

“Copyright and Copywron: Derivative Works V. Transformative Works”

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ABSTRACT

In this research paper, I want to go for an anatomization of precise nature of the relationship between a copyright owner’s exclusive right to prepare derivative works based on the copyrighted work and to determine the transformativeness factor which sheds light on whether an unconsented use of a copyrighted work is a fair use and therefore non infringing. This is with respect to the U.S. Copyright Law. An attempt to an exhaustive analysis of this relationship may help to clearly understand the nature of the transformativeness inquiry in fair use analysis, as well as the scope of this inquiry does as far as the derivative work right is concerned. I have done the analysis by studying some of the relevant appellate court opinions to see whether courts treat the fair use and derivative work issues as related, and if so how. Appellate courts view fair use transformativeness as distinct from any transformation involved in preparing a derivative work, and that in evaluating transformativeness the courts focus more on the purpose of a defendant’s use than on any alteration the defendant has made to the content of the plaintiff’s work. In the eyes of many, the “transformative” subfactor of the fair use analysis is expanding. Recent decisions such as *Cariou v. Prince* , *Seltzer v. Green Day* , and the Google Books line of cases have allegedly pushed the doctrine into new and problematic territory. Given the subfactor’s power in the aggregate fair use analysis and its strong parallels to the goals of copyright law, the scope of the transformativeness inquiry is critical to defining permitted uses under S.107. Part I deals with the basic introduction and history of the transformativeness sub factor. Part II focuses on recent copyright decisions and concludes that some cases have expanded the doctrine of transformativeness into new territory. Here some decisions seem to contradict the earlier made decisions. Part III ultimately deals with conclusion and suggestions.

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Key words-Anatomization,aggregate,sub factor,territory.transformativeness.

- **OBJECTIVE OF STUDY:**

METHODOLOGY:

The doctrinal method of research has been implemented in preparing this study, by referring to various secondary sources (Books, various journals and articles) for conforming to the requisites of the **Copyright in original and derivative works**.

RESEARCH QUESTION/RESEARCH ISSUE:

Whether copyright owner's exclusive right to prepare derivative works based on the copyrighted work and to determine the transformativeness factor which sheds light on whether an unconsented use of a copyrighted work is a fair use and therefore non infringing or not?

COPYRIGHT IN ORIGINAL AND DERIVATIVE WORKS

Have you ever thought about using a particular part or portion of a story or maybe any picture or artwork to develop something new or tried to build on something already established?If so, brace yourself for a potential ringside court session with the original author because your “something new” might be a derivative work!If I were to assign a symbol for derivative works,it would probably be a mockingbird.Though mockingbirds have been portrayed as innocent beings(with reference to kill a mocking bird of course)but a mockingbird is a mockingbird at the end of the day!Now on a serious note, before diving into the realm of derivative work and transformative work **one needs to be fundamentally clear on three basic concepts that is copyright,derivative work and transformative work**.Clarity on these three areas will form your base and will further help in understanding the highlighted issue.To begin with,what exactly is a copyright? **Copyright** in layman terms refers to a legal right created by the law of a country that grants the creator of an **original work** exclusive rights for its use and distribution.A **Derivative work on the other hand** is a **work** based on or derived from one or more already existing **works(original works)**. Common **derivative works** include translations, musical

arrangements, motion picture versions of literary material or plays, art reproductions, abridgments, and condensations of pre existing **works**.² A **Transformative** work on the other hand is a recent establishment which needs to be looked into in a more detailed manner. It is a possible justification that the use of a copyrighted work may qualify as fair use. It is a factor indicating the likelihood of fair use. For instance, if the Harry Potter series is an original work then the film adaptation of the series will be considered as a derivative work but the Harry Potter Encyclopedia will not be transformative work.³

HOW MUCH IS TOO MUCH?

