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## Much Ado about Transformativeness: The Seventh Circuit and Market-Centered Fair Use

Aaron B. Wicker

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MUCH ADO ABOUT TRANSFORMATIVENESS: THE SEVENTH  
CIRCUIT AND MARKET-CENTERED FAIR USE

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ABSTRACT

*In Kienitz v. Sconnie Nation LLC, the U.S. Court of Appeals for the Seventh Circuit ultimately rejected the concept of transformative use having a central role within the doctrine of fair use. In doing so, the Seventh Circuit broke with judicial precedent, namely the Supreme Court's holding in Campbell v. Acuff-Rose Music, Inc., where the Court unanimously held that the inquiry for the first factor of fair use is whether, and to what extent, the work is transformative. The Seventh Circuit's 2014 decision raises questions about the scope of the holding in Campbell and about whether this holding extends to cases outside of the realm of parody.*

*This Article will examine the scope of Campbell and whether there can still be market-centered fair use post-Campbell. This Article will then consider the implications of a market-centered fair use analysis. Finally, this Article will conclude that courts should continue to utilize the transformative use inquiry for the purposes of fair use, that Congress need not intervene in fair use, and that there cannot be market-centered fair use post-Campbell.*

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\* Aaron B. Wicker, American University Washington College of Law, Class of 2016. For their continued guidance and support during this process, I thank my family. For their valuable comments, I am grateful to Professor Victoria Phillips, Professor Peter Jaszi, and the editors of the Washington Journal of Law, Technology & Arts.

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## INTRODUCTION

Fair use, a doctrine of copyright law in the United States, is an important instrument for the promotion of culture and innovation in our society. This doctrine is an affirmative defense against claims of copyright infringement that protects secondary creativity.<sup>1</sup> While fair use has been recognized in common law since the Statute of Anne of 1709,<sup>2</sup> it was not statutorily codified until the Copyright Act of 1976 (the “Copyright Act”).<sup>3</sup> The statute sets out four non-exclusive factors to determine whether a fair use has been made:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>4</sup>

In the years immediately following the enactment of the Copyright Act, fair use was characterized by uncertainty.<sup>5</sup> Fair use jurisprudence was wrought with the application of inconsistent principles and divided courts.<sup>6</sup> In the 1980s, the Supreme Court endorsed the idea that commercial uses are presumptively unfair in back-to-back fair use opinions.<sup>7</sup> In *Harper & Row Publishers v.*

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<sup>1</sup> See Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990) (stating that the fair use doctrine protects secondary creativity as a legitimate concern of copyright).

<sup>2</sup> See, e.g., *Gyles v. Wilcox*, (Ch. 1740) 26 Eng. Rep. 489 (recognizing that “fair abridgement” does not infringe an author’s rights).

<sup>3</sup> 17 U.S.C. § 107 (1982).

<sup>4</sup> *Id.*

<sup>5</sup> See Leval, *supra* note 1, at 1106 (stating that judges did not share a consensus on the meaning of fair use).

<sup>6</sup> See *id.* at 1106–07 (“Reversals and divided courts are commonplace.”).

<sup>7</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451

*Nation Enterprises*, the Supreme Court proclaimed that the fourth factor is “undoubtedly the single most important element of fair use.”<sup>8</sup> These judicial proclamations made it exceptionally unlikely that any use that was commercial in nature would qualify as fair use, and installed the inquiry into market harm as the dominant paradigm in any fair use analysis.<sup>9</sup>

Following a law review article by Pierre N. Leval<sup>10</sup> and a Supreme Court decision in *Campbell v. Acuff-Rose Music, Inc.*,<sup>11</sup> however, a new strand of fair use jurisprudence arose in the early 1990s. In *Campbell*, the Supreme Court found that the inquiry for the first fair use factor focuses on whether, and to what extent, a work’s new use is transformative.<sup>12</sup> The Supreme Court further elaborated that “the 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.”<sup>13</sup> Importantly, the Supreme Court corrected the *Sony* dictum that commercial uses are presumptively unfair.<sup>14</sup>

Following *Campbell*, the circuit courts widely adopted the transformative use inquiry.<sup>15</sup> In a recent opinion, *Kienitz v. Sconnie*

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(1984) (“[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (citing *Sony*, 464 U.S. at 451).

<sup>8</sup> *Harper & Row*, 471 U.S. at 562.

<sup>9</sup> Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 722 (2011) (commenting that under the market-centered paradigm it was very unlikely that any use deemed “commercial” would qualify as fair use).

<sup>10</sup> See Leval, *supra* note 1, at 1111 (noting that the question of justification should turn on whether and to what extent the use is transformative).

<sup>11</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>12</sup> *Id.* at 569.

<sup>13</sup> *Id.*

<sup>14</sup> See *id.* at 594 (“It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew’s parody of ‘Oh, Pretty Woman’ rendered it presumptively unfair.”).

<sup>15</sup> See *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006) (“We have applied *Campbell* in too many non-parody cases to require citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody.”).

*Nation*,<sup>16</sup> however, the Seventh Circuit criticized the Second Circuit's use of transformativeness in its *Cariou v. Prince* decision,<sup>17</sup> rejected the transformative use paradigm, and split from the majority in its treatment of fair use. In *Kienitz*, the Seventh Circuit suggested that the fourth factor was the most important of those enumerated in 17 U.S.C. § 107 and used a market-centered approach to fair use in its analysis.<sup>18</sup> This contrasts with the typical analysis used by courts when utilizing the transformative use paradigm, which is driven by the first factor.<sup>19</sup>

This Article will address the scope of the holding in *Campbell v. Acuff-Rose Music, Inc.*, as well as the scope of transformative use. Furthermore, this Article will seek to provide a detailed description of the implications that transformative use has had and explain that the Seventh Circuit broke from an important legal precedent in its rejection of transformative use. Moreover, this Article seeks to explain the implications of taking the market-centered approach that the Seventh Circuit offered most recently in *Kienitz*. In light of the Seventh Circuit's recent holding, this Article will argue for transformative fair use and assert that there should no longer be market-centered fair use.

Part I of this Article examines the development of fair use, beginning with Pierre Leval's *Toward a Fair Use Standard* and its vast impact on fair use jurisprudence in the last two decades. It will then move on to the opinion in *Campbell* and how courts have applied its holding. More specifically, the section will look at the application of transformative use to appropriation art by the Second Circuit in *Cariou*. Following this, Part I will examine the Seventh Circuit's treatment of transformative use in *Kienitz*.

