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Pierre N. Leval

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CAMPBELL AS FAIR USE BLUEPRINT?

Pierre N. Leval*

Friends, copyright geeks, I come not to bury *Campbell*,¹ but to praise it. I might reasonably be considered a biased critic as *Campbell* took a number of suggestions from an article I wrote.² Biased or not, I submit *Campbell* is a beautifully reasoned opinion, which has demonstrated in its twenty-one years that it provides a healthy framework for fair use analysis. That framework promotes the overall objectives of copyright; it protects the interests of rights holders; and it guards against putting “manacles upon science.”³

This is not to say that every case decided under *Campbell* has been indisputably correct. But disagreement with some decisions of lower courts is not a condemnation of *Campbell*'s blueprint. Furthermore, fair use decisions will often involve difficult appraisals, susceptible to reasonable disagreement. Nor is it surprising to find inconsistency in lower court opinions. Copyright cases come infrequently, especially those with fair use questions. Many judges are often confronting the complexities of fair use for the first time, and may be quick to reach out for what look like easy handholds that are often based on errant dicta.

I. PRE-CAMPBELL

To appreciate what *Campbell* did for us, we should look at the law of fair use prior to *Campbell*. It was a mess, and it gave virtually no guidance. For nearly 300 years, courts had acknowledged a need for doctrine that would allow copying in some circumstances. There developed a widely accepted view that copying in certain types of undertakings—criticism, parody, book reviews, news reporting, political

* Judge, United States Court of Appeals for the Second Circuit. This talk was delivered at the University of Washington School of Law's Fair Use in a Digital Age Conference, April 17, 2015.

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

2. *See generally id.* (citing Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)).

3. *Cary v. Kearsley*, (1803) 170 Eng. Rep. 679, 680.

commentary, historical works, scholarly analyses—would likely be a fair use. But, with the exception of Joseph Story's spare, but well targeted, caution in 1841⁴ that a fair use must not “*diminish the profits, or supersede the objects, of the original work*,”⁵ courts had failed to explain how to distinguish between copying that infringes and copying that is fair use. Decisions were made from the gut, without any real explanation.

The confusion in the law was due, in no small part, to careless utterances by the High Court. The Court needlessly floated a number of unhelpful, distracting, counterproductive propositions, which had no bearing on the outcome of the particular case and have caused no end of confusion and harm.

First, in *Sony Corp. of America v. Universal City Studios, Inc.*,⁶ in gratuitous dictum, the Supreme Court declared that “every commercial use of copyrighted material is presumptively” an unfair use.⁷ This statement played no role in the decision. What is more, it was incomprehensible. Types of enterprise in which fair use are conventionally found—news reporting and analysis, historical and biographical studies, reviews of books, theater, and film, as well as parody—are conventionally done commercially for profit. The notion that commercial uses were presumptively not fair uses plagued fair use analysis until at last it was blunted by *Campbell*.

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁸ the Supreme Court rejected *The Nation's* claim that its taking of President Ford's explanation of the Nixon pardon was fair use because it was so newsworthy. Public interest in the author's writing would not justify disregard of the author's copyright. This was altogether valid. Otherwise, an author's success in writing an important book would be the author's undoing. And, as for harm, the Court explained that by scooping the “heart of [Ford's] book,”⁹ *The Nation* had usurped the “important marketable subsidiary right” of first publication.¹⁰ Had the Court stopped there, its reasoning would have fit into a useful framework for analysis of future fair use disputes. Unfortunately, the

4. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

5. *Id.* at 348 (emphasis added).

6. 464 U.S. 417 (1984).

7. *Id.* at 451.

8. 471 U.S. 539 (1985).

9. *Id.* at 600 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)).

10. *Id.* at 549.

opinion aired numerous distracting aphorisms—many of them misguided.

(a) For starters, the Court asserted that quotation from an unpublished work tends “to negate the defense of fair use.”¹¹ To the extent that proposition could be correct for *Harper & Row*’s facts, where the unauthorized publication scooped the imminent initial publication, the proposition would be at least equally incorrect in other circumstances, such as where the purpose of the copying is to reveal important facts that the rights holder hopes to conceal. If, for example, *The Nation* had discovered secret documents establishing an illicit bargain between Nixon and Ford—if, for example, Nixon had demanded a pardon as a condition of his resignation in Ford’s favor, and Ford had promised to give it—the Court might have said, “[t]he unpublished nature of the original strongly supports a finding of fair use.”

