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Content, Purpose, or Both?

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Abstract: Most debates about the proper meaning of "transformativeness" in fair use are really about a larger shift towards more robust fair use. Part I of this short Article explores the copyright-restrictionist turn towards defending fair use, whereas in the past critics of copyright's broad scope were more likely to argue that fair use was too fragile to protect free speech and creativity in the digital age. Part II looks at some of the major cases supporting that rhetorical and political shift. Although it hasn't broken decisively with the past, current case law makes more salient the freedoms many types of uses and users have to proceed without copyright owners' authorization. Part III discusses some of the strongest critics of liberal fair use interpretations, especially their arguments that transformative "purpose" is an illegitimate category. Part IV looks towards the future, suggesting that broad understandings of transformativeness are here to stay.

INTRODUCTION

In 2008, Professor Tony Reese presciently told us that the case law on fair use transformativeness favored protecting transformative purpose over transforming content, so that, among other things, exact reproduction could have a very good shot at fair use.[1] Since then, defendants who made exact copies with transformative purposes (according to the courts) have done extremely well, while the record of unauthorized transformed content is somewhat more mixed, though also increasingly favorable. Purpose-transformativeness, where a work is reproduced wholesale or nearly so, but in a different context—such as a news report about a controversial artwork that contains an image of that artwork—is regularly enough to justify a finding of fair use. Content-transformativeness, where a work is physically altered, can also lead to a

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1. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 494 (2008).

fair use finding where the meaning is changed substantially as a result.

The case law is consistent with a broader cultural recognition of the value of fair use of many flavors. As a founder of the nonprofit Organization for Transformative Works (OTW),[2] which works to preserve and protect noncommercial fanworks—including fanworks based on existing copyrighted works—I have a deep commitment to both purpose-transformativeness and content-transformativeness, since fanworks regularly perform both kinds of transformations. I have seen fans exercise their fair use rights with increasing resolve, and the concept of transformativeness has helped them articulate and defend their creations.

Most debates about the proper meaning of transformativeness are really about this larger shift towards more robust fair use. Transformativeness has indeed become almost synonymous with fairness, as critics of broad fair use findings charge. Yet those critics' underlying dispute is with fairness, not with transformativeness: they are uncomfortable with fair use findings in favor of exact copies, or sometimes in favor of inexact copies made with different but noncritical purposes.

The changing ways in which transformativeness has been invoked provide an example of what Professor Jack Balkin has called "ideological drift," in which "legal ideas and symbols will change their political valence as they are used over and over again in new contexts."[3] More broadly, fair use itself has undergone a process of ideological drift, with people disagreeing about whether the meaning of fair use has been fundamentally altered by newer applications, or whether the concept remains the same but the facts to which it has been applied have systematically changed.[4] Balkin could have been channeling fair use's current critics when he wrote that "we are likely to see the phenomenon of ideological drift at work when individuals complain that 'a good idea has been taken too far,' or that we must return to the 'original reasons' behind a doctrine or a symbol."[5] These disputes matter because legal concepts are both tools that help us understand the world and also themselves contested ground:

> The parties fight on a battlefield in which the shape of the terrain

2. ORG. FOR TRANSFORMATIVE WORKS, www.transformativeworks.org (last visited Apr. 24, 2015).

3. J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 871 (1993).

4. *Cf. id*. at 871–72 (describing similar processes in other legal fields).

5. *Id*. at 872–73.

> itself is a potential prize. Ideological drift, in this sense, is the effect of a deeper cause—the struggle over cultural and political meaning through the practice of politics and persuasion, whose reward is ideological and rhetorical power.[6]

Part I of this short Article explores the copyright-restrictionist turn towards defending fair use, whereas in the past critics of copyright's broad scope were more likely to argue that fair use was too fragile to protect free speech and creativity in the digital age. Part II looks at some of the major cases supporting that rhetorical and political shift. Although it hasn't broken decisively with the past, current case law makes more salient the freedoms many types of uses and users have to proceed without copyright owners' authorization. Part III discusses some of the strongest critics of liberal fair use interpretations, especially their arguments that transformative "purpose" is an illegitimate category. Part IV looks towards the future, suggesting that purpose-transformativeness is here to stay alongside content-transformativeness, and for good reason.

As in other instances of ideological drift, changing terminology is unlikely to change anyone's substantive agreement or disagreement with the relevant outcomes. Even if we abandoned transformativeness as an overriding fair use category, we would still face the same disputes over which uses should be deemed productive or otherwise fair. I am confident that both content-transformativeness and purpose-transformativeness have important roles to play in the fair use ecosystem. Critics charge that fair use is unpredictable and inconsistent with the rest of copyright law, but—like many a building material—a doctrine can be both flexible and also strong enough to support reliance. So too with fair use. By embracing transformative fair use's broad scope and diversity, we can defend it against critics who argue that transformativeness has become meaningless or contradictory.

I. LET US NOW PRAISE FAIR USE

The political valence of transformativeness, and fair use in general, has changed substantially since the early years after *Campbell v. Acuff Rose Music, Inc.*[7] At that time, copyright low-protectionists like Diane Lenheer Zimmerman were skeptical of *Campbell*'s transformativeness

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6. *Id.* at 877. This is not simply a power struggle, but rather a dispute over the right thing to do and even over how to determine what the right thing to do is in any given situation. *Id.* at 877–78; *see also id.* at 889 (discussing the deep sincerity of belief that can coexist with ideological drift).

7. 510 U.S. 569 (1994).

test,[8] which elevated transformation—the creation of new meaning, message, or purpose—as a key element of fair use. The concept of transformativeness seemed potentially unstable, especially given the Court's unnecessary and ahistorical distinction between favored "parody" and less-favored "satire."[9] I worried that a focus on transformativeness would devalue exact copying, which is often important to particular expressive purposes.[10] And Larry Lessig famously described fair use as "the right to hire a lawyer," charging that the doctrine chilled new expression and valuable uses by creating uncertainty.[11]

How, then, did fair use go from weak reed to powerful shield in a decade's time?[12] As the next Part will explain in more detail, transformativeness developed into an extremely versatile concept as lower courts applied it to situations far afield of the mocking song in *Campbell*. Defendants won significant fair use cases, and a fair use advocacy bar developed, including public intellectuals defending the rights of people who would rarely litigate a fair use defense.[13] My focus in this Part, however, is on the rhetoric surrounding fair use outside of the courts. Very few potential disputes are ever litigated, even in the lawsuit-happy U.S., and therefore claims of right and understandings about the law outside the courts are far more important in practice than

8. Diane Leenheer 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).

9. *See* Bruce P. Keller & Rebecca Tushnet, *Even More Parodic Than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 982–99 (2004) (detailing absence of historical or theoretical warrant for parody/satire distinction in copyright).

10. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 555–60 (2004).

11. LAWRENCE LESSIG, FREE CULTURE 187 (2004) ("[I]n America fair use simply means the right to hire a lawyer to defend your right to create.").

12. Though statements about uncertainty can still be found. *See, e.g.*, Matthew D. Bunker & Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years After* Campbell v. Acuff-Rose Music, 12 DUKE L. & TECH. REV. 92, 95 (2014) ("In the immediate aftermath of Campbell and its reception in the lower courts, one perceptive scholar described the doctrine of transformative use as 'a scrambled mess.' Unfortunately, in the ensuing two decades, the ambiguity surrounding the doctrine has, if anything, increased." (footnote omitted)).