Part II begins by analyzing the two cases in question in order to determine what influenced each decision. The section demonstrates how the two standards can render different outcomes when applied

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<sup>16</sup> *Kienitz v. Scornie Nation LLC*, 766 F.3d 756 (7th Cir. 2014).

<sup>17</sup> *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>18</sup> *Kienitz*, 766 F.3d at 758.

<sup>19</sup> See Jason M. Nolan, *The Role of Transformative Use: Revisiting the Fourth Circuit's Fair Use Opinions* in *Bouchat v. Baltimore Ravens*, 16 VA. J.L. & TECH. 538, 555 (2011) (stating that transformativeness is dispositive of fair use).

to the same factual scenario. To demonstrate that the application of each case's inquiry has different results, this Article applies the different fair use standards to a hypothetical artist named Ronald Woratx.

Part III argues that there is still no need for congressional intervention in 17 U.S.C. § 107. This Article suggests that the *Campbell* decision offers a solution to fair use that best promotes the goals of copyright law, following two decades of more consistent outcomes and a more widely available defense. Part III also notes that the market-centered approach taken by the Seventh Circuit contradicts the goals of copyright law by narrowing the availability of the fair use defense and in turn stifles the promotion of both culture and innovation. It explains how the development of the transformative use paradigm has benefitted fair use immensely by creating a more uniform standard, which the Seventh Circuit should have followed. The section concludes that the transformative use paradigm is a beneficial interpretation of fair use and that it is a clear standard which reflects the original intent of both the fair use doctrine and copyright law.

## I. THE DEVELOPMENT OF TRANSFORMATIVE FAIR USE

Part A provides an overview of the transformative use paradigm from an influential law review article to a critical Supreme Court decision. Part B examines the application of transformative use by courts after *Campbell* and the trends of fair use jurisprudence of the last two decades. Part C directly addresses the decision in *Cariou*. Finally, Part D examines the *Kienitz* decision and its criticism of *Cariou*, as well as the transformative use paradigm.

### A. *From Leval to Campbell: The Creation of the Transformative Use Paradigm*

Pierre Leval's 1990 law review article, *Toward a Fair Use Standard*, has had a tremendous impact on modern fair use

jurisprudence.<sup>20</sup> Leval published the article following a period of inconsistency, divided courts, and reversals that marked the fair use jurisprudence of the 1980s.<sup>21</sup> The article was where the term “transformative use” was first coined.<sup>22</sup> In the article, Leval argues that courts should look to the intention of copyright law, maintaining that it serves a utilitarian purpose.<sup>23</sup> In particular, Leval suggests that courts should look toward the purpose of fair use, which is to ensure that copyright protection is not so expansive to stifle creativity.<sup>24</sup> Perhaps most importantly, Leval reasons that courts should look to “whether, and to what extent, the challenged use is transformative” in determining whether the first factor of 17 U.S.C. § 107 merits a finding of fair use.<sup>25</sup> Leval asserts that the soul of fair use is the first factor.<sup>26</sup> The article maintains that transformative use can take a multiplicity of forms and notably not just parody.<sup>27</sup>

Leval goes on to argue that transformative use should trickle into a third factor analysis as well—specifically, that courts should look to the amount and substantiality of a use in order to determine whether there was in fact a transformative use.<sup>28</sup> Notably, the article discourages courts from relying too heavily on the fourth factor, which would severely cripple fair use.<sup>29</sup>

In 1994, the Supreme Court issued an opinion in *Campbell* that

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<sup>20</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990)).

<sup>21</sup> See, e.g., *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984); see also *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067 (S.D.N.Y. 1983), *modified*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

<sup>22</sup> See Leval, *supra* note 1, at 1111 (“I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative.”).

<sup>23</sup> *Id.* at 1118.

<sup>24</sup> *Id.* at 1109.

<sup>25</sup> *Id.* at 1111.

<sup>26</sup> *Id.* at 1116.

<sup>27</sup> See generally *id.*

<sup>28</sup> *Id.* at 1122–03.

<sup>29</sup> *Id.* at 1124–05.



echoed much of the philosophy Leval advocated in his article.<sup>30</sup> *Campbell* has since become arguably the most important Supreme Court fair use decision.<sup>31</sup>

*Campbell* addressed a parody of Roy Orbison's "Oh, Pretty Woman" by well-known rap artists 2 Live Crew.<sup>32</sup> The *Campbell* Court found that a parody may be a fair use pursuant to § 107.<sup>33</sup> More importantly, however, the Court found that for the first factor:

[T]he enquiry focuses on whether the new work merely supersedes the objects of the original creation, or whether and to what extent it is "transformative," altering the original with new expression, meaning, or message. The 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.<sup>34</sup>

This seemed to follow the standard set out for transformative use in Leval's article.<sup>35</sup> This opinion sparked a wave of new fair use jurisprudence and brought life to transformative use as the dominant consideration in fair use analysis.<sup>36</sup>

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<sup>30</sup> *Campbell*, 510 U.S. at 579 (quoting Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

<sup>31</sup> See, e.g., Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 19 (1994) (expressing joy that Justice Souter's opinion guided the fair use doctrine in the right direction).

<sup>32</sup> *Campbell*, 510 U.S. at 571–72.

<sup>33</sup> *Id.* at 579–80.

<sup>34</sup> *Id.* at 569.

<sup>35</sup> See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 604 (2008) ("The *Campbell* court relied heavily on the concept of transformativeness and on Judge Leval's exposition of it in its first factor analysis of 2 Live Crew's parody.")

