

## Lassoing Transformativeness: Taking Court-Approved Chaos and Grounding it in Congressional Order

*Daniel T. Dodaro\**

I. INTRODUCTION.....		301
II. BACKGROUND .....		304
A. Copyright Law: History, Application, and Evolution .....		304
B. Fair Use Doctrine.....		305
1. The Nature of the Copyrighted Work.....		307
2. The Amount and Substantiality of the Portion used in Relation to the Copyrighted Work as a Whole .....		307
3. The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work .....		308
4. The Purpose and Character of the Use .....		309
C. Precedential Background.....		311
1. Campbell v. Acuff-Rose Music, Inc. (The Supreme Court of the United States).....		311
2. Google LLC v. Oracle America, Inc. (The Supreme Court of the United States).....		312
3. Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (Second Circuit) .....		313
4. McGuken v. Public Ocean Ltd. (Ninth Circuit) .....		315
5. Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (The Supreme Court of the United States) .		316
III. ANALYSIS.....		317

---

\* Juris Doctor Candidate at Seton Hall University School of Law, Class of 2024. First and foremost, I would like to give my deepest thanks to Professor Frank Politano for his stalwart support throughout this long process and Professor Michael Coenen for his skilled guidance in statutory language. Moreover, a very special thanks goes out to Jessica Hajdukiewicz, Class of 2023, for her unceasing mentorship from the day I picked my Comment topic to the day I clicked submit. Furthermore, I am incredibly grateful for the tireless efforts of the editors and executives of Volume 48; without them, this Comment would never have been possible. Lastly, I would like to thank my parents, John Dodaro and Maria Clemente, and my dearest friend through all of this, Neven Abdo, for their unwavering love and support. I could not have sailed through the rocky straits of law school without every person listed here (and many, *many* others not listed here for lack of space). *All stories begin and end with a question. It is up to each and every one of us to discover what that question is.*

2024]	<i>DODARO</i>	301
A.	Objective and Subjective Transformativeness.....	317
B.	Congressional Amendment.....	321
1.	The Codification of Parody.....	322
2.	The Codification of Transformativeness .....	323
3.	The Functionality Exception to Transformativeness ...	323
4.	A Theoretical Amendment to 17 U.S.C. § 107 .....	323
IV.	CONCLUSION .....	325

## I. INTRODUCTION

Following in the footsteps of their British counterparts, the Framers of the United States Constitution recognized the significance of protecting the rights of creators in regard to their works to the extent that was reasonable and legally feasible.<sup>1</sup> Thus, copyright law was hammered into the bedrock of the Union in Article I § 8 cl. 8, the Patent and Copyright Clause, of the United States Constitution.<sup>2</sup> This addition—a mere sentence in the Constitution that can be so easily overlooked—is arguably the most essential clause to the creative progression of expression.<sup>3</sup> Without it, American creativity, the very foundation of learning and culture, would buckle under the sheer weight of unpredictability and mistrust. Why create if the end result is susceptible to theft and appropriation? Why build by day what could be so easily torn down and scrapped for parts overnight? The Framers were aware of these momentous and inherently philosophical concerns; they recognized that incentivizing creators could inspire industry, progress, and ingenuity.<sup>4</sup> Thus, copyright law—currently codified by the Copyright Act of 1976 (“Copyright Statute”)—has protected the creative expression of ideas since the United States’ founding.<sup>5</sup>

Acting as a check on this powerful mode of defense, the current version of the Copyright Statute attempted to incorporate what is known as the fair use doctrine, codified as 17 U.S.C. § 107, one of the

<sup>1</sup> See U.S. CONST. art. I, § 8, cl. 8; Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 331 (2008).

<sup>2</sup> See U.S. CONST. art. I, § 8, cl. 8.

<sup>3</sup> See Craig W. Dallan, *Original Intent and the Copyright Clause: Eldred v. Ashcroft Gets it Right*, 50 ST. LOUIS L. J. 307, 313–15 (2006) (explaining that the copyright clause was “adopted unanimously and without controversy” at the Constitutional Convention, and it was a grant of power that allowed the Framers to protect literary property nationally, which, if left to the states, would have been ineffectual).

<sup>4</sup> See U.S. CONST. art. I, § 8, cl. 8; Lee, *supra* note 1, at 331 (stating “it is fairly well accepted that the Framers drafted the [Patent and Copyright] Clause in reaction to the abuses of monopoly grants under the Crown of England”).

<sup>5</sup> See U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 101.

several explicit limitations on copyright protection.<sup>6</sup> The fair use doctrine is effectively a proximity barrier that marks where one creator's work begins and another creator's work ends.<sup>7</sup> Its essentiality is an understatement. From a philosophical standpoint, with a broad and creative mindset, expression can be all encompassing; even the most unique creative works can sometimes be fairly analogous to works that came before. Accordingly, any arrogant artist can argue that their creation is so fluid and abstract that it encompasses *all* of Creation itself. To prevent the monopolization of expression, courts draw a line in the sand, limiting the extent to which a creator can claim another's creation as a derivative of their own.<sup>8</sup> Hence, fair use protection often arises in cases involving commentary, criticism, teaching, news reporting, and parody.<sup>9</sup>

Three United States Supreme Court Justices and one appellate court judge have had a noteworthy impact on United States copyright law through their case law and scholarly articles: Justice Story in 1841, Judge Leval in 1990, Justice Souter in 1994, and Justice Breyer in 2021.<sup>10</sup> Due to each of their jurisprudence, the application of the four baseline factors for analyzing fair use, laid out in Section 107 of the Copyright Statute, has evolved considerably over time.<sup>11</sup> These four factors can be summarized as: (1) "the purpose and character of the use;" (2) "the nature of the copyrighted work;" (3) the substantiality of the portion used; and (4) "the effect of the use upon the potential market for . . . the copyrighted work."<sup>12</sup> The first factor, "purpose and character of the use," has become especially significant due to its incorporation of Judge Leval's concept of *transformative use* ("transformativeness").<sup>13</sup> Transformativeness asks whether a work "adds something new, with [a] further purpose or different character, altering the first with new

---

<sup>6</sup> See 17 U.S.C. § 107.

<sup>7</sup> See *id.*

<sup>8</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citing *Steward v. Abend*, 495 U.S. 207, 236 (1990)).

<sup>9</sup> See 17 U.S.C. § 107; *Campbell*, 510 U.S. at 596 (Kennedy, J., concurring).

<sup>10</sup> See *Folsom v. Marsh*, 9 F. Cas. 342, 348 (CCD Mass. 1841); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990), [https://www.law.berkeley.edu/files/Leval\\_-\\_Fair\\_Use.pdf](https://www.law.berkeley.edu/files/Leval_-_Fair_Use.pdf) [<https://doi.org/10.2307/1341457>]; *Campbell*, 510 U.S. at 571; *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1190 (2021).

<sup>11</sup> See *Folsom*, 9 F. Cas. at 348; Leval, *supra* note 10, at 1105; *Campbell*, 510 U.S. 569; *Google*, 141 S. Ct. at 1183.

<sup>12</sup> 17 U.S.C. § 107.

<sup>13</sup> *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149, 1157 (9th Cir. 2022); see also Leval, *supra* note 10, at 1111.

expression, meaning, or message.”<sup>14</sup> As this vague concept has gained increasing importance, transformativeness started to influence the other fair use factors, eventually taking center stage in two important Supreme Court cases: *Campbell v. Acuff-Rose Music, Inc.*<sup>15</sup> and *Google LLC v. Oracle America, Inc.*<sup>16</sup> Moreover, transformativeness’ elusive underpinnings led to a circuit split over whether its precepts should be applied objectively or subjectively.<sup>17</sup> The Second Circuit case, *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*,<sup>18</sup> and the Ninth Circuit case, *McGucken v. Public Ocean Ltd.*,<sup>19</sup> exemplified the circuit split.

