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Is Transformative Use Eating the World?

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Abstract: Fair use is copyright law’s most important defense to claims of copyright infringement. This defense allows courts to relax copyright law’s application when courts believe doing so will promote creativity more than harm it. As the U.S. Supreme Court has said, without the fair use defense, copyright law would often “stifle the very creativity [it] is designed to foster.”

In today’s world, whether use of a copyrighted work is “transformative” has become a central question within the fair use test. The Supreme Court first endorsed the transformative use term in its 1994 *Campbell v. Acuff-Rose Music, Inc.* decision. Since then, lower courts have increasingly utilized the transformative use doctrine in fair use case law. In fact, in response to the transformative use doctrine’s seeming hegemony, commentators and some courts have recently called for a scaling back of the transformative use concept. So far, the Supreme Court has yet to respond. But growing divergences in transformative use approaches may eventually attract its attention.

But what is the actual state of the transformative use doctrine? Some previous scholars have empirically examined the fair use defense, including the transformative use doctrine’s role in fair use case law. But few have focused specifically on empirically assessing the transformative use doctrine in much depth. This Article does so by collecting data from all district and appellate court fair use opinions between 1991, when the transformative use term first made its appearance in the

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† This Article’s title is a play on the title of a well-known article from noted venture capitalist Marc Andreessen articulating his view that software is the most important technology in the modern economy. Marc Andreessen, *Why Software Is Eating the World*, WALL ST. J. (Aug. 20, 2011), <https://www.wsj.com/articles/SB10001424053111903480904576512250915629460> [<https://perma.cc/8K9N-7HZ2>].

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case law, and 2017. These data include how frequently courts apply the doctrine, how often they deem a use transformative, and the win rates for transformative users. The data also cover which types of uses courts are most likely to find transformative, what sources courts rely on in defining and applying the doctrine, and how frequently the transformative use doctrine bleeds into and influences other parts of the fair use test. Overall, the data suggest that the transformative use doctrine is, in fact, eating the world of fair use.

This Article concludes by analyzing some possible implications of the findings, including the argument that, going forward, courts should rely *even more* on the transformative use doctrine in their fair use opinions, not less.

INTRODUCTION

“It would seem that the pendulum has swung too far in the direction of recognizing any alteration as transformative, such that [the transformative use] doctrine now threatens to swallow fair use. It is respectfully submitted that a correction is needed in the law.”

—Nimmer on Copyright¹

“We’re skeptical of [the Second Circuit’s] approach, because asking exclusively whether something is ‘transformative’ not only replaces the [fair use factor] list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works. . . . We think it best to stick with the statutory list.”

—Kienitz v. Sconnie Nation LLC²

Fair use is copyright law’s most important defense to claims of copyright infringement.³ The defense enables numerous uses of copyrighted material that would otherwise violate copyright law. Google’s copying of millions of copyrighted books as part of Google Books, for instance, is possible because courts have ruled that Google digitally copying those books into its database is a fair use.⁴ Search engines’ display of copyrighted materials in response to search

¹ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[B][6] (Matthew Bender ed., rev. ed. 2019).

² Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014).

³ Margot E. Kaminski & Guy A. Rub, *Copyright’s Framing Problem*, 64 UCLA L. REV. 1102, 1141 (2017).

⁴ See Authors Guild v. Google, Inc., 804 F.3d 202, 207 (2d Cir. 2015) (“[We] conclude that the district court correctly sustained Google’s fair use defense.”); Authors Guild v. HathiTrust, 755 F.3d 87, 101 (2d Cir. 2014) (“[W]e conclude that the doctrine of fair use allows the Libraries to digitize copyrighted works for the purpose of permitting full-text searches.”); David Kravets, *Fair Use Prevails as Supreme Court Rejects Google Books Copyright Case*, ARSTECHNICA (Apr. 18, 2016), <https://arstechnica.com/tech-policy/2016/04/fair-use-prevails-as-supreme-court-rejects-google-books->

queries also depends on the fair use defense,⁵ as do other technological uses of copyrighted materials (including, in days gone by, using VCRs).⁶ Similarly, parodists, bloggers, news reporters, researchers, authors, artists, consumers, and educators all rely on the fair use defense for a number of socially beneficial uses of copyrighted materials.⁷ In short, fair use matters in a number of important contexts. Without it, the Supreme Court has opined, copyright law would frequently “stifle the very creativity [it] is designed to foster.”⁸

Given its importance, scholars have devoted an enormous amount of time to studying fair use.⁹ And increasingly more of that effort has focused on assessing what it means for a use to be “transformative.”¹⁰ This shift has occurred largely since and because the U.S. Supreme Court explicitly endorsed the “transformative use” term in its 1994 *Campbell v. Acuff-Rose Music, Inc.* fair use decision.¹¹ Since that time, the transformative use inquiry has gained momentum in case after case, with some labeling it the most critical question in the overall fair use analysis.¹² Indeed, once courts determine that a use is transformative, that determination often seems to dictate the rest of the fair use analysis and, ultimately, the case’s outcome.¹³ In fact, as re-

copyright-case/ [https://perma.cc/9LCR-MJZK] (reporting that because the Supreme Court declined to hear the Authors Guild’s appeal, the Second Circuit’s opinion from *Authors Guild v. Google* stands).

⁵ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1154, 1168 (9th Cir. 2007) (“Google has put Perfect 10’s thumbnail images . . . to a use fundamentally different than the use intended by Perfect 10. . . . [C]onsidering the other fair use factors, all in light of the purpose of copyright, we conclude that Google’s use of Perfect 10’s thumbnails is a fair use.”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003) (“[W]e conclude that Arriba’s use of Kelly’s images as thumbnails in its search engine is a fair use.”).

⁶ See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 419–20, 454–55 (1984) (holding that using VCRs to time-shift recorded shows was a fair use); Joe Mullin, *Google Beats Oracle—Android Makes “Fair Use” of Java APIs*, ARSTECHNICA (May 26, 2016), <https://arstechnica.com/tech-policy/2016/05/google-wins-trial-against-oracle-as-jury-finds-android-is-fair-use/> [https://perma.cc/6YDD-P2MM] (summarizing a case where Google’s use of limited portions of Oracle’s Java API software was found to be a fair use).

⁷ See, e.g., 17 U.S.C. § 107 (2018) (listing “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” as types of use that may qualify for the fair use defense).

⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

⁹ See, e.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 565 n.64 (2008) (noting that there were typically more law review articles devoted to fair use in any given sampled year than actual fair use judicial opinions in the same year).

¹⁰ See, e.g., Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 739, 755, 768 (2011) (pointing to empirical data in support of the argument that the transformative use inquiry has come to dominate fair use doctrine).

¹¹ *Campbell*, 510 U.S. at 579.

¹² Netanel, *supra* note 10, at 768.

¹³ See Clark D. Asay, Essay, *Transformative Use in Software*, 70 STAN. L. REV. ONLINE 9, 12–13 (2017), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2017/05/70-Stan.-L.-Rev.-Online->

flected in the epigraph above, some prominent copyright commentators and courts—particularly the Seventh Circuit—believe that courts have expanded the transformative use concept too far, in ways that undermine copyright law’s overall effectiveness.¹⁴

Despite the importance of the transformative use concept, however, we have mostly anecdotal accounts of its role within the fair use inquiry. To date, only a few scholars have studied the transformative use concept empirically.¹⁵ And though these studies provide useful information on what types of uses courts are most likely to view as transformative¹⁶ and how frequently parties

Asay.pdf [https://perma.cc/9TDZ-6L7Q] (summarizing some of the cases and literature espousing this view).

¹⁴ See *infra* note 264 and accompanying text (noting critiques of the transformative use inquiry). Judges Richard Posner and Frank Easterbrook of the Seventh Circuit have both expressed skepticism about the role the transformative use concept should play. See *Kienitz*, 766 F.3d at 758 (Easterbrook, J.) (criticizing focusing on the transformative use concept in fair use analyses); *Ty, Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002) (Posner, J.) (calling application of the transformative use concept “confusing”); see also Jennifer Pitino, *Has the Transformative Use Test Swung the Pendulum Too Far in Favor of Secondary Users?*, 56 *ADVOCATE* 26, 29–30 (2013) (arguing that courts have taken transformative use too far).

¹⁵ See Beebe, *supra* note 9, at 554, 563, 577–78, 603–07 (presenting empirical findings relating to fair use decisions between 1978 to 2005, including findings relating to the transformative use concept); Michael D. Murray, *What Is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law*, 11 *CHI.-KENT J. INTELL. PROP.* 260, 262, 265 (2012) (empirically analyzing fair use case law to assess what the term “transformative” means according to the courts); Netanel, *supra* note 10, at 719, 739, 745, 755, 759–67 (providing empirical data relating to fair use decisions, with a particular focus on more recent decisions and their adoption of and emphasis on the transformative use concept); Matthew Sag, *Predicting Fair Use*, 73 *OHIO ST. L.J.* 47, 74–77, 79–80, 84 (2012) (studying several factors that appear to predict whether a use is likely to be considered a fair use and including an emphasis on factors likely to lead to a finding of transformative use and, therefore, fair use); Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2548–63, 2619–20 (2009) (pushing back against the common critique that fair use is unpredictable by creating a taxonomy of typical fair uses that courts have recognized, including a category of uses that are likely to be considered transformative uses); Laurie Tomassian, Note, *Transforming the Fair Use Landscape by Defining the Transformative Factor*, 90 *S. CAL. L. REV.* 1329, 1352 (2017) (analyzing fair use appellate cases between 2010 to 2015 to assess the impact of the transformative use concept). After the publication process for this Article began, Jiarui Liu came out with an in-depth empirical study on the transformative use concept. See Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 *STAN. TECH. L. REV.* 163, 166 (2019) (presenting a study of all reported transformative use decisions through 2016). Professor Liu’s findings, which are highly recommended, buttress some of this project’s results. This study, however, goes beyond his findings in several important respects and employs some different methodological approaches to related questions.

¹⁶ See Sag, *supra* note 15, at 84 (summarizing the factors likely to lead to a finding of transformative use); Samuelson, *supra* note 15, at 2548–63 (providing a category of uses that are likely to be considered transformative).

with a transformative use finding win their cases,¹⁷ they fall short of capturing the full impact of the transformative use concept in several important respects.

For starters, with one recent exception,¹⁸ each of the most important fair use studies is increasingly dated. Barton Beebe's influential fair use study, for instance, ends its empirical investigation in 2005.¹⁹ Pamela Samuelson's helpful taxonomy concludes in 2009.²⁰ Neil Netanel's follow-up study to Beebe's research ends its data collection in 2010.²¹ And Matthew Sag's 2012 empirical study is based on district court data with a cutoff date of early 2011.²² Yet in the years since, both district and appellate courts have decided some of the most important fair use cases in decades,²³ including some that commentators view as fundamentally expanding the transformative use concept.²⁴ Hence, although these previous studies provide a number of important insights about fair use generally and transformative use specifically, they fail to capture a number of important recent fair use—and transformative use—developments.²⁵ This Article picks up where these previous studies left off by incorporating nearly a decade of additional fair use case law into its ambit.

¹⁷ See Beebe, *supra* note 9, at 605–06 (providing statistics on this question of the likelihood of success in a transformative use finding); Netanel, *supra* note 10, at 755 (providing statistics on this question as a follow-up to the Beebe study).

¹⁸ See Liu, *supra* note 15, at 166 (studying transformative use cases up to 2016).

¹⁹ Beebe, *supra* note 9, at 554.

²⁰ See Samuelson, *supra* note 15, at 2539 (displaying the publication year of Samuelson's article as 2009).

²¹ Netanel, *supra* note 10, at 719.

²² Sag, *supra* note 15, at 52.

²³ See, e.g., *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 173–74, 180–81 (2d Cir. 2018) (finding that recording Fox News' content and making it available for searching purposes was not a fair use, despite finding that the use was transformative); *Katz v. Google Inc.*, 802 F.3d 1178, 1180, 1182 (11th Cir. 2015) (finding that reproduction of an unflattering photo of a real estate tycoon on a critical blog was fair use); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1237 (11th Cir. 2014) (assessing fair use of copyrighted material by universities in the Georgia university system); *HathiTrust*, 755 F.3d at 97, 103 (finding that Google's copying of millions of copyrighted books into a searchable database was a transformative use and, overall, a fair use); *Kienitz*, 766 F.3d at 757–58 (finding reproduction of a photograph of a mayor on a t-shirt was fair use); *Cariou v. Prince*, 714 F.3d 694, 699, 711–12 (2d Cir. 2013) (finding that a famous artist's reuse of copyrighted materials in his own "appropriation" of artistic efforts was transformative and, overall, a fair use).

²⁴ NIMMER & NIMMER, *supra* note 1, § 13.05[B][6] (discussing a 2012 Ninth Circuit case, *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012), and explaining that "the only clear lesson to emerge is how bitterly disputed the transformative test has proven to be in application").

²⁵ See *infra* notes 115–158 and accompanying text (summarizing key empirical studies of fair use and detailing the ways in which this study adds to the existing literature). One recent student Note does include some analysis of case law between 2010 and 2015, but focuses solely on appellate case law to assess a split between the Second and Seventh Circuits regarding what role transformative use should play in the overall fair use inquiry. See Tomassian, *supra* note 15, at 1346, 1352–58. This Article, conversely, includes case law into 2017, including district court opinions, and tracks a much broader range of metrics in assessing transformative use and fair use more generally. See *infra* notes 161–263 and accompanying text (discussing the methodology and results of this Article's study).

But this study does more than merely fill in the chronological gaps. Previous studies assessing fair use and the transformative use component thereof have typically focused on providing general statistics of how frequently transformative users win their cases,²⁶ or, in one instance, identified proxies for transformative use that predict whether a court will find a use to be fair.²⁷ In empirically addressing the role of transformative use, therefore, previous scholarship has often confined itself to noting correlations between a finding of transformative use and an overall finding of fair use.²⁸ From such statistics, scholars have drawn conclusions as to what role the transformative use concept plays within fair use doctrine more generally.²⁹

Although these general statistics are useful, this Article tracks several additional transformative use metrics to better understand the concept's role within the fair use inquiry. These metrics include new data relating to the sources that courts use in defining and applying the transformative use doctrine and metrics relating to what types of uses courts are likely to find transformative and, thus, fair.³⁰

This Article also collects, for the first time, metrics relating to how frequently courts consider transformative use when deciding other fair use factors.³¹ These data are useful because they provide a clearer understanding of how courts actually apply the transformative use concept throughout the fair use inquiry. To briefly illustrate: the fair use test typically involves courts assessing four statutorily defined factors, and courts traditionally examine the transformative use concept as part of the first of these four factors.³² But what becomes clear when reading fair use opinions is that courts also often discuss the transformative use concept within discussions of the remaining three factors. Indeed, the Supreme Court case that officially endorsed the transformative use concept—*Campbell*—directs courts to do so.³³ Hence, courts often discount the impact of factor two—the nature of the work—in light of the court deeming a defendant's use of the copyrighted work to be transforma-

²⁶ Beebe, *supra* note 9, at 605–06; Netanel, *supra* note 10, at 755. Netanel, in particular, does provide some useful statistics focused more particularly on the transformative use concept. Netanel, *supra* note 10, at 736, 739–45. This study builds on his findings and goes beyond them. See *infra* notes 161–263 and accompanying text (detailing this study's methodology and results).

²⁷ Sag, *supra* note 15, at 74–77, 79–80, 84.

²⁸ Beebe, *supra* note 9, at 605–06; Netanel, *supra* note 10, at 755; Sag, *supra* note 15, at 79–80.

²⁹ Beebe, *supra* note 9, at 605–06; Netanel, *supra* note 10, at 755; Sag, *supra* note 15, at 79–80.

³⁰ See *infra* notes 161–263 and accompanying text.

³¹ See *infra* notes 215–243 and accompanying text.

³² 17 U.S.C. § 107 (listing the four non-exclusive factors that courts are to consider when assessing whether use of copyrighted materials constitutes fair use); *Campbell*, 510 U.S. at 579 (indicating that the transformative use concept is a key piece of assessing fair use's first factor); see *infra* note 66 and accompanying text (outlining the four factors).

³³ *Campbell*, 510 U.S. at 577–78.

tive.³⁴ Courts frequently engage in similar discounting on factor three—the amount and substantiality of the copyrighted work used—and factor four—the use’s effect on the market for the copyrighted work—when a court considers a defendant’s use to be transformative.³⁵

By tracking how often the transformative use concept affects resolution of the remaining three factors, this Article helps shed light on how courts actually use the transformative use concept more broadly within the fair use inquiry. And this Article tracks this data not only for more recent fair use cases, but also for fair use case law that earlier studies already incorporate. As part of assessing whether transformative use is actually “eating the world” of fair use, as some commentators suggest,³⁶ this Article thus examines several previously untracked metrics to more fully decipher transformative use’s meaning and impact on the fair use doctrine’s application.³⁷

This study’s results provide a number of important findings. Transformative use is eating the fair use world and is doing so more than previously suspected. This conclusion is based on several pieces of empirical evidence. First, consistent with one recent study,³⁸ over time a vast majority of both appellate and district courts have come to utilize the transformative use paradigm in their opinions, with district courts in particular adopting the transformative use concept in about ninety-one percent of their opinions since 2011.³⁹ This district court data stand in stark contrast to some previous studies, which showed that district court opinions used the transformative use concept much less frequent-

³⁴ See, e.g., *Warren Publ’g Co. v. Spurlock*, 645 F. Supp. 2d 402, 423 (E.D. Pa. 2009) (finding that although factor two disfavored fair use, its impact in the overall fair use calculus was limited because the use was transformative).

³⁵ See, e.g., *HathiTrust*, 755 F.3d at 99–100 (finding that copying entire books into a digital repository did not result in market harm because the use was deemed transformative); *Perfect 10, Inc. v. Google, Inc.*, 2010 WL 9479060, at *12–13 (C.D. Cal. July 30, 2010) (finding the third factor to be neutral, despite the fact that Google copied the entirety of the work, because of Google’s critical, research purposes that the court earlier deemed to be transformative).

³⁶ See Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 563 (2016) (bemoaning modern courts’ focus on transformative use as applied to visual arts fair use cases because that focus is difficult to square with modern art’s foundational premises).

³⁷ See *infra* notes 204–243 and accompanying text. What is equally clear when reading fair use opinions is that inter-factor influence is not limited to factor one and the transformative use inquiry. See, e.g., *Kane v. Comedy Partners*, 2003 WL 22383387, at *5 (S.D.N.Y. Oct. 16, 2003) (stating that because the use was transformative, factor two is less significant); *Gaylord v. United States*, 85 Fed. Cl. 59, 70 (2008) (implying that factor three’s weight in the overall analysis was less because the use was transformative). Thus, this Article also tracks, as part of this study, how frequently the factors appear to affect the resolution of the other factors. See *infra* notes 215–243 and accompanying text.

³⁸ See Liu, *supra* note 15, at 174–76 (presenting empirical evidence of the rise in transformative use opinions beginning in 1991 and going through 2016).

³⁹ See *infra* tbl.3.

ly than appellate courts.⁴⁰ District courts' widespread adoption of transformative use is particularly important because very few litigants make it past the district court, meaning that what happens with regards to transformative use at the district court level is critically important.⁴¹

Second, consistent with previous studies, parties that win the transformative use question win the overall fair use question at extremely high rates.⁴² Contrary to some commentators' arguments, however, the data in this study do not indicate that merely invoking the transformative use concept means the court will find the use to be transformative or fair.⁴³ Indeed, this Article presents a number of metrics showing that particular types of uses are unlikely to ever be found transformative.⁴⁴ Furthermore, the data indicate that win rates between opinions that raise the transformative use concept and those that do not are near equal.⁴⁵ And of the opinions that discuss transformative use, only about half of defendants win the transformative use inquiry.⁴⁶ But when they do, those defendants nearly always succeed on their fair use defense.⁴⁷ And when they do not, they nearly always lose.⁴⁸ Winning the transformative use inquiry, then, is vital. And in today's fair use case law, it is nearly always on the table.

