JUSTIFICATIONS FOR FAIR USES

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The principal goal of this Article is to explain that the Supreme Court's decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* preserved the flexible and well-balanced standards for assessing fair use defenses that the Court first established in its 1994 decision in *Campbell v. Acuff-Rose Music, Inc. Campbell*, which recognized that when putative fair users copy parts or all of earlier works for different purposes than the earlier works' authors, such transformative purposes tend to favor fair use defenses because such uses are less likely to harm markets for the originals. *Campbell* eschewed bright-line rules and directed courts to assess all fair use factors and balance them together in a flexible and holistic manner. Contrary to what some have mistakenly asserted, nothing in *Warhol* abjures the rich body of fair use case law, both before and after *Campbell*, that has recognized many types of fair use justifications. The Article begins by tracing the evolution of copyright's fair use doctrine and its broad scope, reflected in Congress's intent in codifying the doctrine in the 1976 Copyright Act and in cases such as *Campbell* and *Warhol*. This Article then reviews a wide variety of cases in which courts have found fair uses to be justified, not only based on specific parts of the text of 17 U.S.C § 107 but also falling under three other well-established categories of fair use justifications. Such robustness in the case law gives this doctrine the openness to other fair use justifications that Congress intended, in keeping with the constitutional purposes of copyright law.

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INTRODUCTION

> *The fundamental justification for the [fair use] privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and the Useful Arts.' U. S. Const. art. 1, § 8.*
>
> — *Rosemont Enters., Inc. v. Random House, Inc.*[1]

> *[T]he 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 . . . .*
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> — *Campbell v. Acuff-Rose Music, Inc.*[2]

1. 366 F.2d 303, 307 (2d Cir. 1966).
2. 510 U.S. 569, 579 (1994).

Under the fair use doctrine of United States copyright law, targeting an earlier author's work to criticize or comment on its contents is a well-established justification for using part or all of that author's work.[3] Some assert that the Supreme Court narrowed the range of viable fair use justifications to this kind of targeting in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.[4] This seriously mischaracterizes the Court's ruling,[5] as *Warhol* itself identifies several types of cases in which

3. 17 U.S.C. § 107 (identifying criticism and comment as favored fair use purposes); *see, e.g.*, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1263, 1274 (2023) (targeting earlier work for criticism as justifiable fair use purpose); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015) ("Among the best recognized justifications for copying from another's work is to provide comment on it or criticism of it.").

4. *See, e.g.*, Shyamkrishna Balganesh & Peter S. Menell, *Going "Beyond" Mere Transformation:* Warhol *and the Reconciliation of the Derivative Work Right and Fair Use*, 47 COLUM. J.L. & ARTS 413, 436–37 (2024); Appellant's Opening Brief at 45, *Sedlik v. Von Drachenberg*, No. 24-3367 (9th Cir. Oct. 15, 2024) [hereinafter *Sedlik* Brief]. The Tenth Circuit initially took this overly narrow view of *Warhol* in *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 97 F.4th 699, 714–15 (10th Cir. 2024), but it has subsequently agreed to rehear the fair use issue. *Whyte Monkee Prods., LLC*, 97 F.4th 699, *vacated and reh'g granted in part*, 101 F.4th 787 (10th Cir. 2024), No. 22-6086 (10th Cir. argued July 10, 2024). Failure to target the original for criticism or comment has been a consideration in some post-*Warhol* cases. *See, e.g.*, *Dermansky v. Hayride Media, LLC*, 2023 WL 6160864, at *8–9 (E.D. La. 2023) (reuse of photo held unfair for failure to target). Yet other than *Whyte Monkee*, post-*Warhol* appellate court rulings to date do not discuss targeting as a requirement. *See, e.g.*, *Romanova v. Amilus Inc.*, 138 F.4th 104, 120 (2d Cir. 2025) (commercial site's posting of photo was not a transformative fair use); *Designworks Homes, Inc. v. Columbia House of Brokers Realty, Inc.*, 126 F.4th 589, 601–02 (8th Cir. 2025) (brokers' preparation of floor plans of houses for sale held fair use); *Teradyne, Inc. v. Astronics Test Sys., Inc.*, No. 24-239, 2025 WL 341828, at *1 (9th Cir. 2025) (reuse of software interface held fair use); *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 196 (2d Cir. 2024) (digital library lending of books held unfair); *Keck v. Mix Creative Learning Ctr. L.L.C.*, 116 F.4th 448, 456 (5th Cir. 2024) (use of graphic in educational kit held fair use); *Griner v. King*, 104 F.4th 1, 10 (8th Cir. 2024) (use of meme to solicit donations for political campaign held unfair); *Philpot v. Indep. J. Rev.*, 92 F.4th 252, 262 (4th Cir. 2024) (use of photograph of musician in online article held unfair); *Am. Soc'y Testing & Materials v. Public.Resource.Org, Inc.* (*ASTM*), 82 F.4th 1262, 1272 (D.C. Cir. 2023) (posting standards-adopted-as-law held fair use). Courts have found challenged uses nontransformative and unfair under *Warhol* when those uses were for the same purpose as the original. *See, e.g.*, *Romanova*, 138 F.4th at 118–19; *Philpot*, 92 F.4th at 260. The *Romanova* decision recognizes numerous types of justifications for engaging in fair uses, citing approvingly to this Article in preprint. *Romanova*, 138 F.4th at 115–17, 115 n.7.

5. Commentators have questioned and criticized the *Warhol* decision on numerous grounds. *See generally, e.g.*, Amy Adler, *Why Courts Should Not Interpret the Meaning of Art*, 42 CARDOZO ARTS & ENT. L.J. 655 (2024) (critical of *Warhol* for its interpretation of the meaning of art); Peter J. Karol, *What's the Use? The Structural Flaw Undermining* Warhol v. Goldsmith, 71 J. COPYRIGHT SOC'Y 107 (2024) (failure to acknowledge that granting a commercial license does not violate any exclusive right for which a fair use defense was needed); Mark A. Lemley & Rebecca Tushnet, *First Amendment Neglect in Supreme Court Intellectual Property Cases*, 2023 SUP. CT. REV.

fair uses were justified on other grounds.[6] This view also ignores that criticism and comment are only two of the six favored uses identified in § 107,[7] which codified the common law fair use doctrine as part of the Copyright Act of 1976 (1976 Act).[8] Nothing in the *Warhol* decision suggests that the Court regards criticism and comment as the *only* justifiable bases for raising fair use defenses.[9] Others of the Court's fair use decisions have considered justifications based on the other statutorily favored purposes,[10] as well as on some purposes not listed in the statute.[11]