THE POTENTIAL OVERLAP BETWEEN DERIVATIVE WORK AND TRANSFORMATIVENESS IN FAIR USE

Being able to foster derivative works is an undivided right of a copyright holder or owner. This adaptation right is often considered as the Herculean of all the exclusive rights in copyright, because the right to adapt and to modify allows the grantee the right to develop on a copyrighted work, and issues new copyrights that vest in the developer of the derivative work, subject to the rights in the already existing work.⁴ Although copyright law grants exclusive rights to the author, Fair use doctrine acts as a limitation or is an exception to this right and transformative work helps in determining whether a particular work will fall under the category of fair use or not. **Under 17 U.S. Code § 101: “A derivative work is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”.**⁵ The whole concept of transformation or doctrine of transformation was substantially shaped by the

² <https://www.copyright.gov/circs/circ14.pdf>

³ See Warner Bros. Entertainment Inc. V. RDR Books 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

⁴ See understanding the importance of derivative works :Finnegan.

⁵ See 17 U.S. Code § 101

1841 circuit court case, **Folsom V. Marsh**⁶ which is considered as the first “fair use” case in the United States. This particular case brought forward what Judge Joseph Story opined in elucidating four factors that are in use today, and were finally put in the **Copyright Act of 1976** as **17 U.S. Code § 101**. This holding efficiently inflated the scope of copyrightable subject matter potentially, by permitting derivative works to be considered one of the rights of the copyright holder or the owner. First, at that point of time when Upham had created his collection, abridgments of existing works did not violate copyright law by infringing it. Second, the court accepted the defendant's argument that uses could be fair in general, but out-rightly rejected the claim that this particular use was fair. Justice Story thus abolished the "abridgment doctrine", while establishing what has come to be known as the "fair use" doctrine. In this process, the court introduced four factors: the "nature and objects of the selections made" (today characterized as the "purpose and character of the use"); the "quantity and value of the materials used" (described today as two factors: the nature of the original work, and the amount taken); and "the degree in which the use may prejudice the sale, or reduce the profits, or override the objects, of the original work". Judge Story gathered these points in part from a body of English copyright law, as was common at that point of time. Over the next century and a half, *Folsom v. Marsh* was frequently cited for its discussion with respect to fair use and the evolution of the fair use doctrine. This doctrine was ultimately incorporated into the **1976 Copyright Act** as **17 U.S. Code § 101**. In **Campbell v. Acuff-Rose Music, Inc.**,⁷ the Supreme Court, in analyzing the statute's first fair use factor (“the purpose and character of the use”), said that: “The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.”⁸ This development of transformativeness subfactor comes along with a bunch of certain questions with respect to the scope of copyright owners derivative work right to control forms in which her work is transformed. Whether it is a positive trend or taxing and the foreseeability is very much

⁶ See *Folsom v. Marsh*, See *Folsom v. Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841)

⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)..

⁸ *Supra* at pg-6..

unresolved .The cause of worry is whether the transformativeness enquiry under the fair use doctrine has gone too far. Whether using it beyond a reasonable limit has led to the snookering of the concept. The anatomization work has been expanding gradually and this is critical in understanding the purpose behind introducing transformativeness and its apparent overtones on owners of copyrighted work. Fair use has been perceived under divergent lights. Some say that it is a restriction on the author's rights and some say that it the origin of something creative. There is a lack of clarity because there is no express definition of transformative work and absence of any clear boundary as to what can be said as a transformative work and what can not.No set parameters have been defined in this respect therefore it depends on cases to case inquiries. This adds to the uncertainty and fails to provide us a clear picture. It rather looks like chilly, foggy, winter morning with visibility levels at its worst. As Professor Paul Goldstein's treatise notes, "On principle, the rule [weighing transformativeness in favor of fair use] threatens to undermine the balance that Congress struck in section106(2)'s derivative rights provision to give copyright owners exclusive control over transformative works to the extent these works borrow copyrightable expression from the copyrighted work."⁹Even where there is no proper threshold, one of the core issues is figuring out what amounts to transformation. **Clean Flicks v. Soderbergh** involved a claim of infringement by motion picture copyright owners against businesses that produced and rented DVD copies of popular movies that had been "altered by deleting 'sex, nudity, profanity and gory violence.'"¹⁰It is a landmark case which tests what transformative means for derivative work and fair use. It sheds light on the potential interaction between the fair use transformativeness and the scope of derivative work right. The **key issue here was whether the editing of studios' films without any sanction to annihilate allegedly harmful or questionable subject matter for public distribution constituted fair use? The court held that** public distribution of edited versions of plaintiffs' films for the purpose of destroying objectionable content did not fall under the category of fair use. It ruled that the edited film versions were not transformative because there was no fresh substance added to the originals. It further held that the "amount and substantiality" factor weighed against a finding of