13. The Electronic Frontier Foundation, ELECTRONIC FRONTIER FOUND., http://www.eff.org (last visited May 5, 2015), and Stanford's Juelsgaard Intellectual Property and Innovation Clinic, STAN. L. SCH. JUELSGAARD INTELL. PROP. & INNOVATION CLINIC, https://www.law.stanford.edu/organizations/clinics/juelsgaard-intellectual-property-and-innovation-clinic (last visited May 5, 2015), are only two of the public interest organizations and law school clinics that now support pro bono representation in fair use cases.

the law on the books.[14]

The public discourse on fair use changed, in part in response to favorable court decisions, but also in significant part because some activists and institutions emerged as norm entrepreneurs, encouraging people to believe in and depend on fair use for their activities.[15] The development of large businesses reliant on fair use,[16] nonprofit public interest groups devoted to protecting fair use,[17] and activist educators and artists depending on fair use[18] interacted with case law to make fair use far more robust and reliable than I once feared.

Today, public intellectuals are happy to explain to the general public that transformativeness protects a wide range of activities.[19] A number of academics have identified patterns in fair use cases that can be used to predict outcomes and make judgment calls in ordinary practice.[20] Peter

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14. *See* LAURA J. MURRAY, S. TINA PIPER, & KIRSTY ROBERTSON, PUTTING INTELLECTUAL PROPERTY IN ITS PLACE: RIGHTS DISCOURSES, CREATIVE LABOR, AND THE EVERYDAY 2 (2014) (explaining that even when statutory and case law is readily available, "people actually *choose* to understand the law through information and opinion gathered from friends, strangers, coworkers, and the media").

15. *See* Sepehr Shahshahani, *The Nirvana Fallacy in Fair Use Reform*, 16 MINN. J.L. SCI. & TECH. 273, 322–23 (2015) ("There are many who actively work, not without considerable success, to improve fair use by helping to shape copyright litigation in the federal courts. The list includes the Center for Democracy and Technology, Chilling Effects, the Electronic Frontier Foundation, the Free Software Foundation, the NYU Technology Law and Policy Clinic, Public Knowledge, and the Samuelson Law, Technology & Public Policy Clinic, among many others. These organizations and their law-professor members bring lawsuits, defend lawsuits, write amicus briefs, compile facts, and issue reports to raise judicial awareness of copyright abuses and alert judges to the downside of copyright expansionism." (footnotes omitted)).

16. *See* THOMAS ROGERS & ANDREW SZAMOSSZEGI, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE (2011), *available at* http://www.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf (study prepared for Computer & Communications Industry Association).

17. The OTW is one of these, along with the Electronic Frontier Foundation. *What We Believe*, ORG. FOR TRANSFORMATIVE WORKS, http://transformativeworks.org/about/believe (last visited May 16, 2015) ("We believe that fanworks are transformative and that transformative works are legitimate. . . . We envision a future in which all fannish works are recognized as legal and transformative and are accepted as a legitimate creative activity.").

18. Most prominently represented by the best practices in fair use movement spearheaded by Patricia Aufderheide and Peter Jaszi. *See Best Practices*, CTR. FOR MEDIA & SOC. IMPACT, http://www.cmsimpact.org/fair-use/best-practices (last visited Apr. 23, 2015).

19. *See, e.g.*, BRANDON BUTLER, http://brandonbutler.info/ (last visited Apr. 24, 2015); DISRUPTIVE COMPETITION PROJECT, http://www.project-disco.org/ (last visited Apr. 24, 2015); REBECCA TUSHNET'S 43(B)LOG, http://tushnet.blogspot.com (last visited Apr. 23, 2015).

20. *See, e.g.*, Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004) (detailing a number of predictable patterns); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 718 (2011) (arguing that there are "patterns in fair use case law that give the doctrine some measure of coherence, direction, and predictability"); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012) (listing factors empirically useful in

Jaszi and Pat Aufderheide's initiative to create best practices in fair use among nonlawyer practitioners in particular fields has seen ever-increasing success.[21] The clearest example comes from the statement of fair use best practices for documentary filmmakers, which enabled filmmakers to get insurance and distribution while relying on fair use, when once "clearance culture" gatekeepers would have demanded that every image and sound be licensed.[22] As Jaszi and Aufderheide say, fair use is a muscle that needs to be used to stay in shape[23]—and, we might extend the analogy, it gets larger and more defined with vigorous use.

The political utility of claiming that fair use is uncertain has therefore now shifted. Critics of copyright's seemingly ever-expanding scope used to say that fair use wasn't enough to protect the public interest, and proponents of expansion used to reassure them that fair use (and the idea/expression distinction) made any expansion harmless.[24] Now, by contrast, copyright expansionists use fair use's supposed unreliability as a reason why fair use shouldn't actually be considered that important or useful to users or subsequent creators.[25] Copyright restrictionists today often resist the charge of unpredictability in order to make fair use's

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predicting outcomes); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009) (fair use case law is "both more coherent and more predictable than many commentators have perceived").

21. *See generally* PETER JASZI & PAT AUFDERHEIDE, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011); *Best Practices*, CTR. FOR MEDIA & SOC. IMPACT, http://www.cmsimpact.org/fair-use/best-practices (last visited Apr. 23, 2015) (collecting a number of fair use best practices statements).

22. *See* Robert Kasunic, *E&O Insurance for Documentary Films: The Effect of Best Practices in Fair Use*, INTELL. PROP. L. COMMITTEE NEWSL. (Am. Bar Ass'n Tort Trial & Ins. Practice, Chicago, Ill.), Summer 2008, at 1, *available at* http://www.kasunic.com/Articles/ipsummer08.pdf.

23. PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS, CTR. FOR SOC. MEDIA 28 (2004), *available at* http://centerforsocialmedia.org/sites/default/files/UNTOLDSTORIES_Report.pdf (quoting documentarian Sam Green).

24. *See, e.g.*, Golan v. Holder, __ U.S. __, 132 S. Ct. 873, 889–90 (2012); Eldred v. Ashcroft, 537 U.S. 186, 220 (2003) (reasoning that fair use "affords considerable latitude for scholarship and comment" even after copyright term extension).

