

# WHAT IS TRANSFORMATIVE? AN EXPLANATORY SYNTHESIS OF THE CONVERGENCE OF TRANSFORMATION AND PREDOMINANT PURPOSE IN COPYRIGHT FAIR USE LAW

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## INTRODUCTION

In 1994, the United States Supreme Court, in *Campbell v. Acuff-Rose Music*,<sup>2</sup> adopted the transformative test for the evaluation of copyright fair use. Many courts<sup>3</sup> and commentators<sup>4</sup> have interpreted the transformative test as relating to the “purpose and character of the use” factor (the first factor) of the copyright fair use provision, 17 U.S.C. § 107.<sup>5</sup> This article

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<sup>2</sup> 510 U.S. 569 (1994).

<sup>3</sup> The courts to which I refer are cited in the Appendix, Chart A, *infra*.

<sup>4</sup> *E.g.*, Alexander Lindey & Michael Landau, *Lindey on Entertainment, Publ. & the Arts* § 3:23 (3d ed. July 2011); William F. Patry, *Patry on Copyright* § 10:13 (March 2011); Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 Alb. L. Rev. 67, 709-719 (1995); Jeannine M. Marques, *Fair Use in the 21st Century: Bill Graham and Blanch v. Koons*, 22 Berkley Tech. L.J. 331 (2007); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 BYU L. Rev. 1201, 1252 (2005); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L.J. 535 (2004); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 Harv. L. Rev. 1137, 1143-44 (March 1990).

<sup>5</sup> The Copyright Act fair use provision, 17 U.S.C. § 107 (2011), states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;

analyzes the entire body of United States Courts of Appeals' case law applying the transformative test in copyright fair uses cases to present two points: first, that the transformative test modifies the first sentence of 17 U.S.C. 107—in particular, the terms, “the fair use of a copyrighted work”—rather than simply factor one of the four factor test. Second, the implementation of the transformative test by the courts indicates that the courts are to consider transformations in the content, context, and the predominant purpose of the original work and whether the alleged fair use changes the content, context, or purpose in a manner that furthers the public policies reflected in the first sentence of section 107.<sup>6</sup>

The test of transformativeness determines the fairness of a use to evaluate whether new works that copy from existing copyrighted works “merely ‘supersede the objects’ of the original creation,”<sup>7</sup> or “instead add[ ] something new, with a further purpose or different character, altering the first with new expression, meaning, or message[.]”<sup>8</sup> The test “asks, in other words, whether and to what extent the new work is ‘transformative.’”<sup>9</sup>

Since 1994, the federal courts have wrestled with the test of transformation. This article will perform an explanatory synthesis<sup>10</sup> of each

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- (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.

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.

<sup>6</sup> NOTE FOR IP CONFERENCE: This observation begins a conversation on fair use that I hope to pursue in further work, namely that the predominant purpose analysis under the transformative test converges with the analysis of predominant purpose in right of publicity fair use law and in first amendment law on the censorship of artistic expression. Transformative works add new content, meaning, and expression to existing works or valuable names, images, or likenesses, and thereby create new, valuable first amendment expression in a manner that is not exploitative of the purposes of the original works or publicity attributes. This convergence indicates there may be a common standard for fair use in both copyright and right of publicity law that also matches the public policy and standards for first amendment protection of artistic expression.

<sup>7</sup> *Campbell*, 510 U.S. at 579 (citing *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (Story, J., sitting as circuit justice)). See also *Harper & Row, Pubs. v. Nation Enters.*, 471 U.S. 539, 562 (1985) (to avoid new works “supplanting” the original).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (quoting Pierre N. Leval, *Commentary, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990) [Leval]).

<sup>10</sup> Explanatory synthesis in contemporary legal rhetoric is a qualitative method of analysis of legal authorities that uses induction to formulate from multiple authorities the principles concerning

United States Court of Appeals case applying the transformative test in copyright fair use disputes. Although many articles have looked at the concept of transformation in carefully defined contexts,<sup>11</sup> or in quantitative analysis of case law,<sup>12</sup> this article will look more generally at the entire body

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how a legal test or legal standard is to be interpreted and applied. See Michael D. Murray, *Rule Synthesis and Explanatory Synthesis: A Socratic Dialogue Between IREAC and TREAT*, 8 LEG. COM. & RHET. \_\_\_ (forthcoming) [Murray, Rule Synthesis and Explanatory Synthesis]; MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL WRITING AND ANALYSIS ch. 6 (2009) [MURRAY & DESANCTIS, LEGAL WRITING AND ANALYSIS]; MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, ADVANCED LEGAL WRITING AND ORAL ADVOCACY Appx. A (2009) [MURRAY & DESANCTIS, ADVANCED LEGAL WRITING]. See also text accompanying notes 10-11 and 19-30 *infra*.

<sup>11</sup> Early scholarship following the *Campbell* transformation of copyright fair use law wrestled with the concept of transformation and what it might mean in future cases, *see, e.g.*, Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell*, 7 COMM. L. & POL'Y 1 (2002); Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPR. SOC'Y 251 (1998); Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677 (1995), and subsequent works have marked the progress of the law in specific contexts or comparative analysis, *e.g.*, Deborah Gerhardt & Madelyn Wessel, *Fair Use and Fairness On Campus*, 11 N.C. J. L. & TECH. 461 (2010) (focusing on education, research, and reference fair uses); Mary W. S. Wong, *"Transformative" User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?*, 11 VAND. J. ENT. & TECH. L. 1075 (2009) (international and comparative analysis of transformation in context of copyright fair use and user-generated content); Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 CARDOZO ARTS & ENT. L.J. 1059 (2008) (how the definition of authors' rights including the Kantian definition of moral rights and transformative authorship should impact copyright law and policy in the United States and the United Kingdom especially with regard to the treatment of visual vs. literary works); Andrew S. Long, *Comment: Mashed Up Videos and Broken Down Copyright: Changing Copyright to Promote the First Amendment Values of Transformative Video*, 60 OKLA. L. REV. 317 (2007) (discussing reform of copyright law to allow recognition of fair use for transformative video mashups); Matthew D. Bunker, *Transforming the News: Copyright and Fair Use in News-Related Contexts*, 52 J. COPR. SOC'Y 309 (2005) (fair use in news reporting contexts); John Tehranian, *Whither Copyright? Transformative Use, Free Speech, and an Intermediate Liability Proposal*, 2005 B.Y.U. L. REV. 1201 (focusing on first amendment free speech concerns with copyright fair use law). R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008), analyzed the U.S. Court of Appeals cases through 2007 and many district court cases on transformation with the purpose of examining and contrasting the use of the test in fair use compared to derivative works analysis. The work is a good example of analysis that avoids explanatory synthesis of the authorities by using a case-by-case method of analogical reasoning. No work has wrestled with the entire body of appellate law on transformation with the specific intent of demonstrating how the term works based on a synthesis of the data set of appellate cases. This article seeks to address that need.

<sup>12</sup> Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PENN. L. REV. 549, 623 (2008), analyzed all fair use cases since the enactment of the 1976 Copyright Act through 2005. The work performed a quantitative analysis of cases on all four of the fair use factors of section 107 and did not focus exclusively on the transformative test established by *Campbell* in 1994. David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 279-81 (2004), examined fair use in cases from *Campbell* (1994) to *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002). His analysis was partially qualitative and partially quantitative in that Nimmer evaluated the facts of the cases to make a prediction whether a use should be fair, and then analyzed the numbers of cases that matched and did not match the predicted outcome. His method looked at the entire fair use analysis and did not use the explanatory synthesis method I am applying

of appellate law since *Campbell* to demonstrate how the term “transformative” works as revealed in the record of what courts actually declare to be transformative and not transformative.<sup>13</sup> My goal is not to highlight disparities between cases and holdings, but to engage in synthesis—specifically, explanatory synthesis in contemporary legal rhetoric—to create meaning and induce comprehension of the term “transformation” and inspire the rhetorical imagination<sup>14</sup> of how to advocate for particular determinations of transformative fair use<sup>15</sup> using the available data set of appellate cases that have made concrete determinations of transformative fair use in many fact patterns and copyright narratives. Part I will explain the methodology of my study, including the use of rule synthesis to formulate the rules and guidelines<sup>16</sup> for the transformative test, and separately, the use of explanatory synthesis to induce the principles from the case law as to how the transformative test works in actual cases. Part II presents the rule synthesis of the transformative test. Part III presents the explanatory synthesis to demonstrate the operation of the transformative test in seven contexts: (A) transformation of artistic works; (B) transformation of

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specifically to analyze the outcome of the transformative test in court of appeals cases from March 1994-April 2011.

<sup>13</sup> I am intentionally using the term “demonstrate how transformation works” rather than “what the term ‘transformative’ means” to highlight the distinction between *rule synthesis* (what the term means based on an inductive synthesis of authorities contributing to the definition of a legal term) and *explanatory synthesis* (how the term works based on an inductive synthesis of authorities where the term has been applied in actual cases to produce a concrete outcome). See sources cited in note 7 *supra*.

<sup>14</sup> The phrase, “inspire the rhetorical imagination,” is not used casually or with flamboyance, but instead refers to the discipline of legal rhetoric and its study of human comprehension as well as effective and persuasive communication. As a sample of the scholarship in this area, see James L. Kinneavy, *Contemporary Rhetoric*, in *THE PRESENT STATE OF SCHOLARSHIP IN HISTORICAL AND CONTEMPORARY RHETORIC* (Winifred B. Horner ed., rev. ed. 1990); John B. Bender & David E. Wellbery, *Rhetoricity: On the Modernist Return of Rhetoric*, in *THE ENDS OF RHETORIC: HISTORY, THEORY, PRACTICE* (John B. Bender & David E. Wellbery eds., 1990); *THE RHETORICAL TRADITION* (Patricia Bizzel & Bruce Herzberg eds., 1990); PETER GOODRICH, *LEGAL DISCOURSE* (1987); Carroll C. Arnold, *Rhetoric in America since 1900*, in *RE-ESTABLISHING THE SPEECH PROFESSION: THE FIRST FIFTY YEARS* (Robert T. Oliver & Marvin G. Bauer eds., 1959).

<sup>15</sup> Fair use famously has been described as “the most troublesome [issue] in the whole law of copyright.” *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (citations omitted). This article will demonstrate through the method of explanatory synthesis how the cases can be used to support principles of interpretation regarding the transformative test. This analysis continues the scholarly conversation concerning transformation in copyright law but it also should be useful in client counseling and advocacy.

<sup>16</sup> These guidelines are defined in this article as “interpretive rules.” See Murray, *Rule Synthesis and Explanatory Synthesis*, 8 *LEG. COM. & RHET.* at \_\_\_ (forthcoming); MURRAY & DESANCTIS, *LEGAL WRITING AND ANALYSIS*, at 148-51; MURRAY & DESANCTIS, *ADVANCED LEGAL WRITING*, at 515-17.

literary works; (C) transformation of the purpose and function of works through comment, criticism, parody, and satire; (D) transformation of the context, purpose, and function of works through archival, referential, and historical uses; (E) transformation of the context, purpose, and function of works through educational or research uses; (F) transformation without fair use; and (G) non-transformation cases. Part IV, my conclusion, is followed by an appendix containing two charts compiling and reporting my data.

## I. Methodology

Explanatory synthesis analysis of the entire body of copyright fair use case law from the United States Courts of Appeals since 1994 reveals that that the transformative test modifies the first sentence of 17 U.S.C. 107—in particular, the terms, “the fair use of a copyrighted work”—rather than simply factor one of the four factor test, and the implementation of the transformative test by the courts indicates that the courts are to consider transformation of the content, context, and the predominant purpose of the original work and whether the alleged fair use changes the content, context, or purpose in a manner that furthers the public policies reflected in the first sentence of section 107. To demonstrate these points, I have used the following method of analysis:

### A. United States Court of Appeals Cases

I researched and analyzed cases from the United States Supreme Court and United States Courts of Appeals from the date of *Campbell* until April 18, 2011.<sup>17</sup> I chose United States Court of Appeals cases because they have the potential to be controlling authority in copyright cases. I used a variety of methods to compile the data set.<sup>18</sup> The complete list of cases is provided in the Appendix, Chart A.

### B. Rule Synthesis Methodology

Rule synthesis is an inductive synthesis of authorities found to be on point and controlling of a legal question in order to accurately determine and

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<sup>17</sup> NOTE FOR THE IP CONFERENCE: This draft works from my research into the cases as of April 2011. For the final paper, I will continue to look at the most recent cases up to the date of submission for publication.

<sup>18</sup> My principle search on Westlaw’s ALLFEDS and CTA databases was “Copyright & Transform! /100 fair-use & date(aft 3/6/1994).” I cross-checked the results using key note topic 99 (copyright) and transform! in the search “to(99) /p transform!” and KeyCite-checked the *Campbell* case itself for citations in United States Courts of Appeals containing variations on the word “transform.”

state the prevailing law—the rules—that govern a legal issue.<sup>19</sup> Authorities that control the disposition of a legal issue must be reconciled for their explicit statements and pronouncements of the governing legal standards as well as examined for implicit requirements that are induced from the controlling authorities. Legal analysis employs synthesis of the rules to make a single coherent statement of the applicable legal principles that govern the legal issue at hand, and this becomes the “R” (Rule) section of the discourse, or the first half of the major premise of the legal reasoning syllogism.<sup>20</sup> I use rule synthesis in this article to reveal the governing legal standards of transformation in copyright law, both the definitional rules<sup>21</sup> and interpretive rules<sup>22</sup> from the case authorities.

