MAKING SENSE OF FAIR USE

by
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Many criticize fair use doctrine as hopelessly unpredictable and indeterminate. Yet in several recent empirical studies, leading scholars have found some order in fair use case law where others have seen only chaos. Building upon these studies and new empirical research, this Article examines fair use case law through the lens of the doctrine's chronological development and concludes that in fundamental ways fair use is a different doctrine today than it was ten or twenty years ago. Specifically, the Article traces the rise to prominence of the transformative use paradigm, as adopted by the Supreme Court in Campbell v. Acuff-Rose, *over the market-centered paradigm of* Harper & Row v. The Nation *and its progeny. The Article presents data showing that since 2005 the transformative use paradigm has come overwhelmingly to dominate fair use doctrine, bringing to fruition a shift towards the transformative use doctrine that began a decade earlier. The Article also finds a dramatic increase in defendant win rates on fair use that correlates with the courts' embrace of the transformative use doctrine. In light of these developments, adding an historical dimension to a study of fair use case law helps to make sense of what might otherwise appear to be a disconnected series of ad hoc, case-by-case judgments and explains why current rulings might seem to contradict those regarding like cases issued when the market-centered paradigm still reigned supreme.*

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I. INTRODUCTION

Numerous commentators have lambasted fair use doctrine as hopelessly unpredictable and indeterminate. That includes me. "Given the doctrine's open-ended, case-specific cast and inconsistent application," I have lamented in print, "it is exceedingly difficult to predict whether a given use in a given case will qualify" for the privilege.[1] In like vein, David Nimmer concluded his comprehensive study of fair use case law with the biting observation that the four statutory factors are so malleable that "[i]n the end, reliance on the . . . factors to reach fair use decisions often seems naught but a fairy tale."[2] For Larry Lessig, given fair use's pernicious inconstancy, the privilege really just boils down to "the right to hire a lawyer."[3] Jessica Litman curtly, yet most poetically, characterizes all of copyright, including fair use, as "billowing white goo."[4]

Courts have joined the chorus. One states that fair use doctrine is "so flexible as virtually to defy definition."[5] Another describes fair use's case-by-case analysis as "a sort of rough justice."[6]

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[1] NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 66 (2008).

[2] David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 287 (2003).

[3] LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004).

[4] Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008).

[5] Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (quoting Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968)).

The perception that U.S. fair use doctrine is arbitrary and ad hoc is also widely shared outside the United States, where copyright laws typically provide a closed list of highly specific, narrow exceptions to copyright holder rights. The erratic nature of U.S. fair use is frequently raised in opposition to legislative proposals to adopt a fair use defense to give courts a more flexible tool to accommodate new technological uses that fall outside narrow statutory exceptions.[7] Thus, Australia considered but rejected introducing fair use into its copyright law on the basis that to do so would lead to too much uncertainty.[8] Leading Canadian commentators lambasted the defense as "more fickle than fair."[9] In 2007, Israel became one of a handful of countries that has incorporated a fair use provision in its copyright law, but it did so only upon empowering its Minister of Justice to issue regulations specifying conditions under which a use may qualify as fair use.[10]

Yet is fair use truly so unpredictable, so indeterminate, so out of control? Recently, three leading scholars have produced empirical studies that actually find some order in fair use case law, where others have seen just chaos. Barton Beebe conducted a quantitative, empirical study of over 300 fair use opinions from reported cases decided between 1978 and 2005.[11] His regression analysis helps to illuminate which factors and sub-factors actually drive fair use case outcomes and which courts exert the most influence on fair use case law. Pamela Samuelson finds order in fair use precedent by creating a taxonomy of uses.[12] She breaks down fair use case law into numerous categories and sub-categories based upon the type of use at issue. Samuelson finds greater predictability of results when we examine like cases based on the type of use than when

[6] Henley v. DeVore, 733 F. Supp. 2d 1144, 1163 (C.D. Ca. 2010).

[7] *But see* Martin Senftleben, *Fair Use in the Netherlands—a Renaissance?*, 33 TIJDSCHRIFT VOOR AUTEURS, MEDIA EN INFORMATIERECHT 1 (2009) (Neth.) (favoring adoption of a fair use system in the Netherlands and other European countries as a means of providing breathing space for new technological uses that do not fit within the closed catalogue of carefully-defined limitations that currently characterizes continental European copyright regimes); Tatsuhiro Ueno, *Rethinking the Provisions on Limitations of Rights in the Japanese Copyright Act—Toward a Japanese-style "Fair Use" Clause*, 34 AIPPI J. 159 (2009) (favoring adoption of a general, flexible limitation on copyright holder rights in Japan).

[8] Philip Ruddock, *Fair Use and Copyright in Australia*, COMM. L. BULL., Feb. 2007, at 4, 6.

[9] Barry Sookman & Dan Glover, *More Fickle than Fair: Why Canada Should not Adopt a Fair Use Regime*, BARRY SOOKMAN (Nov. 22, 2009), http://www.barrysookman.com/2009/11/22/more-fickle-than-fair-why-canada-should-not-adopt-a-fair-use-regime.

[10] Copyright Act, § 19, 5768-2007, 2007 LSI 34 (Isr.), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=132095. The other countries that have adopted fair use are the Philippines and Singapore. INTELLECTUAL PROPERTY CODE, § 185, Rep. Act No. 8293, (Jan. 1, 1998) (Phil.), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=129343; Copyright Act, Ch. 63, § 35 (2006) (Sing.), *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=187736.

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

[12] Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

we look at fair use case law as a whole. Matthew Sag focuses on various facts about fair use cases that would be salient to potential litigants, such as the legal identity of the parties and whether the defendant used the plaintiff's work as part of a commercial product or service, rather than on how courts characterize the applicable fair use doctrine.[13] He presents a regression analysis of the correlation between those factual variables and fair use outcomes, and finds considerable predictive value for future cases in combining certain variables.

Beebe, Samuelson, and Sag have not discovered—and do not claim to have discovered—a comprehensive formula that can predict all fair use outcomes with anything approximating mathematical precision. But such precision could hardly be expected. After all, our adjudicative system as a whole is the subject of ubiquitous complaints, supported by numerous empirical studies, about unbridled judicial discretion, result-oriented jurisprudence, the inordinate influence of judicial ideology, and arbitrary, ad hoc judicial rulings—and these phenomena extend across a wide spectrum of substantive areas, ranging from constitutional law to conflicts of law.[14] Indeed, it is by now a universally accepted teaching of legal realism that formal legal doctrine bears only a checkered, imperfect correlation with judicial outcomes in particular cases, and some more radical skeptics assert that there is no meaningful correlation at all.[15]

The proper question, then, is not whether fair use case law meets some pristine ideal of consistency. That would be a standard that no area of the law could meet. Rather we must ask whether there are patterns in fair use case law that give the doctrine some measure of coherence, direction, and predictability, as compared with case law generally. Within that framework, Beebe, Samuelson, and Sag provide a convincing and salutary corrective to the widespread view that fair use is fundamentally arbitrary and ad hoc.[16]

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[13] Matthew Sag, Fairly Useful: An Empirical Study of Copyright's Fair Use Doctrine (March 15, 2011) (unpublished manuscript), *available at* http://ssrn.com/abstract=1769130. Sag plans to update and revise his paper under the title, *Predicting Fair Use: An Empirical Study of Copyright's Fair Use Doctrine*. *See also* Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004) (presenting a more theoretical, but also illuminating systematization of fair use doctrine).

[14] *See, e.g.*, LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION (1991) (arguing that result-oriented jurisprudence in constitutional adjudication is inevitable and should be done openly); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775 (2009) (showing correlation between judges' likely political party affiliation and behavior on the bench); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219 (1999) (synthesizing empirical findings that confirm the conventional wisdom that judges' likely political party affiliation is a dependable measure of ideology and performance in modern American courts).

[15] For an insightful review and reconstruction of legal realism, see Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607 (2007).

[16] That corrective has already been noticed by a leading scholar who advocates adoption of U.S. fair use in Europe. *See* Jonathan Griffiths, *Unsticking the Centre-Piece—*

In this Article, I build upon these scholars' important work by analyzing fair use case law through the lens of the doctrine's chronological development. Identifying historical trends in fair use case law and bringing them current to today helps to make further sense of fair use and, indeed, fills in some of the gaps that my three predecessors leave open. My basic point is this: in fundamental ways, fair use is a different doctrine today than it was ten or twenty years ago. So if we bundle together all fair use case law from the 1980s to the present, it is no wonder that fair use looks like a chaotic mix of ad hoc, contradictory decisions. Looking at fair use's recent historical development, on top of Beebe's and Sag's statistical analyses and Samuelson's taxonomy of uses, reveals greater consistency and determinacy in fair use doctrine than many previously believed was the case. Once we account for the dramatic shift in fair use doctrine that began with the Supreme Court's ruling in *Campbell v. Acuff-Rose*[17] in 1994, but that has only come to fruition since 2005, we can understand and predict with greater confidence how today's courts will frame their analysis of the four fair use factors and perhaps even what will be the likely outcome for particular fair use cases.

I begin by sketching the basics of U.S. fair use doctrine and the four-factor test set out in the Copyright Act. I then highlight some of the principal findings of Professors Beebe, Samuelson, and Sag. Finally, I add my observations of historical trends in fair use case law. In so doing, I build upon my own quantitative analysis of fair use cases from 1995, the year following the Supreme Court's seminal decision in *Campbell*, through 2010.

II. FAIR USE BASICS

The fair use doctrine affords a privilege to make what would otherwise be an infringing use of copyrighted expression. The doctrine is judge-made. It is widely said to have its American origins in Justice Story's test for "a fair and bona fide abridgement," as set out in his 1841 decision in *Folsom v. Marsh*,[18] although, as Matthew Sag has recently described, fair use has earlier roots in fair abridgement cases litigated in English courts of law and equity extending back to 1710.[19]

Congress codified the fair use doctrine in the Copyright Act of 1976.[20] As provided in section 107 of the Act, and further interpreted by the courts, the doctrine requires courts to undertake a case-by-case

the Liberation of European Copyright Law?, 1 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 87, 90–92 (2010).

[17] 510 U.S. 569 (1994).

[18] 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4,901).

[19] Matthew Sag, *The Pre-History of Fair Use*, 76 BROOK. L. REV. (forthcoming 2011), *available at* http://ssrn.com/abstract=1663366.

[20] Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (codified as amended at 17 U.S.C. § 107).

analysis, using as a general guide the four factors enumerated in section 107, plus any other factor the court deems appropriate. In its introductory clause, section 107 also provides a non-exclusive list of several types of uses that can qualify as fair use. However, although these uses are often thought to be favored for fair use, as Professor Samuelson documents in her empirical study, [21] courts do not always find them dispositive.

Section 107 provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (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.
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> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[22]

Each of the four statutory factors is the subject of copious scholarly commentary and judicial gloss. I cannot provide a factor-by-factor description in these pages. Rather, I will elucidate relevant judicial interpretations in pertinent context in the discussion that follows.

III. PREVIOUS EMPIRICAL STUDIES

A. Beebe

For his empirical study, Barton Beebe collected a data set of all reported federal opinions decided between 1978 and 2005 that made substantial use of the four statutory factors for fair use.[23] As such, Beebe's data set consisted of 306 opinions, of which 211 were district court, 88

[21] *E.g.*, Samuelson, *supra* note 12, at 2558–59, 2563 (discussing news reporting and criticism).

[22] 17 U.S.C. § 107 (2006).

[23] By "reported opinions," Beebe means opinions, whether majority, dissent, or concurring, in cases that appear in LexisNexis or Westlaw, regardless of whether the case is certified for publication or whether it, with regard to appellate cases, is citable. *See* Beebe, *supra* note 11, at 623. I have followed those parameters in my study as well.

appellate court, and seven Supreme Court.[24] The focus of his analysis is on which factors and sub-factors actually drive the outcome of the fair use test in practice and on how the fair use factors interact in case law. But his quantitative analysis also generated some other findings along the way. Two of these are particularly notable.

First, Beebe found that, as measured by case citations, fair use opinions from courts of the Second and Ninth Circuits exerted an overwhelming influence on fair use opinions outside those Circuits, even more than we might expect.[25] In fact, during the period of Beebe's study, opinions of the Southern District of New York were more influential than those of any circuit court other than the Ninth and Second Circuits.[26] Thus, Beebe concludes that "when we speak of modern U.S. fair use case law, we are speaking primarily of the 122 opinions generated by four courts—the Supreme Court, the Second and Ninth Circuits, and the Southern District of New York—and the progeny of these opinions in the other federal courts."[27]

Second, Beebe found that, to a statistically significant degree, lower courts ignore Supreme Court precedent on fair use.[28] This phenomenon, I suspect, has greatly contributed to the sense that fair use case law is arbitrary and ad hoc. Beebe's primary example concerns the Supreme Court's ruling in 1994 in *Campbell v. Acuff-Rose*[29] as that ruling relates to the Court's earlier decisions in *Sony v. Universal*[30] and *Harper & Row v. The Nation*.[31]

In *Sony*, decided in 1984, a decade before *Campbell*, the Court held that individuals' copying of television programs for later viewing was noncommercial fair use, but suggested in dicta that when the defendant's use is "commercial," there is a presumption of harm to the potential market for the plaintiff's copyrighted work under the fourth fair use factor.[32] Indeed, *Sony* stated even more broadly that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege."[33] A year later, in *Harper & Row*, the Court repeated the broad *Sony* dictum that every commercial use is presumptively unfair, but then seemed to back away from the full force of the presumption by stating, more moderately, that "[t]he fact that a publication was commercial as opposed to nonprofit is a separate factor that *tends to weigh*

[24] *Id.* at 564–69.

[25] Beebe, *supra* note 11, at 567–68.

[26] *Id.* at 568. Indeed, the Southern District of New York exerted almost as much influence on fair use case law as did the Ninth Circuit. *Id.*

[27] *Id.*

[28] *Id.* at 572.

[29] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[30] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

[31] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985). *See* Beebe, *supra* note 11, at 571–72.

[32] *Sony*, 464 U.S. at 451, 454–55.

[33] *Id.* at 451.

against a finding of fair use."[34] Further, *Harper & Row* announced that the fourth factor, the factor of harm to the potential market, is "undoubtedly the single most important" of all the factors.[35] Put together, and as further applied by the lower courts, these judicial pronouncements made it very unlikely that any use deemed "commercial" would qualify as fair use. Indeed, despite *Harper & Row*'s seeming qualification, a number of lower courts continued to construe *Sony* to mean that "every commercial use of copyrighted material is presumptively . . . unfair."[36]

In *Campbell*, the Supreme Court purported to apply *Sony* and *Harper & Row*, not overtly to repudiate them.[37] In so doing, however, the Court left no doubt that neither the so-called *Sony* presumption nor *Harper & Row*'s elevation of the fourth factor as the pre-eminent fair use factor is good law. *Campbell* held that the notion that every commercial use is presumptively unfair, based on "one sentence from *Sony*," actually "runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication."[38] The Court also sharply limited the weaker version of the *Sony* presumption, that commercial uses carry a presumption of market harm under the fourth factor. That presumption, the Court held, does not extend beyond slavish duplication for commercial purposes, and certainly does not apply to "transformative" uses, uses that alter the original work "with new expression, meaning, or message."[39] Further, the Court flatly contradicted *Harper & Row*'s elevation of the fourth factor. It underscored that courts must consider all four statutory factors, without any single factor being the most important.[40] If anything, indeed, the *Campbell* Court suggested that special consideration should be given to the first factor, the purpose and character of the use, particularly whether the use is "transformative."[41] "[T]he goal of copyright," the Court stated, "is generally furthered by the creation of transformative works."[42] Hence, "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."[43]

In short, with its ruling in *Campbell*, the Supreme Court was widely perceived to have set a significant mid-course correction in the direction

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[34] *Harper & Row*, 471 U.S. at 562 (emphasis added).

[35] *Id.* at 566.

[36] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583–84 (1994) (quoting *Sony*, 464 U.S. at 451) (holding that the court of appeals had erred in culling such a presumption from *Sony*).

[37] *Id.* at 591–93.

[38] *Id.* at 585.

[39] *Id.* at 579, 591.

[40] As the *Campbell* Court put it, "All [factors] are to be explored, and the results weighed together, in light of the purposes of copyright." *Id.* at 578.

[41] *Id.* at 578–79.

[42] *Id.* at 579.

