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Fair Use and the New Transformative

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ABSTRACT

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 § 107. Accordingly, this Article assesses the claims that* Cariou *et al. have modified the scope of transformativeness. Part I paints, in broad strokes, the history of the transformativeness subfactor. Part II focuses on recent copyright decisions and concludes that some cases have expanded the doctrine of transformativeness into new territory. Some of those modifications are inconsistent with prior decisions. Finally, Part III considers paths to stabilize the transformative subfactor.*

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Fair use is a doctrinal piñata. Recently, the motivation for courts and commentators to line up and take a swing has been *Cariou v. Prince*, *Seltzer v. Green Day*, and numerous search-related cases; their battle cry in the ensuing volley has been that the transformativeness inquiry under § 107(1) of the fair use doctrine has stretched too far.[1] If, as other commentators have suggested, fair use is a muscle that was strengthened by use, it might now be strained by over-extension.[2] Commentators have criticized the murkiness and secondary effects of these cases' standards[3] and speculated whether, in light of them, Congress should modify the fair use doctrine.[4] This alleged expansion can be cast as a positive

1. *See, e.g.*, Jessica Litman, *Campbell at 21/Sony at 31*, 90 WASH. L. REV. 651, 652, n.4 (2015) (collecting sources); Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 829 (2015) (same); Matthew D. Bunker & Clay Calvert, *The Jurisprudence of Transformation: Intellectual Incoherence and Doctrinal Murkiness Twenty Years After* Campbell v. Acuff-Rose Music, 12 DUKE L. & TECH. REV. 92, 95 (2014); Jennifer Pitino, *Has the Transformative Use Test Swung the Pendulum Too Far in Favor of Secondary Users?*, THE ADVOCATE, Oct. 2013, at 26, 29-30; Barry Werbin, Seltzer v. Green Day*: Ninth Circuit Expands Copyright "Transformative" Fair Use to Street Art Embedded in Music Video*, INTELLECTUAL PROPERTY TODAY, Oct. 2013, at 13; *see also* Jacqueline Morley, *The Unfettered Expansion of Appropriation Art Protection by the Fair Use Doctrine: Searching for Transformativeness in* Cariou v. Prince *and Beyond*, 55 IDEA 385, 397–98 (2015); Benjamin Moskowitz, *Toward A Fair Use Standard Turns 25: How Salinger and Scientology Affected Transformative Use Today*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1057, 1088–91 (2015).

2. *Cf.* Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 874 (2015) (making this analogy based on Peter Jaszi and Pat Aufderheide's comment, but not arguing that courts have strained fair use or transformativeness).

3. *See, e.g.*, Anthony R. Enriquez, *The Destructive Impulse of Fair Use After* Cariou v. Prince, 24 DEPAUL J. ART TECH. & INTELL. PROP. L. 1, 47 (2013).

4. *See, e.g.*, Edward E. Weiman, *Transforming Use: The Google Books Cases Have Created A New Area of Controversy Regarding the Transformative Use Defense to Copyright Infringement*, LOS

trend[5] or as problematic,[6] but however framed, there is a growing belief among many that these cases reflect a fair use doctrine mutating at its edges.[7] This diagnosis arises at a time when many entities are already contemplating amending the Copyright Act.[8]

Even removed from the cases lying at its boundaries, fair use is regularly seen as unpredictable by artists, attorneys, and the general public.[9] The transformativeness inquiry shares that reputation: the leading copyright treatise describes it as being so malleable as to be "all things to all people."[10] Although the predictability of fair use is itself a topic of debate, that such a debate exists says something about fair use's predictability.[11]

That uncertainty has a price. A 2014 report by the College Art Association found that a significant portion of the art community, broadly defined, has avoided or abandoned works because of copyright concerns, including: one-third of visual artists and visual art professionals, one-fifth of artists generally, over one-half of editors and publishers, and over one-third of art historians.[12] A meaningful part of that confusion stems from uncertainty about the parameters of fair use.[13] It reportedly leads to art historians avoiding writing historically oriented texts, graduate students being warned away from certain topics, a perceived decline in academic freedom, self-censoring among editors, avoidance of certain artists and genres amongst museum curators, and artists settling for "inferior substitutes when permissions to incorporate copyrighted visual material . . . have been requested and refused."[14] Separate from whether fair use is too broad or too narrow, "the

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ANGELES LAWYER, June 2014, at 16.

5. *See, e.g.*, Andrew Gilden & Timothy Greene, *Fair Use for the Rich and Fabulous?*, 80 U. CHI. L. REV. DIALOGUE 88, 93 (2013); *cf.* Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 396–408 (2016) (advocating for a fair use test that would be even broader than *Seltzer*'s).

6. *See, e.g.*, Kathleen K. Olson, *The Future of Fair Use*, 19 COMM. L. & POL'Y 417 (2014).

7. *See, e.g.*, Tushnet, *supra* note 2, at 883–84.

8. *See, e.g.*, USPTO & Dep't of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages*, UNITED STATES PATENT AND TRADEMARK OFFICE (Jan. 28, 2016), http://www.uspto.gov/learning-and-resources/ip-policy/copyright/white-paper-remixes-first-sale-and-statutory-damages [https://perma.cc/33UU-D8EF] (recommending amending the Copyright Act as to statutory damages); Maria A. Pallante, Register of Copyrights, *The Register's Call for Updates to U.S. Copyright Law*, U.S. COPYRIGHT OFFICE (Mar. 20, 2013), http://copyright.gov/regstat/2013/regstat03202013.html [https://perma.cc/NLB7-XZ5G] ("My message is simple. The law is showing the strain of its age and requires your attention.").

9. *See, e.g.*, *Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Art Communities*, COLLEGE ART ASSOCIATION (February 2014), http://www.collegeart.org/pdf/FairUseIssuesReport.pdf [https://perma.cc/FTB7-WQ8C]; *see also* Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932, 944 (4th Cir. 2013), *as amended* (Jan. 14, 2014).

10. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1][B] (2002) (quoting Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1670 (2004)).

11. *See, e.g.*, Tushnet, *supra* note 2, at 875 ("[F]air use provides enough certainty that ordinary people can go about their day-to-day business using common sense, just as they can usually do so with respect to other incompletely specified legal regimes . . . .").

12. COLLEGE ART ASSOCIATION, *supra* note 9, at 5.

13. *Cf.* COLLEGE ART ASSOCIATION, *supra* note 9 at 7–9.

14. COLLEGE ART ASSOCIATION, *supra* note 9, at 9.

Progress of Science and the useful Arts"[15] is hindered when fair use is too confusing.[16] Inconsistency in the case law applying fair use does the doctrine's predictability no favors.

Accordingly, this Article intervenes for the piñata to ask whether the recent barrage is warranted. To do so, it assesses whether the transformativeness inquiry has changed in recent cases. Part I paints, in broad strokes, the history of fair use and the transformativeness subfactor. In doing so, the Article emphasizes the cases arising after *Campbell v. Acuff-Rose Music* given that case's central status in the modern doctrine.[17] Part II focuses on several recent copyright decisions and juxtaposes them with prior cases to highlight shifts in the definition of "transformative." Ultimately, the Article concludes that the transformativeness subfactor has expanded in ways that are inconsistent with prior cases. Part III recommends ways to alter the new approach to the transformativeness inquiry to parallel the goals of copyright law.

I. THE OLD TRANSFORMATIVE

A. FAIR USE INTRODUCED

Fair use has been portrayed in divergent lights. Some have argued it is a plague on authors' rights, while others have labeled it the lifeblood of the creative engine. Procedurally, it is generally treated as an affirmative defense to copyright infringement.[18] However, fair use is not merely a defense, but instead a central part of the balance copyright law strikes between promoting author remuneration and enabling the evolution of art and the public good flowing therefrom, much of which occurs—especially now—when one author can build upon the works of another.[19]

In short, fair use is a key piece of modern domestic copyright law. And it is not a new phenomenon. Fair use in the United States is an incarnation of the English doctrine of "fair abridgment" deriving from the 1710 Statute of Anne.[20] It has been enshrined in the Copyright Act since 1976, but the first formulation of fair use in the United States is much older and is generally attributed to Justice Joseph Story's description in *Folsom v. Marsh*.[21]

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15. U.S. CONST. art. I, § 8.

16. *See* Bill Graham Archives v. Kindersley Ltd., 448 F.3d 605, 608 (2d Cir. 2006).

17. *See, e.g.*, Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 112 (2d Cir. 1998).

18. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994); Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 561 (1985). *But see* Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685 (2015) (arguing that fair use should not be seen as an affirmative defense); Samuelson, *supra* note 1, at 853–54 (2015) (same, citing Loren).

19. The tools available to today's creators make it easier than ever to use another's work as raw material for your own. Two examples of that trend are the rise of user-generated websites like YouTube (and the massive amounts of user-generated content therein) and the continued popularity of appropriation art. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 250 (2d Cir. 2006); Ty, Inc. v. Publ'ns. Int'l, Ltd., 292 F.3d 512, 517 (7th Cir. 2002).

20. WILLIAM F. PATRY, PATRY ON FAIR USE (Thomson West 2015 ed.).

21. *See, e.g.*, *Campbell*, 510 U.S. at 576 (citing Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841)). *But see* PATRY ON FAIR USE, *supra* note 20, at 54 n.1 (attributing "many of the points

It seems, though, that fair use was born under a foul moon. Even from its early hours, it was lamented as "one of the most difficult points, under particular circumstances, which can well arise for judicial discussion."[22] It has never outgrown that obfuscating shroud,[23] but instead wears its malleable nature as a badge of honor: the doctrine's flexibility allows it to cover a range of situations.[24] Which direction it will bend, however, is not always foreseeable.

The test itself is simple enough to recite:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.
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> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[25]

In assessing whether a work is a fair use, courts primarily consider those statutory factors, but they may also consider others.[26] Courts avoid bright-line rules in the fair use determination and instead favor case-by-case determinations.[27] In weighing the factors, courts must not consider them in isolation and instead should explore them together "in light of the purposes of copyright."[28] For example, if a use is significantly different in purpose under the first factor, that suggests a lower likelihood of market substitution under the fourth factor.[29] Thus,

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raised in *Folsom*" to a case Justice Story penned two years prior, Gray v. Russell, 10 F. Cas. 1035 (C.C.D. Mass. 1839)).

22. *Folsom*, 9 F. Cas. at 345.

23. *See, e.g.*, Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176 (9th Cir. 2013) (noting that "there is no shortage of language from other courts elucidating (or obfuscating) the meaning of [the first fair use factor]" in the court's attempt "[t]o navigate these treacherous waters"); Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) ("Fair use is one of the most unsettled areas of the law.... The potential for reasonable disagreement here is illustrated by the forcefully argued dissents and the now-vacated panel opinion."); Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) ("[T]he issue of fair use . . . is the most troublesome in the whole law of copyright....").

24. Harper & Row Publishers Inc. v. Nation Enter., 471 U.S. 539, 549 (1985).

25. 17 U.S.C. § 107 (2015).

26. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994); *Harper & Row Publishers Inc.*, 471 U.S. at 560.

27. *Campbell*, 510 U.S. at 577.

28. *Id.* at 578.

29. *See, e.g., id.* at 591; *see also* Fox News Network v. TVEyes, Inc., 43 F. Supp. 3d 379, 394 (S.D.N.Y. 2014) (concluding that "where the creative aspect of the work is transformed, as is the case here, the second factor has limited value").

the factors are weighed together and considered holistically.

B. TRANSFORMATIVENESS DEFINED

Much of the recent debate surrounding § 107 centers on its first factor and, in particular, a subfactor thereunder called "transformativeness" that is not expressly enumerated in the statute. Courts have characterized the transformativeness inquiry 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.[30] 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."[31]

Or, as the Second Circuit described transformativeness, the test 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 society."[32]

However, courts have disagreed, both in practice and in definition, about what qualifies as transformative.[33] "The plethora of cases addressing [transformativeness] means there is no shortage of language . . . elucidating (or obfuscating) the meaning of transformation."[34] Although the precise definition of transformativeness is debatable, it is clear that it has significant influence in modern fair use analysis,[35] and the transformativeness subfactor owes much of that prevalence to *Campbell v. Acuff-Rose Music*.[36]

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

31. *Campbell*, 510 U.S. at 578–79.