### C. Explanatory Synthesis Methodology

Explanatory synthesis, as distinguished from rule synthesis, is a separate process of induction of principles of interpretation and application concerning the prevailing rules governing a legal issue. The induction is from samples—namely case law—representing specific situations with concrete facts and in which the legal rules have been applied to produce a concrete outcome. While rule synthesis is the component of legal analysis that determines what legal standards apply to and control a legal issue, explanatory synthesis seeks to demonstrate and communicate how these

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<sup>19</sup> See, e.g., Murray, Rule Synthesis and Explanatory Synthesis, 8 LEG. COM. & RHET. at \_\_\_ (forthcoming); MURRAY & DESANCTIS, LEGAL WRITING AND ANALYSIS, at chs. 2, 5, 6; HELENE S. SHAPO, ELIZABETH FAJANS & MARY R. FALK, WRITING AND ANALYSIS IN THE LAW ch. 2(IV), ch. 5(III) (4th ed. 1999); DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, SYNTHESIS: LEGAL READING, REASONING, AND WRITING chs. 4, 6, 9 (3d ed. 2007); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING chs. 10-13 (5th ed. 2005); Terrill Pollman, *Building A Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 909-10 (2002).

<sup>20</sup> MURRAY & DESANCTIS, LEGAL WRITING AND ANALYSIS, at chs. 2, 5, 6; Murray, Rule Synthesis and Explanatory Synthesis, 8 LEG. COM. & RHET. at \_\_\_ (forthcoming).

<sup>21</sup> A definitional rule defines a legal rule or legal standard providing the terms, elements, or requirements of the rule or standard. MURRAY & DESANCTIS, LEGAL WRITING AND ANALYSIS, at chs. 4, 5. For example, the rule defining parody as a form of comment and criticism in copyright law under 18 U.S.C. § 107 (2011), *Campbell*, 510 U.S. at 579, and the definition of “parody” as the use of some elements of a prior author’s work to create a new one that, at least in part, comments on or criticizes the original author’s work. *Id.* at 580.

<sup>22</sup> An interpretive rule is a rule issued by a court or provided in another primary legal authority (constitution, statute, or administrative rule or regulation) that instructs attorneys and judges on the proper interpretation and application of a definitional rule. MURRAY & DESANCTIS, LEGAL WRITING AND ANALYSIS, at chs. 4, 5. For example, the rules that the copyright fair use factors of 17 U.S.C. § 107 are to be weighed together in a case-by-case analysis in light of the purposes of copyright law where no one factor predominates over the other factors, and commercial usage is simply one factor to be weighed with the others and is not a dispositive factor. See *Campbell*, 510 U.S. at 577-78, 584-85.

legal standards work in various situations relevant to the legal issue at hand.<sup>23</sup>

Explanatory synthesis contemplates that what judges say does not always match what they do.<sup>24</sup> Courts might describe a rule or legal standard (tell what the rule is), but it remains for subsequent cases to illustrate the legal standard in actual legal situations (show what the rule means). If a court says, “A transformative work is one that ‘adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning or message,’”<sup>25</sup> that pronouncement gives little guidance as to what changes or additions to works actually add something new, changing the purpose or character of the original work, and altering the original work with sufficiently new expression, meaning, or message. Cases provide the answer. Cases are concrete examples of situations where the rules were applied to produce an outcome—there are winners and losers in each case, those who properly transformed original works and those who did not.<sup>26</sup> Explanatory synthesis examines the data set of cases to induce the illustrations of how the rules work, and synthesizes the case illustrations into principles that provide a guide for the proper interpretation and application of the law.<sup>27</sup> This method of analysis is persuasive because it uses induction

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<sup>23</sup> See *id.* at chs. 6, 7 (discussing explanatory synthesis); Murray, Rule Synthesis and Explanatory Synthesis, 8 LEG. COM. & RHET. at \_\_\_ (forthcoming).

<sup>24</sup> This is not a recent observation. See, e.g., KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 14 (Oceana Pub. 1960) (orig. ed. 1930). See also EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 2–3, 5, 8, 26, 29–30 (U. Chi. Press 1949); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 19–25, 51–63 (Yale U. Press 1949) (orig. ed. 1921) (evaluation of precedents in a process of induction); BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 8, 9, 11–12 (Greenwood 1970) (orig. ed., Colum. U. Press 1928) (induction and “relativity” concerning precedents).

<sup>25</sup> *Campbell*, 510 U.S. at 579.

<sup>26</sup> Cases are not rules, they contain rules, they pronounce rules, they adopt rules and interpret rules and apply the rules to facts. Rule synthesis reports the synthesized results of courts’ adoption, interpretation, and pronouncement of legal rules. Thus, it is sometimes referred to as “rule proof.” Explanatory synthesis is different, separate from rule proof. It uses cases as a source of information on the application of the rules to facts, the concrete factual situations of the cases themselves. Explanatory synthesis is reported in the “E” section (explanation section) of TREAT (Thesis-Rule-Explanation-Application-Thesis restated) and IREAC (Issue-Rule-Explanation-Application-Conclusion) paradigms. See Murray, Rule Synthesis and Explanatory Synthesis, 8 LEG. COM. & RHET. at \_\_\_ (forthcoming).

<sup>27</sup> The structure of an explanatory synthesis has three parts: Principle—Citations—Parentheticals. Each synthesis has one principle supported by multiple citations to authorities, and each citation has a parenthetical illustrating how the authority supports the principle. The principle is a statement concerning the proper application of the rule induced from cases. The citations are to the authorities from which the principle is induced. Parentheticals are provided for each citation to explain and illustrate how the authority supports the principle. Parentheticals allow the author to give just enough information (facts, public policy, or other relevant details) as is necessary to demonstrate how

in a form of open demonstrative reasoning supported by a weighty number of authorities.<sup>28</sup>

Explanatory synthesis is not alien to judicial analysis, and in fact, the form of explanatory synthesis may be observed in several copyright cases on transformation.<sup>29</sup> But it is an under-utilized method of analysis, and my

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the authority supports the proposition. See MURRAY & DESANCTIS, *LEGAL WRITING & ANALYSIS*, *supra* n. 7, at ch. 6 (explaining the methodology and giving examples).

<sup>28</sup> See Michael D. Murray, *Law & Economics as a Rhetorical Perspective in Law*, at \_\_\_ (forthcoming) (manuscript on file with author) (discussing the rhetorical advantages of open, demonstrative reasoning).

<sup>29</sup> *E.g.*, *Campbell*, 510 U.S. at 575 n.5:  
The exclusion of facts and ideas from copyright protection serves that goal [progress of science and arts] as well. See § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery ...”); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 359, 111 S.Ct. 1282, 1294, 113 L.Ed.2d 358 (1991) (“[F]acts contained in existing works may be freely copied”); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547, 105 S.Ct. 2218, 2223, 85 L.Ed.2d 588 (1985) (copyright owner’s rights exclude facts and ideas, and fair use).”

and at 579-80:

[P]arody, like other comment or criticism, may claim fair use under § 107. See, e.g., *Fisher v. Dees*, 794 F.2d 432 (CA9 1986) (“When Sonny Sniffs Glue,” a parody of “When Sunny Gets Blue,” is fair use); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F.Supp. 741 (SDNY), *aff’d*, 623 F.2d 252 (CA2 1980) (“I Love Sodom,” a “Saturday Night Live” television parody of “I Love New York,” is fair use); see also House Report, p. 65; Senate Report, p. 61, U.S.Code Cong. & Admin.News 1976, pp. 5659, 5678 (“[U]se in a parody of some of the content of the work parodied” may be fair use).”

and at 586:

Th[e] [nature of the original work] factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. See, e.g., *Stewart v. Abend*, 495 U.S., at 237-238, 110 S.Ct., at 1768-1769 (contrasting fictional short story with factual works); *Harper & Row*, 471 U.S., at 563-564, 105 S.Ct., at 2231-2233 (contrasting soon-to-be-published memoir with published speech); *Sony*, 464 U.S., at 455, n. 40, 104 S.Ct., at 792, n. 40 (contrasting motion pictures with news broadcasts); *Feist*, 499 U.S., at 348-351, 111 S.Ct., at 1289-1291 (contrasting creative works with bare factual compilations); 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.05[A][2] (1993) (hereinafter *Nimmer*); Leval 1116.

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

We have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work.FN4 See *Davis*, 246 F.3d at 174 (use of plaintiff’s eyewear in a clothing advertisement not transformative because it was “worn as eye jewelry in the manner it was made to be worn”); *Castle Rock Entm’t*, 150 F.3d at 142-43 (quiz book called the “*Seinfeld* Aptitude Test” not transformative when its purpose was “to repackage [the television show] *Seinfeld* to entertain *Seinfeld* viewers”); *Ringgold v. Black Entm’t Television, Inc.* 126 F.3d 70, 79 (2d Cir.1997) (copy of plaintiff’s



scholarship on this point<sup>30</sup> is motivated by the potential power of explanatory synthesis as a method of legal analysis and a tool of legal rhetoric.<sup>31</sup> The strength of the principles stated and supported through explanatory synthesis lies in the inductive structure and its method of open demonstration.<sup>32</sup> Each principle concerning how a legal rule works is induced from multiple sources adding to the credibility and reliability of the principle stated.<sup>33</sup>

Explanatory synthesis is supported by the observation that a single case offered as an analogy in direct analogical reasoning often falls short. It is too easy to distinguish a single case on the basis of the nature of the claim, the nature of the parties, the factual background, the procedural history, or the procedural posture of the case. It is more difficult to distinguish a

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painting used as decoration for a television program's set not transformative because it was used for "the same decorative purpose" as the original).

*Kelly*, 336 F.3d at 819 & n.19:

Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium. See *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (concluding that retransmission of radio broadcast over telephone lines is not transformative); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349, 351 (S.D.N.Y. 2000) (finding that reproduction of audio CD into computer MP3 format does not transform the work); *Los Angeles News Serv.*, 149 F.3d at 993 (finding that reproducing news footage without editing the footage "was not very transformative").

See also *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609, 610 (2d Cir. 2006); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 804 (9th Cir. 2003).

<sup>30</sup> *E.g.*, sources cited in n.7 *supra*.

<sup>31</sup> See Murray, Rule Synthesis and Explanatory Synthesis, 8 LEG. COM. & RHET. at \_\_\_ (forthcoming).

<sup>32</sup> See *id.* Authors impose artificial limitations on the method when they limit the usage to a predetermined number of sources, such as three, or limit the illustration provided in the parenthetical to superficial observations, or forgo the supporting parenthetical illustrations altogether. *E.g.*, *Campbell*, 510 U.S. at 575 n.5, 586; *Perfect 10*, 508 F.3d at 1165.

<sup>33</sup> By comparison, a principle stated and supported by one authority may be correct, but it does not enjoy the multiplier effect of adding to the *n* of the sample set to increase comprehension and persuasion. Principles drawn from a larger sample set and supported by a greater number of authorities are more credible and reliable. See *id.* See also Daniel J. Croxall, *Inferring Uniformity: Towards Deduction and Certainty in the Miranda Context*, 39 MCGEORGE L. REV. 1025, 1031 (2008); Kate Litvak, *Sarbanes-Oxley and the Cross-Listing Premium*, 105 MICH. L. REV. 1857, 1892 (2007); Edward K. Cheng, *Mitochondrial DNA: Emerging Legal Issues*, 13 J.L. & POL'Y 99, 110 (2005); James J. Brudney, et. al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1687 (1999).

principle that is induced from and supported by a group of relevant authorities.<sup>34</sup>

The bulk of this article will employ the explanatory synthesis methodology to answer questions based on the synthesized lessons of case law applying the transformative test to concrete legal situations to produce the outcomes in cases.

## II. Rule Synthesis: The Interpretive Rules of the Transformative Test

The definitional and interpretive rules defining what the courts hold the concept of transformation to mean are the subject of this section.<sup>35</sup> The Supreme Court has written the most important statements of the rules and, in particular, has provided several interpretive rules on transformation that have become the standard guide to the resolution of the purpose and character of the use factor of the fair use analysis. *Campbell* stated<sup>36</sup>:

The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” § 107(1). This factor draws on Justice Story's formulation, “the nature and objects of the selections made.” *Folsom v. Marsh*, supra, at 348. The enquiry here 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, see § 107. The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely “supersede[s] the objects” of the original creation, *Folsom v. Marsh*, supra, at 348; accord, *Harper & Row*, supra, 471 U.S., at 562, 105 S.Ct., at 2231 (“supplanting” the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” Leval 1111. Although such transformative use is not absolutely necessary for a finding of fair use, *Sony*, supra,

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<sup>34</sup> See generally sources cited in note 16 supra.

<sup>35</sup> In an IREAC or TREAT format, this section would be the “R” or “Rule Section” of the discussion. See LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION*, chs. 10, 11, 19, 20 (5th ed. 2010) (discussing IREAC and variations for objective and persuasive discourse); James M. Boland, *Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club*, 18 ST. THOMAS L. REV. 711, 719-23 (2006) (discussing IRAC and IREAC); MURRAY & DESANCTIS, *LEGAL WRITING AND ANALYSIS*, chs. 2, 6, 7 (discussing IRAC and TREAT); Murray, *Rule Synthesis and Explanatory Synthesis*, 8 LEG. COM. & RHET. at \_\_ (forthcoming) (discussing IREAC and TREAT).

<sup>36</sup> 510 U.S. at 578-79.

464 U.S., at 455, n. 40, 104 S.Ct., at 795, n. 40, [footnote 11]<sup>37</sup> the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, see, e.g., *Sony*, supra, at 478-480, 104 S.Ct., at 807-808 (BLACKMUN, J., dissenting), and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Thus, the Supreme Court used Judge Leval's definition of a transformative work as a work that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>38</sup> It also stated an interpretation of when a work is not transformative, when it “merely supersede[s] the objects of the original creation,” “supplanting’ the original.”<sup>39</sup> The Court held that the “central purpose” of the analysis of fair use was to be the evaluation of whether works are transformative, and endorsed transformative works as being “at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”<sup>40</sup> The Court further held that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>41</sup> The Court held that transformativeness creates a manifestly favorable outcome on the purpose and character of the use factor (factor 1) but it also empowered transformative character as a factor that would weigh favorably on all of the other factors in the fair use analysis. Thus, the Supreme Court interpreted its own statements earlier and later in the case that there was to be an equilibrium between the fair use factors with no one factor, such as commerciality, being “dispositive” or “conclusive.”<sup>42</sup> Transformation is not

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<sup>37</sup> Footnote 11 states: The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.