Finally, transformative use affects resolution of other factors within the fair use inquiry more than any other subfactor or factor.⁴⁹ This remains true even when including hundreds of opinions in the data that do not invoke the transformative use doctrine; when removing those opinions, the frequency with which courts use the transformative use concept to resolve other fair use factors skyrockets.⁵⁰ Hence, although other factors and subfactors show up in

⁴⁰ See, e.g., Beebe, *supra* note 9, at 604–05 (discussing statistics which show that appellate courts use the transformative use doctrine more than district courts).

⁴¹ See, e.g., Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 659–60 (2004) (showing that a high percentage of federal cases are never even appealed, let alone accepted for adjudication).

⁴² See, e.g., Beebe, *supra* note 9, at 605 (“[I]n those opinions in which transformativeness did play a role, it exerted nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use test.”); Liu, *supra* note 15, at 177 (“Before 1995, transformative use was never successful in any copyright cases. . . . During the decade from 2001 to 2010, the average win rate soared to 54.3%. It further improved to 63.3% between 2011 and 2016.”).

⁴³ See, e.g., NIMMER & NIMMER, *supra* note 1, § 13.05[B][6] (arguing that the transformative use doctrine is excessively invoked and “threatens to swallow fair use”).

⁴⁴ See *infra* notes 244–263 and accompanying text.

⁴⁵ Compare *infra* tbl.7, with *infra* tbl.8.

⁴⁶ See *infra* tbl.8.

⁴⁷ See *infra* tbl.9 and app. A.

⁴⁸ See *infra* tbl.9 and app. A.

⁴⁹ See *infra* tbls.11 & 12.

⁵⁰ See *infra* tbl.11.

unexpected places within the overall fair use analysis, none does more often than transformative use. This piece of evidence, tracked for the first time in this study, provides additional evidence of the transformative use concept's powerful impact on fair use law more generally.⁵¹

This Article has three Parts. Part I provides background on the fair use doctrine and previous empirical studies examining it.⁵² Part II lays out this Article's methodology and results.⁵³ Part III concludes by examining some normative and theoretical implications relating to this study's findings, including the claim that transformative use should play an even bigger role in the fair use inquiry going forward.⁵⁴

I. FAIR USE BACKGROUND

This Part lays out some basic background on the fair use defense and its historical development in the courts.⁵⁵ It then provides a brief overview of how previous scholars have empirically assessed how courts apply the fair use doctrine, including the transformative use concept.⁵⁶

A. *Fair Use 101—A Primer*

The fair use doctrine's history is well-known. This Section does not attempt to capture all of its details, but instead provides a snapshot of it to lay the groundwork for subsequent parts of the Article.⁵⁷

In general, copyright law provides authors with exclusive rights pertaining to whatever original works the authors create.⁵⁸ For instance, an author of a book has exclusive rights with respect to that book, including, under today's copyright laws, the right to reproduce, prepare derivative works of, distribute, publicly perform, and publicly display the book.⁵⁹ Therefore, if a third party would like to exercise any of these rights, that third party generally must obtain the author's permission or risk being sued for copyright infringement.⁶⁰ For instance, if the third party would like to reproduce the book or make a

⁵¹ See *infra* notes 185–263 and accompanying text.

⁵² See *infra* notes 55–158 and accompanying text.

⁵³ See *infra* notes 159–263 and accompanying text.

⁵⁴ See *infra* notes 264–347 and accompanying text.

⁵⁵ See *infra* notes 57–114 and accompanying text.

⁵⁶ See *infra* notes 115–158 and accompanying text.

⁵⁷ See *infra* notes 58–113 and accompanying text.

⁵⁸ 17 U.S.C. §§ 101, 106.

⁵⁹ *Id.* § 106.

⁶⁰ *Id.* § 501.

movie based on it, typically that third party must clear those rights with the copyright owner.⁶¹

But what if the third party only wants to reproduce a small portion of the book for purposes of critiquing it in a newspaper article? Or the third party would like to copy substantial portions of the book into his or her own book, which he or she considers a parody of the original? In response to these and similar situations, courts developed the fair use doctrine at common law.⁶² Courts use fair use as an “equitable rule of reason” to permit socially beneficial uses of copyrighted works that copyright law, strictly applied, would otherwise bar.⁶³ The doctrine thereby guarantees “breathing space within the confines of copyright.”⁶⁴

But what counts as a fair use? The defense has no clear definition; instead, four factors have long guided courts in answering this question, and Congress codified those four factors as part of the Copyright Act of 1976.⁶⁵ These factors, briefly mentioned in this Article’s Introduction, consist of the following:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶⁶

Several of these factors include important subfactors that courts often consider in resolving the fair use question. For instance, under factor one, courts typically consider whether the purported fair use is for a commercial purpose.⁶⁷ Generally, when a defendant makes commercial uses of copyrighted works,

⁶¹ *Id.*

⁶² See generally Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1531–32 (2004) (describing and reinterpreting some of the fair use doctrine’s historical development); Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1373–74 (2011) (describing development of the fair use precursor in English courts).

⁶³ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (“Whether . . . copying . . . is or is not fair must be judged according to the traditional equities of fair use.”); UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (identifying fair use as an “equitable rule of reason” to be applied in light of the overall purposes of the Copyright Act”) (quoting *Sony Corp.*, 464 U.S. at 448).

⁶⁴ *Campbell*, 510 U.S. at 579.

⁶⁵ 17 U.S.C. § 107; Laura Zapata-Kim, Note, *Should YouTube’s Content ID Be Liable for Misrepresentation Under the Digital Millennium Copyright Act?*, 57 B.C. L. REV. 1847, 1855 (2016).

⁶⁶ 17 U.S.C. § 107.

⁶⁷ Beebe, *supra* note 9, at 597.

winning factor one—and the fair use question more generally—becomes more difficult for the defendant, though certainly not insurmountable.⁶⁸ Courts also often consider under factor one the propriety of the defendant’s conduct and whether the use fits into one of the enumerated categories in the preamble to 17 U.S.C. § 107.⁶⁹

Factor two often includes two distinct inquiries. The first is whether the work is factual or creative in nature, with factual works subject to a greater scope of fair use and creative works to a narrower one.⁷⁰ The second subfactor concerns the copyrighted work’s publication status; uses of unpublished works are less likely to be deemed fair, while courts are more likely to consider uses of published works as fair.⁷¹

Under factor three, courts consider subfactors relating to both the quantitative and qualitative amount of the borrowing.⁷² If some party purportedly making fair use of a copyrighted work takes a substantial percentage of the underlying work, in general a fair use finding becomes less likely.⁷³ Relatedly, even small takings of a copyrighted work can count against fair use if that taking relates to the “heart,” or most important part, of the copyrighted work.⁷⁴

Factor four may have no real subfactors of its own; instead, it often becomes a place for courts to synthesize their discussion of the other three factors and their subfactors.⁷⁵ As part of such syntheses, courts often incorporate a presumption that commercial uses of the copyrighted work result in market harm.⁷⁶ Courts also often consider how market opportunities for both the original work and derivatives thereof would fare if the use in question became widespread.⁷⁷ Furthermore, courts sometimes restrict themselves to assessing market harm to “traditional, reasonable, or likely to be developed markets.”⁷⁸

⁶⁸ *Id.* at 602.

⁶⁹ *Id.* at 607–09.

⁷⁰ See Timothy Hill, *Entropy and Atrophy: The Still Uncertain Status of the Fair Use of Unpublished Works and the Implications for Scholarly Criticism*, 51 J. COPYRIGHT SOC’Y U.S.A. 79, 89–90 (2003) (discussing this inquiry within factor two).

⁷¹ *Id.*

⁷² Preeta Reddy, Note, *The Legal Dimension of 3D Printing: Analyzing Secondary Liability in Additive Layer Manufacturing*, 16 COLUM. SCI. & TECH. L. REV. 222, 237 (2014).

⁷³ *Id.*

⁷⁴ *Id.* (quoting *Campbell*, 510 U.S. at 589); see *Harper & Row*, 471 U.S. at 565.

⁷⁵ Beebe, *supra* note 9, at 618.

⁷⁶ See, e.g., *Monge*, 688 F.3d at 1181 (explaining it would be reasonable to presume market harm under the fourth factor because the defendant’s use was commercial in nature); *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 531 (9th Cir. 2008) (presuming market harm under the fourth factor because the defendant’s use was commercial in nature).

⁷⁷ See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*, 923 F. Supp. 1231, 1248 (N.D. Cal. 1995) (articulating this standard and applying it to the facts of the case).

⁷⁸ *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013) (quoting *Ringgold v. Black Entm’t TV, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997)).

As with any multi-factor test, courts have applied the fair use test inconsistently. Indeed, one of the most frequent complaints about the fair use doctrine is that it is incoherent and unpredictable.⁷⁹ As one scholar famously put it, the fair use defense may boil down to the “right to hire a lawyer” because its unpredictability means that parties cannot actually rely on it *ex ante*, instead having to resort to *ex post* judicial adjudication before they know their rights.⁸⁰

Nevertheless, part of that unpredictability is by design.⁸¹ Fair use is meant to be a flexible standard “defy[ing] definition” that courts can adapt to achieve the most just results in any given situation.⁸² Indeed, even the four factors listed in the Copyright Act are non-exhaustive, meaning that courts are permitted to, and sometimes do, take into account additional factors in a given situation.⁸³ Hence, codification of the fair use doctrine as part of the 1976 Copyright Act was not meant to stifle its ongoing development under the common law.⁸⁴

Courts have taken to heart this flexibility in further refining the fair use doctrine over the years. One of the most important refinements to the doctrine occurred in the Supreme Court’s *Campbell* decision.⁸⁵ In that case, the Court explicitly adopted for the first time the transformative use subfactor as part of the first fair use factor discussion (the purpose and character of the use).⁸⁶ The

⁷⁹ See, e.g., NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 66 (2008) (“Given the doctrine’s open-ended, case-specific cast and inconsistent application, it is exceedingly difficult to predict whether a given use in a given case will qualify[.]”); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007) (“While the doctrine’s attention to context has many salutary attributes, it is so case-specific that it offers precious little guidance about its scope to artists, educators, journalists, Internet users, and others who require use of another’s copyrighted expression in order to communicate effectively.”).

⁸⁰ LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004).

⁸¹ See Samuelson, *supra* note 15, at 2540 (“A well-recognized strength of the fair use doctrine is the considerable flexibility it provides in balancing the interests of copyright owners . . . and the interests of subsequent authors in drawing from earlier works . . . as well as the interests of the public in having access to new works and making reasonable uses of them.”).

⁸² Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (quoting *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968)).

⁸³ TCA Television Corp. v. McCollum, 839 F.3d 168, 178 (2d Cir. 2016) (“That codification does not so much define ‘fair use’ as provide a non-exhaustive list of factors to guide courts’ fair use determinations.”).

⁸⁴ See *id.* (quoting NIMMER & NIMMER, *supra* note 1, § 13.05) (“[Codification] affords the [fair use] doctrine a certain ‘malleability’ that can challenge judicial application.”).

⁸⁵ See *Campbell*, 510 U.S. at 578–79 (applying transformative use as a subfactor under factor one).

⁸⁶ *Id.* Though this case was the first time the Court explicitly adopted the transformative use term, courts prior to the decision often applied something similar. In fact, the case that commentators often credit for first articulating the fair use standard in U.S. law includes language that resembles the transformative use standard. See *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (indicating that uses that “supersede the use of the original work” are less likely to be considered fair).

Court defined transformative uses as those that add “something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message” rather than simply “supersed[ing] the objects’ of the original creation.”⁸⁷ In the actual case, the Court held that the hip hop group 2 Live Crew’s rap parody of Roy Orbison’s “Pretty Woman” was transformative in part because it “provide[d] social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”⁸⁸ And although the Court noted that a “transformative use is not absolutely necessary for a finding of fair use,” it also indicated that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”⁸⁹

Given the Court’s emphasis in *Campbell* on the transformative use concept, the doctrine has gained traction as one of the most important subfactors that courts consider when assessing whether a use of a copyrighted work is fair.⁹⁰ This shift in focus stands in stark contrast to some previous fair use case law, which emphasized factor four—the use’s effect on the copyrighted work’s potential market and value—as the dominant consideration in the fair use inquiry.⁹¹ Indeed, nine years prior to its *Campbell* decision, the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises* had identified factor four as by far the most important factor in the fair use inquiry.⁹² *Campbell* retracted from that position, instead emphasizing the importance of factor one and the transformative use concept within it.⁹³

In focusing the fair use inquiry on the transformative use concept, the *Campbell* Court included several admonitions to future courts about how to suffuse the entire fair use inquiry with transformative use considerations.⁹⁴ For instance, as briefly discussed above, under factor two—the nature of the copyrighted work—courts typically assess whether the copyrighted work is more creative or factual in nature.⁹⁵ In general, copyright law affords factual works (such as a biography or news report) less protection; indeed, mere facts on

⁸⁷ *Campbell*, 510 U.S. at 579.

⁸⁸ *Id.* at 579, 583.

⁸⁹ *Id.* at 579.

⁹⁰ Netanel, *supra* note 10, at 739, 755 (pointing to case law metrics that indicate the rising importance and prevalence of the transformative use concept).

⁹¹ *Harper & Row*, 471 U.S. at 566. But again, prior to *Harper & Row*, there was arguably a greater emphasis on the approach that *Campbell* reintroduced, even beginning with *Folsom*, the seminal fair use case. See *Folsom*, 9 F. Cas. at 345.

⁹² *Harper & Row*, 471 U.S. at 566.

⁹³ *Campbell*, 510 U.S. at 578–79.

⁹⁴ See *id.* at 579 (“[T]he 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.”).

⁹⁵ Hill, *supra* note 70, at 89–90.

their own cannot be copyrighted at all.⁹⁶ Factor two attempts to incorporate this tenet of copyright law into the fair use inquiry by acknowledging that use of factual works is more likely to be considered fair, while use of highly creative works is less likely to be a fair use.⁹⁷ Consequently, one might reasonably conclude that factor two would favor Roy Orbison in the actual *Campbell* decision, because “Pretty Woman” is the type of creative work “closer to the core of intended copyright protection than others.”⁹⁸

Yet the *Campbell* court noted in considering factor two that in cases involving transformative uses such as parodies, the nature of the work, whether factual or creative, is unlikely to matter much in determining the overall fair use question.⁹⁹ This is so because transformative uses—such as 2 Live Crew’s rap parody of “Pretty Woman”—often rely on highly creative, well-known works to effectively carry out their transformative purpose.¹⁰⁰ Hence, though the Court noted that Orbison’s work was the type of creative expression copyright law was meant to protect, 2 Live Crew’s transformative purpose meant that the creative nature of the work carried little weight in the overall fair use analysis.¹⁰¹

The Court provided a similar admonition with respect to the third fair use factor, the amount and substantiality of the copyrighted work used. Typically, as mentioned above, the more a second-comer takes of the original work, the more difficult it becomes to sustain a fair use defense.¹⁰² And even relatively minor uses of the work may count against fair use if the small amount used is the heart, or most important part, of the copyrighted work. But in considering factor three, the *Campbell* Court again pointed back to the transformative use concept, suggesting that parties making transformative uses of copyrighted works must often take the most important parts of well-known works to achieve their transformative purposes; they may also sometimes need to take substantial portions of the copyrighted work for those transformative purposes.¹⁰³ Hence, according to the Court, “the extent of permissible copying varies with the purpose and character of the use,” with transformative users having greater leeway in taking significant portions of copyrighted works (whether

⁹⁶ *Dunn v. Brown*, 517 F. Supp. 2d 541, 545 (D. Mass. 2007) (“[I]t is well settled that ‘facts’ cannot be copyrighted”).

⁹⁷ See Hill, *supra* note 70, at 89 (stating that factual creations are afforded less copyright protection than creative works).

⁹⁸ *Campbell*, 510 U.S. at 586.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *id.* (noting that the creative nature of a work is of little help in transformative parody cases).

¹⁰² Reddy, *supra* note 72, at 237.

¹⁰³ *Campbell*, 510 U.S. at 586–88.

qualitatively or quantitatively) if the transformative purpose justifies that taking.¹⁰⁴

Finally, the Court also discussed the transformative use concept within its discussion of how to apply the fair use inquiry's fourth factor. The Court noted that transformative uses of works are less likely to affect the potential market for or value of the original work.¹⁰⁵ This is so because transformative uses, by creating a new work with a different meaning or purpose, are less likely to act as a substitute for the original work in the marketplace.¹⁰⁶ Furthermore, even transformative uses that undermine the value of a copyrighted work by, say, critiquing or parodying it, are permissible.¹⁰⁷ This is so because the fourth factor is meant to guard against uses that substitute for the original, not uses that happen to decrease the work's value by, for instance, convincing the public that the work is not worthy of their pocketbooks.¹⁰⁸

These admonitions to take the transformative use concept into account when considering factors two through four are part of the *Campbell* Court's more general instruction that courts should not treat the fair use factors "in isolation, one from another."¹⁰⁹ Instead, the Court insisted, "[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright."¹¹⁰ But while the Court suggested in several instances such a broader role for the fourth factor, the Court failed to highlight factors two or three's salience in any other part of the broader fair use inquiry.¹¹¹ Instead, other than factor four, the Court reserved its especial attention for highlighting the transformative use's impact on each of the fair use factors, and on the overall fair use inquiry generally.¹¹²

Courts since *Campbell* have increasingly taken these admonitions to heart in suffusing the entire fair use inquiry with inter-factor analyses, particularly with respect to the transformative use concept.¹¹³ Yet scholars studying fair use empirically have not tracked this reality, instead typically focusing on correlations between overall fair use win rates and win rates for each of the factors and some of the more important subfactors such as transformative use. The

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 590–94.

¹⁰⁶ *Id.* at 593–94.

¹⁰⁷ *Id.* at 591–92.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 578.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 587 (highlighting the fourth factor's relevance in factor three's assessment at least twice); *id.* at 580 n. 14 (discussing the relevance of market substitution, the fourth factor's concern, in the context of parody).

¹¹² *See id.* at 579 (emphasizing the importance of transformativeness in the fair use inquiry).

¹¹³ Netanel, *supra* note 10, at 736–43.

next Section briefly reviews these studies and highlights some of this Article's differences from them.¹¹⁴

B. Empirically Studying Fair Use

One of the more influential empirical assessments of fair use is Barton Beebe's 2008 study.¹¹⁵ Beebe's study is important for a number of reasons. For our purposes, its primary importance stems from it being one of the first studies to systematically analyze fair use case law. In contrast to the "anecdotal" approach to studying fair use, where scholars analyze leading fair use cases and derive conventional wisdom about fair use from them, Beebe's study analyzed 306 reported¹¹⁶ fair use opinions between 1978 and 2005 and tracked a number of important metrics from each of those opinions.¹¹⁷ This Article does not include a full summary of the metrics Beebe tracked, but instead focuses on some of the more important ones in light of this study's focus.

One important metric Beebe's study tracked was correlations between fair use findings and each of the four fair use factors.¹¹⁸ For instance, Beebe's study finds that winning factor four is highly correlated with an overall fair use victory.¹¹⁹ Similarly, winning factor one also correlates with high overall fair use win rates (though in Beebe's study, factor one is less highly correlated with the overall fair use outcome than factor four).¹²⁰ Outcomes with respect to factors two and three, meanwhile, do not have as strong of a correlation with overall fair use outcomes, meaning that their resolution one way or the other may be less important to determining whether a use is fair.¹²¹

But Beebe's study goes beyond this macro view of fair use by delving into an analysis of which subfactors within each factor seem to drive the outcomes for each factor and, ultimately, the overall fair use question.¹²² As dis-

¹¹⁴ See *infra* notes 115–158 and accompanying text.

¹¹⁵ See generally Beebe, *supra* note 9, at 554–57 (summarizing the parts of his empirical study on fair use, which was the first such study at the time).

