

# ***The Transformation of Transformative Use: The Infiltration of Functionality into Copyright***

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Intellectual property law has traditionally drawn a clear distinction between the purposes of patent and copyright: Patent protects functionality, while copyright protects creativity. A series of recent U.S. court decisions have begun to break down this traditional allocation and have increasingly relied on functional considerations to resolve the proper scope of copyright fair use. In particular, the line of cases beginning with *Kelly v. ArribaSoft* and culminating in the Second Circuit's *Google Books* decision has modified the transformative use analysis to omit requiring the contribution of new creative expression and instead to find use of a work for a new purpose to be sufficient. This article will trace this development and analyze its inconsistency with copyright's constitutional foundations, the need for such use from the standpoint of economics, and its impact on the traditional distinction between creativity and functionality embodied in current copyright and patent law.