

Predicting Fair Use

An Empirical Study of Fair Use Litigation
in U.S. District Courts

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Motivation

- Almost everything we know is anecdotal

Except:

- Barton Beebe 2008 – Relies on judges retrospective evaluation of the 4 fair use factors
- Pamela Samuelson 2009 – comprehensive doctrinal survey

Data

- 280+ U.S. District Court Cases, 1978 – 2006
- Written opinions, some final, many motions for summary judgment.
- Average fair use win rate at the district court level = 39.92%
 - Only 16 of these cases were successfully appealed on the issue of fair use

Turning intuition into testable hypotheses

- Sources:
 - The text of the Copyright Act
 - Court cases
 - Academic commentary
 - Legal folk wisdom

Hypotheses derived from § 107 and case law

Fair use is more likely if defendant's use

Is “transformative”

{107(1), *Campbell*}

Is not commercial

{107(1), *Sony*}

Is only a partial copy

{107(3)}

Does not effect the market value of
plaintiff's work

{107(4)}

Fair use is less likely if the plaintiff's work is

Unpublished

{107(2)}

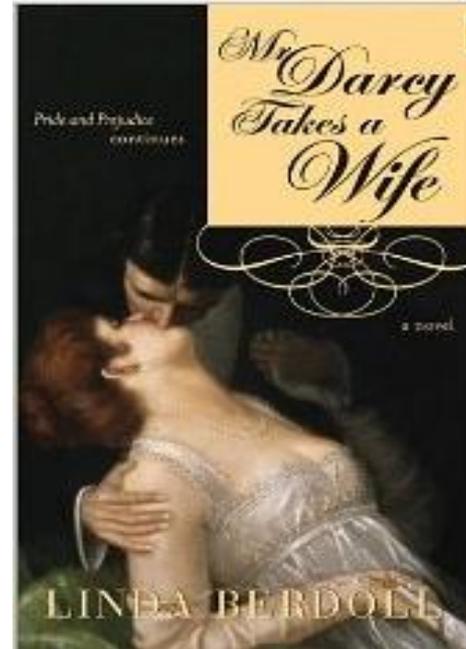
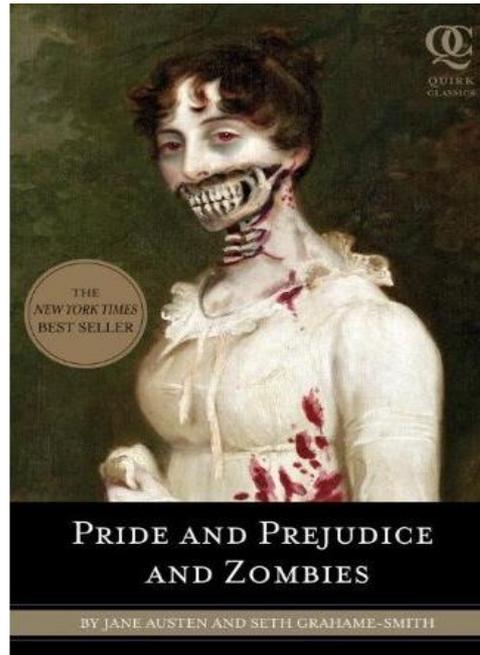
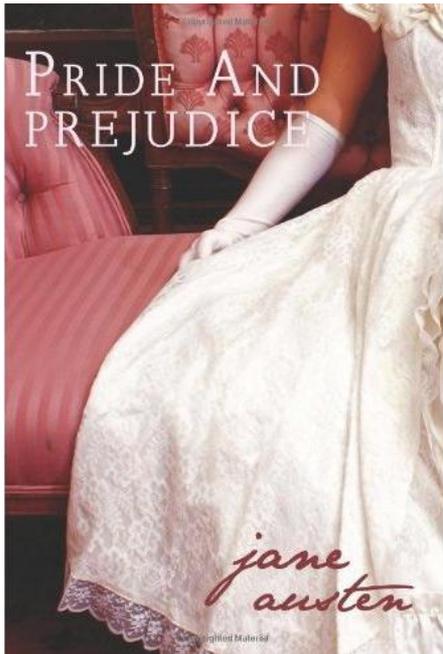
Creative

{107(2)}

Transformative Use

- §107(1) “the purpose and character of the use”
- *Campbell v. Acuff-Rose* (U.S. Supreme Court 1994)
 - the creation of **transformative works**, lies “at the heart of the fair use doctrine”

What is transformative use?