25. *See, e.g.*, June M. Besek, Jane C. Ginsburg, & Philippa S. Loengard, Comments on ALRC Discussion Paper 79, Copyright and the Digital Economy 3 (July 31, 2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344338 ("[The flexibility of fair use] in many instances comes at the cost of certainty and predictability . . . . [F]air use decisions are often complicated, and advice frequently depends as much on the amount of risk the user is willing to undertake as it does on the evaluation of the substantive law."); *see also* GEOFFREY A. MANNE & JULIAN MORRIS, DANGEROUS EXCEPTION: THE DETRIMENTAL EFFECTS OF INCLUDING "FAIR USE" COPYRIGHT EXCEPTIONS IN FREE TRADE AGREEMENTS 15, 17 (2015), *available at* http://laweconcenter.org/images/articles/dangerous_exception_final.pdf (arguing that other legal systems aren't able to handle subtle, common-law fair use inquiries and that other countries would misinterpret fair use to protect too much activity).

reliability a performative reality. This statement, provided by Brandon Butler, Michael Carroll, and Peter Jaszi as part of a Copyright Office inquiry into orphan works proposals, states the basic thesis:

> Myth: Fair use is unpredictable, and people who are not highly risk tolerant need more certainty than fair use currently provides. Representatives of the Copyright Office asked repeatedly whether the flexibility of the four-factor framework is a hindrance to all but the most courageous, risk-tolerant actors, and rights holders claimed there was widespread confusion about what constitutes fair use.
>
> Fact: Fair use has become a stable, predictable, coherent doctrine. The courts are applying a unified view of fair use grounded in the concept of transformativeness, first suggested by Judge Leval and endorsed by the Supreme Court in 1994, and for many common categories of use it is possible to make powerful predictions about how a court will assess specific examples. There are more and more tools available to users to help them make these determinations, including best practices statements developed by user communities. In reality, more and more people and institutions are relying on fair use on a daily basis, and only the myth of an arbitrary and capricious fair use doctrine is preventing others from joining them.[26]

Or, as Professor Jaszi more bluntly put it before Congress: "Fair use is working."[27] There is no such thing as perfect certainty—in America, after all, one can imagine people suing over virtually anything, copyright-related or not. But fair use provides enough certainty that ordinary people can go about their day-to-day business using common sense, just as they can usually do so with respect to other incompletely specified legal regimes, such as negligence liability in tort.

II. THE TRIUMPH OF TRANSFORMATIVE EXACT COPIES

Alongside fair use's robust new public persona, litigated fair use

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26. BRANDON BUTLER, MICHAEL CARROLL, & PETER JASZI, IN RE: DOCKET NO. 2012–12, ORPHAN WORKS AND MASS DIGITIZATION 1–2 (2014), *available at* http://copyright.gov/orphan/comments/Docket2012_12/Butler-Brandon-Carroll-Michael-Jaszi-Peter.pdf (footnotes omitted).

27. *The Scope of Fair Use: Hearing Before Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 3 (2014) (testimony of Professor Peter Jaszi, Washington College of Law American University, Washington, D.C.). *But see* Jennifer E. Rothman, *Copyright's Private Ordering and the "Next Great Copyright Act,"* 29 BERKELEY TECH. L.J. 1595, 1602–05 (2014) (arguing that claims of predictability are overstated, at least for ordinary commercial uses).

defenses have prevailed in situations of great relevance to ordinary Americans and specialists alike, from search engines to critics of particular public figures. Specifically, exact copying plus transformative purpose has a stunningly good fair use record in recent cases. Copies, both large-scale and selective, have been blessed as transformative by courts reasoning that exact copies can still have transformative purposes distinct from the purpose of authorized copies. This Part sketches out the variety in the case law and its underlying justification in transformative purpose.

Beginning with the large, indiscriminate copiers: databases for detecting plagiarism,[28] tracking the news,[29] aggregating legal briefs,[30] and aggregating the text of millions of libraries' books[31] have been held to be fair use mostly because of their transformativeness, even in the presence of a commercial purpose. Why are large-scale copying endeavors transformative? As the Second Circuit explained in *Authors Guild Inc. v. HathiTrust*,[32]

> [T]he creation of a full-text searchable database is a quintessentially transformative use. . . . [T]he result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn. Indeed, we can discern little or no resemblance between the original text and the results of the [HathiTrust database] full-text search.[33]

Interpreting this result, a district court concluded in *Fox News Network LLC v. TVEyes Inc.*[34] that "[t]ransformation almost always occurs when the new work 'does something more than repackage or republish the original copyrighted work.'"[35] There are two ways to read this statement: that doing something more than repackaging or publishing is almost always transformative, or that transformativeness can rarely be found unless the new work does something more than repackaging and republishing. As discussed in Part III, fair use critics

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

29. Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379 (S.D.N.Y. 2014).

30. White v. West Publ'g Corp., No. 12 CIV. 1340 JSR, 2014 WL 3057885 (S.D.N.Y. July 3, 2014).

31. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014); *see also* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

32. 755 F.3d 87 (2d Cir. 2014).

33. *Id.* at 97.

34. 43 F. Supp. 3d 379.

35. *Id.* at 390.

fear that the former reading is becoming predominant, to the detriment of copyright owners' legitimate interests in controlling and monetizing their works. No matter which reading is correct, however, creating a new work that is greater than the sum of its parts has been regularly recognized as transformative. In *TVEyes*, for example, the court found transformativeness when an aggregator of radio and TV news allowed its users to study the tone of reporting.[36] According to the court, "TVEyes' message, 'this is what they said'—is a very different message from [Fox News']—'this is what you should [know or] believe.'"[37]

Selective copying without alteration of the content of the copied work has also succeeded. Instances of copying deemed to be fair use include: law firm copying of scientific journal articles for purpose of patent disclosures,[38] copying an expert's resume for litigation-related communications,[39] copying blog posts for use in a disciplinary proceeding against the blogger,[40] copying a conference call in order to convey executives' tone and wording,[41] copying music posters as part of a history of the music group,[42] copying an alleged ex-Muslim radical's speeches to expose his fraud,[43] and even copying photos of people who were being criticized.[44]

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36. *Id.* at 392.

37. *Id.* at 393 (quoting Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 85 (2d Cir. 2014)) (alterations in original). Jonathan Band suggests that this is similar to the hearsay rule, which treats statements differently for the purpose of proving they were said versus proving the truth of the matter asserted. Jonathan Band, *Transformative Use and the Hearsay Rule*, DISRUPTIVE COMPETITION PROJECT (Sept. 11, 2014), http://www.project-disco.org/intellectual-property/091114-transformative-use-hearsay-rule/.

38. Am. Inst. of Physics v. Winstead PC, No. 3:12-CV-1230-M, 2013 WL 6242843 (N.D. Tex. Dec. 3, 2013) (finding patent-related copying transformative and fair).

39. Devil's Advocate LLC v. Zurich Am. Ins. Co., No. 1:13-CV-1246, 2014 WL 7238856, at *5 (E.D. Va. Dec. 16, 2014) ("[D]efendant's submission of Toothman's resume in the Texas case was for the purpose of providing notice in a judicial proceeding, a purpose different from the resume's intrinsic commercial purpose.").

40. Denison v. Larkin, No. 1:14-CV-01470, 2014 WL 3953637 (N.D. Ill. Aug. 13, 2014) (finding that disciplinary use had a different purpose than blogger's purpose of exposing alleged courtroom corruption).

41. *Swatch Grp.*, 756 F.3d at 85 (copy of recording of Swatch conference call was fair use because news reporting purpose differed from information conveying purpose of Swatch's speakers).

42. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006); *see also, e.g.*, Warren Publ'g Co. v. Spurlock, 645 F. Supp. 2d 402 (E.D. Pa. 2009) (similar holding for works of artist who illustrated many pulp fiction covers).

43. Caner v. Autry, No. 6:14-CV-00004, 2014 WL 2002835 (W.D. Va. May 14, 2014) (videos of plaintiff posted to expose his alleged lies were transformative fair use).

