Washington Law Review

Volume 90
Number 2 *Symposium: Campbell at 21*

6-1-2015

Possible Futures of Fair Use

Pamela Samuelson

POSSIBLE FUTURES OF FAIR USE

Pamela Samuelson*

Abstract: This Article celebrates the twenty-one-year majority status of *Campbell v. Acuff-Rose Music, Inc*. *Campbell* has unquestionably had transformative impacts on the doctrine of fair use in U.S. copyright case law, making several significant contributions that go well beyond the Court's endorsement of the "transformative" nature of a use as tipping in favor of fairness. Several notable cases have built upon the analytical foundation established in *Campbell*.

This Article also considers possible futures of fair use. What will fair use look like twenty-one years from now? Will it stay much as it is right now, or will it change, and if so, how? Some critics think that fair use has gone too far and are urging a return to a more restrictive scope for the doctrine. This Article considers and responds to various critiques of the present state of fair use law, including whether fair use is consistent with international treaty obligations. This Article concludes that fair use will survive these critiques and will continue to evolve to provide a useful mechanism for balancing the interests of authors and other rights holders, on the one hand, and subsequent authors and other users of copyrighted works, on the other hand. It discusses some new horizons that commentators have imagined for fair use to address certain problems that beset copyright law today. Of the possible futures of fair use, that which would preserve the status quo and expand fair use into new horizons is the one most likely to occur and most to be desired.

* Richard M. Sherman Distinguished Professor of Law, Berkeley Law School. I am very grateful to Kathryn Hashimoto for outstanding research assistance and editing suggestions for this Article. I am also grateful for comments on an earlier draft from Judge Pierre Leval, as well as from Jessica Litman, Lydia Loren, Corynne McSherry, Tony Reese, and Rebecca Tushnet.

INTRODUCTION

Campbell v. Acuff-Rose Music, Inc.[1] has unquestionably had transformative impacts on the doctrine of fair use in the U.S. copyright case law.[2] These transformations, though widely acknowledged,[3] have not been universally acclaimed.[4] On the occasion of *Campbell* having attained its twenty-one-year majority status, it is fitting to consider the possible futures of fair use. What will fair use look like twenty-one years from now? Will it stay much as it is right now, with cases simply working out details within its current contours? Or has it gone too far, and will the pendulum swing back toward a more restrictive scope for the doctrine? If it has gone too far, in what ways should it be curtailed? Will some uses that today are free as fair uses be permitted in the future under an obligation to pay licensing fees for the uses? Or will fair use continue to expand? And in what new directions might it evolve?

I am here to celebrate the transformations that *Campbell* has wrought in fair use law and to defend the present state of fair use law from its critics. I am also here to share ideas about some new horizons that I and others have imagined for fair use to address certain problems that beset

---

1. 510 U.S. 569 (1994).

2. *See, e.g.*, Laura Quilter, *How Parodies Transformed Fair Use*, COPYRIGHT & INFO. POL'Y (Feb. 23, 2015), http://blogs.umass.edu/lquilter/2015/02/23/fair-use-week-how-parodies-transformed-fair-use/. The judicially created fair use doctrine is codified at 17 U.S.C. § 107. It directs courts to consider a nonexhaustive list of four factors in determining whether a use is fair:

> (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.

17 U.S.C. § 107 (2012).

3. The *Campbell* decision gave Judge Leval "enormous joy." Pierre N. Leval, Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 19 (1994) [hereinafter Leval, *Souter's Rescue*]; *see also* Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1465 (1997); Neil W. Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 722–23, 736–38 (2011); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L. J. 47, 55, 73 (2012); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2549–55 (2009) [hereinafter Samuelson, *Unbundling Fair Uses*]; Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869 (2015).

4. *See, e.g.*, *The Scope of Fair Use: Hearing Before the H. Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 14–22 (2014) (statement of June M. Besek, Executive Director, Kernochan Center for Law, Media and the Arts), *available at* http://judiciary.house.gov/index.cfm/2014/the-scope-of-fair-use [hereinafter Besek Testimony].

copyright law today, such as the enforceability of mass-market license restrictions that purport to override fair use and bypassing technical protection measures that impede the making of fair and other privileged uses of digital works.

As the scholarly papers presented at this symposium attest, *Campbell* has made several significant contributions to fair use law in the U.S. Part I of this Article discusses my view of these contributions, which go well beyond the Court's endorsement of the "transformative" nature of a use as tipping in favor of fairness. Part I also discusses several notable cases that have built upon the analytical foundation established in *Campbell*. Part II considers and responds to various critiques of the present state of fair use law. *Campbell* itself, interestingly, is not the target of the fair-use-has-gone-too-far critiques, but a number of its progeny are. The most serious charge leveled against the post-*Campbell* fair use case law is that fair use, under *Campbell*'s influence, has put the United States out of compliance with its international treaty obligations. Part III expresses confidence that fair use will survive these critiques and will continue to evolve to provide a useful mechanism for balancing the interests of authors and other rights holders, on the one hand, and subsequent authors and other users of copyrighted works, on the other hand. Of the possible futures of fair use, that which would preserve the status quo and take fair use into new horizons is the one most likely to occur and most to be desired. Part III explores these new horizons.

I. *CAMPBELL* AS A TRANSFORMATIVE FAIR USE CASE

Campbell v. Acuff-Rose Music, Inc. was the most significant copyright decision of the twentieth century in terms of doctrinal developments of the law.[5] In *Campbell*, the Supreme Court overturned a lower court ruling that Luther Campbell's group, 2 Live Crew, made an unfair use of Roy Orbison's song "Pretty Woman" when recording a rap parody version of it.[6] Justice Souter wrote an eloquent opinion for a

5. The Court's decisions in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991), and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), have been cited more often than *Campbell* since 1994. Most cites to *Feist* are for its modicum of creativity originality standard and the rejection of sweat-of-the-brow copyrights. *See, e.g.*, Southco, Inc. v. Kanebridge Corp., 390 F.3d 276, 281–82, 295 n.14 (3d Cir. 2004); Matthew Bender & Co., Inc. v. West Publ'g Co., 158 F.3d 693, 699 (2d Cir. 1998); Eng'g Dynamics, Inc. v. Structural Software, Inc., 26 F.3d 1335, 1344 n.11, 1346 (5th Cir. 1994). *Sony* may have been more significant than *Campbell* in terms of its impact on developments in the information technology field, but not in terms of doctrinal developments. *See, e.g.*, Pamela Samuelson, *The Generativity of* Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1850–75 (2006).

6. *Campbell*, 510 U.S. at 572.

unanimous Court. More important than the eloquence was the substantial guidance the Court provided about how fair use cases should be analyzed. Many fair use decisions rendered in the past two decades have cited *Campbell*.[7] In addition, the law review commentary on *Campbell* has been voluminous.[8]

Section A reviews the many contributions—numbering, by my count, at least a dozen—that *Campbell* has made to fair use jurisprudence. Section B discusses the cases that embraced and built on these contributions.

A. Campbell*'s Contributions Go Beyond Transformativeness*

The most notable and influential contributions of the *Campbell* decision have, of course, been, first, the Court's emphasis on the "transformative" nature of a defendant's use as weighing in favor of fair use and, second, its expansive definition of what constitutes a "transformative" use. (I will address these two landmark contributions at the end of this subsection.) Several others of *Campbell*'s contributions to fair use jurisprudence tend to be overlooked or glossed over in discussions about the impact of that decision. Yet these less noticed aspects of *Campbell* have also reshaped how fair use cases are analyzed and deserve due attention. The remainder of this subsection reviews Justice Souter's contributions to fair use law, emphasizing first the less noted contributions and then returning to the transformativeness contributions.

Campbell was, for instance, influential in its abjuring the dual negative presumptions the Court had seemed to endorse in two earlier fair use decisions.[9] I count this as the third of *Campbell*'s contributions to fair use law. In *Sony of America v. Universal City Studios, Inc.*,[10] the Court had directed lower courts to presume that a challenged use was unfair if it was commercial in nature and, further, to presume harm to the plaintiff's market when a defendant made commercial uses of the rights holder's work.[11] This dicta might have had a less powerful impact on

---

7. *See* discussion *infra* Part I.B.

8. *See, e.g.*, Annemarie Bridy, *Sheep in Goats' Clothing: Satire and Fair Use After* Campbell v. Acuff-Rose Music, Inc., 51 J. COPYRIGHT SOC'Y U.S.A. 257 (2004); Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008); Leval, *Souter's Rescue*, *supra* note 3. The WestlawNext case page includes 2,374 law review articles citing to *Campbell* (as of March 1, 2015).

9. *Campbell*, 510 U.S. at 583–84, 591.

10. 464 U.S. 417.

11. *Id.* at 451.

subsequent cases—after all, *Sony* involved a private noncommercial use[12]—had the Supreme Court not a year later endorsed the dual negative presumptions in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.[13] *Harper & Row* involved the publication of excerpts of President Ford's memoirs in an issue of *The Nation* that "scooped" the excerpts from a "purloined" manuscript; this harmed the market because *Time* magazine subsequently cancelled its contract to publish similar excerpts to whet the public's interest in the book.[14]

The Sixth Circuit in *Campbell* had invoked the dual negative presumptions in its ruling that Campbell's use of the song was unfair.[15] The Supreme Court, however, declared that the Sixth Circuit had misread *Sony*, which called for a "sensitive balancing of interests."[16] The commerciality of a defendant's purpose, opined Justice Souter in *Campbell*, is a factor to be considered and may, in some contexts, weigh against fair use.[17] But a commercial purpose must be considered in context, and it should be given less weight in transformative use cases because of the lower likelihood that such uses will supplant demand for the original.[18]

Although *Campbell* repudiated the dual presumptions in cases involving transformative uses, it did not renounce the dual presumptions of unfairness and of harm to markets altogether.[19] If *Campbell* is to be believed, the negative presumptions still apply to non-transformative

---

12. Justice Stevens' main concern in *Sony* was to announce a presumption of fairness when a use was private and noncommercial. *Id.* at 450–51. That presumption would put the burden of proof of a meaningful likelihood of harm on the plaintiff. *Id.* at 451. It was unnecessary for this purpose to create or announce a presumption as to commercial uses, but it may be that this was a political concession to get agreement about a noncommercial presumption.

13. 471 U.S. 539 (1985). In *Harper & Row*, the Court quoted *Sony*, 464 U.S. at 451 ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."), and cited to *Roy Export Co. Establishment v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980), and the Nimmer treatise for the proposition that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562.

14. *Id.* at 567. Because of the presence of "clear-cut evidence of actual damage" in the case, *id.*, the Court did not discuss the presumption of harm due to commercial use; rather it focused on defendant's motive to profit. *Id.* at 562.

15. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1436 (6th Cir. 1992) (citing *Sony*, 464 U.S. at 449, and *Harper & Row*, 471 U.S. at 562).

16. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584–85 (1994) (quoting *Sony*, 464 U.S. at 455 n.40).

17. *Id.* at 585.

18. *Id.* at 591.

19. *Id.* at 585, 591–92.

commercial uses,[20] although this too is dicta that the Court may eventually decide should not apply across the board. By maintaining the *Sony* presumptions for non-transformative commercial uses, the Court may have inadvertently contributed to the intensity of struggles in subsequent cases over whether uses are transformative. At least some of the expansiveness of judicial interpretations of transformative purposes, as in the search engine cases discussed below, may be aimed at avoiding the *Sony* commercial use presumptions.[21]

A fourth contribution *Campbell* has made to the fair use case law has been its dismissal of the argument that good faith and fair dealing were necessary to fair use determinations. In *Harper & Row*, the Court had stated that the propriety or impropriety of the defendant's conduct should be considered in deciding fair use cases, and expressed support for the proposition that fair use "presupposes 'good faith' and 'fair dealing.'"[22] In a law review article written after *Harper & Row*, Judge Pierre Leval criticized the notion that good faith was relevant to fair use rulings.[23] In *Campbell***,** the Court expressed its agreement with Judge Leval on this point, rejecting Acuff-Rose's argument that Campbell was an unfair user because he acted in bad faith.[24]

Revival of the public interest as a factor worthy of consideration in fair use cases was a fifth contribution. In *Harper & Row*, *The Nation* made much of the public interest in getting access to the news about Ford's explanation of his pardon of former President Nixon as a justification for its publication of this news.[25] The Court expressed skepticism about the public interest as part of a fair use defense.[26] In *Campbell*, however, the Court affirmed the importance of the public interest in access to works and information they may contain as meaningful considerations in fair use cases.[27] The Court explicitly stated

---

20. *Id.* at 591 ("[W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly . . . serves as a market replacement for [the original].").

21. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1166–67 (9th Cir. 2007). See *infra* Part III.A for a discussion of the desirability of repudiating the remaining dual negative presumptions. The search engine cases are discussed *infra* text accompanying notes 112–119.

22. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) (quoting Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968)).

23. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1126–27 (1990). The impact of Judge Leval's article on the Court's transformativeness doctrine is discussed *infra* text accompanying notes 56–64.

24. 510 U.S. at 585 n.18 (citing Leval's article, among other sources).

25. 471 U.S. at 556.

26. *Id.* at 557.

27. 510 U.S. at 578 n.10.

that the public interest in access to a second work should be a factor in deciding to withhold injunctive relief and order monetary compensation instead in close fair use cases.[28] In the aftermath of *Campbell*, courts have sometimes taken the public interest—that is, spillover effects of a fair use ruling on non-parties to the litigation—into account in determining whether a use was fair.[29]

Although the Court in *Campbell* expressly declined to adopt a presumption that parodies of copyrighted works were fair uses,[30] the parody case law after *Campbell* has resulted in many fair use rulings.[31] Thus, a sixth contribution of *Campbell* to fair use case law would seem to be that parodies are de facto presumptively fair. Some litigants have tried to stretch the parody category beyond its conventional bounds so that they too may enjoy the halo effect of *Campbell*'s perspectives on parody.[32]

Campbell distinguished parody from satire, seemingly derogating satire as less worthy than parody of being found a fair use.[33] In the aftermath of *Campbell*, a very clever satire of a Dr. Seuss book was held an infringement in no small part due to *Campbell*'s influence on this point, even though that satire had a transformative purpose and was quite unlikely to supplant demand for the original.[34] The distinction between parody and satire has been criticized in the literature, and some more recent cases suggest that the distinction has become less potent over time.[35]

A seventh important contribution of *Campbell* to the fair use case law has been its insistence that courts should consider all four of the fair use

---

28. *Id.*

29. *See, e.g.*, Bill Graham Archives v. Dorling-Kindersley Ltd., 448 F.3d 605, 609–10 (2d Cir. 2006) ("In some instances, it is readily apparent that DK's image display enhances the reader's understanding of the biographical text.").

30. 510 U.S. at 581.

31. *See, e.g.*, Brownmark Films LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012) (South Park parody of viral video); Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003) (parody of Mattel's Barbie doll); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 113 (2d Cir. 1998) (parody of a photograph).

32. *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259 (11th Cir. 2001) (characterizing a critical retelling of *Gone with the Wind* story as a parody).

33. 510 U.S. at 580–81.