32. 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)).

33. *See, e.g.*, 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).

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

35. *See, e.g.*, 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).

36. *See Campbell*, 510 U.S. 569; *see, e.g.*, Zahr K. Said, *Foreword: Fair Use in the Digital Age, and* Campbell v. Acuff-Rose *at 21*, 90 WASH. L. REV. 579, 582 (2015); Niels Schaumann, *Fair Use and Appropriation Art*, 6 CYBARIS 112, 127 (2015); Stephen McJohn, *The Case of the Missing Case:* Stewart v. Abend *and Fair Use*, 53 IDEA 323, 324 (2013).

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]."[37] By thus characterizing transformative works as residing "at the heart of the fair use doctrine,"[38] the Court breathed significant life into the transformativeness inquiry.

Transformativeness subsequently has grown into one of the two defining inquiries under § 107.[39] 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 in the eyes of most courts.[40] A central concept animating the latitude given to transformative uses is the idea that such uses frequently promote "the novelty copyright seeks to foster" and "are less likely, generally speaking, to negatively impact the original creator's bottom line, because they do not merely supersede the objects of the original creation and therefore are less likely to supplant the market for the copyrighted work [by] fulfilling demand for the original."[41] However, courts have encountered a number of obstacles in applying *Campbell*'s transformativeness doctrine.

Modifications and Interpretive Perspective

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),[42]

(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),[43] or

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37. *Campbell*, 510 U.S. at 578–79 (internal citations and footnote omitted).

38. *Id.* at 579.

39. *See, e.g.*, Bunker & Calvert, *supra* note 1, at 93 ("A key element in the [court's] fair-use determination, as is now standard practice in the federal judiciary, was whether [the defendant] had engaged in a 'transformative use'" of the plaintiff's work.). The second is the impact on the market under §107(4). *See, e.g., Harper & Row Publishers Inc.*, 471 U.S. at 566.

40. *See, e.g.*, 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, 292 (2012); R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008).

41. 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) ("[A] transformative use is one that communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public knowledge.").

42. *See, e.g.*, Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176–77 (9th Cir. 2013) (changing the appearance of the original visual art but arguably not significantly changing its meaning).

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

(c) both of the above.[44]

These categories can be thought of as "content transformativeness" and "purpose transformativeness," respectively.[45] 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.[46] 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.[47] 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).[48] Other times, lesser changes were accepted, such as changing the theme, mood, and tone of a song, even where the two works had similar purposes.[49]

However, some uses need not alter the original work *at all* for the second use to be deemed transformative.[50] A series of courts have held that using an original in a searchable database was transformative even where the work was unaltered (or was only scaled down in quality, such as a lower-resolution image).[51] Similarly, archiving students' papers in a database to check subsequent works for plagiarism was transformative even without alteration of the papers.[52] 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"[53] 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.

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44. *See, e.g.*, 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).

45. *See generally* Tushnet, *supra* note 2 (using these terms).

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

47. *Id.* at 1175–76.

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

49. *See, e.g.*, 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]").

50. *See, e.g.*, 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).

51. *See, e.g.*, 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).

52. *A.V.*, 562 F.3d at 638–40 (4th Cir. 2009).

53. *Id.* at 640; *see also* Brian Sites, *Google the Gozerian and Fair Use Slimed: Copyright Again in the Technocrat's Den*, 47 JURIMETRICS J. 31, 48 (2006) (noting that Google was "us[ing] copyright-protected materials in total disregard for what those materials say, stand for, invoke or represent . . .").

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.[54] As to physical modification of the prior work, generally the more changes the better in the eyes of fair use.[55]

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 looked to what the audience or a reasonable observer would think about the work, especially in parody cases.[56] Other courts have emphasized what the artist intended as the meaning.[57] Still others appear to have looked to both what the artists intended and whether a reasonable person would perceive that message.[58] As is discussed further in Parts II and III, which perspective is used can dramatically impact the outcome of the transformativeness subfactor.

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.[59] Unfortunately, *Campbell* casts too little light to wholly banish the shadows surrounding § 107(1), and recent cases illustrate the resulting analytical difficulties.

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54. *See, e.g.*, Castle Rock Entm't., Inc. v. Carol Publ'g. Grp., Inc., 150 F.3d 132, 143 (2d Cir. 1998) ("[T]he fact that [the *Seinfeld* trivia book at issue in this case] so minimally alters *Seinfeld*'s original expression . . . is further evidence of [the trivia book]'s lack of transformative purpose.").

55. *See, e.g.*, Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013) (significant changes were enough to hold that twenty-five of thirty works were transformative, but lower level of changes in other five warranted remand for further consideration by district court).

56. *See, e.g.*, *Cariou*, 714 F.3d at 707, *cert. denied*, 134 S. Ct. 618 (2013) ("Rather than confining our inquiry to [the appropriation artist's] explanations of his artworks, we instead examine how the artworks may reasonably be perceived in order to assess their transformative nature.") (internal quotations omitted); *see also* Seltzer v. Green Day, Inc., 725 F.3d 1170, 1181 (9th Cir. 2013); Mattel, Inc. v. Walking Mountain Prod., 353 F.3d 792, 801 (9th Cir. 2003).

57. *See* Rogers v. Koons, 960 F.2d 301, 309–10 (2d Cir. 1992); Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932 (4th Cir. 2013), *as amended* (Jan. 14, 2014); Salinger v. Colting, 607 F.3d 68, 83 (2d Cir. 2010). It is often difficult to tell if a court was focused on only intent because the court describes its analysis in a way that could be said to treat the court's observations as the reader/audience. *Compare SunTrust Bank*, 268 F.3d at 1268–69 ("For purposes of our fair-use analysis, we will treat a work as a parody if its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic, work.") *with id.* at 1268 ("[T]he Supreme Court has required that we ensure that 'a parodic character may reasonably be perceived' . . . [to deem it a parody].").

58. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 251–53, 254-55, 256 (2d Cir. 2006) (discussing the artists' intent in detail, but also citing in support quotes such as "parody of a photograph in a movie poster was transformative when the ad [was] not merely different; it differ[ed] in a way *that may reasonably be perceived as commenting* on the original") (emphasis added, internal citation omitted).

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

II. THE NEW TRANSFORMATIVE

In recent years, courts have openly challenged each other's competing attempts to properly define transformative uses.[60] Two genres of uses have generated the bulk of the controversy: search engine-style cases and appropriation art cases. As explained below, the search engine cases are arguably consistent with prior case law, but the appropriation art cases have caused a doctrinal divide. This Part compares whether these recent cases have diverged from prior jurisprudence in their transformativeness analysis.

A. SEARCH ENGINE AND RELATED CASES

One of the major growth areas in the fair use menagerie in the last several years has been a host of cases involving search engines, robotic readers, and related uses.[61] For example, in *HathiTrust* and *Google Books*, the courts addressed claims stemming from millions of books being scanned into databases that fueled search engines and related projects.[62] The courts held that the use of full copies of books in such search engines served a different purpose than the books' original uses.[63]

Similarly, courts have also upheld as fair uses copies made in other databases pertaining to legal briefs and news tracking.[64] Some other cases involving "selective copying without alteration of the content of the copied work ha[ve] also succeeded."[65] As noted previously, what these cases generally have in common is that they were ambivalent to the expression in the works—the databases were a bucket of text or pixels, and the databases' primary concerns were enabling users to search the bucket, not convey the expression that the text or pixels communicated. Although not all such uses have been held to be transformative, and some cases have faulted these types of uses for failing to add new creative content,[66] most of the recent court decisions in this area have found search engine and related tools to

60. *See, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202, 216 (2d Cir. 2015), *cert. denied*, 2016 WL 1551263 (Apr. 18, 2016) (critiquing Seventh Circuit's description of transformativeness); *Kienitz*, 766 F.3d at 758 (critiquing Second Circuit's transformativeness analysis in *Cariou*), *cert. denied*, 135 S. Ct. 1555 (2015).

61. *See generally* James Grimmelmann, *Copyright for Literate Robots*, 101 IOWA L. REV. 657 (2016).

62. *See generally* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 2016 WL 1551263 (Apr. 18, 2016); Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014); Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

63. *HathiTrust*, 755 F.3d 87; *Author's Guild*, 804 F.3d at 216–19; *see also* Olson, *The Future of Fair Use*, *supra* note 6, at 422.

64. White v. W. Pub'g Corp., No. 12 CIV. 1340 JSR, 2014 WL 3057885 (S.D.N.Y. July 3, 2014) (upholding fair use as to legal briefs); *TVEyes*, 43 F. Supp. 3d 379 (upholding fair use as to news tracking). Other aspects of the service provided by TVEyes were not a fair use, however, and the matter is on appeal to the Second Circuit as of February 2016.

65. Tushnet, *supra* note 2, at 877 nn.38–44 (collecting cases).

66. *See, e.g.*, Video Pipeline, Inc. v. Buena Vista Home Entm't Inc., 342 F.3d 191, 198-99 (3d Cir. 2003), *as amended* (Sept. 19, 2003) (finding not transformative the use of video clip previews of movies in a database context because the clip previews overlapped in purpose with the purpose of movie trailers made by the copyright holders).

be transformative.

These recent rulings have been the subject of some debate outside of court decisions as well, much of which ultimately centers on normative questions about what fair use should reach. The cases themselves, however, are arguably consistent recently and with prior cases. For example, in earlier search-related cases, courts upheld as transformative uses of images reproduced for search engine websites.[67] The courts concluded that the websites aimed to help users find sources, which was a completely different purpose than the original sources served (e.g. entertainment).[68] Most of the recent cases have followed suit under generally that same rationale,[69] and can also trace roots back to jurisprudence of much older vintage.[70] These results are also notable in that they arise across circuit courts, some of which have disagreed at times as to the role or scope of transformativeness.[71] Accordingly, as to these recent cases, courts are on an arguably stable path—though commentators are not in agreement about whether these cases *should* be transformative uses, and these issues are the subject of ongoing dispute.[72]

B. APPROPRIATION ART: *SELTZER V. GREEN DAY*

Other recent decisions have not proven so constant, especially in the area of appropriation art. Appropriation art is generally defined as "the more or less direct taking over into a work of art a real object or even an existing work of art."[73] For example, in *Seltzer v. Green Day, Inc.*, the Ninth Circuit addressed the use of a visual work called *Scream Icon*, which depicted a screaming face and was meant to be iconic of skaters and street art.[74] A second artist, Roger Staub, photographed a weathered version of the original, added a spray-painted cross and some streaks, changed the coloration, and used the modified version to "dominate" "the center of the frame" of a video about the hypocrisy of religion, which was played as the backdrop during a particular song, *East Jesus Nowhere*, in band Green Day's rock concerts.[75] The artist explained that his "goal was to convey the song's 'mood, tones or themes,'" which were "'the hypocrisy of some religious people who preach one thing but act otherwise [and] . . . the violence that is done in the name of

67. *See Perfect 10*, 508 F.3d 1146; *Arriba Soft Corp.*, 336 F.3d 811.

68. *See Perfect 10*, 508 F.3d 1146; *Arriba Soft Corp.*, 336 F.3d 811.

69. *See, e.g.*, *A.V.*, 562 F.3d at 639 (citing *Perfect 10*, 508 F.3d at 1165).

70. *See* N.Y. Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217 (D. N.J. 1977) (addressing an index of an index); *see also* Sites, *supra* note 53, at 63 (applying this case to the Google Books controversy).

71. *See infra* notes 73–172 and accompanying text (contrasting *Seltzer*, *Cariou*, *Kienitz*, and other cases).

72. *See, e.g.*, Fox News Network LLC v. TVEyes, Inc., No. 15-03885 (2d Cir. Dec. 3, 2015) (notice of civil appeal by TVEyes); Fox News Network LLC v. TVEyes, Inc., No. 15-03886 (2d Cir. Dec. 3, 2015) (notice of cross-appeal by Fox News Network).

