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# The Triumph of Three Big Ideas in Fair Use Jurisprudence

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# THE TRIUMPH OF THREE BIG IDEAS IN FAIR USE JURISPRUDENCE

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*Abstract*

*In two recent cases,* Google LLC v. Oracle America, Inc. ("*Google v. Oracle*"), and Andy Warhol Foundation for the Visual Arts v. Goldsmith ("*Warhol*"), *the Supreme Court ratified its 1994 holding that transformative use is the appropriate analytical framework for applying copyright law's fair use provision. In doing so, the Court withstood significant pressure from industry participants in these cases to change course. This Article argues that the Court's decisions, which represent one third of the Court's total merits decisions on fair use, are historic. The principal contribution this Article makes is to demonstrate to courts and parties in future fair use disputes how the holdings in these cases readily synthesize to provide useful guidance that will be relevant, for example, in disputes about generative artificial intelligence. This Article disagrees with those who argue that* Warhol *represents a retreat from transformativeness, demonstrating instead that the Court in* Warhol *simply rejected a caricatured version of this form of analysis.*

*This Article also makes an original argument that shows how these cases reflect the hard-won triumph of three big ideas that were hotly contested in the evolution of the fair use doctrine. First, this Article summarizes how courts disagreed about whether fair use was distinct from the question of substantial similarity in infringement analysis. This Article shows that this issue was not fully resolved until Congress codified fair use as a distinct doctrine in the Copyright Act of 1976. Second, this Article summarizes how legislators resolved the debate over whether to codify fair use or to leave it as a judicially-implied limit on exclusive rights. In doing so, this Article credits Barbara Ringer, the Copyright Office's point person in the legislative process, as the primary draftsperson of the core of codified fair use in § 107. Finally, this Article shows how codification facilitated increased Supreme Court review of fair use disputes, which led the Court to adjudicate fair use issues in four cases decided within a single decade, culminating in its adoption of transformative use.*

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* Emeritus Professor of Law, American University Washington College of Law. Small portions of Part III of this Article draw from Peter Jaszi, *Quoting Copyrighted Sports Content Under Fair Use After* Google v. Oracle, *in* INTELLECTUAL PROPERTY AND SPORTS: ESSAYS IN HONOUR OF P. BERNT HUGENHOLTZ (Martin Sentfleben *et al.*, eds., 2021).

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## INTRODUCTION

In *Google LLC v. Oracle America, Inc.* ("*Google v. Oracle*"),[1] and again in *Andy Warhol Found. for the Visual Arts v. Goldsmith* ("*Warhol*"),[2] the Supreme Court considered and rejected forceful challenges to its analytical framework for applying copyright law's fair use provision, adopted in 1994.[3] This standard, which asks whether a use of a copyrighted work is "transformative," centers the fair use inquiry on a user's purpose for the use of a copyrighted work, and the amount of the work used, to evaluate whether the use furthers copyright law's constitutional purposes, including whether the use provides a public benefit.[4]

This Article makes two principal claims in relation to these cases. It provides guidance about how to understand and apply their teachings for use by courts and parties in future fair use disputes, including those involving application of fair use to generative artificial intelligence technologies.[5] In that regard, contrary to arguments by some commentators who see in *Warhol* a significant change, this Article demonstrates that on all major points the rules announced in *Google v. Oracle* and *Warhol* synthesize readily to reaffirm that transformative use provides the applicable framework for analyzing most fair use questions.[6]

Indeed, the Court went further. This Article analyzes the Court's answers to some genuine questions left open by its adoption of transformative use in *Campbell*, such as whether the public benefit arising from a use is an explicit consideration in the analysis. This discussion also demonstrates how the Court clarified issues that this Article argues were already resolved by *Campbell* but that many others have treated as open, such as whether transformative use conflicts with the copyright owner's right to prepare derivative works, the role of a use's commerciality in the analysis, or whether use of an entire work can be fair use.[7]

This Article's other claim is that the Court's decisions in *Google v. Oracle* and *Warhol* are historic.[8] Fair use is a doctrine limiting copyright's

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[1] 141 S. Ct. 1183 (2021).
[2] 143 S. Ct. 1258 (2023).
[3] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578-79 (1994) ("*Campbell*") (adopting transformative use framework of analysis).
[4] *See infra* notes 198-207 and accompanying text (discussing *Campbell*).
[5] *See infra* Part III.
[6] *See id*.
[7] *See infra* Parts III.C., III.D.
[8] Part II summarizes the authors' more extensive historical arguments made, as of this writing, in unpublished manuscripts: *see* Michael W. Carroll & Peter Jaszi, *An Intellectual History of the Fair Use Doctrine in Copyright Law* – 1790-1978 (Feb. 1, 2024) (unpublished manuscript) (on file with authors); Michael W. Carroll & Peter Jaszi,

scope.[9] Although the Supreme Court's copyright docket has been active since the nation's founding, the Court generally steered clear of disputes involving questions of copyright's scope until after enactment of the Copyright Act of 1976.[10] In particular, even though fair use has been part of copyright law since 1841, the Court took up the issue only twice prior to the 1976 Act's codification of fair use in § 107.[11] In contrast, in the post-codification period the Court granted review on fair use issues in four cases within a single decade, culminating in its decision in *Campbell*.[12] The Court then left development of its holding in that case to the lower courts until its return to the issue in *Google v. Oracle* and *Warhol*. Taken together, these two cases represent one fourth of the Court's total fair use case law and one third of its merits decisions on the issue.

Moreover, the Court's analytical framework in *Google v. Oracle* and *Warhol* reflects the triumph of three big ideas that were hotly contested in the fair use doctrine's evolution.[13] Two of these contests were not finally resolved until fair use was codified in § 107 of the Copyright Act of 1976.[14]

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Campbell *at 30: How the Court Adopted the Transformative Use Standard* (Feb. 1, 2024) (unpublished manuscript) (on file with authors).

[9] *See* 17 U.S.C. § 107 (declaring qualifying uses to be non-infringing notwithstanding exclusive rights granted in § 106 and § 106A).

[10] *See* Michael W. Carroll, *An Overview of the Supreme Court's Copyright Docket – 1790-2024* (Feb. 1, 2024) (unpublished manuscript) (on file with author).

[11] *See infra* notes 107, 141 and accompanying text.

[12] *See infra* Part II.C. (discussing cases).

[13] *See infra* Part II. The literature on fair use is vast. It includes a number of sources discussing the events discussed *infra* in Part II. *See*, *e.g.*, WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2d ed.) (Bureau of Nat. Affairs 1995); OREN BRACHA, OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790–1909 (2016); Zahr Said, *Fair Use in the Digital Age, and* Campbell v. Acuff-Rose *at 21*, 90 WASH. L. REV. 579 (2015) (introducing and citing eight contributions to symposium volume reflecting on *Campbell*'s impact); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371 (2011); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009);William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Gary L. Francione, *Facing the Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986); Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982); Bruce E. Boyden, *The Surprisingly Confused History of Fair Use: Is It a Limit or a Defense or Both?,* MARQUETTE UNIVERSITY LAW SCHOOL FACULTY BLOG (Oct. 9, 2022), https://law.marquette.edu/facultyblog/2022/10/the-surprisingly-confused-history-of-fair-use-is-it-a-limit-or-a-defense-or-both/

Space constraints limit Part II to only summarizing this Article's historical argument without also engaging in historiographical conversation with this literature. The authors will do so in their fuller exposition of their account. *See supra* note 8.

[14] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (effective Jan. 1, 1978).

First, courts and commentators differed on whether fair use was a distinct doctrine that applied to otherwise infringing uses of copyrighted works or whether it was merged into the basic inquiry into whether a use was substantial enough to be infringing.[15] Judicial treatment of the question had been uneven, and the Second and Ninth Circuits were split. But, the structure of § 107 clarifies that fair use renders certain uses that fall within the scope of one or more of the copyright owner's exclusive rights non-infringing.[16]

The second contest, reflected in the 1976 Act's legislative debates, was around whether fair use should be codified or left as a judicially implied limit on statutory rights. Congress's choice to codify fair use and to mandate judicial consideration of four factors has been consequential. While these factors find their roots in Justice Story's initial formulation in *Folsom v. Marsh*,[17] we credit Barbara A. Ringer, the Copyright Office's point person on the copyright revision process, as playing a principal role in drafting § 107's core provisions.[18] One consequence of codification was that it provided the conditions for increased activity by the Court because fair use now fit within the familiar framework of statutory interpretation.

The third contested idea concerns the Court's treatment of fair use as a context-sensitive doctrine. The Court faced the question of whether the doctrine, as expressed in § 107, was amenable to a general theory or legal standard, or whether the courts should simply declare it to be an "equitable rule of reason" and decide cases solely on their facts? If fair use was capable of a general standard, what was it?

In its first three encounters with fair use, the parties did not offer, and the Court did not adopt, a generally applicable fair use standard. *Campbell* was the first case to present the Court with fair use as an isolated, statutory issue – in connection with a parody, a traditionally favored use. With the aid of Judge Pierre Leval's scholarship, the Court adopted and implemented transformative use as the generally applicable analytical framework for fair use.[19] As other scholars have amply demonstrated, *Campbell* was consequential.[20] We view these consequences as socially beneficial. For example, the transformative use standard has aided courts to explain why uses of large amounts of copyrighted material are fair in cases involving useful technologies, such as search service, and has provided much-needed

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[15] *See infra* Part II.A.
[16] *See supra* note 8.
[17] 9. F. Cas. 342 (C.C.D. Mass. 1841).
[18] *See infra* notes 128-29 and accompanying text.
[19] *See infra* notes 198-207 and accompanying text (discussing adoption of transformative use).
[20] *See infra* note 222 and accompanying text.

breathing room for users in a range of other domains. But, some lower court judges, commentators, and representatives of large media companies have been sharply critical of lower court application of transformative use.[21]

*Google v. Oracle* was therefore more than just a dispute about whether Google should pay $8.8 billion in damages in connection with its Android platform for mobile devices.[22] It was also a referendum on transformative use, as the parties, the *amici*, and the Court all understood. Against pressure to either roll back transformative use altogether or to diminish its analytical power, the Court stood firm. The Court strongly ratified its adoption of transformative use in *Campbell* and added some clarifications about its application.

*Warhol* presented another opportunity to consider the question in part because the Second Circuit had adopted a very different fair use standard, or standards, arguing that fair use in the visual arts context requires exceptional treatment. Not so, said the Court, once again affirming that transformative use is the generally applicable framework. When applying this framework to the narrow, specific use of the photograph in dispute, the Court held that this particular use was competitive rather than transformative, even if other uses might be transformative.

This Article proceeds as follows. Part I provides a brief synopsis of the facts and the Court's holdings in *Google v. Oracle* and in *Warhol*. Part II traces the arc of the three big ideas embedded in these two decisions. Part II.A. summarizes how some early commentators and courts recognized fair use as a distinct non-infringement doctrine while others did not. It briefly explains why resolving this issue was important, describing the benefits of separating analysis of whether expression used in a secondary work is substantially similar to that in an original work from the interest balancing under fair use. While the Supreme Court might have resolved the question had it reached the merits in its first fair use case, its lack of agreement left the question open until the 1976 Act resolved it.[23]

Part II.B. highlights key moments from the legislative development of § 107. Although early reactions to codification were negative, it became clear that fair use could not be left out of this sweeping revision of copyright law. Nonetheless, codified fair use could have declared a fair use simply to be non-infringing, leaving all other questions to the courts.[24] Alternatively, it could have settled whether certain uses were either categorically or presumptively fair, as some proponents sought.[25] In the end, Congress settled

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[21] *See infra* Part III.B.1.
[22] *See infra* note 29 and accompanying text.
[23] *See infra* notes 115-16 and accompanying text.
[24] *See infra* note 136 and accompanying text.
[25] *See infra* note 137 and accompanying text.

on a non-exclusive list of exemplary uses followed by four factors that courts are to consider when applying fair use.[26] Part II.C. traces the post-codification path that led to the Court's adoption of transformative use in *Campbell*. By giving close attention to the positions of the parties and the litigation context for each of the Court's cases, it demonstrates just how contested some basic premises concerning the scope of fair use were.

Part III explains why transformative use analysis properly ensures that fair use is a user-centered doctrine that generally takes into account the public benefits that certain otherwise infringing uses contribute to shared culture. After showing how and why the Court's recent cases were a referendum on transformative use, this Part interprets the Court's treatment of questions such as how transformative use interacts with the derivative work right, how the "new meaning or message" element of the *Campbell* test applies in future cases, and how considerations of downstream uses are now explicitly relevant.[27] It also evaluates how *Google v. Oracle* treated the public benefit accruing from a particular use an explicit consideration and how it specified the respective roles of judge and jury in future fair use cases.

## I. RATIFICATION OF TRANSFORMATIVE USE IN *GOOGLE V. ORACLE* AND IN *WARHOL*

This Part describes only the essential facts and summarizes the Court's legal analysis in *Google v. Oracle* and *Warhol*, deferring a more detailed discussion of the litigation context of, and lessons to be drawn from, each case to Part III *infra*.

### A. *Google LLC v. Oracle Am., Inc.*

#### 1. Factual and Procedural Background

Oracle sued Google for copying some code that software developers use and the structure of that code from Oracle's Java SE platform to implement in Google's Android platform for mobile phones.[28] Oracle sought $8.8 billion in damages.[29] Google's engineers had independently developed most

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[26] *See* 17 U.S.C. § 107.
[27] *See infra* notes 262-292 and accompanying text.
[28] *See* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1190 (2021) ("A [software] platform provides necessary infrastructure for computer programmers to develop new programs and applications.").
[29] *See* Susan Decker, *Google Could Owe Oracle $8.8 Billion in Android Fight*, Bloomberg (Mar. 27, 2018, 9:44 AM), https://www.bloomberg.com/news/articles/2018-03-27/oracle-wins-revival-of-billion-dollar-case-against-google.

of the code in Android.[30] Google argued that it copied a portion of Oracle's code that contained commands and a command structure that software developers had learned to use when programming for Java SE[31] to attract those developers to create Android apps.[32]

The Federal Circuit initially reversed the district court and ruled that the copied code was copyrightable,[33] in conflict with the First Circuit's reasoning in *Lotus Development Corp. v. Borland International, Inc.*[34] After remand, the Federal Circuit overturned a jury verdict in Google's favor, holding that Google's use was not fair use as a matter of law.[35] The Supreme Court granted certiorari to consider both the copyrightability and fair use issues, and chose to assume the former in order to resolve the case in Google's favor on fair use grounds.[36]

### 2. Summary of the Legal Analysis

The Court reaffirmed its commitment to transformative use analysis as set forth in *Campbell*. As a preliminary matter, the Court clarified that fair use, while a mixed question of law and fact, is ultimately a question of law.[37] Turning to the application of § 107, the Court made clear that its analysis was not limited to software: "We do not understand Congress . . . to have shielded computer programs from the ordinary application of copyright's limiting doctrines in this way."[38]

Analyzing the first fair use factor, echoing *Campbell*, the Court said that a use is transformative when it "adds something new and important,"[39]

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[30] *See Google v. Oracle*, 141 S. Ct. at 1191.
[31] *See id.* at 1191-1192 (describing in detail how programmers use APIs when developing new programs and why Google copied the portions of the Java SE API that it did).
[32] *See id.* at 1190 (2021) (explaining background of Google's development of Android).
[33] Oracle Am., Inc. v. Google LLC, 750 F.3d 1339 (Fed. Cir. 2014).
[34] Lotus Development Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233 (1996).
[35] Oracle Am., Inc. v. Google LLC, 886 F.3d 1179 (Fed. Cir. 2018), *rev'd sub nom*, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021).
[36] *See Google v. Oracle*, 141 S. Ct. at 1197 (2021) (reaffirming that this approach is rooted in the analysis in *Folsom*). The decision was 6-2; Justice Barrett took no part in the case.
[37] *Id.* at 1199.
[38] *Id.* at 1199; *see also id.* ("Just as fair use distinguishes among books and films . . . so to 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.").
[39] *Id.* at 1203; *see also id.* ("An artistic painting might . . . fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism . . . [o]r, as we held in *Campbell*, a parody can be transformative

by which it meant a use that "adds something new, with a further purpose or different character, altering the copyrighted work with new expression, meaning or message."[40] The Court also reemphasized Judge Leval's emphasis on whether a use fulfills copyright law's objective to provide a public benefit.[41]

The Court held that Google's use was transformative because the copied code implemented in Android facilitated the creation of new products and expanded the use and usefulness of Android-based smartphones, a use "consistent with that creative 'progress' that is the basic constitutional objective of copyright itself."[42] For this reason, the undisputed commerciality of the use had less weight in the analysis.[43] The Court also questioned whether good faith was an appropriate consideration under the first factor as a legal matter before deciding that even if it were, it was not determinative in this context.[44]

Addressing the second factor, the Court emphasized the particular functionality of this developer-focused code and its close connection to uncopyrightable elements of the overall platform to say that this code, "if copyrightable at all, [is] further than are most computer programs . . . from the core of copyright."[45] Turning to the third factor, the Court chose to measure the amount and substantiality of the code used in relation to the amount of Android code Google had written.[46] The Court held that this factor favored the use because it was tethered to Google's transformative purpose.[47]

With respect to the fourth factor, the Court held that the jury's verdict in Google's favor was supported because (1) there were sufficient differences in the technologies and market dynamics to treat Android as non-competitive with Java; (2) Oracle's predecessor-in-interest, Sun Microsystems, would have benefited from the likely increase in Java-trained programmers because of Google's implementation of portions of the Java

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because it comments on the original or criticizes it, for parody needs to mimic an original to make its point.") (internal quotation marks and citations omitted).

[40] *Id.* at 1202 (quoting *Campbell*, 510 U.S. at 579) (internal quotation marks omitted).