34. Dr. Seuss Enters. v. Penguin Books, USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

35. *See, e.g.*, Tyler T. Ochoa, *Dr. Seuss, the Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y U.S.A. 546, 548–64 (1998); Gregory K. Jung, Dr. Seuss Enterprises v. Penguin Books, 13 BERKELEY TECH. L.J. 119, 119–20 (1998). A recent example of a successful fair use defense involving satire is *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (satirical transformation of photograph of a mayor to mock him held fair use).

factors—the purpose of the challenged use, the nature of the copyrighted work, the amount and substantiality of the taking, and the potential for harm to the work's market—and weigh them not only together, but also in relation to one another.[36] Prior to *Campbell*, fair use decisions had sometimes seemed a bit like math games. If two of the fair use factors, for instance, supported a finding of fair use, one was neutral, and one tipped against fair use, then the use was likely to be fair, but if two factors disfavored fair use and one was neutral, the likely outcome would be an unfairness ruling.[37] After *Campbell*, courts have generally engaged in a much more nuanced analysis of fair use.

As Professor Reese explains, *Campbell* was innovative in directing courts to consider whether the amount the defendant took from the plaintiff's work was "reasonable" in light of his purpose.[38] Most prior cases had considered the "amount taken" factor as though it was a stand-alone consideration,[39] although sometimes courts considered whether that amount was necessary instead of merely reasonable.[40]

Campbell also directed that the purpose factor should be considered in relation to the harm factor and given different weight in different contexts.[41] When a use was transformative, the Court opined that harm to markets was less likely because "market substitution is at least less certain [than in non-transformative use cases so] market harm may not be so readily inferred."[42]

Campbell also recognized more clearly than other cases that some market harms don't weigh against fair use. When a parody harms the market for the targeted work, for instance, this may be because it was a "lethal parody, [which] like a scathing theater review, kills demand for the original."[43] This, however, "does not produce a harm cognizable

36. 510 U.S. at 577–78.

37. *See, e.g.*, Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 561–64 (2008) (describing a judicial period of courts' "mechanical application" of the four fair use factors). Professor Beebe gives several examples. *See, e.g.*, *id.* at 562 n.51 (citing, as one example, Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003) ("Having considered the four fair use factors and found that two weigh in favor of Arriba, one is neutral, and one weighs slightly in favor of Kelly, we conclude that Arriba's use of Kelly's images . . . is a fair use.")).

38. R. Anthony Reese, *How Much Is Too Much?*, 90 WASH. L. REV. 755, 778 (2015) (citing *Campbell*, 510 U.S. at 586–87).

39. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564–65 (1985); New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp., 904 F.2d 152, 158–59 (2d Cir. 1990).

40. *See, e.g.*, Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1519 (9th Cir. 1992).

41. 510 U.S. at 591.

42. *Id.*

43. *Id.* at 592.

under the Copyright Act."[44]

An eighth, if more indirect, contribution of *Campbell* is, as Professor Fromer explains, a broader conception about market harm.[45] After *Campbell*, it is acceptable for courts to take into account possible market benefits of a defendant's use of the plaintiff's work in weighing market effects, not just possible negative effects. *Campbell* has opened the door to considering possible benefits and harms together in a holistic way, as well as in relation to the other factors.

Campbell has also influenced how courts in fair use cases think about licensing. A ninth contribution is the Court's recognition in *Campbell* of the unlikelihood that copyright owners would be willing to license parodic or other types of critical uses of their works.[46] Parodies typically make fun of the works they target, and copyright owners are unlikely to want to license this sort of use. This was seemingly exemplified by Acuff-Rose's refusal to license Campbell's use of the Roy Orbison song.[47] Although the Court did not expressly embrace "market failure" as a rationale for its observations about rights holders' unwillingness to license critical commentary, commentators have interpreted *Campbell* as adopting a market failure rationale in critical commentary fair use cases.[48]

A tenth contribution of *Campbell* to fair use law was the Court's decision not to give a negative interpretation to a defendant's decision initially to seek a license from the plaintiff which the defendant ultimately did not get. The fact that 2 Live Crew asked Acuff-Rose for a license, the Court said, "[did] not necessarily suggest that they believed their version was not fair use . . . . If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use."[49] Subsequent cases have been influenced by this statement.[50]

An eleventh significant, albeit small, contribution of *Campbell* to the evolution of fair use law was the Court's disinclination to give weight to

---

44. *Id.* at 591–92.

45. *See* Fromer, *supra* note 3.

46. 510 U.S. at 592.

47. *Id.* at 572–73.

48. *See, e.g.*, Anastasia P. Winslow, *Rapping on a Revolving Door: An Economic Analysis of Parody and* Campbell v. Acuff-Rose Music, Inc., 69 S. CAL. L. REV. 767, 820–23 (1996). *See generally* Robert P. Merges, *Are You Making Fun of Me? Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305 (1993).

49. *Campbell*, 510 U.S. at 585 n.18.

50. *See, e.g.*, Bill Graham Archives v. Dorling-Kindersley Ltd., 448 F.3d 605, 615 (2d Cir. 2006).

the arguably distasteful or vulgar nature of 2 Live Crew's rap parody version of Roy Orbison's song.[51] The Sixth Circuit had taken vulgarity into account as weighing against fair use.[52] Judge Souter's opinion, however, returned to copyright first principles and aesthetic nondiscrimination in counseling against making any fair use judgments on the quality of the commentary.[53]

Like Professor Loren, I am less sanguine about *Campbell*'s characterization of fair use as an affirmative defense for which the defendant bears the burden of proof.[54] One must, I suppose, consider this aspect of *Campbell* as a twelfth contribution to the doctrine of fair use, although it has been a less positive contribution. As Professor Loren demonstrates so well, it is a mistake to say that Congress intended fair use to be an affirmative defense.[55] It is much to be hoped for that future fair use cases will correct this mistake.

Having now paid due attention to *Campbell*'s somewhat less appreciated contributions to fair use law, we can turn to *Campbell*'s elevation of transformativeness as a factor in the fair use case law. This has unquestionably been *Campbell*'s most significant contribution to fair use jurisprudence. The Court drew much of its inspiration about the significance of transformative purposes from Judge Leval's article, *Toward a Fair Use Standard*,[56] which the Court cited fourteen times.

In considering the first fair use factor, the purpose and character of the defendant's use of the plaintiff's work, the Court observed that "[t]he central purpose of th[e] investigation" was to consider

> whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words,

---

51. 510 U.S. at 582–83.

52. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1446 & n.9 (6th Cir. 1992). Before *Campbell*, courts sometimes commented on bad taste or indecency when denying fair use defenses in parody cases. *See, e.g.*, *MCA, Inc. v. Wilson*, 677 F.2d 180, 181–82 (2d Cir. 1981) (raunchy rendition of popular song not a fair use); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 753 (9th Cir. 1978) (adult comic book depiction of Disney characters not a fair use).

53. *Campbell*, 510 U.S. at 582–83 ("Whether . . . parody is in good taste or bad does not and should not matter to fair use." (citing Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)).

54. *Id.* at 590; Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685 (2015).

55. *See* Loren, *supra* note 54.

56. Leval, *supra* note 23.

whether and to what extent the new work is "transformative."[57]

The Court stated that it is "not absolutely necessary"[58] for a use to be transformative to be fair, but noted that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."[59] "Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space" in copyright law.[60] And "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."[61]

The Court recognized that "parody has an obvious claim to transformative value," and that it "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[62] Parody is a form of critical commentary with a long pedigree.[63] The Court cautioned that parodies would not always be fair, but the transformativeness of parodic uses weighed in favor of fair use.[64]

The Court's endorsement of Judge Leval's definition of transformativeness—whether the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message"[65]—has been highly influential, even if the phrase has come to have an almost Delphic oracular quality. Once a court accepts that a use is transformative, the defendant will no longer be subject to the dual negative *Sony* presumptions, and the weight given to the amount taken and the possibility of harm to the plaintiff's market will be mitigated.

*B. A Review of the Post-*Campbell *Case Law*

It was initially unclear how broad or narrow would be the range of possible uses that courts might deem to have a "transformative" purpose

---

57. *Campbell*, 510 U.S. at 579 (citations omitted) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (No. 4901) (C.C.D. Mass. 1841); Leval, *supra* note 23, at 1111).

58. The "not absolutely necessary" language has caused some commentators to express concern that courts might treat nontransformative uses as presumptively unfair. *See, e.g.*, Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 556 (2004).

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

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 579–81.

64. *Id.*

65. *Id.* at 579.

after the *Campbell* decision, or how closely courts would adhere to the many other directives described in the previous subsection.[66] This subsection will consider the evolution of the judicial interpretations of transformativeness in the past two decades, as well as the influence *Campbell*'s other contributions have had on the case law.

Campbell has come over time to be understood as including three types of uses within the transformativeness category.[67] *Campbell* exemplifies one type, that which involves the transformation of some expression from a pre-existing work, often in the course of preparing a critical commentary on it, such as a parody. A second type includes conventional productive uses. A biographer or historian who quotes the exact text from a subject's works to make a point about her temperament or historical significance would have "add[ed] something new"[68] and altered the meaning or message of the original. Productive uses have generally been held fair in the aftermath of *Campbell* as long as the defendants took no more than was reasonable in light of their transformative purpose.[69] A third type of transformative use case post-*Campbell* arises when the defendant uses the plaintiff's work for a different purpose than the original.

An exemplar of the different purpose cases is *Bill Graham Archives v. Dorling Kindersley Ltd.*,[70] in which the Second Circuit held that a publisher's use of seven images of Grateful Dead concert posters was fair use.[71] Because the book published by Dorling Kindersley (DK), *Grateful Dead: The Illustrated Trip*, reproduced the entirety of these seven posters and did not comment on them, Bill Graham Archives (BGA) argued the use was non-transformative.[72] Relying on Judge

---

66. *See, e.g.*, Diane L. Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y U.S.A. 251, 262 (1998).

67. *See, e.g.*, Samuelson, *Unbundling Fair Uses*, *supra* note 3, at 2544 n.40.

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

69. *See, e.g.*, Hofheinz v. A & E Television Networks, Inc., 146 F. Supp. 2d 442, 446–47 (S.D.N.Y. 2001) (ruling that unauthorized inclusion of copyrighted film clips in actor's biographical film was protected fair use because the biography "was not shown to recreate the creative expression reposing in plaintiff's [copyrighted] film, [but] for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business").

70. 448 F.3d 605 (2d Cir. 2006).

71. *Id.* The *Bill Graham Archives* case is arguably an example of a productive use case. However, the Second Circuit treated it as a different purpose case. Subsequent different purpose non-productive use cases have relied on *Bill Graham Archives* as a precedent. *See, e.g.*, White v. West Publ'g Corp., 29 F. Supp. 3d 396, 399–400 (S.D.N.Y. 2014) (uploading legal briefs to Westlaw database was a different purpose fair use).

72. *Bill Graham Archives*, 448 F.3d at 608–10. This is one of the cases that Besek criticized in her testimony to Congress. Besek Testimony, *supra* note 4, at 17. Bill Graham Archives ("BGA")

Leval's article and *Campbell*, the Second Circuit disagreed, saying "DK's actual use of each image is transformatively different from the original expressive purpose [of the posters]."[73] The court explained the different purposes:

> Originally, each of BGA's images fulfilled the dual purposes of artistic expression and promotion. The posters were apparently widely distributed to generate public interest in the Grateful Dead and to convey information to a large number [of] people about the band's forthcoming concerts. In contrast, DK used each of BGA's images as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip*'s timeline.[74]

The highly artistic nature of the concert posters might have seemed to weigh against fair use. However, with another citation to *Campbell*, the Second Circuit regarded this factor as "of limited usefulness where the creative work of art is being used for a transformative purpose."[75]

While copying the entirety of the posters might have weighed against fair use before *Campbell*, the Second Circuit, again quoting *Campbell*, noted that "the extent of permissible copying varies with the purpose and character of the use."[76] The court concluded that DK's use was "tailored to further its transformative purpose because DK's reduced size reproductions of BGA's images in their entirety displayed the minimal image size and quality necessary to ensure the reader's recognition of the images as historical artifacts of Grateful Dead concert events."[77]

Campbell's influence was also evident in the Second Circuit's analysis of the harm-to-the-market factor. BGA pointed out that DK had licensed other images for its Grateful Dead book and had been in negotiations with BGA to license the use of these seven posters in the book.[78] BGA claimed as market harm the lost license fees DK should have paid. The Second Circuit drew upon *Campbell* once again as support for its view that "a publisher's willingness to pay license fees for

---

was hoping the court would give a narrow interpretation to *Campbell* such that a failure to comment on the original and the copying of entire works would tilt against fair use. *Bill Graham Archives*, 448 F.3d at 609, 613.

73. *Bill Graham Archives*, 448 F.3d at 608–09 (citing Leval, *supra* note 23, at 1111; *Campbell*, 510 U.S. at 579).

74. *Id.* at 609.

75. *Id.* at 612 (citing *Campbell*, 510 U.S. at 586).

76. *Id.* at 613 (quoting *Campbell*, 510 U.S. at 586–87).

77. *Id.*

78. *Id.* at 614.

reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images."[79] In addition, the Second Circuit endorsed the view, which seems quite consistent with *Campbell*, that copyright owners do not have the right to monopolize transformative use markets.[80]

It is, of course, one thing to say that *Campbell* supports fair use defenses in cases involving quotations in non-fiction works and productive uses for context-setting purposes. It is quite another to affirm as fair the use of another's work as raw material for appropriation art creations. It is worth noting that prior to *Campbell*, the Second Circuit had been quite hostile to fair use claims in appropriation art cases.[81] However, after *Campbell*, the Second Circuit changed its tune.

In *Blanch v. Koons*,[82] a graphic artist made extensive use of a photograph of a model's legs from a commercial advertisement he found in a magazine. Koons scanned the image into a computer and manipulated it to incorporate it into a large canvas, which he sold to a German bank for hundreds of thousands of dollars.[83] Although the final product reproduced much of the photograph, the Second Circuit had no difficulty deciding that Koons had made a transformative use of Blanch's photo. Indeed, it stated that *Campbell*'s definition of transformativeness

> almost perfectly describes Koons's adaptation of "Silk Sandals": the use of a fashion photograph created for publication in a glossy American "lifestyles" magazine—with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details and, crucially, their entirely different purpose and meaning—as part of a massive painting commissioned for exhibition in a German art-gallery space.[84]

Even though Koons' use was seemingly more satirical than parodic—a distinction that *Campbell* had deemed significant, saying that satires were less justified than parodies in their appropriations—the Second Circuit, under the influence of *Campbell*, found Koons' substantial

79. *Id.* at 615 (stating that "being denied permission to use [or pay license fees for] a work does not weigh against a finding of fair use" (citing *Campbell*, 510 U.S. at 585 n.18)).

80. *Id.*

81. *See, e.g.*, Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

82. 467 F.3d 244 (2d Cir. 2006).

83. *Id.* at 247–48.

84. *Id.* at 253.

appropriation of images from Blanch's work qualified as fair.[85]

An even more striking Second Circuit appropriation art case, *Cariou v. Prince*,[86] has generated much controversy.[87] A well-known appropriation artist, Richard Prince, bought books of photographs taken by Patrick Cariou of Rastafarians and Jamaican landscapes in which they live. Prince used the photographs as raw materials for a series of paintings he designated as his Canal Zone paintings. The Gagosian gallery sold several of them for millions of dollars. Cariou sued for copyright infringement.[88]

In the District Court, Cariou scored a big victory.[89] Not only were Prince and Gagosian held liable for infringement of Cariou's derivative work right,[90] but the District Court ordered that the infringing paintings be impounded and destroyed.[91] In addition, Prince and Gagosian were ordered to notify owners of Canal Zone paintings that they would be liable for infringement if they tried to publicly display the paintings.[92]

Although Prince's lawyers argued that he had a transformative purpose in creating these paintings, the District Court rejected this argument because Prince's deposition testimony indicated that he was not trying to comment on Cariou's work.[93] The court granted summary judgment to Cariou, concluding that Prince had taken too much of these highly artistic photographs. It also found that the market for Cariou's work had been harmed, because a gallery owner withdrew an expression of interest in a show of Cariou's work after learning of Prince's Canal

85. *Id.* at 254–55.