<sup>38</sup> 510 U.S. at 579.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* My explanatory synthesis reveals that this construction of 17 U.S.C. § 107 by the Court applies the transformative test as a test of “the fair use of a copyrighted work” in the first sentence of section 107 rather than a test only of the “purpose and character of the use” under factor 1 of the four factor test in section 107.

<sup>42</sup> *Id.* at 578, 584-85, 594: “Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright” and that there are “no hard evidentiary presumption[s]. . . . [T]he commercial . . . character of a work is ‘not conclusive,’ . . . but rather a fact to be ‘weighed along with other[s] in fair use decisions.’ . . . No

tied to one factor because a properly transformative use of original work would tip the scales in favor of fair use on all of the factors when they all are considered together.<sup>43</sup>

The Court only gave one concrete example of a properly transformative character that would lead to a fair use determination, that of parody.<sup>44</sup> Parody, as it turned out in the Court’s analysis, is a near perfect example of a transformative use with an overwhelmingly positive character that produces a favorable rating on all four of the fair use factors.<sup>45</sup> But fair use is not limited to parody, and the United States Courts of Appeals took on the task of defining what is a “properly transformative character” and established several interpretive rules to give guidance as to types of use and purposes and characters of uses that also indicate appropriate transformation.

Several Courts of Appeals’ opinions suggested the broader application of the transformative test to the “fair use of a copyrighted work” language of sentence one of section 107 when the courts interpreted transformation as furthering and fulfilling the goals of copyright—“to promote the progress of science and the . . . arts”<sup>46</sup>—and to avoid “excessively broad protection [that] would stifle, rather than advance, the [law’s] objective”<sup>47</sup>—which is “the very creativity the copyright law is designed to foster.”<sup>48</sup> “In 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>49</sup> The Copyright Act

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such evidentiary presumption is available to address . . . whether a transformative use . . . is a fair one.” [inner citations omitted].

<sup>43</sup> See *id.* at 578, 579, 594.

<sup>44</sup> *Id.* at 579-94. This is not a failing of the Court but a necessary consequence of the doctrine of holding and precedent: the court may discuss, create, or adopt as many definitional rules or interpretive rules regarding the issue at hand as it desires, but the case still resolves and produces a holding as to how the rules work in but one fact pattern—that of the case itself. This indicates the need for a separate synthesis, not of the rules found in authorities (rule synthesis) but of the different and diverse fact patterns of multiple authorities revealing how the rules work in these different fact patterns, namely explanatory synthesis. See *infra* section III.

<sup>45</sup> See *id.*

<sup>46</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>47</sup> *Blanch*, 467 F.3d at 250 (quoting *Leval* at 1109).

<sup>48</sup> *Perfect 10*, 508 F.3d at 1163 (quoting *Campbell*, 510 U.S. at 577; *Stewart*, 495 U.S. at 236).

<sup>49</sup> *Campbell*, 510 U.S. at 575 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.D. Mass. 1845) (No. 4,436)).

recognizes “that science and art generally rely on works that came before them and rarely spring forth in a vacuum, [therefore] the Act limits the rights of a copyright owner regarding works that build upon, reinterpret, and reconceive existing works.”<sup>50</sup>

Fair use involves an evaluation of the copying of an earlier work for various reasons some of which are held to further the goals of copyright and others of which are not. Referential uses of earlier works present a particular problem because certain references are held to further the goals of copyright and the first amendment (news, comment and criticism, parody<sup>51</sup>), and others hinder the goals of copyright (references that exploit the creative content of original works<sup>52</sup>). “Monopoly protection of intellectual property that imped[es] referential analysis . . . would strangle the creative process.”<sup>53</sup> “Copyright law must address . . . the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others, which must be protected up to a point.”<sup>54</sup> If “the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”<sup>55</sup> Such transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space.”<sup>56</sup> But if the reference is made “merely . . . to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.”<sup>57</sup>

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<sup>50</sup> *Mattel*, 353 F.3d at 799 (citing *Campbell*, 510 U.S. at 575-77).

<sup>51</sup> *E.g.*, *Campbell*, 510 U.S. 569; *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004); *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003).

<sup>52</sup> *E.g.*, *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010); *Gaylord v. U.S.*, 595 F.3d 1364 (Fed. Cir. 2010); *Bridgeport Music v. UMG Recordings*, 585 F.3d 267 (6th Cir. 2009).

<sup>53</sup> *Blanch*, 467 F.3d at 250 (quoting *Leval* at 1108).

<sup>54</sup> *Id.*

<sup>55</sup> *Castle Rock Ent. v. Carol Pub. Group*, 150 F.3d 132, 142 (2d Cir. 1998) (quoting *Leval* at 1111).

<sup>56</sup> *Blanch*, 467 F.3d at 251 (quoting *Campbell*, 510 U.S. at 579).

<sup>57</sup> *Campbell*, 510 U.S. at 580.

The courts of appeals have held that transformation is not limited to physical changes to the original work but also includes transformation by recontextualizing the original work: “A use is considered transformative only where a defendant changes a plaintiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the plaintiff’s work is transformed into a new creation.”<sup>58</sup> “[E]ven making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.”<sup>59</sup> A search engine, for example, puts images “in a different context” so that they are “transformed into a new creation.”<sup>60</sup> New content, meaning, or expression must be created through the process, because the courts “have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work.”<sup>61</sup>

### III. Explanatory Synthesis: The Operation of the Transformative Test

The rules above give guidance on the accepted interpretation and application of the transformative test to actual legal situations. The following section demonstrates the actual operation of the transformative based on principles induced from the actual cases with their holdings based on concrete factual situations.<sup>62</sup>

The data set of cases<sup>63</sup> indicates that artistic<sup>64</sup> and literary<sup>65</sup> uses—by reference or by incorporation—may be properly transformative and satisfy the fair use factors, or they may be insufficiently or inconsequentially

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<sup>58</sup> *Perfect 10*, 508 F.3d at 1165; *Wall Data Inc. v. L.A. County Sheriff’s Dep’t*, 447 F.3d 769, 778 (9<sup>th</sup> Cir. 2006).

<sup>59</sup> *Perfect 10*, 508 F.3d at 1165 (citing *Kelly*, 336 F.3d at 818-19).

<sup>60</sup> *Perfect 10*, 508 F.3d at 1165 (quoting *Wall Data*, 447 F.3d at 778).

<sup>61</sup> *Blanch*, 467 F.3d at 252.

<sup>62</sup> As discussed above, this section provides the material for the “E section” (“explanation” section) of the IREAC or TREAT paradigm. See *supra* text accompanying note 20.

<sup>63</sup> See Appendix, Charts A and B, at the end of this article for the compilation and coding of the cases from which the principles stated in this section are induced.

<sup>64</sup> By artistic, I am referring both to the visual arts and the performing arts, including fine arts, music, audio-visual works, and entertainment media. I am not referring to toys, computer programs, or computer games.

<sup>65</sup> By literary, I am referring to printed and verbal works of a literary, scholarly, scientific, or educational nature including computer programs, news reporting, and journalism.

transformative, leading to a finding of no fair use. The difference is drawn through examination of the content, context, and purpose of the transformation.<sup>66</sup>

In general, a use that changes the content or context of the work that also works a change in the purpose or function of the original work tends toward a finding of transformation and a finding of fair use, while a use that makes changes in content or context but still primarily exploits the creative virtues of the original in a new mode or medium will not be held to be fair.<sup>67</sup> This principle may be seen in many areas: a change in purpose and function through comment, criticism, parody, or satire,<sup>68</sup> and change in purpose or function from an expressive or creative use to one of archival, referential, or historical value,<sup>69</sup> or to a new purpose or function of education or research,<sup>70</sup> may be held to be transformative and a fair use of the original work. Taking existing copyrighted material and placing in it a new context so as to change the predominant purpose and function of the original material is transformative if the use creates a new meaning and new expression for the original with a further purpose and different character than the original.<sup>71</sup>

This section also explores the lessons to be learned from the application of the transformative test in situations where transformation failed—where transformation was accomplished but the use was held not to be fair,<sup>72</sup> or where no transformation was attempted or accomplished and the courts determined the use to be not fair as a result of lack of transformation.<sup>73</sup>

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<sup>66</sup> See sections A and B below.

<sup>67</sup> See sections C—E below.

<sup>68</sup> See section C below.

<sup>69</sup> See section D below.

<sup>70</sup> See section E below.

<sup>71</sup> See *Campbell*, 510 U.S. at 579. See also sections C-E below.

<sup>72</sup> See section F below.

<sup>73</sup> See section G below.

## A. Transformation of Artistic Works

**Chart 1: Artistic Cases (Original Artwork, Film, Music, Radio, Photography, Toys) <sup>74</sup>**

	Limited or No Content & Context Changes (0, 1) <sup>75</sup> with Significant Purpose and Function Changes (2, 3) <sup>76</sup>  -/+	Significant Content & Context Changes (2, 3) with Significant Purpose and Function Changes (2, 3)  +/+	
Fair Use	Perfect 10 (1/2) <sup>77</sup> Bill Graham (1/2) NXVIM (0/3) Kelly (1/2) Nunez (0/2) Sony-Bleem (1/2)	Campbell (3/3) Bouchat 2 (2/2) Blanch (2/3) Mattel-Walking Mtn (2/3) Leibovitz (3/3)	Fair Use
No Fair Use	None	Gaylord (3/2)	No Fair Use
Fair Use	None	None	Fair Use
No Fair Use	Bridgeport-UMG (2/1) Castle Rock (3/1)	Bouchat 1 (0/0) Leadsinger (0/0) Zomba (0/0) Elvis-Passport Video (0/1) Video Pipeline (1/1) Ty, Inc. (0/0) On Davis (0/0) A&M Records (0/0) Infinity (0/1) Ringgold (0/0)	No Fair Use
	+/-  Significant Content & Context Changes (2, 3) with Limited or No Purpose and Function Changes (0, 1)	-/-  Limited or No Content & Context Changes (0, 1) with Limited or No Purpose and Function Changes (0, 1)	

<sup>74</sup> This chart compiles in four quadrant format the cases reported in Appendix A, Chart A, that involve artistic works and fair uses. I have used a shorthand for the style of the case—the full citation appears in Appendix, Chart A. The coding of each case is based on the facts and description of the case in Chart A and is further explained in the footnotes below.

<sup>75</sup> **Content or Context Changes from Original Use to Second Use:** 0 = No change in content or context; 1 = Change in size or amount, e.g., creation of reduced size image, but not simply selecting portions of original without other alteration; 2 = Change in context, recontextualization; 3 = Significant changes in content and context.

<sup>76</sup> **Changes in Function or Purpose from Original Use to Second Use:** 0 = No change in function or purpose; 1 = Minimal change in function or purpose but still exploits creative original expression of the original work; 2 = Adds additional function and purpose to original; 3 = Significant, superseding change in function and purpose.

<sup>77</sup> Case names are listed with their scoring in the form: Content, Context Score / Purpose, Function Score). For example, “Perfect 10 (1/2)” means the *Perfect 10* case has a Content, Context Score of 1 and a Purpose, Function Score of 2.



The use of an artistic original work will be deemed transformative when the use adds valuable artistic changes to the original giving the resulting work new artistic meaning and artistic expression.<sup>78</sup> *See Campbell*, 510 U.S. at 577-80 (rap group added new musical style and genre and new lyrics to original rock ballad creating a new musical composition with a new meaning); *Blanch*, 467 F.3d at 244 (artist placed original fashion magazine photographic image into painting combining image with additional images of junk food and Niagra Falls to make new expression concerning the appetites flowing through modern society); *Leibovitz*, 137 F.3d at 109 (movie poster changed original photograph from a work of serious art with historical Renaissance art reference to one of comic art with a new message of buffoonery).

The artistic changes must create a new meaning and new expression; if the original is simply redisplayed, reproduced, rebroadcast, or redistributed in a new mode or method of exploiting the same creative artistic virtues of the original work, the use will not be deemed transformative and not a fair use. *See Bouchat*, 619 F.3d at 301 (plaintiff's Shield Drawing was adapted for a highly stylized Raven's "Flying B" logo on helmets and uniforms, on the playing field, and in posters, tickets, and advertising, but all such uses as a logo still revealed and reproduced the same valuable artistic expression as the original Shield Drawing, and the product of the changes and adaptations still carried the same meaning and message as the original); *Gaylord*, 595 F.3d at 1364 (photograph and postage stamp depicting plaintiff's Korean War Memorial each adapted and altered the appearance of the war memorial to display a different tone and mood in the depiction—gray, murky, fog of war in the photograph, and stark, cold, loneliness of war in winter in the stamp—but the ultimate meaning and message of the original memorial and the two artistic adaptations was held to be the same: to remember and celebrate Korean War Veterans; thus, the uses were not fair); *Bridgeport v. UMG*, 585 F.3d 267 (although defendant's sampling placed the iconic Atomic Dog funk lyric and funk track in an updated hip-hop recording, the funk track was reproduced with little variance or alteration from the original and was reused for the same musical artistic purposes as the original, and the hip-hop version of the sample carried the same meaning and expression as the original: a low tone beat and syncopated vocalization of the same word, "dog," as heard in the original; thus, the use was not fair); *Castle Rock*, 150 F.3d 132 (changing the format and medium of entertainment material from the

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<sup>78</sup> I am citing the cases in the text of this article to draw attention to the mode of demonstration of explanatory synthesis which requires specific attention both to the principle induced from the data set and the parentheticals provided after each citation supporting the principle. Placement of the citations and parentheticals in the text is intended to facilitate the reading of the parentheticals. I have also separated each explanatory synthesis principle and citation string with a paragraph break to facilitate reading.