[41] *See id.* at 1202-03 (quoting and citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

[42] *Google v. Oracle*, 141 S. Ct. at 1203; *see also id.* at 1204 (reviewing relevant evidence to hold that Google's use was transformative).

[43] *See id.*

[44] *See id.*

[45] *Id.* at 1202.

[46] *See id.* (stating that the copied code functioned as part of a larger "task-related system" with which programmers were familiar).

[47] *Id.* ("We consequently believe that this 'substantiality' factor weighs in favor of fair use.").

code; and (3) although Sun and Google had engaged in licensing discussions, they contemplated a scope considerably broader than the amount of code Google used and thus was not sufficient evidence of lost potential licensing revenue.[48] Further, Google's purpose was not to use the expressive value in the code but to attract Java-trained programmers to use their investments in learning to use the code.[49] A ruling for Oracle would have lock-in effects that would impede progress copyright law is designed to promote.[50]

Justice Thomas, joined by Justice Alito, dissented. He would have decided the copyrightability question in favor of protection.[51] He disagreed that the use was transformative because it still performed the same function,[52] treated the amount taken as the "heart" of Oracle's code,[53] and would have given the fourth factor preeminent weight, viewing the evidence as favoring Oracle.[54] He also disagreed about the importance of code's functionality under the second favor.[55]

### B. *Andy Warhol Foundation for the Visual Arts v. Goldsmith*

Prior to the Court's decision in *Google v. Oracle*, the Second Circuit had steered away from the transformative use approach in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*.[56] After *Google v. Oracle* reaffirmed the

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[48] *See id.* at 1206-1207 (reviewing evidence and concluding that in light of jury's decision, Oracle's conflicting evidence insufficient to overcome evidence showing difficulty of Sun's entry into smartphone market even absent Google's copying).
[49] *See id.* at 1208 ("This source of Android's profitability has much to do with third parties' (say, programmers') investment in Sun Java programs.").
[50] *See id.* at 1208 ("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.").
[51] *Google v. Oracle*, 141 S. Ct. at 1212-1214 (Thomas, J., dissenting) (explaining reasoning).
[52] *See id.* at 1218-1219 (arguing that "[t]o be transformative, a work must do something fundamentally different from the original").
[53] *See id.* at 1219-1220 (arguing that the code that attracted Java-trained developers was the "heart" of Oracle's code for that reason).
[54] *See id.* at 1216-1218 (arguing that Google's use harmed Oracle's market by directly substituting for some uses and interfered with licensing opportunities for others).
[55] *See id.* at 1215-1216 (arguing that the Court had treated the copied code as "less worthy" of protection than that for other computer programs).
[56] *See* Andy Warhol Found. for the Visual Arts v. Goldsmith, 992 F.3d 99 (2d Cir. 2021), *after reconsideration*, 11 F.4th 26 (2d Cir. 2021), *aff'd* 143 S. Ct. 1183 (2023); *see also id.* at 126 (Sullivan, J., concurring) ("By returning focus to the fourth fair use factor and being particularly attentive to 'whether unrestricted and widespread conduct of the sort engaged in' by an alleged infringer would adversely affect the potential market for the original work, *id.* at 590, 114 S. Ct. 1164 (internal quotation marks omitted), courts can escape the post-*Campbell* overreliance on transformative use.").

Court's commitment to transformative use analysis, the Second Circuit issued a revised opinion denying a motion for rehearing and claiming that its prior analysis was still correct even after reassessment in light of *Google v. Oracle*.[57] The Court appears to have disagreed, accepting this case in response to The Andy Warhol Foundation for the Visual Arts ("AWF")'s petition for certiorari, which claimed that the Second Circuit had created a split with the Ninth Circuit on the issue of, under the first fair use factor, how or whether to consider the message or meaning of a secondary use to determine if it is transformative.[58]

### 1. Factual and Procedural Background

While on assignment from *Newsweek* in December 1981, Lynn Goldsmith, a successful professional photographer, took the photograph-in-suit of Prince Rogers Nelson (known through most of his career simply as "Prince").[59] Through her agency, Goldsmith licensed *Vanity Fair* magazine to use the photograph as an artist reference.[60] Andy Warhol ("Warhol") used the photograph to create a silkscreen image of Prince that appeared on the cover of *Vanity Fair* along with additional silkscreen images and pencil drawings known collectively as "Prince Series".[61]

Having obtained the copyrights in the Prince Series after Warhol's death in 1987, The Andy Warhol Foundation for the Visual Arts ("AWF") received $10,000 in exchange for a license to use one of the Prince Series, Orange Prince, on *Vanity Fair*'s 2016 retrospective of Prince's career

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[57] *See* Andy Warhol Found. for the Visual Arts, 11 F.4th 26, 51 (2d Cir. 2021), *aff'd* 143 S. Ct. 1183 (2023) (rejecting AWF's claim that its initial opinion was in conflict with *Google v. Oracle* and stating that "an attentive reading of the discussion above will show, the principles enunciated in *Google* are fully consistent with our original opinion.").

[58] *See* Brief of Petitioner at i, Andy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1183 (2023) (No. 21-869) (stating the question presented as "[w]hether a work of art is 'transformative' when it conveys a different meaning or message from its source material (as this Court, the Ninth Circuit, and other courts of appeals have held), or whether a court is forbidden from considering the meaning of the accused work where it 'recognizably deriv[es] from' its source material (as the Second Circuit has held).").

[59] *See A*ndy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1258, 1266-67 (2023) (describing circumstances of photo shoot).

[60] Condé Nast owns *Vanity Fair* and was the licensee. *See id.* at 1267 (explaining that, for $400, *Vanity Fair* could publish an illustration based on the photograph once as a full page and once as a quarter page and that the illustration be accompanied by attribution to Goldsmith).

[61] *Vanity Fair* published Warhol's illustration, with attribution to Goldsmith, with an accompanying article about Prince. In addition to the credit that ran alongside the image, a separate attribution to Goldsmith was included elsewhere in the issue, crediting her with the "source photograph" for the Warhol illustration. *See id*.

following his passing.[62] *People* magazine paid Goldsmith $1,000 for similar use of one of her Prince photographs.[63]

Learning of the Prince Series's existence from having seen the *Vanity Fair* cover,[64] Goldsmith contacted AWF to assert that it had infringed her rights. In April 2017, AWF sued Goldsmith and her agency for a broad declaratory judgment of non-infringement or, in the alternative, fair use covering the full Prince Series. Goldsmith countersued for copyright infringement. The district court ruled in AWF's favor on fair use grounds.[65]

The Second Circuit reversed, holding that the two works were substantially similar as a matter of law[66] and that all four fair use factors favored Goldsmith.[67] The court's discussion of transformative use distinguished its precedents and held that certain specific considerations applied when the contextual comparison involves two works of visual art.[68] Judge Sullivan, joined by Judge Jacobs, concurred, emphasizing the court's turn away from transformative use and toward the primacy of the fourth fair use factor. Judge Jacobs's concurrence emphasized his understanding of the narrowness of the court's holding.[69]

### 2. Summary of Legal Analysis

Goldsmith's position below had put the legality of the entire Prince Series at issue.[70] Before the Court, however, the only issue was whether the first fair use factor favored Goldsmith. Narrowing her claim to focus on Warhol's "Orange Prince" variant, Goldsmith had "abandoned all claims to relief other than her claim as to the 2016 license [to *Vanity Fair*] and her

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[62] *Id.* at 1269.
[63] *Id.*
[64] *See id.*
[65] *See* Andy Warhol Found. for the Visual Arts v. Goldsmith, 382 F. Supp.3d 312, 325-326, 330-331 (S.D.N.Y. 2019), *rev'd*, 11 F.4th 26 (2d Cir. 2021), *aff'd*, 143 S. Ct. 1258 (2023).
[66] Andy Warhol Found. for the Visual Arts v. Goldsmith, 11 F.4th 26, 52-54 (2d Cir. 2021), *aff'd* 143 S. Ct. 1258 (2023).
[67] *Id.* at 38-43.
[68] Andy Warhol Found. for Visual Arts v. Goldsmith, 992 F.3d 99, 112 (2d Cir. 2021), *aff'd after reconsideration*, 11 F.4th 26, *aff'd* 143 S. Ct. 1258 (2023) ("But purpose is perhaps a less useful metric where, as here, our task is to assess the transformative nature of works of visual art that, at least at a high level of generality, share the same overarching purpose (*i.e.* , to serve as works of visual art).").
[69] *Id.* at 54-55 (Jacobs, J., concurring).
[70] *See* Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 322 (S.D.N.Y. 2019) (describing Goldsmith's counterclaim as seeking a judgment "holding that the Prince Series works infringe the copyright of the Goldsmith Prince Photograph.").

request for prospective relief as to similar commercial licensing."[71] With respect to this use alone, the Court held 7-2 that the first fair use factor favored Goldsmith.[72]

Selectively quoting *Campbell*, the Court reiterated that the central question under the first factor 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."[73] The Court stated that whether a use of an original work is for a further purpose or different character "is a matter of degree"[74] and that the amount of difference between the original and secondary use determines the likelihood of whether the first factor favors the use.[75] Reiterating that a use that has a further purpose or different character is "transformative",[76] the Court differentiated transformative use from a use that simply adds sufficient original expression to justify protection of a derivative work.[77] The Court also reiterated that whether a use is commercial is not dispositive and that when a work is transformative the significance of commercialism diminishes.[78]

The Court held that the licensing of Orange Prince shared substantially the same purpose as Goldsmith's photograph because "[b]oth are portraits of Prince used in magazines to illustrate stories about Prince."[79] In light of this similarity of purpose and the commerciality of AWF's licensing, the Court stated that the first factor favored Goldsmith "absent some other justification for copying."[80] The remainder of the Court's

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[71] *Warhol*, 143 S. Ct. at 1278 n.9.
[72] *Warhol*, 143 S. Ct. at 1273.
[73] *Id.* at 1274 (internal quotation marks and citations omitted).
[74] *Id.* at 1274-1275.
[75] *Id.* at 1275 ("The larger the difference, the more likely the first factor weighs in favor of fair use [and] [t]he smaller the difference, the less likely.").
[76] *Id.* at 1275; *see also id.* at 1276 (elaborating that a use can be transformative if it further the goals of copyright to promote the progress of science and the arts or if it is reasonably necessary to achieve the user's new purpose).
[77] *Warhol*, 143 S. Ct. at 1275 ("To preserve [the derivative work] right, the degree of transformation required to make a 'transformative' use of an original must go beyond that required to qualify as a derivative.").
[78] *Id.* at 1276 ("The commercial nature of the use is not dispositive . . . [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.") (internal quotation marks and citations omitted).
[79] *Id.* at 1278. *See also id.* 1278 n.11 (responding to the dissent and clarifying that "[t]he Court does not define the purpose as simply 'commercial' or 'commercial licensing'" nor does it view the Goldsmith Photograph and Orange Prince as "'fungible products in the magazine market'") (citations omitted).
[80] *Id.* at 1280.

opinion, which we discuss *infra*, explained its disagreement with arguments raised by AWF and the dissent and restated its conclusion.[81]

Justice Gorsuch, joined by Justice Jackson, concurred, emphasizing the narrowness of the question presented[82] and that the Court had assumed but not decided whether AWF's image is substantially similar to Goldsmith's.[83] He also indicated that other uses of Orange Prince may well be fair use.[84] Justice Kagan, joined by the Chief Justice, dissented. She would have considered in greater detail how Warhol had altered Goldsmith's photograph when creating Orange Prince, focusing on the new material added.[85] She argued that even if the focus were narrowed to the use of an image of Prince to illustrate a magazine article, an editor would not treat the two images as substitutes and therefore the use should be favored as new and different.[86]

### C. Summary

The Court in *Google v. Oracle* and in *Warhol* affirmed that it had gotten the approach to fair use analysis right in *Campbell*, notwithstanding arguments to the contrary discussed *infra*.[87] The Court's analysis and application of transformativeness demonstrated the suppleness of transformative use analysis to favor those uses that further copyright law's fundamental purposes. On one hand, a use can be transformative even if the user adds no new expression to the original work, such as Google's use of Oracle's code to perform the same function because of the new context in which the work was used. On the other hand, even though Warhol had added new expression, and had eliminated many expressive features from Goldsmith's photograph, AWF's licensing use of Orange Prince was not transformative because AWF's license allowing a magazine to use of the image to illustrate a magazine story about Prince competed directly with Goldsmith's ability to license use of her photograph to the same licensees for the same purpose.

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[81] *See infra* notes 268-92 and accompanying text.
[82] *See Warhol*, 143 S. Ct. at 1288 (Gorsuch, J., concurring).
[83] *See id.* at 1291 (explaining that in the infringement analysis "a court must isolate and vindicate only the truly original elements of a copyrighted work . . . [and that] [t]he plaintiff must show not only a similarity but a 'substantial' similarity between the allegedly infringing work and the original elements of his own copyrighted work . . . . [a]nd even when two works are substantially similar, if both the plaintiff's and the defendant's works copy from a third source . . ., a claim for infringement generally will not succeed.").
[84] *See Warhol*, 143 S. Ct. at 1291 (Gorsuch, J., concurring).
[85] *See id.* at 1292-1293 (Kagan, J., dissenting).
[86] *See id.* at 1297 (Kagan, J., dissenting).
[87] *See infra* Part III.B.1.

Since *Google v. Oracle* involved the full four-factor analysis of fair use, the Court in that case did more. It reaffirmed *Campbell*'s use of transformativeness to connect the purpose of the use under the first factor with the amount and substantiality of the use under the third factor.[88] The Court's introduction of its analysis with consideration of the second factor, the nature of the work, also provided a possible blueprint for courts to use in future cases. Perhaps most significantly, the Court expressly called for consideration of the public benefit that a secondary use provides when analyzing the use's market effect under the fourth factor.[89] In addition, the Court clarified that juries make subsidiary findings but that the ultimate resolution of a fair use dispute is a question of law. We elaborate on these points in the next section.

## II. THREE BIG IDEAS IN THE MODERN FAIR USE DOCTRINE

Before addressing the specific teachings of *Google v. Oracle* and *Warhol* for future fair use analysis, we first want to emphasize how historically important these two decisions are. The Court has played an active role in the development of copyright law.[90] But, it considered fair use in only two cases between the doctrine's origin in 1841 and passage of the 1976 Act, dividing evenly in each.[91] Then, it decided four fair use cases within a single decade, culminating in its decision in *Campbell*.[92] Nearly three decades later, the Court returned to fair use in these two decisions to review lower-court development of the transformative use framework for fair use analysis.

*Google v. Oracle* and *Warhol* embody the triumph of three hard-won ideas that have been contested during the development of the modern fair use doctrine. First, fair use has been established as distinct from the inquiry into substantial similarity in regulating copyright's scope. Second, fair use has become a codified, express limit on exclusive rights rather than a judicially implied limit. These two successes are now reflected in the structure of infringement analysis under the 1976 Act.[93] Third, the transformative use framework announced in *Campbell* maintains its vitality as the appropriate

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[88] *See infra* note 299 and accompanying text.
[89] *See infra* note 251 and accompanying text.
[90] *See* Carroll, *Overview*, *supra* note 10 (discussing cases).
[91] *See infra* notes 107, 141 and accompanying text (discussing cases).
[92] *See infra* Part III.C. (discussing cases).
[93] Under modern law, analyzing a *prima facie* claim for copyright infringement requires consideration of a number of issues, including copyright validity, copying, and improper appropriation of original expression through use of substantially similar expression. *See Google v. Oracle*, 141 S. Ct. at 1195-96. Only after a plaintiff has made a *prima facie* showing does the case turn to fair use. *Id.*

analysis. Each idea developed through dialogue between legal commentators and the courts, and the success of each was due to increasing demand for doctrinal clarity driven by changes in the kinds of disputes the courts faced.

### A. From *Folsom* to Fair Use as a Distinct Doctrine

The direct origins of fair use are in Justice Story's opinion in *Folsom v. Marsh*,[94] which introduced the concept of a "justifiable" use of a copyrighted work.[95] Read in context, Justice Story did not introduce the modern concept of fair use but instead proposed a unitary infringement analysis that merged analysis of the substantiality of a use with what we think of today as fair use. Indeed, throughout the history of fair use's development as a distinct doctrine, *Folsom* stood more for the proposition that substantiality of use is the relevant infringement metric rather than for a more policy-driven analysis of whether such a use was justified.[96]

Nonetheless, *Folsom* enjoys a special position as a super precedent in the law. Sprung from a set of facts that resonates with modern fair use disputes and featuring an analysis that lists relevant factors to use when delineating copyright's scope, *Folsom* introduced a more flexible way of engaging in contextual comparison than the English fair abridgement precedents had offered.[97] The reinterpretation of *Folsom* as support for fair use as a distinct doctrine began in commentary in the mid-twentieth century, gathered momentum during the 1976 Act's legislative process, and culminated in the Supreme Court's adoption of the decision as one of its fair use precedents.[98] For evidence of the case's continued vitality, one need look no further than its role in the briefing in *Google v. Oracle* and in *Warhol* and to Goldsmith's counsel's invocation of the case twice in oral argument.[99]

The argument for fair use as a distinct doctrine was not fully won until enactment of the Copyright Act of 1976. We discuss the details of this struggle elsewhere.[100] For present purposes, the most relevant points are these.

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[94] 9 F. Cas. 342 (C.C.D. Mass. 1841).

[95] Story's formulation was rephrased as "fair use" in Lawrence v. Dana, 8 F. Cas. 40, 60-61 (C.C.D. Mass. 1845) (discussing English precedents and referring "what is called 'fair use'" as a privilege to use another's publication).

[96] *See* Carroll & Jaszi, *Intellectual History*, *supra* note 8 (discussing cases).

