

## VI. Fair Use

In Chapter V, you read about the exclusive rights of copyright holders and how third parties might infringe those rights. You also learned about some limitations on infringement liability, such as the first-sale doctrine and the rule for soundalike recordings. The limitations discussed in Chapter V are principally bright-line rules. Many are technical and complex, such as § 110's provisions permitting certain small business to transmit musical works.

In this chapter, you will learn about **fair use**, the most wide-ranging limitation on copyright protection. It is unlike the limitations in Chapter V; unlike those relatively narrow, rule-like limitations, fair use is encoded as a standard and it is not always clear-cut to apply. As you'll see, courts develop it on a case-by-case basis, though there are recognizable categories of fair use cases and outcomes within each category are far from random. As you read through the statutory section encoding the fair use standard and the cases that analyze it, think about whether it is preferable to implement fair use as a standard or as a set of rules, be they simple or complex. (In general, rules are costlier to promulgate but are easier and clearer to apply than standards. For that reason, individuals can typically structure their own behavior more readily in the face of clearer-to-apply rules than less-clearer-to-apply standards. Standards are thought to be better suited to doing justice across a range of situations that might not be as easily covered by rules. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).)

In the United States, fair use often is said to have originated with Justice Joseph Story's opinion in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841), although intimations of fair use can be discerned in opinions before Story's and in earlier English case law. *See* Matthew Sag, *The Pre-History of Fair Use*, 76 BROOK. L. REV. 1371 (2011). In *Folsom*, the plaintiffs had published a 12-volume, 7,000-page book of George Washington's correspondence. The defendants published a 2-volume, 866-page biography of George Washington, which relied heavily on his correspondence. The defendants' book was intended for less specialized readers. Of the 866 pages in the defendants' book, 388 were copied verbatim from the plaintiffs' book. In ruling on the plaintiffs' ensuing copyright infringement claim against the defendants, Justice Story first notes that deciding whether there is infringement is a result of a "balance" of factors. He subsequently observes:

*The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs.... [W]e must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.*

Justice Story elaborates:

*Thus, for example, no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy. A wide interval might, of course, exist between these two extremes, calling for great caution and involving great difficulty ....*

Courts developed these factors into an analytical framework that defendants could use in appropriate cases to avoid infringement liability by demonstrating their use of a plaintiff's copyrighted work was fair. *See, e.g.,* Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165 (S.D. Cal. 1955); N.Y. Tribune v. Otis & Co., 39 F. Supp. 67 (S.D.N.Y. 1941).

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Congress subsequently codified these factors in the 1976 Act in § 107:

*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—*

*(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.*

*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.*

Note that all four listed factors must be considered by courts entertaining a fair use defense. Yet courts can consider additional factors too because the listed factors are set out as non-exhaustive: the § 107 preamble states that “the factors to be considered *shall include ...*,” and the language “shall include” is understood to invite consideration of any facts, evidence, or arguments that a court would find germane to the fair use analysis in a particular case. As you read through the cases in this chapter, consider whether factors beyond the four set out in § 107 are or ought to be considered.

In the sections that follow, we consider fair use cases, first in foundational cases followed by more recent ones that try to make sense of the now-central notion of **transformativeness**. These cases cover traditional media, such as magazine articles, books, songs, and visual art, as well as software and internet media.

### A. Foundational Cases

As you read the following Supreme Court decision, consider why copyright law provides a fair use defense in the first instance. Pay attention to how the Court analyzes each of the four statutory fair use factors and how it derives an ultimate conclusion as to fair use.

#### **Harper & Row, Publishers, Inc. v. Nation Enterprises**

471 U.S. 539 (1985)

O’CONNOR J.: ...

[1] In February 1977, shortly after leaving the White House, former President Gerald R. Ford contracted with petitioners Harper & Row and Reader’s Digest, to publish his as yet unwritten memoirs. The memoirs were to contain significant hitherto unpublished material concerning the Watergate crisis, Mr. Ford’s pardon of former

President Nixon and Mr. Ford’s reflections on this period of history, and the morality and personalities involved. In addition to the right to publish the Ford memoirs in book form, the agreement gave petitioners the exclusive right to license prepublication excerpts, known in the trade as “first serial rights.” Two years later, as the memoirs were nearing completion, petitioners negotiated a prepublication licensing agreement with *Time*, a weekly news magazine. *Time* agreed to pay \$25,000, \$12,500 in advance and an additional \$12,500 at publication, in exchange for the right to excerpt 7,500 words from Mr. Ford’s account of the Nixon pardon. The issue featuring the excerpts was timed to appear approximately one week before shipment of the full length book version to bookstores. Exclusivity was an important consideration; Harper & Row instituted procedures designed to maintain the confidentiality of the manuscript, and *Time* retained the right to renegotiate the second payment should the material appear in print prior to its release of the excerpts.

[2] Two to three weeks before the *Time* article’s scheduled release, an unidentified person secretly brought a copy of the Ford manuscript to Victor Navasky, editor of *The Nation*, a political commentary magazine. Mr. Navasky knew that his possession of the manuscript was not authorized and that the manuscript must be returned quickly to his source to avoid discovery. He hastily put together what he believed was “a real hot news story” composed of quotes, paraphrases, and facts drawn exclusively from the manuscript.... The 2,250-word article ... appeared on April 3, 1979. As a result of *The Nation*’s article, *Time* canceled its piece and refused to pay the remaining \$12,500.



Figure 99: Gerald Ford’s autobiography (left) and *The Nation*’s article about the book (right)

[3] Petitioners brought suit ..., alleging ... violations of the Copyright Act.... The District Court rejected respondents’ argument that *The Nation*’s piece was a “fair use” sanctioned by § 107 of the Act....

[4] A divided panel of the Court of Appeals for the Second Circuit reversed....

[5] ... [C]opyright is intended to increase and not to impede the harvest of knowledge. But .... [t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors....

[6] .... The monopoly created by copyright thus rewards the individual author in order to benefit the public. This principle applies equally to works of fiction and nonfiction. The book at issue here, for example, was two years in the making, and began with a contract giving the author’s copyright to the publishers in exchange for their services in producing and marketing the work. In preparing the book, Mr. Ford drafted essays and word portraits of public figures and participated in hundreds of taped interviews that were later distilled to chronicle his personal viewpoint. It is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value.

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[7] .... The copyright owner’s rights, however, are subject to certain statutory exceptions. Among these is § 107 which codifies the traditional privilege of other authors to make “fair use” of an earlier writer’s work....

[8] ... *The Nation* has admitted to lifting verbatim quotes of the author’s original language totaling between 300 and 400 words and constituting some 13% of *The Nation* article. In using generous verbatim excerpts of Mr. Ford’s unpublished manuscript to lend authenticity to its account of the forthcoming memoirs, *The Nation* effectively arrogated to itself the right of first publication, an important marketable subsidiary right. For the reasons set forth below, we find that this use of the copyrighted manuscript, even stripped to the verbatim quotes conceded by *The Nation* to be copyrightable expression, was not a fair use within the meaning of the Copyright Act....

[9] Fair use was traditionally defined as a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent. The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine. Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered. This approach was “intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.” H.R. REP. NO. 94–1476, p. 66 (1976) (hereinafter HOUSE REPORT).

[10] The author’s consent to a reasonable use of his copyrighted works had always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus frustrate the very ends sought to be attained. [NYU Law] Professor [Alan] Latman, in a study of the doctrine of fair use commissioned by Congress for the revision effort, summarized prior law as turning on the “importance of the material copied or performed from the point of view of the reasonable copyright owner. In other words, would the reasonable copyright owner have consented to the use?”

[11] As early as 1841, Justice Story gave judicial recognition to the doctrine in a case that concerned the letters of another former President, George Washington.

*“[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.” Folsom v. Marsh, 9 F. Cas. 342, 344–45 (No. 4,901) (CC Mass.).*

[12] As Justice Story’s hypothetical illustrates, the fair use doctrine has always precluded a use that “supersede[s] the use of the original.”

[13] Perhaps because the fair use doctrine was predicated on the author’s implied consent to “reasonable and customary” use when he released his work for public consumption, fair use traditionally was not recognized as a defense to charges of copying from an author’s as yet unpublished works. Under common-law copyright, the property of the author in his intellectual creation was absolute until he voluntarily parted with the same. This absolute rule, however, was tempered in practice by the equitable nature of the fair use doctrine. In a given case, factors such as implied consent through *de facto* publication on performance or dissemination of a work may tip the balance of equities in favor of prepublication use. But it has never been seriously disputed that the fact that the plaintiff’s work is unpublished is a factor tending to negate the defense of fair use. Publication of an author’s expression before he has authorized its dissemination seriously infringes the author’s right to decide when and whether it will be made public, a factor not present in fair use of published works. Respondents contend, however, that Congress, in including first publication among the rights enumerated in § 106, which

are expressly subject to fair use under § 107, intended that fair use would apply *in pari materia* to published and unpublished works. The Copyright Act does not support this proposition....

[14] Though the right of first publication, like the other rights enumerated in § 106, is expressly made subject to the fair use provision of § 107, fair use analysis must always be tailored to the individual case. The nature of the interest at stake is highly relevant to whether a given use is fair. From the beginning, those entrusted with the task of revision recognized the overbalancing reasons to preserve the common law protection of undissemminated works until the author or his successor chooses to disclose them. The right of first publication implicates a threshold decision by the author whether and in what form to release his work. First publication is inherently different from other § 106 rights in that only one person can be the first publisher; as the contract with *Time* illustrates, the commercial value of the right lies primarily in exclusivity. Because the potential damage to the author from judicially enforced “sharing” of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts....

[15] .... We conclude that the unpublished nature of a work is “[a] key, though not necessarily determinative, factor” tending to negate a defense of fair use. SENATE REPORT, at 64.

[16] We also find unpersuasive respondents’ argument that fair use may be made of a soon-to-be-published manuscript on the ground that the author has demonstrated he has no interest in nonpublication. This argument assumes that the unpublished nature of copyrighted material is only relevant to letters or other confidential writings not intended for dissemination. It is true that common-law copyright was often enlisted in the service of personal privacy. In its commercial guise, however, an author’s right to choose when he will publish is no less deserving of protection. The period encompassing the work’s initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor. The Copyright Act, which accords the copyright owner the “right to control the first public distribution” of his work, HOUSE REPORT, at 62, echo[e]s the common law’s concern that the author or copyright owner retain control throughout this critical stage. The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term “news value” to be gained from premature publication of the author’s expression. The author’s control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing. Under ordinary circumstances, the author’s right to control the first public appearance of his undissemminated expression will outweigh a claim of fair use....

[17] Respondents, however, contend that First Amendment values require a different rule under the circumstances of this case. The thrust of the decision below is that the scope of fair use is undoubtedly wider when the information conveyed relates to matters of high public concern. Respondents advance the substantial public import of the subject matter of the Ford memoirs as grounds for excusing a use that would ordinarily not pass muster as a fair use—the piracy of verbatim quotations for the purpose of “scooping” the authorized first serialization. Respondents explain their copying of Mr. Ford’s expression as essential to reporting the news story it claims the book itself represents. In respondents’ view, not only the facts contained in Mr. Ford’s memoirs, but the precise manner in which he expressed himself were as newsworthy as what he had to say. Respondents argue that the public’s interest in learning this news as fast as possible outweighs the right of the author to control its first publication.

[18] The Second Circuit noted, correctly, that copyright’s idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression. No author may copyright his ideas or the facts he narrates.... But copyright assures those who write and publish factual narratives such as “A Time to Heal” that they may at least enjoy the right to market the original expression contained therein as just compensation for their investment.

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[19] Respondents' theory, however, would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure. Absent such protection, there would be little incentive to create or profit in financing such memoirs, and the public would be denied an important source of significant historical information. The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use "news report" of the book.

[20] Nor do respondents assert any actual necessity for circumventing the copyright scheme with respect to the types of works and users at issue here. Where an author and publisher have invested extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by pre-empting the right of first publication. The fact that the words the author has chosen to clothe his narrative may of themselves be "newsworthy" is not an independent justification for unauthorized copying of the author's expression prior to publication....

[21] In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas...

[22] It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike....

[23] In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright. Whether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use....

[24] Fair use is a mixed question of law and fact.... [W]hether *The Nation* article constitutes fair use under § 107 must be reviewed in light of the principles discussed above. The factors enumerated in the section are not meant to be exclusive: "[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." HOUSE REPORT, at 65. The four factors identified by Congress as especially relevant in determining whether the use was fair are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work. We address each one separately.

[25] *Purpose of the Use*. The Second Circuit correctly identified news reporting as the general purpose of *The Nation's* use. News reporting is one of the examples enumerated in § 107 to "give some idea of the sort of activities the courts might regard as fair use under the circumstances." SENATE REPORT, at 61.... "[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence." SENATE REPORT, at 62. The fact that an article arguably is "news" and therefore a productive use is simply one factor in a fair use analysis.

[26] .... *The Nation* has every right to seek to be the first to publish information. But *The Nation* went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a "news event" out of its unauthorized first publication of a noted figure's copyrighted expression.

[27] The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. Every commercial use of copyrighted material is presumptively an unfair

exploitation of the monopoly privilege that belongs to the owner of the copyright. In arguing that the purpose of news reporting is not purely commercial, *The Nation* misses the point entirely. The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.

[28] In evaluating character and purpose we cannot ignore *The Nation's* stated purpose of scooping the forthcoming hardcover and *Time* abstracts. *The Nation's* use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication. Also relevant to the character of the use is the propriety of the defendant's conduct. Fair use presupposes good faith and fair dealing. The trial court found that *The Nation* knowingly exploited a purloined manuscript. Unlike the typical claim of fair use, *The Nation* cannot offer up even the fiction of consent as justification....

[29] *Nature of the Copyrighted Work.* Second, the Act directs attention to the nature of the copyrighted work. "A Time to Heal" may be characterized as an unpublished historical narrative or autobiography. The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy....

[30] Some of the briefer quotes from the memoirs are arguably necessary adequately to convey the facts; for example, Mr. Ford's characterization of the White House tapes as the "smoking gun" is perhaps so integral to the idea expressed as to be inseparable from it. But *The Nation* did not stop at isolated phrases and instead excerpted subjective descriptions and portraits of public figures whose power lies in the author's individualized expression. Such use, focusing on the most expressive elements of the work, exceeds that necessary to disseminate the facts.

[31] The fact that a work is unpublished is a critical element of its nature. Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, the author's right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.

[32] In the case of Mr. Ford's manuscript, the copyright holders' interest in confidentiality is irrefutable; the copyright holders had entered into a contractual undertaking to "keep the manuscript confidential" and required that all those to whom the manuscript was shown also "sign an agreement to keep the manuscript confidential." While the copyright holders' contract with *Time* required *Time* to submit its proposed article seven days before publication, *The Nation's* clandestine publication afforded no such opportunity for creative or quality control. It was hastily patched together and contained a number of inaccuracies. A use that so clearly infringes the copyright holder's interests in confidentiality and creative control is difficult to characterize as "fair."

[33] *Amount and Substantiality of the Portion Used.* Next, the Act directs us to examine the amount and substantiality of the portion used in relation to the copyrighted work as a whole. In absolute terms, the words actually quoted were an insubstantial portion of "A Time to Heal." The District Court, however, found that "[T]he *Nation* took what was essentially the heart of the book." We believe the Court of Appeals erred in overruling the District Judge's evaluation of the qualitative nature of the taking. A *Time* editor described the chapters on the pardon as "the most interesting and moving parts of the entire manuscript." .... [*The Nation*] quoted these passages precisely because they qualitatively embodied Ford's distinctive expression.

[34] .... [T]he fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression.



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[35] Stripped to the verbatim quotes, the direct takings from the unpublished manuscript constitute at least 13% of the infringing article. *The Nation* article is structured around the quoted excerpts which serve as its dramatic focal points. In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the “magazine took a meager, indeed an infinitesimal amount of Ford’s original language.”

[36] *Effect on the Market*. Finally, the Act focuses on “the effect of the use upon the potential market for or value of the copyrighted work.” This last factor is undoubtedly the single most important element of fair use. Fair use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied. The trial court found not merely a potential but an actual effect on the market. *Time*’s cancellation of its projected serialization and its refusal to pay the \$12,500 were the direct effect of the infringement.... Rarely will a case of copyright infringement present such clear-cut evidence of actual damage. Petitioners assured *Time* that there would be no other authorized publication of *any* portion of the unpublished manuscript prior to April 23, 1979. *Any* publication of material from chapters 1 and 3 would permit *Time* to renegotiate its final payment. *Time* cited *The Nation*’s article, which contained verbatim quotes from the unpublished manuscript, as a reason for its nonperformance.... [O]nce a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression. Petitioners established a prima facie case of actual damage that respondents failed to rebut.

[37] More important, 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...

[38] Placed in a broader perspective, a fair use doctrine that permits extensive prepublication quotations from an unreleased manuscript without the copyright owner’s consent poses substantial potential for damage to the marketability of first serialization rights in general. Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented....

[39] The Court of Appeals erred in concluding that *The Nation*’s use of the copyrighted material was excused by the public’s interest in the subject matter. It erred, as well, in overlooking the unpublished nature of the work and the resulting impact on the potential market for first serial rights of permitting unauthorized prepublication excerpts under the rubric of fair use. Finally, in finding the taking “infinitesimal,” the Court of Appeals accorded too little weight to the qualitative importance of the quoted passages of original expression. In sum, the traditional doctrine of fair use, as embodied in the Copyright Act, does not sanction the use made by *The Nation* of these copyrighted materials. Any copyright infringer may claim to benefit the public by increasing public access to the copyrighted work. But Congress has not designed, and we see no warrant for judicially imposing, a “compulsory license” permitting unfettered access to the unpublished copyrighted expression of public figures.

[40] .... [W]e find that *The Nation*’s use of these verbatim excerpts from the unpublished manuscript was not a fair use ....

BRENNAN, J., dissenting, in which Justice White and Justice Marshall joined.

[41] The Court holds that *The Nation*’s quotation of 300 words from the unpublished 200,000-word manuscript of President Gerald R. Ford infringed the copyright in that manuscript, even though the quotations related to a historical event of undoubted significance—the resignation and pardon of President Richard M. Nixon. Although the Court pursues the laudable goal of protecting “the economic incentive to create and disseminate ideas,” this zealous defense of the copyright owner’s prerogative will, I fear, stifle the broad dissemination of



ideas and information copyright is intended to nurture. Protection of the copyright owner’s economic interest is achieved in this case through an exceedingly narrow definition of the scope of fair use. The progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine. I therefore respectfully dissent....

[42] In my judgment, the Court’s fair use analysis has fallen to the temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history. The failure to distinguish between information and literary form permeates every aspect of the Court’s fair use analysis and leads the Court to the wrong result in this case. Application of the statutorily prescribed analysis with attention to the distinction between information and literary form leads to a straightforward finding of fair use within the meaning of § 107....

[43] The Court’s exceedingly narrow approach to fair use permits Harper & Row to monopolize information. This holding effects an important extension of property rights and a corresponding curtailment in the free use of knowledge and of ideas. The Court has perhaps advanced the ability of the historian—or at least the public official who has recently left office—to capture the full economic value of information in his or her possession. But the Court does so only by risking the robust debate of public issues that is the essence of self-government. *The Nation* was providing the grist for that robust debate. The Court imposes liability upon *The Nation* for no other reason than that *The Nation* succeeded in being the first to provide certain information to the public. I dissent.

## NOTES

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1. Given *The Nation’s* status as a non-profit entity, what do you make of the Court’s analysis of whether the magazine’s use of Ford’s autobiography was commercial (as part of its analysis of the first fair use factor)?
2. As a matter of copyright policy, should bad faith be relevant to a determination of fair use? And by what metric is a court to determine “bad faith”? Is *The Nation’s* conduct in reporting on the Ford manuscript “bad faith” by the standards of American journalism? Are you comfortable with a group of lawyers articulating norms for journalists?
3. How does the *Harper & Row* majority view the purpose of fair use? By contrast, how does the dissent view its purpose?
4. Do you have a sense after reading *Harper & Row* whether any particular factor is more important than others to a conclusion of fair use? If so, in all contexts or only in the specific context at issue here?
5. *Harper & Row* emphasized the unpublished nature of the plaintiff’s work as a critical aspect weighing against fair use. In this regard, consider *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), decided after *Harper & Row*. In *Salinger*, Ian Hamilton had written a biography of the famously reclusive author J.D. Salinger. In the biography, Hamilton relied heavily on unpublished letters that Salinger had written and sent to others, including Learned Hand, Ernest Hemingway, and Whit Burnett. Hamilton gained access to most, if not all, of these letters through various university libraries, to which the recipients had donated the letters. The biography relies on 44 such letters, which Hamilton mostly paraphrases closely and occasionally quotes. For example, in a 1943 letter to Burnett, Salinger expresses his disapproval over the marriage of his ex-girlfriend Oona O’Neill to Charlie Chaplin:

*I can see them at home evenings. Chaplin squatting grey and nude, atop his chiffonier, swinging his thyroid around his head by his bamboo cane, like a dead rat. Oona in an aquamarine gown, applauding madly from the bathroom. Agnes (her mother) in a Jantzen bathing suit, passing*

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*between them with cocktails. I'm facetious, but I'm sorry. Sorry for anyone with a profile as young and lovely as Oona's.*

In reliance on this letter, Hamilton wrote in his biography:

*At one point in a letter to Whit Burnett, he provides a pen portrait of the Happy Hour Chez Chaplin: the comedian, ancient and unclothed, is brandishing his walking stick—attached to the stick, and horribly resembling a lifeless rodent, is one of Chaplin's vital organs. Oona claps her hands in appreciation and Agnes, togged out in a bathing suit, pours drinks. Salinger goes on to say he's sorry—sorry not for what he has just written, but for Oona: far too youthful and exquisite for such a dreadful fate.*

Salinger sued Hamilton and Random House, the book's publisher, for copyright infringement. The Second Circuit held in favor of Salinger, finding infringement and no fair use. After noting that *Harper & Row* "underscored the idea that unpublished letters normally enjoy insulation from fair use copying," the Second Circuit reasoned that "the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression."

Many understood *Salinger* and other similar post-*Harper & Row* decisions to establish an absolute bar on finding fair use of unpublished works. In response, in 1992, Congress amended § 107 by adding the following sentence after its listing of the four statutory factors: "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." Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145. Was this amendment good copyright policy?

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As you read the following case, consider whether and how consumer home video recording of broadcast television shows is different than excerpts of material from a biography in a magazine article.

### **Sony Corporation of America v. Universal City Studios, Inc.**

464 U.S. 417 (1984)

STEVENS, J.:

[1] Petitioners manufacture and sell home video tape recorders. Respondents own the copyrights on some of the television programs that are broadcast on the public airwaves. Some members of the general public use video tape recorders sold by petitioners to record some of these broadcasts, as well as a large number of other broadcasts. The question presented is whether the sale of petitioners' copying equipment to the general public violates any of the rights conferred upon respondents by the Copyright Act.

[2] Respondents commenced this copyright infringement action against petitioners .... Respondents alleged that some individuals had used Betamax video tape recorders (VTR's) to record some of respondents' copyrighted works which had been exhibited on commercially sponsored television and contended that these individuals had thereby infringed respondents' copyrights....

[3] Petitioner Sony manufactures millions of Betamax video tape recorders ....

[4] Several capabilities of the machine are noteworthy. The separate tuner in the Betamax enables it to record a broadcast off one station while the television set is tuned to another channel, permitting the viewer, for example, to watch two simultaneous news broadcasts by watching one “live” and recording the other for later viewing. Tapes may be reused, and programs that have been recorded may be erased either before or after viewing. A timer in the Betamax can be used to activate and deactivate the equipment at predetermined times, enabling an intended viewer to record programs that are transmitted when he or she is not at home. Thus a person may watch a program at home in the evening even though it was broadcast while the viewer was at work during the afternoon. The Betamax is also equipped with a pause button and a fast-forward control. The pause button, when depressed, deactivates the recorder until it is released, thus enabling a viewer to omit a commercial advertisement from the recording, provided, of course, that the viewer is present when the program is recorded. The fast forward control enables the viewer of a previously recorded program to run the tape rapidly when a segment he or she does not desire to see is being played back on the television screen.

[5] The respondents and Sony both conducted surveys of the way the Betamax machine was used by several hundred owners during a sample period in 1978. Although there were some differences in the surveys, they both showed that the primary use of the machine for most owners was “time-shifting”—the practice of recording a program to view it once at a later time, and thereafter erasing it. Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast that they desire to watch. Both surveys also showed, however, that a substantial number of interviewees had accumulated libraries of tapes.<sup>3</sup> Sony’s survey indicated that over 80% of the interviewees watched at least as much regular television as they had before owning a Betamax.<sup>4</sup> Respondents offered no evidence of decreased television viewing by Betamax owners.

[6] Sony introduced considerable evidence describing television programs that could be copied without objection from any copyright holder, with special emphasis on sports, religious, and educational programming. For example, their survey indicated that 7.3% of all Betamax use is to record sports events, and representatives of professional baseball, football, basketball, and hockey testified that they had no objection to the recording of their televised events for home use.

[7] Respondents offered opinion evidence concerning the future impact of the unrestricted sale of VTR’s on the commercial value of their copyrights. The District Court found, however, that they had failed to prove any likelihood of future harm from the use of VTR’s for time-shifting....

[8] The [copyright] privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired....

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<sup>3</sup> As evidence of how a VTR may be used, respondents offered the testimony of William Griffiths. Griffiths, although named as an individual defendant, was a client of plaintiffs’ law firm. The District Court summarized his testimony as follows: “He owns approximately 100 tapes. When Griffiths bought his Betamax, he intended not only to time-shift (record, play-back and then erase) but also to build a library of cassettes. Maintaining a library, however, proved too expensive, and he is now erasing some earlier tapes and reusing them.” ...

<sup>4</sup> The District Court summarized some of the findings in these surveys as follows: “According to plaintiffs’ survey, 75.4% of the VTR owners use their machines to record for time-shifting purposes half or most of the time. Defendants’ survey showed that 96% of the Betamax owners had used the machine to record programs they otherwise would have missed. When plaintiffs asked interviewees how many cassettes were in their library, 55.8% said there were 10 or fewer. In defendants’ survey, of the total programs viewed by interviewees in the past month, 70.4% had been viewed only that one time and for 57.9%, there were no plans for further viewing.”

# WATCH WHATEVER WHENEVER.



With Sony's Betamax SL-8600 videorecorder, you can see any TV show you want to see anytime you want to see it. Because Betamax, which plugs into any TV set and is easy to operate, can videotape a show up to three-hours long (with the L-750 videocassette) while you're doing something else—even while you're out of the house, by setting the electronic timer.

It can also videotape something off one channel while you're watching another channel.

And remember, Sony has more experience in videorecorders than anyone (over 20 years!). In fact, we've sold more videorecorders to broadcasters and industry than any other consumer manufacturer. We even make our own tape.

For years you've watched TV shows at the times you've had to. Now you can watch them at the times you want to.

**SONY BETAMAX**  
THE LEADER IN VIDEO RECORDING

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Figure 100: advertisement for Sony's Betamax player





**Sony Betamax videocassette recorder, destined to be a superstar in your home entertainment scene: even if you're not there, it records TV programs you don't want to miss, builds a priceless videotape library in no time, \$1300.**

**If you've ever felt you'd give a million** to see one of those glorious old Sid Caesar *Show of Shows* routines again... if you've ever longed to have the incomparable Lord Olivier tear you apart just once more with his senior Tyrone in *Long Day's Journey*... if you've ever ached to see or re-see any of the marvelous moments television has given us over the last 20 years, then you know the Sony Betamax could be the best home entertainment investment you ever made.

**Using it is easy.** You don't need a speck of electronic know-how. Just plug the Betamax into your TV set (it works with both color and black-and-white). Snap a cassette into the tape deck. Pick the channel you want, and press "record." That's it. The Betamax records a full hour or any part of an hour. Then it's yours for good. To see on your TV set for free. Any time you want to study Connors' backhand or remind yourself that Ella and Ellington combine into a sound that's pure heaven.

**It turns your living room into a private projection room.** But there's more to Betamax than just record and play. Listen to this: It records at your command, whether you're there or not. Just set the Clock Watcher.

It's a digital timer that automatically turns on both your set and the Betamax system to the program you've pre-selected, then turns it off. Your program then awaits you and your next leisure hour. (If you don't like the program, you erase it just as you erase sound tapes—by re-recording right over it.)

**Think of the National Conventions coming up.** Think of the great classic World Series games you can record. Think of having your very own permanent tapes of Nureyev or Streisand or Shirley MacLaine. Or (ah, bliss!) W. C. Fields. You may never want to go out to a movie again. So what in the world are you waiting for? Come check the Betamax out. It could make life a lot more fun.

We regret, no mail or phone. Add 3.50 delivery charge. TV Center (Dept. 223) Fifth Floor, Macy's Herald Square. Also at Queens, Kings Plaza, Roosevelt Field, Huntington, White Plains, Bay Shore, New Rochelle, Parkchester, Smith Haven, Massapequa, and Staten Island.

Figure 101: advertisement for Sony's Betamax player

## Chapter VI – Fair Use

[9] The Copyright Act provides the owner of a copyright with a potent arsenal of remedies against an infringer of his work, including an injunction to restrain the infringer from violating his rights {something we study later in Chapter VIII} ....

[10] The two respondents in this case do not seek relief against the Betamax users who have allegedly infringed their copyrights. Moreover, this is not a class action on behalf of all copyright owners who license their works for television broadcast, and respondents have no right to invoke whatever rights other copyright holders may have to bring infringement actions based on Betamax copying of their works. As was made clear by their own evidence, the copying of the respondents' programs represents a small portion of the total use of VTR's. It is, however, the taping of respondents' own copyrighted programs that provides them with standing to charge Sony with contributory infringement. To prevail, they have the burden of proving that users of the Betamax have infringed their copyrights and that Sony should be held responsible for that infringement....

[11] The question [whether there is secondary liability {something we study later in Chapter VII, when we revisit this case}] is ... whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the district court a significant number of them would be non-infringing. Moreover, in order to resolve this case we need not give precise content to the question of how much use is commercially significant. For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home. It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use....

[12] .... [T]he findings of the District Court make it clear that time-shifting may enlarge the total viewing audience and that many producers are willing to allow private time-shifting to continue, at least for an experimental time period.

[13] The District Court found:

*Even if it were deemed that home-use recording of copyrighted material constituted infringement, the Betamax could still legally be used to record noncopyrighted material or material whose owners consented to the copying. An injunction would deprive the public of the ability to use the Betamax for this noninfringing off-the-air recording.*

*Defendants introduced considerable testimony at trial about the potential for such copying of sports, religious, educational and other programming. This included testimony from representatives of the Offices of the Commissioners of the National Football, Basketball, Baseball and Hockey Leagues and Associations, the Executive Director of National Religious Broadcasters and various educational communications agencies. Plaintiffs attack the weight of the testimony offered and also contend that an injunction is warranted because infringing uses outweigh noninfringing uses....*

[14] .... [T]wo items in the record deserve specific mention.

[15] First is the testimony of John Kenaston, the station manager of Channel 58, an educational station in Los Angeles affiliated with the Public Broadcasting Service. He explained and authenticated the station's published guide to its programs. For each program, the guide tells whether unlimited home taping is authorized, home taping is authorized subject to certain restrictions (such as erasure within seven days), or home taping is not

authorized at all. The Spring 1978 edition of the guide described 107 programs. Sixty-two of those programs or 58% authorize some home taping. Twenty-one of them or almost 20% authorize unrestricted home taping.

[16] Second is the testimony of Fred Rogers, president of the corporation that produces and owns the copyright on *Mr. Rogers' Neighborhood*. The program is carried by more public television stations than any other program. Its audience numbers over 3,000,000 families a day. He testified that he had absolutely no objection to home taping for noncommercial use and expressed the opinion that it is a real service to families to be able to record children's programs and to show them at appropriate times....

[17] Even unauthorized uses of a copyrighted work are not necessarily infringing.... [T]he definition of exclusive rights in § 106 of the present Act is prefaced by the words "subject to sections 107 through 118." Those sections describe a variety of uses of copyrighted material that "are not infringements of copyright notwithstanding the provisions of § 106." The most pertinent in this case is § 107, the legislative endorsement of the doctrine of "fair use."

[18] .... Although not conclusive, the first factor requires that "the commercial or nonprofit character of an activity" be weighed in any fair use decision. If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity. Moreover, when one considers the nature of a televised copyrighted audiovisual work and that timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced does not have its ordinary effect of militating against a finding of fair use.<sup>33</sup>

[19] This is not, however, the end of the inquiry because Congress has also directed us to consider "the effect of the use upon the potential market for or value of the copyrighted work." The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.

[20] Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the ... privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is

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<sup>33</sup> It has been suggested that consumptive uses of copyrights by home VTR users are commercial even if the consumer does not sell the homemade tape because the consumer will not buy tapes separately sold by the copyright holder. Furthermore, the error in excusing such theft as noncommercial, we are told, can be seen by simple analogy: jewel theft is not converted into a noncommercial veniality if stolen jewels are simply worn rather than sold. The premise and the analogy are indeed simple, but they add nothing to the argument. The use to which stolen jewel[]ry is put is quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner's interests in physical possession of it, the law finds the taking objectionable even if the thief does not use the item at all. Theft of a particular item of personal property of course may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual. Timeshifting does not even remotely entail comparable consequences to the copyright owner. Moreover, the timeshifter no more steals the program by watching it once than does the live viewer, and the live viewer is no more likely to buy pre-recorded videotapes than is the timeshifter. Indeed, no live viewer would buy a pre-recorded videotape if he did not have access to a VTR.



## Chapter VI – Fair Use

necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

[21] In this case, respondents failed to carry their burden with regard to home time-shifting. The District Court described respondents' evidence as follows:

*Plaintiffs' experts admitted at several points in the trial that the time-shifting without librarying would result in 'not a great deal of harm.' Plaintiffs' greatest concern about time-shifting is with 'a point of important philosophy that transcends even commercial judgment.' They fear that with any Betamax usage, 'invisible boundaries' are passed: 'the copyright owner has lost control over his program.'*

[22] Later in its opinion, the District Court observed:

*Most of plaintiffs' predictions of harm hinge on speculation about audience viewing patterns and ratings, a measurement system which Sidney Sheinberg, MCA's president, calls a 'black art' because of the significant level of imprecision involved in the calculations.*

[23] There was no need for the District Court to say much about past harm. Plaintiffs have admitted that no actual harm to their copyrights has occurred to date.

[24] On the question of potential future harm from time-shifting, the District Court offered a more detailed analysis of the evidence. It rejected respondents' fear that persons watching the original telecast of a program will not be measured in the live audience and the ratings and revenues will decrease" by observing that current measurement technology allows the Betamax audience to be reflected.<sup>36</sup> It rejected respondents' prediction that live television or movie audiences will decrease as more people watch Betamax tapes as an alternative, with the observation that there is no factual basis for the underlying assumption.<sup>37</sup> It rejected respondents' fear that time-shifting will reduce audiences for telecast reruns, and concluded instead that given current market practices, this should aid plaintiffs rather than harm them.<sup>38</sup> And it declared that respondents' suggestion that

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<sup>36</sup> .... [T]he District Court rejected plaintiffs' suggestion that the commercial attractiveness of television broadcasts would be diminished because Betamax owners would use the pause button or fast-forward control to avoid viewing advertisements: "It must be remembered, however, that to omit commercials, Betamax owners must view the program, including the commercials, while recording. To avoid commercials during playback, the viewer must fast-forward and, for the most part, guess as to when the commercial has passed. For most recordings, either practice may be too tedious. As defendants' survey showed, 92% of the programs were recorded with commercials and only 25% of the owners fast-forward through them. Advertisers will have to make the same kinds of judgments they do now about whether persons viewing televised programs actually watch the advertisements which interrupt them."

<sup>37</sup> [The district court stated:] "Here plaintiffs assume that people will view copies when they would otherwise be watching television or going to the movie theater. There is no factual basis for this assumption. It seems equally likely that Betamax owners will play their tapes when there is nothing on television they wish to see and no movie they want to attend. Defendants' survey does not show any negative effect of Betamax ownership on television viewing or theater attendance."

<sup>38</sup> [The district court stated:] "The underlying assumptions here are particularly difficult to accept. Plaintiffs explain that the Betamax increases access to the original televised material and that the more people there are in this original audience, the fewer people the rerun will attract. Yet current marketing practices, including the success of syndication, show just the opposite. Today, the larger the audience for the original telecast, the higher the price plaintiffs can demand from broadcasters from rerun rights. There is no survey within the knowledge of this court to show that the rerun audience is comprised of persons who have not seen the program. In any event, if ratings can reflect Betamax recording, original audiences may increase and, given market practices, this should aid plaintiffs rather than harm them."

theater or film rental exhibition of a program will suffer because of time-shift recording of that program lacks merit.<sup>39</sup>

[25] After completing that review, the District Court [concluded that] .... [h]arm from time-shifting is speculative and, at best, minimal....

[26] The District Court's conclusions are buttressed by the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits....

[27] When these factors are all weighed in the ... balance, we must conclude that this record amply supports the District Court's conclusion that home time-shifting is fair use...

BLACKMUN, J., dissenting, joined by Justices Marshall, Powell, and Rehnquist:....

[28] The making of a videotape recording for home viewing is an ordinary rather than a productive use of the Studios' copyrighted works. The District Court found that "Betamax owners use the copy for the same purpose as the original. They add nothing of their own." Although applying the fair use doctrine to home VTR recording, as Sony argues, may increase public access to material broadcast free over the public airwaves, I think Sony's argument misconceives the nature of copyright. Copyright gives the author a right to limit or even to cut off access to his work. A VTR recording creates no public benefit sufficient to justify limiting this right. Nor is this right extinguished by the copyright owner's choice to make the work available over the airwaves. Section 106 of the 1976 Act grants the copyright owner the exclusive right to control the performance and the reproduction of his work, and the fact that he has licensed a single television performance is really irrelevant to the existence of his right to control its reproduction. Although a television broadcast may be free to the viewer, this fact is equally irrelevant; a book borrowed from the public library may not be copied any more freely than a book that is purchased....

[29] I recognize, nevertheless, that there are situations where permitting even an unproductive use would have no effect on the author's incentive to create, that is, where the use would not affect the value of, or the market for, the author's work. Photocopying an old newspaper clipping to send to a friend may be an example; pinning a quotation on one's bulletin board may be another. In each of these cases, the effect on the author is truly *de minimis*. Thus, even though these uses provide no benefit to the public at large, no purpose is served by preserving the author's monopoly, and the use may be regarded as fair.

[30] Courts should move with caution, however, in depriving authors of protection from unproductive "ordinary" uses.... [E]ven in the case of a productive use, § 107(4) requires consideration of "the effect of the use upon the *potential* market for or value of the copyrighted work" (emphasis added). A particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come. Although such a use may seem harmless when viewed in isolation, isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.

[31] I therefore conclude that, at least when the proposed use is an unproductive one, a copyright owner need prove only a *potential* for harm to the market for or the value of the copyrighted work. Proof of actual harm, or

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<sup>39</sup> [According to the district court,] "This suggestion lacks merit. By definition, time-shift recording entails viewing and erasing, so the program will no longer be on tape when the later theater run begins. Of course, plaintiffs may fear that the Betamax will keep the tapes long enough to satisfy all their interest in the program and will, therefore, not patronize later theater exhibitions. To the extent this practice involves librarying, it is addressed [elsewhere]. It should also be noted that there is no evidence to suggest that the public interest in later theatrical exhibitions of motion pictures will be reduced any more by Betamax recording than it already is by the television broadcast of the film."

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even probable harm, may be impossible in an area where the effect of a new technology is speculative, and requiring such proof would present the real danger of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances. Infringement thus would be found if the copyright owner demonstrates a reasonable possibility that harm will result from the proposed use. When the use is one that creates no benefit to the public at large, copyright protection should not be denied on the basis that a new technology that may result in harm has not yet done so.

[32] The Studios have identified a number of ways in which VTR recording could damage their copyrights. VTR recording could reduce their ability to market their works in movie theaters and through the rental or sale of pre-recorded videotapes or videodiscs; it also could reduce their rerun audience, and consequently the license fees available to them for repeated showings. Moreover, advertisers may be willing to pay for only "live" viewing audiences, if they believe VTR viewers will delete commercials or if rating services are unable to measure VTR use; if this is the case, VTR recording could reduce the license fees the Studios are able to charge even for first-run showings. Library-building may raise the potential for each of the types of harm identified by the Studios, and time-shifting may raise the potential for substantial harm as well.<sup>35</sup>

[33] Although the District Court found no likelihood of harm from VTR use, I conclude that it applied an incorrect substantive standard and misallocated the burden of proof....

[34] The District Court's reluctance to engage in prediction in this area is understandable, but, in my view, the court was mistaken in concluding that the Studios should bear the risk created by this uncertainty. The Studios have demonstrated a potential for harm, which has not been, and could not be, refuted at this early stage of technological development.

[35] The District Court's analysis of harm, moreover, failed to consider the effect of VTR recording on "the potential market for or the value of the copyrighted work," as required by § 107(4). The requirement that a putatively infringing use of a copyrighted work, to be "fair," must not impair a "potential" market for the work has two implications. First, an infringer cannot prevail merely by demonstrating that the copyright holder suffered no net harm from the infringer's action. Indeed, even a showing that the infringement has resulted in a net benefit to the copyright holder will not suffice. Rather, the infringer must demonstrate that he had not impaired the copyright holder's ability to demand compensation from (or to deny access to) any group who would otherwise be willing to pay to see or hear the copyrighted work. Second, the fact that a given market for a copyrighted work would not be available to the copyright holder were it not for the infringer's activities does not permit the infringer to exploit that market without compensating the copyright holder.

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<sup>35</sup> A VTR owner who has taped a favorite movie for repeated viewing will be less likely to rent or buy a tape containing the same movie, watch a televised rerun, or pay to see the movie at a theater. Although time-shifting may not replace theater or rerun viewing or the purchase of prerecorded tapes or discs, it may well replace rental usage; a VTR user who has recorded a first-run movie for later viewing will have no need to rent a copy when he wants to see it. Both library-builders and time-shifters may avoid commercials; the library builder may use the pause control to record without them, and all users may fast-forward through commercials on playback.

The Studios introduced expert testimony that both time-shifting and librarying would tend to decrease their revenue from copyrighted works. The District Court's findings also show substantial library-building and avoidance of commercials. Both sides submitted surveys showing that the average Betamax user owns between 25 and 32 tapes. The Studios' survey showed that at least 40% of users had more than 10 tapes in a "library"; Sony's survey showed that more than 40% of users planned to view their tapes more than once; and both sides' surveys showed that commercials were avoided at least 25% of the time.

[36] In this case, the Studios and their *amici* demonstrate that the advent of the VTR technology created a potential market for their copyrighted programs. That market consists of those persons who find it impossible or inconvenient to watch the programs at the time they are broadcast, and who wish to watch them at other times. These persons are willing to pay for the privilege of watching copyrighted work at their convenience, as is evidenced by the fact that they are willing to pay for VTRs and tapes; undoubtedly, most also would be willing to pay some kind of royalty to copyright holders. The Studios correctly argue that they have been deprived of the ability to exploit this sizable market.

[37] It is thus apparent from the record and from the findings of the District Court that time-shifting does have a substantial adverse effect upon the “potential market for” the Studios’ copyrighted works. Accordingly, even under the formulation of the fair use doctrine advanced by Sony, time-shifting cannot be deemed a fair use....<sup>44</sup>  
....

[38] ... [T]he Court ... purports to apply to time-shifting the four factors explicitly stated in the statute. The first is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” The Court confidently describes time-shifting as a noncommercial, nonprofit activity. It is clear, however, that personal use of programs that have been copied without permission is not what § 107(1) protects. The intent of the section is to encourage users to engage in activities the primary benefit of which accrues to others. Time-shifting involves no such humanitarian impulse. It is likewise something of a mischaracterization of time-shifting to describe it as noncommercial in the sense that that term is used in the statute. As one commentator has observed, time-shifting is noncommercial in the same sense that stealing jewelry and wearing it—instead of reselling it—is noncommercial. Purely consumptive uses are certainly not what the fair use doctrine was designed to protect, and the awkwardness of applying the statutory language to time-shifting only makes clearer that fair use was designed to protect only uses that are productive.

[39] The next two statutory factors are all but ignored by the Court—though certainly not because they have no applicability. The second factor—“the nature of the copyrighted work”—strongly supports the view that time-shifting is an infringing use. The rationale guiding application of this factor is that certain types of works, typically those involving more of diligence than of originality or inventiveness, require less copyright protection than other original works. Thus, for example, informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment. Sony’s own surveys indicate that entertainment shows account for more than 80 percent of the programs recorded by Betamax owners.

[40] The third statutory factor—“the amount and substantiality of the portion used”—is even more devastating to the Court’s interpretation. It is undisputed that virtually all VTR owners record entire works, thereby creating an exact substitute for the copyrighted original. Fair use is intended to allow individuals engaged in productive uses to copy small portions of original works that will facilitate their own productive endeavors. Time-shifting bears no resemblance to such activity, and the complete duplication that it involves might alone be sufficient to preclude a finding of fair use. It is little wonder that the Court has chosen to ignore this statutory factor.

