris is Burning*, “[r]eading is the real art form of insult”;⁷ it is, in its highest form, the art of throwing “shade.”⁸ But this form of reading-as-critique does not come from a place of hatred or disgust, but instead from a place of commonality, community, and ultimately affection.⁹ Carefully picking apart the object of your “read” and turning it into an insightful, nuanced, and occasionally hilarious takedown shows, in a strange way, just how much you care and how closely you are paying attention. Professor Said implicitly “reads” readers in this dualistic manner, and the remainder of this Response will flesh out both sides of her critique. First, it will examine the “shade” she explicitly throws at the juror–reader and highlight the dangers of black-box, common-sense juror decision-making. Second, it will surface the article’s bubbling subtext of affection and suggest that the likely academic readers of Said’s work could take the concerns and intuitions of lay readers more seriously.

II. “THE SHADE”

Professor Said’s article begins with perhaps the highest profile, recent example of copyright jury trials run amok: the *Blurred Lines* litigation between the heirs of Marvin Gaye and musicians Robin Thicke and Pharrell Williams.¹⁰ In that case, jurors found that the number one hit song, *Blurred Lines*, was substantially similar to the Gaye classic, *Got to Give It Up*, based not upon similarities in lead melody or lyrics, but seemingly instead based upon similarities in “rhythmic and harmonic footprint” and the overall “‘vibe’ or ‘feel’” of the funk/R&B genre Gaye employed.¹¹ According to several

6. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” 129 (1993).

7. Dorian Corey, *Paris is Burning*, YOUTUBE (May 22, 2013), <https://www.youtube.com/watch?v=JnVSkIVO-t4> (noting that “shade is ‘I don’t tell you you’re ugly, but I don’t have to tell you, because you *know* you’re ugly’” (emphasis added)).

8. *Id.*

9. *Id.* (distinguishing between homophobic insults and “reading” within queer communities); see Ami Angelowicz, 12 *Life Lessons from “RuPaul’s Drag Race,”* FRISKY (Nov. 11, 2011, 1:00 PM), <http://www.thefrisky.com/2011-11-17/12-life-lessons-from-rupauls-drag-race> (“Throwing shade can be a form of affection.”).

10. Said, *supra* note 1, at 607–08.

11. Toni Lester, *Blurred Lines—Where Copyright Ends and Cultural Appropriation Begins—The Case of Robin Thicke Versus Bridgeport Music and the Estate of Marvin Gaye*, 36 HASTINGS COMM. & ENT. L.J. 217, 230–31 (2014); see also *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGR), 2015 WL 4479500, at *17–23 (C.D. Cal. July 14, 2015).

observers, instead of carefully identifying and filtering out protectable elements of the two works, jurors were improperly swayed by testimony that Williams was “inspired” by Gaye, that Thicke was intoxicated during much of the song’s production, and that the Gaye family members had been distressed by both the song and the declaratory action brought against them.¹² In Professor Said’s view, this verdict “represented a problematic allocation of authority to jurors on questions they were ill-suited to resolve.”¹³ The jurors were “ill-equipped” to answer the specialized legal questions involved in identifying the protectable elements in the registered composition, particularly in light of the muddled and arguably incorrect instructions presented to them.¹⁴ The result was a dramatic overexpansion of the scope of copyright over nonliteral copying.¹⁵

For Professor Said, the delegation of the substantial similarity analysis to the jury in the *Blurred Lines* trial reflects a broader tendency to delegate questions of infringement to jurors’ “gut reactions” and intuitions about the two works.¹⁶ The result is that the actual processes of comparing two works depends not on a careful application of legal principles to complex creative works, but instead on reading experiences with “complex social, biological, and emotional dimensions.”¹⁷ Jurors, like all readers, pull from their own life experiences, reflect on their own previous exposure to a particular work or genre, and engage in idiosyncratic processes of working through thickets of “tone, metaphor[], narrative, [and] allusion.”¹⁸ Copyright law typically ignores these readership processes, and out of the black box emerge verdicts like *Blurred Lines*, which are hard to square with copyright orthodoxy or with the realities of inspiration and appropriation in popular music industries.¹⁹