[97] In other words, the case exists as both *Folsom*-as-decided and as *Folsom*-as-symbol. The first is a decision by a federal court of appeals; the second is treated as Supreme Court precedent because the opinion was written by Justice Story while riding circuit.

[98] *See infra* Part II.B (discussing *Folsom*'s role in the legislative process), Part II.C (discussing the Court's adoption of *Folsom*).

[99] *Warhol*, Tr. Oral Arg. 69, 72.

[100] *See* Carroll & Jaszi, *Intellectual History*, *supra* note 8.

First, the fair use doctrine developed in the shadow of the sweat-of-the-brow theory of copyrightability.[101] Many disputes involved uses of material that would be unprotected today, such as unoriginal collections of facts, organizational headings in a legal treatises, or ideas. Because the parties often were direct competitors, courts applied the substantiality test to determine when a use would be deemed unfair.[102] The courts' reasoning was often quite explicitly Lockean, asking whether the user had done independent labor to gather facts rather than merely verifying facts found in another's publication.[103] This line of cases constitutes the unfair competition or misappropriation branch of fair use jurisprudence.[104]

Second, treatise authors and courts also recognized that in contexts that did not involve direct competition, such as uses for comment or criticism, a user would be granted significantly more latitude. But, few cases presented facts that would provide a basis for judicial elaboration on the point. Nonetheless, one treatise author recognized in 1925 that it would be "convenient" to recognize fair use as a doctrine distinct from the substantiality test that would apply to otherwise "technical" infringements.[105]

Courts adopted this view in three cases involving the uses of lyrics in magazine articles in which the use was germane to the writer's purpose. In each case, the use involved enough lines to be a substantial use as measured at the time, but each court found the use to be fair because it was for a different purpose and did not compete with the original.[106] A few courts of appeals also picked up on the distinction, but this did not have lasting effect. Instead, some circuits continued to treat fair use as coterminous with substantial similarity until the 1976 Act took effect.

This point is best illustrated by the contrasting approaches taken by the Ninth and Second Circuits at mid-twentieth-century. The Ninth Circuit's

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[101] *See* Feist Publications, Inc. v. Rural Tel. Service Co., 499 U.S. 340, 352 (1991) ("[C]ourts [had] developed a new theory to justify the protection of factual compilations. Known alternatively as 'sweat of the brow' or 'industrious collection,' the underlying notion was that copyright was a reward for the hard work that went into compiling facts.").

[102] *See* Carroll & Jaszi, *Intellectual History*, *supra* note 8 (discussing cases).

[103] *E.g.*, Sampson & Murdock Co. v. Seaver-Radford Co., 140 F. 539, 541 (C.C. 1st Cir. 1905) ("[I]t cannot be questioned that the second publisher, although he gives out exactly the same words as the first publisher, is, nevertheless, within his legal right, provided he resorts independently to the same originals that the first publisher went to.").

[104] *See* Carroll & Jaszi, *Intellectual History*, *supra* note 8 (discussing reasoning in these cases).

[105] *See* RICHARD C. DEWOLFE, AN OUTLINE OF COPYRIGHT LAW 143 (1925).

[106] *See* Karll v. Curtis Pub. Co., 39 F. Supp. 836 (E.D. Wis. 1941); Broadway Music Corp. v. F-R Pub Corp., 31 F. Supp. 817 (S.D.N.Y. 1940); Shapiro, Bernstein & Co., Inc. v. P. F. Collier & Son Co., 26 U.S.P.Q. 40, 1934 WL 25419 *2-4 (S.D.N.Y. Jul. 26, 1934).

mechanical treatment of fair use in *Benny v. Loew's, Inc.*[107] was criticized at the time for being overly restrictive,[108] but in the court's view the substantiality test applied equally to competing directories or to Benny's burlesque.[109] The only relevant evidence to the court was the similarity of words in the original script and the teleplay.[110] From this highly circumscribed view of the facts and the law, the court held that "there is only one decisive point in the case: One cannot copy the substance of another's work without infringing his copyright."[111]

In contrast, in *Rosemont Enterprises., Inc. v. Random House, Inc.*,[112] the Second Circuit explicitly disagreed with *Benny* and adopted a forward-looking analysis that anticipated modern fair use. The court rejected the implied consent rationale for fair use and made explicit the constitutional underpinnings of the doctrine.[113] Without explicitly listing applicable factors as a test, the court's rationale followed a context-sensitive, multi-factor analysis.[114]

The Supreme Court could have resolved whether fair use was distinct from substantial similarity had it reached a decision in the *Benny* case. Counsel for each party acknowledged this conceptual dispute, arguing that their respective position would prevail under either theory of fair use.[115] By

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[107] 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court sub nom.*, Columbia Broad. Sys. v. Loew's, Inc., 356 U.S. 43 (1958).

[108] *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967) ("I will not conceal my view that [the decision] was wrong and possibly unconstitutional . . . .").

[109] *See id.*at 536 ("The so-called doctrine of fair use of copyrighted material appears in cases in federal courts having to do with compilations, listings, digests, and the like[,]" and "[i]n such cases the question is whether the writer has availed himself of the earlier writer's work without doing any independent work himself.").

[110] The court determined that words were so similar that if the material from the dramatic script were removed "there are left only a few gags, and some disconnected and incoherent dialogue." *Id.*

[111] *Id.* at 537.

[112] 366 F.2d 303 (2d Cir. 1966); *see also* Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir. 1964) (laying the groundwork for the split but deciding it "not necessary to determine whether parody and satire require a greater freedom than that afforded by the 'substantiality' test outlined in *Benny*.").

[113] *See id.* at 307 ("The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance.").

[114] *See id.*

[115] *See* Brief of Petitioner at 19, Columbia Broad. Sys. v. Loew's, Inc., 356 U.S. 43 (1958) (No. 58-90), ("It would appear to be less confusing and more in accord with the majority of the cases to confine the terminology of 'fair use' to the use of copyrighted material which, except for the application of the principle, would constitute an infringement."); *id.*, Brief of Respondent at 7-8, 31, Columbia Broad. Sys. v. Loew's, Inc., 356 U.S. 43 (1958) (No. 58-90) ("Whether the case be one of plagiarism in the usual sense where the test is 'substantiality,' or one where 'fair use' it its supposed narrow and

dividing evenly, the Court's decision allowed *Benny*'s shadow linger in the Ninth Circuit until Congress finally resolved the issue in the 1976 Act.[116]

The question was important. Requiring a showing of substantially similar expression as part of the plaintiff's *prima facie* case deters overclaiming in two ways. It puts the copyright owner to their proof by demanding that enough of their original expression has been used to raise reasonable concern that the use may be the kind that could undermine the incentives and rewards that copyright law provides. Procedurally, this distinct, required showing of similarity facilitates quick resolution of claims based on similarity of ideas, facts, or common source materials.[117] This limit may well be decisive in cases involving the outputs of generative artificial intelligence technologies that resemble a visual artist's or writer's style or ideas without copying their protectible original expression.

Refining the regulation of copyright scope by treating fair use as a distinct doctrine allows courts to analyze the reason(s) for the use and the amount used and to more clearly evaluate whether or to what degree there may be substitution effects from the use in relation to the public benefit the secondary use provides. On this last point, a unitary analysis that conflates substantiality of use with fair use usually results in an unwarranted presumption that substantial similarity necessarily creates market substitution.

### B. Fair Use as a Distinct, Statutory Limit on Copyright Scope

The process to revise the Copyright Act of 1909 began in the mid-1950s, when Congress tasked the United States Copyright Office to commission reports on 34 topics,[118] and a rising member of the copyright bar, Alan Latman, wrote the report on fair use.[119] The most fundamental question the

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technical sense is at issue, the courts apply the same criteria to determine whether there has been an infringement.").

[116] *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978) (limiting *Benny* to a threshold substantiality test and holding nonetheless that "defendants took more than is allowed even under the *Berlin* test").

[117] *See*, *e.g.* Vincent Peters v. Kanye West, et al., 692 F.3d 629, 636 (7th Cir. 2012) (affirming grant of motion to dismiss for lack of substantial similarity).

[118] *See* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 872 (1987) (describing process); *see also* U.S. Copyright Office, Copyright Law Revision Studies (hosting copies of the 34 reports), https://www.copyright.gov/history/studies.html.

[119] ALAN LATMAN, STUDY NO. 14, FAIR USE OF COPYRIGHTED WORKS (Mar. 1958), COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW v (July 1961), 87th Cong. 1st sess. (House Committee Print) ("Latman Report"). Latman was a mentee of Barbara Ringer's.

study had to address was whether Congress should expressly address fair use in the revision bill or leave it as a judicially implied limit on exclusive rights. Prior legislative efforts had addressed only specific uses of particular interest to certain industry groups without tackling the range of uses the courts had been faced with over the years.[120]

The Latman Report offered four options for dealing with fair use, including leaving it as a judicially implied limit, and the "boldest" of which would be to codify the doctrine stated as a set of general criteria.[121] If codification were the policy preference, Latman suggested that the statute could develop "broad ground rules" for determining fair use or could solve specific problems.[122] Latman's broad ground rules were a three-factor test resembling elements of what became § 107.[123]

Initially, the prospects for codification were not good. Of the nine consultants or commentators whose views on the Latman Report's recommendations are included in the Committee Print, all but one opposed codification, arguing that fair use was best left to the courts.[124] Professor Melville Nimmer, who would later publish his influential copyright treatise, was the exception. He favored codification with general criteria.[125] He subsequently changed his view during the revision process, arguing for codification of fair use without any further statutory guidance.[126]

However, the Copyright Office's first report to Congress on the revision process in 1961 chose Latman's "boldest" option.[127] Who made this consequential decision? Our research gives strong indication that the leading proponent was Barbara A. Ringer, then-Assistant Register of the Examining Division, and later, Assistant Register, who was the principal draftsperson, negotiator, and architect of the Copyright Act of 1976.[128] As in any

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[120] *See id.* at 18-24 (summarizing prior bills).
[121] *See id.* at 32-33 (explaining this approach).
[122] *See id.* at 31.
[123] *See id.* (suggesting "[1] general statements of the permissible purposes for which copyrighted material may be used, [2] conditioned with respect to the amount of such material, and [3] the effect of the use on the original work."). If Latman's "purpose[]" were the same as Story's "object of the selections made," then these ground rules roughly restate the *Folsom* factors.
[124] *See id.* at 39-42, 43-44.
[125] *See id.* at 42-43.
[126] *See* Richard Dannay, *Factorless Fair Use?: Was Melville Nimmer Right?*, 60 J. COPYRIGHT SOC'Y U.S.A. 127, 128-132 (2013) (discussing evolution of Nimmer's views).
[127] *See* COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24-25 (July 1961), 87th Cong. 1st sess. (House Committee Print) ("Register's 1961 Report").
[128] *See*, *e.g.*, Judith Nierman, *Barbara Ringer: 1925-2009*, COPYRIGHT NOTICES SPECIAL EDITION (Apr. 2009) (describing Ringer as principal draftsperson of the 1976 Act); Matt

policymaking process, this view likely reflected numerous conversations and deliberations with others in the Office and on Capitol Hill. But, the available evidence shows that Ringer drafted the Register's 1961 Report, which laid the foundation for many of the important policy decisions incorporated into the final revision bill in addition to codification of fair use.[129]

In the Report, the challenge for Ringer was to suggest language that would capture the relevant considerations in fair use decision-making. From where might she find such language? Certainly, *Folsom* and Latman's reiteration of three factors provided a starting point. Ringer, who appeared to think more specific and mandatory guidance was in order, sought language with a more legislative tone.

While the courts at this time were divided on whether fair use was a distinct doctrine, the Register's 1961 Report reflects no such hesitation. It declares that for purposes of the revision fair use should be understood to be a distinct doctrine that applies to an otherwise infringing use of a copyrighted work.[130] As to the doctrine's substance, Ringer disguised her drafting handiwork with the passive voice, writing:

> Whether any particular use of a copyrighted work constitutes a fair use rather than an infringement of copyright has been said to depend upon (1) the purpose of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of

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Schudel, *A Local Life: Barbara A. Ringer, 83, Force Behind New Copyright Law*, WASH. POST (Apr. 26, 2009) (same).

[129] *See* Morton David Goldberg, *Barbara Ringer and Copyright History*: *Remembering a Mentor, Colleague, and Friend*, 56 J. OF THE COPYRIGHT SOC'Y OF THE USA iii, (Summer 2009) (quoting award nomination letter from former Register Abraham Kaminstein noting that he "'relied primarily on Barbara Ringer to do the initial drafting of both the 1961 Report on the General Revision and the revision bill.'"); *see also* COPYRIGHT LAW REVISION: SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW i (May 1965), 89th Cong. 1st sess. (House Committee Print) (acknowledging Ringer's role) [hereafter First Supplementary Report]; *see also* Eric J. Schwartz, *Barbara Ringer: A Tribute in Celebration of Women's History Month*, COPYRIGHT ALLIANCE (Mar. 25, 2021) ("Colleagues of Barbara's have estimated (to me) that 'at least 75%' of the text of the 1976 Act (i.e., the current law) was written by Barbara. On this, all agree: she was, without a doubt, the principal drafter of the law, accompanied by key contributions from many others, not the least of which included Congressman Bob Kastenmeier, Registers Arthur Fisher and Abe Kaminstein, and General Counsel and Acting Register Abe Goldman, as well as many in the academic and private sectors (for example, Alan Latman)"), https://copyrightalliance.org/barbara-ringer-womens-history-month/..

[130] *See* Register's 1961 Report, *supra* note 127, at 24 ("Copyright does not preclude anyone from using the ideas or information disclosed in a copyrighted work. Beyond that, the work itself is subject to "fair use.").

> the material used in relation to the copyrighted work as a whole, and (4) the effect of the use on the copyright owner's potential market for his work. These criteria are interrelated and their relative significance may vary, but the fourth one - the competitive character of the use - is often the most decisive.[131]

Having canvassed the relevant case law and commentary, we have found no prior instance in which this formulation of fair use "has been said." A sharp-eyed reader will notice that the final text of § 107 varies from this formulation in certain respects resulting from extensive negotiations.[132] But, the structure and principal language of codified fair use was already in place this early in the process.

The process of finalizing this language was very difficult. A 1963 discussion draft bill incorporated the Register's suggested factors,[133] and, with some additional minor revisions, a fair use provision with general criteria very similar to those in current § 107 was introduced in Congress in 1964.[134] Representatives of library and educational groups on one side, and some authors and publishers on the other, opposed the draft fair use provision. Each side expressed concerns about how the general criteria might be interpreted with respect to certain uses. The special-pleading impulse was also manifested in each side demanding a bill that would decide the issue

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[131] *Id.* at 24-25.

[132] *See* Litman, *Copyright, Compromise*, *supra* note 118, at 875-877 (describing negotiations as "tortuous"). In the final text, under the first factor, "character" joins "purpose" as the general criterion along with, "including whether such use is of a commercial nature or is for nonprofit educational purposes"; under the third factor, "material" becomes "portion", and the fourth factor is restated as "the effect of the use upon the potential market for or value of the copyrighted work."

[133] *See* First Supplementary Report, *supra* note 129, at 25 (quoting § 6 of the 1963 bill).

[134] Notwithstanding the provisions of section 5, the fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, 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;
(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.
*See* First Supplementary Report, *supra* note 129, at 25 (quoting § 6 of the 1964 bill).

with respect to a number of specific contested uses, particularly photocopying in or by libraries and in educational institutions.[135]

Finding little room for common ground between these interests,[136] Ringer and her colleagues at the Copyright Office threw their hands up and the gauntlet down to test each side's evaluation of how unguided judicial discretion might affect the outcomes they cared about most:

> Since it appeared impossible to reach agreement on a general statement expressing the scope of the fair use doctrine . . . we decided with some regret to reduce the fair use section to its barest essentials. Section 107 of the 1965 bill therefore provides:
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> Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright. We believe that, even in this form, the provision serves a real purpose and should be incorporated in the statute.

With the help of legislative prodding, this provocation produced its apparently desired result. Negotiations with stakeholders over inclusion of presumptions or specific uses that would be deemed fair dragged on, and in 1967, the final version of § 107 emerged, keeping the factors intact and compromising on interest group demands by listing in a preamble specific uses as illustrative rather than presumptive fair uses.[137]

Belying this extensive textual wrangling, the House and Senate Reports simply declared that the text of what is today § 107 was a mere restatement

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[135] *See* Litman, *Copyright, Compromise, supra* note 118, at 876-877 (describing hearing testimony detailing the disagreements).

[136] The First Supplementary Report explains:

> [W]e do not favor sweeping, across-the-board exemptions from the author's exclusive rights unless an overriding public need can be conclusively demonstrated. There is hardly any public need today that is more urgent than education, but . . . . [w]e believe that a statutory recognition of fair use would be sufficient to serve the reasonable needs of education with respect to the copying of short extracts from copyrighted works, and that the problem of obtaining clearances for copying larger portions or entire works could best be solved through a clearinghouse arrangement worked out between the educational groups and the author-publisher interests.

First Supplementary Report, *supra* note 129, at 25-26.

[137] *See* Litman, *Copyright, Compromise*, *supra* note 118, at 877 (describing process of finalization).

of the common law.[138] However, the specificity of the uses named in the preamble combined with new vocabulary to describe four factors that *shall* be considered by a court were new developments, as some courts soon recognized.[139] One could argue that the claim was technically correct, but only because treating § 107 as a mere restatement was a self-fulfilled prophecy or legal ouroboros. Because the legislative process to finalize the Act took so long, some courts as early as 1968 adopted the draft legislation as their common law rule statement for fair use analysis under the 1909 Act.[140] This process culminated in 1973's *Williams & Wilkins v. United States*,[141] in which the Court of Claims accepted as applicable law the now-§ 107 factors.[142]

### C. Transformative Use Points the Way Forward

Enactment of § 107 invited the Supreme Court's increased engagement with fair use because codification placed the fair use issue in the familiar terrain of statutory interpretation, at least in part. Another reason for the Court's intense engagement within a ten-year period was litigants' strategic decisions to draw increased attention to the relationship between copyright and the First Amendment. Last, problems of the Court's own making required resolution.