[41] The fourth factor requires an evaluation of “the effect of the use upon the potential market for or value of the copyrighted work.” This is the factor upon which the Court focuses, but once again, the Court has misread the statute. As mentioned above, the statute requires a court to consider the effect of the use on the potential market for the copyrighted work. The Court has struggled mightily to show that VTR use has not reduced the

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<sup>44</sup> Sony asserts that much or most television broadcasting is available for home recording because ... no copyright owner other than the Studios has brought an infringement action .... The ... assertion[] is irrelevant; Sony’s liability does not turn on the fact that only two copyright owners thus far have brought suit. The amount of infringing use must be determined through consideration of the television market as a whole....

## Chapter VI – Fair Use

value of the Studios' copyrighted works in their present markets. Even if true, that showing only begins the proper inquiry. The development of the VTR has created a new market for the works produced by the Studios. That market consists of those persons who desire to view television programs at times other than when they are broadcast, and who therefore purchase VTR recorders to enable them to time-shift. Because time-shifting of the Studios' copyrighted works involves the copying of them, however, the Studios are entitled to share in the benefits of that new market. Those benefits currently go to Sony through Betamax sales. Respondents therefore can show harm from VTR use simply by showing that the value of their copyrights would increase if they were compensated for the copies that are used in the new market. The existence of this effect is self-evident.

### NOTES

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1. In economics, **market failure** is understood to be a situation in which the market does not allocate goods or services efficiently, typically leading to a net loss of social welfare. As one example outside the context of copyright law, even though there is great social cost from pollution, absent market intervention, businesses might rationally be disposed to pollute as a byproduct of manufacturing, for example, because their private cost of doing so is low when no law forces them to pay the external social cost of pollution. Law can intervene to ameliorate this problem by requiring businesses to internalize the social costs of pollution—for example, by imposing taxes on emissions—thereby reducing this externality problem.

In the context of copyright, one can similarly probe whether copyright markets are sometimes causing net social losses. As Wendy Gordon explained in the seminal work on this issue:

*Though the copyright law ... has provided mechanisms to facilitate consensual transfers, at times bargaining may be exceedingly expensive or it may be impractical to obtain enforcement against nonpurchasers, or other market flaws might preclude achievement of desirable consensual exchanges. In those cases, the market cannot be relied on to mediate public interests in dissemination and private interests in remuneration. In extreme instances, Congress may correct for market distortions by imposing a regulatory solution such as a compulsory licensing scheme. Thus, to avoid threatened monopolistic control over the manufacture of piano rolls and other mechanical recordings, Congress provided that any person who wished could make and sell recordings of copyrighted music, so long as he paid to the copyright owner an amount determined under the statute. But the broad brush of this regulatory solution is too sweeping for most cases.*

*Fair use is one label courts use when they approve a user's departure from the market. A useful starting place for analysis of when fair use is appropriate is therefore an identification of when flaws in the market might make reliance on the judiciary's own analysis of social benefit appropriate. By making such an identification, a measure of coherence can be brought to the doctrine of fair use.... [T]here are certain conditions of perfect competition—or assumptions about how a proper transactional setting should look—whose failure is particularly likely to trigger in the courts an unwillingness to rely on the owner's market right to achieve dissemination.*

Wendy J. Gordon, *Fair Use as Market Failure*, 82 COLUM. L. REV. 1600, 1613-14 (1982).

What can cause this sort of market failure that might justify a finding of fair use? Gordon identifies some possibilities. First, **transaction costs** can make it impossible or impracticable for a would-be user of a copyrighted work to reach a deal with the copyright holder. Gordon explains that “[i]f transaction costs exceed anticipated benefits, ... no transactions will occur. Thus, the confluence of two variables is likely to produce a

market barrier: high transaction costs and low anticipated profits.” When this happens, some socially valuable transfers might not happen if copyright is enforced.

Additionally, **positive externalities** that society can experience from the use of copyrighted works but which are not appropriately valued, or internalized, in the marketplace might also prevent copyright transactions. In particular, as Gordon elaborates, “teaching and scholarship may yield significant ‘external benefits’; all of society benefits from having an educated citizenry and from advances in knowledge, yet teacher salaries and revenues from scholarly articles are arguably smaller than such benefit would warrant. When a defendant’s works yield such ‘external benefits,’ the market cannot be relied upon as a mechanism for facilitating socially desirable transactions.” In these cases, the potential user might not be able to afford the use of the copyrighted work through the market, even though society would benefit greatly from that potential use. That inability, to Gordon, “may signal to the court that it should investigate whether the social costs of relying on the market are unacceptably high” in analyzing fair use.

Finally, copyright owners might express **anti-dissemination** preferences in some contexts: for example, to prevent criticism of their works. In this situation, Gordon reasons that “[b]ecause the owner’s antidissemination motives make licensing unavailable in the consensual market, and because the free flow of information is at stake, a strong case for fair use can be advanced in these cases.”

Think through whether you are persuaded by Gordon’s framework for assessing fair use and whether you can understand *Sony* as a way to address a market failure.

2. Market facts and technological facts can change over time. Consider the evidence that the copyright holder plaintiffs introduced in *Sony* as to the harms to their revenues from commercial advertisements caused by VCR recording. Consider also whether there was a market in prerecorded VCR tapes of television programs. Additionally, consider whether it was plausible at the time of the litigation to license VCR recordings of television programs. How have these facts changed over the intervening years? If you were to substitute evidence from the year 2000 or the present day on these issues, how would this case be decided? If you thought that market failure explains *Sony*’s outcome, does that market failure continue to exist as time passes? What do your answers suggest for the stability of fair use determinations over time?

3. Around the time of the *Sony* litigation, Jack Valenti, then-president of the Motion Picture Association of America, testified before Congress that “the VCR is to the American film producer and the American public as the Boston Strangler is to the woman alone.” Reflected in both Valenti’s statement and content owners’ decision to sue Sony for copyright infringement is a fear that VCR technology would undercut content owners’ businesses. That fear was unfounded, and the *Sony* plaintiffs are surely happy they lost their case. The reason is that content owners started to make significant money through prerecorded video sales, which probably would not have happened had they won the case. Do you think these developments subsequent to *Sony* suggest anything about how well copyright owners can assess their business interests in deciding whether to license their works or sue for infringement?

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## Chapter VI – Fair Use

In reading the following opinion, consider the purpose the Court articulates for fair use. How is the Court's understanding of the four factors different, if at all, than in *Harper & Row* and *Sony*? Also, how does the Court distinguish parody from satire? How does the characterization of a use as parody affect the multi-factor analysis?

### **Luther R. Campbell v. Acuff–Rose Music, Inc.**

510 U.S. 569 (1994)

SOUTER, J.: ...

[1] In 1964, Roy Orbison and William Dees wrote a rock ballad called “Oh, Pretty Woman” and assigned their rights in it to respondent Acuff-Rose Music, Inc. Acuff-Rose registered the song for copyright protection.

[2] Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group. In 1989, Campbell wrote a song entitled “Pretty Woman,” which he later described in an affidavit as intended, “through comical lyrics, to satirize the original work....” On July 5, 1989, 2 Live Crew’s manager informed Acuff-Rose that 2 Live Crew had written a parody of “Oh, Pretty Woman,” that they would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and that they were willing to pay a fee for the use they wished to make of it. Enclosed with the letter were a copy of the lyrics and a recording of 2 Live Crew’s song. Acuff-Rose’s agent refused permission, stating that “I am aware of the success enjoyed by ‘The 2 Live Crews’, but I must inform you that we cannot permit the use of a parody of ‘Oh, Pretty Woman.’” Nonetheless, in June or July 1989, 2 Live Crew released records, cassette tapes, and compact discs of “Pretty Woman” in a collection of songs entitled “As Clean As They Wanna Be.” The albums and compact discs identify the authors of “Pretty Woman” as Orbison and Dees and its publisher as Acuff-Rose.

[3] Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skywalker Records, for copyright infringement. The District Court granted summary judgment for 2 Live Crew ....

[4] The Court of Appeals for the Sixth Circuit reversed and remanded....

[5] We granted certiorari to determine whether 2 Live Crew’s commercial parody could be a fair use....

[6] It is uncontested here that 2 Live Crew’s song would be an infringement of Acuff-Rose’s rights in “Oh, Pretty Woman,” under the Copyright Act of 1976 but for a finding of fair use through parody. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, “[t]o promote the Progress of Science and useful Arts....” U.S. CONST., Art. I, § 8, cl. 8....

[7] .... The fair use doctrine ... permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.

[8] The task [of adjudging fair use] is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. The text employs the terms “including” and “such as” in the preamble paragraph to indicate the “illustrative and not limitative” function of the examples given, § 101, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had



found to be fair uses. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.<sup>10</sup> ...

[9] The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” § 107(1).... The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like. The central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely supersedes 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.” Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990). Although such transformative use is not absolutely necessary for a finding of fair use,<sup>11</sup> the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

[10] .... [P]arody has an obvious claim to transformative value .... Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one....

[11] .... For the purposes of copyright law, ... the heart of any parodist’s claim to quote from existing material, is the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.<sup>14</sup> Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.<sup>15</sup>

[12] The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners’ suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be

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<sup>10</sup> Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, to stimulate the creation and publication of edifying matter, are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.

<sup>11</sup> The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.

<sup>14</sup> A parody that more loosely targets an original than the parody presented here may still be sufficiently aimed at an original work to come within our analysis of parody. If a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives, it is more incumbent on one claiming fair use to establish the extent of transformation and the parody’s critical relationship to the original. By contrast, when there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work’s minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.

<sup>15</sup> Satire has been defined as a work “in which prevalent follies or vices are assailed with ridicule,” OXFORD ENGLISH DICTIONARY, or are “attacked through irony, derision, or wit,” AMERICAN HERITAGE DICTIONARY.

## Chapter VI – Fair Use

presumed fair, see *Harper & Row*, 471 U.S. at 561. The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

[13] Here, the District Court held, and the Court of Appeals assumed, that 2 Live Crew's "Pretty Woman" contains parody, commenting on and criticizing the original work, whatever it may have to say about society at large. As the District Court remarked, the words of 2 Live Crew's song copy the original's first line, but then "quickly degenerat[e] into a play on words, substituting predictable lyrics with shocking ones ... [that] derisively demonstrat[e] how bland and banal the Orbison song seems to them." Judge Nelson, dissenting below, came to the same conclusion, that the 2 Live Crew song "was clearly intended to ridicule the white-bread original" and "reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses." Although the majority below had difficulty discerning any criticism of the original in 2 Live Crew's song, it assumed for purposes of its opinion that there was some.

[14] We have less difficulty in finding that critical element in 2 Live Crew's song than the Court of Appeals did, although having found it we will not take the further step of evaluating its quality. The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.<sup>16</sup> Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

[15] While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.

[16] The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. The court then inflated the significance of this fact by applying a presumption ... that every commercial use of copyrighted material is presumptively unfair. In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.

[17] The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term "including" to begin the dependent clause referring to commercial use, and the main clause speaks of a broader

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<sup>16</sup> The only further judgment, indeed, that a court may pass on a work goes to an assessment of whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely supersede the objects of the original.

investigation into “purpose and character.” As we explained in *Harper & Row*, Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence. Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country. Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that “[n]o man but a blockhead ever wrote, except for money.”

[18] *Sony* itself called for no hard evidentiary presumption. There, we emphasized the need for a “sensitive balancing of interests,” noted that Congress had “eschewed a rigid, bright-line approach to fair use,” and stated that the commercial or nonprofit educational character of a work is “not conclusive,” but rather a fact to be “weighed along with other[s] in fair use decisions.” The Court of Appeals’s elevation of one sentence from *Sony* [(that “every commercial use ... is presumptively ... unfair”)] to a *per se* rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication. Rather, as we explained in *Harper & Row*, *Sony* stands for the proposition that the “fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.” But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance. The use, for example, 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, let alone one performed a single time by students in school.<sup>18</sup> ...

[19] The second statutory factor, “the nature of the copyrighted work,” § 107(2), .... calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. We agree with both the District Court and the Court of Appeals that the Orbison original’s creative expression for public dissemination falls within the core of the copyright’s protective purposes. This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works....

[20] The third factor asks whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” § 107(3) .... Here, attention turns to the persuasiveness of a parodist’s justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives....

[21] ... [T]his factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too.... [W]hether a substantial portion of the infringing work was copied verbatim from the

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<sup>18</sup> Finally, regardless of the weight one might place on the alleged infringer’s state of mind, compare *Harper & Row* (fair use presupposes good faith and fair dealing), with *Folsom v. Marsh*, 9 F.Cas. 342, 349 (No. 4,901) (CCD Mass.1841) (good faith does not bar a finding of infringement); *Leval* (good faith irrelevant to fair use analysis), we reject Acuff–Rose’s argument that 2 Live Crew’s request for permission to use the original should be weighed against a finding of fair use. Even if good faith were central to fair use, 2 Live Crew’s actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid this litigation. If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use.

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copyrighted work is a relevant question, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

[22] .... Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to conjure up at least enough of that original to make the object of its critical wit recognizable. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

[23] We think the Court of Appeals was insufficiently appreciative of parody's need for the recognizable sight or sound when it ruled 2 Live Crew's use unreasonable as a matter of law. It is true, of course, that 2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original, and true that the words of the first line copy the Orbison lyrics. But if quotation of the opening riff and the first line may be said to go to the "heart" of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through.

[24] This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it, but also produced otherwise distinctive sounds, interposing scraper noise, overlaying the music with solos in different keys, and altering the drum beat. This is not a case, then, where a substantial portion of the parody itself is composed of a verbatim copying of the original. It is not, that is, a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists.

[25] Suffice it to say here that, as to the lyrics, we think ... that no more was taken than necessary, but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original's "heart." As to the music, we express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative elements, and considerations of the potential for market substitution sketched more fully below....

[26] The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original. The enquiry must take account not only of harm to the original but also of harm to the market for derivative works.

[27] Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.<sup>21</sup> ...

[28] No presumption or inference of market harm ... is applicable to a case involving something beyond mere duplication for commercial purposes.... [W]hen ... the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it .... This is so because the parody and the original usually serve different market functions.

[29] We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically, the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.

[30] This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectible derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.... Thus, to the extent that the opinion below may be read to have considered harm to the market for parodies of "Oh, Pretty Woman," the court erred.

[31] In explaining why the law recognizes no derivative market for critical works, including parody, we have, of course, been speaking of the later work as if it had nothing but a critical aspect. But the later work may have a more complex character, with effects not only in the arena of criticism but also in protectible markets for derivative works, too. In that sort of case, the law looks beyond the criticism to the other elements of the work, as it does here. 2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry. Evidence of substantial harm to it would weigh against a finding of fair use, because the licensing of derivatives is an important economic incentive to the creation of originals. Of course, the only harm to derivatives that need concern us, as discussed above, is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market.<sup>24</sup>

[32] Although 2 Live Crew submitted uncontroverted affidavits on the question of market harm to the original, neither they, nor Acuff-Rose, introduced evidence or affidavits addressing the likely effect of 2 Live Crew's parodic rap song on the market for a nonparody, rap version of "Oh, Pretty Woman." And while Acuff-Rose would have us find evidence of a rap market in the very facts that 2 Live Crew recorded a rap parody of "Oh, Pretty Woman" and another rap group sought a license to record a rap derivative, there was no evidence that a potential rap market was harmed in any way by 2 Live Crew's parody, rap version. The fact that 2 Live Crew's

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<sup>21</sup> Even favorable evidence, without more, is no guarantee of fairness. Judge Leval gives the example of the film producer's appropriation of a composer's previously unknown song that turns the song into a commercial success; the boon to the song does not make the film's simple copying fair. This factor, no less than the other three, may be addressed only through a sensitive balancing of interests. Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.

<sup>24</sup> In some cases it may be difficult to determine whence the harm flows. In such cases, the other fair use factors may provide some indicia of the likely source of the harm. A work whose overriding purpose and character is parodic and whose borrowing is slight in relation to its parody will be far less likely to cause cognizable harm than a work with little parodic content and much copying.

## Chapter VI – Fair Use

parody sold as part of a collection of rap songs says very little about the parody's effect on a market for a rap version of the original, either of the music alone or of the music with its lyrics.... The evidentiary hole will doubtless be plugged on remand....

KENNEDY, J. concurring....

[33] The fair use factors thus reinforce the importance of keeping the definition of parody within proper limits. More than arguable parodic content should be required to deem a would-be parody a fair use. Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist. We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a "comment on the naiveté of the original," because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre. Just the thought of a rap version of Beethoven's Fifth Symphony or "Achy Breaky Heart" is bound to make people smile. If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright. And underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create....

### APPENDIX A TO OPINION OF THE COURT "Oh, Pretty Woman" by Roy Orbison and William Dees

Pretty Woman, walking down the street,  
Pretty Woman, the kind I like to meet,  
Pretty Woman, I don't believe you, you're not  
the truth,  
No one could look as good as you  
Mercy  
Pretty Woman, won't you pardon me,  
Pretty Woman, I couldn't help but see,  
Pretty Woman, that you look lovely as can be  
Are you lonely just like me?  
Pretty Woman, stop a while,  
Pretty Woman, talk a while,  
Pretty Woman give your smile to me  
Pretty Woman, yeah, yeah, yeah  
Pretty Woman, look my way,  
Pretty Woman, say you'll stay with me  
'Cause I need you, I'll treat you right  
Come to me baby, Be mine tonight  
Pretty Woman, don't walk on by,  
Pretty Woman, don't make me cry,  
Pretty Woman, don't walk away,  
Hey, O.K.  
If that's the way it must be, O.K.  
I guess I'll go on home, it's late  
There'll be tomorrow night, but wait!  
What do I see  
Is she walking back to me?  
Yeah, she's walking back to me!  
Oh, Pretty Woman.

### APPENDIX B TO OPINION OF THE COURT "Pretty Woman" as Recorded by 2 Live Crew

Pretty woman walkin' down the street  
Pretty woman girl you look so sweet  
Pretty woman you bring me down to that knee  
Pretty woman you make me wanna beg please  
Oh, pretty woman  
Big hairy woman you need to shave that stuff  
Big hairy woman you know I bet it's tough  
Big hairy woman all that hair it ain't legit  
'Cause you look like 'Cousin It'  
Big hairy woman  
Bald headed woman girl your hair won't grow  
Bald headed woman you got a teeny weeny afro  
Bald headed woman you know your hair could look nice  
Bald headed woman first you got to roll it with rice  
Bald headed woman here, let me get this hunk of biz for ya  
Ya know what I'm saying you look better than rice a roni  
Oh bald headed woman  
Big hairy woman come on in  
And don't forget your bald headed friend  
Hey pretty woman let the boys  
Jump in  
Two timin' woman girl you know you ain't right  
Two timin' woman you's out with my boy last night  
Two timin' woman that takes a load off my mind  
Two timin' woman now I know the baby ain't mine  
Oh, two timin' woman  
Oh pretty woman



## NOTES

1. Following the Supreme Court's decision, Acuff-Rose Music, Inc., and 2 Live Crew settled the suit. Acuff-Rose dismissed its lawsuit, in exchange for 2 Live Crew agreeing to pay some of the proceeds of sales of their song to Acuff-Rose. *Acuff-Rose Settles Suit with Rap Group*, COMMERCIAL APPEAL, at A14, June 5, 1996.
2. As a matter of copyright policy, why might parodies be considered fair use? Can you reconcile fair use for parodies with the rights of copyright owners to prepare derivative works?
3. After reading *Campbell*, do you have a different sense whether any particular factor is more important than others to a conclusion of fair use? If so, in all contexts or only in the specific one at issue here?
4. Very influential on the Court's decision in *Campbell* was a *Harvard Law Review* article on fair use by Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). In the article, Judge Leval argued for "transformativeness" as a touchstone in fair use analysis. Can you think of the ways in which, in the context of the fair use analysis, a defendant's work may be said to "transform" a plaintiff's work? Are all forms of transformativeness equal in value?
5. How can a court decide whether something is a parody? Should it be based on the defendant's creative intent? Or how consumers receive the defendant's use? Or expert opinions? Or another way?

In that regard, consider a case brought by photographer Annie Leibovitz against Paramount Pictures, distributor of the film *Naked Gun 33-1/3: The Final Insult*. Leibovitz had photographed a pregnant, nude Demi Moore for the cover of the August 1991 issue of *Vanity Fair* magazine, as shown in Figure 102. The photograph attracted a significant amount of public attention, and that issue became a top-seller for *Vanity Fair*. In 1993, Paramount Pictures released a promotional poster for its upcoming film release, with star Leslie Nielsen's face superimposed on the body of a nude, pregnant model posed in the same position as Moore and the tagline "Due this March," as shown in Figure 102.

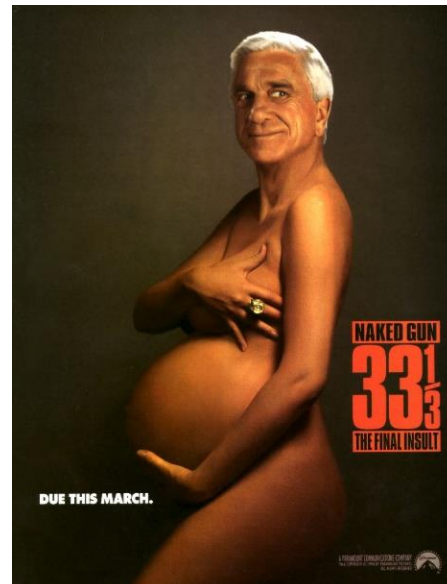


Figure 102: Annie Leibovitz's photograph of Demi Moore (left), and promotional poster for *Naked Gun 33<sup>1</sup>/<sub>3</sub>: The Final Insult* (right)

Leibovitz sued Paramount Pictures for copyright infringement. The district court granted summary judgment to Paramount, on the ground that its use was fair. The Second Circuit agreed and upheld the district court's ruling. In finding Paramount's poster to be a parody protected by fair use, it reasoned:



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*Plainly, the ad adds something new and qualifies as a "transformative" work. Whether it "comments" on the original is a somewhat closer question. Because the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore, the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original. The contrast achieves the effect of ridicule that the Court recognized in Campbell would serve as a sufficient "comment" to tip the first factor in a parodist's favor.*

*In saying this, however, we have some concern about the ease with which every purported parodist could win on the first factor simply by pointing out some feature that contrasts with the original. Being different from an original does not inevitably "comment" on the original. Nevertheless, the ad is not merely different; it differs in a way that may reasonably be perceived as commenting, through ridicule, on what a viewer might reasonably think is the undue self-importance conveyed by the subject of the Leibovitz photograph. A photographer posing a well known actress in a manner that calls to mind a well known painting must expect, or at least tolerate, a parodist's deflating ridicule.*

*Apart from ridiculing pretentiousness, the ad might also be reasonably perceived as interpreting the Leibovitz photograph to extol the beauty of the pregnant female body, and, rather unchivalrously, to express disagreement with this message. The District Court thought such a comment was reasonably to be perceived from the contrast between "a serious portrayal of a beautiful woman taking great pride in the majesty of her pregnant body ... [and] a ridiculous image of a smirking, foolish-looking pregnant man."*

Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 114-15 (2d Cir. 1996). In light of this case, how do you evaluate Justice Kennedy's concern, expressed in his *Campbell* concurrence, that it might be too easy to claim ex post that the use of a copyrighted work is a parody?

6. After reading *Campbell*, how would you distinguish a parody from a satire for purposes of evaluating fair use?

Consider the following case brought against publishing company Houghton Mifflin Co. by the copyright owners of *Gone with the Wind*, one of the world's best-selling books and which tells the fictional story of Scarlett O'Hara—the spoiled daughter of a wealthy Southern plantation owner—who tries to escape poverty following the American Civil War. Alice Randall wrote a book titled *The Wind Done Gone*, a fictional work based on *Gone with the Wind*. In the book, Randall appropriates characters, plots, and major scenes from *Gone with the Wind* to tell an alternative account of *Gone with the Wind*'s story from the point of view of one of O'Hara's slaves, Cynara, and the daughter of O'Hara's father and Mammy, a slave who was O'Hara's childhood nurse.

In defense of the lawsuit, Randall claimed "that her novel is a critique of [*Gone with the Wind*]'s depiction of slavery and the Civil-War era American South." *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1259 (11th Cir. 2001). The Eleventh Circuit characterized Randall's work as a parody, rather than a satire:

*[T]he parodic character of [The Wind Done Gone] is clear. [The Wind Done Gone] is not a general commentary upon the Civil-War-era American South, but a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in [Gone with the Wind]. The fact that Randall chose to convey her criticisms of [Gone with the Wind] through a work of fiction, which she contends is a more powerful vehicle for her message than a scholarly article, does not, in and of itself, deprive [The Wind Done Gone] of fair-use protection.*

After its analysis of the four statutory factors, the court went on to conclude that the defendants were "entitled to a fair-use defense."



Figure 103: book covers for *Gone with the Wind* (left) and *The Wind Done Gone* (right)

Do you think Randall's work is more appropriately categorized as a parody or a satire? Or is it a frontal attack on the Mitchell novel that does not ridicule, as parody and satire do? Notice how Houghton Mifflin described Randall's book on its cover (shown in Figure 103) as a "parody." Why do you think it did so? Should it matter to a determination of fair use whether a work is categorized as a parody or a satire? We will consider the question again later in this chapter in the context of appropriation art.

7. After reading *Campbell*, you might think that fair use is asserted as a defense frequently in infringement cases involving music. In an empirical study, Edward Lee finds that outside the context of parody, no court decision has recognized fair use of a plaintiff's musical work in a defendant's musical work. Edward Lee, *Fair Use Avoidance in Music Cases*, 59 B.C. L. REV. 1874 (2018). Moreover, Lee finds that very few of the many infringement cases about music even consider fair use. Lee posits that both musicians and courts are likely avoiding the defense of fair use in this context to make it easier to settle on song credits and royalties, to pursue instead a defense of not having copied protectable material, and to coincide with music industry norms and practices. This avoidance of fair use by litigants means that courts do not have much precedent on which to rely on deciding non-parody fair use music cases.

8. *Campbell* recognizes that certain market effects are irrelevant to the fair use analysis. *Campbell* suggests the exclusion of market effects from consideration under the fourth factor if the effects are unrelated to the protectable aspects of the copyrighted work, such as its ideas or the societal value attributed to the work. In particular, *Campbell* provides that "when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act." The Court there explains that any harm to the copyright holder's market results from the parody's commentary, not its substitutive effect for the copyrighted work. *Campbell* emphasizes that "the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it." The Court concludes that "[t]he distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectable derivative market for criticism." For an analytical framework on limiting consideration of the fourth factor to copyright-relevant markets, see Jeanne C. Fromer, *Market Effects Bearing*

on Fair Use, 90 WASH. L. REV. 615 (2015).

## B. Contemporary Cases: What Is Transformativeness?

As you just read, in *Campbell*, the Supreme Court promoted the concept of “transformativeness” as a way of understanding the meaning of the first statutory factor of the fair use standard. The *Campbell* Court employed transformativeness analysis in the context of a parodic use; parody, the Court stated, “has an obvious claim to transformative value.” In the years following *Campbell*, courts have employed transformativeness analysis in ways that are almost certainly broader than the Supreme Court’s initial use of the analysis in *Campbell*, both in terms of the statutory factors that are affected by a work’s transformativeness (or lack of transformativeness) and the kinds of uses that may qualify as “transformative.”

### 1. Historical Research

As you read the next case, consider the purpose for which and the ways the defendant is using the plaintiff’s works and how that ought to affect the analysis of fair use.

#### Bill Graham Archives v. Dorling Kindersley Limited

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

RESTANI, J.: ...

[1] In October of 2003, DK [(Dorling Kindersley)] published *Grateful Dead: The Illustrated Trip*, in collaboration with Grateful Dead Productions, intended as a cultural history of the Grateful Dead. The resulting 480-page coffee table book tells the story of the Grateful Dead along a timeline running continuously through the book, chronologically combining over 2000 images representing dates in the Grateful Dead’s history with explanatory text. A typical page of the book features a collage of images, text, and graphic art designed to simultaneously capture the eye and inform the reader. Plaintiff BGA [(Bill Graham Archives)] claims to own the copyright to seven images displayed in *Illustrated Trip*, which DK reproduced without BGA’s permission.

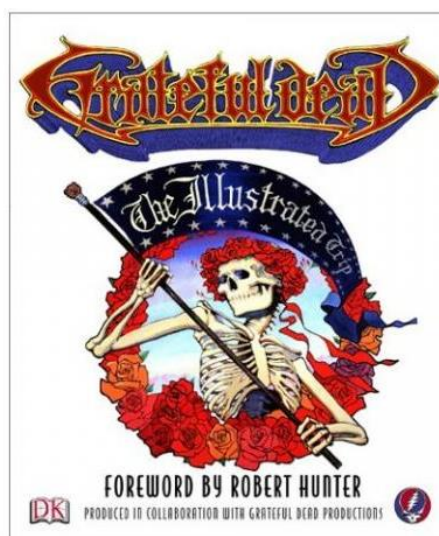


Figure 104: Dorling Kindersley book cover for *Grateful Dead: The Illustrated Trip*



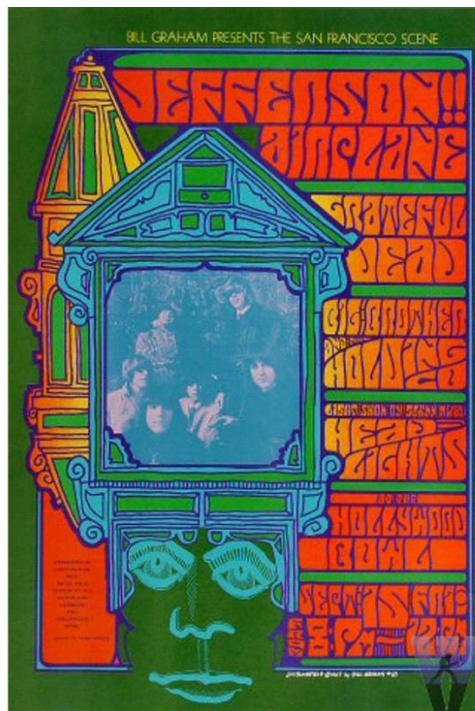


Figure 105: Bill Graham Grateful Dead concert poster (top), and use of it in Dorling Kindersley book (bottom)

[2] Initially, DK sought permission from BGA to reproduce the images. In May of 2003, the CEO of Grateful Dead Productions sent a letter to BGA seeking permission for DK to publish the images. BGA responded by offering permission in exchange for Grateful Dead Productions' grant of permission to BGA to make CDs and DVDs out of concert footage in BGA's archives. Next, DK directly contacted BGA seeking to negotiate a license agreement, but the parties disagreed as to an appropriate license fee. Nevertheless, DK proceeded with

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publication of *Illustrated Trip* without entering a license fee agreement with BGA. Specifically, DK reproduced seven artistic images originally depicted on Grateful Dead event posters and tickets. BGA’s seven images are displayed in significantly reduced form and are accompanied by captions describing the concerts they represent.

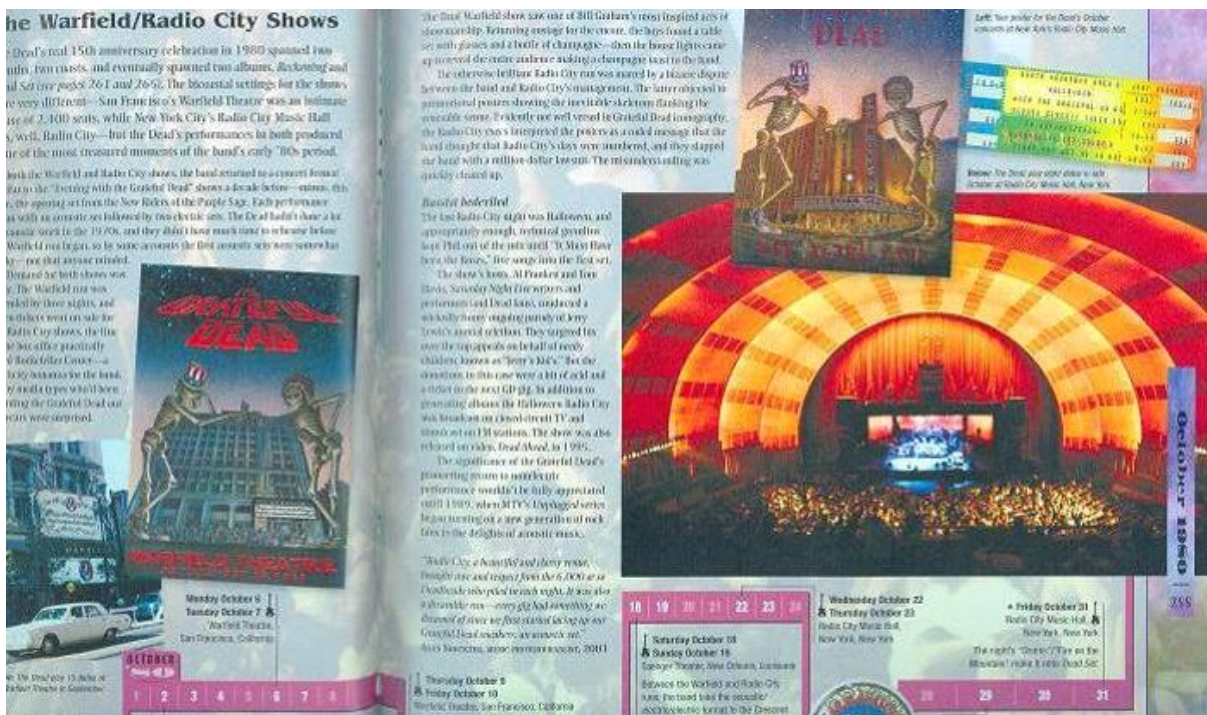


Figure 106: Bill Graham Grateful Dead concert poster (top), and use of it in Dorling Kindersley book (bottom)



[3] When DK refused to meet BGA's post-publication license fee demands, BGA filed suit for copyright infringement....

[4] In this case, the district court concluded that the balance of fair use factors weighs in favor of DK.... We agree with the district court that DK's use of the copyrighted images is protected as fair use.

### I. Purpose and Character of Use

[5] We first address "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). Most important to the court's analysis of the first factor is the "transformative" nature of the work. The question is whether the new work merely supersedes 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.

[6] Here, the district court determined that *Illustrated Trip* is a biographical work, and the original images are not, and therefore accorded a strong presumption in favor of DK's use. In particular, the district court concluded that DK's use of images placed in chronological order on a timeline is transformatively different from the mere expressive use of images on concert posters or tickets. Because the works are displayed to commemorate historic events, arranged in a creative fashion, and displayed in significantly reduced form, the district court held that the first fair use factor weighs heavily in favor of DK.

[7] Appellant challenges the district court's strong presumption in favor of fair use based on the biographical nature of *Illustrated Trip*. Appellant argues that based on this purported error the district court failed to examine DK's justification for its use of each of the images. Moreover, Appellant argues that as a matter of law merely placing poster images along a timeline is not a transformative use. Appellant asserts that each reproduced image should have been accompanied by comment or criticism related to the artistic nature of the image.

[8] We disagree with Appellant's limited interpretation of transformative use and we agree with the district court that DK's actual use of each image is transformatively different from the original expressive purpose. Preliminarily, we recognize, as the district court did, that *Illustrated Trip* is a biographical work documenting the 30-year history of the Grateful Dead. While there are no categories of presumptively fair use, courts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment that require incorporation of original source material for optimum treatment of their subjects. No less a recognition of biographical value is warranted in this case simply because the subject made a mark in pop culture rather than some other area of human endeavor.

[9] In the instant case, DK's purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created. Originally, each of BGA's images fulfilled the dual purposes of artistic expression and promotion. The posters were apparently widely distributed to generate public interest in the Grateful Dead and to convey information to a large number of people about the band's forthcoming concerts. In contrast, DK used each of BGA's images as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip's* timeline.

[10] In some instances, it is readily apparent that DK's image display enhances the reader's understanding of the biographical text. In other instances, the link between image and text is less obvious; nevertheless, the images still serve as historical artifacts graphically representing the fact of significant Grateful Dead concert events selected by the *Illustrated Trip's* author for inclusion in the book's timeline. We conclude that both types of uses fulfill DK's transformative purpose of enhancing the biographical information in *Illustrated Trip*, a purpose separate and distinct from the original artistic and promotional purpose for which the images were created. In sum, because DK's use of the disputed images is transformative both when accompanied by

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referencing commentary and when standing alone, we agree with the district court that DK was not required to discuss the artistic merits of the images to satisfy this first factor of fair use analysis.

[11] This conclusion is strengthened by the manner in which DK displayed the images. First, DK significantly reduced the size of the reproductions. While the small size is sufficient to permit readers to recognize the historical significance of the posters, it is inadequate to offer more than a glimpse of their expressive value. In short, DK used the minimal image size necessary to accomplish its transformative purpose.

[12] Second, DK minimized the expressive value of the reproduced images by combining them with a prominent timeline, textual material, and original graphical artwork, to create a collage of text and images on each page of the book. To further this collage effect, the images are displayed at angles and the original graphical artwork is designed to blend with the images and text. Overall, DK's layout ensures that the images at issue are employed only to enrich the presentation of the cultural history of the Grateful Dead, not to exploit copyrighted artwork for commercial gain.

[13] Third, BGA's images constitute an inconsequential portion of *Illustrated Trip*. The extent to which unlicensed material is used in the challenged work can be a factor in determining whether a biographer's use of original materials has been sufficiently transformative to constitute fair use.... [O]ur circuit has counseled against considering the percentage the allegedly infringing work comprises of the copyrighted work in conducting *third-factor* fair use analysis .... We find this inquiry more relevant in the context of *first-factor* fair use analysis.

[14] In the instant case, the book is 480 pages long, while the BGA images appear on only seven pages. Although the original posters range in size from 13" x 19" to more than 19" x 27," the largest reproduction of a BGA image in *Illustrated Trip* is less than 3" x 4 1/2," less than 1/20 the size of the original. And no BGA image takes up more than one-eighth of a page in a book or is given more prominence than any other image on the page. In total, the images account for less than one-fifth of one percent of the book. This stands in stark contrast to ... wholesale takings ..., and we are aware of no case where such an insignificant taking was found to be an unfair use of original materials.

[15] Finally, as to this first factor, we briefly address the commercial nature of *Illustrated Trip*. Even though *Illustrated Trip* is a commercial venture, we recognize that nearly all of the illustrative uses listed in the preamble paragraph of § 107 are generally conducted for profit. Moreover, the crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price. Here, *Illustrated Trip* does not exploit the use of BGA's images as such for commercial gain. Significantly, DK has not used any of BGA's images in its commercial advertising or in any other way to promote the sale of the book. *Illustrated Trip* merely uses pictures and text to describe the life of the Grateful Dead. By design, the use of BGA's images is incidental to the commercial biographical value of the book.

[16] Accordingly, we conclude that the first fair use factor weighs in favor of DK because DK's use of BGA's images is transformatively different from the images' original expressive purpose and DK does not seek to exploit the images' expressive value for commercial gain.

### II. Nature of the Copyrighted Work ...

[17] The district court determined that the second factor weighs against DK because the images are creative artworks, which are traditionally the core of intended copyright protection. Nevertheless, the court limited the weight it placed on this factor because the posters have been published extensively. Appellant agrees that the district court properly weighed the second factor against DK, although it questions the lesser protection given



to published works. Appellees counter that because the images are mixed factual and creative works and have been long and extensively published, the second factor tilts toward fair use.

[18] We agree with the district court that the creative nature of artistic images typically weighs in favor of the copyright holder. We recognize, however, that the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose. This is not a case ... in which ... the creative work was being used for the same decorative purpose as the original. Here, we conclude that DK is using BGA's images for the transformative purpose of enhancing the biographical information provided in Illustrated Trip. Accordingly, we hold that even though BGA's images are creative works, which are a core concern of copyright protection, the second factor has limited weight in our analysis because the purpose of DK's use was to emphasize the images' historical rather than creative value.

### III. Amount and Substantiality of the Portion Used ...

[19] The district court determined that even though the images are reproduced in their entirety, the third fair use factor weighs in favor of DK because the images are displayed in reduced size and scattered among many other images and texts. In faulting this conclusion, Appellant contends that the amount used is substantial because the images are copied in their entirety. Neither our court nor any of our sister circuits has ever ruled that the copying of an entire work *favors* fair use. At the same time, however, courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image. Adopting this reasoning, we conclude that the third-factor inquiry must take into account that the extent of permissible copying varies with the purpose and character of the use.

[20] Here, DK used BGA's images because the posters and tickets were historical artifacts that could document Grateful Dead concert events and provide a visual context for the accompanying text. To accomplish this use, DK displayed reduced versions of the original images and intermingled these visuals with text and original graphic art. As a consequence, even though the copyrighted images are copied in their entirety, the visual impact of their artistic expression is significantly limited because of their reduced size. We conclude that such use by DK is tailored to further its transformative purpose because DK's reduced size reproductions of BGA's images in their entirety displayed the minimal image size and quality necessary to ensure the reader's recognition of the images as historical artifacts of Grateful Dead concert events. Accordingly, the third fair use factor does not weigh against fair use.

### IV. Effect of the Use upon the Market for or Value of the Original ...

[21] In the instant case, the parties agree that DK's use of the images did not impact BGA's primary market for the sale of the poster images. Instead, we look to whether DK's unauthorized use usurps BGA's potential to develop a derivative market. Appellant argues that DK interfered with the market for licensing its images for use in books. Appellant contends that there is an established market for licensing its images and it suffered both the loss of royalty revenue directly from DK and the opportunity to obtain royalties from others.

[22] It is indisputable that, as a general matter, a copyright holder is entitled to demand a royalty for licensing others to use its copyrighted work, and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor. We have noted, however, that were a court automatically to conclude in every case that potential licensing revenues were impermissibly impaired simply because the secondary user did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder. Accordingly, we do not find a harm to BGA's license market merely because DK did not pay a fee for BGA's copyrighted images.

[23] Instead, we look at the impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets. In order to establish a traditional license market, Appellant points to the fees paid to other

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copyright owners for the reproduction of their images in *Illustrated Trip*. Moreover, Appellant asserts that it established a market for licensing its images, and in this case expressed a willingness to license images to DK. Neither of these arguments shows impairment to a traditional, as opposed to a transformative market.

[24] ... [W]e hold that DK's use of BGA'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. Copyright owners may not preempt exploitation of transformative markets. Moreover, a publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images. Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees....

[25] On balance, we conclude, as the district court did, that the fair use factors weigh in favor of DK's use....

### NOTE

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1. Recall the case discussed in Chapter II with regard to "created facts," in which the producer of the *Seinfeld* television series sued the publisher of *The Seinfeld Aptitude Test*, a book filled with trivia questions about the series. Unlike *Bill Graham Archives*, the Second Circuit held that the defendants infringed the plaintiff's copyrights and did not qualify for a fair use defense. *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1997). The court did not accept the defendants' characterization that *The Seinfeld Aptitude Test* was a reference or critical work. In analyzing the first fair use factor, it stated:

*Any transformative purpose possessed by The SAT [(The Seinfeld Aptitude Test)] is slight to non-existent. We reject the argument that The SAT was created to educate Seinfeld viewers or to criticize, "expose," or otherwise comment upon Seinfeld. The SAT's purpose, as evidenced definitively by the statements of the book's creators and by the book itself, is to repackage Seinfeld to entertain Seinfeld viewers. The SAT's back cover makes no mention of exposing Seinfeld to its readers, for example, as a pitifully vacuous reflection of a puerile and pervasive television culture, but rather urges SAT readers to "open this book to satisfy [their] between-episode [Seinfeld] cravings." Golub, The SAT's author, described the trivia quiz book not as a commentary or a Seinfeld research tool, but as an effort to "capture Seinfeld's flavor in quiz book fashion." Finally, even viewing The SAT in the light most favorable to defendants, we find scant reason to conclude that this trivia quiz book seeks to educate, criticize, parody, comment, report upon, or research Seinfeld, or otherwise serve a transformative purpose. The book does not contain commentary or analysis about Seinfeld, nor does it suggest how The SAT can be used to research Seinfeld; rather, the book simply poses trivia questions. The SAT's plain purpose, therefore, is not to expose Seinfeld's "nothingness," but to satiate Seinfeld fans' passion for the "nothingness" that Seinfeld has elevated into the realm of protectable creative expression.*

As to the fourth fair use factor, the Second Circuit reasoned that "[u]nlike parody, criticism, scholarship, news reporting, or other transformative uses, The SAT substitutes for a derivative market that a television program copyright owner such as Castle Rock would in general develop or license others to develop." *Id.* at 145. Is *Castle Rock* reconcilable with *Bill Graham Archives* on this front?

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## 2. Indexing and Search

As you read the following decision, consider how the court understands transformativeness. Does it use the concept differently in the context at issue here than in previous cases?