44. Katz v. Chevaldina, No. 12-22211-CIV-KING, 2014 WL 2815496 (S.D. Fla. June 17, 2014), *report and recommendation adopted*, No. 12-22211-CV, 2014 WL 4385690 (S.D. Fla. Sept. 5,

In some ways these cases are even more interesting from the perspective of transformativeness because the database cases involved the creation of a resource that wouldn't otherwise exist. The databases emerged out of the contributions of many individual components, each of which has relatively little value to the overall purpose on its own. By contrast, the individual copying cases recognized transformation in context-shifting alone, without immersing one work in a flow of many others. In fact, the *Swatch Group Management Services v. Bloomberg, L.P.*[45] opinion, which approved as transformative a news outlet's posting of the audio of a business earnings call, was even amended after issuance to make clear that this shift in purpose was itself transformative.[46] That even selective copying is doing rather well indicates that courts are open to recognizing many types of transformative purposes.

Transformative purpose, in general, seems to mean that a defendant has a different interpretive or communicative project than the plaintiff did in creating the original work. A work created by a creative photographer in order to depict a person (or a house) can thus have its purpose changed by a news story about the photo, or by a database whose goal is to allow searchers to find lots of different pictures associated with particular keywords.[47] A poster designed to promote a concert by the Grateful Dead can have its purpose changed by a book chronicling the history of the band.[48] Although no communication is univocal given the variety of interpretive positions held by audiences, courts have proven willing to find transformative purpose based on objective characteristics of a particular defendant's use, such as its inclusion within a broader context. *Swatch* is perhaps a pure example of context change, because the context there was not that the work was embedded within a larger news story, nor that it was part of a database of similar works, but that it was reposted in full by a news organization that existed to disseminate information.[49] By contrast, the plaintiff-

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2014) (headshot used in article critical of subject was transformative fair use); Dhillon v. Does 1-10, No. C 13-01465 SI, 2014 WL 722592 (N.D. Cal. Feb. 25, 2014) (same).

45. *Swatch Grp.*, 756 F.3d 73.

46. *See* Andy Sellars, *The (Non)Finality of a Fair Use Opinion*, CYBERLAW CLINIC: HARV. L. SCH., BERKMAN CENTER FOR INTERNET & SOC'Y (Feb. 23, 2015), http://cyberlawclinic.berkman.harvard.edu/2015/02/23/fairuse/ (discussing the meaning of the amended opinion).

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

48. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006).

49. *Swatch Grp.*, 756 F.3d at 85.

owner in *Swatch* created the work to promote its own non-copyright financial interests by reassuring investors of its economic viability.[50] Even in a world where creators have multiple aims, these particular purposes can be readily distinguished.

The major fair use loss in the category of selective copying without alteration, the University of Georgia e-reserves case, involved a lawsuit against the university for allowing sometimes significant portions of books and articles to be placed on electronic reserve for courses.[51] While the Eleventh Circuit Court of Appeals accepted that some use would be fair, it ordered the district court to reconsider its findings by making a more case-by-case analysis.[52] The litigation featured an arguably unnecessary concession by the university that its copies for use by students were nontransformative, and thus does not represent a full exception to transformativeness' current reign.[53]

There is one more case that cuts against the "triumph of transformative purpose" narrative. *Associated Press v. Meltwater U.S. Holdings, Inc.*[54] found that a news monitoring service that downloaded articles from the internet and allowed keyword searching was not transformative because it "use[d] its computer programs to automatically capture and republish designated segments of text from news articles, without adding any commentary or insight in its New Reports."[55] The *Meltwater* court acknowledged that allowing users "to sift through the deluge of data available through the Internet and to direct them to the original source . . . . would appear to be a transformative purpose." But the defendant didn't offer "evidence that Meltwater News customers actually use[d] its service to improve their access to the underlying news stories that are excerpted in its news feed," and thus it failed to show that its service was actually used to transform the original news story into a datapoint that told a broader story about the overall news reporting industry.[56] Thus, *Meltwater*—which arguably is now undermined by

50. *Id.*

51. Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014); *see also* Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65 (2d Cir. 1999) (ruling that abstracts and rough translations of Japanese copyrighted content were not transformative).

52. *Cambridge Univ. Press*, 769 F.3d at 1283.

53. *See* Brandon Butler, *Transformative Teaching and Educational Fair Use After Georgia State*, CONN. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568936.

54. 931 F. Supp. 2d 537 (S.D.N.Y. 2013).

55. *Id.* at 552; *see also* Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998) (allowing dial-in subscribers to listen to live radio over the phone wasn't fair use).

subsequent Second Circuit precedent in *Swatch* and *HathiTrust* in any event—does not represent a significant loss for purpose-transformativeness.

In fact, even historically, copying an entire work wasn't so bad for a fair use finding. Barton Beebe's empirical study of fair use cases from 1978–2005 found that "[o]f the 99 opinions that addressed facts in which the defendant took the entirety of the plaintiff's work, 27.3% found fair use."[57] And this wasn't much different from the overall rate of fair use findings.[58] For all the headline-grabbing power of the full copying cases, then, they don't represent a comprehensive redefinition of fair use (though it's true that the scale of copying in these newer cases is often larger than that in older cases, because of the technological developments that produced the newer cases).[59]

Meanwhile, alteration and partial copying are also succeeding using theories about transformed purpose and, in particular, transformed *meaning*, but with less certainty.[60] The most commented-on of these is surely *Cariou v. Prince*,[61] where the Second Circuit blessed most of appropriation artist Richard Prince's copying from a photographer who found his relatively unsuccessful images of Jamaican men converted into hundred-thousand-dollar works celebrated by the likes of Beyoncé.[62] *Cariou* featured disagreement among the various judges about whether

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56. *Meltwater*, 931 F. Supp. 2d at 544; *see also* Fox News Network, LLC v. TVEyes, Inc., No. 13 Civ. 5315 AKH, 2014 WL 4444043, at *10 (S.D.N.Y. Sept. 9, 2014) (adopting this analysis to distinguish the TVEyes service).

57. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 616 (2008).

58. *Id.* at 575–76.

59. *See* BUTLER, *supra* note 26, at 3 ("Myth: Fair use case law has developed in a disturbing new direction in certain courts, or in recent years. . . . Fact: Fair use as applied by courts has evolved into a clear, coherent, unified doctrine. Recent scholarship has demonstrated that over nearly 20 years courts have moved decisively away from a series of confusing and contradictory rules of thumb focused on market harm and toward an emphasis on transformative purpose under the first factor." (footnote omitted)).

60. *Compare, e.g.*, Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013) (use of altered image in music video was transformative); Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012) (affirming a finding of fair use on a motion to dismiss given the clarity of the transformation, a parody); Arrow Prods., LTD. v. Weinstein Co., 44 F. Supp. 3d 359 (S.D.N.Y. Aug. 25, 2014) (recreation of four scenes from movie was fair use), *and* Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform, 868 F. Supp. 2d 962, 972, 982–93 (C.D. Cal. 2012) (re-edited video critiquing original video was fair use), *with* Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010) (use of Holden Caulfield in quasi-ironic sequel was likely nontransformative), *and* Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (encyclopedia of *Harry Potter* was insufficiently transformative given amount of exact copying involved).

61. 714 F.3d 694 (2d Cir. 2013).