#### 1. *Sony v. Universal City Studios* – Fair Use Is the Fulcrum Issue

In its first merits decision on fair use in *Sony Corp. of America v. Universal City Studios, Inc*,[143] the Supreme Court primarily had to decide whether Sony was contributorily liable for allegedly infringing copies of over-

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[138] "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 1976 House Report, 66; 1975 Senate Report, 62.

[139] *See*, *e.g.*, Pacific and Southern Co., Inc. v. Duncan, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984) ("[T]he House Committee . . . may have overstated its intention to leave the doctrine of fair use unchanged, because the statute clearly offers new guidance for courts considering fair use defenses [by] establish[ing] a minimum number of inquiries that a court must carry out").

[140] *See* Time Inc. v. Bernard Geis Associates, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (discussing pending bills with § 107 factors as stating the law and continuing that "[t]he difficult job is to apply the relevant criteria.").

[141] 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

[142] *See id.* at 1352 (stating factors). The court's acceptance likely was prompted by the statement of law in Alan Latman's brief as plaintiffs' counsel.

[143] 464 U.S. 417 (1984).

the-air broadcast television made by users of Sony's *Betamax* video tape recorder ("VTR"). For the parties, fair use was a subsidiary issue related to how the Court should treat the VTR if it were to adopt patent law's staple article of commerce doctrine. But, we know now that fair use was the fulcrum issue that tipped the decision in Sony's favor.[144]

The Ninth Circuit had ruled against Sony on all counts, rejecting its fair use position by relying on a single commentator to hold that, as a threshold matter, fair use was available only for "productive" uses of other works and not for "intrinsic" uses.[145] The Court granted review to consider the standard for contributory infringement and fair use.[146] Although fair use was now codified as a distinct doctrine, the parties' positions and the Court's internal deliberations demonstrate how the law lacked a theory or standard for applying the statutory factors.

### a. Competing Conceptions of Fair Use

Reflecting their understanding that codification was not intended to disturb the common law, the gap in the parties' positions demonstrated how contested that understanding was. Although they addressed the fair use factors in their briefs, each first argued that the Court could resolve the fair use issue on the basis of general principles or presumptions without having to consider the statutory factors.[147]

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[144] *See infra* note 156 and accompanying text; Carroll & Jaszi, *Campbell at 30*, *supra* note 8 (discussing history in more detail).

[145] *See id.* at 970-971 (quoting and citing LEON E. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT LAW 24, 37-38 (1978)).

[146] Like many aspects of this case, the *certiorari* grant was unusual insofar as only three Justices voted in favor presumably to reverse the Ninth Circuit's ruling in favor of Universal/Disney; Justice Blackmun supplied the fourth vote for purposes of affirming that ruling. *See* Jonathan Band & Andrew J. McLaughlin, *The Marshall Papers: A Peek behind the Scenes at the Making of* Sony v. Universal, 17 COLUM.-VLA J.L. & ARTS 427, 432 (1992) (citing a Bench Memorandum circulated among all Justices found in Justice Marshall's papers).

[147] *See* Brief of Petitioner at 16, Sony Corp. v. Universal City Studios, Inc., 484 U.S. 417 (1984) (No. 81-1687) ("Sony Merits Brief") ("Considering that the recording in issue is only a necessary mechanical step by which the home VTR receives free off-the-air TV broadcasts, such recording should be recognizable immediately as fair use."); Brief of Respondent at 17, Sony Corp. v. Universal City Studios, Inc., 484 U.S. 417 (1984) (No. 81-1687) (arguing that as a threshold matter, the Ninth Circuit had "correctly reasoned that such non-productive use does not qualify as fair use.").

Further, while Sony's brief quickly addressed the § 107 factors, it primarily emphasized the fact-intensive nature of the inquiry[148] and devoted extensive attention to the absence of evidence of market harm in the record.[149] In contrast, Universal argued that "[f]air use was a very narrow doctrine designed for very limited application" such as scholarship, research, comment or news reporting, and "only when a small amount was taken."[150] Other evidence of the absence of a fair use standard include Justice Rehnquist's question at oral argument assuming that Congress had codified a productive use requirement and Sony's disagreement on the basis of intrinsic use that involved copying entire works approved of in *Williams & Wilkins*.[151]

The public release of Justice Blackmun's and Justice Marshall's papers reveals that Justice Blackmun's initial draft opinion would have made a modified version of productive use the law.[152] While Justice O'Connor initially thought that the "fair use exemption is not applicable in this case[,]",[153] five days later she disagreed with Justice Blackmun's draft, arguing that fair use applied to unproductive as well as productive uses and that the copyright owner bore the burden of proof on harm.[154]

But, Justice Blackmun remained committed to the productive use requirement and to limiting the copyright owner's burden to a showing at most a "reasonable possibility of harm."[155] In his view, Congress intended copyright owners to be protected from the effects of new technologies and a more demanding standard of proof would fail to achieve this goal. From the

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[148] *See*, *e.g.*, Sony Merits Brief, *supra* note 147, at 15 ("no generally applicable definition is possible, and each case raising the question must be decided on its own facts'") (quoting Senate report at (pp. 61-62)).

[149] *See id.* at 10-12. Sony made some additional legal arguments concerning the legislative history pertinent to home taping and did ask the Court to reverse the Ninth Circuit's holding on productive use. *See* Carroll & Jaszi, *Campbell at 30*, *supra* note 8 (providing detailed discussion of the litigants' arguments).

[150] Transcript of Oral Argument at 40, Sony Corp. v. Universal City Studios, Inc., 484 U.S. 417 (1984) (No. 81-1687) (argument of Oct. 3, 1983).

[151] "Isn't it accurate to say, with respect to the law at the time Congress codified it, that fair use required some sort of a productive use, like one author — a book reviewer quoting a text in a book review or something like that?" *Id.* at 6.

[152] Under this standard, productive use would have been a rebuttable requirement for fair use. So long as the copyright owner introduced some evidence of potential harm from an unproductive use, the user would have to rebut such evidence to succeed on a fair use claim. *See* Jessica Litman, *The Story of Sony v. Universal Studios: Mary Poppins Meets the Boston Strangler*, *in* INTELLECTUAL PROPERTY STORIES 367 (JANE C. GINSBURG & ROCHELLE COOPER DREYFUSS, EDS., FOUNDATION PRESS, 2006).

[153] Band & McLaughlin, *supra* note 146, at 443 (quoting Letter from Associate Justice Sandra Day O'Connor to Associate Justice Harry A. Blackmun at 1 (June 16, 1983)).

[154] *Id.* Justice O'Connor also disagreed with the draft, favoring adoption of the staple article of commerce doctrine. *Id.*

[155] *Id.*

Justices' exchange of memoranda, it is now clear that this conceptual conflict about the law of fair use cost him Justice O'Connor's vote and his majority.[156]

The evolution of Justice Stevens' draft majority opinions shows that the Court, like the parties, had not fully adjusted to the codification of fair use. He initially had discussed only the fourth factor, and it was in that discussion that the presumption against commercial uses first appeared.[157] Even after including copious citations to the legislative history in footnotes on other points in subsequent drafts, Justice Stevens did not include any analysis of the other three fair use factors until after re-argument, when he circulated a November 23, 1983 draft that closely matches the final opinion.[158]

### b. Fair Use as an Equitable Rule of Reason Subject to a Presumption

In the final opinion, the Court recognized that a range of uses of the *Betamax* would be non-infringing, but it relied primarily on its holding that unauthorized time-shifting was fair use.[159] The Court's analysis gave no explicit attention to purpose or character of the use, although prior portions of the opinion make clear that the Court accepted the district court's finding that the predominant use was time-shifting. The Court's discussion of commerciality was internally inconsistent. Initially, it recognized that "'[[t]he Committee's amendment] is an express recognition that . . . the commercial or non-profit character of an activity . . . can and should be weighed along with other factors in fair use decisions.'"[160]

Then, without explanation, the Court did more than weigh commerciality, instead adopting offsetting presumptions.[161] The Court's presumption in favor of non-commercial uses was announced as part of the

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[156] Initially, Sony had four votes: Justices Stevens, White, and Brennan along with Chief Justice Burger. Though somewhat hesitant, Justice Powell joined Justices Blackmun, Marshall, Rehnquist and O'Connor to rule in favor of Universal/Disney. *See* Litman, *Story of Sony*, *supra* note 152, at 366.

[157] *See* Band & McLaughlin, *supra* note 146, at 445 (discussing Justice Stevens' Jun. 27, 1983 draft opinion).

[158] *See id.* at 449 & n.38 (discussing changes made in Nov. 23, 1983 draft opinion).

[159] *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

[160] *Id.* at 449 (quoting H. Rep. No. 94–1476, p. 66, U.S. Code Cong. & Admin. News 1976, p. 5679).

[161] *Id.* ("If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair [and] [t]he contrary presumption is appropriate here, however, because . . . time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.").

first factor. The Court merely mentioned the second factor and quickly accepted Sony's argument that a user's right to access broadcast television justified copying of complete works under the third factor, in an analysis explicitly connecting the purpose of a use and the amount used. But, Justice Stevens undercut the generality of this point by treating the third factor as a normally isolated consideration under which use of an entire work will usually tip the third factor against fair use.[162]

The Court did elaborate on the standards and evidence relevant to the fourth factor, holding that a plaintiff has to demonstrate some meaningful likelihood of harm from the use. The Court presumed such harm for commercial uses and stated that for non-commercial uses, a sufficient showing would be that if a use had become widespread, it would harm the market for the work.[163]

Altogether, however, it is clear that the Court did not have a theory or a general standard for fair use analysis. With regard to the purpose and character of a use, the Court rejected productive use as a threshold inquiry but left nothing in its wake to guide future analysis. The Court's discussion of the second factor was an afterthought. The Court provided limited guidance about how to assess market effects of a use that relied on a now-disavowed presumption that proved counterproductive.

### 2. *Harper & Row v. Nation Enterprises*

In *Harper & Row v. Nation Enterprises*,[164] the Court revisited fair use so quickly after *Sony* because Harper & Row successfully framed a statutory interpretation case as a constitutional dispute, arguing that the Second Circuit had erroneously adopted a limited construction of the Copyright Act on subject matter and on fair use to avoid conflict with the First Amendment.[165]

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[162] *See id.* at 449-450 (1984) (noting that in this case "that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use").

[163] *See id.* at 451 (1984) (stating fourth factor standard.)

[164] 471 U.S. 539 (1985).

[165] Harper & Row argued that constitutional avoidance led the lower court to adopt an overly narrow understanding of the fact/expression distinction and to adopt an overly broad interpretation of fair use to justify its holding in *The Nation*'s favor. The presence of Floyd Abrams, well known for his First Amendment practice, and the ACLU as *The Nation*'s counsel may have also persuaded the Court that this case required constitutional interpretation, notwithstanding Abrams's contentions to the contrary.

On the copyrightability issue, the district court and Judge Meskill in dissent would have extended broader protection over combinations of uncopyrightable facts and copyrightable expression, relying on "industrious collection" of facts as an alternative ground for copyrightability. *See* Schroeder v. William Morrow Co., 566 F.2d 3, 5-6 (7th Cir. 1977). In particular, the dissent would have treated *The Nation*'s paraphrasing of facts from the autobiography as infringing; whereas, the majority did not. *See* Harper &

This presentation of the fair use issue, clouded by the constitutional overlay and the issue of journalistic ethics, made this case as much about whether *The Nation* had made a "fair scoop"[166] as it was about whether its quotations from President Ford's autobiography were fair use.

Avoiding the subject matter dispute, the Court chose to apply fair use to only *The Nation*'s admitted quoting of about 300 words from President Ford's soon-to-be-published autobiography.[167] Once again neither the parties nor the Court provided general guidance on the application of fair use.

The parties had considerably different understandings of the law. In the briefing, Harper & Row eschewed discussion of § 107 to rely on the implied license theory of fair use[168] and to offer its own interest balancing test.[169] It also invited the Court to resuscitate the productive use doctrine, treating it as a fair use factor.[170] In contrast, *The Nation*'s argument followed the now-familiar sequential treatment of the § 107 factors. It was willing to accept productive use as the relevant inquiry under the first factor, defining productive use as one that confers a public benefit, because even the *Sony* dissenters had treated news reporting as presumptively productive.[171] *The Nation* primarily disagreed about how to treat the soon-to-be-published

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Row Pub. Inc. v. Nation Enters., 723 F.2d 195, 204 (2d Cir. 1984), *rev'd*, 471 U.S. 539 (1985).

[166] *See* Harper & Row, Pub., Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (characterizing *The Nation*'s argument as "advanc[ing] 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.")

[167] *See id.* at 548-49.

[168] *See* Brief of Petitioner at 31, Harper & Row v. Nation Enters., 471 U.S. 539 (1985) (No. 83-1632) ("[A]n author who has published a work may be deemed to have consented to its 'fair use' by others. Obviously, no such consent may be said to apply to unpublished material.").

[169] *Id.* (arguing the user "should . . . demonstrate that the public will derive some benefit from his dissemination of the material in advance of its dissemination by the author which outweighs the author's right of first publication.").

[170] *See id.* at 34-35 (arguing that four members of the Court in *Sony* would have treated productive use as a threshold requirement while the rest of the Court treated it as a helpful guide to calibrating the balance of interests in fair use adjudication).

[171] *See* Brief of Respondent at 27-28, Harper & Row v. Nation Enters., 471 U.S. 539 (1985) (No. 83-1632) ("*The Nation*'s Brief"). The parties disagreed on other points, such as: (1) whether, under the second factor, the Senate Report was reliable legislative history on the use of unpublished works, whether (2) under the third factor, the district court's view that *The Nation* had used the "heart" of the work was correct; and (3) whether the market effect of *The Nation*'s publication was due to its dissemination of President Ford's expression or the facts underlying it. *See* Carroll & Jaszi, *Campbell at 30*, *supra* note 8 (discussing these aspects of the case in greater detail).

nature of the autobiography[172] and about market harm, arguing that publication of facts and not expression led to *Time*'s cancellation of its license.[173]

The Court ruled on fair use grounds for Harper & Row by a 6-3 margin in an opinion written by Justice O'Connor.[174] Without much assistance from counsel, the Court adopted a theory purpose-built to justify its outcome in this case but without enough breadth to apply in other contexts. Demonstrating the transitional nature of this case, Justice O'Connor's opinion essentially announced the Court's decision on common law principles first[175] and then justified its decision in relation to the statutory factors.[176]

The reasoning in the case centered on the unpublished nature of Ford's autobiography. Adopting an implied license theory of fair use, the Court said such license comes from an author's choice to publish.[177] Consequently, the Court treated first publication as a subsidiary exclusive right and added a new fair use presumption against use of unpublished works.[178] In response to *The Nation*'s argument that the First Amendment required a different result in this case, the Court disagreed because the idea/expression dichotomy and fair use accommodated free speech concerns.[179]

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[172] *See The Nation*'s Brief, *supra* note 171, at 31-37.
[173] *See id.* at 40.
[174] The Court chose to avoid engaging on the subject matter dispute. *See* Harper & Row, Pub., Inc. v. Nation Enters., 471 U.S. 539, 548-549 (1985) (noting that "[e]specially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression.").
[175] *See id.* at 548-55.
[176] *See id.* at 560-69.
[177] *Id.* at 549 ("[T]he author's consent to a reasonable use of his copyrighted works ha[d] 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.") (internal quotation marks omitted).
[178] *See id.* at 555 (1985) ("Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."). Congress later amended § 107 to reverse this presumption. *See* Fair Use of Copyrighted Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992).
[179] Harper & Row, Pub., Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) ("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.").

Since the Court thought the essence of the case was about an invasion of the right of first publication, it viewed the § 107 factors through a fiscalized lens tailored to the facts of this case.[180] With respect to purpose and character, the Court accepted in passing that *The Nation*'s news reporting use was productive use without giving any indication of this statement's legal import or the weight the Court assigned to this purpose.

Instead, the opinion treated the first factor as primarily about market analysis. After repeating the *Sony* presumption against commercial use,[181] the Court imported fourth factor considerations into the first factor.[182] How else does one identify "the customary price" to evaluate the impact of a commercial use under the first factor than by considering whether the use has occurred in a well-structured market under the fourth factor?

The Court also relied to ambiguous effect on good faith as relevant to the character of a use. Repeating its version of an implied consent theory of fair use,[183] and reinforcing the "fair scoop" nature of this dispute, the Court characterized *The Nation*'s conduct as "knowingly exploit[ing] a purloined manuscript;"[184] whereas the dissent called it "standard journalistic practice."[185]

The Court's discussion of the nature of the work largely repeated and embellished upon its discussion of its view of the right of first publication and use of unpublished works. With respect to the amount and substantiality of the use, the Court adopted the district court's view that *The Nation* had taken "the heart of the book."[186]

Turning to the fourth factor, the Court relied on the Nimmer treatise and the then-popular law-and-economics approach to legal interpretation to say that "[t]his last factor is undoubtedly the single most important element

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[180] Somewhat ironically, after having created a *de facto* presumption against use of an unpublished work, Justice O'Connor wrote that "[t]he drafters [of § 107] resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis." *Id.* at 561.

[181] *Id.* at 562 (1985) ("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.").

[182] *Id.* ("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.").

[183] *Id.* at 563 (1985) ("Unlike the typical claim of fair use, *The Nation* cannot offer up even the fiction of consent as justification.").

