
TRANSFORMING THE FAIR USE LANDSCAPE BY DEFINING THE TRANSFORMATIVE FACTOR

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INTRODUCTION

Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.

—Pierre N. Leval¹

*. Editor-in-Chief, *Southern California Law Review*, Volume 90. J.D., University of Southern California Gould School of Law, 2017. B.A., University of California, Los Angeles, 2010. A special thank you to Professor Jonathan Barnett for his thoughtful comments, as well as to the editors of *Southern California Law Review* for their careful feedback.

1. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1005, 1107 (1990).

Fair use is a legal doctrine that is at once generous and parsimonious to our society's innovators. The underlying function of fair use is to allow individuals to freely and legally use copyrighted works without obtaining permission from the work's creator. It serves as an exception to the rights granted by copyright law, promoting society's liberty of expression and innovation by allowing individuals to infringe on another's creative efforts. Yet while those taking advantage of the fair use exception have much to gain from the doctrine, their experiences with fair use have been plagued with "pervasive and often crippling uncertainty."²

Since the doctrine's judicial inception and subsequent statutory codification, courts have struggled to define and apply a uniform test assessing whether a copyrighted work's use is protected under fair use. In the 1994 case *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court introduced a new consideration into the fair use analysis: whether and to what extent a secondary use transforms the original copyrighted work.³ A use that sufficiently transformed the original work would weigh in favor of fair use; conversely, a use that failed to sufficiently transform the work would weigh against a fair use finding. This novel element of the fair use analysis left many questions unanswered. Where does the dividing line between a sufficiently transformative work and one that is not transformative enough lie? How much weight should this new inquiry hold in relation to the pre-existing statutory factors?⁴

Answering such questions and clarifying the scope of the transformative inquiry has been a dominant focus of fair use case law since *Campbell* first introduced the transformative concept. It remains a prominent concern today, as courts stand sharply divided on how to resolve these questions. The Second Circuit has expanded to an unprecedented degree the definition of what makes a use sufficiently transformative, and has given it greater weight in the overall fair use analysis. The Seventh Circuit has criticized the Second Circuit for extending and prioritizing the reach of the transformative concept so far that it now has the potential to implicate copyright holders' rights in a way neither contemplated nor intended by the drafters of the copyright statute. The Seventh Circuit contends that the fair use analysis should continue to be guided by the four statutory factors, none of which rely on the "transformative" question.

2. Benjamin Sutton, *New Fair Use Guide Helps Distinguish Between Copyright and Copywrong*, HYPERALLERGIC (Feb. 9, 2015), <http://hyperallergic.com/181301/new-fair-use-guide-helps-distinguish-between-copyright-and-copywrong>.

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

4. 17 U.S.C. § 107 (2012).

Despite the difficulty courts have faced in establishing a cohesive fair use doctrine, there is no denying “the function of fair use as integral to copyright’s objectives.”⁵ Fair use curtails the rights of some—copyright holders—to promote the rights of others: individuals seeking to exercise their First Amendment rights free from copyright law’s restrictions. The Second Circuit’s approach to the transformative question is more favorable to the copyright infringer, while the Seventh Circuit’s conservative approach is more protective of the copyright holder. A conclusive resolution of the ambiguities raised by the transformative question would provide the fair use doctrine with the tools necessary to best serve copyright law’s goal of supporting society’s innovators.

I. THE FAIR USE DOCTRINE’S DEVELOPMENT

The right to exercise an exclusive monopoly over one’s own creative work—including its use, modification, and distribution—finds its force in the U.S. Constitution. The Constitution grants Congress the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶ Notable for this discussion is that Congress holds a constitutionally-derived power to grant exclusivity rights, and that the purpose of this power is given to promote “[s]cience and useful [a]rts.” The control that authors, inventors, and innovators are given over their work serves a purpose greater than merely rewarding their efforts; control rights are given as a means to an end. These rights are conferred to incentivize the continued production of novel and pioneering sciences and useful arts. It is within this purpose-driven framework that U.S. copyright law emerged.

A. THE COPYRIGHT ACT

The principles espoused by the Constitution were first codified in the Copyright Act of 1790.⁷ Consistent with the constitutional objective of incentivizing innovation in the arts and sciences, the control rights granted to creators were accompanied by a limitation: ownership rights were truncated to a fourteen-year term, subject to renewal for a second fourteen-

5. Leval, *supra* note 1, at 1110. Some courts have gone so far as to characterize the analysis of the four fair use statutory factors as a function of whether or not copyright objectives are furthered. *See* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1238 (11th Cir. 2014).

6. U.S. CONST. art. I, § 8, cl. 8.

7. *See* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 414 (5th ed. 2010).

year term.⁸ Both the grant of exclusive control rights and the limitation of these rights served the goal of promoting the arts and sciences, with the latter incentivizing those seeking to benefit from existing works.⁹

As technology advanced, innovators began using new mediums, prompting Congress to update the Copyright Act to adapt and address these novel mediums.¹⁰ The Copyright Act of 1976, the greatest revision to the original Act and current guiding legal framework, reflected the legislators' desire to retain flexibility in the law through rapid changes in technology. Barbara Ringer, then Register of Copyrights, described the revision as "a completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters."¹¹ The 1976 Act differed from the previous version in several fundamental ways. The 1976 Act lengthened the duration of the copyright term to last the author's lifetime plus fifty or seventy-five years (depending on the type of work) and extended the scope of copyrights to confer control rights over unpublished works, sound recordings, and computer programs.¹²

Despite the intention to make the 1976 Act "a completely new copyright statute," the enacted changes remained true to the constitutional themes that informed the original 1790 Act. Although the 1976 revisions strengthened copyrights by extending their duration and scope, they also fundamentally limited the rights of copyright holders by establishing compulsory licenses, preempting the authority of state copyright laws, and, most notably, introducing the fair use doctrine.¹³ While these changes placed restrictions on copyright holders' control rights, they ultimately promoted innovation in the arts and sciences by balancing the competing interests of creating incentives to innovate through rights of exclusivity and protecting society's ability to benefit from and build upon others' innovation.

8. *Id.*

9. See L. RAY PATTERSON & STANLEY W. LINDBERG, A UNIFIED THEORY OF COPYRIGHT (Craig Joyce ed., 2009), printed in 46 Hous. L. Rev. 215, 241–43 (2009).

10. The Copyright Act of 1790 has been revised several times in its history. The 1909 Act, for example—the guiding legal framework for most of the twentieth century—resulted in a longer term and wider scope of copyright protection. MERGES ET AL., *supra* note 7, at 414.

11. Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. Sch. L. Rev. 477, 479 (1977).

12. See Copyright Act of 1976, Pub. Law 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–805 (2012)); Ringer, *supra* note 11, at 483–84, 492.

13. MERGES ET AL., *supra* note 7, at 415.

B. FAIR USE

Fair use, a judicial doctrine codified in the Copyright Act of 1976, allows users of copyrighted works to circumvent the exclusive control the 1976 Act conveys to the works' creators by providing a *lawful* means to infringe upon a copyright.¹⁴ The doctrine limits the force of copyright owners' rights and in doing so furthers the "[p]rogress of [s]cience and useful [a]rts" by allowing individuals greater liberty to innovate through building upon existing copyrighted works.¹⁵ Further, the limitations fair use places on some rights—creators' rights to control their own works—are balanced by the strengthening of others—individuals' rights to exercise their First Amendment freedom of expression without the exclusivity restrictions of copyright law.¹⁶

The concepts driving the fair use doctrine were first articulated in the 1841 case *Folsom v. Marsh*, in which the defendant copied hundreds of pages from the plaintiff's compilation of George Washington's letters to use in his own biography about the first president.¹⁷ In his decision, Judge Joseph Story sought to redefine copyright infringement and in doing so gave rise to the fair use concept.¹⁸ Judge Story asked "whether [there] is a *justifiable* use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs." This question opened the door for the possibility of an unauthorized yet legal use of copyrighted material, which could be "justifiable" as "no[t] infringement."¹⁹ He subsequently sketched out some factors to be considered when assessing whether unauthorized use of a copyrighted work can be deemed justifiable under law, describing the question as one that "often depend[s] upon a nice balance of the comparative use made in one of the materials of the other" and considers factors such as "the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information."²⁰ Regarding the amount of the original copyrighted work that was appropriated, he clarified that use of *any* amount of the copyrighted

14. See 17 U.S.C. § 107 (2012).

15. U.S. CONST. art. I, § 8, cl. 8.

16. See *id.* amend. I; JULI WILSON MARSHALL & NICHOLAS J. SICILIANO, ABA SECTION OF LITIG., THE SATIRE/PARODY DISTINCTION IN COPYRIGHT AND TRADEMARK LAW—CAN SATIRE EVER BE A FAIR USE? 1 (2006), https://apps.americanbar.org/litigation/committees/intellectual/roundtables/0506_outline.pdf.