The Court's *Warhol* decision importantly reaffirmed that a second author's "transformative" purpose in using an earlier author's work for

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85 (critical of *Warhol* for failure to consider First Amendment implications); Glynn S. Lunney, Jr., *Transforming Fair Use*, 14 N.Y.U. J. INTELL. PROP. & ENT. L. 169 (2024) (criticizing *Warhol*'s fair use analysis); Tyler Ochoa, *U.S. Supreme Court Vindicates Photographer, But Destabilizes Fair Use — Andy Warhol Foundation v. Goldsmith (Guest Blog Post)*, TECH. & MKTG. L. BLOG (June 20, 2023), https://blog.ericgoldman.org/archives/2023/06/u-s-supreme-court-vindicates-photographer-but-destabilizes-fair-use-andy-warhol-foundation-v-goldsmith-guest-blog-post.htm [https://perma.cc/EM6N-PT2C] (criticizing *Warhol* for upending a long-held understanding of *Campbell* and fair use); Pamela Samuelson, *Did the Solicitor General Hijack the* Warhol v. Goldsmith *Case?*, 47 COLUM. J.L. & ARTS 513 (2024) (faulting the Court for failing to address the issue on which it granted cert); Jessica Silbey & Eva E. Subotnik, *What the* Warhol *Court Got Wrong: Use as an Artist Reference and the Derivative Work Doctrine*, 47 COLUM. J.L. & ARTS 353 (2024) (criticizing *Warhol* for failing to appreciate the significance of that artist's creation of the *Prince Series* under an artist reference license); Christopher Jon Sprigman, *Copyright, Meet Antitrust: The* Warhol *Court and the Rise of Competition Analysis in Fair Use*, 134 YALE L.J.F. 298 (2025), https://www.yalelawjournal.org/forum/copyright-meet-antitrust-the-supreme-courts-warhol-decision-and-the-rise-of-competition-analysis-in-fair-use [https://perma.cc/7LEE-T9V8] (criticizing *Warhol*'s market effects analysis). For a more positive take on *Warhol*, see Michael W. Carroll & Peter Jaszi, *The Triumph of Three Big Ideas in Fair Use Jurisprudence*, 99 TUL. L. REV. 453, 469–74 (2025).

6. *See infra* Section I.B.

7. The other four favored purposes are news reporting, teaching, scholarship, and research. 17 U.S.C. § 107. None of these purposes were relevant in *Warhol*. Hence, the Court's silence about them as fair use justifications is understandable.

8. *See, e.g.*, Carroll & Jaszi, *supra* note 5, at 474–79 (discussing significance of codification of the fair use doctrine).

9. *See, e.g.*, *Andy Warhol Found. for the Visual Arts, Inc.*, 143 S. Ct. at 1273–74.

10. *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (recognizing news reporting as a generally favored fair use purpose); *id.* at 553–54 (noting that photocopying for classroom use may be fair); *id.* at 582 (Brennan, J., dissenting) (research as favored use); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 465 (1984) (Blackmun, J., dissenting) (teacher copying material for class may be fair use); *id.* at 477–78 (need for fair use to allow researchers and scholars to quote from earlier works).

11. *See, e.g.*, *Sony*, 464 U.S. at 442 (private, noncommercial purpose favored fair use); *id.* at 465 n.12 (Blackmun, J., dissenting) (legislative history gave example of making copy for blind person as fair use).

a different purpose than the original may support a finding of fair use, which may include, but is not limited to, targeting the earlier work for criticism or comment.[12] This reaffirmation is notable because critics of broad interpretations of transformative purposes had wanted the Court to abjure it.[13]

This Article shows that the text of the fair use provision, its legislative history, and the rich and multifaceted fair use case law interpreting that doctrine support the view that a multitude of justifications exists for second authors and other users in making fair uses of earlier authors' works.[14] Part I introduces copyright's fair use doctrine, Congress's broad conception of this doctrine when codifying it, and the role that transformative purposes have played in the fair use case law since the mid-1990s. It shows that *Warhol* recognized five other justifications for fair uses besides targeting and reaffirmed many aspects of its earlier, highly influential decision in *Campbell v. Acuff-Rose Music, Inc.*,[15] albeit with some qualifications. Part II shows that justifications for fair uses may be based on other statutorily favored purposes besides criticism and comment as well as on other fair use factors (*e.g.*, when takings are insignificant or harm to copyright markets is speculative). Part III identifies three types of purposes for using parts of earlier works that frequently justify findings of fair use, despite their not being identified in the 1976 Act: (1) uses of earlier works as evidence to support their authors' theories or illustrate some point; (2) uses that promote broader public access to information without undermining incentives for first-generation creators; and (3) uses that enable fair competition and ongoing innovation. While these three types of purposes do not exhaust the grounds on which second comers may justify fair uses, Part III shows that the robustness of the fair use doctrine goes well beyond targeting for criticism and comment and other statutorily favored uses.[16]

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12. *Warhol*, 143 S. Ct. at 1275–77. See *infra* Part III for a discussion of numerous different purpose fair use cases.

13. For a discussion of copyright industry efforts to rein in or reject the broad interpretations of post-*Campbell* fair use case law and the Court's rejection of their arguments in *Google* and *Warhol*, see Carroll & Jaszi, *supra* note 5, Section IV.B. *See also infra* note 62 and accompanying text.

14. For example, the American Law Institute's upcoming Restatement of copyright law recognizes justifications for fair uses beyond targeting a work for criticism or comment. RESTATEMENT OF COPYRIGHT § 6.12 cmt. g (A.L.I., Tentative Draft No. 6, 2025).

15. 510 U.S. 569 (1994) (rap parody of popular song as plausible fair use).

16. I have previously done qualitative analyses of fair use decisions and the reasons (that is, justifications) courts have relied on when deciding whether challenged uses are fair (or not). *See generally, e.g.*, Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815 (2015) (discussing post-*Campbell* cases and predicting future

I. AN INTRODUCTION TO FAIR USE AND *WARHOL*'S TREATMENT OF FAIR USE JUSTIFICATIONS

The fair use doctrine of U.S. copyright law has sometimes been traced to Justice Story's mid-nineteenth century decision in *Folsom v. Marsh*,[17] which involved a dispute over a two-volume condensation of a twenty-volume work featuring letters of George Washington, among other things.[18] In assessing whether the defendant's secondary work was a "piracy" of the earlier work, Story thought one should "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[19] More holistically, Story considered whether the challenged use was "a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the plaintiffs."[20] Story ultimately decided that Marsh had taken too much from Folsom's work and hence was an infringer.[21]

Folsom notwithstanding, fair use did not begin to take shape as a doctrine until the twentieth century.[22] Prior to the codification of fair use in the 1976 Act, courts did not systematically articulate the grounds on which fair uses could be justified. One useful source of information about

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case developments) [hereinafter Samuelson, *Possible Futures*]; Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) [hereinafter Samuelson, *Unbundling*] (grouping fair use cases into policy-relevant "clusters" to discern predictable patterns). Empirical studies of the fair use case law include: Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 553–54 (2008); Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 166, 180 (2019); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 732–34 (2011); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 49 (2012).