<sup>36</sup> *Id.*

*B. Application of Campbell by the Courts: The New Jurisprudence of Fair Use and the Development of a More Uniform Standard*

Following *Campbell*, circuit courts began to apply the transformative use paradigm.<sup>37</sup> Over time, the doctrine grew widespread. For example, in *Kelly v. Arriba Soft Corporation*, the Ninth Circuit considered whether thumbnails used by a search engine could be considered a fair use.<sup>38</sup> The court reasoned that the thumbnails did not supersede the original photographs' use and that they were transformative because they served a different purpose from the original photographs.<sup>39</sup> This opinion applied the transformative use inquiry to a case involving search engine thumbnails—a far cry from parody—and broadened the scope of *Campbell*.<sup>40</sup>

Similarly, in *Bill Graham Archives v. Dorling Kindersley, Ltd.*, the Second Circuit considered whether a chronological assemblage of reduced-format posters in a biography of the Grateful Dead titled *Illustrated Trip* constituted a fair use.<sup>41</sup> The court found that each poster differed from its original expressive purpose due to the bibliographic nature of the book, and accordingly was transformative.<sup>42</sup> This case broadened *Campbell* by holding that even when a secondary user takes an entire work, the use can still be considered transformative, so long as the use does not supersede the original.<sup>43</sup>

In recent years, transformative use has increasingly become a

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<sup>37</sup> *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006) (“We have applied *Campbell* in too many non-parody cases to require citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody.”).

<sup>38</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

<sup>39</sup> *Id.* at 819.

<sup>40</sup> *See generally id.* (applying transformative use to search engine thumbnails).

<sup>41</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

<sup>42</sup> *Id.* at 609.

<sup>43</sup> *Id.*

more uniform standard amongst the circuit courts.<sup>44</sup> For example, the Second Circuit has cited Ninth Circuit decisions in recent opinions,<sup>45</sup> and consequently outcomes have become more predictable.<sup>46</sup> Circuit courts have interpreted *Campbell* broadly, and such opinions have not been limited to parody cases.<sup>47</sup> Cases such as *Kelly* and *Bill Graham* demonstrate that a use can be transformative if the secondary use serves some new purpose, even when the secondary user did not materially alter the original work.<sup>48</sup> *Kelly* and *Bill Graham* are cases about removing images from their original contexts, shrinking them, and using them in alternate contexts while still recognizing them as their original items. *Blanch v. Koons* is an artistic case about taking images from a copyrighted work, altering those images, and incorporating those altered images into a new whole.<sup>49</sup> *Blanch*, like *Kelly* and *Bill Graham*, supports the view that transformative use is fundamental to determining fair use. Further, *Blanch* reinforces that transformative use is primarily about new purposes.<sup>50</sup>

In *Blanch*, the Second Circuit found that appropriation art

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<sup>44</sup> See Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 49, 51 (2012) (showing that findings of transformative use can be used to predict likely outcomes of fair use cases).

<sup>45</sup> See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 95 (2d Cir. 2014); see also *Authors Guild v. Google, Inc.*, 804 F.3d 202, 217 (2d Cir. 2015).

<sup>46</sup> See Netanel, *supra* note 9, at 736.

<sup>47</sup> See, e.g., *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006) (“We have applied *Campbell* in too many non-parody cases to require citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody.”).

<sup>48</sup> See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006) (holding that using images of posters and tickets used in a book about the Grateful Dead was a fair use); see also *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (holding that a search engine using thumbnail images was a fair use).

<sup>49</sup> See *Blanch*, 467 F.3d at 253 (noting that the defendant’s use of the copyrighted work involved “changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects’ details . . . as part of a massive painting commissioned for exhibition in a German art-gallery space”).

<sup>50</sup> See *id.* at 252 (“The sharply different objectives that Koons had in using, and Blanch had in creating, ‘Silk Sandals’ confirms the transformative nature of the use.”).

could serve a transformative purpose.<sup>51</sup> An appropriation artist named Jeff Koons created a painting entitled “Niagara,” in which he appropriated a photograph taken by Andrea Blanch.<sup>52</sup> Blanch’s photograph depicted a woman’s lower legs and feet in a pair of glittery Gucci sandals, decorated with bronze nail polish, which rested on a man’s lap.<sup>53</sup> Koons appropriated only the legs and feet from the photograph for his painting, excluding the background of the man’s lap.<sup>54</sup> Koons then changed the orientation of the feet from a 45-degree angle to a vertically inverted position.<sup>55</sup> Koons also added a heel to one of the feet and modified the coloring of the photograph.<sup>56</sup> The photograph was included in the painting along with three other pairs of feet and lower legs dangled over images of confections as well as a grassy field and the Niagara Falls in the background.<sup>57</sup>

Relying on *Campbell*, the court applied a transformative use inquiry to the first statutory factor.<sup>58</sup> The court reasoned that Koon’s purposes in using Blanch’s photography were quite different from Blanch’s goals in creating it.<sup>59</sup> Blanch had created her photograph for publication in an American lifestyles magazine, while Koons used the image as part of a large-scale painting for a German museum.<sup>60</sup> Furthermore, Koons wanted “the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives.”<sup>61</sup> Koons wanted to “show some sort of erotic sense [:] . . . to get . . . more of a sexuality to the photographs.”<sup>62</sup>

The *Blanch* court did not believe that the mere fact that Koons’

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<sup>51</sup> See *id.* at 259 (holding that appropriation art can be transformative).

<sup>52</sup> *Id.* at 247–48.

<sup>53</sup> *Id.* at 248.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 251.

<sup>59</sup> *Id.* at 252.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

work was a painting and Blanch's work was a photograph was enough to support a finding of fair use, nor that Koons' work was in a museum and Blanch's was in a magazine to be sufficient.<sup>63</sup> In keeping with *Kelly* and *Bill Graham*, the court needed to find "new expression, meaning, or message" from the secondary use.<sup>64</sup> As such, the *Blanch* court pointed to *Ringgold v. Black Entertainment Television, Inc.* where a copy of a painting was used as decoration for a television program's set.<sup>65</sup> In particular, the court noted that the *Ringgold* court found that the secondary use served the same decorative purpose as the original and accordingly was not transformative.<sup>66</sup>

Further, regarding the amount and substantiality of the selection used, the Second Circuit found that the amount that Koons took was "reasonable in relation to the purpose of the copying."<sup>67</sup> Koons only took the legs, feet, and sandals from the original photograph, and excluded the background.<sup>68</sup> More importantly, Koons excluded many of the creative decisions made by Blanch.<sup>69</sup>

Recent empirical studies suggest that when a new work is found to be transformative, the statutory factors are essentially replaced by transformative use. While opinions do still incorporate by reference all of the considerations in the statute,<sup>70</sup> the inquiry

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<sup>63</sup> *See id.* ("Koons does not argue that his use was transformative solely because Blanch's work is a photograph and his a painting, or because Blanch's photograph is in a fashion magazine and his painting is displayed in museums. He would have been ill advised to do otherwise.")