### **Perfect 10, Inc. v. Amazon.com, Inc.**

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

IKUTA, J.:

{Recall the facts in this case from when you read another excerpt of it earlier in studying the right of public display in Chapter V.} ...

[1] In this case, the district court determined that Google’s use of thumbnails was not a fair use ....

[2] *Purpose and character of the use.* ...

[3] Google’s use of thumbnails is highly transformative.... Although an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information. Just as a parody has an obvious claim to transformative value because it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one, a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work. In other words, a search engine puts images in a different context so that they are transformed into a new creation.

[4] The fact that Google incorporates the entire Perfect 10 image into the search engine results does not diminish the transformative nature of Google’s use. As the district court correctly noted, ... even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.... Here, Google uses Perfect 10’s images in a new context to serve a different purpose....

[5] In conducting our case-specific analysis of fair use in light of the purposes of copyright, we must weigh Google’s superseding and commercial uses of thumbnail images against Google’s significant transformative use, as well as the extent to which Google’s search engine promotes the purposes of copyright and serves the interests of the public. Although the district court acknowledged the “truism that search engines such as Google Image Search provide great value to the public,” the district court did not expressly consider whether this value outweighed the significance of Google’s superseding use or the commercial nature of Google’s use. The Supreme Court, however, has directed us to be mindful of the extent to which a use promotes the purposes of copyright and serves the interests of the public. *See Campbell; Harper & Row; Sony.*

[6] We note that the superseding use in this case is not significant at present: the district court did not find that any downloads for mobile phone use had taken place [to show that Google’s use of thumbnails superseded Perfect 10’s right to sell its reduced-size images for use on cell phones]. Moreover, while Google’s use of thumbnails to direct users to AdSense partners containing infringing content adds a commercial dimension ..., the district court did not determine that this commercial element was significant. The district court stated that

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Google's AdSense programs as a whole contributed "\$630 million, or 46% of total revenues" to Google's bottom line, but noted that this figure did not "break down the much smaller amount attributable to websites that contain infringing content."

[7] We conclude that the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case. In reaching this conclusion, we note the importance of analyzing fair use flexibly in light of new circumstances. We are also mindful of the Supreme Court's direction that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell*, 510 U.S. at 579.

[8] Accordingly, we disagree with the district court's conclusion that because Google's use of the thumbnails could supersede Perfect 10's cell phone download use and because the use was ... commercial ..., this fair use factor weighed "slightly" in favor of Perfect 10. Instead, we conclude that the transformative nature of Google's use is more significant than any incidental superseding use or the minor commercial aspects of Google's search engine and website. Therefore, this factor weighs heavily in favor of Google.

[9] *The nature of the copyrighted work....*

[10] Here, the district court found that Perfect 10's images were creative but also previously published.... Once Perfect 10 has exploited this commercially valuable right of first publication by putting its images on the Internet for paid subscribers, Perfect 10 is no longer entitled to the enhanced protection available for an unpublished work. Accordingly the district court did not err in holding that this factor weighed only slightly in favor of Perfect 10.

[11] *The amount and substantiality of the portion used.* .... [Google]'s use of the entire photographic image was reasonable in light of the purpose of a search engine. Specifically, ... it was necessary for [Google] to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating website. If [Google] only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine.... [T]he district court did not err in finding that this factor favored neither party.

[12] *Effect of use on the market....* The district court here ... [held] that Google's use of thumbnails did not hurt Perfect 10's market for full-size images. We agree.

[13] Perfect 10 argues that the district court erred because the likelihood of market harm may be presumed if the intended use of an image is for commercial gain. However, this presumption does not arise when a work is transformative because market substitution is at least less certain, and market harm may not be so readily inferred. As previously discussed, Google's use of thumbnails for search engine purposes is highly transformative, and so market harm cannot be presumed.

[14] Perfect 10 also has a market for reduced-size images .... The district court held that "Google's use of thumbnails likely does harm the potential market for the downloading of [Perfect 10's] reduced-size images onto cell phones." The district court reasoned that persons who can obtain Perfect 10 images free of charge from Google are less likely to pay for a download, and the availability of Google's thumbnail images would harm Perfect 10's market for cell phone downloads. As we discussed above, the district court did not make a finding that Google users have downloaded thumbnail images for cell phone use. This potential harm to Perfect 10's market remains hypothetical. We conclude that this factor favors neither party.

[15] Having undertaken a case-specific analysis of all four factors, we now weigh these factors together in light of the purposes of copyright. In this case, Google has put Perfect 10's thumbnail images (along with millions of

other thumbnail images) to a use fundamentally different than the use intended by Perfect 10. In doing so, Google has provided a significant benefit to the public. Weighing this significant transformative use against the unproven use of Google’s thumbnails for cell phone downloads, and considering the other fair use factors, all in light of the purpose of copyright, we conclude that Google’s use of Perfect 10’s thumbnails is a fair use....

## NOTE

1. In ruling on the applicability of the fair use defense to Napster’s music file-sharing software in a lawsuit brought by music copyright holders, the Ninth Circuit elaborated on how to think about analysis of the first statutory factor with regard to free music downloads through a service that was not charging users:

*A commercial use weighs against a finding of fair use but is not conclusive on the issue. The district court determined that Napster users engage in commercial use of the copyrighted materials largely because (1) "a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester" and (2) "Napster users get for free something they would ordinarily have to buy." The district court's findings are not clearly erroneous.*

*Direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use. In the record before us, commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies. Plaintiffs made such a showing before the district court.*

A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001). Do you think this reasoning is sensible? Consider its relevance to *Perfect 10*.

### 3. Journalism and News

As you read the following case on news reporting, consider whether it is categorically likelier than other uses not enumerated in the preamble to § 107 to be a fair use. If so, why?

#### **Noelia Lorenzo Monge v. Maya Magazines, Inc.**

688 F.3d 1164 (9th Cir. 2012)

McKEOWN, J.:

[1] This appeal reads like a telenovela, a Spanish soap opera. It pits music celebrities, who make money by promoting themselves, against a gossip magazine, that makes money by publishing celebrity photographs, with a paparazzo, who apparently stole the disputed pictures, stuck in the middle. Noelia Lorenzo Monge and Jorge Reynoso, Latin American celebrities, claim that Maya Magazines, Inc. and Maya Publishing Group, LLC infringed their copyrights by publishing previously unpublished photos of their clandestine wedding in “TVNotas,” a Spanish-language celebrity gossip magazine. The district court granted Maya summary judgment on the ground that publication of the images was fair use under the Copyright Act of 1976. We disagree and



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reverse. The tantalizing and even newsworthy interest in the photos does not trump a balancing of the fair use factors. Simply put, Maya did not sustain its burden of establishing that its wholesale, commercial use of the previously unpublished photos constituted fair use....

[2] Noelia Lorenzo Monge is a pop singer and model. Jorge Reynoso is her manager and husband, and a music producer. Oscar Viqueira is a paparazzo who occasionally worked as a driver and bodyguard for the couple during their visits to Miami. Maya publishes multiple magazines, including the celebrity gossip magazine "TVNotas." In the past, Maya has paid Monge to pose for pictures published in its magazine, "H Para Hombres." Reynoso was paid \$25,000 for photos of his wedding to his former wife Pilar Montenegro, as well as \$40,000 for photos of his vacation in Paris with Montenegro....

[3] Monge and Reynoso were married at the "Little White Wedding Chapel" in Las Vegas, Nevada on January 3, 2007. Valuing their privacy, and Monge's image as a young, single pop singer, the couple went to great lengths to keep the wedding a secret: only the minister and two chapel employees witnessed the ceremony. Using Monge's camera, chapel employees took three photos of the wedding; later that night at least three more photos of Monge and Reynoso in their nuptial garb were also taken. The pictures were intended for the couple's private use. For two years Monge and Reynoso succeeded in keeping their wedding a secret, even from their families.

[4] In the summer of 2008, Reynoso used Viqueira's sport utility vehicle. Viqueira claims that after Reynoso returned the car, Viqueira found a memory chip in the ashtray. When Viqueira looked at the files on the memory chip, he found the photos of the couple's secret wedding, along with an assortment of other photos and videos. Viqueira tried to capitalize on the files to extort money he claimed Reynoso owed him. When this plan failed, in February 2009, Viqueira sold to Maya all of the electronic files he had taken "to recuperate the payment for [his] work." The price was \$1,500. The couple testified, and Maya does not contest, that Viqueira did not have permission to take or sell any of the images on the memory chip....

[5] Reynoso received a phone call from his mother in February 2009, berating him for getting married without telling her. Intent on secrecy, Reynoso denied the marriage to his own mother, but to no avail: She had already seen the wedding photos in a gossip magazine. Maya had published six of the stolen photos—three of the wedding ceremony and three of the wedding night—in Issue 633 of TVNotas. Prior to Issue 633, the photos were unpublished. The headline on the front cover of the magazine stated: "The Secret Wedding of Noelia and Jorge Reynoso in Las Vegas." The byline stated: "We even have photos of their first night as a married couple!" This text was positioned beside the wedding photo on the cover. Three photos were reproduced on the cover: one showing Monge lying on a bed revealing her underwear; one of Reynoso smoking a cigar in front of a neon Playboy logo; and one depicting the newly-married couple.

[6] Inside the magazine, the photos were featured over a two-page spread. "Apparently, the couple married in Las Vegas in January 2007!" was written on the top of the spread. "First and exclusive photos of the secret wedding of Noelia and Jorge Reynoso" was also printed in large font on the spread.

[7] The left side of the spread was comprised of one large wedding photo, a reprint from the cover. Printed on top of this photo was: "Only in TVNotas"; and the caption read: "In fact, a lot has been said about a supposedly secret wedding in Las Vegas, Nevada, that took place in January 2007, but until now, no one had shown photos of that memorable day. TVNotas got a hold of those photos and shows them to you now, exclusively."

[8] The right side of the spread was comprised of four photos. The photos showed the couple next to a priest, kissing in wedding attire, and at a bar. The picture of Monge on a bed with her underwear showing, also published on the cover, was repeated. The footer of this page stated: "Although the couple has declined to confirm their marriage, these photos that we got speak for themselves."



Figure 107: TVNotas cover featuring Monge and Reynoso



Figure 108: Photos of Monge and Reynoso wedding, as they appear in TVNotas

[9] These six images were the only ones Maya published from the assortment of approximately four hundred images and three videos obtained from Viqueira. Maya did not publish other supporting evidence such as a marriage certificate, choosing instead to rely solely on the sensational photos. The couple claims that the three wedding photos published comprise every wedding photo taken, and that the three photos of the wedding night comprise almost every photo of the wedding night. Maya does not challenge either contention. Nor is there any dispute that Maya generated revenue from sales of Issue 633. Maya also admits that, in the past, it has paid for exclusive rights to publish pictures of celebrity weddings, including other celebrity weddings depicted in Issue 633....

[10] Soon after publication of the pictures, the couple registered copyrights in five of the six published photos— all the published pictures, except the one where the couple appears together in front of a Playboy logo. Monge and Reynoso then filed a complaint against Maya asserting claims for copyright infringement ....

[11] .... The parties filed cross-motions for summary judgment. The district court granted Maya’s motion for summary judgment based on fair use ....

## Chapter VI – Fair Use

### A. Purpose and Character of the Use

[12] The first factor includes three principles that simultaneously complement and yet are in tension with one another in this case: news reporting; transformation; and commercial use.

#### 1. News Reporting

[13] The preamble to the fair use statute lists “news reporting” as an illustrative basis supporting fair use under this factor. 17 U.S.C. § 107. We have little doubt that the gossip magazine’s sensational coverage of the wedding qualifies as news reporting. Our role in this regard is not as a literary critic. While the parties agree that the pictures at issue are newsworthy, we must nevertheless proceed cautiously because “[t]he promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use ‘news report’ of the [work].” *Harper & Row*.

[14] Although news reporting is an example of fair use, it is not sufficient itself to sustain a per se finding of fair use. The fact that an article arguably is ‘news’ and therefore a productive use is simply one factor in a fair use analysis. In other words, fair use has bounds even in news reporting, and no per se “public interest” exception exists. Because Maya cannot simply take fair use refuge under the umbrella of news reporting, we analyze Maya’s coverage in light of two other considerations: the degree of transformation occasioned by Maya’s use; and the commercial nature of its use.<sup>6</sup>

#### 2. Transformation ...

[15] Transformation in the news reporting context has been litigated repeatedly in our circuit .... [W]e stated that despite the newsworthiness of ... videos at issue, which documented a beating during a riot in Los Angeles, their mere rebroadcast was not in itself transformative .... Similarly, a news station’s broadcast of an extraordinarily timely news segment concerning ongoing riots related to the Rodney King beating was held unfair .... Minor changes, such as placing voice-overs on video clips, do not necessarily transform a work.

[16] Arrangement of a work in a photo montage, however, can be transformative where copyrighted material is incorporated into other material....

[17] The pictures here are a clear, visual recording of the couple’s wedding and wedding night. Because publication of photographic evidence that constitutes proof of a newsworthy event is not automatically fair use, we turn to the degree to which Maya’s use transformed the works. Each of the individual images was reproduced essentially in its entirety; neither minor cropping nor the inclusion of headlines or captions transformed the copyrighted works. The reasoning regarding voice-overs ... applies with equal vigor to headlines and captions over still images.

[18] The individual images were marginally transformed, however, in other ways. The text and article accompanying the photos, as well as their arrangement in a photo montage, may give the pictures a further purpose. *Campbell* makes clear that the “heart” of a claim for transformative use is “the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.” Of

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<sup>6</sup> In evaluating the “purpose and character” factor, we apply the general rule that a party claiming fair use must act in a manner generally compatible with principles of good faith and fair dealing. The couple claims that the magazine acted in bad faith by failing to: seek permission from them; confirm that the copyrights in the images belonged to Viqueira; and seek any documentation as to ownership. Maya presents evidence, however, that it procured a written copyright assignment from Viqueira, and argues that it had no reason to believe that the known paparazzo did not have rights to the photos. While the couple’s arguments may call into question Maya’s good faith, Maya’s actions do not amount to an abuse of the good faith and fair dealing underpinnings of the fair use doctrine. Application of the defense is not foreclosed.

course, in *Campbell*, the question related to parody, a direct comment aimed at the original song. The dissent’s vivid description of the copyrighted photos does not undermine the conclusion that there was no real transformation of the photos themselves. Nor can it be said, as in *Campbell*, that Maya created a new work based on the photos.

[19] Even if the photos were not physically or creatively transformed, Maya claims that publication of the photos as an exposé amounted to transformation. In other words, Maya’s publication transformed the photos from their original purpose—images of a wedding night—into newsworthy evidence of a clandestine marriage.<sup>7</sup> In support, Maya relies heavily on *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18 (1st Cir. 2000), a First Circuit case that is distinguishable. In *Núñez*, a photographer sued a newspaper that published his copyrighted images of a woman that had won the title of Miss Universe Puerto Rico. In at least one photo, the woman appeared naked or nearly naked. After a local television station displayed the risqué photographs, the model was interviewed about her fitness to retain the Miss Universe Puerto Rico crown. Soon after, a local newspaper published the photographs without permission, along with several articles about the controversy.

[20] Although *Núñez* also involved news reporting, the similarities end there. The controversy there was whether the salacious photos themselves were befitting a Miss Universe Puerto Rico, and whether she should retain her title. In contrast, the controversy here has little to do with photos; instead, the photos here depict the couple’s clandestine wedding. The photos were not even necessary to prove that controverted fact—the marriage certificate, which is a matter of public record, may have sufficed to inform the public that the couple kept their marriage a secret for two years. Indeed, the public interest in the free flow of information is assured by the law’s refusal to recognize a valid copyright in facts. Under copyright law, Maya possesses an unfettered right to use any factual information revealed through the photos for the purpose of enlightening its audience, but it can claim no need to bodily appropriate the couple’s expression of that information by utilizing portions of the actual photos. Unlike here, in *Núñez* the pictures were the story, and the newspaper in *Núñez* did not seek to manufacture newsworthiness, nor did it scoop the story.<sup>8</sup> Also significant, the work in *Núñez* had already been distributed when the infringement occurred.

[21] We reiterate what the First Circuit emphasized, namely that there is no general newsworthiness exception. In other words, newsworthiness itself does not lead to transformation. The dissent’s doomsday prediction about the impact of our decision on investigative journalism is overblown.

[22] Maya’s purpose in publishing the photos was to expose the couple’s secret wedding, which was at odds with the couple’s purpose of documenting their private nuptials. But even an infringer’s separate purpose, by itself, does not necessarily create new aesthetics or a new work that alters the first work with new expression, meaning or message. A difference in purpose is not quite the same thing as transformation, and *Campbell* instructs that transformativeness is the critical inquiry under this factor.

[23] Maya did not transform the photos into a new work, as in *Campbell*, or incorporate the photos as part of a broader work .... Instead, unlike the thumbnail images at issue in *Perfect 10*, Maya left the inherent character of

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<sup>7</sup> While the couple undisputedly kept the wedding a secret, contrary to the dissent’s assertion, the record contains no evidence that the couple made affirmative representations about their marital status. There is no evidence that the couple repeatedly denied their marriage or made other public statements to the contrary. The district court erred in making such factual findings and likewise erred in inferring such representations during the summary judgment proceeding.

<sup>8</sup> Contrary to the dissent’s concern, where the content of the work is the story, such as a controversy over a congressman’s “salacious” photos or a golf celebrity’s “sext” messages, news reporters would have a better claim of transformation, which, far from being determinative, is simply one of the factors we consider in the fair use analysis. In any event, neither example the dissent provides pertains to a “private,” unpublished work—both Tiger Woods and Congressman Weiner distributed their “masterpieces” to others.

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the images unchanged. Maya’s use—wholesale copying sprinkled with written commentary—was at best minimally transformative.

### 3. Commercial Use

[24] Maya’s use was undisputedly commercial in nature. The gossip magazine makes no pretense that it is educational. It is a commercial publication.

[25] The Supreme Court has stated that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” *Sony*. Commercial use is a factor that tends to weigh against a finding of fair use because the user stands to profit from exploitation of the copyrighted material without paying the customary price. There is no dispute here that Maya is motivated by profits, and in fact profited from the publication of the pictures.

[26] Although Maya’s reporting on the clandestine wedding was newsworthy, newsworthiness, by itself, is insufficient to demonstrate fair use. Similarly, exposing truths in the public interest is not a bell weather of fair use. Maya’s minimal transformation of the photos is substantially undercut by its undisputed commercial use. On balance, the first factor is at best neutral, and does not support Maya’s claim of fair use.

### B. Nature of the Copyrighted Work

[27] Under the second factor, we address two aspects of the work: the extent to which it is creative and whether it is unpublished.

[28] Photos are generally viewed as creative, aesthetic expressions of a scene or image and have long been the subject of copyright....

[29] Admittedly, the point-and-shoot images here are hardly the work of famous photographers like Richard Avedon, Diane Arbus, or Annie Liebovitz. But neither are they entirely factual in nature, as Maya argues. Simply because a photo documents an event does not turn a pictorial representation into a factual recitation of the nature referenced in *Harper & Row*. Photos that we now regard as iconic often document an event—whether the flight of the Wright Brothers’ airplane, the sailor’s kiss in Times Square on V–J Day, the first landing on the moon, or the fall of the Berlin Wall.

[30] Although the published photos were not highly artistic in nature, they do have a defining and common characteristic—until Issue 633 hit the stands, they were unpublished. We pointedly note that we address the unpublished status of the photos only under copyright principles, not privacy law.... We begin with a basic principle: “the unpublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use.” *Harper & Row*. The Court specifically honed in on the unpublished status of the work, calling it “a critical element of its ‘nature.’” Accordingly, “[u]nder ordinary circumstances, the author’s right to control the first public appearance of his undissemated expression *will outweigh* a claim of fair use.” (emphases added)....

[31] We are unable to discern anything extraordinary about the situation here, and agree with the district court that Maya’s “publication undoubtedly supplanted Plaintiffs’ right to control the first public appearance of the photographs.” This finding further distinguishes *Núñez*, where the works were hardly confidential or secret and had already been distributed when the infringement occurred. In contrast, Maya’s headlines bragged about its exclusive photo spread of never before seen images.

[32] In analyzing the second factor, the nature of the work, we balance the copyright protection received by marginally creative works with the Supreme Court’s clear recognition that the unpublished status of the work



is a critical element. These aspects counter-balance each other, and because the case is not exceptional, we apply the Supreme Court’s admonition that with respect to unpublished works, this factor outweighs Maya’s claim of fair use.

### C. Amount and Substantiality of the Portion Used

[33] .... We examine both the quantitative and qualitative aspects of the portion of the copyrighted material taken. Quantitatively, every single photo of the wedding and almost every photo of the wedding night were published. With respect to the ceremony, none of the three published photos were heavily cropped. The same is true regarding the remaining photos, with the exception of the image where Reynoso is smoking a cigar. Qualitatively, the minimal cropping of each picture demonstrates that the “heart” of each individual copyrighted picture was published.

[34] The inquiry under this factor is a flexible one, rather than a simple determination of the percentage of the copyrighted work used. But we should be clear, Maya copied 100 percent of the copyrighted photos at issue. While we do not discredit Maya’s legitimate role as a news gatherer, its reporting purpose could have been served through publication of the couple’s marriage certificate or other sources rather than copyrighted photos. Even absent official documentation, one clear portrait depicting the newly married couple in wedding garb with the priest would certainly have sufficed to verify the clandestine wedding. Maya used far more than was necessary to corroborate its story—all three wedding images and three post-wedding photos. Thus, analyzing both the quantitative and qualitative aspects of the published material, this factor weighs against fair use....

### D. Effect upon the Potential Market

[35] The final fair use factor is “the effect of the use upon the *potential market* for or value of the copyrighted work.” 17 U.S.C. § 107(4) (emphasis added)... Maya argued, and the district court agreed, that no potential market for the pictures existed because the couple did not intend to sell publication rights to the photos. The district court’s legal conclusion that the potential market was destroyed due to the couple’s then-present intent regarding publication was in error....

[36] Under section 107, “potential market” means either an immediate or a delayed market, and includes harm to derivative works. Control over the delayed market includes future markets.... Even an author who had disavowed any intention to publish his work during his lifetime was entitled to protection of his copyright, first, because the relevant consideration was the “potential market” and, second, because he has the right to change his mind. The potential market for the photos exists independent of the couple’s present intent, and the district court’s decision to the contrary was error.

[37] Recognizing that fair use focuses on potential, not just actual, market harm, we note there is little doubt that an actual market exists for the photos. Maya does not offer any evidence of the relevant market or the lack of market harm from its publication other than broad, unsubstantiated statements in its brief. The magazine’s failure of proof is hardly surprising: The couple is undisputedly in the business of selling images of themselves and they have done so in the past and Maya itself paid \$1,500 for prior photos. Maya’s purchase of the pictures unequivocally demonstrates a market for the couple’s copyrighted pictures. And Maya is itself a participant in the market for celebrity wedding photos, as Issue 633 also featured pictures of another celebrity wedding with photos that the magazine purchased. The demand for the pictures in the actual market, just as in the potential market, dropped significantly upon Maya’s first and exclusive publication.

[38] The impact on the potential market for unpublished works is best illustrated by the Court’s analysis in *Harper & Row*: “The right of first publication implicates a threshold decision by the author whether and in what form to release his work.” In other words, “[p]ublication of an author’s expression before he has authorized its dissemination seriously infringes the author’s right to decide when and whether it will be made public, a factor

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not present in fair use of published works.” ... Monge and Reynoso have the right to change their mind. They reasonably could decide to sell the images for profit in the future, as Reynoso has demonstrably done in the past. Similarly, photos of Monge have also been marketed commercially, even to a Maya publication. While Maya boldly emphasized that its publication was “[f]irst and exclusive,” the couple’s intention at the time of the publication did not give Maya license to forever deprive them of their right to decide when, whether and in what form to release the photos. Thus, Maya’s claim that a confidential work receives less copyright protection because its author intends to maintain confidentiality finds no support; to the contrary, it has never been seriously disputed that the fact that the plaintiff’s work is unpublished is a factor tending to negate the defense of fair use.

[39] Although the photos were unpublished until Maya printed them for commercial gain, after the publication of Issue 633, the bottom literally dropped out of the market—neither Maya nor anybody else is likely to purchase these pictures from the couple. And it is obvious that any licensing value, to the extent the couple could find a willing licensee, is severely diminished. Maya’s un-authorized “first and exclusive” publication of the images substantially harmed the potential market because the publication directly competed with, and completely usurped, the couple’s potential market for first publication of the photos.

[40] In addition, 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. Unrestricted and widespread reproduction of Maya’s conduct would not only undermine the ability of celebrities to market images of themselves, but would also create incentives to pirate intellectual property.

[41] Our focus on the usurpation of the market further underscores the limited extent to which Maya transformed the works. In a true transformation, such as the parody in *Campbell*, it is more likely that the new work will not affect the market for the original because the parody and the original usually serve different market functions. Not so here. Maya did not transform the images and create a new work; instead, Maya’s mere duplication of the photos serves as a market replacement for the originals, making it likely that cognizable market harm to the originals will occur....

[42] This factor brings us full circle. We recognize that market harm may not be presumed in all instances; however, the harm to both the potential and actual markets based on wholesale copying of unpublished works demonstrates the logic of such a presumption in cases when a commercial use amounts to mere duplication of the entirety of an original. Because the facts demonstrate that Maya’s use was akin to mere duplication—affecting both the actual and potential market for the photos—even without the benefit of any presumption, this factor tips against fair use. In this case, the cat is out of the bag....

[43] Waving the news reporting flag is not a get out of jail free card in the copyright arena. Maya’s effort to document its exposé does not automatically trump the couple’s rights in its unpublished photos. Because the minimal transformation occasioned by Maya’s use is amply outweighed by its commercial use, the first factor does not support the magazine. And, even if it did, this factor does not dwarf the effect of the other factors. Upon balancing the copyright protection for these marginally creative works against their unpublished status, we see nothing exceptional about this case, and follow the Supreme Court’s direction that the second factor weighs against Maya in this instance. Next, Maya has not demonstrated that the third factor supports fair use. Maya used virtually the entirety of the wedding-related photographs; much more than was necessary to corroborate its story. Finally, the district court further erred by holding, without support, that the couple’s then-present intention destroyed the potential market for the photographic works. Maya’s use negatively affected both the potential and actual markets for the couple’s photos. Simply because the works were yet unpublished did not give Maya a license to pull the trigger and blow the couple’s cover.

[44] The balancing of these factors must be weighed against Maya’s burden to establish fair use. Without a single factor tipping in its favor, Maya has not met its burden. Because Maya’s affirmative defense of fair use fails as a matter of law, the district court erred by granting summary judgment in favor of Maya on the basis of fair use. Instead, the district court should have granted the couple’s summary judgment motion on this issue....

M. SMITH, J., dissenting:

[45] I respectfully dissent. Copyright is not an inviolable right that confers upon creators absolute control and ownership over their creations. Copyright protection was enacted “[t]o promote the Progress of Science and useful Arts” by creating a system in which authors and artists may reap the benefits of their creative contributions. U.S. CONST. art. I, § 8, cl. 8. The fair use doctrine was designed to act as the counterbalance to copyright by permitting courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.

[46] The majority’s fair use analysis in this case is inconsistent with Supreme Court precedent, and thwarts the public interests of copyright by allowing newsworthy public figures to control their images in the press. The majority contends that the public interest in a free press cannot trump a celebrity’s right to control his image and works in the media—even if that celebrity has publicly controverted the very subject matter of the works at issue. Under the majority’s analysis, public figures could invoke copyright protection to prevent the media’s disclosure of any embarrassing or incriminating works by claiming that such images were intended only for private use. The implications of this analysis undermine the free press and eviscerate the principles upon which copyright was founded. Although newsworthiness alone is insufficient to invoke fair use, public figures should not be able to hide behind the cloak of copyright to prevent the news media from exposing their fallacies. Accordingly, because three of the photos directly proved the fact of the Noelia Monge’s and Jorge Reynoso’s (the Couple) marriage, I would affirm the district court’s finding of fair use as to those wedding photos. However, because the remaining two photos did not directly prove the Couple’s wedding and therefore may have been unnecessary to the story, I would remand on the grounds that genuine issues of material fact exist, precluding summary judgment....

#### **A. Purpose and Character of Use**

[47] ....The use of photographic evidence to prove a controversial, salacious, or controverted fact weighs in favor of a finding of fair use. In the case of photographic works, a use may be found to be transformative if it complements the original work, rather than supersedes it. Ultimately, the more transformative the use, the less other factors, such as commerciality, weigh against a finding of fair use.

[48] The majority contends that Maya’s use of the photos was not transformative because (1) the photos were minimally changed with limited commentary; (2) the photos were offered for the exact same purpose—to document the wedding; and (3) the newsworthiness of the photos was insufficient to support a finding of fair use. I respectfully disagree on all three points.

##### **1. Editing, Arrangement, and Commentary**

[49] The majority attempts to diminish the significance of Maya’s commentary, cropping, re-sizing, and arrangement of the photos by presenting the publication as little more than a photo album. This is simply not accurate. The February 10, 2009 exposé consisted of a stylized two-page spread: on the left page was a full length image of Reynoso and Noelia embracing in the wedding chapel (originally cropped on the front cover), accompanied by a red text box on the lower left hand corner, with the print:

*Definitely, Noelia never ceases to amaze us. Whether it is her fights with her mother, her allegations of sexual abuse, her pornographic videos, her problems with the press or the behavior*

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*of her partner, Jorge Reynoso, the Puerto Rican singer always takes over the headlines, and this time is no exception. In fact, a lot has been said about a supposedly secret wedding in Las Vegas, Nevada, that took place in January 2007, but until now, no one had shown photos of that memorable day. TVNotas got a hold of those photos and shows them to you now, exclusively.*

[50] The second page consisted of a full page, four-photo montage: first, a different wedding picture of Noelia and Reynoso, next to the minister who married them, in the same wedding clothing, in the same chapel, with the caption, "POSING WITH THE MINISTER OF THEIR MARRIAGE," and accompanying the inset text, "Noelia Lorenzo-Monge and Jorge Reynoso looked happy, she in her stretch mini dress and a garter, he in a suit and tie." To the immediate right of that, a close up photo of Noelia and Reynoso kissing, with two inset captions, above "THEIR FIRST KISS AS MAN AND WIFE" and below, with the accompanying inset text, "After years of a relationship, Reynoso finally came through for her." In the second row, to the left was a photo of Noelia posing next to a seated Reynoso in a bar, his arm around Noelia and a cigar in his hand, with the caption above, "THEY WENT TO A BAR." Finally, to the right of that, a fourth photo of Noelia, laying on the bed in the same stretch white mini dress and black knee high boots, exposing her underwear and looking seductively at the camera, with the above caption, "THIS IS HOW THE SINGER ENDED UP IN THE NUPTIAL SUITE," also accompanied by a smaller caption inset, "Flirty, suggestive and happy, as every wife would be, the Singer posed ready for her wedding night." At the bottom of the page in bold, large black and white print read: "Though they didn't want to confirm their marriage, these images speak for themselves."

[51] Maya's article constituted much more than a haphazard republication of the Couple's photos. Framed around the Couple's refusals to confirm their marriage and to continue to represent Noelia as an "unwed sex symbol," Maya used the images as documentary evidence.... [A] photo montage, with accompanying commentary, may constitute a transformative use. Maya's commentary, editing, and arrangement of the photos added to, and ultimately changed, the original character of the images by advancing them as the basis of an exposé. The extent of Maya's editing, commentary, and arrangement thus weighs in favor of a finding of transformativeness.

### 2. Different Purpose

[52] The majority contends: "[i]n one sense, the parties' purposes are identical: Photographic documentation of the wedding." However, the majority repeatedly confuses the original subject matter of the photos with the intended use of the images. For the Couple, these were personal images, originally taken to capture the night of their marriage. After they were married, however, the photos were kept secret for the Couple's commercial gain. As Reynoso testified, the images were withheld from the public solely for "marketing" purposes, in order to maintain Noelia's "image of being a single singer appeal to young people."<sup>3</sup> ("Q: Why did you decide to have a secret wedding? A: I just mentioned to you that we're trying to protect her image of being a single singer to appeal to young people ... Q: Were there any other reasons? A: No, just marketing reasons."). For Maya, the photos were used as direct, documentary evidence of a clandestine wedding that had been hidden from the public for years, disproving the Couple's representations to the contrary. Indeed, media speculation regarding their relationship—even referring to them as husband and wife—had occurred years before the publication of the TVNotas expose in February 2009. Thus, the exposé served an entirely different purpose—indeed, a purpose contrary to the Couple's original intent to record and conceal their Las Vegas wedding. Accordingly, I would find that the fundamentally different purpose of Maya's use also weighs in favor of a finding of transformativeness.

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<sup>3</sup> Reynoso [has] been linked to other publicity stunts regarding Noelia's image as well, including leaking her sex-tape with former-boyfriend.

### 3. Newsworthiness

[53] The majority misguidedly relies on *Harper & Row* to criticize newsworthiness as a basis for fair use. However, *Harper & Row* is distinguishable on two critical points: (1) the excerpts at issue were soon-to-be published in a hard-cover memoir by their author, President Gerald Ford, and rights to publish excerpts had already been bid on, and sold to, competing magazines; and (2) Ford had never concealed or controverted the facts at issue in the infringing excerpts.

[54] Specifically, *Harper & Row* involved the surreptitious publication by a magazine, *The Nation*, of critical excerpts of Gerald Ford's soon-to-be published memoirs regarding the Nixon pardon. *The Nation* published the excerpts for commercial gain in an effort to "scoop" the hardcover release, as well as its competitors, who had rightfully bid for publication rights. Here, there was no such subterfuge. The Couple had concealed the truth of their relationship from the public, and even from their close friends and family. The photographs proved not only their marriage, but when, where, and how it took place, and for how long the Couple had hidden the truth. In short, Maya's exposé constituted a transformative use because it shed light upon the Couple's covert nuptials.

[55] The majority contends that if a work is created for "private use," and then subsequently published without permission because it is newsworthy, that the publication cannot constitute a fair use. The logical extension of the majority's reasoning could produce absurd results. If public, newsworthy figures were permitted to invoke a "private use" exception, Tiger Woods, for example, could have claimed copyright in his sexting messages and, without fair use, the media would have no right to quote them.<sup>4</sup> Likewise, without a fair use defense, the media would have only been able to describe former Congressman Anthony Weiner's self-portraits, rather than reprint the images themselves. Thus, the majority attempts to distinguish Maya's use of the wedding photos from "legitimate" fair uses—namely, when the "content of the photographs is the story." In so doing, the majority oversimplifies Maya's use of the images and superimposes the court as the final arbiter of what is sufficiently "salacious" or "controversial" to constitute a "legitimately" fair use. This is a dangerous intrusion upon both the sanctity of the free press and copyright.

[56] The majority's proposed test would effectively vest in the courts the power to circumscribe news stories and the sources upon which the media may rely. The line between when a copyrighted work "is the story" and when it is not is not nearly as clear as the majority contends. Thus, if the "story" of Tiger Woods' infidelities was limited to merely exposing his multiple mistresses, the majority's test would still prohibit the "fair use" of his sexts because his liaisons could be proven by other, non-copyrighted sources. Likewise, it is unclear whether republication of former Congressman Weiner's seminude tweets and graphic Facebook messages would be deemed entirely necessary to investigate the organized "cover-up" of his online trysts. News stories have multiple purposes, layers, and facets and, by their nature, evolve over time. Here, while the TVNotas article began as a factual exposé, the story did not end there. Noelia and Reynoso were celebrities who carefully concealed their relationship to maintain Noelia's image as a single sex symbol. Maya's use of the photos was thus integral to exposing to the public the depth of their relationship and the actual events of their secret Vegas wedding night—the venue, the clothing, the after-party. Contrary to the majority's contentions, a mere marriage certificate would not suffice.

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<sup>4</sup> The majority implies that Woods' sext messages and former Congressman Weiner's tweets and Facebook messages were public because they "distributed their 'masterpieces' to others." The majority's contention is contrary to well-established copyright law. The Copyright Act defines "Publication" as "the *distribution* of copies or phonorecords of a work to the *public* by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 101 (emphasis added). Merely sending suggestive self-portraits or "sexts" to another, private person does not launch a work into the public domain. Woods' "writings" were likely always intended to be kept secret between author and inspiration. And, but for one rogue tweet, former Congressman Weiner's "works" were kept privately between him and his desired recipients.



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[57] Accordingly, I would reject the majority’s approach and hold that the fundamentally different purpose underlying Maya’s publication of the photos constituted a transformative use, and thus counterbalanced the commerciality of the use such that the first fa[ct]or weighs in favor of a finding of fair use.

### B. Nature of Copyrighted Works

[58] In determining the nature of the original work, we decide first, the extent to which it is a creative work enjoying broader copyright protection as opposed to a factual work requiring broader dissemination, and second, whether it is unpublished, in which case the right of first publication is implicated. Because the law generally recognizes a greater need to disseminate factual works, the “nature of the work” inquiry is designed to distinguish between the levels of “core” protectability of copyright. Indeed, ... where a copyrighted work is informational and factual and news; each characteristic strongly favors a finding of fair use. The tiered approach thus reflects the understanding that certain types of works—namely, fictional, creative, and unpublished works—fall closer to the core of copyright, and other types of works—namely, factual, informative, and published works—enjoy generally less protection.

[59] The majority reasons that the nature of the original photographs weighs against a finding of fair use because they were unpublished. The majority’s analysis is flawed on two grounds: (1) the majority ignores the threshold determination that the photos were factual and documentary in nature; and (2) even if the unpublished nature of the work did cut against a finding of fair use, the majority fails to address the fact that the “nature of the work” analysis is much less significant in cases of transformative use.

[60] The majority concedes that the photographs were essentially factual in nature, noting that the images were taken as “[p]hotographic documentation of the wedding” and characterizing the photos as “point-and-shoot,” and thus “not highly artistic in nature.” Thus, as a threshold matter, the factual and informative nature of the photographs places them outside the core of copyright protection. While the photos were admittedly unpublished, this factor is less significant because the photographs were documentary in nature. Moreover, even if the unpublished nature of the photos did undercut their factual character, any possible impact is further mitigated by the fact that Maya’s exposé constituted a transformative use. Although the majority attempts to use the unpublished nature of the works to trump their factual character and Maya’s transformative use, we have held in cases of transformative use, the nature of the work carries less significance. Accordingly, I would hold that the second factor weighs either neutrally or slightly in favor of a finding of fair use.

### C. Substantiality of Use

[61] When excerpts of a work or compilation of works are taken to tell a narrative different from, and independent of, the collection in its entirety, we may consider the selection and proportion of the excerpts used against the collection as a whole. Although taking the “heart” of a work generally weighs against a finding of fair use, selectivity in using only what is necessary cuts both ways and must be considered in evaluating the amount and substantiality of the use.

[62] The majority concludes that because Maya minimally cropped and altered the five wedding photographs that, qualitatively and quantitatively, the substantiality of the use weighs against a finding of fair use.... The majority’s analysis lacks any basis in law or fact.

[63] Contents unseen, Maya purchased a memory disk of four hundred photos and three videos of Noelia and Reynoso. Maya paid for that disk, in its entirety, as a compilation. Indeed, the paparazzo, Oscar Viqueira, received \$1,500 for the disk, as a whole. From that disk, Maya culled through, extracted, and ultimately published five photos from the Couple’s secret wedding night to use in its photo montage exposé. Out of all of the possible photos that Maya could have selected from the disk, Maya chose those five because they told the story of the Couple’s clandestine nuptials in Las Vegas.

[64] The majority fails to address, let alone refute, the impact of Maya's selectivity because it contends that Maya's use of the photographs must be evaluated individually ....

[65] The reality is that Maya carefully selected the photos out of four hundred possible photos and videos on the disk because it wanted to use them to tell the wedding story. Three of those five photos depicted the wedding itself. The law dictates, at least as to the three photos that depicted the wedding ceremony, that Maya's relative restraint in choosing only those photos supports a finding of fair use. Admittedly, Maya's use of the additional two other photos, of the Couple at the bar, and of Noelia on the nuptial bed, was not necessary to prove the story of their secret wedding. Maya's use of these photos is thus qualitatively distinct from the three images directly depicting the wedding. Accordingly, I would hold that, at least as to the three photos of the wedding ceremony, Maya's selectivity and restraint from using more from the four hundred possible images and videos weighs either neutrally or slightly in favor of a finding of fair use.

#### **D. Harm to Potential and Future Markets**

[66] The majority contends that the Couple's intention never to release the photographs, let alone sell them, does not affect our analysis of harm to potential and future markets. The majority relies on ... the proposition that even if an author completely disavowed any intention to publish his work during his lifetime that unauthorized publication of the work by another could still harm potential and future markets. But the majority's selective analysis mischaracterizes our [case law]. In [a previous case], we specifically exempted from the aforementioned reasoning publications involving "market failure," in which an author specifically keeps a work from being published for the purposes of concealing information:

*When an owner refuses to license because he is concerned that defendant's work will substitute for his own work or derivative works, the owner is representing not only his own interest, but also the interest of his potential customers and thus the public interest. Market failure should be found only when the defendant can prove that the copyright owner would refuse to license out of a desire unrelated to the goals of copyright-notably a desire to keep certain information from the public.*

[67] Here, the Couple's intention never to publish photos must frame our market harm analysis because their intention was based upon their desire to conceal their secret Las Vegas wedding from the public. The fact that on the date of publication, nearly two years after their wedding, they had still refused to even tell their families, let alone the general public, proves this to be true. The application of the market failure exception makes sense here because the Couple sought to conceal their wedding out of their own interests, namely, to preserve Noelia's image as a "sex symbol," in spite of the common public interest in informing their fans and followers of the event. Accordingly, in light of the Couple's intention to continue to conceal their Las Vegas nuptials, I would hold that the market failure harm exception to the harm to potential and future markets militates toward a finding of fair use....

[68] Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. To satisfy a celebrity couple's desire to control their public images, the majority extends inapposite case law to undercut the fair use doctrine and the free press. Rather than follow the majority's course, I would affirm the district court's grant of summary judgment on fair use grounds, at least as to the three images of the wedding in the exposé, and remand due to disputed issues of material fact regarding the use of the remaining two nonwedding photos.

### NOTE

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1. A number of issues arise in the context of journalism as practiced contemporarily. For example, can news reporters claim fair use of photographs of relatively unknown people taken from their social media profiles when news breaks about them? What about professional news organizations' reuse of amateur photography and videography of breaking news posted online?

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## 4. Education

The following case concerns educational uses of copyrighted material. Consider whether it deserves preferential status as a fair use. Do all educational uses deserve preferential status? If not, how would you distinguish those that deserve preferential status from those that do not?

### **Cambridge University Press v. Carl V. Patton**

769 F.3d 1232 (11th Cir. 2014)

TJOFLAT, J.:

[1] Three publishing houses, Cambridge University Press, Oxford University Press, and Sage Publications, Inc. ... allege that members of the Board of Regents of the University System of Georgia and officials at Georgia State University ... infringed Plaintiffs' copyrights by maintaining a policy which allows GSU professors to make digital copies of excerpts of Plaintiffs' books available to students without paying Plaintiffs. Plaintiffs alleged seventy-four individual instances of infringement, which took place during three academic terms in 2009. The District Court issued an order finding that Plaintiffs failed to establish a prima facie case of infringement in twenty-six instances, that the fair use defense applied in forty-three instances, and that Defendants had infringed Plaintiffs' copyrights in the remaining five instances.

[2] ... Because we find that the District Court's fair use analysis was in part erroneous, we reverse the District Court's judgment ....

[3] Like many recent issues in copyright law, this is a case in which technological advances have created a new, more efficient means of delivery for copyrighted works, causing copyright owners and consumers to struggle to define the appropriate boundaries of copyright protection in the new digital marketplace. These boundaries must be drawn carefully in order to assure that copyright law serves its intended purpose, which is to promote the creation of new works for the public good by providing authors and other creators with an economic incentive to create. If copyright's utilitarian goal is to be met, we must be careful not to place overbroad restrictions on the use of copyrighted works, because to do so would prevent would-be authors from effectively building on the ideas of others. Some unpaid use of copyrighted materials must be allowed in order to prevent copyright from functioning as a straightjacket that stifles the very creative activity it seeks to foster. If we allow too much unpaid copying, however, we risk extinguishing the economic incentive to create that copyright is intended to provide.

[4] The fair use doctrine provides a means by which a court may ascertain the appropriate balance in a given case if the market actors cannot do so on their own. Fair use is a defense that can excuse what would otherwise be an infringing use of copyrighted material.... Here, we are called upon to determine whether the unpaid

copying of scholarly works by a university for use by students—facilitated by the development of systems for digital delivery over the Internet—should be excused under the doctrine of fair use....

[5] Plaintiffs do not publish the large, general textbooks commonly used in entry-level university courses. Rather, Plaintiffs publish advanced scholarly works, which might be used in upper-level undergraduate and graduate courses. Cambridge and Oxford publish scholarly books and journals on niche subject areas. Their works involved in this case include research-based monographs, ... instructional books, trade books, and other works on academic topics. Sage primarily publishes books on the social sciences. All three plaintiffs publish, in addition to works by a single author, edited books which feature the contributions of multiple authors.