- **Transformative**

- “a further **purpose or different character**, altering the first with new expression, meaning, or message.”
- **Creativity Shift (0,1)** Plaintiff’s work is creative, defendant’s is informational, or vice-versa.

What is Commercial Use?

- **Direct “commercial” Use**

- D used P’s work as **part of a commercial product or service**

- **Indirect Commercial Use**

- D used P’s work as an **intermediate step** to creating **a commercial product or service.**

- **Non-commercial Use**

- Personal uses, Educational uses, Research uses (not part of a specific product development process), No direct or indirect commercial benefit (e.g. file sharing)

How can we measure Market Effect?

Problems

- Prone to circular reasoning
 - If fair use then no effect on copyright owner's market: If not fair use, permission required, market for permission
- Extent of competitive injury (past & future lost sales), always disputed

Solution

- Industry Separation using NAICS codes as a proxy for market effect

Additional hypotheses

- **The fair use doctrine favors the ‘underdog’**
 - statutory examples: criticism, comment, news reporting, teaching, scholarship and research
 - “commercial” v. “nonprofit educational” distinction in § 107(1)
- **fair use is “a form of subsidy”** at the expense of authors that permits limited use of a work **“for the public good.”**
 - Justice Blackmun in *Sony Corp. v. Universal City Studios*, U.S. Supreme Court (1984)
- Market failure \approx preference for the underdog

Measures of Underdog Status

- Measures
 - Natural person v. Corporation
 - (court records, corporate databases, PACER)
 - Experience Rating of Attorney & Law Firm
 - (Martindale Hubble Directory)

Additional hypotheses

- Fair use litigation will differ according to plaintiff and defendant industry identity
 - Evidence of industry variation in patent law.
 - See e.g., Burk & Lemley, *Policy Levers in Patent Law* (2003)