*Seinfeld* television series to a trivia quiz format did not add new and valuable artistic or entertainment content to the original material, and did not change the meaning, message, expression, or purpose of the original material; thus, the use of the original entertainment content was not fair).

A change in context for an artistic work even without any changes to the content of the work may be sufficient if the predominant purpose and functioning of the new work is sufficiently different from the original work *and* fulfills a goal of the copyright laws. *See Bouchat*, 619 F.3d at 301 (use of original Shield Drawing in logos held and displayed for historical and archival reasons at the Baltimore Ravens' headquarters was a use with a purpose and function different from the artistic purpose and meaning of the original work; historical, referential, and archival uses are appropriate fair use purposes); *Perfect 10*, 508 F.3d at 1146 (original photographs were reduced in size to thumbnail images but otherwise reproduced verbatim, but the purpose and function of the thumbnails within a search engine image search results screen was a completely new function with a new and different purpose and meaning from the artistic purposes and meaning of the original photographs; the use fulfilled proper fair use reference and research purposes); *Bill Graham Archives*, 448 F.3d at 605 (original images of concert posters were reduced in size but otherwise reproduced verbatim, but the purpose and function of the new use of the images—to document a timeline of concert performances of the Grateful Dead—was completely new and different from the artistic purposes and meaning of the original poster images and fulfilled proper fair use archival, historical, referential, and educational purposes); *Kelly*, 280 F.3d at 934 (as in *Perfect 10*, use of original images in reduced size for purpose of displaying search results in internet image search engine was new function with a new purpose and meaning for the images that fulfilled proper fair use reference and research purposes); *Nunez*, 235 F.3d at 18 (republication of original modeling portfolio photographs without alteration but within new context of news reporting of the actual existence of the photographs themselves after subject became Puerto Rico's Miss Universe contestant was a new function with a new meaning and new purpose for the photographs that met fair use news and reference purposes); *Sony Computer v. Bleem*, 214 F.3d at 1022 (use of screen shots from original computer game in comparative advertising to critique the original images was fair use).

A change in context alone for artistic works is not necessarily sufficient if the change does not have a new purpose and function that communicates a new meaning with new, valuable expression furthering a goal of the copyright laws. *See Bouchat*, 619 F.3d at 301 (aside from historical and archival uses at Baltimore Ravens' headquarters, the general use of the plaintiff's Shield Drawing in stadium advertising, on the field, on uniforms, on tickets and other merchandise did not represent a new appropriate function for the

drawing and did not fulfill a different artistic or creative purpose for the original work, and thus, did not constitute a fair use); *Gaylord*, 595 F.3d at 1364 (function and meaning of the original sculpture and the images in the photograph and postage stamp were held to be the same: to celebrate and remember Korean War Veterans); *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522 (9th Cir. 2008) (change in form and function from audio recording to karaoke soundtrack audio recording was not a new function carrying new meaning or purpose from original musical recordings); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007) (same); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003) (recombining video and audio segments from performances of Elvis were placed in new context—a comprehensive video biography work—but were reproduced for the same purpose and carried the same function and meaning as the original video and audio recordings); *Video Pipeline v. Buena Vista Home Enter.*, 342 F.3d 191 (3rd Cir. 2003) (copying two-minute segments of original motion pictures for use as internal reference for proprietary video database did not create a new function carrying a new appropriate fair use meaning and purpose different from the original artistic works); *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001) (depiction of original artwork in print ad was a new context for the work without any change in artistic purpose and function of the original work); *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (facilitating a change in format from CD to MP3 format and changing context of recording to facilitate unlicensed uncompensated file transfer did not create a new function carrying a new appropriate fair use meaning and purpose different from the original artistic works); *Infinity Broad. Co. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998) (change in mode and medium of communication from radio broadcast to telephone communication did not create a new function carrying a new appropriate fair use meaning and purpose different from the original artistic works); *Ringgold v. Black Ent. Television*, 126 F.3d 70 (2d Cir. 1997) (reproduction of story quilt image from authorized museum poster to unauthorized use as set dressing on television program did not create a new function carrying a new appropriate fair use meaning and purpose different from the original artistic work).

The toy business falls into line with the artistic creation cases above. A use of a toy that adds new content, material, and expression in a manner that changes the function and purpose of the original toy will be permitted, but one that exploits the creative virtues of the toy in new media but for the same purposes as the original will not be fair. *See Mattel*, 353 F.3d at 792 (defendant placed Barbie in unusual contexts and settings, often with kitchen appliances, to criticize Barbie's status as a beauty icon and feminine role model for young girls); *Ty, Inc.*, 292 F.3d at 512 (collectors catalog of Beanie Babies exploited the virtues of the original in a new format that worked as an competing derivative work and not a fair use).

**B. Transformation of Literary Works**

Chart 2: Literary, Computer Program, and News Reporting Cases

	Limited or No Content & Context Changes (0, 1) with Significant Purpose and Function Changes (2, 3) <b>-/+</b>	Significant Content & Context Changes (2, 3) with Significant Purpose and Function Changes (2, 3) <b>+/+</b>	
Fair Use	A.V. Vanderhye (0/3) Bond (0/3) Sundeman (0/3) Allen (0/2)	Suntrust (3/3) Sony-Connectix (3/3)	Fair Use
No Fair Use	None	Salinger (3/2) Dr. Seuss (3/3)	No Fair Use
Fair Use	None	None	Fair Use
No Fair Use	None	Peter Letterese (0/0) Wall Data (0/0) Worldwide Church (0/0) Veeck (0/1) Micro Star (0/0) Princeton U. Press (0/0) Am. Geophysical (1/1)  LA News-CBS (0/0) Nihon Keizai (0/0) LA News-Reuters (0/0) LA News-KCAL (0/0)	No Fair Use
	<b>+/-</b> Significant Content & Context Changes (2, 3) with Limited or No Purpose and Function Changes (0, 1)	<b>-/-</b> Limited or No Content & Context Changes (0, 1) with Limited or No Purpose and Function Changes (0, 1)	

Changes in the content of literary works that add new meaning and expression and further an appropriate fair use purpose that is different from the meaning and purpose of the original work are found to be transformative and fair. *See* NXIVM Corp. v. Ross Inst., 364 F.3d 474 (2d Cir. 2004) (Ross Institute added commentary and criticism to copied portions of NXIVM training materials to create a new meaning and purpose—that being commentary on and criticism of the cult-like nature of NXIVM and its training materials); *Suntrust Bank*, 268 F.3d at 1257 (author of “The Wind Done Gone” copied large portions of the dialogue, characters, and plot of the original “Gone With the Wind” novel but added new character names and

new situations and new plot to create an entirely new work with new content, meaning, and expression that was different from and in fact critical of the meaning and message of the original work's pro-slavery and pro-white antebellum societal viewpoints); *Sundeman v. The Seajay Soc.*, 142 F.3d 194 (4th Cir. 1998) (professor published portions of unpublished manuscript in combination with lecture and presentation notes regarding the historical significance of the original author and her development as a writer; purpose and meaning of the work was transformed); *Allen v. Academic Games League of Am.*, 89 F.3d 614 (9th Cir. 1996) (games were "reproduced" and played in context of academic, educational contest changing meaning and purpose from that of the original).

Courts look for a significant alteration in the style, theme, meaning, tone, and purpose of literary works in order to declare them fair uses rather than infringing, unauthorized, derivative works that take the same content, characters, plot, or themes as are found in the original and simply advance them to new contexts and situations. *Compare NXIVM*, 364 F.3d at 474 (copied materials were subject to significant criticism as "cult materials" in second use), *and Suntrust Bank*, 268 F.3d at 1257 (second work ridiculed and criticized the racist views and attitudes of the original work through changes in characters, perspective, dialogue, and theme), *with Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (although Colting attempted to change the meaning and purpose of the material he copied from "The Catcher in the Rye," the court found that Colting's book, "60 Years Later: Coming Through the Rye" still exploited the main character and many of the plot devices and themes of the original in an unfair manner; Colting advanced the plot 60 years and added Salinger himself to the story, but still exploited the purpose and meaning of the themes, characters, tone, and genre of the original work in the manner of an unauthorized derivative work), *and Dr. Seuss Enterprises, LP v. Penguin Books USA*, 109 F.3d 1394 (9th Cir. 1997) (although the storyline, characters, plot, theme, tone, and genre of the original "Cat in the Hat" book were completely changed in the satirical work, "The Cat Not in the Hat," the court held that the artistic and literary value of the original artwork and poetic rhyming style of the original work was exploited solely to grab attention to the second work and not for a proper fair use purpose).

Literature can be copied verbatim but placed in a new context and used in such a way that the resulting use has a completely different function and purpose from the original. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (students' papers were copied verbatim for purpose of checking content for plagiarism and were copied and archived for present and future comparison to other papers by plagiarism checking software; this use and purpose was completely different from the creative, literary purposes of the original and served reference, education, archival, and research fair use

purposes); *NXIVM*, 364 F.3d at 474 (copied materials were presented in new work for the purpose of criticizing the original work); *Bond v. Blum*, 317 F.3d 385 (4<sup>th</sup> Cir. 2003) (attorneys copied manuscript of autobiographical work to use it as evidence against original author in child custody dispute); *Sundeman*, 142 F.3d 194 (unpublished manuscript was copied and displayed for the purpose of comment and educational study and research concerning the early work of the original author).

When the second use of a literary work does not involve the addition of new material *and* does not change the function, meaning, or purpose of the literature, the use is held to be not fair. *Peter Letterese and Assocs., Inc. v. World Institute of Scientology Enters.*, 533 F.3d 1287 (11<sup>th</sup> Cir. 2008) (marketing materials used in scientology training were copied and distributed in the same form and for the exact same purposes as the original work); *Veeck v. So. Bldg. Code Cong. Int'l*, 241 F.3d 398 (5<sup>th</sup> Cir. 2001), *rev'd on other grounds*, 293 F.3d 791 (5<sup>th</sup> Cir. 2002) (model codes were reproduced verbatim for same purposes as the original model codes; later ruling reversed and declared the original material to be non-copyrightable); *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110 (9<sup>th</sup> Cir. 2000) (original works of the founder of Worldwide Church of God were copied verbatim and republished and distributed by splinter Philadelphia Church for the same purposes as the original texts); *Princeton Univ. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381 (6<sup>th</sup> Cir. 1996) (significant portions of scholarly and literary works were copied verbatim for commercial sale at university bookstores, but for same function and purposes as the original copyrighted works); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2<sup>d</sup> Cir. 1995) (Texaco copied and abstracted the content of scientific magazine for internal reference and research, but in fact simply exploited the content of the magazines for the same function and purposes for which the original works were created and sold).

Computer programs may receive copyright protection under a general category of literature and writings, but the fair use of such materials is affected by the originality doctrines of merger and scènes à faire in a way that differs from the standard literature cases discussed above. *E.g.*, *Sony Computer Ent. v. Connectix Corp.*, 203 F.3d 596 (9<sup>th</sup> Cir. 2000) (court allowed interim copying of code in process of reverse engineering of operation of source code to make PlayStation emulator program for use on personal computers because it was the only way to study the operation of the source code to be able to replicate its noncopyrightable procedures and functioning under the Merger Doctrine). Copying a computer program and using its creative, original attributes for the same purposes for which the original program was created is not fair use even if it serves general public interest or expressive purposes. *See Wall Data*, 447 F.3d at 769 (sheriff's office benefited

from unauthorized copying and installation of Wall Data's program, but program was copied and used for the same function and purpose for which the original work was sold); *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998) (replication of characters and images from original Duke Nukem game in the context of compiling a collection of user-generated levels for the computer game was not fair use as it exploited the creative contents of the game; Formgen allowed creation of user-generated levels with its level development kit, but did not expressly or impliedly authorize the commercial sale of user-generated game levels). *But see Bleem*, 214 F.3d at 1022 (use of screen shots from original computer game in comparative advertising to critique the original images was fair use).

News reporting cases do not differ greatly from the standard literature fair use cases already discussed above. There is no general exemption for news reporting that allows broader and greater fair uses of copyrighted material when used in a news reporting context. *See L.A. News Service v. CBS Broad.*, 305 F.3d at 924 (9th Cir. 2002) (replication of a few key seconds of copyrighted footage of beatings during post-Rodney King verdict Los Angeles riots was not fair use as news reporting even during the time frame of the riots, nor was it fair use when it was used later in abstracted news montage form with added text and commentary; the secondary use exploited the copyrighted news footage for the exact same purposes for which the original was created); *LA News Service v. Reuters Television Int'l Ltd.*, 149 F.3d at 987 (9th Cir. 1998) (same—even the rebroadcasting of a few seconds of footage of the beating of Reginald Denny in Los Angeles riots could not be justified solely on the grounds of news reporting); *L.A. New Service v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997) (same); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999) (copying and abstracting Japanese financial and business news data was not fair use as it replicated the copyrighted materials for the same purposes for which the original news items were created).

If the original material is used because the material itself is newsworthy, rather than copying the original in order to report or republish the newsworthy material contained in the original work, then the use might be held fair. *E.g., Nunez*, 235 F.3d at 18 (modeling portfolio pictures of Puerto Rico's Miss Universe contestant became the news story because her status as a contestant made the existence of nude and partially nude photographs newsworthy and replication of the actual photos documented and proved their existence fulfilling the news reporting fair use requirements).