[6] Plaintiffs market their books to professors who teach at universities and colleges. Cambridge and Oxford regularly send complimentary copies of their publications to professors. Sage provides trial copies upon request. Plaintiffs intend that professors use Plaintiffs' publications in their work and assign them as required reading so that students will purchase them.

[7] Rather than assigning whole books, some professors assign or suggest excerpts from Plaintiffs' books as part of the curriculum for their courses. Professors might do this by putting the work on reserve at the university library so that students can visit the library to read an assigned excerpt. Or, professors might prepare a bound, photocopied, paper "coursepack" containing excerpts from several works for a particular course. Often, a third-party copy shop assembles these coursepacks, performing the copying and binding, obtaining the necessary licenses from publishers, and charging students a fee for the finished coursepack. In recent years, however, universities—following the trend with regard to distribution of many forms of media the world over—have increasingly abandoned paper coursepacks in favor of digital distribution of excerpts over the Internet.

[6] ... GSU maintains two on-campus systems known as "ERes" and "uLearn" for digital distribution of course materials to students....

[7] ERes and uLearn have been popular at GSU. For example, during the Spring 2009 term, paper coursepacks were offered for only about fifteen courses, while instructors in hundreds of courses made readings available on ERes. Thus, the excerpts from larger works that make up some portion of course readings at GSU, and which were once distributed to students via a paper coursepack purchased at the university bookstore, are now largely distributed to students via digital download on the Internet, that the students pay for only indirectly via tuition and fees.

[8] There exists a well-established system for the licensing of excerpts of copyrighted works. Copyright Clearance Center is a not-for-profit corporation .... [that] licenses excerpts from copyrighted works for a fee, acting on behalf of publishers who choose to make their works available through CCC. These licenses are called "permissions." All three Plaintiffs offer excerpt-specific permissions to photocopy or digitally reproduce portions of their works, which may be obtained directly from Plaintiffs or through CCC. Permissions are not, however, available for licensed copying of excerpts from all of Plaintiffs' works.

[9] CCC offers a variety of permissions services to various categories of users, including corporate, educational, and institutional users. One such service, the Academic Permissions Service, licenses educational users to make print copies on a per-use basis. CCC also offers an electronic course content service for licensing of digital excerpts by educational users on a per-use basis, that—in 2008, the year for which evidence on the question was presented—offered only a small percentage of the works that were available through APS. ECCS is designed for electronic reserve systems such as ERes and uLearn. Software is available that would allow GSU library personnel to place an order with CCC for a permission to provide students with a digital copy of an excerpt via ERes. CCC also offers an Academic Repertory License Service which affords subscribers access to excerpts from a set group of about nine million titles, approximately 17 percent of which are available in digital

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format. Sage participates in ARLS and did so in 2009, Oxford participated in 2009 with regard to journals but not books, and Cambridge does not participate. GSU did not and does not subscribe to this program.

[10] When the GSU bookstore assembles and sells a paper coursepack containing excerpts from copyrighted works, GSU pays permissions fees for use of the excerpts. The central issue in this case is under what circumstances GSU must pay permissions fees to post a digital copy of an excerpt of Plaintiffs' works to ERes or uLearn....

[11] On April 15, 2008, Plaintiffs filed their original complaint .... Plaintiffs alleged that hundreds of GSU professors have made thousands of copyrighted works—including works owned or controlled by Plaintiffs—available on GSU's electronic reserve systems without obtaining permissions from copyright holders, and that GSU's administration facilitated, encouraged, and induced this practice. Plaintiffs sued Defendants in their official capacities as GSU officials, claiming ... copyright infringement .... Defendants ... assert[ed] a defense of fair use because any alleged use of copyrighted materials was for the purpose of teaching, scholarship or research and for nonprofit educational purposes...

[12] On February 17, 2009, [GSU] announced a new copyright policy ..., which went into effect the same day. Under the 2009 Policy, a revised version of which remains in effect today, GSU professors who wish to post an excerpt of a copyrighted work on ERes or uLearn for distribution to their students must first determine whether they believe that doing so would be fair use. In order to make this determination, professors must fill out a "Fair Use Checklist" for each excerpt.

[13] The Checklist allows GSU professors to perform a version of the analysis a court might perform should the professor claim fair use in a subsequent copyright infringement suit.... For each factor, the Checklist provides several criteria that purportedly weigh either for or against a finding of fair use, each with a corresponding checkbox.<sup>10</sup> The Checklist instructs professors to check each criterion that applies, and then add up the checks to determine whether the factor weighs in favor of or against a finding of fair use. After making this tally, the Checklist explains that "[w]here the factors favoring fair use outnumber those against it, reliance on fair use is justified. Where fewer than half the factors favor fair use, instructors should seek permission from the rights holder." Thus, under the 2009 Policy, a GSU professor may post an excerpt of a copyrighted work on ERes or uLearn without obtaining a permission from the copyright holder if the professor first decides that doing so would be protected by the doctrine of fair use, according to the criteria set forth in the Checklist....

[14] ... [T]he District Court issued an order holding that Defendants had infringed Plaintiffs' copyright in five of the seventy-four instances at issue....

[15] .... The District Court held that the first fair use factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," "strongly favor[ed] Defendants" in all instances because "[t]his case involves making copies of excerpts of copyrighted works for teaching students and for scholarship ... [and so] [t]he use is for strictly nonprofit educational purposes."

[16] The District Court held that the second fair use factor, "the nature of the copyrighted work," favored Defendants in all instances because it found—after undertaking an individualized review of all of the works at

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<sup>10</sup> For example, the Fair Use Checklist provides that the nonprofit educational use of an excerpt favors a finding of fair use, whereas commercial activity weighs against a finding of fair use. Use of a factual or nonfiction work favors a finding of fair use, whereas use of a highly creative work (art, music, novels, films, plays, poetry, fiction) weighs against a finding of fair use. Use of a small portion of a work favors a finding of fair use, whereas use of a large portion or entire work weighs against a finding of fair use. A use that has no significant effect on the market or potential market for the copyrighted work favors a finding of fair use, whereas a use that sign[i]ficantly impairs the market or potential market for the copyrighted work or a derivative weighs against a finding of fair use.



issue for which it found that Plaintiffs had made a prima facie case of infringement—that “the books involved in this case are properly classified as informational in nature, within the spectrum of factual materials and hence favoring fair use.”

[17] The District Court held that the third fair use factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” “favor[ed] either Plaintiffs or Defendants, depending on the amount taken from each book.”

[18] After hearing testimony from several GSU professors as to the reasoning behind their choice of a particular excerpt and how use of that excerpt furthered the professor’s goals for a particular class, the District Court found that all of the selections furthered the legitimate educational purposes of the courses in which they were used. The District Court also found that some professors’ educational purposes were furthered by using whole chapters of books, because chapters typically contain a complete treatment of a topic.

[19] The District Court then determined that “[t]he right approach is to select a percentage of pages which reasonably limits copying and to couple that with a reasonable limit on the number of chapters which may be copied.” Accordingly, the District Court held that

*[w]here a book is not divided into chapters or contains fewer than ten chapters, unpaid copying of no more than 10 percent of the pages in the book is permissible under factor three.... Where a book contains ten or more chapters, the unpaid copying of up to but no more than one chapter (or its equivalent) will be permissible under fair use factor three.... The chapter or other excerpt must fill a demonstrated, legitimate purpose in the course curriculum and must be narrowly tailored to accomplish that purpose. Where the foregoing limitations are met factor three will favor fair use, i.e., will favor Defendants. Otherwise factor three will favor Plaintiffs....*

[20] With regard to the fourth fair use factor, “the effect of the use upon the potential market for or value of the copyrighted work,” the District Court found that “Defendants’ use of small excerpts did not affect Plaintiffs’ actual or potential sales of books” because they do not substitute for the books. However, the District Court found that Defendants’ use of excerpts may be at the cost of Plaintiffs’ licensing revenues, and so may affect the market for licensing of excerpts. Thus, the District Court concluded that, in reviewing the individual instances of alleged infringement, it would analyze fair use factor four as follows:

*[W]here permissions are readily available from CCC or the publisher for a copy of a small excerpt of a copyrighted book, at a reasonable price, and in a convenient format (in this case, permissions for digital excerpts), and permissions are not paid, factor four weighs heavily in Plaintiffs’ favor. Factor four weighs in Defendants’ favor when such permissions are not readily available.*

[21] .... [I]n cases where no evidence showed whether digital permissions were readily available for excerpts of a particular work, the District Court found that the fourth fair use factor favored Defendants.

[22] The District Court took into account two additional considerations. First, the District Court noted that, based on testimony that “royalties are not an important incentive for academic writers,” and on a presumption that that academic authors publish primarily to enhance their professional reputation and contribute to academic knowledge, “[t]here is no reason to believe that allowing unpaid, nonprofit academic use of small excerpts in controlled circumstances would diminish creation of academic works.” Second, the District Court found that “it is consistent with the principles of copyright to apply the fair use doctrine in a way that promotes the dissemination of knowledge, and not simply its creation.” The District Court noted that the evidence demonstrates that academic permissions income does not represent a significant portion of Plaintiffs’ overall revenue. Thus, the District Court found that a slight diminution of Plaintiffs’ permissions income caused by the District Court’s findings of fair use would not appreciably harm Plaintiffs’ ability to publish scholarly works. On

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the other hand, the District Court found, “[m]aking small free excerpts available to students would further the spread of knowledge.” ...

[23] In weighing the fair use factors to assess each of the forty-eight instances of alleged infringement for which the District Court found that Plaintiffs had established a prima facie case, the District Court held that fair use applied whenever at least three of the four factors favored Defendants. Because the District Court found that factors one and two favored Defendants in all cases, the District Court essentially held that fair use applied each time a professor posted an excerpt that fell within the 10 percent-or-one-chapter limit on allowable copying the District Court had set (such that factor three favored Defendants) and each time there was no evidence that digital permissions were available for excerpts of the work in question (such that factor four favored Defendants).

[24] With regard to factor three, in thirty-five of the forty-eight claims of infringement, the District Court found that the copying was “decidedly small” because it fell within the 10 percent-or-one-chapter limit, and so factor three favored Defendants. In the other thirteen cases, the copying exceeded the 10 percent-or-one-chapter limit, and so the District Court held that factor three favored Plaintiffs.

[25] With regard to factor four, in seventeen of the forty-eight cases, the District Court found that the parties had presented no evidence regarding licensing availability, but because the District Court placed the burden on this issue on Plaintiffs, the District Court found that factor four favored Defendants. In the other thirty-one cases, the District Court found that Plaintiffs had made digital licensing available for excerpts of the work in question, and so, because there was a “ready market for licensed digital excerpts of [the] work in 2009,” factor four strongly favored Plaintiffs....

[26] [O]f the forty-eight instances of alleged infringement for which the District Court found that Plaintiffs had established a prima facie case, the District Court held that Defendants had infringed Plaintiffs’ copyrights in five instances and that the fair use defense applied in forty-three. The District Court concluded that the 2009 Policy had caused the five instances of infringement. In reaching this conclusion, the District Court noted that the 2009 Policy did not limit copying to excerpts which were “decidedly small,” did not prohibit the copying of multiple chapters from the same book, and did not provide sufficient guidance in determining the effect the use of an excerpt may have on the market for or value of the copyrighted work....

[27] .... On appeal, ... Plaintiffs argue that the District Court’s application of the fair use factors was legally flawed, and that the District Court consequently erred in finding that the fair use defense applied in forty-three of the forty-eight remaining instances of alleged infringement....

[28] ... [T]he examples enumerated in the preamble of § 107—“criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”—are meant to give some idea of the sort of activities the courts might regard as fair use under the circumstances. This listing was not intended to be exhaustive, or to single out any particular use as presumptively a fair use....

[29] Plaintiffs ... argue that the District Court erred in giving each of the four factors equal weight, essentially taking a mechanical “add up the factors” approach, finding fair use if three factors weighed in favor of fair use and one against and vice versa, and only performing further analysis in case of a “tie.” We agree that the District Court’s arithmetic approach was improper.

[30] Congress, in the Copyright Act, spoke neither to the relative weight courts should attach to each of the four factors nor to precisely how the factors ought to be balanced. However, the Supreme Court has explained that the four statutory factors may not be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright. In keeping with this approach, a given factor may be more or less important in determining whether a particular use should be considered fair under the

specific circumstances of the case. As such, the four factors do not mechanistically resolve fair use issues.... Accordingly, we find that the District Court erred in giving each of the four factors equal weight, and in treating the four factors as a simple mathematical formula. As we will explain, because of the circumstances of this case, some of the factors weigh more heavily on the fair use determination than others...

[31] Plaintiffs [also] argue that the District Court erred in its application of each of the four fair use factors. Plaintiffs' argument centers on a comparison of the circumstances of the instant case to those of the so-called "coursepack cases," in which courts rejected a defense of fair use for commercial copyshops that assembled paper coursepacks containing unlicensed excerpts of copyrighted works for use in university courses.

[32] In *Basic Books, Inc. v. Kinko's Graphics Corp.*, publishing houses sued Kinko's, a commercial copyshop, alleging that Kinko's infringed the publishers' copyrights when it copied excerpts from the publishers' books, without permission and without payment of a license fee, and sold the copies for profit in bound, paper coursepacks to students for use in college courses. 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991). The District Court rejected Kinko's claim that its use of the excerpts was fair use ....

[33] Similarly, in *Princeton University Press v. Michigan Document Services, Inc.*, the Sixth Circuit upheld the District Court's ruling that Michigan Document Services, a commercial copyshop, was not entitled to a fair use defense when it reproduced substantial portions of copyrighted academic works and sold the copies in bound, paper coursepacks to students for use in courses at the University of Michigan, without obtaining permission from the copyright holder. 99 F.3d 1381, 1383 (6th Cir. 1996) (en banc).

[34] In essence, Plaintiffs argue that the coursepack cases should have guided the District Court's analysis in this case, because GSU cannot alter the fair use calculus simply by choosing to distribute course readings in an electronic rather than paper format....

[35] ... [B]ecause the fair use analysis is highly fact-specific and must be performed on a work-by-work basis, the coursepack cases provide guidance but do not dictate the results here, which must be based upon a careful consideration of the circumstances of the individual instances of alleged infringement involved in this case....

[36] Here, Defendants' use of excerpts of Plaintiffs' works is not transformative. The excerpts of Plaintiffs' works posted on GSU's electronic reserve system are verbatim copies of portions of the original books which have merely been converted into a digital format. Although a professor may arrange these excerpts into a particular order or combination for use in a college course, this does not imbue the excerpts themselves with any more than a *de minimis* amount of new meaning. See *Princeton University Press*, 99 F.3d at 1389 ("[I]f you make verbatim copies of 95 pages of a 316-page book, you have not transformed the 95 pages very much—even if you juxtapose them to excerpts from other works.").

[37] Nor do Defendants use the excerpts for anything other than the same intrinsic purpose—or at least one of the purposes—served by Plaintiffs' works: reading material for students in university courses. Although an electronic reserve system may facilitate easy access to excerpts of Plaintiffs' works, it does nothing to transform those works. Rather, Defendants' use of excerpts of Plaintiffs' works supersedes the objects of the original creation. Were this element by itself dispositive, we would be compelled to find that the first factor weighs against a finding of fair use.

[38] However, we must also consider under the first factor whether Defendants' use is for a nonprofit educational purpose, as opposed to a commercial purpose.... Indeed, the Supreme Court has recognized in dicta that nonprofit educational use may weigh in favor of a finding of fair use under the first factor, even when nontransformative. *Campbell*, 510 U.S. at 579 n.11 ("The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.").

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[39] Because copyright has always been used to promote learning, allowing some leeway for educational fair use furthers the purpose of copyright by providing students and teachers with a means to lawfully access works in order to further their learning in circumstances where it would be unreasonable to require permission. But, as always, care must be taken not to allow too much educational use, lest we undermine the goals of copyright by enervating the incentive for authors to create the works upon which students and teachers depend.

[40] In the coursepack cases, *Princeton University Press* and *Basic Books*, the first factor weighed against a finding of fair use when the nontransformative, educational use in question was performed by a for-profit copyshop, and was therefore commercial.... [T]he[se] court[s] refused to allow the defendants, who were engaged in commercial operations, to stand in the shoes of students and professors in claiming that their making of multiple copies of scholarly works was for nonprofit educational purposes.

[41] However, in both of the coursepack cases, the courts expressly declined to conclude that the copying would fall outside the boundaries of fair use if conducted by professors, students, or academic institutions...

[42] Thus, the question becomes whether Defendants' use of Plaintiffs' works is truly a nonprofit educational use under § 107(1), and if so, whether this places sufficient weight on the first factor scales to justify a finding that this factor favors fair use despite the nontransformativeness of Defendants' use.

[43] GSU is a nonprofit educational institution. While this is relevant, our inquiry does not end there: we must consider not only the nature of the user, but the use itself.

[44] Defendants' use of Plaintiffs' works in the teaching of university courses is clearly for educational purposes. Nevertheless, it is not entirely clear that use by a nonprofit entity for educational purposes is always a "nonprofit" use as contemplated by § 107(1). The Supreme Court has explained that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562....

[45] Under [one] line of reasoning, Defendants' educational use of Plaintiffs' works is a for-profit use despite GSU's status as a nonprofit educational institution, and despite the fact that GSU does not directly sell access to Plaintiffs' works on Eres and uLearn. Defendants "exploited" Plaintiffs' copyrighted material for use in university courses without "paying the customary price"—a licensing fee. Defendants profited from the use of excerpts of Plaintiffs' works—however indirectly—because GSU collects money from students in the form of tuition and fees (which students pay in part for access to ERes and uLearn) and reduces its costs by avoiding fees it might have otherwise paid for the excerpts.

[46] However, this reasoning is somewhat circular, and hence of limited usefulness to our fair use inquiry. Of course, any unlicensed use of copyrighted material profits the user in the sense that the user does not pay a potential licensing fee, allowing the user to keep his or her money. If this analysis were persuasive, no use could qualify as "nonprofit" under the first factor. Moreover, if the use is a fair use, then the copyright owner is not entitled to charge for the use, and there is no "customary price" to be paid in the first place...

[47] Although GSU certainly benefits from its use of Plaintiffs' works by being able to provide the works conveniently to students, and profits in the sense that it avoids paying licensing fees, Defendants' use is not fairly characterized as commercial exploitation. Even if Defendants' use profits GSU in some sense, we are not convinced that this type of benefit is indicative of commercial use. There is no evidence that Defendants capture significant revenues as a direct consequence of copying Plaintiffs' works. At the same time, the use provides a broader public benefit—furthering the education of students at a public university.

[48] Thus, we find that Defendants' use of Plaintiffs' works is of the nonprofit educational nature that Congress intended the fair use defense to allow under certain circumstances. Furthermore, we find this sufficiently weighty that the first factor favors a finding of fair use despite the nontransformative nature of the use.

[49] The text of the fair use statute highlights the importance Congress placed on educational use. The preamble to the statute provides that fair uses may include "teaching (including multiple copies for classroom use), scholarship, or research" and the first factor singles out "nonprofit educational purposes." 17 U.S.C. § 107. The legislative history of § 107 further demonstrates that Congress singled out educational purposes for special consideration. In the years leading up to passage of the Copyright Act of 1976 (which introduced § 107), Congress devoted considerable attention to working out the proper scope of the fair use defense as applied to copying for educational and classroom purposes, going so far as to include in a final report the Classroom Guidelines developed by representatives of educator, author, and publisher groups at the urging of Congress....

[50] Accordingly, we find that the District Court did not err in holding that the first factor favors a finding of fair use. Nevertheless, because Defendants' use of Plaintiffs' works is nontransformative, the threat of market substitution is significant. We note that insofar as the first factor is concerned with uses that supplant demand for the original, this factor is closely related to the fourth fair use factor, the effect on the potential market for the work. We will thus revisit this concern when we analyze the fourth factor....

[51] Here, the District Court held that "[b]ecause all of the excerpts are informational and educational in nature and none are fictional, fair use factor two weighs in favor of Defendants." We disagree....

[52] Defendants argue that GSU professors chose the excerpts of Plaintiffs' works for their factual content, not for any expressive content the works may contain, noting that several professors testified that if the use of a particular excerpt was not a fair use, they would have found another source. Of course, other professors testified that they chose particular excerpts because of the author's interpretative originality and significance. Regardless of whether GSU faculty chose the excerpts for their expressive or factual content, the excerpts were copied wholesale—facts, ideas, and original expression alike. Which aspect the secondary user was interested in is irrelevant to the disposition of the second factor.

[53] Accordingly, we find that the District Court erred in holding that the second factor favored fair use in every instance. Where the excerpts of Plaintiffs' works contained evaluative, analytical, or subjectively descriptive material that surpasses the bare facts necessary to communicate information, or derives from the author's experiences or opinions, the District Court should have held that the second factor was neutral, or even weighed against fair use in cases of excerpts that were dominated by such material. That being said, the second fair use factor is of relatively little importance in this case....

[54] Here, the District Court found that the third factor favored fair use in instances where Defendants copied no more than 10 percent of a work, or one chapter in case of a book with ten or more chapters. The District Court's blanket 10 percent-or-one-chapter benchmark was improper. The fair use analysis must be performed on a case-by-case/work-by-work basis. We must avoid hard evidentiary presumptions and eschew a rigid, bright-line approach to fair use. By holding that the third factor favored fair use whenever the amount of copying fell within a 10 percent-or-one-chapter baseline, the District Court abdicated its duty to analyze the third factor for each instance of alleged infringement individually....

[55] Defendants also argue that the District Court's 10 percent-or-one-chapter approach is supported by the record. Defendants' explain that a CCC white paper, *Using Electronic Reserves: Guidelines and Best Practices for Copyright Compliance* (2011), identifies "best practices" for electronic reserves, stating that electronic reserve materials should be limited to "small excerpts" and that "[m]ost experts advise using a single article or ... chapter of a copyrighted work...." However, even if we accept that the 10 percent-or-one-chapter approach



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represents a general industry “best practice” for electronic reserves, this is not relevant to an individualized fair use analysis....

[56] Accordingly, .... we find that the District Court erred in applying a 10 percent-or-one-chapter safe harbor in its analysis of the individual instances of alleged infringement. The District Court should have analyzed each instance of alleged copying individually, considering the quantity and the quality of the material taken—including whether the material taken constituted the heart of the work—and whether that taking was excessive in light of the educational purpose of the use and the threat of market substitution....

[57] We agree with the District Court that the small excerpts Defendants used do not substitute for the full books from which they were drawn. Plaintiffs offered no trial testimony or evidence showing that they lost any book sales in or after 2009 on account of any actions by anyone at Georgia State. Thus, the District Court did not err in finding that Defendants’ use of small excerpts did not affect Plaintiffs’ actual or potential sales of books.

[58] However, CCC’s various programs for academic permissions—and Plaintiffs’ own permissions programs—constitute a workable market through which universities like GSU may purchase licenses to use excerpts of Plaintiffs’ works. Plaintiffs contend that, by failing to purchase digital permissions to use excerpts of Plaintiffs’ works on ERes and uLearn, Defendants caused substantial harm to the market for licenses, and that widespread adoption of this practice would cause substantial harm to the potential market. Plaintiffs also argue that, even if a license for a digital excerpt of a work was unavailable, this should not weigh in favor of fair use because the copyright owner is not obliged to accommodate prospective users.

[59] Defendants argue that, because permissions income for academic books represents a minuscule percentage of Plaintiffs’ overall revenue, Defendants’ practices have not caused substantial harm to the market for Plaintiffs’ works, and would not do so even if widely adopted. Defendants further argue that unavailability of licensing opportunities for particular works should weigh in favor of fair use.

[60] We note that it is not determinative that programs exist through which universities may license excerpts of Plaintiffs’ works. In other words, the fact that Plaintiffs have made paying easier does not automatically dictate a right to payment....

[61] .... [A]bsent evidence to the contrary, if a copyright holder has not made a license available to use a particular work in a particular manner, the inference is that the author or publisher did not think that there would be enough such use to bother making a license available. In such a case, there is little damage to the publisher’s market when someone makes use of the work in that way without obtaining a license, and hence the fourth factor should generally weigh in favor of fair use. This is true of Plaintiffs’ works for which no license for a digital excerpt was available...

[62] .... A publisher determines the value of a work, which is set by the anticipated demand for the work. Thus, the greater the demand for the work—the greater the market—the more the publisher will pay the author of the work up front, and the more the publisher will endeavor to make the work widely available. If a publisher makes licenses available for some uses but not for others, this indicates that the publisher has likely made a reasoned decision not to enter the licensing market for those uses, which implies that the value of that market is minimal.

[63] With regard to the works for which digital permissions were unavailable, Plaintiffs choose to enter those works into some markets—print copies of the whole work, or perhaps licenses for paper copies of excerpts—but not the digital permission market. This tells us that Plaintiffs likely anticipated that there would be little to no demand for digital excerpts of the excluded works and thus saw the value of that market as de minimis or zero. If the market for digital excerpts were in fact de minimis or zero, then neither Defendants’ particular use

nor a widespread use of similar kind would be likely to cause significant market harm. Of course, if publishers choose to participate in the market the calculation will change.

[64] In its individual analysis under the fourth factor of each of the forty-eight works for which it found Plaintiffs had made a prima facie case of infringement, the District Court performed a sufficiently nuanced review of the evidence regarding license availability. Where the evidence showed that there was a ready market for digital excerpts of a work in 2009, the time of the purported infringements, the District Court found that there was small—due to the amount of money involved—but actual damage to the value of Plaintiffs' copyright. The District Court also properly took into account that widespread use of similar unlicensed excerpts could cause substantial harm to the potential market. Thus, where there was a license for digital excerpts available, the District Court generally held that the fourth factor weighed against a finding of fair use. In close cases, the District Court went further and examined the amount of permissions income a work had generated in order to determine how much this particular revenue source contributed to the value of the copyright in the work, noting that where there is no significant demand for excerpts, the likelihood of repetitive unpaid use is diminished. Where there was no evidence in the record to show that a license for digital excerpts was available—as was the case for seventeen works published by Oxford and Cambridge—the District Court held that the fourth factor weighted in favor of fair use. We find that the District Court's analysis under the fourth factor was correct, and that the District Court properly took license availability into account in determining whether the fourth factor weighted for or against fair use....

[65] Accordingly, we REVERSE the judgment of the District Court. We ... REMAND for further proceedings consistent with this opinion.

## NOTES

1. On remand, the district court stated that it "estimates the initial, approximate respective weights of the four factors as follows: 25% for factor one, 5% for factor two, 30% for factor three, and 40% for factor four." It then performed individualized inquiries for each work, always having the first factor favor fair use, concluding that 44 of the 48 claims of infringement were fair uses. On appeal again, the Eleventh Circuit remanded again to the district court to revisit its analysis because the court "failed to break free of its erroneous arithmetic approach and to give each excerpt the holistic review the Act demands." *Cambridge University Press v. Albert*, 906 F.3d 1290, 1300 (11th Cir. 2018). The district court consequently evaluated individually each work used and concluded that the plaintiffs prevailed on 11 of their claims of infringement but the defendants' claims of fair use succeeded as to the 37 other infringement claims. *Cambridge Univ. Press v. Becker*, 446 F. Supp. 3d 1145 (N.D. Ga. 2020).

2. Do you think fair use analyses ought to distinguish between materials specifically produced for the education market and materials that happen to be used in the course of education? Why, or why not?

3. *Campbell* recognized that many educational uses might not be transformative but still be fair use, pointing to the appearance of making "multiple copies for classroom use" in § 107's preamble. After reading *Cambridge University Press*, do you think that transformativeness plays a key or subsidiary role in fair use determinations regarding education? For varied analyses of how to understand which educational uses of copyrighted material ought to be considered fair (particularly on the ground that they are transformative), see Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149 (1998); Brandon Butler, *Transformative Teaching and Educational Fair Use After Georgia State*, 48 CONN. L. REV. 473 (2015); Peter Jaszi, *Fair Use and Education: The Way Forward*, 25 LAW & LITERATURE 33 (2013).

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4. Fair use analysis is explicitly sensitive to the market effects of allowing a defendant's use of a copyrighted work by requiring consideration of the fourth statutory factor: "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4).

An important question arises as to which effects are permissible to consider. Pertinently, any copyright plaintiff can assert against a defendant that has used the plaintiff's work without a license that the plaintiff has suffered pecuniary harm from not having obtained a licensing fee for the work. Furthermore, the plaintiff can contend more generally that if the defendant does not have to pay a licensing fee for their use, then other third parties would start using the plaintiff's work in similar contexts without paying, which in turn would harm the defendant's licensing market more broadly. Given that a plaintiff can always assert these market harms, should a court always weigh them against fair use under the fourth factor? *Campbell* suggests that this argument should not always be given much weight: "The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop." *Campbell*, 510 U.S. at 592. That is, the likelihood of a market's development affects the relevance of its consideration. For scholarship on evaluating the empirical likelihood of a market's development, see Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015); Frank Pasquale, *Breaking the Vicious Circularity: Sony's Contribution to the Fair Use Doctrine*, 55 CASE W. RES. L. REV. 777 (2005).

5. The Second Circuit worked through these principles in *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994), in holding that photocopies by a Texaco researcher of technical journal articles are not fair use. The court reasoned that the fourth fair use factor favored the copyright holders even "[t]hough the [journal] publishers still have not established a conventional market for the direct sale and distribution of individual articles." The court elaborated that the publishers "have created, primarily through the [Copyright Clearance Center (CCC)], a workable market for institutional users to obtain licenses for the right to produce their own copies of individual articles via photocopying." Even though the market was not yet "conventional," major businesses used its photocopying licenses, including Texaco. The court concluded that:

*Despite Texaco's claims to the contrary, it is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier. This notion is not inherently troubling: it is sensible that a particular unauthorized use should be considered "more fair" when there is no ready market or means to pay for the use, while such an unauthorized use should be considered "less fair" when there is a ready market or means to pay for the use. The vice of circular reasoning arises only if the availability of payment is conclusive against fair use. Whatever the situation may have been previously, before the development of a market for institutional users to obtain licenses to photocopy articles, it is now appropriate to consider the loss of licensing revenues in evaluating "the effect of the use upon the potential market for or value of" journal articles. It is especially appropriate to do so with respect to copying of articles from [the journal at issue in this case], a publication as to which a photocopying license is now available. We do not decide how the fair use balance would be resolved if a photocopying license for [this journal's] articles were not currently available.*

Judge Jacobs dissented, criticizing the majority's analysis of the effect on the market as circular. He reasoned that "[t]he CCC scheme is neither traditional nor reasonable; and its development into a real market is subject to substantial impediments. There is a circularity to the problem: the market will not crystallize unless courts reject the fair use argument that Texaco presents; but, under the statutory test, we cannot declare a use to be an infringement unless (assuming other factors also weigh in favor of the secondary user) there is a market to be harmed. At present, only a fraction of journal publishers have sought to exact these fees. I would hold that this fourth factor decisively weighs in favor of Texaco, because there is no normal market in photocopy licenses, and no real consensus among publishers that there ought to be one." Judge Jacobs further noted as to the CCC

scheme, “[t]here is nothing workable, and there is no market.” Has the Second Circuit broken free of the circularity involved in analyzing the effect of a use on the market? Or is Judge Jacobs right?

6. Since *Texaco*, courts have elaborated on what constitutes a “traditional, reasonable, or likely to be developed market[.]” The Second Circuit has indicated that a copyright owner cannot create a market for criticism and other transformative uses as a way to count that against defendants making such uses:

*Just as secondary users may not exploit markets that original copyright owners would in general develop or license others to develop even if those owners had not actually done so, copyright owners may not preempt exploitation of transformative markets, which they would not in general develop or license others to develop, by actually developing or licensing others to develop those markets. Thus, by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets.*

*Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 145 n.11 (2d Cir. 1998).

7. Scholars observe that third parties’ risk aversion with respect to copyright infringement can cause both copyright protection to grow and fair use to shrink over time. As James Gibson explains, due to risk aversion, “copyright users ... seek licenses even when they have a good fair use claim .... This practice of unneeded licensing feeds back into doctrine because ... the fair use defense looks to the existence vel non of a licensing market when defining the reach of the copyright entitlement. The result is a steady, incremental, and unintended expansion of copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users.” James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007).

## 5. Indexing and Search: Redux

### The Authors Guild v. Google, Inc.

804 F.3d 202 (2d Cir. 2015)

LEVAL, J.: ...

[1] Google’s Library Project, which began in 2004, involves bi-lateral agreements between Google and a number of the world’s major research libraries. Under these agreements, the participating libraries select books from their collections to submit to Google for inclusion in the project. Google makes a digital scan of each book, extracts a machine-readable text, and creates an index of the machine-readable text of each book. Google retains the original scanned image of each book, in part so as to improve the accuracy of the machine-readable texts and indices as image-to-text conversion technologies improve.

[2] Since 2004, Google has scanned, rendered machine-readable, and indexed more than 20 million books, including both copyrighted works and works in the public domain. The vast majority of the books are non-fiction, and most are out of print. All of the digital information created by Google in the process is stored on servers protected by the same security systems Google uses to shield its own confidential information.

[3] The digital corpus created by the scanning of these millions of books enables the Google Books search engine. Members of the public who access the Google Books website can enter search words or terms of their own choice, receiving in response a list of all books in the database in which those terms appear, as well as the number of times the term appears in each book. A brief description of each book, entitled “About the Book,”

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gives some rudimentary additional information, including a list of the words and terms that appear with most frequency in the book. It sometimes provides links to buy the book online and identifies libraries where the book can be found. The search tool permits a researcher to identify those books, out of millions, that do, as well as those that do not, use the terms selected by the researcher. Google notes that this identifying information instantaneously supplied would otherwise not be obtainable in lifetimes of searching.

[4] No advertising is displayed to a user of the search function. Nor does Google receive payment by reason of the searcher's use of Google's link to purchase the book.

[5] The search engine also makes possible new forms of research, known as "text mining" and "data mining." Google's "ngrams" research tool draws on the Google Library Project corpus to furnish statistical information to Internet users about the frequency of word and phrase usage over centuries. This tool permits users to discern fluctuations of interest in a particular subject over time and space by showing increases and decreases in the frequency of reference and usage in different periods and different linguistic regions. It also allows researchers to comb over the tens of millions of books Google has scanned in order to examine word frequencies, syntactic patterns, and thematic markers and to derive information on how nomenclature, linguistic usage, and literary style have changed over time. The district court gave as an example "track[ing] the frequency of references to the United States as a single entity ('the United States is') versus references to the United States in the plural ('the United States are') and how that usage has changed over time."

[6] The Google Books search function also allows the user a limited viewing of text. In addition to telling the number of times the word or term selected by the searcher appears in the book, the search function will display a maximum of three "snippets" containing it. A snippet is a horizontal segment comprising ordinarily an eighth of a page. Each page of a conventionally formatted book in the Google Books database is divided into eight non-overlapping horizontal segments, each such horizontal segment being a snippet. (Thus, for such a book with 24 lines to a page, each snippet is comprised of three lines of text.) Each search for a particular word or term within a book will reveal the same three snippets, regardless of the number of computers from which the search is launched. Only the first usage of the term on a given page is displayed. Thus, if the top snippet of a page contains two (or more) words for which the user searches, and Google's program is fixed to reveal that particular snippet in response to a search for either term, the second search will duplicate the snippet already revealed by the first search, rather than moving to reveal a different snippet containing the word because the first snippet was already revealed. Google's program does not allow a searcher to increase the number of snippets revealed by repeated entry of the same search term or by entering searches from different computers. A searcher can view more than three snippets of a book by entering additional searches for different terms. However, Google makes permanently unavailable for snippet view one snippet on each page and one complete page out of every ten—a process Google calls "blacklisting."

[7] Google also disables snippet view entirely for types of books for which a single snippet is likely to satisfy the searcher's present need for the book, such as dictionaries, cookbooks, and books of short poems. Finally, since 2005, Google will exclude any book altogether from snippet view at the request of the rights holder by the submission of an online form....

[8] Plaintiffs brought this suit on September 20, 2005, as a putative class action on behalf of similarly situated, rights-owning authors. After several years of negotiation, the parties reached a proposed settlement that would have resolved the claims on a class-wide basis. The proposed settlement allowed Google to make substantially more extensive use of its scans of copyrighted books than contemplated under the present judgment, and provided that Google would make payments to the rights holders in return. On March 22, 2011, however, the district court rejected the proposed settlement as unfair to the class members who relied on the named plaintiffs to represent their interests.



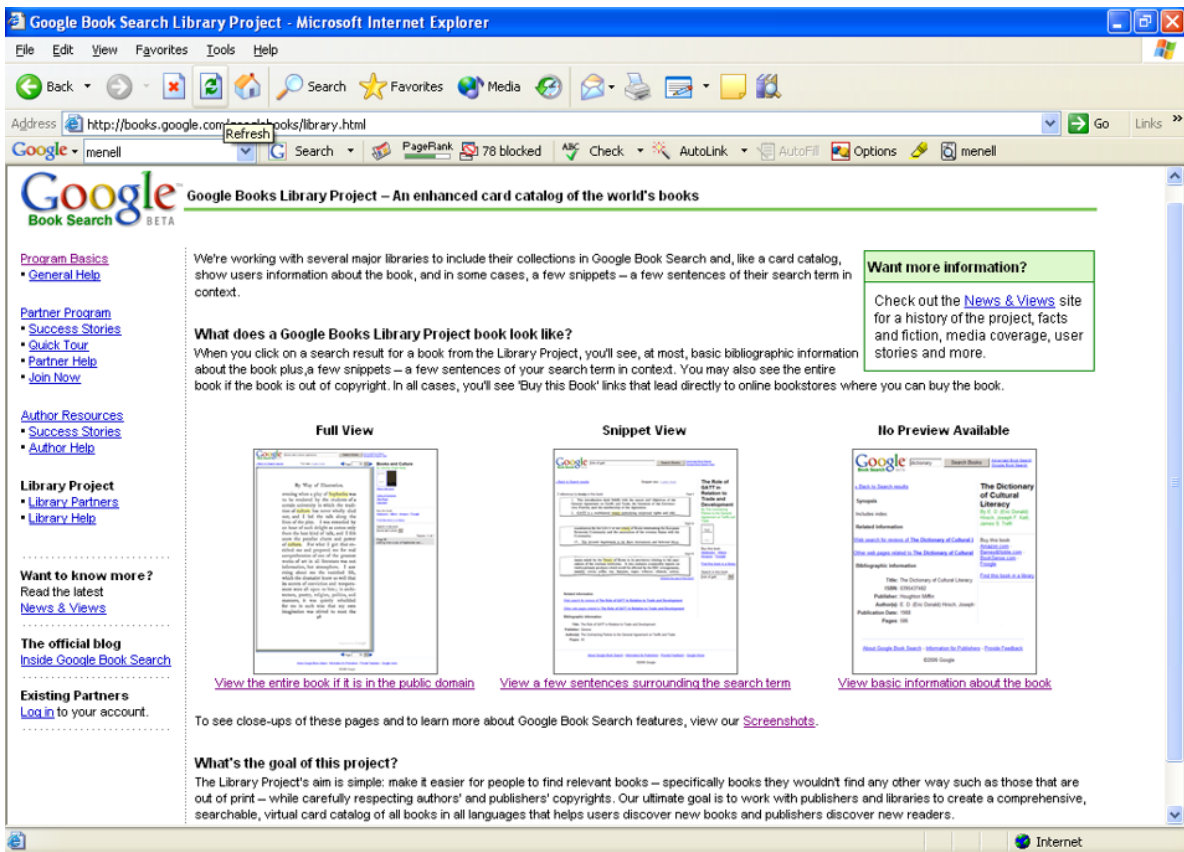


Figure 109: Google Books overview

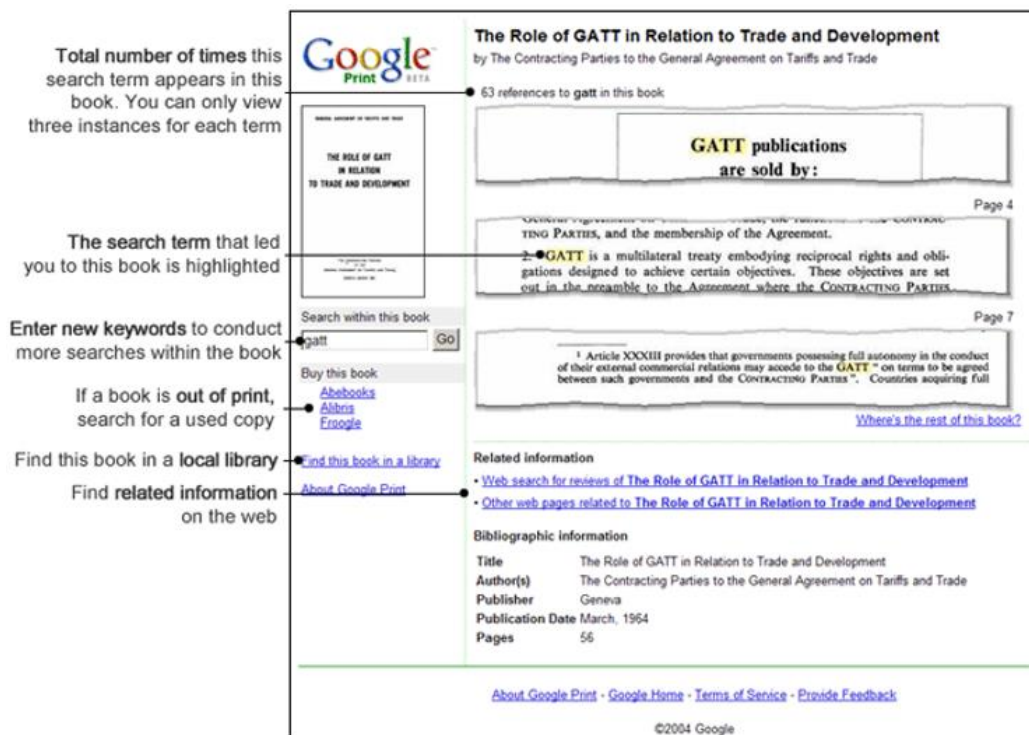


Figure 110: Google Books snippet view overview

[g] On October 14, 2011, Plaintiffs filed a fourth amended class action complaint, which is the operative complaint for this appeal. The district court certified a class on May 31, 2012. Google appealed from the certification, and moved in the district court for summary judgment on its fair use defense. Plaintiffs cross-moved in the district court for summary judgment. On the appeal from the class certification, our court—

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questioning whether it was reasonable to infer that the putative class of authors favored the relief sought by the named plaintiffs—provisionally vacated that class certification without addressing the merits of the issue, concluding instead that “resolution of Google’s fair use defense in the first instance will necessarily inform and perhaps moot our analysis of many class certification issues.”

[10] On November 14, 2013, the district court granted Google’s motion for summary judgment, concluding that the uses made by Google of copyrighted books were fair uses, protected by § 107. Upon consideration of the four statutory factors of § 107, the district court found that Google’s uses were transformative, that its display of copyrighted material was properly limited, and that the Google Books program did not impermissibly serve as a market substitute for the original works....

### II. The Search and Snippet View Functions

#### A. Factor One

[11] (1) *Transformative purpose.* ... [T]ransformative uses tend to favor a fair use finding because a transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright’s overall objective of contributing to public knowledge.

[12] The word “transformative” cannot be taken too literally as a sufficient key to understanding the elements of fair use. It is rather a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author’s original text will necessarily support a finding of fair use.... [T]he would-be fair user of another’s work must have justification for the taking. A secondary author is not necessarily at liberty to make wholesale takings of the original author’s expression merely because of how well the original author’s expression would convey the secondary author’s different message. Among the best recognized justifications for copying from another’s work is to provide comment on it or criticism of it. A taking from another author’s work for the purpose of making points that have no bearing on the original may well be fair use, but the taker would need to show a justification. This part of the Supreme Court’s discussion [in *Campbell*] is significant in assessing Google’s claim of fair use because, as discussed extensively below, Google’s claim of transformative purpose for copying from the works of others is to provide otherwise unavailable information about the originals.

[13] A further complication that can result from oversimplified reliance on whether the copying involves transformation is that the word “transform” also plays a role in defining “derivative works,” over which the original rights holder retains exclusive control. Section 106 of the Act specifies the “exclusive right[]” of the copyright owner “(2) to prepare derivative works based upon the copyrighted work.” The statute defines derivative works largely by example, rather than explanation. The examples include “translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation,” to which list the statute adds “any other form in which a work may be ... *transformed.*” ... [P]aradigmatic examples of derivative works include the translation of a novel into another language, the adaptation of a novel into a movie or play, or the recasting of a novel as an e-book or an audiobook. While such changes can be described as transformations, they do not involve the kind of transformative purpose that favors a fair use finding. The statutory definition suggests that derivative works generally involve transformations in the nature of *changes of form*. 17 U.S.C. § 101. By contrast, copying from an original for the purpose of criticism or commentary on the original or provision of information about it, tends most clearly to satisfy *Campbell’s* notion of the “transformative” purpose involved in the analysis of Factor One.<sup>18</sup>

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<sup>18</sup> The Seventh Circuit takes the position that the kind of secondary use that favors satisfaction of the fair use test is better described as a “complementary” use, referring to how a hammer and nail complement one another in that together they

[14] With these considerations in mind, we first consider whether Google’s search and snippet views functions satisfy the first fair use factor with respect to Plaintiffs’ rights in their books....