<sup>64</sup> *Id.* at 251 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>65</sup> *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997).

<sup>66</sup> *Blanch*, 467 F.3d at 252.

<sup>67</sup> *Id.* at 257.

<sup>68</sup> *Id.* at 258.

<sup>69</sup> *Id.*

<sup>70</sup> Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1564 (2004) ("[T]he facial emptiness of the statutory language means that alone, it is almost entirely useless analytically, except to the extent that it structures the collection of evidence that a court might think relevant to its decision.")

has effectively been reduced to two prongs.<sup>71</sup> In *A Pattern-Oriented Approach to Fair Use*, Michael Madison demonstrates that courts have recognized certain patterns of practice utilized by social and professional groups, such as the idea that journalism, education, and comparative advertising deserve fair use recognition.<sup>72</sup> Madison's research reveals that courts have typically found uses to be fair when they find that a defendant is engaged in one of these patterns.<sup>73</sup> Similarly, in *Predicting Fair Use*, Mathew Sag establishes that findings of transformative use tend to precede findings of fair use.<sup>74</sup> Additionally, in *Making Sense of Fair Use*, Neil Netanel shows that transformative use has replaced inquiry into harm to an actual or potential market as the dominant paradigm in fair use doctrine.<sup>75</sup> Netanel demonstrates that courts almost always find uses to be fair when they find the use of a copyrighted work to be transformative. His conclusion shows that the fair use inquiry has narrowed to two prongs: whether a use has a transformative purpose, and whether amount of copyrighted material used was appropriate to that purpose.<sup>76</sup>

To this end, modern courts typically disregard the fourth factor if the use is transformative.<sup>77</sup> The only market effects that are relevant in fair use analysis are those that result from consumer substitution. In *Authors Guild v. Google, Inc.*, an authoritative recent decision, the Second Circuit opined that:

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<sup>71</sup> See Netanel, *supra* note 9, at 768 (“If the use is for a transformative purpose, then the question is whether the defendant has copied more than a reasonable amount for that purpose.”).

<sup>72</sup> Madison, *supra* note 70, at 1646–47.

<sup>73</sup> See *id.* at 1645–46.

<sup>74</sup> See Sag, *supra* note 44, at 49, 51.

<sup>75</sup> See Netanel, *supra* note 9, at 742.

<sup>76</sup> See *id.* at 743, 745–46.

<sup>77</sup> See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006) (recognizing that copyright owners are not entitled to control the “transformative markets” for their works); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (“[W]hen, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”).

The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives[ . ]<sup>78</sup>

In other words, highly transformative uses have a lower risk for market harm because they are not serving the original work's intended market.

### C. Cariou: *A Broadening of Transformative Use?*

In *Cariou v. Prince*, the Second Circuit held that a new work need not comment on the original in order to be transformative.<sup>79</sup> The court found that a new purpose and a different audience were sufficient for a finding of fair use.<sup>80</sup> In this case, the Second Circuit again considered whether a fair use defense could be applicable to appropriation art.<sup>81</sup> Patrick Cariou, a professional photographer, brought a copyright infringement action against a well-recognized appropriation artist, Richard Prince, for his use of Cariou's copyrighted photographs of Rastafarians and Jamaican landscapes.<sup>82</sup> Appropriation art by definition involves directly taking an object or another existing work of art and placing it into a new work of art.<sup>83</sup> In this case, Prince included Cariou's photographs into his new works of art. Prince had previously stated that in his work he "completely tr[ies] to change [another artist's work] into something that's completely different."<sup>84</sup>

The Second Circuit found that Prince's use of Cariou's photographs was, in fact, transformative in twenty-five out of his

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<sup>78</sup> Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015).

<sup>79</sup> See *id.* at 706–07.

<sup>80</sup> See *id.* at 706, 709.

<sup>81</sup> *Cariou v. Prince*, 714 F.3d 694, 706–07 (2d Cir. 2013).

<sup>82</sup> *Id.* at 706, 709.

<sup>83</sup> *Id.* at 699.

<sup>84</sup> *Id.*

thirty paintings and constituted a fair use.<sup>85</sup> The court relied heavily on Leval's article and *Campbell* in its decision and gave great weight to the fact that the paintings were transformative when concluding that a fair use was made.<sup>86</sup>

The court went on to hold that Prince's work could be transformative, notably without commenting on Cariou's photographs and in the absence of any defense from Prince suggesting that he intended to comment upon or criticize Cariou's work.<sup>87</sup> The court held that the photographs were transformative because Prince's work employed new aesthetics and had an entirely different audience than Cariou's work.<sup>88</sup> The court found that Prince's paintings had a new expression and a new communicative result. Accordingly, the first factor weighed in favor of Prince because his work was transformative.<sup>89</sup>

The Second Circuit then cascaded transformativeness across the other three statutory factors.<sup>90</sup> For the fourth statutory factor of § 107, the court held that the inquiry is whether the new work completely usurps the market for the original, and that the more transformative the new work, the less likely it is that it does so.<sup>91</sup> This broadened treatment of transformative use across statutory factors, as well as the court's rejection of the requirement of commentary, considerably extended the fair use doctrine previously employed in other circuits.

#### *D. Pushing Back: The Seventh Circuit Rejects Transformative Use*

Following *Cariou*, Harvard Law Review published an article criticizing the Second Circuit's analysis in the case and asserting that the definition of transformative use adopted by the Second Circuit was the broadest to date.<sup>92</sup> This definition, the article

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<sup>85</sup> *Id.* at 694.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 707.

<sup>88</sup> *Id.* at 708–09.

<sup>89</sup> *Id.* at 708.

<sup>90</sup> *Id.* at 708–09.

<sup>91</sup> *Id.* at 709.