### **C. Transformation of the Purpose and Function of Works Through Comment and Criticism, Parody and Satire**

The use of original material copied from other works for the purpose of criticizing, spoofing, ridiculing, or commenting on the original works is a well established fair use. *Campbell*, 510 U.S. at 569 (original rock ballad was copied so as to covert the work to one that openly criticized the naivete of the original); *NXIVM*, 364 F.3d at 471 (original work was copied so as to comment on the cultlike nature of the work); *Blanch*, 467 F.3d at 244 (the use of a paradigmatic example of the depiction of women in fashion magazines was used in part to comment on the meaning of such images); *Mattel*, 353 F.3d 792 (use of Barbie doll in images was intended to comment on the iconic status of Barbie as a model of feminine grace, beauty, and perfection for young girls); *Bleem*, 214 F.3d 1022 (use of screen shots in comparative advertising was fair use; images were modified and were used for new function and purpose to compare computer emulator's screen shots with original console screen shots); *Suntrust Bank*, 268 F.3d at 1257 (“Wind Done Gone” book was intended to ridicule and expose the prejudices and racism of the original work, “Gone With the Wind”); *Leibovitz*, 137 F.3d at 109 (“Naked Gun” movie ad intended to ridicule the serious, artistic posing and pretentiousness of the original work by replacing female subject’s head with male comedian’s head); *Sundeman*, 142 F.3d at 194 (replication of portions of the original work was done to comment on the development of the original author as a writer).

Parody is one of the safest fair use because it intentionally copies the original work in order to criticize and ridicule the original work, but for the most certain results of fair use, the criticism should be blatant and obvious rather than subtle or indirect. *Compare Campbell*, 510 U.S. at 569 (2 Live Crew copied the bass riff and musical scheme of the beginning of “Pretty Woman” and proceeded to distort the music and lyrics to make a bawdy rap song that ridiculed the romantic tone and naivete of the original rock ballad), *and Suntrust Bank*, 268 F.3d at 1257 (“Wind Done Gone” copied characters and situations from “Gone With the Wind” but distorted the dialogue and point of view of the work adding a new tone and new meaning that ridiculed the racist perspective and themes of the original), *and Mattel*, 353 F.3d at 792 (Walking Mountain placed Barbie dolls in unusual settings with kitchen appliances to comment on and criticize Barbie’s iconic status as a model for feminine beauty, grace, and style for young American girls), *and Leibovitz*, 137 F.3d at 109 (Paramount created poster with famous portrait of pregnant star and distorted the image by superimposing a male comedian’s head onto the female star’s body to ridicule the pretentious artistic styling of the original), *with Salinger*, 607 F.3d at 68 (Colting attempted to advance the plot of “Catcher in the Rye” 60 years and added Salinger as a character in Salinger’s own story to comment on and critique the original work, the main character, and Salinger’s reclusive lifestyle, but in the end, the court found



the new work merely exploited the same creative aspects of the original novel in the manner of a derivative work, not a parody or other proper commentary or criticism), *and Dr. Seuss Enters.*, 109 F.3d at 1394 (although O.J. Simpson trial story changed the entire genre, theme, tone, characters, dialogue, and plot of the original “Cat in the Hat” work, the court found no critical commentary or statement of any kind regarding or reflecting on the original Dr. Seuss work, and the court concluded that the second work merely stole and exploited the Dr. Seuss work to grab attention).

Satire may be accepted as fair use, but it must be highly transformative and not exploit the same creative artistic virtues of the original for the same or similar purposes as the original. *Compare Blanch*, 467 F.3d at 244 (Blanch’s work was used as one example of the genre of fashion imagery, and the additional creative, artistic material added by Koons and his recontextualization of the work overwhelmed any exploitive purpose in the use of the creative content reflected in Blanch’s photograph), *with Salinger*, 607 F.3d at 68 (whatever additional comment and message added by Colting did not change the fact that his work generally exploited the creative material of the original work by advancing the plot rather than changing the function and purpose of the work), *and Castle Rock*, 150 F.3d at 132 (Seinfeld Aptitude Test did not make commentary or criticism regarding the *Seinfeld* series but still exploited the same creative value and meaning of the original for the same entertainment purpose as the original), *and Dr. Seuss Enters.*, 109 F.3d at 1394 (“Cat Not in the Hat” author’s commentary and criticism of the O.J. Simpson trial and the U.S. court system did not justify the exploitation of the creative artwork and rhyming style of the original Dr. Seuss work).

#### **D. Transformation of the Context, Purpose, and Function of Works Through Archival, Referential, and Historical Uses**

Transformation is possible if the second use changes the context of the original work in such a manner that the new work is a new creation with a new meaning and new function and most importantly a new purpose. There are several new contexts that have been held to provide a new meaning and a proper fair use purpose. This section explores recontextualization of original material to an archival, referential, or historical purpose.

Archival and historical usage of original material has the potential to create a new function and meaning for the work, and may meet fair use objectives if the use has a proper purpose that is different from exploitation of the creative original value and meaning of the original work. *Compare Bouchat*, 619 F.3d at 301 (the holding on two separate issues in the case reveals that a change in context from artwork to commercial exploitation as a

logo for team uniforms, stadium, tickets, and other merchandise is not a sufficient change in the meaning and purpose of the work, but a change from an artistic use in the original to an archival and historical use to record the history of the franchise in a display at the franchise's headquarters was an appropriate change in the purpose and function of the use of the original work), and *Perfect 10*, 508 F.3d at 1146 (verbatim reproduction of images in thumbnail size was fair because the use in the context of an internet image search engine created a completely new function and purpose for the images that met fair use reference, research, and public interest objectives), and *Kelly*, 280 F.3d at 934 (same), and *Bill Graham Archives*, 448 F.3d at 605 (use of concert poster images in historical timeline in work documenting the career of the Grateful Dead band was appropriate archival and historical reference use that did not simply seek to exploit the artistic and creative virtues of the original works), with *Elvis Presley Enters.*, 349 F.3d at 622 (compilation of historical recordings and video of famous musical artist into one package for archival, historical purposes did not change the fact that each copied segment was exploited for the same artistic, creative virtues and for the same purpose as the original works were created to fulfill), and *Video Pipeline*, 342 F.3d at 191 (film clips were copied and compiled for internal reference and archiving in a proprietary, commercial database of videos, and thus exploited the creative content of the original videos in the same way and for the same purpose that the copyright owners create and distribute trailers of the works), and *Ty, Inc. v. Pubs. Int'l Ltd*, 292 F.3d 512 (7th Cir. 2002) (collectors catalog reproduced images of Ty, Inc.'s Beanie Babies for archival and reference purposes that duplicated the purposes for Ty's creation and distribution of similar images of the Beanie Babies, and thus functioned as an unauthorized derivative work and not a fair use of the original images).

Copying for reference would swallow all of copyright's protection in one fair use exception if any original material could be freely reproduced simply to acknowledge and refer to its existence. See *Peter Letterese*, 533 F.3d at 1287 (copying of sales and marketing materials for reference in scientology sales training was unauthorized infringement not fair use); *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522 (9th Cir. 2008) (adaption of original musical works for use in karaoke did not change the fact that the creative, artistic value of the original works was being exploited in a new medium); *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007) (same); *Veeck*, 241 F.3d at 398 (copying and display of text of model building code for reference on information website was infringement, not fair use); *Worldwide Church*, 227 F.3d at 1110 (copying of religious texts for reference in religious study and education still was copying of original texts to exploit them for the same purposes for which they were created); *Castle Rock*, 150 F.3d at 132 (copying material from *Seinfeld* show to make trivia questions simply exploited the entertainment value of the original work); *A&M Records*

v. *Napster, Inc.*, 239 F.3d at 1004 (9th Cir. 2001) (adaptation of works for a new medium and archiving and referential use in search service that facilitated unauthorized duplication and transfer of the original works did not change the fact that the creative, artistic value of the original works was being exploited for the same purposes for which the original works were created).

Instead, a proper referential use is one that is undertaken for a completely new and separate purpose from the purpose the original work was created to fulfill. *Perfect 10*, 508 F.3d at 1146 (display of images in an internet image search engine created a completely new function and purpose for the images that met fair use reference, research, and public interest objectives), *and Kelly*, 280 F.3d at 934 (same), *and Bill Graham Archives*, 448 F.3d at 605 (use of concert poster images to illustrate historical record of music group was a new function and purpose for the images that met fair use reference, archival, and research objectives).

#### **E. Transformation of the Context, Purpose, and Function of Works Through Educational or Research Uses**

Simple reference to original works by copying the content of the works is not sufficient to meet fair use objectives even if the copying occurs in an educational, research, religious, or other general public interest context unless the meaning and purpose of the use of the work changes. *Compare Sundeman*, 142 F.3d at 194 (use of portions of original unpublished novel was undertaken by an academic in an educational setting to explain the author's research and analysis of the early writing of the famous author of the unpublished original work; the work was not copied simply to exploit the creative, literary virtues of the work), *with Peter Letterese*, 533 F.3d at 1287 (copying of sales and marketing materials for reference in scientology sales training was unauthorized infringement not fair use); *Veeck*, 241 F.3d at 398 (copying and display of text of model building code for reference on information website was infringement, not fair use); *Worldwide Church*, 227 F.3d at 1110 (copying of religious texts for reference in religious study and education still was copying of original texts to exploit them for the same purposes for which they were created); *Princeton Univ. Press*, 99 F.3d at 1381 (copying of portions of literary, scholarly, and scientific works for sale in university course packets was a commercial exploitation of the creative, literary virtues of the original works); *Am. Geophysical*, 60 F.3d at 913 (copying and abstracting contents of scientific and technical manuals for internal distribution for research, reference, and archival purposes still exploited the original works for the same purposes for which they were created).

Compilation of excerpts of original material is not sufficient even if the material is combined for educational, archival, research, or other reference uses if the contents of the work ultimately are used for the same creative, literary, or scientific purposes as the original works. *See Peter Letterese*, 533 F.3d at 1287 (sales training materials were copied and used for same purposes for which the original materials were created); *Veeck*, 241 F.3d at 398 (model building code was copied and displayed for same purposes for which the original materials were created); *Worldwide Church*, 227 F.3d at 1110 (religious texts were copied and republished for the same purposes for which the original texts were created); *Princeton Univ. Press*, 99 F.3d at 1381 (literary, scholarly, and scientific works were copied and sold in university course packets for same purposes for which the original materials were created); *Am. Geophysical*, 60 F.3d at 913 (scientific and technical manuals were copied for the same purposes for which they were created).

#### **F. Transformation without Fair Use**

The fair uses cases above dwell on uses that added content and expression in a way that changed the function and purpose of the original work to a fair use function and purpose. This section looks at cases that involve a significant transformation of the original without accomplishing the appropriate change in function or purpose. I have included this section of the analysis to bring some seemingly “outlying” cases into the fold, explaining through explanatory synthesis how these cases still reveal that the transformative test interprets the first sentence of section 107 to require content, context, or purpose changes that further the overall goals and public policy of copyright law that encourages the creation of new, original, creative works that do not copy earlier works simply to exploit their creative content.

Artistic changes that allow the creative artistic expression of the *original* work to shine through, and merely work an embellishment of the original artistic virtues and expression, are not properly transformative and are not fair use. *Compare Gaylord*, 595 F.3d at 1364 (the appearance of the Korean War Memorial was significantly altered in the photograph and postage stamp but still depicted the same artistic design and expression of the original sculpture; the artistic embellishments of the photograph and stamp did not change the meaning and function of the artistic expression present in the original work), *and Bridgeport Music v. UMG*, 585 F.3d at 267 (hip hop group’s sampling of the iconic Atomic Dog sound and lyric significantly altered the genre and context of the original, but allowed the iconic sound and expression of the original work to shine through, that being the primary purpose of the inclusion of the same in the second work, and this improperly exploited the creative, artistic virtues of the original work), *and Castle Rock*, 150 F.3d at 132 (*Seinfeld* trivia book significantly altered the

form and presentation of the original television show content, but the transformation did not change the entertainment function and purpose of the original work and allowed the creative, entertaining content and expression of the original material to shine through in the second work), *and Dr. Seuss Enters.*, 109 F.3d at 1394 (original artwork and poetic style of original Dr. Seuss work was allowed to shine through in the second work although the style, genre, tone, and function of the plot and story of the second work was completely different from the original), *with Blanch*, 467 F.3d at 244 (the original work was used as raw material—a placeholder for a certain genre of fashion photographic depiction of women—and the artistic changes added by Koons were meant to completely change the meaning and message of the depiction for a new function and purpose), *and Leibovitz*, 137 F.3d at 109 (original photograph was altered specifically to change the meaning, function, and purpose of the original from a serious artistic portrait to a ridiculous, comic spoof of the original work).

A work of literature that makes literary changes that advance the plot of the original or alter the form of the work but still allow the main literary and creative virtues of the original work to be appreciated in the new work will not lead to a finding of fair use. *Compare Salinger*, 607 F.3d at 68 (Colting advanced “Catcher in the Rye” ahead 60 years and added Salinger himself as a new character, but the new work appeared as a genuine sequel containing many of the same themes, characters, and plot devices as the original, and allowed the original work with all of its literary merits to be seen in the new work), *and Dr. Seuss Enters.*, 109 F.3d at 1394 (poetic genre and rhyming scheme were reused and shined through in the new work, although “The Cat Not in the Hat” changed the storyline, plot, dialogue, characters, and theme of the original work), *with Suntrust Bank*, 268 F.3d at 1257 (new work transformed the meaning, function, and purpose of the characters, plot, dialogue, and scenes taken from “Gone With the Wind” so that original work was distorted in a manner that communicated a significant criticism of the earlier work).