17. 9 F. Cas. 342 (C.C.D. Mass. 1841).

18. *Id.* at 345. *See, e.g.*, Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1372–73 (2011) (acknowledging that *Folsom* is commonly said to be the origin of this doctrine, although arguing that the fair use concept predated *Folsom*).

19. *Folsom*, 9 F. Cas. at 348. These elements are quite similar to the fair use factors set forth in § 107. *See* 17 U.S.C. § 107.

20. *Folsom*, 9 F. Cas. at 348.

21. *Id.* at 349.

22. In the nineteenth and early twentieth-century, courts sometimes said that a second comer's use of an earlier work was fair use if it took only ideas or other unprotectable elements. *See, e.g.*, *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (fair use to take ideas or themes from another's work); *Simms v. Stanton*, 75 F. 6, 7, 17 (C.C.N.D. Cal. 1896) (book on physiognomy made fair use of earlier book on same subject). For a discussion of the sparse nineteenth century and early twentieth century fair use case law, *see* WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 18–64 (1985). *See also* Carroll & Jaszi, *supra* note 5, at 469–74 (discussing the evolving conception of fair use from *Folsom* to codification in 1976).

the fair use doctrine prior to its codification is a study prepared by Professor Alan Latman in the mid-1950s in anticipation of a planned revision of the Copyright Act of 1909.[23] The Latman Study identified eight categories of plausible fair uses: incidental uses, review and criticism, parody and burlesque, scholarly works and compilations, personal or private use, news reporting, uses in litigation, and uses for nonprofit or governmental purposes[24]––although the study noted that no decided cases had issued as to four of them.[25] The study found no consensus in the case law or commentary about theoretical justifications for fair uses.[26] It identified four options for Congress to consider: (1) not mentioning fair use in the revised statute, (2) mentioning fair use in the statute but in only a general way, (3) articulating general criteria of fair use in the statute, and (4) identifying in the statute specific types of uses that should be considered fair.[27]

Congress chose the third option.[28] As enacted, § 107 first states that "the fair use of a copyrighted work . . . is not an infringement of copyright."[29] Its preamble signals that purposes "such as criticism, comment, news reporting, teaching . . . , scholarship, or research" may support fair use rulings.[30] The "such as" clause that precedes the list of favored uses has been understood to signal that other purposes may also justify fair uses.[31]

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23. ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS (1958), Study No. 14, *in* Copyright Law Revision Studies Nos. 14–16, prepared for the S. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION (Comm. Print 1960) [hereinafter LATMAN STUDY].

24. *Id.* at 8–14.

25. Latman reported that no cases had been decided involving review and criticism, personal or private use, uses in litigation, or governmental uses. *See id.*

26. *See id.* at 6–7.

27. *Id.* at 32–34.

28. See *infra* text accompanying notes 183–187 for a discussion of compromises that led to changes in the text of § 107 prior to codification.

29. 17 U.S.C. § 107. Section 107 does not say that it is a defense to charges of infringement, although that is how the provision has been construed. If plaintiffs make a prima facie showing that defendants have violated one or more exclusive rights, those defendants may raise fair use as a defense. The Second Circuit has held that courts may consider fair use as a defense to infringement claims, even if the defendant did not raise the issue. *See Romanova v. Amilus Inc.*, 138 F.4th 104, 120–22 (2d Cir. 2025). Nor does § 107 say that fair use is an affirmative defense on which the defendant bears the burden of persuasion, although the Court has asserted that it is. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985). *But see* Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH L. REV. 685, 696–703 (2015) (explaining that Congress did not intend for fair use to be an affirmative defense in this sense).

30. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994).

31. *See infra* Section II.F (discussing the "such as" clause).

Section 107 directs consideration of four factors in making fair use assessments: (1) the purpose and character of the challenged use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the use, and (4) the effect of the challenged use on the potential market for or value of the copyrighted work.[32] Section 107 also states that courts should also consider whether the challenged use has a commercial or nonprofit educational purpose. Courts have understood this part of § 107 to mean that nonprofit purposes are more likely than commercial uses to qualify as fair uses.[33]

The House Report accompanying the 1976 Act characterized fair use as "one of the most important and well-established limitations on the exclusive right of copyright owners," noting that it had been applied in "innumerable copyright actions over the years."[34] The specific wording of § 107 "is the result of a process of accretion," which had been shaped in part by an intense controversy about photocopying and other machine reproductions of in-copyright works.[35] Although "no generally applicable definition [of fair use] is possible," the House Report characterized fair use as "an equitable rule of reason."[36] It stated that courts had "evolved a set of criteria which, though in no case definitive or determinative, provide some guage [sic] for balancing the equities," which Congress

32. 17 U.S.C. § 107. Courts sometimes consider other factors. In *Harper & Row*, for instance, the Court took into account that The Nation had obtained a "purloined" copy of the soon-to-be-published Ford memoir. *Harper & Row*, 471 U.S. at 563. In *Google*, the Court took into account the public benefit of the challenged use. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1206 (2021).

33. *See infra* Section II.A.

34. H.R. REP. NO. 94-1476, at 65 (1976). It noted that the Register of Copyrights had identified some uses likely to be fair. *Id.* at 66. The Register's report did not mention personal use copies or nonprofit or government purpose copies, which Latman included in his taxonomy. *See* REGISTER OF COPYRIGHTS, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (Comm. Print 1961).

35. The House Report devoted several pages to a discussion of reproduction of copyrighted materials for classroom use. It concluded that "a specific exemption . . . for educational and scholarly purposes" was not warranted but recognized the "need for greater certainty and protection for teachers." H.R. REP. NO. 94-1476, at 66–67. Rep. Kastenmeier, who shepherded the 1976 Act through Congress, reflected on the complexities of adapting copyright law in an era in which technologies were disrupting many sectors. *See generally* Robert W. Kastenmeier, *Copyright in an Era of Technological Change: A Political Perspective*, 14 COLUM. J.L. & ARTS 1 (1989) (describing then-current technological developments and identifying present and future legislative issues to consider). He foresaw that technological changes would continue to challenge this law and offered suggestions about how Congress should approach future such challenges. *Id.* at 24.