17. *Folsom v. Marsh*, 9 F. Cas. 342, 344–49 (C.C.D. Mass. 1841) (No. 4,901).

18. L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 431–32 (1998).

19. *Folsom*, 9 F. Cas. at 345, 348 (emphasis added).

20. *Id.* at 344.

work could be infringement if “the value of the original [copyrighted work] is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another.”²¹

The century following *Folsom* witnessed the courts’ struggles to consistently define and apply the principles of fair use.²² Their efforts resulted in unpredictable precedent, driven by an inability to clearly delineate the factors to be assessed in a fair use determination.²³ The Copyright Act of 1976, however, statutorily codified the fair use doctrine, clearly articulating the factors to be considered. Under 17 U.S.C. § 107, the four factors to be considered when determining whether a particular unauthorized use of a copyrighted work is justified as fair use are: (1) “the purpose and character of the use”; (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.”²⁴ The statute is silent as to *how* these factors should be applied, but it provides some general guidance in the overall fair use inquiry by including a non-exhaustive list of unauthorized uses that are categorically protected under the fair use doctrine, including “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”²⁵

By amending the Copyright Act to include fair use, Congress did not seek to “change, narrow, or enlarge” the preexisting judicial doctrine, even though its application had been fraught with inconsistency and confusion.²⁶ The abstract nature of the four statutory factors effectively placed the fair use determination in the hands of each court’s subjective interpretation of how each factor should be defined and how much weight each should be accorded in the overall analysis. These loosely defined factors and subsequent subjective judicial interpretations have resulted in unpredictable precedent.²⁷ As Judge Pierre Leval of the Second Circuit famously noted in 1990, “Judges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones.”²⁸ While almost three decades have passed since Judge Leval’s observation, the mystery

21. *Id.* at 348.

22. *See* MERGES ET AL., *supra* note 7, at 592–93.

23. *Id.*

24. 17 U.S.C. § 107 (2012).

25. *Id.*

26. H.R. REP. NO. 94-1476, at 66 (1976); S. REP. NO. 94-473, at 62 (1975).

27. *See* Leval, *supra* note 1, at 1106–07 & nn.9–10.

28. *Id.* at 1106.

surrounding the application of fair use is far from dispelled. Courts have interpreted the factors' definitions in varying ways, divergently applied weight to certain factors over others, and reached opposite outcomes when approaching similar sets of facts.²⁹

II. THE TRANSFORMATIVE TEST

One of the principal questions raised in establishing uniform and consistent application of the fair use test, across different sets of facts, was how much weight to give each factor in the overall fair use analysis. Following the statutory codification of fair use, two Supreme Court cases provided guidance on this issue. These cases established the fourth factor—market effect of the second use upon the original copyrighted work—as the most influential factor in the analysis.

The first of the two cases, *Sony Corp. of America v. Universal City Studios, Inc.*, found, in a split decision, that the use of home videotape recorders for the purpose of time-shifting was a fair use of the original copyrighted television programming.³⁰ In making its fair use determination, the Court noted that when the unauthorized use of copyrighted material is commercial in nature, there is a presumption negating a fair use finding.³¹ The strong emphasis the Court placed on whether an unauthorized use was commercial significantly increased the importance of the fourth factor in the overall analysis, moving away from former approaches that accorded equal weight to each factor. The second case, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, reiterated and broadened *Sony's* approach to viewing unauthorized commercial uses as presumptively unfair by strengthening the weight of the fourth factor as “undoubtedly the single most important element of fair use.”³² In its finding that a commercial appropriation of an unpublished work did not qualify as fair use, the split *Harper* Court clarified in proving a given use unfair, one need not prove existing harm to the copyright's market, but only “show that if the

29. See, e.g., Mark Meyer, *Copyright: How Did Transformative Use Become Fair Use?*, MARK MEYER PHOTOGRAPHY: PHOTOGRAPHY J. (July 8, 2013), <http://www.photo-mark.com/notes/how-did-transformative-use-become-fair> (“In keeping with the tradition of fair use cases, two courts looking at the same material, the same statutes, and the same case law came to completely different conclusions.”) (explaining how in *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), the district court found that allegedly infringing works did not qualify for fair use because they were minimally transformative overall, while the court of appeals found that fair use applied because the works were transformative, marked by their differing “aesthetic” qualities).

30. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 418, 454–56 (1984) (5-4 decision).

31. *Id.* at 448–49.

32. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1986) (6-3 decision).

challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work.’”³³ The decision effectively prioritized a copyright holder’s hypothetical market interests over a secondary user’s freedom of expression. The Court’s emphasis on the fourth factor moved the fair use analysis in the direction of equating fair use to a question of whether a copyrighted work’s market is affected by an unauthorized use.

Consequently, the influence of these two cases created a fair use jurisprudence dominated by a focus on the market effect of secondary uses. Lower courts, in keeping with the tradition set by *Sony* and *Harper*, prioritized the fourth factor, tending to find unauthorized commercial uses, as well as non-commercial uses that influenced the copyrighted work’s market, to be unfair. Between 1978 and 2005, the period following *Sony* and *Harper*, there was a strong correlation between the outcome of factor four and the overall fair use result. Of 141 court opinions finding the fourth factor weighing against fair use, 140 of them subsequently ruled that the use was unfair; only one case deviated from the correlation between the fourth factor and subsequent fair use determination.³⁴ From the opposite perspective, of 116 cases that determined factor four favored fair use, 110 of them found the use to be fair.³⁵ The data amassed during this period substantiates the theory that the market-related factor is the most influential factor in the fair use test.³⁶

However, notwithstanding the general dominion of the fourth factor, the decades following *Sony* and *Harper* failed to create consistency and harmony in fair use’s application. Even *Sony* and *Harper*, the leading authorities on fair use of the time, were decided by split courts.³⁷ Post-*Sony* and -*Harper* opinions were written with divided panels and frequently overturned.³⁸ The result was a public left without predictable guidance on how to behave in relation to copyrighted works.

33. *Id.* at 568 (quoting *Sony*, 464 U.S. at 451).

34. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 617 (2008).

35. *See id.*

36. *Id.* at 584–55.

37. The Court’s *Sony* decision was split 5-4. *Sony*, 464 U.S. at 418, 457. The Court was also split in *Harper*, with a 6-3 majority. *See Harper*, 471 U.S. at 541, 619.

38. *See Leval, supra* note 1, at 1106–07 & nn.9–10.