<sup>92</sup> See Harv. L. Rev. Ass'n, *Copyright Law — Fair Use — Second Circuit Holds that Appropriation Artwork Need Not Comment on the Original to Be*



argues, is in tension with the definition of derivative works in 17 U.S.C. § 106 of the Copyright Act.<sup>93</sup> The article is primarily critical of the Second Circuit's holding that new work need not comment on the original in order to be transformative.<sup>94</sup> Additionally, it seems to suggest that there remains some uncertainty as to whether the holding in *Campbell* should be limited to the genre of parody.<sup>95</sup>

In *Kienitz v. Sconnie Nation LLC*, the Seventh Circuit issued the first circuit-level critique of *Cariou* and, more broadly, of transformative use. In its opinion, the court cited some of the same concerns of the foregoing article.<sup>96</sup>

The issue before the Seventh Circuit in *Kienitz* was whether a fair use was made where a copyrighted photograph of Paul Soglin, mayor of Madison, Wisconsin, was turned lime green, used to make t-shirts and tank tops along with the words, "Sorry for Partying," and sold by Sconnie Nation on clothing for a marginal profit.<sup>97</sup> The Seventh Circuit found that a fair use was made of Kienitz's photographs.<sup>98</sup> More interesting than the outcome, however, was the court's analysis. In the opinion, Judge Easterbrook held that transformative use was not a statutory factor and that it is better to adhere to the four factors listed in § 107.<sup>99</sup> Easterbrook then proceeded to emphasize that:

The Second Circuit has run with the suggestion and concluded that "transformative use" is enough to

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*Transformative.* — *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), 127 HARV. L. REV. 1228, 1229 (2014).

<sup>93</sup> See *id.* at 1232 (stating that the Second Circuit's definition of transformative is in direct tension with the derivative work right); see also 17 U.S.C. § 106.

<sup>94</sup> *Id.* at 1228.

<sup>95</sup> See *id.* at 1232; cf. *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006) ("We have applied *Campbell* in too many non-parody cases to require citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody.").

<sup>96</sup> See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) (stating that transformative use is in tension with the derivative work right).

<sup>97</sup> *Id.* at 757.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 758.

bring a modified copy within the scope of § 107. See, e.g., *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013). *Cariou* applied this to an example of “appropriation art,” in which some of the supposed value comes from the very fact that the work was created by someone else.

We’re skeptical of *Cariou*’s approach, because asking exclusively whether something is “transformative” not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every “transformative use” can be “fair use” without extinguishing the author’s rights under § 106(2).<sup>100</sup>

This last passage follows some of the concerns of the Harvard Law Review article, specifically with regard to § 106 derivative works and the holding that certain appropriation art is a fair use.<sup>101</sup> Further, the Seventh Circuit maintained that the fourth factor, market effect, should be the most important in a fair use analysis.<sup>102</sup> The opinion went on to look at fair use through an economic lens, relying on whether the allegedly infringing work was a complement to, or a substitute for, the original work.<sup>103</sup> Ignoring whether Scennie Nation’s work could be considered transformative, the *Kienitz* court held that, because a shirt or tank top is not a substitute for the original photograph, a fair use can be

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<sup>100</sup> *Id.*

<sup>101</sup> *See id.* (asserting that transformative use is in direct tension with the derivative work right); *see also* Harv. L. Rev. Ass’n, *supra* note 92.

<sup>102</sup> *Kienitz*, 766 F.3d at 758 (“We think it best to stick with the statutory list, of which the most important usually is the fourth.”).

<sup>103</sup> *See id.* at 759 (“A t-shirt or tank top is no substitute for the original photograph.”).

made in such contexts.<sup>104</sup>

*Kienitz* is significant in that it seemingly rejects the fair use jurisprudence developed after *Campbell*. While the opinion specifically criticizes *Cariou* and the Second Circuit, both the language and analysis are dismissive of transformative use as a whole. It thus hearkens back to pre-*Campbell* fair use decisions by placing most of the weight of the statutory analysis on the fourth factor.<sup>105</sup>

## II. TRANSFORMATIVE FAIR USE: AN ISSUE?

The Seventh Circuit's approach in *Kienitz* is problematic for a number of reasons. Not only does the opinion seemingly ignore the entirety of the fair use jurisprudence of the 1990s and 2000s, but it also diminishes the Supreme Court's holding in *Campbell*.<sup>106</sup> Instead, the opinion puts great weight on the fourth factor of § 107 analysis.<sup>107</sup>

Placing such weight on the fourth factor does great harm to the availability of fair use.<sup>108</sup> In the words of Leval, “[b]y definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties.”<sup>109</sup> One of the greatest benefits of the new fair use jurisprudence has been that it has made the doctrine more widely available.<sup>110</sup> A thriving fair use defense is

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<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at 758 (“We think it best to stick with the statutory list, of which the most important usually is the fourth.”).

<sup>106</sup> *See id.* (“The district court and the parties have debated whether the t-shirts are a ‘transformative use’ of the photo—and, if so, just how ‘transformative’ the use must be. That’s not one of the statutory factors, though the Supreme Court mentioned it in *Campbell*.”).

<sup>107</sup> *See id.* (holding that the fourth statutory factor is usually the most important).

<sup>108</sup> *See* Leval, *supra* note 1, at 1124–25 (“[I]f an insubstantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary user. And if we then gave serious deference to the proposition that it is ‘undoubtedly the single most important element of fair use,’ fair use would become defunct.”).

<sup>109</sup> *Id.* at 1124.

<sup>110</sup> *See* Sag, *supra* note 44, at 79 (maintaining that focusing on the character of the use rather than the identity of the user makes the defense available to

paramount to accomplishing one of copyright law's foremost goals: the promotion of culture and innovation.<sup>111</sup>

The following hypothetical exemplifies some of the differences between the circuit split and ideally will highlight some of the problems with the Seventh Circuit's approach to fair use in *Kienitz*: A professional photographer, Jessica Smith, takes several photographs of New Zealand landscapes and Māori people performing haka. The photographs are then published in a book entitled *Yes Haka*.

A recognized appropriation artist, Ronald Woratx, then incorporates the photographs into a sequence of paintings and collages. The original photographs are blown up in size, acrylic paint is added, the photographs are then superimposed along with photographs of various technologies not taken by Smith onto a piece of sheet metal. A major news network quotes Woratx in an interview: "I wanted to explore information-age propaganda and to get the viewer to think about their personal experience with it."

Gallery A is putting on a show. The owner contacts Smith about potentially incorporating some of her photographs from *Yes Haka* into the show. Gallery B is showing several of Woratx's works in another show, including his pieces that incorporate photographs by Smith. The owner of Gallery A learns of Woratx's pieces being shown at Gallery B and then attempts to contact Smith. Smith does not respond and the gallery owner concludes that Smith is collaborating with Woratx and is not interested in the exhibition at Gallery A. The owner of Gallery A then decides not to feature any of Smith's pieces from *Yes Haka* in the show.