Recently, the Supreme Court granted certiorari to the defendants in *Andy Warhol Found.* to determine how transformativeness should be applied: objectively or subjectively.<sup>20</sup> The Court ultimately decided that transformativeness should be applied objectively but appeared to leave the application open to a subjective inquiry.<sup>21</sup> This application may create further interpretative issues in the future because the Court’s analysis mainly focused on commerciality, and it did not completely address the respective weights subjectivity and objectivity should be allotted in a transformativeness fair use analysis.<sup>22</sup> Thus, this Comment will take a legislative rather than a judicial route, proposing that Congress should amend the fair use section of the current Act. After explaining the need for this suggestion, this Comment then proposes its own congressional amendment that would solidify (1) parody, (2) transformativeness, and (3) functionality once and for all into 17 U.S.C. § 107. Part II of this Comment will provide a brief overview of modern copyright law and fair use, along with a case-by-case analysis of relevant precedent that has paved the way for copyright application in the United States. Part III will analyze the evolution of subjective and objective fair

---

<sup>14</sup> *Campbell*, 510 U.S. at 579; *Google*, 141 S. Ct. at 1202–03.

<sup>15</sup> *Campbell*, 510 U.S. at 569.

<sup>16</sup> *Google*, 141 S. Ct. at 1183.

<sup>17</sup> See *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41–42 (2d Cir. 2021); *McGucken*, 42 F.4th at 1159–61.

<sup>18</sup> See *Andy Warhol Found.*, 11.4th at 41–42.

<sup>19</sup> See *McGucken*, 42 F.4th at 1159–61.

<sup>20</sup> *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/andy-warhol-foundation-for-the-visual-arts-inc-v-goldsmith/> (last visited Feb. 4, 2024) [hereinafter *Scotusblog*].

<sup>21</sup> See *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1283–84 (2023) (stating “[a] court should not attempt to evaluate the artistic significance of a particular work. Nor does the subjective intent of the user (or the subjective interpretation of a court) determine the purpose of the use. But the meaning of the secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original.”).

<sup>22</sup> *Id.* (Kagan, J., dissenting).

use analyses and craft a potential congressional amendment to the existing fair use statute, 17 U.S.C. § 107, that will fix some of the modern-day ambiguities of fair use application. Part IV will conclude this Comment with a brief summary of the benefits that a congressional amendment could afford copyright law in place of merely relying on interpretations of transformativeness from various courts.

## II. BACKGROUND

This section will provide a general overview of copyright law and fair use while focusing on fair use's first factor, "the purpose and character of the use."<sup>23</sup> Following an overview of relevant statutory and case law, this section will summarize the facts and holdings of two major Supreme Court copyright cases: *Campbell v. Acuff-Rose Music, Inc.* and *Google LLC v. Oracle America, Inc.*<sup>24</sup> Furthermore, this section will discuss the issues raised by the recent circuit split, illustrated by *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* and *McGuken v. Public Ocean Ltd*, which the Supreme Court questionably resolved in *Andy Warhol Foundation for the Visual Arts, Inc.*<sup>25</sup>

### A. Copyright Law: History, Application, and Evolution

Anglo-American copyright is an enduring form of legal protection with deep historical roots.<sup>26</sup> The British parliament initially enacted copyright into law in 1709.<sup>27</sup> The "Statute of Anne," so named because it was passed during Queen Anne's reign, was the first statute responsible for copyright globally.<sup>28</sup> Its purpose was to protect the purchases and printing of written works, thereby encouraging "learned men to compose and write useful books."<sup>29</sup> Article I, § 8, cl. 8 of the United States Constitution, the Patent and Copyright Clause, later reiterated copyright, which "promote[d] the Progress of Science and useful Arts,

---

<sup>23</sup> 17 U.S.C. § 107; *see also* *Dr. Suess Enters., LP v. ComicMix LLC*, 983 F.3d 443, 451–52 (9th Cir. 2020).

<sup>24</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

<sup>25</sup> *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021); *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149 (9th Cir. 2022); *Andy Warhol Found.*, 143 S. Ct. 1258.

<sup>26</sup> Jeremy M. Norman, *The Statute of Anne: The First Copyright Statute*, HISTORYOFINFORMATION, <https://www.historyofinformation.com/detail.php?id=2955> (last visited Feb. 4, 2024).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Leval, *supra* note 10, at 1108–09; Act for the Encouragement of Learning, 1709, 8 Ann. c. 19 (Gr. Brit.), [https://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](https://avalon.law.yale.edu/18th_century/anne_1710.asp).

2024]

DODARO

305

by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>30</sup> The Copyright Act of 1976 (“Copyright Statute”), codified at 17 U.S.C. § 101 *et seq.*, is the current source of federal copyright protection today.<sup>31</sup>

The Act extends copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>32</sup> Copyright law is distinguishable from patent law because, while patent law protects ideas, copyright law protects the manner in which ideas are expressed, but not the ideas themselves.<sup>33</sup> For this reason, copyright protection of fiction is more easily defensible than works of fact.<sup>34</sup> Advancing beyond copyright’s humble origins and limited protections of the distant past, the United States legal system now defends a plethora of categories, providing creators of literature, music, art, and other mediums peace of mind that their creations will remain their own and not be pilfered by pernicious thieves.<sup>35</sup>

#### B. Fair Use Doctrine

Although copyright protects creators’ rights to their works, the law limits the extent that such protections should be permissible.<sup>36</sup> The enumeration of exclusive rights provided by Section 106 of the Copyright Statute is absolute and, out of necessity, requires limitations.<sup>37</sup> These limitations include: (1) unoriginal works are not afforded copyright protection; (2) ideas, processes, procedures, systems, methods of operation, concepts, principles, or discoveries are specifically excluded from protection; (3) copyright protection has a limited duration that *usually* “endures for a term consisting of the life of the author and 70 years after the author’s death;” and (4) fair use prevents an unnecessarily severe application of copyright law.<sup>38</sup> Fair use will be this Comment’s focus.

Courts understand that artists and creators build on past creations, often making it practically impossible to create a work that is untouched

---

<sup>30</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>31</sup> 17 U.S.C. § 101.

<sup>32</sup> *Id.* § 102(a).

<sup>33</sup> *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196 (2021).

<sup>34</sup> *Google*, 141 S. Ct. at 1197 (citing *Stewart v. Abend*, 495 U.S. 207, 237–38 (1990); *Harper v. Row*, 471 U.S. 539, 563 (1985)).

<sup>35</sup> *See* 17 U.S.C. § 102(a).

<sup>36</sup> *Id.* § 107.

<sup>37</sup> *Id.* § 106.

<sup>38</sup> *See id.* § 102(b), 107, 302(a).

or uninspired by a work that came before.<sup>39</sup> Fair use is an affirmative defense that allows a secondary work to “copy” certain aspects of another creator’s original, earlier work.<sup>40</sup> If a secondary work is insubstantially similar to the original, then a fair use defense is not necessary; fair use is only implicated if a secondary work is substantially similar to the original.<sup>41</sup> Furthermore, fair use often arises as a defense in cases involving criticism, teaching, news reporting, and parody.<sup>42</sup> Fair use is a helpful dividing line for establishing where one work begins and another work ends. Broad protections could result in oppressive monopolies that corner entire categories of expression, while narrow protections could lead to shameless and crafty schemes to appropriate the sweat equity of visionaries and artists. To strike a balance, the fair use doctrine prevents a “rigid application” of copyright law, protecting the creativity the law was designed to encourage.<sup>43</sup> Because no bright-line rules exist to determine whether a use falls within the fair use doctrine, courts’ analyses are notably fact-dependent.<sup>44</sup> Although this list is non-exhaustive, four common factors balanced by courts are set forth in Section 107 of the Copyright Statute:

(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.<sup>45</sup>

These factors were imported from the common law for the first time in the 1976 Act.<sup>46</sup> The first factor, “the purpose and character of the use,” is the principal factor in a fair use analysis and will be the focus

---

<sup>39</sup> See *Emerson v. Davies*, 8 F. Cas. 615, 619 (CCD Mass. 1845) (stating “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.”).

<sup>40</sup> See MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.05: CH. 13 INFRINGEMENT ACTIONS—SUBSTANTIVE ASPECTS: § 13.05 THE DEFENSE OF FAIR USE (2022) [hereinafter *Nimmer on Copyright*].

<sup>41</sup> *Nimmer on Copyright*, *supra* note 40, at § 13.05.

<sup>42</sup> 17 U.S.C. § 107; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 596 (1994) (Kennedy, J., concurring).

<sup>43</sup> *Campbell*, 510 U.S. at 577 (citing *Steward v. Abend*, 495 U.S. 207, 236 (1990)).