A. THE TRANSFORMATIVE STANDARD'S EMERGING IMPORTANCE

Frustrated by the ambiguity and unpredictability of fair use case law, Judge Pierre Leval called for a more structured and dependable approach to the fair use inquiry,³⁹ diverging from the market-based approach endorsed by *Sony* and *Harper*. Instead of approaching fair use cases with a thumb on the scale for the fourth factor, Leval proposed making the first factor the priority in the analysis.⁴⁰ He argued that a successful fair use defense depends “primarily on whether, and to what extent, the challenged use is *transformative*,”⁴¹ rather than whether the use would “adversely affect the potential market for the copyrighted work.”⁴² The potential market effect, while important, “should not overshadow the requirement of justification under the first factor, without which there can be no fair use.”⁴³ Per his approach, a transformative use “must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”⁴⁴ For a use to be transformative, it is insufficient for a user of copyrighted material to “merely repackage[] or republish[] the original.”⁴⁵ However, despite the probative value of the transformative nature of the work to the fair use determination, Leval clarified that it is not conclusive.⁴⁶ This influential proposition significantly differed from the then-prevailing attitude in fair use case law. Theoretically, when compared with the prevalent market effect framework, Leval’s approach would be more likely to find a use fair when copyrighted material was used in a novel manner or for a novel purpose, even if the use negatively affected the original work’s market.

In *Campbell*, the Supreme Court formally adopted Leval’s view when for the first time it introduced the notion of a “transformative” use into the fair use analysis.⁴⁷ *Campbell* marked a major shift in fair use case law, reinterpreting the first factor of fair use in two important ways: reimagining (1) the way courts should define the factor, and (2) the weight they should give each of the four factors. In determining whether a parody use of the song “Oh, Pretty Woman” constituted a fair use, the Supreme Court expanded the definition of the first factor to ask whether, and to what

39. See generally *id.*

40. See *id.* at 1111.

41. *Id.*

42. *Sony*, 464 U.S. at 451.

43. Leval, *supra* note 1, at 1124.

44. *Id.* at 1111.

45. *Id.*

46. *Id.*

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

extent, a secondary work was *transformative* relative to the original copyrighted work.⁴⁸ The Court reached its answer by asking whether the secondary work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message,”⁴⁹ ultimately finding in *Campbell* that the commercial nature of parodies does not negate their potential to be fair use,⁵⁰ and that “[n]o such evidentiary presumption is available” in a fair use determination.⁵¹

Further, *Campbell* prioritized the first factor among all the others. The Court expressly contradicted its pro-market effect position in *Sony* and *Harper* by establishing the transformative nature of the work as the more probative factor.⁵² “[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁵³ The Court accorded so much value to the transformative quality of a work as essential to the fair use analysis that it found the creation of transformative works “lie[s] at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”⁵⁴

Campbell’s redefining influence on fair use analysis cannot be understated.⁵⁵ The decision inspired hope for a redirection of fair use law toward a more uniform application and the creation of predictable precedent. Leval himself believed that the case “restored valid compass bearings to the fair use doctrine by relating it in each of its component inquiries to the overarching central purpose of copyright.”⁵⁶ Unlike the Court’s preceding fair use decisions, characterized by split opinions met with hostile dissents, *Campbell* was decided by a unanimous Court,⁵⁷ serving as a testament to the Court’s committed embrace of the new transformative era.

In the period immediately following *Campbell*, from 1995–2000,

48. *Id.*

49. *Id.*

50. *Id.* (“Like less ostensibly humorous forms of criticism, [parodies] can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”).

51. *Id.* at 594.

52. *Id.* at 578–79.

53. *Id.* at 579.

54. *Id.*

55. Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 818–24 (2015) (outlining eleven different ways *Campbell* significantly contributed to shaping fair use case law).

56. Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter’s Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 23 (1994).

57. *See Campbell*, 510 U.S. at 571.

73.9% of fair use opinions adopted the new transformative standard.⁵⁸ Courts' reliance on this standard rose in subsequent years, as 87.2% of district and appellate opinions from 2006–2010 considered whether a use was transformative.⁵⁹ Even though there is no mention of the “transformative” concept in the Copyright Act,⁶⁰ it remains the dominant approach to fair use cases.⁶¹

Empirical data obtained from fair use cases decided between 1978–2005 found that when courts considered the transformative factor it was a “dispositive force” on the fair use inquiry, such that “while a finding of transformativeness is not necessary to trigger an overall finding of fair use, it is sufficient to do so.”⁶² Nearly every case decided in the post-*Campbell* era that found a secondary use to be transformative found in favor of fair use.⁶³ This trend continued between 2006 and 2010, when all but two cases finding a use to be transformative were decided in favor of fair use.⁶⁴ These two cases attributed their fair use findings to procedural posture, not substantive analysis, justifying their deviance from the overall trend.⁶⁵

While *Campbell* altered the fair use conversation to include a transformative inquiry,⁶⁶ its influence has not dissipated the cloud of mystery surrounding the fair use doctrine. *Campbell* was the Court's final word on the standards to be used when applying fair use, leaving the doctrine's uncertain application to be resolved by lower courts.⁶⁷ As such, the ambiguity of the term “transformative” remains hotly debated, particularly with respect to the scope with which it should be defined and the influence it should bring to bear on the overall fair use determination.

58. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 736 (2011).

59. *Id.*

60. See 17 U.S.C. § 107 (2012).

61. Netanel, *supra* note 58, at 734, 738.

62. Beebe, *supra* note 34, at 605.

63. *Id.*

64. Netanel, *supra* note 58, at 740.

65. *Id.*

66. *Id.* at 723 (noting that *Campbell*'s perceived legacy was the creation of “a true multi-factor test in which factors two, three, and four would be assessed and weighed in line with the degree of transformativeness of the use, rather than the market-centered presumption set out in *Sony* and *Harper & Row*”).

67. See Andrea Weiss Jeffries & Kevin Goldman, *High Court Will Need to Resolve Circuit Split in Fair Use*, LAW360 (Apr. 30, 2015, 10:54 AM), <http://www.law360.com/appellate/articles/645919>.

B. VARYING INTERPRETATIONS OF THE TRANSFORMATIVE STANDARD

Campbell set the tone for the broad application of the transformative standard by expanding the scope of its protection to include parodies. However, despite endorsing a broad applicability of the transformative factor in all sorts of fair use contexts, *Campbell*'s holding was narrow. The Court set the standard for a transformative work to be one that "adds something new [to the copyrighted work], with a further purpose or different character, altering the first with new expression, meaning, or message," and finding parodies to be transformative in light of their ability to "provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."⁶⁸ Its specific fair use determination was limited to the context of musical parody: "We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107."⁶⁹

Uncertainty remained post-*Campbell* as to how widely lower courts would interpret this holding,⁷⁰ and specifically whether they would expand the narrow transformative *musical* parody allowance to "confer substantial freedom to parodists of *all* media."⁷¹ Sure enough, different courts approached the transformative factor in varying ways, resulting in multiple definitions of "transformative." Some courts have taken the lead in giving the transformative factor a broad interpretation, widening the boundaries set by *Campbell*.

The scope of *Campbell*'s "transformative" definition has since widened by lower courts' interpretations in three ways: (1) the scope of the transformative parody has expanded beyond the medium of song; (2) courts have ushered in a new purpose-driven era whereby secondary uses can be fair even though they are not in any way connected to the original work—through either commentary, criticism, or any of the prescribed fair use purposes in § 107's preamble—so long as the use expresses a new purpose and meaning; and (3) the era of Internet search engines has expanded the fair use doctrine's boundaries—furthering the novel purpose-driven inquiries—by allowing users to duplicate copyrighted works in their

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

69. *Id.*

70. *Campbell*'s concurrent broad formulation of the transformative factor and narrow holding limited to parodies left "open the question of whether the broad language or the narrow genre analysis constituted the Court's rule." Recent Case, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), 127 HARV. L. REV. 1228, 1232 (2014) [hereinafter *Cariou* Case Summary].