[184] *Id.*

[185] *See Harper & Row*, 471 U.S. at 593 (Brennan, J., dissenting) ("Indeed the Court's reliance on this factor would seem to amount to little more than distaste for the standard journalistic practice of seeking to be the first to publish news.").

[186] *Harper & Row*, 471 U.S. at 564-65 (1985) ("The District Court, however, found that [T]he Nation took what was essentially the heart of the book.") (citation omitted).

of fair use."[187] Defining the market narrowly, as it would again in *Warhol*, the Court held that *The Nation*'s publication of the quotations to let the reader know President Ford's views in his own words "directly competed for a share of the market for prepublication excerpts."[188]

Justice Brennan, joined by Justices White and Marshall, dissented, expressing a very different understanding of the law of fair use. Most relevant here is the dissent's disagreement about the role of commerciality in the Court's analysis of the first factor, noting that many of the uses in § 107's preamble are usually done commercially.[189] Additionally, the dissent accepted the Court's characterization of the fourth factor as "most important" but then faulted the Court for analyzing the market impact of the entire article rather than the impact of using only the protected expression contained therein.

The role of Professor Melville Nimmer as authority in the case is interesting. Each side cited different versions of his influential treatise on the issue of use of unpublished works, but Nimmer the advocate represented large newspapers an *amicus* in support of *The Nation*. He argued that the Ninth Circuit had erred in adopting "productive use" and that fair use did not turn on an implied license theory.[190] Among other points, he also did careful factor four analysis.[191]

As in *Sony*, the Court in *Harper & Row* did not provide a general framework of analysis for fair use. The Court did rely on an implied license

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[187] *Id.* at 566 (citing Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982). One point of interest is that even though Justice O'Connor had characterized fair use as an affirmative defense earlier in the opinion, she reiterated her view in the *Sony* correspondence that the copyright owner has to "establish[] with reasonable probability the existence of a causal connection between the infringement and a loss of revenue." *Id.* at 567

[188] *Id.* at 568 (1985). Reinforcing once again its view about the distinction between published and unpublished works, the Court appended *The Nation* article to its opinion, apparently concluding that doing so would have no discernable impact on sales or licensing of the now-published biography.

[189] *Id.* at 592 (Brennan, J., dissenting) ("Many uses § 107 lists as paradigmatic examples of fair use, including criticism, comment, and *news reporting*, are generally conducted for profit in this country, a fact of which Congress was obviously aware when it enacted § 107.") (emphasis in original).

[190] *See* Brief of the Gannett Company, *et al.* as Amici Curiae in Support of Respondent at 27, Harper & Row v. Nation Enters., 471 U.S. 539 (1985) (No. 83-1632) ("[Implied license] is manifestly a fiction. The applicability of the fair use defense is simply not triggered by the consent of the author.").

[191] With respect to market harm, Nimmer pointed out that *Time* was still willing to go ahead with serialization if the date could be moved up, it was Harper & Row's rejection of this approach that led to cancellation and that any market harm was due to disclosure of the facts and not from use of the quotes as such. *See id.* at 29.

theory of fair use and a lay sense of fairness or ethics in its analysis. But neither of these considerations provided a standard or theory to guide analysis of the factors in § 107.

Demonstrating the absence of general guidance provided by *Harper & Row*, in its aftermath, a conceptual tug-of-war over the scope of fair use broke out in the Second Circuit. Sharp disagreements about the amount of latitude fair use afforded a biographer to quote from the subject's writings – an issue closely analogous to the issue in *Harper & Row* – revealed a deeper fissure.[192] Some of the circuit judges involved in the cases also had taken to the pages of law journals to further explicate their respective positions.[193] Judge Pierre Leval, who had been the district judge in each case, reflected on why the law of the Second Circuit had become misaligned with the fundamental purposes of fair use. These ruminations led him to introduce the concept of transformative use in his influential 1990 *Harvard Law Review* article.[194]

### 3. *Stewart v. Abend*

Fair use was a minor issue in *Stewart v. Abend*,[195] which involved interpretation of § 24 of the 1909 Act concerning the fate of a derivative work based on an underlying work in which copyright had reverted by operation of law to the statutory heirs. In an extremely short argument in their brief, Petitioners argued that since Congress decided in the 1976 Act to permit a derivative work to continue to be exploited even if the license to use a pre-existing work had been terminated, the same result could be achieved by the fair use doctrine under the 1909 Act.[196] As might be expected, the Court affirmed the Ninth Circuit's dutiful march through the § 107 factors

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[192] *See* New Era Pub. Int'l, ApS v. Henry Holt & Co., 873 F.2d 576 (2d Cir. 1989); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987).

[193] *See* James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983 (1990); Roger J. Miner, *Exploiting Stolen Text: Fair Use or Foul Play?*, 37 J. COPYRIGHT SOC'Y 1 (1989); Jon O. Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC'Y 12 (1989); *see also* New Era Publications, ApS v. Carol Pub. Group, 904 F.2d 152, 155 (2d Cir. 1990) (noting the controversy and including Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990) as part of the conversation); *New Era Publications Intern. v. Henry Holt Co.*, 884 F.2d 659, 662-63 (2d Cir. 1989) (Newman, J., dissenting from denial of rehearing en banc) (noting that five of twelve judges would have granted rehearing to correct *dicta* reflecting a narrow understanding of fair use).

[194] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

[195] 495 U.S. 207 (1990).

[196] *See* Brief for Petitioner at 39-42, Stewart v. Abend, 495 U.S. 207 (1990) (No. 88-2102).

without adding anything further to help resolve the contested issues concerning fair use's scope.[197]

### 4. *Campbell v. Acuff-Rose* and the Transformative Use Standard

The Court finally provided a general analytical framework for fair use analysis in *Campbell v. Acuff-Rose Music, Inc.*[198] The case presented a single issue – whether 2 Live Crew had made a fair use of "Pretty Woman" – as a purely statutory dispute.[199] While the Court generally does not review cases only to correct a lower court error, the disproportionately heavy weight that the Sixth Circuit had place on commerciality as a matter of law, even in the context of a traditionally favored use, made the case a good vehicle for the Court to call for a reset in framing fair use analysis.[200] In addition, the case presented an appealing opportunity for the Court to essentially retract its errant statements in *Sony* and *Harper & Row*.

Justice Souter's consequential decision to embrace transformative use as the appropriate general analytical framework cannot be credited to the parties.[201] However, it is worth noting that Acuff-Rose relied on Judge

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[197] *Abend*, 495 U.S. at 238("[A]ll four factors point to unfair use.").

[198] 510 U.S. 569 (1994).

[199] To be sure, *amici* supporting Campbell also relied on First Amendment arguments, and Campbell's reply brief made reference to incorporating "First Amendment values" in the application of fair use to parody. *See* Reply Brief for Petitioner at 31, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292). But, the question presented and the focus of argument was on the interpretation and application of § 107.

[200] *See* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1437 (6th Cir. 1992), *rev'd sub nom.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) ("[T]he admittedly commercial nature of the derivative work . . . requires the conclusion that the first factor weighs against a finding of fair use [citing *Sony*]"); *id.* at 1438 ("The use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists."). The pioneering hip hop group 2 Live Crew had copied a guitar riff and other portions of the composition "Oh Pretty Woman" by Roy Orbison and Rick Dees for their song "Pretty Woman," which parodies the street encounter depicted in the original.

[201] Campbell cited the Leval article only in his reply brief with respect to the amount and substantiality of the use. *See* Reply Brief of Petitioner at 15-16, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292). He indirectly may have drawn the Court's attention to the article with glancing citation to the Second Circuit's then-recent decision in Twin Peaks Prod. v. Publications Int'l, 996 F.2d 1356, 1375 (2d Cir. 1993), which cited the Leval article as "useful" without any more attention. *See* Reply Brief of Petitioner, *supra*, at 9, 16. Of the nine amicus briefs filed in the case, only the ACLU's brief cited the Leval article for general propositions about the role of fair use in copyright law. *See* Brief of American Civil Liberties Union as Amicus Curiae in Support of

Leval's article at oral argument, pointing to the section in which he claimed to have erred in *Salinger* by not giving enough weight to the commercial appeal of some quotes in the biography.[202]

First, recognizing that fair use's role in the copyright scheme is to maintain a dynamic balance of party and policy interests as circumstances change, Justice Souter's opinion swept away the presumptions from the Court's prior cases that interfere with this function.[203] The Court then established transformative use as the appropriate specific focus of analysis under the first factor but also as a means of synthesizing the overall analysis by linking purpose to the amount used under the third factor.

As Judge Leval had done, the Court rooted transformative use in the rich soil of *Folsom*, noting that the inquiry into purpose and character of the use asks whether the use merely "supersede[s] the objects of the original creation" or whether the use "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.'"[204] Importantly, the Court modeled for lower courts how this inquiry into transformativeness is a thematic inquiry that runs through analysis of all of the factors.

Specifically, even though commerciality is a first-factor consideration, it also returns under the fourth factor. The Sixth Circuit erred not only in treating commerciality as a presumptive counterweight to a favored purpose (*i.e.* a parody), but also, more deeply, it erred in assuming commerciality serves as a counterweight at all in the context of transformative uses.

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Petitioners at 11-12, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292).

[202] *See* Transcript of Oral Argument at 26, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292) ("There's a wonderful article by Judge LaValle (sic) in which he modestly reassesses his own opinion on the Salinger letters case"); *see also id.* at 29 (citing the article again for this point). The Court demonstrated familiarity with the article by asking whether counsel would also agree with Leval's argument that injunctions may be inappropriate if a parody took too much. *See id.* at 33-34 (quipping that counsel's response disagreeing with that proposition was that [y]ou take the sweet but not the bitter from him.").

[203] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994) (accusing the Sixth Circuit of misreading *Sony*'s statement that "every commercial use of copyrighted material is presumptively . . . unfair. . . ." as creating a "hard" presumption) (quoting *Sony*, 464 U.S. at 451); *id.* at 584 (noting that most uses in § 107's preamble are done commercially); *see also id.* at 578 (dispensing with the *Harper & Row dictum* on fourth factor primacy; "[n]or may the four statutory factors be treated in isolation, one from another [because] [a]ll are to be explored, and the results weighed together, in light of the purposes of copyright.").

[204] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (quoting *Folsom* at 348 and Leval, *supra* note 194, at 1111, respectively).

*Campbell* teaches that works that make transformative use of a prior work "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."[205]

The Court held that the amount and substantiality used must be judged in light of the purpose under the first factor. In the case of a parodic use, extensive borrowing is permitted. A transformative use also will receive different treatment under the fourth factor because its object is not to supersede the original. As a result, "when . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred."[206] Although the Court remanded the case for lack of evidence about the market for a rap derivative work, the Court made clear that arguments based on harm to licensing markets have to be rooted in general commercial practice:

> This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectable 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.[207]

Importantly, this linkage of the purpose and character of a use under the first fair use factor with the amount and substantiality of the use under the third to inform consideration of how this purpose and amount are likely to affect the market for the copyrighted work provides a user-centered synthesis of the relevant considerations in § 107.

For this reason, the Court's decision in *Campbell* has been a watershed in the development of the fair use doctrine. Fair use, no longer tethered to the sweat of the brow and codified as an express limit on exclusive rights, is now recognized for the central role it plays in advancing the fundamental purposes of copyright law. While it took some time for the lower courts to fully embrace *Campbell's* teachings, transformative use analysis has become the primary mode of adjudicating fair use disputes.[208]

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[205] *Id.*at 579 (citation omitted).
[206] *Id.* at 591.
[207] *Id.* at 592.
[208] *See infra* note 221.

In the interim between *Campbell* and *Google v. Oracle*, the courts of appeals determined that a wide range of activities qualified as transformative uses of copyrighted works. These uses include institutional, wholesale and systematic copying for commercial purposes to create search engines and related tools,[209] to detect plagiarism,[210] or to identify word frequency in a corpus of books.[211] They also include a range of uses in which a work was used in the creation of a new work, such as for illustrative purposes,[212] in appropriation art,[213] and in the performing arts.[214] As *Campbell* noted, news reporting is a named use in § 107 that also is usually done commercially. Transformative use has helped courts distinguish journalistic use for new purposes[215] from those that are competitive.[216] Last, as we discuss *infra*, *Campbell* did not restrict transformative use to uses that target or comment on a specific work of authorship. Nonetheless, uses that do so such as parodies[217] or those engaged in critical commentary[218] have unsurprisingly

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[209] Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d. Cir. 2015); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 97 (2d Cir. 2014); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1169 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003).

[210] *See* A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 640 (4th Cir. 2009).

[211] Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d. Cir. 2015) (singling out Google's nGram feature as a transformative use).

[212] *See* Marano v. Metro. Museum of Art, 844 F. App'x 436 (2d Cir. 2021) (concert photograph used in museum exhibition); Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932 (4th Cir. 2013); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614 (2d Cir. 2006) (use of concert poster in "biography" of the Grateful Dead).

[213] *See* Cariou v. Prince, 714 F.3d 694, 703 (2d Cir. 2013); Blanch v. Koons, 467 F.3d 244, 254-55 (2d Cir. 2006).

[214] *See*, *e.g.*, Tresóna Multimedia, LLC v. Burbank High School Vocal Music, 953 F.3d 638, 649 (9th Cir. 2020) (musical compositions rearranges for high school medley); SOFA Entm't, Inc. v. Dodger Prods., Inc., 709 F.3d 1273 (9th Cir. 2013) (use of television footage in musical); Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013) (image used as background in concert).

[215] *See*, *e.g.*, Swatch Group Mgmt Serv. Ltd. v. Bloomberg L.P, 756 F.3d 73 (2d Cir. 2014); Payne v. Courier-Journal, 193 F. App'x 397 (6th Cir. 2006) (fair use for a newspaper to quote from convicted rapists's unpublished children's book); L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924 (9th Cir. 2002); Nunez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000).

[216] *See* L.A. News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987 (9th Cir. 1998) (use of video of violent altercation competitive with licensed use for same purpose); L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997) (same).

[217] *See*, *e.g.*, Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012); Lyons P'ship v. Giannoulas, 179 F.3d 384 (5th Cir. 1999) (parody of Barney the dinosaur being assaulted by chicken at sporting event); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998) (poster parodying magazine cover photo of pregnant nude actress).

fared well in the post-*Campbell* era. Some courts have turned to transformative use as grounds for decision even when lack of copyrightable subject matter[219] or lack of substantial similarity would have readily been applicable.[220]

## III. FAIR USE AS A USER-CENTERED INQUIRY ABOUT PUBLIC BENEFIT

The discussion *supra* shows that the Court gave relatively frequent attention to fair use in the first decade and a half after § 107's enactment in *Sony*, *Harper & Row*, briefly in *Abend*, and then in *Campbell*. That discussion also highlights that *Campbell*'s adoption of transformative use had measurable, and measured, impact on lower courts' conceptual and doctrinal application of fair use with outcome-determinative effect in many cases.[221]

The Court's choice to focus on the fair use issue in *Google v. Oracle* recognized that the case was a referendum on transformative use analysis and its post-*Campbell* application in the lower courts. In contrast, *Warhol* initially presented a question that may have refined transformative use analysis. But once the issue narrowed to one of competitive use in licensing magazine cover illustrations, there was little or nothing further at stake with respect to transformative use.

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[218] *See*, *e.g.*, Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 796 (9th Cir. 2003) (photographs of Barbie dolls in threatening situations); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264-65 (11th Cir. 2001) (critical reimagining of *Gone With the Wind*); Sundeman v. The Seajay Soc'y, Inc., 142 F.3d 194 (4th Cir. 1998) (use of quotations in critical review of novel).

[219] *See*, *e.g.*, Nat'l Rifle Ass'n v. Handgun Control Fed'n, 15 F.3d 559 (6th Cir. 1994) (use of NRA's list of state legislators who would vote on handgun control legislation by proponents of such legislation was transformative use).

[220] *See infra* notes 301-04 and accompanying text.

[221] *See*, *e.g.*, Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 25 (2020) ("Since the 1994 *Campbell* case, the consideration of whether a defendant's use qualifies as 'transformative' has emerged as among the most important to a court's overall fair use determination; indeed, Netanel argues that it "overwhelmingly drives" that determination," citing Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 732-34 (2011)); Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law* , 22 STAN. TECH. L. REV. 163, 180 (2019); Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815 (2015) (discussing *Campbell*'s impact); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (arguing that fair use had become more predictable and coherent with respect to "policy-relevant clusters" of uses, implicitly documenting some of *Campbell*'s impacts).

### A. Transformative Use Analysis Has Proven Resilient and Reliable

The Court's opinions in *Google v. Oracle* and in *Warhol* reaffirm its commitment to transformative use in fair use analysis. This result is welcome and was not inevitable. Transformative use came under vigorous attack in the briefing in *Google v. Oracle* from Oracle and its *amici*. But, the Court recognized why transformative use remains so relevant and useful for courts and litigants who must resolve contested issues concerning copyright's scope.

Some may read the Court's apparent diminution of the importance of a use's new meaning in *Warhol* as signaling a course change in fair use analysis. But, as is discussed in detail *infra*, because the Court treated this as a competitive use case in the context of magazine cover illustrations any new meaning that Warhol may have added to Goldsmith's image was irrelevant for this specific use.

But, as to the law, the Court reaffirmed *Campbell*'s teaching that the inquiry into the purpose or character of a use is objectively tethered rather than open-ended: "[T]he 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."[222]

At its core, transformative use centers the fair use inquiry on the public benefit of a secondary use. By focusing on the user's purpose and the amount of expression used to accomplish that purpose, the transformative use framework structures the fair use inquiry properly in our view. For example, while it is true that proof of harm is not a required element of the copyright owner's *prima facie* case, their prayer for relief and their submission of evidence on substantial similarity already will have provided a good part of their story about why the use should be deemed infringing.