62. *Id.* at 709.

the meaning or message of Prince's works so obviously differed from the meaning or message of Cariou's as to justify summary judgment.[63]

By contrast, the pure copying purpose-transformation cases discussed above have not produced such divided findings. Moreover, by finding five of the images at issue not physically altered enough to qualify as transformative fair use for purposes of summary judgment, the majority in *Cariou* suggested that merely directing a work at the market for appropriation art wasn't necessarily enough for transformativeness.[64] At least when the markets were close enough, a significant change in content seemed necessary as well. At the same time, *Cariou* recognized the relevance of interpretive communities: if a particular community, such as the world of "high art," perceives a work as having a new meaning or message, the court should find transformativeness even if the court itself is not sure what's going on.[65]

The Copyright Office has also recognized various types of content-transformativeness as fair use in its ruling on exemptions to the Digital Millennium Copyright Act's prohibition on circumventing access controls, such as the access protection on DVDs.[66] These exemptions must be re-examined every three years. In 2009, remix artists—represented by the Electronic Frontier Foundation (EFF) and the OTW—for the first time sought exemptions for remix video, and have continued to participate in the exemption process. Both in 2009 and 2012, the Office found that significant numbers of noncommercial remixes were fair use: they took parts of an existing work and used them to comment on or criticize the work itself, or on some other aspect of the world.[67] The representatives of large copyright industries who opposed

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63. *See id.* at 706–07 (majority opinion); *id.* at 712–13 (Wallace, J., concurring in part and dissenting in part).

64. *See id.* at 711 (majority opinion).

65. *See* Jonathan Francis, *On Appropriation:* Cariou v. Prince *and Measuring Contextual Transformation in Fair Use*, 29 BERKELEY TECH. L.J. 681, 693 (2014) (discussing *Cariou*'s recognition of interpretive communities). *See generally* Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008) (exploring the issues surrounding interpretive communities); Rebecca Tushnet, *Judges as Bad Reviewers: Fair Use and Epistemological Humility*, 25 LAW & LIT. 20 (2013) (arguing in favor of recognizing multiplicity of meanings to different communities); Michael W. Tyszko, *Whose Expression Is It, Anyway? Why "New Expression, Meaning, or Message" Should Consider All Reasonably Available Viewpoints*, 65 SYRACUSE L. REV. 221 (2014) (advocating adoption of multiple reasonable viewpoints).

66. *See* 17 U.S.C. § 1201(a)(1)(C) (2012).

67. *See* MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS, SECTION 1201 RULEMAKING: FIFTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION 127–28 (Oct. 2012); Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Cong. 66–68 (June

the current remix exemption proposal have essentially conceded the point. Though they offered pro forma arguments that remixes weren't generally fair use, they also did not oppose the existing exemptions for remix and argued that the exemptions should only be renewed in their 2012 form, not expanded.[68]

Not all changes create content-transformativeness: for example, a new episode of *Gilligan's Island* wouldn't be identical to previous episodes, but the different ways in which Gilligan bollixed a new attempt to leave the island wouldn't necessarily change the meaning or message of the work.[69] By contrast, Jonathan McIntosh's remix in which Buffy the Vampire Slayer confronts *Twilight*'s Edward Cullen, exposing him as a creepy stalker, uses Buffy as a tool of critique and *Twilight* as the subject of that critique.[70] Both of these uses give new meanings to the existing works, and thus the resulting content is transformative.

While purpose-transformativeness has the appeal of protecting copiers whose projects are opposed or orthogonal to the original authors' aims—broadly speaking, using the original works as evidence or as bits of a larger mosaic—content-transformativeness has its own merit. Content-transformativeness sets up the specifically *authorial* claims of people who are making transformative works as equal, or not subordinate to, the claims of other authors. Thus, both kinds of transformativeness are important to current doctrine.

There is also one significant nontransformative fair use success: copying for the benefit of print-disabled library patrons in *HathiTrust*.[71] In that case, libraries' copies were for the same purpose as the original: allowing the works to be read, albeit read in accessible formats (large print, pages that did not need to be turned by hand, or other converted

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11, 2010) (regarding recommendation of the Register of Copyrights in RM 2008-8 and rulemaking on exemptions from prohibition on circumvention of copyright protection systems for access control technologies).

68. Joint Creators & Copyright Owners, Long Comment Regarding a Proposed Exemption Under 17 U.S.C. 1201 (Proposed Class #7), at 2–3, *available at* http://copyright.gov/1201/2015/comments-032715/class%207/Joint_Creators_and_Copyright_Owners_class07_1201_2014.pdf (detailing lack of opposition to existing exemptions but claiming that remixes are generally infringing); Comments of the DVD Copy Control Association ("DVD CCA") on Proposed Class 7, at 2, 3–8, *available at* http://copyright.gov/1201/2015/comments-032715/class%207/DVDCCA_class07_1201_2014.pdf (same).

69. *But cf.* Adjmi v. DLT Entm't Ltd., No. 14 Civ.568 (LAP), 2015 WL 1499575 (S.D.N.Y. Mar. 31, 2015) (finding a playwright's dark rewriting of *Three's Company*, a lighthearted 1970s sitcom, to be transformative fair use).

70. *See* Jonathan McIntosh, *Buffy vs. Edward: Twilight Remixed*, REBELLIOUS PIXELS (June 20, 2009), http://www.rebellionspixels.com/2009/buffy-vs-edward-twilight-remixed.

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

formats depending on patrons' needs) because the audience couldn't read the original.[72] Although the court deemed this purpose nontransformative, it was nonetheless fair use because copyright owners had consistently declined to develop a licensing market for such uses.[73] Thus, the access benefits outweighed any potential lost market, which by all indications was never going to materialize regardless.[74]

Ultimately, however, there is general consensus that "the transformative use paradigm, as adopted in *Campbell v. Acuff-Rose* overwhelmingly drives fair use analysis in the courts today."[75] Use as a datapoint, as evidence, or as a starting point for some substantive reworking offering new meanings will all justify a transformativeness finding, and therefore usually a fair use finding. There's less consensus that this variety within transformativeness is a good idea.

III. THE CRITICS

Fair use's alleged uncertainty, addressed in Part I, isn't its only failing, according to its critics. As Congress, the Copyright Office, and even the Patent and Trademark Office start to consider possible revision of the Copyright Act, and as other nations examine the U.S. model of fair use as part of reconsidering their own exceptions and limitations, some people have warned that current judicial interpretations of fair use are far too broad. These critics are attempting to push the pendulum back towards restrictive interpretations and even to suggest that our current case law may violate our obligations under the Berne Convention.[76] While I hope they fail, their arguments against a broad and flexible fair use doctrine are worth addressing.

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72. *Id.* at 101.

73. *Id.* at 103.

74. *Id.*

75. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1][b] (2013) (stating that transformative has become a shorthand for fair, and not transformative has become a shorthand for not fair); Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 734 (2011); *see also* Beebe, *supra* note 57, at 605–06.

76. Jane C. Ginsburg, *Letter from the US: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms — Part II (Fair Use)* 3 (Columbia Law & Econ., Working Paper No. 503, 2014), *available at* http://ssrn.com/abstract=2539178 ("The potential disparities between the U.S. fair use exception and the three-step test have long attracted the attention of scholars. . . . U.S. authorities could reasonably contend that, in practice, courts' actual application of the exception remained consonant with international standards. Recent U.S. fair use decisions, however may challenge the credibility of that assertion." (footnote omitted)); *The Scope of Fair Use*, *supra* note 27 (statement of June M. Besek, Executive Director of the Kernochan Center for Law, Media and the Arts and Lecturer-in-Law, Columbia Law School) (making the same argument).