<sup>44</sup> *Id.*

<sup>45</sup> 17 U.S.C. § 107; *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021) (explaining that the “provision’s list of factors is not exhaustive”).

<sup>46</sup> *Campbell*, 510 U.S. at 576 (explaining that fair use was “judge-made doctrine” until the 1976 Copyright Act).

2024]

DODARO

307

of this Comment.<sup>47</sup> However, the three other fair use factors will be discussed briefly first to provide context.

### 1. The Nature of the Copyrighted Work

The second factor in a fair use analysis is “the nature of the copyrighted work.”<sup>48</sup> In 1841, Justice Story provided a famous fair use analysis in the case *Folsom v. Marsh*<sup>49</sup> that was later incorporated into the Copyright Statute.<sup>50</sup> Justice Story originally defined the second fair use factor as the “value of the materials used.”<sup>51</sup> Nearly 150 years later, Pierre Leval, a Second Circuit judge and legal scholar, famed for his expertise on copyright, summed up this same factor.<sup>52</sup> Judge Leval clarified that this factor was less a subjective judgment of quality, and more of a consideration as to whether a work is of the type that copyright law is targeted to protect.<sup>53</sup> Combining the interpretations of Justice Story and Judge Leval, it is clear that copyright values some works more than others and safeguards them accordingly.<sup>54</sup> For example, an unpublished work is usually granted a broader scope of protection.<sup>55</sup> Additionally, copyright values the author’s expression of facts but does not value or protect the underlying facts themselves.<sup>56</sup>

### 2. The Amount and Substantiality of the Portion used in Relation to the Copyrighted Work as a Whole

The third factor in a fair use analysis is “the substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>57</sup> Justice Story’s rendition of this factor was “the quantity and value of the materials used.”<sup>58</sup> Judge Leval explained that this factor considers

---

<sup>47</sup> *Dr. Seuss Enters., LP v. ComicMix LLC*, 983 F.3d 443, 451 (9th Cir. 2020) (“This [first] factor has taken on a heightened significance because it influences the lens through which we consider two other fair use factors.”); *Campbell*, 510 U.S. at 586–87; *see also* *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149, 1157 (9th Cir. 2022) (explaining how the concept of “transformation” is judicially created and “permeates” the fair use analysis”); *Bell v. Eagle Mt. Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 321 (5th Cir. 2022) (“Courts typically give particular attention to factors one and four.”).

<sup>48</sup> 17 U.S.C. § 107.

<sup>49</sup> *See Folsom v. Marsh*, 9 F. Cas. 342, 344 (CCD Mass. 1841).

<sup>50</sup> Leval, *supra* note 10, at 1105; *Folsom*, 9 F. Cas. at 348.

<sup>51</sup> *Campbell*, 510 U.S. at 586 (citing *Folsom*, 9 F. Cas. at 348).

<sup>52</sup> Leval, *supra* note 10, at 1117.

<sup>53</sup> Leval, *supra* note 10, at 1117.

<sup>54</sup> *Folsom*, 9 F. Cas. at 348; Leval, *supra* note 10, at 1117.

<sup>55</sup> *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 564 (1985).

<sup>56</sup> *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 266–67 (4th Cir. 2019).

<sup>57</sup> 17 U.S.C. § 107.

<sup>58</sup> *Folsom*, 9 F. Cas. at 348.



volume: the greater the volume or importance of what is appropriated, the more a court should question fair use.<sup>59</sup> In *Campbell*, Justice Souter equated this factor, when analyzing parody, to “the persuasiveness of a parodist’s justification” for the second use and found that this factor will “harken back” to the first factor, “the purpose and character of the use,” when measuring the extent of copying.<sup>60</sup> When applying this factor in *Google*, the Court noted that copying 11,500 lines of code from a source with 2.62 million lines of code sways in favor of fair use, providing those lines were not the “heart of the original work’s creative expression.”<sup>61</sup>

### 3. The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work

The fourth factor in a fair use analysis is “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>62</sup> This factor primarily analyzes market harm or impairment.<sup>63</sup> However, the impairment must be substantial.<sup>64</sup> Although the Supreme Court in *Harper & Row, Publishers v. Nation Enterprises*<sup>65</sup> once stated that the fourth factor is “the single most important element of fair use,” the rise of the first factor’s transformativeness analysis has dethroned the fourth factor because transformativeness is necessary to analyze market harm.<sup>66</sup> Nonetheless, market harm remains a critical consideration.<sup>67</sup>

To analyze the fourth factor of fair use, courts must decipher whether the secondary work has superseded or replaced the original work’s market viability.<sup>68</sup> This analysis increases in difficulty when derivative works are involved.<sup>69</sup> Derivative works, also protected by the

---

<sup>59</sup> Leval, *supra* note 10, at 1122.

<sup>60</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

<sup>61</sup> *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1205 (2021) (citing *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 564–65 (1985)).

<sup>62</sup> 17 U.S.C. § 107.

<sup>63</sup> *See Nimmer on Copyright, supra* note 40, at § 13.05[A][4]; Leval, *supra* note 10, at 1124.

<sup>64</sup> Leval, *supra* note 10, at 1125; *Campbell*, 510 U.S. at 590; *see also Harper*, 471 U.S. at 568 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)) (explaining that, to negate fair use, a litigant has to show that should the challenged use become widespread, “it would adversely affect the *potential* market for the copyrighted work.”).

<sup>65</sup> *Harper*, 471 U.S. at 566.

<sup>66</sup> *See Campbell*, 510 U.S. at 591; *see also Leval, supra* note 10, at 1124.

<sup>67</sup> Leval, *supra* note 10, at 1124.

<sup>68</sup> *Campbell*, 510 U.S. at 591 (citing *Folsom v. Marsh*, 9 F. Cas. 342, 348 (CCD Mass. 1841)).

<sup>69</sup> *See Campbell*, 510 U.S. at 592.

Copyright Statute, are “work[s] based upon one or more preexisting works.”<sup>70</sup> An example of a derivative work is provided in *Roy Export Company v. CBS*,<sup>71</sup> where Roy Export acquired the rights to six Charlie Chaplin films and approved the creation of a compilation of snippets of those Chaplin films for the 1972 Academy Awards and a film biography of Chaplin called *The Gentleman Tramp*.<sup>72</sup> When CBS used a piece of the compilation in its broadcast for the death of Chaplin, Export sued CBS for copyright infringement of the derivative work.<sup>73</sup> The Court held that the compilation was a derivative work that was allotted the same protection as the original works owned by Export, and CBS had infringed on Export’s copyright.<sup>74</sup> Overall, the fourth factor is implicated when the copying work acts as a substitute or, as Justice Story explains, “supersede[s] the use of the original.”<sup>75</sup>

#### 4. The Purpose and Character of the Use

The first factor in a fair use analysis is “the purpose and character of the use.”<sup>76</sup> As stated previously, this factor is the principal factor in a fair use analysis.<sup>77</sup> There are three main aspects of the first factor that courts consider: (1) transformativeness, (2) commerciality, and (3) bad faith.<sup>78</sup>

Although transformativeness is not explicitly listed in 17 U.S.C. § 107, it “permeates” copyright analysis.<sup>79</sup> To be transformative, the work must “[add] something new, with a further purpose or different

---

<sup>70</sup> *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 36 (2d Cir. 2021) (citing 17 U.S.C. § 101).

<sup>71</sup> *Roy Exp. Co. Establishment of Vaduz v. CBS*, 503 F. Supp. 1137 (S.D.N.Y. 1980).

<sup>72</sup> *Roy Exp.*, 503 F. Supp. at 1141–42.

<sup>73</sup> *Id.* at 1142–43.

<sup>74</sup> *Id.* at 1149, 1157.

<sup>75</sup> Leval, *supra* note 10, at 1125 (quoting *Folsom*, 9 F. Cas. at 345).

<sup>76</sup> 17 U.S.C. § 107.

<sup>77</sup> *Dr. Suess Enters., LP v. ComicMix LLC*, 983 F.3d 443, 451 (9th Cir. 2020); *see also McGucken*, 42 F.4th at 1158; *Bell v. Eagle Mt. Saginaw Indep. Sch. Dist.*, 27 F.4th 313, 321 (5th Cir. 2022).

