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MISREADING *CAMPBELL*: LESSONS FOR *WARHOL*

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ABSTRACT

In Andy Warhol Foundation (AWF) v. Goldsmith*, the Supreme Court is set to revisit its most salient fair use precedent that introduced the idea of a "transformative use." Purporting to rely on the Court's adoption of "transformative use" as a way of understanding the fair use doctrine in* Campbell v. Acuff-Rose Music, Inc.*, many lower courts, including the district court below, have effectively substituted an amorphous "transformativeness" inquiry for the full statutory framework and factors that Congress and* Campbell *prescribe. At the oral argument in* AWF*, the Justices focused on how the transformativeness of a work might be considered as part of the fair use doctrine and rendered compatible with copyright's right to prepare derivative works. In this Essay, we argue that the answers to these questions lay in* Campbell*'s logic and careful analysis, where Justice Souter methodically and meticulously incorporated the idea of transformativeness into a rich understanding of the first fair use factor and the overall four-factor framework as a whole. As we show,* Campbell *paid special attention to concerns with the workability of this idea and its integration with the copyright scheme developed by Congress in the Copyright Act of 1976. The Court in* AWF *would benefit from a close reading of* Campbell*, which presciently*

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foreshadowed and thoughtfully addressed the very questions before it today.

INTRODUCTION

If fair use is copyright law's "most troublesome" doctrine[1] owing to its flexibility and open-endedness, the Supreme Court's landmark decision in *Campbell v. Acuff-Rose Music, Inc.*[2] must count as a significant contributor to that trouble. Even though the Court's earlier decision in *Harper & Row v. Nation*[3] has garnered more citations, *Campbell*'s influence and reach on the fair use doctrine remains significantly deeper.[4] Much of this influence emanates from the fact that Justice Souter's opinion in *Campbell* involved not just an application of the doctrine to a complex set of facts, but, in addition, seemingly signaled a novel approach to the fair use doctrine, one that later courts were quick to emulate and apply. It is with this in mind that one notable judicial commentator described the *Campbell* opinion as having "rescued . . . [and] . . . reoriented" the fair use doctrine after a decade where it was "lost and wandering."[5]

The most commonly accepted readings of *Campbell* credit it with having developed a *new variant* of the fair use doctrine: "transformative use."[6] The idea of transformative use has since captivated courts, litigants, and legal scholars, who have taken it in new directions—theoretical, technological, and otherwise.[7] Much of that

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1. Mongue v. Maya Magazines, Inc., 688 F.3d 1164, 1170 (9th Cir. 2012) (quoting Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam)).

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

3. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985).

4. According to Westlaw Citing References, as of January 19, 2023, *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) has been cited 1,459 times by federal courts, and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) has been cited 832 times by federal courts.

5. Pierre N. Leval, Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 26 (1994).

6. *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 550 (2004); Jacob Victor, *Utility-Expanding Fair Use*, 105 MINN. L. REV. 1887, 1895 (2021); *see generally* David E. Shipley, *A Transformative Use Taxonomy: Making Sense of the Transformative Use Standard*, 63 WAYNE L. REV. 267 (2017) (analyzing different categories of cases using a transformative use standard in fair use decisions).

7. *See generally* John Tehranian, *White Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 B.Y.U. L. REV. 1201; Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 702 (2009); David Tan, *The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the Transformative Use Doctrine Twenty-Five Years On*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 311 (2015); Jacqueline D. Lipton & John Tehranian, *Derivative Works 2.0: Reconsidering Transformative Use in the Age of Crowdsourced Creation*, 109 NW. U. L. REV. 383 (2014); John

fascination traces back to *Campbell*'s observation that an examination of whether the work is "transformative" involves asking whether it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message," a proposition for which it quoted Judge Pierre Leval's law review article.[8] Indeed, that phrase alone has been quoted in its entirety in a significant number of lower court decisions.[9]

Over the last nearly three decades, courts around the country have accorded that quoted language nearly dispositive significance in applying the fair use doctrine.[10] The idea of adding "something new" to a work has, in effect, become the touchstone around which *Campbell*'s framework of transformative use has come to be understood and applied. The problem with this reductive interpretation is, of course, that copyright law grants authors the exclusive right to make derivative works, with a derivative work being understood as one that adds new expression to a prior work, including one where the prior work is "transformed," a term used in the statutory definition of such works.[11] Few courts, if any, have directly addressed the tension, if not contradiction, between the notion of transformative use and the definition of a derivative work. The few that have simply chose to avoid the issue altogether by finding the facts to fall on one side of the line.[12]

Perhaps sensing this looming conflict between a judicially crafted doctrine, i.e., transformative use, and Congress's choice of language in the definition of a derivative work, the Court recently granted

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A. Williams, *Can Reverse Engineering of Software Ever Be Fair Use Application of* Campbell*'s Transformative Use Concept*, 71 WASH. L. REV. 255 (1996); Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008); Clark D. Asay, *Transformative Use in Software*, 70 STAN. L. REV. ONLINE 9 (2017).

8. *Campbell*, 510 U.S. at 579 (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

9. As of January 20, 2023, a Westlaw search of the phrase "adds something new" from *Campbell* reveals that the phrase has been quoted by 284 judicial opinions in federal district courts and courts of appeal.

10. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 605 (2008); Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 163 (2019).

11. *See* 17 U.S.C. §§ 101, 106(2).

12. *See, e.g.*, Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758, 759 (7th Cir. 2014) (noting the conflict but declining to offer a reconciliation); Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 460–61 (9th Cir. 2020) (discussing the derivative work right but avoiding balancing it against the idea of transformativeness).

certiorari in a case that will undoubtedly revisit its *Campbell* decision.[13] In *Andy Warhol Foundation (AWF) v. Goldsmith*,[14] the Second Circuit attempted to reconcile the conflicting doctrines.[15] The dispute in *AWF* involved a photograph of the famed musician Prince taken by Lynn Goldsmith, a professional photographer known for her photographs of rock 'n roll icons.[16] Under the terms of a license, *Vanity Fair*, a well-known publication, had obtained permission from Goldsmith to use the photograph as an "artist reference" in a single piece of art for its print edition.[17] Unknown to Goldsmith at the time, *Vanity Fair* entered into an agreement with the noted graphic artist Andy Warhol to have him produce a print to publish in their magazine. Instead of producing just one work of art, however, Warhol produced sixteen, well beyond the terms of the license.[18] Following his death, his estate sought to commercialize the remaining prints, and, when presented with an assertion of copyright infringement by Goldsmith, AWF raised the argument that his use of the original photograph was fair use: transformative use under the holding and logic of *Campbell*.[19] While the district court agreed with the estate on its fair use claim, the Second Circuit concluded otherwise.[20]

In finding for Goldsmith, however, the Second Circuit did much more than just reverse the district court. Recognizing that a series of prior decisions from its circuit had greatly expanded the "transformative use" idea in ways that had rendered it essentially unworkable, the Second Circuit attempted to rein in the transformative use doctrine by giving it workable limits.[21] And, in so doing, it deviated from a lengthy tradition of treating the Court's few sentences from *Campbell* as talismanic and conclusory. The Supreme Court then agreed to hear the matter on appeal.[22]

During oral argument, the Justices appeared genuinely conflicted about the workability of the "transformative use" idea as well as its

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13. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, No. 21-869, 142 S. Ct. 1412 (2022).
14. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021).
15. *See generally id.* (discussing the interplay between derivative works and transformation).
16. *Id.* at 33.
17. *Id.* at 34.
18. *Id.*
19. *Id.* at 35.
20. *Id.* at 54.
21. *Id.* at 37–44.
22. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, No. 21-869, 142 S. Ct. 1412 (2022).

compatibility with the terms of the statute, even while acknowledging its overall utility and value to the copyright system.[23] The Court's questions on this issue ranged from whether the introduction of "a little smile" on a portrait's face would meet the standard, to whether it demanded "art critics as experts" in all cases or whether judges could be art critics, and, finally, to how developed the factual record needed to be for a court to decide the question on a motion for summary judgment.[24] Not once in the exchanges, though, did the lawyers—or, indeed, the Justices—consider that the answer may be found precisely where they began: in the *Campbell* opinion.