⁹ PAUL GOLDSTEIN, 2 GOLDSTEIN ON COPYRIGHT 12.49 (3d ed. 2005 & 2007 Supp.).

¹⁰ Clean Flicks of Colorado, LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1238 (D. Colo. 2006).

fair use because the movies were copied in their entirety for non-transformative use. The court, however, stated that this argument ignored the defendants' "right to control the content of the copyrighted work," and further commented that the manner or format of editing to make it more publicly acceptable depends on the target audience of the copyright owner." and also found that editing the versions as a form of comment or criticism was a public policy argument that was not appropriately raised in the copyright context. So basically fair use was not found in this case.¹¹ The decision made in this particular case indicates an inclination towards the narrowing scope of derivative work right because for a certain work to fall under the category of derivative work an additional condition has been added that is whether it is 'transformative' in fair use sense. Now this seems to be hampering the very purpose of the derivative work right granted to people. Now in order to understand this aspect we can look into some other cases focusing on the same issue. In **Castle Rock Entertainment v. Carol Publishing Group**¹², the plaintiff was the copyright holder and producer of each episode of the popular American sitcom *Seinfeld*. The court held that the nature of work in case of *Seinfeld* was fictional, and the second factor is inclined towards factual works. Fictional works normally enjoy greater copyright protection because of a greater degree of protectable content. The court's reasoning was that no major portion had been selected in order to go for a critique, and there was hardly any transformative use for the purposes of critique, so this weighed against defendants.¹³ The court thus appeared to expressly reject a view that any transformation involved in the preparation of a derivative work would necessarily count toward making that preparation a "transformative" use for purposes of fair use analysis. In the court's opinion fair-use transformativeness was seen as starkly distinct from the transformation that forms a derivative work, and saw the former as focused on the purpose of the use.¹⁴ Then in certain cases like 1) **Dr. Seuss Enterprises, L.P. v. Penguin Books** 2) **Micro Star v. FormGen Inc.** 3) **Greenberg v. National Geographic Soc'y** the court the court apparently did not view the transformation wrought by the defendant in creating the derivative work as even relevant to the analysis of whether the defendant's use was transformative for purposes of the

¹¹ U.S. Copyright Office Fair Use Index

¹² *Castle Rock Ent'mt, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998).