Fair use analysis, then, appropriately should start with the user's understanding of the use.[223] By focusing at this stage of the case on whether the use is transformative, the approach established in *Campbell*, as elaborated

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[222] *Warhol*, 143 S. Ct. at 1284 (citing *Author's Guild*); *see also* Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013) ("Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may 'reasonably be perceived' in order to assess their transformative nature."); Part III.D.3 (discussing role of new meaning or message in fair use analysis).

[223] *See*, *e.g.* Leval, *supra* note 194, at 1116 (describing purpose and character inquiry as "the soul" of the "fair use defense"); *Warhol*, 143 S. Ct. at 1299 (Kagan, J., dissenting) (stating that by inquiring into the purpose of the use, "the first factor gives the copier a chance to make his case").

by the lower courts, has established a coherent format for this inquiry. This approach avoids the pitfall of treating the § 107 factors as four independent weights to be put on a scale[224] or as makeweights that can be harnessed, corralled, or even "stampeded" to rationalize a judge's preferred outcome.[225] Instead, the approach synthesizes the factors by overtly connecting the goal or purpose of the use with the amount used to achieve the user's purpose, noting that distinct purposes are unlikely to have substitutional effects in the market. In our view, focusing on this combination of purpose and amount is sufficient to determine whether a use is fair in the large majority of situations that call for fair use analysis.[226]

Importantly, the transformative use inquiry begins with the user's perspective, but it does not end there. Whether the use adds "something new" such that it is transformative is less concerned with a user's subjective motivation than it is with an objective approach that brings into the picture members of the public as beneficiaries of the use. When these considerations show that a use is transformative, it is therefore unlikely to have meaningful impact on the market or value of the work under the fourth factor regardless of the copied work's nature under the second factor.[227] The application of this approach in earlier cases involving search, and related, technologies, which held that copying to support these earlier forms of artificial intelligence were fair use, provide the legal foundation for current disputes concerning copying to support generative artificial intelligence technologies.[228]

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[224] *See Google v. Oracle*, 141 S. Ct. at 1197 (quoting Leval, *supra* note 194, at 1110: "The factors do not represent a score card that promises victory to the winner of the majority.")

[225] *See*, *e.g.* Beebe, *supra* note 221, at 20-21 (finding that courts do not stampede the factors in their analysis).

[226] *See* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 745 (2011) (concluding from study of opinions that "[u]nder the transformative use paradigm, factor three . . . becomes a question not of whether the defendant took what is the most valuable part of the plaintiff's work . . ., but rather whether the defendant used more than what was reasonable in light of the expressive purpose driving the transformative use.").

[227] *See*, *e.g.*, Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 100 (2d Cir. 2014) (discussing use of copied books to enable full-text search as a transformative use and holding that "it is irrelevant that the Libraries might be willing to purchase licenses in order to engage in this transformative use (if the use were deemed unfair). Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original and the full-text-search use does not.").

[228] *See supra* notes 209-11; *see also* Michael W. Carroll & Charles Duan, *A Copyright-Relevant Primer on Generative Artificial Intelligence* (Oct. 30, 2023) (explaining how copyrighted works are used in generative artificial intelligence models), https://youtu.be/2nARmcWZfKE?si=MrbEoGBUe2FEykqd.

To fully appreciate the significance of the Court's ratification of transformative use in *Google v. Oracle* and in *Warhol*, it is important to consider how it might have ruled differently in each case. In *Google v. Oracle* the Court refused to rule narrowly in a software-specific manner, and it forcefully rejected the invitation from Oracle and some of its *amici* to disavow or substantially curtail the scope of transformative use. *Warhol* started out as a fair use case about the creation and use of a form of appropriation art. And, to be sure, the Second Circuit apparently *had* adopted a subject-matter exceptionalist view for cases involving visual art.[229] In the course of reframing *Warhol* as a case about competitive use in the market for magazine cover art,[230] the Court wiped away the Second Circuit's erroneous reasoning and reaffirmed that transformative use is the proper, general, inquiry in fair use cases that do not involve direct competition. It then decided that even if other uses of the Goldsmith photograph by Warhol or AWF may be fair, AWF's 2016 commercial license of the Orange Prince image to Condé Nast directly competed with Goldsmith in the well-structured market of magazine cover art licensing and therefore the first fair use factor did not favor AWF.[231]

Taken together, *Google v. Oracle* and *Warhol* reinforce *Campbell*'s general transformative use approach. In addition these cases refined and extended it in important and interesting ways. Nonetheless, some commentators and industry representatives would prefer to recharacterize *Warhol*'s explicitly narrow decision to elevate some strands of *dicta* responding to arguments by the parties, *amici* or dissent. We address some of those arguments below.

For courts and litigants the message from the Court is clear: Keep Calm and Carry On focusing on a user's purpose for using another's original work and the amount of such use in relation to that purpose as the morning star of fair use analysis. The Court's general interpretation of § 107 is to be

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[229] Andy Warhol Found. for Visual Arts v. Goldsmith, 992 F.3d 99, 112 (2d Cir. 2021) ("But purpose is perhaps a less useful metric where, as here, our task is to assess the transformative nature of works of visual art that, at least at a high level of generality, share the same overarching purpose (*i.e.* , to serve as works of visual art).").

[230] *See* Pamela Samuelson, *Did the Solicitor General Hijack the* Warhol v. Goldsmith *case?*, 47 COLUM. J.L. & ARTS (forthcoming 2024).

[231] *See Warhol*, 143 S. Ct. at 1277-1278:

> Here Goldsmith's copyrighted photograph has been used in multiple ways [including the licensed use as an artist's reference]. Only that last use . . . AWF's commercial licensing of Orange Prince to Condé Nast is alleged to be infringing. 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.

found in *Campbell* and *Google v. Oracle*, and statements in *Warhol* that some would argue retreat from this approach do nothing of the kind when read in the context in which they were uttered. We are particularly concerned that *Warhol*'s statement that fair use should be applied on a use-by-use basis rather than to a work as such could create unnecessary complications if not properly contextualized. Justice Sotomayor sprinkled her opinion with additional thoughts that do more to reject a reductive recharacterization of transformative use rather than addressing the now-traditional transformative use analysis as the lower courts – and the Court in *Google v. Oracle* – actually have conducted it.

In contrast, in the course of reinforcing *Campbell* and exploring the application of its general principles to computer software, Justice Breyer's opinion for the Court in *Google v. Oracle* offers a number of well-reasoned general thoughts on fair use, restating and clarifying a number of general issues about which there had been uncertainty or even controversy among courts and lawyers working to interpret and apply the 1994 precedent. There is every reason to think that the more general language of the *Google v. Oracle* majority will shape future fair use jurisprudence every bit as much as its narrow holding. Although this was an easy case because – according to Justice. Breyer – the computer code involved was "further than are most computer programs…from the core of copyright"[232] the fair use analysis is not without novelty nor free from difficulty. The decision helps to anticipate harder cases, by answering some recurrent questions about how the *Campbell* approach to fair use should work in practice.

The remainder of this section discusses post-*Campbell* issues or questions that the Court resolved in *Google v. Oracle*, and to a lesser extent in *Warhol*, synthesizes these into a current statement of the law for application in fair use cases; and concludes with some reflections about how – welcome as these recent developments have been for the law of fair use – courts are relying on the doctrine in cases in which limits on copyrightable subject matter or other limits on scope should have provided the rule of decision.

### B. Transformative Use is Settled Law

As we argued *supra*, the Court's considered opinion in *Campbell* demonstrated that it had learned some lessons about addressing the law of fair use in ways that supported its result in a particular case without due consideration for future ones. As a result, Justice Souter's opinion undertook a careful rebalancing of interests that rejected *Sony*'s apparent presumption against all commercial uses and *Harper & Row*'s importation of implied-

[232] *Google v. Oracle*, 141 S. Ct. at 1202.

license theory and fourth-factor primacy under § 107. It replaced these with the transformative use approach to analysis that applies in most, but not all, fair use cases.

In turn, *Google v. Oracle* and *Warhol* presented the Court with opportunities to reflect on the post-*Campbell* treatment of transformative use in the lower courts and to consider whether any lessons required a change in course. Importantly, the stakes in *Google v. Oracle* for the law of fair use were not restricted to the software industry or to the future of the Android operating system. Briefing in the case made clear that the future direction of fair use adjudication *writ large* was presented for decision. The original question presented in *Warhol* could have led the Court to consider whether to walk back statements about the first fair use factor it had just made in *Google v. Oracle*, but the Court saw no reason to do so. Instead, the Court largely avoided revisiting the doctrine of *Campbell*; instead it reframed the dispute as a narrow, competitive use case and, seemingly influenced by the equities, provided some redress for a sympathetic creator.

In retrospect, we can say that *Google v. Oracle*, was the real test case for the transformative use approach to fair use analysis and adjudication. Certainly it had been anticipated. As lower courts began to embrace and apply the transformative use approach with greater frequency in the early-2000s, representatives of media organizations, trade associations, and related interests began voicing dissent ranging from concern to outrage about the range of uses courts determined to be transformative.

### 1. The Attack on Transformative Use

This contrary view focused initially on courts' application of transformative use to systematic, wholesale, commercial copying by technology companies of millions of copyrighted works to create image search engines, plagiarism detection software, and search services for books.[233] The critics' alarm was further magnified by decisions permitting uses of original expression by other artists in the visual and performing arts contexts.[234]

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[233] *See supra* notes 208-10 and accompanying text.

[234] See, *e.g.*, Prince v. Cariou, 714 F.3d 694, 706 (2d Cir. 2013) (holding most, but not all, appropriation art images made from photographs to be transformative); Sofa Entm't, Inc. v. Dodger Prods., Inc., 709 F.3d 1273, 1278 (9th Cir. 2013) ("By using [television clip from Ed Sullivan show] as a biographical anchor, Dodger put the clip to its own transformative ends."); Seltzer v. Green Day, Inc., 725 F.3d 1170, 1178 (9th Cir. 2013) (holding use of photograph of graffiti art as rock concert backdrop to be transformative use).

The Court's grant of *certiorari* in *Google v. Oracle* could have been explained based on the circuit split on the copyrightability issue that the Federal Circuit created with the First Circuit's analysis in *Borland*.[235] But, the Court also granted review on the fair use question, and then indicated its strong interest in this potential ground for decision as the oral argument approached.[236] Those who sought repeal or revision of transformative use invested substantial resources to try to persuade the Court that a course correction was in dire need. In numerous *amicus* briefs, some representatives seeking this change deployed highly charged rhetoric.

Oracle argued its case broadly, likening the use at issue to an unauthorized "sequel" of a narrative work:

> Moreover, . . . neither "adding something new" nor putting the code in a new context is transformative, unless the code's meaning or purpose changes. . . . Otherwise, transformative use would swallow the derivative-work right because every derivative work "adds something new." Movies, for example, convert books' descriptions and prose to images and dialogue, just as Google updated the implementing code for resource-constrained devices. Movies commonly take snippets of the original and add new material. And movies require significant innovation. But producers cannot assert that their added innovation insulates them from infringement.[237]

Representatives of large media organizations also invited the Court to broadly "course correct" based on lower court interpretations of *Campbell*. Characterizing the 25-year-old doctrine as a dangerous novelty. For example, the Recording Industry of America Association (RIAA) argued that "[t]his 'transformation' inquiry . . . has unexpectedly and dramatically shifted the fair use landscape in two ways, sowing inconsistency and often leading to inapt truncation of copyright."[238] The brief singled out the Second and Ninth Circuit's application of transformative use as evidence for the need for a

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[235] *See supra* note 34 and accompanying text.

[236] *See* Order, May 4, 2020, Google LLC v. Oracle Am. Inc., 141 S. Ct. 1183 (2021) (No. 18-956) (directing parties to file "supplemental letter briefs addressing the appropriate standard of review for the [fair use question] presented, including but not limited to the implications of the Seventh Amendment, if any, on that standard.").

[237] Brief for Respondent at 19, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) (No. 18-956)

[238] Brief for Recording Industry Ass'n of America, *et al.* as Amicus Curiae Supporting Respondent at 9, Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (No. 18-956).

course correction. "However, it appears unavoidable that the Second and Ninth Circuits' expansive definition of transformative content will . . . subsume the exact type of 'recast[ing], transform[ing], or adapt[ing]' of 'preexisting works' that the Copyright Act expressly deems derivative and reserves for the benefit of the creator of the original work" – suggesting the desirability of a (literally) unprecedented subject-matter carve-out from fair use.[239]

The American Association of Publishers (AAP) essentially asked the Court to overrule specific circuit precedents: "Since *Campbell*, several Circuits have extended the transformative use analysis to reach various forms of electronic duplication of copyrighted works in their entirety, with no change in their content, where the use arguably serves a fundamentally different purpose, [but] this Court has not yet accepted a case where it could have ruled on applying transformative use in this manner."[240] AAP's brief echoes its previous critiques of such analysis  cases of "non-expressive" use.

The Motion Picture Association (MPA) asked the Court to scale back its holding in *Campbell* to avoid parties like Google adopting it in a case such as this: "Improper emphasis on this Court's original articulation of transformative use, especially when taken in isolation or given too much weight, often conflicts with the derivative work right and threatens to undermine important market opportunities for copyright owners. Because derivative works often contain new meanings and messages, and adapt or modify the original work, improper application of the transformative use inquiry conflicts with the derivative work right on which the entertainment industries so heavily rely."[241] MPA further expressed concern that "Google's erroneous view of transformation, if adopted here, might in the future be applied in the lower courts to cases involving traditional expressive works like motion pictures."[242]

In *Warhol*, some *amici* supporting Goldsmith continued to rail against the role of transformative use. The MPA reasserted its complaint that the lower courts were misapplying transformative use,[243] while the other large media organizations shifted their aim, targeting a recharacterized version of transformative use that they attributed to AWF. For example, they argued,

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[239] *Id.* at 18.
[240] Brief for Ass'n of American Publishers at 14, as Amicus Curiae Supporting Respondent, Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (No. 18-956).
[241] Brief for Motion Picture Ass'n, Inc. as Amicus Curiae Supporting Respondent at 9, Google LLC v. Oracle America, Inc., 141 S. Ct. 1183 (2021) (No. 18-956).
[242] *Id.* at 11.
[243] *See* Brief for Motion Picture Ass'n, Inc. as Amicus Curiae Supporting Neither Party at 6, *Warhol*, 143 S. Ct. 1258 (2023) (No. 21-869). ("It is no exaggeration to say that the meaning of "transformative use" in the lower courts has become amorphous to the point of incoherence.").

"[u]nder Petitioner's treatment of transformativeness, a secondary user could change slight details of a protected work and claim immunity from infringement due to the work's "new" meaning or message."[244] This was a shift in strategy that already had succeeded to some degree, because the Second Circuit had stood up and knocked down a straw-person version along these lines. Now the Court was urged to do so as well.[245]

### 2. Repelling the Attack and Reinforcing Transformative Use

The first question the Court answered in *Google v. Oracle* was whether it agreed with the critiques of lower courts' application of *Campbell*. It did not. The Court's reaffirmation of transformative use as the proper paradigm of fair use analysis is significant. By a 6-2 margin, the Court confidently declined these invitations and instead reaffirmed that a transformative use is one that "adds something new, with a further purpose or different character, altering the copyrighted work with new expression, meaning or message."[246] The Court also reemphasized the importance of Judge Leval's emphasis on whether a use fulfills copyright law's objective to provide a public benefit.[247] *Warhol* added another layer of cement to transformative use's foundation. After repeating *Campbell*'s quotation from *Folsom*, the Court reiterated that the focus of analysis in on whether the secondary use is the same or distinct from the original use, signaling its intent to maintain course on transformative use.[248] While the Court did not repeat *Campbell*'s formulation verbatim, this Article understands *Warhol*'s slight variations to be distinctions without a difference.[249]

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[244] *See* Brief for Ass'n of American Publishers as Amicus Curiae Supporting Respondent, Lynn Goldsmith at 18, *Warhol*, 143 S. Ct. 1258 (2023) (No. 21-869); *see also* Brief for Recording Industry Association of America ("RIAA") and the National Music Publishers' Association ("NMPA") in Support of Respondent Lynn Goldsmith, Andy Warhol Foundation for the Visual Arts v. Goldsmith, 143 S. Ct. 1258 (2023) (No. 21-869) ("Petitioner's purely transformative purpose analysis would allow an original work to be duplicated in its entirety and in an unaltered manner so long as the supposed purpose for which the original work was duplicated was deemed sufficiently different from the purpose of the original work.").

[245] *See infra* notes 273-84 and accompanying text (discussing the role of this straw-person in the Court's opinion).

[246] *Google v. Oracle*, 141 S. Ct. at 1202 (quoting Campbell, 510 U.S. at 579) (internal quotation marks omitted).

[247] See id. at 1202-03 (quoting and citing Leval, *supra* note 194, at 1111).

[248] *See Warhol*, 143 S. Ct. at 1274.

[249] There are two alterations that have gained notice. The first is a shift from whether "the new *work* merely supersedes," *Campbell*, 510 U.S. at 579, or whether "the new *use* merely supersedes," *Warhol*, 143 S. Ct. at 1262, the objects' of the original creation. The

The arc of fair use development traced in Part II, *supra*, demonstrates that, taking account of the fair abridgement antecedents, and the conceptual and doctrinal journey that *Folsom* began in 1841, the doctrinal recognition of fair use as a consistently distinct non-infringement doctrine is more recent than has been generally appreciated. The combined force of *Campbell* and *Google v. Oracle*'s and *Warhol's* support for *Campbell*'s restatement of the doctrine is therefore historic. The Court had the opportunity to review *Campbell*'s progeny in the lower courts. Had it seen reason for concern, it could easily have signaled that concern during the course of its discussion of the first factor. Instead, its reasoning strongly supports the lower courts' reasoning and holdings in a number of cases.[250]

### C. The Extensive Reach of Transformative Use Analysis

Of the various contributions made in the Court's analyses in the two cases, the two most important are that the social context of the use matters, and that the public benefit from a use is an explicit consideration under both the first and fourth fair use factors. These stem from the same theoretical insight. Fair use analysis is relational, and the relationships that matter are not only those between the original work and the secondary use but also those downstream of the use who are enabled to engage in activities that further the purpose of copyright law.