In this Essay, we argue that the nearly three decades of jurisprudence around the idea of "transformative use" has been based on a reductive and simplistic misreading of the Court's decision in *Campbell*. In focusing almost exclusively on Justice Souter's language about "something new," courts and scholars have largely ignored the guidance that the opinion provides on *how* those considerations are to be integrated into the statutorily restated doctrine of fair use. Altogether ignored in discussions of transformative use is the reality that *Campbell* strove hard to integrate its common law reasoning with the language of the statute, and, in the process, engaged in a form of common law statutory interpretation, which the Court in *AWF* would do well to acknowledge and embrace. Indeed, an approach along these lines would go a long way toward reconciling the apparent conflict between *Campbell*'s idea of transformativeness and the statute's exclusive right to prepare derivative works.

Part I traces the framing of fair use analysis of the *Campbell* litigation. By examining the briefing and oral argument, Part I surveys the landscape of arguments that the Court was asked to consider in the case. Part II then breaks down the *Campbell* opinion with a focus not just on *what* the Court said but also on *how* the Court suggested—by example—that its approach to fair use be applied in future cases. In the process, it showcased crucial lessons for future applications of its idea, insights that have been largely ignored. Part III then explains how the logic of *Campbell* can answer some of the questions that the Justices raised during oral argument in the *AWF* case.

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23. *See generally* Transcript of Oral Argument, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, No. 21-869 (U.S. argued Oct. 12, 2022).

24. *Id.* at 49–50, 104–05.

I. THE ROAD (NOT) TAKEN IN *CAMPBELL*

The facts at issue in *Campbell* were both exceptional in one sense yet conventional in another. The work at issue was the 1964 chart-topping song *Oh, Pretty Woman* written by Roy Orbison and Billy Dees and performed by Roy Orbison.[25] Copyright in the musical composition had been transferred to Acuff-Rose Music, the plaintiff. The song enjoyed a resurgence in popularity in the early 1990s as a result of being featured in the box office romantic comedy hit *Pretty Woman* featuring Julia Roberts and Richard Gere. 2 Live Crew, the defendant, was a rap music group that sought to use lyrics and music from the original in a rap version with parodic elements.[26] The defendant initially sought permission from the plaintiff, with an offer to credit the plaintiff, Orbison, and Dees as the authors of the work and to compensate them for the use.[27] The plaintiff denied the request. The defendant nevertheless went ahead and released its song, titled *Pretty Woman*, which sampled the distinctive bassline from the Dees/Orbison song, copied chorus lyrics, and replaced the narrator's yearning for an attractive woman with verses about a hairy woman and her bald-headed friend, as well as denunciation of a "two-timing woman."[28] The defendant's song never charted, but it attained fame in legal annals and casebooks as a result of the subsequent litigation.

Structured as rap music, the defendant's song sought to replicate the tempo and music of the plaintiff's song but replaced many of the iconic original's lyrics with new ones. Songwriter Luther Campbell contended in his deposition that his rendition was intended to show the banality and simplicity of the original.[29] Many of these replacements were intended to shock, but the rap work as a whole undoubtedly conjured up images of the original Orbison song since it was intended to comment on. The plaintiff sued the defendant for copyright infringement, and the defendant argued that its version constituted a parody that was insulated from copyright liability under the fair use doctrine.[30]

The district court found for the defendant, concluding that it was a fair use under the terms of the statutory factors.[31] The Sixth Circuit

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25. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 571–72 (1994).
26. *Id.* at 572.
27. *Id.*
28. *Id.* at 595–96.
29. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991).
30. *Id.* at 1152.
31. *Id.* at 1160.

reversed.[32] Relying on other fair use precedent, it concluded that the parodic nature of the defendant's use—which the district court had weighed heavily in its analysis—was outweighed by its commerciality, and, since commercial uses were to be treated as presumptively unfair, the defendant had a higher burden to meet, which it failed to accomplish.[33] Thereafter, the Supreme Court granted certiorari in the matter.[34]

A. The Parties' Opening Briefs: Singular Focus on Parody

As Petitioner, defendant 2 Live Crew's core argument was that its parody was unequivocally a fair use under the terms of the statute. Seeking to overcome any presumptions to the contrary by focusing on the uniqueness of a parody—as opposed to a verbatim copy—Petitioner's merits brief focused entirely on having the fair use doctrine recognize parodists' need to use the works that they lampoon. This included the likely reluctance of the original creator to permit the creation of such a parody, the parody's intrinsically expressive nature, and the need for a parody to allow its audience to recognize key components of its target.[35]

Somewhat surprisingly, Petitioner appeared to concede that parodies were indeed derivative works under the terms of the statute, although it did not look to the language of the statutory definition. Instead, its focus was on having the Court treat parodies as a special kind of derivative work that was outside the author's ability to control. As its brief noted, "[i]n certain circumstances, a derivative work must pay a statutory rate for its use of the copyrighted work."[36] Yet, this had an exception. "[I]f the derivative work is *creative* and *distinguishable* from the copyrighted work, such as a parody, then the use constitutes fair use and no payment is required."[37] The rationale for this, in Petitioner's view, was that the original author was likely to deny permissions to the use that would create the parody.[38] To buttress this point, Petitioner emphasized that it had tried to obtain permission from Orbison for its song and had been denied such permission, which was,

32. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1439 (6th Cir. 1992).

33. *Id.*

34. Campbell v. Acuff-Rose Music, Inc., No. 92-1292, 113 S. Ct. 1642 (1993).

35. Brief for Petitioner at 11, 16, 27, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292).

36. *Id.* at 16.

37. *Id.*

38. *Id.*

in their view, a denial of Petitioner's "right to freedom of expression."[39] In short, Petitioner sought a "rebuttable presumption in favor of fair use, if a creative derivative work can be defined as a parody."[40]

Respondent's brief chose to counter Petitioner's expansive position. While it noted multiple times that a copyright owner had the exclusive right to prepare derivative works, it, too, skipped any discussion of the statutory definition of a derivative work.[41] Instead, the brief focused on the problems attending a bright-line fair use exception for parodies. Respondent emphasized the need for courts to adopt a case-by-case analysis using the four statutory fair use factors *even for* parodies.[42] In emphasizing the full scope of market harm that Petitioner's unauthorized use could produce, the brief highlighted the extensive licensing market that had emerged for the Orbison work, from musicians in different genres to advertisers and others seeking to use it for commercial purposes.[43]

In short, the parties' opening briefs barely touched on the interaction between fair use and the derivative works right. Nor did either mention the "transformative use" term, which would significantly anchor the *Campbell* opinion. The true origin of that term in the case lies elsewhere.

B. Amicus Briefing: Introducing the Court to Transformative Use

When the matter reached the Supreme Court, the case attracted third party interest and resulted in the filing of ten amicus briefs. All but three were in favor of the Petitioner, while two sided with the Respondent and one with neither side. Most amici emphasized the same issues as the parties themselves: the importance of parody, the centrality of free speech to fair use, and the malleability of the statutory factors. None directly addressed the statutory definition of a derivative work. All the same, two briefs introduced arguments that would prove to be influential in the eventual decision.

In its brief on behalf of Petitioner, the American Civil Liberties Union (ACLU) echoed the Petitioner's claim that a parody was a powerful embodiment of free speech protected under the First Amendment and, therefore, deserved special protection in the nature

39. *Id.* at 15 n.7.

40. *Id.* at 20.

41. *See generally* Brief for Respondent, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292).

42. *Id.* at 8.