¹¹⁶ *Id.* at 564–65. Beebe was likely including cases reported by either Westlaw or Lexis, rather than only opinions reported as part of a hardcopy federal reporter, which is one meaning of the term "reported" that is often used. This is the most likely conclusion because the spreadsheet that Beebe used to track his opinions included several opinions that were unreported in this technical sense but that Lexis and/or Westlaw did "report" within their databases. See *What Is the Difference Between "Unpublished" and "Unreported" Cases?*, LEXIS ADVANCE, https://help.lexisnexis.com/tabula-rasa/newlexis/unpublishedunreported_ref-reference?lbu=US&locale=en_US&audience=res [<https://perma.cc/2XYA-HEP4>] (explaining the distinction between unreported and unpublished cases).

¹¹⁷ Beebe, *supra* note 9, at 552–54.

¹¹⁸ *Id.* at 584–86.

¹¹⁹ *Id.* at 585–86.

¹²⁰ *Id.*

¹²¹ *Id.* at 584.

¹²² *Id.* at 594–621.

cussed in Section A of this Part, at least the first three factors of the fair use test include various subfactors within them that courts often consider when resolving the fair use inquiry.¹²³ Beebe's study conducts a regression analysis with respect to many of these subfactors, including the transformative use concept, to better isolate which subfactors carry the most influence in resolving individual factor and overall fair use outcomes.¹²⁴

For instance, Beebe's study shows that transformative use, when a court chooses to invoke the concept, plays a significant role in determining the outcome with respect to both factor one and the overall fair use inquiry.¹²⁵ His study, however, also indicates that a significant percentage of opinions fail to even reference the transformative use concept, let alone allow it to dictate resolution of the fair use analysis.¹²⁶ He goes on to test other subfactors within factor one, as well as those relating to factors two and three, to better isolate the impact of each of those subfactors.¹²⁷

Beebe also notes that courts do not tend to "stampede" results, meaning that most opinions called each factor "as they saw it."¹²⁸ For instance, rather than allowing a finding of fair use under factors one or four to dictate courts' decisions on factors two and three, for the most part courts appear to simply decide each of those factors as the situation merits, even if a finding of fair use under factors one or four (or both) ultimately helps persuade the court to find fair use overall.¹²⁹ Furthermore, Beebe specifically notes in his analysis of transformative use that a finding of transformative use typically does not result in courts conforming the rest of the factors to that finding—instead, they appear in most cases to decide the factors as they merit.¹³⁰

Yet a lack of stampeding, as Beebe defines it, does not mean that the transformative use concept (and other factors and subfactors within fair use more generally) do not influence the other factors' outcomes, even when their outcomes differ from the transformative use outcomes. As discussed above, *Campbell* taught that courts should take into account the transformative use

¹²³ See *supra* notes 67–74 and accompanying text.

¹²⁴ Beebe, *supra* note 9, at 594–621.

¹²⁵ *Id.* at 605.

¹²⁶ *Id.* at 604–05.

¹²⁷ *Id.* at 597–603 (assessing the commerciality subfactor); *id.* at 607–09 (assessing the bad faith inquiry); *id.* at 609–10 (assessing the preambular purposes inquiry); *id.* at 611–12 (assessing the creative/factual distinction); *id.* at 612–15 (assessing the published/unpublished inquiry); *id.* at 615–16 (assessing the amount and substantiality of the use under factor three).

¹²⁸ *Id.* at 590–91.

¹²⁹ See *id.* at 606 (“[W]hile a finding of transformativeness may be dispositive of the outcome of the fair use test, such a finding does not stampede the outcomes of the other factors.”).

¹³⁰ *Id.*

concept in assessing each of the fair use inquiry's four factors.¹³¹ But there are a number of ways to do so without the type of stampeding that Beebe means. For instance, a court need not align the transformative use finding with the outcome of each of the other factors for de facto stampeding to occur. Courts may rule that a use is transformative and then, upon reviewing factor two, still decide that factor two disfavors fair use because the work is highly creative in nature. Yet in making such a ruling, the court may also rule that, in light of its transformative use finding, factor two carries very little weight in the overall fair use analysis.¹³² In fact, courts engage in this type of discounting frequently when a finding of transformative use coincides with uses of substantial portions of highly creative works.¹³³ Hence, stampeding by another name is often happening in such cases because the transformative use concept is still dictating resolution of those factors' overall impact by effectively neutralizing them (whatever their outcomes may technically be). Yet Beebe's and others' studies fail to track this type of inter- and intra-factor influence—questions that this study addresses, among others.

Subsequent to Beebe's study, several other scholars took up the task of empirically assessing fair use and the transformative component thereof. Neil Netanel built on Beebe's study by assessing five additional years of fair use case law.¹³⁴ Netanel distinguished between the cases chronologically to argue that the fair use case law is more consistent and predictable than previous studies suggest.¹³⁵ Beebe's study, for instance, analyzed its 306 opinions as part of a single group of like cases, though Beebe did analyze some specific questions with chronological considerations in mind.¹³⁶ Netanel's insight is that lumping together opinions from different time periods inevitably leads to a seeming lack of consistency and predictability because that approach fails to explicitly

¹³¹ See *Campbell*, 510 U.S. at 578–79 (“Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright. . . . [T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”).

¹³² Liu's results provide additional support for this point. See Liu, *supra* note 15, at 168 (finding that courts tended to significantly discount factors two and three when the uses were deemed transformative).

¹³³ See, e.g., *HathiTrust*, 755 F.3d at 99–100 (finding no market harm because the use was deemed transformative); *Perfect 10*, 2010 WL 9479060, at *12–13 (finding the third factor to be neutral because Google's use was transformative); *Warren Publ'g*, 645 F. Supp. 2d at 423 (finding that though factor two disfavored fair use, its impact was limited because the use was transformative).

¹³⁴ Netanel, *supra* note 10, at 731.

¹³⁵ *Id.* at 719.

¹³⁶ Beebe, *supra* note 9, at 554, 605. For instance, when assessing what percentage of opinions took transformative use into account, Beebe does distinguish between pre-*Campbell* and post-*Campbell* opinions. *Id.* at 605.

take into account dramatic shifts in the fair use doctrine, as articulated by the Supreme Court.¹³⁷

For instance, clumping pre-*Campbell* and post-*Campbell* cases together in an empirical analysis is bound to manifest greater variance than warranted because courts applied quite different fair use standards in each of those time periods.¹³⁸ Hence, Netanel's study focuses on cases from 2006 to 2010—a time period, Netanel argues, during which the Supreme Court's *Campbell* teachings had finally become more established in the case law.¹³⁹ And during this time period, his study argues, courts became more consistent and predictable in applying the teachings of *Campbell* in their fair use decisions.¹⁴⁰ For example, Netanel shows that the transformative use concept has not only made more frequent appearances in recent fair use cases, but also seems to dictate more completely the overall fair use question in this time period (and, presumably, going forward).¹⁴¹

While helpful, Netanel's study still lacks the empirical depth that this Article provides. For instance, missing from Netanel's study are metrics relating to how frequently transformative use influences resolution of other parts of the fair use analysis, as well as other data that this study has collected relating to how courts define and apply the transformative use concept. Part II examines how this Article addresses this and other empirical gaps.¹⁴² Furthermore, Netanel's empirical investigation ends in 2010, since which time courts have decided nearly a decade of important fair use and transformative use cases.¹⁴³

Pamela Samuelson and Matthew Sag have also conducted empirical studies of the fair use doctrine subsequent to Beebe's investigation. Samuelson's study seeks to make greater sense of the seeming incoherence of fair use case

¹³⁷ See Netanel, *supra* note 10, at 731 (indicating that “[a]dding an historical dimension [to a study of fair use case law] helps to make further sense of what might otherwise appear to be a disconnected series of ad hoc, case-by-case judgments”).

¹³⁸ See *id.* at 719, 731 (stating that empirically studying the case law in light of the fair use doctrine's legal development shows greater consistency than originally assumed).

¹³⁹ *Id.* at 731.

¹⁴⁰ *Id.* at 736–46.

¹⁴¹ *Id.* at 736–38.

¹⁴² See *infra* notes 159–263 and accompanying text.

¹⁴³ Netanel, *supra* note 10, at 719. As noted earlier, a student Note recently looked at appellate fair use case law from 2010 to 2015. Tomassian, *supra* note 15, at 1352. That Note, however, focuses on a circuit split between the Second and Seventh Circuits, and only focuses on appellate cases and a narrower range of data. *Id.* at 1346, 1352–58. Anthony Reese has also looked at appellate opinions since *Campbell*. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485, 494 (2008). Although useful, the questions his study focused on are narrower than those that this study investigates. See *id.* at 467 (stating that his study is meant to determine “whether courts treat the fair use and derivative work issues as related”). His data collection also ends in 2007. *Id.* at 471.

law by creating a taxonomy of fair uses, or “policy-relevant clusters.”¹⁴⁴ By creating this taxonomy, Samuelson shows that the seeming chaos of fair use case law exhibits a greater coherence than previous commentators had imagined.¹⁴⁵ Part of her taxonomy focuses on transformative uses, and she points to factors courts frequently consider when deciding whether a use counts as transformative and fair use generally.¹⁴⁶ Yet as with Beebe’s study, Samuelson’s study also fails to systematically track the type of inter-factor (and subfactor) interactions that this study examines, as well as the other transformative use data that this study has collected. Her study also ends a decade ago.¹⁴⁷

In his study, Matthew Sag takes a different approach to studying fair use than Beebe and Samuelson. His study focuses on better predicting fair use outcomes based on case characteristics apparent to litigants prior to judicial resolution.¹⁴⁸ For instance, rather than focus on fair use outcomes and correlating those outcomes to outcomes for each factor and subfactor, Sag seeks to identify characteristics of the purported fair use and the parties involved in the case that help predict whether the court will ultimately decide that the use is fair.¹⁴⁹ His findings include the proposition that uses involving a “creative shift”—a partial proxy for transformative use—have significant predictive power as to whether a court will deem the use fair.¹⁵⁰ “Direct commercial use”—another partial proxy for transformative use—also has significant predictive power as to whether a court will find a use to be a fair use, especially when combined with the “creative shift” consideration.¹⁵¹

Sag’s findings are certainly helpful in isolating some of the impact of the transformative use concept and other factors within the fair use inquiry. But like the other studies discussed above,¹⁵² his study fails to explicitly and systematically capture the inter-factor influence that is apparent when reading fair use opinions. His findings are also based entirely on district court opinions between 1978 and 2011, and his proxies for transformative use, as he acknowledges, do not capture all types of uses that courts may deem transformative.¹⁵³ This study, in contrast, includes both district and appellate court opinions spanning the life of the transformative use concept.¹⁵⁴ Furthermore, this study

¹⁴⁴ Samuelson, *supra* note 15, at 2546.

¹⁴⁵ *Id.* at 2541.

¹⁴⁶ *Id.* at 2548–55.

¹⁴⁷ *See id.* at 2539 (displaying the publication year of Samuelson’s article as 2009).

¹⁴⁸ Sag, *supra* note 15, at 49, 51.

¹⁴⁹ *Id.* at 49–51, 68.

¹⁵⁰ *Id.* at 76–77.

¹⁵¹ *Id.*

¹⁵² *See supra* notes 115–147 and accompanying text.

¹⁵³ Sag, *supra* note 15, at 52, 76–77.

¹⁵⁴ *See infra* tbls.1–3.

includes a number of other transformative use (and fair use) metrics that expand upon Sag's and others' earlier findings.¹⁵⁵

Finally, shortly after completion of this study, Jiarui Liu published an empirical assessment of the transformative use concept, covering transformative use case law through 2016.¹⁵⁶ Some of his findings buttress those of this study, including the reality that courts tend to discount the importance of factors two, three, and four when courts find a use to be transformative.¹⁵⁷ The present study provides additional data relating to this and other transformative use (and fair use) questions. The next Part lays out this study's methodology and presents its primary findings.¹⁵⁸

II. METHODOLOGY AND RESULTS

Section A of this Part provides details on this study's methodology,¹⁵⁹ and Section B presents this study's most important findings.¹⁶⁰

A. Methodology

This Article's analysis is based on the results of a Westlaw advanced search for federal opinions containing the terms "fair use," "copyright," and "107" between the years 1991 and 2017.¹⁶¹ This study begins in 1991 because Judge Pierre N. Leval first coined the term "transformative use" in late 1990 in a now famous *Harvard Law Review* article,¹⁶² and a court first explicitly invoked the doctrine in 1991.¹⁶³ Hence, because this study focuses on the trans-

¹⁵⁵ See *infra* app. A and notes 215–243 and accompanying text.

¹⁵⁶ Liu, *supra* note 15, at 166.

¹⁵⁷ *Id.* at 167–68.

¹⁵⁸ See *infra* notes 161–263 and accompanying text.

¹⁵⁹ See *infra* notes 161–183 and accompanying text.

¹⁶⁰ See *infra* notes 184–263 and accompanying text.

¹⁶¹ These search terms are the same as those used by Beebe in his earlier analysis. See Beebe, *supra* note 9, at 623 (explaining the search terms used in Lexis and Westlaw). The validity of the search string was confirmed by consulting with two separate Westlaw research attorneys. To replicate this search, perform an advanced search in Westlaw's federal cases database using the following parameters: copyright & "fair use" & 107 & AD(aft 12-31-1990 & bef 09-14-2018) & DA(aft 12-31-1990 & bef 01-01-2018). The latter parenthetical limits the results to opinions between 1991 and 2017. The first parenthetical in the search string is necessary because Westlaw constantly adds opinions to its databases, months or sometimes even years after they are first written. Hence, in order to ensure that future researchers could replicate the exact results, the first parenthetical was added to the search string, which limits the results to opinions added by Westlaw beginning in 1991 but before September 14, 2018, the first date of the initial search.

¹⁶² Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111–12 (1990).

¹⁶³ See *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991) (defining "transformative use" by citing to Leval's article and determining that the defendant's use was not transformative but "a mere repackaging"); Netanel, *supra* note 10, at 724 (stating that the transformative use doctrine traces back to Leval's article).

formative use concept, 1991 was the study's logical starting point. The study ends in 2017 because it was the last complete year of data available when the study concluded.

The initial search yielded 1,017 cases. The results were then narrowed to 441 opinions¹⁶⁴ by excluding: (1) opinions that mentioned the word “copyright” but did not concern an actual copyright issue;¹⁶⁵ (2) opinions that mentioned but did not actually concern fair use;¹⁶⁶ (3) opinions that failed to explicitly analyze at least two of the four fair use factors in rendering fair use decisions, because these conclusory opinions tended to provide little information behind the courts' decisions;¹⁶⁷ and (4) opinions with non-substantive fair use outcomes.

This final category of exclusions consists of opinions in which the court denied a party's motion for dismissal or summary judgment because the court determined that too many outstanding factual issues remained for it to make a substantive determination.¹⁶⁸ For instance, often a court denied a party's motion for summary judgment on the issue of fair use because the court determined that it possessed insufficient evidence to decide the issue as a matter of law.¹⁶⁹ Instead, the court punted the issue to the jury for additional fact-finding.¹⁷⁰ One might reasonably view this as a fair use outcome—the use was fair if the court denied the plaintiff's motion, or not fair if the court denied the defendant's. In fact, previous scholars appear to follow this approach in their studies.¹⁷¹ We chose to exclude these types of cases, however, because the court, in denying these types of motions, did not actually opine whether the use was fair or not. Instead, the court indicated in these situations that it could not definitively say one way or the other due to outstanding factual issues that a jury must further investigate and, ultimately, decide.¹⁷²

¹⁶⁴ These opinions include those reported in a hardcopy federal reporter, as well as unpublished and unreported cases that Westlaw nonetheless made available through its electronic database.

¹⁶⁵ For instance, a case may mention the word copyright but not actually be a case applying copyright law. Beebe made the same choice in his earlier study. *See* Beebe, *supra* note 9, at 623 (“A research assistant then reviewed each of these opinions to exclude those that did not involve in any way an issue of copyright fair use.”).

¹⁶⁶ For instance, a case may mention fair use in passing but not actually apply or analyze it.

¹⁶⁷ Beebe made the same choice in his earlier study. *See* Beebe, *supra* note 9, at 623 (“Of the 307 remaining opinions, 306 made substantial use of the section 107 four-factor test, which I defined as any use of the test that made reference, however briefly, to at least two test factors.”).

¹⁶⁸ *See, e.g.,* *Basquiat v. Baghoomian*, 1991 WL 253334, at *2 (S.D.N.Y. Nov. 19, 1991).

¹⁶⁹ *See, e.g., id.* (“However, where, as here, numerous issues of material fact remain in dispute, summary judgment would be inappropriate on the infringement issue.”).

¹⁷⁰ *See id.* at *3 (explaining that the court cannot make a ruling until the factual issues are settled).

¹⁷¹ *See* Beebe, *supra* note 9, at 585 (counting a plaintiff's summary judgment denial as a fair use finding); Netanel, *supra* note 10, at 755 (similar).

¹⁷² *See, e.g., Basquiat*, 1991 WL 253334, at *2 (“If sufficient facts are established for each of the four statutory factors, a court may determine as a matter of law whether the allegedly infringing con-

The remaining 441 opinions are based on 416 cases, meaning that some of the cases yielded multiple distinct fair use opinions (e.g., separate opinions in the same case for different types of uses) as well as dissents and concurrences that included fair use opinions. The final tally thus consists of 441 opinions that include a substantive fair use outcome utilizing at least two of the four fair use factors.

We then catalogued each of the 441 opinions based on seventy-one factors, including whether the court discussed the transformative use concept, outcomes for each fair use factor, and some of the more important subfactors such as transformative use. We also analyzed whether any factor (or the subfactors of factor one, including transformative use) appeared to explicitly affect resolution of the other fair use factors. Section B of this Part presents the main findings.¹⁷³

Before turning to these results, we note several general limitations of this study. First, the data analysis is constrained by the reality that Westlaw may not provide access to the entire population of relevant fair use opinions. The company chooses to exclude some opinions from its database and it may never even encounter yet others.¹⁷⁴ Furthermore, no combination of available databases is likely to change this reality, because judges simply choose not to make some of their opinions available.¹⁷⁵ As a result, we are left with a potentially imperfect universe of opinions for the 1991 to 2017 time period. We still elected to treat that universe as census data (i.e., the entire population of opinions meeting this study's criteria) rather than a sample, because labeling something a probability sample entails random selection from a population, and there is certainly nothing random about our or Westlaw's selection criteria.¹⁷⁶ Because of this lack of randomization, we were reluctant to employ statistical tests of significance to the data that depend on a random sample being present.¹⁷⁷

duct constitutes fair use. However, where, as here, numerous issues of material fact remain in dispute, summary judgment would be inappropriate on the infringement issue.”) (citation omitted).

¹⁷³ See *infra* notes 184–263 and accompanying text.

¹⁷⁴ See generally Ellen Platt, *Unpublished vs. Unreported: What's the Difference?*, 5 PERSPECTIVES 26, 26–27 (1996) (discussing how Westlaw and Lexis choose which opinions go into their databases).

¹⁷⁵ *Id.* at 27.

¹⁷⁶ See *Sampling*, YALE STAT. DEP'T, <http://www.stat.yale.edu/Courses/1997-98/101/sample.htm> [<https://perma.cc/F2H8-7V4X>] (explaining that when utilizing the “random sampling” technique, “[e]ach individual is chosen entirely by chance and each member of the population has an equal chance of being included in the sample”).

¹⁷⁷ See generally Lisa Sullivan, *Confidence Intervals*, B.U. SCH. PUB. HEALTH, http://sphweb.bumc.bu.edu/otlt/MPH-Modules/BS/BS704_Confidence_Intervals/BS704_Confidence_Intervals_print.html [<https://perma.cc/KC4A-DJSN>] (noting the importance of randomization for drawing valid statistical inferences).

Thus, with a few exceptions,¹⁷⁸ we present the study's results as metrics relating to the entire population of opinions meeting the study's criteria at the time of the Westlaw search, with the caveat that it is possible that Westlaw does not include some relevant opinions.