At recent congressional hearings on fair use, for example, representatives of the large copyright industries such as book and music publishing cautioned that courts have found fair use in too many cases.[77] They had no enthusiasm for congressional intervention into the guts of the Copyright Act at this time, given that they'd likely have to trade some consumer-friendly reforms for any statutory change cutting back on fair use, but they wished to put a public marker down on what they considered unacceptable.

June Besek, at Columbia's Kernochan Center, argued both before Congress and at a Copyright Office roundtable that fair use has expanded to the point that some copyright provisions are now "meaningless"[78] and that fair use has become too defendant-favorable.[79] For example, she believed that *HathiTrust* (then on appeal from a fair use ruling by the district court) mistakenly found fair use in university libraries' mass digitization of works, because that made the library-specific exemptions of Section 108 irrelevant.[80] These exceptions are both broader than fair use in some respects and narrower in others; the Second Circuit easily rejected an argument based on Section 108, which explicitly does not interfere with fair use.[81] I raise Besek's point not to agree with it, but to illustrate her concern that fair use is protecting conduct that Congress otherwise chose not to protect.

Professor Jane Ginsburg, a longstanding copyright expansionist whose views are always worth serious consideration, has turned her attention outwards. It may be too late for us, but perhaps other nations can be warned off of our current fair use path, and possibly even provide

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77. *See, e.g.*, *The Scope of Fair Use*, *supra* note 27, at 6–7 (testimony of Kurt Wimmer, General Counsel, Newspaper Association of America) (arguing that Congress should keep its hands off, but that "some courts' recent willingness to give undue weight to the concept of 'transformative use' in connection with the first fair-use factor risks eroding fundamental copyright protections." (footnote omitted)).

78. *Orphan Works and Mass Digitization Roundtables*, LIBRARY OF CONG. 39 (Mar. 10, 2014), *available at* http://copyright.gov/orphan/transcript/0310LOC.pdf (statement of June Besek) ("I've said that fair use has incredibly expanded over the past several years and I think it's expanded to the point that it is distorting the law. It's sort of taken over some of the other exceptions. . . . I think essentially fair use has made some provisions simply meaningless . . . .").

79. *The Scope of Fair Use*, *supra* note 27, at 12 (statement of June M. Besek).

80. *Id.* at 10.

81. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 94 n.4 (2d Cir. 2014) ("Plaintiffs argue that the fair use defense is inapplicable to the activities at issue here, because the Copyright Act includes another section, 108, which governs 'Reproduction [of copyrighted works] by Libraries . . .' 17 U.S.C. § 108. However, section 108 also includes a 'savings clause,' which states, 'Nothing in this section in any way affects the right of fair use as provided by section 107 . . . .' § 108(f)(4). Thus, we do not construe § 108 as foreclosing our analysis of the Libraries' activities under fair use, and we proceed with that analysis.").

some pressure to turn us back in the other direction. Both in a "Letter from the US"[82] and in a submission to the Australian Law Reform Commission with her colleagues,[83] Professor Ginsburg set out her concerns with the growing—in her view, metastasizing—scope of fair use.

One primary criticism of transformativeness from Ginsburg and others identifies a conflict between the concept of "transformation" in fair use doctrine and the derivative works right, which in the statute's language allows the copyright owner to claim rights in works that are "transformed" as well as "adapted."[84] Thus, it could be difficult to tell which works ought to be deemed infringing derivative works and which protected fair uses.[85] Content-transformativeness, Ginsburg suggests, "makes fair use even more indeterminate and unpredictable than before (some level of indeterminacy and unpredictability being inherent to the flexibility that is the hallmark of fair use), because 'transformativenes[s]' may be entirely in the eye of the judicial beholder."[86]

A recent Seventh Circuit case, *Kienitz v. Sconnie Nation LLC*,[87] echoed Ginsburg's concerns. *Kienitz* involved the use of a photo of the

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82. *See* Ginsburg, *supra* note 76.

83. Besek, Ginsburg, & Loengard, *supra* note 25.

84. 17 U.S.C. § 101 (2012) (defining "derivative work").

85. *See, e.g.*, *The Scope of Fair Use*, *supra* note 27, at 8–10 (statement of June M. Besek) (arguing that post-*Campbell* cases have inappropriately contracted the derivative works right); 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.49 (3d ed. 2005 & 2007 Supp.) ("On principle, the rule [weighing transformativeness in favor of fair use] threatens to undermine the balance that Congress struck in section 106(2)'s derivative rights provision to give copyright owners exclusive control over transformative works to the extent these works borrow copyrightable expression from the copyrighted work."); Reese, *supra* note 1, at 468 ("The rise of transformativeness as an explicit, and important, aspect of fair use analysis obviously has potential implications for the copyright owner's exclusive right . . . to prepare derivative works . . . , since derivative works seem, by definition, to involve some transformation of the underlying work."); Jane C. Ginsburg, *Copyright and Intermediate Users' Rights*, 23 COLUM.-VLA J.L. & ARTS 67, 69–71 (1999); Jeremy Kudon, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 592–93 (2000); Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 720–21 (1995); Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 126–27 (2001). *But see* Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505 (2013) (setting forth a framework for properly defining the derivative works right without a conflict with fair use).

86. Ginsburg, *supra* note 76, at 21; *see also* Francis, *supra* note 65, at 682 ("This reliance on physical alteration leaves a creator unsure of just how much alteration is needed before a court will find her new work has altered the original's expression sufficiently to manifest new and different meaning.").

87. 766 F.3d 756 (7th Cir. 2014).

mayor of Madison, Wisconsin, a formerly hard-partying student at the university there who now wanted to control students' exuberance (and drunkenness).[88] A local business removed the background of the photo, posterized and colored the image of the mayor's face, and put it on a T-shirt with the phrase "sorry for partying."[89] The photographer sued, and the court of appeals affirmed a finding of fair use, but only after criticizing transformativeness.[90]

The *Kienitz* court commented that transformativeness doesn't appear in the Copyright Act, though the Supreme Court "mentioned" it in *Campbell*, which is like downplaying Article III courts as merely "mentioned" in the Constitution.[91] The court then expressed its "skeptic[ism]" about prioritizing transformativeness over the plain text of the statute because of the potential effect of transformativeness on the derivative works right:

> To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every "transformative use" can be "fair use" without extinguishing the author's rights under § 106(2).[92]

Instead, the court decided to "stick with the statutory list," and the most important factor was the fourth, market effect, which ultimately favored fair use.[93] (This interpretive re-prioritizing of Supreme Court decisions by a court of appeals is a kind of "underruling."[94])

Unfortunately, *Kienitz* doesn't tell us what the first fair use factor *does* attempt to privilege and deprivilege, if not transformativeness. Instead, the Seventh Circuit used its own test, worded in the language of economics: "whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited)."[95] Where this concept appears in the Copyright Act is left as an exercise for the reader. More importantly, the complement/substitute opposition requires some

88. *Id.* at 757.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 758.