43. *Id.* at 39.

of a presumption in favor of fair use.[44] All the same, it cited Judge Pierre Leval's *Harvard Law Review* commentary that had been published just a few years prior.[45] As will be discussed, Judge Leval was among the first to use the phrase "transformative use" in his article, which developed the approach to fair use that *Campbell* would eventually adopt. The ACLU brief did not quote Leval's discussion of transformative use and focused instead on his argument that fair use needed to be conceptualized as an integral part of the creative system that copyright was designed to foster.[46]

The term "transformative use" formed a part of the amicus brief filed by a collection of multiple famous composers, songwriters, and their estates, who urged the Court to find in favor of *Respondent* Acuff-Rose Music.[47] Ironically, the brief did not cite to Judge Leval's article and appeared to develop an independent understanding of the term, which it drew from prior case law that had in turn cited to Judge Leval's article.[48] This brief offered a definition of "transformative purpose" as one that "uses and transforms a limited portion of a prior copyrighted work in the course of creating a new work for a socially desirable purpose, such as literary criticism."[49] The definition was offered without support and used the terms "productive" and "transformative" together to describe the defendant's use and purpose.[50]

The term "productive use" was initially understood as little more than the opposite of what the copyright practitioner Leon Seltzer described as an "ordinary" use of the work in his 1978 treatise on fair use.[51] In this understanding, a productive use was one where a second author used portions of a protected work in a manner that added social value through such use.[52] Initially endorsed by the Ninth Circuit in its

44. Brief for ACLU as Amici Curiae Supporting Petitioners at 6, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292).

45. *Id.* at 4–5 (citing Leval, *supra* note 8, at 1110).

46. *Id.* at 4–6.

47. Brief for Composers and Songwriters et al. as Amici Curiae Supporting Respondent at 20, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292).

48. *Id.* at 19.

49. *Id.* at 20.

50. *Id*.

51. L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978). Seltzer did not use the term "productive use" in his treatise. It instead appears to have originated in a student note a couple of years later, which sought to analyze the district court decision in *Sony* using Seltzer's framework. *See* C.H.R., III, Note, University City Studios, Inc. v. Sony Corp.*: "Fair Use" Looks Different on Videotape Author(s)*, 66 VA. L. REV. 1005, 1013 (1980).

52. *See* C.H.R., III, *supra* note 51.

decision in *Universal City Studios, Inc. v. Sony*,[53] on appeal the Court expressed marked ambivalence about the utility of the idea, noting that while it "may be helpful . . . it cannot be wholly determinative" since "social 'productivity' cannot be a complete answer" to the fair use question.[54]

In his 1990 law review article that introduced the phrase "transformative use," Judge Leval built on the idea put forward by Seltzer and *Sony*, noting that "the question of justification [for a secondary use] turns primarily on whether, and to what extent, the challenged use is *transformative*," meaning that "[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."[55] By productive, Judge Leval meant that the "secondary use adds value to the original . . . for the enrichment of society."[56]

At the time of writing his article, Judge Leval was a district court judge in the Southern District of New York. Barely a few months after its publication, another judge in the same district picked up the idea and terminology from Judge Leval's article and used it to decide a fair use case involving course packets, which it found did not entail a "transformative use" since the content was hardly "productive" and did not enhance public welfare.[57] The very next year, Judge Leval himself incorporated the logic of his law review article into his opinion in *American Geophysical Union v. Texaco*. Interpreting the *Sony* decision to have endorsed the idea that there were two kinds of fair use—a "transformative, productive, non-superseding" use and a noncommercial use—he went on to find against fair use while nevertheless reifying his terminology and logic.[58] The very next year, the Second Circuit referenced the "transformative use" terminology and applied it. It did so, however, without any reference to a "productive use," seemingly giving it independent analytical significance.[59]

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53. Universal City Studios, Inc. v. Sony, 659 F.2d 963, 970, 971–72 (9th Cir. 1981).

54. Sony v. Universal City Studios, 464 U.S. 417, 455 n.40 (1984). In contrast to the majority, the dissent in the case made extensive use of the term and employed it in its reasoning. *See id.* at 478–82 (Blackmun, J., dissenting).

55. Leval, *supra* note 8, at 1111.

56. *Id.*

57. Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1530–31 (S.D.N.Y. 1991).

58. Am. Geophysical Union v. Texaco, Inc., 802 F. Supp. 1, 12–13 (S.D.N.Y. 1992).

59. Twin Peaks Prods. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1375 (2d Cir. 1993).

In offering up a definition of "transformative use" that tied it back to a "productive use" and the idea of public welfare, the composers' and songwriters' brief in *Campbell* was in some ways seeking to cabin the idea to its originally intended framing—i.e., as a mechanism for encouraging uses that added social value. Yet, the brief went one step further and argued that the parody at issue did not evince a "transformative purpose" since it did not make "a meaningful comment" and was "not distributed or performed as having political or meaningful social content."[60] To them it was merely to "exploit interest" in the original work and use it "as a vehicle for entertainment," which negated any "productive or transformative quality."[61] The import of this argument should be obvious: it required the court to scrutinize and evaluate the connection between the secondary use and its direct contribution to social value. It risked undermining the content-neutral approach that had long restrained the judicial role in copyright adjudication.

Therefore, it was in the amicus briefs that Judge Leval's notion of transformative use and its connection to Seltzer's original idea was presented to the Court. Furthermore, neither amicus brief that raised transformativeness considered its interaction with the statutory definition of a derivative work.

C. Oral Argument: "You Take the Sweet but Not the Bitter from [Judge Leval]."

While the initial stages of the oral argument in *Campbell* focused on Petitioner's parody presumption notion, about ten minutes into the argument several Justices—led by Justice Souter—began asking Petitioner's counsel about the market for derivatives of the original song.[62] In particular, they appeared perplexed by the fact that the district court had decided the question of fair use on a motion for summary judgment in the complete absence of any evidence about the effect of the use on the market for derivatives of Respondent's work.[63] Justice Souter, in particular, emphasized that any reference to "harm" that Petitioner had relied on had ignored the "market for derivative works" altogether, which ought to have precluded the grant of

60. Brief for Composers and Songwriters et al. as Amici Curiae Supporting Respondent at 20–21, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292).

61. *Id.* at 21.

62. Transcript of Oral Argument at 21–24, *Campbell*, 510 U.S. 569 (No. 92-1292).

63. *Id.*

summary judgment.[64] Intriguingly, all of this discussion of derivative works focused almost entirely on the question of market harm rather than the actual definition of a derivative work, with all of the Justices implicitly assuming that Petitioner's use had resulted in the creation of a derivative work.

Petitioner's counsel did not bring up transformative use. Ironically, it was Respondent's counsel who referenced Judge Leval's article during oral argument. Noting that Judge Leval had used the article to "reassess his own opinion" in a prominent fair use case—the *Salinger* case—Respondent argued that Petitioner's use of the song was identical to the defendant's (non-fair use) copying in *Salinger*.[65] In this case, Petitioner had taken more than was necessary for the purposes of a parody (just as the defendant had taken more than was needed for its biography in *Salinger*), thereby rendering it an intrinsic and commercial—rather than transformative—use.

Most of the Justices appeared to have little familiarity with Judge Leval's article. Justice O'Connor seemed perplexed that Respondent was using the article to question the status of the use as a parody, and Chief Justice Rehnquist voiced genuine confusion at the analogy to *Salinger*.[66] It was only Justice Ginsburg who seemed to have known about the article. At argument, she pushed Respondent's counsel, noting that he was essentially using Judge Leval to find against fair use, and pointed out that, in such close situations where a fair use was *not* found, Judge Leval had himself further cautioned against issuing an injunction automatically since the underlying use—even if not fair use—could be socially valuable.[67] Respondent's counsel was caught off guard, noting that he was reluctant to go down that path, to which Justice Ginsburg replied, "You take the sweet but not the bitter from him," causing the courtroom to erupt into laughter.[68] The remainder of Respondent's argument then moved on to remedies, with the Justices then attempting to examine why Respondent was not satisfied with damages.[69]

One might have expected Petitioner to have called attention to Judge Leval's article and its idea of transformative use; yet, ironically, it was the other side which emphasized its absence, despite it being a

64. *Id.* at 21–22.
65. *Id.* at 26–27, 29–30.
66. *Id.* at 29–30.
67. *Id.* at 33.
68. *Id.* at 34.
69. *Id*. at 35.

defense. And, there, too, the term itself (or its predecessor term "productive use") never once came up at oral argument.