73. Cariou v. Prince, 714 F.3d 694, 699 (2d Cir. 2013) (quoting the Tate Gallery).

74. Seltzer v. Green Day, Inc., 725 F.3d 1170, 1173–74 (9th Cir. 2013).

75. *Id.* at 1174.

religion.'"[76] The video was played at approximately seventy concerts and during Green Day's performance at the MTV Video Music Awards.[77] The Ninth Circuit held that this use was transformative, concluding the original work "sa[id] nothing about religion" while the new use did; thus, the video literally added "new expression, meaning, or message."[78]

Normative judgments aside, this result is perplexing. First, the Ninth Circuit seemed to gloss over key facts, such as that Staub "studied the [band's] album art, which use[d] graffiti and street art as significant visual elements."[79] *Scream Icon*, too, was meant to be street art.[80] If Green Day's album used street art, then Staub's use of street art in the tour video related to that album was likely linked to the same general entertainment purpose of the album and concert. This would indicate that there was overlap in the two uses' purposes besides any discussion of religion. Normally, that could undermine a finding of a different purpose under § 107(1).[81] *Scream Icon* was street art, Green Day used street art in its album, and Staub used street art in the video for the tour promoting that album: that sounds a lot like a non-transformative entertainment duck, not one transmogrified into a religious fowl.

Second, the "transformations" to the original work in *Seltzer* were meager. As the Ninth Circuit noted, *Scream Icon* was clearly identifiable as it "dominated" the center of the frame and was highly visible at the concert.[82] That lack of modifications is concerning when the purposes of the works are similar. In a similar vein, the court also concluded that Green Day "never used [*Scream Icon*] to market the concert, CDs, or merchandise," and so the use was only "incidentally commercial."[83] However, the image was apparently plastered behind the band (and even behind the lead singer) in seventy-ish concerts promoting the street-art-linked CD, and it was also played at the MTV Music Awards.[84] Its purpose was, in part, to entertain and decorate the background at a commercial venue; *Scream Icon* was also made to entertain and decorate. Although Green Day's use was not as

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76. *Id.*

77. *Id.*

78. *Id.* at 1176–77.

79. *Id.* at 1174.

80. *Id.* at 1173–75.

81. *See, e.g.*, Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1117 (9th Cir. 2000) ("[W]here the 'use is for the same intrinsic purpose as [the copyright holder's] . . . such use seriously weakens a claimed fair use.'") (quoting Weissmann v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989)); Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 79–80 (2d Cir. 1997) (finding second use was not transformative where it served the same purpose as the original); *see also Video Pipeline, Inc.*, 342 F.3d at 200 ("shared character and purpose" between second and original uses tilted first factor towards no fair use).

82. *Seltzer*, 725 F.3d at 1174.

83. *Id.* at 1177.

84. Videos of the concerts depict this vividly. *See, e.g.*, Check out My Playlists, *Green Day - East Jesus Nowhere Official Music Video*, YOUTUBE (Oct. 9, 2009), https://www.youtube.com/watch?v=iPu18Wt8e7Y, grenadegoesboom, *Green Day - East Jesus Nowhere. . . Billie Joe brings a fan onstage*, YOUTUBE (July 27, 2009), https://www.youtube.com/watch?v=QHwwJuzv0j0, Augusto Bellini, *Green Day East Jesus Nowhere Live in Munich Mtv World Stage*, YOUTUBE (Mar. 10, 2011), https://www.youtube.com/watch?v=0wuu-U5ArrM.

commercial as, say, using the image on the CD itself, it seems worthy of more weight than the Ninth Circuit put on the scales.[85]

Third, if simply using a work to talk about a different topic makes a work transformative, as *Seltzer* held, the subfactor swallows other transformativeness subcategories. For example, when one work uses content from a prior work to parody the original, courts require that the parody comment on the original.[86] It is not enough that the work commented on something else—that is the often-maligned area of satire, and it is generally further from the domain of fair use.[87] If a parody must comment on the original to be a protected parody, why can *Scream Icon* be used to discuss anything that *isn't* in the original?

In other words, what value remains in the parody defense when *Seltzer*'s less-restrictive alternative is available? To qualify as transformative under *Seltzer*, there would be no need for a parody to comment on the original so long as it commented on *anything* the original did not address. That court was unconcerned about the fact that the two works overlapped in other purposes—both Scream Icon and Green Day's CD/concert served an entertainment function and addressed street art culture and imagery—so it is not, under *Seltzer*, problematic in future fact patterns if the two works have similar purposes. *Seltzer* does not resolve this quandary.

Seltzer's rule could similarly undermine the requirements in news reporting. For example, in *Nunez v. Caribbean International News Corp.*, a newspaper used an allegedly scandalous photograph of Miss Puerto Rico Universe to discuss whether the photograph was so racy as to be inappropriate for the holder of that title.[88] The court held that this was a fair use because the "the pictures were the story. It would have been much more difficult to explain the controversy without reproducing the photographs."[89] "It [wa]s this transformation of the works into news—and not the mere newsworthiness of the works themselves—that weigh[ed] in favor of fair use under the first factor of § 107."[90] Under *Seltzer*, it would not be required that a news publication used the photograph as a topic of discussion about the images so long as it used the image to talk about any new meaning other than what the image contained. This would be the case as to the news reporting category more broadly, not *Nunez* in particular. Thus, *Seltzer*'s definition of transformativeness threatens to override classic fair use doctrines.

But even if *Seltzer* is to pave the way for a category of transformative uses that simply comment on some matter the original did not address, this use was not part of a comment on the meaning of religion among graffiti artists or a debate about whether popular street art had religious connotations (uses that would have a better

85. *See Seltzer*, 725 F.3d at 1178.

86. *See, e.g.*, *SunTrust Bank*, 268 F.3d at 1268 ("[T]he Supreme Court has required that we ensure that 'a parodic character may reasonably be perceived' in the allegedly infringing work.") (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)).

87. The role of satire in fair use is a topic of ongoing debate. A classic lightning rod in that debate is *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997).

88. 235 F.3d 18, 21 (1st Cir. 2000).

89. *Id.* at 22 (internal quotation marks omitted).

90. *Id.* at 23.

claim to fair use of *Scream Icon*). This was a rock concert. While famous musicians certainly can make transformative uses,[91] it is hard to see why they should be able to appropriate nearly an entire image unrelated to the original's message and use it in a strongly commercial venue. This case looked less like true transformation and more like "avoid[ing] the drudgery in working up something fresh," which generally disfavors fair use under factor one.[92] Thus, even under *Seltzer*'s own doctrine, it seems like a weak case for transformative use.

Irrespective of whether *Seltzer* is, normatively speaking, a wise transformativeness category, it is also in tension with prior cases. In reaching its conclusion, the Ninth Circuit cited a number of cases that exemplified, in its eyes, "the typical 'non-transformative' case" and the typical transformative case.[93] But those same cases reveal the Ninth Circuit's deviation from a standard transformativeness ruling.

Among those cases was *Ringgold v. Black Entertainment Television, Inc.*, a Second Circuit case which found not transformative the brief use in a cable sitcom of a poster depicting a quilt.[94] The poster was used as a decoration on the sitcom's set and appeared multiple times, though briefly, in a broadcast of a particular episode addressing a range of topics including gambling debts.[95] The Second Circuit concluded the poster was used "for precisely a central purpose for which it was created—to be decorative"[96] and, accordingly, "[i]n no sense [wa]s the defendants' use transformative."[97] That the quilt was used in an episode that added new message and meaning (such as addressing gambling) did not change that result. Yet, even though the screaming face in *Seltzer* had "a central purpose" of being decorative street art, and it was used by Green Day to be decoration in an entertainment-related event linked to street art, the fact that the video added a religious critique was sufficient to render it transformative.[98] Given these factual similarities but divergent results, *Seltzer* was a step away from *Ringgold*.[99]

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91. *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (involving famous musicians); Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932 (4th Cir. 2013), *as amended* (Jan. 14, 2014) ("Society's interest in ensuring the creation of transformative works incidentally utilizing copyrighted material is legitimate no matter who the defendant may be."), *cert. denied*, 134 S. Ct. 2319 (2014).

92. *Campbell*, 510 U.S. at 580 ("If . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses . . . to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish) . . . .").

93. Seltzer v. Green Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013).

94. 126 F.3d 70, 79 (2d Cir. 1997).

95. *Id.* at 72, 79.

96. *Id.*

97. *Id.* at 78 (internal citation omitted).

98. *Cf. id.* at 80 ("[P]roducers of plays, films, and television programs should generally expect to pay a license fee when they conclude that a particular work of copyrighted art is an appropriate component of the decoration of a set.").

99. *Seltzer* and *Ringgold* could be distinguished on a sort of "artistic merger" theory; work is likely more transformative when it is merged into the original such that they take on a unified existence (like in a collage) and less transformative when the work simply appears unaltered in the second use (like a poster in the background of a TV episode). Although that theory would be consistent with some

The same is true for *Elvis Presley Enterprises, Inc. v. Passport Video*—another case *Seltzer* cited—in which the Ninth Circuit considered whether using numerous Elvis songs, photos, and video appearances as elements in a comprehensive Elvis biography was a fair use.[100] The court held that the infringing uses were not transformative because, *inter alia*, they were "clearly commercial in nature" and were "not consistently transformative" because some video clips were shown with little or no interruption and thus "serve[d] the same intrinsic entertainment value" as the original works.[101] Other clips and uses in that case were transformative because they were historical references.[102]

Seltzer's analysis is in tension with that result. Just as in *Elvis Presley Enterprises*, at least some of the uses in *Seltzer* were "for the same intrinsic entertainment value" as *Scream Icon*, but the *Seltzer* court still found the work was transformative.[103] That does not parallel the *Elvis* case's holding that using works in a biography that involved at least other partially transformative uses was not enough to be transformative. The Elvis biography commented on topics that were not in the originals, but that was not enough to render all the uses transformative.[104] Why, then, was such commentary on a new topic sufficient in *Seltzer*? The two cases are partially distinguishable in that *Elvis Presley Enterprises* was decided as "a close issue" under an abuse of discretion standard, but the two cases are not in harmony.[105]

Seltzer does not fare much better among the cases it cited as positive examples supporting its conclusion. For example, the court cited *Bill Graham Archives v. Dorling Kindersley Ltd.*, which involved Grateful Dead posters and tickets that were reproduced in a biography to discuss the history of the band.[106] The court held that use was transformative.[107] Though the posters and other images had an overlapping purpose with the originals (both were, in part, made to entertain), they were not random pop icons—they were images of the band used in a discussion about that band's history.[108] Thus, the uses fell in the classic historical biography and "commenting on" categories because the new work was commenting on the originals and related matters.[109] Green Day, however, neither commented on Scream Icon itself nor was the image used in a biographical sense.[110] Thus, this

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prior cases, *Scream Icon* was largely unaltered in *Seltzer* and simply had additional images layered on top of it, making that case a weak candidate under even a merger theory.

100. 349 F.3d 622, 628–29 (9th Cir. 2003), *overruled on other grounds as stated in* Flexible Lifeline Sys., Inc. v. Precision Lift, Inc., 654 F.3d 989, 995 (9th Cir. 2011).

101. *Id.* at 629.

102. *Id.*

103. *Seltzer*, 725 F.3d at 1177 (citing Elvis Presley Enters. v. Passport Video, 349 F.3d 622, 629 (9th Cir. 2003)).

104. *Id.*

105. *Id.* at 629, 631.

106. 448 F.3d 605 (2d Cir. 2006).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Seltzer* is also distinguishable in other important ways. For example, whereas the book creators in *Bill Graham Archives* reduced the resolution of the images, *Scream Icon* was enlarged and

case does not predict the result in *Seltzer*; instead, *Seltzer* was a deviation from much of the prior case law the court cited addressing § 107(1).