Results

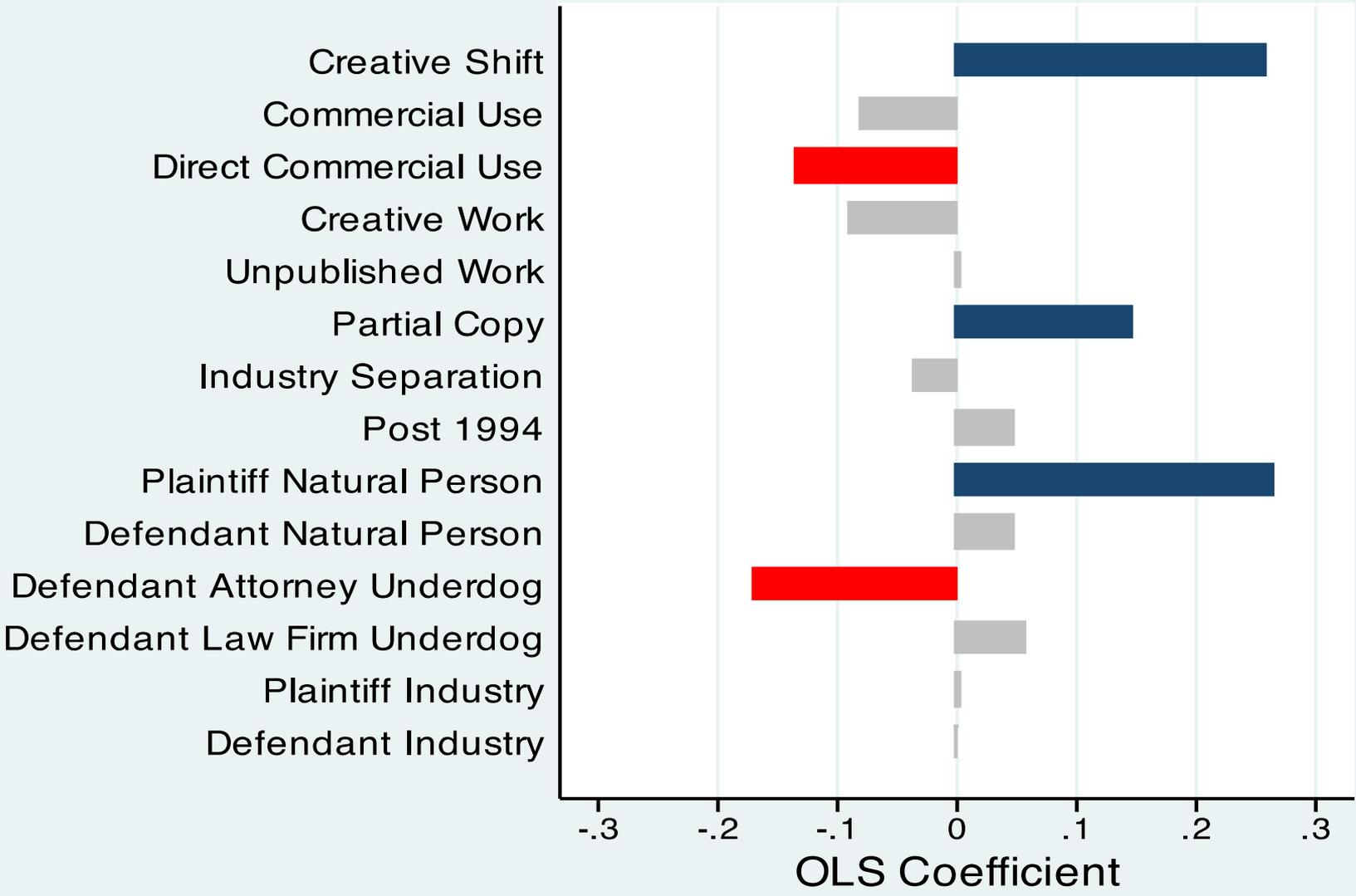


Results | Regression Table

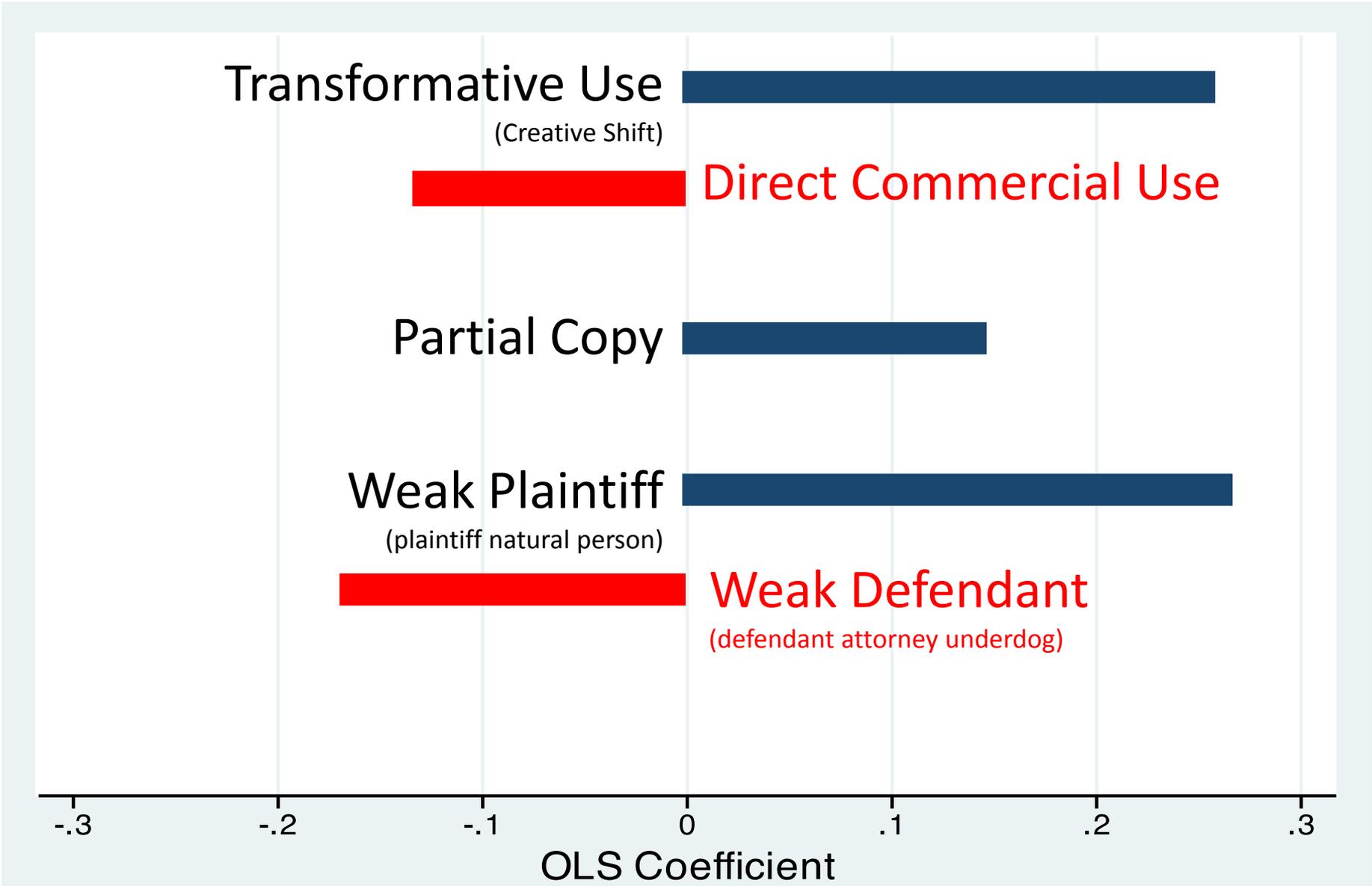
Doctrine	Variable	Regression Model – Finding of Fair Use				
Transformative use	Creative Shift	.995**	1.350**	.872*	.880*	1.313**
Commercial use	Commercial Use Direct Commercial Use	-.328 -.629*	-.484 -.771*	-.304 -.495	-.355 -.548#	-.407 -.703*
Nature of the Work	Creative Work Unpublished Work	.012 .269	-.458 .093	-.048 .073	-.208 -.002	-.472 -.005
Amount Copied	Partial Copy	.312	.781*	.308	.426	.754*
Market Effect	Industry Separation	.448	-.116	.207	.144	-.199
Time	Post 1994	.013*	.097	.090	.042	.203
Underdog	Pf natural person Df natural person Df attorney underdog Df law firm underdog		1.568** .283 -.967# .270		.968** .149	1.299** .271 -.871# .296
Industry	Plaintiff Industry Defendant Industry			.031** .005	.013 .004	.017 .008
	Constant Pseudo R ²	-.585 .073	-.551 .166	-2.538 .089	-1.655 .111	-1.969 .173