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The lead up to the *Campbell* opinion reveals that the transformative use idea was largely peripheral to the parties' briefs and arguments in the case. In so far as the idea was introduced in the briefing, it was heavily tied to Seltzer's idea of productive use and portrayed as requiring a scrutiny of the social welfare (public benefit) effects of a secondary use. Neither the Petitioner (who would eventually benefit from the idea) nor the Justices (with the exception of Justice Ginsburg) evinced any familiarity with the idea, much less its interaction with other aspects of the copyright landscape, such as the fair use factors or the statutory definition of a derivative work. Its emergence as a touchstone for fair use analysis was, therefore, entirely in Justice Souter's opinion. Indeed, he molded and integrated the concept in articulating a comprehensive framework faithful to the legislative design and jurisprudential antecedents.

II. JUSTICE SOUTER'S MISUNDERSTOOD NUANCE

How, then, did the Court's opinion in *Campbell* come to focus on transformative use as an idea and with it the singular emphasis on whether the defendant's use added "something new," as has been commonly understood? The answer is rather straightforward: *it did not.* Even though *Campbell* is routinely cited for its reliance on transformative use as an idea and its use of seemingly talismanic language,[70] an unhurried reading of Justice Souter's majority opinion reveals that the Court focused carefully on the statutory text, jurisprudence, and factual record in crafting a faithful, sophisticated, and pragmatic interpretation of the fair use doctrine. Indeed, the core contribution of the opinion is to be found not just in what Justice Souter said about fair use but also how he conducted the fair use analysis in the case, applying his logic to the facts of the case and related circumstances. It is this nuance that appears to have been unfortunately altogether lost in recent readings of the opinion.

This Part revives this lost nuance, focusing on integrating the opinion's verbiage with its actual application to the dispute in *Campbell*. In the process, it highlights the centrality of Justice Holmes's

70. *See supra* notes 7–9.

famous admonition that "[i]t is the merit of the common law that it *decides* the cases first and determines the principle afterwards."[71]

A. Fact Specificity

While *Campbell* is often treated as an abstract "pie in the sky" opinion that advanced a theoretical idea found in a law review article, this account ignores the reality that the opinion itself pays acute attention to the unique factual elements that were at stake in the dispute that arrived at the Court. Some of this played out at oral argument, but the opinion itself went well beyond. The opinion did not find for or against fair use in the case. Instead, it noted the incompleteness of the factual record on a core issue in the case—the effect of the Petitioner/Defendant's copying on the market for derivatives of the protected work—and, on that basis, *remanded* the case back to the lower court.[72] While the parties eventually settled, it was nevertheless the Court's close scrutiny of the factual record that produced this outcome.

Additionally, Justice Souter's opinion for the Court is replete with references to the factual record that were unequivocally designed to highlight the uniqueness of the dispute before the Court, which prompted his novel analytical framework. First, the Court recognized that the Petitioner had "departed markedly" from the original work despite its copying by introducing "distinctive sounds, interposing 'scraper' noise, overlaying the music with solos . . . and altering the drum beat."[73] In so doing, the Court refrained from passing judgment on whether the copying was "excessive" in light of the proffered purpose.[74] Second, in acknowledging the parodic nature of the Petitioner's work, Justice Souter did much more than just summarily conclude that it was a parody. Instead, he concluded that the work might be "reasonably perceived as a parody," a seemingly objective standard met by his conclusion that it "juxtapose[d] the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility."[75] He even noted that the Petitioner had failed to label its music a parody, a fact from which he refused to draw an adverse

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71. Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870).

72. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 593–94 (1994).

73. *Id.* at 589.

74. *Id.*

75. *Id.* at 583.

inference. Finally, Justice Souter astutely observed that the Petitioner's work was not just a parody but also quite legitimately an entrant into the market for rap music, being a rap derivative of the original.[76] From this, the opinion therefore demanded an account of the effects of the unauthorized use on that market, noting that the Respondent's effort to have the Court draw an inference of market harm from the mere fact that another group had sought a license to make a rap derivative was as unpersuasive as the lower court's failure to consider the evidence on this point.[77]

In short, then, Justice Souter's opinion exhibited deep, instructive, insightful, and critically important facility with the factual record that motivated both the Court's application of the fair use doctrine and its resolution of the matter. Indeed, some of this was previewed at oral argument when Justice Souter corrected Petitioner's counsel by noting that the only affidavit submitted in the district court related to the market for the original and not the market for derivatives thereof, a significant omission.[78]

B. Common Law Statutory Interpretation

Quoting from legislative history and precedent, Justice Souter began his foray into fair use by noting that Congress fully "intended that courts continue the common-law tradition of fair use adjudication," which abjured rigid bright-line rules in favor of a case-by-case analysis.[79] All the same, he did not treat Congress's invocation of the common law as an authorization for the Court to proceed entirely in the direction of pure common law development, i.e., unfettered by the statute.[80] Instead, the opinion weaved a synergistic hybrid of statutory text and common law reasoning, in effect engaging in what is best described as a method of common law statutory interpretation.

Courts and scholars have long identified statutes that actively delegate law- and policy-making to courts as "common law statutes."[81]

76. *Id.* at 592–93.

77. *Id.* at 593–94.

78. Transcript of Oral Argument at 21, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (No. 92-1292).

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

80. *Id.* at 577–78.

81. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 879 (2007) (acknowledging the Sherman Act is treated as a common-law statute); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1247, 1249 (2001) (proposing that super-statutes such as the Sherman Act, the Civil Rights Act, and the Endangered Species Act should

Paradigmatic of this genre is the Sherman Antitrust Act, which effectively directs courts to develop the law around the ideal of "restraint[s] of trade or commerce."[82] In these situations, the congressional design is clear: the statute is an implicit delegation and authorization of lawmaking power to courts, sometimes broad and other times tethered to statutory text. Congress has periodically also employed a similar strategy when legislating against the backdrop of an area already covered by common law rules. In these situations, a well-worn canon of construction—"common law conformity"—directs that Congress's language be accorded the same meaning as the common law, unless an intention to the contrary is obvious.[83]

There are multiple areas in the Copyright Act of 1976 where Congress chose to delegate such lawmaking to courts in an unrestricted manner. The statute's use of "original" to describe an eligible work is exemplary, in relation to which the legislative history makes clear that Congress intended to have the term carry the weight of the existing judge-made law around the originality requirement.[84] Similarly, the statute's use of "authorize" in delineating an author's exclusive rights was meant to preserve the judge-made area of secondary liability, again made clear in the legislative history.[85]

All the same, common law statutes (or provisions) are not all identical in their design. With fair use, Congress decided to do something different. Instead of merely referencing the doctrine and authorizing further common law development, Congress chose to "restate" the judge-made doctrine in the language of the statute using a framework of four factors.[86] In so doing, it thus fully intended that its choice of language and structure be given due attention, unlike in other areas where that language was little more than an authorization. To be sure, this did not mean that its chosen language was to be treated as constraining in the same manner that it was to be respected in other areas but merely that any further common law development had to take shape and guidance from what it restated in the text of the statute.

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be construed liberally and in a common law way); Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 89–90 (Shyamkrishna Balganesh ed., 2013) (recognizing the Sherman Act, § 1983, and the Taft-Hartley Act as common law statutes).

82. 15 U.S.C. § 1; *see Leegin*, 551 U.S. at 885.

83. *See, e.g.*, Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952).

84. 17 U.S.C. § 102(a); H.R. REP. NO. 94-1476, at 51 (1976).

85. 17 U.S.C. § 106; H.R. REP. NO. 94-1476, at 61 (1976).

86. 17 U.S.C. § 107; H.R. REP. NO. 94-1476, at 65–66 (1976).

Thus, Congress clearly called for courts to not just make fair use law on a case-by-case basis but to do so using Congress's guidance and framework in the text of the statute.