<sup>78</sup> *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202–04 (2021); *Campbell*, 510 U.S. at 579 (stating “Although such transformative use is not absolutely necessary for finding of fair use . . . the goal of copyright . . . is generally furthered by the creation of transformative works.”); *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149, 1157 (9th Cir. 2022) (explaining “[u]nder this factor [the purpose and character of the use], we consider whether the infringing work is transformative and whether it is commercial.”); Gary Myers, *Muddy Waters: Fair Use Implications of Google LLC v. Oracle America, Inc.*, 19 NW. TECH. & INTELL. PROP. 1, 155, 160, 170 (2022); Leval, *supra* note 10, at 1111 (asserting “I believe the answer to the question of justification [when considering the purpose and character of the use] turns primarily on whether, and to what extent, the challenged use is *transformative*.”).

<sup>79</sup> *Dr. Suess*, 983 F.3d at 452.

character, altering the first with new expression, meaning, or message.”<sup>80</sup> When applied, transformativeness can be complicated due to its interconnectedness with the other factors and its overall vague focus.<sup>81</sup> For example, the third fair use factor “harken[s] back” to transformativeness because the substantiality of the volume of copying is dependent on the purpose for which the original work is being used, and the fourth factor accounts for whether the commercial use is transformative.<sup>82</sup>

Moreover, transformativeness can outweigh other factors; the more transformative a work is, the less other factors will be substantive.<sup>83</sup> A helpful example of transformativeness’ application is displayed in cases involving parodies.<sup>84</sup> Parodies are comments or criticisms made by pulling from the elements of other works.<sup>85</sup> By definition, to create a parody, the parodist must copy elements of the original work to evoke a connection with that work.<sup>86</sup> For example, in *Campbell*, the Supreme Court recognized that 2 Live Crew needed to take a portion of the music and lyrics of “Oh Pretty Woman” in order to conjure up an association with the subject of the parody.<sup>87</sup> By contrast, in *Dr. Suess Enters., L.P. v. ComixMix LLC*,<sup>88</sup> ComicMix LLC, a publishing company, attempted to publish a pop culture book combining *Oh, the Places You’ll Go!* and Star Trek, believing that the book would be a parody of Dr. Suess’ seminal work.<sup>89</sup> The Court did not find this “mashup” to be transformative because it merely overlaid two works without adding anything new.<sup>90</sup> Thus, on a broader level, the notion of transformativeness is the manner in which courts identify creativity when analyzing fair use.<sup>91</sup>

Commerciality is defined as “relating to or connected with trade and traffic or commerce in general.”<sup>92</sup> In copyright, there are commercial and noncommercial uses; noncommercial uses include

---

<sup>80</sup> *Campbell*, 510 U.S. at 579; *Google*, 141 S. Ct. at 1202–03; *McGucken*, 42 F.4th at 1157.

<sup>81</sup> *Dr. Suess*, 983 F.3d at 452; *Campbell*, 510 U.S. at 586.

<sup>82</sup> *Dr. Suess*, 983 F.3d at 451; *Campbell*, 510 U.S. at 586.

<sup>83</sup> *Campbell*, 510 U.S. at 579 (citing *Leval*, *supra* note 10, at 1111).

<sup>84</sup> *Id.* at 579.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 580.

<sup>87</sup> *Id.* at 580–83.

<sup>88</sup> *Dr. Suess Enters., LP v. ComixMix LLC*, 983 F.3d 443, 449 (9th Cir. 2020).

<sup>89</sup> *Id.* at 449–50.

<sup>90</sup> *Id.* at 448.

<sup>91</sup> *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149, 1157 (9th Cir. 2022).

<sup>92</sup> *Commercial*, THELAWDICTIONARY.ORG, <https://thelawdictionary.org/commercial/> (last visited Feb. 4, 2024).

2024]

DODARO

311

categories like teaching and scholarship, while commercial uses include categories like news reporting and parody.<sup>93</sup> Although noncommercial use increases the likelihood of fair use, commerciality does not dispositively demonstrate that a work violates fair use.<sup>94</sup> Thus, although commerciality is incredibly relevant to a fair use analysis, transformativeness can nullify its impact.<sup>95</sup>

The bad faith doctrine in the fair use context asks whether the defendant “engaged in explicit piracy in deliberately copying a work for commercial gain.”<sup>96</sup> A bad faith analysis is equitable and discretionary in nature, causing courts to disagree over whether it should be considered at all.<sup>97</sup> In *Google*, Justice Breyer admitted that he was skeptical about the necessity of its application.<sup>98</sup> To further his point, he quoted Judge Leval’s statement: “copyright is not a privilege reserved for the well-behaved.”<sup>99</sup> This uncertainty over bad faith’s relevance will likely continue to seep into the application of fair use analyses until it is readdressed by the Supreme Court.

### C. Precedential Background

#### 1. *Campbell v. Acuff-Rose Music, Inc.* (The Supreme Court of the United States)

In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court addressed whether commercial parody could fall under fair use.<sup>100</sup> The facts are as follows: a rap group, 2 Live Crew, asked for permission from a publisher, Acuff-Rose Music, Inc., to parody their song, “Oh Pretty Woman,” written by Roy Orbison and William Dees.<sup>101</sup> When Acuff-Rose Music refused to grant permission, 2 Live Crew proceeded with their parodic composition anyway and achieved financial success.<sup>102</sup> Acuff-Rose Music sued 2 Live Crew and its record company, Luke Skywalker

---

<sup>93</sup> *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1204 (2021); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994); 17 U.S.C. § 107(1).

<sup>94</sup> *Google*, 141 S. Ct. at 1204.

<sup>95</sup> *Campbell*, 510 U.S. at 579.

<sup>96</sup> Adam Mossoff, *Intellectual Property: Declaring Computer Code Uncopyrightable With a Creative Fair Use Analysis*, 103 CATO. SUP. CT. REV. 237, 255 (2021), <https://www.cato.org/sites/cato.org/files/2021-09/supreme-court-review-2020-2021-10.pdf>.

<sup>97</sup> *Id.* at 258; *Google*, 141 S. Ct. at 1200 (stating that fair use is equitable).

<sup>98</sup> *Google*, 141 S. Ct. at 1204.

<sup>99</sup> *Id.*; Leval, *supra* note 10, at 1126.

<sup>100</sup> *Campbell*, 510 U.S. at 571–72.

<sup>101</sup> *Id.* at 572.

<sup>102</sup> *Id.* at 573.

Records, for copyright infringement.<sup>103</sup> The District Court granted 2 Live Crew summary judgment, reasoning that (1) commercial use did not bar fair use and (2) parody could fall within 17 U.S.C. § 107.<sup>104</sup> However, the United States Court of Appeals for the Sixth Circuit reversed and remanded, holding that the glaring commercial purpose of parody bars fair use.<sup>105</sup> The Supreme Court of the United States granted certiorari.<sup>106</sup> Writing for the majority, Justice Souter reversed and remanded the Sixth Circuit's decision, holding that the commercial character of parody does not bar fair use, and commerciality is only one of the considerations in a fair use analysis.<sup>107</sup> The Court also embraced Judge Leval's revolutionary notion of transformativeness.<sup>108</sup>

2. Google LLC v. Oracle America, Inc. (The Supreme Court of the United States)

In *Google LLC v. Oracle America, Inc.*, the Supreme Court, for the first time, addressed (1) whether computer code should be afforded copyright protection under the Copyright Statute and (2) whether fair use impacts copyrighting computer code.<sup>109</sup> *Google* was the first Supreme Court case since *Campbell* to address fair use doctrine in twenty-eight years.<sup>110</sup> The facts are as follows: after Google acquired Android in 2005, it sought to transform Android into a "free and open" platform for developers.<sup>111</sup> Google met with Sun Microsystems, the predecessor of Oracle, to use its Java SE Platform, a fluid platform that could run on almost any hardware.<sup>112</sup> When negotiations fell through, Google copied 11,500 lines of Java SE code, known as an Application Programming Interface ("API"), anyway, adding the "stolen" code to the millions of new lines of code it was writing for Android.<sup>113</sup> The District Court decided that copyright protection should not include API because API is a "system or method of operation," which copyright law distinctly does not protect.<sup>114</sup> On appeal, the Federal Circuit reversed and

---

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Campbell*, 510 U.S. at 573–74.