[43] *Id.*

of fair use law.[44] Henceforth, fair use would be a true multi-factor test in which factors two, three, and four would be assessed and weighed in line with the degree of transformativeness of the use, rather than the market-centered presumptions set out in *Sony* and *Harper & Row*. Beebe's empirical study finds, however, that a statistically significant number of post-*Campbell* lower cases ignore *Campbell*'s correction.[45] Even when those courts cite *Campbell*, they continue to invoke the broad *Sony* presumption regarding commercial use and/or the *Harper & Row* elevation of the fourth factor, each of which *Campbell* had supposedly relegated to the trash heap.[46] Beebe hypothesizes that this perdurability of overturned precedent stems from the Supreme Court's repeated attempts, in both *Harper & Row* and *Campbell*, to maintain an appearance of consistency by purporting to "refine and construe what it should have explicitly rescinded and replaced."[47]

Turning to the heart of his study, Beebe does find some consistency in how courts apply the four factors as well as various sub-factors. First, he presents data which suggests that courts do not decide at the outset whether a use is a fair use and then proceed to stampede all factors to support that decision. In a large portion of cases, courts are willing to concede that one or more factors cuts against the overall finding. This suggests that courts either truly use the factors as a guideline for their decisions or see no need to justify their fair use determination by lining up all factors on the prevailing side.

Second, Beebe demonstrates that the first and fourth factors are overwhelmingly the most important factors in fair use analysis, as measured by their correlation with the outcome of the overall fair use test.[48] With regard to the first factor, the purpose and character of the use, Beebe's study reveals that 95% of the opinions that found that factor one disfavored fair use, found no fair use, while 90% of opinions that

[44] *See, e.g.*, Pierre N. Leval, Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19 (1994).

[45] Beebe, *supra* note 11, at 618–20. While fair use is not the only area where lower courts have strayed from Supreme Court precedent, the political science and legal scholarship suggests that, overall, lower court compliance with Supreme Court directives is the norm. *See* Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 394–95 (2007) (reviewing the political science and legal scholarship).

[46] An example is the contorted Ninth Circuit decision in *Elvis Presley Enters., Inc. v. Passport Video*, which somehow wraps together the *Harper & Row* elevation of the fourth factor, *Campbell*'s special consideration for transformative uses, *and* the *Sony* presumption all in one: "The last, and 'undoubtedly the single most important' of all the factors, is the effect the use will have on the potential market for and value of the copyrighted works. [*Harper & Row*] The more transformative the new work, the less likely the new work's use of copyrighted materials will affect the market for the materials. [*Campbell*] Finally, if the purpose of the new work is commercial in nature, 'the likelihood [of market harm] may be presumed.' [*Sony*]" 349 F.3d 622, 630 (9th Cir. 2003) (citations omitted).

[47] Beebe, *supra* note 11, at 596–97, 602.

[48] *Id.* at 582–86.

found that factor one favored fair use, found fair use.[49] For the fourth factor, the effect of the use on the potential market for or value of the copyrighted work, the correlation with overall outcome was even higher. Of 141 opinions that found that factor four disfavored fair use, all but one found no fair use.[50] That is a correlation of over 99%. Of 116 opinions that found that factor four favored fair use, all but six found fair use: a correlation of 95%.[51] At bottom, given the near-perfect correlation between judicial findings on the fourth factor and fair use outcomes, Beebe hypothesizes that the fourth factor is actually not an independent variable at all, but rather serves as the analytic space in which courts engage in a two-sided balancing test, weighing "the strength of the defendant's justification for its use, as that justification has been developed in the first three factors, against the impact of that use on the incentives of the plaintiff."[52]

In that vein, Beebe further recognizes, to uncover which factors are most influential does not tell us very much without identifying which sub-factors within each factor have the greatest impact on courts' determinations of whether that factor favors fair use. He presents a number of intriguing findings in this regard as well. Most strikingly—and this is a finding to which I will return when I add my layer of historical development—Beebe finds that commentators have exaggerated the influence of the transformativeness of the use on fair use doctrine.[53] Although Beebe does not say so, it seems that the surprisingly weak impact of the transformative use sub-factor is intertwined with lower courts' tendency to disregard other aspects of *Campbell*'s reformulation of fair use doctrine as well.

Campbell's adoption of what has come to be termed the "transformative use doctrine" drew directly from Judge Pierre Leval's 1990 Harvard Law Review article, *Toward a Fair Use Standard*.[54] Leval argued that a central inquiry in fair use analysis should be whether the defendant's use was "transformative."[55] As he explained, in weighing the strength of the defendant's justification for use against factors favoring the copyright owner, the court should consider whether "the secondary use [transforms the original by creating] new information, new aesthetics, new insights and understandings," because "this is the very type of activity that the fair use doctrine intends to protect for the

[49] *Id.* at 597.

[50] *Id.* at 617.

[51] *Id.* Beebe's regression analysis finds, in marked contrast, that factor two, the nature of the copyrighted work, exerts no statistically significant impact on fair use outcome. In fact, over 20% of the opinions in his study failed even to refer to the second factor or did so only to call it irrelevant. *Id.* at 610.

[52] *Id.* at 621.

[53] *Id.* at 603–06.

[54] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

[55] Leval, *supra* note 54, at 1111.

enrichment of society."[56] Citing Judge Leval's article, the Court held in *Campbell* that the "central purpose of [the fair use inquiry] is to see . . . 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, whether and to what extent the new work is 'transformative.'"[57] As noted above, the *Campbell* Court further held that the more transformative the use, the less the lower courts should weigh other factors that would otherwise count against fair use.

However, Beebe's quantitative study concludes that, despite the Supreme Court's express adoption of Judge Leval's transformative use doctrine, the influence of the doctrine has, in fact, been quite limited.[58] Even after *Campbell*, over 40% of the reported district court opinions and almost 20% of circuit court opinions during the period of his study failed even to refer to the transformative use concept.[59] Where the transformative use doctrine does seem to have significant impact according to Beebe's study is in those cases in which courts did analyze whether the use was transformative and found in the affirmative. All but two of the 42 decisions that found the use to be transformative also found it to be fair use—and the two outliers were district court decisions, one of which was reversed on appeal.[60]

All in all, Beebe's highly illuminating study reveals a number of general patterns that defined fair use case law between 1978 and 2005. Yet as I will demonstrate, developments in fair use doctrine since 2005 reveal fundamental changes in the doctrine since the period of Beebe's study. Further, even putting that continuing historical development aside, we need more guidance on a granular level than Beebe's study gives us in order to make greater sense of fair use doctrine and to help predict particular case outcomes. It certainly helps to know the relative influence on the courts of the *Sony* presumption, the *Harper & Row* elevation of the fourth factor, and the transformative use doctrine. But we also need to know when and why courts are finding certain uses to be commercial or transformative and when and why courts are finding that certain uses are within the copyright holder's potential market, but that other uses are not.

B. Samuelson

Pamela Samuelson's study steps into that breach by providing a taxonomy of fair use case law broken down into specific types of uses

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[56] *Id.*

[57] *Campbell*, 510 U.S. at 579 (alteration in original) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901); Leval, *supra* note 54, at 1111).

[58] Beebe, *supra* note 11, at 604–06.

[59] *Id.* at 604–05.

[60] *Id.* at 605.

organized within what Samuelson terms "policy-relevant clusters."[61] Samuelson contends that "[i]f one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair"—although she does caution that any given case outcome will be impacted by application of the four statutory factors to its particular facts.[62] As the title of her article suggests, Samuelson contends that we will better understand fair use if we conceive of it in terms of a multiplicity of various "fair uses" rather than a unitary overarching doctrine and concept.

These are Samuelson's policy-relevant clusters:[63]

1. Free speech and expression fair uses
2. Authorship-promoting fair uses
3. Uses that promote learning
4. "Foreseeable Uses of Copyrighted Works Beyond the Six Statutorily Favored Purposes," including personal uses, uses in litigation and for other government purposes, and uses in advertising
5. "Unforeseen Uses," including technologies that provide information location tools, facilitate personal uses, and spur competition in the software industry.

"Foreseeable" and "Unforeseen Uses" refer to whether Congress considered those uses in enacting the Copyright Act of 1976,[64] as set out in the Act and its legislative history. The "Six Statutorily Favored Purposes" are those listed in the introductory clause to section 107: "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, [and] research."[65] Within each policy-relevant cluster, Samuelson further organizes the cases by a number of specific uses. For example, under Authorship-Promoting Fair Uses, she lists six specific uses, ranging from social commentary to incidental uses, plus a category for "other customary authorial uses."[66]

Significantly, within the category of free speech and expression fair uses, Samuelson breaks down what Judge Leval and the *Campbell* Court broadly labeled as "transformative uses" into three separate clusters: what she terms "transformative uses, productive uses, and orthogonal uses."[67] Samuelson defines "transformative uses" as those that modify a preexisting work in creating a new one, whether to criticize the preexisting work or simply as an expression of artistic imagination.[68] She

[61] Samuelson, *supra* note 12, at 2541.
[62] *Id.* at 2542.
[63] *Id.* at 2538, 2544–46.
[64] *Id.* at 2545–46.
[65] Copyright Act of 1976 § 107, 17 U.S.C. § 107 (2006).
[66] Samuelson, *supra* note 12, at 2568–80.
[67] *Id.* at 2544.
[68] *Id.* at 2548–55.

characterizes "productive uses" as those that iteratively copy some or all of the preexisting work in preparing a new work that is critical of the first.[69] Samuelson describes "orthogonal uses" as those that make iterative copies of the whole or significant parts of a copyrighted work for a very different speech-related purpose than the original, such as an activist organization's distribution of copies of an opponent's work in its fundraising materials in order to highlight the adversity the organization faces.[70] We will return to Samuelson's proffered nomenclature in the context of the lower courts' definition of what constitutes a transformative use below.[71]

I cannot convey across-the-board generalizations about Samuelson's findings regarding fair use case outcomes. After all, the very point of Samuelson's study is that broad generalizations about fair use are not particularly helpful in understanding how courts are likely to apply the doctrine in the sundry cases that come before them. To give a flavor of her study, I therefore summarize a few of her specific findings:

- It has consistently been held to be fair use to copy an entire work for use in litigation, unless the copied work was initially commissioned for possible use in litigation. A prime example is that of copying a murderer's unpublished memoirs to introduce in opposition to the author's parental rights in a child custody case.[72]
- Even though news reporting is listed in the introductory clause to section 107 as among the examples of the types of uses that can qualify for fair use, the fair use defense is less certain for news reporting than for other types of listed uses, like criticism and commentary. Common pitfalls for news organizations include systematically copying more than necessary for the news reporting purpose; interfering with the copyright holder's core licensing market, such as by copying material that a news service created in order to license it to news organizations; and engaging in wrongful acts, such as when The Nation purloined a copy of former President Ford's unpublished manuscript in order to scoop its rival.[73]
- Courts have found that displaying a competitor's copyrighted work in comparative advertising or quoting from a respected objective source, such as Consumer Reports, for purposes of truthful advertising is fair use, even though those uses are arguably commercial.[74]

Samuelson's taxonomy demonstrates that courts' case-by-case application of fair use doctrine, far from being infinitely flexible and

[69] *Id.* at 2555–56.
[70] *Id.* at 2557–59.
[71] *See infra* text accompanying note 137.
[72] Samuelson, *supra* note 12, at 2592–93.
[73] *Id.* at 2558–59, 2563.
[74] *Id.* at 2597–99.

indeterminate, tends to coalesce in consistent patterns around particular categories of uses. By presenting a granular account of fair use's operation on the ground, at least with regard to those fair use disputes that culminate in reported cases, she also fills in some of the gaps that Beebe's more global study necessarily leaves open. Yet, as Samuelson recognizes, breaking down fair use into narrow categories presents a necessarily incomplete picture as well. For one, there are some types of uses for which there is insufficient data, *i.e.*, not enough reported cases, to say anything meaningful about how fair use doctrine would likely be applied to such uses in the future. In addition, drilling down on distinct categories of use may obscure common doctrinal threads and chronological developments that transcend numerous categories and thus impact judicial application of fair use with respect to many uses.

C. Sag

Matthew Sag presents yet another vital piece of the fair use puzzle by focusing on what courts might actually be doing in fair use cases, rather than on what they say they are doing. Sag coded more than 220 fair use cases decided in U.S. federal district courts between January 1, 1978, and December 31, 2006, a period that almost entirely overlaps with that of Beebe's study. Sag's basic hypothesis is that judicial applications of the four factors and various sub-factors are largely empty of content, but rather serve merely as legal conclusions for fair use outcomes that are really driven by unstated factual patterns in the cases.

Sag surmises, for example, that lower courts "apply the label of transformative use to any use they think ultimately fair" rather than, first, truly determining whether the criteria for transformative use are met, and then, applying that finding to the four-factor analysis.[75] Similarly, Sag echoes Beebe's observation that the near-perfect correlation between judicial findings on the fourth factor and fair use case outcomes must mean that the fourth factor is not really an independent variable in judges' fair use analysis. As Sag colorfully puts it: "Finding a 99% correlation in an empirical study is a bit like finding that 99% of Iraqis voted for Saddam Hussein—it is a statistic so impressive that it engenders disbelief."[76]

Sag proceeds to measure the statistical correlation between fair use outcomes and a variety of factual patterns that can be objectively coded from reading the cases, but which are not typically identified by courts as the basis for fair use findings. Some of these factual patterns bear a logical relation to one or more of the four fair use factors. For example, Sag finds that defendants have a significantly greater chance of prevailing on fair use outcomes when the defendant has engaged in what Sag terms a "Creativity Shift," *i.e.*, the defendant's use is informational while the

[75] Sag, *supra* note 13 (manuscript at 11).
[76] *Id.* (manuscript at 17).

plaintiff's work is creative, or vice versa, a fact pattern that, as I discuss below, should typically result in a finding of transformative use.[77] Sag also finds that defendants face a lesser chance of prevailing on fair use when the defendant has used the plaintiff's work as part of a commercial product or service without applying its own labor or creativity to change the original copyrighted work, what Sag terms "Direct Commercial Use,"[78] and that defendants have a greater chance of prevailing when the defendant uses only a part of the plaintiff's work.[79] Other fact patterns that Sag measures bear no relation at all to fair use analysis as enunciated by the courts. Sag finds, for example, that defendants have a greater chance of prevailing on fair use if the plaintiff is a natural person and a lesser chance of prevailing if the plaintiff is a corporation. On the other hand, the defendant's legal personality has no statistically significant correlation with fair use outcome.[80]

Sag's regression analysis of objectively measurable fact patterns is a significant contribution to understanding how fair use cases are decided. But it, too, presents a static, and necessarily incomplete, picture. In particular, as Sag recognizes, in selecting and distilling specific fact patterns that are reasonably conducive to objective measurement, he fails to capture other salient facts that might also exert a significant impact on fair use case law. As Sag notes, for example, parodies of creative works, including the 2 Live Crew rap version of a pop ballad at issue in *Campbell v. Acuff-Rose* would not fall within the rubric of a Creativity Shift, even though parodies are highly favored for fair use.[81]

More broadly, Sag's study decidedly brackets off the possible impact of fair use doctrine on fair use case outcomes. As a result, some might read his study to suggest that the four-factor test for fair use is, at best, epiphenomenal to fair use case outcomes and, at worst, just a post hoc cloak used by judges to justify results. Indeed, Sag's highly skeptical account of fair use doctrine raises the fundamental issue of the extent to which judges are generally constrained by legal doctrine and higher court precedent. While I cannot begin to do justice to that complex issue in these pages, suffice it to say that there is a vast empirical and theoretical literature concerning judicial behavior and that, on the whole, this body of work suggests that while judges are no doubt heavily influenced by personal ideology and other extra-doctrinal variables, law matters, too.[82] Whether because of the shared norms of the legal

[77] *Id.* (manuscript at 12, 27).

[78] *Id.* (manuscript at 15, 27).

[79] *Id.* (manuscript at 16–17, 27).

[80] *Id.* (manuscript at 27, 29).

[81] *Id.* (manuscript at 28–29).