71. Lisa M. Babiskin, *Oh, Pretty Parody: Campbell v. Acuff-Rose Music, Inc.*, 8 HARV. J.L. & TECH. 193, 193 (1994) (emphasis added).

entirety so long as the second use of the work is for a different purpose. Yet despite the liberal approach with which some courts have construed the transformative factor, the fair use doctrine's tradition of indecision continues as other courts have narrowly interpreted *Campbell's* holding.⁷²

In 2003, the Southern District of New York decided a musical parody case, *Abilene Music, Inc. v. Sony Music Entertainment, Inc.*, in which it held that Ghostface Killah's use of Louis Armstrong's song "What a Wonderful World" was a fair use,⁷³ noting that once a "parodic character" is reasonably perceived the new work is *necessarily* transformative.⁷⁴ This conclusive determination of parodies as transformative differs substantially from *Campbell's* ruling, which cautioned that while parodies "may claim fair use," they are not exempt from case-by-case assessment "through the relevant factors" and "in light of the ends of copyright law," and that "[t]he Act has no hint of evidentiary preference for parodists over their victims."⁷⁵ The Southern District of New York's blanket determination deeming parodies as transformative, without taking note of *Campbell's* cautionary advice, sets the tone for the further expansion of parodies to other mediums, like Walking Mountain Production's use of Mattel Inc.'s copyrighted Barbie doll figures in highly sexualized and politically charged photographs.⁷⁶ Since *Campbell*, lower courts have expanded parody fair uses beyond the bounds of the music medium on several other occasions to encompass plays,⁷⁷ iconic styles of photography,⁷⁸ and audiovisual works.⁷⁹

Case law has also formed an unofficial judicial doctrine of "expressive purpose," whereby uses of a copyrighted work may be fair if they express a new purpose and meaning, notwithstanding their failure to fit into any of

72. Leval, *supra* note 56 (characterizing the copyright-holder criticism of the *Campbell* decision—a decision far less liberal in its definition of transformative than its successors—as "interfering excessively with the *absolute right* of an author to exercise total control over the use of the author's creations").

73. See *Abilene Music, Inc. v. Sony Music Ent., Inc.*, 320 F. Supp. 2d 84, 95 (S.D.N.Y. 2003).

74. *Id.* at 89 (emphasis added).

75. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

76. See *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800–06 (9th Cir. 2003).

77. See *Keeling v. Hars*, 809 F.3d 43, 50 (2d Cir. 2015) (affirming as fair use plaintiff's parody of the film *Point Break* in his play), *cert. denied* 136 S. Ct. 2519 (2016).

78. See *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 111–12, 114–17 (2d Cir. 1998) (finding fair use where Paramount parodied Annie Liebovitz's famous magazine cover photo of pregnant actress Demi Moore by superimposing Leslie Nielson's face on an image of a pregnant woman as part of an advertising campaign).

79. See *Northland Family Planning Clinic v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 966–68, 983 (C.D. Cal. 2012) (finding a pro-life advocacy organization's adoption of anti-abortion video footage in its own videos to be a parody protected under fair use).

the prescribed statutory categories of fair use.⁸⁰ In cases that have adopted this loose standard, courts have pushed the boundaries of the transformative factor such that the new work need not “shed[] light on an earlier work, and, in the process, creat[e] a new one,” as *Campbell* believed necessary for transformative parodies.⁸¹ The new transformative work under these cases is not required to anchor its meaning or purpose in the original copyrighted work at all, and it is given the ability to copy the whole of an original work so long as it is done for a new purpose. For example, in *Bill Graham Archives v. Dorling Kindersley Ltd.*, authors of a musical group’s biography faced copyright infringement charges for reproducing the group’s former concert posters in their book.⁸² The biography authors reproduced the *entirety* of each poster image they used, arranging them chronologically in their biography.⁸³ Despite having used the entire poster image, the court affirmed the authors’ fair use privilege because their “purpose in using the copyrighted images at issue . . . is plainly different from the original purpose for which they were created.”⁸⁴

Courts that have embraced this widened definition of a transformative use have also relied upon the intent of the unauthorized copyright user when determining what the use’s purpose is and whether that use is transformative. *Blanch v. Koons* is representative of some courts’ tendency to consider the user’s intent in making their final transformative determination.⁸⁵ In this case, artist Jeff Koons created a collage titled “Niagara” in which he depicted women’s legs, one of which came from photographer Andrea Blanch’s copyrighted image “Silk Sandals by Gucci.”⁸⁶ When assessing whether Koons’s use was transformative, the court relied on his own subjective account of his expressive purpose,⁸⁷ one facet of which was his desire to bring “more of a sexuality to the photographs,” a purpose the court considered a “sharply different” goal from Blanch’s original photograph.⁸⁸ The court placed great weight on Koons’s testimony, noting that “[w]hether or not Koons could have created ‘Niagara’ without reference to ‘Silk Sandals,’ we have been given no

80. 17 U.S.C. § 107 (2012) (referring to a non-exhaustive list of purposes that are non-infringing such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”).

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

82. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006).

83. *Id.* at 609, 613.

84. *Id.* at 609.

85. *See Blanch v. Koons*, 467 F.3d 244, 252–53 (2d Cir. 2006).

86. *Id.* at 247–48.

87. Netanel, *supra* note 58, at 762.

88. *Blanch*, 467 F.3d at 252.

reason to question his statement that the use of an existing image advanced his artistic purposes.”⁸⁹

The unprecedented deference to the secondary user’s subjective intent first displayed in *Blanch v. Koons* is echoed in other cases, both when fair use is found and when it is not. In *Salinger v. Colting*, the court found in its preliminary injunction ruling that Fredrik Colting’s sequel to J.D. Salinger’s novel *The Catcher in the Rye*, which significantly borrowed from the characters and plot of the original novel, was unlikely to be a fair use.⁹⁰ In making its determination, the district court found insufficient transformative purpose, explaining that Colting’s inconsistent statements about his purpose demonstrated a lack thereof.⁹¹ The Second Circuit subsequently approved the district court’s reliance on Colting’s statements of his expressive purpose and affirmed the district court’s finding that Colting is unlikely to prevail on a fair use defense.⁹² Similarly, in *Bourne Co. v. Twentieth Century Fox Film Corp.*, the district court’s finding that use of the copyrighted song “When You Wish Upon a Star” in the popular television show *Family Guy* was fair was anchored in the defendants’ own explanation of their expressive purpose.⁹³ The court looked to *Blanch v. Koons* for support of this methodology, reasoning that “[t]he Second Circuit has given weight to an artist’s own explanation of their creative rationale when conducting fair use analysis . . . and here Defendants have produced uncontroverted evidence that a parallel joke . . . was discussed in the writers’ room prior to the recording of the song.”⁹⁴ These cases demonstrate a shift in the transformative factor inquiry such that the secondary work no longer bears an absolute requirement to either comment on or criticize the original copyrighted work to be eligible for the fair use defense, so long as the expressed subjective purpose in appropriating the work differs from the expressed purpose of the original work.

The prevalence of Internet search engines presented a novel medium

89. *Id.* at 255.

90. *See Salinger v. Colting*, 641 F. Supp. 2d 250, 268 (S.D.N.Y. 2009), *vacated*, 607 F.3d 68 (2d Cir. 2010).

91. “It is simply not credible for Defendant Colting to assert now that his primary purpose was to critique Salinger and his persona, while he and his agents’ previous statements regarding the book discuss no such critique . . .” *Id.* at 262.

92. *See Salinger*, 607 F.3d 68, 83–84 (2d Cir. 2010) (holding that the district court’s determination of Colting’s insufficient fair use defense on the basis of his statements regarding his own subjective intent was “not clear error”).

93. *See Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 507–08, 511 (S.D.N.Y. 2009).