12. See, e.g., Noah Feldman, “*Blurred Lines*” and *Bad Law*, BLOOMBERG VIEW (Mar. 12, 2015, 2:07 PM), <https://www.bloomberg.com/view/articles/2015-03-12/-blurred-lines-and-bad-law>; Kal Raustiala & Christopher Jon Sprigman, *Squelching Creativity: What the “Blurred Lines” Team Copied Is Either Not Original or Not Relevant*, SLATE (Mar. 12, 2015, 12:27 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/_blurred_lines_verdict_is_wrong_williams_and_thicke_did_not_infringe_on.html (“[T]he jury appears to have been swayed by things that were not supposed to matter. The background chatter, the party vibe, even the percussion that makes ‘Got to Give It Up’ an iconic hit were not in the written composition.”); see also Said, *supra* note 1, at 607 nn.1–3 (collecting sources critical of the verdict).

13. Said, *supra* note 1, at 607.

14. *Id.* at 608; Shyamkrishna Balganeshe et al., *Judging Similarity*, 100 IOWA L. REV. 267, 272–78 (2014); see also Wendy Gordon, *How the Jury in the ‘Blurred Lines’ Case Was Misled*, CONVERSATION (Mar. 17, 2015, 5:47 AM), <http://theconversation.com/how-the-jury-in-the-blurred-lines-case-was-misled-38751> (describing the disputed jury instructions).

15. See Said, *supra* note 1, at 607–13.

16. *Id.* at 638–39; see *Williams v. Bridgeport Music, Inc.*, No. LA CV13–06004 JAK (AGRx), 2015 WL 4479500, at *15–23 (C.D. Cal. July 14, 2015) (discussing disputed jury instructions).

17. Said, *supra* note 1, at 609.

18. See *id.*

19. See Raustiala & Sprigman, *supra* note 12; see also generally Brief of Amicus Curiae 212 Songwriters, Composers, Musicians, and Producers in Support of Appellants, *Williams v. Gaye*,

Professor Said is rightfully wary of this black box approach towards juries. Relying on common sense, “gut-reaction” jury decision-making poses significant risks for several areas of law, such as copyright, that are trying to engage in a delicate balance of expression and free speech with majoritarian notions of harm, theft, and other wrongful conduct.²⁰ When well-meaning jurors are asked to use their common sense or put themselves into the shoes of other “ordinary” observers, black-box intuitions have a strong tendency to punish what “feels” wrong, looks strange, or is unfamiliar to everyday folks. Although this dynamic is most acutely observed in the criminal law context, where jurors are sometimes confronted with the darkest corners of the human psyche,²¹ it can similarly be triggered in copyright law cases involving disparities in fame,²² race,²³ gender,²⁴ and sexuality.²⁵ “Rich and fabulous” celebrity artists can easily claim theft of their valuable cultural contributions; outsider artists struggle for sympathy when asserting fair use or when confronting more famous artists who pull from their work; and minority authors and subject matter are seen as fair-game “raw material” for future appropriation.²⁶ The *Blurred Lines* case does not cleanly line up with such disparities, but the combination of Marvin Gaye’s fame and legacy, a grieving family, and smarmy, drug-abusing litigants can understandably derail and outshine the difficult task of carefully filtering out and comparing copyrightable subject matter. And important dividing lines between inspiration and infringement begin to, ahem, blur.

Professor Said’s proposed solutions to “gut-reaction” jury verdicts are both sensible and in line with others’ critiques of “common-sense” decision-

No. 15-56880 (9th Cir. Aug. 30, 2016); Jacob Gershman, *‘Blurred Lines’ Verdict a ‘Dangerous’ Threat to Creativity, Musicians Warn Appeals Court*, WALL STREET J.: L. Blog (Aug. 31, 2016, 6:49 PM), <http://blogs.wsj.com/law/2016/08/31/blurred-lines-verdict-a-dangerous-threat-to-creativity-celebrity-musicians-warn-appeals-court>.