Results | Graphical Form

(Ordinary Least Squares, Full Specification)



What makes a finding a fair use more/**less** likely?



Debunking Myths of Fair Use

- **Myth 1**

Fair use is only available to non-commercial actors.

Not statistically significant

- **Myth 2**

Creative & Unpublished Works are less susceptible

to fair use. **Not statistically significant**

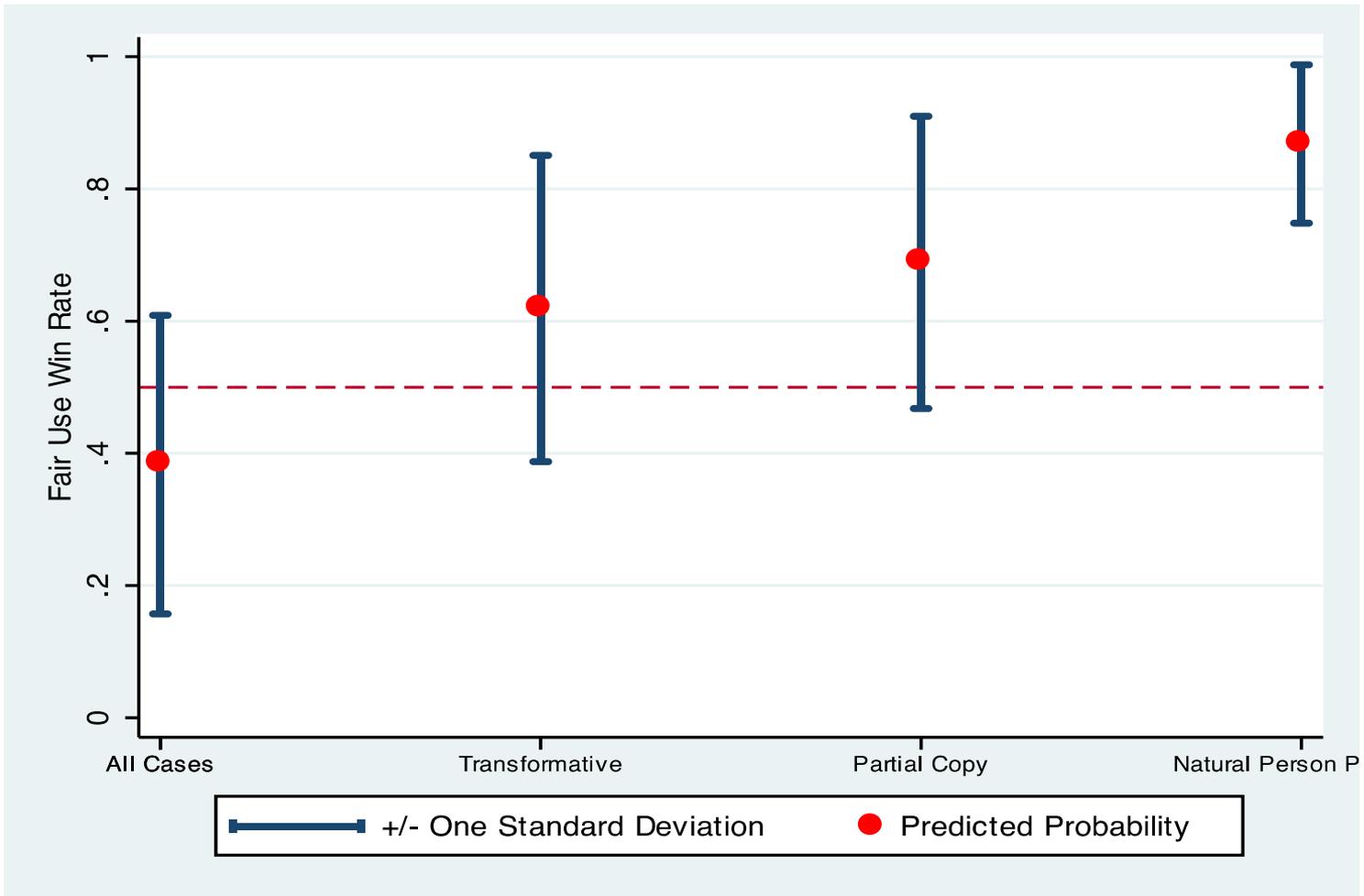
- **Myth 3**

Fair use favors the 'underdog'. **Evidence suggests**

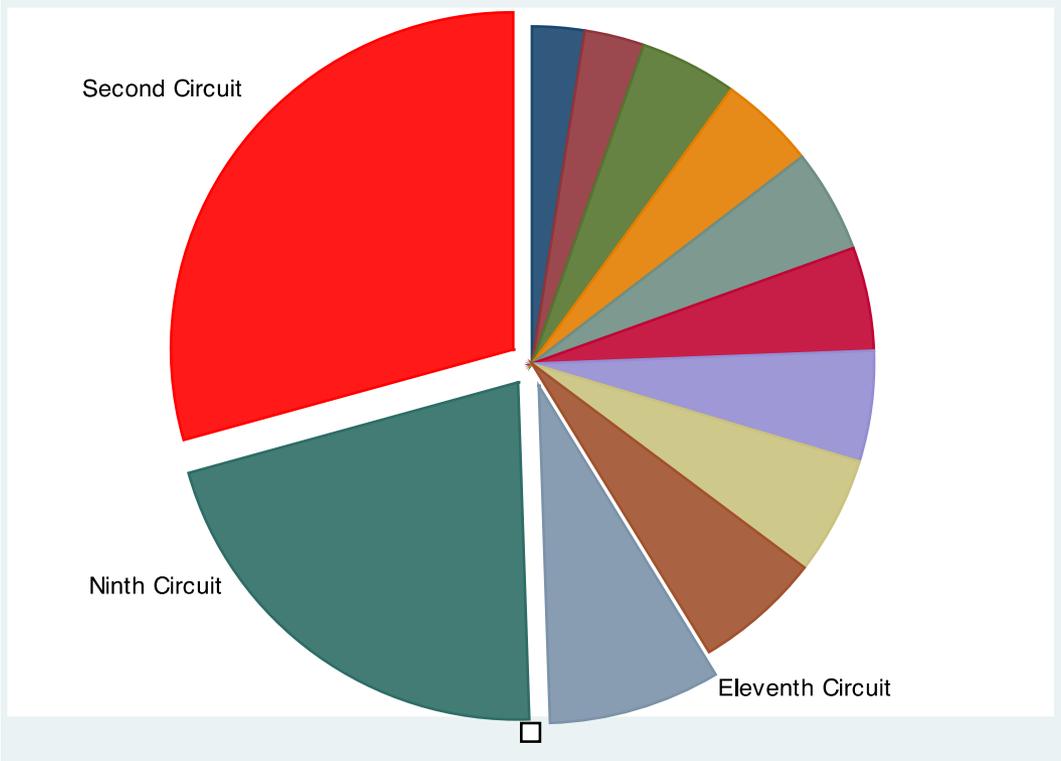
fair use favors the 'overdog'