[82] *See, e.g.*, Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998) (finding that appellate judges generally follow their political ideology, not Supreme Court precedent, in deciding whether to accord deference to agency decision making, but that the presence on a panel of a judge of the opposite ideology has a

profession, judges' need to explain their decisions in writing, the power of doctrinal concepts to shape the way judges understand the cases before them, or other institutional constraints of common-law adjudication, legal doctrine and precedent do seem, generally, to exert at least some discipline on judicial discretion and thus to impact case outcomes.[83]

The same is mostly likely true in the area of fair use.[84] We can expect, for example, that courts that adopt the transformative use doctrine will frame and approach a case differently from those that follow the *Sony/Harper & Row* focus on commerciality and harm to the plaintiff's market. And this is so because the doctrine carries some authority in judges' understanding and analysis, not simply because it serves as a post hoc justification for a result reached on some other basis. Hence, we would expect that defendants have a significantly greater chance of prevailing on fair use when the use is a Creativity Shift, not because something about Creativity Shifts directly triggers a judicial response for defendants, but rather, because a credible and coherent application of transformative use doctrine, as it has developed in the judicial precedent, requires that (1) such uses generally be held to be transformative and (2) transformative uses are heavily favored to be fair uses.

IV. THE HISTORICAL DIMENSION

Much of fair use case law's apparent inconsistency stems from the dramatic transformation of fair use doctrine over time. Beebe and Samuelson capture some of the dynamism of fair use doctrine but neither illuminates how those changes impact and clarify fair use doctrine today: Beebe because his study ends in 2005 and Samuelson because her focus is on discovering and presenting a taxonomy of uses, not dividing fair use chronologically into periods of doctrinal

moderating influence, leading the court to follow legal doctrine more often); Kim, *supra* note 45, at 394–95 (reviewing the political science and legal scholarship).

[83] *See* Dagan, *supra* note 15, at 643–59 (describing and building upon the mainstream legal realist understanding that legal doctrine and law's institutional framework imposes partial constraints on judicial subjectivity). *See generally*, Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989 (1996) (describing the debate in political science and legal scholarship regarding the influence of non-legal factors versus legal doctrine on judges' rulings, and concluding that both are at work).

[84] Of note, Beebe has published a study concluding that judges' overall political ideology bears no statistical relation to judges' likelihood of finding fair use or no fair use, or to judges' treatment of the principal factors and sub-factors that bear most heavily on fair use outcomes. Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence from the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 520–22 (2008). *See also* Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801, 807 (2009) (concluding that judicial ideology does not influence judicial rulings in intellectual property cases generally, and noting Beebe's finding regarding fair use).

development. Sag likewise presents an elucidating, but static portrait of fair use during the time period of his study, which, in any case, extends only to the end of 2006. Adding an historical dimension helps to make further sense of what might otherwise appear to be a disconnected series of ad hoc, case-by-case judgments. It explains why courts today place far greater weight on certain aspects of fair use analysis than previously, and why current rulings might seem to contradict those regarding like cases issued more than five or ten years ago.

My empirical analysis of fair use case law focuses on reported federal court cases decided between the beginning of 2006 and the end of 2010, the five-year period following that of Beebe's study. I also examine fair use case law extending back to 1995, the year following the Supreme Court's decision in *Campbell v. Acuff-Rose* in order to trace the origins of the shift in fair use doctrine that has come to fruition since 2005. Following Beebe's parameters, my data set consists of all opinions that make substantial use of the four statutory factors for fair use, whether the opinion is majority, dissent, or concurring, in cases that appear in LexisNexis or Westlaw, regardless of whether the case is certified for publication. My data set of fair use case law during the period 2006 to 2010 consists of 79 opinions, arising out of 68 unique cases.[85] Of the 79 opinions, 16 are appellate and 63 are district court. Of the appellate opinions, one is a dissenting opinion and the rest are majority opinions.[86] There are no concurring opinions. Further, two of the appellate cases and one of the district court cases involve a dual fair use analysis, one for each of two distinct uses of the plaintiff's work by the defendant.[87] In my coding of the opinions and data analysis, I treated each such fair use analysis as a separate opinion. Finally, four of the district court opinions were reversed, at least in part, on appeal, but, like Beebe, I included them in my data set nonetheless, even if, as I later note, I excluded them for some specific analyses, such as comparing overall fair use outcomes.

The 68 unique cases for which fair use opinions were reported during the period 2006–2010 represent a broad mix of copyrighted-work subject matter, defendant uses, case postures, and parties' legal personality. I discuss these case characteristics in the context of particular findings below. It will suffice to say at the outset that I found no significant chronological shift in the mix of those case characteristics that

[85] My data set is available as a link alongside this Article at http://www.law.ucla.edu/faculty/bibliography/Pages/neil-netanel.aspx.

[86] The dissent was in *Bouchat v. Baltimore Ravens Ltd. P'ship* (*Bouchat II*), 619 F.3d 301, 317 (4th Cir. 2010) (Niemeyer, J., dissenting).

[87] *Id.* (holding that defendant's use of plaintiff's design in team logo in a football team's highlights film was not fair use but that its use in photos displayed in the team's corporate headquarters was fair use); Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l, 533 F.3d 1287 (11th Cir. 2008) (defendant church copied from plaintiff's sales techniques book in two separate publications, one for internal church purposes and another marketed for secular use); Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010) (defendant used two of plaintiff's songs).

might serve as an alternative explanation for what otherwise appears to be a dramatic transformation of fair use doctrine over time.[88] However, I have not eliminated the possibility that shifts from earlier periods in some combination of these or other case characteristics might correlate significantly with the doctrinal transformation that I describe. I leave that question for further statistical analysis.

Nor can I completely rule out the possibility that, given the relatively small data set and short period of my study, the doctrinal transformation revealed by the data is actually just statistical noise, even if it is statistically significant within the bounds of my study. Even far larger longitudinal studies, including studies involving hard physical and social science data, can be plagued by statistical flukes that are discovered only when the studies are replicated using more data and the results regress to the statistical mean.[89] Yet, that being said, my statistical results comport with the enunciation and application of fair use doctrine in leading cases decided since 2005, particularly those in the influential Second and Ninth Circuits. Thus, while my snapshot cannot predict with certainty how fair use doctrine will evolve in the future, it appears to be an accurate characterization of how fair use doctrine has evolved over the past couple of decades. In any event, I include a discussion of leading cases as illustrative examples.

More broadly, my study is characterized by the same selection bias as those of my three predecessors: it analyzes only reported judicial rulings, whether they be final rulings following a trial on the merits; substantive rulings on pretrial motions, such as motions for dismissal on the pleadings, preliminary injunction, or summary judgment; or rulings on appeal. Only a small fraction of potential disputes are litigated and, of those lawsuits that are filed, only a small proportion proceed to a reported judicial ruling before being settled or otherwise dismissed. Moreover, as commentators have long noted, there is significant reason to believe that the cases that do proceed to a reported judicial ruling do not constitute a random, representative sample of all potential disputes, or even of all lawsuits that are filed. Rather as Sag aptly summarizes the literature, the costly process of "litigation acts as a filter, selecting only those cases where uncertainty about the law, asymmetric stakes, divergent expectations, or other quirks of human behavior have prevented the

[88] There are significant shifts in the mix of case posture over time, but with the exception of uncrossed motions for summary judgment, none impact the transformation of fair use doctrine that I describe. As I discuss below, both Beebe and I eliminate uncrossed motions for summary judgment from our analysis of case outcomes in order to avoid skewing the results as a result of fluctuations in the mix of plaintiff versus defendant uncrossed motions for summary judgment. *See infra* notes 1535–1567 and accompanying text.

[89] For a chilling account of pervasive flaws and random impacts in major statistical studies, as well as scientific publications' selection biases, see Jonah Lehrer, *The Truth Wears Off; Is There Something Wrong with the Scientific Method?*, NEW YORKER, Dec. 13, 2010, at 52.

parties from settling their dispute."[90] There may be structural biases arising from which types of judicial decisions result in reported opinions as well. Studies have shown, for example, that for various reasons data sets limited to reported opinions overstate plaintiff win rates at trial but understate plaintiff win rates on pretrial motions.[91]

Thus, a study of reported opinions does not provide a comprehensive or fully accurate picture of how legal doctrine operates on the ground or even, more narrowly, in court. That observation might be especially true with regard to fair use doctrine.[92] Commentators present strong anecdotal evidence of a pervasive copyright "clearance culture," in which a combination of copyright industry overreaching and user, publisher, and insurance-carrier risk aversion causes potential users of copyrighted material systematically to obtain licenses or desist from use even when they would likely prevail on a fair use defense if litigated.[93] At the same time, the high cost of enforcing copyrights against millions of Internet remixers, mash-up artists, fan fiction writers, personal copyists, and file swappers leaves vast swaths of de facto free use, even when many such uses might not qualify as fair use under current doctrine. Fair use case law hangs above, and only occasionally ventures into, this terrain of uncertainty regarding which personal, non-commercial uses are truly fair use and which are merely reluctantly tolerated by copyright holders for the time being.

Any attempt to "make sense of fair use" is incomplete without taking into account how the doctrine actually operates across such multiple settings and impacts individual behavior and understandings in practice. Nonetheless, for many potential litigants, and certainly those represented by counsel, reported opinions are the most salient indication of what fair use doctrine is. As such, reported opinions likely have a significant

[90] Sag, *supra* note 13 (manuscript at 6). The pioneer article on the reported case selection bias is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). *See also* Samuel Issacharoff, *The Content of Our Casebooks: Why Do Cases Get Litigated?*, 29 FLA. ST. U. L. REV. 1265 (2002).

[91] *See* Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 910–11 (2006). Some studies also find differences in result between reported cases that are certified for publication and those that are not. *See* Lee Epstein & Gary King, *The Rules of Inference*, 60 U. CHI. L. REV. 1, 106–08 (2002) (surveying the literature). I did not attempt to compare reported with unreported fair use decisions. However, in examining all reported fair use opinions issued since 1994, I found no statistically significant difference between published opinions and those opinions reported in Westlaw or LexisNexis but not certified for publication for either of the two critical factors in my analysis: fair use outcomes and judicial adoption of the transformative use doctrine.

[92] *See* Beebe, *supra* note 11, at 565 (noting the paucity of reported fair use opinions as compared to the number of copyright infringement complaints that are filed and surmising that "many fair use disputes may never reach the courts").

[93] *See generally* PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004); LESSIG, *supra* note 3; James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007).

impact on potential litigants' perceptions of the legal background rule and thus their behavior, as well as on litigants' decisions about when to settle and when to proceed to trial or summary judgment.[94] While reported opinions do not represent the entirety of fair use doctrine, they do constitute its essential, dominant core.

A. The Market-Centered versus Transformative Use Paradigms

In the last three decades, fair use case law has been heavily influenced by two competing paradigms of fair use: what I term the "market-centered" and "transformative use" paradigms. The market-centered paradigm reigned supreme for some two decades following its adoption in *Harper & Row* in 1985. Yet, contrary to Beebe's finding that the transformative use doctrine has had quite limited influence on fair use case law, the transformative use paradigm, as adopted in *Campbell v. Acuff-Rose* overwhelmingly drives fair use analysis in the courts today. The explanation for this seeming contradiction, as we shall see, is that the transformative use paradigm ascended to its overwhelmingly predominant position only after 2005, following the period that Beebe studied, even if the trend towards embracing the transformative paradigm began well before that year.[95]

The market-centered paradigm treats fair use as an anomalous exception to the copyright owner's exclusive rights, applicable only in cases of irremediable market failure. It owes its origin to Professor Wendy Gordon's highly influential law review article, published in 1982, *Fair Use as Market Failure: A Structural Analysis of the Betamax Case and its Predecessors*, in which Gordon argued that fair use should be available only when the defendant meets the heavy burden of proving both that high transaction costs pose an insurmountable obstacle to copyright licensing and that the use serves an identifiable public benefit that would outweigh any harm caused to the copyright owner by granting fair use.[96]

Gordon's article was cited by the dissent in *Sony* and majority in *Harper & Row*, each time in support of restricting fair use. The *Sony* dissent, which would have denied fair use to individuals' videotaping of television programs for later viewing, cited Gordon in characterizing the

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[94] *See* Issacharoff, *supra* note 90, at 1270–71 (noting the impact of existing case law on prospects for settlement); Sag, *supra* note 13 (manuscript at 6 n.22) ("[T]he selection effect may not even be constant as the results of prior cases necessarily inform the expectations of future litigants.").

[95] *See infra* Part IV.B.

[96] Wendy J. Gordon, *Fair Use as Market Failure: A Structural Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982) [hereinafter Gordon, *Structural Analysis*]. Gordon subsequently distanced herself from that market paradigm, emphasizing the importance of non-monetary values in fair use doctrine and in copyright law generally. *See* Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031 (2002).

fair use doctrine "as a form of subsidy—albeit at the first author's expense—to permit the second author to make limited use of the first author's work for the public good."[97] *Harper & Row* cited to Gordon as an example of economists' view that that "the fair use exception should come into play only in those situations in which the market fails or the price the copyright holder would ask is near zero."[98]

Following in that vein, *Harper & Row* held that fair use is inappropriate unless a "reasonable copyright owner [would] have consented to the use" given the "importance of the material copied . . . from the point of view of the reasonable copyright owner."[99] That understanding of fair use as a disfavored deviation from the norm of a voluntary market bargain also infused *Harper & Row*'s broad application of the *Sony* presumption that every commercial use is presumptively unfair (or at least "tends to weigh against a finding of fair use").[100] After quoting the *Sony* dictum, the Court held that the test for determining whether a use is commercial 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."[101] The market-centered paradigm likewise undergirded the Court's application and elevation of the fourth factor as the single most important factor in fair use analysis. A showing of market harm, the Court held, need not be limited to the defendant's use. Rather, "to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'"[102] In this regard, the potential market encompasses not only the market for the original work but also the market for derivative works and, indeed, the potential licensing market for "any of the rights in the copyrighted work."[103] In sum, under the market-centered paradigm, fair use is available only when reasonable copyright holders would consent to the defendant's use and others like it but are prevented from doing so due to the prohibitively high costs of negotiating for such a license.

The transformative use paradigm, as discussed above, was set out by Judge Pierre Leval in his law review article, *Toward a Fair Use Standard*, published in 1990, and adopted by the Supreme Court in 1994 in

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[97] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 478 (Blackmun, J., dissenting).

[98] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 n.9 (1985). *See also id.* at 559 ("[T]o propose that fair use be imposed whenever the 'social value [of dissemination] . . . outweighs any detriment to the artist,' would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it." (alteration in original) (citing Gordon, *Structural Analysis*, *supra* note 96, at 1615)).

[99] *Id.* at 549–50.

[100] *Id.* at 562.

[101] *Id.*

[102] *Id.* at 568 (quoting *Sony*, 464 U.S. at 451).

[103] *Id.*

Campbell v. Acuff-Rose.[104] Under this paradigm, the key question in fair use analysis is whether the defendant's use is "transformative," not whether the defendant might have obtained a license or the copyright owner would have reasonably consented to the use. The transformative use paradigm views fair use as integral to copyright's purpose of promoting widespread dissemination of creative expression, not a disfavored exception to copyright holders' exclusive rights. Indeed, the *Campbell* Court suggested that even in failed claims of fair use for transformative purposes, courts should often desist from enjoining the infringing use in order to further the "strong public interest in the publication of . . . secondary work."[105]

B. The Transformative Use Paradigm Triumphant

1. Judicial Embrace of the Transformative Use Doctrine

As noted above, looking past 2005, which is when the Beebe study ends, we see that fair use doctrine today is overwhelmingly dominated by the Leval–*Campbell* transformative use doctrine. As indicated in Figure 1, judicial adoption of the transformative use paradigm increased measurably during the period 2006–2010, even if it was already quite high previous to that period.[106] During 2006–2010, 85.5% of district court opinions and 93.75%, or all but one, of appellate opinions considered whether the defendant's use was transformative (even if, as explained below, not all explicitly used the term "transformative"). The sole appellate outlier was an unpublished decision in which the court noted that the defendant had relied exclusively on the fourth factor in its brief.[107] All together, a total of 87.2% of all reported opinions during the five-year period following Beebe's study embraced the transformative use doctrine. In contrast, during the periods 1995–2000 and 2001–2005, respectively, 73.9% and 77.8% of all opinions followed the transformative use doctrine.[108]

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[104] 510 U.S. 569, 576 (1994).

[105] *Id.* at 578 n.10.

[106] The percentage of opinions in which judges adopted the transformative use doctrine during 2006–2010 represents a statistically significant increase since 1995–2000 but is not statistically significant when one takes into account the increase from 1995–2000 that already occurred during 2001–2005. However, as I discuss below with respect to case outcomes, the results for 2001–2005 are skewed in favor of defendants by a relatively low percentage of uncrossed motions for summary judgment brought by plaintiffs during that period. The increase in judicial adoption of the transformative use doctrine during 2006–2010 is statistically significant for district court opinions when uncrossed summary judgment motions are eliminated from the analysis. *See infra* notes 155–164 and accompanying text.