Second, as with previous studies, this study's opinion data are not representative of all fair use opinions because of the chosen parameters.¹⁷⁹ For instance, we chose to only include those opinions that rely on at least two of the four fair use factors in rendering a substantive fair use outcome. While we believe this choice has merit, it does mean that some selection bias is inherent in the data. Furthermore, the opinions in this study's dataset are not representative of cases before 1991. This latter limitation is a virtue in some respects, however, because in certain regards fair use case law prior to 1991 is increasingly irrelevant given the transformative use paradigm's ascendance.

Indeed, despite these limitations, this study's results provide a number of important insights about the fair use and transformative use doctrines' evolution.¹⁸⁰ The dataset includes practically all relevant opinions for the specified time period because Westlaw focuses on including all substantive cases in its database and attempts to be thorough in doing so.¹⁸¹ Furthermore, whatever else might be said, opinions reported through services like Westlaw remain "the most salient indication of what fair use doctrine is."¹⁸² With these thoughts in mind, Section B presents this study's results.¹⁸³

B. Results

The following Section presents evidence supporting the argument that transformative use is eating the world of fair use. This evidence consists of at least the following two realities. First, courts increasingly rely on the transformative use concept in their opinions.¹⁸⁴ And second, when a court uses the transformative use concept, the doctrine frequently appears to dictate the

¹⁷⁸ The exceptions apply where the research team conducted regression analysis. In those cases, we treated the data as a sample of a theoretical infinite population.

¹⁷⁹ Furthermore, the data are not representative of all the work the fair use doctrine does because many disputes simply never get litigated. See Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 572 (2013) ("Settlement is a critical aspect of civil litigation. Although the exact settlement rate is unclear, most cases settle.").

¹⁸⁰ See *infra* notes 186–213 and accompanying text.

¹⁸¹ Platt, *supra* note 174, at 26–27.

¹⁸² Netanel, *supra* note 10, at 733. For a helpful overview of biases inherent in this type of study in general, see *id.* at 730–34.

¹⁸³ See *infra* notes 184–263 and accompanying text.

¹⁸⁴ See *infra* tbls.1–3.

court's analysis of the remaining factors and, ultimately, the overall fair use outcome.¹⁸⁵

1. How Frequently Do Courts Consider Transformative Use?

One important figure to consider at the outset is the percentage of opinions that employ the transformative use concept. After all, if a large proportion of courts fail to even utilize the transformative use doctrine, it becomes difficult to argue that transformative use is eating the fair use world.

In his earlier study, Beebe makes precisely this point, arguing that commentators have exaggerated the extent to which the transformative use paradigm dictates fair use case law.¹⁸⁶ He backs up this claim by highlighting that about forty-one percent of post-*Campbell v. Acuff-Rose Music, Inc.* district court opinions in his dataset fail to invoke the transformative use concept, while nearly nineteen percent of post-*Campbell* appellate opinions omit a discussion of transformative use.¹⁸⁷ He also indicates that the transformative use doctrine “appears to be losing strength,” pointing out that the relative number of opinions utilizing the doctrine began to decline in the early 2000s.¹⁸⁸

In his follow-up study to Beebe, Netanel argues that part of the reason behind Beebe's results is that Beebe's study relies on data that include periods of time when the transformative use paradigm was not yet fully entrenched in the case law.¹⁸⁹ In support of this point, Netanel indicates that the percentage of opinions making use of the transformative use concept has risen since Beebe's study, particularly between the years 2006 and 2010.¹⁹⁰

Before looking at this study's data, we note a general disagreement with Beebe's interpretation of his earlier dataset.¹⁹¹ In our view, the fact that over eighty-one percent of post-*Campbell* appellate opinions and nearly sixty percent of district court opinions in his dataset explicitly considered transformative use¹⁹² is actually strong evidence that transformative use is one of the most dominant considerations in fair use case law. Transformative use may not play

¹⁸⁵ See *infra* app. A and notes 215–243 and accompanying text. It should be noted that many of the statistics offered in support of this argument are correlations and are not meant to suggest that the reported correlations are somehow equivalent to causation. This issue is discussed in greater detail below, particularly in the regression results reporting. See *infra* notes 215–230 and accompanying text.

¹⁸⁶ Beebe, *supra* note 9, at 604–05.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 605.

¹⁸⁹ Netanel, *supra* note 10, at 736–37.

¹⁹⁰ *Id.* at 736.

¹⁹¹ See Beebe, *supra* note 9, at 604 (“It appears . . . that courts and commentators have exaggerated the influence of transformativeness doctrine on our fair use case law.”).

¹⁹² *Id.* at 604–05.

a role in every fair use case for any number of reasons.¹⁹³ But that is no different than for any other factor or subfactor within the fair use inquiry—in this study’s review of fair use case law, courts often chose to omit various factors and subfactors from their fair use discussions. The fact that transformative use shows up in fair use discussions so frequently, despite neither the Supreme Court nor the Copyright Act mandating it, is thus evidence of its significance.

This study’s updated data show that transformative use plays a vital role in the vast majority of both district and appellate decisions, with that role becoming more pronounced over time. Overall, courts discussed transformative use in a little over seventy-one percent of all opinions. When excluding pre-*Campbell* opinions, however, the percentage of opinions that considered transformative use rises to nearly eighty percent.¹⁹⁴ And when only considering opinions from 2011 to 2017, nearly ninety percent of all opinions applied the transformative use doctrine. Liu’s recent study presents similar results.¹⁹⁵ Tables 1 through 3 below summarize these findings.

Table 1. Breakdown of Fair Use Opinions by Court Level and Use of the Transformative Use Doctrine, 1991–2017.

	Fair Use Opinions	Trans. Use Opinions	% Trans. Use Opinions
District	346	246	71.10%
Appellate	95	69	72.63%
Total	441	315	71.43%

Table 2. Breakdown of Post-*Campbell* Fair Use Opinions by Court Level and Use of the Transformative Use Doctrine.

	Fair Use Opinions	Trans. Use Opinions	% Trans. Use Opinions
District	310	242	78.06%
Appellate	84	67	79.76%
Total	394	309	78.43%

¹⁹³ One important reason is that the Supreme Court did not absolutely mandate it, indicating that “transformative use is not absolutely necessary for a finding of fair use.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). For this reason, some litigants may not even raise the issue and courts may therefore not consider it in their opinions.

¹⁹⁴ Like studies by some previous scholars, this study includes a few opinions that applied the transformative use concept, even if those opinions did not explicitly use the term “transformative use.” See, e.g., Netanel, *supra* note 10, at 737.

¹⁹⁵ Liu, *supra* note 15, at 166.

	Fair Use Opinions	Trans. Use Opinions	% Trans. Use Opinions
District	127	115	90.55%
Appellate	26	21	80.77%
Total	153	136	88.89%

As Table 1 also shows, overall appellate and district court opinions were nearly equal in how frequently they considered transformative use. This is a significant change from previous empirical assessments, which found that district courts significantly lagged behind appellate courts in applying the transformative use doctrine.¹⁹⁶ In fact, between 2011 and 2017, Table 3 shows that district courts actually outpaced appellate courts in relying on the transformative use doctrine.

Collectively, these three tables thus point to at least two important findings. First, over time there has been a steady progression of both appellate and district courts adopting the transformative use paradigm, with modern courts relying on it nearly ninety percent of the time. This data helps substantiate Netanel's earlier claim that it took some time for the transformative use doctrine to become entrenched in the case law.¹⁹⁷ But entrenched the doctrine now is, with modern courts nearly always invoking it. Transformative use may not always eat the world of fair use, but in today's world, it almost always has a seat at the table.

Second, as indicated above, district courts have caught up with, and even surpassed, appellate courts in utilizing the transformative use doctrine. This is significant because so few district court cases ever make their way before an appellate decisionmaker.¹⁹⁸ Indeed, in some respects transformative use metrics at the district level are even more important than those at the appellate level. And this study's metrics indicate that in modern district courts, the transformative use paradigm reigns supreme.

2. Which Courts Utilize Transformative Use the Most?

It is also worth considering whether courts within particular federal circuits embrace the transformative use paradigm more than others. Similar to previous studies, opinions from district and appellate courts within the Second and Ninth Circuits dominate this study.¹⁹⁹ Nearly a quarter of this study's opin-

¹⁹⁶ Beebe, *supra* note 9, at 604–05; Netanel, *supra* note 10, at 736.

¹⁹⁷ Netanel, *supra* note 10, at 736–37.

¹⁹⁸ Eisenberg, *supra* note 41, at 659–60.

¹⁹⁹ Beebe, *supra* note 9, at 568–69; Netanel, *supra* note 10, at 732.

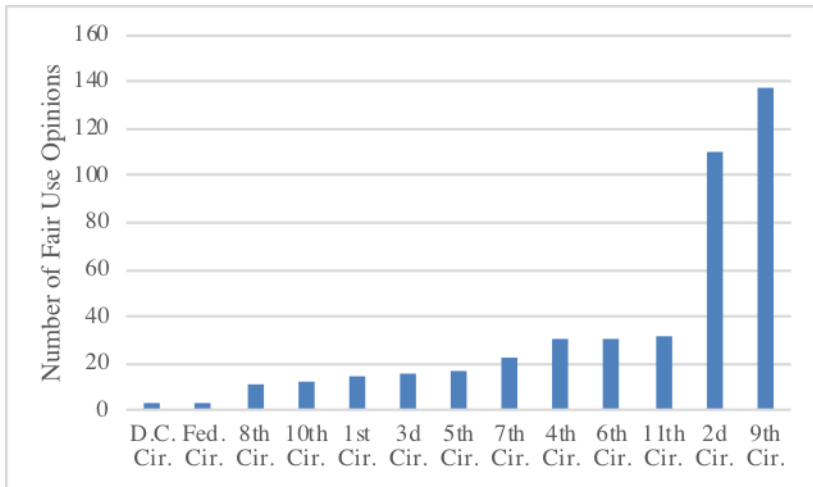
ions comes from district and appellate courts within the Second Circuit, where Judge Pierre Leval, the transformative use concept's originator, currently resides as a senior circuit judge.²⁰⁰ Meanwhile, thirty-one percent of the opinions come from courts within the Ninth Circuit. The next closest to either of these behemoths is the Eleventh Circuit (about seven percent of the opinions studied). Table 4 below provides these and additional details.

	Number of Opinions	Percentage of Total Opinions
1st Cir.	15	3.40%
2d Cir.	110	24.94%
3d Cir.	16	3.63%
4th Cir.	31	7.03%
5th Cir.	17	3.85%
6th Cir.	31	7.03%
7th Cir.	23	5.22%
8th Cir.	11	2.49%
9th Cir.	137	31.07%
10th Cir.	12	2.72%
11th Cir.	32	7.26%
D.C. Cir.	3	0.68%
Fed. Cir.	3	0.68%
Total	441	100.00%

Figure 1 provides a graphical depiction of how much the Second and Ninth Circuits dominate fair use case law in this study's dataset.

²⁰⁰ Leval, *supra* note 162, at 1111–12; Netanel, *supra* note 10, at 724; *Pierre N. Leval*, U.S. CT. APPEALS FOR SECOND CIR., <http://www.ca2.uscourts.gov/judges/bios/pnl.html> [<https://perma.cc/BXL2-P9C8>].

Figure 1. Fair Use Opinions by Circuit.

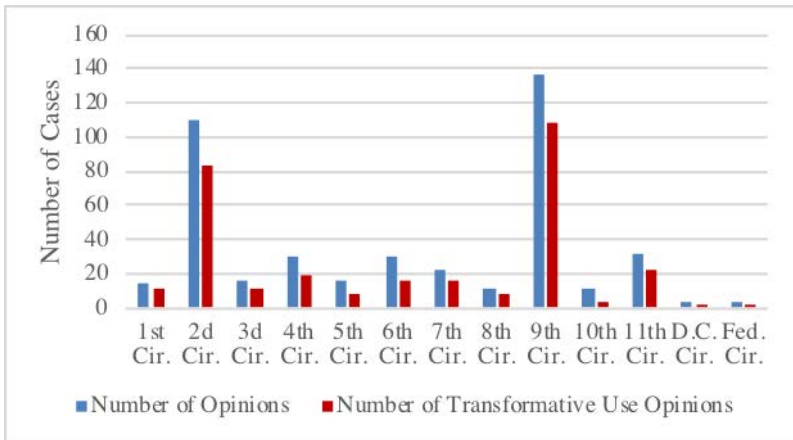


While the Ninth and Second Circuits dominate fair use case law, opinions from courts in those circuits have not universally adopted the transformative use paradigm. This study's data indicate that courts within the Second Circuit utilize transformative use in a little over three-quarters of their opinions, while courts within the Ninth Circuit do so at a slightly higher clip. One might reasonably expect that opinions emanating from courts in the Second Circuit would have even higher percentages of transformative use adoption, because the concept's originator, Judge Leval, is a senior judge on that circuit. But it appears that about a quarter of the time, Judge Leval's colleagues choose to ignore his magnum opus. It is worth noting, however, that these overall percentages increase for opinions from both circuits when excluding pre-*Campbell* opinions: a little over eighty-seven percent for opinions from within the Second Circuit, and a little over eighty-four percent for opinions from within the Ninth Circuit.

When looking at opinions from other circuits, the percentage of opinions that adopt the transformative use paradigm seems somewhat sporadic. Indeed, the small number of opinions within these circuits makes drawing broad conclusions based on these percentages difficult. Table 5 and Figure 2 summarize these findings.

	Fair Use Opinions	Trans. Use Opinions	% Trans. Use
1st Cir.	15	11	73.33%
2d Cir.	110	84	76.36%
3d Cir.	16	12	75.00%
4th Cir.	31	19	61.29%
5th Cir.	17	9	52.94%
6th Cir.	31	17	54.84%
7th Cir.	23	17	73.91%
8th Cir.	11	8	72.73%
9th Cir.	137	108	78.83%
10th Cir.	12	4	33.33%
11th Cir.	32	23	71.88%
D.C. Cir.	3	1	33.33%
Fed. Cir.	3	2	66.67%
Total	441	315	71.43%

Figure 2. Graphical Depiction of Transformative Use Adoption by Circuit.



Suffice it to say that these data, on their own, do not fully explain how courts within different circuits approach the transformative use question. But supplementing them with other information gleaned from the opinions can help. For instance, though opinions in the Seventh and Second Circuits appear to adopt the transformative use paradigm in near equal measure, judges in the Seventh Circuit have recently begun to criticize overreliance on the transform-

ative use concept, identifying the Second Circuit as the fosterer of this erroneous emphasis.²⁰¹ In fact, some of the opinions from the Seventh Circuit that use the transformative use concept (and thus count towards increasing the Seventh Circuit's adoption rate) mostly do so in order to criticize the role the doctrine plays in fair use jurisprudence, in several instances labeling the term "confusing."²⁰² Hence, opinion data spanning the transformative use concept's entire history mask a growing divergence in approaches to transformative use, with the Seventh Circuit in particular appearing to be moving away from the concept. If these divergences continue, they may ultimately force the Supreme Court to revisit the fair use doctrine and transformative use concept within it, something the Court has not done since its 1994 *Campbell* decision.²⁰³

3. What Sources Do Courts Use in Defining and Applying the Transformative Use Concept?

Much has been made about what the transformative use term even means.²⁰⁴ The Supreme Court's definition in *Campbell*—a use that "alter[s] the [original] with new expression, meaning, or message"—is quite open-ended.²⁰⁵ Furthermore, the *Campbell* Court applied the transformative use concept in the specific context of a parody.²⁰⁶ But most subsequent courts have been forced to apply the transformative use doctrine outside of that context.²⁰⁷ In fact, this study's data show that of the transformative use opinions subsequent to *Campbell*, only about fifteen percent grappled specifically with whether the use in-

²⁰¹ See, e.g., *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (deciding to forgo the transformative use inquiry and instead exclusively look to 17 U.S.C. § 107 because "the Second Circuit do[es] not explain how every 'transformative use' can be 'fair use' without extinguishing the author's rights"); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 518 (7th Cir. 2002) (indicating that the transformative use term is confusing); *Campinha-Bacote v. Evansville Vanderburgh Sch. Corp.*, 2015 WL 12559889, at *4 (S.D. Ind. Nov. 5, 2015) (stating that the case demonstrates why the Seventh Circuit finds the transformative use term "confusing" despite the Second Circuit's reliance on the doctrine).

²⁰² *Ty, Inc.*, 292 F.3d at 518; *Campinha-Bacote*, 2015 WL 12559889, at *4.

²⁰³ In fact, the Supreme Court recently agreed to hear a copyright case that involves the fair use doctrine. Adam Liptak, *Supreme Court to Hear Google and Oracle Copyright Case*, N.Y. TIMES (Nov. 15, 2019), <https://www.nytimes.com/2019/11/15/us/supreme-court-google-oracle.html> [<https://perma.cc/ZDGG5-7779>].

²⁰⁴ See, e.g., Netanel, *supra* note 10, at 746–47 (summarizing some of this literature on the debate surrounding the definition of transformative use).

²⁰⁵ *Campbell*, 510 U.S. at 579.

²⁰⁶ *Id.*

²⁰⁷ See, e.g., *Authors Guild v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014) (applying the transformative use doctrine in the context of a database); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (applying the transformative use doctrine in the context of thumbnail images).

volved parody. Therefore, courts following in *Campbell*'s wake have necessarily wrestled with refining the concept in a variety of non-parodic contexts.

In doing so, what sources have courts relied on? The *Campbell* decision is one obvious candidate, and the data confirm that nearly eighty-six percent of transformative use opinions cite *Campbell* in applying the transformative use concept. By comparison, Judge Leval, the person responsible for coining the phrase, is cited in only about fifteen percent of the opinions in this study.

Given the Second and Ninth Circuits' significant shares of fair use and transformative use opinions, it is also worth investigating to what extent other circuits follow their transformative use lead. As noted above, the Seventh Circuit has recently pushed back against the Second Circuit's approach to transformative use.²⁰⁸ But do other circuits, including the Seventh Circuit, rely on opinions emanating from the Second and Ninth Circuits in defining and applying transformative use in their own cases?

The answer is in the affirmative. Nearly thirty-five percent of opinions emanating from courts outside the Second Circuit cite Second Circuit case law when defining and applying the transformative use concept. When adding the Second Circuit's self-citations to its own transformative use case law, the percentage rises to forty-six percent. Courts within the Ninth Circuit, itself a heavyweight in defining the transformative use doctrine, cite the Second Circuit a little over twenty-nine percent of the time. And even courts within the Seventh Circuit, the Second Circuit's self-declared transformative use antagonist,²⁰⁹ cite Second Circuit case law fifty-nine percent of the time when defining and applying the transformative use doctrine. In fact, courts within the Seventh Circuit cite Second Circuit transformative case law more frequently than their own.

The Ninth Circuit also boasts a significant percentage of opinions outside of it which rely on its transformative use case law: nearly twenty-seven percent of non-Ninth Circuit opinions cite Ninth Circuit case law when defining and applying the transformative use concept. When self-citations are factored in, Ninth Circuit case law is cited in about forty-two percent of all transformative use opinions. The Second Circuit also regularly patronizes Ninth Circuit case law when defining and applying transformative use, with twenty-three percent of Second Circuit court opinions citing to Ninth Circuit transformative use opinions. Overall, when we look at the entire set of non-Ninth and Second Circuit opinions, over fifty-three percent of them rely on either Ninth or Second

²⁰⁸ *Kienitz*, 766 F.3d at 758; *Campinha-Bacote*, 2015 WL 12559889, at *4.

²⁰⁹ See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215–16 n.18 (2d Cir. 2015) (“The Seventh Circuit takes the position that the kind of secondary use that favors satisfaction of the fair use test is better described as a ‘complementary’ use We do not find the term ‘complementary’ particularly helpful in explaining fair use.”) (citation omitted).

Circuit opinions (or both) in defining and applying the transformative use doctrine. Table 6 below provides a breakdown of how often courts within each circuit cite various sources in defining and applying transformative use.