94. *Id.* (citing *Blanch*, 467 F.3d at 255).

and new challenge to fair use case law. The judicial response to this unfamiliar medium paralleled the approach of the expressive purpose line of cases, significantly expanding the scope of the transformative factor by allowing search engines to reproduce entire copyrighted works in fulfillment of an expressive purpose different from that of the original copyrighted work. The groundbreaking case in this area is *Perfect 10, Inc. v. Amazon.com, Inc.*, in which Google was accused of copyright infringement for providing thumbnails of and links to Perfect 10's copyright-protected images.⁹⁵ The court held that the search engine's use of these images was fair use, and in doing so it broadly defined "transformative" to include use of an entire copyrighted work "in a different context such that the plaintiff's work is transformed into a new creation."⁹⁶ This formulation of the transformative factor is a significant expansion from preexisting definitions, as it does not require the user to change the initial copyrighted work in any way so long as the work is used in a new context, making it a "new creation." The court expressly clarified that "even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work."⁹⁷ In this case, Google's publicly beneficial use of the images for ease of reference was a sufficiently different context than the plaintiff's entertainment purpose.⁹⁸

Following *Perfect 10*, a string of highly publicized Internet search-engine cases followed *Perfect 10*'s lead by finding the duplication of copyrighted works for the purpose of providing a more effective and informative search to be fair use. In *Authors Guild, Inc. v. HathiTrust*, the court found that research libraries' project of scanning full books for the purpose of creating a full-text searchable database, to be accessed by disabled individuals, was fair use.⁹⁹ In making its determination, the court defined the transformative factor as one that "serves a new and different function from the original work,"¹⁰⁰ and it relied on the "different purpose" and "different character" of the search database in finding transformative value.¹⁰¹ The Authors Guild advanced another case against book-scanning by Internet search engines, this time against Google, a for-profit

95. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157 (9th Cir. 2007).

96. *Id.* at 1165 (quoting *Wall Data Inc. v. L.A. Cty. Sheriff's Dep't*, 447 F.3d 769, 778 (9th Cir. 2006)).

97. *Id.*

98. *Id.* at 1164–66.

99. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014).

100. *Id.* at 96.

101. *Id.* at 97.

corporation (unlike the nonprofit libraries in *HathiTrust*) offering snippet views of copyrighted books.¹⁰² The distinction between the commercial nature of Google and the nonprofit nature of HathiTrust presented the potential for the commerciality of the Google enterprise to outweigh the search engine's transformative purpose. However, the court, in a case litigated for ten years,¹⁰³ affirmed that the transformative quality of a work should be prioritized over other considerations, finding that the first factor weighed in favor of Google notwithstanding any profits that Google might reap from its book-search function.¹⁰⁴ The court expressly rejected "the contention that commercial motivation should outweigh a convincing transformative purpose."¹⁰⁵ Citing *Perfect 10* and *HathiTrust*, the court found Google's scanning of copyrighted books for the purpose of making them searchable for the public sufficiently transformative,¹⁰⁶ and ultimately found that the factors collectively weighed in favor of fair use.¹⁰⁷

Perfect 10's strong influence extends beyond its broad definition of the transformative factor. It analogized search engines' socially beneficial value to that of parodies, establishing strong precedent that could lend support in favor of finding all future search-engine cases to be transformative fair uses. In fact, the *Perfect 10* court made a case for search engines being even more socially valuable than parodies "because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work."¹⁰⁸ The court's position is a contentious one because its view discounts the fact that while parodies share the purpose of entertaining with the original works, they also provide commentary and criticism—their ability to do so is the essence of what makes them parodies¹⁰⁹—and protecting the free

102. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207, 217–18 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016).

103. "Google's book-scanning project is one of the longest-running copyright cases in U.S. history." Mathew Ingram, *Why the Authors Guild Is Still Wrong About Google's Book Scanning*, FORTUNE (Feb. 8, 2016), <http://fortune.com/2016/02/08/authors-guild-google>.

104. *Google*, 804 F.3d at 219 (finding "no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose").

105. *Id.*

106. *Id.* at 215–17.

107. *Id.* at 225.

108. *Perfect 10, Inc. v. Amazon.com, Inc.* 508 F.3d 1146, 1165 (9th Cir. 2007).

109. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) ("[T]he heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, *comments* on that author's works. . . . If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up

expression of these types of speeches was precisely the reason for the development of the copyright doctrine;¹¹⁰ these expressions are statutorily embedded as basic non-infringing uses.¹¹¹

The controversial position taken in *Perfect 10* with regard to the greater social value of search engines is illustrative of the palpable difference in attitude in the line of cases which turn on the expressive purpose of a secondary use. These cases focus their gaze more toward the subjective intent of the user in their appropriation of the copyrighted work, granting deference to the users' expressed purpose. They have significantly expanded the transformative inquiry in two ways. First, they have expanded the scope of *Campbell's* holding to new forms of parody and new uses across a variety of different mediums and purposes generally. Second, they have widened the scope of what makes a use transformative, from a requirement of "altering the first [work] with new expression, meaning or message"¹¹² to allowing an unaltered work to be eligible for fair use if the work is "in a different context" and is thereby made a "new creation."¹¹³ The implication of this expansion is that an exact copy of a copyrighted work, under the right circumstances, can be construed as *highly* transformative.

III. THE CIRCUIT SPLIT

The preceding cases demonstrate developments in fair use case law tending to both widely interpret the transformative factor to encompass a broader category of uses and place greater emphasis on the transformative factor when compared to the other three statutory fair use factors. However, while many courts have followed suit in expanding the doctrine's scope, these trends have not been universally adopted. The disparate treatment of these issues and the lack of guidance on how to conclusively and uniformly resolve them among different courts have created a federal circuit split. There are two distinct, yet interrelated, unresolved questions at issue: (1) how should the transformative factor be defined (specifically with regard to its scope), and (2) how much emphasis should be placed on the transformative inquiry compared to the other factors within the overall fair use analysis?

something fresh, the claim to fairness in borrowing from another's work diminishes accordingly") (emphasis added) (citation omitted).

110. See U.S. CONST. art. I, § 8, cl. 8; *supra* text accompanying note 15.

111. See 17 U.S.C. § 107 (2012).

112. *Campbell*, 510 U.S. at 579.

113. *Perfect 10*, 508 F.3d at 1165.

A. DEFINING THE CIRCUIT SPLIT

The current circuit split stems from a fundamental disagreement between the Seventh and Second Circuits regarding the role of the transformative inquiry in fair use assessments.¹¹⁴ (The Ninth Circuit has subsequently adopted the Second Circuit's approach, thus finding itself embroiled in this circuit split and opposing the Seventh Circuit's view.¹¹⁵) The Seventh Circuit has shown a more conservative approach, paying more attention to the copyright holder's rights and placing the most importance on the market factor, while the Second and Ninth Circuits have applied the transformative factor more liberally in favor of the secondary user of the copyrighted work and have often found the transformative factor dispositive.

This judicial opposition found its genesis in *Cariou v. Prince*, in which the Second Circuit found that most of a Richard Prince artwork—appropriated from Patrick Cariou's copyrighted photographs of Rastafarians—was sufficiently transformative and ultimately protected by fair use.¹¹⁶ In reaching its fair use determination, the court made two significant rulings that serve as the basis for the debate between the circuits today. First, the Second Circuit defined the transformative factor with an unprecedented breadth.¹¹⁷ The court began its definition of the factor by stating that “[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those . . . identified in the preamble to the statute,”¹¹⁸ and it continued by requiring that the new work present a “new expression, meaning, or message.”¹¹⁹ This formulation of the transformative factor is completely silent as to the requirement of a different *purpose* between the two works. After all, the two works in this case, a book of photography and an art exhibit, can very likely serve the same purpose.

Through this wide definition, the court ruled that Prince's lack of a lengthy explanation regarding his transformative purpose, which the court might have otherwise relied on in its fair use determination, was “not

114. Jeffries & Goldman, *supra* note 67.

115. *Id.*

116. *Cariou v. Prince*, 714 F.3d 694, 699–704, 712 (2d Cir. 2013) (holding that twenty-five out of Prince's thirty uses of Cariou's photographs were fair use).

117. See *Cariou Case Summary*, *supra* note 70, at 1228.

118. *Cariou*, 714 F.3d at 706.