[107] That outlier decision was Thomas M. Gilbert Architects, P.C. v. Accent Builders & Developers, LLC, 377 Fed. App'x 303 (4th Cir. 2010).

[108] The data for appellate opinions only does not show the same upward curve. During the first 6 year period after *Campbell*, 19 out of 20, or 95%, of appellate

It is important to note that not all opinions that embrace the transformative use doctrine explicitly use the term "transformative" in assessing the purpose and character of the defendant's use. Some simply quote the sentence in *Campbell* that defines the transformative use doctrine—stating that the key to fair use analysis is whether the defendant "adds something new to the original creation, with a further purpose or different character, altering the first with new expression, meaning or message"—but leaving off the final phrase following the semicolon in that sentence in which the Supreme Court denominated such uses as "transformative."[109] Others ask, mirroring the *Campbell* definition without quoting it, whether the defendant has used the plaintiff's work for a different expressive purpose than that of the work's creator or, to the contrary, whether the defendant has merely repackaged the original in another medium. Still others assess, without expressly referencing the term "transformative," whether the defendant's use is of a type, such as parody or criticism, that Judge Leval enumerated as a likely example of transformative use in his article and that courts have typically held to fall within that rubric as well.[110] Finally, in a couple of instances, the court finds that the use before them is analogous to a use defined as "transformative" in a prior case, without repeating that designation in its own opinion.[111]

In all of the above instances, I contend, the opinion is correctly characterized as one that assesses the transformative character of the defendant's use, as defined in *Campbell* and Judge Leval's article, even if it does not expressly employ the word "transformative" in doing so. On that score, my coding differs from Beebe, who apparently tracks only whether the opinion explicitly invokes to the term "transformative" by name. It is by that more narrow and, arguably, underinclusive measure for assessing the influence of the transformative use doctrine, that Beebe notes that even following *Campbell*, over 40% of the district court opinions and almost 20% of the circuit court opinions issued during the period of his study "failed even to refer to the [transformative use] doctrine."[112] Yet, even by Beebe's measure, the percentage of opinions that fail to refer to

opinions invoked the transformative use doctrine, which is slightly higher than the appellate court's embrace of the doctrine during the most recent period.

[109] *See, e.g.*, Lorimar Music A. Corp. v. Black Iron Grill Co., No. 09-6067-CV, 2010 WL 3022962, at *4 (W.D. Mo. July 29, 2010) (quoting *Campbell*, 510 U.S. at 579).

[110] As Judge Leval noted, "[t]ransformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses." Leval, *supra* note 54, at 1111.

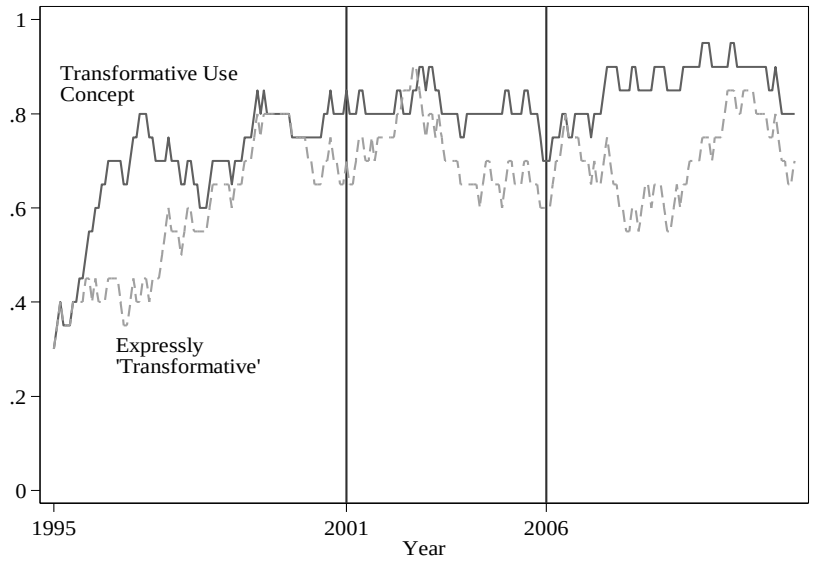
[111] *See, e.g.*, Bouchat v. Baltimore Ravens Ltd. P'ship (*Bouchat I*), 587 F. Supp. 2d 686, 695 (D. Md. 2008) (citing Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006), a leading Second Circuit decision on the importance of the transformativeness of the use for the fair use analysis).

[112] *See* Beebe, *supra* note 11, at 604.

the transformative use doctrine has significantly declined since *Campbell*. During the period 1995–2000, in line with the results that Beebe reports for the entire period 1978–2005, 39.13% of the opinions either did not expressly address whether the defendant's use is "transformative" or (in one opinion) expressly minimized the importance of that question for fair use analysis. However, during the period 2001–2005, that failure to consider explicitly whether the defendant's use is "transformative" declined to 30.16% of the opinions, and during the period 2006–2010, it declined further to 28.21% of the opinions. Hence, by that measure as well, as indicated in Figure 1, there has been a significant increase in the influence of the transformative use doctrine in judicial analysis of fair use.[113]

[113] The data regarding express reference to the term "transformative" as broken down by appellate and district court opinions is more erratic, showing a marked increase in appellate opinions that did not make such a reference in 2001–2005, followed by a sharp decrease in 2006–2010, and a slight increase in district court opinions that failed to make that express reference in 2006–2010 as compared to the previous five-year period. It is the combined total of all opinions, appellate and district court, that suggests that there has been a steady increase in influence of the transformative use doctrine using Beebe's measure.

Figure 1. Twenty-Opinion Moving Average of the Proportion of Opinions that (1) Adopt the Transformative Use Concept and (2) Do So By Expressly Using the Term "Transformative", 1995–2010.



Nor, by either measure, does the judicial embrace of the transformative use doctrine over time appear merely to reflect a recent increase in the percentage of cases involving uses that courts have traditionally characterized as transformative, or of otherwise favored uses for fair use analysis. Notably, for example, parodies—the type of transformative use at issue in *Campbell*—comprised only 6.33% of the defendant uses in the 2006–2010 opinions, down from 12.70% during the period 2001–2005. Similarly, the percentage of opinions featuring defendant uses for education, social criticism, news reporting, and biography showed no statistically significant difference from previous periods and/or declined over time. The same is true of uses for purposes of litigation, which, as noted above, Samuelson concludes is generally held to be fair use even if section 107 does not identify it as a favored use per se.[114]

On the other hand, the 2006–2010 period did see a marginally statistically significant increase (at the $p \leq 0.10$ level) in a category of use that did not exist until the late 1990s: digital information location tools.

[114] *See supra* note 72 and accompanying text. Although copying for purposes of litigation does not appear among the favored uses enumerated in section 107's introductory clause, the House Report accompanying the Copyright Act of 1976 listed the "reproduction of a work in . . . judicial proceedings" as an example of "the sort of activities that the courts might regard as fair use under the circumstances." House Committee on the Judiciary, H.R. Rep. No. 94-1476, at 65, (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

The periods 1995–2000 and 2001–2005 each had one opinion in this category: *Kelly v. Arriba Soft*, at the district court level and appellate level, respectively.[115] Between 2006 and 2010, there were five opinions involving such uses, representing 6.33% of all opinions during that period. Three such opinions involved the Google search engine and two concerned a case involving the creation of a digital database of student papers to detect plagiarism by automated digital comparison with new papers.[116] Each such opinion characterized the primary use in question as "transformative."

Hence, the overall increase in judicial invocation of the transformative use doctrine during the 2006–2010 period might be partly, although far from primarily, attributable to the marginally statistically significant increase in the number of digital information location tool cases. Of interest, that category of uses includes the much discussed Google Books Search case, which, as of this writing, remains pending before the Southern District of New York.[117] Digital information location tools are also a category of uses that can be expected to grow significantly in the coming years, although that, of course, does not mean that such uses will be the subject of a growing proportion of copyright litigation and fair use case law.

2. Correlation of Transformativeness with Fair Use

Alongside the judicial embrace of the transformative use doctrine during 2006–2010, and consistent with the pre-2006 decisions in Beebe's study, those recent decisions that unequivocally characterize the defendant's use as transformative almost universally find fair use. Twenty of the 22 opinions that found the defendant's use to be "highly," "certainly," or "significantly" transformative, or just simply "transformative," held that the defendant had engaged in fair use. The two outliers were more a function of case posture than substance. They included a Sixth Circuit decision that characterized a song containing a digital sample of the plaintiff's composition as "certainly transformative," but declined to overturn a jury verdict that rejected the defendant's fair use defense,[118] and an unpublished district court decision that

[115] Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116 (C.D. Cal. 1999); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

[116] The three opinions involving the Google search engine were: Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006); the same case on appeal, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); and Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006). The two opinions involving the digital plagiarism detection service were: A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473 (E.D. Va. 2008); and the same case on appeal, A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009).

[117] The court recently rejected the proposed settlement in that case. *See* Authors Guild v. Google, Inc., No. 05 Civ. 8136 (S.D.N.Y. March 22, 2011).

[118] Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267, 278 (6th Cir. 2009). The decision might also be explained by the court's use of "transformative" to mean altered aesthetic character rather than different expressive purpose, which cuts

characterized the defendant's use as "significantly transformative," but denied the defendant's motion to dismiss on the pleadings given the plaintiff's allegation of substantial copying and the court's inability to assess market harm without evidence.[119]

Concomitantly, all but three cases that characterized the use in question as non-transformative, or only "minimally," "partly," or "somewhat" transformative, found no fair use. One of the outliers that held the use to be fair use despite finding it to be non-transformative involved the plaintiff competitor's effort to use copyright to stifle competition in a market for unrelated products or services.[120] The second such decision concerned the defendant's copying of a corporation's copyrighted expression in order to criticize the corporation, a type of use that most other courts have characterized as unequivocally transformative.[121] The third held, on what seem to be unique facts, that the Church of Scientology's non-transformative incorporation of portions of the plaintiff's copyrighted book on sales techniques for use in instruction within the Church would not harm the potential derivative market for the out-of-print book since, the court found, there was no possibility that the Church would use new course materials incorporating the plaintiff's derivative works.[122]

Of course, the high correlation between judicial findings of transformativeness and fair use results does not necessarily mean that the judges first find whether the use is transformative and then apply that finding as a central part of the fair use analysis. As Sag notes, "David Nimmer has suggested that in the hands of some judges, transformative use has no content at all and that it is simply synonymous with a finding

against the prevailing understanding of "transformative." It found the defendant's song to be transformative given that it had "a different theme, mood, and tone" from the plaintiff's composition. *Id.*

[119] Shepard v. Miler, No. Civ. 2:10-1863, 2010 WL 5205108, at *6 (E.D. Cal. Dec 15, 2010).

[120] Gulfstream Aerospace Corp. v. Camp Sys. Int'l, Inc., 428 F. Supp. 2d 1369 (S.D. Ga. 2006) (plaintiff sought to prevent reproduction of aircraft manual in order to stifle competition in providing maintenance service).

[121] Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A., 553 F. Supp. 2d 680 (N.D. Tex. 2008) (posting of loan servicer's image on webpage criticizing loan servicer's business practices).

[122] Peter Letterese & Assocs., Inc. v. World Inst. Of Scientology Enters., 533 F.3d 1287, 1318–19 (11th Cir. 2008). There are also three cases that involve two distinct uses, with the courts assessing the transformative character of each use separately: *Peter Letterese & Assocs., Inc.*, 533 F.3d 1287(defendant church copied from plaintiff's sales techniques book in two separate publications, one for internal church purposes and another marketed for secular use); Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010) (two songs); and Bouchat v. Baltimore Ravens Ltd. P'ship (*Bouchat I*), 587 F. Supp. 2d 686 (D. Md. 2008) (use of logo in a football team's highlights film and in photos displayed in the team's corporate headquarters); and another case in which the same use was held to be transformative vis-à-vis one of the plaintiff's works but not vis-à-vis another of the plaintiff's works. Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

of fair use."[123] Sag predicts, in this vein, that courts will continue to apply the label "transformative use" as a post hoc justification, "as long as a finding of transformativeness is perceived to be necessary to avoid the presumption of market harm attaching to commercial uses."[124]

Sag raises a point worthy of consideration. Granted, courts have repeatedly asserted that a use need not be transformative in order to be a fair use, and that transformativeness is merely a part, albeit a central part, of the fair use inquiry. Nonetheless, there is certainly a strikingly high—though less than universal—correlation between judicial findings regarding transformativeness and fair use outcomes. Moreover, as we shall shortly see, the concept of transformative use is, indeed, susceptible of judicial manipulation to justify results that are actually reached on other bases. So it is possible, if very difficult to assess, that rather than actually driving fair use analysis, "transformative use" has simply replaced "market harm" as the favored moniker to characterize judicial balancing and justify the result post hoc.

However, the data in my study does not support Sag's hypothesis that courts resort to a finding of transformativeness to avoid the presumption that commercial uses cause market harm. The 2006–2010 period saw a sharp decline in the weight that courts say they are giving to whether a use is commercial. In this most recent period, 37.97% of the opinions expressly minimized the importance of the commerciality inquiry, up from 25% in both 1995–2000 and 2001–2005. Consistent with that decline, only seven opinions, representing 8.86% of the 2006–2010 opinions, acknowledged the *Sony/Harper & Row* presumption that commercial use causes market harm; and only five opinions, representing 6.33% of the 2006–2010 opinions, acknowledged the stronger *Sony*-era presumption that commercial uses are per se not fair use. As indicated in Figure 2, judicial acknowledgement of each presumption has declined precipitously since the Supreme Court's ruling in *Campbell* and has, on average, hovered at around 10% or less of reported fair use opinions for each of three periods I examined. In short, the data suggests that courts have, in fact, embraced the transformative use doctrine as they have largely abandoned the commercial use presumptions, not that courts perceive it necessary to find transformativeness in order to avoid the presumption that the commercial uses cause market harm. Indeed, judicial abandonment of the commercial presumptions appears to be a part of courts' dramatic shift from the market paradigm to the transformative use paradigm, whether that shift actually impacts judicial analysis or, as Sag suspects, merely reflects a change in rhetoric.[125]

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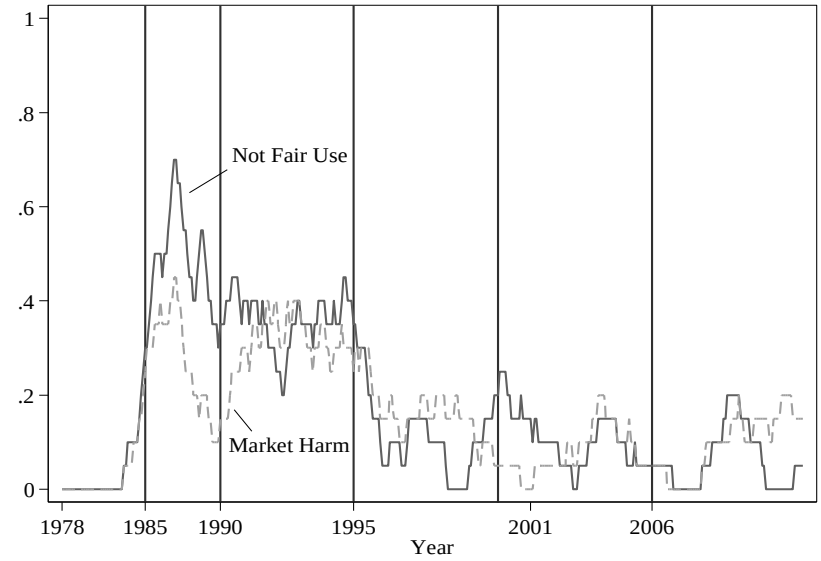
[123] Sag, *supra* note 13 (manuscript at 11) (citing Nimmer's discussion of Second Circuit cases).

[124] *Id.*

[125] Whatever the weakness of the commerciality presumptions, my data shows that, for each of the three periods, a judicial finding that the use is commercial

Figure 2. Twenty-Opinion Moving Average of the Proportion of Opinions Acknowledging Presumption That Commercial Uses are (1) Not Fair Use or (2) Cause Market Harm, 1978–2010.