<sup>106</sup> *Id.* at 574.

<sup>107</sup> *Id.* at 572.

<sup>108</sup> *See id.* at 579 (citing Leval, *supra* note 10, at 1111).

<sup>109</sup> *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1190 (2021); Mossoff, *supra* note 96, at 238.

<sup>110</sup> Myers, *supra* note 78, at 188.

<sup>111</sup> *Google*, 141 S. Ct. at 1190.

<sup>112</sup> *Id.* at 1190–91.

<sup>113</sup> *Id.* at 1191.

<sup>114</sup> *Id.* at 1194 (citing 17 U.S.C. § 102(b)).

remanded, holding that the computer code could be copyrighted.<sup>115</sup> The second District Court's jury found that Google had shown fair use.<sup>116</sup> On the second appeal, the Federal Circuit reversed the District Court again, holding that the fair use doctrine did not apply to Google.<sup>117</sup> Finally, after a lengthy back and forth, the Supreme Court granted certiorari.<sup>118</sup>

Writing for the majority, Justice Breyer first assumed "purely for argument's sake" that computer code is copyrightable and then held that the functional nature of computer code affords it a narrower scope of protection than other copyrightable works.<sup>119</sup> Additionally, the Court implicitly diminished the weight of commerciality for the first fair use factor by allowing Google to intentionally copy Java SE Code without permission and for profit.<sup>120</sup> Overall, the majority broadened the scope of transformativeness and weighed its impact on their analysis more heavily than ever before.<sup>121</sup> The Court noted that Google copied Java SE Code for nearly the same purpose that Sun Microsystems had designed it for, which by itself could not be transformative.<sup>122</sup> However, the code was implemented into a new platform, which promoted "creative progress."<sup>123</sup> This progress *was* transformative.<sup>124</sup> Thus, the Court concluded that Google had legitimately copied the Java SE Code.<sup>125</sup>

It should be noted that *Google* appears to be confined to the development of computer programs and will likely apply primarily to software copyright in the future.<sup>126</sup> However, its broad application of transformativeness partly influenced the circuit split over the interpretation and importance of transformativeness.<sup>127</sup>

### 3. Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (Second Circuit)

Before the Supreme Court of the United States granted certiorari in 2022, the United States Court of Appeals for the Second Circuit

---

<sup>115</sup> *Id.* at 1194.

<sup>116</sup> *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195 (2021).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Mark A. Lemley & Pamela Samuelson, *Interfaces and Interoperability After Google v. Oracle*, 100 TEX. L. REV. 1, 38 (2021); *Google*, 141 S. Ct. at 1190, 1198.

<sup>120</sup> *See* Mossoff, *supra* note 96, at 248.

<sup>121</sup> *See* Mossoff, *supra* note 96, at 254; *Scotusblog*, *supra* note 20.

<sup>122</sup> *Google*, 141 S. Ct. at 1203.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1190.

<sup>126</sup> *See generally id.* at 1183.

<sup>127</sup> *See* Mossoff, *supra* note 96, at 254.

addressed whether transformativeness should be evaluated subjectively, in light of the “underlying artistic message,” or if transformativeness should only be evaluated objectively, solely in light of the purpose and character of the physical work, in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.<sup>128</sup> The facts are as follows: in 1984, Lynn Goldsmith licensed a photograph of Prince, the musical artist, to Vanity Fair.<sup>129</sup> Vanity Fair later commissioned Andy Warhol to use the photograph as the basis for an art piece that would be featured in its magazine.<sup>130</sup> Overlooking copyright law, Warhol created fifteen more works based on the photograph, known as the “Prince Series.”<sup>131</sup> After Andy Warhol’s death, the Andy Warhol Foundation (“AWF”) purchased the rights to the Prince Series.<sup>132</sup> When Goldsmith discovered an iteration of the Prince Series on the cover of Condé Nast Magazine, she contacted AWF, providing notice of the perceived copyright infringement of her copyrighted work.<sup>133</sup> AWF sued Goldsmith for a declaratory judgment and Goldsmith counterclaimed.<sup>134</sup> The District Court granted summary judgment for AWF, concluding in part that the subjective nature of the Prince series was transformative because Warhol portrayed Prince as an “iconic, larger-than-life figure” while Goldsmith portrayed him as an “[un]comfortable person and a vulnerable human being.”<sup>135</sup>

Writing for the Second Circuit, Judge Lynch held that transformativeness should be analyzed objectively and “cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic—or for that matter, a judge—draws from the work.”<sup>136</sup> This holding differed drastically from the Second Circuit’s previous opinion in *Cariou v. Prince*,<sup>137</sup> which held that a secondary work’s subjective alteration of expressions, meanings, or messages can be transformative, despite the lack of apparent objective alterations.<sup>138</sup> The framework that arose from *Andy Warhol Found.* expects judges to

---

<sup>128</sup> *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 32 (2d Cir. 2021); *Scotusblog*, *supra* note 20.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 34.

<sup>132</sup> *Id.* at 35.

<sup>133</sup> *Id.*

<sup>134</sup> *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 35 (2d Cir. 2021).

<sup>135</sup> *Id.* at 35–36.

<sup>136</sup> *Id.* at 41.

<sup>137</sup> *See Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

<sup>138</sup> *See id.* at 706.

forgo acting as art critics to uncover the secondary work's intent and to, instead, analyze the secondary work's "fundamentally different and new" changes, which differ from the "raw material" of the original work.<sup>139</sup> Thus, the Court concluded that the Andy Warhol Foundation infringed on Goldsmith's copyright since it did not satisfy the objective elements necessary for maintaining a fair use defense.<sup>140</sup>

#### 4. *McGuken v. Public Ocean Ltd.* (Ninth Circuit)

The *Andy Warhol Found.* decision was critical because it was decided by the United States Court of Appeals for the Second Circuit: the United States Court of Appeals for the Second Circuit and United States Court of Appeals for the Ninth Circuit are the two pillars of copyright in the United States, as a consequence of Hollywood and the publishing industry.<sup>141</sup> Accordingly, a recent Ninth Circuit case that illustrates the circuit split over transformativeness is *McGuken v. Public. Ocean Ltd.*<sup>142</sup> In *McGuken*, the Ninth Circuit addressed whether the fair use doctrine, with an emphasis on transformativeness, applied to an exact reproduction of a photograph in a website article.<sup>143</sup> The facts are as follows: McGucken, a professional photographer, took photographs of a still lake that formed in Death Valley after a heavy rain.<sup>144</sup> McGucken permitted various magazines to use his photographs, but Pub Ocean, a digital publisher, used twelve of his photographs without his permission, earning nearly seven thousand dollars.<sup>145</sup> McGucken sued Pub Ocean for copyright infringement, and the District Court granted Pub Ocean summary judgment for its fair use defense.<sup>146</sup>

Writing for the majority of the Ninth Circuit, Judge Nguyen held that fair use did not apply to Pub Ocean's use of McGucken's photographs because Pub Ocean's article did not transform the photographs' purpose and simply used them for the same function and purpose that McGucken had intended: "to depict the lake."<sup>147</sup> Although fair use was shot down in *McGuken*, the Court illustrated its willingness to test

---

<sup>139</sup> *Andy Warhol Found.*, 11 F.4th at 42.

<sup>140</sup> *Id.* at 32.

<sup>141</sup> *Andy Warhol Found.*, 11 F.4th 26; David E. Shipley, *Protecting the Public Domain and the Right to Use Copyrighted Works: Four Decades of the Eleventh Circuit's Copyright Law Jurisprudence*, 29 J. INTELL. PROP. L. 67, 69 (2021).

<sup>142</sup> *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149 (9th Cir. 2022).

<sup>143</sup> *See id.* at 1153.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1155.

<sup>146</sup> *Id.* at 1156.