Justice Souter was quick to recognize this early in the *Campbell* opinion. Almost immediately after noting Congress's desire to avoid rigid rules in the area, he proceeded to note the specific words used by the text of the statute, including its preamble wherein Congress had identified uses "most commonly . . . found to be fair uses."[87] He then announced: "Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighted together, in light of the purposes of copyright."[88] These words are critical. Not only does Justice Souter declare that the precise language of the statute matters, but he further concedes that the statutory design and structure of the fair use provision also ought to dictate the manner in which courts undertake their analysis.

And, to be sure, Justice Souter applied this approach in conducting the fair use analysis in the case. Paying particular attention to the "language of the statute," the opinion emphasized Congress's use of the word "including" to suggest that it was open to courts considering purposes beyond the commercial (or non-commercial) nature of the use.[89] Elsewhere, it emphasizes that the inquiry into purpose and character of the defendant's putative fair use "may be guided by the examples given in the [statute]"[90] and contained in the preamble. Using this interpretive exercise, Justice Souter then relied on Judge Leval's article to introduce the notion of a "transformative" purpose behind a use wherein it adds "something new, with a further purpose or different character."[91]

The notion of a "transformative" purpose was undoubtedly introduced into the fair use analysis by Justice Souter in keeping with the idea of developing fair use law in common law form. All the same, it was done so as an exercise in *statutory interpretation*, relying on the flexibility that Congress built into the text of the fair use provision. This meant two important things. First, the notion of a "transformative" purpose was integrated into the existing statutory language as a component of the first fair use factor ("purpose and character"[92]).

87. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994).
88. *Id*. at 578.
89. *Id.* at 584.
90. *Id.* at 578.
91. *Id.* at 579.
92. 17 U.S.C. § 107(1).

Second, it was done with the express recognition that the full text of the first fair use factor as well as "all [the factors] are to be explored" even when so introduced, thus emphasizing the centrality of Congress's design behind the fair use doctrine.[93]

Therefore, the idea of transformativeness was not a freestanding exercise in policy formulation, as many have assumed it to be. Instead, it was an interpretive explanation of the hybrid statutory/common law character of the fair use doctrine, wherein Justice Souter brought a view of copyright's purposes (drawn from Judge Leval's article) to bear on the fair use provision in order to embellish its text with a gloss that would guide cases involving uses such as parodies.

C. Sliding Scale Logic

Closely tied to the opinion's focus on the statute is the manner in which it required transformativeness to be considered during the fair use analysis. Instead of just injecting the idea into the fair use doctrine and letting courts thereafter apply it in whatever manner they best chose, Justice Souter's opinion for the Court also instructed courts on how they were to undertake the analysis of transformativeness in individual cases. And, here, it developed an overtly scalar—rather than binary—approach to transformativeness.

In this understanding, the assessment of transformative purpose underlying a defendant's use was not simply a determination of whether such use was transformative. Instead, it was a variable under the first fair use factor that would influence a court's application and emphasis on the overall question of purpose within that factor, which would be considered alongside the other fair use factors. Transformativeness was, thus, a matter of degree to the Court in *Campbell*. This scalarity was a consequence of the Court's recognition that it was introducing the idea into the term "purpose" contained in the first fair use factor, wherein Congress had already indicated that another crucial element underlying the assessment of purpose was the commerciality of the defendant's use. To suggest that transformativeness could end the inquiry when the statute had specifically used the term "commercial," which Congress had specifically added, would have been deeply problematic as an interpretive exercise. Instead, as Justice Souter observed, "the more transformative the new work, the less will be the significance of other

93. *Campbell*, 510 U.S. at 578.

factors, like commercialism, that may weigh against a finding of fair use."[94]

Thus, transformativeness was meant to be a question of degree. A mere finding that a work was minimally transformative did not render it ineligible for fair use, and, conversely, a finding that a work was highly transformative did not produce the opposite conclusion. Instead, transformativeness was to guide the extent to which the other elements of the inquiry—including the question of commerciality in factor one—was to be weighed by courts during the analysis.[95]

In applying the analysis to the facts in the case, the opinion did just this. After concluding that the use at issue was indeed a legitimate parody or "could be perceived as commenting on the original or criticizing it, to some degree" as a parody, Justice Souter then proceeded to have other fair use factors—most notably the third and fourth—take color from this conclusion.[96] Noting that the context of the parody required assessing whether it had taken more than was required for its purpose, he found the third factor to favor the defendant.[97] For the fourth factor, he similarly concluded that the parodic purpose influenced the very nature of harm that the court was to consider under this factor, drawing a distinction between a "potentially remediable displacement" and an "unremediable disparagement."[98]

The real crux of the *Campbell* sliding scale analysis was its focus on the interaction between transformativeness and the commercial nature of the use under the first fair use factor—both "purpose[s]" of the use.[99] And, it is here that Justice Souter takes pains to explicate the idea, once again revealing that it was not some abstract formulation:

> The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake, let alone one performed a single time by students in school.[100]

Hardly anyone has paid attention to this observation in *Campbell*, but it is quite telling and reveals the significance that Justice Souter placed on the sliding scale nature of transformativeness. In it, he posits that

94. *Id.* at 579.
95. *See id.*
96. *Id.* at 583; *see id.* at 586–94.
97. *Id.* at 586–89.
98. *Id.* at 592.
99. *Id.* at 579.
100. *Id.* at 585.

the sliding scale analysis applies not just to transformativeness but also to commerciality even when a work has some transformative characteristics. Even for a legitimate parody—endowed with some identifiable transformativeness—the degree of that parody's commercialism influences the first fair use factor. A non-commercial parody (school use) is thus entitled to the most "indulgence" under the analysis; a moderately commercial one (one sold for its own sake) to moderate indulgence; and a highly commercial one (a parody embedded in an advertisement) the least indulgence.

The mere identification of a parodic purpose was hardly an end to the inquiry, since the transformativeness and commerciality were meant to interact. Thus, a work with minimal transformativeness—such as a work with only a slight "parodic element"[101]—but which is nevertheless endowed with a major commercial purpose (e.g., an advertisement), would likely fail the first factor. Conversely, a highly parodic work with a non-commercial purpose would most likely succeed on this factor.

Therefore, *Campbell*'s sliding scale analysis was a framework that it imposed not just on the question of transformativeness, but also on the question of commerciality vis-à-vis any transformativeness.

D. Navigating Bleistein

Determining whether—and to what degree—a defendant's secondary use is transformative is undoubtedly a matter of judgment. And, in making this judgment, the decision-maker (usually a court) must therefore invariably engage with the content, purpose, meaning, and nature of the use that is attempting to qualify as transformative. The question, then, becomes whether this call for judicial assessment of transformative use runs afoul of copyright law's longstanding principle of "aesthetic neutrality," one that has long been a guardrail of the copyright system.[102]

Aesthetic neutrality is commonly traced back to the Supreme Court's opinion in *Bleistein v. Donaldson Lithographing Co.*, where Justice Holmes famously observed that:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial

101. *Id*. at 582 n.16.

102. *See* Barton Beebe, Bleistein*, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 372 (2017); Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 836 (2005); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 298 (1998).

> illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.[103]

This observation has since been treated by courts as requiring courts to consciously steer clear of introducing their own views of a work's quality into their analysis of the work for copyright purposes.[104] While originally introduced in relation to the originality doctrine, the principle has since been extended well beyond.[105] Therefore, if the analysis of transformativeness is about a work's introduction of "new meaning," how then might a court go about implementing it without either running afoul of the *Bleistein* admonition (i.e., aesthetic neutrality) or instead relying on art (or other relevant) critics as experts in every case?

This is where Justice Souter's opinion in *Campbell* was both careful and pragmatic. In advancing the idea of transformativeness as a sliding scale inquiry, he at the same time openly recognized the risk that it might be perceived as running counter to *Bleistein*'s principle of aesthetic neutrality. After quoting Justice Holmes's admonition, he then drew a crucial distinction: "The threshold question when fair use is raised in defense of parody is whether a parodic character may

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103. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903).