Copyright’s justification lies in its aim to stimulate creativity for the enrichment of public knowledge. Exchange of letters establishing corrupt bargains is not stimulated by the authors’ hope of publishing them for profit. Quoting such letters to reveal what their contents tell about their authors serves copyright’s primary goal of enriching public knowledge—without derogating from the parallel goal of providing authors with financial inducements to create. Fortunately, seven years later, Congress passed a special amendment to § 107, rejecting this privileging of unpublished works.¹²

(b) Second, the *Harper & Row* Court said there is “a greater need to disseminate factual works than works of fiction or fantasy.”¹³ This served no role in supporting the Court’s decision. It has been widely understood to mean that the defense of fair use is favored when quotation is from a factual work. To me that makes no sense. To be sure, there is often a need to test the accuracy of propositions advanced in factual works, and quotation for such purposes may well be justified as fair use. But that is a very different proposition from allowing a second writer to copy wholesale from an earlier writer’s treatment of the same subject—just because the subject is factual.

(c) Finally—and most harmful of all—in reference to the fact that *The*

11. *Id.* at 551 (quoting 3 M. NIMMER, COPYRIGHT § 13–62, n.2 (1984)).

12. This was after *Harper & Row*’s suggestion re-emerged in the Second Circuit’s ruling in *Salinger* that unpublished works “normally enjoy insulation from fair use copying.” *Salinger v. Random House, Inc.*, 811 F.2d 90, 95 (2d Cir. 1987), *opinion supplemented on denial of reh’g*, 818 F.2d 252 (2d Cir. 1987). “The fact that a work is unpublished shall not itself bar a finding of fair use” 17 U.S.C. § 107 (2012).

13. *Harper & Row*, 471 U.S. at 563.

Nation had gotten access through a “purloined manuscript,”¹⁴ the Court erroneously characterized fair use as an equitable doctrine¹⁵ and disastrously declared that “[f]air use presupposes ‘good faith’ and ‘fair dealing.’”¹⁶ I will return to this issue later on.

Random distribution of cases from the District Court Clerk’s Office sent me an amazing stream of fascinating fair use cases—suits by J. D. Salinger¹⁷ and the heirs of L. Ron Hubbard¹⁸ and Igor Stravinsky¹⁹ to enjoin biographical writings that quoted from their private documents, and the suit brought by publishers of scholarly journals against Texaco to enjoin Texaco’s geologists from photocopying scientific articles for their files.²⁰ For the decisions of these cases, the precedents offered scant guidance, and the guidance they gave was largely bad guidance. My decisions scored a sixty-seven percent reversal rate. I thought at the time that it had been exciting to find myself at the cutting edge of the law, even if in the role of the salami.

II. *CAMPBELL*

The *Campbell* decision in 1994 brought to an end fair use’s odyssey of bad piloting and aimless drift. In place of a laundry list of meaningless or harmful aphorisms, the Court undertook at last to explain fair use in terms of the goals of copyright—protection of the author’s exclusive entitlement to publish for profit, for the enrichment of public knowledge. *Campbell* recognized that, at least in some circumstances, those who quote from the writings of prior authors are also authors, and that quotation from prior writings for new purposes can also enrich public knowledge. To this end, *Campbell*’s explanation allowed copying in order to advance different understandings or achieve new

14. *Id.* at 542.

15. *Id.* at 551 (mentioning “the equitable nature of the fair use doctrine”); see also WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 5 (2d ed. 1995) (“It is . . . incorrect to characterize fair use as a child of equity. Rather, it was the child of the common law that sought to accommodate a statutory scheme . . .” (emphasis in original)).

16. *Harper & Row*, 471 U.S. at 562 (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968)).

17. *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986) *rev’d*, 811 F.2d 90 (2d Cir. 1987) *opinion supplemented on denial of reh’g*, 818 F.2d 252 (2d Cir. 1987).

18. *New Era Publ’ns Int’l v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988) *aff’d on other grounds*, 873 F.2d 576 (2d Cir. 1989).

19. *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987).

20. *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *amended* (Oct. 26, 1992), *aff’d*, 37 F.3d 881 (2d Cir. 1994), *order amended and superseded*, 60 F.3d 913 (2d Cir. 1994) and *aff’d*, 60 F.3d 913 (2d Cir. 1994).

objectives—so long as the copying is achieved without competing significantly with the author’s exclusive entitlements.