*A. Transformative Fair Use: A Second Circuit Analysis Would Likely Support a Finding of Fair Use Because Woratx's Secondary Use Was Transformative*

Following the new and more unified jurisprudence of transformative fair use, a court would likely find that a fair use was

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commercial actors and that the doctrine is more predictable than one might think).

<sup>111</sup> See Leval, *supra* note 1, at 1107 (maintaining that the observance of fair use is necessary to achieve the objectives of copyright law).

made of Smith's photographs. This school of jurisprudence has placed the first factor—whether the use was transformative in nature—at the center of the analysis.<sup>112</sup> Although first established in *Campbell*, two decades of case law have narrowed it to focus primarily on whether the purpose of the use was transformative in nature.<sup>113</sup> Following this paradigm, courts would then look to the amount of the original work taken and whether it was appropriate to the purpose of the secondary use.<sup>114</sup> *Cariou* took the first prong of this inquiry a step further, holding that a new work need not comment on the original in order to be transformative.<sup>115</sup> This new fair use jurisprudence created a more uniform articulable standard by simplifying the analysis to the foregoing two prongs.<sup>116</sup>

Thus, a court would typically begin its transformative use analysis by examining the first factor: the purpose and character of the use.<sup>117</sup> In *Campbell*, the Supreme Court found that the inquiry for the first factor is whether and to what extent the work is transformative.<sup>118</sup> The circuits have interpreted this inquiry to focus on the extent to which the purpose is transformative.<sup>119</sup>

Professor R. Anthony Reese surveyed thirty-seven circuit court opinions, ranging from the decision in *Campbell* in 1994 to

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<sup>112</sup> See Sag, *supra* note 44, at 55 (“According to *Campbell*, transformativeness not only occupies the core of the fair use doctrine but also reduces the importance of all other factors such that ‘the 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.’”).

<sup>113</sup> See R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008) (“[I]n evaluating transformativeness the courts focus more on the purpose of a defendant’s use than on any alteration the defendant has made to the content of the plaintiff’s work.”).

<sup>114</sup> See Netanel, *supra* note 9, at 745 (“Under the transformative use paradigm, factor three—the amount of the copyrighted work that the defendant has used—becomes a question not of whether the defendant took what is the most valuable part of the plaintiff’s work (as it was under the market-centered paradigm), but rather whether the defendant used more than what was reasonable in light of the expressive purpose driving the transformative use.”).

<sup>115</sup> See *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>116</sup> See Sag, *supra* note 44.

<sup>117</sup> Leval, *supra* note 1, at 1105.

<sup>118</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994).

<sup>119</sup> See Nolan, *supra* note 19, at 554 (stating that courts have found purpose to be dispositive of transformativeness).

2007.<sup>120</sup> In thirty-one cases, transformativeness was expressly addressed in the first-factor analysis.<sup>121</sup> Reese's study revealed that:

In all of those opinions, when the court found that the defendant had a transformative purpose for her use, the court found that the transformativeness inquiry weighed in favor of fair use, regardless of whether the court viewed the defendant as having transformed the actual content of the plaintiff's work in any way. Indeed, in all of the cases where transformativeness was found based on the defendant's transformative purpose, the opinion's ultimate conclusion was that the use was, or was likely to be, fair.<sup>122</sup>

Following the above reasoning, the court would consider whether the purpose of Woratx's use of Smith's photographs was transformative. The application of this reasoning to the Woratx scenario would begin by looking at whether the secondary use serves a transformative purpose. The court would likely find such transformativeness because Woratx's secondary use serves a distinctly different purpose. Smith's photographs were created for a traditional book on the Māori people and their culture. Woratx sought to express an idea about the modern world by using Smith's photograph as part of a large-scale collage about information-age propaganda. This difference in the purposes of these works would likely weigh in favor of a finding that the use was transformative.

Next, the court would examine the amount of the original work taken and consider whether it was appropriate to the purpose of the secondary use.<sup>123</sup> In the Woratx scenario, the photographs taken by

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<sup>120</sup> Reese, *supra* note 113, at 471.

<sup>121</sup> *Id.* at 471.

<sup>122</sup> *Id.* at 485.

<sup>123</sup> See Netanel, *supra* note 9, at 745 ("Under the transformative use paradigm, factor three—the amount of the copyrighted work that the defendant has used—becomes a question not of whether the defendant took what is the most valuable part of the plaintiff's work (as it was under the market-centered

Smith were part of a large-scale collage along with several other photographs and a sheet metal background. Accordingly, the amount taken is likely proportional to the amount needed to accomplish the purpose of the secondary use.<sup>124</sup>

Based on this two-prong approach, the court would likely find that Woratx made a fair use of the photographs and, accordingly, Woratx would not be held liable for copyright infringement.

*B. Market-Centered Fair Use: A Seventh Circuit Analysis Would Likely Hold Woratx Liable for Copyright Infringement Because the Works Are Substitute Goods*

Applying the recent Seventh Circuit jurisprudence of fair use, however, the court would likely find Woratx liable for infringing Smith's photographs. The effect of this jurisprudence has been to place the fourth factor at the center of the analysis and to inquire whether the use constituted substitutional or complementary copying within the original's market.<sup>125</sup>

The application of this analysis to the Woratx scenario would begin by looking at whether the secondary use was substitutional or complementary. The focal point of this analysis is whether the copying harms the market value of the original work. In the Woratx scenario, Woratx created a collage that was to be exhibited in art galleries. Smith took photographs that had potential to be displayed in an art gallery. In this scenario, in fact, when a gallery owner heard that Woratx's work was being displayed in a gallery she decided to no longer pursue an exhibit with Smith's photographs. According to the logic in *Kienitz*, this fact would weigh against a finding of fair use because Woratx's appropriation

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paradigm), but rather whether the defendant used more than what was reasonable in light of the expressive purpose driving the transformative use.”).

<sup>124</sup> See *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (holding that because Koons only took the legs, feet, and sandals from the original photograph, excluding the background and excluded many of the creative decisions made by Blanch, the copying was reasonable in relation to the transformative use).