<sup>147</sup> *Id.* at 1153, 1158.



transformativeness subjectively, so long as the work is shown in a “new or different light” and used for a different purpose.<sup>148</sup>

5. *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* (The Supreme Court of the United States)

In 2022, after the emergence of the circuit split regarding transformativeness, the Supreme Court granted certiorari to *Andy Warhol Found.* to determine whether a subjective or objective test should apply to transformativeness.<sup>149</sup> Writing for the Supreme Court, Justice Sotomayor affirmed the Second Circuit’s decision, focusing less on the objective and subjective factors of transformativeness and more on (1) the purpose and (2) the commerciality of the secondary work.<sup>150</sup> The Court explained that, when analyzing the purpose of the secondary work, courts should look to the justification of the use.<sup>151</sup> Since Goldsmith’s photo and Andy Warhol’s print were both used in magazines to give background on the musician, Prince, the purposes were substantially the same.<sup>152</sup> Additionally, both the photograph and the print were licensed for profit.<sup>153</sup> Although this is not dispositive, the Court found this commerciality convincing when considered in combination with the purpose of both works.<sup>154</sup>

Touching upon the objective and subjective factors of transformativeness briefly, Justice Sotomayor explained, “[w]hether the purpose and character of a use weighs in favor of fair use is . . . an objective inquiry” and the subjective interpretation of the court should only be used to determine “whether the purpose of the use is distinct from the original.”<sup>155</sup> This discretionary test will likely create issues in the future because it allows for subjectivity while, at the same time, stating that the first factor should remain an objective inquiry.<sup>156</sup> As Justice Kagan explained in her dissent, the Court’s focus on commercialism goes against prior precedent, which maintained that the more transformative a work is, the less the commerciality factor should

---

<sup>148</sup> *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149, 1158 (9th Cir. 2022).

<sup>149</sup> *Scotusblog*, *supra* note 20.

<sup>150</sup> *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1277, 1288 (2023).

<sup>151</sup> *Id.* at 1277.

<sup>152</sup> *Id.* at 1277–78.

<sup>153</sup> *Id.* at 1279–80.

<sup>154</sup> *Id.* at 1280.

<sup>155</sup> *Id.* at 1284.

<sup>156</sup> *See Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1284 (2023).

2024]

DODARO

317

matter.<sup>157</sup> Justice Kagan went on to say that this decision will “stifle creativity of every sort” because it focuses on money changing hands rather than the creative expression of artists.<sup>158</sup> Instead of resolving the recent circuit split, the Supreme Court’s decision in *Andy Warhol Found.* may very well lead to an even more jarring split in the future.<sup>159</sup>

### III. ANALYSIS

Part III will begin by analyzing the objective and subjective aspects of transformativeness, which have been weighed discordantly by different judges and circuits.<sup>160</sup> This section will then shift focus to the benefit of legislatively amending 17 U.S.C. § 107 to apply fair use more seamlessly.

#### A. *Objective and Subjective Transformativeness*

Fair use analysis is rife with subjectivity because few statutory bright-line rules exist, making analyses incredibly fact-dependent.<sup>161</sup> To make the search for objectivity even more elusive, the four factors provided by 17 U.S.C. § 107 are non-exhaustive and transformativeness is not even listed in the federal statute.<sup>162</sup> Even so, ever since Judge Leval suggested transformativeness as a means to apply and understand the first factor of fair use, his methodology has permeated the four factors overall.<sup>163</sup> Thus, to truly understand transformativeness and fair use more broadly, it is pertinent to return to Judge Leval’s original meaning and scrutinize the deviations from his framework that have arisen over time.

To start, Judge Leval had originally grounded transformativeness in the first factor, “the purpose and character of the use,” as a means of balancing the strength of the original copyright owner’s justification against the secondary user’s justification for why the fair use defense should or should not apply to the secondary work before courts.<sup>164</sup> Judge Leval implicitly viewed transformativeness as an assessment of the gap between Point A, the original work, and Point B, the secondary

---

<sup>157</sup> *Id.* at 1299 (Kagan, J., dissenting).

<sup>158</sup> *Id.* at 1312 (Kagan, J., dissenting).

<sup>159</sup> *Id.* at 1312 (Kagan, J., dissenting) (stating “In failing to give Warhol credit for that transformation, the majority distorts [the] ultimate resolution of the fair-use question”).

<sup>160</sup> *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149, 1158 (9th Cir. 2022); *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021).

<sup>161</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

<sup>162</sup> 17 U.S.C. § 107; *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021).

<sup>163</sup> Leval, *supra* note 10, at 1111; *Dr. Suess Enters., LP v. ComicMix LLC*, 983 F.3d 443, 452 (9th Cir. 2020).

<sup>164</sup> Leval, *supra* note 10, at 1111.

work.<sup>165</sup> The wider the gap, the stronger the fair use defense.<sup>166</sup> Two elements of Leval's first test that help assess the wideness of the gap are whether the new work has (1) a new manner, or (2) a new purpose.<sup>167</sup> Judge Leval did not explain how to weigh these factors, but he did guide courts' understanding by explaining that repackaging the original work is rarely sufficient, yet the transformation of "raw material" into something more *is* sufficient.<sup>168</sup> How does a court decide between "raw material" and something more? Judge Leval presents a conjunctive second test, conceiving that a valid secondary use consists of the raw material plus some "new information, new aesthetic, [or] new insight and understandings."<sup>169</sup> Thus, Judge Leval proposed that a valid secondary use (1) requires an unknown combination of new manner and new purpose that can be further evaluated by (2) analyzing the new aesthetics and insights of the secondary work.<sup>170</sup> With these two separate but interrelated tests, Judge Leval likely intended for courts to have less difficulty analyzing the first fair use factor. However, time would prove his underestimation of the complexities of his analysis fatal to a simple application of transformativeness.

Four years later, the Supreme Court in *Campbell* took Judge Leval's transformativeness concept and embraced it.<sup>171</sup> The Court saw the usefulness of Judge Leval's tests.<sup>172</sup> Justice Souter, writing for the majority in *Campbell*, explained that transformativeness (1) "adds something new" (2) with "a further purpose or different character," (3) thereby "altering the first with new expression, meaning, or message."<sup>173</sup> The interconnectivity of the two tests is apparent in his language, even if it is slightly more obscured. The Court replaced Judge Leval's "different manner" with the synonymous, though slightly less confusing, "different character," while keeping Judge Leval's "different purpose" as "further purpose."<sup>174</sup> Additionally, rather than dividing the two tests out, as Judge Leval himself did, Justice Souter attached Judge Leval's second test, "new information, new aesthetic, new insights and

---

<sup>165</sup> See Leval, *supra* note 10, at 1111.

<sup>166</sup> See Leval, *supra* note 10, at 1111.

<sup>167</sup> See Leval, *supra* note 10, at 1111.

<sup>168</sup> See Leval, *supra* note 10, at 1111.

<sup>169</sup> See Leval, *supra* note 10, at 1111.

<sup>170</sup> See Leval, *supra* note 10, at 1111.

<sup>171</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*; see also Leval, *supra* note 10, at 1111.

understandings,” with the gerund, “altering” to the first test, also changing the language to “new expression, meaning, or message.”<sup>175</sup>

Did Justice Souter’s edits of Judge Leval’s transformativeness factors alter the application of the original test? It is difficult to say. However, the Court appears to have clarified Judge Leval’s two tests through its lengthy application. The first test, “purpose or different character” is seemingly more objective, while the second test, “new expression, meaning, or message” is seemingly more subjective.<sup>176</sup> It is almost as if the second test is the proper lens for double-checking the first test’s objective elements. Purpose and character are simple words with complex applications.<sup>177</sup> Character includes one’s “distinguishing attributes.”<sup>178</sup> So, essentially, the test requires courts to objectively analyze the intent of the secondary user and the attributes of the secondary work.<sup>179</sup> However, “expression, meaning, or message” are vague quantifiers that significantly change meaning depending on the judge.<sup>180</sup> Is the combination of objectivity and subjectivity, inspired by Leval’s separate but interconnected tests, confusing to courts because fair use allows judges to apply these tests autonomously?<sup>181</sup> Perhaps some judges prefer the objective route and give purpose and character more sway because it allows for a formal application. Nevertheless, could a judge’s use of the objective test for the sake of formality sacrifice fairness? The subjective test may be more sporadic, but perhaps judges can use it to do what is right rather than what is objectively significant.

Twenty-eight years later, in *Google*, Justice Breyer reaffirmed many of the alterations that Justice Souter made to Judge Leval’s two tests.<sup>182</sup> Justice Breyer’s language mirrored much of the language used by Justice Souter.<sup>183</sup> However, Justice Breyer broadened transformativeness and fair use by stating that the attributes of the secondary work or its “reason” for existence, can be exactly the same as the attributes of the original work, as long as the secondary user’s purpose or intent is to “creative[ly] progress” the way in which the original work is

---

<sup>175</sup> *Id.*; see also Leval, *supra* note 10, at 1111.