3. The Rise of Factor One and Decline of Factor Four

Finally, leading cases make quite clear that, in effect, if the first factor favors fair use, that will trump the fourth factor. It is not that courts state explicitly that the first factor overrides the fourth. As Beebe's study shows and mine confirms, in the small handful of cases in which courts find expressly that factors one and four point in opposite directions, they tend slightly (and to a statistically insignificant extent) to favor factor four.[126] More subtly and frequently, however, courts find that a use that is unequivocally transformative causes no market harm. In the period of 2006 to 2010—and this is essentially consistent with early cases in the post-*Campbell* period—84.21% of opinions that found that the use was unequivocally transformative and that opined on the issue of market harm found that there was no actual or potential harm to the plaintiff's market; only 1.3% found actual market harm. At least as articulated by the Second Circuit, this lopsided result arises not because transformative uses are generally harmless to the plaintiff's desired licensing market, but

correlates significantly with a fair use win for the plaintiff, but that a judicial finding that the use is also unequivocally transformative trumps the significance of commerciality. For the entire period 1995–2010, the plaintiff won on fair use in 90.3% of the cases in which the court held that the use was commercial but not (unequivocally) transformative, versus only 12.5% of the cases in which the court held that the use was both commercial and unequivocally transformative. For the period 2006–2010, those plaintiff win rates were 88.2% versus 20%, respectively.

[126] *See* Beebe, *supra* note 11, at 584–85.

rather because the first factor effectively delimits the legally relevant market for the fourth factor. If a use is unequivocally transformative, then, by definition, it causes no market harm since the copyright holder does not have a right to exclude others from the market for transformative uses.[127] At the same time, when the court finds that the use is not transformative, this usually (though not always) means that the use substitutes in the market for the original, and thus the fair use privilege is not available.[128]

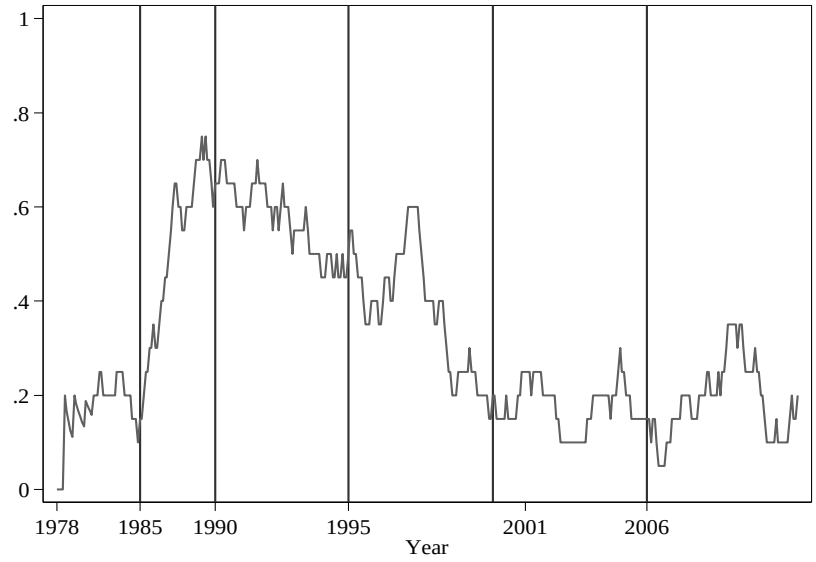
Data regarding judicial treatment of the fourth factor in general further supports the conclusion that the market paradigm no longer asserts a hold on fair use case law. As indicated in Figure 3, the proportion of opinions citing the *Harper & Row* dictum (that the fourth factor is the most important) is far lower today than it was prior to *Campbell*, even if 2006–2010 saw a slight uptick in citing the dictum over the previous five-year period. Notably, moreover, even when courts cite the *Harper & Row* dictum, they usually do so in the context of finding that the defendant's use does *not* harm the plaintiff's market. Of the 17 opinions issued between 2006 and 2010 that acknowledge the *Harper & Row* dictum, ten of them, some 60%, found no market harm and 50% found that the fourth factor favored the defendant.[129]

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

[128] In 2006–2010, a surprisingly high 30.43% of opinions that found that the use was not transformative, nevertheless found that the use did not harm the plaintiff's market. For 1995–2000 and 2001–2005, that figure was 0.00% and 7.14%, respectively.

[129] Indeed, in the prior two periods as well, a substantial percentage of opinions that acknowledged the *Harper & Row* dictum found no market harm and that the fourth factor favored the defendant. In 1995–2000, 50% of those opinions found no market harm and 44.44% found that the fourth factor favored the defendant. In 2001–2005, 42.86% of those opinions found no market harm and 37.5% found that the fourth factor favored the defendant. The variations from one period to the next, and as compared with 2006–2010, are not statistically significant.

Figure 3. Twenty-Opinion Moving Average of the Proportion of Opinions Stating that the Fourth Factor is the Most Important



In sum, in contrast to the *Harper & Row* regime in which the fourth factor was undoubtedly the most important, today it is largely the first factor, particularly whether the use is held to be transformative, that drives fair use analysis. It is not that the characterization of the use as transformative *explicitly* trumps the fourth factor. Rather, once the court finds that the use is transformative (and here, again, I mean unequivocally, not minimally or partially, transformative), that finding then infuses the court's analysis of factors three and four. Under the transformative use paradigm, factor three—the amount of the copyrighted work that the defendant has used—becomes a question not of whether the defendant took what is the most valuable part of the plaintiff's work (as it was under the market-centered paradigm), but rather whether the defendant used more than what was reasonable in light of the expressive purpose driving the transformative use.[130] Likewise, the analysis of factor four asks not whether the use falls within a conceivable licensing market for the copyright owner as under the market-centered approach, but whether the copyright owner should be entitled to prevent others from entering the market for the use in question—and, as noted above, if the use is transformative, then the

[130] More than 75% of the 2006–2010 opinions that found that the use was transformative expressly considered whether the defendant copied more than necessary for the defendant's expressive purpose in the court's analysis of factor three. In the 1995–2000 and 2001–2005, that figure was 44.44% and 57.14 %, respectively.

answer given by leading cases is "no." It has taken some time, but finally Judge Leval's proposed transformative use doctrine has come to be the prevailing view in fair use case law.

C. *What is a "Transformative Use"?*

1. *Transforming Content Versus Transforming Message*

The dramatic turn towards the transformative use doctrine underscores the importance of clearly defining what constitutes a transformative use. The issue on that score is that *Campbell*'s definition of transformative use—a use that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message"[131]—is susceptible to variable interpretations. In particular, the *Campbell* definition seems to set out two possible alternatives for transformative use. The first involves transforming the expressive content of the original work by modifying or adding new expression to the original, such as in writing a sequel to a novel or script or incorporating a short snippet of a song in a new composition. The second involves transforming the meaning or message of the original, such as an artistic painting that incorporates an advertising logo to make a comment about consumerism, or a newspaper's verbatim reprinting of a piece from a police department newsletter to expose racism or corruption in the police department. As courts and commentators have lamented, the *Campbell* definition leaves unclear whether either, both, or some combination of transforming content and transforming message are required to constitute a transformative use.[132]

Likewise regarding *Campbell*'s seeming requirement of "a further purpose or different character."[133] A sequel might have a "different character" from the original; many sequels tell a completely different story, albeit incorporating at least some of the characters from the original. But a sequel might be seen to serve the same overall "purpose" as the original: to entertain. Reproducing a work in its entirety in a very different context from the original in order to criticize the work or its author serves a very different purpose than the original but does not change the aesthetic character of the work itself seen in isolation from context. *Campbell* suggests that either different purpose or different character suffices for a work to be transformative.[134] But if different

[131] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[132] For discussion of this confusion, as well as other ambiguities in the definition of transformative use, see Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y 251, 256–268 (1998).

[133] *Campbell*, 510 U.S. at 579.

[134] Moreover, in his article, Judge Leval states that adding "new aesthetics" and creativing a "derivative work" can qualify as transformative, even if not necessarily fair use when copying is excessive. Leval, *supra* note 54, at 1111–12.

character flowing from new expressive contributions suffices, does that—and could that—mean that any derivative work constitutes a transformative use? Moreover, when, if ever, might verbatim copying with no alteration or added expression constitute a transformative use?

That fundamental uncertainty about what is a transformative use has led some commentators to challenge the transformative use doctrine as fundamentally untenable. They argue, in particular, that if transformative use means *different character flowing from new expressive contributions*, the doctrine would severely undermine the copyright holders' derivative right.[135]

However, as Tony Reese has shown in his study of appellate cases involving fair use decided between *Campbell* and the end of 2007, appellate courts have in fact been almost universally consistent in defining transformative use as a use that is for a new, different purpose, not a use that entails new expressive contributions per se.[136] My study bears out that conclusion for the period 1995–2010 for both appellate and district courts. In case after case decided since *Campbell*, courts have made clear that what matters for determining whether a use is transformative is whether the use is for a different purpose than that for which the copyrighted work was created. It can help if the defendant modifies or adds new expressive form or content as well, but different expressive purpose, not new expressive content, is almost always the key. Using Samuelson's proffered nomenclature and policy clusters, courts find as transformative primarily those uses that are "productive" or "orthogonal."[137] What Samuelson defines as "transformative uses"—uses that modify a preexisting work in creating a new one—are deemed "transformative" by the courts only if the defendant creates the new work for a different expressive purpose than the preexisting work.

Between 1995 and 2010, a total of 82 reported opinions expressly addressed the definition of transformative use beyond simply quoting the language in *Campbell*. Of these, only three stated that altered expression without different expressive purpose can qualify as transformative.[138] The

[135] *See, e.g.*, 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12:34–35 (3d ed. Supp. 2011) ("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 that these works borrow copyrightable expression from the copyrighted work").

[136] R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008).

[137] *See supra* text accompanying notes 67–70.

[138] In the single outlier decision between 2006 and 2010, *Bridgeport Music v. UMG Recordings*, the Sixth Circuit found the defendant's song to be "certainly transformative" because it had "a different theme, mood, and tone" from the plaintiff's composition, but then declined to overturn a jury's verdict rejecting the defendant's fair use defense. 585 F.3d 267, 278 (6th Cir. 2009).

vast majority of courts adhere to the rule that new expressive content, even a fundamental reworking of the original, is generally insufficient for the use to be transformative absent a different expressive purpose.[139] Nor does repackaging the work in a different format or medium qualify as transformative, absent a different expressive purpose in doing so.[140]

On the other side of the coin, a startling number of recent cases have held that the use was transformative when the defendant copied the plaintiff's work in its entirety without modification, but for a different expressive purpose. Indeed, such instances of copying without alteration comprised almost a quarter of the opinions that found the use in question to be unequivocally transformative between 2006 and 2010. Granted, Sag's data shows that, all else being equal, a finding of fair use is more likely when the defendant uses only part of the plaintiff's work.[141] Nonetheless, over 40% of the 2006–2010 opinions where the defendant copied the entire work without alteration found that the defendant's use was transformative, and over 90% of those uses were held to be fair use.

2. Particular Uses

The different expressive purposes that courts have recognized as transformative are quite varied. They have included replication of literary or graphic works to serve as an information tool;[142] replication of artistic works to illustrate a biography;[143] reproducing a fashion photograph originally made for a lifestyle magazine in a painting to make a comment about the mass media;[144] copying and displaying a photographic portrait originally made as a gift item for the subject's family and friends for purposes of entertainment and information;[145] a football team's display of

[139] *See, e.g.*, Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l, 533 F.3d 1287, 1311 (11th Cir. 2008) ("Although the [defendant's] course materials adopt a different format, incorporate pedagogical tools such as sales drills, and condense the material in the [plaintiff's] book, these changes do not alter the educational character of the material taken from the book; they merely emphasize, rather than transform, the overall purpose and function of the book.").

[140] *See* Soc'y of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory, 685 F. Supp. 2d 217, 227 (D. Mass. 2010) (holding that making a religious text available for religious instruction on the Internet constitutes non-transformative repackaging). Courts have long been reluctant to find fair use when they find that the defendant has merely retransmitted the copyrighted work in a different medium. *See, e.g.*, Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108–09 (2d Cir. 1998) (concluding that retransmission of radio broadcast over telephone lines is not transformative).

[141] Sag, *supra* note 13 (manuscript at 16, 27).

[142] A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 644 (4th Cir. 2009); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–19 (9th Cir. 2003); Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 541 (S.D.N.Y. 2008).

[143] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 615 (2d Cir. 2006); Warren Publ'g Co. v. Spurlock, 645 F. Supp. 2d 402, 423 (E.D. Pa. 2009).

[144] Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006).

[145] Calkins v. Playboy Enters. Int'l, Inc., 561 F. Supp. 2d 1136, 1141 (E.D. Cal. 2009).

artwork that the team previously used as its logo without the artist's permission in a "museum-like setting" in the lobby of the team's corporate headquarters;[146] copying a work to criticize its author;[147] and, of course, copying a work to parody or criticize the work. However, there is one type of different expressive purpose that courts have almost always found to be per se non-transformative: a use of a work for commercial advertising or promotion,[148] unless the use consists of the display of a competitor's product packaging in comparative advertising, or a quotation from an authoritative source for evaluating product quality. In that regard, moreover, courts have held that copying, displaying, or performing a portion of a work as a preview to sell the work itself constitutes non-transformative commercial advertising and promotion.[149]

Might Professor Samuelson's taxonomy help us determine which uses are likely to be held to be "transformative" (in the sense that the courts use that term, not under Samuelson's proffered nomenclature) and thus fair use? In principle, the transformative use doctrine should not favor particular types of defendant uses or expressive purposes. Rather, the test for transformativeness requires a comparison between the expressive purpose for which the author created the copyrighted work and that for which the defendant used the work. It is the relational difference

[146] Bouchat v. Baltimore Ravens Ltd. P'ship (*Bouchat II*), 619 F.3d 301, 314 (4th Cir. 2010).

[147] While 86% of opinions considering author criticism between 1995 and 2010 found the use to be unequivocally transformative, courts are split on whether copying to criticize the author, as opposed to the work itself, constitutes a parody, which is especially favored for fair use purposes. *See* Henley v. DeVore, 733 F. Supp. 2d 1144, 1152–54 (C.D. Cal. 2010) (discussing split case law on the issue of whether copying to criticize the author as distinct from the work itself is a parody).

[148] Between 2006 and 2010, 11 opinions considered uses in advertising and commercial promotion. All but two found the use to be non-transformative and the remaining two found the respective uses in question to be "somewhat transformative" and "minimally transformative at best." Reyes v. Wyeth Pharmaceuticals, Inc., 603 F. Supp. 2d 289, 296–97 (D.P.R. 2009) (use of photograph of sculpture in an advertisement as part of public service education campaign); Designer Skin, LLC v. S & L Vitamins, Inc., 560 F. Supp. 2d 811, 823 (D. Ariz. 2008) (internet reseller's use of depictions of plaintiff's products to market those products to consumers was "minimally transformative at best"). In disfavoring uses for advertising and promotion, lower courts have followed Supreme Court dicta in *Campbell*, suggesting that "use . . . of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 (1994).

[149] *See, e.g.*, Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 198–200 (3d Cir. 2003) (display of movie trailers to sell videos was not a transformative use); Teter v. Glass Onion, Inc., 723 F. Supp. 2d 1138, 1153–54 (W.D. Mo. 2010) (art gallery's display of digital images of artist's work was not transformative since the images served only the promotional function of showing customers that the artist's works were available in the gallery); United States v. Am. Soc'y of Composers, Authors & Publishers, 599 F. Supp. 2d 415, 432 (S.D.N.Y. 2009) (ringtone preview is advertising, not informational).

between the two purposes that renders the defendant's use transformative, not the purpose or character of the defendant's use in and of itself.

Nonetheless, there seem to be certain types of uses that correlate positively with a finding of fair use (which itself correlates with a finding of transformativeness), at least based on the data for 1995–2010. Defendant uses that the court found were for purposes of parody, criticizing the author, biography, history, general social and political criticism, litigation, or intermediate copying were held to be fair use to a statistically significant degree. Of course, many instances of such uses are likely to be for a different expressive purpose than that for which the author created the copyrighted work. In contrast, uses that the court found were for advertising and consumptive uses were held not to be fair use to a statistically significant degree. As discussed above, courts generally hold advertising to be non-transformative, and "consumptive uses," by definition, are the opposite of transformative use. The data for other uses, including those for satire, news reporting, reference works, information location tools, research, and education, did not generate statistically significant results in a bivariate analysis of fair use outcomes.

3. Remaining Indeterminacy

At bottom, the transformative use doctrine sets out a test for whether the defendant's use is transformative that may be precisely enunciated, but which is susceptible of incoherence and judicial manipulation as applied in practice. The test quite clearly requires the court to identify the expressive purpose for which the author of the copyrighted work created that work and the expressive purpose for which the defendant copied from the work, and then to compare the two to determine if the defendant's expressive purpose materially differs from that of the author. But neither the test nor precedent provides dispositive rules for how broad the relevant categories of expressive purpose should be, and just how different the defendant's expressive purpose must be from that of the author to qualify as a transformative use.