#### 1. The Inquiry Into Transformative Purpose Cannot be Limited to the Immediate Defendant

Consideration of whose interests count in fair use analysis goes to the heart of the fair use inquiry. As Part II.A., *supra*, demonstrates, judicial concern about overprotection is fundamentally based on ensuring that copyright law provides sufficient space for users of protected works to make uses that support their own learning and exchange of knowledge and that also can provide the public with the benefits such uses produce. In the early twentieth century, this concern was expressed in cases involving legal publishing in connection with downstream users – reprinting legal texts may

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second is *Warhol*'s elision of to what extent the new work is 'transformative" by selectively quoting *Campbell* to elide "new expression, meaning, or message" from the explanation of what makes a use transformative. *Compare Campbell*, 510 U.S. at 579 *with Warhol*, 143 S. Ct. 1262 ("The central question it asks is whether the use 'merely supersedes the objects of the original creation ... (supplanting the original), or instead adds something new, with a further purpose or different character.'") This Article addresses these issues *infra* in Part III.D.3.

[250] *See supra* notes 209-18 and accompanying text (collecting cases).

not, in itself, be an activity that differs fundamentally from their original publication in character, but access to legal sources is a fundamental prerequisite for the rule of law.[251] More recently, in *Authors Guild v. HathiTrust*,[252] the court made clear that the fact that readers with visual impairments will be able to access books contributes to the fair use justification for scanning them into a database.In *Google v. Oracle*, the Court focused not on the defendant's immediate interests but on those of other information stakeholders. Giving weight to the fact that the copied code was implemented in the Android platform, which would serve as a launchpad for thousands of application developers and their millions of users, it said:

> [I]n determining whether a use is "transformative," we must go further and examine the copying's more specifically described "purpose[s]" and "character." 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 …. [a purpose] consistent with that creative "progress" that is the basic constitutional objective of copyright itself.[253]

In fair use analysis, the end can justify the means, as the anticipated virtuous nature of an end user's activities reflects positively onto the upstream entity that enables them. Thus, for example, the intention to disseminate useful knowledge to an audience – this being the ultimate goal served by "creative 'progress'"– helps support the fair use claims of a teacher, librarian, blogger, or journalist.

### 2. Public Benefits Conferred by a Use Are an Explicit Consideration in Overall Fair Use Balancing

Fair use, like other doctrines that limit the reach of copyright, promotes a public interest in access to information. Since Judge Reinhardt restated this general view in *Sega v. Accolade*,[254] however, there has been less

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[251] *See*, *e.g.*, Edward Thompson Co. v. American Law Book Co., 122 F. 922, 925 (2d Cir. 1903) (holding that second publisher's copying of headings from first publisher's book was fair use because a rule otherwise would be a "serious blow to jurisprudence.").
[252] 755 F.3d 87 (2d Cir. 2014).
[253] *Google v. Oracle*, 141 S. Ct. at 1203.
[254] *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992) (analyzing the first fair use factor and stating that "we are free to consider the public benefit resulting from a particular use notwithstanding the fact that the alleged infringer

indication in the case law about whether specific benefits conferred on particular sectors of the public should count in the overall balancing of interests under § 107. In *Google v. Oracle*, however, the Court said:

> Further, we must consider 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)….
>
> 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.[255]

Not only does *Google v. Oracle* offer useful clarifications about whose interests are to be reckoned with where the first fair use factor inquiry into "purpose" is concerned. With respect to analysis of economic consequences from unlicensed uses that the fourth factor directs, the decision goes farther, indicating explicitly for the first time that third-party benefits should be part of the mix. It remains to be seen what courts will make of this invitation to broaden the inquiry by taking public value added into account along with private monetary losses. But it is at least possible that the language in question will open up new and promising directions in fair use analysis.

Two other portions of Justice Breyer's opinion support the role of public benefits in fair use analysis: the treatment of the second fair use factor and the resolution of the standard of review. By opening the analysis with consideration of the second fair use factor, the nature of the work, Justice Breyer highlighted its role. The question under the first factor is limited to the purpose and character of the use of only the expressive elements attributable to the owner. The amount and substantiality inquiry and the consideration of market effect are similarly limited.

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may gain commercially. Public benefit need not be direct or tangible, but may arise because the challenged use serves a public interest. ") (citations omitted).

[255] *Google v. Oracle*, 141 S. Ct. at 1206 (internal quotation marks and citations omitted).

Properly applied, the second factor inquiry is directed primarily toward the nature of the author's original expression within the work – as distinct from facts, ideas, and expression from other sources. Guarding against the risk that public benefits from uses of unprotectible subject matter could be weighed improperly, specifying what the relevant expressive elements in the work are at the outset of the analysis can make discussion of the other factors more precise.

With respect to the standard of review, courts are better positioned than juries to recognize and value the public benefits conferred by a use in light of copyright law's purposes. Thus, even though pre-1976 Act cases had left the ultimate fair use question to the vagaries of jury determinations,[256] once fair use had been codified, the Court in *Harper & Row* agreed with lower court decisions treating fair use as a mixed question of law and fact.[257] The Court in *Google v. Oracle* updated this holding with reference to its more recent statement about the standard of review of mixed questions determining that "the ultimate 'fair use' question primarily involves legal work."[258] Weighing the public benefit of a use fits well within this characterization of the analysis.

### 3. In Considering Whether a Use is Fair on the Basis of Transformativeness, It Matters Whether the Results From its Circulation or Adoption Are Particularly Good or Useful

Is fair use "content neutral" – or should it be? This question has roiled disputes about so-called "appropriation art," where – consistent with U.S. copyright law tradition – judges have often tried to eschew entering into

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[256] In two appellate decisions recognizing fair use as a distinct doctrine, fair use was still treated as a question of fact. *See* Matthews Conveyer Co. v. Palmer-Bee Co., 135 F.2d 73, 85 (6th Cir. 1943) (differentiating fair use from substantial similarity and then stating that "like rules are applicable to the so-called fair use which may be made of copyrighted material[]" such that a jury's fair use determination must be reviewed deferentially); *cf.* MacDonald v. DuMaurier, 4 F.2d 696 (2d Cir. 1944) (grudgingly reversing judgment on the pleadings because, under the then-new Federal Rules of Civil Procedure, the complaint had presented sufficient allegations to raise factual issues on the fair use question).

[257] *Harper & Row*, 471 U.S. at 560 (citing Pacific Southern Co. v. Duncan, 744 F.2d 1490, 1495, n.8 (11th Cir. 1984). *Pacific Southern* stated that "[f]air use is probably best characterized as a mixed question of law and fact that can be decided by an appellate court if the trial court has found facts sufficient to evaluate each of the four statutory factors."). Pacific Southern Co. v. Duncan, 744 F.2d 1490, 1495, n.8 (11th Cir. 1984)

[258] *See Google v. Oracle*, 141 S. Ct. at 1199 (citing and quoting U.S. Bank N.A. v. Village at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018) for proposition that courts should decide whether analysis of a mixed question is primarily factual or legal).

questions about what constitutes valuable creative work.[259] But in *Google v. Oracle*, the Court answered differently:

> "Commentators have put the matter more broadly, asking whether the copier's use 'fulfill[s] 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*. Campbell, 510 U. S., at 579."[260]

This new short-form explanation of transformativeness is a coinage not a quotation – that is, itself something "new and important." This formulation demonstrates a high level of intentionality. The language speaks strongly to users who are doing acknowledged socially/culturally productive things with copyrighted material – educators, scholars, journalists, filmmakers and others – including artists. Indeed, the passage just quoted continues: "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."'[261] Clearly, the new formulation applies across the board, not just in the realm of computer software.

Where fair use in the fine arts is concerned, future judges may still endeavor to avoid the aesthetic commentary condemned in *Bleistein*, but they will not be able to duck responsibility for assessing the larger significance of new works challenged as infringements. The *Warhol* majority opinion disappoints because it failed to model such an assessment – as the dissenters would have preferred.[262] Justice Sotomayor avoided the issue by collapsing the inquiry into the actual purpose of the challenged use and thereby trivializing its outcome; the effect is to make any discussion about the potential "importance" of that purpose irrelevant.[263]

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[259] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

[260] *Google v. Oracle* 141 S. Ct. at 1203 (emphasis added) (citing and quoting Leval, *supra* note 194, at 1111).

[261] *See id.* at 1203 (citing 4 NIMMER ON COPYRIGHT §13.05[A][1][b] (quoting Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 746 (2011)).

[262] *Warhol*, 143 S. Ct. at 1292.

[263] *See Warhol* 143 S. Ct. at 1284 ("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").

### D. The Court Resolved Questions About a Use's Further Purpose or Different Character Posed in the Post-*Campbell* Period

Of the various other contributions made in the Court's analyses in the two cases, we think these offer the most salient guidance for practitioners who rely on the doctrine and for courts who may decide their cases in the future.

#### 1. A Transformative Use Need Not Alter the Original

Until the Second Circuit's decisions applying fair use to mass digitization, in *HathiTrust* and *Authors Guild v. Google*, it had been possible to argue that transformative use as envisaged in *Campbell* was reserved for cases of "expressive repurposing," and that the Ninth Circuit had overreached in applying this mode of analysis to cases involving (for example) search technology in which the copyrighted content had been reproduced but not modified. Echoes of this critique appeared in the Copyright Alliance brief in *Google v. Oracle* casting doubt on whether fair use can apply where "infringing material is moved from one medium to another" – a common mode of repurposing.[264] Whether transformative fair use could be achieved by means of recontextualization was not a threshold question in *Warhol*, but it certainly had been in *Google v. Oracle*, which put an end to any dispute by applying transformativeness analysis to the literal duplication of lines of computer code reimplemented in an entirely different work.

#### 2. Transformative Fair Use Analysis Applies to the Derivative Work Right

The oft-heard argument that transformative use analysis conflicts with the exclusive right to prepare derivative works comes in two forms. The first lacks logical coherence and relies on a misreading of the Copyright Act of 1976. Section 106(2) grants the copyright owner the exclusive right to prepare derivative works.[265] This version of the argument looks to the definition of a derivative work, which is "a work based upon one or more preexisting works such as . . . [a series of examples] or any other form in which a work may be recast, transformed, or adapted."[266] How then can a work that transforms a preexisting work be a fair use if the copyright owner

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[264] *See* Brief for the Copyright Alliance as Amicus Curiae in Support of Respondent at 17, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021) (No. 18-956).
[265] *See* 17 U.S.C. § 106(2) (granting exclusive right to prepare derivative works).
[266] *Id.* § 101.

has the exclusive right to engage in such transformation? The answer is straightforward, the statute grants that exclusive right *subject to* sections 107-122. Section 107 provides that "*notwithstanding* the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . is not an infringement of copyright."[267]

In *Google v. Oracle*, the Court succinctly explained this: "[O]wners 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… ."[268] *Warhol* is to the same effect: "To be sure, [the derivative work] right is 'subject to' fair use . . .[;] [t]he two are not mutually exclusive."[269]

The second variant of this argument runs that even if it is formally possible to square the derivative work right and transformative use, as a policy matter the Court's articulation of transformative use "swallows" the derivative work right. Judge Easterbrook, writing for the Seventh Circuit, had previously created a straw-person version of transformativeness under which a transformative use is co-extensive with the kind of transformation of a pre-existing work to be sufficiently original to create a derivative work: "To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under [ 17 U.S.C.] § 106(2).")[270] This version of the argument was the centerpiece of Oracle's and its *amici*'s briefs in *Google v. Oracle*, discussed *supra*, and, though accepted by the dissent, was rejected by the Court's reasoning concerning Google's recontextualization of Oracle's literal code.

The theme resurfaced in *Warhol* in response to a recharacterization of transformative use analysis that had emerged in the lower courts. AWF's argument focused on a claim that Warhol's creation of the Prince Series was transformative use because it embodied "new meaning or message," taking that isolated phrase as shorthand for *Campbell*'s overall explanation of what makes a use transformative. In response, Goldsmith's supporters had

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[267] *Id.* § 107 (emphasis added).
[268] *Google v. Oracle*, 141 S. Ct. at 1199.
[269] *Warhol*, 143 S. Ct. at 1275.
[270] Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014); *but see* R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS, 101 118-19 (2008) ("A close reading of the appellate court fair use opinions that expressly address transformativeness suggests why those courts, in evaluating fair use, generally disregard whether the defendant has created a derivative work. In assessing transformativeness, the courts generally emphasize the transformativeness of the defendant's *purpose* in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the *content* of the underlying work.") (emphasis in original).

mischaracterized the argument as suggesting that all unauthorized derivative works would be immunized from infringement liability.[271]

Understandably, the Court in *Warhol* rejected this recharacterized riposte to a rhetorical oversimplification as inconsistent with *Campbell*. Thus, the Court's statement that "the degree of transformation required to make a 'transformative' use of an original must go beyond that required to qualify as a derivative"[272] is unexceptional. Significantly, no prior decision had held that merely adding the small modicum of creativity necessary to create an authorized derivative work (or one based on public domain material) necessarily makes a use transformative.

Instead, while the vocabulary is similar, the concept behind the word "transform" as used in the derivative work definition differs from the one associated with the vocabulary of fair use.[273] These terms represent distinct ideas. In particular, creation of a *copyrightable* derivative work involves some merely discernible new authorial expression. By contrast, transformative use analysis as a means of determining the purpose and character of a use under *Campbell*, the concept referenced, is whether and how the use contributes to the sum total of knowledge and culture. Some transformative uses will involve changing or adding to a preexisting work and others will not. The considerations that matter are the context and impact of the use. Appropriately, to the extent that comparable metrics can be applied to the assessment of transformativeness in the essentially incommensurate settings of derivative work copyrightability and fair use analysis, the quantum requirement in the latter typically will be greater, as befits an exceptional doctrine.

There is a deeper point here to surface. The effective carve-out of definitional derivative works from fair use under *Campbell*, as advanced by Oracle, Goldsmith, and the big media *amici*, among others, is a form of prospect theory focused on copyright's scope. Introduced in the patent

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[271] *See*, *e.g.*, Brief for Recording Industry Association of America and the National Music Publishers' Association as Amici Curiae in Support of Respondent at 24, Andy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1258 (2023) (No. 21-869) (characterizing AWF's test as "rendering a purported different 'meaning or message' alone sufficient to find a secondary use 'transformative' and fair *per se*").

[272] *Warhol*, 143 S. Ct. at 1263.

[273] The overlap with the definition of a derivative work in some ways makes the "transformative" adjective to describe a favored use less than felicitous. In addition, as a term of art, it can mislead the lay reader into thinking only changes in content count. But, using "transformative" to describe a class of favored uses is an improvement on "productive" use because the word transformative communicates that the use involves something new and different about the use.

context by Edmund Kitch,[274] prospect theory argues in favor of granting broad patent rights early in the innovation process to incentivize the patentee to invest in follow-on innovation and commercialization.[275] In the copyright context, the proponents of the prospect theory of derivative work rights argue similarly that a broad understanding of transformative use undermines copyright owners' incentives to develop and enter markets for derivatives of their works.

Recognizing that *Campbell* as written is inconsistent with prospect theory, the rightsholders in *Google v. Oracle* and in *Warhol*, tried to persuade the Court that if transformative use is here to stay, its reach should be limited by excluding the creation of derivative works as a potentially qualifying purpose under the first factor or by broadly interpreting the market for derivatives under the fourth factor.[276] The Court did neither. By reinforcing *Campbell*'s breadth in *Google v. Oracle* and by rejecting only a reductive recharacterization of transformative use in *Warhol*,[277] the Court has put paid to the prospect theory of the derivative work right as a matter of law.

### 3. "New Meaning or Message" Informs but Does Not Exhaust the Analysis

Of course, not all uses that add new meaning or message are fair. As it had in *Campbell*, the Court in *Warhol* again recognized that [w]hether 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."[278] This statement rejected another, recharacterization of transformative use, closely-related the one discussed immediately *supra*.

This overly-simple version of transformativeness analysis first emerged in the discourse around *Warhol* as a result of the district court's

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[274] *See* Edmund Kitch, *The Nature and Function of the Patent System*, 20 J. L. & ECON. 265 (1977).

[275] *See id.* at 265-266, 268. The simplicity of the thesis has proven a useful foil for critique by economically oriented scholars. *See*, *e.g.*, Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 Colum. L. Rev. 839 (1990); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 Va. L. Rev. 1575 (2003); John F. Duffy, *Rethinking the Prospect Theory of Patents*, 71 U. Chi. L. Rev. 439 (2004).

[276] *See*, *e.g.*, *supra* Part III.B.1 (discussing relevant briefing in *Google v. Oracle*); RIAA *Warhol* Brief, *supra* note 268, at 13-14 (arguing for fourth factor primacy); Brief of Motion Picture Association as Amicus Curiae in Support of Neither Party at 19-22, Andy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1258 (2023) (No. 21-869) (arguing that transformativeness needs scaling back to protect derivative work markets).

[277] *See infra* notes 279-84 and accompanying text (demonstrating the lineage and treatment of this recharacterization).