Are fair use cases unpredictable?

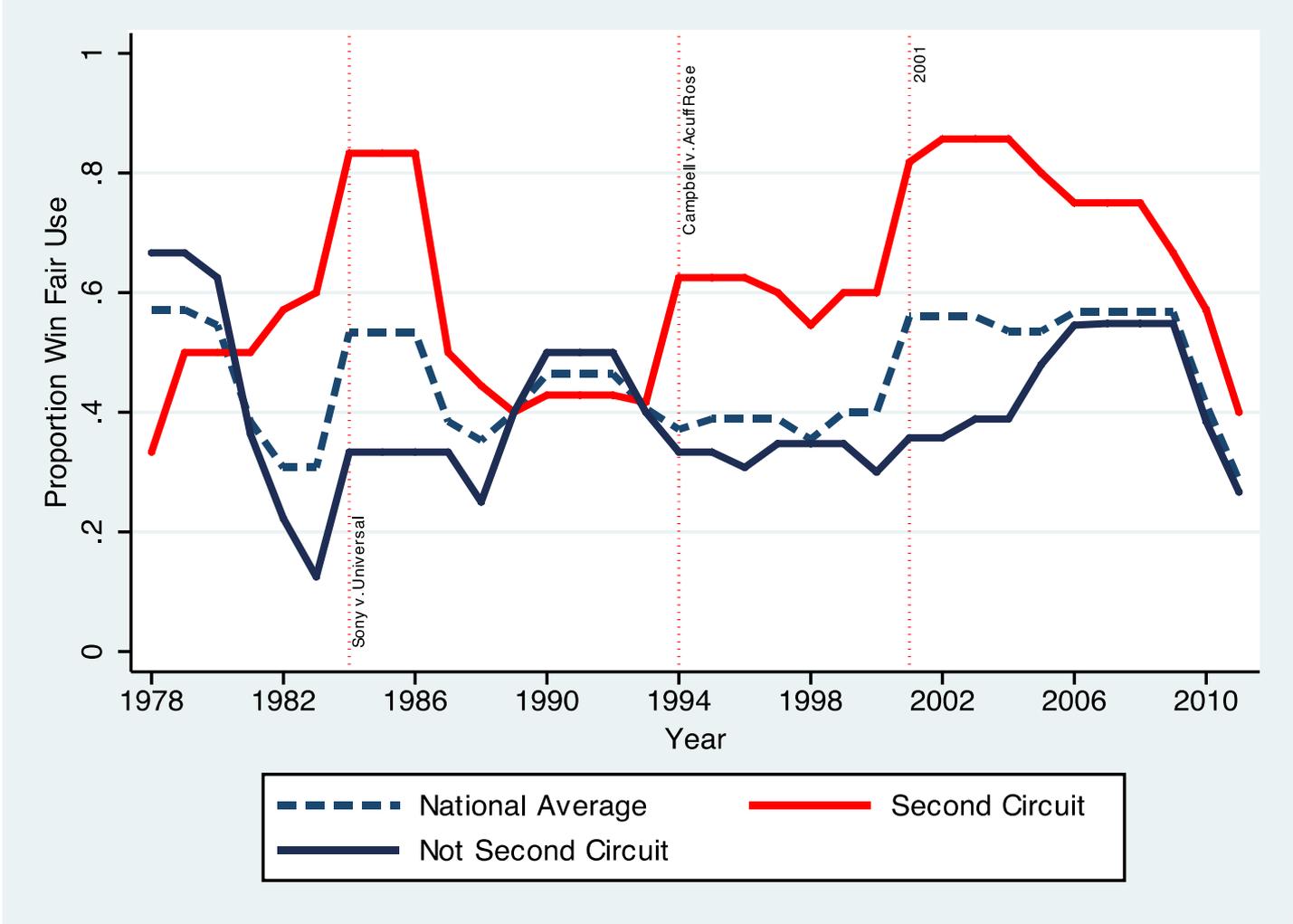
Cumulative Predicted Probability of A Fair Use Win