36. H.R. REP. NO. 94-1476, at 65.

had distilled into the four codified fair use factors.[37] Even so, "each case raising the question must be decided on its own facts."[38]

The House Report anticipated that fair use would be applied in an "endless variety of situations and combinations of circumstances," which was why it was impossible to formulate "exact rules in the statute."[39] It anticipated that fair use would evolve over time and disclaimed any intent "to freeze the doctrine in the statute, especially during a period of rapid technological change," adding that "courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[40] Congress "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[41]

A. The Emergence of Transformative Purpose Justifications for Fair Uses

In the 1980s, fair use case law had begun to mature. Productive uses of in-copyright works, such as quotations in biographies, histories, critical commentaries, and the like, were often, but not always, found fair.[42] Parodies were more likely than satires to be found fair.[43] Incidental and litigation uses tended also to be adjudged fair uses.[44] News reporting favored fair use unless the report took too much or took too systematically.[45]

The first time that the Supreme Court put its stamp on the fair use doctrine was in the 1984 decision *Sony Corp. of America v. Universal City Studios, Inc.*,[46] which held that private noncommercial copying,

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37. *Id.*

38. *Id.*

39. *Id.* at 66.

40. *Id.*

41. *Id.*

42. *See, e.g.*, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1255, 1265 (2d Cir. 1986) (fair use to quote from earlier work about abortion). *But see New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 577, 593–94 (2d Cir. 1989) (substantial taking from unpublished works held unfair).

43. *See, e.g.*, *Elsmere Music, Inc. v. Nat'l Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (per curiam) (parody held fair use); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978) (satirical comic book held unfair).

44. *See, e.g.*, *Jartech, Inc. v. Clancy*, 666 F.2d 403, 407–08 (9th Cir. 1982) (making copies of adult movie for litigation purposes was fair use); *Italian Book Corp. v. Am. Broad. Cos.*, 458 F. Supp. 65, 70–71 (S.D.N.Y. 1978) (incidental inclusion of music in news coverage of parade was fair use).

45. *See, e.g.*, *Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60–62 (2d Cir. 1980) (broadcaster took too much of plaintiff's video); *Wainwright Sec. Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 96–97 (2d Cir. 1977) (systematic taking of news was unfair).

46. 464 U.S. 417 (1984).

such as consumers' uses of Betamax machines to make time-shift recordings of television programs, should be presumed fair.[47] The next year the Court revisited fair use in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[48] which ruled that a news magazine had made an unfair use of expression in a soon-to-be-published memoir of former President Gerald Ford.[49] However, the Court's third fair use ruling, *Campbell v. Acuff-Rose Music, Inc.*, has had an indelible effect on the evolution of this doctrine.[50]

Campbell tested the fairness of 2 Live Crew's rap parody of Roy Orbison's popular song *Pretty Woman*. *Campbell* opined that when a second comer's use of a pre-existing work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message," it has a "transformative" purpose, which supports its fair use defense.[51] Under this standard, 2 Live Crew's parody was transformative because it was a critical commentary on the Orbison song and had a different purpose and character than that song.[52]

Although a transformative purpose may favor fair use, the Court made clear that such a purpose was no guarantee that the challenged use

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47. *Id.* at 420–21. The Court heard arguments in two fair use cases prior to 1976, but reached split decisions in both. *See Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1362 (Ct. Cl. 1973) (library photocopying of research articles held fair use), *aff'd by an equally divided Court*, 420 U.S. 376 (1975); *Benny v. Loew's Inc.*, 239 F.2d 532, 536–37 (9th Cir. 1956) (TV show burlesque of movie held unfair), *aff'd by an equally divided Court sub nom.*, *Columbia Broad. Sys., Inc. v. Loew's Inc.*, 356 U.S. 43 (1958). *Williams & Wilkins* is discussed *infra* text accompanying notes 179–181, 186, 300–305.

48. 471 U.S. 539 (1985).

49. *Id.* at 569. The Court's ruling in *Stewart v. Abend*, while mainly concerned with whether the petitioners could continue to authorize performances of a movie based on a short story whose copyright was owned by Abend, also affirmed a Ninth Circuit ruling against Stewart's fair use defense. 495 U.S. 207, 236–38 (1990).

50. 510 U.S. 569 (1994). While *Campbell* has had the most significant impact on fair use case law, *Sony*'s significance should not be underestimated for limiting copyright liability for private noncommercial copying and for adopting a rule that copyright owners cannot stop the development of technologies having substantial noninfringing uses. *See, e.g.*, Pamela Samuelson, *The Generativity of* Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831, 1850, 1862, 1875 (2006); Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of* Sony*,* Galoob *and* Sega, 1 J. INTELL. PROP. L. 49, 63–64 (1993) [hereinafter Samuelson, *Implications of* Sony*,* Galoob *and* Sega].

51. *Campbell*, 510 U.S. at 579. The Court adopted this standard from Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111, 1116 (1990), citing Leval's article thirteen times.

52. *Campbell*, 510 U.S. at 581–83 (characterizing 2 Live Crew's parody song as intending to ridicule the original song's naive, romantic character).

will be found fair.[53] Other fair use factors must also be considered.[54] The Court recognized that parodists often poke fun at popular works such as the Orbison song and that they must generally take qualitatively substantial parts to conjure up the original to make fun of the earlier work, so neither the second nor third factors disfavored Campbell's fair use defense.[55] It also directed consideration of fair use factors in relation to one another, so that the amount taken factor should be assessed in light of the user's transformative purpose.[56] The Court recognized that 2 Live Crew's use of the Orbison song would not supplant demand for the original song, and noted that transformative uses of earlier works were less likely to usurp the earlier work's markets than non-transformative uses.[57] Yet, the Court remanded *Campbell* so that lower courts could consider whether 2 Live Crew's use of the Orbison song interfered with a market for licensing rap parody derivatives.[58]

The post-*Campbell* case law warmly embraced the transformative purpose standard and its spillover effects on other fair use factors,[59] much to the dismay of some prominent copyright industry groups. When the Court decided in 2020 to review the Court of Appeals for the Federal Circuit (CAFC)'s decision to overturn a jury verdict in favor of Google's fair use defense for reusing parts of the Java API in which Oracle claimed copyright, critics of the post-*Campbell* transformative purpose case law perceived it as an opportunity to persuade the Court to affirm the CAFC's narrow interpretation of fair use.[60] The CAFC held that Google had a non-transformative commercial purpose in reimplementing 11,500 creative Java API declarations, use of which harmed Oracle's markets.[61] Ten of the thirty-two amicus curiae briefs filed in support of Oracle had copyright lawyer and copyright industry group signatories.[62]

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53. *Id.* at 579.

54. *Id.* The Court also acknowledged that challenged uses may be fair even if the second comer's use was non-transformative, citing *Sony* approvingly for this proposition. *Id.* (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984)).