In my view, the most important among *Campbell*’s contributions are the following:

- It taught us not to search for answers in the words of the statute, as Congress made clear in its report that it was not undertaking to tell us what fair use is. Its intention was only to acknowledge this important doctrine in the statute, summarizing what courts had said and leaving further development to the courts that created the doctrine.²¹ Congress would have been wiser and would have invited less occasion for misunderstanding had it written simply that fair use is not infringement. That is all it meant.
- *Campbell* re-emphasized Story’s focus on whether the secondary work diminishes the profits and “supersede[s] the objects’ of the original.”²²
- It rejected the utility of bright-line rules—especially the misconceived bias against commercial uses.²³
- It cast doubt on the continuing validity of *Harper & Row*’s assertion of a good faith requirement.²⁴
- It cautioned courts not to be too ready (in cases raising a non-frivolous contention of fair use) to enjoin the work found to infringe.²⁵ A work that includes infringing copying may at the same time contain much that is non-infringing and valuable—including some fair use copying, and other copying that does not infringe because it communicates facts and ideas, which copyright does not protect. Copyright is a commercial doctrine—not a “moral right,” as the author’s right is conceived in Europe. Copyright’s goal is to guarantee authors reasonable compensation. Reasonable compensation for infringement can in many cases be a fully adequate copyright remedy, while an injunction might deprive the public of a work of significant value.

21. Congress “intended [in § 107] to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

22. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (alteration in original) (quoting Justice Joseph Story in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901)).

23. *Id.* at 577–78.

24. *Id.* at 585 n.18.

25. *Id.* at 578 n.10.

- Finally, *Campbell* rejected treating the statute's four factors as disparate inquiries, requiring instead that they be "weighed together, in light of the purposes of copyright."²⁶

Under *Campbell*, the four statutory factors are symbiotic. They represent interrelated parts of a cohesive inquiry, instructing examination from all pertinent sides of the question: How to better advance the objectives of copyright?

What emerges are two essential and intimately intertwined questions:

1. Does the secondary work copy from the original in pursuit of a different objective—a "transformative" purpose?
2. Does the secondary work compete significantly with the original, by offering itself as a significant substitute in markets that the copyright law reserves to the original author?

While these may sound like two discrete questions, *Campbell* took pains to point out their interdependence.²⁷ The greater the divergence of the objectives of the copying from those of the original, the less likely that the secondary work will compete in the original's exclusive markets—the less likely, in Story's words, that the secondary work will "diminish the profits, or supersede the objects, of the original work."²⁸ From this perspective, they are not two separate questions at all, but rather two facets of one complex question. The transformative purpose of the copy remains subservient to the protection of the market value of the copyright—the concern of the fourth factor, which *Harper & Row* had identified as "undoubtedly the single most important element of fair use."²⁹

Campbell's touchstone is copyright's touchstone. The objectives of fair use are the objectives of copyright. A copyright law that did not allow for fair use, as fair use is conceived in *Campbell*, would fail to satisfy copyright's objectives. Coming just before the dawn of the Internet, *Campbell* was either prescient, or at least lucky, in formulating a mode of analysis that would serve to produce sound answers to questions that have arisen in droves in our digital age.

26. *Id.* at 578.

27. *Id.* at 591 ("[W]hen . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.").

28. *Id.* at 576 (quoting Justice Story's decision in *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901)).

29. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

III. HOW IS *CAMPBELL* DOING?

Let's examine some of the criticisms of *Campbell*.

A. *Complete Unchanged Copies*.

A puzzling view is that a complete, unchanged copy cannot be a fair use.³⁰ This seems arbitrary and incompatible with the objectives of copyright. It would be disastrously limiting, especially now in the digital age when virtually every use of digital material involves making a complete copy.

Even before the digital age, innumerable valuable functions were served by making complete unchanged copies, without harm to the value of the copyright or diminution of the incentive to create.