[15] (2) *Search Function*. We have no difficulty concluding that Google’s making of a digital copy of Plaintiffs’ books for the purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose, in the sense intended by *Campbell*....

[16] ... [T]he purpose of Google’s copying of the original copyrighted books is to make available significant information *about those books*, permitting a searcher to identify those that contain a word or term of interest, as well as those that do not include reference to it. In addition, through the ngrams tool, Google allows readers to learn the frequency of usage of selected words in the aggregate corpus of published books in different historical periods. We have no doubt that the purpose of this copying is the sort of transformative purpose described in *Campbell* as strongly favoring satisfaction of the first factor....

[17] (3) *Snippet View*. ... [T]he Google Books search function allows searchers to read snippets from the book searched .... Snippet view adds important value to the basic transformative search function, which tells only whether and how often the searched term appears in the book. Merely knowing that a term of interest appears in a book does not necessarily tell the searcher whether she needs to obtain the book, because it does not reveal whether the term is discussed in a manner or context falling within the scope of the searcher’s interest. For example, a searcher seeking books that explore Einstein’s theories, who finds that a particular book includes 39 usages of “Einstein,” will nonetheless conclude she can skip that book if the snippets reveal that the book speaks of “Einstein” because that is the name of the author’s cat. In contrast, the snippet will tell the searcher that this is a book she needs to obtain if the snippet shows that the author is engaging with Einstein’s theories.

[18] Google’s division of the page into tiny snippets is designed to show the searcher just enough context surrounding the searched term to help her evaluate whether the book falls within the scope of her interest (without revealing so much as to threaten the author’s copyright interests). Snippet view thus adds importantly to the highly transformative purpose of identifying books of interest to the searcher. With respect to the first factor test, it favors a finding of fair use (unless the value of its transformative purpose is overcome by its providing text in a manner that offers a competing substitute for Plaintiffs’ books, which we discuss under factors three and four below).

[19] (4) *Google’s Commercial Motivation*. Plaintiffs also contend that Google’s commercial motivation weighs in their favor under the first factor.... Although Google has no revenues flowing directly from its operation of the Google Books functions, Plaintiffs stress that Google is profit-motivated and seeks to use its dominance of book

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achieve results that neither can accomplish on its own. *Ty, Inc. v. Publ’ns Int’l, Ltd.*, 292 F.3d 512, 517–518 (7th Cir.2002). We do not find the term “complementary” particularly helpful in explaining fair use. The term would encompass changes of form that are generally understood to produce derivative works, rather than fair uses, and, at the same time, would fail to encompass copying for purposes that are generally and properly viewed as creating fair uses. When a novel is converted into film, for example, the original novel and the film ideally complement one another in that each contributes to achieving results that neither can accomplish on its own. The invention of the original author combines with the cinematographic interpretive skills of the filmmaker to produce something that neither could have produced independently. Nonetheless, at least when the intention of the film is to make a “motion picture version” of the novel without undertaking to parody it or to comment on it, the film is generally understood to be a derivative work, which under § 106, falls within the exclusive rights of the copyright owner. Although they complement one another, the film is not a fair use. At the same time, when a secondary work quotes an original for the purpose of parodying it, or discrediting it by exposing its inaccuracies, illogic, or dishonesty, such an undertaking is not within the exclusive prerogatives of the rights holder; it produces a fair use. Yet, when the purpose of the second is essentially to destroy the first, the two are not comfortably described as complementaries that combine to produce together something that neither could have produced independently of the other. We recognize, as just noted above, that the word “transformative,” if interpreted too broadly, can also seem to authorize copying that should fall within the scope of an author’s derivative rights. Attempts to find a circumspect shorthand for a complex concept are best understood as suggestive of a general direction, rather than as definitive descriptions.

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search to fortify its overall dominance of the Internet search market, and that thereby Google indirectly reaps profits from the Google Books functions...

[20] Our court has ... repeatedly rejected the contention that commercial motivation should outweigh a convincing transformative purpose and absence of significant substitutive competition with the original.

[21] While we recognize that in some circumstances, a commercial motivation on the part of the secondary user will weigh against her, especially, as the Supreme Court suggested, when a persuasive transformative purpose is lacking, we see no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose, together with the absence of significant substitutive competition, as reasons for granting fair use. Many of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit.

### B. Factor Two

[22] The second fair use factor directs consideration of the "nature of the copyrighted work." While the "transformative purpose" inquiry discussed above is conventionally treated as a part of first factor analysis, it inevitably involves the second factor as well. One cannot assess whether the copying work has an objective that differs from the original without considering both works, and their respective objectives.

[23] The second factor has rarely played a significant role in the determination of a fair use dispute. The Supreme Court in *Harper & Row* made a passing observation in dictum that, "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy." 471 U.S. 539, 563 (1985). Courts have sometimes speculated that this might mean that a finding of fair use is more favored when the copying is of factual works than when copying is from works of fiction. However, while the copyright does not protect facts or ideas set forth in a work, it does protect that author's manner of expressing those facts and ideas. At least unless a persuasive fair use justification is involved, authors of factual works, like authors of fiction, should be entitled to copyright protection of their protected expression. The mere fact that the original is a factual work therefore should not imply that others may freely copy it. Those who report the news undoubtedly create factual works. It cannot seriously be argued that, for that reason, others may freely copy and re-disseminate news reports.<sup>21</sup>

[24] ... While each of the three Plaintiffs' books in this case is factual, we do not consider that as a boost to Google's claim of fair use. If one (or all) of the plaintiff works were fiction, we do not think that would change in any way our appraisal. Nothing in this case influences us one way or the other with respect to the second factor considered in isolation. To the extent that the "nature" of the original copyrighted work necessarily combines with the "purpose and character" of the secondary work to permit assessment of whether the secondary work uses the original in a "transformative" manner, as the term is used in *Campbell*, the second factor favors fair use not because Plaintiffs' works are factual, but because the secondary use transformatively provides valuable information about the original, rather than replicating protected expression in a manner that provides a meaningful substitute for the original.

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<sup>21</sup> We think it unlikely that the Supreme Court meant in its concise dictum that secondary authors are at liberty to copy extensively from the protected expression of the original author merely because the material is factual. What the *Harper & Row* dictum may well have meant is that, because in the case of factual writings, there is often occasion to test the accuracy of, to rely on, or to repeat their factual propositions, and such testing and reliance may reasonably require quotation (lest a change of expression unwittingly alter the facts), factual works often present well justified fair uses, even if the mere fact that the work is factual does not necessarily justify copying of its protected expression.

## C. Factor Three

[25] The third statutory factor instructs us to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” The clear implication of the third factor is that a finding of fair use is more likely when small amounts, or less important passages, are copied than when the copying is extensive, or encompasses the most important parts of the original. The obvious reason for this lies in the relationship between the third and the fourth factors. The larger the amount, or the more important the part, of the original that is copied, the greater the likelihood that the secondary work might serve as an effectively competing substitute for the original, and might therefore diminish the original rights holder’s sales and profits.

[26] (1) *Search Function.* The Google Books program has made a digital copy of the entirety of each of Plaintiffs’ books. Notwithstanding the reasonable implication of Factor Three that fair use is more likely to be favored by the copying of smaller, rather than larger, portions of the original, courts have rejected any categorical rule that a copying of the entirety cannot be a fair use. Complete unchanged copying has repeatedly been found justified as fair use when the copying was reasonably appropriate to achieve the copier’s transformative purpose and was done in such a manner that it did not offer a competing substitute for the original....

[27] .... [N]ot only is the copying of the totality of the original reasonably appropriate to Google’s transformative purpose, it is literally necessary to achieve that purpose. If Google copied less than the totality of the originals, its search function could not advise searchers reliably whether their searched term appears in a book (or how many times).

[28] While Google *makes* an unauthorized digital copy of the entire book, it does not reveal that digital copy to the public. The copy is made to enable the search functions to reveal limited, important information about the books. With respect to the search function, Google satisfies the third factor test, as illuminated by the Supreme Court in *Campbell*.

[29] (2) *Snippet View....*

[30] Without doubt, enabling searchers to see portions of the copied texts could have determinative effect on the fair use analysis. The larger the quantity of the copyrighted text the searcher can see and the more control the searcher can exercise over what part of the text she sees, the greater the likelihood that those revelations could serve her as an effective, free substitute for the purchase of the plaintiff’s book. We nonetheless conclude that, at least as presently structured by Google, the snippet view does not reveal matter that offers the marketplace a significantly competing substitute for the copyrighted work.

[31] Google has constructed the snippet feature in a manner that substantially protects against its serving as an effectively competing substitute for Plaintiffs’ books. In the Background section of this opinion, we describe a variety of limitations Google imposes on the snippet function. These include the small size of the snippets (normally one eighth of a page), the blacklisting of one snippet per page and of one page in every ten, the fact that no more than three snippets are shown—and no more than one per page—for each term searched, and the fact that the same snippets are shown for a searched term no matter how many times, or from how many different computers, the term is searched. In addition, Google does not provide snippet view for types of books, such as dictionaries and cookbooks, for which viewing a small segment is likely to satisfy the searcher’s need. The result of these restrictions is, so far as the record demonstrates, that a searcher cannot succeed, even after long extended effort to multiply what can be revealed, in revealing through a snippet search what could usefully serve as a competing substitute for the original.

[32] The blacklisting, which permanently blocks about 22% of a book’s text from snippet view, is by no means the most important of the obstacles Google has designed. While it is true that the blacklisting of 22% leaves 78% of a book *theoretically* accessible to a searcher, it does not follow that any large part of that 78% is in fact



## Chapter VI – Fair Use

accessible. The other restrictions built into the program work together to ensure that, even after protracted effort over a substantial period of time, only small and randomly scattered portions of a book will be accessible. In an effort to show what large portions of text searchers can read through persistently augmented snippet searches, Plaintiffs' counsel employed researchers over a period of weeks to do multiple word searches on Plaintiffs' books. In no case were they able to access as much as 16% of the text, and the snippets collected were usually not sequential but scattered randomly throughout the book. Because Google's snippets are arbitrarily and uniformly divided by lines of text, and not by complete sentences, paragraphs, or any measure dictated by content, a searcher would have great difficulty constructing a search so as to provide any extensive information about the book's use of that term. As snippet view never reveals more than one snippet per page in response to repeated searches for the same term, it is at least difficult, and often impossible, for a searcher to gain access to more than a single snippet's worth of an extended, continuous discussion of the term.

[33] The fact that Plaintiffs' searchers managed to reveal nearly 16% of the text of Plaintiffs' books overstates the degree to which snippet view can provide a meaningful substitute. At least as important as the percentage of words of a book that are revealed is the manner and order in which they are revealed. Even if the search function revealed 100% of the words of the copyrighted book, this would be of little substitutive value if the words were revealed in alphabetical order, or any order other than the order they follow in the original book. It cannot be said that a revelation is "substantial" in the sense intended by the statute's third factor if the revelation is in a form that communicates little of the sense of the original. The fragmentary and scattered nature of the snippets revealed, even after a determined, assiduous, time-consuming search, results in a revelation that is not "substantial," even if it includes an aggregate 16% of the text of the book. If snippet view could be used to reveal a coherent block amounting to 16% of a book, that would raise a very different question beyond the scope of our inquiry.

### D. Factor Four

[34] The fourth fair use factor, "the effect of the [copying] use upon the potential market for or value of the copyrighted work," focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original. Because copyright is a commercial doctrine whose objective is to stimulate creativity among potential authors by enabling them to earn money from their creations, the fourth factor is of great importance in making a fair use assessment.

[35] *Campbell* stressed the close linkage between the first and fourth factors, in that the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original....

[36] However, *Campbell's* observation as to the likelihood of a secondary use serving as an effective substitute goes only so far. Even if the *purpose* of the copying is for a valuably transformative purpose, such copying might nonetheless harm the value of the copyrighted original if done in a manner that results in widespread revelation of sufficiently significant portions of the original as to make available a significantly competing substitute. The question for us is whether snippet view, notwithstanding its transformative purpose, does that. We conclude that, at least as snippet view is presently constructed, it does not.

[37] Especially in view of the fact that the normal purchase price of a book is relatively low in relation to the cost of manpower needed to secure an arbitrary assortment of randomly scattered snippets, we conclude that the snippet function does not give searchers access to effectively competing substitutes. Snippet view, at best and after a large commitment of manpower, produces discontinuous, tiny fragments, amounting in the aggregate to no more than 16% of a book. This does not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue.

[38] We recognize that the snippet function can cause *some* loss of sales. There are surely instances in which a searcher’s need for access to a text will be satisfied by the snippet view, resulting in either the loss of a sale to that searcher, or reduction of demand on libraries for that title, which might have resulted in libraries purchasing additional copies. But the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original. There must be a meaningful or significant effect “upon the potential market for or value of the copyrighted work.”

[39] Furthermore, the type of loss of sale envisioned above will generally occur in relation to interests that are not protected by the copyright. A snippet’s capacity to satisfy a searcher’s need for access to a copyrighted book will at times be because the snippet conveys a historical fact that the searcher needs to ascertain. For example, a student writing a paper on Franklin D. Roosevelt might need to learn the year Roosevelt was stricken with polio. By entering “Roosevelt polio” in a Google Books search, the student would be taken to (among numerous sites) a snippet from page 31 of Richard Thayer Goldberg’s *The Making of Franklin D. Roosevelt* (1981), telling that the polio attack occurred in 1921. This would satisfy the searcher’s need for the book, eliminating any need to purchase it or acquire it from a library. But what the searcher derived from the snippet was a historical fact. Author Goldberg’s copyright does not extend to the facts communicated by his book. It protects only the author’s manner of expression. Google would be entitled, without infringement of Goldberg’s copyright, to answer the student’s query about the year Roosevelt was afflicted, taking the information from Goldberg’s book. The fact that, in the case of the student’s snippet search, the information came embedded in three lines of Goldberg’s writing, which were superfluous to the searcher’s needs, would not change the taking of an unprotected fact into a copyright infringement.

[40] Even if the snippet reveals some authorial expression, because of the brevity of a single snippet and the cumbersome, disjointed, and incomplete nature of the aggregation of snippets made available through snippet view, we think it would be a rare case in which the searcher’s interest *in the protected aspect* of the author’s work would be satisfied by what is available from snippet view, and rarer still—because of the cumbersome, disjointed, and incomplete nature of the aggregation of snippets made available through snippet view—that snippet view could provide a significant substitute for the purchase of the author’s book.

[41] Accordingly, considering the four fair use factors in light of the goals of copyright, we conclude that Google’s making of a complete digital copy of Plaintiffs’ works for the purpose of providing the public with its search and snippet view functions (at least as snippet view is presently designed) is a fair use and does not infringe Plaintiffs’ copyrights in their books....

## NOTES

1. Most courts’ analyses of the fourth factor focus on the market harms caused to the plaintiff by the defendant’s use. Yet the statute frames this factor as an analysis of the “the *effect* of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4) (emphasis added). Nowhere does the statute indicate that courts should look just to the “negative effect” of the use. By stating that courts should look to “the effect” generally, should the statute be read as requiring a look at all effects of the use on the potential market for the copyrighted work, both positive and negative? For example, a defendant’s use of another’s copyrighted work might revive interest in the copyrighted work, boosting sales. Do you see how *Author’s Guild* might be read as involving market benefits for the plaintiffs? For an argument that courts ought to weigh both market harms and benefits in assessing the fourth factor, see David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359 (2014); Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015); Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975 (2002).

## Chapter VI – Fair Use

2. Many had thought that *Perfect 10* and *Authors Guild* meant that full copying of copyrighted works for searchable databases of them would now be fair use. The Second Circuit’s decision in *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018), demonstrated the sensitivity of those earlier decisions to the facts of the particular case. In this case, as demonstrated by Figure 109, TVEyes “offers a service that enables its clients to easily locate and view segments of televised video programming that are responsive to the clients’ interests. It does so by continuously recording vast quantities of television programming, compiling the recorded broadcasts into a database that is text-searchable (based primarily on the closed-captioned text copied from the broadcasts), and allowing its clients to search for and watch (up to) ten-minute video clips that mention terms of interest to the clients.” Additionally, “[a] TVEyes client may archive videos permanently on the TVEyes servers and may download videos directly to the client’s computer. These services are useful because TVEyes otherwise deletes captured content after thirty-two days. Clients can also email the clips for viewing by others, including those who are not TVEyes clients. And clients can search for videos by date, time, and channel (rather than by keyword). The parties dispute whether clients can watch live broadcasts on TVEyes.” Clients include “journalists, government and political organizations, law enforcement, the military, for-profit companies, and non-profits.”



Figure 111: snapshots of TVEyes media monitoring

The Second Circuit ruled that TVEyes is not entitled to claim fair use as to the Watch function it performs (though the district court found TVEyes engaged in fair use by copying material to create its database and providing search functionality, rulings that the parties did not appeal). As to the first fair use factor, the Second Circuit used *Authors Guild* and *Sony* to conclude that TVEyes’ use of copyrighted television content is transformative:

*TVEyes’s copying of Fox’s content for use in the Watch function is similarly transformative insofar as it enables users to isolate, from an ocean of programming, material that is responsive to their interests and needs, and to access that material with targeted precision. It enables nearly instant access to a subset of material—and to information about the material—that would otherwise be irretrievable, or else retrievable only through prohibitively inconvenient or inefficient means....*

*The Watch function certainly qualifies as technology that achieves the transformative purpose of enhancing efficiency: it enables TVEyes’s clients to view all of the Fox programming that (over the prior thirty-two days) discussed a particular topic of interest to them, without having to monitor thirty-two days of programming in order to catch each relevant discussion; and it eliminates the clients’ need even to view entire programs, because the ten most relevant minutes are presented to them. Much like the television customer in Sony, TVEyes clients can view the Fox programming they want at a time and place that is convenient to them, rather than at the time and place of broadcast. For these reasons, TVEyes’s Watch function is at least somewhat transformative.*

Although TVEyes’ use was commercial, the court thought that the first factor weighed slightly in favor of TVEyes. The court thought the second factor to be unimportant. Unlike the case on Google Books, the Second Circuit thought that the third factor weighed against TVEyes because “TVEyes makes available virtually the entirety of the Fox programming that TVEyes users want to see and hear.” It elaborated that “TVEyes redistributes Fox’s news programming in ten-minute clips, which—given the brevity of the average news segment on a particular topic—likely provide TVEyes’s users with all of the Fox programming that they seek and the entirety of the message conveyed by Fox to authorized viewers of the original. TVEyes’s use of Fox’s content is therefore both extensive and inclusive of all that is important from the copyrighted work.” The Second Circuit also thought that the fourth factor weighed against TVEyes:

*The success of the TVEyes business model demonstrates that deep-pocketed consumers are willing to pay well for a service that allows them to search for and view selected television clips, and that this market is worth millions of dollars in the aggregate. Consequently, there is a plausibly exploitable market for such access to televised content, and it is proper to consider whether TVEyes displaces potential Fox revenues when TVEyes allows its clients to watch Fox’s copyrighted content without Fox’s permission.*

*Such displacement does occur. Since the ability to re-distribute Fox’s content in the manner that TVEyes does is clearly of value to TVEyes, it (or a similar service) should be willing to pay Fox for the right to offer the content. By providing Fox’s content to TVEyes clients without payment to Fox, TVEyes is in effect depriving Fox of licensing revenues from TVEyes or from similar entities. And Fox itself might wish to exploit the market for such a service rather than license it to others. TVEyes has thus usurped a market that properly belongs to the copyright-holder. It is of no moment that TVEyes allegedly approached Fox for a license but was rebuffed: the failure to strike a deal satisfactory to both parties does not give TVEyes the right to copy Fox’s copyrighted material without payment.*

Are the Second Circuit’s analyses of the first and fourth factors reconcilable with prior cases you have read?

In a concurrence, Judge Kaplan cast doubt on the Second Circuit’s conclusion that TVEyes’ use was at all transformative:

*Even on the majority’s view that TVEyes’ Watch function substantially improves the efficiency with which TVEyes customers can access Fox copyrighted broadcasts of possible interest, it does no more than repackage and deliver the original works. It adds no new information, no new aesthetics, and no new insights or understandings. I therefore doubt that it is transformative.*

Does the majority or the concurrence have the better understanding of transformativeness?

## 6. Software Interoperability

In the Supreme Court's first fair use decision revisiting *Campbell*, consider how it understands transformativeness. Does its reasoning make you reconsider the outcomes in any of the previous circuit court decisions? Also, is there a fair use factor that seems more determinative to the case than the others?

### Google LLC v. Oracle America, Inc.

141 S. Ct. 1183 (2021)

BREYER, J.:

[1] Oracle America, Inc., is the current owner of a copyright in Java SE, a computer program that uses the popular Java computer programming language. Google, without permission, has copied a portion of that program, a portion that enables a programmer to call up prewritten software that, together with the computer's hardware, will carry out a large number of specific tasks. The lower courts have considered (1) whether Java SE's owner could copyright the portion that Google copied, and (2) if so, whether Google's copying nonetheless constituted a "fair use" of that material, thereby freeing Google from copyright liability. The Federal Circuit held in Oracle's favor (i.e., that the portion is copyrightable and Google's copying did not constitute a "fair use"). In reviewing that decision, we assume, for argument's sake, that the material was copyrightable. But we hold that the copying here at issue nonetheless constituted a fair use. Hence, Google's copying did not violate the copyright law....

[2] In 2005, Google acquired Android, Inc., a startup firm that hoped to become involved in smartphone software. Google sought, through Android, to develop a software platform for mobile devices like smartphones. A platform provides the necessary infrastructure for computer programmers to develop new programs and applications. One might think of a software platform as a kind of factory floor where computer programmers (analogous to autoworkers, designers, or manufacturers) might come, use sets of tools found there, and create new applications for use in, say, smartphones....

[3] Google envisioned an Android platform that was free and open, such that software developers could use the tools found there free of charge. Its idea was that more and more developers using its Android platform would develop ever more Android-based applications, all of which would make Google's Android-based smartphones more attractive to ultimate consumers. Consumers would then buy and use ever more of those phones. That vision required attracting a sizeable number of skilled programmers.

[4] At that time, many software developers understood and wrote programs using the Java programming language, a language invented by Sun Microsystems (Oracle's predecessor). About six million programmers had spent considerable time learning, and then using, the Java language. Many of those programmers used Sun's own popular Java SE platform to develop new programs primarily for use in desktop and laptop computers. That platform allowed developers using the Java language to write programs that were able to run on any desktop or laptop computer, regardless of the underlying hardware (i.e., the programs were in large part "interoperable"). Indeed, one of Sun's slogans was "write once, run anywhere."

[5] Shortly after acquiring the Android firm, Google began talks with Sun about the possibility of licensing the entire Java platform for its new smartphone technology. But Google did not want to insist that all programs written on the Android platform be interoperable. As Android's founder explained, "[t]he whole idea about [an]



open source [platform] is to have very, very few restrictions on what people can do with it,” and Sun’s interoperability policy would have undermined that free and open business model. Apparently, for reasons related to this disagreement, Google’s negotiations with Sun broke down. Google then built its own platform.

[6] The record indicates that roughly 100 Google engineers worked for more than three years to create Google’s Android platform software. In doing so, Google tailored the Android platform to smartphone technology, which differs from desktop and laptop computers in important ways. A smartphone, for instance, may run on a more limited battery or take advantage of GPS technology. The Android platform offered programmers the ability to program for that environment. To build the platform, Google wrote millions of lines of new code. Because Google wanted millions of programmers, familiar with Java, to be able easily to work with its new Android platform, it also copied roughly 11,500 lines of code from the Java SE program. The copied lines of code are part of a tool called an Application Programming Interface, or API.

[7] What is an API? The Federal Circuit described an API as a tool that “allow[s] programmers to use ... prewritten code to build certain functions into their own programs, rather than write their own code to perform those functions from scratch.” Through an API, a programmer can draw upon a vast library of prewritten code to carry out complex tasks. For lay persons, including judges, juries, and many others, some elaboration of this description may prove useful.

[8] Consider in more detail just what an API does. A computer can perform thousands, perhaps millions, of different tasks that a programmer may wish to use. These tasks range from the most basic to the enormously complex. Ask the computer, for example, to tell you which of two numbers is the higher number or to sort one thousand numbers in ascending order, and it will instantly give you the right answer. An API divides and organizes the world of computing tasks in a particular way. Programmers can then use the API to select the particular task that they need for their programs. In Sun’s API (which we refer to as the Sun Java API), each individual task is known as a “method.” The API groups somewhat similar methods into larger “classes,” and groups somewhat similar classes into larger “packages.” This method-class-package organizational structure is referred to as the Sun Java API’s “structure, sequence, and organization,” or SSO.

[9] For each task, there is computer code, known as “implementing code,” that in effect tells the computer how to execute the particular task you have asked it to perform (such as telling you, of two numbers, which is the higher). The implementing code (which Google independently wrote) is not at issue here. For a single task, the implementing code may be hundreds of lines long. It would be difficult, perhaps impossible, for a programmer to create complex software programs without drawing on prewritten task-implementing programs to execute discrete tasks.

[10] But how do you as the programmer tell the computer which of the implementing code programs it should choose, i.e., which task it should carry out? You do so by entering into your own program a command that corresponds to the specific task and calls it up. Those commands, known as “method calls,” help you carry out the task by choosing those programs written in implementing code that will do the trick, i.e., that will instruct the computer so that your program will find the higher of two numbers. If a particular computer might perform, say, a million different tasks, different method calls will tell the computer which of those tasks to choose. Those familiar with the Java language already know countless method calls that allow them to invoke countless tasks.

[11] And how does the method call (which a programmer types) actually locate and invoke the particular implementing code that it needs to instruct the computer how to carry out a particular task? It does so through another type of code, which the parties have labeled “declaring code.” Declaring code is part of the API. For each task, the specific command entered by the programmer matches up with specific declaring code inside the API. That declaring code provides both the name for each task and the location of each task within the API’s overall organizational system (i.e., the placement of a method within a particular class and the placement of a

class within a particular package). In this sense, the declaring code and the method call form a link, allowing the programmer to draw upon the thousands of prewritten tasks, written in implementing code. Without that declaring code, the method calls entered by the programmer would not call up the implementing code.

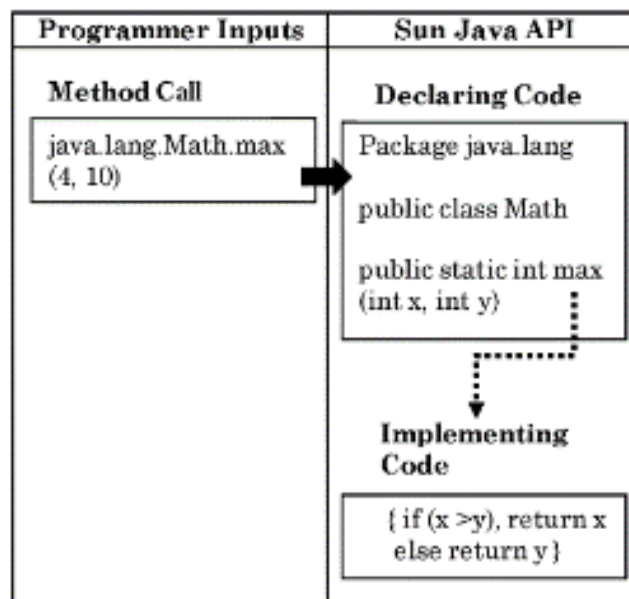


Figure 112: Java API Diagram

[12] The declaring code therefore performs at least two important functions in the Sun Java API. The first, more obvious, function is that the declaring code enables a set of shortcuts for programmers. By connecting complex implementing code with method calls, it allows a programmer to pick out from the API's task library a particular task without having to learn anything more than a simple command. For example, a programmer building a new application for personal banking may wish to use various tasks to, say, calculate a user's balance or authenticate a password. To do so, she need only learn the method calls associated with those tasks. In this way, the declaring code's shortcut function is similar to a gas pedal in a car that tells the car to move faster or the QWERTY keyboard on a typewriter that calls up a certain letter when you press a particular key. As those analogies demonstrate, one can think of the declaring code as part of an interface between human beings and a machine.

[13] The second, less obvious, function is to reflect the way in which Java's creators have divided the potential world of different tasks into an actual world, i.e., precisely which set of potentially millions of different tasks we want to have our Java-based computer systems perform and how we want those tasks arranged and grouped. In this sense, the declaring code performs an organizational function. It determines the structure of the task library that Java's creators have decided to build. To understand this organizational system, think of the Dewey Decimal System that categorizes books into an accessible system or a travel guide that arranges a city's attractions into different categories. Language itself provides a rough analogy to the declaring code's organizational feature, for language itself divides into sets of concepts a world that in certain respects other languages might have divided differently. The developers of Java, for example, decided to place a method called "draw image" inside of a class called "graphics."

[14] Consider a comprehensive, albeit farfetched, analogy that illustrates how the API is actually used by a programmer. Imagine that you can, via certain keystrokes, instruct a robot to move to a particular file cabinet, to open a certain drawer, and to pick out a specific recipe. With the proper recipe in hand, the robot then moves to your kitchen and gives it to a cook to prepare the dish. This example mirrors the API's task-related organizational system. Through your simple command, the robot locates the right recipe and hands it off to the cook. In the same way, typing in a method call prompts the API to locate the correct implementing code and

hand it off to your computer. And importantly, to select the dish that you want for your meal, you do not need to know the recipe's contents, just as a programmer using an API does not need to learn the implementing code. In both situations, learning the simple command is enough.

[15] Now let us consider the example that the District Court used to explain the precise technology here. A programmer wishes, as part of her program, to determine which of two integers is the larger. To do so in the Java language, she will first write **java.lang**. Those words (which we have put in bold type) refer to the "package" (or by analogy to the file cabinet). She will then write **Math**. That word refers to the "class" (or by analogy to the drawer). She will then write **max**. That word refers to the "method" (or by analogy to the recipe). She will then make two parentheses (). And, in between the parentheses she will put two integers, say 4 and 6, that she wishes to compare. The whole expression—the method call—will look like this: "**java.lang.Math.max(4, 6)**." The use of this expression will, by means of the API, call up a task-implementing program that will determine the higher number.

[16] In writing this program, the programmer will use the very symbols we have placed in bold in the precise order we have placed them. But the symbols by themselves do nothing. She must also use software that connects the symbols to the equivalent of file cabinets, drawers, and files. The API is that software. It includes both the declaring code that links each part of the method call to the particular task-implementing program, and the implementing code that actually carries it out.

[17] Now we can return to the copying at issue in this case. Google did not copy the task-implementing programs, or implementing code, from the Sun Java API. It wrote its own task-implementing programs, such as those that would determine which of two integers is the greater or carry out any other desired (normally far more complex) task. This implementing code constitutes the vast majority of both the Sun Java API and the API that Google created for Android. For most of the packages in its new API, Google also wrote its own declaring code. For 37 packages, however, Google copied the declaring code from the Sun Java API. As just explained, that means that, for those 37 packages, Google necessarily copied both the names given to particular tasks and the grouping of those tasks into classes and packages.

[18] In doing so, Google copied that portion of the Sun Java API that allowed programmers expert in the Java programming language to use the "task calling" system that they had already learned. As Google saw it, the 37 packages at issue included those tasks that were likely to prove most useful to programmers working on applications for mobile devices. In fact, three of these packages were fundamental to being able to use the Java language at all. By using the same declaring code for those packages, programmers using the Android platform can rely on the method calls that they are already familiar with to call up particular tasks (e.g., determining which of two integers is the greater); but Google's own implementing programs carry out those tasks. Without that copying, programmers would need to learn an entirely new system to call up the same tasks.

[19] We add that the Android platform has been successful. Within five years of its release in 2007, Android-based devices claimed a large share of the United States market. As of 2015, Android sales produced more than \$42 billion in revenue.

[20] In 2010 Oracle Corporation bought Sun. Soon thereafter Oracle brought this lawsuit in the United States District Court for the Northern District of California....

[21] The case has a complex and lengthy history. At the outset Oracle complained that Google's use of the Sun Java API violated both copyright and patent laws. For its copyright claim, Oracle alleged that Google infringed its copyright by copying, for 37 packages, both the literal declaring code and the nonliteral organizational structure (or SSO) of the API, i.e., the grouping of certain methods into classes and certain classes into packages. For trial purposes the District Court organized three proceedings. The first would cover the copyright

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issues, the second would cover the patent issues, and the third would, if necessary, calculate damages. The court also determined that a judge should decide whether copyright law could protect an API and that the jury should decide whether Google's use of Oracle's API infringed its copyright and, if so, whether a fair use defense nonetheless applied.

[22] After six weeks of hearing evidence, the jury rejected Oracle's patent claims (which have since dropped out of the case). It also found a limited copyright infringement. It deadlocked as to whether Google could successfully assert a fair use defense. The judge then decided that, regardless, the API's declaring code was not the kind of creation to which copyright law extended its protection. The court noted that Google had written its own implementing code, which constituted the vast majority of its API. It wrote that "anyone is free under the Copyright Act to write his or her own code to carry out exactly the same" tasks that the Sun Java API picks out or specifies. Google copied only the declaring code and organizational structure that was necessary for Java-trained programmers to activate familiar tasks (while, as we said, writing its own implementing code). Hence the copied material, in the judge's view, was a "system or method of operation," which copyright law specifically states cannot be copyrighted.

[23] On appeal, the Federal Circuit reversed. That court held that both the API's declaring code and its organizational structure could be copyrighted. It pointed out that Google could have written its own declaring code just as it wrote its own implementing code. And because in principle Google might have created a whole new system of dividing and labeling tasks that could be called up by programmers, the declaring code (and the system) that made up the Sun Java API was copyrightable.

[24] The Federal Circuit also rejected Oracle's plea that it decide whether Google had the right to use the Sun Java API because doing so was a fair use, immune from copyright liability. The Circuit wrote that fair use "both permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." But, it added, this "is not a case in which the record contains sufficient factual findings upon which we could base a de novo assessment of Google's affirmative defense of fair use." And it remanded the case for another trial on that question. Google petitioned this Court for a writ of certiorari, seeking review of the Federal Circuit's copyrightability determination. We denied the petition.

[25] On remand the District Court, sitting with a jury, heard evidence for a week. The court instructed the jury to answer one question: Has Google shown by a preponderance of the evidence that its use in Android of the declaring code and organizational structure contained in the 37 Sun Java API packages that it copied constitutes a fair use under the Copyright Act? After three days of deliberation the jury answered the question in the affirmative. Google had shown fair use.

[26] Oracle again appealed to the Federal Circuit. And the Circuit again reversed the District Court. The Federal Circuit assumed all factual questions in Google's favor. But, it said, the question whether those facts constitute a fair use is a question of law. Deciding that question of law, the court held that Google's use of the Sun Java API was not a fair use. It wrote that "[t]here is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform." It remanded the case again, this time for a trial on damages.

[27] Google then filed a petition for certiorari in this Court. It asked us to review the Federal Circuit's determinations as to both copyrightability and fair use. We granted its petition....

[28] Google's petition for certiorari poses two questions. The first asks whether Java's API is copyrightable. It asks us to examine two of the statutory provisions just mentioned, one that permits copyrighting computer programs and the other that forbids copyrighting, e.g., "process[es]," "system[s]," and "method[s]" of

operation.” Google believes that the API’s declaring code and organization fall into these latter categories and are expressly excluded from copyright protection. The second question asks us to determine whether Google’s use of the API was a “fair use.” Google believes that it was.

[29] A holding for Google on either question presented would dispense with Oracle’s copyright claims. Given the rapidly changing technological, economic, and business-related circumstances, we believe we should not answer more than is necessary to resolve the parties’ dispute. We shall assume, but purely for argument’s sake, that the entire Sun Java API falls within the definition of that which can be copyrighted. We shall ask instead whether Google’s use of part of that API was a fair use. Unlike the Federal Circuit, we conclude that it was....

[30] Generically speaking, computer programs differ from books, films, and many other “literary works” in that such programs almost always serve functional purposes. These and other differences have led at least some judges to complain that “applying copyright law to computer programs is like assembling a jigsaw puzzle whose pieces do not quite fit.” *Lotus Development Corp. v. Borland Int’l, Inc.* (Boudin, J., concurring).

[31] These differences also led Congress to think long and hard about whether to grant computer programs copyright protection. In 1974, Congress established a National Commission on New Technological Uses of Copyrighted Works (CONTU) to look into the matter. After several years of research, CONTU concluded that the “availability of copyright protection for computer programs is desirable.” At the same time, it recognized that computer programs had unique features. Mindful of not “unduly burdening users of programs and the general public,” it wrote that copyright “should not grant anyone more economic power than is necessary to achieve the incentive to create.” And it believed that copyright’s existing doctrines (e.g., fair use), applied by courts on a case-by-case basis, could prevent holders from using copyright to stifle innovation. Congress then wrote computer program protection into the law.

[32] The upshot, in our view, is that fair use can play an important role in determining the lawful scope of a computer program copyright, such as the copyright at issue here. It can help to distinguish among technologies. It can distinguish between expressive and functional features of computer code where those features are mixed. It can focus on the legitimate need to provide incentives to produce copyrighted material while examining the extent to which yet further protection creates unrelated or illegitimate harms in other markets or to the development of other products. In a word, it can carry out its basic purpose of providing a context-based check that can help to keep a copyright monopoly within its lawful bounds. See H.R. REP. No. 94-1476, pp. 65-66 (1976) (explaining that courts are to “adapt the doctrine [of fair use] to particular situations on a case-by-case basis” and in light of “rapid technological change”); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 543-45 (6th Cir. 2004) (discussing fair use in the context of copying to preserve compatibility); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 603-608 (9th Cir. 2000) (applying fair use to intermediate copying necessary to reverse engineer access to unprotected functional elements within a program); *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1521-1527 (9th Cir. 1992) (holding that wholesale copying of copyrighted code as a preliminary step to develop a competing product was a fair use).

[33] Justice Thomas’ thoughtful dissent offers a very different view of how (and perhaps whether) fair use has any role to play for computer programs. We are told that no attempt to distinguish among computer code is tenable when considering “the nature of the work,” even though there are important distinctions in the ways that programs are used and designed. We are told that no reuse of code in a new program will ever have a valid “purpose and character,” even though the reasons for copying computer code may vary greatly and differ from those applicable to other sorts of works. (accepting that copying as part of “reverse engineer[ing] a system to ensure compatibility” could be a valid purpose). And we are told that our fair use analysis must prioritize certain factors over others, even though our case law instructs that fair use depends on the context, *see Campbell*.



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[34] We do not understand Congress, however, to have shielded computer programs from the ordinary application of copyright's limiting doctrines in this way. By defining computer programs in § 101, Congress chose to place this subject matter within the copyright regime. Like other protected works, that means that the owners of computer programs enjoy the exclusive rights set forth in the Act, including the right to "reproduce [a] copyrighted work" or to "prepare derivative works." 17 U.S.C. § 106. But that also means that exclusive rights in computer programs are limited like any other works. Just as fair use distinguishes among books and films, which are indisputably subjects of copyright, so too must it draw lines among computer programs. And just as fair use takes account of the market in which scripts and paintings are bought and sold, so too must it consider the realities of how technological works are created and disseminated. We do not believe that an approach close to "all or nothing" would be faithful to the Copyright Act's overall design....

[35] At the outset, Google argues that fair use is a question for a jury to decide; here the jury decided the question in Google's favor; and we should limit our review to determining whether "substantial evidence" justified the jury's decision. The Federal Circuit disagreed. It thought that the fair use question was a mixed question of fact and law; that reviewing courts should appropriately defer to the jury's findings of underlying facts; but that the ultimate question whether those facts showed a fair use is a legal question for judges to decide de novo.

[36] We agree with the Federal Circuit's answer to this question. We have said, "[f]air use is a mixed question of law and fact." *Harper & Row*. We have explained that a reviewing court should try to break such a question into its separate factual and legal parts, reviewing each according to the appropriate legal standard. But when a question can be reduced no further, ... the standard of review for a mixed question all depends—on whether answering it entails primarily legal or factual work.

[37] In this case, the ultimate fair use question primarily involves legal work. Fair use was originally a concept fashioned by judges. Our cases still provide legal interpretations of the fair use provision. And those interpretations provide general guidance for future cases. This type of work is legal work.

[38] Applying a legal fair use conclusion may, of course, involve determination of subsidiary factual questions, such as whether there was harm to the actual or potential markets for the copyrighted work or how much of the copyrighted work was copied. In this case the Federal Circuit carefully applied the fact/law principles we set forth ..., leaving factual determinations to the jury and reviewing the ultimate question, a legal question, de novo.

[39] Next, Google argues that the Federal Circuit's approach violates the Seventh Amendment. The Amendment both requires that "the right of trial by jury ... be preserved" and forbids courts to "re-examin[e]" any "fact tried by a jury." The Reexamination Clause is no bar here, however, for, as we have said, the ultimate question here is one of law, not fact. It does not violate the Reexamination Clause for a court to determine the controlling law in resolving a challenge to a jury verdict, as happens any time a court resolves a motion for judgment as a matter of law.

[40] Nor is Google correct that "the right of trial by jury" includes the right to have a jury resolve a fair use defense. That Clause is concerned with the particular trial decision at issue. Even though it is possible to find pre-Revolutionary English cases in which a judge sent related questions like fair abridgment to a jury, those questions were significantly different from the fair use doctrine as courts apply it today. As far as contemporary fair use is concerned, we have described the doctrine as an equitable, not a legal, doctrine. We have found no case suggesting that application of [our rules] here would fail to preserve the substance of the common-law jury trial right as it existed in 1791....

[41] We turn now to the basic legal question before us: Was Google’s copying of the Sun Java API, specifically its use of the declaring code and organizational structure for 37 packages of that API, a fair use[?] In answering this question, we shall consider the four factors set forth in the fair use statute as we find them applicable to the kind of computer programs before us.... For expository purposes, we begin with the second.

#### A. “The Nature of the Copyrighted Work”

[42] The Sun Java API is a “user interface.” It provides a way through which users (here the programmers) can manipulate and control task-performing computer programs via a series of menu commands. The API reflects Sun’s division of possible tasks that a computer might perform into a set of actual tasks that certain kinds of computers actually will perform. Sun decided, for example, that its API would call up a task that compares one integer with another to see which is the larger. Sun’s API (to our knowledge) will not call up the task of determining which great Arabic scholar decided to use Arabic numerals (rather than Roman numerals) to perform that “larger integer” task. No one claims that the decisions about what counts as a task are themselves copyrightable—although one might argue about decisions as to how to label and organize such tasks (e.g., the decision to name a certain task “max” or to place it in a class called “Math.” Cf. *Baker v. Selden*).

[43] As discussed above, ... we can think of the technology as having three essential parts. First, the API includes “implementing code,” which actually instructs the computer on the steps to follow to carry out each task. Google wrote its own programs (implementing programs) that would perform each one of the tasks that its API calls up.

[44] Second, the Sun Java API associates a particular command, called a “method call,” with the calling up of each task. The symbols `java.lang.`, for example, are part of the command that will call up the program (whether written by Sun or, as here, by Google) that instructs the computer to carry out the “larger number” operation. Oracle does not here argue that the use of these commands by programmers itself violates its copyrights.

[45] Third, the Sun Java API contains computer code that will associate the writing of a method call with particular “places” in the computer that contain the needed implementing code. This is the declaring code. The declaring code both labels the particular tasks in the API and organizes those tasks, or “methods,” into “packages” and “classes.” We have referred to this organization, by way of rough analogy, as file cabinets, drawers, and files. Oracle does claim that Google’s use of the Sun Java API’s declaring code violates its copyrights.

[46] The declaring code at issue here resembles other copyrighted works in that it is part of a computer program. Congress has specified that computer programs are subjects of copyright. It differs, however, from many other kinds of copyrightable computer code. It is inextricably bound together with a general system, the division of computing tasks, that no one claims is a proper subject of copyright. It is inextricably bound up with the idea of organizing tasks into what we have called cabinets, drawers, and files, an idea that is also not copyrightable. It is inextricably bound up with the use of specific commands known to programmers, known here as method calls (such as `java.lang.Math.max`, etc.), that Oracle does not here contest. And it is inextricably bound up with implementing code, which is copyrightable but was not copied.

[47] Moreover, the copied declaring code and the uncopied implementing programs call for, and reflect, different kinds of capabilities. A single implementation may walk a computer through dozens of different steps. To write implementing programs, witnesses told the jury, requires balancing such considerations as how quickly a computer can execute a task or the likely size of the computer’s memory. One witness described that creativity as “magic” practiced by an API developer when he or she worries “about things like power management” for devices that “run on a battery.” This is the very creativity that was needed to develop the Android software for use not in laptops or desktops but in the very different context of smartphones.