<sup>125</sup> See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“We have asked whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited).”).

of Smith's photographs harmed the market value of her photographs by costing her an opportunity at a museum exhibit by virtue of being a substitute for the photographs. Woratx's appropriation of Smith's photographs would thus be unlikely to constitute a fair use under the Seventh Circuit's approach to fair use.

*C. Assessing the Kienitz Decision: Should There Be Market-Centered Fair Use?*

Prior to *Campbell*, one of the mistakes of fair use precedent that Judge Leval lamented most was the inappropriate weight given to the market effect of a copyrighted work.<sup>126</sup> Leval accurately pointed out that all instances of fair use inherently involve certain market effects because, at a minimum, the author of the original work would be missing out on royalties.<sup>127</sup> Placing too much weight on this factor has the effect of stifling the availability of fair use, which in turn can have the effect of stifling secondary creativity.<sup>128</sup>

The Seventh Circuit's fair use analysis in *Kienitz* hearkens back to a time when courts designated the fourth factor as central to a finding of fair use.<sup>129</sup> This approach is problematic for two reasons. First, it ignores a highly influential Supreme Court decision. *Campbell* overturned prior fair use precedent by decentering the fourth fair use factor and placing the first factor in the center of the inquiry. The opinion in *Kienitz* completely disregards this by stating that transformative use is "not one of the statutory factors, though the Supreme Court mentioned it in *Campbell v. Acuff-Rose Music, Inc.*"<sup>130</sup> *Campbell* did not simply mention transformative use, but rather installed it as the central

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<sup>126</sup> See Leval, *supra* note 1, at 1125 (stating that if we treat the fourth factor as the single most important element of fair use, then fair use will become defunct).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985) ("[T]he last factor is undoubtedly the single most important element of fair use.").

<sup>130</sup> *Kienitz*, 766 F.3d at 758.



inquiry in cases involving fair use.<sup>131</sup> The *Campbell* test has been central to fair use case law since it was decided.<sup>132</sup> It has created a more uniform standard that, in turn, has increased the availability of fair use.<sup>133</sup> The Seventh Circuit should not have brushed this aside.

Second, and perhaps the most problematic aspect of *Kienitz*, is the Seventh Circuit's attempt to revive a market-driven approach to fair use.<sup>134</sup> This is precisely what Leval urged courts to avoid.<sup>135</sup> While the fourth factor is important, it should not eclipse the requirement of justification under the first factor.<sup>136</sup> Although a secondary use may not impair the market value of the original one, it does not necessarily follow that the secondary use is justified.<sup>137</sup> A party should still need to demonstrate that the purpose of the use was transformative and that the amount taken was proportional in relation to that purpose. Such reasoning is supported by the basic goal of copyright law, which is to stimulate progress in the arts for the benefit of the public. Fair use is meant to protect secondary creativity.<sup>138</sup> All intellectual creativity is in some sense derivative.<sup>139</sup> Authors and other artists do not simply start from scratch. Instead, they build on past ideas. Fair use recognizes this

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<sup>131</sup> See Beebe, *supra* note 35, at 605 (“[I]n those opinions in which transformativeness did play a role, it exerted nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use test.”).

<sup>132</sup> See Netanel, *supra* note 9, at 736 (“During 2006–2010, 85.5% of district court opinions and 93.75%, or all but one, of appellate opinions considered whether the defendant’s use was transformative.”).

<sup>133</sup> See Sag, *supra* note 44 (stating that fair use outcomes are more predictable and consistent than commonly assumed); see also Beebe, *supra* note 35, at 566 (stating that unpredictability in fair use may cause defendants to settle).

<sup>134</sup> See *Kienitz*, 766 F.3d at 758 (maintaining that the fourth factor is usually the most important and that transformativeness is not a statutory factor).

<sup>135</sup> Leval, *supra* note 1, at 1125 (“[I]f we then gave serious deference to the proposition that it is ‘undoubtedly the single most important element of fair use,’ fair use would become defunct.”).

<sup>136</sup> *Id.* at 1124.

<sup>137</sup> See *id.* (“The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified.”).

<sup>138</sup> *Id.* at 1110.

<sup>139</sup> *Id.* at 1109.

process as an inherent and important aspect of innovation.<sup>140</sup>

The *Campbell* test better aligns with this important aspect of innovation. An inquiry into whether the purpose of a use is transformative, rather than simply whether the market of the original is harmed, better ensures that the use is of the sort that fair use is designed to protect. While market effect should be considered in a finding of fair use, to place it as the central element of fair use would be a misstep by the courts.

There has been some concern, illustrated by the *Kienitz* court, that transformative use may potentially override 17 U.S.C. § 106(2), which protects derivative works.<sup>141</sup> This concern, however, is misguided. Derivative works, by definition, involve transformation.<sup>142</sup> The meaning of “transform” for the purposes of § 107, however, is distinctly different from the meaning of “transform” for the purposes § 106. In examining the relationship between transformative fair use and the derivative work right, a study by R. Anthony Reese found that courts:

[I]n evaluating fair use, generally disregard whether the defendant has created a derivative work. In assessing transformativeness, the courts generally emphasize the transformativeness of the defendant’s purpose in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the content of the underlying work.<sup>143</sup>

Reese concluded that U.S. appellate courts have so far “not applied fair use transformativeness in ways that significantly implicate the scope of the copyright owner’s derivative work right.”<sup>144</sup>

Congress intended for fair use to be a doctrine with the ability

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<sup>140</sup> *Id.*

<sup>141</sup> *Kienitz v. Scornie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

<sup>142</sup> 17 U.S.C. § 101 (2006) (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization . . . or any other form in which a work may be recast, transformed or adapted.”).

<sup>143</sup> Reese, *supra* note 113, at 484–85.

<sup>144</sup> *Id.* at 467.

to adapt and evolve.<sup>145</sup> The *Campbell* test has given the doctrine new life and brought it out of the darkness of the market-centered paradigm used throughout the 1980s. The Seventh Circuit's rejection of *Campbell* not only contradicts Supreme Court precedent, but also fails to consider congressional intent.