¹³ id

¹⁴ Columbia journal of law and the arts

first fair use factor, and certainly did not view the preparation of the derivative work as itself constituting transformativeness that weighed in favor of fair use.¹⁵ Then in **Greenberg v. National Geographic Soc’y** also the court no indication that the fact that the defendant had prepared a derivative work meant that the issue of transformativeness in factor one should weigh in favor of fair use. **Mulcahy v. Cheetah Learning LLC**, and **Ty, Inc. v. Publications International Ltd.** Also provide the same opinion. In sum, in cases in which the court found that an alleged infringer had violated—or could be found to have violated—the derivative work right, courts showed no inclination to treat the transformation involved in the preparation of the derivative work as “transformativeness” in analyzing the first fair use factor.⁴⁵ This gives us hint that, at least to date, **Campbell’s view** that transformative uses are qualified to a greater extent for fair use to contract the scope of the copyright owner’s derivative work right by seeing derivative works as necessarily, or even normally as transformative uses. Even where there was an apparent preparation of derivative work like in the case of **Zomba Enterprises Inc. V. Panorama Records Inc.** even though the defendant’s use fell within a derivative work category, the court did not find that the transformation involved in preparing the derivative work amounted to transformativeness for fair use analysis. So the court refused to recognize that the defendant’s work was a derivative made the defendant’s use transformative for fair use analysis. Only in **Suntrust**¹⁶ and **Leibovitz**¹⁷ did the court find that the defendant’s derivative work was a fair use and that the use was transformative, but that conclusion was just based in both cases principally on the critical, parodic (burlesque) nature of the use, and not merely on the defendant’s act of transforming content from the underlying original. But in cases where there was an unlikely preparation of derivative work such as in the cases of 1) **Bill Graham Archives v. Dorling Kindersley Ltd.**, 2) **Kelly v. Arriba Soft Corp.** 3) **Perfect 10, Inc. v. Amazon.com** the court concluded that the defendant’s use was transformative (and, indeed, in each case the court ultimately concluded that the defendant’s use was fair), and seemed oblivious to the fact that the defendant’s use in each case did not transform the content of the plaintiff’s work sufficiently to create a derivative work (if it transformed the content at all).⁸⁰ The cases discussed above with

¹⁵ id

¹⁶ Suntrust Bank v. Houghton Mifflin Co. 268 F.3d 1257 (11th Cir. 2001).

¹⁷ Leibovitz v. Paramount pictures corp 137 F.3d 109, 111-12 (2d Cir. 1998).

respect to the derivative works created by the defendant were not considered as transformative for fair use analysis, but these decisions stoutly suggest that the circuit courts view the question of transformativeness for fair use and the question of transformation in the preparation of derivative works under different lights . The apprehension indicated by observers that taking into account the transformativeness factor in fair use might affect the scope of the derivative work right appears so far not to have transpired yet.¹⁸

So the above mentioned cases reflect on the potential overlap and transformativeness in fair use and give us the opinion of the courts and their approach towards this issue.

WHAT IS TRANSFORMATIVENESS?

The bulk of the recent debate with respect to S.107 focuses its first factor and, in particular, a subfactor under it called “transformativeness” that is not expressly stated in the statute. There have been several attempts by the courts to characterize the transformativeness inquiry in many ways. The most common definition comes from **Campbell** , which borrowed it from earlier sources including **Folsom** and a highly influential article by **Judge Leval**.¹⁹**That definition states: The enquiry [under 107(1)] may be guided by the examples given in the preamble to 107, looking to whether the use is for criticism, or comment, or news reporting, and the like. The central purpose of this investigation is to see . . . whether the new work merely “supersede[s] the objects” of the original creation, . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.”**²⁰ Another notable definition has been provided by the Second Circuit, a test that asks whether “**the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of**

¹⁸ Columbia Journal of law and the arts

¹⁹ Pierre N. Leval, Toward a Fair Use Standard, 103 HARV. L. REV. 1105 (1990).

²⁰ Campbell, 510 U.S.

society.”²¹ However, courts are still at loggerheads, both in practice and in definition, about what qualifies as transformative.²² “The plethora of cases addressing[transformativeness] means there is no shortage of language . . . elucidating (or obfuscating) the meaning of transformation.”²³ Although the precise definition of transformativeness is debatable, it is clear that it has significant influence in modern fair use analysis,²⁴ and the transformativeness subfactor owes much of that prevalence to *Campbell v. Acuff-Rose Music*.²⁵ In *Campbell*, the Court characterized the transformativeness subfactor as “not absolutely necessary for a finding of fair use, [but] the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright [law].” By thus characterizing transformative works as residing “at the heart of the fair use doctrine,” the Court breathed significant life into the transformativeness inquiry. Transformativeness subsequently has grown into one of the two defining inquiries under 107.²⁶ And recent studies have confirmed what copyright devotees have suspected for years: whether a new work is transformative is a central, often dispositive, part of the fair use analysis under the scanner of most courts.²⁷ A central concept given the transformative uses is the idea that such uses frequently promote “the novelty copyright seeks to foster” and “are less likely, to negatively impact the original creator’s bottom line, because they do not just overrule the objects of the original creation and therefore are less