55. *Id.* at 586–89.

56. *Id.* at 586–87.

57. *Id.* at 590–91.

58. *Id.* at 593–94.

59. *See, e.g.*, Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Purpose Eating the World?*, 61 B.C. L. REV. 905, 908–09, 930–32 (2020); Beebe, *supra* note 16, at 603–04.

60. *See, e.g.*, Carroll & Jaszi, *supra* note 5, at 503–05.

61. *Oracle Am., Inc. v. Google, Inc.*, 886 F.3d 1179, 1196–99, 1206–10 (Fed. Cir. 2018), *rev'd sub nom.*, *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

62. The ten amicus briefs were filed by the Association of American Publishers (AAP), the Copyright Alliance, the Motion Picture Association (MPA), and the Recording Industry Association of America (RIAA), as well as by Ten Creator Rights

Notwithstanding considerable copyright industry support for narrowing the fair use doctrine, the Court's 2021 decision in *Google LLC v. Oracle America, Inc.*[63] reaffirmed the importance of transformative purposes and repeated *Campbell*'s definition of that term, holding that Google's reimplementation of parts of Oracle's Java interfaces was a transformative fair use as a matter of law.[64] It found Google's purpose to be transformative because of the substantial creativity it enabled, and decided the other factors also supported fair use, for the functionality of the declarations meant they were further from the core of copyright than implementing code.[65] Google only used those parts of the Java API that were reasonably necessary to perform common functions for its Android platform, and Android had not harmed Oracle's markets because it operated in a very different market.[66]

Despite the setback in *Google*, copyright industry groups perceived the *Warhol* case as another opportunity to persuade the Court to narrow its interpretation of the fair use and transformative purpose doctrines. These groups filed another round of amicus curiae briefs urging the Court to repudiate the broad interpretation of fair use on which the Warhol Foundation was relying.[67]

B. Warhol *on Transformative Purposes and Justifications for Fair Uses*

The facts of the *Warhol* case can be simply stated.[68] Lynn Goldsmith, a commercial photographer, took a series of black and white

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Associations, Copyright Thought Leaders, Helienne Lindvall et al. and the Songwriters Guild of America, Ralph Oman, Arthur Miller, and Nine Professors and Scholars of Intellectual Property Law. *See* Docket, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (2021). Four of those groups also filed amicus briefs in *Warhol* criticizing broad interpretations of the transformative test. *See* Brief for *Amicus Curiae* Assoc. of Am. Publishers in Support of Respondents at 19–21, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023) (No. 21-869); Brief for the Copyright All. as *Amicus Curiae* in Support of Neither Party at 4–7, *Warhol*, *supra*; Brief of *Amicus Curiae* the Motion Picture Assoc., Inc. in Support of Neither Party at 3–7, 10–13, *Warhol*, *supra*; Brief for *Amici Curiae* Recording Indus. Ass'n of Am ("RIAA") & Nat'l Music Publishers' Ass'n ("NMPA") in Support of Respondents at 24–28, *Warhol, supra*.

63. 141 S. Ct. 1183 (2021).

64. *Id.* at 1203–04, 1209.

65. *Id.*

66. *Id.* at 1200–08.

67. *See, e.g.*, Brief of Amicus Curiae The Motion Picture Ass'n, Inc. in Support of Neither Party at 14–18, *Warhol*, 143 S. Ct. 1258 (No. 21-869) (urging the Court to restrict transformative uses to those that shed light on the original).

68. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 317–22 (S.D.N.Y. 2019); *Andy Warhol Found. for the Visual Arts, Inc., v. Goldsmith*, 11 F.4th 26, 32–36 (2d Cir. 2021).

photos of the musician Prince in 1981.[69] Vanity Fair decided to publish a story about Prince's rise to fame in 1984 and to commission an artist to create a graphic image to accompany this story.[70] It paid Goldsmith's agent $400 for a license to use one of Goldsmith's photos as an artist reference;[71] Andy Warhol was the artist it chose for this commission. Later that year, the magazine published the story alongside a Warhol work known as the *Purple Prince*.[72]

After Prince died in 2016, Condé Nast (Vanity Fair's parent company) decided to publish a commemorative magazine honoring his legacy.[73] It contacted the Warhol Foundation for permission to reuse the *Purple Prince* on the front cover.[74] After discovering that Warhol had made sixteen graphic works based on Goldsmith's photograph (known as the *Prince Series*), Condé Nast decided to use a different one, known as the *Orange Prince*, for the cover.[75] The Foundation received $10,000 for granting this license.[76]

When Lynn Goldsmith saw the *Orange Prince* on the cover of the Condé Nast magazine, she surmised it was based on one of her 1981 photographs.[77] She contacted the Foundation and informed its staff that she regarded the *Orange Prince* as an infringing derivative work, asserting that the Foundation could claim no copyright in it.[78] When she learned about the sixteen works constituting the *Prince Series*, she claimed they were all infringing derivatives and demanded a seven figure amount as compensation for the Foundation's exploitation of them.[79]

The Foundation was so confident that these works did not infringe her copyright that it sought a declaratory judgment that Warhol's *Prince Series* works were not substantially similar to Goldsmith's photograph, or alternatively, that Warhol had made fair uses of the photograph when creating the *Prince Series*.[80] Goldsmith counterclaimed, charging the Foundation with infringement.[81] She asked the court for an award of damages and profits, an injunction against further exploitation of the

69. *Warhol*, 382 F. Supp. 3d at 318.

70. *Id.*

71. *Id.* For a discussion of artist reference agreements, see generally Silbey & Subotnik, *supra* note 5.

72. *Warhol*, 143 S. Ct. at 1295 (Kagan, J., dissenting).

73. *Warhol*, 382 F. Supp. 3d at 321.

74. *Id.*

75. *Warhol*, 143 S. Ct. at 1269.

76. *Id.*

77. *Warhol*, 382 F. Supp. 3d at 321.

78. *Warhol*, 11 F.4th at 32.

79. Transcript of Oral Argument at 7, *Warhol*, 143 S. Ct. 1258 (No. 21-869).

80. Complaint at 2, 26–29, *Warhol*, 382 F. Supp. 3d 312 (No. 17-cv-02532).

81. *Warhol*, 382 F. Supp. 3d at 322.