93. *Id.*

94. *See, e.g.*, Michael Stokes Paulsen, *Accusing Justice: Some Variation on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33, 82 (1989) (arguing that "when push comes to shove, the [lower court] judge may . . . . in effect, 'overrule' (or, perhaps a better term, given the relationships of the courts, 'underrule') [lawless precedent]").

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

baseline for understanding the appropriate scope of the copyright right—the markets to which copyright owners are entitled—just as transformativeness does.

I obviously disagree with Ginsburg and with *Kienitz*: Transformativeness is a flexible standard for identifying uses with new meanings, messages, or purposes outside of the bounds the copyright owner reasonably deserves to control. Transformativenesss doesn't make all derivative works into fair uses, and the Second Circuit in *Cariou* didn't purport to reject prior case law so finding.[96] And, as noted above in Part II, fair use has sufficient predictability to serve as the basis for action in many cases.

Indeed, to the extent that fair use's critics like fair use at all, it is for content-transformativeness: uses that create new creative works.[97] And it's this somewhat conflicted relationship with content-transformativeness that leads to one of the most interesting features of the new criticism of transformativeness: Transformative purpose, though it makes copyright expansionists see red, simply doesn't pose the same conceptual conflict with the derivative works right as transformative content. As Professor Reese's careful analysis established, courts finding fair use transformativeness were relatively uninterested in whether a defendant's use transformed a plaintiff's work in the sense of creating a derivative work.[98] Courts did not use the creation of a derivative work as evidence of transformative fairness, nor were they using the fact of mere reproduction as evidence of unfairness.[99] As noted in Part II, that pattern has, if anything, only intensified. Thus, fears about the overlap between transformativeness and derivative works—including mine[100]—were overstated.

Instead, the database and historical uses that have been protected by the pure transformative purpose line of cases involve the creation of allegedly infringing reproductions, not allegedly infringing derivative works. As pure copies, they *can't* conflict with the derivative works

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96. *See, e.g.*, Castle Rock Entm't v. Carol Publ'g Grp., Inc., 955 F. Supp. 260 (S.D.N.Y. 1997). Indeed, in its recent *Salinger* opinion, the Second Circuit endorsed a disturbingly narrow characterization of content-transformativeness, suggesting that a novel that followed an older, broken-down Holden Caulfield was not transformative or fair. *See* Salinger v. Colting, 607 F.3d 68, 83 (2d Cir. 2010).

97. *See, e.g.*, *The Scope of Fair Use*, *supra* note 27, at 14 (statement of June M. Besek) (noting that fair use's "most appropriate role" is "fostering new authorship"); MANNE & MORRIS, *supra* note 25, at 15 (suggesting that fair use is supposed to encourage the creation of "derivative works").

98. Reese, *supra* note 1, at 484, 494.

99. *Id.*

100. *See* Tushnet, *supra* note 10, at 555–60.

right. Yet fair use's critics oppose the transformative purpose cases such as *HathiTrust* and *Perfect 10, Inc. v. Amazon.com, Inc.*,[101] which found that creating thumbnail images for use in online image search was fair use,[102] with even more fervor.[103] For example, rather than regarding purpose as something that can legitimately be transformed, Ginsburg argues that these cases actually rest on false premises that certain beneficial uses deserve a subsidy from copyright owners and that a market failure prevents a licensing regime from emerging to allow these beneficial uses.[104] The inapplicability of the "overlap with derivative works" criticism to the database cases reveals that Ginsburg and her colleagues' real disagreement lies with fair use's strength, not with its alleged conceptual fuzziness.[105]

Other criticisms of transformativeness are equally awkward as applied to the database cases. For example, some have complained that cases like *Cariou* leave transformativeness in the eye of the beholder, who might perceive a new meaning or message based on any change—or not.[106] But how does the meaning or message of a database appear to a reasonable observer, compared to the meaning or message of a single work? It seems a very weird question even to ask. No matter one's interpretive community, the two seem like very different types of communicative objects.

Relatedly, Reese asks a number of cogent questions about the

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101. 508 F.3d 1146 (9th Cir. 2007).

102. *Id.*

103. *See, e.g.*, *The Scope of Fair Use*, *supra* note 27, at 5, 8 (statement of June M. Besek) (criticizing application of transformativeness to complete copies or "functional transformation"); *cf.* Kathleen K. Olson, *Transforming Fair Use Online: The Ninth Circuit's Productive-Use Analysis of Visual Search Engines*, 14 COMM. L. & POL'Y 153, 167 (2009) (while supporting the outcomes in such fair use cases, calling purpose-transformativeness an "absurd conception of transformative use").

104. *See* Ginsburg, *supra* note 76, at 4; Jonathan Band, *The Future of Fair Use After Google Books*, DISRUPTIVE COMPETITION PROJECT (Feb. 11, 2014), http://www.project-disco.org/intellectual-property/021114-the-future-of-fair-use-after-google-books/ (describing criticisms of lawyer Jon Baumgarten that the new approach to purpose-transformativeness merely asks if the new use was socially beneficial).

105. *See* Laura Quilter, *Fair Use Week—How Parodies Transformed Fair Use*, COPYRIGHT & INFO. POL'Y BLOG (Feb. 23, 2015), http://blogs.umass.edu/lquilter/2015/02/23/fair-use-week-how-parodies-transformed-fair-use/ ("[T]he criticisms are less about whether the doctrine is correct or not, and more a complaint that the concept has been too successful.").

106. *See* Cariou v. Prince, 714 F.3d 694, 711 (2d Cir. 2013) ("What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work."); *cf.* Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. DIALOGUE 88, 98–100 (2013) (criticizing *Cariou*'s reasoning as unduly malleable).

meaning of "purpose" that simply seem easier to answer in the mass copying cases. As he notes, the court has to have some sense of the plaintiff's purpose to determine whether the defendant's purpose is transformative.[107] Whether the appropriate standard is subjective (what the author actually had in mind) or objective (what reasonable authors of this type of work would have in mind), and whether or not courts recognize multiple authorial purposes,[108] "I intend to create a database of lots of works" is rarely if ever going to be a plausible purpose for the creator of an individual work, or even for any transferee. Even if the author intends database-type use, once the author sees that doing so is possible,[109] she can't do it on her own as long as there's more than one copyright owner in the world. This makes the author's claim to encompass the "big data" purpose less plausible.[110]

Indeed, the conceptual argument against content-transformativeness seems to be more persuasive, at least on a case-by-case basis, than the argument against purpose-transformativeness as applied to large-scale uses that generate benefits that individual, unaggregated works couldn't. Thus, a recent article on fair use cases quoted Professor Lateef Mtima calling content-transformativeness cases "a snake pit" because of courts' need to judge the aesthetics of any transformation.[111] Others expressed the opinion that courts were likely to move the pendulum back against fair use, with 2014 likely to mark its furthest extension.[112] But even though key 2014 cases were purpose-transformative cases,

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107. Reese, *supra* note 1, at 494; *see also* Bunker & Calvert, *supra* note 12, at 121–25 (arguing that defining purpose is unstable in individual-copying cases).

108. Reese, *supra* note 1, at 494–95.

109. *Id.* at 495.