²¹ *Castle Rock Entm’t, Inc. v. Carol Publ’g. Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998)(quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

²² *Authors Guild v. Google, Inc.*, 804 F.3d 202, 216 n.18 (2d Cir. 2015), cert. denied, 2016 WL 1551263 (Apr. 18, 2016) (critiquing Seventh Circuit’s description of transformativeness); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (critiquing Second Circuit’s transformativeness analysis in *Cariou*), cert. denied, 135 S. Ct. 1555 (2015).

²³ *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1176 (9th Cir. 2013).

²⁴ *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 944 (4th Cir. 2013), as amended (Jan. 14, 2014) (“Our precedents have placed primary focus on the first factor.”), cert. denied, 134 S. Ct. 2319 (2014). But see *Kienitz*, 766 F.3d at 758 (noting that transformativeness is “not one of the statutory factors” and expressing skepticism about its level of importance).

²⁵ *Campbell*, 510 U.S.

²⁶ *Bunker & Calvert*, See, e.g., *Harper & Row Publishers Inc.*, 471 U.S.

²⁷ Michael D. Murray, *What Is Transformative?* 11 CHI.-KENT J.INTELL. PROP. 260, 262, 292 (2012); R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008).

likely to supplant the market for the copyrighted work by fulfilling demand for the original.”²⁸ However, courts have encountered a number of obstacles in applying **Campbell’s** transformativeness doctrine.

INTERPRETATION

One of the core issues in determining whether a use is transformative is the question of whether a second work must: (a) transform the content of the original (such as changing the colors and otherwise modifying the content of the original, or cutting the original into pieces and using those pieces in a collage),²⁹ (b) transform the purpose of the original (such as by using elements of the original for a new purpose, like in a parody that mocks the original),³⁰ or (c) both of the above.³¹ These categories are namely “content transformativeness” and “purpose transformativeness,” respectively. Courts have recognized fair uses that fall in each of these camps, but it is not always clear what threshold of change is required for each category. For example, when photographs of a couple’s secret wedding were used in a celebrity magazine along with the addition of headlines, captions, and minor cropping, the court deemed the use not transformative.³² Although material was added, the images were cropped, and the second use was for a new purpose (news reporting), that was not sufficient in the court’s eyes. Conversely, in *Blanch v. Koons*, the Second Circuit held that a work was transformative where it made several aesthetic changes to the original, used it in a collage with other works, and had a different purpose than the original (commenting on the nature of consumerism and related issues as opposed to advertising).³³ Other times, lesser changes were accepted, such as changing the

²⁸ *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1262 (11th Cir. 2014) (alteration in original, internal quotation marks omitted); see also *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015), cert. denied, 2016 WL 1551263 (Apr. 18, 2016).

²⁹ *Seltzer v. Green Day, Inc.*, 725 F.3d (9th Cir. 2013).

³⁰ *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (parody of *Gone With The Wind*).

³¹ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (using the original in a collage to comment on society and the original’s genre).

³² *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1174 (9th Cir. 2012).