86. 714 F.3d 694 (2d Cir. 2013).

87. *See, e.g.*, Kim J. Landsman, *Does* Cariou v. Prince *Represent the Apogee or Burn-Out of Transformativeness in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 321 (2014). Jane Ginsburg has criticized *Cariou* as "the boldest and most disturbing apparition of 'transformativeness.'" 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), *available at* http://ssrn.com/abstract=2539178.

88. *Cariou*, 714 F.3d at 698–99, 709.

89. Cariou v. Prince, 784 F. Supp. 2d 337, 355–56 (S.D.N.Y. 2011), *rev'd*, 714 F.3d 694 (2d Cir. 2013).

90. *Id.* at 354.

91. *Id.* at 355.

92. *Id.* at 356.

93. *Id.* at 348–49. The District Court also emphasized the commerciality of Prince's use of the Cariou photographs and regarded his use of the photographs as having been done in bad faith. *Id.* at 349–51. The Second Circuit did not address the bad faith issue, perhaps because of *Campbell*'s directive that good or bad faith is irrelevant to fair use determinations.

Zone series.[94]

The Second Circuit had a strikingly different view of the *Cariou* case than the District Court. At the oral argument, one of the judges likened the District Court's order to destroy Prince's art to "something that would appeal to the Huns or the Taliban."[95] Unlike the District Court, the Second Circuit found Prince's work to be transformative, saying that the District Court had an unduly narrow view of transformativeness:

> [O]ur observation of Prince's artworks themselves convinces us of the transformative nature of all but five . . . . Prince's artworks manifest an entirely different aesthetic from Cariou's photographs. Where Cariou's serene and deliberately composed portraits and landscape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince's crude and jarring works . . . are hectic and provocative . . . . Prince has created collages on canvas that incorporate color, feature distorted human and other forms and settings, and measure between ten and nearly a hundred times the size of the photographs. Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work.[96]

The artist's intent was not dispositive on the transformativeness inquiry, said the Second Circuit. The question was what a reasonable observer would perceive: was there a different message or meaning? If yes, then the work was transformative.[97]

As in *Blanch v. Koons*, the other fair use factors in *Cariou* were mitigated once the court accepted the transformativeness of Prince's purpose. Cariou and Prince were operating in entirely different markets, their works appealed to very different audiences, and in any event, Cariou would never have licensed the derivative uses that Prince had made of Cariou's photographs.[98] The case was remanded for further proceedings as to five of the Canal Zone series, and the parties settled after Cariou failed to persuade the Supreme Court to review the Second

94. *Id.* at 348–54.

95. *See, e.g.*, Brian Boucher, *Injunction in* Prince v. Cariou *Compared to Taliban in Appeal*, ART IN AM. (May 21, 2012), http://www.artinamericamagazine.com/news-features/news/price-cariou-oral-arguments/.

96. Cariou v. Prince, 714 F.3d 706 (2d Cir. 2013).

97. *Id.* at 707.

98. *Id.* at 709.

Circuit's ruling.[99]

Blanch and *Cariou* were transformative use cases in at least one conventional way: in each, the defendant created a second work that used portions of the plaintiffs' works and seemed fair uses because they allowed the breathing room for ongoing creativity that *Campbell* endorsed. But can a use be considered transformative if no second work has been created?

The short answer in the post-*Campbell* case law is yes. There have been a significant number of fair use cases in recent years in which differences between the purpose of the original work and the purpose of the use made by a putative fair user have been treated as transformative, even if the defendant was a commercial entity that made exact copies of the plaintiff's works.[100] Not all different purpose fair use defenses have succeeded, however.[101]

One successful different purpose case was *American Institute of Physics v. Schwegman, Lundberg & Woessner, P.A.*[102] There, a District Court found that patent lawyers had made fair uses of scientific and technical journal articles when copying and distributing the copies within the law firm (and to clients) for purposes of assessing the prior art in connection with drawing up patent applications for the clients.[103] The lawyers made exact copies of whole articles, and they charged clients for the work they did in analyzing the prior art.[104] The publishers argued that they were suffering market harm because the Copyright Clearance Center (CCC) could provide a reasonable licensing market for patent lawyers' uses of such articles.[105] Prior to *Campbell*, such a use might

99. *Id.* at 699, *cert. denied*, 134 S. Ct. 618 (2013); Randy Kennedy, *Richard Prince Settles Suit Over Photos*, N.Y. TIMES, Mar. 20, 2014, at C3. Judge Wallace wrote a partial concurrence, partial dissent in *Cariou* which questioned the majority's distinction between the twenty-five paintings it held to be fair use as a matter of law and the five that it remanded. *Cariou*, 714 F.3d at 713–14 (Wallace, J., concurring in part, dissenting in part); *see also* Amy Adler, *The Meaning of "Transformative" and the Transformation of Meaning* (manuscript on file with the author).

100. *See infra* Part II.C.

101. *See, e.g.*, Balsley v. LFP, Inc., 691 F.3d 747 (6th Cir. 2012) (use of nude photos in magazine not transformative); Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012) (secret celebrity wedding photos in gossip magazine not transformative); Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537 (S.D.N.Y. 2013) (excerpts of articles in news service search results not transformative).

102. No. 12-528 (RHK/JJK), 2013 WL 4666330 (D. Minn. Aug. 30, 2013).

103. *Id.* at *18; *accord* Am. Inst. of Physics v. Winstead PC, No. 3:12-CV-1230-M, 2013 WL 6242843, at *2, *13 (N.D. Tex. Dec. 3, 2013); *see also* White v. West Publ'g Corp., 29 F. Supp. 3d 396 (S.D.N.Y. 2014) (fair use for West to upload lawyers' briefs to the Westlaw database and make the briefs available for its customers to download).

104. *Schwegman*, 2013 WL 4666330, at *10–12.

105. *Id.* at *5, *14.

well have been held unfair.[106]

The court in *Schwegman* took note of the differences between the purpose of the original and the defendant's purpose, observing that scientific authors had not written the articles and the publishers hadn't distributed them "for the purpose of ensuring that a government agency is provided with the information it needs to determine whether an invention is novel or non-obvious."[107] The difference in purposes mattered for the court's fair use analysis.[108]

In keeping with *Campbell*, the court weighed the purpose in relation to the harm factor. The publishers, the court noted, had produced

> no evidence that the patent lawyers' use of the scientific Articles to meet their obligations to disclose prior art to the [U.S. Patent and Trademark Office (PTO)] adversely affects the traditional target market for these Articles, i.e., academics, physical scientists and researchers, engineers, educators, students, and members of the general public who want to read peer-reviewed scholarly, highly specialized articles about the physical sciences and other scientific disciplines.[109]

It did not matter to the court that licenses were available or that some law firms had taken licenses.[110] Calling upon the *Bill Graham Archives* case for support, the court ruled that the Schwegman firm had made fair uses of the articles.[111]

Schwegman is a far cry from the parody in *Campbell*, but not perhaps as far a cry as the set of recent cases involving search engines that copied hundreds of thousands or even millions of works for purposes of indexing their contents and enabling search inquiries to be run against that index. The Second and Ninth Circuits have decided such uses are not only fair, but also transformative, as illustrated by the next three

---

106. *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994) (making archival copies of scientific and technical articles for researchers held unfair, largely because CCC was offering licenses for this use).

107. 2013 WL 4666330, at *10.

108. The difference in purpose, the court concluded, "weighs heavily in favor" of fair use, although it recognized that the "lack of alteration may make the label 'transformative use' a messy fit for Schwegman's use." *Id.* at *10–11. The companion decision to *Schwegman* in *Winstead* spoke of that law firm's use as "transformative as evidence supporting a quasi-judicial decision." *Winstead*, 2013 WL 6242843, at *5.

109. *Schwegman*, 2013 WL 4666330, at *14.

110. *Id.*

111. *Id.* at *14–19. The court distinguished *Texaco*, 60 F.3d 913, because the research scientist in *Texaco* was using the articles for the same purpose as that for which they were written and published. *Schwegman*, 2013 WL 4666330, at *15.

cases.[112]

The Ninth Circuit initiated this line of cases in *Kelly v. Arriba Soft Corp*.[113] Kelly, a photographer who displayed some images on his website, sued Arriba Soft for copyright infringement because it had copied and was publicly displaying thumbnail-sized images of Kelly's photographs via its search engine.[114] Before *Campbell*, this infringement claim might have been plausible because the copying could have been said to be a commercial iterative copying of the whole of an artistic work; that Kelly wanted to license Arriba's use might have been given some weight as well.

Yet, relying on *Campbell* and some of its progeny, the Ninth Circuit upheld Arriba's fair use defense. "Arriba's use of the images serves a different function than Kelly's use—improving access to information on the internet versus artistic expression."[115] Because the thumbnails were small, low-resolution images, they were unlikely to supersede the market for Kelly's work. The Ninth Circuit took into account the public benefit of Arriba's use of Kelly's works, as well as the likely benefit for Kelly insofar as Arriba's thumbnails helped users find his website.[116] Four years later, in *Perfect10, Inc. v. Amazon.com, Inc.*,[117] the Ninth Circuit characterized another search engine's display of thumbnail images as "highly transformative"[118] and further emphasized the public benefit that search engines provide in support of its fair use ruling, with references to *Campbell* sprinkled throughout the court's analysis.[119]

Perhaps the most significant of the different purpose fair use cases is *Authors Guild, Inc. v. HathiTrust*.[120] The Authors Guild, some

112. *See also* A.V. *ex rel.* Vanderhye v. iParadigms LLC, 560 F.3d 630 (4th Cir. 2009) (fair use to create searchable database of student papers to detect plagiarism).

113. 336 F.3d 811 (9th Cir. 2003). June Besek has criticized the search engine cases as "radical." Besek Testimony, *supra* note 4, at 1–7.

114. *Kelly*, 336 F.3d at 815.

115. *Id.* at 819.

116. *Id*. at 820–22.

117. 508 F.3d 1146 (9th Cir. 2007).

118. *Id.* at 1165.

119. *Id.* ("[A] search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work."). The opinion cites to *Campbell* fifteen times.

120. 755 F.3d 87 (2d Cir. 2014). June Besek and Jane Ginsburg have been critical of the *HathiTrust* decision. Besek Testimony, *supra* note 4, at 18; Ginsburg, *supra* note 87, at 16–19. Currently pending before the Second Circuit is an appeal, No. 13-4829-cv (2d Cir.) (argued Dec. 3, 2014), of *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), a related case which challenges Google's scanning of millions of books for its Google Book Search project and

individual authors, and non-U.S. authors organizations sued HathiTrust and several of its public university partners for copyright infringement because HathiTrust had created a database of ten million books, of which perhaps up to seven million were in-copyright, from digitized copies of books from research library collections.[121] HathiTrust claimed fair use because the database was a full-text searchable information resource that allowed patrons to find books relevant to their research projects, because the database preserved books in partner institutions' collections, and because it used the database to make books accessible to print-disabled people.[122]

The Authors Guild challenged the lower court's characterization of the purpose of HathiTrust's use as transformative, pointing out that the HathiTrust corpus contained exact copies of the books and no new work had been created to justify the use, as in *Campbell*.[123] Although HathiTrust was a nonprofit entity, the Authors Guild argued that there was commerciality in its use because HathiTrust had swapped letting Google scan books from research library collections for a copy of the database of books that it scanned.[124] The Guild made much of two specific HathiTrust uses of the books in arguing, first, that HathiTrust's preservation copying unfairly exceeded the library privilege Congress had created in § 108 of the Copyright Act of 1976 ("1976 Act"), and, second, that HathiTrust's provision of access for print-disabled patrons went too far beyond what § 121 allows.[125] All of the Authors Guild's arguments on the purpose factor were unavailing.

The Second Circuit characterized the creation of a full-text searchable database as "a quintessentially transformative use," because it enabled word searches that yielded information about which books contained the sought-after information and on what page the references were to be

---

indexing their contents to serve up some snippets in response to user search queries. The District Court ruled that Google's use was fair. Authors Guild v. Google, 954 F. Supp. 2d at 293-94.

121. *See* Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 448 (S.D.N.Y. 2012), *aff'd in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014).

122. *Id.*

123. *See* Final Form Brief and Special Appendix for Plaintiffs-Appellants at 31–34, *HathiTrust*, 755 F.3d 87 (No.12-4547-cv).

124. *Id.* at 25–26.

125. *See id.* at 18–22; 17 U.S.C. §§ 108, 121 (2012). June Besek has criticized the *HathiTrust* decision for finding fair use despite the more limited privileges that §§ 108 and 121 provide. Besek Testimony, *supra* note 4, at 20–21. However, § 108(f)(4) specifically preserves the right of libraries to rely on fair use. Moreover, the legislative history of the 1976 Act gives enabling access to print-disabled persons as an example of a use that should be fair. H.R. REP. No. 94-1476, at 73 (1976).

found.[126] This was a very different purpose than authors had in mind when they wrote their books. Drawing upon *Campbell*'s formulation of transformation, the court noted that "by enabling full-text search, the [HathiTrust Digital Library (HDL)] adds to the original something new with a different purpose and a different character."[127]

The Second Circuit disagreed with the District Court, though, on the purpose factor in relation to providing access to works for print-disabled patrons. The lower court had considered the print-disabled purpose as transformative because the works were being made available in a different format (e.g., Braille) than the original.[128] The Second Circuit regarded this use as non-transformative,[129] but went on to find the use fair nonetheless.[130]

The Second Circuit regarded the copying of the books to be reasonably necessary to carry out the search and enhance print-disabled access functions.[131] It was unpersuaded by the Guild's licensing arguments and assertions of other types of harms.[132] The most important point was that

> full-text search function does not serve as a substitute for the books that are being searched. Thus, it is irrelevant that the Libraries might be willing to purchase licenses in order to engage in this transformative use (if the use were deemed unfair). Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original and the full-text-search use does not.[133]

The nature of the work factor was in *HathiTrust*, as in so many other cases, given little weight. The Second Circuit decided that on balance

---

126. *HathiTrust*, 755 F.3d at 97.

127. *Id.*

128. Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 461 (S.D.N.Y. 2012), *aff'd in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014).

129. *HathiTrust*, 755 F.3d at 101–02. The Authors Guild had claimed that the transformed format of the works was an unlawful derivative work. *Id.* The Second Circuit rejected that argument. *Id.*; *see also* Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73 (2d Cir. 2014) (nontransformative commercial use of contents of telephone call as news was fair use).

130. *HathiTrust*, 755 F.3d at 101–02. Legislative history of the 1976 Act and the purposes underlying the American Disabilities Act supported the positive valence of the purpose of the use, even though it was non-transformative. *Id.* at 102.

131. *Id.* at 98–99, 103–04.