- One entrusted with a unique manuscript to read would want to make a copy to ensure against loss, coffee stains, or, if in Europe, cigarette burns.
- Every museum or serious art collection needs a photographic copy of each work in its collection, for numerous purposes: to provide a meaningful inventory list, to guide future restorations in event of damage, and to prove ownership in case of theft.
- An art historian who seeks to assess the influence Matisse and Picasso asserted on one another based on comparison of paintings which hang in different places throughout the world would require photographic copies.
- Personal letters and memoranda of elected government officials and other prominent persons should be subject to revelation by journalists and historians to reveal important facts about the writers, which they or their descendants might wish to conceal. (In such circumstances, reproducing the original without change can be important to dispel suspicion that the secondary, expository writer may have distorted by selective quotation or paraphrase.)

In the digital age, the need for ability to make complete unchanged copies without liability has soared. Numerous well-reasoned court decisions have found a fair-use home for complete digital copies that transformatively expand knowledge about the works without interfering with the legitimate entitlements or incentives of the authors of the works. Among these are:

30. See, e.g., Paul Goldstein, *Copyright's Commons*, 29 COLUM. J.L. & ARTS 1, 5–6 (2005).

- *Arriba Soft*³¹ and *Perfect 10*,³² where low-resolution thumbnails of images were transformatively employed to provide an Internet pathway to the originals. Because of the low resolution, they did not offer meaningful substitutes to potential purchasers of copies of the original images.
- *iParadigms*,³³ where digital copies of student theses were used to detect plagiarism.
- *Swatch*,³⁴ where a copy of a private discussion of a publicly held corporation's operating statistics between the corporation's executives and selected financial industry analysts was disseminated to a broader public.
- *HathiTrust*,³⁵ where large numbers of books were digitized to create a tool for identifying and locating books that use particular words (as well as telling where in the book the words are found), without allowing users to view the text; and where the court approved provision of digitized copies in a format accessible to the print impaired, in view of the "insignifican[ce]" of the market for the product.³⁶

Campbell's framework soundly guided those courts to the conclusion that the copies were made for a purpose substantially different from that of the originals and that, in part because of that difference of purpose, and in part because of precautions taken, the copies did not substantially compete with, or substitute for, the originals.

B. *Evisceration of the Fourth Factor?*

An objection made particularly with respect to digital copies is that, under *Campbell*, identification of transformative purpose may override the fourth factor's interest in protecting the value of the copyright. Professor Ginsburg of Columbia Law School notes that a finding of a broadly beneficial transformative purpose may lead the court to give low importance, or none at all, to the copyright owner's fourth factor interest in earning revenues from her copyright. Instead of reaping the rewards

31. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002), *amended by* 336 F.3d 811 (9th Cir. 2002).

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

33. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

34. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014).

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

36. *Id.* at 103; *cf.* S. REP. NO. 94-473, at 64 (1975) ("If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it.").

of their creations, then, authors may be forced to subsidize the world's harvest of their contributions.³⁷ A further criticism is that a finding that the secondary work does not compete in the market for the original work can blind courts to the need to determine whether the secondary work competes with a *derivative* of the copyrighted work, for which a market has not yet developed.

If lower court opinions are vulnerable to these criticisms, they are not criticisms of *Campbell*, but rather of misinterpretations of *Campbell*. While *Campbell* unquestionably gives high importance to the enrichment of society provided by creatively transformative copying, that importance is not at the expense of the fourth factor. To the contrary, *Campbell* characterizes the first factor inquiry as subservient to the fourth.³⁸ And if lower court opinions have said that the fourth factor favored fair use because the secondary work did not compete with the original, without exploring whether it competes with a derivative, this may be attributable either to insufficiently cautious diction, or perhaps to the absence in the particular case of a plausible argument based on derivative rights. *Campbell* itself explicitly explored whether the secondary work infringed the plaintiff's right in derivative forms; indeed the Supreme Court remanded on that question.³⁹

C. *Vagueness and Unpredictability*

Some deplore *Campbell*'s rejection of bright-line rules, arguing that vagueness produces unpredictability, which chills secondary creativity.⁴⁰

37. See, e.g., Jane C. Ginsburg, *Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms – Part II (Fair Use)*, REVUE INTERNATIONALE DU DROIT D'AUTEUR (forthcoming Jan. 2015) (manuscript at 4–19) (Columbia Law and Economics, Working Paper No. 503), available at <http://ssrn.com/abstract=2539178> (noting that authors are rarely, if ever, in this position).

38. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (demonstrating that transformative works tend to be fair uses because they are less likely to “act[] as a substitute” for the original work and thus to “affect the market for the original in a way cognizable under [the fourth factor]”).

39. *Id.* at 594.