Nor does the test definitively constrain judicial discretion on how to characterize the author's and defendant's expressive purpose. For example, in *Calkins v. Playboy*,[150] one of the cases alluded to above, a photographer sued Playboy for reproducing his high school yearbook portrait of a teenage girl who later became a Playboy model in the magazine's photographic centerfold feature of the model. The court characterized the high school portrait photographer's expressive purpose as creating a gift for family and friends, and Playboy's use as one designed to "inform and entertain" its readers through personalizing the model.[151] However, a court that wished to find that Playboy's use was not

[150] 561 F. Supp. 2d 1136.

[151] *Id.* at 1141.

transformative could fairly and more broadly characterize the high school yearbook portrait as informational or biographical, while narrowly characterizing Playboy's choice to reproduce its model's high school portrait as serving an informational and biographical purpose within a glossy photographic spread otherwise designed for entertainment.

As courts have in other cases, the *Calkins* court relied on evidence of the defendant's motive for using the copyrighted work, as presented in the defendant's own statements and testimony.[152] The defendant's statement of motive provides an evidentiary basis for determining the expressive purposes for the defendant's use. But reliance on such statements, obviously, opens the door for users' self-serving, strategic statements to build a fair use defense in anticipation of a possible copyright infringement lawsuit.

D. Case Outcomes

The transformative use paradigm merely means that the key question for fair use analysis is whether the court characterizes the use as transformative. Despite the paradigm's favorable view of fair use as integral to the overall purposes of copyright law, its ascendancy does not necessarily portend that more uses will be found fair than under pre-2006 case law. So what impact has the transformative use paradigm had on case outcomes? The data, of course, can show correlation, but not causation. Nonetheless, there seems to be a strong correlation between increased win rates for fair use defendants and judicial adoption of the transformative use doctrine at the district court level. The appellate court level shows at best a weak correlation.

Beebe reported that during the period he studied, only 30.4% of the unreversed district court preliminary injunction decisions, 24.1% of the unreversed bench trial opinions, and 37.5% of the unreversed district court rulings on cross motions for summary judgment found fair use.[153] The combined total in such cases in Beebe's study is a fair use win rate at the district court level of only 32.1%. The unreversed circuit court rulings compiled by Professor Beebe were somewhat more favorable to fair use. Their holdings in favor of fair use were, respectively, 40% for preliminary injunction decisions, 38.5% for bench trial opinions, and 55% for cross motions for summary judgment, representing a combined total of 43.75% fair use wins for the defendant in such cases.[154]

In reporting fair use case outcomes, Beebe presents convincing reasons for excluding uncrossed motions for summary judgment.[155] As he notes, summary judgment motions brought only by one side tend to

[152] *Id.*
[153] Beebe, *supra* note 11, at 577.
[154] *Id.* at 578.
[155] *Id.* at 576.

present a clearer case in that party's favor than when both parties bring conflicting summary judgment motions. Moreover, Beebe cites data showing that courts are more likely to publish an opinion granting summary judgment than denying it.[156] My data supports Beebe's arguments. During the period 1995–2010, the plaintiff prevailed in 84.21% of the reported opinions in which only the plaintiff brought a motion for summary judgment, and the defendant prevailed in 70% of the reported opinions in which only the defendant brought a motion for summary judgment.

Further, my data provides an additional reason for excluding uncrossed motions for summary judgment in an empirical analysis of historical trends in fair use outcomes: there is a statistically significant variation in the proportion of reported rulings on uncrossed plaintiff versus defendant motions for summary judgment over time. In 2001–2005 only 19% of uncrossed motions for summary judgment were brought by plaintiffs, while in 1995–2000, the previous period, and 2006–2010, the later period, that percentage was, respectively, 33% and 42%. Thus, a longitudinal study of case outcomes that includes uncrossed motions for summary judgment will present results that are skewed by the significant variation in the mix of uncrossed plaintiff versus defendant summary judgment motions over time. Accordingly, like Beebe, in my analysis of fair use case outcomes I exclude motions for summary judgment brought only by one party or the other, and include data only from unreversed preliminary injunction decisions, bench trial opinions, and rulings on cross motions for summary judgment.

Within those parameters, my study adds a temporal dimension to Beebe's findings and shows a remarkable shift in favor of finding fair use in such cases at the district court level since 1995. During the period 1995–2000, only 22.73% of the district court opinions in such cases found that the defendants had made a fair use of the plaintiffs' work. During the period 2001–2005, the percentage of fair use wins for the defendant in such cases increased to 40.91%. During the years 2006–2010, the period in which courts have overwhelmingly embraced the transformative use doctrine, 58.33% of the opinions found in favor of the defendant on the issue of fair use.[157]

The parallel data for appellate rulings on motions for preliminary injunction, bench trial appeals, and cross motions for summary judgment

[156] *Id.*

[157] By point of comparison, the defendant win rates in all unreversed district court opinions, including rulings on uncrossed summary judgment motions, during the three periods was 31.34% in 1995–2000, 55.00% in 2001–2005, and 41.32% in 2006–2010. Those percentages show a modest increase in defendant wins comparing 1995–2000 and 2006–2010. But the highest rate of defendant wins for this open data set of all unreversed district court opinions was in 2001–2005, when there was a considerably greater proportion of uncrossed motions for summary judgment brought by defendants.

does not match the shift in favor of fair use that we see for such opinions at the district court level. In fact, while the appellate rulings in such cases show an increase in fair use wins for defendants from 1995–2000 to 2001–2005, moving from 46.67 to 57.14%, they exhibit a slight decrease in findings of fair use from 2001–2005 to 2006–2010, when the fair use win rate for defendants in appellate opinions declined to 50%. The defendant win rate at the appellate level during the years 2006–2010, and indeed during the previous two periods following the *Campbell* decision as well, is slightly higher than the defendant win rate at the appellate level during the entire period of Beebe's study. But given the small sample size of appellate opinions and relatively small increase in fair use wins for the defendant, the difference may well be just a reflection of statistical randomness.

As Beebe discusses, the high plaintiff win rates on the issue of fair use for the pre-2006 district court cases he studied run contrary to the much cited "Priest–Klein selection hypothesis," which predicts that civil litigation plaintiff win rates at trial should typically approach 50%, largely because it is only the close cases that survive settlement or summary judgment.[158] Indeed, the plaintiff win rate of 67.9% during Beebe's period of study is all the more striking given that empirical studies of the Priest–Klein selection hypothesis have demonstrated that, for various possible reasons, an overwhelming majority of types of lawsuits in fact exhibit plaintiff win rates of considerably less than 50%. For example, a study of all district court outcomes in civil cases reported in the Seventh Circuit between 1982 and 1987 found that plaintiffs initially won at trial in only 26.9% of the cases and won only 31.4% of time after appeals had been decided.[159] Notably, that study also provides ancillary, contextual support for Beebe's finding that fair use outcomes were highly skewed in favor of plaintiffs in comparison to other types of litigation generally. In the Seventh Circuit study, copyright infringement plaintiffs initially won at trial 71.4% of the time, and after appeal in 57.1% of the cases, a far greater win rate for copyright infringement plaintiffs than for plaintiffs generally.[160]

Beebe offers two possible explanations for the discrepancy between win rates for plaintiffs on fair use and the Priest–Klein hypothesis. First, as Priest and Klein recognize, their 50% hypothesis does not apply when the stakes of the parties differ; repeat players and other parties with greater stakes in, or risk aversion to, the litigation are likely to have a higher degree of success in adjudicated outcomes because they will be

[158] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4–6, 17–18 (1984).

[159] Daniel Kessler, Thomas Meites, & Geoffrey Miller, *Explaining Deviations from the Fifty-Percent Rule: A Mulitmodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 249–51 (1996).

[160] *Id.* at 251.

more likely to settle near-close, as well as close, cases.[161] In that vein, Beebe conveys William Landes's argument that intellectual property plaintiffs tend to have higher stakes in a favorable litigated outcome than civil litigation plaintiffs generally since IP plaintiffs face the risk that an adverse judgment will limit or extinguish their rights vis-à-vis third parties.[162] As a result, we would expect IP plaintiffs to settle near-close, as well as close, cases rather than take that risk. Second, Beebe adds that some of those who have decided to defend a copyright infringement lawsuit might raise a frivolous fair use defense in addition to more credible defenses.[163] To the extent that either explanation has purchase—and Beebe raises them merely as possibilities—they would apply equally to post-2005 cases, which makes the significant shift in favor of fair use even more notable.

We now turn to the correlation between increased defendant win rates and judicial embrace of the transformative use doctrine. As noted above, there has been a sharp increase in the embrace of the transformative use doctrine for all judicial opinions from the first post-*Campbell* period of my study, 1995–2000, to the most recent period, 2006–2010. To isolate the possible correlation between defendant win rates and judicial adoption of the transformative use doctrine, I examined judicial adoption of the doctrine and findings on transformativeness for the mix of reported district court opinions that form the basis for Beebe's and my reporting of case outcomes—that is, preliminary injunction decisions, rulings on crossed motions for summary judgment, and bench trial judgments. As indicated in Table A, I found, in those opinions, a sharp increase over time in (1) judicial assessment of whether the use is of a type favored under the transformative use doctrine (regardless of whether the court expressly uses the term "transformative"); (2) the percentage of cases in which the court found that the defendant's use was favored under the transformative use doctrine; and (3) the percentage of cases in which the defendant won on fair use when the court considered the transformativeness of the use.[164] I also found (4) a consistently high rate of defendant wins, reaching 100% in 2001–2005 and 2006–2010, in those cases in which the court found that the defendant's use was, in fact, unequivocally transformative. At bottom, the respective increases in district courts' embrace of the transformative use doctrine and in their findings that the use in question is, in fact, transformative during 2006–2010 each correlate significantly

[161] *See id.* at 237–48 (describing and building upon the Priest–Klein hypothesis).

[162] Beebe, *supra* note 11, at 579. *See* William M. Landes, *An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results*, 41 HOUS. L. REV. 749, 772 (2004).

[163] Beebe, *supra* note 11, at 580.

[164] The statistical significance of the increase over time for each variable is set out in the Table footnotes.

with (5) the increase in defendant win rates in fair use case outcomes for our mix of district court cases since 1995–2000.

Table A. The Transformative Use Doctrine in Unreversed District Court Preliminary Injunctions, Bench Trials, and Crossed Motions for Summary Judgment

	1995–2000	2001–2005	2006–2010
(1) Considers transformativeness[a]	70.45%	77.27%	95.83%
(2) Finds that use is transformative[b]	22.72%	31.81%	50.00%
(3) Defendant wins when court considers transformativeness[c]	32.14%	47.06%	60.87%
(4) Defendant wins when court finds that use is transformative	88.89%	100%	100%
(5) Overall Defendant Wins[d]	22.73%	40.91%	58.33%

[a] Increase over time is statistically significant across all three periods.

[b] Increase over time is statistically significant comparing 2006–2010 with 1995–2005 (first two periods combined).

[c] Increase over time is statistically significant comparing 2006–2010 with 1995–2005 (first two periods combined).

[d] Increase over time is statistically significant across all three periods.

As Sag emphasizes, the increasing rate at which judges invoke the transformative use concept does not necessarily mean that the transformative use paradigm is actually driving the trend towards significantly greater win rates for fair use defendants at the district court level.[165] However, particularly in light of the empirical studies discussed above, concluding that legal doctrine does generally impose some constraint on judicial discretion and thus impact case outcomes,[166] I hypothesize that the judicial turn towards the transformative use paradigm is, at the very least, partly responsible for greater defendant win rates. Moreover, Sag's principal results would appear to comport with that possibility.

In his study of district court cases, Sag concludes that the case attributes that have the most significant correlation with a fair use defendant's successful outcome are the plaintiff's legal personality and whether the defendant's use constitutes a "Creativity Shift," i.e., a use of a

[165] *See supra* notes 123–124 and accompanying text.

[166] *See supra* notes 82–83 and accompanying text.

creative work for informational purposes or visa-versa.[167] With regard to legal personality, Sag concludes that fair use defendants are more likely to win if the plaintiff is a natural person than if a corporation.[168] Interestingly, however, there is no statistically significant difference between the proportions of plaintiffs who are natural persons and corporations in unreversed district court opinions during 2006–2010 than the relative proportion of plaintiffs with those respective legal personalities during 1978–2006, the period of Sag's study.[169] This suggests that even though the plaintiff's legal personality significantly correlated with defendant win rates overall during 1978–2006, it was not a factor driving increased win rates for fair use defendants over time into the period 2006–2010.

With regard to Creativity Shift, Sag concludes that when a defendant's use falls within that category, the defendant's predicted probability of a favorable finding on fair use almost doubles, from 33 to 62%.[170] I have not attempted to determine the proportion of cases that might be characterized by a Creativity Shift, as Sag defines it, during 2006–2010. Yet the use of a creative work for informational purpose or an informational work for purposes of creative expression falls solidly within the widely accepted definition of transformativeness in that they are uses in which the defendant's expressive purpose differs from that of the copyrighted work's author. Hence, as Sag notes, Creativity Shifts are a "kind of transformative use."[171] Accordingly, even if the proportion of Creativity Shifts sharply increased and remained a significant predictor of fair use outcomes for 2006–2010, the data would not show whether courts were applying the transformative use concept to find that Creativity Shifts are fair use, as the transformative use paradigm suggests they should, or merely labeling Creativity Shifts as "transformative" to justify case outcomes post hoc.[172]

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[167] *See* Sag, *supra* note 13 (manuscript at 27, 32).

[168] *Id.* (manuscript at 29).

[169] For the period of his study (1978–2006), Sag found that in 41.29% (64 out of 155) of the cases a natural person was the plaintiff and in 53.55% (83 out of 155) a corporation was the plaintiff. Matthew Sag, Predicting Fair Use (2011) (manuscript at 39), *available at* http://works.bepress.com/matthew_sag/10. I found, for 2006–2010 (unreversed district courts), that in 46.7% (28 out of 60) of the cases a natural person was the plaintiff and in 48.3% (29 out of 60) a corporation was the plaintiff. The differences are not statistically significant—and, in any event, are far smaller than the percentage increase in defendant win rates from the period 1978–2006, which Sag measured at 32.28%, to the period 2006–2010, which for district court opinions, excluding uncrossed summary judgment motions, was 58.33% and for district court opinions including uncrossed summary judgment motions was 41.32%.

[170] Sag, *supra* note 13 (manuscript at 28).

[171] *Id.*

[172] As noted in the text accompanying notes 78 and 79, *supra*, Sag also finds a significant correlation (although less so than that for plaintiff's legal personality and Creativity Shifts) between fair use outcomes and whether the use is a Direct

More speculatively (and without quantitative, empirical support), I offer a further alternative hypothesis for the increase in defendant win rates: the tilt towards fair use defendants and the judicial embrace of the transformative use doctrine are, together, part of a broader, growing judicial skepticism towards copyright holder rights, for which the Supreme Court's decision in *Eldred v. Ashcroft*,[173] issued in 2003, might have been the watershed. In *Eldred*, the Supreme Court rejected a constitutional challenge to the Copyright Term Extension Act of 1998, in which Congress added an additional 20 years to the copyright term for new and existing works.[174] But, as the next day's *New York Times* headline proclaimed, while *Eldred* was a "corporate victory" for the copyright industries who lobbied for the term extension, it was one that "raise[ed] public consciousness" about copyright excess,[175] and tarnished the copyright industries as greedy and overreaching. Since *Eldred*, courts have interpreted other 1998 amendments to the Copyright Act to provide far-reaching immunity to Internet service providers, like YouTube, which host infringing material posted by users;[176] held that a cable operator that stores television programs for subscribers on a company server has not itself reproduced or publicly distributed the copied programs;[177] limited the availability of statutory damages in lawsuits against peer-to-peer file trading sites and other secondary infringers;[178] and held that copyright

Commercial Use or Partial Copy. If the former, the defendant has a lesser chance of winning; if the latter, a greater chance. The definition of transformative use does not encompass all uses that are other than Direct Commercial Uses or all uses that are Partial Copies. Some transformative uses involve uses of the plaintiff's work as part of a commercial product or service without any modification of the original copyrighted work, even if courts have declined to hold that uses for commercial advertising or promotion are transformative. Further, a use may be transformative even if the defendant has copied the plaintiff's work in its entirety. Thus, if the proportion of uses that are Direct Commercial Uses have markedly declined during 2006–2010 or if those that are Partial Copies have markedly increased, this might suggest an alternative explanation for the significant increase in fair use defendant win rates during that period—or at least an additional explanation to supplement the judicial abandonment of the market paradigm and embrace of the transformative use paradigm, which is evident in how courts actually characterize their analysis of the four fair use factors.