104. *See* SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951); Stuff v. La Budde Feed & Grain Co., 42 F. Supp. 493, 495 (E.D. Wis. 1941); Vitaphone Corp. v. Hutchinson Amusement Co., 28 F. Supp. 526, 528–29 (D. Mass. 1939); Hoague-Sprague Corp. v. Frank C. Meyer Co., 27 F.2d 176, 179 (E.D.N.Y. 1928).

105. *See* Brandir Int'l, Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 n.3 (2d Cir. 1987) (avoiding aesthetic judgments in applying copyright law's useful article doctrine); Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 418 (2d Cir. 1985) (noting that subjecting utilitarian articles to a lower level of scrutiny in determining copyrightability would "conflict with the anti-discrimination principle Justice Holmes enunciated in *Bleistein*"); Denker v. Uhry, 820 F. Supp. 722, 728 (S.D.N.Y. 1992) (observing that "courts have been reluctant to make subjective determinations regarding the similarity between two works"); Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992) (rejecting suggestion in appeal of an infringement determination that "a trial judge uneducated in art is not an appropriate decision-maker misses the mark" and stating that "the decision-maker, whether it be a judge or a jury, need not have any special skills other than to be a reasonable and average lay person"); Parks v. LaFace Records, 329 F.3d 437, 462–63 (6th Cir. 2003) (referencing Justice Holmes' admonition in a right of publicity case).

reasonably be perceived . . . [and w]hether, going beyond that, parody is in good taste or bad does not and should not matter to fair use."[106]

The distinction is crucial to appreciate. In it, Justice Souter is drawing an important distinction between what we might call the questions of *qualification* and *quality*. In the qualification question, the inquiry is merely into whether the use legitimately qualifies into the category that the defendant is alleging for it. The objective here is to make sure that the invocation of a specific category of use—e.g., a parody, commentary, review, etc.—is not a mere sham that is invoked merely for fair use.[107] The opinion thus emphasized that the inquiry was into whether the use "reasonably could be perceived" as fitting the category it was claiming for itself, i.e., parody in the specific case.[108]

The qualification question is different from the quality question, where the assessment is instead whether the use (work) is a good or bad version of the category it is claiming for itself. In relation to a parody, this would be the question of whether it was "in good taste or bad."[109] And, Justice Souter was quick to caution that this was precluded by the *Bleistein* principle, and, therefore, courts were to eschew any assessment of "rank" once legitimately slotted into a category.[110]

A simplistic read of the qualification/quality distinction might lead one to think that the opinion's emphasis on a sliding scale comes perilously close to the assessment of quality that Justice Souter warned against, potentially revealing a contradiction. While it is certainly true that the sliding scale requires a court to assess the degree to which the secondary use falls within a claimed category, that is not the same as assessing the quality of the use within the category. *Campbell* presciently emphasized the distinction:

> The only further judgment, indeed, that a court may pass on a work goes to an assessment of whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely "supersede the objects" of the original.[111]

106. *Campbell*, 510 U.S. at 582.

107. *See id.* at 584 (noting that the inquiry must be whether the parodic purpose can be reasonably perceived from the work and no more).

108. *Id.* at 583.

109. *Id.* at 582.

110. *See id.* at 582–83.

111. *Id.* at 582 n.16.

Passing judgment on the extent of the use's reliance on the category was thus firmly within the qualification (rather than quality) question in as much as it requires asking about the extent of such qualification, instead of treating qualification as a simple binary determination. A book review illustrates this further. For an essay to qualify as a book review, it must legitimately offer thoughts on a prior book, rather than merely refer to the title of a book, and then proceed to discuss the subject quite independently. Yet, even book reviews come in different shades. Some go chapter by chapter and offer views; others offer a quick summary of the book and then proceed to deliver their own views on the matter; and others do something that lies between these extremes. The degree and extent to which the essay at issue is a book review is thus a question of the extent to which its body is reviewing the book. And, this question is altogether different from whether the review is good or bad or fair or unfair. The former is part of the qualification assessment, while the latter is an aesthetic judgment likely to run afoul of *Bleistein*.

While the qualification/quality distinction made perfect sense in *Campbell* and was rather straightforward to apply when the secondary use was a parody—and thus an identified category—there was, nevertheless, a problem embedded within it that would be exposed in later cases, including *AWF*. In situations where a secondary use did not fit any established *a priori* category, the defendant would very often fall back on *Campbell*'s language of "new meaning" to suggest that this was enough to address the qualification question. And, when this occurred, as it did in *AWF*, the defendant fell back on *Bleistein* to suggest that the absence of a qualification inquiry—owing to absence of a pre-defined category—simply means that a court engaged in the inquiry is obligated to accept the defendant's own assessment of meaning, since any other approach would make the court a critic of such meaning and thus violate the ideal of aesthetic neutrality.

On its face, this argument might seem like it has some resonance and represents an oversight in the *Campbell* opinion. On closer scrutiny, however, this was not something that Justice Souter overlooked. His opinion focused on a parody in the analysis not just because the defendant was alleging that the use at issue was parodic. It was instead also driven by his explicit recognition that a parody was a category that the legislative history as well as prior caselaw had endorsed as eligible for fair use. At multiple points in the opinion, Justice Souter is deliberate in using language contained in the statute

or the legislative history.[112] For instance, in concluding that "parody has an obvious claim to transformative value," he is quick to note that it is akin to "comment or criticism," categories identified in the statute.[113] Later, in applying the first fair use factor and its use of "purpose," his opinion emphasizes that the inquiry into transformative purpose "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."[114] While he certainly did not want these categories to be a closed set—noting how Congress had used the word "including"—he, at the same time, emphasized that they were to be given significant weight in the analysis.[115] And, finally, noteworthy is his treatment of satire, which the opinion is unwilling to equate with parody for the fair use analysis since its connection to the original is more attenuated and less essential and therefore more likely to be licensed. *Campbell* thus observes in categorical terms that it "express[ed] no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it."[116]

This nuanced analysis tells us something important. Insofar as *Campbell* offered courts a way to get around the constraint of aesthetic neutrality posed by *Bleistein*, it required them to give some (even if not dispositive) weight to the categories identified by Congress in the statute and legislative history. Indeed, a few courts have over the years recognized this reading of *Campbell*.[117] Implicit in Justice Souter's move is the idea that when the defendant abjures reliance on an established category but decides to rely directly on a new transformative purpose, the burden is on the defendant—not the court—to navigate the qualification/quality question and establish that the use is legitimately transformative even without an assessment of its quality. Without this, defendants would simply lay claim to a novel transformative purpose at each instance and thereafter preclude courts from reviewing the nature of that purpose by invoking *Bleistein*, a form of strategic bootstrapping. *Campbell* quite directly sought to eliminate this possibility.

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112. *E.g.*, *id.* at 584, 586.

113. *See id.* at 579; 17 U.S.C. § 107 (2022).

114. *Campbell*, 510 U.S. at 578–79.

115. *Id.* at 584.

116. *Id.* at 592 n.22.

117. *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 923 (2d Cir. 1994); Ringgold v. Black Ent. Television, Inc., 126 F.3d 70, 78 (2d Cir. 1997).

E. Remedial Equilibration

A final aspect of *Campbell* that courts and scholars have paid scant attention to relates to a court's choice of remedy in fair use cases and the connection between the strength of the fair use claim and the exercise of its remedial discretion. A common fallacy that some courts fall prey to in their treatment of copyright as just another property right is the idea that if an infringement is found in a case, the plaintiff is entitled to an injunction as a matter of course. More than a decade after *Campbell*, the Court in *eBay, Inc. v. MercExchange LLC*[118] admonished courts to move away from this approach and instead apply a four-factor balancing test drawn from equity.[119] While *Campbell* did something similar a dozen years prior to *eBay*, it, at the same time, connected this to the substance of the fair use determination.