Prince Series, and an order declaring that the Foundation had no copyright interests in those works.[82]

A trial court ruled that Warhol's creation of the *Prince Series* was fair use.[83] It regarded those works as transformative under the Court's *Campbell* decision because they conveyed a different meaning and message than the Goldsmith photograph.[84] Although recognizing that the photograph was creative and not previously published, the court reasoned that these considerations were offset because Warhol created the *Prince Series* under an artist reference license.[85] The court regarded Warhol's work as having "removed nearly all [of] the photograph's protectible elements," so the amount taken factor tipped in favor of fair use.[86] And because Warhol's work operated in a very different market sector than Goldsmith's photograph, the court thought the market effects factor also favored the Foundation's fair use claim.[87]

Goldsmith's appeal found favor with a Second Circuit panel. It ruled that the *Prince Series* works were non-transformative because they "retain[ed] the essential element[] of its source material" and had the same purpose as Goldsmith's photograph in depicting Prince for licensing to magazines.[88] While not saying that the Warhol works were infringing derivatives, the appellate court thought they were closer to that status than to transformative fair uses.[89] It regarded the nature-of-the-work and amount taken factors as favoring Goldsmith because her photograph was creative and unpublished and because Warhol's use was both quantitatively and qualitatively substantial.[90] It opined that the *Prince Series* posed cognizable harm to Goldsmith's markets, as witnessed by the commercial license granted to Condé Nast to use the *Orange Prince* on the cover of the commemorative issue.[91] Because all four fair use factors disfavored fair use, the court concluded that Warhol's use of Goldsmith's photograph was unfair as a matter of law.[92]

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82. *See* Amended Answer and Counterclaim at 27, *Warhol*, 382 F. Supp. 3d 312 (No. 17-cv-02532).

83. *Warhol*, 382 F. Supp. 3d at 324, 331.

84. *Id.* at 325–26.

85. *Id.* at 327.

86. *Id.* at 329–30.

87. *Id.* at 330–31.

88. *Andy Warhol Found. for the Visual Arts, Inc., v. Goldsmith*, 11 F.4th 26, 43, 49 (2d Cir. 2021).

89. *Id.* at 44.

90. *Id.* at 49–50.

91. *Id.* at 49.

92. *Id.* at 51. It also held that the *Prince Series* works were substantially similar to the Goldsmith photograph. *Id.* at 54.

Rather than appealing the Second Circuit's overall ruling against the Foundation's fair use claim, it sought instead Supreme Court review of only one specific issue: whether the 1984 creation of the *Prince Series* had a transformative or non-transformative purpose.[93] Its certiorari petition emphasized that the Second Circuit had not taken account of the Court's reaffirmation of the broad definition of transformative purposes in *Google*.[94] It argued that the *Prince Series* works added something new, with a further purpose and different character, and conveyed a new message or meaning than Goldsmith's photograph, which was why the Court should reverse the Second Circuit ruling that Warhol lacked a transformative purpose and remand for further consideration of the fair use claim, giving due weight to Warhol's transformative purpose.[95]

The Court took the case to consider whether Warhol's 1984 creation of the *Prince Series* was transformative under *Campbell* and *Google*.[96] This was, after all, the issue about which the Foundation and Goldsmith had been disputing since 2017. All but one of the briefs to the Court focused on the 1984 creation issue. The exception was the Solicitor General's amicus brief in support of Goldsmith,[97] which advised the Court that the only issue it needed to address was the transformative purpose (or not) of the 2016 license the Foundation granted to Condé Nast.[98]

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93. Petition for a Writ of Certiorari at i, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023) (No. 21-869).

94. *Id.* at 17–20. The Second Circuit issued its first opinion in *Warhol* before the *Google* ruling. *See Warhol*, 992 F.3d at 108, 125 (reversing lower court's fair use ruling). The Foundation petitioned for rehearing and rehearing en banc, arguing that the panel ruling was inconsistent with *Google*. *See* Petition for Panel Rehearing and Rehearing En Banc at 9, *Warhol*, 11 F.4th at 32 n.1 (No. 19-2420-cv). The Panel issued a revised opinion asserting that its decision was consistent with *Google*. 11 F.4th at 51–52.

95. Brief for Petitioner at 44–46, *Warhol*, 143 S. Ct. 1258 (No. 21-869). The Foundation must have expected that a reversal on this ground would require the Second Circuit to reassess its ruling on the other fair use factors, as courts have often decided that when a challenged use has been ruled transformative, there are spillover effects on other fair use factors. *See, e.g.*, Asay, Sloan & Sobczak, *supra* note 59, at 908; Beebe, *supra* note 16, at 604.

96. *See Warhol*, 142 S. Ct. at 1412; *supra* note 93 and accompanying text (question presented in Foundation's petition for cert).

97. Brief for the United States as Amicus Curiae Supporting Respondents, *Warhol* 143 S. Ct. 1258 (No. 21-869).

98. *Id.* at 9–11. That brief indicated that Warhol's 1984 creation of the *Prince Series* might have been fair use for his own edification or covered by the license that Vanity Fair obtained from Goldsmith's agent. *Id.* at 32. *But see* Samuelson, *supra* note 5, at 520–24 (showing that the lower court decisions were almost entirely focused on the fairness (or not) of the 1984 creation of the *Prince Series*).

The Court took the Solicitor General's advice and stated that it was expressing "no opinion as to the creation, display, or sale of any of the original Prince Series works" and that it understood Goldsmith to have abandoned all other claims to relief, which would include her claim that Warhol's creation of the *Prince Series* infringed Goldsmith's derivative work rights.[99] The Court focused its analysis instead on whether the Foundation had a transformative purpose when granting a commercial license to Condé Nast in 2016 to use one of the *Prince Series* (the *Orange Prince*) on the front cover of a magazine commemorating Prince's life.[100]

The Court decided that the Foundation's grant of a license to Condé Nast did not have a transformative purpose because its use of the *Orange Prince* had the same purpose as Goldsmith's photograph: being available for licensing to magazines wanting to publish depictions of Prince.[101] *Warhol* observed that when a secondary work has the same purpose as the original, this poses "the problem of substitution—copyright's bête noire" because the secondary work "is more likely to substitute for, or 'supplan[t],'" demand for the earlier work.[102]

The Foundation's license grant had, moreover, a commercial purpose because Condé Nast paid the Foundation $10,000 for the license.[103] When a challenged use has the same purpose and is commercial, the Court indicated that the use is unlikely to be a fair use absent a compelling justification.[104] It noted that the *Orange Prince* did

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99. *Warhol*, 143 S. Ct. at 1278 & n.9. I have elsewhere questioned the Court's conclusion that Goldsmith abandoned the 1984 claims. *See* Samuelson, *supra* note 5, at 530, 548–49. From the time she filed a counterclaim against the Foundation, Goldsmith had consistently asserted that all sixteen of the *Prince Series* works were infringing derivatives in which the Foundation owned no copyright. *Id.* at 515, 530.