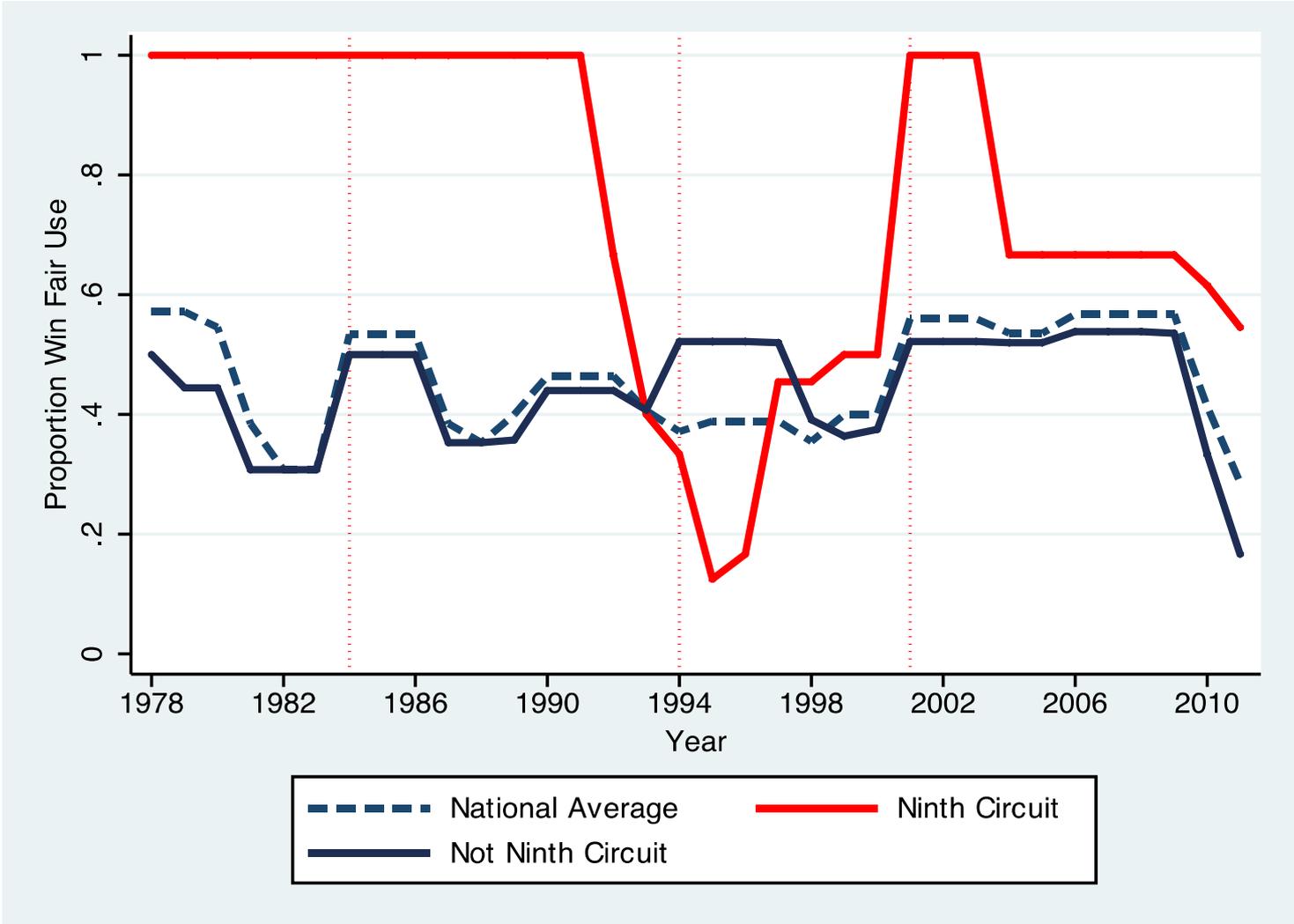
Circuit Distribution District Court Fair Use Cases