20. See generally, e.g., C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891 (2002); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001).

21. See generally Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419, 487–89 (2016) (summarizing how “[j]urors sitting in a single trial . . . are more likely to be swayed by a sense of disgust or revulsion”).

22. See Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. DIALOGUE 88, 99–101 (2013).

23. See Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 379–81 (2016) (describing how “raw material is associated with images of women’s bodies and people of color”).

24. *Id.*

25. Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL’Y & L. 273, 275–85 (2007) (describing cases where sexualizing the copyrighted work led to fair use).

26. See, e.g., Gilden, *supra* note 23, at 375–78 (2016); Gilden & Greene, *supra* note 22, at 99–101 (2013).

making.²⁷ Most importantly, it is crucial for all actors involved, including the jurors themselves, to understand the inner workings of the supposedly black box. Juries should be made perfectly clear that the task they are being asked to perform—even though it may involve creative works they encounter everyday—is difficult, complex, and inevitably impacted by prior beliefs and experiences.²⁸ Educating judges and juries about the complexity of reading will by no means eliminate all biases and idiosyncrasies from the infringement analysis, but it, at the very least, will prime jurors to engage in a very particular type of analytical reading, to listen carefully to expert dissections of creative works, and ultimately to approach pop culture differently in the courtroom than they would in their living rooms. Through a combination of expert testimony, improved jury instructions, and increased use of special verdicts, jurors are encouraged to better communicate about their diverse reading experiences and to only bring a freer-form “aesthetic” reading to factual questions that are clearly within their lay competencies.²⁹ By contrast, where the question at hand is more “informational,” such as identifying unprotectable stock elements and ideas, jurors should be instructed to read “efferently”—approach the work instrumentally and with a clear set of analytical tasks.³⁰

Ultimately, Professor Said’s primary contribution is to emphasize to a legal audience that reading is complex, interpretive, and subjective. By asking juror-readers to draw lines between lawful and unlawful conduct without accounting for the glorious messiness of reading, copyright law becomes hobbled in its ability to provide useful guidance about the line between inspiration and infringement. Opening up the black box of readership and narrowing the jurors’ task are, accordingly, crucial steps towards a more principled copyright system.

III. “THE LOVE”

In Part II of her article, Professor Said critiques the highly malleable and unpredictable “ordinary observer” standard for copyright infringement as “contribut[ing] to the general mess in substantial similarity law, and thus frustrat[ing] coherence in copyright law generally.”³¹ In Part V, she seeks to remedy some of the inconsistencies and illogic of copyright infringement by

27. See Said, *supra* note 1, at 635–45.

28. There are parallels between Professor Said’s work and scholarship about how to bring insights about implicit bias into the courtroom. See generally Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012). The educational mission of raising questions of juror bias in the courtroom is an imperfect, but ultimately necessary, step towards shifting jurors away from rendering verdicts based on a dislike for the defendant as opposed to a principled engagement with the factual record. *Id.* at 1181–84.

29. Said, *supra* note 1, at 638–39.

30. *Id.* at 637–38.

31. *Id.* at 620.

shifting work away from the jury and towards judges and experts.³² You might imagine that Parts III and IV would connect the dots and accordingly contain a sharp critique of a dangerously biased, naïve, and/or lazy juror–reader. Instead, however, Professor Said’s reader is treated to a rich and joyful account of reading. What might happen if she and other scholars embraced this joy, and ran with it?