132. *Id.* at 99–100. The Guild made much of the risk of a security breach that might cause millions of books to be released onto the Internet. The Second Circuit was unimpressed.

133. *Id.* at 100 (citations omitted) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591–92 (1994); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614 (2d Cir. 2006)).

HathiTrust's uses were fair.[134]

There are at least five notable things about the *HathiTrust* ruling. First, the court viewed the full-text search use as transformative because it considered the HathiTrust database itself as a new work that had a different purpose than the books in it.[135] Second, the court accepted the Guild's argument that improving access to print-disabled persons was a non-transformative use; yet, it went on to find the use fair anyway.[136] Third, the court thought so little of the Guild's beyond-the-library-privilege argument that it consigned the point to a footnote, and it did not even mention the beyond-the-statutory-exception-for-print-disabled argument.[137] Fourth, the court focused the harm analysis as to the transformative use on whether the use supplanted demand for the original, and if not, that factor tipped in favor of fairness.[138] Fifth, the scale and scope of copying in the *HathiTrust* case was beyond what had been deemed fair in other cases.[139] The Second Circuit has opened the door to mass digitization, at least by libraries, insofar as this will further the progress of science. The Second Circuit called upon *Campbell* numerous times in the *HathiTrust* opinion,[140] but took fair use in some new directions in that ruling.

Campbell has understandably had considerable salience in transformative use cases. Yet courts have sometimes relied heavily upon it in non-transformative work cases. In *Cambridge University Press v. Patton*,[141] for instance, the Eleventh Circuit repeatedly drew upon *Campbell* for a substantial number of propositions: that fair use "critically limits the scope" of copyright "in order to promote the public

134. *HathiTrust*, 755 F.3d at 105 (finding creation of a full-text searchable database and disabled-access format to be fair use). However, the Second Circuit vacated and remanded the lower court ruling of fair use as to digitizing works for the purpose of preservation. *Id.* The parties then settled. *See, e.g.*, Krista Cox, Authors Guild v. HathiTrust *Litigation Ends in Victory for Fair Use*, ASS'N OF RES. LIBRARIES (Jan. 8, 2015), http://www.arl.org/news/community-updates/3501-authors-guild-v-hathitrust-litigation-ends-in-victory-for-fair-use#.VQ2Qr-Fmppk.

135. *HathiTrust*, 755 F.3d at 97.

136. *Id.* at 101–02.

137. *Id.* at 94 n.4, 103 n.7.

138. *Id.* at 96–97.

139. *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994) (holding that making eight archival copies of scientific and technical articles for future reference by a Texaco researcher was unfair).

140. *Campbell* is cited and/or quoted fourteen times in the Second Circuit's *HathiTrust* opinion.

141. 769 F.3d 1232 (11th Cir. 2014). The Eleventh Circuit cited to *Campbell* fifteen times in its *Patton* opinion. The *Patton* decision is yet another that Jane Ginsburg has criticized as insufficiently attentive to harm to potential licensing markets. Ginsburg, *supra* note 87, at 5–9.

benefit";[142] that fair use provides "breathing space" and "avoid[s] rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster";[143] that courts should not adopt "hard evidentiary presumption[s]" in fair use cases;[144] that fair use is to be judged case-by-case with a sensitive balancing of interests;[145] and that fair use factors must be weighed together and weighed in relation to one another,[146] just to name a few.

Cambridge University Press (CUP) challenged the electronic course reserves policy of Georgia State University (GSU), under which many faculty members had posted digital copies of book chapters on the library servers or on course management sites to make the chapters accessible to their students. Professors routinely filled out fair use checklists before putting these chapters online. After a trial on the merits, a District Court decided that all but five of the seventy-five challenged uses of the plaintiffs' books were fair.[147] CUP appealed, and although it prevailed in the appeal, it did not attain as strong a victory as it had hoped.[148] *Campbell* seems to have played at least some role in CUP's narrower win.[149]

The Eleventh Circuit accepted that posting exact copies of book chapters generally served non-transformative purposes, although interestingly it recognized the possibility that some of the excerpts could serve transformative purposes (e.g., teaching about the civil rights movement by examining materials written by racists).[150] The non-

142. *Patton*, 769 F.3d at 1257 (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994)).

143. *Id.* (quoting *Campbell*, 510 U.S. at 579, 577).

144. *Id.* at 1261 (alteration in original) (citing *Campbell*, 510 U.S. at 584).

145. *Id.* at 1259 (citing *Campbell*, 510 U.S. at 577).

146. *Id.* at 1260 (citing *Campbell*, 510 U.S. at 578, 586).

147. Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1237 (11th Cir. 2014), *rev'g* Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012). The district court ruled that instances in which a digital license was readily available for an excerpt weighed in favor of the publishers. *Becker*, 863 F. Supp. 2d at 1239.

148. Andrew Albanese, *Appeals Court Reverses GSU Copyright Ruling*, PUBLISHERS WKLY. (Oct. 20, 2014), http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/64454-appeals-court-reverses-gsu-copyright-ruling.html.

149. The plaintiff-publishers relied on earlier case law that had ruled unfair the copying of book chapters and articles by commercial copy-shops for hard-copy student course-packs because ready licensing markets existed. *See Patton*, 769 F.3d at 1260–61 (citing Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991) and Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1383 (6th Cir. 1996) (en banc)); *id.* at 1276–77 (citing Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929, 931 (2d Cir. 1994)).

150. *Patton*, 769 F.3d at 1263 n.21.

transformative character of the uses, however, did not weigh against fair use as much as CUP expected. The nonprofit educational purpose was "sufficiently weighty" to overcome the non-transformative character of the use.[151] The court noted that "multiple copies for classroom use" is specifically identified in the statute as one that may qualify for fair use.[152]

On two grounds, however, the Eleventh Circuit took issue with the District Court's fair use analysis. The District Court had been too quick to regard the informational nature of the works posted online for students as weighing, across the board, in favor of fair use.[153] The Eleventh Circuit remanded the case for reconsideration of the nature of the work factor because it was possible that at least some of the posted materials were "evaluative, analytical, or subjectively descriptive" and assigned for their expressive value.[154]

The Eleventh Circuit also decided that the District Court's "blanket 10 percent-or-one-chapter benchmark [for the amount-taken fair use factor] was improper"[155] because it was inconsistent with *Campbell*'s critique of hard evidentiary presumptions in fair use cases.[156] The Eleventh Circuit remanded the case for reconsideration so that the amount taken would be judged individually rather than by a blanket rule. The question for each excerpt would be whether the amount copied was "excessive in relation to Defendants' pedagogical purpose of the work," taking into account the quantity and quality of the materials.[157] *Campbell*'s nuanced approach to the amount factor was evident in the Eleventh Circuit's fair use assessment.

The Eleventh Circuit recognized that non-transformative character of the online course materials made "the threat of market substitution . . . great," again with a tip of the hat to *Campbell*.[158] The harm factor had, however, to be considered in relation to the other factors, as *Campbell* directed. The Eleventh Circuit agreed with the District Court that "the small excerpts Defendants used do not substitute

151. *Id.* at 1267.

152. *Id.* (quoting 17 U.S.C. § 107 (2012)). The court further noted that *Campbell* had recognized this type of non-transformative use as possibly fair. *Id.* at 1263.

153. *Id.* at 1269–70.

154. *Id.* at 1270.

155. *Id.* at 1271.

156. *Id.* at 1272.

157. *Id.* at 1275.

158. *Id.*

for the full books from which they were drawn."[159] CUP argued that the willingness of the CCC to develop licenses for online course materials, as it had done for coursepacks, meant that the unlicensed use of these materials was causing harm to the plaintiffs' markets for these works.

However, the Eleventh Circuit took a more nuanced view of the harm issue: that CUP would suffer some loss of revenue was not sufficient. The question instead was whether the defendants' use "would cause *substantial* economic harm such that allowing it would frustrate the purposes of copyright by materially impairing . . . incentive[s] to publish the work."[160] The Eleventh Circuit deferred to the District Court's finding that licenses were unavailable for many of the excerpts as a factor undercutting CUP's market harm argument.[161] The court nevertheless remanded for further consideration of the market harm factor in relation to the other factors.

In sum, *Campbell* has had transformative impacts on the fair use case law in numerous ways: by repudiating the dual negative presumptions from *Sony*; directing courts to weigh factors more sensitively, both internally and in relation to the other factors; appreciating the creativity of many secondary uses of copyrighted materials; endorsing the role of fair use in providing breathing space for second comers' creativity; recognizing that uses of works for different purposes than the original might qualify as fair; and focusing attention on market substitution as the harm that copyright law cares about.

II. HAS FAIR USE GONE TOO FAR?

Part I has shown how influential *Campbell* has been in the fair use case law of the past two decades. Many commentators seem satisfied with its impacts on fair use law and jurisprudence.[162] Let's count them as supporters of the post-*Campbell* status quo. While the status quo commentators are numerous, there are some commentators who think that *Campbell* or some of its progeny do not go far enough.[163] They want fair use to expand further to protect interests they regard as in need of this doctrine's protection. Let's call these commentators the status-quo-plus group. We will visit in Part III some new horizons into which they

159. *Id.* at 1276.

160. *Id.* (emphasis in the original).

161. *Id.* at 1278–82.

162. *See, e.g.*, sources cited *supra* note 3.

163. *See, e.g.*, Amy Adler, *supra* note 99; John Tehranian, *Et Tu, Fair Use? The Triumph of Natural Law Copyright*, 38 U.C. DAVIS L. REV. 465, 497–99 (2005); Tushnet, *supra* note 58.

and others think that fair use should expand and play important roles.

There is, however, a vocal group of critics who think fair use has gone too far. They have raised three principal challenges to the post-*Campbell* fair use case law: that courts have been too quick to treat the copying of the whole of copyrighted works as fair uses; that copying for a different purpose than the author of a protected work had at the time of creation or dissemination should not be considered transformative; and that fair use rulings as to transformative uses of expression in copyrighted works are undermining the derivative work right.[164] These critics are urging the courts, Congress, and seemingly the World Trade Organization to cut back on U.S. fair use law.[165]

The principal purpose of this Part is to respond to those who argue for a substantial curtailment of the fair use defense in the post-*Campbell* era.[166] Section A explains why criticisms of the whole-work-fair-use copy cases are unpersuasive. Section B addresses the perceived conflict between the transformation-of-expression fair use cases and the derivative work right. Section C considers criticisms of the different purpose cases. Section D responds to the charge that fair use has gone so far that the U.S. is in violation of its obligations under international treaties and trade agreements.

A. Faulting Sony *for the Whole Work Fair Use Cases*

Campbell itself has not been the target of the fair-use-has-gone-too-far critics. It is, after all, a relatively conventional case involving the creation of a new work that appropriated some parts of a preexisting work in a manner that can reasonably be construed as a critical commentary on the original.

Sony v. Universal is the Supreme Court decision that the gone-too-far

---

164. *See, e.g.*, Besek Testimony, *supra* note 4; Ginsburg, *supra* note 87; Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 442 (2008). See also other critiques cited in Jessica Litman, Campbell *at 21*/Sony *at 31*, 90 WASH. L. REV. 651 (2015). Besek has also complained that fair use is "swallowing" up specific copyright exceptions. Besek Testimony, *supra* note 4, at 10–11. I addressed that critique in Samuelson, *infra* note 248.

165. *See, e.g.*, Besek Testimony, *supra* note 4, at 12–14; Ginsburg, *supra* note 87, at 13–14.

166. Although the gone-too-far commentators have criticized the *CUP v. Patton* decision, *see, e.g.*, Ginsburg, *supra* note 87, at 5–9, I have not addressed that critique in this Part for a few reasons. First, the Eleventh Circuit reversed the lower court's ruling, and remanded for further proceedings, so we really do not know which uses will ultimately be deemed fair or unfair. Second, the fact that the publishers would have preferred a bigger win is not a basis for claiming that fair use has gone too far. Third, despite the many citations to *Campbell* in the Eleventh Circuit's decision, that non-transformative use case is not as central a part of *Campbell*'s legacy as the cases defended in this Part. *Sony* is a more closely analogous case, as it also involved non-transformative copying.

critics typically regard as the one that caused fair use to go off the rails.[167] It is true, as they claim, that before *Sony*, it was rare for courts to say that copying the whole of a protected work could be a fair use.[168] And it is true that in recent decades, as Professor Reese has shown in his symposium contribution, courts have found fair use in several cases involving whole work copies.[169] The search engine cases, along with some recent cases that have ruled copying broadcast programs were fair use[170]—of which the critics also disapprove[171]—owe a much bigger debt to *Sony* than to *Campbell*.

The attack on *Sony* is, however, misguided for several reasons. For one thing, the Latman fair use study that informed the Register's recommended codification of fair use identified private and personal use copies as among the uses that might find shelter under the codified fair use umbrella,[172] so while it may be true that few fair use cases had recognized whole copies as fair, that does not mean no one had contemplated that whole copies might sometimes be fair. As Professor Litman explains in her contribution to this symposium, there is considerable evidence in the legislative history of U.S. copyright laws that Congress did not intend to regulate personal use copies.[173]

The Latman study also contemplated that whole work copies might be fair in litigation and judicial proceedings.[174] The House Report accompanying the 1976 Act also gave several examples of whole work fair use copies, such as those that would preserve motion pictures or provide special format copies for the blind.[175]

Moreover, three of the six favored uses in the codified statute—teaching, research, and scholarship—contemplate at least some whole

---

167. *See, e.g.*, Jane C. Ginsburg, *Fair Use for Free or Permitted-But-Paid*, 29 BERKELEY TECH. L.J. 1383, 1383 (2014).

168. *Id.*

169. Reese, *supra* note 38.

170. Fox Broad. Co., Inc. v. Dish Network L.L.C., 723 F.3d 1067 (9th Cir. 2013) (time- and space-shifting); Fox News Network LLC v. TV Eyes, Inc., 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (news aggregation database service).

171. *See, e.g.*, Besek Testimony, *supra* note 4, at 17 (criticizing the *Perfect10 v. Amazon.com* decision as a "radical shift" in fair use law); Ginsburg, *supra* note 87, at 13–15 (criticizing *Fox v. Dish*); Ginsburg, *supra* note 167, at 1413 (giving the search engine cases as examples of uses that should perhaps be permitted, but only if subject to compensation).

172. ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS 11 (1958), *reprinted in* STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, S. JUDICIARY COMM., 81ST CONG., COPYRIGHT OFFICE STUDY NO. 14, COPYRIGHT LAW REVISION (Comm. Print 1960).

173. Litman, *supra* note 164.

174. LATMAN, *supra* note 172, at 13–14.

175. H.R. REP. No. 94-1476, at 73 (1976).

work copies, and the statute even contemplates multiple copies for classroom use as potentially fair.[176] In addition, Congress codified a privilege for libraries to make whole work copies of journal articles for patrons,[177] the very issue on which the Court had evenly split in the *Williams & Wilkins v. United States* fair use case.[178] Thus, there is considerable evidence that Congress contemplated that the copying of the whole of copyrighted works could be fair use, evidence that the critics of *Sony* ignore.