As Table 6 shows, no other circuits come close to the Second and Ninth Circuits in how frequently other circuits cite their transformative use case law. For instance, the Seventh Circuit's deemphasis of the transformative use doctrine remains a clear minority position, at least as shown by how infrequently courts outside the Seventh Circuit cite Seventh Circuit transformative use case law (three percent of the time; self-citations within the Seventh Circuit double that circuit's percentage to a little over six percent). This low rate is not terribly surprising, in part because the Seventh Circuit's push against the transformative use doctrine is of somewhat recent origin.²¹⁰ Courts from other circuits may eventually choose to follow the Seventh Circuit's lead. But, at least for now, the Second and Ninth Circuits are the clear leaders in defining and applying the transformative use doctrine, both within their own circuits and more broadly.

Table 6. Percentage of Opinions by Circuit That Cite to Various Transformative Use Sources.

	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	D.C.	Fed.	Total
Acuff	82	92	83	68	100	82	88	100	84	100	74	100	100	86
Leval	0	37	8	26	11	0	12	0	5	0	4	0	0	15
S.C.	55	10	0	16	11	6	12	25	7	0	9	0	0	10
1st	36	2	8	0	0	0	12	12	8	0	13	0	0	7
2d	36	76	17	68	44	12	59	38	29	50	30	0	100	46
3d	0	2	25	0	0	0	12	0	1	0	0	0	0	3
4th	0	6	8	63	11	0	0	12	4	0	4	0	0	8
5th	0	0	0	0	11	0	0	0	0	0	0	0	0	0
6th	0	1	0	0	0	59	0	0	0	0	0	0	0	3
7th	9	6	8	0	0	0	53	12	1	0	0	0	0	6
8th	0	0	0	0	0	0	0	25	0	0	0	0	0	1
9th	27	23	33	32	44	12	35	50	70	0	30	0	0	42

²¹⁰ See, e.g., *Kienitz*, 766 F.3d at 758 (criticizing the transformative use doctrine); *Campinha-Bacote*, 2015 WL 12559889, at *4 (stating that the transformative use term is “confusing”). The first opinion from a court within the Seventh Circuit that appears to put the transformative use doctrine in question came in 2002. *Ty, Inc.*, 292 F.3d at 518 (“The distinction between complementary and substitutional copying (sometimes—though as it seems to us, *confusingly*—said to be between ‘transformative’ and ‘superseding’ copies) is illustrated not only by the difference between quotations from a book in a book review and the book itself, but also by the difference between parody (fair use) and burlesque (often not fair use).”) (citations omitted) (emphasis added). But calling something confusing is not a clear renunciation of the concept. That renunciation comes across most clearly in *Kienitz*. See 766 F.3d at 758 (criticizing the Second Circuit’s emphasis on transformative use, while expressing the opinion that “[w]e think it best to stick with the statutory list”).

10th	0	0	0	5	0	0	0	0	1	0	0	0	0	1
11th	0	6	0	5	11	0	6	0	2	0	39	0	0	6
D.C.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Fed.	0	0	0	0	0	0	0	0	1	0	0	0	0	0
Other	0	7	0	0	0	6	6	12	3	0	4	0	0	4

Note: The values in this table are percentages. The row headings refer to the source cited. The column headings refer to the citing circuit.

Some circuits do not even have their own transformative use case law on which to rely. For instance, this study only includes eleven opinions from courts within the Eighth Circuit, all of which are district court opinions. Eight of these eleven opinions apply the transformative use concept, and only two of those eight cite Eighth Circuit case law when doing so. Furthermore, each of those citations is to a sole Eighth Circuit district court opinion; apparently the Eighth Circuit has never issued a transformative use appellate opinion worthy of citation by Eighth Circuit courts.²¹¹ Indeed, it is astonishing that in the nearly twenty-six years that this study spans, not once has the Eighth Circuit issued an appellate opinion applying the transformative use doctrine. Meanwhile, Fifth Circuit case law has never been cited in defining and applying the transformative use doctrine outside of the Fifth Circuit, and only once within it.²¹²

Hence, when modern courts discuss what “transformative use” means, they more often than not do so in the context of the *Campbell* definition, as further refined by courts within the Second and Ninth Circuits. This Article discusses in greater detail below data that help us better understand what exactly that means.²¹³ But for now, suffice it to say that the Second and Ninth Circuits dominate that discussion relative to other circuits, such as the Seventh, that may wish to have a greater say in the matter.

4. When Courts Use the Transformative Use Concept, What Role Does It Play?

a. Transformative Use by the Numbers

Having examined how frequently courts utilize transformative use and what sources they rely on in doing so, this Article now turns to some of the most important findings in this study: how frequently do transformative users win?

²¹¹ That sole district court opinion is *Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp. 2d 980 (D. Minn. 2003).

²¹² See *Peteski Prods., Inc. v. Rothman*, 264 F. Supp. 3d 731, 736 (E.D. Tex. 2017) (citing *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980)).

²¹³ See *infra* notes 214–243 and accompanying text.

Overall, a little over fifty percent of the opinions in this study found the use to be fair. Table 7 breaks this total out by the circuit—whether a district or appellate court—in which the opinion writer sits. Overall win rates in the Second Circuit are above average, while in the Ninth Circuit fair use win rates are below average. Astonishingly, defendants in the Fourth Circuit won their fair use arguments about three-quarters of the time.

Table 7. Overall Fair Use Win Rates by Circuit.

	Not Fair	Fair	Total	Win Rate
1st Cir.	8	7	15	46.67%
2d Cir.	46	64	110	58.18%
3d Cir.	9	7	16	43.75%
4th Cir.	8	23	31	74.19%
5th Cir.	11	6	17	35.29%
6th Cir.	15	16	31	51.61%
7th Cir.	12	11	23	47.83%
8th Cir.	6	5	11	45.45%
9th Cir.	75	62	137	45.26%
10th Cir.	8	4	12	33.33%
11th Cir.	17	15	32	46.88%
D.C. Cir.	3	0	3	0.00%
Fed. Cir.	1	2	3	66.67%
Total	219	222	441	50.34%

Of the opinions that utilized the transformative use concept, the win rate was slightly lower than the overall fair use win rate. Hence, the mere fact that an opinion discusses transformative use does not appear to increase a party's odds that the opinion's author will find the use to be fair. In fact, as the lower overall fair use win rate for transformative use opinions suggests, win rates in some circuits are actually lower when the court considers transformative use. Fair use win rates in the Second Circuit, for instance, are three percent lower when only looking at transformative use opinions.²¹⁴ Ninth Circuit rates of fair use success are also slightly lower when only considering opinions that apply the transformative use doctrine. Even the Fourth Circuit's high fair use win rate dips slightly when only examining those opinions that address the transformative use concept.

Hence, transformative use may be eating the fair use world by playing a role in increasingly more fair use opinions. But this study's data, on their face, do not suggest that when courts rely on the transformative use concept, the fair use outcome is favorably predetermined in any way. Table 8 below breaks

²¹⁴ In fact, when only looking at Second Circuit opinions that do not take transformative use into account, the win rate is a little over sixty-five percent.

down by circuit overall fair use win rates for only opinions that utilize the transformative use doctrine, regardless of whether the opinion found the use transformative.

Table 8. Overall Fair Use Win Rates by Circuit in Opinions That Consider Transformative Use.

	Trans. Use Opinions	Not Fair	Fair	Win Rate
1st Cir.	11	7	4	36.36%
2d Cir.	84	37	47	55.95%
3d Cir.	12	8	4	33.33%
4th Cir.	19	5	14	73.68%
5th Cir.	9	5	4	44.44%
6th Cir.	17	9	8	47.06%
7th Cir.	17	8	9	52.94%
8th Cir.	8	4	4	50.00%
9th Cir.	108	60	48	44.44%
10th Cir.	4	3	1	25.00%
11th Cir.	23	11	12	52.17%
D.C. Cir.	1	1	0	0.00%
Fed. Cir.	2	1	1	50.00%
Total	315	159	156	49.52%

None of this is to suggest, however, that the transformative use outcome is immaterial to the overall fair use determination. Far from it. Of the 315 opinions that made use of the transformative use concept, 152 found the use to be transformative (a little over forty-eight percent). Of these 152 opinions, 138 (nearly ninety-one percent) also found the overall outcome to be fair. In the two most important copyright circuits—the Ninth and the Second—the win rates for transformative users are even higher. In other circuits, the win rate for transformative users is one hundred percent. Table 9 below breaks these opinions out by the circuit in which the opinion writer sits.

Table 9. Win Rates by Circuit for Transformative Users.

	Trans. Use Opinions	Use Found Trans.	Use Found Fair	Win Rate for Trans. Users
1st Cir.	11	6	4	66.67%
2d Cir.	84	46	43	93.48%
3d Cir.	12	4	4	100.00%
4th Cir.	19	13	13	100.00%
5th Cir.	9	4	3	75.00%
6th Cir.	17	6	5	83.33%
7th Cir.	17	9	8	88.89%
8th Cir.	8	4	4	100.00%
9th Cir.	108	49	45	91.84%

10th Cir.	4	1	1	100.00%
11th Cir.	23	9	7	77.78%
D.C. Cir.	1	0	0	N/A
Fed. Cir.	2	1	1	100.00%
Total	315	152	138	90.79%

Relatedly, parties that lose the transformative use inquiry rarely win the fair use inquiry. Of the 161 such opinions, only sixteen defendants (about ten percent) emerged victorious on fair use overall. These win rates for defendants were low regardless of whether the opinion came from a district or appellate court judge, though this study's data suggest appellate courts were slightly more likely to deem a use fair even if the use was not transformative.

b. Regression Results

While these win rates are interesting in their own right, this study also includes regression analysis to better isolate which fair use factors and subfactors appear to have the most significant role in influencing fair use outcomes. Table 10 below provides the regression results when examining overall fair use outcomes as a function of the four statutory fair use factors. Essentially, this table shows which of the fair use factors appears to be the most influential in determining fair use outcomes. Similar to previous studies, it shows that outcomes for factors one, three, and four exhibit statistically significant relationships with the overall fair use outcome, while factor two does not.²¹⁵ As with previous studies, factor four, with the largest odds ratio and coefficient value, appears to exert the strongest influence on fair use outcomes, though factors one and three appear to have made up some ground.²¹⁶ In fact, contrary to previous studies, in this study's model factor three even slightly outpaces factor one in its overall relationship to fair use outcomes.²¹⁷

²¹⁵ See, e.g., Beebe, *supra* note 9, at 586 (stating that factor two has very little impact on the outcome of the fair use test); Sag, *supra* note 15, at 77 (stating that the nature of the work, the second factor, did not appear to have any influence in predicting the outcome of fair use).

²¹⁶ See, e.g., Beebe, *supra* note 9, at 586 (“[T]he first and fourth factors are shown each to exert an enormous amount of influence on the outcome of the test, with the fourth very much in the driver’s seat.”); Liu, *supra* note 15, at 181 (“[F]actor one and factor four highly correlate with fair use outcome.”). *But see* Netanel, *supra* note 10, at 743–44 (“Data regarding judicial treatment of the fourth factor in general further supports the conclusion that the market paradigm no longer asserts a hold on fair use case law.”).

²¹⁷ See, e.g., Beebe, *supra* note 9, at 586 (stating that factors one and four, compared to the other factors, appear to have the largest influence on a fair use outcome, at least at a macro level); Liu, *supra* note 15, at 181 (stating that factor one has a larger correlation with a fair use outcome than factor three).

Table 10. Logistic Regression of the Outcome of the Fair Use Defense as a Function of the Four Statutory Factors in 441 Dispositive Opinions.²¹⁸

	Odds Ratio*	Coefficient	Standard Error	Z Value	p-value
Intercept	1.694	0.527	0.463	1.139	0.255
Factor 1	8.229	2.108	0.371	5.674	0.000
Factor 2	1.857	0.619	0.378	1.637	0.102
Factor 3	9.228	2.222	0.588	3.777	0.000
Factor 4	13.406	2.596	0.428	6.058	0.000

***Boldface** denotes statistical significance at the 0.05 level.

But as Beebe has previously noted, analyzing fair use outcomes at this level of abstraction may not actually explain much in terms of what drives those outcomes.²¹⁹ For instance, though factor four appears to be the most influential on overall fair use outcomes, Beebe has rightly pointed out that judges rarely actually make factual findings under factor four.²²⁰ Instead, judges often synthesize their findings under the first three factors when deciding whether factor four favors fair use.²²¹ Thus, because factor four often functions as a quasi-conclusion of the court's reasoning under the earlier fair use factors, it is not terribly surprising that outcomes for factor four, more than any other factor, often prove to be the best predictor of overall fair use outcomes.

So which factors actually drive fair use outcomes? Beebe, in his earlier study, makes the case that examining each factor's subfactors helps get us closer to the truth, in part because doing so moves us away from high levels of abstraction to the court's actual findings under each factor.²²² He then finds that factor one's subfactors are the most influential in terms of predicting fair use outcomes.²²³ And of those factor one subfactors, he finds that when a court invokes the transformative use subfactor, it exerts near dispositive force on not only factor one's resolution, but on the fair use outcome more generally.²²⁴

²¹⁸ For logistic regression models, the closer the Pseudo R² value is to 1, the better the model is in explaining the observed variation. Hence, the Pseudo R² value of 0.887 for this regression suggests high statistical reliability. Furthermore, the model accurately classified over ninety-seven percent of the observations.

²¹⁹ Beebe, *supra* note 9, at 586.

²²⁰ *Id.* at 621.

²²¹ *Id.*

²²² *See id.* at 594 ("Having established . . . a macro view of the section 107 test and the factors that structure it, I seek . . . to look within the factors themselves to determine which subfactor considerations drive the outcomes of the factors, and through these factor outcomes, the outcome of the overall test.").

²²³ *Id.* at 595. As a reminder, factor one's most typical subfactors include assessing whether the defendant's use is commercial or noncommercial, whether the use is transformative, and whether the defendant used the work in bad faith. *Id.*

²²⁴ *Id.*

This study's data confirm some of these earlier findings, while also expanding on them. First, this study's regression results, the remainder of which are presented in Appendix A, confirm that transformative use outcomes have a statistically significant relationship to overall fair use outcomes.²²⁵ This study's results also show that the transformative use-fair use relationship is stronger than the relationships that other factor one subfactors have with the overall fair use outcome.²²⁶ Put simply, these statistical results show that fair use outcomes tend to follow transformative use outcomes more than any other factor one subfactor. And because factor one's subfactors are the most significant in the overall fair use inquiry in terms of impact, these findings further cement the transformative use doctrine's status as leader of the subfactor pack.²²⁷

Beyond this, we also tested whether transformative use outcomes exhibited statistically significant relationships to outcomes for factors one, three, and four. This is useful to know because, as discussed above, how courts resolve each of these factors appears to play an important role in how courts resolve the overall fair use question.²²⁸ Hence, determining which subfactors have the strongest relationships to each of these factors' outcomes also better elucidates the role that transformative use plays in fair use doctrine more generally.

Again, this study's regression results in Appendix A provide additional evidence in support of the argument that transformative use is eating the world of fair use. Transformative use outcomes exhibit a statistically significant relationship to outcomes for factors one, three, and four, each of which plays a major role in determining fair use outcomes.²²⁹ And the transformative use doctrine's role in influencing outcomes for each of these factors appears to be greater than any of the other factor one subfactors, traditionally thought of as the most significant fair use subfactors.²³⁰ This all means that outcomes for factors one, three, and four tend to follow the transformative use doctrine's lead more than outcomes for any of the other factor one subfactors.

In light of these findings, it is worth stressing again that a court's mere invocation of the transformative use concept does not appear to predetermine

²²⁵ See *infra* app. A.

²²⁶ Although this study's results show that the good faith/bad faith inquiry has a statistically significant coefficient, the fact that this inquiry is so rarely applied means that this statistic is somewhat meaningless.

²²⁷ See, e.g., Beebe, *supra* note 9, at 595 (displaying the empirical results of the subfactor analysis and showing that factor one's subfactors have the most influence).

²²⁸ See *id.* at 621 ("In practice, judges appear to apply section 107 in the form of a cognitively more familiar two-sided balancing test in which they weigh the strength of the defendant's justification for its use, as that justification has been developed in the first three factors, against the impact of that use on the incentives of the plaintiff.").

²²⁹ See *supra* tbl.8.

²³⁰ Beebe, *supra* note 9, at 595.

the transformative use or fair use outcomes. But these findings provide substantial evidence supporting the contention that however a court answers the transformative use inquiry is vitally important to how the court will decide fair use's most important factors and the fair use outcome more generally. For litigants, therefore, winning the transformative use fight is paramount. And as these data show, in modern courts that fight is nearly always present.

c. Stamping Revisited

The transformative use doctrine's hegemony in the overall fair use inquiry appears to be true despite a lack of "stamping," as Beebe calls it.²³¹ In other words, this study's data confirm that although a finding of transformative use appears to have a significant relationship to whether the use is ultimately fair (and on resolution of factors one, three, and four as well), a finding of transformative use does not always dictate outcomes on these other factors. Hence, courts tend to call the factors as they see them, while still affording significant weight to transformative use in determining overall whether the use is fair.

Be that as it may, another metric this study tracked is how often courts consider different factors and subfactors when resolving other factors within the broader fair use inquiry. For instance, although transformative use outcomes may not strongly predict outcomes for factor two, how frequently do courts discuss transformative use within their factor two analyses? What about factors three and four? Overall, how often do courts discuss each of the factors and most important subfactors within their discussion and resolution of the others?

We thought this metric was important to track for several reasons. First, inter-factor analysis is how the Supreme Court in *Campbell* instructed future courts to carry out their fair use discussions.²³² Despite this, previous studies have not specifically tracked how often these inter-factor discussions occur.

Second, occurrences of inter-factor analysis suggest stamping by another name. In fact, though courts may call the factors as they see them in terms of overall factor outcomes, courts often explicitly note in their discussions of the various factors the influence of one or another "outside" factor.²³³ For instance, courts often decide a particular factor is not fair, but note within that discussion that that determination does not matter much because other fac-

²³¹ *Id.* at 588–89.

²³² *See Campbell*, 510 U.S. at 578–79 (applying transformative use as a subfactor under factor one).

²³³ *See, e.g., Kane v. Comedy Partners*, 2003 WL 22383387, at *5 (S.D.N.Y. Oct. 16, 2003) (stating that because the use was transformative, if "factor [two] favors plaintiff, it is without much force"); *Gaylord v. United States*, 85 Fed. Cl. 59, 70 (2008) (implying that factor three's weight in the overall analysis was less due to the transformative nature of the use).

tors outweigh it.²³⁴ This type of discounting occurs frequently in the context of factors two and three when courts deem the use transformative; courts concede that one or the other factor weighs against fair use, but then explicitly note that neither carries much weight overall because of the transformative nature of the use.²³⁵ Courts also sometimes determine a particular factor is fair, and as part of that determination, they indicate that some other fair use factor outside of the particular factor under discussion influenced that determination.²³⁶

Finally, this metric is also important to track because it helps substantiate (or disaffirm) previous studies' claims about the roles different factors play.²³⁷ For instance, as discussed previously, Beebe in his earlier study claims that factor four is largely a place where courts synthesize their analyses of the previous three factors.²³⁸ This claim, if true, helps explain why factor four so strongly correlates with overall fair use outcomes—if factor four truly is where courts summarize their previous findings under the first three factors, then factor four should nearly always align with the overall fair use outcome.

This study's data provide some substantiation to these claims. For instance, Table 11 below shows that in about fifty-eight percent of the opinions, the court discussed factor one considerations within the context of its factor four discussion. The table also shows that courts discussed factor three considerations in a little over twenty-five percent of factor four discussions. Factor two considerations, unsurprisingly, came up in a little less than three percent of factor four discussions. In total, nearly sixty-five percent of the opinions involved the court discussing factors one, two, or three considerations (or some combination thereof) in the context of their factor four discussions. Hence, this study's data confirm that, more than any of the other factors, courts do in fact often use factor four as a space in which to discuss other factors in resolving factor four (and fair use) questions.

²³⁴ See, e.g., *Kane*, 2003 WL 22383387, at *5 (affording little weight to factor two's outcome in favor of the plaintiff because the defendant's use was transformative); *Gaylord*, 85 Fed. Cl. at 69 (explaining that "[a]lthough [plaintiff's work] is creative, indicating that the second fair use factor weighs in favor of Plaintiff, this Court must give the second factor limited weight in the fair use analysis" because of "the transformative nature of [defendant's work]").