### G. Non-Transformation Cases

The cases of limited or no transformation of the original, artistic work reveal that failure to alter, distort, adapt, or otherwise change the contents of the original work raises a significant bar to fair use. *Bouchat*, 619 F.3d at 301 (no fair use of non-altered drawing that formed the basis of the team’s logo when the logo was used in dozens of items associated with the team); *Leadsinger, Inc.*, 512 F.3d at 522 (non-alteration of basic elements of music when adapted for karaoke lead to a finding of no fair use); *Zomba Enterprises*, 491 F.3d at 574 (same); *Elvis Presley Enters.*, 349 F.3d at 622 (no fair use when the original video clips and recordings were not altered or

modified in content when compiled for biographical video compilation); *Video Pipeline*, 342 F.3d at 191 (no fair use when the film contents were excerpted without other alteration for use in proprietary video database); *A&M Records*, 239 F.3d at 1004 (no fair use when the content and expression of the original audio recordings was not altered or modified when the works were changed in digital format and compiled to assist file-sharing); *Infinity Broad. Co.*, 150 F.3d at 104 (no fair use when the only change in the work was a change in mode and medium of communication from radio broadcast to telephone communication); *Ringgold*, 126 F.3d at 70 (appearance of story quilt poster was not altered or modified, only the amount shown or the timing of each display varied in the non-fair use display of the work).

Literary works that are not transformed in the second use also present a significant burden in establishing a fair use of the original work. *Peter Letterese*, 533 F.3d at 1287 (original marketing materials were reformatted in places, but the basic contents were copied in whole in a non-fair use replication); *Veeck*, 241 F.3d at 398 (no fair use when contents of model building code were replicated in their entirety); *Worldwide Church*, 227 F.3d at 1110 (no fair use when religious texts were reproduced and republished without alteration); *Princeton Univ. Press*, 99 F.3d at 1381 (portions of literary, scholarly, and academic texts were reproduced verbatim in course packets and led to a finding of no fair use); *Am. Geophysical*, 60 F.3d at 913 (scientific and technical journals were reproduced and abstracted without further addition to or alteration of the contents and led to a finding of no fair use).

Lack of transformation of the contents and expression of artistic works can only be overcome if the second use reveals a significant change in the function and purpose of the original work, and the new function and purpose of the second work must fulfill one of the public policy objectives of fair use. *Bouchat*, 619 F.3d at 301 (the only use of the unaltered Shield Drawing image that appears in the Baltimore Ravens Flying “B” logo was a limited fair use for historical, archival display at the Ravens’ headquarters); *Perfect 10*, 508 F.3d at 1146 (limited alteration in the size of the reproduced photographs was overcome by a complete change in the function and purpose of the display of the images in an internet image search engine results screen, leading to a finding of fair use); *Kelly*, 280 F.3d at 934 (same); *Bill Graham Archives*, 448 F.3d at 605 (limited change in the size of reproductions of concert posters was overcome by the significant change in the function and purpose of the display of the images when they were placed in a historical reference work showing a timeline of concert engagements of the Grateful Dead, and this new function and purpose met historical, reference, and archive fair use objectives); *Nunez*, 235 F.3d at 18 (unaltered display of nude and semi-nude modeling photographs was permitted because the function and purpose of the new

display was to prove the existence of these photographs in the context of news reporting).

Literary works may also be copied fairly without alteration of the contents if there is a significant change in the function and purpose of the original work, and the new function and purpose of the second work fulfill a proper objective of the fair use doctrine. *A. V. ex rel. Vanderhuy*, 562 F.3d at 630 (verbatim replication of students' papers was undertaken for brand new academic, educational, archival, and reference purposes and copying the works for this new function and purpose was fair); *NXIVM*, 364 F.3d at 471 (portions of *NXIVM* texts were copied verbatim, but the works were reproduced to criticize the cult-like approach of the materials and reproduction was held to be fair); *Sundeman*, 142 F.3d at 194 (portions of unpublished novel of famous author were reproduced verbatim, but the reason and purpose for the reproduction was to allow scholarly, education, and critical examination of the merits of the author's early writings, and this effort was deemed fair); *Allen*, 89 F.3d at 614 (plaintiff's games were played openly without alteration or modification, but the educational, academic contest setting permitted this fair use).

#### **IV. Conclusions about the Functioning of the Transformative Test**

The data set of cases applying the transformative test to concrete legal situations producing final judgments in the cases highlights the importance of certain interpretive rules and gives guidance to authors, artists, and all secondary users of original works about the character and nature of proper uses of the works. *Campbell* established that "transformation" requires a change in the purpose and character of the work.<sup>79</sup> It is evident from the record of cases above that the courts take the "purpose" part of that interpretive rule very seriously, for all of the approved fair uses in the courts of appeals cases involved a change in purpose for the use of the work. Even if the works were not changed in function or genre, the fair use works were transformed in purpose either through alteration of the contents, or recontextualization of the copied material, or by the addition of significant creative expression so that the purpose of the new work was significantly different from the original work.<sup>80</sup> Non-alteration of the contents and expression of artistic and literary works still can be justified as fair use, but the function and purpose of the original works must be changed in the second

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<sup>79</sup> 510 U.S. at 579.

<sup>80</sup> *E.g.*, *Campbell*, 510 U.S. at 569; *Perfect 10*, 508 F.3d at 1146; *Bill Graham Archives*, 448 F.3d at 605; *Blanch*, 467 F.3d at 244; *Suntrust Bank*, 268 F.3d at 1257.

works in a manner that fulfills fair use objectives promoting education, research, comment and criticism, or archival, reference, and historical uses.<sup>81</sup>

The strongest transformative fair uses are those that modify the contents, function, and purpose in a significant and obvious manner, turning the meaning of the original work on its head, or openly criticizing the original work.<sup>82</sup> Uses that do not modify the contents, function, or purpose of the original works in a significant and obvious manner fail the transformative test and are found not to be fair.<sup>83</sup>

The most troubling fair use cases for secondary users of artistic or literary works are those that appear to have greatly transformed aspects of the original works, but were not found to be fair uses. This seemingly incongruous outcome is addressed by explanatory synthesis when all of these cases are considered together to explain the common underpinning and public policy objectives pursued by the courts in these opinions: even significant transformation in the form, or genre, or theme, or tone, or even the overall meaning of the works will not be found to be fair use if some of the creative, artistic, and expressive virtues of the original works are not replaced or superseded in the second work. If the creative, artistic, and expressive virtues of the original works still are discernable in the second work and still add value to the secondary work, the use of the original work will be deemed unfair.<sup>84</sup>

The transformative test has changed copyright law, and it has become the defining standard for fair use. Copyright law seeks first to promote new, original expression in the arts and literature, and second to allow other public interest activities such as education, research, news reporting, and comment and criticism of existing works. Transformation requires the copier to fulfill these objectives. The duplication of works just to show off their same creative, artistic, or literary virtues in a new time, a new place, a new mode or medium of communication, or for a new audience does not fulfill the goals

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<sup>81</sup> *E.g., A.V. ex rel. Vanderhye*, 562 F.3d at 630; *Perfect 10*, 508 F.3d at 1146; *Bill Graham Archives*, 448 F.3d at 605.

<sup>82</sup> *E.g., Campbell*, 510 U.S. at 569; *Blanch*, 467 F.3d at 244; *Mattel*, 353 F.3d at 792; *Suntrust Bank*, 268 F.3d at 1257; *Leibovitz*, 137 F.3d at 109.

<sup>83</sup> *E.g., Leadsinger, Inc.*, 512 F.3d at 522; *Zomba Enterprises*, 491 F.3d at 574; *Elvis Presley Enters.*, 349 F.3d at 622; *Video Pipeline*, 342 F.3d at 191; *A&M Records*, 239 F.3d at 1004; *Infinity Broad. Co.*, 150 F.3d at 104; *L.A. News Service v. CBS Brdcst.*, 305 F.3d at 924; *LA News Service v. Reuters Television Int'l Ltd.*, 149 F.3d at 987; *Ringgold*, 126 F.3d at 70.

<sup>84</sup> *E.g., Salinger*, 607 F.3d at 68; *Gaylord*, 595 F.3d at 1364; *Bridgeport Music v. UMG*, 585 F.3d at 267; *Castle Rock*, 150 F.3d at 132; *Dr. Seuss Enters.*, 109 F.3d at 1394.



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of copyright. No new and original expression results from simple replication of the same communication and expression found in the original. The derivative works doctrine gives those rights to the original author or artist, not to the public at large.

The lessons of the transformative test for those engaged in creative, artistic, or literary pursuits may be summed up in the following: if you copy an original work, use it for a different purpose than the purpose for which the original work was created. Modify the contents, function, and meaning of the original work through alteration of the original expression or the addition of significant new expression. Otherwise, you are making an unauthorized exploitation of the creative expression of the work for exactly the same reasons and purposes that the original author or artist created the work, and you are depriving them of the derivative works right guaranteed by copyright.

Appendix

Chart A – Complete Listing of Supreme Court and Court of Appeals Cases

Style and Citation	Fair Use	Outcome	Facts	Discussion
Campbell v. Acuff-Rose, 510 U.S. 569 (1994)	Parody	Fair Use	2LiveCrew HipHop group used old Roy Orbison rock ballad associated with motion picture fairy tale concerning prostitute (Pretty Woman) to make criticism of original. Original title, bass riff, and some lyrics were duplicated in the copy. Naïve sentimental lyrics about woman walking down street were replaced with bawdy crude lyrics pertaining to unappealing nature of prostitute streetwalkers.	Campbell changed fair use law in copyright by finding that all 17 USC 107 factors were to be weighed together in case-by-case determination, no one factor predominates, commercial use factor is not dispositive, and a bad score on one factor of fair use can be outweighed by good scores on other factors. With parody, purpose and character of use to comment on and criticize the original is very favorable on the other 107 factors--parodists can use famous creative works, use a great deal of them to "conjure up the original" and will not have a negative impact on the market for the original.
Bouchat v. Baltimore Ravens, 619 F.3d 301 (4th Cir. 2010)	Historical; Archival	No Fair Use	Bouchat's shield logo infringed by Ravens' Flying B Logo. No transformation found when Ravens display the logo in commercial films and promos, in spite of the editing and glitzy production values of the films and promos. No transformation meant no fair use in the court's ruling.	No transformation of the actual Bouchat logo. Logo was displayed as is, without alteration, in merchandise and advertising--NFL highlight films, promos, stadium entertainment.
Bouchat v. Baltimore Ravens, 619 F.3d 301 (4th Cir. 2010)	Historical; Archival	Fair Use	Historical and archival display of logos in corp. headquarters is fair use.	Different context of display--to show history of Ravens franchise--was also a change in function and purpose of use. It was transformative in purpose. Education and historical use emphasized Bouchat's work for its factual content, not creative content.
Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010)	Comment; Criticism; Parody	No Fair Use	Colting wrote "60 Years Later: Coming Through the Rye" under the pen name "John David California" as an unauthorized sequel to the landmark work of fiction, J.D. Salinger's "Catcher in the Rye." 60 Years Later replicated the character of Holden Caulfield, albeit as a 70 year old, and other characters, and replicated many sequences of the plot and the story arc of the original work. Although, Catcher was held by the court to be semi-autobiographical, and Colting alleged his	The 60 Years Later book was not transformative and was not a fair use of Salinger's characters, plot events, story arc, and scenes of the story. The addition of Salinger, the original author, into the story was held not to be a significant transformation. The court rejected the testimony of experts that held that the two works were significantly different in style and purpose--Catcher being a work of fiction, and 60 Years Later being an inventive, scholarly work of literary criticism taking the form of a novel.

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			intention to comment on and criticize and to parody the author, Salinger, and the original work. Catcher, the Court of Appeals affirmed the District Court's finding that Colting would not succeed on his fair use defense.	
Gaylord v. U.S., 595 F.3d 1364 (Fed. Cir. 2010)	Transformation	No Fair Use	US Postal Service issued stamp depicting photograph of "The Column" soldier sculptures in Korean War memorial in Wash. DC. Sculptor brought copyright infringement action. Photo of The Column sculpture showed original work covered in snow and muted the coloration of the work allegedly creating a new narrative (patrol lost in the snow) and altering the content of the original work (cold weary soldiers). The Stamp further altered the coloration making the scene monochromatic and "colder." Court of Appeals found that the government's use of the sculptures was not fair use.	Court of Appeals focused on the "further purpose or different character" of the use standards as defined in Campbell, and ignored the physical transformations in the appearance of the actual Korean War Memorial compared to the photograph and the stamp, and focused exclusively on the purpose of the works, finding the purpose of the sculpture, the photo, and the stamp to be the same: to depict the memorial and honor Korean War Veterans. Because the purpose of the three was the same, the court found there was no transformation. The Court of App. also found the coloration and "mood" changes did not make enough change in the character of the work which was "dreamlike" to begin with. The court found the alternations did not change the character, meaning, or message of the original sculpture.
Bridgeport Music v. UMG Recordings, 585 F.3d 267 (6th Cir. 2009)	Transformation	No Fair Use	Famous George Clinton funk anthem, "Atomic Dog," was sampled by hip-hop group, Public Announcement, in the song "D.O.G. in Me" on their All Work, No Play album. Public Announcement sampled the refrain "Bow wow wow, yippie yo, yippie yea," and the repetition of the word "dog" in a low tone of voice at regular intervals, and the sound of rhythmic panting. The two songs differed in theme, tempo, and style, characteristics that are partially attributable to the funk genre vs. hip-hop genre of music. The court reviewed the jury verdict finding of no fair use, and affirmed.	The Ct. App. affirmed the jury verdict of no fair use on the basis that three of the four fair use factors (all but the first factor, purpose and character of use) weighed against UMG's defense of fair use. The court held, "D.O.G. in Me" is certainly transformative (first factor), having a different theme, mood, and tone from 'Atomic Dog.'" But this transformativeness did not outweigh the other factors to a degree that would overturn the jury verdict on the "against the great weight of the evidence" standard of review.
A.V. ex rel. Vanderhuy v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009)	Transformation	Fair Use	iParadigms, owner of Turnitin plagiarism-checking computer service, had fair use defense allowing wholesale copying of student essays for purpose of checking for percentage of non-original content (i.e., plagiarism). Essays also were archived for later checking or retrieval.	iParadigm's use was held to be transformative in purpose, even with no transformation of content. iParadigms' use of the works was completely unrelated to their expressive content. The literary or scholastic purpose of essays was transformed into a functional, instrumental database for plagiarism checking.