40. See, e.g., CHRISTINA BOHANNAN & HERBERT HOVENKAMP, CREATION WITHOUT RESTRAINT: PROMOTING LIBERTY AND RIVALRY IN INNOVATION 159 (2012) (arguing that the “vagueness and uncertainty” of the post-*Campbell* fair use standard “have an enormous chilling effect on the vast universe of speech that incorporates and builds on copyrighted material”); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1620 (2009) (“The uncertainty of the standard, if anything, is likely to deter potential users . . . from treading too close to the boundaries of impermissible copying.”); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 178 (2009) (calling for “crystallizing fair use by incorporating determinate benchmarks for legitimate takings [through] a straightforward formula: take standards, and replace them with rules”); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV.

Without doubt, a clear rule is a good thing, at least if it produces good results. But bright-line tests applied to complex circumstances are likely to produce unjustifiable results, which will be even more injurious to creativity than uncertainty.

When copyright disputes reach bad results, the ultimate loser is the public, which is the primary intended beneficiary of the copyright law. This injury to the public occurs regardless of whether fair use is too liberally dispensed, harming the ability of original authors to earn from their creations and thus chilling creation, or too narrowly applied, foreclosing the dissemination of secondary works that advance copyright's goals without significant harm to the original authors. In either case, the public loses.

A bright-line rule that would either place unreasonable restraints on the creativity of secondary users, or unreasonably diminish the protection of original authors, would not be an improvement. Deploring a test's vagueness is easy. Much more difficult is to come up with a clear test that would provide better, or at least acceptable, results. So far as I am aware, none have been suggested.

Furthermore, I do not agree with the proposition that fair use adjudications under *Campbell* have been wildly unpredictable. While some cases involve very difficult exercises of line drawing, on the whole, I believe the great majority of circuit-level opinions since *Campbell* have been well justified and reasonably predictable.⁴¹

D. Complementary

An interesting quibble with *Campbell* comes from the endlessly resourceful and fascinating mind of Judge Posner. He argues that, instead of the concept of “transformativeness,” the goal of the first factor would be better explained by asking whether the original and the secondary works are in a “complementary relationship”—as with a hammer and nail—so that in conjunction the two achieve something neither can achieve on its own—to the mutual benefit of both.⁴²

1483, 1489, 1511–18 (2007) (arguing that fair use is unpredictable and suggesting nonexclusive, bright-line rules defining per se fair uses).

41. See Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2537 (2009) (“If one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair.”).

42. *Ty, Inc. v Publ'ns Int'l, Inc.*, 292 F.3d 512, 517–18 (7th Cir. 2002); see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 153–54 (2003).

Judge Posner illustrates this by reference to book reviews.⁴³ Publishers depend on book reviews to publicize their books. Book reviews are more useful to book readers if they quote from the books they review. If reviewers' right to quote depended on permission from the publisher, the public would justifiably distrust the independence of the reviews. Therefore, both sides benefit from the right of reviewers to quote without permission, and the consent of publishers to such quotation can be inferred from the overall benefit they derive, regardless of the fact that the quotation will be sometimes in the service of a negative review.⁴⁴

I believe this argument fails. It works with the example of fair use that Judge Posner has chosen. But, for other heartland examples of fair use, it doesn't. Consider where the secondary author—an investigative reporter—quotes unknown private writings of a public figure to reveal the plaintiff's bigotry, lies, cruelty, crimes, or corruption, through the plaintiff's own words. Effective exposition by the secondary writer requires copying the original words. The expository writer cannot say merely, "That man was a liar and a thief. Take my word for it."

Even if Posner is correct that the consent of book publishers can be inferred from benefits that unauthorized quotation confers on them, if the Presidents, Prime Ministers, Senators, and Judges of the nations of the world could elect either to authorize or to prohibit free quotation from their previously unpublished writings, what percentage would say yes to free quotation? My guess is *zero*. Parody is another classic example of fair use. The essence of parody is ridicule, and few authors would consent to have their work ridiculed. The "complementary" formula, requiring the flow of benefits to the owner of rights in the quoted material to justify fair use, would kill off many forms of secondary use that further copyright's objectives.

A further problem with using the term "complementary" as the key to fair use is that the word perfectly describes the classic examples of derivative works, which by definition cannot be fair uses, as they are protected by the author's copyright in the original work. Conversion of a novel into a film, or of a cartoon character into a plush toy, translation of a poem—these are perfect examples of complementaries, but they do not qualify for fair use.