### III. A DEFENSE OF TRANSFORMATIVE USE: THE NEED FOR A CONSISTENT STANDARD

In light of the foregoing analysis, courts should continue to follow a transformative use approach in fair use cases. At the heart of any discussion of fair use should be the goals of copyright law and the objectives that fair use seeks to accomplish. Copyright law aims to increase the progress of knowledge and creativity by providing a special reward—the monopoly of a copyright—to artists.<sup>146</sup> This individual reward, however, is given to serve a utilitarian purpose:<sup>147</sup> to benefit the public with “the Progress of Science and useful Arts.”<sup>148</sup> The fair use doctrine works synergistically with these goals based on the idea that “excessively broad protection would stifle, rather than advance, the objective.”<sup>149</sup> A thriving fair use right is vital to the progress of culture and intellectual creativity.

Since *Campbell*, the development of a more uniform standard has increased the availability of fair use dramatically.<sup>150</sup> This is

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<sup>145</sup> See H.R. REP. 94-1476, at 66 (1976) (“[There is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change.”).

<sup>146</sup> Leval, *supra* note 1, at 1108.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (quoting U.S. CONST. art. I, § 8, cl. 8).

<sup>149</sup> *Id.* at 1109.

<sup>150</sup> See Netanel, *supra* note 9, at 735 (“[U]nder the market-centered paradigm, fair use is available only when reasonable copyright holders would consent to the defendant’s use and others like it but are prevented from doing so due to the prohibitively high costs of negotiating for such a license.”); *see also id.* at 768 (stating that under the transformative use paradigm “if the use is transformative and the defendant has not copied excessively in light of the transformative purpose, the use will most likely be held to be a fair use even if the copyright holder might enter or already has entered a licensing market for similar uses, and indeed even if the copyright holder would have been willing in

beneficial. Fair use's present position provides the benefit of predictability for recognized fair uses, such as parody, and of flexibility when it comes to cases of first impression. This allows fair use to adapt to new technologies and the times.

The adoption of the Seventh Circuit's opinion in *Kienitz* by other district courts would be detrimental to the fair use doctrine. To maintain uniformity, the Seventh Circuit should uphold the standard set out by the Supreme Court in *Campbell*. At present, practitioners would have to prepare an entirely different argument for fair use in the Seventh Circuit than anywhere else in the United States.

Furthermore, the standard embraced by the Seventh Circuit in *Kienitz*, which places the fourth factor at the heart of the analysis, will too often cause a fair use plea to lose.<sup>151</sup> Cases involving value-added uses, which are nevertheless public and commercial in nature, will always be present in the courts. If such cases were to lose out from an approach that focused on the fourth factor, the public would lose out on the benefit of such innovation. This contradicts what the fair use doctrine was intended to accomplish.<sup>152</sup>

While some discrepancies will always exist regarding a fair use analysis,<sup>153</sup> rejecting a standard ubiquitous amongst the rest of the circuit courts is a different matter. The transformative fair use jurisprudence has served to empower the doctrine, resulting in more predictability, and is more closely aligned with the goals of copyright law. Fair use has evolved greatly over the last two decades and to revert to a pre-*Campbell* market-centered fair use analysis would be to regress back to a less consistent, weaker fair use defense. Accordingly, courts should disregard *Kienitz*'s larger implications and continue to use a transformative fair use

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principle to license the use in question").

<sup>151</sup> Leval, *supra* note 1, at 1125 (stating that if we treat the fourth factor as the single most important element of fair use, fair use will become defunct).

<sup>152</sup> *Id.* at 1110 (maintaining that fair use is meant to protect secondary creativity as a legitimate concern of copyright).

<sup>153</sup> *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1267 (11th Cir. 2014) (holding that a nonprofit educational use may weigh in favor of a finding of fair use under the first factor, even when nontransformative).

approach.

### CONCLUSION

The decision in *Kienitz* would significantly impact the fair use landscape for secondary users of creative works if widely adopted. Congress intended fair use to promote secondary creativity and recognized it as a valid policy goal of copyright protection.<sup>154</sup> With multiple standards and less predictability, the result could stifle secondary creativity. Additionally, adoption of a market-centered fair use analysis would cause the public to lose out on the benefits of thriving fair use defense, including increased innovation and the progress of culture. Under the foregoing approach, value-added uses that are still public and commercial in nature would often lose.<sup>155</sup>

There was a time, in the period following the Supreme Court decision in *Harper & Row*,<sup>156</sup> when the market-centered fair use inquiry dominated. This period, however, was marked by unpredictability and confusion over fair use—making it difficult to take advantage of the defense. Because there is a high cost of defending a claim of infringement in court and devastating liability if one incorrectly evaluates the outcome of a case, the ability to forecast outcomes to a certain extent is critical to a thriving fair use policy.<sup>157</sup>

With the modern paradigm of transformative use, however, comes a doctrine that generates relatively predictable outcomes and is widely available. Accordingly, the circuits, including the Seventh Circuit, should follow the thriving transformative fair use jurisprudence that has been maintained since the Supreme Court decision in *Campbell*. There is no need for Congress to intervene

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<sup>154</sup> See Leval, *supra* note 1, at 1110 (stating that the fair use doctrine protects secondary creativity as a legitimate concern of copyright).

<sup>155</sup> Leval, *supra* note 1, at 1125.

<sup>156</sup> See *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 566 (1985) (“[T]his last factor is undoubtedly the single most important element of fair use.”).

<sup>157</sup> Marjorie Heins & Tricia Beckles, *Will Fair Use Survive?*, BRENNAN CTR. FOR JUSTICE 4 (Jan. 4, 2005), <https://www.brennancenter.org/sites/default/files/publications/Will%20Fair%20Use%20Survive.pdf>.

in this circuit split; a strong fair use defense needs the ability to adapt to changing technology and times. Congress did not want to freeze fair use in 1976 by statute, but rather wanted the law to continue to adapt and evolve with the times.<sup>158</sup>

The Supreme Court established the transformative use inquiry in *Campbell*, which the Seventh Circuit has seemingly ignored. It remains to be seen how other courts will react to *Kienitz*. However, it would be best practice for courts, including the Seventh Circuit, to follow a transformative use approach to cases involving fair use.

#### PRACTICE POINTERS

- The courts now focus on transformative use rather than inquiry into market harm when determining whether a use is fair.
- In determining whether a use is transformative, courts inquire primarily into whether a use has a new purpose, not whether there has been literal alteration of a copyrighted work.
- If it serves a new purpose, a use need not comment on an underlying work in order to be considered fair.

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<sup>158</sup> See H.R. REP. 94-1476, 66 (1976) (“The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”).