³³ *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006).

theme, mood, and tone of a song, even where the two works had similar purposes.³⁴ However, some uses need not alter the original work at all for the second use to be deemed transformative.³⁵ A series of courts have held that using an original in a search-able database was transformative even where the work was unaltered (or was only scaled down in quality, such as a lower-resolution image).³⁶ Similarly, archiving students' papers in a database to check subsequent works for plagiarism was transformative even without alteration of the papers. There are three key threads in these cases. First, these uses were at least partially for a different purpose than the original use (finding sources as opposed to reading or viewing those sources; detecting plagiarism as opposed to being a history report, etc.). Second, the new uses were generally beneficial to the public: they facilitated finding sources or deterred plagiarism. Finally, the uses were expression ambivalent because they were "completely unrelated to [the] expressive content" in the originals. The databases arguably did not care what the texts said or the images depicted; they cared only that they were fodder for the database. Thus, though there is some inconsistency as to how much a second user must change an original for those changes to warrant a finding of transformativeness, courts generally agree that a change in purpose is relevant to the analysis, and a failure to modify the content can be probative of whether there is a transformation in purpose. As to physical modification of the prior work, generally the more changes the better in the eyes of fair use. In analyzing the purpose of the works, courts also wrestle with how to interpret them. For example, in determining the "purpose and character of the use," which perspective matters? What the artist intended the work to mean; what a reasonable person would perceive; what the audience actually perceived; or some other approach? Many courts have discussed what the audience or a prudent man would think about the work, especially in parody cases. Other courts have emphasized what the artist intended as the meaning. Still others appear to have looked to both what the artists intended and whether a

³⁴ *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009) (noting that the allegedly infringing work was "certainly transformative" because it "ha[d] a different theme, mood, and tone from [the original song]").

³⁵ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *A.V. v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009).

³⁶ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

reasonable person would perceive that message. Courts have wrestled with these issues for years. Amidst these interpretations, they have sought clarity by looking to the definition of transformative in *Campbell*, the primary beacon for that term's meaning. Unfortunately, *Campbell* does not provide sufficient material to eliminate the shadows surrounding S.107(1), and recent cases illustrate the resulting analytical difficulties.

FORK IN THE ROAD

Professor Rebecca Tushnet explains, **“transformative purpose, in general, seems to mean that a defendant has a different interpretive or communicative project than the plaintiff did in creating the original work.”**¹⁷⁸ Content transformation, on the other hand, pertains to **using components of an original in an altered form to create new meaning, such as Prince’s work in the twenty-five images held fair use in *Cariou*.**¹⁷⁹ Purpose transformations that fall in a preamble category—such as news reporting, historical reference, and parodying an original, etc.—are classic fair use and are often accepted by courts post-*Campbell*.¹⁸⁰ Similarly, purpose transformations that are expression-neutral, such as using originals in a database to help find works or detect plagiarism, are also often found not to threaten the central market of a work or its derivative markets.¹⁸¹ Thus, in terms of changes in purpose, the state of fair use is fairly clear in the courts: such works are transformative. Unsurprisingly, then, works that change both purpose and content are similarly seen as transformative.³⁷ With respect to content-transformation there seems to be a difficulty.¹⁸³ ***Cariou and Seltzer***, as two such cases, where a doctrinal divide is being seen. The central question in content transformation cases is simple: How much is enough? How much must the second artist change about the original, and how much new meaning is needed? Related questions quickly multiply: What types of meaning are enough to count as new? And from whose perspective do courts evaluate whether there is new meaning? Thus, the Article first confronts a fork in the road for fair use: Should courts take the path to the right and continue to protect content transformation, or should they veer left and jettison that doctrine and its

³⁷ *Blanch v. Koons*, 467 F.3d 244, 252–53 (2d Cir. 2006).

undrawn lines?³⁸ There can be no doubt that content-transformation cases and copyright law collide at times.³⁹ As another commentator has phrased it, **“if the goal of copyright is to promote the arts, then when art and law collide, it should be the law that yields.”**⁴⁰ Courts should not reject content transformation simply because of its interpretive challenges. Although the purpose of copyright law supports this conclusion, ultimately retaining or rejecting content transformation as favoring fair use is a normative question on which there is reasonable disagreement.