²³⁵ See, e.g., *Kane*, 2003 WL 22383387, at *5 (discounting the weight afforded to factor two due to the transformative nature of the use); *Gaylord*, 85 Fed. Cl. at 70 (strongly indicating under its analysis of factor three that, though disfavoring fair use, factor three's weight in the overall analysis was less due to the transformative nature of the use).

²³⁶ See, e.g., *Sofa Entm't, Inc. v. Dodger Prods., Inc.*, 782 F. Supp. 2d 898, 906 (C.D. Cal. 2010) (deciding factor one favored the defendant in part because the amount of copying—seven seconds of a film—was limited, a concern that courts typically address under factor three).

²³⁷ See, e.g., Beebe, *supra* note 9, at 586 (stating that the first and fourth factors appear to have the most influence on the test, at least at a macro level); Netanel, *supra* note 10, at 743–44 (indicating that the fourth factor has recently experienced a decline relative to factor one's importance).

²³⁸ Beebe, *supra* note 9, at 621.

Table 11. Frequency with Which Each Factor and Factor One Subfactors Affect Resolution of Other Fair Use Factors.

	Factor 1	Factor 2	Factor 3	Factor 4
Factor 1 (Total)	100.00%	23.36%	55.56%	57.6%
Transformative Use	71.43%	16.78%	41.72%	37.87%
Commercial Use	90.23%	4.99%	17.23%	18.59%
Preamble	55.33%	2.04%	3.85%	24.26%
Parody	11.56%	4.99%	6.12%	6.35%
Bad Faith	16.10%	0.00%	0.23%	0.00%
Factor 2	4.76%	100.00%	3.63%	2.72%
Factor 3	29.25%	3.4%	100.00%	25.17%
Factor 4	17.91%	6.8%	12.24%	100.00%

What becomes equally clear when examining these data, however, is that courts also frequently engage in inter-factor analysis outside of factor four. Factors three and four, for instance, show up somewhat frequently in courts' factor one discussions. In fact, courts discuss factor three considerations slightly more frequently in the context of factor one than they do in the context of factor four (though factor four remains the most frequent venue for discussion of outside factors in general). Courts also discuss factor one considerations at a fair clip (about twenty-three percent of the time) in the context of factor two, though this study's data show that factor two is not a typical place for courts to discuss factors three and four considerations. Overall, factor four remains the predominant area in which courts engage in inter-factor syntheses. But factors one and three, and to a lesser extent factor two, also sometimes prove to be fertile grounds for courts to discuss other fair use factors in resolving them.

Importantly for this study's purposes, the data also show that the transformative use concept affects resolution of "non-native"²³⁹ fair use factors more frequently than any other tracked factor or subfactor (besides factor one's composite score, much of which is driven by the transformative use concept). This means that the transformative use doctrine bleeds into analyses outside of its home base (factor one) more frequently than any other factor or subfactor. Astonishingly, this is true even when opinions that omit discussion of the transformative use concept altogether are included—transformative use remains, by the percentages, the most frequent interloper in other factor discussions.

²³⁹ By this we mean factors and subfactors outside of factor one of the fair use test, where courts typically address the transformative use doctrine.

And when only looking at opinions that utilize the transformative use doctrine, it is astonishing how frequently the transformative use doctrine ends up influencing factor discussions outside of factor one. For instance, about fifty-three percent of this study's transformative use opinions discussed the transformative use concept within their factor four discussions, and close to sixty percent did so when discussing factor three. Furthermore, of the factors and subfactors studied, transformative use was the most frequent visitor to factor two discussions as well.²⁴⁰ Table 12 below lists the frequencies with which each of the fair use factors and factor one subfactors affected resolution of other fair use factors when considering only transformative use opinions.

Table 12. Frequency with Which Each Factor and Factor One Subfactors Affect Resolution of Other Fair Use Factors, Transformative Use Opinions Only.

Influencing Factor	Factor 1	Factor 2	Factor 3	Factor 4
Factor 1 (Total)	100.00%	28.89%	69.21%	65.71%
Transformative Use	100.00%	23.49%	58.41%	53.02%
Commercial Use	90.16%	6.03%	21.90%	21.27%
Preamble	60.95%	1.90%	4.44%	24.13%
Parody	14.92%	6.67%	7.62%	7.62%
Bad Faith	17.46%	0.00%	0.32%	0.00%
Factor 2	5.08%	100.00%	3.49%	2.54%
Factor 3	37.46%	3.17%	100.00%	29.84%
Factor 4	19.68%	5.40%	14.29%	100.00%

Notably, these data indicate that factor three may be more influential in how courts resolve the remaining fair use factors than factor four, which commentators have traditionally viewed as one of the most important in the overall fair use calculus.²⁴¹ Unsurprisingly, factor two appears to play a quite limited role in influencing resolution of the other fair use factors. As explored below, this result is not because factor two considerations are irrelevant, but rather

²⁴⁰ It is important to note that when we say the opinions discussed the transformative use term within these other factor discussions, they often did so implicitly by, for instance, using the definition of transformative use within those discussions, or referring back to their transformative use discussion under factor one, even if they do not explicitly use the term again.

²⁴¹ See NIMMER & NIMMER, *supra* note 1, § 13.05[A][4] (stating that the fourth factor is the most salient factor in the fair use inquiry). This is largely based on the fact that the Supreme Court, at one time, explicitly said the fourth factor was the most important factor. See Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) (“This [fourth] factor is undoubtedly the single most important element of fair use.”).

because other factors within the fair use test already address those considerations more effectively.²⁴²

Hence, not only does transformative use appear to play a significant role in determining overall fair use outcomes, it is also the factor that shows up the most frequently (and by a significant margin) in how courts decide the other fair use factors. The presence of transformative use in these other factor discussions may not predetermine their outcome by “stampeding” results.²⁴³ But its frequent presence does suggest that the transformative use concept is helping shape those discussions, and fair use outcomes generally, more than any other fair use factor.

5. Are Certain Types of Uses More Likely to Be Found Transformative?

This final Subsection considers yet another important transformative use question: what exactly does the term mean? While we may have a better sense of what sources courts rely on in defining the term and how often transformative users win their cases, the transformative use concept remains difficult to corral. Indeed, this difficulty is one of the primary complaints with the doctrine.²⁴⁴

In his earlier study, Sag attempted to better predict fair use outcomes by assessing the characteristics of uses that would have been known to litigants pretrial.²⁴⁵ A large part of his study thus focuses on identifying particular types of uses that are more likely to be found fair.²⁴⁶ He uses “creativity shift” as a proxy for transformative use, which he defines as when a defendant uses the plaintiff’s creative copyrighted work for an informational purpose, or vice versa (i.e., the defendant uses the plaintiff’s informational work for a creative purpose).²⁴⁷ He finds that when defendants use copyrighted works for such fundamentally different purposes, courts tend to find that those uses are fair.²⁴⁸

In his study, Sag thus relies on one prevalent meaning of transformative use—a shift in purpose.²⁴⁹ This study, however, goes beyond this finding and assesses other characteristics of uses that may be relevant to transformative use

²⁴² See *infra* notes 319–335 and accompanying text.

²⁴³ Beebe, *supra* note 9, at 588–93.

²⁴⁴ See NIMMER & NIMMER, *supra* note 1, § 13.05[A][1][b] (discussing the difficulty in ascertaining the meaning of what constitutes transformative use).

²⁴⁵ Sag, *supra* note 15, at 47, 49.

²⁴⁶ *Id.* at 74–75.

²⁴⁷ *Id.* at 58.

²⁴⁸ *Id.* at 74.

²⁴⁹ *Id.* at 58. It should be noted that Sag was fully aware that “creativity shift” is only a partial proxy for transformative use. See *id.* at 76 (“The positive and significant coefficient associated with [the creative shift variable] shows that . . . this proxy measure for transformative use makes a finding of fair use more likely.”).

and fair use questions. We thus gathered a number of additional data in hopes of better understanding what courts mean when they use the transformative use term. These include data about whether the use involved altering the original work with new expression, using the work in a new context, and a shift in medium between the original work and the purported fair use.

First, what role, if any, does altering the original work with new expression play? Some have argued that courts should limit the transformative use doctrine to situations where the defendant actually alters the original work.²⁵⁰ For instance, if a party uses a copyrighted photo as part of a montage but otherwise leaves the photo intact, some believe such uses should be ineligible for a transformative use finding because the purported fair user did nothing to alter the original work itself.²⁵¹ Yet courts routinely note that merely altering a copyrighted work with new expression does not necessarily make a use transformative.²⁵² A sequel to a movie is a clear example of altering the original copyrighted work with new expression that would not automatically qualify as a transformative use.²⁵³ Instead, such a use would typically qualify as making a derivative work, one of the core rights of copyright holders.²⁵⁴

This study thus investigates what role altering the original work with new creative expression plays. Do courts frequently find unaltered uses of works to be transformative and fair? And does altering an original work with new creative expression even help a party's transformative use and fair use chances?

The data provide some insights to these questions. Of the 315 transformative use opinions, eighty-six involved uses where the defendant altered the

²⁵⁰ *TCA Television Corp. v. McCollum*, 839 F.3d 168, 180 (2d Cir. 2016) (“In sum, even if, as the district court concluded, [the work in contention] is a ‘darkly comedic critique of the social norms governing a small town in the Bible Belt,’ and even if the Play’s purpose and character are completely different from the [original] . . . that, by itself, does not demonstrate that defendants’ use . . . was transformative of the original work.”) (citation omitted); *NIMMER & NIMMER*, *supra* note 1, § 13.05[B][6] (“Although defendant’s usage was funny, the humor was an achievement belonging to the original copyright owners, not to defendants who took advantage of it without transforming it. . . . [TCA Television Corp.] thus supplies a necessary course correction[.]”).

²⁵¹ *See TCA Television*, 839 F.3d at 180 (explaining that even if the defendants’ purpose was distinct from the original’s purpose, it does not inherently make the use transformative); *NIMMER & NIMMER*, *supra* note 1, § 13.05[B][6] (praising the court’s refusal in *TCA Television Corp.* to find a transformative use because the defendants “took advantage of [the original] without transforming it”).

²⁵² *See, e.g., Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013) (“A secondary work may modify the original without being transformative.”); *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 143 (2d Cir. 1998) (“Although derivative works that are subject to the author’s copyright transform an original work into a new mode of presentation, such works . . . take expression for purposes that are not ‘transformative.’”).

²⁵³ *See, e.g., Salinger v. Colting*, 641 F. Supp. 2d 250, 267–68 (S.D.N.Y. 2009), *vacated on other grounds*, 607 F.3d 68 (2d Cir. 2010) (finding a sequel to *Catcher in the Rye* to be a derivative work of the same).

²⁵⁴ *See id.* (finding the sequel to not be transformative and, instead, an infringing derivative work).

original work with new creative expression. To be clear, this category only includes uses where the party actually made alterations to the original work; it does not count uses that left the copyrighted work unaltered, even if the use occurred in a different context or in conjunction with new creative expression. Of these eighty-six opinions, fifty-six found the use to be transformative (sixty-five percent), and forty-six of these fifty-six found the use fair (eighty-two percent). Thus, though altering the original work with new expression may not be necessary to a finding of transformative use and fair use, it often seems to be sufficient.

Of the 229 transformative use opinions where the defendant failed to alter the original work with new creative expression, ninety-six of these (forty-two percent) still found the use to be transformative, and ninety-two of those ninety-six opinions found the overall outcome to be fair (nearly ninety-six percent). Hence, while altering the original with new expression may in some cases aid defendants in their fair use quests, many defendants who fail to alter the original work with new expression still come out on top.

Using copyrighted works in new contexts is another piece of data we collected in hopes of better understanding what courts mean by the transformative use term. We defined uses involving a new context broadly, covering any use that went beyond mere replication of the copyrighted work in the same medium or for the same purpose. For example, posting a news article online verbatim for purposes of discussion would qualify as a use in a new context, as would altering the Mona Lisa by adding a mustache and beard to the painting.

We defined this category broadly to assess how much of a difference a mere change in venue makes. Based solely on anecdotal statements in the fair use case law, it is difficult to tell. For instance, courts frequently stress the new context in which the defendant placed the copyrighted work in finding uses to be transformative and fair.²⁵⁵ In an important Second Circuit case, the court relied on just such reasoning in finding that a party's use of unaltered artwork in a historical book about the Grateful Dead was transformative and, accordingly, a fair use.²⁵⁶ Yet courts also routinely conclude that a mere change in medium, on its own, is insufficient to guarantee a favorable fair use outcome.²⁵⁷ So which is it? Or, perhaps, is it both?

²⁵⁵ See, e.g., *Perfect 10 v. Amazon.com*, 508 F.3d at 1165 (finding Google's use of thumbnail images as part of its search engine transformative in part because the use involved using the images in a new context); *Wall Data Inc. v. L.A. Cty. Sheriff's Dep't*, 447 F.3d 769, 778 (9th Cir. 2006) (indicating that uses are transformative when defendants use plaintiffs' copyrighted works "in a different context such that the plaintiff's work is transformed into a new creation").

²⁵⁶ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 606–07, 611 (2d Cir. 2006).

²⁵⁷ See, e.g., *Castle Rock Entm't*, 150 F.3d at 135, 143 (holding the use was not transformative despite the change in medium of famous lines and scenes from *Seinfeld* put into text in a trivia book);

The data suggest that a mere change in context, on its own, does not answer the transformative use question decisively. Of the 315 transformative use opinions, 274 included using the copyrighted work in a new context (eighty-seven percent). Of these, 148 found the use to be transformative, while 124 did not.²⁵⁸ Based on these percentages alone, it seems that using a copyrighted work in a new context may provide a slight transformative use edge, though the substantial number of transformative use losers in this category suggests that that edge is just that: slight, if at all.

On the other hand, the forty-one transformative use opinions that did not involve use in a new context almost all resulted in the court finding the use to be non-transformative (ninety percent). And of these thirty-seven opinions, only two ultimately found the use to be fair (about five percent). Hence, while changing contexts may not ensure a favorable transformative use and fair use finding, failing to use a copyrighted work in a new context does appear to put defendants at a significant transformative use and fair use disadvantage.

What about parties that both alter the original with new expression and use the original work in a new context? Based on this study's data, a party's transformative use odds only went up slightly when combining these two metrics rather than solely looking to whether the party altered the original with new creative expression (seventy percent transformative use win rate versus a sixty-five percent transformative use win rate). Furthermore, the overall fair use win rates for both groups were identical.

Another metric this study tracked is the medium in which the original work appeared and whether that medium changed with the alleged fair use. For instance, in many cases parties copied copyrighted music into a film, or parties took traditional print media (such as books), digitized that media, and made it available online. Tracking this metric helps assess whether courts are more likely to consider uses of some media transformative and determine whether a change in medium relates to the transformative use inquiry. One might expect it to do so because "transforming" copyrighted materials might reasonably include situations in which the copyrighted material goes from one medium to the other. Note that shifts in medium are a subset of our earlier category of uses in a new context.

The medium categories used in coding the opinions are similar to those used by Beebe: non-virtual, two-dimensional textual material (such as books); non-virtual, two-dimensional images, graphics, illustrations, and other artwork (such as photographs); technological media, including software and Internet

Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998) (holding that the unaltered re-transmission of a radio broadcast through a different medium was not a transformative use).

²⁵⁸ Two of the 315 cases did not definitively determine whether the use was transformative.

technology; videos (including traditional television, film, and movies); music; performances; and three-dimensional artwork (such as sculptures).²⁵⁹ Note that in some cases, the original copyrighted work overlapped several mediums.

Similar to Beebe's study, the most frequent original medium for copyrighted works in this study's opinions was non-virtual, two-dimensional textual material (a little over thirty-two percent), followed by non-virtual, two-dimensional imagery (nearly twenty-four percent).²⁶⁰ Thus, non-virtual texts and imagery combined accounted for a little over fifty-five percent of the copyrighted works at the center of our opinions' fair use fights.

As one might expect, technological mediums accounted for a higher percentage of uses than in previous studies. Although only about twenty percent of the study's opinions concerned works that were originally embodied in a technological medium, nearly forty-two percent of these opinions concerned technological uses of the copyrighted works, including digitizing and making available online a variety of traditional print media. In total, about forty-seven percent of the opinions implicated technological mediums, a dramatic increase from Beebe's earlier study.²⁶¹ Furthermore, from 2006 to 2017, this trend accelerated significantly, with a little over fifty-seven percent of the opinions implicating technological uses of copyrighted works.

Scholars in the past have called for some form of "technological fair use" in order to make fair use more responsive to technological advances.²⁶² Does the transformative use paradigm already help update fair use by incorporating technological considerations within its ambit? This study's summary figures do not clearly answer this question. Of the 315 opinions in this study that utilized the transformative use concept, 149 (forty-seven percent) implicated technological uses of the copyrighted material. This percentage does not clarify much about how courts may or may not be utilizing the transformative use concept to address technological changes; it merely tells us that in nearly half of all transformative use opinions, courts end up having to apply the transformative use paradigm to facts implicating technological uses of the copyrighted work. Outside of transformative use, as mentioned above, nearly half (and over half more recently) of this study's opinions implicated technological mediums. This means that, in general, courts frequently must apply fair use to technological

²⁵⁹ See Beebe, *supra* note 9, at 572–73 (categorizing court opinions based upon the various mediums the courts considered).

²⁶⁰ See *id.*

²⁶¹ See *id.* at 573 (finding that only about twenty-two percent of opinions between the years 1988 and 2005 involved technology).

²⁶² Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 801, 804 (2010); see also Clark D. Asay, *Intellectual Property Law Hybridization*, 87 U. COLO. L. REV. 65, 105–06 (2016) (proposing another form of technological fair use that explicitly takes into account patent law considerations).

mediums, with and without the transformative use concept in tow. While a more technologically focused fair use doctrine may still make sense, it seems clear from this study's data that courts are having plenty of practice applying fair use (and transformative use) in technological contexts.

At a very basic level, courts do not appear to favor technological uses of copyrighted works when deciding whether the use is transformative. For instance, only about forty-three percent of the transformative use opinions that involved technological uses of copyrighted works resulted in a finding of transformative use. Of these transformative uses, about ninety-four percent ultimately found the use to be fair. In contrast, of the 166 opinions in which the copyrighted work was neither originally in a technological medium nor later used in one, courts found fifty-three percent of these to be transformative and about eighty-nine percent of these transformative uses to be fair use overall. Hence, because a finding of transformative use is so strongly associated with a finding of fair use overall, it actually appears that non-technological uses may have the upper hand, at least percentage-wise, in terms of being deemed fair.

Of the 315 transformative use opinions in this study, 148 included a shift in medium (e.g., from print to video), while 167 did not. About fifty-two percent of these no-medium-shift opinions found the use to be transformative, while only about forty-five percent of the opinions where a medium shift did occur found the use to be transformative. Thus, at least based on these summary figures, a shift from one medium to another does not appear to result in a higher likelihood that the court will find the use to be transformative. In fact, some of our regression results presented in Appendix A suggest a negative relationship; if anything, medium shifts may predict a greater likelihood of a non-transformative use finding.

Overall, it remains difficult to say what types of alterations or new uses courts are likely to deem transformative. Altering copyrighted works with new expression appears to be associated with an improvement in a party's fair use chances, though doing so does not appear essential. Using a work in a new context seems nearly necessary but insufficient for a finding of transformative use. Medium shifts and technological uses also fall far short of guaranteeing a transformative use victory—in fact, they may push in the opposite direction. And the regression analysis performed using these factors as independent variables on transformative use outcomes confirms this messy state of affairs. Although some of these factors exhibit statistically significant relationships to transformative use outcomes, the regression models suffered from a significant amount of statistical unreliability.²⁶³ Hence, though the transformative use doc-

²⁶³ See *infra* app. A.

trine is increasingly crucial to the fair use doctrine more generally, it remains an elusive concept to pin down.