Seltzer is also inconsistent with cases it did not cite. For example, in *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*, the court considered the book *The Cat NOT in the Hat!*, which told the story of the O.J. Simpson trial using thematic elements and style from Dr. Seuss's book *The Cat in the Hat.*[111] The Ninth Circuit held that this use was not transformative because the second work was not a parody of the original and "there [wa]s no effort to create a transformative work with 'new expression, meaning, or message.'"[112]

Under the *Seltzer* model, the attempted parody would have been transformative because the original tale said nothing about murder, but the latter did—that is new meaning and expression.[113] The Ninth Circuit in *Dr. Seuss Enterprises* would not have needed to say that "the critical issue under this factor is whether *The Cat NOT in the Hat!* is a parody"[114] because, even if not, it could be transformative in the vein of *Seltzer* by adding a new message on a different topic. Nor would the court's closing observation that "there [wa]s no effort to create a transformative work with 'new expression, meaning, or message'"[115] have been correct because, just as in *Seltzer*, *The Cat NOT in the Hat!* used portions of the original (less than was used in *Seltzer*) to tell a new story on a topic the original did not address. If that was not transformative of *The Cat in the Hat*, it is hard to explain why fewer changes, less copying, and an equally new topic were sufficient in *Seltzer*.

On Davis v. The Gap, Inc. presents similar difficulties. In that case, the plaintiff made "sculptured metallic ornamental wearable art" in the form of eye jewelry, which The Gap inadvertently used in a photo shoot for an ad.[116] The court held the use was not transformative because the jewelry was depicted "in the manner it was made to be worn."[117] However, under *Seltzer* it could have been transformative because the ad also commented on new issues apparently not part of the eye jewelry's message and expression: multi-cultural fashion and diversity topics.[118]

These cases suggest that *Seltzer* was an expansion of the transformative use subfactor. Although the *Seltzer* court concluded in passing that *Seltzer* was "a

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otherwise fairly unmodified. And whereas the book creators had tried to license the images, that was not the case in *Seltzer*. Though there are similarities, such as that both works were commercial and both works involved—to different extents—a collage approach, those differences do not explain *Seltzer*.

111. 109 F.3d 1394, 1396–97 (9th Cir. 1997).

112. *Id.* at 1399–1401 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)).

113. *Cf. id.* at 1394. *See also Copyright Law - Fair Use - Second Circuit Holds That Appropriation Artwork Need Not Comment on the Original to Be Transformative.* - Cariou v. Prince, *714 F.3d 694 (2d Cir. 2013)*, 127 HARV. L. REV. 1228, 1234 n.62 (2014). This comment is not to be taken as suggesting that *The Cat NOT in the Hat* was not transformative. The point made here is only that even the Ninth Circuit should have found the work transformative if the test in *Seltzer* is the applicable law.

114. *Dr. Seuss Enterprises, L.P.*, 109 F.3d at 1400.

115. *Id.* at 1401 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)).

116. On Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001).

117. *Id.* at 174-75.

118. The opinion gives no indication that the original jewelry had a message related to multi-cultural and diversity matters, but the example here is primarily illustrative in any event.

close and difficult case,"[119] the court's discussion of the transformativeness subfactor did not reflect that belief. Omitted was any hand-wrenching.[120] If *Seltzer* truly was seen as a close case, depicting that in the analysis would have clarified how subsequent courts should adjudicate similar cases. Without that clarification, and in light of the problems identified in this section, *Seltzer* has muddied the waters as to the state of § 107(1).

C. *CARIOU*

In the *Seltzer* court's eyes, however, it was largely building from the foundation of an earlier case in the Second Circuit, *Cariou v. Prince*.[121] *Cariou* is the case that most galvanized the recent outcry against the transformativeness factor.[122] In *Cariou*, the Second Circuit considered appropriation artist Richard Prince's *Canal Zone* work, which was based largely on photographs by Patrick Cariou.[123] Cariou published a series of classical portraits and landscape photographs of Rastafarians in Jamaica.[124] Prince used those photographs to varying degrees in several images that Prince later sold for large amounts.[125] For example, Prince tore pictures out of Cariou's original book and pinned them to plywood, significantly enlarged the images, drew circle and oval shapes over some subjects' facial features, added other images such as of nude women, and made additional changes such as adjusting the coloration and assembling the works into collages.[126] For some of his finished creations, Prince made several changes to the original works, and "Cariou's work [wa]s almost entirely obscured,"[127] but in others Prince made "vanishingly" few changes to Cariou's originals.[128]

Cariou sued Prince and associated entities; Prince raised a fair use defense; and the district court rejected that defense.[129] In doing so, though, the district court "impose[d] a requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works" to qualify as fair use—a requirement the court concluded Prince's works did not meet.[130]

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119. Seltzer v. Green Day, Inc., 725 F.3d 1170, 1181 (9th Cir. 2013).

120. *See, e.g.*, *Suntrust Bank*, 268 F.3d at 1269 ("On the one hand, the story of Cynara and her perception of the events in [The Wind Done Gone] certainly adds new 'expression, meaning, [and] message' to [Gone with the Wind]. From another perspective, however, TWDG's success as a pure work of fiction depends heavily on copyrighted elements appropriated from GWTW to carry its own plot forward."). This quote, with "Scream Icon" and "Green Day's video" substituted in, could be applied verbatim to *Seltzer*.

121. *Seltzer*, 725 F.3d at 1177 (citing Cariou v. Prince, 714 F.3d 694, 698 (2d Cir. 2013)).

122. *See, e.g.*, Samuelson, *supra* note 1, at 829, 843 (noting this controversy).

123. *Cariou*, 714 F.3d at 698.

124. *Id.*; *see also* PATRICK CARIOU, YES RASTA (powerHouse Books 2000).

125. *Cariou*, 714 F.3d at 699–700.

126. Cariou v. Prince, 784 F. Supp. 2d 337, 350 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

127. *Cariou*, 714 F.3d at 700–01.

128. *Cariou*, 784 F. Supp. 2d at 350.

129. *Cariou*, 714 F.3d at 700–01.

130. *Cariou*, 784 F. Supp. 2d at 348–49; *see also Cariou*, 714 F.3d at 704 (quoting the district court).

The Second Circuit disagreed on appeal.[131] First, the court rejected the district court's aforementioned requirement, explaining that it was not a part of the first factor in all cases.[132] Instead, the new works needed only to add "new expression, meaning, or message."[133] The court then held that twenty-five of Prince's works were transformative because—unlike Cariou's serene, composed, black-and-white images—Prince's were crude and jarring, incorporated color, and were ten-to-one-hundred times larger.[134] In the other five works, however, Prince had made fewer changes, and the court remanded them for further consideration of whether they were transformative and fair use generally.[135] That analysis never happened, as the parties ultimately settled after the Supreme Court denied the petition for review.[136]

In some ways, *Cariou* is generally consistent with prior cases given the significant level of modifications that Prince made to the twenty-five works.[137] However, *Cariou* is still notable for several reasons. First, the district court made various observations that the Second Circuit did not fully address. The district court had explained that it was "aware of no precedent holding that [using copyrighted materials as 'raw ingredients' in the creation of new works [wa]s fair absent transformative comment on the original."[138] Though the Second Circuit rejected that conclusion, it offered no case law to directly rebut it. Instead, it relied on several cases that did not rest mainly (or even at all) on a transformed-content rationale, including: *Campbell* (second work was purpose transformation as it commented on the original via a parody), *Blanch* (purpose and content transformation), *Leibovitz* (parody/purpose transformation), *Harper & Row* (news reporting/purpose transformation), and *Castle Rock Entertainment* ("slight to non-existent" transformativeness).[139]

Though the *Cariou* court was not breaking new ground in holding that copyright law does not impose a "comment on or relate to the . . . original" requirement,[140] it did not directly confront the extent to which the court was charting new territory in

131. *Cariou*, 714 F.3d at 706.

132. *Id.* Instead, it is traditionally an element of a parody case.

133. *Id.* at 705–06 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

134. *Id.* at 707.

135. *Id.* at 710–11.

136. Cariou v. Prince, 134 S. Ct. 618 (2013); Randy Kennedy, *Richard Prince Settles Copyright Suit With Patrick Cariou Over Photographs*, N.Y. TIMES (Mar. 18, 2014, 6:23 PM), http://artsbeat.blogs.nytimes.com/2014/03/18/richard-prince-settles-copyright-suit-with-patrick-cariou-over-photographs/ [https://perma.cc/BQ9J-GWLD].

137. *See generally* Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (holding an appropriation artist's work was transformative and fair use in part because of the modifications the appropriation artist made to the original); *see also* Sandoval v. New Line Cinema Corp., 973 F. Supp. 409, 413 (S.D.N.Y. 1997) (use of photographs in a movie set was transformative because they were used to help create "a distinct visual aesthetic and overall mood" for the movie scene at issue), *aff'd on other grounds*, 147 F.3d 215 (2d Cir. 1998) (holding use was de minimis).

138. Cariou v. Prince, 784 F. Supp. 2d 337, 358 (S.D.N.Y. 2011).

139. Castle Rock Entm't., Inc. v. Carol Publ'g. Grp., Inc., 150 F.3d 132, 143 (2d Cir. 1998) (internal citation omitted).

140. *See, e.g.*, Part II, *supra* (discussion of the search engine cases, which generally did not involve modifications to the originals' content).

concluding Prince's works were content-transformative.[141] This is especially so given that the works included significant portions of the originals for the same purpose as the originals (expression and entertainment). The Second Circuit presumably cited no such cases because same-purpose-different-content is not the traditional fair use arena outside the search engine/expression-ambivalent context discussed previously.

Nor did the Second Circuit directly counter the district court's observation that "[i]f an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use . . . there would be no practicable boundary to the fair use defense."[142] If adding *any* new meaning is sufficient to make a work transformative, cases like *Seltzer* are a natural progression of *Cariou*. And if new expression is sufficient even where the purposes are otherwise identical, the crucial inquiry is, "how much is enough?"

Unfortunately, even though that issue was a core basis for the court remanding five of the works, the Second Circuit did not articulate a standard for that analysis. *Cariou* offers only the shadow of such a standard because the court did not actually rule that the five were or were not transformative—it left that analysis to the district court. Thus, *Cariou* highlights that new expression can render a work transformative but provides minimal guidance on how much is enough.

Finally, part of Prince's self-described purpose in using another individual's photographs was to "get as much fact into [his] work and reduce[] the amount of speculation," which the district court interpreted as "using Cariou's Rastafarian portraits [for] the same as Cariou's original purpose in taking them: a desire to communicate to the viewer core truths about Rastafarians and their culture."[143] But the Second Circuit relied on cases that generally involved a change in purpose. Further, those changes were not just a change in the work's topic like the district court thought Cariou's works were. Given that the Second Circuit's decision in *Cariou* was entering new territory concerning the transformativeness subfactor, these silences obscure subsequent understandings as to how this "new transformative" functions.

Cariou is also notable for a second reason. In Prince's deposition, he had explained that he "'do[es]n't really have a message,' that he was not 'trying to create anything with a new meaning or a new message,' and that he do[es]n't have any . . . interest in [Cariou's] original intent.'"[144] This evidence could have been viewed as relevant to whether Prince was using the original materials for a new purpose and to create new meaning.[145] The Second Circuit did not see itself as

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141. *See, e.g.*, Gilden & Greene, *supra* note 5, at 93 ("[T]he Second Circuit's opinion in *Cariou* shifted the doctrine away from a rather long line of cases requiring the putative fair user to 'at least in part' comment on the borrowed work itself.") (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)).

142. *Cariou*, 784 F. Supp. 2d at 348 (quoting *Rogers*, 960 F.3d at 310).

143. *Id.* at 349 (quoting Richard Prince's Transcript at 44).

144. Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013) (quoting the district court and Prince's deposition) (alterations in original).