43. *Ty*, 292 F.3d at 517–18; *see also* LANDES & POSNER, *supra* note 42, at 153–54.

44. *Ty*, 292 F.3d at 517–18; *see also* LANDES & POSNER, *supra* note 42, at 153–54.

E. Valid Criticisms

1. Ambiguity of “Transformative”

I recognize that the word “transformative” suffers from the same ambiguity as “complementary.” This raises a problem. The problem arises from the need for standards to distinguish derivatives (which are governed by the original author’s copyright) from fair uses (which are not). Although not always recognized as such, this question is often the crux of a fair use dispute. A confusing application of the fourth factor arises when the original author has suffered no loss of sales of the original work, but has a credible claim of infringement for the making of a derivative. To say that the secondary use was transformative is not a sufficient answer because the word “transformative,” like “complementary,” can apply to derivatives as well as to fair uses. Indeed, the statutory definition of a “derivative” employs the word “transform.”⁴⁵ Accordingly, saying that a secondary work transforms the original does nothing to distinguish a fair use from a derivative.

But it does not follow from this ambiguity that the word “transformative” is an inappropriate symbol to signify the crux of the first factor inquiry. I don’t think I have heard a better one. Because some manner of change is at the heart of both derivatives and fair uses, any word that focuses descriptively on that crucial fair use element will suffer from the same ambiguity. Indeed, the word “derivative” also suffers from it. Any copying, even if it achieves fair use status, necessarily *derives* from the original.

Transformative, however, was never intended as a full definition or explanation of fair use. If a transformative purpose is required for fair use, that does not mean that any sort of transformation qualifies. *Campbell* (and my article as well) would certainly have done well to explain the tautological, but not necessarily obvious, point that the transformative purpose required to achieve fair use cannot be the same type of transformation that results in a derivative.

If that were the end of the problem, it would be easy enough to fix. All that would be required would be an authoritative opinion explaining that, while a transformative use is usually necessary to satisfy the first

45. See 17 U.S.C. § 101 (2012) (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”).

factor, it is not sufficient. Transformations of the sort that produce a substitute for a derivative work don't qualify. But that is not the end of the matter. The more serious and much more difficult problem is how to distinguish between transformative uses that can result in fair uses and those that result in derivatives.

2. *How to Tell a Derivative*

How should we distinguish between fair uses and derivatives?

(a) Music Sampling. Think of various manifestations of musical quotation or sampling:

- A piece of new music that includes a few bars from a well-known work, a kind of nod of acknowledgment to the influence of the former—fair use or a derivative?
- A new piece of music consists largely of a stringing together of such quotations from numerous former influential works?
- A new work that contains passages copied from a little known work?

(b) Quiz Books. Consider quiz books. Suppose one without authorization markets a trivia quiz book, based on *Downton Abbey* or *The Sopranos*.

- “What was Lady Mary wearing when she first met Matthew Crawley?”
- “What was the name of the boat on which Tony and his friends bade farewell to Big Pussy?”

(c) Sequels. What about sequels?

- Suppose that among the 100,000 members of a Harry Potter Internet Fan Club, members freely compose and share sequels.⁴⁶
- Or, consider a sequel like *The Wind Done Gone*, in which the new work retells the original's story from a different character's point of view, which inherently attacks the original's assumptions.⁴⁷

Should the answers for the two types of sequel be the same, or different?

Transformations of the sort producing fair use are usually of a different character from the transformations that produce derivatives. In the fair use context, the word most frequently refers to the *purpose* of the

46. See generally Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997).

47. See *Suntrust v. Houghton Mifflin Co.*, 252 F.3d 1165 (11th Cir. 2001).

copying—ordinarily to communicate some kind of commentary *about* the original or provide information *about* it. As *Campbell* explained in its distinction between parody—an exemplary instance of fair use—and satire,

[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 something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish). . . . Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.⁴⁸

In the derivative context, by contrast, what *Campbell* refers to as the “critical bearing”⁴⁹ of the secondary work will generally be absent. The transformation involved in making a derivative is usually one of form or medium, offering the same work in a new version, form, medium, or shape, rather than offering information or commentary *about* the original.