Professor Said invites her audience to engage with three creative works—a recording of Carla Bruni’s song *La Dernière Minute*, Adrienne Rich’s poem *Turbulence*, and a self-portrait by painter Jacob Lawrence.³³ In the following eloquent passage, she observes:

As you let each work sink in, you found various cues—a sound, a shape, a choice of word or an arrangement of words, a line break—that you used as you actively continued to chart a perceptual course, correcting for meanings you might have misread or not seen, continually adding new layers as you learned more about each work. Your experience relied on your memory of each prior part of the experience. The line or measure before it; the thought you had as you reviewed one part of the painting, and then another. It was idiosyncratic, and shaped by your prior experience with that medium, perhaps that genre, and even that artist. . . . You may have reread the poem, or listened to the song again, or covered the image again from frame to frame, poring over the work and seeing what else might reveal itself to you.³⁴

The reader is fully engaged—active, reflective, enthralled; it is hardly the casual or unsophisticated perusal of creative works you might expect in a critique of jury trials. It instead is an exquisite process that Professor Said shares with her audience. She reflects on her own reactions to Rich’s poem:

I experience pleasure at the sounds and repetitions Rich uses (“shudder, shoulder,” “mind, mind”), and her alliterative phrases “lungs labor, heights hurl vistas,” which cause the reader reading aloud to breathe differently. Even the title creates a repetition that is almost reassuring when read to flow directly into the poem: “Turbulence. There’ll be turbulence.” Finally, I experience a chill of sorts when the last line breaks off abruptly, as though the line hangs there the way it does because the speaker finally believes it to be empty advice, a futile thing to try to do when in the midst of trauma.³⁵

32. *Id.* at 628–35.

33. *Id.* at 615.

34. *Id.* at 629–30.

35. *Id.* at 632.

Far from a critique of readerly subjectivity, these passages and others appear to *celebrate* it. Professor Said and her fellow readers are in active conversation with their texts, drawing meaning out of the text and infusing the text with their own unique human experiences. In short, sign me up for the book club.

Why then, does Professor Said shift from a beautiful exposition on readership to a set of proposals designed to limit and narrow it? The concern appears to be that in the midst of the doctrinal muddle of substantial similarity, jurors will engage in a troubling two-step gap-filling. First, they will, as readers, inevitably infuse their own unique set of meanings into the creative works at issue—"breath[ing] life" into the work, "making it mean as much as it possibly can."³⁶ Second, they will export this supplied meaning into the *doctrinal* gaps of copyright infringement, leaning on their own intuitions about the relative value of the two works and disregarding important conceptual bulwarks on copyright's scope, such as the idea/expression distinction.³⁷ What results is a verdict like in *Blurred Lines* that in almost no way lines up with the dominant justification for U.S. copyright—incentivizing authorship by protecting against market substitutes while making sure that other authors retain a rich set of public domain ideas, facts, and older creative works.³⁸ In critiquing the verdict, copyright scholars point to the public domain and generic elements present in both works, and decry the difficulty of systemizing a decision in which inspiration blurs into infringement.³⁹ When confronted with the task of applying murky doctrine to a particular set of creative works, most scholars and judges are likely to fill in the gaps with recourse to copyright's predominantly utilitarian vision. The unbound reader-juror, however, comes to the table with a much different set of commitments.

Underlying the criticism of *Blurred Lines* is a sense that the verdict was substantively "incorrect," that there is a broadly shared set of principles (both conceptual and doctrinal) that should have been, but were not, applied to absolve Thicke and Williams of liability. Unfortunately, this is far from an accurate assessment of the copyright landscape, which is currently rife with uncertainties about its ultimate purposes and underlying justifications. Such uncertainties include: sharp, heated disputes between consequentialist and deontological visions of copyright;⁴⁰ a disconnect between what copyright

36. *Id.* at 635.

37. *Id.* at 635–39.

38. See Raustiala & Sprigman, *supra* note 12 ("The 'Blurred Lines' ruling, unfortunately, turns this principle on its head. Rather than motivate creation, it squelches it.").

39. *Id.*; Gordon, *supra* note 14 ("Ultimately, when Thicke said he wanted to do a song 'like that,' with 'that groove,' he may have been aiming at copying no more than the *idea* of Gaye's song.").