100. *Warhol*, 143 S. Ct. at 1277–78. Justice Kagan, joined by Chief Justice Roberts, wrote a spirited dissent arguing that Warhol had made a transformative fair use of the Goldsmith photograph in 1984. *Id.* at 1291, 1297 (Kagan, J., dissenting).

101. *Id.* at 1278. *But see* Karol, *supra* note 5, at 107 (granting a license to use a copyrighted work does not infringe any exclusive right for which a fair use defense might be needed).

102. *Warhol*, 143 S. Ct. at 1274. Some critics of the *Warhol* decision have questioned the Court's conclusion that Goldsmith's and the Foundation's works were competitors in magazine licensing markets. *See, e.g.*, Lunney, *supra* note 5, at 199 ("There was no evidence in the record that the use of *Orange Prince* for the magazine cover cost Goldsmith a sale, in the sense that but-for *Orange Prince*, Goldsmith's black-and-white photo would have been used instead."). *See generally* Sprigman, *supra* note 5 (suggesting that antitrust conceptions of market substitution may be helpful in the post-*Warhol* fair use case law and questioning whether the *Prince Series* and Goldsmith's photograph were competing in the same market).

103. *Warhol*, 143 S. Ct. at 1279–80.

104. *Id.* at 1280. *But see infra* text accompanying notes 366–371, 389–398 (discussing cases involving biographies and documentaries in which courts found fair uses despite the two works having similar commercial purposes).

not target Goldsmith's photograph for criticism or comment and that the Foundation had not offered any other justification for the license grant.[105] Hence, the Court concluded that the Foundation's licensing use had a non-transformative purpose.[106] Because the Foundation had not asked the Court to review other aspects of the Second Circuit's ruling, *Warhol* affirmed the Second Circuit's decision.[107]

Warhol did not, as some of Goldsmith's amici hoped, abjure transformative purposes as a consideration favoring fair uses. Indeed, it reaffirmed the significance of transformative purposes.[108] However, it refined the definition of that standard. Both *Campbell* and *Google* had included the phrase "altering [the first work] with new expression, meaning or message" in their articulations of transformative purposes that favor fair use defenses.[109] *Warhol*'s restatement of the transformative purpose standard de-emphasized that phrase,[110] although indicating that a second comer's contribution of new expression may be relevant to whether the secondary work has a different purpose than the original.[111]

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105. *Warhol*, 143 S. Ct. at 1285–86.

106. *Id.* The Court made several statements about the Foundation's argument that the *Prince Series* works had transformative purposes because they had new messages or meanings. One was to abjure this as a standalone test for transformativeness. *Id.* at 1281–82. It noted that many derivative works add new meanings or messages to their source works, but that does not mean that they qualify as fair uses. *Id.* at 1282. Second, a new meaning or message may be relevant to whether the second work has a different purpose than the original. *Id.* Third, *Warhol* restated the definition of transformative without the new "meaning or message" clause. *Id.* at 1283. Fourth, somewhat contradicting the second point was the Court's claim that judges were not well-equipped to assess new meanings or messages. *Id.* As Lemley and Tushnet observe, the Court routinely makes judgments about the meanings and messages of content in First Amendment cases. Lemley & Tushnet, *supra* note 5, at 91, 110.

107. *Warhol*, 143 S. Ct. at 1287. The Court did not rule on the fairness of the 1984 creation of the *Prince Series*, *id.* at 1278, on which the Second Circuit focused when concluding that Warhol's purpose was non-transformative. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 40–44 (2d Cir. 2021).

108. *See, e.g.*, *Warhol*, 143 S. Ct. at 1275 ("A use that has a further purpose or different character is said to be 'transformative.'"); *id.* at 1282 ("*Campbell* did describe a transformative use as one that 'alter[s] the first [work] with new expression, meaning, or message.'"). Elsewhere I have explained that the Solicitor General's amicus brief seems to have hijacked the *Warhol* case by focusing solely on the 2016 license. *See* Samuelson, *supra* note 5, at 525–27.

109. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202 (2021).

110. *Warhol*, 143 S. Ct. at 1272–73.

111. *Id.* at 1273. *See, e.g.*, *Romanova v. Amilus Inc.*, 138 F.4th 104, 118–19 (2d Cir. 2025) (rejecting lower court's finding that the defendant had a transformative purpose when posting the plaintiff's photograph on its website because of a new meaning or message); *Griner v. King*, 104 F.4th 1, 9–10 (8th Cir. 2024) (defendant's commercial use of meme image held non-transformative despite its conveying a different meaning or message). After *Warhol*, it is also questionable whether the "new aesthetic" conception

Going forward, *Warhol* directs courts to focus on how different or similar the putative fair user's purpose is to the purpose of the source work.[112] This is consistent with much of the post-*Campbell* fair use case law.[113] *Warhol* made clear, as in *Campbell*, that a transformative purpose, of itself, is not dispositive of the fair use inquiry.[114]

C. Warhol *Recognized That Targeting Is Not the Only Fair Use Justification*

Justice Sotomayor's *Warhol* opinion gave considerable attention to the importance of justifying fair uses and noted that targeting earlier works for criticism and comment is a well-established justification.[115] If one cherry picks the opinion emphasizing statements on these concepts, it may be possible to persuade oneself that justifications have become a new subfactor of the purpose factor and that targeting an earlier work for criticism or comment is the only viable fair use justification.[116]

However, a more careful reading of *Warhol* reveals that this view is mistaken. The Court gave five examples of justifiable fair uses that did not involve targeting of earlier works for purposes of criticism of or comment on the works' contents, as this Section will detail. Most

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of transformative purposes, as in *Cariou v. Prince*, 714 F.3d 694, 706–08 (2d Cir. 2013), remains viable.

112. *Warhol*, 143 S. Ct. at 1282–83.

113. For a review of the post-*Campbell* case law, see, *e.g.*, Samuelson, *Possible Futures*, *supra* note 16, at 845–50.

114. *See Warhol*, 143 S. Ct. at 1272–73; *Campbell*, 510 U.S. at 579; *see, e.g.*, *Peterman v. Republican Nat'l Comm.*, 320 F. Supp. 3d 1151, 1158–59 (D. Mont. 2018) (denying RNC's motion to dismiss despite its different purpose than photographer in using her image).

115. Justice Sotomayor's *Warhol* opinion uses "justif" words (justified, unjustified, justification, etc.) twenty-nine times. *Google* used "justif" words only twice, but neither use concerned fair use justifications. *Campbell* used "justif" words five times, but only twice in relation to the purpose factor and then only to say that satirists must justify their borrowing. *See infra* text accompanying note 151.