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[48] The declaring code (inseparable from the programmer’s method calls) embodies a different kind of creativity. Sun Java’s creators, for example, tried to find declaring code names that would prove intuitively easy to remember. They wanted to attract programmers who would learn the system, help to develop it further, and prove reluctant to use another. Sun’s business strategy originally emphasized the importance of using the API to attract programmers. It sought to make the API open and then compete on implementations. The testimony at trial was replete with examples of witnesses drawing this critical line between the user-centered declaratory code and the innovative implementing code.

[49] These features mean that, as part of a user interface, the declaring code differs to some degree from the mine run of computer programs. Like other computer programs, it is functional in nature. But unlike many other programs, its use is inherently bound together with uncopyrightable ideas (general task division and organization) and new creative expression (Android’s implementing code). Unlike many other programs, its value in significant part derives from the value that those who do not hold copyrights, namely, computer programmers, invest of their own time and effort to learn the API’s system. And unlike many other programs, its value lies in its efforts to encourage programmers to learn and to use that system so that they will use (and continue to use) Sun-related implementing programs that Google did not copy.

[50] Although copyrights protect many different kinds of writing, we have emphasized the need to “recogni[ze] that some works are closer to the core of [copyright] than others,” *Campbell*. In our view, for the reasons just described, the declaring code is, if copyrightable at all, further than are most computer programs (such as the implementing code) from the core of copyright. That fact diminishes the fear, expressed by both the dissent and the Federal Circuit, that application of fair use here would seriously undermine the general copyright protection that Congress provided for computer programs. And it means that this factor, “the nature of the copyrighted work,” points in the direction of fair use.

### B. “The Purpose and Character of the Use”

[51] In the context of fair use, we have considered whether the copier’s use adds something new, with a further purpose or different character, altering the copyrighted work with new expression, meaning or message. Commentators have put the matter more broadly, asking whether the copier’s use fulfills the objective of copyright law to stimulate creativity for public illumination. In answering this question, we have used the word “transformative” to describe a copying use that adds something new and important. An “artistic painting” might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism. Or, as we held in *Campbell*, a parody can be transformative because it comments on the original or criticizes it, for parody needs to mimic an original to make its point.

[52] Google copied portions of the Sun Java API precisely, and it did so in part for the same reason that Sun created those portions, namely, to enable programmers to call up implementing programs that would accomplish particular tasks. But since virtually any unauthorized use of a copyrighted computer program (say, for teaching or research) would do the same, to stop here would severely limit the scope of fair use in the functional context of computer programs. Rather, in determining whether a use is “transformative,” we must go further and examine the copying’s more specifically described “purpose[s]” and “character.” 17 U.S.C. § 107(1).

[53] Here Google’s use of the Sun Java API seeks to create new products. It seeks to expand the use and usefulness of Android-based smartphones. Its new product offers programmers a highly creative and innovative tool for a smartphone environment. To the extent that Google used parts of the Sun Java API to create a new platform that could be readily used by programmers, its use was consistent with that creative progress that is the basic constitutional objective of copyright itself.

[54] The jury heard that Google limited its use of the Sun Java API to tasks and specific programming demands related to Android. It copied the API (which Sun created for use in desktop and laptop computers) only insofar as needed to include tasks that would be useful in smartphone programs. And it did so only insofar as needed to allow programmers to call upon those tasks without discarding a portion of a familiar programming language and learning a new one. To repeat, Google, through Android, provided a new collection of tasks operating in a distinct and different computing environment. Those tasks were carried out through the use of new implementing code (that Google wrote) designed to operate within that new environment. Some of the *amici* refer to what Google did as “reimplementation,” defined as the building of a system that repurposes the same words and syntaxes of an existing system—in this case so that programmers who had learned an existing system could put their basic skills to use in a new one.

[55] The record here demonstrates the numerous ways in which reimplementing an interface can further the development of computer programs. The jury heard that shared interfaces are necessary for different programs to speak to each other. It heard that the reimplementation of interfaces is necessary if programmers are to be able to use their acquired skills. It heard that the reuse of APIs is common in the industry. It heard that Sun itself had used pre-existing interfaces in creating Java. And it heard that Sun executives thought that widespread use of the Java programming language, including use on a smartphone platform, would benefit the company....

[56] These and related facts convince us that the “purpose and character” of Google’s copying was transformative—to the point where this factor too weighs in favor of fair use.

[57] There are two other considerations that are often taken up under the first factor: commerciality and good faith. The text of § 107 includes various noncommercial uses, such as teaching and scholarship, as paradigmatic examples of privileged copying. There is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use. But the inverse is not necessarily true, as many common fair uses are indisputably commercial. For instance, the text of § 107 includes examples like “news reporting,” which is often done for commercial profit. So even though Google’s use was a commercial endeavor—a fact no party disputed—that is not dispositive of the first factor, particularly in light of the inherently transformative role that the reimplementation played in the new Android system.

[58] As for bad faith, our decision in *Campbell* expressed some skepticism about whether bad faith has any role in a fair use analysis. We find this skepticism justifiable, as copyright is not a privilege reserved for the well-behaved. We have no occasion here to say whether good faith is as a general matter a helpful inquiry. We simply note that given the strength of the other factors pointing toward fair use and the jury finding in Google’s favor on hotly contested evidence, that factbound consideration is not determinative in this context.

### C. “The Amount and Substantiality of the Portion Used”

[59] If one considers the declaring code in isolation, the quantitative amount of what Google copied was large. Google copied the declaring code for 37 packages of the Sun Java API, totaling approximately 11,500 lines of code. Those lines of code amount to virtually all the declaring code needed to call up hundreds of different tasks. On the other hand, if one considers the entire set of software material in the Sun Java API, the quantitative amount copied was small. The total set of Sun Java API computer code, including implementing code, amounted to 2.86 million lines, of which the copied 11,500 lines were only 0.4 percent.

[60] The question here is whether those 11,500 lines of code should be viewed in isolation or as one part of the considerably greater whole. We have said that even a small amount of copying may fall outside of the scope of fair use where the excerpt copied consists of the “heart” of the original work’s creative expression. *Harper & Row*. On the other hand, copying a larger amount of material can fall within the scope of fair use where the material copied captures little of the material’s creative expression or is central to a copier’s valid purpose. If a

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defendant had copied one sentence in a novel, that copying may well be insubstantial. But if that single sentence set forth one of the world's shortest short stories—"When he awoke, the dinosaur was still there."—the question looks much different, as the copied material constitutes a small part of the novel but the entire short story. See A. Monterroso, *El Dinosaurio*, in *COMPLETE WORKS & OTHER STORIES* 42 (E. Grossman transl. 1995). (In the original Spanish, the story reads: "Cuando despertó, el dinosaurio todavía estaba allí.")

[61] Several features of Google's copying suggest that the better way to look at the numbers is to take into account the several million lines that Google did not copy. For one thing, the Sun Java API is inseparably bound to those task-implementing lines. Its purpose is to call them up. For another, Google copied those lines not because of their creativity, their beauty, or even (in a sense) because of their purpose. It copied them because programmers had already learned to work with the Sun Java API's system, and it would have been difficult, perhaps prohibitively so, to attract programmers to build its Android smartphone system without them. Further, Google's basic purpose was to create a different task-related system for a different computing environment (smartphones) and to create a platform—the Android platform—that would help achieve and popularize that objective. The "substantiality" factor will generally weigh in favor of fair use where, as here, the amount of copying was tethered to a valid, and transformative, purpose.

[62] We do not agree with the Federal Circuit's conclusion that Google could have achieved its Java-compatibility objective by copying only the 170 lines of code that are necessary to write in the Java language. In our view, that conclusion views Google's legitimate objectives too narrowly. Google's basic objective was not simply to make the Java programming language usable on its Android systems. It was to permit programmers to make use of their knowledge and experience using the Sun Java API when they wrote new programs for smartphones with the Android platform. In principle, Google might have created its own, different system of declaring code. But the jury could have found that its doing so would not have achieved that basic objective. In a sense, the declaring code was the key that it needed to unlock the programmers' creative energies. And it needed those energies to create and to improve its own innovative Android systems.

[63] We consequently believe that this "substantiality" factor weighs in favor of fair use.

### D. Market Effects

[64] The fourth statutory factor focuses upon the "effect" of the copying in the "market for or value of the copyrighted work." Consideration of this factor, at least where computer programs are at issue, can prove more complex than at first it may seem. It can require a court to consider the amount of money that the copyright owner might lose. As we pointed out in *Campbell*, "verbatim copying of the original in its entirety for commercial purposes" may well produce a market substitute for an author's work. Making a film of an author's book may similarly mean potential or presumed losses to the copyright owner. Those losses normally conflict with copyright's basic objective: providing authors with exclusive rights that will spur creative expression.

[65] But a potential loss of revenue is not the whole story. We here must consider not just the amount but also the source of the loss. As we pointed out in *Campbell*, a "lethal parody, like a scathing theatre review," may "kill[] demand for the original." Yet this kind of harm, even if directly translated into foregone dollars, is not cognizable under the Copyright Act.

[66] Further, we must take into account the public benefits the copying will likely produce. Are those benefits, for example, related to copyright's concern for the creative production of new expression? Are they comparatively important, or unimportant, when compared with dollar amounts likely lost (taking into account as well the nature of the source of the loss)?



[67] We do not say that these questions are always relevant to the application of fair use, not even in the world of computer programs. Nor do we say that these questions are the only questions a court might ask. But we do find them relevant here in helping to determine the likely market effects of Google’s reimplementation.

[68] As to the likely amount of loss, the jury could have found that Android did not harm the actual or potential markets for Java SE. And it could have found that Sun itself (now Oracle) would not have been able to enter those markets successfully whether Google did, or did not, copy a part of its API. First, evidence at trial demonstrated that, regardless of Android’s smartphone technology, Sun was poorly positioned to succeed in the mobile phone market. The jury heard ample evidence that Java SE’s primary market was laptops and desktops. It also heard that Sun’s many efforts to move into the mobile phone market had proved unsuccessful. As far back as 2006, prior to Android’s release, Sun’s executives projected declining revenue for mobile phones because of emerging smartphone technology. When Sun’s former CEO was asked directly whether Sun’s failure to build a smartphone was attributable to Google’s development of Android, he answered that it was not. Given the evidence showing that Sun was beset by business challenges in developing a mobile phone product, the jury was entitled to agree with that assessment.

[69] Second, the jury was repeatedly told that devices using Google’s Android platform were different in kind from those that licensed Sun’s technology. For instance, witnesses explained that the broader industry distinguished between smartphones and simpler feature phones. As to the specific devices that used Sun-created software, the jury heard that one of these phones lacked a touchscreen, while another did not have a QWERTY keyboard. For other mobile devices, the evidence showed that simpler products, like the Kindle, used Java software, while more advanced technology, like the Kindle Fire, were built on the Android operating system. This record evidence demonstrates that, rather than just repurposing Sun’s code from larger computers to smaller computers, Google’s Android platform was part of a distinct (and more advanced) market than Java software.

[70] Looking to these important differences, Google’s economic expert told the jury that Android was not a market substitute for Java’s software. As he explained, “the two products are on very different devices,” and the Android platform, which offers “an entire mobile operating stack,” is a “very different typ[e] of produc[t]” than Java SE, which is “just an applications programming framework.” Taken together, the evidence showed that Sun’s mobile phone business was declining, while the market increasingly demanded a new form of smartphone technology that Sun was never able to offer.

[71] Finally, the jury also heard evidence that Sun foresaw a benefit from the broader use of the Java programming language in a new platform like Android, as it would further expand the network of Java-trained programmers. In other words, the jury could have understood Android and Java SE as operating in two distinct markets. And because there are two markets at issue, programmers learning the Java language to work in one market (smartphones) are then able to bring those talents to the other market (laptops). See 4 NIMMER ON COPYRIGHT § 13.05[A][4] (explaining that factor four asks what the impact of “widespread conduct of the sort engaged in by the defendant” would be on the market for the present work).

[72] Oracle presented evidence to the contrary. Indeed, the Federal Circuit held that the “market effects” factor militated against fair use in part because Sun had tried to enter the Android market. But those licensing negotiations concerned much more than 37 packages of declaring code, covering topics like the implementation of Java’s code and branding and cooperation between the firms. See also 4 NIMMER ON COPYRIGHT § 13.05[A][4] (cautioning against the “danger of circularity posed” by considering unrealized licensing opportunities because “it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar”). In any event, the jury’s fair use determination means that neither Sun’s effort to obtain a license nor Oracle’s conflicting evidence

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can overcome evidence indicating that, at a minimum, it would have been difficult for Sun to enter the smartphone market, even had Google not used portions of the Sun Java API.

[73] On the other hand, Google's copying helped Google make a vast amount of money from its Android platform. And enforcement of the Sun Java API copyright might give Oracle a significant share of these funds. It is important, however, to consider why and how Oracle might have become entitled to this money. When a new interface, like an API or a spreadsheet program, first comes on the market, it may attract new users because of its expressive qualities, such as a better visual screen or because of its superior functionality. As time passes, however, it may be valuable for a different reason, namely, because users, including programmers, are just used to it. They have already learned how to work with it. *See Lotus Development Corp.* (Boudin, J., concurring).

[74] The record here is filled with evidence that this factor accounts for Google's desire to use the Sun Java API. This source of Android's profitability has much to do with third parties' (say, programmers') investment in Sun Java programs. It has correspondingly less to do with Sun's investment in creating the Sun Java API. We have no reason to believe that the Copyright Act seeks to protect third parties' investment in learning how to operate a created work. *Cf. Campbell* (discussing the need to identify those harms that are "cognizable under the Copyright Act").

[75] Finally, given programmers' investment in learning the Sun Java API, to allow enforcement of Oracle's copyright here would risk harm to the public. Given the costs and difficulties of producing alternative APIs with similar appeal to programmers, allowing enforcement here would make of the Sun Java API's declaring code a lock limiting the future creativity of new programs. Oracle alone would hold the key. The result could well prove highly profitable to Oracle (or other firms holding a copyright in computer interfaces). But those profits could well flow from creative improvements, new applications, and new uses developed by users who have learned to work with that interface. To that extent, the lock would interfere with, not further, copyright's basic creativity objectives. *See Connectix Corp.*, 203 F.3d at 607; *see also Sega Enterprises*, 977 F.2d at 1523–1524 ("An attempt to monopolize the market by making it impossible for others to compete runs counter to the statutory purpose of promoting creative expression"); *Lexmark Int'l*, 387 F.3d at 544 (noting that where a subsequent user copied a computer program to foster functionality, it was not exploiting the programs "commercial value as a copyrighted work" (emphasis in original)). After all, copyright supplies the economic incentive to both create and disseminate ideas, and the reimplementing of a user interface allows creative new computer code to more easily enter the market.

[76] The uncertain nature of Sun's ability to compete in Android's market place, the sources of its lost revenue, and the risk of creativity-related harms to the public, when taken together, convince that this fourth factor—market effects—also weighs in favor of fair use....

[77] The fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world. *See Lotus Development Corp.* (Boudin, J., concurring). In doing so here, we have not changed the nature of those concepts. We do not overturn or modify our earlier cases involving fair use—cases, for example, that involve "knockoff" products, journalistic writings, and parodies. Rather, we here recognize that application of a copyright doctrine such as fair use has long proved a cooperative effort of Legislatures and courts, and that Congress, in our view, intended that it so continue. As such, we have looked to the principles set forth in the fair use statute, § 107, and set forth in our earlier cases, and applied them to this different kind of copyrighted work.

[78] We reach the conclusion that in this case, where Google reimplemented a user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program, Google's

copying of the Sun Java API was a fair use of that material as a matter of law. The Federal Circuit’s contrary judgment is reversed, and the case is remanded for further proceedings in conformity with this opinion....

Justice BARRETT took no part in the consideration or decision of this case.

Justice THOMAS, with whom Justice Alito joins, dissenting.

[79] Oracle spent years developing a programming library that successfully attracted software developers, thus enhancing the value of Oracle’s products. Google sought a license to use the library in Android, the operating system it was developing for mobile phones. But when the companies could not agree on terms, Google simply copied verbatim 11,500 lines of code from the library. As a result, it erased 97.5% of the value of Oracle’s partnership with Amazon, made tens of billions of dollars, and established its position as the owner of the largest mobile operating system in the world. Despite this, the majority holds that this copying was fair use.

[80] The Court reaches this unlikely result in large part because it bypasses the antecedent question clearly before us: Is the software code at issue here protected by the Copyright Act? The majority purports to assume, without deciding, that the code is protected. But its fair-use analysis is wholly inconsistent with the substantial protection Congress gave to computer code. By skipping over the copyrightability question, the majority disregards half the relevant statutory text and distorts its fair-use analysis. Properly considering that statutory text, Oracle’s code at issue here is copyrightable, and Google’s use of that copyrighted code was anything but fair....

[81] In the 1990s, Oracle created a programming language called Java. Like many programming languages, Java allows developers to prewrite small subprograms called “methods.” Methods form the building blocks of more complex programs. This process is not unlike what legislatures do with statutes. To save space and time, legislatures define terms and then use those definitions as a shorthand. For example, the legal definition for “refugee” is more than 300 words long. 8 U.S.C. § 1101(42). Rather than repeat all those words every time they are relevant, the U.S. Code encapsulates them all with a single term that it then inserts into each relevant section. Java methods work similarly. Once a method has been defined, a developer need only type a few characters (the method name and relevant inputs) to invoke everything contained in the subprogram. A programmer familiar with prewritten methods can string many of them together to quickly develop complicated programs without having to write from scratch all the basic subprograms....

[82] Oracle’s declaring code was central to its business model. Oracle profited financially by encouraging developers to create programs written in Java and then charging manufacturers a fee to embed in their devices the Java software platform needed to run those programs. To this end, Oracle created a work called Java 2 Platform, Standard Edition, which included a highly organized library containing about 30,000 methods. Oracle gave developers free access to these methods to encourage them to write programs for the Java platform. In return, developers were required to make their programs compatible with the Java platform on any device. Developers were encouraged to make improvements to the platform, but they were required to release beneficial modifications to the public. If a company wanted to customize the platform and keep those customizations secret for business purposes, it had to pay for a separate license.

[83] By 2005, many companies were racing to develop operating systems for what would become modern smartphones. Oracle’s strategy had successfully encouraged millions of programmers to learn Java. As a result, Java software platforms were in the vast majority of mobile phones. Google wanted to attract those programmers to Android by including in Android the declaring code with which they were now familiar. But the founder of Android, Andrew Rubin, understood that the declaring code was copyrighted, so Google sought a custom license from Oracle. At least four times between 2005 and 2006, the two companies attempted to negotiate a license, but they were unsuccessful, in part because of trust issues.

## Chapter VI – Fair Use

[84] When those negotiations broke down, Google simply decided to use Oracle’s code anyway. Instead of creating its own declaring code—as Apple and Microsoft chose to do—Google copied verbatim 11,500 lines of Oracle’s declaring code and arranged that code exactly as Oracle had done. It then advertised Android to device manufacturers as containing “Core Java Libraries.” ...

{The dissent presents its argument that the declaring code is copyrightable.}

[85] .... Three [of the four statutory fair use factors] decisively favor Oracle. And even assuming that the remaining factor favors Google, that factor, without more, cannot legally establish fair use in this context.

[86] .... Tellingly, the majority evaluates the factors neither in sequential order nor in order of importance (at least two factors are more important under our precedent). Instead, it starts with the second factor: the nature of the copyrighted work. It proceeds in this manner in order to create a distinction between declaring and implementing code that renders the former less worthy of protection than the latter. Because the majority’s mistaken analysis rests so heavily on this factor, I begin with it as well.

### A. The Nature of the Copyrighted Work

[87] This factor requires courts to assess the level of creativity or functionality in the original work. It generally favors fair use when a copyrighted work is more informational or functional than creative. Because code is predominantly functional, this factor will often favor copying when the original work is computer code. But because Congress determined that declaring and implementing code are copyrightable {by deeming computer programs to be copyrightable}, this factor alone cannot support a finding of fair use.

[88] The majority, however, uses this factor to create a distinction between declaring and implementing code that in effect removes copyright protection from declaring code. It concludes that, unlike implementing code, declaring code is far “from the core of copyright” because it becomes valuable only when third parties (computer programmers) value it and because it is “inherently bound together with uncopyrightable ideas.”

[89] Congress, however, rejected this sort of categorical distinction that would make declaring code less worthy of protection. The Copyright Act protects code that operates “in a computer in order to bring about a certain result” both “directly” (implementing code) and “indirectly” (declaring code). § 101. And if anything, declaring code is closer to the core of copyright. Developers cannot even see implementing code. Implementing code thus conveys no expression to developers. Declaring code, in contrast, is user facing. It must be designed and organized in a way that is intuitive and understandable to developers so that they can invoke it.

[90] Even setting those concerns aside, the majority’s distinction is untenable. True, declaring code is “inherently bound together with uncopyrightable ideas.” Is anything not? Books are inherently bound with uncopyrightable ideas—the use of chapters, having a plot, or including dialogue or footnotes. This does not place books far “from the core of copyright.” And implementing code, which the majority concedes is copyrightable, is inherently bound up with the division of computing tasks that cannot be copyrighted.<sup>6</sup> We have not discounted a work of authorship simply because it is associated with noncopyrightable ideas. While ideas cannot be copyrighted, expressions of those ideas can.

[91] Similarly, it makes no difference that the value of declaring code depends on how much time third parties invest in learning it. Many other copyrighted works depend on the same. A Broadway musical script needs

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<sup>6</sup> The majority also belittles declaring code by suggesting it is simply a way to organize implementing code. Not so. Declaring code defines subprograms of implementing code, including by controlling what inputs they can process. Similarly, the majority is wrong to suggest that the purpose of declaring code is to connect pre-existing method calls to implementing code. Declaring code creates the method calls.

actors and singers to invest time learning and rehearsing it. But a theater cannot copy a script—the rights to which are held by a smaller theater—simply because it wants to entice actors to switch theaters and because copying the script is more efficient than requiring the actors to learn a new one.

[92] What the majority says is true of declaring code is no less true of implementing code. Declaring code is how programmers access prewritten implementing code. The value of that implementing code thus is directly proportional to how much programmers value the associated declaring code. The majority correctly recognizes that declaring code “is inextricably bound up with implementing code,” but it overlooks the implications of its own conclusion.

[93] Only after wrongly concluding that the nature of declaring code makes that code generally unworthy of protection does the Court move on to consider the other factors. This opening mistake taints the Court’s entire analysis.

### B. Market Effects

[94] Undoubtedly the single most important element of fair use is the effect of Google’s copying upon the potential market for or value of Oracle’s copyrighted work. As the Federal Circuit correctly determined, “evidence of actual and potential harm stemming from Google’s copying was overwhelming.” By copying Oracle’s code to develop and release Android, Google ruined Oracle’s potential market in at least two ways.

[95] First, Google eliminated the reason manufacturers were willing to pay to install the Java platform. Google’s business model differed from Oracle’s. While Oracle earned revenue by charging device manufacturers to install the Java platform, Google obtained revenue primarily through ad sales. Its strategy was to release Android to device manufacturers for free and then use Android as a vehicle to collect data on consumers and deliver behavioral ads. With a free product available that included much of Oracle’s code (and thus with similar programming potential), device manufacturers no longer saw much reason to pay to embed the Java platform.

[96] For example, before Google released Android, Amazon paid for a license to embed the Java platform in Kindle devices. But after Google released Android, Amazon used the cost-free availability of Android to negotiate a 97.5% discount on its license fee with Oracle. Evidence at trial similarly showed that right after Google released Android, Samsung’s contract with Oracle dropped from \$40 million to about \$1 million. Google contests none of this except to say that Amazon used a different Java platform, Java Micro Edition instead of Java Standard Edition. That difference is inconsequential because the former was simply a smaller subset of the latter. Google copied code found in both platforms. The majority does not dispute—or even mention—this enormous harm.

[97] Second, Google interfered with opportunities for Oracle to license the Java platform to developers of smartphone operating systems. Before Google copied Oracle’s code, nearly every mobile phone on the market contained the Java platform. Oracle’s code was extraordinarily valuable to anybody who wanted to develop smartphones, which explains why Google tried no fewer than four times to license it. The majority’s remark that Google also sought other licenses from Oracle does not change this central fact. Both parties agreed that Oracle could enter Google’s current market by licensing its declaring code. But by copying the code and releasing Android, Google eliminated Oracle’s opportunity to license its code for that use.

[98] The majority writes off this harm by saying that the jury could have found that Oracle might not have been able to enter the modern smartphone market successfully.<sup>7</sup> But whether Oracle could itself enter that market

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<sup>7</sup> It also suggests that Oracle may have received some incidental benefit from Android. But even assuming that is true, it would go to the question of damages, not fair use. And there is no evidence that any benefit came even close to offsetting Oracle’s enormous loss.



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is only half the picture. We look at not only the potential market that creators of original works would in general develop but also those potential markets the copyright holder might license others to develop. A book author need not be able to personally convert a book into a film so long as he can license someone else to do so. That Oracle could have licensed its code for use in Android is undisputed.

[99] Unable to seriously dispute that Google’s actions had a disastrous effect on Oracle’s potential market, the majority changes course and asserts that enforcing copyright protection could harm the public by giving Oracle the power to “limi[t] the future creativity” of programs on Android. But this case concerns only versions of Android released through November 2014. Google has released six major versions since then. Only about 7.7% of active Android devices still run the versions at issue. The majority’s concern about a lock-in effect might carry more weight if this suit concerned versions of Android widely in use or that will be widely in use. It makes little sense in a suit about versions that are close to obsolete.

[100] The majority’s concern about a lock-in effect also is speculation belied by history. First, Oracle never had lock-in power. The majority (again) overlooks that Apple and Microsoft created mobile operating systems without using Oracle’s declaring code. Second, Oracle always made its declaring code freely available to programmers. There is little reason to suspect Oracle might harm programmers by stopping now. And third, the majority simply assumes that the jury, in a future suit over current Android versions, would give Oracle control of Android instead of just awarding damages or perpetual royalties.

[101] If the majority is going to speculate about what Oracle might do, it at least should consider what Google has done. The majority expresses concern that Oracle might abuse its copyright protection (on outdated Android versions) and “attempt to monopolize the market.” But it is Google that recently was fined a record \$5 billion [by the European Commission] for abusing Android to violate antitrust laws. Google controls the most widely used mobile operating system in the world. And if companies may now freely copy libraries of declaring code whenever it is more convenient than writing their own, others will likely hesitate to spend the resources Oracle did to create intuitive, well-organized libraries that attract programmers and could compete with Android. If the majority is worried about monopolization, it ought to consider whether Google is the greater threat.

[102] By copying Oracle’s work, Google decimated Oracle’s market and created a mobile operating system now in over 2.5 billion actively used devices, earning tens of billions of dollars every year. If these effects on Oracle’s potential market favor Google, something is very wrong with our fair-use analysis.

### C. The Purpose and Character of the Use

[103] The second-most important factor—“the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”—requires us to consider whether use was commercial and whether it was transformative. Both aspects heavily favor Oracle.

[104] Begin with the overwhelming commercial nature of Google’s copying. In 2015 alone, the year before the fair-use trial, Google earned \$18 billion from Android. That number has no doubt dramatically increased as Android has grown to dominate the global market share.<sup>9</sup> On this scale, Google’s use of Oracle’s declaring code weighs heavily—if not decisively—against fair use.

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<sup>9</sup> The real value also may be much higher because Android indirectly boosts other sources of revenue. For years Google has set its search engine as the default engine on Android. Google can use that engine to collect reams of data used to deliver behavioral advertisements to consumers on desktops. Using control over Android to choose a default search engine may seem trivial, but Google certainly does not think so. According to a Goldman Sachs analysis, Google paid Apple \$12 billion

[105] The majority attempts to dismiss this overwhelming commercial use by noting that commercial use does “not necessarily” weigh against fair use. True enough. Commercial use sometimes can be overcome by use that is sufficiently transformative. But we cannot ignore Google’s intended purpose of supplanting Oracle’s commercially valuable platform with its own. Even if we could, we have never found fair use for copying that reaches into the tens of billions of dollars and wrecks the copyright holder’s market.

[106] Regardless, Google fares no better on transformative use. A court generally cannot find fair use unless the copier’s use is transformative.... This question is guided by the examples of fair use given in the preamble to § 107. Those examples include: “criticism, comment, news reporting, teaching ..., scholarship, or research.” § 107. Although these examples are not exclusive, they are illustrative, and Google’s repurposing of Java code from larger computers to smaller computers resembles none of them. Google did not use Oracle’s code to teach or reverse engineer a system to ensure compatibility. Instead, to avoid the drudgery in working up something fresh, Google used the declaring code for the same exact purpose Oracle did. As the Federal Circuit correctly determined, “[t]here is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform.”

[107] The majority acknowledges that Google used the copied declaring code “for the same reason” Oracle did. So, by turns, the majority transforms the definition of “transformative.” Now, we are told, “transformative” simply means—at least for computer code—a use that will help others “create new products.”

[108] That new definition eviscerates copyright. A movie studio that converts a book into a film without permission not only creates a new product (the film) but enables others to “create products”—film reviews, merchandise, YouTube highlight reels, late night television interviews, and the like. Nearly every computer program, once copied, can be used to create new products. Surely the majority would not say that an author can pirate the next version of Microsoft Word simply because he can use it to create new manuscripts.

[109] Ultimately, the majority wrongly conflates transformative use with derivative use. To be transformative, a work must do something fundamentally different from the original. A work that simply serves the same purpose in a new context—which the majority concedes is true here—is derivative, not transformative. Congress made clear that Oracle holds “the exclusive rights ... to prepare derivative works.” § 106(2). Rather than create a transformative product, Google profited from exploitation of the copyrighted material without paying the customary price.

#### **D. The Amount and Substantiality of the Portion Used**

[110] The statutory fair-use factors also instruct us to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” § 107(3). In general, the greater the amount of use, the more likely the copying is unfair. *Ibid.* But even if the copier takes only a small amount, copying the “heart” or focal points of a work weighs against fair use, unless no more was taken than necessary for the copier to achieve transformative use.

[111] Google does not dispute the Federal Circuit’s conclusion that it copied the heart or focal points of Oracle’s work. The declaring code is what attracted programmers to the Java platform and why Google was so interested in that code. And Google copied that code verbatim, which weighs against fair use. The majority does not disagree. Instead, it concludes that Google took no more than necessary to create new products. That analysis fails because Google’s use is not transformative. This factor thus weighs against Google.

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to be the default search engine for Safari, Apple’s web browser, for just one year. Google does not appear to have disputed this figure.

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[112] Even if Google’s use were transformative, the majority is wrong to conclude that Google copied only a small portion of the original work. The majority points out that the 11,500 lines of declaring code—enough to fill about 600 pages in an appendix—were just a fraction of the code in the Java platform. But the proper denominator is declaring code, not all code. A copied work is quantitatively substantial if it could serve as a market substitute for the original work or potentially licensed derivatives of that work. The declaring code is what attracted programmers. And it is what made Android a market substitute for potentially licensed derivatives of Oracle’s Java platform. Google’s copying was both qualitatively and quantitatively substantial....

[113] In sum, three of the four statutory fair-use factors weigh decidedly against Google. The nature of the copyrighted work—the sole factor possibly favoring Google—cannot by itself support a determination of fair use because holding otherwise would improperly override Congress’ determination that declaring code is copyrightable....

### NOTES

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1. Which fair use factor, if any, was the most important to the Court’s conclusion? Why? Is your answer like or unlike your answer for previous cases?
2. Do you think the dissent is right that the majority could not avoid ruling on the copyrightability of the declaring code as a prerequisite to deciding whether Google’s use was fair? Note how repeatedly the majority decision approvingly cites Judge Boudin’s concurrence in *Lotus Development Corp. v. Borland Int’l, Inc.*, the First Circuit decision on the copyrightability of aspects of a spreadsheet program’s user interface you read in Chapter II. Does that suggest anything about the majority’s view of copyrightability here?
3. Although the Supreme Court underscores that its ruling is confined to the facts of the case, its multiple supportive citations of two Ninth Circuit decisions involving reverse engineering software for interoperability suggests a possible broader applicability of the fair use decision.

The first of those cases, *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1993), involved a copyright infringement lawsuit by Sega, a maker of video game systems and video game cartridges, against Accolade, another maker of video game cartridges, for reverse engineering Sega’s programs to discern the requirements to make its own video games compatible with Sega’s system. This reverse engineering involved “transform[ing] the machine-readable object code contained in commercially available copies of Sega’s game cartridges into human-readable source code using a process called ‘disassembly’ or ‘decompilation.’” Accolade engineers then “experimented to discover the interface specifications for [Sega’s] console by modifying the programs and studying the results,” from which they created a development manual about how to make a Sega-compatible game. The Ninth Circuit held that this reverse engineering process, which necessarily involved copying Sega’s computer programs, constituted fair use. With regard to the first fair use factor, the court emphasized that it weighed in Accolade’s favor because Accolade’s copying was only to discover the functional requirements for compatibility with Sega’s console, aspects that are not copyrightable, and was an intermediate use on the way to creating its own video games. The court emphasized that the second fair use factor “is important to the resolution of cases such as th[is] one.” It reasoned that “[b]ecause Sega’s video game programs contain unprotected aspects that cannot be examined without copying, we afford them a lower degree of protection than more traditional literary works.” The court also found that the third and fourth fair use factors favored Accolade.

In the second Ninth Circuit decision cited approvingly by the Supreme Court, Connectix Corporation had reverse engineered the interoperability specifications for the Sony PlayStation console to enable its games to be run on the Apple iMac computer platform instead of only through the PlayStation console attached to a television. *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000). Connectix

created the Virtual Game Station, a PlayStation emulator for the iMac to emulate the PlayStation’s hardware and software. Sony sued Connectix, claiming that when Connectix reverse engineered Sony’s PlayStation code during the course of creating the emulator, it infringed Sony’s copyright in the code. How is this set of facts and marketplace realities alike or different than in *Sega*? The Ninth Circuit concluded that Connectix’s intermediate copies of Sony’s copyrighted code that it made in the course of reverse engineering the PlayStation were protected by fair use. In addition to following *Sega*’s analysis, the Ninth Circuit observed that “Connectix’s Virtual Game Station is modestly transformative. The product creates a new platform, the personal computer, on which consumers can play games designed for the Sony PlayStation. This innovation affords opportunities for game play in new environments, specifically anywhere a Sony PlayStation console and television are not available, but a computer with a CD-ROM drive is. More important, the Virtual Game Station itself is a wholly new product, notwithstanding the similarity of uses and functions between the Sony PlayStation and the Virtual Game Station.”

4. As generative artificial intelligence software—like Stable Diffusion and ChatGPT—increases in popularity and utility, a question arises whether the vast array of often copyrighted material on which such software is trained constitutes a fair use of that material. Consider how much the technical details of the training matter, such as whether the material is copied, represented in another form, or not stored at all, and how much the output resembles the copyrighted material. For analysis of the issue, see Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743 (2021); Amanda Levendowski, *How Copyright Law Fixes Artificial Intelligence’s Implicit Bias Problem*, 93 WASH. L. REV. 579 (2018); Matthew Sag, *Fairness and Fair Use in Generative AI*, 92 FORDHAM L. REV. 1887 (2024). This issue is at play in a spate of recently-filed lawsuits by copyright holders (such as Getty Images and the New York Times) against businesses providing generative AI software (such as Stability AI and OpenAI). In one of the few decisions thus far weighing in on the merits of a fair use defense in such cases—a case involving the alleged use of Westlaw headnotes to train an AI-grounded legal research tool—the United States District Court for the District of Delaware has stated, “It was transformative intermediate copying if [the defendant’s] AI only studied the language patterns in the headnotes to learn how to produce judicial opinion quotes. But if [the plaintiff] is right that [the defendant] used the untransformed text of headnotes to get its AI to replicate and reproduce the creative drafting done by Westlaw’s attorney-editors, then [the defendant’s] comparisons to cases like *Sega* and *Sony* are not apt.” Thomson Reuters Enter. Centre GmbH v. Ross Intelligence Inc., --- F. Supp. 3d ----, 2023 WL 6210901 (D. Del. 2023). This case is somewhat unusual in that the plaintiff appears to have alleged that the training was done for the purpose of having the AI agent produce outputs that reproduce protected expression essentially verbatim. Whether or not this is a correct description of the technology at issue in this case, it is unlikely to correctly describe the outputs produced by general-purpose AI models.”

5. For an analysis of how copyright law ought to handle reverse engineering of others’ software, in light of concerns about interoperability and the software marketplace, see Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J. 1575 (2002).

6. In *Google*, the district court had asked a jury to rule on fair use. Is fair use an appropriate question to have a jury determine? Do you think a judge or jury is better equipped to assess fair use? As *Google* makes clear, the Supreme Court views fair use as a mixed question of law and fact.

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## 7. Appropriation Art

Over the years, there have been prominent infringement cases about whether a visual artist can use preexisting artwork from another artist for use in subsequent “appropriation art.” Those decisions reflected different approaches and outcomes to whether such appropriation can result in fair use. For example, one Second Circuit decision held that a sculpture based on a photograph purchased in a “tourist-like card shop” (both shown in Figure 113) was not a fair use in large part because it was satire rather than parody, as “the audience [was not]

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aware that underlying the [sculpture] there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.” *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). By contrast, in a subsequent Second Circuit decision, the court concluded it was a fair use to copy a fashion magazine photograph as part of a collage painting (both shown in Figure 114) in large part because the artist articulated “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.” *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006). In yet another decision, the Second Circuit ruled that most, but not necessarily all, of the defendant’s appropriations (two examples shown in Figure 116) of the plaintiff’s photographs (an example being shown in Figure 115) were fair use because they appear transformative to a reasonable observer given that they “have a different character, give [the plaintiff’s] photographs a new expression, and employ new aesthetics with creative and communicative results distinct from [the plaintiff’s].” *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).



Figure 113: Art Rogers “Puppies” photograph (top), and Jeff Koons “String of Puppies” sculpture (bottom)





Figure 114: Andrea Blanch's "Silk Sandals by Gucci" photograph (left), and Jeff Koons' "Niagara" (right)

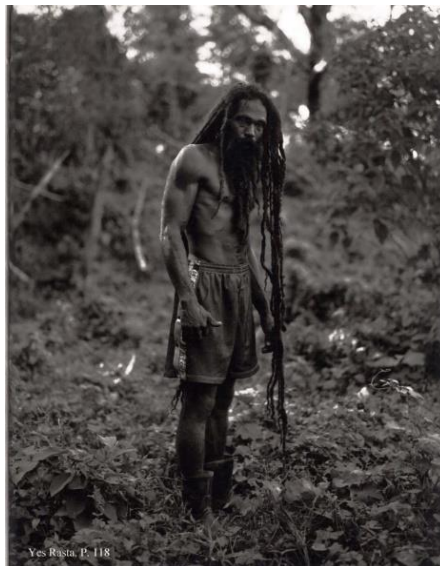


Figure 115: photograph from Patrick Cariou's *Yes Rasta*



Figure 116: artwork from Richard Prince's *Canal Zone* series

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Two central issues underlying these cases are (1) which justifications for using another's work count as transformative, and (2) from whose vantage point is this determined? For example, does a defendant artist need to provide a justification for using another's work? What if the artist does not do so but the work looks transformative to consumers? To art experts?

This series of cases on appropriation art in the Second Circuit culminated in this recent Supreme Court decision. How favorable is the Supreme Court to appropriation art? Is it right to be concerned about the breadth of transformativeness?

### **Andy Warhol Foundation for the Visual Arts, Inc. v. Lynn Goldsmith**

598 U.S. 508 (2023)

SOTOMAYOR, J.:

[1] This copyright case involves not one, but two artists. The first, Andy Warhol, is well known. His images of products like Campbell's soup cans and of celebrities like Marilyn Monroe appear in museums around the world. Warhol's contribution to contemporary art is undeniable.

[2] The second, Lynn Goldsmith, is less well known. But she too was a trailblazer. Goldsmith began a career in rock-and-roll photography when there were few women in the genre. Her award-winning concert and portrait images, however, shot to the top. Goldsmith's work appeared in *Life*, *Time*, *Rolling Stone*, and *People* magazines, not to mention the National Portrait Gallery and the Museum of Modern Art. She captured some of the 20th century's greatest rock stars: Bob Dylan, Mick Jagger, Patti Smith, Bruce Springsteen, and, as relevant here, Prince....

[3] In 1981, Goldsmith convinced *Newsweek* magazine to hire her to photograph Prince Rogers Nelson, then an up and coming and hot young musician. *Newsweek* agreed, and Goldsmith took photos of Prince in concert at the Palladium in New York City and in her studio on West 36th Street. *Newsweek* ran one of the concert photos, together with an article titled "The Naughty Prince of Rock." Goldsmith retained the other photos. She holds copyright in all of them.



Figure 117: Lynn Goldsmith's photograph of Prince

[4] One of Goldsmith's studio photographs, a black and white portrait of Prince, is the original copyrighted work at issue in this case.

[5] In 1984, Goldsmith, through her agency, licensed that photograph to *Vanity Fair* to serve as an "artist reference for an illustration" in the magazine. The terms of the license were that the illustration was "to be published in *Vanity Fair* November 1984 issue. It can appear one time full page and one time under one quarter page. No other usage right granted." Goldsmith was to receive \$400 and a source credit.

[6] To make the illustration, *Vanity Fair* hired pop artist Andy Warhol. Warhol was already a major figure in American art, known among other things for his silkscreen portraits of celebrities.<sup>1</sup> From Goldsmith's photograph, Warhol created a silkscreen portrait of Prince, which appeared alongside an article about Prince in the November 1984 issue of *Vanity Fair*. The article, titled "Purple Fame," is primarily about the "sexual style" of the new celebrity and his music. Goldsmith received her \$400 fee, and *Vanity Fair* credited her for the "source photograph." Warhol received an unspecified amount.



Figure 118: *Vanity Fair* with Andy Warhol's illustration of Goldsmith's photograph

[7] In addition to the single illustration authorized by the *Vanity Fair* license, Warhol created 15 other works based on Goldsmith's photograph: 13 silkscreen prints and two pencil drawings. The works are collectively referred to as the "Prince Series." Goldsmith did not know about the Prince Series until 2016, when she saw the image of an orange silkscreen portrait of Prince ("Orange Prince") on the cover of a magazine published by *Vanity Fair*'s parent company, Condé Nast.

[8] By that time, Warhol had died, and the Prince Series had passed to the Andy Warhol Foundation for the Visual Arts, Inc. AWF no longer possesses the works,<sup>2</sup> but it asserts copyright in them. It has licensed images of the works for commercial and editorial uses. In particular, after Prince died in 2016, Condé Nast contacted AWF about the possibility of reusing the 1984 *Vanity Fair* image for a special edition magazine that would commemorate Prince. Once AWF informed Condé Nast about the other Prince Series images, however, Condé Nast obtained a license to publish Orange Prince instead. The magazine, titled "The Genius of Prince," is a tribute to "Prince Rogers Nelson, 1958–2016." It is devoted to Prince. Condé Nast paid AWF \$10,000 for

<sup>1</sup> A silkscreen is a fine mesh fabric used in screen printing. Warhol's practice was to deliver a photograph to a professional silkscreen printer with instructions for alterations, such as cropping and high contrasting. The latter alteration would flatten the image. Once Warhol approved, the printer would reproduce the altered image like a photographic negative onto the screen. For canvas prints, Warhol would then place the screen face down on the canvas, pour ink onto the back of the mesh, and use a squeegee to pull the ink through the weave and onto the canvas. The resulting high-contrast half-tone impressions served as an under-drawing, over which Warhol painted colors by hand.

<sup>2</sup> AWF sold 12 of the works to collectors and galleries, and it transferred custody of the remaining four works to the Andy Warhol Museum in Pittsburgh.

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the license. Goldsmith received neither a fee nor a source credit.

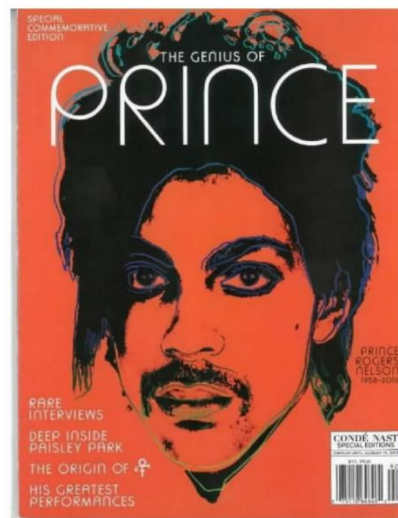


Figure 119: Condé Nast special issue featuring Orange Prince

[9] Remember that Goldsmith, too, had licensed her Prince images to magazines such as *Newsweek*, to accompany a story about the musician, and *Vanity Fair*, to serve as an artist reference. But that was not all. Between 1981 and 2016, Goldsmith's photos of Prince appeared on or between the covers of *People*, *Readers Digest*, *Guitar World*, and *Musician* magazines.