40. See generally Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328 (2015); see also generally Brian L. Frye, *Machiavellian Intellectual Property*, 78 U. PITT. L. REV. 1

doctrine says about authors and what authors say about their own motivations;⁴¹ and broad disagreement about privacy, dignity, and other noneconomic motivations for rights assertions.⁴² Copyright scholars may broadly agree with core copyright concepts like the distinction between protected expression and unprotected ideas and the requirement that infringing copies be at least “substantially similar” to the copyrighted work, but the ultimate disagreements about the ends served by these doctrines ultimately bleed into muddled instructions about how the juror should apply law to fact. Infringement requires both the act of copying and a finding that the copying was improper, unreasonable, or went too far.⁴³ Substantiality, reasonableness, propriety, and proportionality are all highly subjective concepts that require the decision-maker to have some sense of what copyright law is trying to do.⁴⁴

As scholars and jurists diverge on what copyright is and ought to be doing, the engaged reader might provide a normative anchor for copyright

(2016) (summarizing consequentialist/deontologist debate that has followed Lemley’s article); Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, B.U. L. Rev. (forthcoming) (same).

41. See generally JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY (2014). Similarly, the “negative space” literature questions the need for IP protections in creative communities more broadly. See generally Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); Elizabeth L. Rosenblatt, *A Theory of IP’s Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011).

42. See Margaret Chon, *Copyright’s Other Functions*, 15 CHI-KENT J. INTELL. PROP. 364, 366 (2016) (“If we limit our understanding of legitimate goals of copyright protection to market actors or commercial ends, we are missing a lot of the copyright story, past and especially present.”); see also generally Jeanne Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549 (2015) (surveying noneconomic motivations for asserting intellectual property claims); M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI-KENT J. INTELL. PROP. 1, 7 (2016) (describing a “fundamental mismatch” between the reputational claim in *Garcia v. Google* and the purposes of copyright); John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245 (2015) (discussing the disingenuous uses of copyright law).

43. Wendy Gordon makes the following useful analogy in her criticism of the *Blurred Lines* case:

The two-part copyright test somewhat resembles the familiar two-part inquiry in an auto accident case. In most jurisdictions, it isn’t enough for an injured pedestrian to show that a driver hit him. To succeed, the pedestrian also has to prove the defendant who hit him was driving too fast or otherwise acting “unreasonably.”

Gordon, *supra* note 14.

44. See Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 741 (1987) (“There is no objective framework for defining how much copying is too much.”); see also generally Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203 (2012) (recognizing that questions of infringement often hinge on normative assessments of the copying at issue); Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303 (2012) (critiquing the supposed objectivity of a “reasonable observer” standard in copyright law).

law's broader cultural role. For those primarily concerned about the corrective/distortive impact of copyright on creative markets, the deep pleasure of reading is what *creates* a market for creative works and drives the purchasing decisions that make “copyright industries” possible. Juror–reader sensibilities about what is morally acceptable behavior within these industries inevitably shape decisions about how to consume creative works. Copyright law can try to push back hard against consumer intuitions of right and wrong—an approach which has had a very mixed history⁴⁵—or it might listen more sympathetically to what readers have to say about inspiration, appropriation, attribution, and revenue-sharing.⁴⁶ This sympathetic ear could bring greater legitimacy to copyright law and counter the increased public wariness that has emerged in recent decades.⁴⁷ When the disconnect between social and legal norms has militated towards weakening copyright, scholars have largely been willing to listen.⁴⁸ Yet when the disconnect suggests stronger protections, such as in the *Blurred Lines* decision, they largely have not.⁴⁹ It is

45. See, e.g., Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1256 (2011) (arguing that efforts to discourage and deter online files-sharing have “severely damage[d] the public image of copyright industries specifically, and copyright law more generally”); Mark F. Schultz, *Reconciling Social Norms and Copyright Law: Strategies for Persuading People to Pay for Recorded Music*, 17 J. INTELL. PROP. L. 59, 65 (2009) (“Laws that contradict social norms, however, also can produce harmful secondary effects.”).