Recognizing that questions of fair use—especially when they involved an allegedly transformative purpose—were often close calls, Justice Souter had the following guidance for lower courts, reminding them of their remedial discretion:

> Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law . . . are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use.[120]

The intellectual lineage of this point appears to have been Judge Leval's article that had made a similar point and which Justice Ginsburg brought up at oral argument to Respondent's counsel.[121]

Implicit in the above quoted observation is the idea that scholars have described as remedial equilibration, wherein the content of the remedy influences a court's conclusion in the existence, scope, and violation of a right.[122] When a remedy is perceived to be harsh but legally necessary upon a finding of a rights violation, courts gravitate toward a finding of no violation in order to avoid the harsh remedy

118. eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).

119. *See id.* at 392–93.

120. *Campbell*, 510 U.S. at 578 n.10.

121. Transcript of Oral Argument at 33, *Campbell*, 510 U.S. 569 (No. 92-1292) (noting that respondent cited Judge Leval, who "has put forth a very interesting idea that there may be infringements that are not properly subject to injunction because you take into account the value of parody").

122. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999).

altogether. Yet, when presented with remedial flexibility, they approach their analysis of the right in a more nuanced manner. This appears to have been precisely the thinking behind the *Campbell* observation.

Since uses involving a transformative purpose were invariably close judgment calls, the concern appears to have been that the fear of an injunction—and its free speech impeding (i.e., chilling) effects—would push courts in the direction of finding more uses to be fair use principally in order to avoid the harsh result. Justice Souter was instead signaling to them that this need not be their solution to the concern, since a finding of no fair use might perfectly lend itself to the award of damages rather than an injunction and thus avoid much of the chilling effect concerns.[123] Indeed, implicit in the observation appears to have been the concern that a myopic focus on injunctive relief would skew the fair use analysis altogether and eliminate much of the nuance that the opinion had just advanced.

While *eBay* would express the same concern a decade later in relation to patent law,[124] *Campbell* introduced the idea that remedial discretion was a useful way of thinking about close fair use questions. In so doing, Justice Souter should be seen as doing two things at once: first, reminding courts of their equitable discretion, which the copyright system fully preserved, and, second, exhorting them to not shy away from making close calls on the question of fair use with nuance and sophistication in a manner that Judge Hand famously called for many decades ago.[125]

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In summary, Justice Souter's opinion for the Court in *Campbell* was not just an effort to introduce a new idea (transformativeness) into the fair use analysis. It was much more than that. Above all else, it was a *blueprint* for how the fair use analysis was to be carried out while remaining true to (1) the purposes of copyright law, (2) the text of the statute and Congress's design behind the fair use provision and its language, and (3) the appropriate role of the judiciary in the

123. *See Campbell*, 510 U.S. at 578 n.10.

124. *See eBay Inc.*, 547 U.S. at 392–93 (2006) (noting how the Court had already made the same point for copyright infringement cases and citing to *Campbell* among other early cases).

125. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930) ("We have to decide how much, and while we are as aware as any one that the line, whereever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases.").

development and expansion of the fair use doctrine. Focusing exclusively on the rhetoric of the opinion to the exclusion of the manner in which he deployed it risks egregiously misunderstanding *Campbell*.

III. FROM PARODY TO APPROPRIATION ART

As noted earlier, the Court is poised to examine the application of *Campbell* to the dispute in *AWF*, where the question is whether Warhol's unauthorized copying of a photograph to produce a new piece of art qualifies as fair use. Almost all of the questions that the Justices raised during oral argument find an answer in Justice Souter's opinion in *Campbell*. Five in particular deserve special mention.

A. Courts as Art Experts

A key concern that several of the Justices voiced was the fear that adopting *Campbell*'s "new meaning" standard for transformativeness would require them to serve as art experts and judge the work for such meaning or else defer completely to the meaning proffered for the work by a defendant.[126] Requiring courts to make the judgment risks running afoul of *Bleistein*, while deferring to the defendant renders the standard meaningless since every defendant would plead a new meaning for the use (and be able to find an art expert to back its assertion).

As *Campbell* emphasized, requiring a court to examine whether the use qualifies for a category of transformativeness is compatible with *Bleistein*'s aesthetic neutrality principle. In *AWF*, Petitioner argued that Warhol had injected new meaning into the original photograph by focusing on the "dehumanizing nature of celebrity" in contrast to the original photograph which had portrayed its subject as vulnerable.[127] Yet, *Campbell* makes clear that secondary uses which comment on the original are to be treated as being of potentially greater transformative value than those that merely comment on society or some other unrelated subject. As Justice Souter emphasized in drawing the distinction between a parody and a satire: "[S]atire can

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126. *See* Transcript of Oral Argument, *supra* note 23, at 24 (Alito, J.); *id.* at 25–26 (Kagan, J.); *id.* at 27–28 (Sotomayor, J.); *id.* at 39–42 (Roberts, C.J.); *id.* at 42–45 (Thomas, J.); *id.* at 63–64 (Kagan, J.); *id.* at 74–76 (Alito, J.).

127. *See* Brief for Petitioner at 44, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021) (No. 19-2420) (arguing that because of this focus, his work "conveys a new meaning"); *id.* at 45 (noting that Warhol's work diverged from the original work, which depicted its subject as vulnerable).

stand on its own two feet and so requires justification for the very act of borrowing," since in a satire the original is merely a "vehicle" where no criticism or comment on the original is made.[128] And, in fact, Warhol, through the Goldsmith-Vanity Fair "artist reference" license, obtained permission to produce a derivative work.[129] This indicates that Warhol could well have worked out licenses for further derivative works.

While Warhol may have indeed offered a "different" or "distinct" meaning from that of the original photograph taken by Goldsmith,[130] that difference was irrelevant to *Campbell*, under which courts must examine whether such different meaning even qualifies for an assessment of transformativeness based on its justification for the borrowing.[131] Warhol—based on this reality—may have chosen any portrait of Prince to make his artwork. Warhol was comfortable working with Goldsmith's photograph. That borrowing "requires justification" on its own, which is the qualification question that *Campbell* authorizes courts to make without running afoul of *Bleistein*.[132]

B. Reconciling Transformativeness with the Right to Prepare Derivative Works

Another concern voiced by some Justices relates to the apparent conflict between the very idea of a transformative use and the statutory definition of a derivative work, which identifies situations where the pre-existing work has been "transform[ed]" as a derivative work, the exclusive right over which is granted to authors.[133] Some courts have

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128. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581 (1994).

129. *See AWF*, 11 F.4th at 34 (noting that Goldsmith licensed the original "to Vanity Fair magazine for use as an artist reference").

130. *See* Brief for Petitioner, *supra* note 127, at 33 (arguing that Warhol's work had a "distinct meaning" from and "conveyed a very different message" than did the original work).

131. *See Campbell*, 510 U.S. at 579–83.

132. *See id*. at 580–83.

133. *See* Transcript of Oral Argument, *supra* note 23, at 3, 5 (Thomas, J.) (requesting "an example of follow-on work" that would fail the petitioner's proposed test in which an artist's new meaning in follow-on work should be part of a court's fair use analysis); *id.* at 13 (Roberts, C.J.) (noting that "there may be nothing left to the original author for derivative works" in the petitioner's test); *id.* at 14 (Kagan, J.) (suggesting that even petitioner's example of a classic non-transformative use, a book to a movie, is indeed transformative); *id.* at 45–46 (Alito, J.) (noting that when an artist reproduces a song, the artist alters how the song is performed, yet still infringes the original artist's work); *id.* at 47–48 (Sotomayor, J.) (questioning why a work that is transformative yet caters to the same market does not infringe the original that it transformed); *id.* at 52–53 (Barrett, J.) (explaining that petitioner's test conceptualizes transformation so broadly as to include any derivative work); *id.* at 92–93 (Kagan, J.) (asking the respondent why

suggested a direct conflict between the common law of fair use and the statute because of this potential for overlap.[134]

Again, Justice Souter was aware of and sensitive to this overlap. Crucial to his analysis under the fourth fair use factor was the need for the court (on remand) to consider the potential harm to the market for derivatives of the original in the case, which the lower court had failed to consider. Such derivatives were to him "an important economic incentive to the creation of originals" and thus deserved emphasis.[135] All the same, *Campbell* recognized that rap derivatives of the original—even if endowed with a transformative purpose—were derivative works. The key, in Justice Souter's analysis, was in segregating the transformativeness that made them into derivative works (i.e., rap derivatives) from the transformativeness that qualified them for the category of a transformative purpose (i.e., the parodic purpose).[136] Or, as he put it, in these cases "the law looks beyond the criticism to the other elements of the work, as it does here . . . [since the secondary use was] not only parody but also rap music, and the derivative market for rap music is a proper focus of the enquiry."[137]

Returning to *AWF*, the logic of *Campbell* ought to lead the Court to segregate the transformativeness underlying Warhol's use of the photograph in his art from the transformative purpose proffered by the Petitioner. If the two are incapable of separation or if the purpose—so understood—is minimally transformative, the exclusive right to prepare derivative works should be seen as overriding any transformative purpose.