110. Professor Thomas Cotter disagrees, arguing that any author's purpose can be described at a sufficient level of abstraction that the parties' purposes will be the same. Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701, 721 (2010). For example, both the individual photographer and the image search engine intend to provide information. I find this unpersuasive; even Cotter has to concede that the "immediate" purpose of the parties' endeavors differs in mass copying cases, *id.*, and I don't see evidence that courts are more incoherent about purpose-transformation than they are about anything else. (Transformation's role in right of publicity cases is a different matter.) Moreover, if we said "the author intends to license her work for database use," even if "licensing" were not an empty abstraction rather than a purpose, that still wouldn't be the same as the database creator's purpose of making a database through aggregation.

111. Anandashankar Mazumdar, *Digital-Age Strain on Copyrights Continues; Action Coming from Courts Not Congress*, 20 ELECTRONIC COM. & L. REP. 121 (Jan. 28, 2015); *cf.* N.J. Media Grp., Inc. v. Pirro, No. 13 CIV. 7153 ER, 2015 WL 542258, at *8 (S.D.N.Y. Feb. 10, 2015) (finding that incorporation of a photo of 9/11 firefighters into a viral meme comparing them to Marines raising the flag at Iwo Jima was arguably nontransformative).

112. Mazumdar, *supra* note 111 (quoting Professors Zahr Said and Roger Schecter).

prognosticators predicted retrenchment in *content*-transformativeness: Professor Roger Schechter argued that "the ascension of the concept of transformative use has 'seriously cut back' on the copyright holder's rights of adaptation and preparation of derivative works," and library/tech industry lawyer Jonathan Band also thought that plaintiff victories would come "more with the appropriation art cases or something like that," based on the conflict with the derivative works right.[113] Band continued: "But in the tech cases, where you don't see the copies—like the HathiTrust case or the Google case . . . . what's transformative is that you're making a database for a different purpose—search," and he predicted that those cases would remain untouched.[114]

Individualized determinations about content-transformativeness do seem likely to remain more hard-fought and contextual than the orthogonal purposes approved in the pure copying cases, which may be ironic from the perspective of the critics, but only to be expected in an area of law subject to ideological drift. It's in content-transformativeness that we have the most significant questions to ask about the roles of differing interpretive communities in identifying transformed meaning. But, in order to preserve equal freedom of interpretation for all such communities, whether federal judges are part of them or not, it is vital to recognize that different audiences may take different meanings from the same work, so that what seems like a critical transformation to one group may seem trivial to another. Where the target audience would find new meanings or messages, courts should recognize content-transformativeness even if they (or I) don't see it. Narrower alternatives, such as those suggested by fair use's critics, run too much risk of suppressing speakers who don't speak in a language familiar to the court.[115]

The relatively new epistemological humility expressed in cases such as *Cariou* is a welcome respite from what Zahr Said has characterized as formalism in the mode of New Criticism, in which judges treat works as having only one correct meaning.[116] Abandoning certainty about the true meaning of a work—whether that work is the plaintiff's or the

113. *Id.*

114. *Id.* (quoting Jonathan Band).

115. *Cf.* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. . . . until the public had learned the new language in which their author spoke.").

116. *See* Zahr K. Said, *Reforming Copyright Interpretation*, 13–16 (July 26, 2014), *available at* ssrn.com/abstract=2472500.

defendant's—is uncomfortable, especially for judges trained to fix meaning whenever possible. People have always fought over the meaning of texts, though, and advocates for broad fair use protections will have to continue that fight when it comes to transformed content, no matter how entrenched the pure copying/transformative purpose cases become as a matter of copyright doctrine.

IV. WHAT'S NEXT?

The present ideal behind the criticism of transformativeness is pretty much the same as it has always been: There should be an authorized market for every copy.[117] Unauthorized productive uses, or unauthorized transformative uses, aren't, in general, justified, given owners' interest in control.[118] Exceptions and limitations should be highly constrained, ideally for listed purposes like comment, news reporting, and criticism. In addition, copyright owners should have strong moral rights, limited only as a last resort.

For those who find this vision unattractive, transformative use is a good alternative. Transformativeness, despite its potential ambiguities, has the capacity to recognize the uses that we find valuable and that we believe copyright owners shouldn't control. When high-protectionists argue that fair use is too broad, and that uses that should be controlled by copyright owners are escaping control, transformativeness provides ways to respond. When copyright owners make incentive and moral rights claims based on authorial labor, transformativeness has incentive-based and desert-based responses. Transformative uses generally involve the addition of labor to create value, whether that labor is in building an interpretive scaffold around a work, changing the work to send a different message, or putting the work together with numerous other

117. *See* Jessica D. Litman, *Fetishizing Copies*, *in* RUTH OKEDIJI, COPYRIGHT IN AN AGE OF LIMITATIONS AND EXCEPTIONS 3–4 (forthcoming 2015), *available at* http://ssrn.com/abstract=2506867 ("Copy-fetish has persuaded others that fair use has somehow run amok because copyright owners are losing lawsuits that they would probably never have brought if they didn't feel obliged to protect themselves from all unlicensed copies."); *id.* at 18 ("Copy-fetishists have demonstrated that they view the mere existence of any unlicensed copy as an invasion of their prerogatives. In the *HathiTrust* case, the Authors Guild was willing to spend millions of dollars in an effort to ensure that even invisible unlicensed copies were eradicated."); MANNE & MORRIS, *supra* note 25, at 12, 16 (arguing that licensing should supplant fair use whenever possible).

118. *See, e.g.*, *Written Comments of Copyright Clearance Center Inc.*, COPYRIGHT CLEARANCE CENTER 2–4 (Nov. 13, 2013), http://www.ntia.doc.gov/files/ntia/copyright_clearance_center_comments.pdf (arguing that rights should generally be entirely exclusive and all uses should be licensed); *Comments of the American Society of Composers, Authors and Publishers*, NAT'L TELECOMM. & INFO. ADMIN. 9–10 (Nov. 15, 2013), http://www.ntia.doc.gov/files/ntia/ascap_comments.pdf (arguing that essentially all uses of music should be licensed).

works in order to search across them. The defendant's labor is of the kind that the original copyright owner generally couldn't or wouldn't perform. No book's copyright owner has the ability to code a Google-style database; Swatch would never create objective reporting on its own economic prospects; abortion clinics wouldn't allow uses of their videos to condemn abortion.

I believe these cases were rightly decided, even if having an expansive fair use doctrine means that its contours will never be defined down to the microscopic level. In American law, there is rarely if ever a doctrine defined sufficiently to be one hundred percent predictable. Fair use doesn't need to be perfect to do its job—like parenting, it just has to be good enough.

After a long time, fair use has finally adapted to the relatively new, higher default level of copyright protection.[119] In the process, its public persona has changed, from a ninety-pound weakling to a mixed martial arts champion with a number of different strengths. Both in practices outside the courts and in fair use findings, flexibility has replaced uncertainty; the same statutory factors look different in new political and social circumstances. Given the variety of circumstances in which copyright law now operates, we shouldn't be surprised that there are also different clusters of fair uses, including both pure copying and alterations. This diversity is fair use's strength, not its weakness.

119. *See* Jessica Litman, *Campbell* at 21/*Sony* at 31, 90 WASH. L. REV. 651 (2015).