46. See Lester, *supra* note 11, at 239–40 (“But it is equally important to be *cognizant* of the cultures we are influenced by in our creative process and to *honor* those cultures with overt forms of public recognition, and perhaps even compensation, when possible.” (emphasis in original)); see also generally Bair, *supra* note 40 (arguing that copyright law should more explicitly consider lay perceptions of fairness in its social welfare calculus); Sean O’Connor et al., Opinion, *Overdue Legal Recognition for African-American artists in ‘Blurred Lines’ Copyright Case*, SEATTLE TIMES (May 20, 2015, 5:19 PM), <http://www.seattletimes.com/opinion/overdue-legal-recognition-for-african-american-artists-in-blurred-lines-copyright-case>.

47. See Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 264 (2014) (demonstrating public misperceptions about what intellectual property protects and arguing that this misperception “can undermine the legitimacy and effectiveness of the law”); see also Bair, *supra* note 40, at 22 (“[C]ommentators can speak all day about what a jury *should* do, but if their conclusions do not align with widespread public sentiment, they may be wasting their breath.” (footnote omitted)). Perhaps the most prominent example of this wariness is the successful grassroots online opposition to the Stop Online Piracy Act in 2011, notwithstanding its broad industry support. See Larry Downes, *Who Really Stopped SOPA, and Why?*, FORBES (Jan. 25, 2012, 1:15 AM), <http://www.forbes.com/sites/larrydownes/2012/01/25/who-really-stopped-sopa-and-why> (“[U]sers were mad as hell, and they weren’t going to take it anymore.”). Other areas of law have recognized the importance aligning the law with lay intuitions of justice; see also LAURA I. APPELMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* 80 (2015) (“[C]ommunity interest strengthens the rule of law, because engaged citizens are more likely to comply with the law and trust it as fair.”); Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1841 (2000).

48. See generally JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* (2011) (critiquing the gap between copying norms and copyright law).

49. For instance, Gregory Mandel and Jeanne Fromer have shown that both the general public and creators of artistic works view intellectual property as deriving from the natural rights

becoming increasingly clear both that authors (and their families) use copyright to assert interests in privacy, recognition, and fair treatment and that these interests matter to their everyday lay readers.⁵⁰ If readers were lazy, apathetic, or disengaged consumers of creative works, their intuitions might be more easily dismissed. Professor Said's exposition of readership, however, reveals just the opposite.

An alternative takeaway from Professor Said's article is that copyright law does not sufficiently appreciate the rich resource that juror-readers provide. There's a wisdom, engagement, and moral intuition that could be, but too often is not, channeled towards the difficult task of aligning copyright law with the material needs of authors and the cultural norms in which they operate. Professor Said's article has the potential to bring us a major step closer to realizing the untapped potential of the juror-reader; we should respond to the beautiful messiness of cultural engagement not by limiting it, but by harnessing it.

Ultimately, the healthy evolution of copyright law requires ongoing discourse among lawmakers, judges, scholars, authors, and everyday readers. Professor Said reveals that juror-readers need other actors to step up to the plate and actively assist them in their efforts to draw lines between lawful and unlawful copying. The onus is on scholars and lawmakers to craft doctrines that link up with the practices and expectations of everyday readers and shift away from approaching readers as either empty vessels or foolish amateurs. In other words, we need to approach reform from a posture of both critique and affection. As a cultural critic once said, "the library is open."⁵¹

to creative achievements and not as an ex ante incentive to create. Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1764–68 (2012); Mandel, *supra* note 47, at 299.

50. See generally, e.g., Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433 (2016) (summarizing variety of psychological motivations for asserting copyright infringement).

51. See Brianna LeRose, *The Best Library Reads in 'RuPaul's Drag Race' Herstory*, BEAMLY (Apr. 24, 2015), <https://www.beamly.com/tv-film/best-library-reads-rupauls-drag-race-herstory> (reviewing some of the best "reads" in the history of "RuPaul's Drag Race").