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<p>Peter Letterese and Assocs., Inc. v. World Institute of Scientology Enters., 533 F.3d 1287 (11th Cir. 2008)</p>	<p>Transformation</p>	<p>No Fair Use</p>	<p>Peter Letterese and Assocs. (PLA) sued Scientology organizations including World Institute of Scientology Enters. (WISE) to end copying of sales training information taken from <i>Big League Sales</i> book owned by PLA. Many defenses were raised--permission and consent, implied license, de minimis use--but did not dispose of copyright claims. Fair use defense arose from defendants' allegation that they adapted the course materials into a different format, incorporated pedagogical tools such as sales drills, and condensed the material in the book. Other than these format changes, the content was not altered, and the purpose of the materials remained the same.</p>	<p>Defendants' use of <i>Big League Sales</i> in their course materials falls short of a transformative use. The original book selected, ordered, and described a number of sales techniques with the purpose of educating its readers to become more effective salesmen. The same is true of defendants' course materials. As the district court noted, "Defendants' courses and materials merely attempt to provide a user-friendly method of reading and learning from [<i>Big League Sales</i>]." The course materials do not reshape the instructional purpose or character of the book, or cast the book in a different light through a new meaning, message, or expression. Although the course materials adopt a different format, incorporate pedagogical tools such as sales drills, and condense the material in the book, these changes do not alter the educational character of the material taken from the book; they merely emphasize, rather than transform, the overall purpose and function of the book.</p>
<p>Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522 (9th Cir. 2008)</p>	<p>Education; Pubic Interest</p>	<p>No Fair Use</p>	<p>Leadsinger, mfg of karaoke device, claimed fair use to copy and display lyrics to accompany musical compositions for which it obtained compulsory 17 USC 115 licenses.</p>	<p>No alteration of lyrics or music; no new purpose; no new context. No fair use.</p>
<p>Zomba Enterprises, Inc. v. Panorama Records, Inc., 491 F.3d 574 (6th Cir. 2007)</p>	<p>Education; Transformation</p>	<p>No Fair Use</p>	<p>Panorama produced karaoke disks of copyrighted music and lyrics without license. Performers played and recorded the compositions, but no lyrics, composition, or any other changes to the music were made.</p>	<p>No alteration of lyrics or music; no new purpose; no new context. No fair use.</p>
<p>Perfect 10 v. Amazon.com, 508 F.3d 1146 (9th Cir. 2007)</p>	<p>Transformation</p>	<p>Fair Use</p>	<p>Google and others were accused by Perfect 10 of copying and infringing on Perfect 10's photos when Google performed in-line linking to images, framing of images (without duplication), and creation and storage of thumbnail-size versions of Perfect 10 images as references in search results. Only the thumbnails were actual copies--duplications in reduced size of the original images. Other rights (publication/distribution, and display) were involved in in-line linking and framing.</p>	<p>Court found Google's use to be highly transformative. Court found a completely different purpose for the images in all three of Google's activities. Most importantly, the creation of thumbnail versions for reference in internet search results was held to be highly transformative in purpose and context even if there was no physical changes (other than reduction in size and resolution) of the original images, and it was held to be highly beneficial to the public and thus supportive of copyright clause and 1st A public policy goals. Transformation was described as "the central purpose" of the purpose and character of use inquiry. Search engine use transforms the function and purpose of the original images completely, and is directly analogous to the way a successful parody transforms the original work. Search engine use also changes the context in a highly transformative way producing an entirely new creation.</p>

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<p>Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)</p>	<p>Satire; Transformation</p>	<p>Fair Use</p>	<p>Famous artist, Jeffrey Koons, took Blanch's fashion photo of woman's legs and silk sandals and inverted the image to place it in a new context where it was displayed with other images of dangling women's legs and feet overlaying an image of Niagra Falls and accompanied by large colorful images of junk food.</p>	<p>The court found the use to be highly transformative and fair. Although the use of the images was held not to be parody, and more likely an example of satire, the court found the use to be fair because of the additional artistic meaning and message created by Koons and the different purpose for the use of the image in the new work. The work was highly transformed, with a completely new meaning, character, and purpose because of Koon's additions and recontextualization of the original image.</p>
<p>Wall Data, Inc. v. L.A. Cnty. Sheriff's Dep't, 447 F.3d 769 (9th Cir. 2006)</p>	<p>Public Interest</p>	<p>No Fair Use</p>	<p>L.A. County Sheriff's office installed more copies of software than its licenses permitted. Sheriff Dep't programmed network so that only a certain number of people could actually use the software at any given time, as many people as it had actual licenses for. No other changes to the software were made. Sheriff Dep't saved money by not having to buy authorized copies or licenses for each desktop.</p>	<p>There were no physical alterations of the software. It was used in the same location, same context, and for the same purpose as the original. Transformation was held to be the "primary concern" of the first factor, purpose and character of use. Transformation requires changes to the original work or the use of the work in a new context such that the work is transformed into a new creation. Hard drive imaging did not produce any new creation for benefit of public.</p>
<p>Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006)</p>	<p>Historical; Archival; Education</p>	<p>Fair Use</p>	<p>Artistic concert posters and tickets for Grateful Dead were reproduced in color but in reduced size for heavily pictorial biography of the band, the Grateful Dead, produced by Dorling Kindersley (DK). Bill Graham owned the copyrights to the posters. DK had permission for most of the material from Grateful Dead Productions, its partner in the project, but not the rights to the concert posters.</p>	<p>Court described transformative analysis to be the "most important" part of the purpose and character of the use analysis. Biographies are often given fair use status when they copy or redisplay copyrighted historical material in a new format for information, education, comment, or simple historical-archival uses. The physical changes to the images of the posters and tickets (reduced size) and their placement in a new context (timelines that combined original images in visual-textual collage with other graphics and text) in the biographical publication changed their purpose from advertisement and artistic expression to historical and archival purposes. The use of the images in this heavily pictorial biography was likened to a quotation of text in text-oriented biographies.</p>
<p>NXIVM Corp. v. Ross Inst., 364 F.3d 471 (2d Cir. 2004)</p>	<p>Comment and Criticism</p>	<p>Fair Use</p>	<p>Ross Institute criticized NXIVM materials and methods and copied portions to quote and comment on them.</p>	<p>The copied quotes were used in a highly transformative manner to comment on and criticize the original material.</p>

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Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003)	Comment and Criticism	Fair Use	Forsythe, and artist and owner of Walking Mnt Prods, depicted Barbie dolls unclothed and in unusual settings with kitchen appliances and food preparations. Forsythe claimed he was commenting on objectification of women in society and through iconic figures such as Barbie.	New context and setting and unusual depictions of Barbie nude, frazzled, and in strange juxtaposition with appliances transformed the meaning of the doll's image and communicated a parodic purpose of comment and criticism. As parody, the works scored high on fair use factors in favor of defendant. New works often build on those that came before, and here the reference is made in a critical context.
Elvis Presley Enters. v. Passport Video, 349 F.3d 622 (9th Cir. 2003)	Comment and Criticism	No Fair Use	Passport created comprehensive biography video set (16 hrs) on Elvis. Used portions of videos, photos, and recordings of Elvis owned by plaintiffs without license or permission. Basically, deft used too much - clips ran too long for intended transformative purpose.	Biography lacked transformative purpose to justify extent and length of copies. Passport often used the heart of the original in a commercial enterprise. Used clips and portions for same basic purpose as original, thus market substitution possible.
Video Pipeline v. Buena Vista Home Enter., 342 F.3d 191 (3d Cir. 2003)	Archival	No Fair Use	Video Pipeline made verbatim copies of 2 minute segments of motion pictures for its own internet database purposes. It did not alter the segments in any way. The clips functioned exactly like authorized trailers from the copyright owners.	Simply copying and compiling in one internet service did not change purpose or evince creativity (new purpose, meaning, expression) in the copies, so failed on transformation, failed on purpose and character of use, and was not a fair use.
Bond v. Blum, 317 F.3d 385 (4th Cir. 2003)	Evidence; Public Interest	Fair Use	Attorneys copied Bond's unpublished autobiographical manuscript of "Self-Portrait of a Patricide: How I Got Away with Murder" book to use as evidence against Bond in child custody proceeding.	Although the court did not mention or rely on the transformative test it did hold that the book was used for a completely different function and purpose (legal evidence) separate from the literary and expressive purposes of the original, and the use was fair.
L.A. News Service v. CBS Brdcast., 305 F.d 924 (9th Cir.), amended & reh. denied, 313 F.3d 1093 (9th Cir. 2002)	News Reporting	No Fair Use	LA News Service had captured video of events of LA riots, including the beating of Reginald Dempsey. CBS aired footage without license or permission. Other defendants aired in a montage and in conjunction with trial footage.	Copying and rebroadcasting of the key few seconds of footage from news video was not fair use in spite of news reporting context. Montage use combined with trial footage was slightly transformative, but not enough to outweigh the misuse for same news purposes as original.
Ty, Inc. v. Pubs. Int'l Ltd, 292 F.3d 512 (7th Cir. 2002)	Reference		Photographing of Ty Beanie Baby toys for advertising in collectors guides and catalogs was not fair use. Court (Posner, J.) did not apply traditional <i>Campbell</i> fair use analysis, relying instead on economic analysis.	Photography of Beanie Babies for collectors guides and catalogs was substitute for original copyright owners' complementary derivative works, and as substitute, was not fair use.

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<p>Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)</p>	<p>Transformation; Reference; Research</p>	<p>Fair Use</p>	<p>Arriba Soft Corp. created thumbnails of copyrighted images found on internet as references in search results as part of functioning of Arriba's internet search engine. Images were not altered except in reduced size and lowered resolution, but were placed in new context for the purpose of directing viewers to the actual location of the original images on the internet.</p>	<p>Thumbnails created and stored for functioning of internet search engine was new purpose and created new meaning for the images copied. Public purpose (search function, education, research) furthered by the limited copying. Images were placed in new context for new purpose which was held to be transformative. The incidental copying that took place to make the thumbnail reference images did not compete in any way with the creative, artistic purposes of the original images.</p>
<p>Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001)</p>	<p>Parody; Comment and Criticism</p>	<p>Fair Use</p>	<p>Author of "The Wind Done Gone" made critical comment on the white-centric racist views of "Gone With the Wind" novel through a parody adaption of the famous novel copying and incorporating several of the major characters (albeit with altered names) and plot lines and copying portions of the original text and character dialogue from the original work.</p>	<p>Parody was found in the second work, criticizing the original work. The second work transformed the content and purpose of the original to create an entirely new work with a new meaning and purpose that was critical of the original work and its themes and prejudices.</p>
<p>On Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001)</p>	<p>Reference</p>	<p>No Fair Use</p>	<p>The Gap used Davis's Onoculii work as eye jewelry (eye wear) in a print ad. The jewelry was used without alteration in the commercial ad.</p>	<p>Davis's Onoculii work was worn as eye jewelry in the manner it was made to be worn-looking much like an ad Davis himself might have sponsored for his copyrighted design. There was no transformation in form or appearance, nor in purpose or function. The use was not transformative and not fair.</p>
<p>A&amp;M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)</p>	<p>Single-Copy, Home Use; Public Interest</p>	<p>No Fair Use</p>	<p>Napster facilitated the finding and transfer of unauthorized copies of copyrighted music. Some music was converted from CD or other formats to MP3 format, but was otherwise copied by Napster's users verbatim in its entirety.</p>	<p>The fair use discussion touched on the lack of transformation of the music. The music was copied and used in the same contexts and for the same purposes as the original music was created.</p>
<p>Veeck v. So. Bldg. Code Cong. Int'l, 241 F.3d 398 (5th Cir. 2001), <i>rev'd on other grounds</i>, 293 F.3d 791 (5th Cir. 2002)</p>	<p>Education; Public Interest</p>	<p>No Fair Use</p>	<p>Website operator copied the text of two building codes that had been enacted by municipalities for purpose of posting the text on informational website. Text of enacted legislation was the same as allegedly copyrighted model building code and was copied verbatim when posted on site.</p>	<p>First opinion found no fair use. There was no transformation of any kind, although arguably the information and research purposes of the website were different and the context created a different purpose for the laws' text compared to the model code. The first opinion was reversed and the second opinion held that enacted legislation was non-copyrightable, and building codes were 'facts' which merged with the idea and formula of the legislation within the meaning of the merger doctrine.</p>