<sup>176</sup> *Id.*; see also Leval, *supra* note 10, at 1111.

<sup>177</sup> *Purposely*, THELAWDICTIONARY.ORG, <https://thelawdictionary.org/purposely/> (last visited Feb. 4, 2024).

<sup>178</sup> *Character*, THELAWDICTIONARY.ORG, <https://thelawdictionary.org/character/> (last visited Feb. 4, 2024).

<sup>179</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>180</sup> *Id.*; see also Leval, *supra* note 10, at 1111.

<sup>181</sup> See *id.* at 577–78.

<sup>182</sup> See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202–03 (2021).

<sup>183</sup> *Id.*

employed.<sup>184</sup> Is Justice Breyer saying that, even if the work serves the exact same purpose and has the exact same attributes, it can be transformative if it is used to incite the “creative progress” of a new platform?<sup>185</sup> Is Justice Breyer adding a new element? No, he is likely not because he suggests that computer programs have narrower copyright protection since they are functional works, which would implicitly explain why the two transformativeness tests are applied so loosely in *Google*.<sup>186</sup> Additionally, “creative progress” may be a euphemism for Judge Leval’s subjective test since “creative progress” aligns definitionally with new “expression, meaning, or message.”<sup>187</sup> If this is the case, then Justice Breyer may have merely been applying the subjective elements of transformativeness more comprehensively than the objective elements.<sup>188</sup> Either way, *Google* is likely a case that broadens transformativeness for *functional* works, like computer software, without having as much of an impact on other copyrightable works.<sup>189</sup>

Once the evolution of Judge Leval’s subjective and objective tests for transformativeness are clearly understood, the recent Second and Ninth Circuit deviations are more palatable. The Second Circuit, in *Andy Warhol Found.*, viewed the test mostly objectively, finding that “the meaning or impression” and “perceived intent of the artist” are too subjective and instead, judges should examine whether the changes made to the source material cause “the secondary work to [stand] apart from the raw materials used to create it.”<sup>190</sup> In *McGucken*, the Court held that a more subjective look at whether the secondary work is shown in a “new or different light” is relevant and equated this to a different purpose.<sup>191</sup> The Supreme Court in *Andy Warhol Found.* affirmed the Second Circuit’s objective interpretation without properly doing away with a subjective analysis.<sup>192</sup> Will this decision cause further confusion over the subjective and objective factors’ respective weights? Judge Leval had founded an objective analysis with a subjective corroborating

---

<sup>184</sup> See Mossoff, *supra* note 96, at 254; *Google*, 141 S. Ct. at 1203.

<sup>185</sup> See *Google*, 141 S. Ct. at 1203.

<sup>186</sup> Lemley & Samuelson, *supra* note 119, at 48; see also *Google*, 141 S. Ct. at 1198.

<sup>187</sup> See *Google*, 141 S. Ct. at 1203.

<sup>188</sup> See *id.* at 1202–03.

<sup>189</sup> See Lemley & Samuelson, *supra* note 119, at 38; *Google*, 141 S. Ct. at 1198.

<sup>190</sup> *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41–42 (2d Cir. 2021).

<sup>191</sup> See *McGucken v. Pub. Ocean Ltd.*, 42 F.4th 1149, 1158 (9th Cir. 2022).

<sup>192</sup> See *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1284 (2023).

2024]

DODARO

321

mechanism.<sup>193</sup> However, it is not entirely clear where objectivity ends and subjectivity begins.<sup>194</sup> Should purpose refer to the subjective, *ad hoc* intent of the individual or the objectively reasonable *post hoc* intent inferred from the end result? Should the “new expression, meaning, or message” compliment, stand alone from, or overshadow purpose and character?

Although the Supreme Court in *Andy Warhol Found.* instituted a new precedent on how to interpret the first factor of fair use, there is still uncertainty over the respective weights of the subjective and objective factors.<sup>195</sup> Thus, it is time to amend 17 U.S.C. § 107, the fair use statute, to include a more definitive and applicable test for courts to apply.

### B. Congressional Amendment

An amendment is “an addition or alteration made to a constitution, statute, or legislative bill or resolution.”<sup>196</sup> Copyright law is codified in Title Seventeen of the *United States Code*, which is federal legislation enacted by Congress.<sup>197</sup> Since the enactment of the Copyright Act of 1976, copyright law has been amended dozens of times to account for changes in technology and society’s advances.<sup>198</sup> For example, the Webcaster Settlement Act of 2009 amended Title Seventeen by merely changing the expiration date for specific settlements by receiving agents “for the reproduction and performance of sound recordings” from “February 15, 2009” to “at 11:59 p.m. Eastern time on the 30<sup>th</sup> day after the date of the enactment of the Webcaster Settlement Act of 2009.”<sup>199</sup>

In the “Notes to Decisions” section of Westlaw, which is a subsequent aid to the application of 17 U.S.C. § 107, transformativeness is mentioned as a general determination of fair use, citing *Campbell*, but transformativeness is not included as a factor nor is it mentioned regarding any factor in the Act itself.<sup>200</sup> Although the four factors are

---

<sup>193</sup> See Leval, *supra* note 10, at 1111.

<sup>194</sup> See *Andy Warhol Found.*, 11 F.4th at 41–42; *McGucken*, 42 F.4th at 1158; Leval, *supra* note 10, at 1111.

<sup>195</sup> See *Andy Warhol Found.*, 11 F.4th at 41–42; *McGucken*, 42 F.4th at 1158; Leval, *supra* note 10, at 1111.

<sup>196</sup> *Amendment*, BRITANNICA, <https://www.britannica.com/topic/amendment>, (last visited Feb. 4, 2024).

<sup>197</sup> U.S. COPYRIGHT OFF., COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE (2022), <https://www.copyright.gov/title17/title17.pdf>.

<sup>198</sup> U.S. COPYRIGHT OFF., *supra* note 197.

<sup>199</sup> Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926; 17 U.S.C. § 114(f)(5)(A)–(F) (2010).

<sup>200</sup> See 17 U.S.C. § 107; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

non-exhaustive, implementing a uniform standard for transformativeness can guide courts toward a more accurate application of Judge Leval and Justice Souter’s objective and subjective tests.<sup>201</sup> However, what should this amendment look like?

As stated previously, transformativeness has an objective prong, which requires courts to check if the secondary work has a new purpose or character.<sup>202</sup> Transformativeness also has a subjective prong, which requires courts to assess whether the raw material of the original work is altered with a “new expression, meaning, or message” to create the secondary work.<sup>203</sup> Independent of the recent decision in *Andy Warhol Found.* and Congress’ usual unwillingness to involve itself in issues of case law, Congress should amend 17 U.S.C. § 107 to include Judge Leval and Justice Souter’s combined iteration of transformativeness to update fair use permanently.<sup>204</sup> The main difficulty is the fluidity of transformativeness: it falls under the first factor, “purpose and character of the use,” but it also affects the application of the fourth factor’s commerciality.<sup>205</sup> Moreover, the third factor “harkens back” to the first factor.<sup>206</sup> A secondary difficulty involves the altered analysis of functional works, created by Justice Breyer in *Google*; the Court is more accepting of fair use, despite a similar purpose and character, if there is “creative progress.”<sup>207</sup> Therefore, whatever amendment is crafted will have to be quite comprehensive. Below are three alterations that could improve fair use application as a whole.

### 1. The Codification of Parody

First, Congress should add “parody” explicitly to the list of non-exhaustive, accepted fair use defenses. The list will then become “criticism, comment, news reporting, teaching, . . . scholarship, . . . research” or *parody*.<sup>208</sup> Congress should do this simply to account for cases like *Campbell and Dr. Suess Enters.*, which held that parody can fall under fair use.<sup>209</sup> Congress may find this redundant, however, since

---

<sup>201</sup> See *Campbell*, 510 U.S. at 579; Leval, *supra* note 10, at 1111; 17 U.S.C. § 107.

<sup>202</sup> *Campbell*, 510 U.S. at 579; see also Leval, *supra* note 10, at 1111.