C. The Need for the Particular Use

During the Solicitor General's argument, several Justices probed the extent to which the defendant in a fair use case would need to justify its use of the particular copyrighted work.[138] Must the plaintiff's

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the question in follow-on work should not center on whether the transformative aspect involved creativity); *id.* at 99–100 (Barrett, J.) (asking the respondent's view on "the tension between the transformation" of a work and "the transformative [requirement] in the derivative use provision").

134. *See, e.g.*, Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (noting that cases that have focused on whether a use is merely transformative "do not explain how every 'transformative use' can be 'fair use' without extinguishing the author's rights").

135. *Campbell*, 510 U.S. at 593.

136. *See id*. at 592.

137. *Id*. at 592–93.

138. *See* Transcript of Oral Argument, *supra* note 23, at 110–16 (Kagan, J.; Gorsuch, J.; Jackson, J.).

work be essential or necessary for the use to be a fair use? What if it were merely useful? And, to what extent does the availability of substitutes affect the analysis?

The *Campbell* decision focused on the question of parody, for which the use will typically be essential. A parody has a particular target.[139] But, even there, the fact that a secondary work parodies a work does not resolve the fair use question, as the *Campbell* Court observed.[140] Nonetheless, the Court's discussion of transformativeness suggests that there is no bright-line test for the need to use the plaintiff's work.

When the secondary user is not commenting on the underlying work, but, rather, using it for an artistic or "amusement"[141] purpose, and when alternative sources exist, then, under *Campbell*, the secondary user bears a stronger justificatory burden.[142] That burden translates into a need for the secondary user to show a higher degree of transformativeness, especially when the purpose is not among § 107's preambular categories.

Furthermore, the injunctive relief stage of the case affords a secondary—and more appropriate—way of balancing the respective interests. It affords courts recourse to a liability rule that can allocate the respective contributions of the parties. In this way, both original creators and follow-on creators can be rewarded for their efforts. And, at that stage, courts can take into consideration the reasonableness of the plaintiff's willingness to license the use. Injunctive relief should be less available if the copyright owner was exceedingly stingy in granting a license.

D. The Factual Record

Another issue was whether the Court could resolve the fair use question in its entirety based on the record before it given the petition's sole focus on the first fair use factor.[143] Yet, unlike in *Campbell*, where the lower courts had never been presented with key factual data about the fourth fair use factor (i.e., the harm to the market for derivatives),

139. *See Campbell*, 510 U.S. at 580–81 (explaining that "[p]arody needs to mimic an original to make its point").

140. *Id.* at 581 ("[P]arody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.").

141. *Id.* at 592 n.22.

142. *See id.* at 581 (noting how "satire can stand on its own feet and so requires justification for the very act of borrowing").

143. *See* Transcript of Oral Argument, *supra* note 23, at 102–04 (Jackson, J.).

the lower court's factual record in *AWF* is complete on all four factors.[144] The second fair use factor is to be decided entirely by looking to the work under protection. The Court's decision on the first factor will influence the weight it accords to the third, which examines the "amount and substantiality" of the copying. And, on the fourth factor, both lower courts were presented with evidence on the question of market harm. Often forgotten in fair use cases is the reality that the issue is routinely decided on motions rather than through a jury trial,[145] and the Court would do well to take its conclusion on the first fair use factor to its logical conclusion on the overall applicability of fair use.

E. Remedial Justice

At the oral argument, several Justices asked about the remedy that Goldsmith was seeking in the case, which had caused some confusion in the lower court.[146] Goldsmith's lawyer maintained that they were merely seeking an injunction, one tailored to the commercial licensing of the Warhol print by AWF in 2016, but no remedy in relation to the other prints or the other actions of Warhol (e.g., his very creation of the additional prints).[147] The Second Circuit had made special mention of Goldsmith's "disclaim[er]" of all other remedies and observed how her focus on the "commercial" licensing was fully in keeping with the idea that the "commercial nature" of the secondary use was to be weighed against its transformativeness under the first fair use factor.[148] A concurring opinion in the Second Circuit had also highlighted this issue.[149]

Implicit in these observations was something that Justice Souter had emphasized in *Campbell*: the centrality of remedial choice in protecting follow-on creativity. As noted previously, Justice Souter drew on Judge Leval's article to reiterate that one way for courts to

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144. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 33–51 (2d Cir. 2021); Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 317–22 (S.D.N.Y. 2021).

145. *See* David Nimmer, *Juries and the Development of Fair Use Standards*, 31 HARV. J.L. & TECH. 563, 565, 573 (2018) (observing that "every one of the 'great fair use cases' in the field has emerged from judges, who are trained in the law—not from an ad hoc body of laypeople wholly lacking background in the ins and outs of copyright"; and noting that disputes over historical facts rarely arise in fair use cases).

146. *See* Transcript of Oral Argument, *supra* note 23, at 35 (Kavanagh, J.), 77–78 (Barrett, J.), 81 –82 (Sotomayor, J.).

147. *See id*. at 82.

148. *See AWF*, 11 F.4th at 50–51; 17 U.S.C. § 107(1).

149. *See AWF*, 11 F.4th at 54–55 (Jacobs, J., concurring) (emphasizing the role of commercial licensing).

alleviate their concerns about a finding of no fair use was by offering losing defendants a less harsh remedy, i.e., damages instead of a prohibitory injunction.[150] The same logic extends one step further: a narrow injunction is to be favored over a broad one in the interest of allowing downstream uses. And, this was precisely what AWF and the Second Circuit were alluding to. In other words, by implicitly suggesting that non-commercial uses of the photograph were to be excluded from the injunction—even if clearly not a fair use—they were building into the analysis the concern with remedial justice that was key to Justice Souter in *Campbell*.[151]

Campbell's rationale for this emphasis was clear: avoiding over-emphasis on transformativeness in order to ensure greater dissemination and protect the public interest. In so doing, it echoed Judge Leval's concern. And, to this end, *Campbell* invoked the well-worn rubric of the court's equitable discretion in the process of choosing and tailoring its remedy.[152] The Court in *AWF* would do well to recognize this, as the Second Circuit did, and either award Goldsmith a narrowly tailored injunction or an award of damages that focuses exclusively on the commercial use of the photograph. An approach along these lines would achieve justice in this case and signal to lower courts the important and complementary role that the standard for injunctive relief plays in promoting progress while restoring *fairness* to the fair use doctrine.

CONCLUSION

In considering the fair use question in *AWF v. Goldsmith*, the Supreme Court need not look much further than its own insightful opinion in *Campbell*. In contrast to the narrow focus of most post-*Campbell* jurisprudence and academic commentary on transformativeness, Justice Souter's majority opinion integrates statutory text and intent with common law to produce a balanced and coherent framework for reconciling the Copyright Act's right to prepare derivative works with the fair use doctrine. Most importantly, it does so by engaging in a nuanced exercise of common law statutory interpretation. The *Campbell* decision also thoughtfully anticipated *eBay*'s flexible standard for injunctive relief in balancing protection and dissemination. The careful application of the *Campbell* framework

150. *See supra* Section II(E).

151. *See id.*

152. *Campbell*, 510 U.S. at 578 n.10.

serves copyright law's purpose of promoting the progress of the creative arts, animates the meaning of fairness in fair use, and solves the challenge of fitting appropriation art within the copyright system.