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<p>Nunez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000)</p>	<p>News Reporting</p>	<p>Fair Use</p>	<p>Private photographer's modeling portfolio photographs of Puerto Rico's Miss Universe candidate were copied and displayed in conjunction with reporting news about the candidate. The photos were not altered and were copied verbatim in their entirety.</p>	<p>The use of the modeling portfolio photographs in a new context and for a new purpose of news reporting was transformative. The photos were "the news story" as opposed to being used to illustrate an unrelated news story. The photos were newsworthy in and of themselves because the candidate appeared nude or partially clothed in the photos.</p>
<p>Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110 (9th Cir. 2000)</p>	<p>Education; Public Interest</p>	<p>No Fair Use</p>	<p>Religious works of founder of Church of God sect were at first licensed for duplication and distribution, and then withheld from further publication and distribution. New church, Philadelphia Church of God, continued to duplicate, publish, and distribute the texts without license or permission. Works were copied and republished verbatim.</p>	<p>No transformation of any kind. Texts were used in same form for same purposes as original.</p>
<p>Sony Computer Ent. America, Inc. v. Bleem, LLC, 214 F.3d 1022 (9th Cir. 2000)</p>	<p>Comment &amp; Criticism; Comparative Advertising</p>	<p>Fair Use</p>	<p>Use of screen shot images in comparative advertising. Screen shots were only partially displayed and in small size.</p>	<p>Use of screen shots in comparative advertising was fair use. No discussion of transformative test, but images were modified and were used for new function and purpose to compare computer emulator's screen shots with original console screen shots.</p>
<p>Sony Computer Ent. V. Connectix Corp., 203 F.3d 596 (9th Cir. 2000)</p>	<p>Transformation</p>	<p>Fair Use</p>	<p>Connectix produced virtual Game Station emulator program to allow personal computers to emulate Sony's PlayStation game console so as to allow the users of Connectix's program to play PlayStation games on their personal computers without purchasing and using a Sony game console. In order to reengineer the Sony BIOS code, Connectix had to make copies of the code without license or permission in order to study how it worked. Copies made were only temporary and only for observation and study of the functioning of the computer program. No part of Sony's code was copied or incorporated into Connectix's end product emulator program.</p>	<p>The court allowed the interim copying for purposes of reverse engineering because it was the only means for Connectix to access the merger doctrine uncopyrightable material (process and functioning) of Sony's BIOS program. The interim copying allowed Connectix to create an entirely new computer program running on an entirely new platform (personal computer OS). Although similar in function to Sony's program (i.e., it played PlayStation games), the program was a transformed creation and the interim copying was a fair use of Sony's BIOS code material.</p>
<p>Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65 (2d Cir. 1999)</p>	<p>News Reporting</p>	<p>No Fair Use</p>	<p>Comline copied Nihon Keizai's financial data (on Nikkei index and other information) for its own bundling and republishing news reporting services. The data was copied and republished verbatim. Comline prepared abstracts of the material but left much of the text and information</p>	<p>Lack of creative alteration or transformation of the material, and use in the same contexts and for the same purposes as the original led to a finding of no fair use by the court. Repackaging and abstracting of news even for additional news reporting purpose is not recognized as a proper transformation of the material for fair use analysis.</p>



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			intact.	
Micro Star v. Formgen Inc., 154 F.3d 1107 (9th Cir. 1998)	Transformation	No Fair Use	Micro Star compiled and sold 300 user-generated levels for expansion of the play in Formgen's Duke Nukem 3D video game. Formgen had allowed and encouraged the creation of expansion levels by providing a level-development kit with the Duke Nukem game. Micro Star did not do any creation or alteration of the character and appearance of Duke Nuken and the images and sequences from the original work that was included in the compiled work and the trade dress on the packaging of the Micro Star compilation.	The court first determined the user-generated levels to be unauthorized, unlicensed derivative works of the original Duke Nukem game. Formgen's provision of a level development kit was not construed to also offer a blanket implied license for users to create <i>and own</i> the rights to the levels created by using the kit. The subsequent bundling and repackaging of infringing derivative works did not transform the infringing works in any proper way. The levels were created and sold for the same purpose and for use in the same context as the original. The lack of transformation combined with a commercial purpose led to the determination that the use was not fair.
LA News Service v. Reuters Television Int'l Ltd., 149 F.3d 987 (9th Cir. 1998)	News Reporting	No Fair Use	LA News Service had captured video of events of LA riots, including the beating of Reginald Dempsey. Reuters aired and distributed, and rebroadcast small portions of the footage without license or permission.	In spite of new reporting context, copyrights news video may not be copied by others wishing to rebroadcast the same material for the same purpose of news reporting. Use of a very small portion (a few seconds of footage) is not fair use simply because of the small amount taken if what is taken is significant and more than de minimis.
Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998)	Transformation	No Fair Use	Kirkwood created dial-up telephone service to rebroadcast copyrighted radio transmissions over the telephone. Various purposes were offered for the service--to audition radio talent, check for placement of advertising, and more.	Retransmission and rebroadcast in new medium for slightly modified purposes was not a creative, original use of the material, and the original material was not transformed in a proper manner. Simple repackaging or retransmission in a new media is not transformation and is not fair use.
Castle Rock Ent. v. Carol Pub. Group., 150 F.3d 132 (2d Cir. 1998)	Comment and Criticism	No Fair Use	Castle Rock, owner of the rights to the <i>Seinfeld</i> TV program, sued the creators of the Seinfeld Aptitude Test (SAT) trivia book. The book collected and copied multiple items of text, character information, plot, dialogue, and other copyrighted material from the television show in order to compile the questions for the trivia book.	The SAT book did not comment on or criticize the <i>Seinfeld</i> show, it celebrated the show, and its purpose was to entertain its readers--the same purpose for which the original show was created. The different media and format and the massive excerpting and reforming of the material into trivia questions was held not to be transformative. Instead, the court held that the book merely repacked the original material for a new media format but for the same entertainment purpose.
Sundeman v. The Seajay Soc., 142 F.3d 194 (4th Cir. 1998)	Comment and Criticism; Research; Education	Fair Use	Posthumous copying of unpublished work for inclusion in lectures and handouts of literature professor who commented on and critiqued the work in her research.	Copying was held to be fair for purposes of comment and criticism, research, and education. Both the original author and her earlier unpublished work were critiqued by the second user of the material. The use of the material was transformative in purpose and context if not in content.

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<p>Leibovitz v. Paramount Pics. Corp., 137 F.3d 109 (2d Cir. 1998)</p>	<p>Parody</p>	<p>Fair Use</p>	<p>Paramount's movie ad for "Naked Gun 3 1/3" mimicked famous Leibovitz Vanity Fair cover photo of pregnant Demi Moore by replacing Moore's head with that of comic actor Leslie Neilson. Paramount reshoot the scene with a different actress but attempted to replicate the photo image except for Neilson's head replacement.</p>	<p>The movie ad, although commercial speech, was found to target the original photograph for comment and criticism through parody. The court found that the ad spoofed the serious if not pretentious artistic posing of Demi Moore in a "modest Venus" pose and turned the meaning and purpose of the photo on its head by replacing the female head of Moore with a comic male actor's head. The ad was found to be highly transformative in style, subject matter, content, and purpose.</p>
<p>Ringgold v. Black Ent. Television, 126 F.3d 70 (2d Cir. 1997)</p>	<p>De Minimis Use</p>	<p>No Fair Use</p>	<p>Ringgold's story quilt was the subject of an art poster from the High Museum of Art in Atlanta, and the poster depicting the story quilt was used as set decoration visible in an episode of "Roc" on BET. The poster-quilt image was seen for no more than a few seconds at a time, and never in a full screen shot, but there was no alteration of the image or appearance of the poster-quilt.</p>	<p>The court found that the poster-quilt image was used without transformation for the exact same purpose and context as the original work. Thus, no fair use. De minimis use exception argument also failed.</p>
<p>Dr. Seuss Ents., LP v. Penguin Books USA, 109 F.3d 1394 (9th Cir. 1997)</p>	<p>Parody; Satire</p>	<p>No Fair Use</p>	<p>Penguin produced self-described "parody" work discussing the OJ Simpson trial and its many characters (OJ and his attorneys and adversaries) using the same style and similar graphic images of characters and settings as in Dr. Seuss's "The Cat in the Hat" work. The OJ book, "The Cat Not in the Hat," did not appear to comment on or criticize Theodore Geisel (Dr. Seuss) or "The Cat in the Hat" work in any way, but the work told an entirely new story for an entirely new purpose of critiquing the OJ trial and the U.S. court system.</p>	<p>In spite of "The Cat Not in the Hat"'s telling an entirely new story with an entirely new purpose of spoofing and criticizing the OJ trial and the court system, the court made its decision on the basis that the work could be a fair use of Dr. Seuss material because it did not target the original work or its author for criticism or comment. Thus, the purpose and character of the work could not be categorized as a true parody, but instead was a satire. The work was largely transformative, but not for a properly accepted purpose. The discussion of the transformative test was slight and not in depth. The court preferred to dwell on the distinction between satire and parody, the latter being fair use and the former being not fair use.</p>
<p>L.A. New Service v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997)</p>	<p>News Reporting</p>	<p>No Fair Use</p>	<p>LA News Service had captured video of events of LA riots, including the beating of Reginald Dempsey. KCAL-TV copied and rebroadcast small portions of the footage without license or permission.</p>	<p>In spite of new reporting context, copyrights news video may not be copied by others wishing to rebroadcast the same material for the same purpose of news reporting. Use of a very small portion (a few seconds of footage) is not fair use simply because of the small amount taken if what is taken is significant and more than de minimis.</p>

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Princeton Univ. Press v. Mi. Doc. Servs., Inc., 99 F.3d 1381 (6th Cir. 1996)	Education; Research	No Fair Use	Copying of scholarly and literary works for educational course packets sold for profit at book stores. Most works were excerpted, and all were combined with other materials to make up a course packet.	The educational context of university-course packet-university bookstore did not insulate the commercial sale of excerpted and repackaged copyrighted materials. The works were not transformed other than by cutting and recombining the work into packets with other materials. This "transformation" did not change the fact that the works were created and sold for use in the exact same contexts and for the exact same purposes as the original works.
Allen v. Academic Games League of Am., 89 F.3d 614 (9th Cir. 1996)	Education	Fair Use	Defendant's performance of Plaintiff's games in public for not-for-profit educational, academic purposes.	The playing of the games in public contests in a not-for-profit educational setting was a fair use for a new purpose of education.
Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995)	Research; Education; Reference	No Fair Use	Texaco copied, excerpted, and abstracted material from copyrighted scientific journals for internal distribution within the corporation.	Copying of material from scientific articles, albeit for research, education, or reference uses but within a for-profit business setting, was not fair use. Cutting, rearranging, or repackaging the material was not recognized as proper transformation to support fair use.

Chart B – Coding of Cases

Style and Citation	Content or Context Changes to Original <sup>85</sup>	Changes in Function or Purpose <sup>86</sup>
Campbell v. Acuff-Rose, 510 U.S. 569 (1994)	3	3
Bouchat v. Baltimore Ravens, 619 F.3d 301 (4th Cir. 2010)	0	0
Bouchat v. Baltimore Ravens, 619 F.3d 301 (4th Cir. 2010)	2	2
Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010)	3	2
Gaylord v. U.S., 595 F.3d 1364 (Fed. Cir. 2010)	3	2
Bridgeport Music v. UMG Recordings,	2	1

<sup>85</sup> **Content or Context Changes from Original Use to Second Use:** 0 = No change in content or context; 1 = Change in size or amount, e.g., creation of reduced size image, but not simply selecting portions of original without other alteration; 2 = Change in context, recontextualization; 3 = Significant changes in content and context.

<sup>86</sup> **Changes in Function or Purpose from Original Use to Second Use:** 0 = No change in function or purpose; 1 = Minimal change in function or purpose but still exploits creative original expression of the original work; 2 = Adds additional function and purpose to original; 3 = Significant, superseding change in function and purpose.

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585 F.3d 267 (6th Cir. 2009)		
A.V. ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009)	0	3
Peter Letterese and Assocs., Inc. v. World Institute of Scientology Enters., 533 F.3d 1287 (11th Cir. 2008)	0	0
Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522 (9th Cir. 2008)	0	0
Zomba Enterprises, Inc. v. Panorama Records, Inc., 491 F.3d 574 (6th Cir. 2007)	0	0
Perfect 10 v. Amazon.com, 508 F.3d 1146 (9th Cir. 2007)	1	2
Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)	2	3
Wall Data, Inc. v. L.A. Cnty. Sheriff's Dep't, 447 F.3d 769 (9th Cir. 2006)	0	0
Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006)	1	2
NXIVM Corp. v. Ross Inst., 364 F.3d 471 (2d Cir. 2004)	0	3
Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003)	2	3
Elvis Presley Enters. v. Passport Video, 349 F.3d 622 (9th Cir. 2003)	0	1
Video Pipeline v. Buena Vista Home Enter., 342 F.3d 191 (3d Cir. 2003)	1	1
Bond v. Blum, 317 F.3d 385 (4th Cir. 2003)	0	3
L.A. News Service v. CBS Brdcast., 305 F.3d 924 (9th Cir.), amended & reh. denied, 313 F.3d 1093 (9th Cir. 2002)	0	0
Ty, Inc. v. Pubs. Int'l Ltd, 292 F.3d 512 (7th Cir. 2002)	0	0
Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)	1	2
Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001)	3	3
On Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001)	0	0
A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)	0	0
Veeck v. So. Bldg. Code Cong. Int'l, 241 F.3d 398 (5th Cir. 2001), <i>rev'd on other grounds</i> , 293 F.3d 791 (5th Cir. 2002)	0	1
Nunez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000)	0	2

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Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110 (9th Cir. 2000)	0	0
Sony Computer Ent. America, Inc. v. Bleem, LLC, 214 F.3d 1022 (9th Cir. 2000)	1	2
Sony Computer Ent. V. Connectix Corp., 203 F.3d 596 (9th Cir. 2000)	3	3
Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65 (2d Cir. 1999)	0	0
Micro Star v. Formgen Inc., 154 F.3d 1107 (9th Cir. 1998)	0	0
LA News Service v. Reuters Television Int'l Ltd., 149 F.3d 987 (9th Cir. 1998)	0	0
Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998)	0	1
Castle Rock Ent. v. Carol Pub. Group., 150 F.3d 132 (2d Cir. 1998)	3	1
Sundeman v. The Seajay Soc., 142 F.3d 194 (4th Cir. 1998)	0	3
Leibovitz v. Paramount Pics. Corp., 137 F.3d 109 (2d Cir. 1998)	3	3
Ringgold v. Black Ent. Television, 126 F.3d 70 (2d Cir. 1997)	0	0
Dr. Seuss Ents., LP v. Penguin Books USA, 109 F.3d 1394 (9th Cir. 1997)	3	3
L.A. New Service v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997)	0	0
Princeton Univ. Press v. Mi. Doc. Servs., Inc., 99 F.3d 1381 (6th Cir. 1996)	0	0
Allen v. Academic Games League of Am., 89 F.3d 614 (9th Cir. 1996)	0	2
Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995)	1	1