145. *See, e.g.*, *Salinger*, 607 F.3d at 83 (upholding the district court's conclusion that the work was

limited to Prince's intended meaning, however; instead, it looked to "how the work in question appears to *the reasonable observer*."[146] In that discussion the *Cariou* court also made the comment that paved the path for *Seltzer*:

> The law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research) identified in the preamble to the statute.[147]

Unfortunately, in addressing this topic, *Cariou* did not distinguish its own prior case, *Salinger v. Colting*, which was relevant to how an artist's prior statements affect the "purpose and character of the work" analysis.[148] In *Salinger*, the district court had concluded a purported commentary on *The Catcher in the Rye* and its author was actually written for other reasons; the court reached that result by looking to the artist's and his agent's statements about the purposes behind the book.[149] The Second Circuit found no clear error in that conclusion and affirmed on appeal.[150] If *Cariou*'s "how the work might reasonably be perceived" standard was the right approach, that is in tension with the fact that the court in *Salinger* did not address whether the work at issue could reasonably be perceived as commentary or critique independent of what the artist and agent intended. A credibility analysis as to the author's asserted intent would be largely superfluous—except perhaps from a bad faith angle—since the *Cariou* court's analysis allows courts to bypass even an author's admissions of intents that weaken his or her § 107(1) case. *Cariou* leaves unilluminated the contours of disbelieved intentions versus reasonable perceptions.

For these reasons and others, many commentators have concluded that *Cariou* and *Seltzer* represent an expansion of the transformativeness subfactor of § 107(1).[151] Though much of that criticism has focused on *Cariou*, *Seltzer* broke more new ground. Further, the decision in *Cariou*, though not explained fully, at least gestured at some boundary for its application: using too much of the original work undermines a finding of transformativeness, and the five works remanded at least offer some indicia of what "not enough" might look like.[152] Further, as to many of Prince's works that were not remanded, Cariou's originals were modified almost to the point of not being identifiable, and Prince had added additional elements including: painting a new background, adding shapes to subjects' faces,

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not transformative based on defendant's and his agent's statements as to the purposes behind the work under clear error standard). *Cf.* Morris v. Guetta, No. LA CV12-00684 JAK (RZx), 2013 WL 440127, at *8 (C.D. Cal. Feb. 4, 2013) (faulting defendant for failing to explain why work was transformative).

146. Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013) (emphasis added).

147. *Id.* at 706.

148. 607 F.3d 68 (2d Cir. 2010).

149. *Id.* at 83.

150. *Id.*

151. *See supra* notes 1–6.

152. *See Cariou*, 714 F.3d at 710–11 ("Specifically, [five of Prince's works] do not sufficiently differ from the photographs of Cariou's that they incorporate for us confidently to make a determination about their transformative nature as a matter of law.").

and adding the ever present graphic nudity in the *Canal Zone* series.[153] One of the stranger notes in *Cariou*, though, was the remand itself—if the key question was how the works may reasonably be perceived, why was that a role the district court was better suited to play as to those five images than as to the others the Second Circuit "reasonably perceived" itself?[154] In any event, *Cariou*'s analysis has already taken root in other courts.[155]

Further, if *Cariou* was an expansion of § 107(1), *Seltzer* was a step even further. The changes to *Scream Icon* in *Seltzer* were closer in scope to the modifications in the five images that the court in *Cariou* remanded than they were to the changes in the twenty-five images that *Cariou* held were fair use.[156] Thus, whereas the Second Circuit adjusted the bar for transformativeness in *Cariou* under the "new expression, meaning, or message" test, the Ninth Circuit in *Seltzer* removed the bar nearly entirely by approving minimal changes in the context of substantially overlapping (and commercial) purposes.

D. *KIENITZ*

In the wake of these decisions, and perhaps because of their expansive interpretation of what qualifies as "transformative," that subfactor has come under fire. *Kienitz v. Sconnie Nation LLC* illustrates one chapter of that revolt.[157] In *Kienitz*, Sconnie Nation made shirts depicting a mayor's face and the text "Sorry for Partying."[158] The text referenced the mayor's desire to shut down an annual block party that, ironically, he had previously attended many years before.[159] The image on the shirt was a posterized version of a photograph of the mayor that Michael Kienitz took and gave to the mayor to use on the city's website.[160] Kienitz

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153. Cariou would have a weaker infringement claim as to many of those twenty-five works than would the artists who took the photographs of the nude women, as the added women were a feature of the works even more so than Cariou's images. Presumably no such claim would come to pass, however, as Prince reported that the images of women were supplied from friends. *Richard Prince: May 8 – June 14, 2014*, GAGOSIAN GALLERY, http://www.gagosian.com/exhibitions/richard-prince—may-08-2014 [https://perma.cc/C6JJ-RJXP] (last visited July 18, 2015).

154. *See, e.g.*, *Cariou*, 714 F.3d at 713–14 (Wallace, J., concurring in part and dissenting in part) (making a similar observation).

155. *See, e.g.*, TCA Television Corp. v. McCollum, No. 15 CIV. 4325 (GBD), 2015 WL 9255341, at *10–12 (S.D.N.Y. Dec. 17, 2015) (use held transformative where it critiqued topics other than the original and despite overlapping purposes—both original and second use were partly for comedic purposes), *appeal docketed*, No. 16-134 (2d Cir. Jan. 13, 2016).

156. *Compare supra* note 84 (videos of the use in *Seltzer*) *with* Filing 91 Attachments 3-5, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013) (No. 11-1197-cv) (Joint Appendix docket entries showing most of Prince's works at issue), https://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/91/3.html [https://perma.cc/US4A-6D7K], https://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/91/4.html [https://perma.cc/UH8F-AQ7Q], and https://docs.justia.com/cases/federal/appellate-courts/ca2/11-1197/91/5.html [https://perma.cc/MG9V-HVBZ]. The five remanded images are titled *Graduation*, *Meditation*, *Canal Zone (2007)*, *Canal Zone (2008)*, and *Charlie Company*. *Cariou*, 714 F.3d at 710–11.

157. 766 F.3d 756 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1555 (2015).

158. *Id.* at 757.

159. *Id.*

160. *Id.*

sued, alleging copyright infringement, and Sconnie Nation defended on the grounds of fair use.[161]

The trial court granted summary judgment to Sconnie Nation on the fair use question, and the Seventh Circuit affirmed on appeal.[162] In doing so, the appellate court took several swipes at transformativeness and *Cariou*. First, the court remarked that the transformativeness subfactor was "not one of the statutory factors" in § 107 and characterized *Cariou* as a decision which overemphasized the importance of transformativeness.[163] The court then continued its lambast of *Cariou*:

> We're skeptical of *Cariou*'s approach, 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. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every "transformative use" can be "fair use" without extinguishing the author's rights under § 106(2).
>
> We think it best to stick with the statutory list, of which the most important usually is the fourth (market effect).[164]

The court then determined that the first factor was not of much help because, though the shirts were created as political commentary, they were also created for commercial ends.[165] And although the court remarked that "[t]he fair-use privilege under § 107 is not designed to protect lazy appropriators" and suggested these defendants might be such,[166] it concluded that the district court reached the right conclusion—that the use was a fair use—because Sconnie Nation had used so little of the original photograph after all the modifications were taken into account, and there was no significant market harm.[167]

E. ASSESSING THE NEW TRANSFORMATIVE

As *Kienitz* illustrates, not all courts are on board with the new transformative (and perhaps even the old transformative). *Seltzer,* and to a lesser extent *Cariou,* represent an expansion of the § 107 transformativeness subfactor. Those results are, however, offshoots of the Supreme Court's definition of "transformative" in *Campbell* as encompassing subsequent works that involve "new expression, meaning, or message."[168] As noted previously, *Campbell* explained that "[t]he central purpose of [the transformativeness inquiry] is to see . . . whether the new

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161. *Id.* at 757–58.

162. *Id.* at 758–60. The trial court in this case was a magistrate judge serving by consent of the parties pursuant to 28 U.S.C. § 636(c).

163. *Id.* at 758.

164. *Id.*

165. *Id.* at 759.

166. *Id.*

167. *Id.* at 758–60.

168. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578–79 (1994).

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* . . . ."[169]

To the extent that this test was intended to impose a new *purpose* requirement for transformativeness, *Campbell*'s language did not do so clearly. In that regard, *Seltzer* and *Cariou* fall within *Campbell*'s test as phrased because they embrace as transformative merely new content or character. Unless "further purpose" is defined to include simply a different message, the works in *Seltzer* and *Cariou* did not have a "further purpose" beyond the purpose of the original (entertainment). They were not parodies or news reports, for example. However, the works did have a "different character," in that Green Day's video backdrop addressed religion (whereas the original *Scream Icon* did not) and Prince's works had a jarring, post-apocalyptic feel (whereas the *Yes, Rasta* works were serene). That led to the secondary uses being deemed transformative despite the overlapping other purposes, and the same has been true in other recent cases.[170]

The new transformative of *Cariou* and *Seltzer*, though within the technical phrasing of *Campbell*, is not consistent with the way courts have applied the subfactor in the decades following *Campbell*'s issuance. In other words, though *Campbell*'s phrasing permits this result, it was largely a dormant clause in the case law. Now that it has been animated in various decisions, it is clear that *Campbell* cast a very broad definition of transformativeness. Compounding the breadth is that, under the "reasonably perceived" and undefined threshold for how much new meaning is enough analyses, the predictability of the transformativeness factor has diminished.[171]

Cariou and *Seltzer* do not answer these questions. While the Second Circuit recently required a secondary user "to show a justification" when "taking from another author's work for the purpose of making points that have no bearing on the original,"[172] that standard applied with no rigor (if at all) in its prior decision in *Cariou*. Further, defining what is a sufficient justification under that test brushes against the general prohibition in fair use on artists using works simply to avoid the drudgery of conjuring something fresh.[173]

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169. *Id.* at 579 (emphasis added).

170. *See, e.g.*, TCA Television Corp. v. McCollum, No. 15 CIV. 4325 (GBD), 2015 WL 9255341, at *11 (S.D.N.Y. Dec. 17, 2015) (explaining that use in play of "Who's on First" comedic routine was transformative and caused first factor to weigh strongly in favor of the use because, *inter alia*, play used the routine to illuminate the relationship between characters in the play).

171. *Cf.* Olson, *supra* note 6, at 430–31 ("Certainly the longstanding criticism that transformativeness lacks clear standards and is unpredictable has not been allayed—and the decisions in *Cariou* and *Seltzer* only add to the confusion.").

172. Authors Guild v. Google, Inc., 804 F.3d 202, 215 (2d Cir. 2015), *cert. denied*, 2016 WL 1551263 (Apr. 18, 2016).

173. *Cf. TCA Television Corp.*, 2015 WL 9255341 at *11–12. In this case, a boy used a sock puppet to perform the "Who's on First" routine for a female romantic interest, Jessica; when Jessica asked if the boy came up with the routine, he answered yes but the sock puppet revealed that the boy did not and mocked Jessica for not knowing better. *Id.* at *10-11. The court argued that using the well-known routine was "require[d so] that the audience [could] recognize the original source" of the routine. *Id.* at *11. This was transformative instead of "an attempt to . . . 'avoid the drudgery in working up

This is the state of the new transformative. *Kienitz*'s skepticism about other approaches to transformative—which is not surprising against this backdrop—gives rise to the specter of a circuit split, and one in an era of increased influence of transformativeness under § 107.[174] It is debatable as a normative matter, however, whether this expansion is desirable. Given the inconsistency in the case law that *Seltzer* and *Cariou* created, this Article proceeds on the argument that they are the aberrations, not all of the cases with which they are in tension. Accordingly, Part III considers ways to correct course for the transformativeness ship.

III. A MODEL FOR TRANSFORMATIVE

Parties on both sides of the fair use debate should agree that amorphous boundaries and unpredictability are problematic. Although the case-by-case nature of fair use makes it a flexible doctrine, malleability is the enemy of predictability and is made worse when the rules of the case-by-case analysis are unclear. Rights holders do not know what is permitted among secondary users, and secondary users' artistic expression may be chilled by the unknown parameters of fair use. Given the largely toothless nature of the Digital Millennium Copyright Act's misrepresentation provision, rights holders can respond to this uncertainty with a rain of takedown notices.[175] This chills and outright prevents some expressive content. And under an amorphous fair use regime, all parties are less able to predict the likelihood of success in a copyright action and the associated costs. These shared concerns point towards the desirability for reform.