[173] 537 U.S. 186 (2003).

[174] *Id.* at 218.

[175] Amy Harmon, *A Corporate Victory, But One That Raises Public Consciousness*, N.Y. TIMES, Jan. 16, 2003, at A24.

[176] *See, e.g.*, Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007) (interpreting the safe harbor provisions of the Digital Millennium Copyright Act); Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (same); IO Group, Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (same).

[177] Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008).

[178] Arista Records LLC v. Lime Group LLC, No. 06 CV 5936, 2011 WL 1226277 (S.D.N.Y. March 29, 2011) (copyright plaintiff may not elect to receive the "extraordinary remedy" of statutory damages against a secondarily liable defendant

infringement plaintiffs are not entitled to a presumption of irreparable harm in motions for preliminary injunction.[179] In addition, in *Eldred*'s wake, the Supreme Court sharply curbed copyright holders' ability to use federal trademark rights to control uses of formerly copyrighted material that is in the public domain,[180] and in a possible step towards further limiting *Eldred*, the Supreme Court has recently granted cert to hear a constitutional challenge to a 1994 law that restored copyright protection to certain works that had gone into the public domain.[181] To the extent these rulings are representative of a backlash against a perceived expansion of copyright holder rights and demands, the tilt towards defendants in fair use cases might be a part of that general move.

In any event, the Priest–Klein selection hypothesis teaches that the judicial shift in favor of defendants in fair use outcomes is unlikely to persist even if the transformative use paradigm continues to dominate fair use analysis and is the driving force in that shift in outcomes. At some point, we would expect that copyright holders will settle or cease to litigate copyright infringement claims in which the user has a colorable argument of transformative use, leaving only materially uncertain areas of fair use doctrine for adjudicated outcomes. Indeed, the data presented in Figure 4 on the proportion of fair use defendant wins over time suggests that defendant win rates might have already begun to return to a mean of somewhat below 50% during the last half of 2006–2010, although the number of opinions is too small to discount the possibility of statistical randomness.

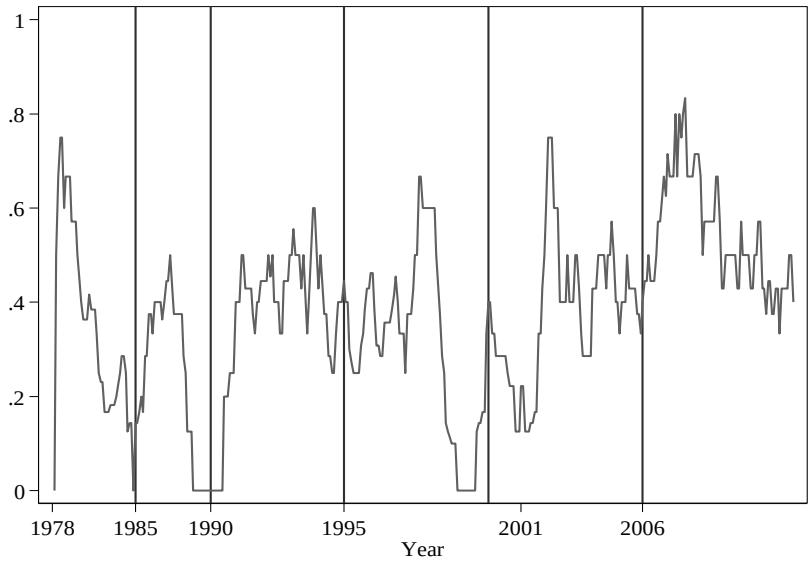
when any individual direct infringer infringed the work in question prior to the work's copyright registration).

[179] Salinger v. Colting (*Salinger II*), 607 F.3d 68 (2d Cir. 2010).

[180] Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003).

[181] Golan v. Holder, 131 S. Ct. 1600 (2011), *granting cert. to* Golan v. Holder, 609 P.3d 676 (10th Cir. 2010).

Figure 4. Twenty-Opinion Moving Average of the Proportion of Unreversed District Court Opinions (Preliminary Injunctions, Bench Trials, and Crossed Motions for Summary Judgment) in Which Defendant Wins on Fair Use, 1978–2010.



V. ILLUSTRATIVE CASES

Whatever the transformative use paradigm's impact on case outcomes, the past five to ten years have witnessed a sea change in the way fair use cases are framed and on the emphasis placed within the fair use analysis. In this Part, I examine some of the leading, frequently cited post-2005 cases in the adoption and definition of the transformative use doctrine.[182]

A. Bill Graham Archives v. Dorling Kindersley Ltd.[183]

Bill Graham Archives, decided by the Second Circuit in May 2006, represents a cornerstone in lower courts' belated embrace of the transformative use doctrine adopted by *Campbell* more than ten years earlier. In *Bill Graham Archives*, the defendant book publisher used thumbnail images of the plaintiff's concert posters in its book, *Grateful Dead: The Illustrated Trip*, an illustrated 480-page coffee table book that presented a chronological account of the celebrated rock band. The

[182] Over a third of the fair use opinions reported during the 2005–2010 period cited one or more of the first three cases that I discuss.

[183] 448 F.3d 605 (2d Cir. 2006).

book contained over 2,000 images representing dates in the Grateful Dead's history with explanatory text. Among those images were seven substantially reduced-size reproductions of the plaintiff's copyrighted images from Grateful Dead concert posters and tickets.[184]

Bill Graham Archives had been actively engaged in licensing the use of its images in books. Indeed, the parties had negotiated for a license regarding the seven images in question in the lawsuit, but they could not agree on terms. When the parties failed to reach agreement, the defendant proceeded to publish the book with its reproduction of the images anyway.[185]

The Second Circuit held nevertheless that the defendant's use was fair use. In so holding, it emphasized that the defendant's use of the images was "transformatively different [than] the original expressive purpose."[186] The images had been created for use on concert posters and tickets, with the dual purposes of artistic expression and promotion. But in the defendant's book they served as historic artifacts that documented events and enhanced the understanding of the biographical text. The court noted that its conclusion regarding the transformative nature of the use was "strengthened" by the fact that the defendant had significantly reduced the size of the original images.[187] As a result, the reproductions were tailored to the defendant's transformative purpose, enabling readers to recognize the posters' historical significance without offering "more than a glimpse of their expressive value."[188]

Turning to the effect of the defendant's use on the potential market for the copyright work, recall that the central question under the market-centered paradigm was whether the unauthorized use would likely usurp the copyright holder's potential to license the original or develop a market for derivative uses.[189] In this case, that potential market would certainly include licensing reduced size reproductions for use in a book. In fact, Bill Graham Archives had demonstrated that it was *already* licensing its images for reduced size reproduction in books. Not only that, the Archives had expressed willingness to license the defendants on agreed-upon terms.

Nevertheless, the Second Circuit held that the defendant's use presented no harm to the potential market under the fourth factor.[190] The reason, quite strikingly, was that if the use is transformative, even actual market substitution is not enough to negate fair use or even to find that the fourth factor weighs against fair use. As the court stated:

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[184] *Id.* at 607.
[185] *Id.*
[186] *Id.* at 609.
[187] *Id.* at 611.
[188] *Id.*
[189] *See supra* text accompanying notes 95–103.
[190] *Bill Graham Archives*, 448 F.3d at 615.

"Here, . . . we hold that [Kindersley's] use of [Bill Graham Archive's] images is transformatively different from their original expressive purpose. In a case such as this, a copyright holder cannot prevent others from entering fair use markets merely 'by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.'"[191]

Hence, for the Second Circuit in *Bill Graham Archives*, a finding of transformative purpose under the first factor effectively trumps the fourth. As was the case in prior fair use case law, we still ask for the fourth factor whether the defendant's use might harm a potential market that a reasonable copyright holder would be expected to enter. But transformative uses are not considered to be part of the potential market. Thus, even if the copyright holder is already developing a licensing market for transformative uses of the work, she may not prevent others from making such use.

B. Blanch v. Koons[192]

Many thought that *Bill Graham Archives* was an aberration. The panel's ruling would certainly be vacated on rehearing en banc or at least ignored by other Second Circuit panels. But some six months later, the Second Circuit struck again.

Blanch v. Koons is not entirely all-fours on-point with *Bill Graham Archives*, but it very much reinforces the understanding that whether the use is "transformative" is key to determining fair use. Moreover, as in *Bill Graham Archives*, *Blanch* underscores that in determining whether a use is transformative, the focus is on whether the defendant used the original work for a different expressive purpose than that for which the copyrighted work was created.

Blanch, a fashion photographer, had created the photograph at issue, entitled *Silk Sandals by Gucci*, for display in *Allure* magazine, an American lifestyle magazine, as part of an article about metallic make-up.[193] Koons, on the other hand, reproduced the photograph for an entirely different expressive purpose. He included a portion of the image in his artistic painting, entitled "Niagara," in which he used the image as "fodder for his commentary on the social and aesthetic consequences of mass media."[194] Citing *Bill Graham Archives* in support, the *Blanch* panel held that "[w]hen, as here, the copyrighted work is used as 'raw material,' in the furtherance of distinct creative or communicative

[191] *Id.* at 614–15 (footnote omitted) (quoting *Castle Rock Entm't Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 145 n.11 (2d Cir. 1998)).

[192] 467 F.3d 244 (2d Cir. 2006).

[193] *Id.* at 247–48.

[194] *Id.* at 253.

objectives, the use is transformative."[195] As in *Bill Graham Archives*, it helped that Koons had not presented the copyrighted image in its unaltered original form, in this case cropping, changing the color, and adding a feature to the image. But "crucially" for the *Blanch* court, Blanch's photograph and Koons's use had "entirely different purpose and meaning."[196]

In addition to reinforcing *Bill Graham Archives*' articulation of the transformative use doctrine, *Blanch* presented two other points of note. First, in determining whether Koons's use was for a different expressive purpose than Blanch's and was thus transformative, the court relied heavily on Koons's subjective intent in copying and including Blanch's copyrighted expression in his painting. Indeed, the Second Circuit relied entirely on Koons's own description of his expressive purpose, as set out in an affidavit he filed with the district court, albeit, as the court noted, Blanch did not dispute Koons's characterization of his stated objective.[197] Other cases have followed suit in giving weight to evidence of the defendant's contemporaneous intent in using the plaintiff's work to determine the defendant's expressive purpose. In addition to an affidavit, courts have looked to the defendant's prior statements about the purpose of his use.[198]

Second, *Blanch* seems largely to obliterate the distinction between parody and satire. In *Campbell*, the Supreme Court dispelled the notion that satire—the use of a copyrighted work to comment on something other than the work itself—cannot qualify as a transformative fair use.[199] While parody has greater justification for borrowing from a particular work, a highly transformative satire that borrows to a relatively small extent from the original work may also "be found to be fair use," even with "lesser justification for . . . borrowing than would otherwise be required."[200] Nonetheless, *Campbell* makes it more difficult for satire than parody to qualify and, for many lower courts, the characterization of the defendant's use as satire rather than parody has weighed very heavily, if not conclusively, against finding fair use.

Blanch recognized that Koons's work was satire, not parody, since his target was the mass media genre of which the plaintiff's work was typical, not the photograph itself.[201] However, the Second Circuit continued, "[w]e have applied *Campbell* in too many non-parody cases to require

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[195] *Id.* (citation omitted).

[196] *Id.*

[197] *Id.* at 247, 253.

[198] *See* Salinger v. Colting (*Salinger II*), 607 F.3d 68, 72–73 (2d Cir. 2010) (statements on book jacket and other public statements); Bourne Co. v. Twentieth Century Fox Film Corp., 602 F. Supp. 2d 499, 507–08 (S.D.N.Y. 2009).

[199] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 n.14 (1994).

[200] *Id.*

[201] *Blanch*, 467 F.3d at 254.

citation for the proposition that the broad principles of *Campbell* are not limited to cases involving parody."[202] The court recognized, quoting *Campbell*, that parody has an inherent justification for borrowing from a particular work that satire does not. But the key is to determine whether the defendant had a "genuine creative rationale for borrowing [the plaintiff's] image, rather than using it merely 'to get attention or to avoid the drudgery in working up something fresh.'"[203] And in determining that Koons did have such a rationale, the court relied on his own non-contradicted explanation for why he used Blanch's image to comment upon the culture and attitudes embodied in *Allure* magazine in an authentic way. As the court concluded, "[w]hether or not Koons could have created 'Niagara' without reference to 'Silk Sandals,' we have been given no reason to question his statement that the use of an existing image advanced his artistic purposes."[204]

Blanch's embrace of Koons's copying for purposes of general social criticism and his own artistic purposes is all the more striking when contrasted with the Second Circuit's pre-*Campbell* ruling in *Rogers v. Koons*.[205] In that case, the Second Circuit held that Koons's creation of sculpture that targeted the banality of a photograph on which the sculpture was based did not qualify as fair use.[206] Among the reasons the court gave for its ruling was that Koons's use was a satirical critique of our materialistic society rather than a parody of the copied work.[207]

C. Perfect 10, Inc. v. Amazon, Inc.[208]

In *Perfect 10 v. Amazon*, decided in December 2007, the Ninth Circuit joined the Second Circuit in underscoring the centrality of the transformativeness of the use for fair use analysis and in defining transformativeness by the use's purpose or function. *Perfect 10* involved a claim that Google infringed the plaintiff's copyrights by displaying on Google Image Search thumbnail replicas of infringing third-party copies of images from the plaintiff's adult magazine and website.[209]

In holding that Google's display was fair use, the Ninth Circuit noted expressly that the use need not modify the original or add new creative expression so long as it serves a different purpose or function, especially one that promotes the goals of copyright law and serves the interest of the public.[210] In this case, the court found, Google's image search engine

[202] *Id.* at 255.
[203] *Id.* (quoting *Campbell*, 510 U.S. at 580).
[204] *Id.*
[205] 960 F.2d 301 (2d Cir. 1992).
[206] *Id.* at 309–10.
[207] *Id.* at 310.
[208] 508 F.3d 1146 (9th Cir. 2007).
[209] *Id.* at 1157.
[210] *Id.* at 1165.

provides a clear social benefit and is highly transformative.[211] The plaintiff's images were created for purposes of art and entertainment. Google, on the other hand, uses them for a pointer directing the user to a source of information. Google does not display the thumbnails for aesthetic purposes but only incorporates the Perfect 10 images into its electronic reference tool.[212]

Perfect 10 v. Amazon is also notable for its treatment of the fourth factor, "the effect of the use upon the potential market for or value of the copyrighted work." After it filed its lawsuit, Perfect 10 began marketing thumbnails of its images for download to cell phones. For the district court, this was sufficient to weigh the fourth factor against fair use. It found that adept users of Google Image Search are able to capture thumbnail images that Google displays in response to an image search query and transfer them to the user's cell phone.[213]

The Ninth Circuit rejected that analysis. It held that because the district court did not make a finding that Google users had actually downloaded thumbnail images for cell phone use, the potential harm to Perfect 10's market remained hypothetical and thus that the fourth factor favored neither party.[214] The Ninth Circuit presented this holding in evidentiary terms and did not go as far as the Second Circuit in *Bill Graham Archives* in exempting transformative uses from the analysis of market harm under the fourth factor. Nevertheless, in refusing to consider Perfect 10's cell phone market as even a potential market that Perfect 10 would reasonably enter, when in fact it was a market that Perfect 10 had *already* entered, *Perfect 10* sharply diminishes the scope and force of the fourth factor. Similarly to *Bill Graham Archives*, it holds Google's display of thumbnail images to be fair use because of the use's highly transformative, socially beneficial character despite possible harm to the plaintiff's potential market for licensing thumbnails.[215]

D. A.V. *ex rel.* Vanderhye v. iParadigms, LLC[216]

Vanderhye is another striking example of a circuit court holding that a defendant's verbatim copying without alteration of a plaintiff's copyrighted work, but for a different expressive purpose or function, constitutes a transformative fair use.

iParadigms runs the "Turnitin Plagiarism Detection Service." Schools that subscribe to the service require their students to upload the students' term papers onto the Turnitin website. Turnitin then

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[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.* at 1168.
[215] *Id.* at 1166.
[216] 562 F.3d 630 (4th Cir. 2009).

electronically compares each student paper against its electronic database of published articles and previously uploaded student papers. Further, if the school gives permission, Turnitin stores each new student paper in its database for use in evaluating the originality of other students' papers in the future.[217]

High school students are not happy about this service. Some high school students whose papers have been archived in Turnitin's database sued iParadigms for copyright infringement.