Although the Supreme Court was deeply split in *Sony* on whether time-shifting was fair use, twenty-one years later the Court was unanimous in regarding time-shifting as fair use; indeed, the Court seemed to think that copying programs to store them for personal use might well be fair.[179] The Court was, however, mindful in *Sony* of the possibility that the copying of whole works could be harmful. To ensure *Sony* would not be too broadly construed, the Court directed that consideration be given to the market impact if the challenged use became widespread.[180] This recognized that if a court ruled a particular use by this defendant was fair, it would set a precedent on which others could rely. Thus, even though that one defendant's use might not cause meaningful harm to the market, the same or similar uses by hundreds, thousands, or even millions of people might cause such harm, and that would tip an individually minimal harm use into a harmful one as to the multitudes. This check was important in some post-*Campbell* peer-to-peer file-sharing and news clipping cases.[181] The Court in *Sony* sought to craft a careful balance between the interests of rights holders in controlling harmful uses of their works and the interests of users of copyrighted works in harmless activities.

The *Authors Guild, Inc. v. HathiTrust* decision is another of the whole

---

176. 17 U.S.C. § 107 (2012).

177. *Id.* § 108(a).

178. Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

179. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 545 U.S. 913, 931 (2005).

180. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

181. BMG Music, Inc. v. Gonzalez, 430 F.3d 888 (7th Cir. 2005); Associated Press v. Meltwater, 931 F. Supp. 2d 537 (S.D.N.Y. 2013). The directive in *Sony* to consider the potential harm to the market if the use became widespread serves as an important built-in check on the scope of fair use that should preserve it against those who claim that *Sony* is among the cases that puts the U.S. out of compliance with its treaty obligations. *But see*, *e.g.*, Goldstein, *supra* note 164, at 442 (claiming that the fair use analyses in the *Sony*, *Bill Graham Archives*, and *Perfect 10* cases violate the Berne Convention's minimum standards). For more discussion of the treaty compliance issue, see *infra* Part II.D.

work copy cases that has been criticized as going too far.[182] That Second Circuit decision may have cited more prolifically to *Campbell* than to *Sony*, but *Sony* seems to be the more relevant holding. Still, the indexing in that case was no more infringement than was the indexing in the *New York Times v. Roxbury Data Interface* case from the 1970s.[183] The preservation and print-disabled access functions of the HathiTrust database seem consistent with the preservation and print-disabled access that the House Report contemplated as fair uses.[184] And because HathiTrust does not display any contents of the in-copyright books in its corpus (except to those who have been certified as print-disabled), the risk of supplanting demand for the original is non-existent.[185]

In sum, the criticisms of *Sony* and *Campbell* for permitting whole-work-copies as fair uses are misguided because Congress contemplated that such uses might be fair, because *Sony* directed courts to consider the potential for harm if small uses became widespread, and because *Campbell* provided that the amount copied must be reasonable in light of the defendant's purpose, which also serves as a meaningful check on the scope of fair use.

B. Transformation of Expression Cases

Of the recent transformation-of-expression fair use cases, only *Cariou v. Prince* has been singled out for censure.[186] The main critique lodged against that decision has been that it undermines the exclusive right of authors to make derivative works. Judge Easterbrook, for instance, took a swipe at *Cariou* in a recent decision in another transformation-of-expression case, saying that he was skeptical of the approach in *Cariou* "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."[187] Yet, his *Kienitz* decision ultimately affirmed a lower court ruling that Sconnie Nation had made

182. *See, e.g.*, Besek Testimony, *supra* note 4, at 10–11; Ginsburg, *supra* note 167, at 1398.

183. 434 F. Supp. 217 (D.N.J. 1977).

184. *See supra* note 175 and accompanying text.

185. A prominent economist prepared an expert report to explain why a viable market for the uses that HathiTrust was making of in-copyright books would be unlikely to form. Declaration of Joel Waldfogel in Support of Defendants' Motion for Summary Judgment, Authors Guild Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012) (No. 11 Civ. 6351), *available at* http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2011cv06351/384619/108 [hereinafter Waldfogel Declaration].

186. *See, e.g.*, Ginsburg, *supra* note 87, at 19.

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

fair use of Kienitz' photograph of the mayor of Madison, Wisconsin, by creating a colorful version for a protest t-shirt that mocked the mayor for trying to shut down a street fair.[188]

It is notable that both the *Cariou* and *Kienitz* cases involved commercial uses of transformed-expression that posed zero risk of supplanting demand for the plaintiffs' original works. Both cases, moreover, involved transformations that the plaintiffs would have been unwilling to license. The Second Circuit's decision in *Cariou* might have been somewhat more persuasive had the court observed that the photographer's objections to Prince's uses of his work were implicitly moral rights objections, which Congress had decided not to extend to the photographs published in Cariou's books.[189] There was, in addition, a moral rights element in the *Kienitz* case that also tipped in favor of fair use. Kienitz may have wanted to assure clients that he would not license disrespectful uses of his photographs,[190] but the clients' and his interests in avoiding critical comment are not cognizable under U.S. law. In these respects, the *Cariou* and *Kienitz* cases seem consistent with *Campbell*. And it is also worth noting that the Supreme Court was not so outraged by the *Cariou* decision as to grant the photographer's petition for certiorari.[191]

Although critics of the transformed-expression cases seem to think that the cases ride roughshod over the derivative work right, the post-*Campbell* case law, when viewed more closely and holistically, suggests otherwise. For example, plaintiffs won two recent cases involving photographs of the musician Sid Vicious that defendants transformed into colorful paintings, which the courts ruled were unfair, perhaps because of their non-critical nature.[192] In a third transformed-expression case, the defendant lost a summary judgment motion for creating a montage of two photographs—the iconic photograph of the planting of a flag at Iwo Jima with another photograph of the hoisting of a flag at the ruins of the World Trade Center—that was posted on a Facebook page.[193] These cases are consistent with Professor Reese's findings some years ago that transformative purpose cases were not, contrary to some

188. *Id.* at 757, 759–60.

189. 17 U.S.C. § 106A(c)(3) (2012).

190. *Kienitz*, 766 F.3d at 759–60.

191. Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

192. Morris v. Guetta, No. LA CV12-00684 JAK (RZx), 2013 WL 440127 (C.D. Cal. Feb. 4, 2013); Morris v. Young, 925 F. Supp. 2d 1078 (C.D. Cal. 2013).

193. North Jersey Media Grp., Inc. v. Pirro, No. 13 Civ. 7153, 2015 WL 542258 (S.D.N.Y. Feb. 10, 2015).

expectations, undermining the derivative work right.[194]

C. Different Purpose Fair Uses

The critics of fair use object to the different purpose cases because they say that having a different purpose than the creator should not make uses fair if licensing markets are possible.[195] They are correct in thinking that there have been quite a few different purpose cases in recent years. Indeed, sixteen of the fifty fair use cases decided in the past three years involved claims that the difference between the purpose of the original work and the purpose of the defendant's use should weigh in favor of fair use.[196] Each will be reviewed in this subsection. In most of these cases, the courts cited to *Campbell* in support of treating different purposes as transformative, even though the gone-too-far critics are correct that the ordinary meaning of "transformative" would not encompass the iterative copies made in those cases.[197] Yet that does not mean that all of the defense wins in the different purpose cases were wrongly decided.

Consider these seven cases. Lawyers who copied the CV of a prospective expert witness—who later became disgruntled because he was not actually hired as an expert—made fair use of the CV when distributing it to the court and opposing counsel in pre-trial proceedings.[198] Officials of a state bar association prevailed in a fair use defense for copying portions of a lawyer's blog to use in disciplinary proceedings against her.[199] Use of excerpts from the plaintiff's book in pleadings to support a harassment claim was similarly ruled fair use.[200] A blogger won a fair use defense for posting an unflattering photo of a businessman in connection with her extensive criticism of his business practices.[201] eBay won a fair use defense to quash a photographer's

194. R. Anthony Reese, *Transformative Use and The Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008).

195. *See, e.g.*, Besek Testimony, *supra* note 4, at 5–9; Ginsburg, *supra* note 167, at 1385, 1413.

196. *See* Appendix A for a complete listing of the fifty fair use cases decided in the past three years from the WestlawNext database covering the period March 2012 to March 2015.

197. See *infra* Part III.A where I recommend removing the different purpose cases from the transformative category. I agree with Tushnet, *supra* note 3, that different purpose cases should often qualify as fair uses.

198. Devil's Advocate, LLC v. Zurich Am. Ins. Co., No. 1:13-cv-1246, 2014 WL 7238856 (E.D. Va. Dec. 16, 2014).

199. Denison v. Larkin, No. 1:14-cv-01470, 2014 WL 3953637 (N.D. Ill. Aug. 13, 2014)

200. Levington v. Earle, No. CV-12-08165-PCF-JAT, 2014 WL 1246369 (D. Ariz. Mar. 26, 2014).

201. Katz v. Chevaldina, No. 12-22211-CIV, 2014 WL 2815496 (S.D. Fla. June 17, 2014), *aff'd*

claim of infringement based on user displays of images of his photographs when users were trying to resell magazines on whose front cover the photographs appeared.[202] An architect made fair use of a sculpture when taking a photograph for his portfolio of an elaborate hallway he had designed for a condominium that included the plaintiff's art glass creation.[203] Sony won a fair use defense for using "the past is not even past" phrase from a Faulkner novel in its *Midnight in Paris* movie.[204]

Plaintiffs won four cases in the past three years in which different purpose fair use defenses were mounted. A conservative group's use of a photograph of a gay couple kissing for its political ads aimed at defeating pro-gay rights candidates in a Colorado election was held unfair.[205] Hustler Magazine made unfair use of a photograph of a nearly nude former news anchor who got drunk at a beer bash for its "hot news babes" feature.[206] A celebrity gossip magazine lost its fair use defense for publishing some wedding photos of a popular singer who had held herself out as a single person.[207] A news clipping service made unfair use of AP news by copying too much, posing a risk of supplanting demand for the original.[208]

The remaining five different purpose cases from the past three years

---

& adopted by 2014 WL 4385690 (S.D. Fla. Sept. 5, 2014). The court took into account that the businessman had purchased the copyright so he could force the blogger to take down the photo. *Id.* at *1–2.

202. Rosen v. eBay, No. CV 13-6801 MWF (Ex), 2015 WL 1600081 (C.D. Cal. Jan. 16, 2015).

203. Neri v. Monroe, 11-cv-429-slc, 2014 WL 793336 (W.D. Wisc. Feb. 25, 2014).

204. Faulkner Literary Rights LLC v. Sony Picture Classics, 953 F. Supp. 2d 701 (N.D. Miss. 2013). This would ordinarily be a productive use case, but the court treated it as a different purpose case.

205. Hill v. Pub. Advocate of the U.S., 35 F. Supp. 3d 1347 (D. Colo. 2014). The Hill plaintiffs lost their privacy claim because the court considered the photograph newsworthy. *Id.* at 1357.

206. Balsley v. LFP, Inc., 691 F.3d 747 (6th Cir. 2012). Balsley purchased the copyright in the photos first published on a website so she could use the copyright to quash further dissemination of the photos.

207. Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012). It was not at all clear that Monge actually owned copyrights in the photos as they were of her and her spouse which someone in her entourage probably took. I have elsewhere expressed some qualms about the *Hill*, *Balsley*, and *Monge* decisions because they seem to me to be cases in which copyright claims were being asserted to accomplish non-copyright objectives, such as privacy interests. *See* Pamela Samuelson, *Protecting Privacy Through Copyright?*, *in* VISIONS OF PRIVACY IN THE MODERN AGE (Marc Rotenberg, ed., forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435288.

208. Associated Press v. Meltwater, 931 F. Supp. 2d 537 (S.D.N.Y. 2013). Meltwater relied on the search engine cases, but the court thought Meltwater's use was not as different in purpose as the use in those cases.

are the controversial ones. Two are Google Book Search cases; two others are publisher lawsuits against patent lawyers for copying articles in preparation of patent applications; and the fifth is the failed class action lawsuit against West Publishing for uploading lawyers' briefs to its Westlaw database.[209] Because the Book Search and patent lawyer lawsuits pose virtually identical issues, there are only three controversial different purpose fair use cases. Even if they were wrongly decided—which I don't believe they were—they hardly demonstrate such an egregious extension of fair use as to trigger claims that the U.S. is out of compliance with its treaty obligations.

Consider first the *White v. West Publishing*[210] case. White filed a class action lawsuit against West and Reed Elsevier, owner of the Lexis database, asserting that these firms' downloading of documents, including his and other lawyers' briefs filed in court cases, from the federal court PACER site and uploading them into the legal databases constituted infringement.[211] The District Court found the defendants' purposes to be transformative for two reasons: first, because the database providers had a different purpose than White in making briefs part of its interactive legal research tools, and second, because the firms added something new by inserting codes and links to these legal documents.[212] The nature of the work was said to be the "functional presentations of fact and law" which also favored fair use.[213] Whole briefs were copied, but this was necessary to make the briefs searchable.[214] The briefs were "in no way economically a substitute for the use of the briefs in their original market."[215] There was, in the court's view, no secondary market

209. The Google Book Search cases are: Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *argued*, No. 13-4829-cv (2d Cir. Dec. 3, 2014); and Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014), *aff'g in part, vacating in part*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012). The patent lawyer cases are: Am. Inst. of Physics v. Winstead PC, No. 3:12-CV-1230-M, 2013 WL 6242843 (N.D. Tex. Dec. 3, 2013) and Am. Inst. of Physics v. Schwegman, Lundberg, & Woessner, P.A., No. 12-528 (RHK/JJK), 2013 WL 4666330 (D. Minn. Aug. 30, 2013). The Westlaw database case is White v. West Publ'g Corp., 29 F. Supp. 3d 396 (S.D.N.Y. 2014).

210. 29 F. Supp. 3d 396.

211. One problem for White's class action was that very few U.S. lawyers have registered their briefs and other court documents with the Copyright Office. *White*, 29 F. Supp. 2d at 397. But it is also questionable whether White would or could adequately represent the interests of all lawyers who had filed documents with PACER since many of them might well find the availability of briefs on Westlaw and Lexis to be beneficial.

212. *Id.* at 398.

213. *Id.* at 399.

214. *Id.*

215. *Id.* at 400.

for the briefs, and White himself had never tried to license their use before bringing the lawsuit.[216] The court also pointed to the "prohibitively high" transaction costs that a victory for White would entail.[217] Such a ruling would also put lawyers at risk for making copies of other lawyers' briefs to share with colleagues as well as public interest groups, such as the Electronic Frontier Foundation, and journalistic enterprises, such as SCOTUSblog, for posting significant briefs online. The District Court's decision in *White* seems quite sensible in light of these considerations.[218]

Consider next the *Winstead*[219] and *Schwegman* cases. The American Institute of Physics (AIP) sought to hold these law firms liable for copyright infringement because of copies their lawyers made of scientific and technical articles in connection with preparation of patent applications.[220] A significant factor in both cases was that federal regulations require that patent lawyers submit copies of prior art documents so that patent examiners will have relevant information about the state of the art so they can make good judgments about whether the claimed inventions are novel and nonobvious.[221] Initially, AIP claimed infringement for the copies submitted to the PTO, but later withdrew these claims, focusing only on the copying within the firms and with clients.[222] The courts in both cases ultimately concluded that these copies too were made to comply with PTO requirements.[223] The court in *Schwegman* likened these copies to fair use copies made of documents for litigation purposes, noting that the lawyers were indifferent to the expression in the articles, caring only about the facts and ideas they contained.[224] The court in *Winstead* spoke of the public benefit of the lawyer copying as "minimiz[ing] excessive costs in patent applications and maximiz[ing] the accuracy of the patent process."[225] Given that many countries have specific exceptions for copying in connection with

---

216. *Id.*

217. *Id.*

218. *White* is not one of the decisions that the gone-too-far critics point to as a treaty violation.