The solution, however, is harder to identify. In response to these issues, this Part considers several interpretive approaches under § 107(1). Given that the transformativeness inquiry is central to the fair use analysis, the revisions ultimately proposed are grounded in "[t]he ultimate test of fair use . . . [which] is whether the copyright law's goal of promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it."[176]

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something fresh.'" *Id.* (quoting *Campbell*, 510 U.S. at 580).

However, this use could also be seen as avoiding working up something fresh and capitalizing on the well-known routine. For example, the play could have used an original joke introduced earlier in the play and that Jessica had heard but simply forgot. The audience would connect with the joke (perhaps even more so since some audience members will not be familiar with Who's on First?). This level of micromanagement of art would likely have a chilling effect, but those same concerns could push courts to find artistic convenience a sufficient justification and thereby trivialize the Second Circuit's "justification" requirement.

174. *See, e.g.*, Bunker & Calvert, *supra* note 1, at 97 ("Although some authority exists for the fourth factor being the most important, it has since been overshadowed by the transformative-use doctrine . . . .") (internal citations omitted).

175. *See, e.g.*, Rossi v. Motion Picture Assoc. of Am., Inc., 391 F.3d 1000 (9th Cir. 2004) (imposing a subjective bad faith standard for DMCA bad faith claims); Lenz v. Universal Music Corp., No. 5:07-CV-03783-JF, 2013 WL 271673, at *6 (N.D. Cal. Jan. 24, 2013) (same), *appeal granted* (9th Cir. May 30, 2013); *Takedown Hall of Shame*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/takedowns [https://perma.cc/66MG-DJGK] (last visited July 23, 2015) (noting examples of frivolous takedown notices).

176. Bill Graham Archives v. Kindersley Ltd., 448 F.3d 605, 608 (2d Cir. 2006) (quoting Castle Rock Entm't., Inc. v. Carol Publ'g. Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998)).

A. A FORK IN THE ROAD

Professor Rebecca Tushnet's description of purpose transformation and content transformation is one helpful way to frame this discussion.[177] As she explained, "[t]ransformative 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.[182]

The greater difficulties have arisen for content-transformation cases.[183] *Cariou* and *Seltzer*, as two such cases, are natural seeds of doctrinal divide. 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 different enough to count as new? And from whose perspective do courts evaluate whether there is new meaning? The transformative-purpose cases present fewer lines to draw, and courts can also look to the preamble of § 107 for examples as to the types of purposes that Congress favored—there is no similar listing of exemplary content transformation. 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 undrawn lines?[184]

Though it is tempting to conclude that content transformation is simply not worth the trouble, this is the lesser path from the perspective of copyright law's goal of promoting the arts. Some uses that consist only of content transformation would clearly be fair use and are of value to the progress of science and the useful

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177. *See generally* Tushnet, *supra* note 2, at 878.

178. *Id.*

179. *Id.* at 881.

180. *See generally* Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994) (parody); Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687 (7th Cir. 2012) (parody); Nunez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000) (news reporting).

181. *See, e.g.*, *supra* Part II.

182. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 252–53 (2d Cir. 2006).

183. *But see* Tushnet, *supra* note 2, at 887 ("Indeed, to the extent that fair use's critics like fair use at all, it is for content-transformativeness: uses that create new creative works.").

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

arts. For example, we can imagine appropriation art that was non-commercial, that used only modified portions of a published original, that used fairly little of the original, and that did not harm the market for the original.[185] Appropriation art, as a genre, is also valued by many in the art community, and declaring all such art non-transformative would harm the progress of the arts as to those segments.[186] Discarding a whole category of expression to reduce uncertainty makes little sense if the reason less uncertainty is desirable is to promote expression.

There can be no doubt that content-transformation cases and copyright law collide at times.[187] 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."[188] Though this has more rhetorical force than categorical application—for example, imagine if pirated first editions or peer-to-peer networks were valued widely as art—it is grounded in a keen observation: to promote the arts requires some recognition of which arts the art world values. Appropriation art is one such area. 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.

B. RIGHT PATH: RETAIN CONTENT TRANSFORMATION

Courts should, however, modify their approach to content transformation given those challenges. This section proposes such alterations.

First, courts should recognize 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. For example, the preamble to § 107 lists criticism, comment, news reporting, teaching, scholarship, and research as example fair use categories.[189] Those areas may not be treated as "presumptively fair uses," and the list of examples was not meant to be exhaustive.[190] However, many courts recognize the general concept of looking to the preamble in determining which "purpose[s] and character[s]" tip factor one towards fair use.[191] The Supreme Court said as much expressly: "The enquiry [under factor one] may be guided by

185. *Cf.* § 107(1)–(4).

186. *See generally* Schaumann, *supra* note 36 (arguing, *inter alia*, that "[a]ppropriation art is a legitimate and long-standing art form practiced by many twentieth- and twenty-first century artists").

187. *See, e.g.*, 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.

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

189. 17 U.S.C. § 107.

190. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581, 584 (1994) ("Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence."); *accord Harper & Row Pub., Inc.*, 471 U.S. at 561 (news reporting is not a presumptively fair use); PATRY ON FAIR USE, *supra* note 20, at 86.

191. *See, e.g.*, *Campbell*, 510 U.S. at 578–79; Dr. Seuss Enters., L.P. v. Penguin Books, Inc., 109 F.3d 1394, 1399 (9th Cir. 1997).

the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like."[192] Similarly, courts should note that the preamble's examples are not merely different subject matter; they are different approaches to and contexts for expressive and factual works—they are different purposes.

The preamble does not list as examples changes in message. In offering examples of broad categories of uses like research and news reporting, it does not indicate that simply changing the topic of the use from pertaining to astronomy to pertaining to fishing is enough to make the use a new "purpose and character." Some courts have already recognized that identical *purposes* are problematic even when the artist makes some modifications or adds some new expression, and that is in part because changing topic (i.e. potential content transformation) is not the same as changing purpose.[193] This suggests that content transformation is a more limited fair use realm.

For example, under this topic-based approach, *Seltzer* would have come out differently. *Scream Icon* was likely made for decorative, general expressive, and general entertainment purposes. The use of that work in Green Day's concert was probably for decorative and general entertainment purposes as well, and thus it was not a purpose-transformation case. And it involved few modifications to the original, making it a weak content-transformation case. Thus, under this model, the court would have concluded that the secondary use was not for a new purpose—it was for a new topic (religion) within the same purpose (entertainment and expression)—and thus was not purpose transformation. Similarly, there were too few modifications to the original to qualify as content transformation. If simply commenting on something the original did not address is sufficient under § 107, the limits described in other cases would be largely superfluous, as discussed in Part II. Ironically, the historically favored parody defense would then be harder to meet than the content transformation model in *Seltzer*.

For these reasons, absent some other relevant trait under § 107(1)—like a change in purpose—courts should not treat as transformative commenting on and criticizing topics unrelated to the original work unless the original has been significantly modified. However, because content transformation still has value in promoting the arts, courts should continue to protect content transformations (like in *Cariou* generally) but not read the category as so broad as to encompass minimal modifications with overlapping central purposes (like in *Seltzer*). And of course, 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

192. *Campbell*, 510 U.S. at 578–79.

193. *See, e.g.*, Gaylord v. United States, 595 F.3d 1364, 1373 (Fed. Cir. 2010); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1117 (9th Cir. 2000).

likely not permissible under *Campbell*[194]—some general principles are apparent. First, courts should reiterate 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 § 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 § 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 many sizes.

Similarly, the goal of copyright in this area—allowing others to build on prior artists' works[195]—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."[196] 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.

This is essentially the balance that *Cariou*, to the Second Circuit's credit, adopted by remanding the five works that used Cariou's images in large swaths and finding transformative the twenty-five works that more or less used only obscured pieces of Cariou's photographs. If subsequent courts follow *Cariou* and *Seltzer* and find transformative a content-transformation use that serves the same purpose as the original, the extent-of-modifications or Legos vs. lawnmowers line is the last line of defense containing the transformativeness subfactor. Where the original work is copied in whole or substantial part, courts should adjust the other factors accordingly. In such a case, the third factor should be at its apex even when new meaning is added because content transformation does not "need" to use the originals in the same way that many purpose transformations do. Courts should not be in the business of micromanaging artistic decisions, but that truism does not

194. *Campbell*, 510 U.S. at 584–85 (eschewing "rigid, bright-line" rules).

195. *See, e.g.*, Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932, 944 (4th Cir. 2013), *as amended* (Jan. 14, 2014) ("Absent any protection for fair use, subsequent writers and artists would be unable to build and expand upon original works, frustrating the very aims of copyright policy.") (citing Campbell, 510 U.S. at 575-76).

196. *Castle Rock*, 150 F.3d at 142 (internal quotation marks and citation omitted).

mean that all artists have carte blanche in the name of fair use.[197]

For example: if an artist seeks to address religious hypocrisy and to include a screaming face in the final product to symbolize anguish on the topic, the artist does not need to use *Scream Icon* to accomplish that to the same extent that Weird Al parodying Michael Jackson's "Bad" needs to use elements of "Bad."[198] Though reasonable minds can debate how much of "Bad" the parody needs—does it need the same subway venue, the steam grate, the dance moves, etc.—its use of any of them is a greater degree of necessity than the choice the artist seeking to use *Scream Icon* made. Nor does an artist wishing to depict a futuristic, post-apocalyptic world *need* to use Patrick Cariou's images of Rastafarians—again, at least not in the same way that a news report on whether a given photo is scandalous needs to use that photo. Many other images of screaming faces or Rastafarians will do—most importantly, images the artist can create him or herself.[199]

That is not to say that artists do not feel deep connections to images or that they should be forced to settle for "inferior substitutes."[200] Nor should they have to try to obtain permission from others before appropriating work as raw material. But there is a difference in the degree of necessity at issue, and that should affect the latitude otherwise given under factor three to uses of large amounts of the original(s).

Seltzer again is instructive. There, the court concluded that *Scream Icon* "[wa]s not meaningfully divisible. Given that fact, this court has acknowledged that [the third] factor will not weigh against an alleged infringer, even when he copies the whole work, if he takes no more than is necessary for his intended use."[201] This requirement makes sense when the original is the only work that will do for that purpose—a parody needs the parody target and a historical report on a document might need the document. *Scream Icon*, to return to *Seltzer*, was eminently divisible—Green Day's video could have used only the eyes or only the mouth or half of the face, etc. The artist would not necessarily have to use a different image, but requiring the artist to use less than the whole image to win the third factor is a reasonable requirement when there is no parody-level-need for its use to begin

197. *See, e.g.*, Mattel, Inc. v. Walking Mountain Prod., 353 F.3d 792, 802 n.7 (9th Cir. 2003). ("[Plaintiff] strongly argues that [defendant] . . . could have made his statements . . . without using [the copyrighted works at issue]. Acceptance of this argument would severely and unacceptably limit the definition of parody. We do not make judgments about what objects an artist should choose for their art.").

198. *See, e.g.*, Adjmi v. DLT Entm't Ltd., 97 F. Supp. 3d 512 (S.D.N.Y. 2015) ("Applying [the third factor] to parody is particularly difficult because of a simple reality: a parody's humor is entirely contingent on recognizable allusion to the original work."), *appeal withdrawn*, No. 15-1477 (2d Cir. June 25, 2015). This example is simply illustrative as Weird Al generally has permission for his parodies. *See, e.g.*, Weird Al Frequently Asked Questions, Questions Related to Specific Albums #6, http://www.al-oholicsanonymous.com/faq/ [https://perma.cc/H2CT-TUDQ] (last visited July 22, 2015).