The Fourth Circuit held that iParadigms had engaged in fair use.[218] First and foremost, the court held, iParadigms' use is transformative because it is undertaken to prevent plagiarism, which is an entirely different purpose than that for which student authors created their papers in the first place.[219] In particular, the Fourth Circuit cited the Ninth Circuit's ruling in *Perfect 10 v. Amazon* in support of the proposition that a use can be transformative in function or purpose without altering or actually adding to the original work.[220]

Moving to the third factor, the court held that the amount of the copyrighted work used must be evaluated in light of the nature of the use.[221] Where, as here, it was reasonably necessary for the transformative use to copy the entire work, the third factor does not count against fair use.

E. Salinger v. Colting[222]

Cases rejecting fair use are no less instructive than those upholding fair use in understanding the transformative use paradigm and its place in current fair use doctrine. In *Salinger v. Colting*, the defendant had written a novel which imagined what Holden Caulfield, the principal character from J.D. Salinger's classic American novel, *The Catcher in the Rye*, would be like 60 years later. Colting's novel also had a character modeled on J.D. Salinger himself, and Colting argued that his novel was a parodic comment on and criticism of both *The Catcher in the Rye* and J.D. Salinger himself, particularly of the fact that the reclusive Salinger had stopped writing for publication in 1965.[223]

In denying fair use, the district court found that Colting's novel was merely a sequel, not a parodic comment, and thus was only minimally transformative.[224] In order to be transformative, the court held, the defendant's use must do more than add new expression. Rather it must

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[217] *Id.* at 634.

[218] *Id.* at 645.

[219] *Id.* at 640.

[220] *Id.* at 639.

[221] *Id.* at 642.

[222] Salinger v. Colting (*Salinger II*), 607 F.3d 68 (2d Cir. 2010); Salinger v. Colting (*Salinger* I), 641 F. Supp. 2d 250 (S.D.N.Y. 2009).

[223] *Salinger II*, 607 F.3d at 71–72.

[224] *Salinger I*, 641 F. Supp. 2d at 261–62.

have been created for a new, different purpose, such as criticism or comment.[225] The court granted that a *Catcher in the Rye* sequel that targeted Salinger himself for criticism would be transformative, even if not a parody.[226] But based on its reading of Colting's novel and Colting's prior public statements and admissions that his novel was a "sequel to a beloved classic," not a criticism, the court found the use to be insufficiently transformative.[227]

On appeal, aside from a catch-all reference to "all the other facts in this case," the Second Circuit upheld the denial of fair use entirely on the district court's finding that Colting's protestations of transformative purpose were post hoc and "simply not credible."[228] *Salinger* thus leaves open the question of how the Second Circuit would rule if presented with unequivocal evidence of the defendant's purpose of criticizing the original work's author as opposed to parodying the work itself.

F. Warner Brothers Entertainment, Inc. v. RDR Books[229]

Warner Brothers Entertainment and J.K. Rowling, owners of copyrights in the *Harry Potter* book and movie series, sued RDR, the publisher of a lexicon of the series. Akin to a comprehensive encyclopedia, the lexicon contained more than 2,400 entries about the fictional world that Rowling created.[230]

The Southern District of New York found that the defendant's use was transformative vis-à-vis the *Harry Potter* series because the lexicon served a fundamentally different purpose than the original works and thus did not supplant the object works. The *Harry Potter* novels, the court found, were created to serve entertainment and aesthetic purposes.[231] In contrast, far from simply repackaging *Harry Potter* stories for entertainment, the lexicon served as a reference guide to the series.[232] In so finding, the court emphasized that the fact that the defendant added no commentary or analysis did not matter. Its use was still transformative because the lexicon served a different function than that of the *Harry Potter* novels.

Where the defendant fell into trouble, however, was that the lexicon also copied extensively from two Rowling-authored companion books to the *Harry Potter* series. The court found that these books could be used for an informational, reference purpose, as well as for entertainment,

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[225] *Id.* at 256.
[226] *Id.* at 262–63.
[227] *Id.*
[228] *Salinger II*, 607 F.3d at 83.
[229] 575 F. Supp. 2d 513 (S.D.N.Y. 2008).
[230] *Id.* at 517–20.
[231] *Id.* at 541.
[232] *Id.*

and thus that the defendant's use of the companion books was transformative to a much lesser extent than its use of the *Harry Potter* novels themselves.[233] In addition, the court held, the defendant's lexicon was not fair use because it repeatedly copied distinct original language from the *Harry Potter* works in excess of what was reasonable in relation to the defendant's transformative purpose of creating a useful and complete reference guide.[234] Such excessive verbatim copying from J.K. Rowling's vivid prose was not transformative because it copied for the original's inherent entertainment and aesthetic value. In addition, it weighed against fair use in regard to the third statutory factor.

G. Gaylord v. United States[235]

Finally, *Gaylord* illustrates that courts' insistence on transformative purpose can disqualify from fair use a use found only to have a different expressive character.

Gaylord created a sculpture of a group of soldiers on an undefined mission during the Korean War. The sculpture is displayed as part of the Korean War Memorial on the National Mall in Washington, D.C. John Alli took a photograph of the sculpture when it was covered with snow. The U.S. Postal Service acquired the photograph and then further reduced and darkened the image, transposing the photograph to an image that appeared on a postage stamp honoring Korean War veterans.[236]

The Court of Claims found that the image on the postage stamp was transformative because it had a very different expressive character than the original.[237] While the sculpture was clearly a three-dimensional snapshot of a group of soldiers, the image on the stamp presents a surrealistic environment of snow and subdued lighting, leaving the viewer unsure whether she is viewing a photograph of statues or actual human beings.

Upon appeal, the Federal Circuit faced the question of whether a very different expressive character and, arguably, a very different aesthetic aim, is enough to make the use transformative, even if it shares the same overall expressive purpose as the original. It held that the use was not transformative.[238] Even though the stamp altered the appearance of the sculpture, the court held, the expressive purpose of the sculpture and the stamp were the same: to honor Korean War veterans.[239]

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[233] *Id.* at 541–42.

[234] *Id.* at 547.

[235] Gaylord v. United States (*Gaylord II*), 595 F.3d 1364 (Fed. Cir. 2010); Gaylord v. United States (*Gaylord I*), 85 Fed. Cl. 59 (Fed. Cl. 2008).

[236] *Gaylord II*, 595 F.3d at 1368–71.

[237] *Gaylord I*, 85 Fed. Cl. at 68–69.

[238] *Gaylord II*, 595 F.3d at 1372–73.

[239] *Id.* at 1373.

V. CONCLUSION

Since 2005, the transformative use paradigm has come to dominate fair use case law and the market-centered paradigm has largely receded into the pages of history. Today, the key question for judicial determination of fair use is not whether the copyright holder would have reasonably consented to the use, but whether the defendant used the copyrighted work for a different expressive purpose from that for which the work was created. Courts ask, for example, "Does the defendant use the work for purposes of criticism, whether the criticism targets the work itself, the author or someone else associated with the work, or a general genre or social phenomenon?" and "Does the defendant use a work originally created for aesthetic, entertainment, or commercial advertising purposes for a different purpose, such as biographical or historical documentation?" Or vice versa, perhaps, as in a case holding to be fair use Playboy magazine's reproduction and display of a high school yearbook photograph that had been taken of its model: "Does the defendant use a work created originally as a gift for family and friends instead for aesthetic and entertainment purposes?"[240] Or: "Does the defendant use the copyrighted work as raw material for a reference guide or information location tool?" If the answer is "yes," the use is likely to be held to be transformative, unless the new expressive purpose is for commercial advertising or promotion. On the other hand, if the defendant merely modifies the original or adds new expression for the same expressive purpose, the use will most probably qualify neither as transformative nor as a fair use.

If the use is for a transformative purpose, then the question is whether the defendant has copied more than a reasonable amount for that purpose. It can sometimes be reasonable to copy the entire work without modification. However, the defendant does best to avoid copying the most expressively vivid aspect of the original work. For example, it was helpful to the defendants in both *Perfect 10 v. Amazon* and *Bill Graham Archives* that they produced a thumbnail image of the plaintiff's copyrighted artwork rather than a larger reproduction that displayed the aesthetic elements of the original. And the *Harry Potter Lexicon* ran into trouble because it copied too much of JK Rowling's distinctive prose.

If the use is transformative and the defendant has not copied excessively in light of the transformative purpose, the use will most likely be held to be a fair use. This is so even if the copyright holder might enter or already has entered a licensing market for similar uses, and indeed even if the copyright holder would have been willing in principle to license the use in question.

[240] Calkins v. Playboy Enters. Int'l, Inc., 561 F. Supp. 2d 1136, 1141 (E.D. Cal. 2009).

The transformative use doctrine presents a relatively straightforward standard for approaching fair use cases. As discussed above, however, it leaves judges considerable discretion in determining whether any given use is transformative, creating the possibility that the judicial embrace of the transformative use doctrine will produce new fault lines and uncertainties in fair use. In addition, despite the pronounced judicial turn in recent years, a number of doctrinal issues remain open.

First, neither the Second nor Ninth Circuit has yet to apply the transformative use doctrine across the entire spectrum of defendant uses. In particular, while the Second Circuit has championed the transformative use paradigm in the area of cultural expression and social criticism, it has yet to apply the paradigm to a reference guide or information location tool, along the lines of the Ninth Circuit's ruling in *Perfect 10*. And, for its part, the Ninth Circuit has yet to apply the paradigm to cultural expression and social criticism, along the lines of the Second Circuit's rulings in *Bill Graham Archives* and *Blanch*.

There is little reason to doubt that the Second Circuit would be inclined to reach the same result as did the Ninth Circuit in *Perfect 10*—and, for that reason, I predict that the plaintiff authors and publishers in the Google Book Search litigation will ultimately find some way to settle that case rather than face Google's fair use defense in court.[241] The district court's ruling that the *Harry Potter Lexicon* was transformative vis-à-vis the *Harry Potter* novels (except to the extent the Lexicon excessively copied Rowling's prose) provides some support for that assumption. Indeed, that court cited *Perfect 10*, as well as *Bill Graham Archives*, for the propositions that a use is transformative when the "defendant uses a copyrighted work in a different context to serve a different function than the original" and that "[d]epending on the purpose, using a substantial portion of a work, or even the whole thing, may be permissible."[242]

However, in applying the transformative use paradigm outside the realm of information location tools, the Ninth Circuit would have to contend with pre-2006 but post-*Campbell* precedent that might construe transformative use and fair use for cultural expression more narrowly than has the Second Circuit since 2005. In *Elvis Presley Enterprises v. Passport Video*,[243] decided in 2003, the Ninth Circuit upheld the district court's finding that the defendant's inclusion of multiple short video clips of Elvis Presley's television appearances, accompanied by narrative voice-over and interviews, in a 16-hour documentary about Presley was

[241] *See* Matthew Sag, *The Google Book Settlement and the Fair Use Counterfactual*, 55 N.Y.L. SCH. L. REV. 19, 26–37 (2010) (concluding that the Google Book Search project as originally conceived would likely be held to be fair use).

[242] Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 541, 548 (S.D.N.Y. 2008).

[243] 349 F.3d 622 (9th Cir. 2003).

not fair use.[244] Although the Ninth Circuit adopted the transformative use doctrine in stating that defendants' works are transformative when they "use copyrighted materials for purposes distinct from the purpose of the original material," it characterized the use in question as "not consistently transformative" and found that the defendant had sought to "profit at least in part from the inherent entertainment value of Elvis' appearances" on popular television shows.[245] Moreover, in *Dr. Seuss Enterprises v. Penguin Books USA*, decided in 1997, the Ninth Circuit seemed to suggest that a work that is a satire rather than a parody is per se not transformative.[246] These cases might well be distinguishable on their facts from *Bill Graham Archives* and *Blanch*. But they are certainly not a ringing embrace of a broad conception of transformative use as applied to biography and satire.

Second, while transformative purpose is almost universally a sufficient condition for fair use, at least assuming that the defendant has not copied more than reasonably needed for the purpose, courts have repeatedly stated, citing *Campbell* and *Sony*, that transformative use is not a necessary requirement for a finding of fair use.[247] In stating that transformative use is not required, *Campbell* gave as an example the making of multiple copies for classroom use, which is included among the favored uses in the introductory clause of section 107.[248] It also cited to *Sony*, which held that individuals' video recordings of television programs for later home viewing is fair use.[249] In short, the judicial embrace of the transformative use paradigm does not exclude other possible categories of fair use that fall outside the parameters of transformative uses.

Yet while that much is clear, courts have left largely unresolved what those other favored categories might be. Neither the courts that have reiterated in dicta that transformativeness is not required, nor the handful of recent cases that have actually found non-transformative uses to be fair use, have provided a clear direction about when a non-

[244] *Id.* at 625, 628–29, 631.

[245] *Id.* at 628–29.

[246] 109 F.3d 1394, 1400–01 (9th Cir. 1997) (holding that a book entitled The Cat NOT in the Hat, satirizing the O.J. Simpson trial using the style and characters of the plaintiff's work, was not transformative because it did not ridicule the original work). *But see* Henley v. DeVore, 733 F. Supp. 2d 1144, 1158 (C.D. Cal. 2010) (stating that "parody is not the only form of fair use," but that "satire faces a higher bar for fair use because it requires greater justification for appropriating the original work").

[247] *E.g.*, Sarl Louis Feraud Int'l v. Viewfinder Inc., 627 F. Supp. 2d 123, 128 (S.D.N.Y. 2008) ("Transformative use is not a requirement for a finding of fair use, but '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.'" (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984))).

[248] *Campbell*, 510 U.S. at 579 n.11.

[249] *Id.* at 579; *Sony Corp. of Am.*, 464 U.S. at 454–55.

transformative use should qualify as a fair use. In particular, they have left open the much-debated question of whether and when *Sony*'s finding of fair use for individuals' analogue-technology "time-shifting" might extend more broadly to other types of private copying, such as Internet downloading and transferring copies of works that one has purchased from one digital platform or device to another.[250] Fair use case law also leaves uncertain when and whether a defendant's highly creative incorporation of portions of copyrighted works for the same general expressive purpose can qualify as fair use. Mash-ups, remixes, fan fiction, collages, and digital sampling of sound recordings often serve the same broad purpose as the original: art or entertainment. Sometimes such works build upon existing works to convey a critical message, but often they do not. It seems that secondary works that use portions of existing works as raw materials to build a very different expressive product should be able to qualify as fair use even absent a different expressive purpose. But courts have yet to determine when, if ever, highly creative alterations of expressive content might constitute an exception to the rule that, like the postage stamp image in *Gaylord v. United States*, a difference in expressive character, without more, does not qualify as fair use.

Despite the questions remaining, the embrace of the transformative use doctrine represents a sea change in fair use case law that has finally come to fruition in the period since 2005, even if we can trace its beginnings to the Supreme Court's 1994 decision in *Campbell*. Moreover, when post-2005 cases are compared with one another, one finds considerably greater consistency than when comparing recent cases with those decided under the market-centered paradigm. Yet my examination of post-2005 cases is only a snapshot in time. Whether such consistency continues depends on whether and when courts turn to the next fair use paradigm.

[250] Courts have held that *Sony* does not apply to unlicensed Internet downloading of copyrighted works. *See* BMG Music v. Gonzalez, 430 F.3d 888, 890 (7th Cir. 2005); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–19 (9th Cir. 2001); Sony BMG Music Entm't v. Tenenbaum, 672 F. Supp. 2d 217, 228–29 (D. Mass. 2009) (suggesting more broadly that *Sony* does not apply to private copying in order to keep a permanent copy of the copyrighted work, as opposed to recording an over-the-air television program that is available without payment in order to view it at a more convenient time and then erasing it). *But see* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) ("Rio [a portable MP3 player] merely makes copies in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive. . . . Such copying is a paradigmatic noncommercial personal use."); *Sony BMG Music Entm't*, 672 F. Supp. 2d at 237 (stating in dicta that file sharing of sound recordings during the historical period in which such recordings were not commercially available online, and the law regarding whether file sharing is infringing was unclear, would present a strong case for fair use). *See also* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1898–1903 (2007).