219. Am. Inst. of Physics v. Winstead, 3:12-CV-1230-M, 2013 WL 6242843 (N.D. Tex. Dec. 3, 2013).

220. *Id.* at *1; Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A., CIV. 12-528 RHK/JJK, 2013 WL 4666330, at *2 (D. Minn. Aug. 30, 2013)..

221. *Winstead*, 2013 WL 6242843, at *1; *Schwegman*, 2013 WL 4666330, at *2–3.

222. *Winstead*, 2013 WL 6242843, at *9; *Schwegman*, 2013 WL 4666330, at *7.

223. *Schwegman*, 2013 WL 4666330, at *10.

224. *Id.* at *11–12.

225. 2013 WL 6242843, at *12.

administrative and judicial proceedings,[226] it seems unlikely that the *Schwegman* and *Winstead* cases would put the U.S. out of compliance with treaty obligations.

That leaves us with the *Authors Guild, Inc. v. Google* and *HathiTrust* decisions.[227] One purpose of the copying in *HathiTrust* was to preserve books in research library collections.[228] Other countries have copyright exceptions that allow libraries to make preservation copies of works in their collections.[229] A second purpose of HathiTrust's copying was to enhance access to books for print-disabled persons,[230] which is also an internationally-recognized social norm.[231] Both HathiTrust and Google use the corpus of books they possess for data-mining purposes,[232] an activity for which some countries have adopted specific exceptions.[233] Because HathiTrust does not display the contents of in-copyright books to non-print-disabled patrons, there can be no harm to the market for these books. Although Google makes up to three snippets of book contents available in response to search queries, the snippets do not supplant demand for the books; indeed, they may whet users' appetite for the books because Google provides a link to sources from which users can purchase the books. It is, moreover, unrealistic to expect a licensing market to develop for authorizing these very limited uses with owners of copyrights in millions of books.[234]

This subsection has reviewed several types of different purpose fair use cases. In some, fair use defenses have failed, which shows that having a different purpose than the plaintiff is not a guarantee that a challenged use will be fair. Where different purpose defenses have succeeded, the risks that the defendants' uses would supplant market

---

226. *See, e.g.*, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 5.3(e), 2001 O.J. (L 167) [hereinafter InfoSoc Directive].

227. *See supra* notes 120–140 and accompanying text for further discussion of these two cases.

228. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 92 (2d Cir. 2014).

229. *See, e.g.*, InfoSoc Directive, *supra* note 226, art. 5.2(c); Case C-117/13, Technische Universität Darmstadt v. Eugen Ulmer KG (2014) (university library could under EU member state law digitize books in their collections in keeping with the InfoSoc Directive).

230. *HathiTrust*, 755 F.3d at 91.

231. InfoSoc Directive, *supra* note 226, art. 5.3(b); Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, rev. June 27, 2013, WIPO Doc. VIP/DC/8, *available at* http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf.

232. *HathiTrust*, 755 F.3d at 97.

233. *See, e.g.*, Copyright Act, Law No. 43 of 2012, art. 47 (Japan).

234. *See, e.g.*, Waldfogel Declaration, *supra* note 185.

demand for the plaintiffs' works have either been non-existent or very low. Courts seem also to be cognizant that excessive transaction costs may explain why speculations about licensing markets may be unpersuasive. The fact that plaintiffs want defendants to license certain uses of their works is not sufficient under *Campbell* and its progeny to impose an obligation to license.

D. Fair Use Is Consistent with International Treaty Obligations

Some of the fair-use-has-gone-too-far critics claim that the United States is out of compliance with its international treaty obligations.[235] One relevant treaty is the Berne Convention for the Protection of Literary and Artistic Works, which is the principal international treaty on copyright law and to which the United States became a signatory in 1989.[236] A second is the Agreement on Trade-Related Intellectual Property Rights (TRIPs), to which all members of the World Trade Organization, of which the U.S. is one, have acceded.[237] The Berne Convention and the TRIPs Agreement both contain provisions setting forth a three-step test that regulates the adoption of national copyright exceptions.[238] As a foundation for assessment of whether fair use is inconsistent with U.S. treaty obligations, it is helpful to review the origins and evolution of the test that lies at the heart of this debate.[239]

When the Berne Convention was revised in 1967, Berne Union members sought to harmonize a broader authorial right to control reproductions of protected works than had been required under previous versions of that treaty.[240] Because member states were not in complete agreement about just how broad that right should be, the treaty established a three-step test for nations to consider when deliberating about whether to adopt an exception to the reproduction right.[241]

---

235. Besek Testimony, *supra* note 4; Ginsburg, *supra* note 87.

236. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, 1161 U.N.T.S. 3, *available at* http://www.wipo.int/treaties/en/text.jsp?file_id=283693 [hereinafter Berne Convention].

237. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPs Agreement].

238. Berne Convention, *supra* note 236, art. 9(2); TRIPs Agreement, *supra* note 237, art. 13.

239. *See, e.g.*, Christophe Geiger, Daniel Gervais, & Martin Senftleben, *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV. 581, 612–16 (2014).

240. *See* MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 47 (2004).

241. *Id.* at 48–51.

The first step calls for identifying the specific purpose the exception would serve (i.e., it should be focused on "certain special cases"). The second step inquires whether the exception would conflict with a normal exploitation of the work. The third step considers whether the exception would otherwise unreasonably prejudice legitimate interests of the rights holder.[242] Berne Union members' copyright laws have adopted a wide variety of copyright exceptions they consider to be compliant with the three-step test.[243]

A new phase in the evolution of the three-step test came about when it was incorporated into the TRIPs Agreement in 1994.[244] The TRIPs provision introduced three changes to the test. First, it extended the test so that it applies to all copyright exceptions, not just to those affecting the reproduction right.[245] Second, TRIPs recast the test so that it creates some constraint on national adoptions of copyright exceptions.[246] Third, TRIPs provided a process by which member states can challenge another member state with violation of a TRIPs norm if, for example, one of its copyright exceptions did not satisfy the three-step test.[247]

One reason to believe the U.S. fair use doctrine is consistent with the three-step test is that the U.S. asserted that its copyright law, including the fair use doctrine, was compatible with Berne norms when it joined the Berne Convention in 1989.[248] This was five full years after the Supreme Court's *Sony* decision.[249] The U.S. must also have believed its fair use doctrine was compatible with its obligations under the TRIPs

---

242. Berne Convention, *supra* note 236, art. 9(2).

243. The U.S. had adopted all but a few of its exceptions before it joined the Berne Convention in 1989.

244. TRIPs Agreement, *supra* note 237, art. 13.

245. *Id.* The TRIPs three-step test also applies to other intellectual property rights. *See id.* art. 26(2) (industrial designs); *id.* art. 30 (patents).

246. Article 13 states that member states "shall confine" L&Es to those that satisfy the three-step test. *Id.* art. 13. The Berne provision is phrased more permissively, for it says that "[i]t shall be a matter for legislation" for nations "to permit the reproduction" of works in accordance with the three-step test. Berne Convention, *supra* note 236, art. 9(2).

247. TRIPs Agreement, *supra* note 237, art. 64.

248. Though perhaps this assertion was made more through omission than by overt declaration. *See generally U.S. Adherence to the Berne Convention: Hearings Before the Subcomm. on Patents, Copyrights & Trademarks of the Comm. on the Judiciary*, 99th Cong. 427–522 (1986) (Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention), *reprinted in* 10 COLUM.-VLA J.L. & Arts 513 (1986) (discussing Berne compatibility of U.S. copyright law without mentioning fair use specifically); *see also* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 39, 77–78 (2000) (describing the official U.S. stance that its fair use doctrine was consistent with Article 13 of the TRIPs Agreement).

249. *See, e.g.*, Geiger et al., *supra* note 239, at 615–16.

Agreement in 1994 as its principal instigator.[250] This was, of course, the very year that *Campbell* was decided, and a full decade after the *Sony* decision.[251]

The "certain special cases" requirement of the three-step test would seem to be satisfied because fair use cases fall within reasonably predictable patterns.[252] The no-conflict-with-normal-exploitation step of the test should be satisfied because a use is unlikely to be fair under U.S. law if it would harm the market for the work. Fair uses do not otherwise unreasonably interfere with legitimate interests of rights holders.[253] Hence, the argument that the U.S. fair use doctrine is compatible with the three-step test is strong, and most commentators who have considered the question of the compatibility of fair use with the three-step test have answered this question affirmatively.[254]

It seems unlikely that the several countries that have adopted fair use or expanded fair dealing exceptions in recent years would have done so if fair use was incompatible with TRIPs.[255] There is even growing

250. *See, e.g.*, Gwen Hinze, Peter Jaszi & Matthew Sag, *The Fair Use Doctrine in the United States – A Response to the Kernochan Report* (June 26, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=2298833.

251. *See generally* Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth Okediji ed., forthcoming 2015). It is worth noting that the Court of Justice of the European Union (CJEU) recently ruled that member states had discretion to decide that certain types of devices that could be used to make private copies caused such minimal harm that no obligation to pay fair compensation arose. Case C-463/12, Copydan Bandcopi v. Nokia Danark A/S, (Mar. 15, 2015).

252. *See, e.g.*, Samuelson, *supra* note 3, at 2541–42.

253. Professor Ginsburg has argued that U.S. fair use law is incompatible with the third step of this test because the U.S. does not provide compulsory or statutory license fee obligations for certain uses she thinks should be permitted only if compensation is provided. *See, e.g.*, Ginsburg, *supra* note 87, at 23; Ginsburg, *supra* note 167. But most countries do not have compensation requirements attached to their copyright exceptions. There is, moreover, no international consensus that compulsory or statutory licenses are necessary to satisfy that step, so her interpretation of U.S. non-compliance with the three-step test is questionable. For a more fair use-friendly interpretation of that third step, see, for example, Geiger et al., *supra* note 239.

254. *See, e.g.*, AUSTL. LAW REFORM COMM'N, COPYRIGHT AND THE DIGITAL ECONOMY: FINAL REPORT 116–22 (Nov. 2013), *available at* http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf (citing several academic experts in concluding that fair use complies with the three-step test); Justin Hughes, *Fair Use and Its Politics—At Home and Abroad*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth Okediji ed., forthcoming 2015) (suggesting that fair use can be better reconciled with the three-step test when perceived not as an exception itself but as a mechanism for establishing specific exceptions).

255. *See, e.g.*, Jonathan Band & Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook*, INFOJUSTICE.ORG (Mar. 2015), http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf (reporting that more than forty countries have fair use or fair dealing provisions).

interest in the EU for adoption of fair use or some other type of flexible copyright exception in EU member states.[256]

Several scholars cite the drafting history of the three-step test in support for the proposition that fair use is compatible with international treaty obligations. This history "demonstrate[s] that [the test] was intended to serve as a flexible balancing tool offering national policy makers sufficient breathing space to satisfy economic, social and cultural needs."[257] Indeed, the three-step test parallels the U.S. fair use doctrine because it considers the purpose of a challenged use, the risk of interference with normal exploitations (which inevitably must be assessed in light of the nature of the work and how much was taken), and other legitimate interests of rights holders, as well as the public, in assessing whether the three-step test is satisfied.[258]

III. NEW HORIZONS FOR FAIR USE

Because the law of fair use has evolved rather substantially over the course of the past two decades, it stands to reason that it will continue to evolve over the next two decades (and beyond). This Part explores three directions in which fair use law may evolve in an expansive way: one focusing on procedural and substantive refinements of the fair use doctrine, a second considering the extent to which fair use might limit the ability of copyright owners to enforce contractual or technical restrictions, and a third addressing some remedial issues that implicate fair use policy.

A. Refining the Doctrine of Fair Use

Several doctrinal refinements of the fair use doctrine provide future horizons for the evolution of fair use. For the very well-developed

256. *Public Consultation on the Review of the EU Copyright Rules*, EUR. COMMISSION, http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm (last visited Apr. 29, 2015); Neelie Kroes, *Reform of EU Copyright Rules: Your Chance to Give Your Views!*, EUR. COMMISSION (Jan. 9, 2014), http://ec.europa.eu/commission_2010-2014/kroes/en/content/reform-eu-copyright-rules-your-chance-give-your-views.

257. Geiger et al., *supra* note 239, at 582. Thirty scholars, mostly from European universities, have endorsed a balanced flexible interpretation of this test. *See* Christophe Geiger et al., *Declaration: A Balanced Approach to the Interpretation of the "Three Step Test" of Copyright Law*, 39 I.I.C. 707 (2008), *available at* http://www.ip.mpg.de/fileadmin/user_upload/declaration_three_step_test_final_english1.pdf. *See also* Jerome H. Reichman & Ruth L. Okediji, *When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale*, 96 MINN. L. REV. 1362, 1453–56 (2012) (analyzing the three-step test and endorsing the Geiger et al. Declaration).

258. Geiger et al., *supra* note 239, at 612–13.

reasons given in Professor Loren's symposium contribution, fair use should no longer be treated as an affirmative defense for which the burden of proof rests on the defendant.[259] Equally persuasive are Professor Fromer's arguments that market benefits as well as harms should be considered in fair use determinations.[260] A few cases have taken possible benefits of a defendant's use into account,[261] but this may become more common in future cases.[262]

Two other refinements that may emerge in future fair use cases are: first, a branching off of the iterative copy-different purpose cases from the transformative use category; and second, a repudiation of the dual presumptions of unfairness and harm in commercial non-transformative use cases. These refinements are interrelated because *Campbell*'s retention of the *Sony* dual negative presumptions has contributed to the pressure exerted by defense lawyers and the inclination of courts to stretch the meaning of transformativeness to cover the different purpose cases.[263]

Some iterative copies are, of course, transformative in the conventional productive-use sense of that term (that is, an author copies something from a prior work in the course of preparing a new work). The author of a book on the Kennedy assassination, for instance, once

---

259. Loren, *supra* note 54; *see also* Steven Hetcher, *The Immorality of Strict Liability in Copyright*, 17 MARQ. INTELL. PROP. L. REV. 1, 14–25 (2013) (arguing that courts, viewing copyright law from a tort standard, could shift the burden of proof in fair use cases); Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 588 (2008) (showing legislative intent to remain neutral on burden-of-proof issues). Having read more than 300 fair use decisions for my *Unbundling Fair Uses* article, I believe that *Campbell*'s assertion that fair use is an affirmative defense has not unduly burdened those who defend their uses as fair. In none of those cases was the evidence so in equipoise that the defendant lost because it had not carried the burden of persuasion. Still, the Court in *Campbell* erred in this assertion about fair use, and this error should be corrected.

260. Fromer, *supra* note 3.

261. *See, e.g.*, Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013), *argued*, No. 13-4829-cv (2d Cir. Dec. 3, 2014); Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003).

262. Fromer offers additional insights about why this should happen. Fromer, *supra* note 3. By endorsing market benefits as a fair use consideration, I do not mean to suggest that making unauthorized movies of novels should be deemed fair uses merely because a successful movie would sell more of the novelists' books. Authors should have the right to choose and negotiate over terms with those who make derivative works of their novels. *See, e.g.*, Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505 (2013).