[278] *Warhol*, 143 S. Ct. at 1274-1275.

reliance on *Cariou*: "If 'looking at the [works] side-by-side,' the secondary work 'ha[s] a different character, ... a new expression, and employ[s] new aesthetics with creative and communicative results distinct' from the original, the secondary work is transformative as a matter of law."[279]

This holding from *Cariou*, and its adoption by the district court in *Warhol*, should be understood as proposing an analytical process for understanding whether the secondary work contains "new expression" that qualifies as fair use based on a substantive comparison of the two works' purposes and effects rather than describing a mechanical or superficial approach to assessing whether fair use applies. While the district court did detail the expressive changes Warhol made to the photograph, its analysis of transformativeness was not based on the expressive character of these changes but on how these changes would be reasonably perceived to alter the meaning of the image.[280]

Throughout the appellate litigation, however, this language was mischaracterized as meaning that addition of *any* new expression qualified a use as transformative, as here in the Second Circuit opinion:

> Notwithstanding, the district court appears to have read *Cariou* as having announced such a rule, to wit, that any secondary work is *necessarily* transformative as a matter of law "[i]f looking at the works side-by-side, the secondary work has a different character, a new expression, and employs new aesthetics with [distinct] creative and communicative results." *Warhol* , 382 F. Supp. 3d at 325-26 . . . . Although a literal construction of certain passages of *Cariou* may support that proposition, such a reading stretches the decision too far.[281]

Having first recharacterized AWF's argument about the kinds of meaning and message that make a use transformative, the Second Circuit then rejected this recharacterized argument: "It does not follow, however, that any secondary work that adds a new aesthetic or new expression to its source material is necessarily transformative."[282]

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[279] Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 325-26 (S.D.N.Y. 2019) (quoting *Cariou*, 714 F.3d at 707-708).
[280] *See id.* at 326 ("These alterations result in an aesthetic and character different from the original. The Prince Series works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure. ").
[281] The Andy Warhol Found. for Visual Arts v. Goldsmith, 992 F.3d 99, 111 (2d Cir. 2021), *aff'd*, 143 S. Ct. 1258 (2023).
[282] *Id.*

Under this recharacterized account of transformativeness, any party claiming to have added *any* new meaning or message to an original work of authorship necessarily had made a transformative use.[283] So, for example, a movie adapted from a novel would necessarily be a transformative use and only considerations under the fourth factor would provide a basis for holding against fair use.[284]

But, this version of transformativeness appears nowhere in Judge Leval's law review article, in *Campbell* or in any of the post-*Cambpell* appellate cases applying transformative use.[285] Instead, these sources have all recognized that a transformative use is one whose purpose and character differs from the traditional uses the copyright owner has, or would reasonably be expected to, have made in well-structured markets, such as a novelist's licensing of film rights to a studio, or its licensing of a remake. This is the relevant context to understand *Warhol*'s statement that a concept of

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[283] This recharacterization of transformative use is resonant with the philosopher Robert Nozick's tongue-in-cheek version of John Locke's labor theory of property. Under both recharacterizations, the law would reward a small endeavor with an outsize reward, whether that be adding a few sentences to a novel and then designating the use as transformative or granting property rights in the seven seas. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 174-175 (1974) ("If I own a can of tomato juice and spill it in the sea so that its molecules . . . mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?").

[284] The Court argued that this was the position that the dissent took and that AWF took at oral argument. Andy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1258, 1282 n.17 (2023) ("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. *Post,* at 1298, note 5. This idea appears to come from a Hail Mary lobbed by AWF when it got caught in the same bind. See Tr. of Oral Arg. 15-16.").

This mischaracterizes AWF's position at argument, which was consistent with its position in its merits brief:

> MR. MARTINEZ: With respect to Factor 1, we would say that the normal sort of book-to-movie transition, we don't think that . . . the necessary sort of changes in the form from --from the written word into a movie, that that would inherently be a change in meaning or message;

*see also* Brief of Petitioner at 52, *Warhol*, 143 S. Ct. 1258 (2023) (No. 21-869) ("An adaptation of a novel into a movie is typically not considered fair use precisely because it does not change the meaning or message of the original—even though it does significantly alter the work's form and function, and the original may even be barely recognizable.) (quotation and citation omitted).

[285] *See supra* notes 209-18 and accompanying text.

transformativeness that would credit "*any* further purpose, or *any* different character" would be overbroad.[286]

This also is the relevant context to understand *Warhol*'s statement that new meaning or message is relevant to, but not dispositive of, the tranformativeness inquiry.[287] The Court made this statement to approve of the Second Circuit's handling of the bright-line straw-person version of transformativeness. "'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."[288]

Of course, we agree. While the Court explained that the result in *Campbell* was not simply based on adding new expression to Orbison's work, we understand *Warhol* to have restated the law – what a transformative use adds is not simply any new meaning or message associated with the original work but enough, or of a kind, to distinguish the new use from the ones for which the original one was intended.[289]

In this connection, the Court also reaffirmed *Campbell*'s teaching that the inquiry into the purpose or character of a use is objectively tethered rather than open-ended: "[T]he 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."[290]

Much ado also has been made of the Court's statement in *Warhol* that "[t]he 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.'" The proposition is, again, unexceptional, and unexceptionable, but it does remind us of the need for precision in the contemporary vocabulary of transformative use. The phrase "transformative

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[286] *See Warhol*, 143 S. Ct. at 1275 (emphasis added); *see also id.* at 1282 (2023) ("But *Campbell* cannot be read to mean that § 107(1) weighs in favor of *any* use that adds some new expression, meaning, or message.") (emphasis added).

[287] Andy Warhol Found. for the Visual Arts v. Goldsmith, 143 S. Ct. 1258, 1283 (2023) ("[The Second Circuit] also appeared correctly to accept that meaning or message is relevant to, but not dispositive of, purpose.").

[288] *Id.* (emphasis added).

[289] *Id.* at 1263 (2023) (*Campbell*'s recognition of 2 Live Crew's new additions "did not end the Court's analysis of the first fair use factor. The Court found it necessary to determine whether 2 Live Crew's transformation rose to the level of parody, a distinct purpose of commenting on the original or criticizing it.")

[290] *Warhol*, 143 S. Ct. at 1284 (citing *Author's Guild*); *see also* Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013) ("Rather than confining our inquiry to Prince's explanations of his artworks, we instead examine how the artworks may 'reasonably be perceived' in order to assess their transformative nature.")

works" originated in *Campbell*'s discussion of how a use may qualify as transformative because it results in the creation of a new and different work.[291] However, this has been misunderstood to suggest that if a work is deemed transformative because of the context of its creation, further use of the work is necessarily transformative.

In fact, the Court in *Warhol* actually focused not on all possible uses of Orange Prince but on the challenged use alone. Importantly, the reason that the majority opinion and the concurrence drew attention to their analyses of the specific use challenged by Goldsmith was to emphasize the narrowness of the decision. Goldsmith's initial theory of the case was broad and blunt, like an unsharpened pencil, challenging all of Warhol's uses of the photograph at the outset of the litigation process.[292] Each turn of that process shaved away elements of the case, whittling it down to a small, sharp point aimed only at AWF's 2016 license for use on the cover of Vanity Fair to illustrate its Prince retrospective article.

In addition, the Court reaffirmed that a user may add significant value to a copyrighted work in a way that has a further purpose or a different character from the original. *Google v. Oracle* had reiterated Judge Leval's broad characterization of uses that are transformative when they "'fulfill[s] the objective of copyright law to stimulate creativity for public illumination.'"[293] *Warhol* is to the same effect: "[A] use that has a distinct 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."[294] And

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[291] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("Although such transformative use is not absolutely necessary for a finding of fair use . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."), *Warhol*, 143 S. Ct. at 1284 (referring to "secondary works"); *see also* Organization for Transformative Works, https://www.transformativeworks.org/fan-studies/ (fan fiction site).

[292] Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 322 (S.D.N.Y. 2019) (describing Goldsmith's counterclaim as seeking a judgment "holding that the Prince Series works infringe the copyright of the Goldsmith Prince Photograph.").

[293] *Google v. Oracle*, 141 S. Ct. 1183, 1203 (2021) (quoting Leval, *supra* note 194, at 1111.)

[294] *Warhol*, 143 S. Ct. at 1276. In any case involving an argument that a use is transformative, the user has to provide a reason for making the use. Whether providing that reason is an "explanation" or a "justification" is a distinction without a difference. *See* Folsom v. Marsh, 9 F. Cas. 342, 348 (1841) ("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."). Judge Leval returned to this term in his article for the same purpose. *See* Leval, *supra* note 194, at 1111 ("Factor One's direction that we 'consider[] . . . the purpose and character of the use' raises the question of justification.") (citing 17 U.S.C. § 107(1)).

finally, the Court went on to reject Goldsmith's argument that *Campbell* imposed a necessity test on the user.[295] Rather, a use may qualify as transformative "because copying is reasonably necessary to achieve the user's new purpose."[296]

### E. The Court Resolved Other Questions Posed in the Post-*Campbell* period

Despite the relative clarity of *Campbell*'s transformative use holding, courts, practitioners, and clients treated a number of issues as uncertain.

#### 1. Consideration of commercial use

The persistence of the argument that a commercial use is likely to be unfair represents selective listening among advocates who would prefer to treat *Sony* as the last word on the subject. *Campbell* explicitly held that there is no presumption that a commercial use weighs against fair use, embracing Justice Brennan's observation that most of the exemplary fair uses identified in § 107's preamble are done commercially.[297] Lower courts have followed this reasoning in a range of cases involving commercial search services, commercial entertainment, and commercial news reporting.[298] While two Justices in *Google v. Oracle* were willing to give commerciality increased weight,[299] two out of eight does not a majority make.

To demonstrate that we have now reached escape velocity from the gravitational pull that *Sony*'s errant *dictum* has had on some, the Court again made abundantly clear "[t]here 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… many common fair uses are indisputably commercial.

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[295] *See* Brief of Respondent at 24, *Warhol* 143 S. Ct. 1258 (2023) (No. 21-869) ("A follow-on use is transformative only if that use must necessarily copy from the original without "supersed[ing] the use of the original work, and substitut[ing] … for it.") (citations omitted); *see also id.* at 26 ("Under this Court's modern fair-use cases, new uses transform original works with a different "purpose and character" only when some copying is indispensable to accomplishing a different end that does not substitute for the original.").

[296] *Warhol*, 143 S. Ct. at 1276. The Court characterized this as an "independent justification," *see id.* at 1277, but we do not understand the Court to suggest that there are transformative uses based solely on the user's need that do not further the purposes of copyright law. Instead, the Court said that this explanation for a use is particularly apt in cases in which a use might otherwise be competitive. *See id.*

[297] *See supra* note 189 and accompanying text.

[298] *See supra* notes 208-20 and accompanying text.

[299] *See Google v. Oracle*, 141 S. Ct. at 1218 (Thomas, J., dissenting) (characterizing Google's use as "overwhelmingly commercial").

For though Google's use was a commercial endeavor—a fact no party disputed…—that is not dispositive of the first factor…."[300] *Warhol* cited *Google v. Oracle* for this proposition, saying only that under the first factor, the degree of difference between the original and secondary use "must be balanced against the commercial nature of the use."[301]

On this point, Justice Sotomayor was careful to avoid the Court's past missteps. She could have closed the door on a use that is both commercial *and* that shares the same purpose as that of the original work. Instead, she cited *Google v. Oracle* to say that "if an original work and secondary use share the same or highly similar purposes, and the secondary use is commercial, the first fair use factor is likely to weigh against fair use, *absent some other justification for copying*."[302] She was wise to recognize that a future case may arise in which such "other justification" is sufficient to make a use transformative and to leave space in the doctrine to accommodate such a situation.

### 2. Refining understanding of "substantiality" for purposes of the third fair use factor

Sec. 107(3) invites consideration of the "amount and substantiality" of the "portion used" in relation to the copyrighted source work as a whole. The first term invites an objective inquiry, the second one seems to require a more subjective approach. Over time, confusion about what form this might take (which, it must said, *Campbell* may not have fully anticipated) has helped to generate various unreliable rubrics – for example, that fair users should never use more material than is "necessary" to fulfill their purposes. There is a problem, however, with such an approach: the minimum possible will not always be optimal for either the fair user or the audience.

*Google v. Oracle* acknowledged this by offering the following formulation: "'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."[303] This language represents an important reaffirmance (and clarification) of *Campbell* and should help bring about further coalescence around an "appropriateness" standard that can be applied situationally. It also makes clear, in case such clarification was

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[300] *Google v. Oracle*, 141 S. Ct. at 1204.
[301] *See Warhol*, 143 S. Ct. at 1277.
[302] *Warhol*, 143 S. Ct. at 1263.
[303] *Google v. Oracle*, 141 S. Ct. at 1205 (citing for authority "[s]upra, at 25–26; see Campbell, 510 U. S., at 586–587 (explaining that the factor three 'enquiry will harken back to the first of the statutory factors, for . . . the extent of permissible copying varies with the purpose and character of the use')").

necessary, that sometimes taking the entire work may be the "right size" solution, for example, if one were to use a photograph of a famous musician to illustrate a scholarly or political argument.

### F. Looking Forward – Fair Use In Relation to Other Limits on Exclusive Rights

Our argument that the utility of transformative use has been proven should not be understood as proving too much. Under the logic of modern infringement analysis, other limits on exclusive rights, such as copyrightability or substantial similarity, need to first be considered before fair use applies. Indeed, as we argued *supra,* separating the scope analysis into two considerations, substantial similarity and fair use, is quite important.[304]

We have some concerns about the readiness of some courts to skip over these other limits with assumptions, leaving fair use to do all of the work to keep exclusive rights in their proper place. For example, while we support the way the Court applied fair use in *Google v. Oracle*, we do not agree with the proposition it assumed about the copyrightability of interfaces to get there. Similarly, the Second Circuit in *Warhol* robbed the jury of its opportunity to assess substantial similarity *of protectible expression* in the Prince Series by deciding the question as a matter of law. While we agree with Justice Gorsuch that the Court did not decide the substantial similarity issue, we also share his implied skepticism about the likelihood that such similarity exists.

One context in which fair use bears too much of the limiting work is in cases involving similarity of small snippets of music or lyrics in disputes about popular music.[305] In many of these, the copied material is either unoriginal or the amount used is so minute that use of it hardly amounts to *substantial* similarity. Rather than enforcing these limits against overclaiming plaintiffs, some courts have found greater comfort in assuming away any issues in applying these limits because fair use would cover the use in any event.[306]

Maintaining robust analysis of copyrightability and substantial similarity will be particularly important in the era of generative artificial intelligence. Copyrightability issues already have arisen with respect to works

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[304] *See supra* Part II.A.

[305] *See*, *e.g.*, Hall v. Swift, No. 18-55426, 3 (9th Cir. Oct. 28, 2019) (reversing district court's dismissal of suit against Taylor Swift for certain "Shake It Off" lyrics as raising factual dispute).

[306] *See*, *e.g.*, Oyewole v. Ora, 291 F. Supp.3d 422, 436 (S.D.N.Y. 2018) (holding that repeated use of a three-word phrase was fair use), *aff'd*, Oyewole v. Ora, No. 18-1311-cv, 5 (2d Cir. Sep. 4, 2019) (adopting district court's fair use analysis).

generated by AI in whole or in part.[307] More will arise, including issues about how to connect original expression in series of prompts to resulting outputs, how to identify copyrightable elements in style, and the like.

A robust doctrine of substantial similarity will be a necessary guardrail against overclaiming by copyright owners seeking rights in dissimilar outputs generated from models that were trained with their works. It will also be essential in disputes involving AI-generated works that incorporate other AI-generated works because under current law *prima facie* infringement requires substantial similarity of human-created original expression in the allegedly infringing work.

## CONCLUSION

Fair use has grown from being a generalized, catch-all for a range of non-infringing uses to becoming a codified, distinct legal ground for non-infringement. The Court has layered on an important gloss by focusing attention the purpose and character of a use and by asking whether it is transformative because it provides the public with the benefit of a new meaning, message, or content.

This Article has situated *Google v. Oracle* and *Warhol* as historically important points along the long but irregular arc of fair use jurisprudence, reinforcing and extending the Supreme Court's first full doctrinal synthesis of the fair use factors in *Campbell*. This Article demonstrates that the actual, rather than the perceived, history of fair use is more complicated in interesting ways, and we show that codification did far more than "restate" existing common law. Although the factors that comprise the modern fair use doctrine were indeed elements of fair use decision-making in the courts, these appeared sporadically and generally were not treated as a legal "test" for fair use.

This Article shows that fair use as a distinct non-infringement doctrine was first recognized in trio of cases in the late 1930s and early 1940s involving the use of song lyrics in a short story or long-form journalism article related to the subject or the singer of the song. That recognition was

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[307] *See*, *e.g.*, Thaler v. Perlmutter, Civ. No. 22-1564 (BAH) (D.D.C. Aug. 18, 2023) (affirming Copyright Office refusal to register AI-generated work and recognizing that "[t]he increased attenuation of human creativity from the actual generation of the final work will prompt challenging questions regarding how much human input is necessary to qualify the user of an AI system as an "author" of a generated work, the scope of the protection obtained over the resultant image, how to assess the originality of AI-generated works where the systems may have been trained on unknown pre-existing works, how copyright might best be used to incentivize creative works involving AI, and more.")

not stable, however, and courts would continue to use fair use as a general non-infringement designation up until enactment of the Copyright Act of 1976.

Enactment of § 107 did two new important things: (1) it established fair use as a stable, distinct legal doctrine that applied when a user had made use of copyrighted expression that would otherwise infringe the copyright owner's exclusive rights; and (2) it set forth the factors that a court "shall" consider when analyzing fair use. It is for this reason that the Supreme Court had not played a significant role in the development of fair use law until after 1978.

Finally, this Article has shown that affirmation of the transformative use paradigm adopted by the Court in 1994 is significant in light of the pressure from large media companies and influential commentators for the Court to "course correct" and roll back this approach. By making the public benefit from a use an explicit consideration in the analysis, the Court has not only reaffirmed the transformative use approach to fair use analysis but has extended it in this important and welcome respect.