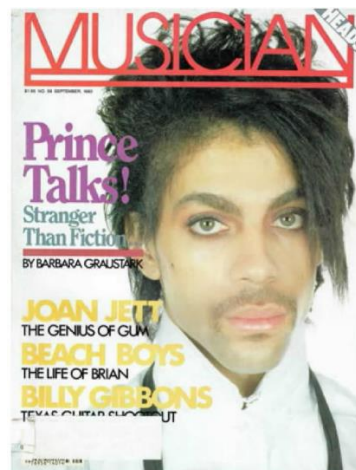


Figure 120: *Musician* magazine featuring Prince photograph

[10] *People* magazine, in fact, paid Goldsmith \$1,000 to use one of her copyrighted photographs in a special collector's edition, "Celebrating Prince: 1958–2016," just after Prince died. *People's* tribute, like Condé Nast's, honors the life and music of Prince. Other magazines, including *Rolling Stone* and *Time*, also released special editions. All of them depicted Prince on the cover. All of them used a copyrighted photograph in service of that object. And all of them (except Condé Nast) credited the photographer.

[11] When Goldsmith saw Orange Prince on the cover of Condé Nast's special edition magazine, she recognized her work. "It's the photograph," she later testified. Orange Prince crops, flattens, traces, and colors the photo but otherwise does not alter it.

[12] Goldsmith notified AWF of her belief that it had infringed her copyright. AWF then sued Goldsmith and her agency for a declaratory judgment of noninfringement or, in the alternative, fair use. Goldsmith counterclaimed for infringement.





Figure 121: Various magazine covers featuring Prince



Figure 122: Goldsmith's Prince photograph (left) and the Goldsmith photograph with Orange Prince superimposed (right)

[13] The District Court granted summary judgment for AWF. The court considered the four fair use factors enumerated in 17 U.S.C. § 107 and held that the Prince Series works made fair use of Goldsmith's photograph. As to the first factor, the works were transformative because, looking at them and the photograph side-by-side, they have a different character, give Goldsmith's photograph a new expression, and employ new aesthetics with creative and communicative results distinct from Goldsmith's. In particular, the works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure, such that each Prince Series work is immediately recognizable as a "Warhol" rather than as a photograph of Prince. Although the second factor, the nature of Goldsmith's copyrighted work



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(creative and unpublished), would ordinarily weigh in her favor, this factor was of limited importance because the Prince Series works are transformative. The third factor, the amount and substantiality of the portion used in relation to the copyrighted work, favored AWF because, according to the District Court, Warhol removed nearly all the photograph's protectible elements in creating the Prince Series. Finally, the fourth factor likewise favored AWF because the Prince Series works are not market substitutes that have harmed—or have the potential to harm—Goldsmith.

[14] The Court of Appeals for the Second Circuit reversed and remanded. It held that all four fair use factors favored Goldsmith. On the first factor, the purpose and character of the use, the Court of Appeals rejected the notion that any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative. The question was, instead, whether the secondary work's use of its source material is in service of a fundamentally different and new artistic purpose and character. Such transformative purpose and character must, at bare minimum, comprise something more than the imposition of another artist's style on the primary work. Here, however, the overarching purpose and function of the two works at issue is identical, not merely in the broad sense that they are created as works of visual art, but also in the narrow but essential sense that they are portraits of the same person. The Court of Appeals also rejected the District Court's logic that each Prince Series work is transformative because it is immediately recognizable as a "Warhol," which the Court of Appeals believed would create a celebrity-plagiarist privilege.

[15] On the other three factors, the Court of Appeals found that the creative and unpublished nature of Goldsmith's photograph favored her; that the amount and substantiality of the portion taken (here, the essence of the photograph) was not reasonable in relation to the purpose of the use; and that AWF's commercial licensing encroached on Goldsmith's protected market to license her photograph to publications for editorial purposes and to other artists to create derivative works. The court noted that there was no material dispute that both Goldsmith and AWF have sought to license (and indeed have successfully licensed) their respective depictions of Prince to popular print magazines to accompany articles about him.

[16] Finally, although the District Court had not reached the issue, the Court of Appeals rejected AWF's argument that the Prince Series works were not substantially similar to Goldsmith's photograph.

[17] Judge Jacobs concurred. He stressed that the Court of Appeals' holding did not consider, let alone decide, whether the infringement here encumbers the original Prince Series works. Instead, the only use at issue was the Foundation's commercial licensing of images of the Prince Series.

[18] This Court granted certiorari....

[19] AWF does not challenge the Court of Appeals' holding that Goldsmith's photograph and the Prince Series works are substantially similar. The question here is whether AWF can defend against a claim of copyright infringement because it made fair use of Goldsmith's photograph.

[20] Although the Court of Appeals analyzed each fair use factor, the only question before this Court is whether the court below correctly held that the first factor, "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," weighs in Goldsmith's favor. AWF contends that the Prince Series works are transformative, and that the first factor therefore weighs in its favor, because the works convey a different meaning or message than the photograph. The Court of Appeals erred, according to AWF, by not considering that new expression.

[21] But the first fair use factor instead focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism. Although new expression may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive of the first factor.

[22] Here, the specific use of Goldsmith's photograph alleged to infringe her copyright is AWF's licensing of Orange Prince to Condé Nast. As portraits of Prince used to depict Prince in magazine stories about Prince, the original photograph and AWF's copying use of it share substantially the same purpose. Moreover, the copying use is of a commercial nature. Even though Orange Prince adds new expression to Goldsmith's

photograph, as the District Court found, this Court agrees with the Court of Appeals that, in the context of the challenged use, the first fair use factor still favors Goldsmith....

[23] The first fair use factor is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” This factor considers the reasons for, and nature of, the copier’s use of an original work. The “central” question it asks is “whether the new work merely supersedes the objects of the original creation ... (supplanting the original), or instead adds something new, with a further purpose or different character.” *Campbell* (quoting *Folsom v. Marsh* (Story, J.), and *Harper & Row*). In that way, the first factor relates to the problem of substitution—copyright’s *bête noire*. The use of an original work to achieve a purpose that is the same as, or highly similar to, that of the original work is more likely to substitute for, or supplant, the work....

[24] .... Whether a use shares the purpose or character of an original work, or instead has a further purpose or different character, is a matter of degree. Most copying has some further purpose, in the sense that copying is socially useful *ex post*. Many secondary works add something new. That alone does not render such uses fair. Rather, the first factor (which is just one factor in a larger analysis) asks whether and to what extent the use at issue has a purpose or character different from the original. The larger the difference, the more likely the first factor weighs in favor of fair use. The smaller the difference, the less likely.

[25] A use that has a further purpose or different character is said to be transformative. As before, transformativeness is a matter of degree. That is important because the word “transform,” though not included in § 107, appears elsewhere in the Copyright Act. The statute defines derivative works, which the copyright owner has the exclusive right to prepare, to include “any other form in which a work may be recast, transformed, or adapted.” In other words, the owner has a right to derivative transformations of her work. Such transformations may be substantial, like the adaptation of a book into a movie. To be sure, this right is subject to fair use. The two are not mutually exclusive. But an overbroad concept of transformative use, one that includes any further purpose, or any different character, would narrow the copyright owner’s exclusive right to create derivative works. To preserve that right, the degree of transformation required to make “transformative” use of an original must go beyond that required to qualify as a derivative.

[26] For example, this Court in *Campbell* considered whether parody may be fair use. In holding that it may, the Court explained that parody has an obvious claim to transformative value because it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. The use at issue in *Campbell* was 2 Live Crew’s copying of certain lyrics and musical elements from Roy Orbison’s song, “Oh, Pretty Woman,” to create a rap derivative titled “Pretty Woman.” Without a doubt, 2 Live Crew transformed Orbison’s song by adding new lyrics and musical elements, such that “Pretty Woman” had a new message and different aesthetic than “Oh, Pretty Woman.” Indeed, the whole genre of music changed from rock ballad to rap. That was not enough for the first factor to weigh in favor of fair use, however. The Court found it necessary to determine whether 2 Live Crew’s transformation of Orbison’s song rose to the level of parody, a distinct purpose of commenting on the original or criticizing it.

[30] Distinguishing between parody (which targets an author or work for humor or ridicule) and satire (which ridicules society but does not necessarily target an author or work), the Court further explained that parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing. More generally, when commentary has no critical bearing on the substance or style of the original composition, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.

[27] This discussion illustrates two important points: First, the fact that a use is commercial as opposed to nonprofit is an additional element of the first factor. The commercial nature of the use is not dispositive. But it is relevant. As the Court explained in *Campbell*, it is to be weighed against the degree to which the use has a further purpose or different character.

[28] Second, the first factor also relates to the justification for the use. In a broad sense, a use that has a distinct

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purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create. A use that shares the purpose of a copyrighted work, by contrast, is more likely to provide the public with a substantial substitute for matter protected by the copyright owner's interests in the original work or derivatives of it, which undermines the goal of copyright.

[29] In a narrower sense, a use may be justified because copying is reasonably necessary to achieve the user's new purpose. Parody, for example, needs to mimic an original to make its point. Similarly, other commentary or criticism that targets an original work may have compelling reason to conjure up the original by borrowing from it. An independent justification like this is particularly relevant to assessing fair use where an original work and copying use share the same or highly similar purposes, or where wide dissemination of a secondary work would otherwise run the risk of substitution for the original or licensed derivatives of it. Once again, the question of justification is one of degree.

[30] In sum, the first fair use factor considers whether the use of a copyrighted work has a further purpose or different character, which is a matter of degree, and the degree of difference must be balanced against the commercial nature of the use. If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weigh against fair use, absent some other justification for copying....

[31] The fair use provision, and the first factor in particular, requires an analysis of the specific "use" of a copyrighted work that is alleged to be "an infringement." § 107. The same copying may be fair when used for one purpose but not another. See *Campbell* (contrasting the use of a copyrighted work "to advertise a product, even in a parody," with "the sale of a parody for its own sake, let alone one performed a single time by students in school"); *Sony* (contrasting the recording of TV "for a commercial or profit-making purpose" with "private home use").

[32] Here, Goldsmith's copyrighted photograph has been used in multiple ways: After Goldsmith licensed the photograph to *Vanity Fair* to serve as an artist reference, Warhol used the photograph to create the *Vanity Fair* illustration and the other Prince Series works. *Vanity Fair* then used the photograph, pursuant to the license, when it published Warhol's illustration in 1984. Finally, AWF used the photograph when it licensed an image of Warhol's Orange Prince to Condé Nast in 2016. Only that last use, however, AWF's commercial licensing of Orange Prince to Condé Nast, is alleged to be infringing.<sup>9</sup> We limit our analysis accordingly. In particular, the Court expresses no opinion as to the creation, display, or sale of any of the original Prince Series works.<sup>10</sup>

[33] A typical use of a celebrity photograph is to accompany stories about the celebrity, often in magazines. For example, Goldsmith licensed her photographs of Prince to illustrate stories about Prince in magazines such as *Newsweek*, *Vanity Fair*, and *People*. She even licensed her photographs for that purpose after Prince died in 2016. A photographer may also license her creative work to serve as a reference for an artist, like Goldsmith did in 1984 when *Vanity Fair* wanted an image of Prince created by Warhol to illustrate an article about Prince. As noted by the Court of Appeals, Goldsmith introduced uncontroverted evidence that photographers generally license others to create stylized derivatives of their work in the vein of the Prince Series. In fact, Warhol himself paid to license photographs for some of his artistic renditions. Such licenses, for photographs or derivatives of them, are how photographers like Goldsmith make a living. They provide an economic

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<sup>9</sup> AWF sought a declaratory judgment that would cover the original Prince Series works, but Goldsmith has abandoned all claims to relief other than her claim as to the 2016 Condé Nast license and her request for prospective relief as to similar commercial licensing..

<sup>10</sup> .... [T]he dissent assumes that any and all uses of an original work entail the same first-factor analysis based solely on the content of a secondary work. This assumption contradicts the fair use statute and this Court's precedents. Had AWF's use been solely for teaching purposes, that clearly would affect the analysis, and the statute permits no other conclusion. Preferring not to focus on the specific use alleged to infringe Goldsmith's copyright, the dissent begins with a sleight of hand, and continues with a false equivalence between AWF's commercial licensing and Warhol's original creation. The result is a series of misstatements and exaggerations, from the dissent's very first sentence ("Today, the Court declares that Andy Warhol's eye-popping silkscreen of Prince ... is (in copyright lingo) not 'transformative'"), to its very last ("[The majority opinion] will make our world poorer").

incentive to create original works, which is the goal of copyright.

[34] In 2016, AWF licensed an image of Orange Prince to Condé Nast to appear on the cover of a commemorative edition magazine about Prince. The edition, titled “The Genius of Prince,” celebrates the life and work of “Prince Rogers Nelson, 1958–2016.” It is undisputed here that the edition is devoted to Prince. In addition to AWF’s image on the cover, the magazine contains numerous concert and studio photographs of Prince. In that context, the purpose of the image is substantially the same as that of Goldsmith’s photograph. Both are portraits of Prince used in magazines to illustrate stories about Prince.<sup>11</sup> Such environments are not distinct and different. AWF’s licensing of the Orange Prince image thus superseded the objects, i.e., shared the objectives, of Goldsmith’s photograph, even if the two were not perfect substitutes.<sup>12</sup>

[35] The use also is of a commercial nature. Just as Goldsmith licensed her photograph to *Vanity Fair* for \$400, AWF licensed Orange Prince to Condé Nast for \$10,000. The undisputed commercial character of AWF’s use, though not dispositive, tends to weigh against a finding of fair use.

[36] Taken together, these two elements—that Goldsmith’s photograph and AWF’s 2016 licensing of Orange Prince share substantially the same purpose, and that AWF’s use of Goldsmith’s photo was of a commercial nature—counsel against fair use, absent some other justification for copying. That is, although a use’s transformativeness may outweigh its commercial character, here, both elements point in the same

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<sup>11</sup> The Court does not define the purpose as simply “commercial” or “commercial licensing.” (KAGAN, J., dissenting). Nor does the Court view Goldsmith’s photograph and Warhol’s illustration as “fungible products in the magazine market.” Post. Rather, the Court finds significant the degree of similarity between the specific purposes of the original work and the secondary use at issue.

According to the dissent, the fact that a magazine editor might prefer one image to the other must mean the secondary use is transformative, either because it has a different aesthetic or conveys a different message. The Court, because it fails to understand the difference, does not have “much of a future in magazine publishing,” the dissent chides. While the dissent is probably correct about the Court’s business prospects, the editors of *People*, *Rolling Stone*, and *Time* chose a variety of different photos of Prince for their memorial issues. Portrait photos, in fact. Some black and white; some depicting Prince’s corporeality; some realistic or humanistic. These variations in aesthetics did not stop the photos from serving the same essential purpose of depicting Prince in a magazine commemorating his life and career.

Fortunately, the dissent’s “magazine editor” test does not have much of a future in fair use doctrine. The flaw in the dissent’s logic is simple: If all that mattered under the first factor were whether a buyer was “drawn aesthetically” to a secondary work (instead of the pre-existing work it adapted) or whether the buyer preferred “to convey the message of” the secondary work, then every derivative work would qualify. *The New Yorker* might prefer an unauthorized sequel to a short story, rather than the original, but that does not mean the purpose and character of the use would weigh in its favor. Similarly, a rap label might prefer 2 Live Crew’s song, rather than Orbison’s original, based on the new sound and lyrics (i.e., new aesthetic and message), but that was not enough in *Campbell*, and it is not enough here.

<sup>12</sup> In this way, the first factor relates to the fourth, market effect. While the first factor considers whether and to what extent an original work and secondary use have substitutable purposes, the fourth factor focuses on actual or potential market substitution. Under both factors, the analysis here might be different if Orange Prince appeared in an art magazine alongside an article about Warhol.

While keenly grasping the relationship between [t]he [t]wo *Lolitas*, the dissent fumbles the relationship between the first and fourth fair use factors. Under today’s decision, as before, the first factor does not ask whether a secondary use causes a copyright owner economic harm. There is, however, a positive association between the two factors: A secondary use that is more different in purpose and character is less likely to usurp demand for the original work or its derivatives, as the Court has explained. This relationship should be fairly obvious. Still, the relationship is not absolute. For example, copies for classroom use might fulfill demand for an original work. The first factor may still favor the copyist, even if the fourth factor is shown not to. At the same time, other forms of straight copying may be fair if a strong showing on the fourth factor outweighs a weak showing on the first.

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direction.<sup>14</sup>

[37] The foregoing does not mean, however, that derivative works borrowing heavily from an original cannot be fair uses. In *Google*, the Court suggested that “an artistic painting might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism.” That suggestion refers to Warhol’s works that incorporate advertising logos, such as the Campbell’s Soup Cans series.

[38] Yet not all of Warhol’s works, nor all uses of them, give rise to the same fair use analysis. In fact, *Soup Cans* well illustrates the distinction drawn here. The purpose of Campbell’s logo is to advertise soup. Warhol’s canvases do not share that purpose. Rather, the *Soup Cans* series uses Campbell’s copyrighted work for an artistic commentary on consumerism, a purpose that is orthogonal to advertising soup. The use therefore does not supersede the objects of the advertising logo.<sup>15</sup>



Figure 123: Andy Warhol's *Campbell's Soup Cans*

[39] Moreover, a further justification for Warhol’s use of Campbell’s logo is apparent. His *Soup Cans* series targets the logo. That is, the original copyrighted work is, at least in part, the object of Warhol’s commentary. It is the very nature of Campbell’s copyrighted logo—well known to the public, designed to be reproduced, and a symbol of an everyday item for mass consumption—that enables the commentary. Hence, the use of

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<sup>14</sup> The dissent contends that the Court gives “little role” to “the key term ‘character.’” This is somewhat puzzling, as the Court has previously employed “character” to encompass exactly what the dissent downplays: “the commercial or nonprofit character of an activity.” *Sony*; see also *Campbell* (repeatedly referring to “commercial character”). Rather than looking to this case law, the dissent looks up the word “character” in a dictionary. But the dissent’s preferred definition—“a thing’s ‘main or essential nature[,] esp[ecially] as strongly marked and serving to distinguish,’”—helps Goldsmith, not AWF. Even this definition does not support the implication that “character” is determined by any aesthetic distinctiveness, such as the addition of any new expression. Instead, it is the “main or essential nature” that must be “strongly marked and serv[e] to distinguish.” So return to *Orange Prince* on the cover of the *Condé Nast* issue commemorating Prince, and ask, what is the main or essential nature of the secondary use of Goldsmith’s photograph in that context?

<sup>15</sup> The situation might be different if AWF licensed Warhol’s *Soup Cans* to a soup business to serve as its logo. That use would share much the same purpose of Campbell’s logo, even though *Soup Cans* has some new meaning or message. This hypothetical, though fanciful, is parallel to the situation here: Both Goldsmith and AWF sold images of Prince (AWF’s copying Goldsmith’s) to magazines to illustrate stories about the celebrity, which is the typical use made of Goldsmith’s photographs.



the copyrighted work not only serves a completely different purpose, to comment on consumerism rather than to advertise soup, it also conjures up the original work to shed light on the work itself, not just the subject of the work. Here, by contrast, AWF's use of Goldsmith's photograph does not target the photograph, nor has AWF offered another compelling justification for the use....

[40] AWF contends, however, that the purpose and character of its use of Goldsmith's photograph weighs in favor of fair use because Warhol's silkscreen image of the photograph, like the Campbell's Soup Cans series, has a new meaning or message. The District Court, for example, understood the Prince Series works to portray Prince as an iconic, larger-than-life figure. AWF also asserts that the works are a comment on celebrity. In particular, Warhol's Prince Series conveys the dehumanizing nature of celebrity. According to AWF, that new meaning or message, which the Court of Appeals ignored, makes the use transformative in the fair use sense. We disagree....

[41] *Campbell* did describe a transformative use as one that "alters the first work with new expression, meaning, or message. That description paraphrased Judge [Pierre] Leval's law review article, which referred to "new information, new aesthetics, new insights and understandings." (Judge Leval contrasted such additions with secondary uses that "merely repackage" the original.) But *Campbell* cannot be read to mean that § 107(1) weighs in favor of any use that adds some new expression, meaning, or message.

[42] Otherwise, "transformative use" would swallow the copyright owner's exclusive right to prepare derivative works. Many derivative works, including musical arrangements, film and stage adaptations, sequels, spinoffs, and others that "recast, transfor[m] or adap[t]" the original, § 101, add new expression, meaning or message, or provide new information, new aesthetics, new insights and understandings. That is an intractable problem for AWF's interpretation of transformative use. The first fair use factor would not weigh in favor of a commercial remix of Prince's "Purple Rain" just because the remix added new expression or had a different aesthetic. A film or musical adaptation, like that of Alice Walker's *The Color Purple*, might win awards for its significant creative contribution; alter the meaning of a classic novel; and add important new expression, such as images, performances, original music, and lyrics. But that does not in itself dispense with the need for licensing.<sup>17</sup>

[43] *Campbell* is again instructive. 2 Live Crew's version of Orbison's song easily conveyed a new meaning or message. It also had a different aesthetic. Yet the Court went further, examining whether and to what extent 2 Live Crew's song had the parodic purpose of commenting on the original or criticizing it. Parody is, of course, a kind of message. Moreover, the Court considered what the words of the songs might have meant to determine whether parody reasonably could be perceived. But new meaning or message was not sufficient. If it had been, the Court could have made quick work of the first fair use factor. Instead, meaning or message was simply relevant to whether the new use served a purpose distinct from the original, or instead superseded its objects. That was, and is, the central question under the first factor.

[44] The dissent commits the same interpretive error as AWF: It focuses on *Campbell's* paraphrase, yet ignores the rest of that decision's careful reasoning. Indeed, upon reading the dissent, someone might be surprised to learn that *Campbell* was about parody at all. Had expert testimony confirmed the obvious fact that 2 Live Crew's "Pretty Woman" differed in aesthetics and meaning from Orbison's original, that would have been the end of the dissent's analysis. Not the Court's, however. *Campbell* was the culmination of a long line of cases and scholarship about parody's claim to fairness in borrowing. "For purposes of copyright law," the Court explained, "the heart of any parodist's claim to quote from existing material is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works." *Campbell* thus drew a nuanced distinction between parody and satire: While parody cannot function unless it

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<sup>17</sup> The dissent is stumped. Buried in a conclusory footnote, it suggests that the fourth fair use factor alone takes care of derivative works like book-to-film adaptations. This idea appears to come from a Hail Mary lobbed by AWF when it got caught in the same bind. The Court is aware of no authority for the proposition that the first factor favors such uses (on the dissent's view, the first factor must, because the use modifies the expressive content of an original work), leaving it to the fourth factor to ensure that § 106(2) is not a dead letter. Certainly *Google*, which merely noted in passing that "making a film of an author's book may mean potential or presumed losses to the copyright owner," did not hold as much.

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conjures up the original, satire can stand on its own two feet and so requires justification for borrowing. The objective meaning or message of 2 Live Crew's song was relevant to this inquiry into the reasons for copying, but any new expression, meaning, or message was not the test.

[45] What role meaning or message played in the Court of Appeals' analysis here is not entirely clear. The court correctly rejected the idea that any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative. It also appeared correct to accept that meaning or message is relevant to, but not dispositive of, purpose.

[46] Elsewhere, however, the Court of Appeals stated that "the district judge should not assume the role of art critic and seek to ascertain the intent behind or meaning of the works at issue." That statement is correct in part. A court should not attempt to evaluate the artistic significance of a particular work. See *Bleistein*.<sup>19</sup> Nor does the subjective intent of the user (or the subjective interpretation of a court) determine the purpose of the use. But the meaning of a secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original, for instance, because the use comments on, criticizes, or provides otherwise unavailable information about the original....

[47] The District Court determined that the Prince Series works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure. To make that determination, the District Court relied, in part, on testimony by Goldsmith that her photographs of Prince show that he is not a comfortable person and that he is a vulnerable human being. An expert on Warhol, meanwhile, testified that the Prince Series works depict Prince as a kind of icon or totem of something, a mask-like simulacrum of his actual existence.

[48] The Court of Appeals noted, correctly, that whether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic—or for that matter, a judge—draws from the work. Otherwise, the law may well recognize any alteration as transformative. Whether the purpose and character of a use weighs in favor of fair use is, instead, an objective inquiry into what use was made, i.e., what the user does with the original work.

[49] Granting the District Court's conclusion that Orange Prince reasonably can be perceived to portray Prince as iconic, whereas Goldsmith's portrayal is photorealistic, that difference must be evaluated in the context of the specific use at issue. The use is AWF's commercial licensing of Orange Prince to appear on the cover of Condé Nast's special commemorative edition. The purpose of that use is, still, to illustrate a magazine about Prince with a portrait of Prince. Although the purpose could be more specifically described as illustrating a magazine about Prince with a portrait of Prince, one that portrays Prince somewhat differently from Goldsmith's photograph (yet has no critical bearing on her photograph), that degree of difference is not enough for the first factor to favor AWF, given the specific context of the use.

[50] To hold otherwise would potentially authorize a range of commercial copying of photographs, to be used for purposes that are substantially the same as those of the originals. As long as the user somehow portrays the subject of the photograph differently, he could make modest alterations to the original, sell it to an outlet to accompany a story about the subject, and claim transformative use. Many photographs will be open to various interpretations. A subject as open to interpretation as the human face, for example, reasonably can be

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<sup>19</sup> The dissent demonstrates the danger of this approach. On its view, the first fair use factor favors AWF's use of Goldsmith's photograph simply because Warhol created worthy art. Goldsmith's original work, by contrast, is just an old photo, one of Warhol's templates. In other words, the dissent (much like the District Court) treats the first factor as determined by a single fact: "It's a Warhol." This Court agrees with the Court of Appeals that such logic would create a kind of privilege that has no basis in copyright law. Again, the Court does not deny that Warhol was a major figure in American art. But it leaves the worth of his works to the critics. Whatever the contribution of Orange Prince, Goldsmith's photograph is part of that contribution. A court need not, indeed should not, assess the relative worth of two works to decide a claim of fair use. Otherwise, some works of genius would be sure to miss appreciation, and, at the other end, copyright would be denied to works which appealed to a public less educated than the judge. That Goldsmith's photograph had its worth and its success is sufficiently shown by the desire to reproduce it without regard to her rights.

perceived as conveying several possible meanings. The application of an artist’s characteristic style to bring out a particular meaning that was available in the photograph is less likely to constitute a “further purpose” as *Campbell* used the term.

[51] AWF asserts another, albeit related, purpose, which is to comment on the dehumanizing nature and effects of celebrity. No doubt, many of Warhol’s works, and particularly his uses of repeated images, can be perceived as depicting celebrities as commodities. But again, even if such commentary is perceptible on the cover of Condé Nast’s tribute to “Prince Rogers Nelson, 1958–2016,” on the occasion of the man’s death, AWF has a problem: The asserted commentary is at *Campbell*’s lowest ebb. Because it has no critical bearing on Goldsmith’s photograph,<sup>20</sup> the commentary’s claim to fairness in borrowing from her work diminishes accordingly (if it does not vanish).<sup>21</sup> The commercial nature of the use, on the other hand, looms larger.

[52] Here, the circumstances of AWF’s 2016 licensing outweigh its diminished claim to fairness in copying under the first factor. Like satire that does not target an original work, AWF’s asserted commentary can stand on its own two feet and so requires justification for the very act of borrowing. Moreover, because AWF’s commercial use of Goldsmith’s photograph to illustrate a magazine about Prince is so similar to the photograph’s typical use, a particularly compelling justification is needed. Yet AWF offers no independent justification, let alone a compelling one, for copying the photograph, other than to convey a new meaning or message. As explained, that alone is not enough for the first factor to favor fair use.

[53] Copying might have been helpful to convey a new meaning or message. It often is. But that does not suffice under the first factor. Nor does it distinguish AWF from a long list of would-be fair users: a musician who finds it helpful to sample another artist’s song to make his own, a playwright who finds it helpful to adapt a novel, or a filmmaker who would prefer to create a sequel or spinoff, to name just a few.<sup>22</sup> As Judge Leval has explained, “[a] secondary author is not necessarily at liberty to make wholesale takings of the original author’s expression merely because of how well the original author’s expression would convey the secondary author’s different message.” *Authors Guild*....

[54] .... It will not impoverish our world to require AWF to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work. Recall, payments like these are incentives for artists to create original works in the first place. Nor will the Court’s decision, which is consistent with longstanding principles of fair use, snuff out the light of Western civilization, returning us to the Dark Ages of a world without Titian, Shakespeare, or Richard Rodgers. The dissent goes on at length about the basic premise that copyright (like other forms of intellectual property) involves a tradeoff between stimulating innovative activity, on the one hand, and allowing follow-on innovation, on the other. This theme will be familiar to any student of copyright law. In tracing the history of Renaissance painting, however, the dissent loses sight of the statute and this Court’s cases. The *Lives of the Artists* undoubtedly makes for livelier reading than the U.S. Code or the U.S. Reports, but as a court, we do not have that luxury.

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<sup>20</sup> At no point in this litigation has AWF maintained that any of the Prince Series works, let alone Orange Prince on the cover of the 2016 Condé Nast special edition, comment on, criticize, or otherwise target Goldsmith’s photograph. That makes sense, given that the photograph was unpublished when Goldsmith licensed it to *Vanity Fair*, and that neither Warhol nor *Vanity Fair* selected the photograph, which was instead provided by Goldsmith’s agency.

<sup>21</sup> The dissent wonders: Why does targeting matter? The reason, as this opinion explains, is the first factor’s attention to justification. Compare, for example, a film adaptation of *Gone with the Wind* with a novel, *The Wind Done Gone*, that “inverts” the original’s “portrait of race relations” to expose its “romantic, idealized” portrayal of the antebellum South. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001). Or, to build from one of the artistic works the dissent chooses to feature, consider a secondary use that borrows from Manet’s *Olympia* to shed light on the original’s depiction of race and sex. Although targeting is not always required, fair use is an affirmative defense, and AWF bears the burden to justify its taking of Goldsmith’s work with some reason other than, “I can make it better.”

<sup>22</sup> The dissent oddly suggests that under the Court’s opinion, the first fair use factor favors such uses. This ignores, well, pretty much the entire opinion. In particular, the Court does not hold that the first factor favors any user who “wants to reach different buyers, in different markets, consuming different products.” (opinion of KAGAN, J.). The dissent apparently deduces this proposition from its inverse, which is a common logical fallacy.

## Chapter VI – Fair Use

[55] The dissent thus misses the forest for a tree. Its single-minded focus on the value of copying ignores the value of original works. It ignores the statute's focus on the specific use alleged to be infringing. It waves away the statute's concern for derivative works. It fails to appreciate *Campbell's* nuance. And it disregards this Court's repeated emphasis on justification.

[56] The result of these omissions is an account of fair use that is unbalanced in theory and, perhaps relatedly, in tone. The dissent's conclusion—that whenever a use adds new meaning or message, or constitutes creative progress in the opinion of a critic or judge, the first fair use factor weighs in its favor—does not follow from its basic premise. Fair use instead strikes a balance between original works and secondary uses based in part on objective indicia of the use's purpose and character, including whether the use is commercial and, importantly, the reasons for copying.

[57] Finally, copyright law is replete with escape valves: the idea-expression distinction; the general rule that facts may not receive protection; the requirement of originality; the legal standard for actionable copying; the limited duration of copyright; and, yes, the defense of fair use, including all its factors, such as whether the amount taken is reasonable in relation to the purpose of the use. These doctrines (and others) provide ample space for artists and other creators to use existing materials to make valuable new works. They account for most, if not all, of the examples given by the dissent, as well as the dissent's own copying (and the Court's, too). If the last century of American art, literature, music, and film is any indication, the existing copyright law, of which today's opinion is a continuation, is a powerful engine of creativity....

[58] Lynn Goldsmith's original works, like those of other photographers, are entitled to copyright protection, even against famous artists. Such protection includes the right to prepare derivative works that transform the original. The use of a copyrighted work may nevertheless be fair if, among other things, the use has a purpose and character that is sufficiently distinct from the original. In this case, however, Goldsmith's original photograph of Prince, and AWF's copying use of that photograph in an image licensed to a special edition magazine devoted to Prince, share substantially the same purpose, and the use is of a commercial nature. AWF has offered no other persuasive justification for its unauthorized use of the photograph. Therefore, the "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," weighs in Goldsmith's favor.

[59] The Court has cautioned that the four statutory fair use factors may not be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright. AWF does not challenge the Court of Appeals' determinations that the [other three statutory factors] all favor Goldsmith. Because this Court agrees with the Court of Appeals that the first factor likewise favors her, the judgment of the Court of Appeals is affirmed.

### APPENDIX

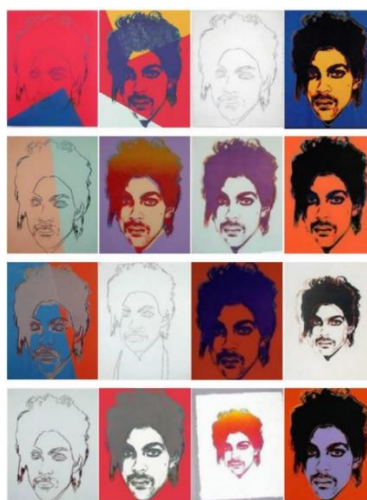


Figure 124: Andy Warhol's Prince Series

GORSUCH, J., with whom Justice Jackson joins, concurring:

[60] The question before us is a narrow one of statutory interpretation. It concerns the meaning of one of four factors Congress has instructed courts to consult when a party invokes the affirmative defense of fair use to a claim of copyright infringement. The statutory factor in question requires courts to consider “the purpose and character of the use.” The parties disagree which “purpose” and “character” counts.

[61] On the Foundation’s telling, the statute requires courts to focus on the purpose the creator had in mind when producing his work and the character of his resulting work. So what matters in this case is that Andy Warhol intended to apply a new aesthetic to Lynn Goldsmith’s photograph and the character of his work transformed Prince from the vulnerable, uncomfortable person depicted in Ms. Goldsmith’s photograph into an iconic, larger-than-life figure. Because the purpose and character of Mr. Warhol’s work is so different from Ms. Goldsmith’s, the Foundation insists, the first statutory factor points in favor of finding a fair-use affirmative defense.

[62] By contrast, on Ms. Goldsmith’s reading of the law and under the Second Circuit’s approach, the first fair-use factor requires courts to assess the purpose and character of the challenged use. The Foundation now owns Mr. Warhol’s image of Prince and it recently sought to license that image to a magazine looking for a depiction of Prince to accompany an article about Prince. Ms. Goldsmith seeks to license her copyrighted photograph to exactly these kinds of buyers. And because the purpose and character of the Foundation’s challenged use and the purpose and character of her own protected use overlap so completely, Ms. Goldsmith argues that the first statutory factor does not support a fair-use affirmative defense.

[63] As I see it, the second view of the law is the better one. Nothing in the copyright statute calls on judges to speculate about the purpose an artist may have in mind when working on a particular project. Nothing in the law requires judges to try their hand at art criticism and assess the aesthetic character of the resulting work. Instead, the first statutory fair-use factor instructs courts to focus on “the purpose and character of *the use*, including whether *such use is of a commercial nature or is for nonprofit educational purposes.*” (emphases added) By its terms, the law trains our attention on the particular use under challenge. And it asks us to assess whether the purpose and character of that use is different from (and thus complements) or is the same as (and thus substitutes for) a copyrighted work. It’s a comparatively modest inquiry focused on how and for what reason a person is using a copyrighted work in the world, not on the moods of any artist or the aesthetic quality of any creation....

[64] ... [W]hile our interpretation of the first fair-use factor does not favor the Foundation in this case, it may in others. If, for example, the Foundation had sought to display Mr. Warhol’s image of Prince in a nonprofit museum or a for-profit book commenting on 20th-century art, the purpose and character of that use might well point to fair use. But those cases are not this case. Before us, Ms. Goldsmith challenges only the Foundation’s effort to use its portrait as a commercial substitute for her own protected photograph in sales to magazines looking for images of Prince to accompany articles about the musician. And our only point today is that, while the Foundation may often have a fair-use defense for Mr. Warhol’s work, that does not mean it always will. Under the law Congress has given us, each challenged use must be assessed on its own terms.

KAGAN, J., with whom Chief Justice Roberts joins, dissenting:

[65] Today, the Court declares that Andy Warhol’s eye-popping silkscreen of Prince—a work based on but dramatically altering an existing photograph—is (in copyright lingo) not “transformative.” Still more, the Court decides that even if Warhol’s portrait were transformative—even if its expression and meaning were worlds away from the photo—that fact would not matter. For in the majority’s view, copyright law’s first fair-use factor—addressing “the purpose and character” of “the use made of a work”—is uninterested in the distinctiveness and newness of Warhol’s portrait. What matters under that factor, the majority says, is instead a marketing decision: In the majority’s view, Warhol’s licensing of the silkscreen to a magazine precludes fair use.

[66] You’ve probably heard of Andy Warhol; you’ve probably seen his art. You know that he reframed and reformulated—in a word, transformed—images created first by others. Campbell’s soup cans and Brillo boxes.



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Photos of celebrity icons: Marilyn, Elvis, Jackie, Liz—and, as most relevant here, Prince. That’s how Warhol earned his conspicuous place in every college’s Art History 101. So it may come as a surprise to see the majority describe the Prince silkscreen as a “modest alteration[]” of Lynn Goldsmith’s photograph—the result of some “crop[ping]” and “flatten[ing]”—with the same “essential nature.” Or more generally, to observe the majority’s lack of appreciation for the way his works differ in both aesthetics and message from the original templates. In a recent decision, this Court used Warhol paintings as the perfect exemplar of a “copying use that adds something new and important”—of a use that is “transformative,” and thus points toward a finding of fair use. *Google*. That Court would have told this one to go back to school.

[67] What is worse, that refresher course would apparently be insufficient. For it is not just that the majority does not realize how much Warhol added; it is that the majority does not care. In adopting that posture of indifference, the majority does something novel (though in law, unlike in art, it is rarely a good thing to be transformative). Before today, we assessed “the purpose and character” of a copier’s use by asking the following question: Does the work “add something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message”? *Campbell*. When it did so to a significant degree, we called the work “transformative” and held that the fair-use test’s first factor favored the copier (though other factors could outweigh that one). But today’s decision—all the majority’s protestations notwithstanding—leaves our first-factor inquiry in shambles. The majority holds that because Warhol licensed his work to a magazine—as Goldsmith sometimes also did—the first factor goes against him. It does not matter how different the Warhol is from the original photo—how much “new expression, meaning, or message” he added. It does not matter that the silkscreen and the photo do not have the same aesthetic characteristics and do not convey the same meaning. It does not matter that because of those dissimilarities, the magazine publisher did not view the one as a substitute for the other. All that matters is that Warhol and the publisher entered into a licensing transaction, similar to one Goldsmith might have done. Because the artist had such a commercial purpose, all the creativity in the world could not save him.

[68] That doctrinal shift ill serves copyright’s core purpose. The law does not grant artists (and authors and composers and so on) exclusive rights—that is, monopolies—for their own sake. It does so to foster creativity—“[t]o promote the [p]rogress” of both arts and science. U.S. Const., Art. I, § 8, cl. 8. And for that same reason, the law also protects the fair use of copyrighted material. Both Congress and the courts have long recognized that an overly stringent copyright regime actually stifles creativity by preventing artists from building on the work of others. For, let’s be honest, artists don’t create all on their own; they cannot do what they do without borrowing from or otherwise making use of the work of others. That is the way artistry of all kinds—visual, musical, literary—happens (as it is the way knowledge and invention generally develop). The fair-use test’s first factor responds to that truth: As understood in our precedent, it provides breathing space for artists to use existing materials to make fundamentally new works, for the public’s enjoyment and benefit. In now remaking that factor, and thus constricting fair use’s boundaries, the majority hampers creative progress and undermines creative freedom. I respectfully dissent.<sup>2</sup> ....

[69] Andy Warhol is the avatar of transformative copying. *Cf. Google* (selecting Warhol, from the universe of creators, to illustrate what transformative copying is). In his early career, Warhol worked as a commercial illustrator and became experienced in varied techniques of reproduction. By night, he used those techniques—in particular, the silkscreen—to create his own art. His own—even though in one sense not. The silkscreen enabled him to make brilliantly novel art out of existing images carefully selected from popular culture. The works he produced, connecting traditions of fine art with mass culture, depended on appropriations: The use

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<sup>2</sup> One preliminary note before beginning in earnest. As readers are by now aware, the majority opinion is trained on this dissent in a way majority opinions seldom are. Maybe that makes the majority opinion self-refuting? After all, a dissent with no theory and no reason is not one usually thought to merit pages of commentary and fistfuls of comeback footnotes. In any event, I’ll not attempt to rebut point for point the majority’s varied accusations; instead, I’ll mainly rest on my original submission. I’ll just make two suggestions about reading what follows. First, when you see that my description of a precedent differs from the majority’s, go take a look at the decision. Second, when you come across an argument that you recall the majority took issue with, go back to its response and ask yourself about the ratio of reasoning to ipse dixit. With those two recommendations, I’ll take my chances on readers’ good judgment.

of elements of an extant image is Warhol's entire modus operandi. And with that m.o., he changed modern art; his appropriations and his originality were flip sides of each other. To a public accustomed to thinking of art as formal works belonging in gold frames—disconnected from the everyday world of products and personalities—Warhol's paintings landed like a thunderclap. Think *Soup Cans* or, in another vein, think *Elvis*. Warhol had created something very new—shockingly important, transformative art.

[70] To see the method in action, consider one of Warhol's pre-Prince celebrity silkscreens—this one, of Marilyn Monroe. He began with a publicity photograph of the actress. And then he went to work. He reframed the image, zooming in on Monroe's face to "produc[e] the disembodied effect of a cinematic close-up." (expert declaration).



Figure 125: Photograph of Marilyn Monroe (marked up by Andy Warhol)

[71] At that point, he produced a high-contrast, flattened image on a sheet of clear acetate. He used that image to trace an outline on the canvas. And he painted on top—applying exotic colors with "a flat, even consistency and an industrial appearance." (expert declaration) The same high-contrast image was then reproduced in negative on a silkscreen, designed to function as a selectively porous mesh. Warhol would "place the screen face down on the canvas, pour ink onto the back of the mesh, and use a squeegee to pull the ink through the weave and onto the canvas." (expert declaration) On some of his *Marilyns* (there are many), he reordered the process—first ink, then color, then (perhaps) ink again. (expert declaration) The result—see for yourself—is miles away from a literal copy of the publicity photo.



Figure 126: Andy Warhol's *Marilyn Monroe*

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[72] And the meaning is different from any the photo had. Of course, meaning in great art is contestable and contested (as is the premise that an artwork is great). But note what some experts say about the complex message(s) Warhol's Marylins convey. On one level, those vivid, larger-than-life paintings are celebrity iconography, making a "secular, profane subject[]" "transcendent" and "eternal." (expert declaration) But they also function as a biting critique of the cult of celebrity, and the role it plays in American life. With misaligned, "Day-Glo" colors suggesting "artificiality and industrial production," Warhol portrayed the actress as a "consumer product." THE METROPOLITAN MUSEUM OF ART GUIDE (2012); THE METROPOLITAN MUSEUM OF ART, MARILYN (2023). And in so doing, he "exposed the deficiencies" of a "mass-media culture" in which "such superficial icons loom so large." (expert declaration) Out of a publicity photo came both memorable portraiture and pointed social commentary.

[73] As with Marilyn, similarly with Prince. In 1984, *Vanity Fair* commissioned Warhol to create a portrait based on a black-and-white photograph taken by noted photographer Lynn Goldsmith:



Figure 127: Lynn Goldsmith's photograph of Prince

[74] As he did in the Marilyn series, Warhol cropped the photo, so that Prince's head fills the whole frame: It thus becomes "disembodied," as if "magically suspended in space." (expert declaration) And as before, Warhol converted the cropped photo into a higher-contrast image, incorporated into a silkscreen. That image isolated and exaggerated the darkest details of Prince's head; it also reduced his "natural, angled position," presenting him in a more face-forward way. (expert declaration) Warhol traced, painted, and inked, as earlier described. He also made a second silkscreen, based on his tracings; the ink he passed through that screen left differently colored, out-of-kilter lines around Prince's face and hair (a bit hard to see in the reproduction below—more pronounced in the original). Altogether, Warhol made 14 prints and two drawings—the Prince series—in a range of unnatural, lurid hues. *Vanity Fair* chose the Purple Prince to accompany an article on the musician. Thirty-two years later, just after Prince died, Condé Nast paid Warhol to use the Orange Prince on the cover of a special commemorative magazine. A picture (or two), as the saying goes, is worth a thousand words, so here is what those magazines published:



Figure 128: Andy Warhol's *Prince*, published by *Vanity Fair* (left) and Condé Nast (right)

[75] It does not take an art expert to see a transformation—but in any event, all those offering testimony in this case agreed there was one. The experts explained, in far greater detail than I have, the laborious and painstaking work that Warhol put into these and other portraits. They described, in ways I have tried to suggest, the resulting visual differences between the photo and the silkscreen. As one summarized the matter: The two works are “materially distinct” in “their composition, presentation, color palette, and media”—i.e., in pretty much all their aesthetic traits.<sup>3</sup> And with the change in form came an undisputed change in meaning. Goldsmith’s focus—seen in what one expert called the “corporeality and luminosity” of her depiction—was on Prince’s “unique human identity.” Warhol’s focus was more nearly the opposite. His subject was “not the private person but the public image.” (expert declaration) The artist’s “flattened, cropped, exotically colored, and unnatural depiction of Prince’s disembodied head” sought to “communicate a message about the impact of celebrity” in contemporary life. (expert declaration) On Warhol’s canvas, Prince emerged as “spectral, dark, [and] uncanny”—less a real person than a “mask-like simulacrum.” (expert declaration) He was reframed as a “larger than life” “icon or totem.” (expert declaration) Yet he was also reduced: He became the product of a “publicity machine” that “packages and disseminates commoditized images.” (expert declaration) He manifested, in short, the dehumanizing culture of celebrity in America. The message could not have been more different.