263. *See, e.g.*, Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A., No. CIV. 12-52BRHK/JJK, 2013 WL 4666330, at *11 (D. Minn. Aug. 30, 2013) (the "lack of alteration [in a patent lawyer's copying of journal articles] may make the label 'transformative' a messy fit for Schwegman's use"); Am. Inst. of Physics v. Winstead PC, No. 3:12-CV-1230-M, 2013 WL 6242843, at *5 (N.D. Tex. Dec. 3, 2013) (characterizing patent lawyer copying of journal articles as "transformative as evidence supporting a quasi-judicial decision").

used frames from the Zapruder film as important evidence in support of his claim that Lee Harvey Oswald was not the lone shooter.[264] This was obviously a different purpose than Zapruder had in taking the film in the first place. This kind of productive use falls squarely within the transformative use category that the Court endorsed in *Campbell*.

However, iterative copying for different purposes should probably not be considered transformative, as it often is in the post-*Campbell* case law. Search engines, for example, don't really transform images they copied from the Internet, even if the thumbnails are smaller in size than the originals, and briefs written by lawyers are not meaningfully transformed by Lexis or Westlaw when loaded into their databases of legal materials.

Taking these different purpose use cases out of the transformative category should not, however, subject them to the *Sony* dual negative presumptions. Like transformation-of-expression and productive uses, different purpose uses often do not supplant demand for the original, as in the search engine cases, so the rationale for imposing the negative presumptions may not apply to many different purpose uses.[265]

The elevation of transformative uses as favoring fair use in *Campbell* evoked some concerns that non-transformative uses would be at greater risk of unfairness rulings.[266] It is certainly true that some non-transformative uses, particularly commercial ones, have been found unfair.[267] But in other cases, non-transformative uses have been deemed fair. Especially significant was the Second Circuit's *HathiTrust* decision, which accepted that enabling print-disabled persons to have improved access to books was non-transformative, but nonetheless fair.[268] It would be a desirable development, in my view, for the courts to follow the lead of the Second Circuit in *HathiTrust* in not presuming, expressly or

264. Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 135 (S.D.N.Y. 1968).

265. *See, e.g.*, Tushnet, *supra* note 3.

266. *See, e.g.*, Tushnet, *Copy This Essay*, *supra* note 58, at 555–60.

267. *See, e.g.*, Society of Holy Transfiguration v. Gregory, 689 F.3d 29 (1st Cir. 2012) (unauthorized posting of translations of ancient texts on website); BWP Media USA v. Gossip Cop Media, LLC, No. 13 Civ. 7574 (KPF), 2015 WL 321863 (S.D.N.Y. Jan. 26, 2015) (reproduction of photos on media website); Calibrated Success, Inc. v. Charters, No. 13-cv-13127, 2014 WL 7157154 (E.D. Mich. Dec. 15, 2014) (selling exact copies of video); Richards v. Merriam Webster, Inc., No. 13-cv-13092-IT, 2014 WL 4843977 (D. Mass. Sept. 26, 2014) (copying seventy percent of dictionary entries for online dictionary); Fibresabre Consulting LLC v. Sheehy, No. 11-CV-4719 (C), 2013 WL 5420977 (S.D.N.Y. Sept. 26, 2013) (reuse of virtual reality content); Vil v. Poteau, No. 11-cv-11622-DJC, 2013 WL 3878741 (D. Mass. July 26, 2013) (continued use of learning program).

268. Authors Guild v. HathiTrust, 755 F.3d 87, 101–02 (2d Cir. 2014); *see also supra* notes 119–39, 225–30, and accompanying text.

implicitly, that non-transformative uses are unfair.

The *HathiTrust* decision may give libraries and archives greater courage to make and publicly display fair use copies of orphan works—that is, works whose rights holders cannot be located, even if one makes a diligent search—in their collections.[269] These non-transformative uses of a large number of commercially unavailable works cannot cause harm to markets for these works, given that the rights holders of these works are either unknown or unlocatable after a diligent search.

A riskier, even if much desired, goal of libraries and archives would be to defend as fair use the scanning of books and other documents in research library or archive collections and allowing patrons to access and read their contents online.[270] One can imagine libraries and archives structuring access to digital copies of works in their collections in a manner that approximated traditional lending practices (e.g., wrapping the digital content in technical protections that would shut down access to the book after two weeks and only lending out as many copies as the library or archive possesses).[271] Academic administrators and librarians these days worry that students and even faculty are so used to finding information resources online that the books on library shelves are far less often sought out as a resource.[272]

Thus far, this section has discussed several procedural and substantive refinements of the fair use doctrine that symposium authors and I have proposed. Other scholarly commentators have identified four other aspirations for the future of the fair use doctrine.

For example, some have proposed that fair use should become more broadly applicable in later years of a work's copyright term.[273]

---

269. *See, e.g.*, David R. Hansen et al., *Solving the Orphan Works Problem for the United States*, 37 COLUM. J.L. & ARTS 1 (2013); Jennifer Urban, *How Fair Use Can Help Solve the Orphan Work Problem*, 27 BERKELEY TECH. L.J. 1379 (2012).

270. The Court of Justice of the European Union recently ruled that member states may allow libraries, without rights holders' consent, to digitize certain books in their collections and make them available to users for on-site viewing. *See* Case C-117/13, Technische Universitat Darmstadt v. Eugen Ulmer KG (Sept. 11, 2014), *available at* http://curia.europa.eu/juris/liste.jsf?num=C-117/13. Perhaps fair use could achieve the same objective in the U.S.

271. *See, e.g.*, *Open Library Launches New "Digitize and Lend" E-Book Lending Program*, PUBLISHERS WKLY. (Feb. 23, 2011), http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/46253-open-library-launches-new-digitize-and-lend-e-book-lending-program.html. *See also* ASS'N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 19–21 (2012), *available at* http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf (creating digital collections of archival and special collections materials).

272. *See, e.g.*, Mary S. Coleman, Opinion, *Riches We Must Share . . .*, WASH. POST (Oct. 22, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/10/21/AR2005102101451.html.

273. *See, e.g.*, Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003); Joseph P.

Derivative uses that might, for instance, have been unfair in the first five or ten years of the commercial life of a book might become fair as the work's commercial value recedes and creative second comers are willing decades later to invest in creative reuses of works still in copyright.[274]

Some commentators have also urged courts to characterize the fair use doctrine as creating "user rights," not just providing a defense to claims of infringement.[275] The user right concept is not as radical as it might seem to some copyright professionals, for the library-use exception in the 1976 Act specifically refers to "fair use rights" to indicate that by identifying specific excepted uses, Congress did not mean to limit the ability of libraries to assert fair use in response to infringement claims.[276] Besides, insofar as fair use is the mechanism by which First Amendment interests of second comers can be vindicated, one would think that just as speakers have First Amendment rights, they should have fair use rights, at least as to critical commentary.[277] The Canadian Supreme Court has endorsed the view that its copyright law's fair dealing provision creates "user rights,"[278] so perhaps U.S. courts should follow that high court's lead.

Another possible future evolution in fair use law would be to make it acceptable (again) to speak of First Amendment interests and values in fair use cases involving critical commentary. The Supreme Court in *Harper & Row* emphatically rejected *The Nation*'s First Amendment

---

Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002); *see also* William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of* Eldred, 92 CALIF. L. REV. 1639, 1650–52 (2004) (proposing specific fair use rules to be applied to certain older works).

274. An example might be Frederick Colting's book imagining the life of a once-youthful J.D. Salinger character as an old man, written decades after *Catcher in the Rye* was first published. *See* Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010) (reversing a lower court's issuance of a preliminary injunction against publication of *60 Years Later*).

275. *See, e.g.*, L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS (1991); Abraham Drassinower, *Taking User Rights Seriously*, *in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 462, 474 (Michael Geist ed., 2005) ("Cast as a user right, what fair dealing shows is . . . that reproduction is not *per se* wrongful."); David Vaver, *Copyright Defenses As User Rights*, 60 J. COPYRIGHT SOC'Y U.S.A. 661 (2013).

276. 117 U.S.C. § 108(f)(4) (2012).

277. The Supreme Court has characterized fair use as a doctrine that protects First Amendment interests. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 190 (2003). The copyright case law includes examples of copyright owners who have asserted infringement claims with the goal of suppressing critical speech. *See, e.g.*, New Era Publ'ns Int'l, ApS v. Carol Publ'g Grp., 904 F.2d 152 (2d Cir. 1990).

278. *See, e.g.*, CCH Canadian Ltd. v. Law Soc'y of Upper Can., [2004] 1 S.C.R. 339, para. 48 (Can.), *available at* http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html ("The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance . . . it must not be interpreted restrictively.").

defense because it regarded First Amendment interests as adequately protected by fair use and the idea-expression distinction.[279] As a result, there has been a virtual kibosh on referring to the First Amendment in copyright fair use cases, as though mentioning it would weaken one's case.[280] Even *Campbell*, which speaks glowingly of fair use as "permit[ting and requiring] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster,"[281] does not mention, let alone discuss, ways in which First Amendment interests are protected by fair use law. First Amendment values should inform fair use to provide meaningful breathing room for appropriation artists.[282]

Finally, and somewhat more realistically, future fair use cases might take into account fair use best practices guidelines that have been developed by certain communities of practice, such as documentary filmmakers, even when the guidelines were not negotiated among all interested stakeholders.[283] It is constructive for creative communities to develop shared understandings about how fair use should be understood

---

279. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555–60 (1985).

280. *But see* Caner v. Autry, 16 F. Supp. 3d 689, 703 (W.D. Va. 2014) (referring to the First Amendment in a ruling that the defendant was not, as the plaintiff claimed, unqualified to criticize him by using excerpts of his work in a later work). For arguments that the First Amendment should play a greater role in copyright cases, see, for example, Jed Rubinfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 7–11 (2002). Professor Netanel sees some recent case law bringing fair use and First Amendment values in closer consideration, but he nonetheless concludes that "fair use thus provides a highly permeable, often merely theoretical, defense of First Amendment interests." *See* NEIL NETANEL, COPYRIGHT'S PARADOX 65–66 (2008) (discussing Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1260 (11th Cir. 2001); Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 803 (9th Cir. 2003); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 615 (2d Cir. 2006)).

281. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

282. *See* Adler, *supra* note 99.

283. The Center for Media & Social Impact (formerly the Center for Social Media) at American University has helped user communities develop codes of fair use best practices. *See, e.g.*, *Documentary Filmmakers' Statement of Best Practices in Fair Use*, CENTER FOR MEDIA & SOC. IMPACT, http://www.cmsimpact.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use#statement (last visited Apr. 29, 2015); *Code of Best Practices in Fair Use for the Visual Arts*, C. ART ASS'N (Feb. 2015), http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf. *See generally* PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE (2011). Some commentators have criticized non-negotiated guidelines as too one-sided to be worthy of deference, but other commentators have endorsed giving some consideration to the views of those who developed the guidelines about the scope that fair use ought to have. *See, e.g.*, Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1946–80 (2007). *But see* Niva Elkin-Koren & Orit Fischman-Afori, *Taking Users' Rights to the Next Level: A Pragmatist Approach to Fair Use*, 33 CARDOZO ARTS & ENT. L.J. 1 (2015).

as applied in their particular fields of endeavor. Ultimately, a fair use doctrine that encourages and includes the input of creative user communities to develop consensus about reasonable in-practice fair uses of copyrighted material will have the added benefit of engendering respect for copyright law.

B. Fair Use and Contractual or Technical Restrictions

Some copyright owners do not wish to make their works available for fair uses. Two techniques commonly used to impede fair uses of copyrighted works are the adoption of mass-market license agreements containing restrictive terms and the implementation of technical protection measures (TPMs) that prevent access to or copying of digital works.[284] The law review literature about fair use and license or technical restrictions is ample, and most commentators favor fair use as a policy that should trump license and technical restrictions under some conditions.[285] However, the case law on these issues is at best mixed.[286] One future direction in which fair use law might evolve is in the articulation of standards for determining under what circumstances fair use should override license or technical restrictions.

It seems unlikely that courts would accept that fair use should either always or never override contractual restrictions. As part of a confidentiality agreement between a startup and a big firm, for example, the startup's insistence on a contractual restriction on reverse engineering and a pledge to protect program internals as trade secrets would very likely be respected. The same restrictions in a mass-market license agreement for software might be treated quite differently.[287] Mass-market license terms that purport to restrict criticism of the

---

284. *See, e.g.*, *Hearing Before the Subcomm. on Courts, Intellectual Property, & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 77–78 (2014) (discussing the use of license agreements and technical protection measures to restrict product modifications); Netanel, *supra* note 280, at 213–15 (discussing the use of such methods as a limitation on speech).

285. *See, e.g.*, JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 81, 96 (2011). See also *infra* notes in this subsection for other citations to the literature on fair use and license restrictions and for references to the literature on fair use and TPMs.

286. Concerning enforceability of mass-market license restrictions, see, for example, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). *But see* Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255 (5th Cir. 1988) (refusing to enforce mass-market license restrictions on reverse engineering and backup copying). Concerning fair use and technical measures, see *infra* notes 293, 295–296, and accompanying text.

287. *See, e.g.*, David McGowan, *Free Contracting, Fair Competition, and Article 2B: Some Reflections on Federal Competition Policy, Information Transactions, and "Aggressive Neutrality,"* 13 BERKELEY TECH. L.J. 1173 (1998).

copyrighted work or the copyright owner would seem even more unlikely to be enforced, if tested in court.[288]

But what principles should courts employ to decide when or which license restrictions should be unenforceable because they would interfere with fair uses? Some commentators have proposed a set of factors that courts might consider when faced with having to mediate tensions between policies favoring fair use and those favoring freedom of contract.[289] Others argue that copyright law and policy should preempt contractual overrides of fair uses, while still others suggest other doctrinal solutions.[290] One suggests that a doctrine of "fair breach" of licensing restrictions might develop.[291] The most promising approach is one that would override mass-market license restrictions that interfere with copyright policy purposes.[292]

It also seems unlikely that fair use should always or never trump TPMs, although some support exists for the "never" position.[293] A close examination of the structure of the anti-circumvention rules suggests that Congress left some room for fair use circumventions. The law expressly bans circumvention of TPMs that copyright owners use to control access to their works, but not circumvention of other types of TPMs, such as copy-controls.[294] Even as to access controls, Congress created exceptions for certain activities that overlap with what fair use would allow.[295] The anti-circumvention rules also arguably include a fair use

---

288. Fair use has been recognized as an important safety valve for protecting First Amendment values in copyright cases. *See* Eldred v. Ashcroft, 537 U.S. 186, 190 (2003). The policies of both copyright law and the First Amendment support freedom of critical commentary as a federal policy that should not be overridden by non-negotiated mass market contracts. *See, e.g.*, J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 877 (1999).

289. *See, e.g.*, Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1235–38 (2010) (recommending some factors that courts should consider in determining whether to hold particular state law contract terms preempted by federal copyright policy).

290. *See, e.g.*, MAZZONE, *supra* note 285; Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111 (1999); Charles R. McManis, *The Privatization (or "Shrink-Wrapping") of American Copyright Law*, 87 CALIF. L. REV. 173 (1999).

291. *See, e.g.*, Jane C. Ginsburg, *Copyright Without Walls: Speculations on Literary Property in the Library of the Future*, 42 REPRESENTATIONS 53, 63 (1993).

292. *See, e.g.*, Vault Corp. v. Quaid Software, Ltd., 847 F.2d 255, 269–70 (5th Cir. 1988).

293. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 443–44 n.13 (2d Cir. 2001), *aff'g sub nom.* Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (concluding that Congress did not intend fair use to apply to § 1201); David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000) (same).

294. 17 U.S.C. § 1201(a)(1)(A) (2012).

295. *See, e.g.*, *id.* § 1201(f) (exception to § 1201(a)(1)(A) to allow reverse engineering necessary

savings clause.[296]

A ban on circumvention of access controls can be justified on the ground that users do not have fair use rights as to copyrighted works to which they lack lawful access. However, bypassing TPMs to make fair use of mass-marketed copies of technically protected works does not on its face violate the anti-circumvention rules.[297]

That it should be lawful to make fair uses of technically protected works is somewhat reinforced by exceptions to the anti-circumvention rules that the Copyright Office creates through a triennial rule-making procedure.[298] One exception created during the 2011 rulemaking proceeding was for bypassing the TPM that controls access to DVD movies

> where circumvention is undertaken solely in order to make use of short portions of the motion pictures for the purpose of criticism or comment in the following instances: (i) In noncommercial videos; (ii) In documentary films; (iii) In nonfiction multimedia ebooks offering film analysis; and (iv) For educational purposes in film studies or other courses requiring close analysis of film and media excerpts, by college and university faculty, college and university students, and kindergarten through twelfth grade educators.[299]

Courts should perhaps consider that if an activity has been deemed worthy of an exception in one rulemaking proceeding, it should be fair use to do the same activity in a later period, even if the Copyright Office does not renew the exception in a later proceeding.[300] Commentators

---

for interoperability); *cf.* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) (reverse engineering of software to achieve interoperability is fair use).

296. 17 U.S.C. § 1201(c)(1); *see, e.g.*, Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004) (perceiving this provision as a fair use savings clause).

297. *See, e.g.*, R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619 (2003) (noting that access control TPMs were becoming common and discussing implications of this for the scope of the anti-circumvention rules).

298. 17 U.S.C. § 1201(a)(1)(B)–(C). The existence of this rulemaking process does not, in my view, undercut the argument that fair use circumventions are lawful, but it is significant that the Copyright Office has an obligation to consider whether fair and other privileged uses of copyrighted works are being interfered with and to establish an exception to the anti-circumvention rules when a good case for such an exception has been made.

299. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65260, 65266 (Oct. 26, 2012) (codified at 37 C.F.R. § 201.40(b) (2014)).

300. An even better reform would be to make DMCA exceptions, once granted, permanent rather than putting fair users to the task of making the same case every three years.

have proposed some alternative mechanisms to facilitate the making of fair uses of technically protected works.[301] There should, moreover, be an implied right to make a circumvention tool to enable fair uses.[302] The anti-circumvention rulemaking process itself is in need of reforms to make it less cumbersome for prospective fair users.[303]

C. Remedial Adjustments

There are at least two adjustments to copyright remedy rules in which fair use considerations should play a role. One concerns awards of compensation in lieu of injunctive relief, and the other should limit awards of statutory damages.

The Supreme Court in *Campbell* recognized that there may be "a strong public interest" in access to creative reuses of existing works, which courts should take into account in deciding whether to order injunctive relief in close fair use cases:

> Because the fair use inquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, "to stimulate the creation and publication of edifying matter," are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.[304]

Despite the Court's endorsement of this important idea, there has been to date no case in which courts have withheld injunctions in close fair uses that were just over the line.[305] One welcome doctrinal

---

301. *See, e.g.*, Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 HARV. J.L. & TECH. 41 (2001); Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095 (2003); Jerome H. Reichman et al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981 (2007); Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice About Their Use of Technical Protection Measures?*, 6 J. TELECOM. & HIGH TECH. L. 41 (2007).

302. *See, e.g.*, Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999).

303. *See, e.g.*, Aaron K. Perzanowski, *Evolving Standards and the Future of the DMCA Rulemaking*, 10 J. INTERNET L. 1 (2007).

304. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10. (1994) (citation omitted).

305. Some commentators have recommended that compensation, not injunctions, should be ordered in response to creative but infringing derivative works. *See, e.g.*, Paul Edward Geller, Hiroshige v. Van Gogh: *Resolving the Dilemma of Copyright Scope in Remedying Infringement*, 46 J. COPYRIGHT SOC'Y U.S.A. 61 (2000); Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271 (2008).

development for the future of fair use would be for courts to finally take the Court's endorsement of compensation instead of injunctions in just-over-the-line fair use cases. This might be especially useful in future appropriation art cases if the taking was too substantial to be fair use or in other creative derivative work cases.[306]

A second remedial development that would be desirable would be judicial limits on awards of statutory damages in close but unsuccessful fair use cases. The 1976 Act allows successful plaintiffs to request, in lieu of an award of actual damages and profits of the defendant attributable to infringement, an award of statutory damages in any amount between the $750 per infringed work minimum and $150,000 per infringed work maximum.[307] In some close, plausible fair use cases, courts have awarded minimum statutory damages,[308] but in others, courts have awarded the maximum, finding the infringement willful notwithstanding the plausible fair use claim.[309] Judicial limits on statutory damage awards would lessen the chilling effect on plausible fair uses about which many commentators have expressed concern.[310] In some cases, the minimum statutory damage award may be appropriate, but higher awards should only be available to approximate actual damages.[311] Awards of attorney fees should perhaps also be limited in close fair use cases.

CONCLUSION

Congress expected the fair use doctrine to evolve when it passed the

306. One can also hope that courts in the future would be more wary than was the District Court in *Cariou v. Prince*, 784 F. Supp. 2d 337, 355–56 (S.D.N.Y. 2011), of using the impoundment and destruction of infringing copies remedies under the 1976 Act or ordering defendants to inform their customers that the customers will be unable to resell or publicly display the infringing paintings they had unwittingly purchased.

307. 17 U.S.C. § 504(c) (2012). Statutory damage awards over $30,000 per infringed work are available if the infringement is "willful," *id.*, but courts have often given this term a very broad interpretation. *See, e.g.*, Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009).

308. *See, e.g.*, Religious Tech. Ctr. v. Lerma, No. 95-1107-A, 1996 WL 633131, at *15 (E.D. Va. Oct. 4, 1996).

309. *See, e.g.*, Macklin v. Mueck, No. 00-10492-CIV, 2005 WL 1529259, at *2 (S.D. Fla. Jan. 28, 2005) (awarding $300,000 in a default judgment for unauthorized posting of two poems on a poetry website).

310. *See, e.g.*, Michael Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891 (2012); Samuelson & Wheatland, *supra* note 307, at 443.

311. If the plaintiff's usual license fee for a use is above $750, it may be reasonable to provide a statutory damage award that is or approximates that license fee.

1976 Act,[312] and evolve it certainly has. Some of that evolution has been due to the useful framework that fair use provides for balancing competing interests when disputes arise in the far more complex copyright ecosystem today as compared to 1976. Congress certainly did not foresee the advent of digital networked environments in which every access to and use of a work involves a reproduction, but fortunately the codification of fair use has helped courts sort out which of these reproductions are fair or foul.

Campbell was, of course, a relatively conventional type of fair use case, considering whether a parody of a popular song was fair use.[313] But the framework it provided for assessing fair use defenses has proved useful in a wide array of cases, including those posed by digital copies made by search engines and for online course reserves. This Article has shown that the post-*Campbell* case law has, for the most part, been uncontroversial. The Court's *Sony* decision has taken more heat than *Campbell* as having caused fair use to expand beyond what some think are its proper bounds. The most controversial of the *Campbell* legacy decisions have been those involving iterative copies of copyrighted works for different purposes than the original that did not result in the creation of a second work that builds upon the pre-existing work. This Article has shown that while it may be desirable to limit the category of "transformative purpose" cases to those that involve the production of a subsequent work incorporating expression from the first, the different purpose cases are often, although not always, justifiable as fair uses.

Those who would prefer for fair use to be more bounded have leveled various criticisms against *Sony*, *Campbell*, and their progeny. It is possible, although not likely, that some courts will tighten up on fair use in future appropriation art cases. Perhaps some will be more skeptical of the different purpose cases in the future too. However, the decisions built on the *Sony* and *Campbell* foundations have become the new normal. I will be surprised if the courts radically cut back on fair use as

312. *See* H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 ("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. . . . [T]he courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

313. Some of the earliest twentieth century fair use cases involved parodies, specifically vaudeville impersonations. *See, e.g.*, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395 (1984) (citing Green v. Luby, 177 F. 287 (C.C.S.D.N.Y. 1909); Green v. Mitzensheimer, 177 F. 286 (C.C.S.D.N.Y. 1909); Bloom & Hamlin v. Nixon, 125 F. 977 (C.C.E.D. Pa. 1903) as the earliest parody cases); *see also supra* text accompanying notes 31–32.

some critics hope. Nor does licensing of permitted uses, such as online course reserves, seem likely to be adopted. So I predict that the status of fair use under *Campbell* and its progeny will and should prevail. Part II has also defended the post-*Campbell* fair use decisions as compatible with U.S. treaty obligations.

How far will fair use evolve beyond the current status quo? Part III has suggested many possibilities. Of the new horizons explored here, the shift away from conceiving of fair use as an affirmative defense and the shift toward taking account of market benefits as well as harms seem to be reasonably plausible future developments in the law as Professors Loren and Fromer have recommended. One might have expected *Campbell* to have resulted in more judgments of compensation instead of injunctions in close fair use cases, but perhaps courts will come to be more comfortable with this option in the future.

The case law does not (yet) recognize fair use as a policy that should be considered as a basis for overriding mass-market license restrictions, although the policy arguments for this are strong. But this may be because firms have been reluctant to bring a lawsuit that would set what they would regard as an unfortunate precedent. Fair use policy arguments are similarly strong in favor of allowing circumvention of TPMs to make fair uses of digital copies of protected works. Even the Copyright Office has recognized fair use circumventions to some degree in its triennial rulemakings. Perhaps there will be future fair use cases to make it official.

Given how many surprising developments there have been in the fair use case law in the past two decades, it seems likely there will be some equally surprising developments in the next twenty-one years. I hope I live long enough to experience and celebrate them as well.

Appendix A

Fair Use Cases, March 2012 – March 2015

1) Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A., No. 12-528 (RHK/JJK), 2013 WL 4666330 (D. Minn. Aug. 30, 2013).
2) Am. Inst. of Physics v. Winstead PC, No. 3:12-CV-1230-M, 2013 WL 6242843 (N.D. Tex. Dec. 3, 2013).
3) Arrow Prods., Ltd. v. Weinstein Co. LLC, 44 F. Supp. 3d 359 (S.D.N.Y. 2014), *appeal filed*, No. 14-3753 (2d Cir. Oct. 3, 2014).
4) Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537 (S.D.N.Y. 2013).
5) Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013).
6) Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).
7) Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012).
8) Balsley v. LFP, Inc., 691 F.3d 747 (6th Cir. 2012).
9) Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932 (4th Cir. 2013).
10) Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012).
11) BWP Media USA, Inc. v. Gossip Cop Media, LLC, No. 13 Civ. 7574(KPF), 2015 WL 321863 (S.D.N.Y. Jan. 26, 2015).
12) Calibrated Success, Inc. v. Charters, No. 13-cv-13127, 2014 WL 7157154 (E.D. Mich. Dec. 15, 2014).
13) Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).
14) Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014).
15) Caner v. Autry, 16 F. Supp. 3d 689 (W.D. Va. 2014).
16) Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013).
17) Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013).
18) Denison v. Larkin, No. 1:14-cv-01470, 2014 WL 3953637 (N.D. Ill. Aug. 13, 2014).
19) Devil's Advocate, LLC v. Zurich Am. Ins. Co., No. 1:13-cv-1246, 2014 WL 7238856 (E.D. Va. Dec. 16, 2014).
20) Dhillon v. Does 1-10, No. C 13-01465 SI, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014).
21) Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc., 953 F. Supp. 2d 701 (N.D. Miss. 2013).
22) FireSabre Consulting LLC v. Sheehy, No. 11-CV-4719 (CS), 2013 WL 5420977 (S.D.N.Y. Sept. 26, 2013).

23) Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13 Civ. 5784(CM), 2014 WL 6670201 (S.D.N.Y. Nov. 14, 2014).
24) Fox Broad. Co. v. Dish Network LLC, No. CV 12-4529 DMG (SHx), 2015 WL 1137593 (C.D. Cal. Jan. 20, 2015).
25) Fox Broad. Co., Inc. v. Dish Network L.L.C., 723 F.3d 1067 (9th Cir. 2013).
26) Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379 (S.D.N.Y. 2014).
27) Hill v. Public Advocate of the U.S., 35 F. Supp. 3d 1347 (D. Colo. 2014).
28) Hoge v. Schmalfeldt, Civil Action No. ELH-14-1683, 2014 WL 3052489 (D. Md. July 1, 2014).
29) Katz v. Chevaldina, No. 12-22211-CIV, 2014 WL 2815496 (S.D. Fla. June 17, 2014).
30) Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014).
31) Kienitz v. Sconnie Nation LLC, 965 F. Supp. 2d 1042 (W.D. Wisc. 2013).
32) Leveyfilm, Inc. v. Fox Sports Interactive Media LLC, No. 13 C 4664, 2014 WL 3368893 (N.D. Ill. July 8, 2014).
33) Levingston v. Earle, No. CV-12-08165-PCT-JAT, 2014 WL 1246369 (D. Ariz. Mar. 26, 2014).
34) Monge v. Maya Magazines, Inc., 688 F.3d 1164 (9th Cir. 2012).
35) Morris v. Guetta, No. LA CV12-00684 JAK (RZx), 2013 WL 440127 (C.D. Cal. Feb. 4, 2013).
36) Morris v. Young, 925 F. Supp. 2d 1078 (C.D. Cal. 2013).
37) Nat'l Ctr. for Jewish Film v. Riverside Films LLC, No. 5:12-cv-00044-ODW(DTBx), 2012 WL 4052111 (C.D. Cal. Sept. 14, 2012).
38) Nat'l Football Scouting, Inc. v. Rang, 912 F. Supp. 2d 985 (W.D. Wash. 2012).
39) Neri v. Monroe, No. 11-cv-429-slc, 2014 WL 793336 (W.D. Wisc. Feb. 26, 2014).
40) North Jersey Media Grp. Inc. v. Pirro, No. 13 Civ. 7153(ER), 2015 WL 542258 (S.D.N.Y. Feb. 10, 2015).
41) Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform, 868 F. Supp. 2d 962 (C.D. Cal. 2012).
42) Richards v. Merriam Webster, Inc., 55 F. Supp. 3d 205 (D. Mass. 2014).
43) Rosen v. eBay, Inc., No. CV 13-6801 MXF (Ex), 2015 WL 1600081 (C.D. Cal. Jan. 16, 2015).
44) Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013).
45) Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29 (1st Cir. 2012).

46) SOFA Entm't, Inc. v. Dodger Prods., Inc., 709 F.3d 1273 (9th Cir. 2013).
47) Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73 (2d Cir. 2014).
48) Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 861 F. Supp. 2d 336 (S.D.N.Y. 2012).
49) Vil v. Poteau, No. 11-cv-11622-DJC, 2013 WL 3878741 (D. Mass. July 26, 2013).
50) White v. West Publ'g Corp., 29 F. Supp. 3d 396 (S.D.N.Y. 2014).