III. IMPLICATIONS

A. Has Transformative Use Gone Too Far?

One question worth revisiting in light of this Article's findings is whether courts have taken the transformative use concept too far, as some have suggested.²⁶⁴ In other words, if transformative use is eating the world, is that a bad thing?

Fair use, after all, is meant to be a flexible standard that courts adapt to whatever the circumstances merit, all in an effort to bring about the most just results.²⁶⁵ Neither the doctrine's codification in 1976 nor any particular fair use decision was meant to stymie that flexibility and the doctrine's ongoing evolution.²⁶⁶ But if transformative use is dominating the overall fair use analysis, as this Article suggests is happening to a greater degree than previously believed, that reality could be preventing flexible application of fair use in ways that would otherwise yield net social benefits.

Consider, for instance, application of the fair use doctrine in the software context. Software is functional in nature; the reuse of software typically impli-

²⁶⁴ See *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“We’re skeptical of *Cariou*’s approach [that placed emphasis on transformativeness], because asking exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works.”); *NIMMER & NIMMER*, *supra* note 1, § 13.05[A][1][b] (“Many of the [opinions utilizing the doctrine] are conclusory—they appear to label a use ‘not transformative’ as a shorthand for ‘not fair,’ and correlatively ‘transformative’ for ‘fair.’ Such a strategy empties the term of meaning.”); *Adler*, *supra* note 36, at 563 (“[T]he move to the transformative analysis, thought by many to be the solution to fair use woes, has actually made things worse for the visual arts.”); *Pitino*, *supra* note 14, at 26 (“[T]he predominately accepted transformative use test heavily favors secondary users at the expense of copyright holders.”).

²⁶⁵ See *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1258–59 (11th Cir. 2014) (“[T]he fair use inquiry is a flexible one. The four statutory factors provide courts with tools to determine—through a weighing of the four factors in light of the facts of a given case—whether a finding of fair use is warranted in that particular instance.”); *Northland Family Planning Clinic, Inc. v. Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 982 (C.D. Cal. 2012) (“The case-by-case analysis resists bright-line determinations and the resulting decisions inevitably represent a sort of rough justice.”).

²⁶⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“Congress meant § 107 ‘to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way’ and intended that courts continue the common-law tradition of fair use adjudication.”); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (“The [Section 107] drafters 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.”); H.R. REP. NO. 83, at 32 (1967) (“Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”).

cates the very same computing functions that the original software was designed to perform.²⁶⁷ Under some interpretations of the transformative use concept, reuse of software is, consequently, almost never transformative because those reuses are for the “same intrinsic purpose” as the original software—to perform the only computing function of which the software is capable.²⁶⁸ In fact, in a recent high-profile copyright infringement suit between Oracle and Google, Oracle made this precise point in arguing that Google’s reuse of some of its software was not transformative because Google used that software to perform the same computing functions for which the software was designed.²⁶⁹

But accepting such an argument would mean that third parties can almost never rely on the fair use defense in the software context.²⁷⁰ This is because, as we have previously seen, if a party loses the transformative use argument, they are likely to lose the overall fair use question as well, particularly in the modern era.²⁷¹ Hence, to the extent that transformative use has come to stifle flexible application of the fair use doctrine in key contexts such as software, that reality may end up, ironically, stifling the very creativity that the doctrine is meant to help facilitate. This may be particularly so because fair use has become an important part of enabling innovative reuses of software.²⁷²

Amy Adler has highlighted the modern visual arts world as another context where the dominance of the transformative use inquiry may have negative repercussions.²⁷³ In that world, modern visual artists often copy the entirety of works of others, in part as a rejection of the concept of “newness” or any real stability in artistic meaning.²⁷⁴ The famous appropriation artist Richard Prince is the quintessential example of this type of artist—some of his recent artwork,

²⁶⁷ Asay, *supra* note 13, at 14.

²⁶⁸ See, e.g., Opening Brief & Addendum for Oracle America, Inc. at 29–37, Oracle Am., Inc. v. Google Inc., (N.D. Cal. Feb. 10, 2017) (Nos. 17-1118, 17-1202), 2017 WL 679347 (arguing that the use was not transformative because there was no alteration or change in expression from the original) (emphasis in original removed).

²⁶⁹ *Id.* The Supreme Court recently agreed to review that argument. Adi Robertson, *The Supreme Court Will Hear Google and Oracle’s Nearly Decade-Long Copyright Fight*, THE VERGE (Nov. 15, 2019), <https://www.theverge.com/2019/11/15/20946398/oracle-google-java-copyright-lawsuit-trial-supreme-court-request> [<https://perma.cc/7JH3-FA2K>].

²⁷⁰ See Asay, *supra* note 13, at 14 (explaining that Oracle’s argument, if wholly accepted, would mean software reuse can rarely—if ever—be transformative due to software’s functional nature).

²⁷¹ Netanel, *supra* note 10, at 717 (“The erratic nature of U.S. fair use is frequently raised in opposition to legislative proposals to adopt a fair use defense to give courts a more flexible tool to accommodate new technological uses that fall outside narrow statutory exceptions.”).

²⁷² Pamela Samuelson & Clark D. Asay, *Saving Software’s Fair Use Future*, 31 HARV. J.L. & TECH. 535, 537 (2018) (“Fair use in the digital age has come to play an important role in balancing the interests of first- and second-generation creators in software as well as other creative fields.”).

²⁷³ Adler, *supra* note 36, at 563.

²⁷⁴ *Id.*

for example, involves copying others' Instagram posts verbatim in their entirety and simply increasing the posts' scale.²⁷⁵ His only other alteration is to include emoji-filled and often crude comments beneath the actual Instagram post.²⁷⁶ Prince (and other similar artists) may have a claim to transformativeness in such cases; after all, he does include some commentary to otherwise identical artwork.²⁷⁷ And perhaps appropriation is the message itself.²⁷⁸ But courts have often found that simply adding some material to otherwise unaltered copies of works does not make a use transformative.²⁷⁹ Indeed, the modern transformative use inquiry focuses on the second comer's added expression or meaning in using the copyrighted material, the "very criteria that contemporary art rejects" in the act of appropriation.²⁸⁰ Hence, to the extent modern courts rely on typical understandings of the transformative use concept, modern visual artists face significant, and perhaps insurmountable, hurdles in winning fair use cases.²⁸¹

Of course, one solution to such issues is for courts to take the *Campbell v. Acuff-Rose Music, Inc.* Court at its word. As that Court explained, uses need not be transformative to be fair.²⁸² Courts thus have leeway to emphasize other factors in the software, modern art, and other contexts so that fair use defenses can succeed in them. There are some examples where courts rely on such flexibility in rendering fair use decisions.²⁸³ But it takes a confident, brave court to do so. Indeed, taking the *Campbell* Court at its word also means acknowledging the importance of the transformative use concept in the vast majority of cases, because according to the Court, transformative uses are precisely the type of uses most likely to help achieve copyright law's goals.²⁸⁴ And as the

²⁷⁵ Hannah Jane Parkinson, *Instagram, an Artist and the \$100,000 Selfies—Appropriation in the Digital Age*, THE GUARDIAN (July 18, 2015), <https://www.theguardian.com/technology/2015/jul/18/instagram-artist-richard-prince-selfies> [<https://perma.cc/527X-32JZ>].

²⁷⁶ *Id.*

²⁷⁷ *Id.*; see *Campbell*, 510 U.S. at 579 (explaining that transformative use "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

²⁷⁸ Parkinson, *supra* note 275.

²⁷⁹ See, e.g., *L.A. Time v. Free Republic*, 1999 WL 33644483, at *10 (C.D. Cal. Nov. 8, 1999) ("Adding commentary to a verbatim copy of a copyrighted work or portions thereof does not transform the work.").

²⁸⁰ Adler, *supra* note 36, at 563.

²⁸¹ See *id.* at 562–64 (arguing that the transformative use paradigm does not work well in the contemporary art context because of contemporary art's norms).

²⁸² *Campbell*, 510 U.S. at 579.

²⁸³ See, e.g., *Kienitz*, 766 F.3d at 758 (arguing against focusing on transformative use in fair use analyses); *Sony Comput. Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 602–03 (9th Cir. 2000) (beginning its fair use analysis with the second factor, therewith implicitly signaling that factor's greater importance in software reuse cases).

²⁸⁴ *Campbell*, 510 U.S. at 579.

data show, increasingly more courts have followed this admonition in rendering their fair use decisions.²⁸⁵ Thus, to the extent that courts mechanically apply the transformative use concept in contexts where it may not make sense to do so, the transformative use concept may end up stymieing the very creativity it is meant to enable.

On the other side of the ledger, of course, is the argument that courts' widespread adoption of the transformative use concept has actually facilitated a significant amount of socially beneficial creativity.²⁸⁶ In fact, the concept's application in a variety of new contexts is precisely the basis for some parties' complaints that courts have taken the transformative use concept too far.²⁸⁷ Hence, though instances may arise where an undue focus on the transformative use concept may prevent uses that would otherwise provide overall social benefits, by and large emphasizing transformative uses may still prove to be fair use's best bet.

For instance, today we take Internet search engines for granted. But their ongoing survival depends in large part on courts' earlier findings that their use and display of copyrighted materials was a fair use.²⁸⁸ These fair use determinations, furthermore, depended in large part on the courts' flexible application of the transformative use concept in a new technological environment.²⁸⁹

Since that time, courts have continued to apply the transformative use concept flexibly in enabling innovative technological uses of copyrighted materials.²⁹⁰ The Second Circuit, for instance, only recently found Google's copying of tens of millions of books into its Google Books service to be trans-

²⁸⁵ See *supra* tbls.1–3.

²⁸⁶ *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the Comm. on the Judiciary*, 113th Cong. 8 (2014) (statement of Professor Peter Jaszi, Washington College of Law, American University) (stating that the transformative use doctrine has helped the courts adequately implement the fair use statute); see Netanel, *supra* note 10, at 771 (pointing to greater consistency in fair use case law since the transformative use concept's ascendancy).

²⁸⁷ See, e.g., Adler, *supra* note 36, at 563 (critiquing the transformative use's application to contemporary art); *Where We Stand*, Authors Guild v. Google, AUTHORS GUILD, <https://www.authorsguild.org/where-we-stand/authors-guild-v-google/> [<https://perma.cc/J4JN-VLCX>] (critiquing the "expansion of fair use" in light of the Second Circuit's ruling that Google's copying of millions of books verbatim into its Google Books project was transformative because of its significant public service).

²⁸⁸ See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1154, 1165 (9th Cir. 2007) (finding Google's display of thumbnail versions of images located on third-party sites in response to user searches constituted fair use); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815, 820 (9th Cir. 2003) (finding search engine's display of copyrighted images in response to user queries was fair use).

²⁸⁹ See *Perfect 10 v. Amazon.com*, 508 F.3d at 1163 ("We must be flexible in applying a fair use analysis."); *Kelly*, 336 F.3d at 818 ("We must balance these [fair use] factors in light of the objectives of copyright law, rather than view them as definitive or determinative tests.").

²⁹⁰ See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207, 213, 229 (2d Cir. 2015) (stating that Congress intended the fair use statute to be flexible, and finding the use of Google Books transformative and, ultimately, fair); *Authors Guild v. HathiTrust*, 755 F.3d 87, 97, 101 (2d Cir. 2014) (concluding that the digitization of various copyrighted works was transformative and fair use).

formative and overall a fair use.²⁹¹ The use was transformative because the Google Books service allowed for uses of the works that the original author had not envisioned, including data mining and digital searching.²⁹² The Second Circuit came to this conclusion despite the reality that authors lost out on a large sum of money for those digital copies—in fact, the parties had negotiated several iterations of a settlement agreement over nearly a decade that would have paid authors a significant amount of money for Google’s use of the works.²⁹³ But courts rejected those settlement attempts for a variety of reasons, and ultimately the Second Circuit found that Google’s use was transformative and fair.²⁹⁴

Indeed, modern courts’ focus on the transformative use concept may be a positive development overall, despite whatever problems that emphasis entails, primarily because it means the fourth factor receives less deference in how courts apply fair use. More colloquially, transformative use’s ascendance and the fourth factor’s demise may be a classic example of addition by subtraction. The transformative use concept itself may not be the perfect vehicle for ensuring that fair use helps copyright achieve its intended purposes. But it is certainly a better vehicle than the fourth factor such that deemphasizing the fourth factor yields positive results in its own right.

The fourth factor, after all, has been notoriously difficult to apply.²⁹⁵ In fact, as mentioned earlier, courts often simply use it as a space to summarize their analyses of the preceding three factors; in most cases, courts make few actual factor four findings.²⁹⁶ Making findings under the fourth factor can be difficult in part because of an oft-noted circularity problem.²⁹⁷ This problem lies in the reality that any uncompensated use can be said to harm the work’s market because the copyright holder loses out on a fee for that use.²⁹⁸ And while many courts acknowledge that this type of reasoning should not dictate resolution of the fourth factor, it is difficult to say what else should.²⁹⁹ Courts

²⁹¹ *Authors Guild v. Google*, 804 F.3d at 207, 229.

²⁹² *Id.* at 209, 216, 229.

²⁹³ *Where We Stand*, *supra* note 287.

²⁹⁴ *Authors Guild v. Google*, 804 F.3d at 229; *see Where We Stand*, *supra* note 287 (summarizing the various hurdles to the settlement agreement including various opposition and court rejections).

²⁹⁵ *See Beebe*, *supra* note 9, at 620–21 (“Ultimately, the paradox of the fourth factor is that it is everything in the fair use test and thus nothing.”).

²⁹⁶ *Id.* at 621.

²⁹⁷ Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW & CONTEMP. PROBS. 185, 190–91 (2007); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 38–41 (1997).

²⁹⁸ *See, e.g., Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 928–30 (2d Cir. 1994) (discussing the pitfalls of this type of circular reasoning under the fourth factor).

²⁹⁹ *See, e.g., id.* at 931 (pointing out the “vice of circular reasoning” under the fourth factor); *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1347, 1357–59 (Ct. Cl. 1973) (rejecting

sometimes import a presumption based on the first factor—if the court considers the use to be commercial under the first factor, then the court presumes market harm unless the defendant rebuts that presumption.³⁰⁰ But that presumption suffers from circular reasoning itself, particularly because, as courts have noted, “no man but a blockhead ever wrote, except for money.”³⁰¹ Or under the fourth factor, courts sometimes look to whether the uncompensated uses concern traditional or likely to be developed markets for the copyrighted works.³⁰² But that inquiry also suffers from a circularity problem, because copyright owners would seem to be able to guarantee victories under the fourth factor simply by demanding license fees for any use of their work.³⁰³ In fact, only recently a court engaged in this type of circular reasoning in resolving a high-profile fair use case against the defendants.³⁰⁴

Hence, given the difficulty courts face in applying the fourth factor, displacing its earlier predominance in fair use doctrine with the transformative use concept is arguably a positive development. This is not to say that the transformative use concept does not suffer from its own set of issues, some of which have been noted above.³⁰⁵ But its deficiencies appear to be less dire than those that have long afflicted the fourth factor.

Furthermore, addressing the transformative use concept’s deficiencies, though not an easy fix, is certainly within courts’ discretion. As discussed above, the *Campbell* Court made clear that a finding of transformative use, while important, is not necessary for a finding of fair use.³⁰⁶ Thus, courts are explicitly permitted to emphasize other factors where the context warrants.

In the software context, the functional nature of software would seem to warrant a greater focus on factor two considerations in the overall fair use

plaintiff’s argument that it will suffer market harm from defendant’s photocopying of its articles because such photocopying will take away subscribers who would otherwise pay for a subscription to plaintiff’s periodicals).

³⁰⁰ See, e.g., *Shell v. City of Radford*, 351 F. Supp. 2d 510, 513 (W.D. Va. 2005) (quoting *Ass’n of Am. Med. Colls. v. Cuomo*, 928 F.2d 519, 525 (2d Cir. 1991)) (“If the intended use is for commercial gain, that likelihood [of market harm] may be presumed.”).

³⁰¹ *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 142 (2d Cir. 1998) (quoting *Campbell*, 510 U.S. at 584).

³⁰² *HathiTrust*, 755 F.3d at 96; *Am. Geophysical Union*, 60 F.3d at 928–29.

³⁰³ Cf. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007) (noting that risk-averse users often seek licenses for uses of intellectual property that the law may not actually require).

³⁰⁴ *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 179–80 (2d Cir. 2018) (finding that the fourth factor favored plaintiffs because they had already developed a market with respect to defendant’s use of their copyrighted works).

³⁰⁵ See Adler, *supra* note 36, at 563 (stating that the transformative use doctrine does not adequately serve the nuances of contemporary art); Pitino, *supra* note 14, at 26 (arguing that the transformative use doctrine has unjustly displaced the other important fair use factors).

³⁰⁶ *Campbell*, 510 U.S. at 579.

equation.³⁰⁷ As discussed earlier, this factor typically carries little weight in fair use analyses.³⁰⁸ But the functional nature of software has traditionally meant that it enjoys a narrower scope of copyright in general, and emphasizing factor two considerations would allow courts to more effectively implement that tenet of copyright law in software fair use cases.³⁰⁹ Greater attention to factor two in software reuse cases would not necessarily always weigh in favor of fair use; one can imagine situations where a second comer copies the more expressive components of a software program for reasons unrelated to functionality, which copying would generally weigh against a finding of fair use under factor two. But in situations where a follow-on user copies functionally dictated elements of a software program, emphasizing that reality under factor two would allow courts to do greater fair use justice in software fair use cases.

In the modern arts context, as Adler argues, redirecting attention away from transformative use to other factors may also be warranted.³¹⁰ For instance, given the norms of contemporary art,³¹¹ focusing on whether the appropriation art functions as a market substitute for the original under factor four, rather than attempting to decipher new meaning in the use as part of the transformative use inquiry, may be a better approach in deciding contemporary art fair use cases.

Alternatively, courts may continue to emphasize the transformative use inquiry but simply apply it flexibly rather than mechanically. The transformative use standard that the *Campbell* Court articulated, after all, is not a definition.³¹² Instead, it is a broad standard that seems capable of encompassing all sorts of uses, so long as those uses do not “merely supersede[] the objects of the original creation . . . [but] instead add[] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”³¹³ Adler notes that courts have developed several different approaches to applying this definition, none of which work well in the contemporary art context.³¹⁴ But it need not be so. By recognizing the norms and practices of

³⁰⁷ See Asay, *supra* note 13, at 15 (“Software’s functional nature situates software farther from the core of intended copyright protection than other types of works.”).

³⁰⁸ See Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 572 (2008) (discussing the typical irrelevance of factor two in fair use decisions); *supra* tbl.10 (showing factor two’s limited impact).

³⁰⁹ Samuelson & Asay, *supra* note 272, at 561.

³¹⁰ See Adler, *supra* note 36, at 563 (“[T]he move to the transformative analysis, thought by many to be the solution to fair use woes, has actually made things worse for the visual arts. This is because the transformative inquiry asks precisely the wrong questions about contemporary art.”).

³¹¹ *Id.* at 562–63.

³¹² See *Campbell*, 510 U.S. at 579 (providing a general list of aspects a transformative work may embody such as new purpose or message).

³¹³ *Id.* (internal quotations removed).

³¹⁴ Adler, *supra* note 36, at 584.

contemporary art, courts could almost certainly find room for contemporary art fair uses within the *Campbell* Court's broad transformative use standard.

In fact, courts have already flexibly applied the transformative use concept in other contexts, particularly technological ones.³¹⁵ It thus remains crucial that courts not become too wedded to particular applications or understandings of the transformative use standard itself. Of course, the United States' precedential tradition makes it tempting for courts to confine the transformative use inquiry to the dustbin of whatever historical uses courts have previously considered to be transformative. Indeed, because *Campbell* endorsed the transformative use concept in the context of a parody, courts attempting to apply the transformative use concept may have difficulty applying it with confidence outside of the parodic context.³¹⁶ Yet that is precisely what courts must do for the transformative use concept to continue to serve its intended purpose within the overall fair use doctrine.³¹⁷

In sum, although transformative use may be eating the world of fair use, that trend is arguably better than courts relying on the fourth factor and its commerciality compatriot from factor one. Furthermore, there are ways for courts to mitigate whatever ills a focus on transformative use entails. First, Supreme Court precedent provides courts with leeway to emphasize other factors within the fair use inquiry when the context warrants it.³¹⁸ Second, courts should continue to flexibly apply the transformative use standard rather than reducing that standard to a more limited definition that was never intended.