199. *Cf. Kienitz*, 766 F.3d at 759 ("There's no good reason why defendants should be allowed to appropriate someone else's copyrighted efforts as the starting point in their lampoon, when so many noncopyrighted alternatives (including snapshots they could have taken themselves) were available. The fair-use privilege under § 107 is not designed to protect lazy appropriators.").

200. COLLEGE ART ASSOCIATION, *supra* note 9, at 9.

201. Seltzer v. Green Day, Inc., 725 F.3d 1170, 1178 (9th Cir. 2013).

with. The artist might not desire to use less, but that does not mean the third factor should pack it up and sit this one out.

How, though, are courts to draw this line given that artists will desire to use—and may feel a deep need to use—a particular screaming face or Rastafarian photographs? Courts give search engines wider latitude under the third factor to copy entire originals[202] even though the database could accomplish its goal *fairly well* by using less than all the text in a book—users could still find lots of books, or find all the books with those words in the books' introductions. Why, then, push an artist to compromise his or her vision by giving the artist less latitude in that same factor? If "close enough" is not what fair use forces on search engines, why otherwise for appropriation art?

The answer is that courts should not view the third factor as a "use only the minimum" requirement. Nor should courts be in the business of telling artists to choose a different image. But the fair use doctrine historically puts courts directly in the business of weighing the fact that the artist used the entire original work and balancing that fact accordingly. Section 107(3) and the precedent which the statute enshrined instruct courts that the amount of the original used is relevant to fair use. Where there is a decline in degree of need in content-transformation cases, full and close-to-full use of an original should push factor three towards disfavoring fair use. That does not mean that the second user will fail in a fair use defense, but the difference in degree of necessity calls for a difference in analysis under § 107(3). To do otherwise limits the extent to which fair use encourages copying less than the entire work when appropriate.

C. MULTIPLE PURPOSES

Works will often have multiple purposes.[203] Artists create works for a variety of reasons, and so too the purposes and characters of works are often multifaceted. For the same reasons that courts consider whether there is a change in purpose and character generally—it reveals whether a sufficiently new work has been created, and it shapes how much the secondary use will supersede the original—courts should consider the various reasons the work was made. That does not always happen, however.

For example, in *Warner Bros. Entertainment Inc. v. RDR Books*, the district court considered whether an unauthorized guidebook to the Harry Potter universe was a fair use.[204] The court held that "[p]resumably" the author of the Harry Potter

202. *See, e.g.*, *HathiTrust*, 755 F.3d at 98 ("Because it was reasonably necessary . . . to make use of the entirety of the works in order to enable the full-text search function, we do not believe the copying was excessive.").

203. *See, e.g.*, Bill Graham Archives v. Kindersley Ltd., 448 F.3d 605, 608–09 (2d Cir. 2006) ("Originally, each of [the] images [at issue] fulfilled the dual purposes of artistic expression and promotion."); Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 22 (1st Cir. 2000) ("Appellee reprinted the pictures not just to entice the buying public, but to place its news articles in context . . . .").

204. Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 540–51 (S.D.N.Y. 2008).

books wrote them for an expressive, entertainment-related purpose.[205] The court found that the guidebook, however, was created "for the practical purpose of making information about the intricate world of Harry Potter readily accessible to readers."[206] That conclusion gave insufficient weight to the fact that the guidebook was also created to entertain, among perhaps other reasons.[207] In weighing the transformativeness inquiry, courts should analyze the work's primary purpose but also identify and compare the extent to which additional purposes overlap with the original use's purposes. Greater overlap should weigh against fair use while lesser overlap should weigh in favor of fair use. Not reviewing the multifaceted reasons for which works are made ignores the extent to which two uses do or do not have distinct "purpose[s] and character[s]" under § 107(1).[208] Forcing a work into only a primary category ignores the reality and nuance of the work's actual goals.

That a new work's additional purpose(s) overlaps with the original work's purpose(s) does not mean that the new work is not transformative. Instead, if both works had something of an entertainment purpose (for example), that would diminish the second work's claim to transformativeness. But that does not mean the work fails factor one: in many cases, like *Campbell*, the primary purpose (parody) will be so prominent that it will trump any overlap, and the use will still be transformative. Recognizing additional purposes does not foreclose fair use, but it does better reflect the nuanced reality of why works are made. And where works truly do have only one primary purpose that differs from the original work's purpose, that should strongly support a finding of transformativeness.

D. INTERPRETING PURPOSE: WHICH PERSPECTIVE MATTERS?

An additional issue under § 107(1) that *Cariou* highlighted is the issue of how courts should decipher the purpose of the initial and secondary uses. Should the court look to the author's intended purpose, to what a reasonable observer might think is the purpose, to surveys or other evidence of what actual observers have concluded was the purpose, to what art critics think is the purpose, or to some combination of the above?

As discussed in Part II, courts have adopted a range of positions on this question.[209] Commentators have also proposed a variety of approaches to determining the relevant vantage point for adjudicating the works' purposes. Some

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205. *Id.* at 541.

206. *Id.* at 541, 543.

207. For example, the long entries that contained few-to-no citations to where the material described was from—an omission that greatly diminishes the book's value as a reference tool—suggest the book also sought to be an enjoyable read. *See id.* at 544. Similarly, that the guidebook contained jokes also suggests it was intended to have, however slight, an entertainment purpose. *See, e.g.*, *id.* at 543. The at times heavy use of the original author's "colorful literary device[s and] distinctive description[s]" supports this argument as well. *Id.* at 547.

The court did, however, note that author J.K. Rowling's companion books had multiple purposes. *Id.* at 541–42 (noting they had reference and entertainment goals).

208. 17 U.S.C. § 107(1).

209. *See supra* notes 42–58 and accompanying text.

tests focus on the reader response, others look to author's intent, while still others call for a balancing of the available viewpoints.[210] Among the advocates for an audience's-perspective-based analysis, there is also debate over whether the audience should be a lay audience, an audience of art experts, the actual target audience for the work, or somewhere in between.[211] There are many such approaches judges could take, and copyright law offers no shortage of parallels to draw from: judges make a variety of interpretive decisions throughout copyright litigation.[212]

For example, Laura Heymann has argued that "the better test . . . is to turn to the reader . . . [because doing so] determine[s] whether the defendant's use promotes the delivery of new works to the public, the ultimate goal of copyright . . . ."[213] Similarly, Walker and Depoorter argue that courts should look to hypothetical viewers in "the general community from which the works in question hail" and ascribe to those viewers "aesthetic insights that are appropriate to the interpretative questions at issue."[214] Another alternative would be for judges to look to the perspectives of experts trained in art criticism via expert testimony.[215] Still others would focus on "all viewpoints reasonably available to the reviewing court"[216] or on an assembly of factors that include the artist's intent and expert testimony from art critics and historians.[217] Arguably, considering a range of interpretations might potentially push the court's perception "toward the center of the viewpoint spectrum" and thereby minimize outliers likely to be present given the wide range of possible interpretations for art.[218] This might also make the fair use analysis more predictable, given that it would be grounded in mainstream views.[219] Finally, commentators have advocated that, at a minimum, the reasonable perception test at

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210. *See, e.g.*, Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 449 (2008); Michael W. Tyszko, *Whose Expression Is It, Anyway? Why "New Expression, Meaning, or Message" Should Consider All Reasonably Available Viewpoints*, 65 SYRACUSE L. REV. 221, 223 (2014).

211. *See, e.g.*, Tushnet, *supra* note 2, at 890 (target audience approach); Robert Kirk Walker & Ben Depoorter, *Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard*, 109 NW. U. L. REV. 343, 349 (2015) (standard based on the "person having ordinary skill in the art" standard from patent law).

212. *See generally* Zahr K. Said, *Reforming Copyright Interpretation*, 28 HARV. J.L. & TECH. 469 (2015) (describing interpretive decisions judges make in numerous contexts ranging from the "substantial similarity" stages to fair use determinations); Walker & Depoorter, *supra* note 211, at 358–71 (summarizing different "interpretative devices" in different parts of copyright analysis).

213. Heymann, *supra* note 210, at 448–49 (footnotes omitted). Heymann would consider evidence that there are "distinct discursive communities . . . surrounding each copy" as indicating that "the meaning of the expression has been transformed, even if the expression itself has not." *Id.* at 455.

214. Walker & Depoorter, *supra* note 211, at 376.

215. *See, e.g.*, Monika Isia Jasiewicz, *"A Dangerous Undertaking": The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases*, 26 YALE J.L. & HUMAN. 143, 171 (2014).

216. Tyszko, *supra* note 210, at 223.

217. *See, e.g.*, McEneaney, *supra* note 188, at 1547 (2013) (considering these factors along with "the objective difference between the two works").

218. Tyszko, *supra* note 210, at 241–42.

219. Tyszko, *supra* note 210, at 242.

play in parts of *Cariou* and *Seltzer* should be better defined to clarify how to apply it in the future.[220]

How an "ordinary person" might reasonably perceive the work is the best analytical angle for several reasons. If the first factor is to mirror and advance the goal of copyright of "promot[ing] . . . the Progress of Science and the useful Arts,"[221] it will best accomplish that by reference to the ordinary person.[222] That is, after all, who would most frequently benefit from copyrighted works. Artistic "progress," in the sense of the Constitution's grant of power, is not something that happens in the ether; it happens with real people in the real world. Focusing on what an ordinary person would perceive grounds the analysis in the body of people that copyright law was meant to protect.

Evidence from the other categories of potential audiences could assist this analysis. For instance, evidence of what actual observers perceive to be the purpose of each work can be valuable in the same way that evidence of actual confusion can be helpful in proving likelihood of confusion under trademark law—though not all courts are receptive to either idea.[223] Like in trademark law, the data will be only as helpful as it is accurate and representative; biased survey questions or a small sample size would undermine the evidence's value.[224] If a court considers survey or other direct evidence of what a group of people actually perceived in the work, it is critical that the data reflect a large, representative sample. When the sample is of an appropriate size, this data has natural appeal: credible evidence that individuals actually did perceive a different purpose is strong evidence that such a purpose could reasonably be perceived.

The reasonable observer standard is also preferable to courts looking to an art expert's perspective alone, because that route could lead to a chilling effect in the name of art elitism. The average artist, especially an artist not classically trained in art history and technique, could only guess what the "expert" might say about his or her work's purpose. However, everyone has a fair chance of deciphering what the "ordinary person" might think. In as much as prediction is possible from any theoretical perspective, the ordinary person is easiest to gauge.

However, looking simply to the vast depths of how art might "reasonably be

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220. *See, e.g.*, Olson, *supra* note 6, at 431.

221. U.S. CONST. art. I, § 8.

222. *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); SOFA Entm't, Inc. v. Dodger Prods., Inc., 709 F.3d 1273, 1277 (9th Cir. 2013) ("The Copyright Act exists to stimulate artistic creativity for the general public good.") (internal quotation marks omitted); Mattel, Inc. v. MGA Entm't, Inc., 705 F.3d 1108, 1111 (9th Cir. 2013).

223. *See* Mattel, Inc. v. Walking Mountain Prod., 353 F.3d 792, 801 (9th Cir. 2003) (declining to consider plaintiff's survey purporting to show a work was not a parody by reference to individuals in the general public thought was the work's purpose); *id.* ("Allowing majorities to determine whether a work is a parody would be greatly at odds with the purpose of the fair use exception and the Copyright Act.").

224. If evidence of actual perception is valuable, why not make it required in place of a reasonable observer standard? In short because it will not always be available and, when it is, it will often be expensive, which will foreclose it as an option for many litigants. An ordinary person standard is thus a better fit, though it can be informed by survey data when the sample is representative.

perceived"[225] is still too unpredictable because art can mean many things to as many people.[226] It is a task that, to most people (and most judges), invites wild speculation and, as a result, brushes against the Supreme Court's warning that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[227] And even if trained discernment was attempted, judges do not always have such training and might not recognize the complexity of interpreting some expressive works.[228] An unanchored analysis of "reasonable perception" is therefore problematic.