<sup>203</sup> *Campbell*, 510 U.S. at 579; see also Leval, *supra* note 10, at 1111.

<sup>204</sup> *Campbell*, 510 U.S. at 579; see also Leval, *supra* note 10, at 1111; *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1261 (2023).

<sup>205</sup> *Dr. Suess Enters., LP v. ComicMix LLC*, 983 F.3d 443, 451 (9th Cir. 2020); *Campbell*, 510 U.S. at 591.

<sup>206</sup> *Dr. Suess*, 983 F.3d at 451; *Campbell*, 510 U.S. at 586–87.

<sup>207</sup> See Mossoff, *supra* note 96, at 250–55; *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021).

<sup>208</sup> See 17 U.S.C. § 107; *Campbell*, 510 U.S. at 576.

<sup>209</sup> *Dr. Suess*, 983 F.3d at 452; *Campbell*, 510 U.S. at 579.

2024]

DODARO

323

parody could fall under “criticism” or “comment” definitionally.<sup>210</sup> Even so, this explicit addition could save litigants costs and confusion if interpretation of parody precedent is ever called into question again.

## 2. The Codification of Transformativeness

Second, Congress should officially amend 17 U.S.C. § 107 to integrate transformativeness.<sup>211</sup> Such an enactment will consolidate the overall evolution of transformativeness into fixed language, finally giving Judge Leval and Justice Souter their due.<sup>212</sup> Case law may continue to confuse circuit courts if transformativeness is not explicit in its language. To the contrary, a congressional revamping has the potential to give courts more guidance on the evolving standards of fair use.

The other two elements of “purpose and character of the use” are (2) commerciality and (3) bad faith.<sup>213</sup> Commerciality’s influence should persist in the fourth factor.<sup>214</sup> Additionally, an effective congressional amendment should not incorporate bad faith because it is considered discretionary in most courts’ analyses, and the Supreme Court called its relevance into question in *Google*.<sup>215</sup>

## 3. The Functionality Exception to Transformativeness

Third, because functional works, such as computer software, have a looser level of copyright protection, it would be useful to include an addition specifically for functional works to the aforementioned transformativeness amendment.<sup>216</sup>

## 4. A Theoretical Amendment to 17 U.S.C. § 107

An amended 17 U.S.C. § 107 that incorporates parody, transformativeness, and a functionality component may look like this [amended sections are italicized]:

(a) Notwithstanding the provisions of sections 106 and 106A [17 USCS §§ 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

---

<sup>210</sup> *Dr. Suess*, 983 F.3d at 452.

<sup>211</sup> 17 U.S.C. § 107.

<sup>212</sup> *See Campbell*, 510 U.S. at 579; *see also* Leval, *supra* note 10, at 1111.

<sup>213</sup> *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202–04 (2021).

<sup>214</sup> *See* 17 U.S.C. § 107; *Campbell*, 510 U.S. at 590.

<sup>215</sup> *Google*, 141 S. Ct. at 1204; Leval, *supra* note 10, at 1126 (“Copyright is not a privilege reserved for the well-behaved.”).

<sup>216</sup> Lemley & Samuelson, *supra* note 119, at 38; *see also Google*, 141 S. Ct. at 1198.



(including multiple copies for classroom use), scholarship, research, or parody is not an infringement of copyright.

(b) Whether the *challenged* use of a work qualifies as a fair use primarily depends on the extent to which the challenged use effectuates a substantial transformation of the original work.

More specifically,

(1) *If a work qualifies as substantially transformative, the challenged use made is a fair use.*

(2) *Otherwise, the reviewing court shall evaluate the fair use defense by considering the degree of the work's transformativeness along with the following additional factors:*

- (i) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (ii) The nature of the copyrighted work;
- (iii) The amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- (iv) The effect of the use upon the potential market for or value of the copyrighted work;

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.

(c) *To determine whether the challenged use is substantially transformative within the meaning of paragraph (b)(1) and/or the extent of a work's transformativeness within the meaning of paragraph (b)(2), the reviewing court shall consider:*

(1) *Whether an objectively reasonable person who would be a potential consumer of the work would view the work as adding a new purpose or character to the original work;*  
*or*

(2) *Whether the trier of fact, exercising its discretion, views the work as altering the raw material of the original work by adding new expression, meaning, or message*

(d) *A "functional work" is more informational or functional than it is creative, and the work constructs a new platform using the raw material of the original work to promote creative progress. A functional work generally favors fair use.<sup>217</sup>*

With this new language, the application of copyright law would be more accurate, seamless, and cost-effective. Judicial precedent is useful and helpful, but it is essential to revise the law itself at intervals to ensure fresh and appropriate application.

---

<sup>217</sup> See 17 U.S.C. § 107; *Campbell*, 510 U.S. at 579; Leval, *supra* note 10, at 1111; *Google*, 141 S. Ct. at 1215; Myers, *supra* note 78, at 169–70.

## IV. CONCLUSION

Overall, copyright law has evolved to better provide for new technological, social, and societal advances concerning artistic expression. Likewise, its counterpart, the fair use doctrine, has only grown in relevance due to its increasingly useful constraints on copyright in mediums, including criticism, parody, reporting, and education.<sup>218</sup> To keep the Copyright Statute relevant and useful, Congress and the court system have intermittently tweaked the Act's language and application, respectively.<sup>219</sup> However, because the court system is the frontline for handling evolving issues in the law, it often has to face questions that have yet to be addressed by Congress.

The Supreme Court decided that parody can fall under fair use doctrine in *Campbell*.<sup>220</sup> Judge Leval's notion of transformativeness, a means of evaluating the first of the four fair use factors, "the purpose and character of the use," has evolved through Supreme Court precedent in *Campbell*, *Google*, and *Andy Warhol Found.*<sup>221</sup> Additionally, in *Google*, the Court recently loosened the threshold of transformativeness in regard to functional works, like computer software, making it so that "creative[ly] progress[ing]" a new platform could act as a substitute for the objective elements of "purpose" and "character."<sup>222</sup>

This Comment argues that these three holdings—even functionality, a relatively new consideration—should be codified into 17 U.S.C. § 107.<sup>223</sup> Without proper guidance and specific language, the Supreme Court will continue to be burdened by vagueness as new mediums and forms of expression develop and require protection. Gone are the days when copyright *only* involved authors fighting over written works. Soon, if not already, courts will have to decipher the complexities of applying copyright to everything from NFTs to tattoos.

By codifying transformativeness—specifically in the vein of Judge Leval's subjective and objective dual analysis—the Supreme Court will have less reason to roll up its sleeves and decide circuit splits that may

---

<sup>218</sup> See 17 U.S.C. § 107.

<sup>219</sup> See U.S. COPYRIGHT OFF., *supra* note 197.

<sup>220</sup> *Campbell*, 510 U.S. at 579; *see also Google*, 141 S. Ct. at 1183 (providing an example of a case that has recently tweaked copyright law).

<sup>221</sup> See *Campbell*, 510 U.S. at 578 (citing Leval, *supra* note 10, at 1111); *Google*, 141 S. Ct. at 1202–03; *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1261 (2023).

<sup>222</sup> See *Google*, 141 S. Ct. at 1203; Leval, *supra* note 10, at 1111.

<sup>223</sup> See *Campbell*, 510 U.S. at 578 (citing Leval, *supra* note 10, at 1111); *Google*, 141 S. Ct. at 1202–03; *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1261 (2023).

arise in the future.<sup>224</sup> Congressional amendments obviously cannot solve every issue, but they can lay a new foundation that courts can apply easily and with some certainty. Thus, Congress should amend 17 U.S.C. § 107 to include (1) parody, (2) both the subjective and objective interpretations of transformativeness, and (3) the adoption of a looser definition of transformativeness for functional works.<sup>225</sup> If all goes well, creators will once again be able to rest easy, knowing that their works are protected by resolute principles, not just the ever-changing whims of the judicial system.

---

<sup>224</sup> *Scotusblog*, *supra* note 20; *see also Campbell*, 510 U.S. at 579; *Leval*, *supra* note 10, at 1111.

<sup>225</sup> *See Campbell*, 510 U.S. at 579 (citing *Leval*, *supra* note 10, at 1111); *Google*, 141 S. Ct. at 1203; 17 U.S.C. § 107.