B. Reforming Fair Use

Another implication from this study's findings is that simplifying the fair use doctrine by eliminating several of its factors may be warranted. In particular, eliminating factors two and four from the analysis may help streamline the doctrine without affecting fair use's overall effectiveness. In fact, doing so may help courts to apply the fair use doctrine more effectively.

For instance, this study's data suggest that factor two, the nature of the work, seems to play only a modest role in the fair use inquiry. Factor two out-

³¹⁵ See, e.g., *Authors Guild v. Google*, 804 F.3d at 207, 214, 229 (stating that "[t]he word 'transformative' cannot be taken too literally" and finding the use of Google Books transformative); *HathiTrust*, 755 F.3d at 97, 101 (concluding that the digitization of various copyrighted works was transformative).

³¹⁶ For a review of the different transformative use approaches courts take, see Murray, *supra* note 15, at 270–73, 291–92.

³¹⁷ Cf. Leval, *supra* note 162, at 1111–12 (coining the transformative use term and arguing that the standard is key to enabling fair use to serve its goals of promoting creativity under copyright law).

³¹⁸ See *Campbell*, 510 U.S. at 577–78 ("The task is not to be simplified with bright-line rules, for the [§ 107] statute, like the doctrine it recognizes, calls for case-by-case analysis. . . . All [factors] are to be explored, and the results weighed together, in light of the purposes of copyright.").

comes do not predict overall fair use outcomes, nor does factor two appear to explicitly affect resolution of the other factors much at all.³¹⁹ In fact, factor two explicitly affected resolution of other fair use factors less than any other factor or subfactor examined.³²⁰ Other studies have similarly found that factor two outcomes failed to strongly correlate with overall fair use outcomes, thus suggesting a lack of effect.³²¹ However, when testing the significance of factor two's dominant subfactors—whether the work is more creative than factual and the work's publication status—Beebe found that these subfactors seemed to significantly affect fair use outcomes.³²² This finding suggests factor two's concerns are not irrelevant in how courts assess fair use, which stands in some contrast to others' claims that factor two is inconsequential and thus should be abolished.³²³ This Article also proposes eliminating factor two, but not because factor two is irrelevant. Instead, this Article suggests that factor two's concerns are better (and already are) addressed in other parts of the fair use inquiry.

As we assessed how frequently each of the factors affects resolutions of the others, for instance, it became apparent that courts often address the concerns factor two is meant to safeguard under other fair use factors.³²⁴ And arguably, these other fair use factors address the second factor's concerns more effectively than factor two itself. This may help explain Beebe's counterintuitive finding that factor two seems irrelevant overall, even though its primary subfactors do not.³²⁵ Consequently, eliminating factor two would simplify the fair use analysis without undermining—and perhaps better serving—factor two's purported role.

To illustrate: factor two largely focuses on ensuring that creative expression receives a narrower scope of fair use, while factual and functional works receive a broader scope.³²⁶ Yet factor three already asks courts to assess the amount and substantiality of the copyrighted work that the second comer has taken.³²⁷ In fact, in applying the third factor, courts often consider whether the

³¹⁹ See *supra* tbls.10–12 and *infra* app. A (showing factor two's limited impact).

³²⁰ See *supra* tbls.11–12 and *infra* app. A.

³²¹ Beebe, *supra* note 9, at 610–15; Liu, *supra* note 15, at 189–93.

³²² Beebe, *supra* note 9, at 611, 613–14.

³²³ See Liu, *supra* note 308, at 572–73 (arguing for elimination of factors two and three from the fair use analysis).

³²⁴ See *supra* tbl.12.

³²⁵ Beebe, *supra* note 9, at 610–15. Though we have no statistical basis for this supposition, it seems intuitive that if factor two outcomes diverge from factor two subfactor outcomes and those subfactor outcomes seem to actually affect resolution of fair use overall, then perhaps those subfactor outcomes are reflected in other factor outcomes that also correlate with overall fair use outcomes.

³²⁶ *Campbell*, 510 U.S. at 586 (“This factor calls for recognition that [creative] works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”).

³²⁷ 17 U.S.C. § 107(3) (2018).

second comer has copied qualitatively important expression versus simply elements of the copyrighted work undeserving of much protection (such as facts or other non-expressive portions of the work).³²⁸ The “heart” of a work, indeed, is often the most expressive, creative portions of the work.³²⁹ Hence, factor three’s application typically already addresses the most important concerns factor two is meant to address: whether the user has taken highly creative portions of the work. This may be why factor two typically does not end up mattering much—because factor three already effectively addresses factor two’s primary concerns.

At times factor one’s transformative use subfactor also ends up helping address the concerns that factor two is meant to protect. For instance, in some cases courts focus as part of that inquiry on whether the defendants used the copyrighted material for its original expressive purposes or, instead, for a transformative purpose that primarily relied on the factual or informational components of the copyrighted work.³³⁰ Indeed, when defendants repurpose copyrighted materials for news reporting, comment, criticism, and other favored uses, courts often take into account as part of the transformativeness inquiry factor two’s concern of protecting the underlying expression while allowing for informational uses of the content.³³¹ Factor one is thus also sometimes a space where courts get at the real concerns underlying factor two.

Furthermore, factor two’s presence in the fair use analysis may do more harm than good because it asks courts to assess the nature of the work as a whole, rather than the nature of the portion of the copyrighted work that the second comer has actually taken (which, again, the first and third factors often end up addressing).³³² The possible harm of factor two’s focus is to distract courts from the more relevant inquiry concerning what the second comer actu-

³²⁸ See, e.g., *Harper & Row*, 471 U.S. at 564–66 (finding against the defendant under the third factor because it took the most expressive parts of the copyrighted work, rather than just the information underlying that expression); *Gaylord v. United States*, 85 Fed. Cl. 59, 69–70 (2008) (assessing under factor three “the amount and substantiality of the portion used”).

³²⁹ *Harper & Row*, 471 U.S. at 541–42, 564–65 (identifying the expressive portions taken as the “heart” of a biography about Gerald Ford).

³³⁰ See, e.g., *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009) (finding under the first factor that the defendant’s use was transformative in part because use of the copyrighted “works was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism,” or, in other words, factual or functional uses). For a discussion of the different strands of non-expressive uses, see Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1610–24 (2009).

³³¹ See, e.g., *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1175 (9th Cir. 2012) (finding duplication of secret celebrity photos in a magazine not to be transformative because that duplication copied creative expression that was unnecessary to reporting the facts underlying the photos).

³³² Compare 17 U.S.C. § 107(2) (asking courts to assess the nature of the entire copyrighted work), with *id.* § 107(3) (asking courts to look specifically to the amount which was used in comparison to the entire work).

ally took and how they used it.³³³ Of course, given the second factor's near statistical irrelevance, at least at a macro-level,³³⁴ it seems this distraction rarely leads courts down many rabbit holes. But factor two's presence nonetheless leads courts to clutter their fair use analyses with mostly irrelevant tidbits relating to the nature of the work overall, rather than the creativity relating to the portion of the work the second comer actually used. Given factors one and three's focus on this latter issue, judicial economy would be well served with factor two's removal.

This proposal, furthermore, is consistent with the admonition above that courts should give more weight to factor two in the software context due to software's functional nature.³³⁵ Because courts can and often do already address the primary concerns factor two is meant to tackle under factors one and three (and arguably, more effectively), courts could simply stress factors one and three in software fair use cases if factor two were formally eliminated.

Factor four also deserves strong consideration for an early retirement. This is because factors one (and several of its subfactors) and three also already address the concerns factor four is meant to protect. And again, arguably they do so more effectively than factor four itself. For instance, factor four's focus on whether the use harms "the potential market for or value of the copyrighted work" largely boils down to whether the use substitutes for the original work in the marketplace.³³⁶ In assessing whether a particular use "supersedes the objects of the original" work, the transformative use subfactor already essentially asks whether the use acts as a market substitute for the original work.³³⁷ Indeed, this overlap is precisely why so many courts hark back to the transformative use concept when analyzing factor four, as the *Campbell* Court did itself.³³⁸

Factor one also already includes a "commercial use" inquiry, which asks whether the user is exploiting the copyrighted work without paying the "cus-

³³³ Cf. Liu, *supra* note 308, at 572 (arguing for elimination of factors two and three because allowing courts to focus on factors one and four exclusively would help courts better achieve the purpose of the fair use doctrine).

³³⁴ See *supra* tbls. 10–12 and *infra* app. A.

³³⁵ See 17 U.S.C. § 107(2) (directing courts to assess "the nature of the copyrighted work"); Asay, *supra* note 13, at 15 (explaining that because software's nature is functional, copyright law should not protect it as much as creative works).

³³⁶ 17 U.S.C. § 107(4); see *Campbell*, 510 U.S. at 590–93 (discussing how transformative uses are less likely to function as market substitutes for the original, in which case market harm for the original is more difficult to infer).

³³⁷ *Campbell*, 510 U.S. at 569, 590–93.

³³⁸ *Id.* at 590–93; see, e.g., *Authors Guild v. Google*, 804 F.3d at 223–24 (discussing transformative use's role in factor four considerations).

tomary price.”³³⁹ This inquiry thus gives courts additional opportunities to assess whether the use supplants a traditional market for the copyrighted work, thereby harming the market for it. In fact, as with the transformative use concept, this subfactor’s connection to the concerns factor four is meant to address often leads courts to import this subfactor into their fourth factor analyses as well.³⁴⁰ Indeed, as we have seen, factor one’s subfactors, such as transformativeness and commerciality, often end up dictating the results under factor four.³⁴¹ For these and related reasons, Beebe has characterized factor four as vacuous in terms of having its own standards.³⁴²

Factor three’s focus on “the amount and substantiality” of the copyrighted work that the defendant took also already helps address factor four’s concerns. Uses of quantitatively or qualitatively insignificant portions of the copyrighted work, for instance, are less likely to result in market harm, as courts often recognize in their fair use analyses.³⁴³ On the other hand, using significant portions of copyrighted works verbatim is more likely to result in market harm because such uses are more likely to function as a substitute for the original work.³⁴⁴ Thus, factor three also provides coverage for the issues factor four is meant to highlight.

If mere duplication of efforts were the end of the story, that may not be enough to justify eliminating factor four. But like factor two, factor four’s duplicative efforts also carry the possibility of real detriment. One such harm of retaining duplicative inquiries across the factors is that what may be a relatively straightforward analysis under factors one and three becomes more confused under factor four. This is so for reasons already discussed; factor four’s lack of clear standards tempts courts to resort to circular reasoning in analyzing whether the use harms the copyrighted work’s market.³⁴⁵ And courts at least

³³⁹ *Harper & Row*, 471 U.S. at 562 (“The crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”).

³⁴⁰ *See, e.g., Monge*, 688 F.3d at 1181 (explaining it would be reasonable to presume market harm under the fourth factor because the defendant’s use was commercial in nature); *Nat’l Rifle Ass’n of Am. v. Handgun Control Fed’n of Ohio*, 15 F.3d 559, 561–62 (6th Cir. 1994) (finding that the use was noncommercial and, therefore, a presumption of market harm did not apply).

³⁴¹ *See supra* tbls.11–12.

³⁴² Beebe, *supra* note 9, at 620–21.

³⁴³ *See, e.g., Sarvis v. Polyvore, Inc.*, 2015 WL 5934759, at *9 (D. Mass. Aug. 24, 2015) (“[T]he record belies any significant copying of the copyrighted art images. Consequently, the degree of market harm, part of the fourth factor, is de minimus.”).

³⁴⁴ *See, e.g., Perfect 10, Inc. v. Google, Inc.*, 2010 WL 9479060, at *13 (C.D. Cal. July 30, 2010) (reviewing the opposite situation in concluding that thumbnail versions of images did not substitute for full-sized versions of the same images, and thus resolving factor four in favor of the defendants).

³⁴⁵ *See Loren, supra* note 297, at 38 (“In light of the growing number of lower court precedents, copyright owners may now more easily convince courts that, because they were not paid the fees they demanded, they were legally injured.”).

sometimes give in to that temptation.³⁴⁶ While factor one's commerciality prong also presents opportunities for circular logic, the transformative use concept helps temper that inclination. Furthermore, case law over the years has already done much to reign in the first factor's commerciality prong so that the possibility of courts grossly misapplying it going forward seems less likely.³⁴⁷

In sum, another implication from this study's findings is that streamlining the fair use inquiry may be warranted. While factors two and four may point to legitimate concerns under the overall fair use rubric, other factors already address those concerns and arguably do so more effectively. Relying on them exclusively thus seems warranted.

CONCLUSION

This Article has empirically examined the role transformative use plays in the overall fair use inquiry. The results confirm some commentators' worst fears: transformative use is eating the fair use world. First, modern courts apply the transformative use doctrine more than ever before. And second, this study's data show that the vast majority of modern courts use the transformative use concept throughout the fair use inquiry as the dominant means of resolving various fair use questions.

But this development should be celebrated, not mourned. That celebration, however, comes with a few caveats. First, transformative use and the fair use doctrine must remain flexible constructs. Some contexts, such as software and modern art, may be ill-suited for typical understandings of transformative use and fair use. In such settings, courts must show adaptability in applying these doctrines. Second, though we believe the transformative use concept's hegemony is overall a positive development in fair use jurisprudence, fair use still has room for improvement. In particular, removing factors two and four from the fair use inquiry would improve judicial economy without sacrificing those factors' concerns. This is because other fair use factors, such as the transformative use doctrine and factor three, can and often already do effectively address the concerns that factors two and four are meant to safeguard.

³⁴⁶ See, e.g., *Fox News Network*, 883 F.3d at 179–80 (finding in favor of plaintiffs under the fourth factor because plaintiffs already developed a market with respect to defendant's use of their copyrighted works); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1386–88 (6th Cir. 1996) (acknowledging that although the defendants claim it is circular reasoning, "there is no circularity in saying, as we do say, that the potential for destruction of this market by widespread circumvention of the plaintiffs' permission fee system is enough . . . to negate fair use") (internal quotations omitted).

³⁴⁷ See Netanel, *supra* note 10, at 736–42 (discussing the ascendance of the transformative use subfactor under the first factor and overall fair use case law, particularly between 2006 to 2010).

APPENDIX A

Regression Results

Table 13 shows that transformative use outcomes exhibit a statistically significant relationship to overall fair use outcomes, meaning that transformative use outcomes are a reliable predictor of fair use outcomes generally. Furthermore, as reflected by its high coefficient and odds ratio values, transformative use's relationship to fair use outcomes is stronger than that of any other factor one subfactor (the higher these values, the greater the variable's predictive capability is with respect to the dependent variable, which, in this case, is fair use outcomes).

Table 13. Logistic Regression of the Fair Use Test's Outcome as a Function of Factor One's Subfactors in 441 Dispositive Opinions.³⁴⁸

	Odds Ratio*	Coefficient	Standard Error	Z Value	p-value
Intercept	1.406	0.341	0.194	1.756	0.079
Commerciality	4.283	1.455	0.218	6.680	0.000
Preamble	4.565	1.518	0.282	5.384	0.000
Bad Faith	7.423	2.005	0.602	3.330	0.001
Trans. Use	8.904	2.186	0.252	8.674	0.000

***Boldface** denotes statistical significance at the 0.05 level.

Tables 14 to 15 below show that transformative use outcomes exhibit a statistically significant relationship to factors one and four outcomes. Furthermore, transformative use's relationship to factors one and four outcomes is stronger than that of any other factor one subfactor, as evidenced by its higher coefficient and odds ratio values.

Table 14. Logistic Regression of Factor One's Outcome as a Function of Factor One's Subfactors in 430 Dispositive Opinions.³⁴⁹

	Odds Ratio*	Constant	Standard Error	Z Value	p-value
Intercept	2.504	0.918	0.298	3.078	0.002
Commerciality	12.988	2.564	0.370	6.938	0.000
Preamble	16.219	2.786	0.444	6.269	0.000
Bad Faith	1.300	0.262	0.684	0.384	0.701
Trans. Use	19.595	2.975	0.380	7.831	0.000

***Boldface** denotes statistical significance at the 0.05 level.

³⁴⁸ The closer the Pseudo R² value is to 1, the better the model is in explaining the observed variation. The Pseudo R² value here, 0.614, indicates an acceptable level of statistical reliability. Furthermore, the model accurately classified about ninety percent of the observations.

³⁴⁹ The pseudo R² value for this model, 0.765, indicates an acceptable level of statistical reliability. Furthermore, the model accurately classified about ninety percent of the observations.

Table 15. Logistic Regression of Factor Four's Outcome as a Function of Factor One's Subfactors in 426 Dispositive Opinions.³⁵⁰

	Odds Ratio*	Coefficient	Standard Error	Z Value	p-value
Intercept	1.812	0.594	0.171	3.473	0.001
Commerciality	3.426	1.231	0.182	6.749	0.000
Preamble	2.665	0.980	0.221	4.436	0.000
Bad Faith	1.246	0.220	0.392	0.560	0.575
Trans. Use	4.436	1.490	0.192	7.741	0.000

***Boldface** denotes statistical significance at the 0.05 level.

Table 16 below provides similar findings with respect to factor three outcomes. We note that this model, based on tests of accuracy, appears to be the least reliable regression model of the three models testing transformative use's relationship to the individual fair use factor outcomes. Nevertheless, its results appear to be statistically significant.

Table 16. Logistic Regression of Factor Three's Outcome as a Function of Factor One's Subfactors in 366 Dispositive Opinions.³⁵¹

	Odds Ratio*	Coefficient	Standard Error	Z Value	p-value
Intercept	0.502	-0.690	0.162	-4.263	0.000
Commerciality	1.649	0.500	0.156	3.194	0.001
Preamble	2.362	0.859	0.223	3.848	0.000
Bad Faith	2.175	0.777	0.399	1.948	0.051
Trans. Use	3.526	1.260	0.192	6.562	0.000

***Boldface** denotes statistical significance at the 0.05 level.

Finally, Table 17 below presents the regression results testing whether medium shifts, uses in new contexts, and altering the original work with new expression reliably predict whether a court will find the use to be transformative. Our results show that each of these variables exhibits a statistically significant relationship with transformative use outcomes, including a negative relationship between medium shifts and a finding of transformative use (i.e., a shift in medium may actually predict a non-transformative use finding more often than not). It is important to note, however, that the relevant statistical

³⁵⁰ Although the Pseudo R² value for this regression is less than ideal at 0.44, previous studies addressing similar questions have accepted lower levels of reliability in reporting their results. See Beebe, *supra* note 9, at 595 (showing a Pseudo R² value of 0.425); Sag, *supra* note 15, at 74 (showing a Pseudo R² value of 0.073). Furthermore, this model accurately classified a little over eighty-six percent of the observations.

³⁵¹ Because of the relatively low Pseudo R² value for this regression (0.334), we urge caution in trusting this model's predictive capability. With that said, the model did exhibit an average classification accuracy of 81.4%.

indicators of this particular regression model suggest some skepticism in trusting the model's predictive capabilities.

Table 17. Logistic Regression of Transformative Use Outcomes as a Function of Medium Factors in 313 Dispositive Opinions.³⁵²

	Odds Ratio*	Coefficient	Standard Error	Z Value	p-value
Intercept	0.543	-0.610	0.292	-2.091	0.037
Medium Shift	0.513	-0.668	0.252	-2.644	0.008
New Context	3.782	1.330	0.282	4.712	0.000
New Expression	1.508	0.411	0.141	2.910	0.004

***Boldface** denotes statistical significance at the 0.05 level.

³⁵² Though the model accurately predicted about sixty-eight percent of the results, the model's Pseudo R² value was 0.116, which means that the model fit to the data is quite poor. Hence, though the results appear statistically significant, we urge caution in trusting this model's predictive capability.