There is also a troublesome interaction between an unanchored "how [the] works may reasonably be perceived" test[229] and content transformation. If any new topic or meaning will suffice as content transformation, and the topic and meaning are to be interpreted in whatever ways a reasonable person might see the work, the test compounds in expansiveness. For example, in *Gaylord v. United States*, the United States Postal Service issued a stamp depicting sculptures of soldiers in the Korean War Memorial.[230] The sculptor sued, and the Federal Circuit held the stamp's use was not transformative.[231] However, the stamp depicted the soldier sculptures covered in snow (thus not depicting all of the works) and in subdued lighting, while the original sculptures did not involve snow.[232] Thus, the stamp had some modifications to the original work. A reasonable observer free to cast about in the depths of interpretation could perceive many new meanings in such a work as well: that the Korean War buried the United States in chilled conditions; commentary about Korean War and Cold War connections; a commentary tied to 21st century wars in desert climates; etc. These are levels of "new meaning," but how is a plaintiff or defendant expected to anticipate all of them? The stamp in *Gaylord* was held not transformative, but how would the court sort through these approaches without some anchor for the analysis?[233]

Tethering the reasonable observer test to the artist's intent would make this analysis more manageable and predictable. In essence, it is the difference between guessing what all possible interpretations might be (i.e. how a work might

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225. Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013).

226. *See, e.g.*, Liz McKenzie, *Drawing Lines: Addressing Cognitive Bias in Art Appropriation Cases*, 20 UCLA ENT. L. REV. 83, 95–103 (2013) (collecting sources and arguing that there is a strong risk that judges will succumb to cognitive bias in cases involving interpreting appropriation art).

227. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903). *Cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582–83 (1994) (citing *Bleistein* and applying it in the context of parody).

228. *See, e.g.*, Said, *supra* note 212, at 506 ("Judges lack clear guidance on what to do when confronted with expressive or artistic works, because at present there is little awareness of the interpretive complexity inherent in these works."); *see generally* Rebecca Tushnet, *Worth A Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683 (2012) (addressing copyright and visual works).

229. *Cariou*, 714 F.3d at 707.

230. *Gaylord*, 595 F.3d at 1370.

231. *Id.* at 1373.

232. *Id.* at 1369–73.

233. *Id.* at 1373.

reasonably be perceived generally) and determining whether the artist's intent could be reasonably perceived. The largely unrestrained inquiry into how a work might reasonably be perceived invites judges to invent purposes the artist never had, and use the transformativeness subfactor as a proxy for their own biases.[234] It pushes "transformative" towards being "all things to all people" and a vacuous concept.[235] Limiting the inquiry to whether an ordinary person would perceive the purpose the artist actually intended grounds this analysis in the tangible and reduces the risk of bias.[236] It also parallels the analysis the Court undertook in *Campbell*: there, the justices looked to whether the authors' asserted intent (that the work was a parody) "may reasonably be perceived."[237]

This approach also reduces the unpredictability of this factor. Ideally, a plaintiff seeking to bring or appeal a copyright claim should be able to assess the likely outcome. So too should many others connected with art, such as galleries and art promoters. Otherwise, the parties cannot properly evaluate the risks of the art, litigation, alternative paths, settlement, and the various associated transaction costs. By grounding the analysis in the artist's intent and reasonable perception thereof, the parties can better analyze and proceed.

Finally, this approach also supports the general concept that artists who act in good faith should be less susceptible to copyright claims than artists who act in bad faith. Although permission is not required for a finding of fair use and acting in bad faith does not necessarily undermine fair use, courts tend to look more favorably upon artists who act in good faith.[238] Basing the content transformativeness analysis on what the artist intended complements that assessment because it will reward artists who intend, and succeed, at creating works that have a different character than the original. This is a useful incidental benefit to an author-intent linked approach. It does not solve this problem entirely, but it at least requires the artist to have (or in a more cynical vein, convince the judge he or she had) good faith. This approach also preserves breathing room for good faith attempts that are not fully realized. If an artist sets out to create something with a different purpose and meaning but he or she does not completely succeed, the work may be saved because it can still "reasonably be perceived" as

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234. *Cf.* Olson, *supra* note 6, at 431 ("A court's substitution of its own artistic judgment over that of the artist or expert witnesses with regard to the expressive purpose of a secondary work does nothing to clarify the transformative use doctrine and injects further uncertainty into the practice of any type of creative activity that requires significant borrowing of material.").

235. 4 NIMMER ON COPYRIGHT § 13.05[A][1][b] (quoting Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1670 (2004)).

236. Not all artists will make comments regarding their intent. In many cases, however, they will. *See, e.g.*, Mattel, Inc. v. Walking Mountain Prod., 353 F.3d 792, 797 (9th Cir. 2003) (noting artist's website statement that described his intent in creating certain works); Jonathan McIntosh, *Buffy vs Edward: Twilight Remixed*, YOUTUBE (June 19, 2009), https://www.youtube.com/watch?v=RZwM3GvaTRM (including, in the video description, a statement of intent and link to further discussion of his intent).

237. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994); *see also id.* at 582–83.

238. *See, e.g.*, Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1173 n.6; Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 23 (1st Cir. 2000); *see also* Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932 (4th Cir. 2013), *as amended* (Jan. 14, 2014).

having the purpose and meaning intended.

In summary, courts should adopt a hybrid approach to analyzing content transformation uses through a three step analysis. First, the person claiming fair use (or his or her attorney) should point to the intended purpose of the use. Second, the court should consider whether an ordinary person would reasonably perceive that intended purpose by viewing the art in the primary context in which it was presented. Finally, the court should determine whether that purpose was transformative. If so, the use is transformative under the first factor.

There are, however, costs to this model. For example, what if an artist does not express any intent in creating the work or, though he or she had intent, refuses to voice it for the court?[239] Similarly, what about where an artist has no particular intent except to create art generally, or perhaps created the work for general amusement, to hone his or her skills, or simply for general expression related purposes?

Those intentions often will not exist alone—although the artist might be creating art just to practice, he or she chose to practice in a particular way for some reason, and that reason is a secondary purpose that might be transformative under purpose or content transformation. For example, a secondary purpose might be to add new meaning to a prior work, and that second purpose could then qualify as content transformation if reasonably perceived. Or it could be parody under purpose transformation. And if the artist is not trying to sell the work, it might even win the first factor on the grounds that it is simply noncommercial practice. Thus, by recalling the spectrum of purposes, artists practicing are still protected. This model is not perfect, but it is superior to casting about in the depths of the mind of an unmoored reasonable observer.

E. FINAL THOUGHTS ON THE NEW TRANSFORMATIVE

It is essential that copyright empower artists to build on the works that came before. However, there is more than one layer to that onion. There are levels of abstraction as to how much an artist should be allowed to stand on the shoulders of the past, and neither *Seltzer* nor *Cariou* were situations akin to no one being able to write about star crossed lovers because it was locked up in copyright. At the same time, courts generally should not be in the business of micro managing artistic decisions. Doctrines other than fair use also contribute to artistic freedom to reuse the past—such as the ability to use uncopyrighted ideas, scènes à faire, etc.—but fair use itself necessarily calls for a balance in that it involves contributing to the arts by favoring one of the works at issue. The proposals herein are aimed at assisting in that balance under § 107.

However, the transformativeness subfactor need not do all of the balancing

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239. *See, e.g.*, Enriquez, *supra* note 3, at 4 ("[I]n much contemporary art, the artist's refusal to articulate an identifiable intent is the point of the work. [A] standard [focusing on intent] therefore forces the artist to choose between symbolic destruction of an intentionally ambiguous work in order to win her case or literal destruction of the work upon losing.").

alone. It is not necessary to configure it such that all uses that are "objectively" unfair uses are deemed not transformative. Courts can account for the extent of modifications in other factors and weigh those factors against the transformativeness finding. And, as noted, transformativeness is not a binary concept in that weighing. As *Campbell* noted, the factors must be considered holistically, and the new transformative is simply one such factor.

CONCLUSION

In many ways, the battles over fair use are about issues that run deeper than how transformativeness is defined. As Rebecca Tushnet phrased it, "[e]ven if we abandoned transformativeness as an overriding fair use category, we would still face the same disputes over which uses should be deemed productive or otherwise fair."[240] She is surely correct. But because transformativeness helps decide which uses prosper and which wilt, it is important to craft that definition carefully.[241] Recent decisions like *Seltzer* have expanded that subfactor into a test so easy to meet it begs for reduction. One resulting risk is not that transformativeness will return to its proper parameters, but that the barber will take a bit too much off the top. Further, a fair use standard that fails to balance the goals of copyright is a sign that the scales need recalibration. Cases like *Seltzer* and *Cariou* have tipped the scales too far towards fair use.

Although this Article has argued that this shift is problematic, some level of inconsistency is not new. This is evidenced by, if nothing else, the several cases where circuit court judges, district court judges, and Supreme Court justices disagreed on the fair use merits.[242] That inconsistency is also present in the transformativeness subfactor.[243] 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; persisting in copyright litigation is no small task. So, too, does unpredictability chill creative efforts.[244] 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

240. *See, e.g.*, Tushnet, *supra* note 2, at 871.

241. I do not mean to suggest, by use of her quote, that Professor Tushnet would disagree with the assertion that a clear definition of fair use is helpful.

242. *Compare* Seltzer v. Green Day, Inc., No. Civ. 10-2103, 2011 WL 5834626, at *6 (C.D. Cal. 2011) (concluding copyright claims were "objectively [un]reasonable), *with Seltzer*, 725 F.3d 1170, 1181 (9th Cir. 2013) (labeling it "a close and difficult case"); *see also* Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994) (district court reversed by circuit court which was reversed by Supreme Court).

243. *Compare* Cariou v. Prince, 784 F. Supp. 2d 337, 350 (S.D.N.Y. 2011) ("[T]he 'transformative use' prong of the first § 107 factor weighs heavily against a finding of fair use [here].") *with* Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013) ("[W]e see twenty-five of [Prince's works] as transformative as a matter of law."). *See also* Gaylord v. U.S., 595 F.3d 1364, 1372–74 (Fed. Cir. 2010) (rejecting the Court of Federal Claims' conclusion that the work at issue was transformative).

244. *See, e.g.*, COLLEGE ART ASSOCIATION, *supra* note 9.

backgrounds, and young artists often borrow heavily from existing works. With a worldwide audience at your fingertips and automated content programs like Google's ContentID, it is easier than ever to land on a rights holder's radar.[245] In the face of DMCA notices, lawsuits against individuals, and potential monetary judgments that would cripple many families, an unpredictable fair use defense is—for many artists—no defense at all; they cannot risk a loss (or even the expenses associated with getting to a lawsuit). Fair use means you can hire a lawyer only if you can afford a lawyer.[246]

Perhaps, though, fair use *should* expand. Copyright law has grown in breadth, length, and potency in recent decades; shouldn't fair use expand in parallel?[247] Perhaps a broader fair use would be better for the advancement of art and expression. This Article has, for the most part, sought to reserve that divisive normative question for another day. If, however, expansion is warranted, it should be express and through an articulated standard that explains why content transformativeness should override the limits placed on its subcategories like parody. At a minimum, that is not what we received in *Seltzer*.

When the Supreme Court takes another § 107 case (or if Congress does actually redraft § 107), fair use is ripe for clarification.[248] But we need not reshape § 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 § 107 in their creative efforts, and they would pave a clearer path forward for the new transformative.

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245. "How Content ID Works," YOUTUBE HELP, https://support.google.com/youtube/answer/2797370?hl=en (last visited Apr. 20, 2016).

246. *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE 187 (2004) ("[F]air use in America simply means the right to hire a lawyer to defend your right to create.").

247. *See, e.g.*, Litman, *supra* note 1, at 653 & nn.6–12 (describing emboldened copyright provisions pertaining to scope, length, breadth of rights, and remedies, and making the argument that fair use should expand in response).

248. Redrafting seems less likely. *See generally* Litman, *supra* note 1 (discussing successful resistance to Congress creating new exemptions). Though, it is possible. *See generally* Pallante, *supra* note 8 (calling for updates to domestic copyright law).