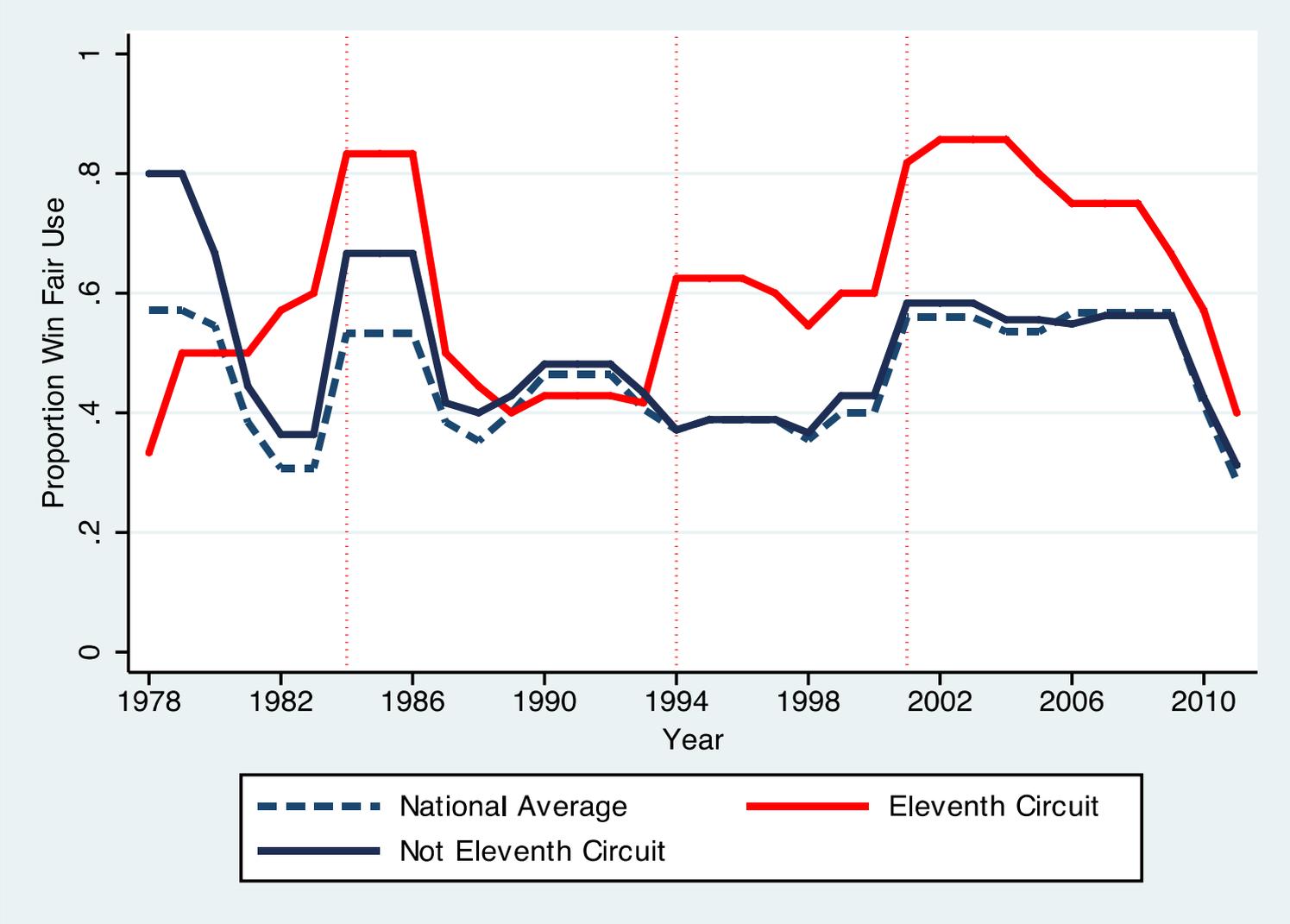
Second Circuit Fair Use Cases



Ninth Circuit



Eleventh Circuit



Conclusion

- The outcomes of litigated fair use cases are necessarily obvious or mechanical applications of the statute, but the unpredictability of the doctrine is over-stated
- Fair use is much more than merely the right hire a lawyer and take ones chances in court.

Questions

- Full paper available at SSRN
<http://ssrn.com/abstract=1769130>
- Email comments to MatthewSag@gmail.com