119. *Id.* (citations omitted).

dispositive.”¹²⁰ Since there was no strong evidence of expressive purpose in this case, the court looked to how the photos “may reasonably be perceived,” finding that Prince’s artwork’s “fundamentally different aesthetic” made it transformative.¹²¹ The resolution of this transformative inquiry is at odds with former cases that either relied exclusively on an objective assessment of the two works¹²² or the expressive purpose testimony of the user of the copyrighted work,¹²³ not an assessment of both at once. By assessing the objective aesthetic of the works *after* finding a lack of expressive purpose, the court essentially grants secondary users *two* chances to present and win their case. This approach, when coupled with the court’s wide definition of the transformative factor, establishes an unprecedented move away from copyright holders’ interests and toward a judicial evaluation of the aesthetic quality of the two works before it.

Having decided that the transformative nature of Prince’s work satisfied the first factor, notwithstanding the commercial nature of his artwork,¹²⁴ the court moved on to assess the remaining three factors, resulting in the second significant ruling that would spark the debate with the Seventh Circuit. Although the court spent time analyzing the three other statutory factors, its finding of the secondary work’s transformative quality played a consequential role in these assessments by decisively informing the resolution of the other factors.¹²⁵ The court minimized Prince’s damaging effect on Cariou’s copyright, citing the transformative quality of Prince’s work as a justification for why the detrimental effects argued by Cariou were misguided. The court reversed the district court’s finding that the fourth factor, market effect on the original work, weighed against Prince’s fair use claim, noting in its analysis that highly transformative works are not as likely to effectively *substitute* the original work, even though the fair use “might well harm, or even destroy, the market for the original.”¹²⁶ The transformative finding also informed the assessment of the second and third fair use factors, to the detriment of Cariou. Although the court found that the second factor, the nature of the copyrighted work,

120. *Id.* at 707.

121. *Id.* at 707–08.

122. “[T]he only two pieces of evidence needed to decide the question of fair use in this case are the original version of [the video] and the episode at issue.” *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012).

123. *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (relying on Koons’s deposition testimony to “confirm[] the transformative nature of the use”).

124. *Cariou*, 714 F.3d at 708–09.

125. *See id.* at 705–10.

126. *Id.* at 709 (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998)).

“weigh[ed] against a fair use determination,” it limited the force of this factor, citing the transformative purpose as the reason for the factor’s “limited usefulness.”¹²⁷ The transformative nature of Prince’s work came up once again when the court reversed the district court’s holding that the third factor, “amount and substantiality” used from the copyrighted work,¹²⁸ weighed against Prince. Despite the Second Circuit’s recognition that much of Cariou’s photographs were used “in whole or substantial part,” the court expressed confusion “as to how the district court could arrive at such a conclusion,” and instead minimized the impact of this factor by requiring the inquiry to consider that “the extent of permissible copying varies with the purpose and character of the use.”¹²⁹

By relying on the transformative factor to limit the importance of factors disfavoring fair use, the court effectively allowed the transformative factor to trump the other statutory fair use factors. While courts have, in the past, afforded more weight to some factors over others,¹³⁰ Cariou’s treatment of the three other statutory factors in this case is irreconcilable with *Campbell*’s oft-cited admonition that “[a]ll [factors] are to be explored, and the results weighed together.”¹³¹ By allowing the transformative question to inform the whole of the analysis in such a conclusive way, the court failed to properly explore each factor and weigh them equally, instead collapsing the fair use inquiry into a single question of whether the use is transformative.

The Ninth Circuit has since adopted the Second Circuit’s broad approach in *Seltzer v. Green Day, Inc.*,¹³² drawing criticism from the public.¹³³ In *Seltzer*, the court found music group Green Day’s use of artist Derek Seltzer’s drawing “Scream Icon” as a backdrop in eight of their concerts to be fair use.¹³⁴ In making its transformative determination, the court acknowledged that while Green Day made “few physical changes to the original [and] fail[ed] to comment on the original,” the use was

127. *Id.* at 710 (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006)).

128. 17 U.S.C. § 107(3) (2012).

129. *Cariou*, 714 F.3d at 710 (quoting *Bill Graham Archives*, 448 F.3d at 613).

130. *See supra* notes 30–38, 65–68 and accompanying text.

131. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

132. *See Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013).

133. *See, e.g.*, Shannon Hyle, *Scream Icon: Questioning the Fair Use of Street Art in Seltzer v. Green Day, Inc.*, 49 NEW ENG. L. REV. 573, 578–79 (2015) (finding the fair use doctrine’s application in this case “overbroad” due to its infringement on the original “author’s rights to his work and its dissemination”).

134. *Seltzer*, 725 F.3d at 1179 (citing *Cariou*, 714 F.3d at 708).

nevertheless transformative, relying upon *Cariou*'s broad definition of the factor as only requiring "new expressive content or message."¹³⁵ While the court cited recognitions of the requisite need for a transformative purpose,¹³⁶ the court did not itself engage in any analysis of whether Green Day's purpose differed from Seltzer's. Both Seltzer and Green Day used the work for an artistic purpose,¹³⁷ a detail that *Cariou*'s broad definition of "transformative" extinguished as a real impediment to a fair use finding.

The split in judicial opinions formally emerged when the Seventh Circuit took the opportunity in *Kienitz v. Sconnie Nation LLC* to criticize the Second Circuit's approach, both with respect to the unprecedented scope that the Second Circuit gave to the definition of the transformative factor and to the strong weight that it gave to the transformative factor in its overall fair use determination.¹³⁸ The issue before *Kienitz* was whether companies' use of a copyrighted photograph of the mayor of Madison, Wisconsin, alongside text that read "Sorry for Partyng," on t-shirts for sale was fair use.¹³⁹ The court found that the use was fair but took great care to expressly distinguish itself from *Cariou*, grounding its fair use finding on the following facts: the companies altered the original image so much so that "only the smile remains," the use of this particular photograph was for the purpose of political commentary, and the use of the photograph on the t-shirts did not serve as substitute for the original photograph.¹⁴⁰ The court did not assess or even mention the transformative quality of the secondary use.

The *Kienitz* court expressed its concern over *Cariou*'s wide definition of transformative, pointing to its potential to override the statutory protection guaranteed to derivative works in 17 U.S.C. § 106(2).¹⁴¹ Per the Seventh Circuit's understanding of "transformative," uses that transform the original work in the way that the Second Circuit endorses are derivatives of the original work, and as such should be considered as statutorily protected derivative works of the copyright holders,¹⁴² rather than fair uses of the original by unauthorized parties. Granting wide

135. *Id.* at 1177.

136. *Id.* at 1176 (citing *Campbell*'s requirement for a "further purpose," *Campbell*, 510 U.S. at 579; and Judge Leval's requirement for a use to serve a "different purpose" from the original, Leval, *supra* note 1, at 1111).

137. *See* Hyle, *supra* note 133, at 584–85.

138. *See* *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

139. *Id.* at 757–58.

140. *Id.* at 759.

141. *Id.* at 758.

142. *Id.*

latitude to the transformative inquiry creates the potential for judicial endorsement of the rights of unauthorized users of copyrighted works *over* the protection of copyright holders' *exclusive* right to create "derivative works based upon the copyrighted work."¹⁴³ While the tension between copyright holders' derivative works right and secondary users' right to fairly use the copyrighted work in new ways has always existed,¹⁴⁴ allowing a use to be sufficiently transformative for fair use by virtue of expressing a "new expression, meaning, or message,"¹⁴⁵ without even a requirement of a different purpose, is dangerously similar to the copyright owner's right to "recast, transform[], or adapt[]" their work into a derivative.¹⁴⁶ The tension between these two rights is particularly heightened here because *Cariou* was a case about art appropriation, a transformation expressly mentioned as an example of a derivative work in the statutory definition of "derivative work."¹⁴⁷ Richard Prince's sufficiently transformative photographs could have well been Patrick Cariou's derivative works under the statute.