RIGHT PATH: RETAIN CONTENT TRANSFORMATION

Courts should, however, modify their approach to content transformation given those challenges. Some alterations like recognizing that, even though content transformation is protected by fair use, it is an area that will often have a more difficult path to reach fair use than purpose transformation. Content transformation is a more limited fair use realm. Even when content transformation works are not transformative, they may still be fair use when enough other factors favor that result (including the commercial inquiry under factor one). If courts are to retain content transformation, guidance is needed on how much modification is sufficient to create a new work. While it might not be possible to draw the line precisely for content-only transformation—and a bright-line rule is likely not permissible under **Campbell**—some general principles are apparent. First, courts should again emphasize on the fact that transformativeness is not a binary concept: works can be almost transformative, slightly transformative, heavily transformative, and on across the gamut. The same is true for content transformation. Courts weighing a work’s transformativeness in the S.107 inquiry should use a spectrum approach. If a work made few changes to the original but made enough to deem the work transformative, the other S.107 factors could more easily outweigh transformativeness. By reiterating this spectrum, even when a court concludes a work is transformative, it can better balance the weight of transformativeness against other factors by acknowledging that transformativeness comes in

³⁸ Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).

³⁹ Seltzer v. Green Day, Inc., 725 F.3d 1170 (9th Cir. 2013); Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013); Blanch, 467 F.3d 244.

⁴⁰ Caroline L. McEneaney, Transformative Use and Comment on the Original: Threats to Appropriation in Contemporary Visual Art, 78 BROOK. L. REV. 1521, 1551 (2013).

many sizes. Similarly, the goal of copyright in this area—allowing others to build on prior artists’ works⁴¹—is not an all-or-nothing proposition. This goal is epitomized by the transformativeness inquiry into whether “the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.”⁴² Like other aspects of transformativeness, courts should view “raw material” claims across a spectrum. Although the fair use doctrine is intended to empower artists to build on the generations of art before them (especially in light of our lengthy copyright terms), there is a range in the extent to which an artist may use prior works as raw material. Works should not be deemed automatically transformative simply because they use, in some sense of the word, another work as “raw material.” For example, using a work like a child uses individual Legos to build a replica of downtown is not akin to putting, unmodified, a chair on a lawnmower and calling it a John Deere. Instead, courts should also look to how the material is used and whether the end result meets the other requirements of transformativeness.

CONCLUSION AND SUGGESTIONS

The issue of fair use runs much deeper than how transformativeness is defined. Cases like *Seltzer* and *Cariou* have tipped the scales too far towards fair use. Inconsistency is expensive and chilling. For secondary users who rely on fair use for their creations, the potential that a higher court might correct an “erroneous” ruling is of little comfort; as persisting in copyright litigation is no small task. Unpredictability also dampens creative efforts. While fair use’s malleability might be its strength, we buy it at a price. At the same time, technology has made content creation increasingly accessible to a wide array of artists. As the explosion of user-generated content on YouTube and other sites has shown, content creators come in all ages and socio-economic backgrounds, and young artists often borrow heavily from existing works. With a worldwide audience at your fingertips and automated content programs like Google’s Content ID, it is easier than ever to land on a rights holder’s radar. In the face of DMCA notices, lawsuits against individuals, and potential monetary judgments that would cripple many families, an

⁴¹ *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 944 (4th Cir. 2013), as amended (Jan. 14, 2014)

⁴² *Castle Rock*, 150 F.3d

unpredictable fair use defense is—for many artists—no defense at all; they cannot risk a loss (or even the expenses with getting to a lawsuit). Fair use means you can hire a lawyer only if you can afford a lawyer. Copyright law has grown in breadth, length, and potency in recent decades; shouldn't fair use expand in parallel? Perhaps a broader fair use would be better for the advancement of art and expression. There is no need to reshape S.107 much to clear the waters. Instead, if courts defined transformativeness more precisely and included guidance on issues like content transformation and the ordinary observer approach, the doctrine would gain in clarity. Further, courts should reiterate that works often have more than one purpose. These clarifications would assist the countless individuals who rely upon S. 107 in their creative efforts, and they would pave a clearer path forward for the new transformative.