The classic understanding of derivatives is that they are works that represent the original author's creative expression in a different medium or form to an audience that either is, or would be, motivated by appreciation of the original author's creative expression—a novel converted into a film, a poem translated into another language, an oil painting photographically reproduced on paper. Consistent with this notion, the statute defines derivatives by a “such-as” list which includes “translation, musical arrangement, dramatization, fictionalization, motion picture version, . . . art reproduction,” etc.⁵⁰

In this formulation, Congress was not defining derivative doctrine. It was legislating in an older mode, in which Congress viewed the courts as partners. Congress sought to express its policy through a list of examples that would convey the rough idea of the types of transformations Congress had in mind as protected derivatives—leaving it to the courts to interpret Congress's intention and formulate a standard

48. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580–81 (1994) (internal citations omitted).

49. *Id.* at 580.

50. 17 U.S.C. § 101 (2012).

that would accomplish Congress's goal.

3. *What Should the Standard Be?*

Campbell noted that “the market for potential derivative uses includes only those that creators of original works would in general develop”⁵¹ This appropriately limited the scope of derivatives. Authors cannot enlarge the scope of their copyright (to the detriment of society) to control criticism, analyses, mockery, or parody simply by offering to license such uses. Nor would it necessarily matter that users agreed to pay for such licenses. If the price is not prohibitive, would-be users will often pay for authorization to use without challenge, notwithstanding that they might have the right to do so without authorization—just to avoid the uncertainties and expenses of litigation. *Campbell* did not undertake the further step of analyzing the scope of the territory covered by the derivative right. It did, however, offer the illuminating passage quoted just above on the distinction between parody and satire, explaining that a parody is more likely to be fair use because it draws its justification for the taking from the fact that its purpose is to comment on the original. This distinction between parody and satire sheds light on the more general distinction between fair uses and derivative works.

Whether a type of copying infringes the author's rights over derivatives, or is a fair use, is a matter of copyright policy. Copyright law's ability to achieve its objectives depends in part on how courts answer the question. Just as courts have made crucial normative judgments, drawing the boundary lines of copyright to include manner of expression, but not ideas and facts, courts must make a normative judgment to draw the boundary line that separates derivatives from fair uses, and must do so in relation to the nature and purpose of copyright.

Focus on the nature and purpose of the copyright can provide a helpful approach to making this distinction. What the copyright protects is the author's manner of expression. The examples of derivatives set forth in the statutory list are of secondary works that seek to re-communicate the protected expression of the original, converted into a different form or medium. This suggests at least the germ of a useful test.

The more the aim of the secondary copying is to communicate the original author's manner of expression (albeit in a changed form)—without commentary on it or provision of information about it—the

51. *Campbell*, 510 U.S. at 592.

stronger the argument that the secondary transformation should be classed as a derivative, and be subject to the original author's copyright. In contrast, the more the copying is done for the purpose of communicating attitudes or information about the original, the stronger the argument supporting fair use.

This germ of a test would not serve to answer all such questions. As with other aspects of fair use analysis, it should not be a rigid rule. Furthermore, courts have concluded that some secondary uses that merely seek to communicate the original author's manner of expression in a changed form or medium (without transformative purpose) qualify as fair use, when the costs of producing such transformations are so high, and the market for them so small, that the rights holder would not incur the costs of producing them herself. An example is the recent *HathiTrust* case, in which the court found fair use for conversion of books into a format accessible to certified print-impaired users, noting that the market for such a format was insignificant.⁵²

IV. BAD FAITH

A final word on *Campbell's* contributions. Few pronouncements have been more harmful to fair use than the Supreme Court's assertion in *Harper & Row* that "[f]air use presupposes good faith and fair dealing."⁵³ Why is this so harmful? First, a good-faith requirement would undermine the primary goal of copyright—to enrich public knowledge. Equally important, such a requirement would have very bad practical consequences for all participants.

The copyright is a commercial property right given by law to authors to stimulate creativity so as to benefit society at large. Three limitations on the scope of the copyright undertake to assure that copyright will advance, rather than suppress, that goal. The goal would be seriously harmed if original authorship encompassed the right to suppress the publication by others of facts or ideas contained in the original and fair uses made of it. The fact that a secondary user, who copies to disseminate facts or discuss ideas contained in the original, or to make transformative fair uses, may have acted in bad faith has no bearing on the copyright law's goal of allowing such uses for the enrichment of public knowledge, without harm to the original author's financial

52. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 103 (2d Cir. 2014); *cf.* S. REP. NO. 94-473, at 64 (1975) ("If the work is 'out of print' and unavailable for purchase through normal channels, the user may have more justification for reproducing it.").

53. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

incentives to create. The public's access to important knowledge should not be barred because of bad behavior by the purveyor of the knowledge. A copier's bad faith has no logical bearing on the scope of the original author's copyright.

Investigative writers often need to dissemble to obtain access to raw materials for valuable expository works. Those who write to expose the corruption of public figures may need to falsely portray themselves as ardent admirers to gain access to private files. It makes no sense for copyright law to deprive the public of the knowledge the secondary author provides, and impose liability on the publisher of the secondary work, because the secondary writer engaged in deceptive sweet-talk. The law has other remedies, both civil and criminal, for deceitful conduct. It is not the concern of the copyright law. Making it copyright's concern would impair copyright's objective of enriching public knowledge.

Of more immediate practical import, a good-faith requirement would impose huge inefficiencies, costs, and uncertainties on everyone concerned. The law should permit the prospective publisher of an expository work that quotes from the letters and memoranda of a public figure to make a reasonably confident evaluation of whether the publication would be an infringement or fair use by studying and comparing the two texts. The publisher should not be compelled to launch a costly, difficult investigation into the secondary author's dealings with her sources before deciding whether to publish her work. A good-faith requirement would add enormous costs, burdens, and chilling risks to the publishing process, thus harming the copyright law's objectives.

Such a requirement would also sabotage an efficient judicial process. Fair use disputes should generally be amenable to disposition on the pleadings or on summary judgment. The answer should ordinarily be evident from study and comparison of the texts. But, if judgment will depend on what the secondary writer said to get access to the files and a moralistic evaluation of whether she acted in good faith, courts will frequently be unable to decide in the pretrial stages of the litigation. Trials, perhaps with juries, will be required, which will impose not only huge expenses on all participants, but also catastrophic delays of publication, as well as potentially quirky results influenced by a jury's sympathies.

It is hard to knock good faith, and easy to villainize bad faith, but allowing allegations of bad faith to play a role in fair use adjudications would hurt everyone. It would be a lose-lose proposition.

Accordingly, among the many great benefits bestowed by *Campbell* was its tactful, but firm, step in the direction of correcting *Harper &*

Row's misstep. *Campbell* undertakes comprehensive instruction on how fair use analysis should be made, nowhere assigning any pertinence to whether there was bad faith in the development of the claimed fair use. That by itself strongly suggests the Court was saying the question is not a part of fair use analysis. Nor does *Campbell* repeat *Harper & Row*'s canard that fair use is an "equitable doctrine." Then, in footnote 18, after noting conflicting precedent on the pertinence of good faith, the Court added, "Even if good faith *were* central to fair use, [the defendant's] actions were not inconsistent with good faith."⁵⁴ The formulation, "Even if it were," strongly implies, "It isn't."⁵⁵ This was a diplomatic way of putting in doubt the survival of the earlier assertion without forcing those who had joined in the opinion to acknowledge error (something judges hate doing).

It is hard to think of a more useful role copyright scholarship could play today than by convincing the Supreme Court to finish the job begun by *Campbell* and expressly disavow that fair use presupposes good faith.

V. COPYRIGHT'S FIRST AMENDMENT

A concluding thought. Copyright and freedom of the press are uncomfortable bedfellows. It is not easy to see how copyright could survive under our Constitution if it did not have its own express constitutional authorization.

Even with that authorization, the copyright, if too broadly construed, would clash intolerably with a free press. Although the "Progress of Science" (or knowledge) explains the justification for "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings,"⁵⁶ overly broad authorial control would undermine the progress of knowledge and clash with press freedom.

Wise judicial tailoring of the scope of copyright has minimized that conflict. Together with the doctrines that remove the use of facts and ideas from the control of copyright, fair use serves as the First Amendment's agent within the framework of copyright. *Campbell* crafts a fine balance, converting a head-on conflict into a healthy synergy.

54. *Campbell*, 510 U.S. at 585.

55. H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 595 (2d ed. 1965) (discussing the counterfactual implication of the subjunctive); THEODORE M. BERNSTEIN, THE CAREFUL WRITER: A MODERN GUIDE TO ENGLISH USAGE 430 (1965) (same).

56. U.S. CONST. art. I, § 8.