The Seventh Circuit also took issue with the Second Circuit's method of assessing all four factors, noting that their heavy emphasis on the transformative quality of the secondary use ignores the holistic four-factor fair use inquiry and equates a finding of transformativeness with a finding of fair use.¹⁴⁸ The court in *Kienitz* thus adopted a more conservative approach with respect to the fair use factors, "stick[ing] with the statutory list"¹⁴⁹ and ignoring altogether whether the use was transformative, a consideration the court noted was "not one of the statutory factors."¹⁵⁰ Despite many courts' embrace of and reliance on the transformative factor in their fair use assessments, the *Kienitz* court maintained that the fourth factor, the market effect on the copyright holder's work, is the "most important."¹⁵¹

143. 17 U.S.C. § 106(2) (2012).

144. The lines between a transformative fair use and a derivative work are blurred because "derivative works seem, by definition, to involve some transformation of the underlying work." R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 468 (2008).

145. *Cariou v. Prince*, 714 F.3d 694, 711 (2d Cir. 2013) (citation omitted).

146. 17 U.S.C. § 101 (defining "derivative work").

147. *Id.* (citing "art reproduction" as an instance of a derivative work).

148. *See Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

149. *Id.*

150. *Id.*

151. *Id.*

B. EMPIRICAL DATA ASSESSING RECENT FAIR USE DECISIONS

Empirical data obtained from all reported appellate fair use cases between the 2010–2015 period, inclusive of the aforementioned contentious Second, Seventh, and Ninth Circuit opinions, show that there is still no consensus among courts as to how to resolve fair use inquiries, although there is a clear trend in the prioritization of the transformative inquiry in resolving the first factor of fair use. The collective data comprise sixteen appellate opinions¹⁵² that make reference to and assess the four statutory factors laid out in 17 U.S.C. § 107.¹⁵³ The limited size, term, and scope of the collective data are not immune to the risks of statistical and selection bias,¹⁵⁴ yet the data still yield important insights as to the way courts have assessed the fair use factors within the last five years. The results from the data can be categorized in three groups: (1) the prevailing influence of *Campbell* and the transformative factor, (2) the weight that the transformative factor carries within the first factor analysis, and (3) the weight that the transformative factor carries within the overall fair use determination.

The data from this period confirm *Campbell*'s heavy influence, with 88.2% of cases—all but two—citing the decision. The same cases that failed to cite *Campbell* were the only two cases in the entire data set that

152. The sixteen cases are as follows: *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016); *Katz v. Google Inc.*, 802 F.3d 1178 (11th Cir. 2015); *Kienitz*, 766 F.3d at 756; *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014); *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013); *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514 (4th Cir. 2013); *Seltzer v. Green Day, Inc.*, 725 F.3d 1176 (9th Cir. 2013); *Fox Broad. Co. v. Dish Network LLC*, 747 F.3d 1060 (9th Cir. 2013); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013); *Sofa Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273 (9th Cir. 2013); *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012); *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012); *Brownmark Films LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3rd Cir. 2011).

153. The data was obtained through a Westlaw search of “fair use” within federal cases, limited by the following parameters: copyright cases reported between 2010 and 2015 which expressly contain the term “copyright.” Cases yielded through this search were further filtered by eliminating those that did not substantively analyze the fair use factors. Only one case which substantively discussed the four fair use factors, *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), was omitted from the data set; although it discussed the factors in detail, the *Cambridge University Press* court did not reach a fair use conclusion. *See also* 17 U.S.C. § 107 (2012).

154. The results emerging from the data set are subject to statistical bias such that the limited number of cases and short five-year term of the collected data may restrict their statistical significance. Additionally, a selection of only reported cases creates the risk of “structural biases arising from which types of judicial decisions result in reported opinions as well.” Netanel, *supra* note 58, at 732–33. That being disclosed, these cases do provide a snapshot of appellate approaches to case law within the contentious period from which the circuit split emerged.

failed to mention the transformative factor at all. One of these cases, *Fox Broadcasting Co. v. Dish Network L.L.C.*, assessed whether the district court erred in denying the plaintiff's preliminary injunction and did not undertake a de novo review of fair use.¹⁵⁵ Although the court mentioned and assessed all the fair use factors, the central aim of the inquiry was not to reach a determinative ruling on whether the use was fair, but rather to assess whether the denial of a preliminary injunction was inappropriate, potentially justifying the lack of mention of either *Campbell* or the transformative factor.¹⁵⁶ The other case, *Diversey v. Schmidly*, assessed the first fair use factor only with respect to the commerciality of the secondary use.¹⁵⁷ Overall, though, the *Campbell* decision and transformative factor were considered in a strong majority of the cases within this period, demonstrating their judicial prevalence and broad acceptance.¹⁵⁸

The doubt that the Seventh Circuit's opinion creates as to the transformative inquiry's ability to further the objectives of copyright law raises the question as to how influential the transformative question actually is within both the first factor and the overall fair use inquiry. Of the cases that found fair use, 73% of the secondary uses were commercial.¹⁵⁹ Notwithstanding their commerciality, all but one case with a commercial secondary use found the first factor to be in favor of fair use. This data supports two conclusions. First, courts have embraced *Campbell's* ruling that commerciality does not create a presumption against fair use.¹⁶⁰ Second, the pro-transformative nature of a secondary use has a stronger influence on the first factor than does the commerciality of that use.

Every case that found a transformative use resulted in a finding of fair use; conversely, there were no fair use holdings that found a use to be non-transformative. This correlation suggests that the transformative inquiry has become an indispensable part of the analysis. There is a clear correlation between a pro-transformative finding and a finding that the first factor favors fair use. While a commercial use was found in a majority of cases resolving both in favor of *and* against fair use—73% and 60%,

155. *Fox Broad.*, 747 F.3d at 1066.

156. *Id.* at 1063–73.

157. *Diversey*, 738 F.3d at 1203.

158. The Ninth Circuit turned to *Campbell* for the meaning of transformative, referring to it as “the most definitive formulation of the test.” *Seltzer v. Green Day, Inc.*, 725 F.3d 1176, 1176 (9th Cir. 2013).

159. *See infra* Table 1.

160. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994).

respectively¹⁶¹—the large discrepancy between a fair use finding and its absence when the first factor favors fair use—91% and 20%, respectively¹⁶²—may be attributable to the transformative factor’s strong influence.

Finally, the data sheds some light on the transformative factor’s influence on the overall fair use analysis. The Seventh Circuit expressed concern that the Second Circuit’s methodology would result in the transformative question replacing the four-factor fair use inquiry.¹⁶³ While this is a valid concern, in reality, all of the cases in the data set analyze each of the four statutory factors, even though they may afford them different weight in the overall analysis. The data is not as clear on whether the first or the fourth factor dominates the fair use analysis. As expected, a large majority of cases that found fair use had first factors favoring fair use and none of these cases found any market harm. Similarly, a large majority of cases that found against fair use did involve market-harming infringements, and none of the uses were transformative.

While the numbers do not elucidate the courts’ view on which factor should be given the most weight, their substantive analysis does. Of all the cases, eleven of them expressly mention which factor they believe to be most important. Eight of the eleven cases stated that the fourth factor, the market effect, is the most important, and all eight of these cases cite *Harper & Row* to support their proposition.¹⁶⁴ Only two of these eight cases recognized the importance of the transformative factor.¹⁶⁵ Of the remaining three cases that mentioned the relative importance of the factors, only one of them expressly recognized the importance of the first factor by referring to it as “[t]he heart of the fair use inquiry.”¹⁶⁶ The other two cases recognized the collective importance of both the first and fourth factors over the other two, noting that they have “dominated the case law.”¹⁶⁷ The clear majority recognition of the importance of the fourth factor may be

161. *Id.*

162. *Id.*

163. See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

164. “Finally, the [Copyright] Act focuses on ‘the effect of the use upon the potential market for or value of the copyrighted work.’ This last factor is undoubtedly the single most important element of fair use.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1986) (quoting 17 U.S.C. § 107(4) (2012)).

165. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1173–76 (9th Cir. 2012).

166. *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (alteration in original) (citing *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)).

167. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013) (quoting *Monge*, 688 F.3d at 1171).

evidence of prioritization of the fourth factor in these cases, yet there is no clear data to support this theory. While there are credible concerns regarding the now widely-defined transformative factor, it is clear from these cases that fair use jurisprudence is by no means collapsing the fair use inquiry into a mere question of transformativeness, and it is even further from disposing of the fourth factor entirely.

TABLE 1. Copyright Cases Involving Fair Use Arguments, 2010–15

<i>Factor findings</i>	<i>Ultimate finding of fair use</i>	<i>Ultimate finding against fair use</i>
First factor (“purpose and character”) favors fair use	91%	20%
Commercial nature	73%	60%
Transformative use	82%	0%
Fourth factor (market harm) disfavors fair use	0%	80%

Note: Data source and methodology are discussed *supra* in notes 153–54 and accompanying text.

C. WHAT IS AT RISK IF WE LEAVE THIS CIRCUIT SPLIT UNRESOLVED?

Absent a resolution to the judicial discord regarding the transformative factor’s scope and weight, the threat of allowing judges to make qualitative fair use determinations based on their subjective judgments looms large. By expanding transformative use to include secondary works with the same purpose as the works they borrow from, the *Cariou* court eliminated the “clear, workable distinction” between a derivative of a copyrighted work and a transformative secondary use, and did not redefine new boundaries to enforce this distinction.¹⁶⁸ Without establishing new boundaries, there is no safeguard to prevent the bench from making decisions based on judges’ subjective opinions, rather than decisions grounded in law and guided by the overarching principles of copyright.¹⁶⁹ This limitless definition of a transformative use creates the potential for the problematic, unbounded exercise of judicial discretion. Courts following this unbounded standard will have the capability to make subjective, aesthetic judgments about whether or not a work expresses new expression or meaning, as happened in *Cariou*.¹⁷⁰

168. *Cariou* Case Summary, *supra* note 70, at 1233.

169. Meyer, *supra* note 29.

170. The court determined most of Prince’s uses were transformative by “looking at the artworks and the photographs side-by-side” to conclude that they “have a different character, give *Cariou*’s photographs a new expression, and employ new aesthetics.” *Cariou*, 714 F.3d at 707–08.

The possibility of courts making these types of subjective determinations is directly at odds with copyright law's principle of aesthetic neutrality, a well-established commitment to not subjectively assess the value of works based on their perceived aesthetic quality.¹⁷¹ Abandoning this essential principle gives judicial decisions the latitude to usurp the force of the copyright holder's right to create derivative works; defies predictability to the detriment of creators and users of copyrighted works, who turn to the law as a dependable source in structuring their behavior; and potentially chills the expression of innovators who fear the inconsistent application of judicial officers' diverse subjective views.¹⁷² There is a pressing need for clarification on the conclusive bounds of transformative secondary uses to prevent these possibilities from becoming reality. This need is heightened by the rapid pace of technological change, which places courts deciding fair use in the position of perpetually encountering unprecedented factual scenarios, as the emergence of new media prompts novel ways in which to use copyrighted works.¹⁷³ A clear and certain framework for the application of the transformative factor would guide courts in deciding these cases in ways that align with the overarching goals of copyright law.

D. PROPOSITION FOR HOW TO RESOLVE THE SPLIT

Today's technological advances have undoubtedly and significantly changed the landscape of copyright and the use of copyrighted works. It would be impossible for the drafters of the first Copyright Act, who secured authors' rights in "copies of maps, charts, and books,"¹⁷⁴ to have anticipated that copyright law would eventually have to embrace and

171. See John Tehranian, *Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality*, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 418, 418–19 (Matthew David & Debora Halbert eds., 2014). Justice Oliver Wendell Holmes famously characterized the concept of aesthetic neutrality when he wrote, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). Similarly, Judge John Wallace recognized the difficulty in the court's passing aesthetic judgments on the works before it, recognizing his own "limited art experience" and the "extremely uncomfortable" position he would be placed in as a judge should he be required to make such "opinion-intensive decisions." *Cariou*, 714 F.3d at 714 (Wallace, J., concurring in part and dissenting in part).

172. See *Cariou* Case Summary, *supra* note 70, at 1233–35.

173. "As remix culture grows with technological advancements so too does the need for a clear and balanced framework to best account for and promote new modes of creativity and authorship." *Cariou* Case Summary, *supra* note 70, at 1235 (footnote omitted).

174. Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790).

regulate uses of technologies like the Google search engine.¹⁷⁵ Nevertheless, the original statute and the purposes behind its enactment are instructive for today's discussion, providing us with guiding principles for how we should proceed in shaping fair use in a way that favors the fundamental interests of copyright law.

This discussion began with an introduction of the constitutional roots from which copyright law developed and was codified. While those guiding principles have certainly been debated and interpreted in varying ways, they have not themselves changed. The overarching goal of securing copyrights for authors remains to “promote the Progress of Science and useful Arts.”¹⁷⁶ While the fair use exception is a way for the public to reap the benefits from copyrighted innovations in limited circumstances, the incentive created by giving innovators monopolistic control over their own work is what drives innovation to begin with.

Compromising those strong monopoly rights by loosening the boundaries of fair use, as a case like *Cariou* has done through the transformative factor, has the potential to crumble the whole system by minimizing innovators' incentives to innovate. The tension between copyright holders' desire to maintain the highest level of exclusivity over their works and the public's desire to freely benefit from innovation is unavoidable. However, clarifying the boundaries of infringers' abilities to benefit from copyright-protected works, and prohibiting the crossing of these boundaries, will instill confidence in creators, invigorating and incentivizing their innovative efforts. Without this confidence of exclusivity in one's own works, there will be fewer innovations from which the public can benefit.

The methodology espoused by *Cariou* is unworkable in its imprecision and ambiguity because it provides no objective way to police the boundaries of fair use. The confines of the transformative doctrine should be resolved in favor of the Seventh Circuit's view, curtailing the wide liberality that the Second Circuit grants to infringers. Such a definition, removed from the unprecedented and dangerous area of subjectivity towards which *Cariou* has guided us, ensures that innovators will feel secure enough in the predictability of copyright law to invest their time and energy into producing creative works. A resolution of the transformative question favoring the interests of copyright holders will best

175. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1658 (2016); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157 (9th Cir. 2007).

176. U.S. CONST. art. I, § 8, cl. 8.

serve the congressionally mandated goal of promoting arts and sciences.

While there exists a credible fear that increasing the strength of copyright monopolies will hinder the free exercise of the public's First Amendment free expression right, resolving the transformative inquiry in favor of copyright holders does not affirmatively curb free speech. Freely using a copyright work—for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”¹⁷⁷—remains an integral part of fair use law, supporting the public's First Amendment rights to free expression in addition to promoting society's access to those works.

The limitations of fair use should be drawn at the point where an infringer uses a copyrighted work for the same purpose as the original. Such a scenario ceases to be a self-expression and is instead a reconveyance of another's expression. As a use of a copyrighted work edges ever closer to mere reiteration of the original, it implicates First Amendment concerns less and less. Even so, the public is not entirely precluded from reiterating another's expression, though they are unable to do so through the legal mechanism of fair use. They maintain a legitimate alternative avenue to reiterate the expression: licensing. While licensing is outside the scope of this discussion, it serves a valuable purpose in demonstrating that a resolution of the transformative inquiry in favor of copyright holders would not necessarily implicate First Amendment interests by chilling speech.

In fact, so long as copyright holders' interests are strengthened, the variety and abundance of our innovations is more likely to increase, providing the public with more opportunities to fairly use protected works.

177. 17 U.S.C. § 107 (2012).