[76] A thought experiment may pound the point home. Suppose you were the editor of *Vanity Fair* or *Condé Nast*, publishing an article about Prince. You need, of course, some kind of picture. An employee comes to you with two options: the Goldsmith photo, the Warhol portrait. Would you say that you don’t really care? That the employee is free to flip a coin? In the majority’s view, you apparently would. Its opinion, as further discussed below, is built on the idea that both are just “portraits of Prince” that may equivalently be “used to depict Prince in magazine stories about Prince.” All I can say is that it’s a good thing the majority isn’t in the magazine business. Of course you would care! You would be drawn aesthetically to one, or instead to the other. You would want to convey the message of one, or instead of the other. The point here is not that one is better and the other worse. The point is that they are fundamentally different. You would see them not as “substitute[s],” but as divergent ways to (in the majority’s mantra) “illustrate a magazine about Prince with a portrait of Prince.” Or else you (like the majority) would not have much of a future in magazine publishing.

[77] In any event, the editors of *Vanity Fair* and *Condé Nast* understood the difference—the gulf in both aesthetics and meaning—between the Goldsmith photo and the Warhol portrait. They knew about the photo; but they wanted the portrait. They saw that as between the two works, Warhol had effected a transformation....

[78] The question in this case is whether that transformation should matter in assessing whether Warhol made “fair use” of Goldsmith’s copyrighted photo. The answer is yes—it should push toward (although not dictate) a finding of fair use. That answer comports with the copyright statute, its underlying policy, and our precedent concerning the two. Under established copyright law (until today), Warhol’s addition of important “new expression, meaning, [and] message” counts in his favor in the fair-use inquiry. *Campbell*.

[79] Start by asking a broader question: Why do we have “fair use” anyway? The majority responds that while copyrights encourage the making of creative works, fair use promotes their “public availability.” But that description sells fair use far short. Beyond promoting “availability,” fair use itself advances creativity and artistic progress. That is because creative work does not happen in a vacuum. “Nothing comes from nothing, nothing ever could,” said songwriter Richard Rodgers, maybe thinking not only about love and marriage but also about how the Great American Songbook arose from vaudeville, ragtime, the blues, and jazz.<sup>4</sup> This Court

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<sup>3</sup> The majority attempts to minimize the visual dissimilarities between Warhol’s silkscreen and Goldsmith’s photograph by rotating the former image and then superimposing it on the latter one. But the majority is trying too hard: Its manipulated picture in fact reveals the significance of the cropping and facial reorientation that went into Warhol’s image. And the majority’s WarGold combo of course cannot obscure the other differences, of color and presentation, between the two works.

<sup>4</sup> In the spirit of this opinion, I might have quoted that line without further ascription. But lawyers believe in citations, so I will tell you that the Rodgers lyric (which is, of course, from the *Sound of Music*) is used—to make the same point I do—in

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has long understood the point—has gotten how new art, new invention, and new knowledge arise from existing works. Our seminal opinion on fair use quoted the illustrious Justice Story:

*In truth, in literature, in science and in art, there are, and can be, few, if any, things, which ... are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.* Campbell (quoting *Emerson v. Davies*, 8 F. Cas. 615 (No. 4,436) (C.C.D. Mass. 1845)).

Because that is so, a copyright regime with no escape valves would stifle the very creativity which the law is designed to foster. Fair use is such an escape valve. It allows others to build upon copyrighted material, so as not to put manacles upon creative progress. In short, copyright's core value—promoting creativity—sometimes demands a pass for copying.

[80] To identify when that is so, the courts developed and Congress later codified a multi-factored inquiry.... Th[e four statutory] factors sometimes point in different directions; if so, a court must weigh them against each other. In doing so, we have stated, courts should view the fourth factor—which focuses on the copyright holder's economic interests—as the most important.<sup>5</sup> But the overall balance cannot come out right unless each factor is assessed correctly. This case, of course, is about (and only about) the first.

[81] And that factor is distinctive: It is the only one that focuses on what the copier's use of the original work accomplishes. The first factor asks about the "character" of that use—its "main or essential nature[,] esp[ecially] as strongly marked and serving to distinguish." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976). And the first factor asks about the "purpose" of the use—the "object, effect, or result aimed at, intended, or attained." *Id.* In that way, the first factor gives the copier a chance to make his case. Look, the copier can say, at how I altered the original, and what I achieved in so doing. Look at how (as Judge Leval's seminal article put the point) the original was "used as raw material" and was "transformed in the creation of new information, new aesthetics, new insights." That is hardly the end of the fair-use inquiry (commercialism, too, may bear on the first factor, and anyway there are three factors to go), but it matters profoundly. Because when a transformation of the original work has occurred, the user of the work has made the kind of creative contribution that copyright law has as its object.

[82] Don't take it from me (or Judge Leval): The above is exactly what this Court has held about how to apply factor 1. In *Campbell*, our primary case on the topic, we stated that the first factor's purpose-and-character test "central[ly]" concerns "whether and to what extent the new work is transformative." That makes sense, we explained, because "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works." We then expounded on when such a transformation happens. Harking back to Justice Story, we explained that a "new work" might "merely supersede the objects of the original

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Rob Kapilow's *Listening for America: Inside the Great American Songbook from Gershwin to Sondheim* (2019). One of that book's themes is that even the most "radically new" music builds on existing works—or as Irving Berlin put the point, "songs make history, and history makes songs." And so too for every other form of art.

<sup>5</sup> The fourth factor has, to use the majority's repeated example, forced many a filmmaker to pay for adapting books into movies—as we noted two Terms ago. See *Google* (explaining that film adaptations may founder on "[t]he fourth statutory factor" because "[m]aking a film of an author's book" may result in "potential or presumed losses to the copyright owner"). The majority asserts that it is "aware of no authority for the proposition" that the fourth factor can thus protect against unlicensed film adaptations, insisting that the first factor must do (or at least share in) the work. But *Google* is the "authority for the proposition": That's just what it said, in so many words. And anyway, the majority's own first-factor test, applied consistently, would favor, not stop, the freeloading filmmaker. As you've seen (and I'll discuss below), that test boils down to whether a follow-on work serves substantially the same commercial purpose as the original—here, "depict[ing] Prince in magazine stories about Prince." A film adaptation doesn't fit that mold: The filmmaker (unlike Warhol, in the majority's view) wants to reach different buyers, in different markets, consuming different products. The majority at one point suggests it might have some different factor 1 test in its back pocket to deal with this problem. But assuming the majority's approach, as stated repeatedly in its opinion, is truly the majority's approach, factor 1 won't help the author in the book-to-film situation. Under that approach, it is the fourth factor, not the first, which has to "take[] care of derivative works like book-to-film adaptations." It's a good thing the majority errs in believing that the fourth factor isn't up to the job.



creation”—meaning, that it does no more, and for no other end, than the first work had. But alternatively, the new work could “add something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” Forgive me, but given the majority’s stance, that bears repeating: The critical factor 1 inquiry, we held, is whether a new work alters the first with “new expression, meaning, or message.” The more it does so, the more transformative the new work. And (here is the final takeaway) “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.” Under that approach, the *Campbell* Court held, the rap group 2 Live Crew’s “transformative” copying of Roy Orbison’s “Pretty Woman” counted in favor of fair use. And that was so even though the rap song was, as everyone agreed, recorded and later sold for profit.

[83] Just two Terms ago, in *Google*, we made all the same points.... And then we gave an example. Yes, of course, we pointed to Andy Warhol. (The majority claims not to be embarrassed by this embarrassing fact because the specific reference was to his Soup Cans, rather than his celebrity images. But drawing a distinction between a “commentary on consumerism”—which is how the majority describes his soup canvases—and a commentary on celebrity culture, i.e., the turning of people into consumption items, is slicing the baloney pretty thin.) Finally, the Court conducted the first-factor inquiry it had described. Google had replicated Sun Microsystems’ computer code as part of a commercial endeavor, done for commercial profit. No matter, said the Court. Many common fair uses are indisputably commercial. What mattered instead was that Google had used Sun’s code to make something new and important: a highly creative and innovative software platform. The use of the code, the Court held, was therefore transformative and pointed toward fair use.

[84] *Campbell* and *Google* also illustrate the difference it can make in the world to protect transformative works through fair use. Easy enough to say (as the majority does) that a follow-on creator should just pay a licensing fee for its use of an original work. But sometimes copyright holders charge an out-of-range price for licenses. And other times they just say no. In *Campbell*, for example, Orbison’s successor-in-interest turned down 2 Live Crew’s request for a license, hoping to block the rap take-off of the original song. And in *Google*, the parties could not agree on licensing terms, as Sun insisted on conditions that Google thought would have subverted its business model. So without fair use, 2 Live Crew’s and Google’s works—however new and important—might never have been made or, if made, never have reached the public. The prospect of that loss to creative progress is what lay behind the Court’s inquiry into transformativeness—into the expressive novelty of the follow-on work (regardless whether the original creator granted permission).

[85] Now recall all the ways Warhol, in making a Prince portrait from the Goldsmith photo, added something new, with a further purpose or different character—all the ways he altered the original work’s expression, meaning, and message.” The differences in form and appearance, relating to composition, presentation, color palette, and media. The differences in meaning that arose from replacing a realistic—and indeed humanistic—depiction of the performer with an unnatural, disembodied, masklike one. The conveyance of new messages about celebrity culture and its personal and societal impacts. The presence of, in a word, transformation—the kind of creative building that copyright exists to encourage. Warhol’s use, to be sure, had a commercial aspect. Like most artists, Warhol did not want to hide his works in a garret; he wanted to sell them. But as *Campbell* and *Google* both demonstrate (and as further discussed below), that fact is nothing near the showstopper the majority claims. Remember, the more transformative the work, the less commercialism matters. The dazzling creativity evident in the Prince portrait might not get Warhol all the way home in the fair-use inquiry; there remain other factors to be considered and possibly weighed against the first one. But the purpose and character of Warhol’s use of the copyrighted work—what he did to the Goldsmith photo, in service of what objects—counts powerfully in his favor. He started with an old photo, but he created a new new thing.<sup>6</sup> ....

[86] The majority does not see it. And I mean that literally. There is precious little evidence in today’s opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning. Whatever new expression Warhol added, the majority says, was not transformative. Apparently, Warhol made only “modest alterations.” Anyone, the majority suggests, could have “crop[ped],

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<sup>6</sup> I have to admit, I stole that last phrase from Michael Lewis’s *THE NEW NEW THING: A SILICON VALLEY STORY* (2014). I read the book some time ago, and the phrase stuck with me (as phrases often do). I wouldn’t have thought of it on my own.

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flatten[ed], trace[d], and color[ed] the photo” as Warhol did. True, Warhol portrayed Prince “somewhat differently.” But the “degree of difference” is too small: It consists merely in applying Warhol’s “characteristic style”—an aesthetic gloss, if you will—“to bring out a particular meaning” that was already “available in [Goldsmith’s] photograph.” So too, Warhol’s commentary on celebrity culture matters not at all; the majority is not willing to concede that it even exists. And as for the District Court’s view that Warhol transformed Prince from a “vulnerable, uncomfortable person to an iconic, larger-than-life figure,” the majority is downright dismissive. Vulnerable, iconic—who cares? The silkscreen and the photo, the majority claims, still have the same “essential nature.”

[87] The description is disheartening. It’s as though Warhol is an Instagram filter, and a simple one at that (e.g., sepia-tinting). “What is all the fuss about?,” the majority wants to know. Ignoring reams of expert evidence—explaining, as every art historian could explain, exactly what the fuss is about—the majority plants itself firmly in the “I could paint that” school of art criticism. No wonder the majority sees the two images as essentially fungible products in the magazine market—publish this one, publish that one, what does it matter? The problem is that it does matter, for all the reasons given in the record and discussed above. Warhol based his silkscreen on a photo, but fundamentally changed its character and meaning. In belittling those creative contributions, the majority guarantees that it will reach the wrong result.

[88] Worse still, the majority maintains that those contributions, even if significant, just would not matter. All of Warhol’s artistry and social commentary is negated by one thing: Warhol licensed his portrait to a magazine, and Goldsmith sometimes licensed her photos to magazines too. That is the sum and substance of the majority opinion. Over and over, the majority incants that “both works are portraits of Prince used in magazines to illustrate stories about Prince”; they therefore both “share substantially the same purpose”—meaning, a commercial one. Or said otherwise, because Warhol entered into a licensing transaction with Condé Nast, he could not get any help from factor 1—regardless how transformative his image was. The majority’s commercialism-trumps-creativity analysis has only one way out. If Warhol had used Goldsmith’s photo to comment on or critique Goldsmith’s photo, he might have availed himself of that factor’s benefit (though why anyone would be interested in that work is mysterious). But because he instead commented on society—the dehumanizing culture of celebrity—he is (go figure) out of luck.

[89] From top-to-bottom, the analysis fails. It does not fit the copyright statute. It is not faithful to our precedent. And it does not serve the purpose both Congress and the Court have understood to lie at the core of fair use: stimulating creativity, by enabling artists and writers of every description to build on prior works. That is how art, literature, and music happen; it is also how all forms of knowledge advance. Even as the majority misconstrues the law, it misunderstands—and threatens—the creative process.

[90] Start with what the statute tells us about whether the factor 1 inquiry should disregard Warhol’s creative contributions because he licensed his work. (Sneak preview: It shouldn’t.) The majority claims the text as its strong suit, viewing our precedents’ inquiry into new expression and meaning as a faulty “paraphrase” of the statutory language. But it is the majority, not *Campbell* and *Google*, that misreads § 107(1). First, the key term “character” plays little role in the majority’s analysis. And you can see why, given the counter-intuitive meaning the majority (every so often) provides. When referring to the “character” of what Warhol did, the majority says merely that he “licensed Orange Prince to Condé Nast for \$10,000.” But that reductionist view rids the term of most of its ordinary meaning. “Character” typically refers to a thing’s “main or essential nature[,] esp[ecially] as strongly marked and serving to distinguish.” WEBSTER’S THIRD. The essential and distinctive nature of an artist’s use of a work commonly involves artistry—as it did here. See also *Campbell* (discussing the expressive “character” of 2 Live Crew’s rap). So the term “character” makes significant everything the record contains—and everything everyone (save the majority) knows—about the differences in expression and meaning between Goldsmith’s photo and Warhol’s silkscreen.

[91] Second, the majority significantly narrows § 107(1)’s reference to “purpose” (thereby paralleling its constriction of “character”). It might be obvious to you that artists have artistic purposes. And surely it was obvious to the drafters of a law aiming to promote artistic (and other kinds of) creativity. But not to the majority, which again cares only about Warhol’s decision to license his art. Warhol’s purpose, the majority says, was just to “depict Prince in a magazine story about Prince” in exchange for money. The majority spurns

all that mattered to the artist—evident on the face of his work—about “expression, meaning, [and] message.” *Campbell*. That indifference to purposes beyond the commercial—for what an artist, most fundamentally, wants to communicate—finds no support in § 107(1).<sup>7</sup>

[92] Still more, the majority’s commercialism-über-alles view of the factor 1 inquiry fits badly with two other parts of the fair-use provision. To begin, take the preamble, which gives examples of uses often thought fair: “criticism, comment, news reporting, teaching[,] ... scholarship, or research.” As we have explained, an emphasis on commercialism would swallow those uses—that is, would mostly deprive them of fair-use protection. *Campbell*. For the listed activities are generally conducted for profit in this country. “No man but a blockhead,” Samuel Johnson once noted, “ever wrote[] except for money.” And Congress of course knew that when it drafted the preamble.

[93] Next, skip to the last factor in the fair-use test: “the effect of the use upon the potential market for or value of the copyrighted work.” You might think that when Congress lists two different factors for consideration, it is because the two factors are, well, different. But the majority transplants factor 4 into factor 1. Recall that the majority conducts a kind of market analysis: Warhol, the majority says, licensed his portrait of Prince to a magazine that Goldsmith could have licensed her photo to—and so may have caused her economic harm. That issue is no doubt important in the fair-use inquiry. But it is the stuff of factor 4: how Warhol’s use affected the “value of” or “market for” Goldsmith’s photo. Factor 1 focuses on the other side of the equation: the new expression, meaning, or message that may come from someone else using the original. Under the statute, courts are supposed to strike a balance between the two—and thus between rewarding original creators and enabling others to build on their works. That cannot happen when a court, à la the majority, double-counts the first goal and ignores the second.

[94] Is it possible I overstate the matter? I would like for that to be true. And a puzzling aspect of today’s opinion is that it occasionally acknowledges the balance that the fair-use provision contemplates. So, for example, the majority notes after reviewing the relevant text that “the central question [the first factor] asks” is whether the new work “adds something new” to the copyrighted one. Yes, exactly. And in other places, the majority suggests that a court should consider in the factor 1 analysis not merely the commercial context but also the copier’s addition of “new expression,” including new meaning or message. In that way, the majority opinion differs from Justice Gorsuch’s concurrence, which would exclude all inquiry into whether a follow-on work is transformative. And it is possible lower courts will pick up on that difference, and ensure that the “newness” of a follow-on work will continue to play a significant role in the factor 1 analysis. If so, I’ll be happy to discover that my “claims [have] not age[d] well.” But that would require courts to do what the majority does not: make a serious inquiry into the follow-on artist’s creative contributions. The majority’s refusal to do so is what creates the oddity at the heart of today’s opinion. If “newness” matters (as the opinion sometimes says), then why does the majority dismiss all the newness Warhol added just because he licensed his portrait to Condé Nast? And why does the majority insist more generally that in a commercial context “convey[ing] a new meaning or message” is “not enough for the first factor to favor fair use”?

[95] Certainly not because of our precedent—which conflicts with nearly all the majority says. As explained earlier, this Court has decided two important cases about factor 1. In each, the copier had built on the original to make a product for sale—so the use was patently commercial. And in each, that fact made no difference,

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<sup>7</sup> The majority seeks some statutory backing in what it describes as § 107’s reference to the “specific ‘use’” of a work “alleged to be ‘an infringement.’” Because the challenged use here is a licensing (so says the majority), all that matters is that Goldsmith engaged in similar commercial transactions. But the majority is both rewriting and splicing the statute. The key part of the statute simply asks whether the “use made of a [copyrighted] work” is fair. (The term “alleged infringement,” which the majority banks on, nowhere exists in the text; indeed, all the statute says about infringement, and in a separate sentence, is that a fair use doesn’t count as one.) The statute—that is, the actual one—thus focuses attention on what the copier does with the underlying work. So when the statute more particularly asks (in factor 1) about the “purpose and character of the use”—meaning again, the “use made of [the copyrighted] work”—it is asking to what end, and with what result, the copier made use of the original. And that necessarily involves the issue of transformation—more specifically here, how Warhol’s silkscreen transformed Goldsmith’s photo.

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because the use was also transformative. The copier, we held, had made a significant creative contribution—had added real value. So in *Campbell*, we did not ask whether 2 Live Crew and Roy Orbison both meant to make money by “including a catchy song about women on a record album.” *But cf.* majority opinion (asking whether Warhol and Goldsmith both meant to charge for “depict[ing] Prince in magazine stories about Prince”). We instead asked whether 2 Live Crew had added significant “new expression, meaning, [and] message”; and because we answered yes, we held that the group’s rap song did not “merely supersede the objects of the original creation.” Similarly, in *Google*, we took for granted that Google (the copier) and Sun (the original author) both meant to market software platforms facilitating the same tasks—just as (in the majority’s refrain) Warhol and Goldsmith both wanted to market images depicting the same subject. “So what?” was our basic response. Google’s copying had enabled the company to make a “highly creative and innovative tool,” advancing “creative progress” and thus serving “the basic constitutional objective of copyright.” Search today’s opinion high and low, you will see no such awareness of how copying can help produce valuable new works.

[96] Nor does our precedent support the majority’s strong distinction between follow-on works that “target” the original and those that do not. (Even the majority does not claim that anything in the text does so.) True enough that the rap song in *Campbell* fell into the former category: 2 Live Crew urged that its work was a parody of Orbison’s song. But even in discussing the value of parody, *Campbell* made clear the limits of targeting’s importance. The Court observed that as the extent of transformation increases, the relevance of targeting decreases. *Google* proves the point. The new work there did not parody, comment on, or otherwise direct itself to the old: The former just made use of the latter for its own devices. Yet that fact never made an appearance in the Court’s opinion; what mattered instead was the highly creative use Google had made of the copied code. That decision is on point here. Would Warhol’s work really have been more worthy of protection if it had (somehow) shed light on Goldsmith’s photograph, rather than on Prince, his celebrity status, and celebrity culture? Would that Goldsmith-focused work (whatever it might be) have more meaningfully advanced creative progress, which is copyright’s *raison d’être*, than the work he actually made? I can’t see how; more like the opposite. The majority’s preference for the directed work, apparently on grounds of necessity, again reflects its undervaluing of transformative copying as a core part of artistry.

[97] And there’s the rub. (Yes, that’s mostly Shakespeare.) As Congress knew, and as this Court once saw, new creations come from building on—and, in the process, transforming—those coming before. Today’s decision stymies and suppresses that process, in art and every other kind of creative endeavor. The decision enhances a copyright holder’s power to inhibit artistic development, by enabling her to block even the use of a work to fashion something quite different. Or viewed the other way round, the decision impedes non-copyright holders’ artistic pursuits, by preventing them from making even the most novel uses of existing materials. On either account, the public loses: The decision operates to constrain creative expression.<sup>8</sup>

[98] The effect, moreover, will be dramatic. Return again to Justice Story: “[I]n literature, in science and in art, there are, and can be, few, if any, things” that are “new and original throughout.” *Campbell* (quoting *Emerson*). Every work “borrows, and must necessarily” do so. Creators themselves know that fact deep in their bones. Here is Mark Twain on the subject: “The kern[e], the soul—let us go further and say the substance, the bulk, the actual and valuable material” of creative works—all are “consciously and unconsciously drawn from a million outside sources.” “[A]ppropriation, mimicry, quotation, allusion and sublimated collaboration,” novelist Jonathan Lethem has explained, are “a kind of *sine qua non* of the creative act, cutting across all forms and genres in the realm of cultural production.” Or as Mary Shelley once wrote, there is no such thing as “creating out of [a] void.” *FRANKENSTEIN* (1831).

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<sup>8</sup> No worries, the majority says: Today’s decision is only about the commercial licensing of artistic works, not about their “creation” or their other uses. So, for example, if Warhol had used his Prince silkscreen “for teaching purposes” or sought to “display [it] in a nonprofit museum,” the first factor could have gone the other way. But recall what Samuel Johnson said about “blockheads”: Unless an artist is one, he makes art for money. So when the majority denies follow-on artists the full reward of their creativity, it diminishes their incentive to create. And as should go without saying, works not created will not appear in classrooms and museums.

[99] Consider, in light of those authorial references, how the majority's factor 1 analysis might play out in literature. And why not start with the best? Shakespeare borrowed over and over and over. I could point to a whole slew of works, but let's take *Romeo and Juliet* as an example. Shakespeare's version copied most directly from Arthur Brooke's *The Tragical History of Romeus and Juliet*, written a few decades earlier (though of course Brooke copied from someone, and that person copied from someone, and that person ... going back at least to Ovid's story about Pyramus and Thisbe). Shakespeare took plot, characters, themes, even passages: The friar's line to Romeo, "Art thou a man? Thy form cries out thou art," appeared in Brooke as "Art thou a man? The shape saith so thou art." (Shakespeare was, among other things, a good editor.) Of course Shakespeare also added loads of genius, and so made the borrowed stories uniquely Shakespearian. But on the majority's analysis? The two works—Shakespeare's and Brooke's—are just two stories of star-crossed lovers written for commercial gain. Shakespeare would not qualify for fair use; he would not even come out ahead on factor 1.

[100] And if you think that's just Shakespeare, here are a couple more. (Once you start looking, examples are everywhere.) *Lolita*, though hard to read today, is usually thought one of the greatest novels of the 20th century. But the plotline—an adult man takes a room as a lodger; embarks on an obsessive sexual relationship with the preteen daughter of the house; and eventually survives her death, remaining marked forever—appears in a story by Heinz von Lichberg written a few decades earlier. Oh, and the girl's name is Lolita in both versions. All that said, the two works have little in common artistically; nothing literary critics admire in the second *Lolita* is found in the first. But to the majority? Just two stories of revoltingly lecherous men, published for profit. So even factor 1 of the fair-use inquiry would not aid Nabokov. Or take one of the most famed adventure stories ever told. Here is the provenance of *Treasure Island*, as Robert Louis Stevenson himself described it:

*No doubt the parrot once belonged to Robinson Crusoe. No doubt the skeleton is conveyed from [Edgar Allan] Poe. I think little of these, they are trifles and details; and no man can hope to have a monopoly of skeletons or make a corner in talking birds.... It is my debt to Washington Irving that exercises my conscience, and justly so, for I believe plagiarism was rarely carried farther.... Billy Bones, his chest, the company in the parlor, the whole inner spirit and a good deal of the material detail of my first chapters—all were there, all were the property of Washington Irving.*

Odd that a book about pirates should have practiced piracy? Not really, because tons of books do—and not many in order to target or otherwise comment on the originals.... The point here is that most writers worth their salt steal other writers' moves—and put them to other, often better uses. But the majority would say, again and yet again in the face of such transformative copying, "no factor 1 help and surely no fair use."

[101] Or how about music? Positively rife with copying of all kinds. Suppose some early blues artist (W. C. Handy, perhaps?) had copyrighted the 12-bar, three-chord form—the essential foundation (much as Goldsmith's photo is to Warhol's silkscreen) of many blues songs. Under the majority's view, Handy could then have controlled—meaning, curtailed—the development of the genre. And also of a fair bit of rock and roll. "Just another rendition of 12-bar blues for sale in record stores," the majority would say to Chuck Berry (*Johnny B. Goode*), Bill Haley (*Rock Around the Clock*), Jimi Hendrix (*Red House*), or Eric Clapton (*Crossroads*). Or to switch genres, imagine a pioneering classical composer (Haydn?) had copyrighted the three-section sonata form. "One more piece built on the same old structure, for use in concert halls," the majority might say to Mozart and Beethoven and countless others: "Sure, some new notes, but the backbone of your compositions is identical." ...

[102] Finally, back to the visual arts, for while Warhol may have been the master appropriator within that field, he had plenty of company; indeed, he worked within an established tradition going back centuries (millennia?). The representatives of three giants of modern art (you may know one for his use of comics) describe the tradition as follows: "[T]he use and reuse of existing imagery" are "part of art's lifeblood"—"not just in workaday practice or fledgling student efforts, but also in the revolutionary moments of art history." Brief for Robert Rauschenberg, Roy Lichtenstein, and Joan Mitchell Foundations et al. as Amici Curiae.

[103] Consider as one example the reclining nude. Probably the first such figure in Renaissance art was Giorgione's *Sleeping Venus*. (Note, though, in keeping with the "nothing comes from nothing" theme, that



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Giorgione apparently modeled his canvas on a woodcut illustration by Francesco Colonna.) Here is Giorgione's painting:



Figure 129: Giorgione's *Sleeping Venus*

[104] But things were destined not to end there. One of Giorgione's pupils was Titian, and the former student undertook to riff on his master. The resulting *Venus of Urbino* is a prototypical example of Renaissance imitatio—the creation of an original work from an existing model. You can see the resemblance—but also the difference:



Figure 130: Titian's *Venus of Urbino*

[105] The majority would presumably describe these Renaissance canvases as just “two portraits of reclining nudes painted to sell to patrons.” But wouldn't that miss something—indeed, everything—about how an artist engaged with a prior work to create new expression and add new value?

[106] And the reuse of past images was far from done. For here is Édouard Manet's *Olympia*, now considered a foundational work of artistic modernism, but referring in obvious ways to Titian's (and back a step, to Giorgione's) Venus:



Figure 131: Édouard Manet's *Olympia*

[107] Here again consider the account of the Rauschenberg, Lichtenstein, and Mitchell Foundations: “The revolutionary shock of the painting depends on how traditional imagery remains the painting’s recognizable foundation, even as that imagery is transformed and wrenched into the present.” It is an especially striking example of a recurrent phenomenon—of how the development of visual art works across time and place, constantly building on what came earlier. In fact, the Manet has itself spawned further transformative paintings, from Cézanne to a raft of contemporary artists across the globe. But the majority, as to these matters, is uninterested and unconcerned....

[108] The majority thus treats creativity as a trifling part of the fair-use inquiry, in disregard of settled copyright principles and what they reflect about the artistic process. On the majority’s view, an artist had best not attempt to market even a transformative follow-on work—one that adds significant new expression, meaning, or message. That added value (unless it comes from critiquing the original) will no longer receive credit under factor 1. And so it can never hope to outweigh factor 4’s assessment of the copyright holder’s interests. The result will be what this Court has often warned against: suppression of the very creativity which copyright law is designed to foster. And not just on the margins. Creative progress unfolds through use and reuse, framing and reframing: One work builds on what has gone before; and later works build on that one; and so on through time. Congress grasped the idea when it directed courts to attend to the “purpose and character” of artistic borrowing—to what the borrower has made out of existing materials. That inquiry recognizes the value in using existing materials to fashion something new. And so too, this Court—from Justice Story’s time to two Terms ago—has known that it is through such iterative processes that knowledge accumulates and art flourishes. But not anymore. The majority’s decision is no “continuation” of “existing copyright law.” In declining to acknowledge the importance of transformative copying, the Court today, and for the first time, turns its back on how creativity works....

[109] And the workings of creativity bring us back to Andy Warhol. For Warhol, as this Court noted in *Google*, is the very embodiment of transformative copying. He is proof of concept—that an artist working from a model can create important new expression. Or said more strongly, that appropriations can help bring great art into being. Warhol is a towering figure in modern art not despite but because of his use of source materials. His work—whether Soup Cans and Brillo Boxes or Marilyn and Prince—turned something not his into something all his own. Except that it also became all of ours, because his work today occupies a significant place not only in our museums but in our wider artistic culture. And if the majority somehow cannot see it—well, that’s what evidentiary records are for. The one in this case contained undisputed testimony, and lots of it, that Warhol’s Prince series conveyed a fundamentally different idea, in a fundamentally different artistic style, than the photo he started from. That is not the end of the fair-use inquiry. The test, recall, has four parts, with one focusing squarely on Goldsmith’s interests. But factor 1 is supposed to measure what Warhol has done. Did his “new work” “add something new, with a further purpose or different character”? *Campbell*. Did it “alter[] the first with new expression, meaning, or message”? *Id.* It did, and it did. In failing to give Warhol credit for that transformation, the majority distorts ultimate resolution of the fair-use question.

[110] Still more troubling are the consequences of today’s ruling for other artists. If Warhol does not get credit for transformative copying, who will? And when artists less famous than Warhol cannot benefit from fair use, it will matter even more. Goldsmith would probably have granted Warhol a license with few conditions, and for a price well within his budget. But as our precedents show, licensors sometimes place stringent limits on follow-on uses, especially to prevent kinds of expression they disapprove. And licensors may charge fees that prevent many or most artists from gaining access to original works. Of course, that is all well and good if an artist wants merely to copy the original and market it as his own. Preventing those uses—and thus incentivizing the creation of original works—is what copyrights are for. But when the artist wants to make a transformative use, a different issue is presented. By now, the reason why should be obvious. Inhibiting subsequent writers and artists from improving upon prior works—as the majority does today—will frustrate the very ends sought to be attained by copyright law. It will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge. It will make our world poorer.

### NOTES

1. Which of the three *Warhol* opinions has the best read of the statutory provision on fair use? Which has the best take on fair use's place vis-à-vis copyright protection? Note the different sorts of evidence that each opinion uses—or rejects—to make its argument. After reading this decision, do you think you have a better understand of the relationship between fair use and the copyright holder's right to prepare derivative works?
2. Pam Samuelson makes the case that until the Solicitor General filed an amicus curiae brief with the U.S. Supreme Court on Goldsmith's behalf, Goldsmith's claims had focused principally on whether Warhol's creation in 1984 of the Prince Series was a fair use. She claims that the Solicitor General's brief focused instead on whether the foundation's licensing of Orange Prince to *Vanity Fair* was a fair use, which in turn affected the Supreme Court's focus. Given this turn of events, Samuelson argues that the litigants and other amicus curiae briefs did not have adequate opportunity to address this shifted focus. Pamela Samuelson, *Did the Solicitor General Hijack the Warhol v. Goldsmith Case?*, 47 COLUM. J.L. & ARTS (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4770725](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4770725). How do you think the Supreme Court would have ruled on whether Warhol's creation of the Prince Series was a fair use?
3. What is the foundation's act that is allegedly a copyright use or act of infringement that the Supreme Court addresses? Is it the foundation's licensing of Orange Prince to *Vanity Fair*? For an argument that the Court's evaluation has a structural flaw in this regard, see Peter J. Karol, *What's the Use? The Structural Flaw Undermining Warhol v. Goldsmith*, 71 J. COPYRIGHT SOC'Y (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4663576](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4663576).
4. Appropriation artist Richard Prince was recently a defendant in multiple copyright infringement lawsuits over his *New Portraits* series. This series consisted almost entirely of other people's Instagram posts, as shown in Figure 132. Richard Prince created the *New Portraits* series by searching other people's Instagram posts; when he found an image he liked, he added his own online comment to the user's post, screen-grabbed the image, and emailed it to an assistant, who had it inkjet-printed and stretched on canvas. The resulting series of six-by-four-foot works sold for \$90,000 to \$100,000 each. Prince's only changes to the users' Instagram posts (other than printing them out in large format) were the addition of his own brief online comments, alternately salacious and nonsensical, often appropriated from things he heard on television as he found the image. The bulk of the photos he chose from Instagram were vaguely prurient selfies of young, attractive women. They also included a smattering of artists and celebrities like Taylor Swift and Kate Moss. Several of the *New Portraits* were based on photos posted by the Suicide Girls, young women in an alt-porn pin-up collective.

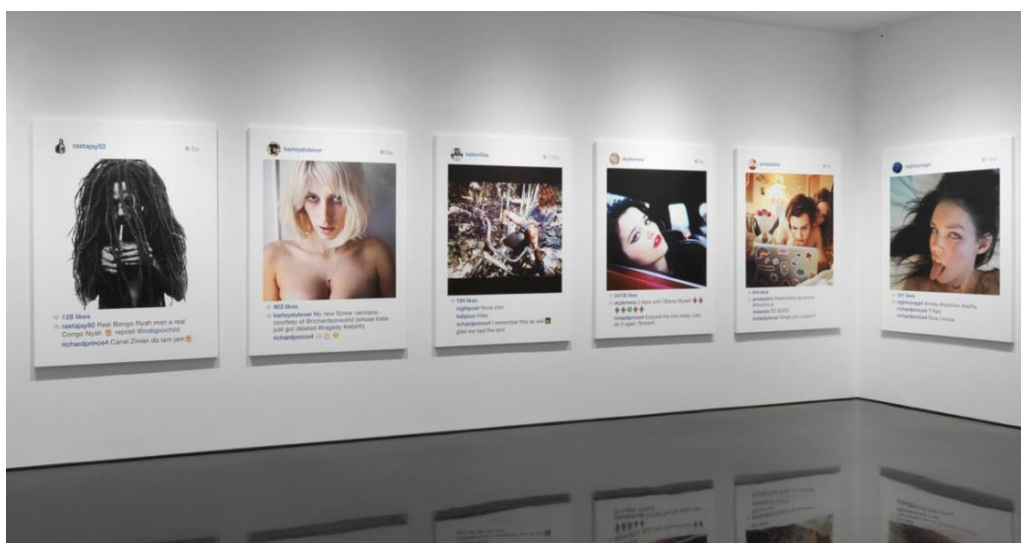


Figure 132: Richard Prince's *New Portraits* series (installation view)

Four different parties whose images Prince appropriated have sued him for copyright infringement. Post-*Warhol*, in 2024 on the eve of trial, two of those cases have been settled with a final judgment entered ordering Prince to pay at least \$650,000 in damages and enjoining him from using the underlying photographs or the Instagram posts. Did the plaintiffs or Prince have a stronger case post-*Warhol*?

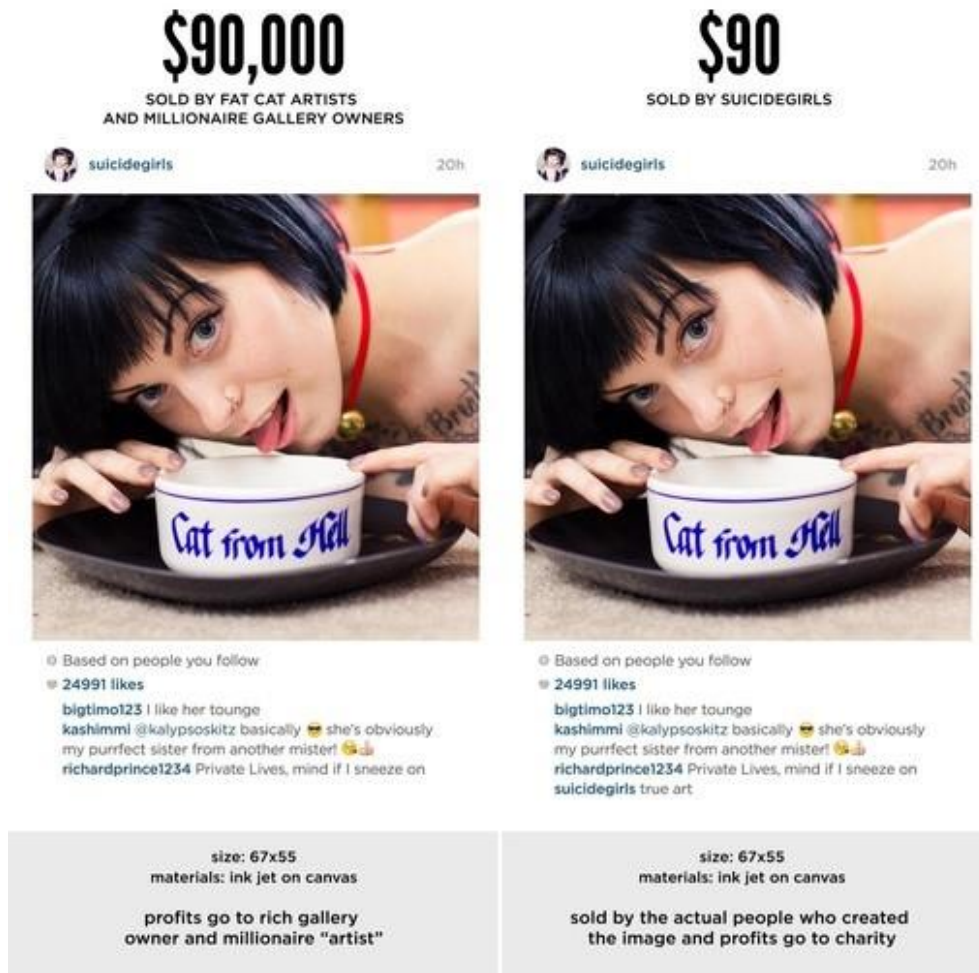


Figure 133: Suicide Girls' advertisement

Rather than filing a lawsuit, another set of "victims" responded to the appropriation in true Richard Prince spirit. In particular, the Suicide Girls decided to retaliate by reappropriating Prince's appropriations of five of their original images. They then sold the reappropriations themselves online, underselling their copyist in the marketplace. Like Prince, they made a slight alteration to each appropriated image, adding their own comment after Prince's added comment before printing. Their added comment was overtly shaming: "true art." Other than that, they produced works identical to his: inkjet-printed canvases of the same Instagram posts in the same dimensions. The dramatic difference was price. Instead of Prince's \$90,000 price tag, the Suicide Girls' nearly identical copies were offered at a mere \$90. All profits from their sales went to the nonprofit organization Electronic Frontier Foundation. Figure 133 shows an image from the Suicide Girls' website advertising one of their reappropriations of Prince's appropriation, side by side.

The Suicide Girls' move was an instant internet sensation, as bloggers and reporters hailed the Suicide Girls' act of payback. Appealing to the sense of online outrage that Prince's appropriation had caused, the Suicide Girls portrayed themselves as—and indeed might have felt like—online avenging goddesses. Suicide Girls founder Missy Suicide told the press that "The thing about Prince's theft of the images is that it feels like such a violation by someone who doesn't get it." She pondered, "Do we have Mr. Prince's permission to sell these prints? We have the same permission from him that he had from us. ;)." The move elicited not only adoring media



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coverage. It also generated sales. In one day, the Suicide Girls sold more than 250 prints and soon the entire run sold out. Indeed, Richard Prince himself retweeted their retakings of “his” work, in effect advertising the copies. Instead of seeing the Suicide Girls as siphoning from his profit, Prince welcomed the Suicide Girls on the gravy train, tweeting that the move was “smart.”

The Suicide Girls’ reappropriation raised money, spread their fame, enacted a sort of public revenge on their appropriator, and vindicated the connection the creators felt to their work. As Missy Suicide explained, “Instagram is such an expression of our identity and to have an old dude steal [our Instagram photos] and get paid such a significant fee for them hurt. We have seen more attention from media and have received tons of messages of support, it has been a little overwhelming, in a good way.”

This jiu-jitsu self-help move stood in stark contrast to the conventional litigation route chosen by other unhappy subjects of Prince’s works. Unlike litigation, which can be long, expensive, and uncertain in outcome with regard to fair use, the Suicide Girls made a quick and big splash, achieving an immediate sense of vindication, spreading their fame, making money (for charity), and gaining new admirers for their vigilante response. For other examples of people taking copyright law into their own hands and analysis of whether this phenomenon should be celebrated or extinguished, see Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455 (2019).

5. For an argument that the transformative test “poses a fundamental threat to art because the test evaluates art by the very criteria that contemporary art rejects,” see Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016). Specifically, Adler argues that “the transformative inquiry asks precisely the wrong questions about contemporary art. It requires courts to search for ‘meaning’ and ‘message’ when one goal of so much current art is to throw the idea of stable meaning into play. It requires courts to ask if that message is ‘new’ when so much contemporary art rejects the goal of newness, using copying as a primary building block of creativity.”

6. Now that you’ve read many copyright decisions on fair use, consider whether you find courts’ analyses predictable. Scholars are divided on this question. Some find it to be unpredictable. See, e.g., Deidré A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511 (2012); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395 (2009). Others think that even though fair use comes in many versions, there are patterns and coherence to it. See, e.g., Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

Barton Beebe has comprehensively studied all reported federal court decisions on fair use under the 1976 Act. Among other things, Beebe shows that “the outcomes of factors one and four very strongly correlated with the test outcome and fairly strongly correlated with each other, while the outcome of factor two correlated weakly, if at all, with the outcome of the test and with the outcomes of the other factors.” Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 584 (2008). Matthew Sag has also shown empirically how significant transformative use is in determining the outcome of fair use cases. Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012).

7. Jason Mazzone proposes that an administrative body be empowered to help clarify fair use. He proposes “two possible models of agency regulation. In the first model, an agency is responsible for generating regulations that determine what constitutes fair use in specific contexts as well as preventing efforts to interfere with fair uses of copyrighted works. In the second model, an agency issues fair use regulations and determines prior to any copyright infringement claim being brought in court whether the use in question constitutes fair use. Agency regulation can bring much needed clarity and predictability to fair use in ways that neither Congress nor the courts are able to accomplish; an agency can also protect fair use in ways that the market does



not.” Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 396 (2009). Do you agree with this approach? Is the sort of “fair use agency” that Mazzone proposes vulnerable to regulatory capture, that is to influence by industries that appear regularly before the agency and which may serve as a primary source of employment for officials who have left the agency?

8. Gideon Parchomovsky and Kevin Goldman suggest a different approach to make fair use more certain and predictable: safe harbors. Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1488-89 (2007). They suggest

*reforming fair use through the recognition of certain types of copying as per se fair. Uses that fall within these bounds would not give rise to liability for copyright infringement, so actors who engage in them would be categorically immune from suit. Carefully tailored, safe harbors would provide much needed certainty to users and potential creators without unduly compromising the rights of current copyright owners. Thus, the introduction of a bright-line rule component into the doctrine of fair use has the potential to significantly enhance social welfare.*

9. Parchomovsky and Goldman’s approach is somewhat similar to that adopted in other countries, in which there is a list of exceptions to copyright infringement rather than a general standard like fair use. For example, the European Union’s 2019 Directive on Copyright in the Digital Single Market includes an exception from copyright infringement for text and data mining for purposes of scientific research. Article 3. As another illustration, the Directive exempts from infringement uses of copyrighted works for “digital and cross-border teaching activities.” Article 5.

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