116. *See, e.g.*, *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 97 F.4th 699, 714–15 (10th Cir. 2024) (interpreting *Warhol* as requiring a secondary work to either target or offer a compelling justification to qualify for fair use), *vacated and reh'g granted in part*, 101 F.4th 787 (10th Cir. 2024), No. 22-6086 (10th Cir. argued July 10, 2024); *Sedlik* Brief, *supra* note 4, at 45; Balganesh & Menell, *supra* note 4, at 436 (asserting that putative fair users must persuade courts that their uses of earlier works have "independent justification[s]" and "distinct purpose[s]" from the originals, and therefore must (1) provide an "independent rationale" for making those uses, (2) show "the necessity of targeting the [plaintiff's] work," and (3) explain why their rationale for making the uses was "compelling"). Although Judge Leval's opinion in *Romanova* cited to the Balganesh-Menell article, *Romanova*, 138 F.4th at 112, it went on to acknowledge numerous types of justifications for engaging in fair uses, citing this Article. *Id.* at 115–18.

significant was *Warhol*'s focus on Google's reimplementation of Oracle interfaces in the Court's earlier *Google* decision.[117] A second was *Warhol*'s riff on the *Google* decision's hypothetical about an artist's painting of a soup can label.[118] A third was its approval of the *Authors Guild v. Google*[119] decision, which held that Google had made fair use of millions of books by digitizing them to index their contents and to serve up snippets in response to search queries.[120] A fourth was *Warhol*'s recognition that a newspaper was justified in publishing a photograph relevant to a local controversy.[121] A fifth was *Warhol*'s positive citation to the *Sony* decision, which upheld fair use for making private noncommercial copies of television programs.[122] All but the last were secondary uses for different purposes than the original, which means they had transformative purposes under *Warhol*'s formulation of that standard.[123] *Warhol* also identified several uses of the *Prince Series* that might qualify as fair uses.[124] Each of these examples of justifications that are beyond targeting an earlier work for criticism or comment warrants some elaboration.

Warhol's most extensive discussion of justifications for fair uses beyond criticism and comment focused on Google's purpose in using parts of the Java API when creating its Android platform.[125] It observed that *Google* "looked, first, to whether the purpose of the [secondary] use was significantly different from that of the original; and, second, to the strength of other justifications for the use."[126] It noted that "[a]lthough Google's use was commercial in nature, it copied Sun's code, which was 'created for use in desktop and laptop computers,' 'only insofar as needed

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117. *Warhol*, 143 S. Ct. at 1277 n.8.

118. *Id.* at 1280.

119. 804 F.3d 202 (2d Cir. 2015).

120. *Id. Warhol*, 143 S. Ct. at 1276, 1284, 1286.

121. *Warhol*, 143 S. Ct. at 1275 n.5.

122. *Id.* at 1277.

123. Balganesh and Menell's claim that *Warhol* has limited transformative fair uses to those that target plaintiffs' works for criticism or comment, *supra* note 4 at 437, ignores *Warhol*'s acknowledgement of these five alternative justifications, the Court's more general endorsement of different purpose fair uses, and the majority's and concurrence's identifications of reuses of the *Prince Series* that might not infringe Goldsmith's copyright. *See also* Michael W. Carroll & Peter Jaszi, Campbell *at 30: A Retrospective Appreciation*, 111 CORNELL L. REV. (forthcoming 2026) (manuscript at 68–69) (on file with author) (criticizing Balganesh & Menell's misreading of *Warhol*).

124. *See infra* text accompanying notes 146–147 (discussing four types of uses of the *Prince Series* works identified in *Warhol* as warranting different fair use analyses).

125. *Warhol*, 143 S. Ct. at 1277 n.8 (discussing *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021)). *Google* is discussed at greater length *infra* Section III.C. Justice Sotomayor cited *Google* sixteen times, frequently also quoting from it.

126. *Warhol*, 143 S. Ct. at 1277 n.8.

to include tasks that would be useful in smartphone[s].'"[127] Google had, moreover, "put Sun's code to use in the 'distinct and different computing environment' of its own Android platform, a new system created for new products."[128] Google's use of the Java API declarations was also "justified . . . because 'shared interfaces are necessary for different programs to speak to each other' and because 'reimplementation of interfaces is necessary if programmers are to be able to use their acquired skills.'"[129] These statements show that *Warhol* acknowledged the existence of fair use justifications that did not involve targeting the earlier work (*i.e.*, API declarations from the Java Special Edition) for comment or criticism.

A second fair use justification recognized in *Warhol* was its elaboration on *Google*'s statement that "[a]n 'artistic painting' might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted 'advertising logo to make a comment about consumerism.'"[130] *Warhol* acknowledged that such a use would be transformative because the artist's use of the logo "serves a completely different purpose," than the soup maker's purpose, namely, "to comment on consumerism rather than to advertise soup."[131] The Court characterized this kind of secondary use as a kind of targeting because it "'conjures up' the original work to 'she[d] light' on the work itself, not just the subject of the work."[132] It is, however, implausible that Andy Warhol's purpose in painting soup cans was to shed light on the soup's label design. Warhol's purpose in painting soup labels was thus more like a satire than a parody. He was commenting on consumerism in society, not about the label, the logo, the soup inside the can, or the soup company. With this example, *Warhol* acknowledged that artistic social commentary can qualify as fair use.

A third viable fair use justification can be found in *Warhol*'s analysis of the Second Circuit's *Authors Guild v. Google* decision.[133] That case analyzed the fairness of Google's digitization of millions of in-copyright books from research library collections for purposes of indexing their contents and serving up short snippets of book contents in response to

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127. *Id.* (quoting *Google*, 141 S. Ct. at 1203).

128. *Id.* (quoting *Google*, 141 S. Ct. at 1203).

129. *Id.* (quoting *Google*, 141 S. Ct. at 1203–04).

130. *Id.* at 1280 (quoting *Google*, 141 S. Ct. at 1203) (referencing Andy Warhol's art work series depicting Campbell's Soup cans).

131. *Id.* at 1281.

132. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, 588 (1994)).

133. 804 F.3d 202 (2d Cir. 2015), *cited in Warhol*, 143 S. Ct. at 1276, 1284. The *Authors Guild* decision is discussed in more detail *infra* Section III.B.

user search queries.[134] In affirming a lower court ruling that Google's use was fair, *Authors Guild* said Google had made a transformative use of the books because Google Book Search "augments public knowledge by making available information *about* Plaintiffs' books without providing the public with a substantial substitute" for the books.[135] The enrichment of public knowledge praised by the Second Circuit did not involve any comment on or criticism of the works that Google copied; yet, the court regarded the use as justified notwithstanding the lack of targeting.[136] In keeping with *Campbell*'s definition of transformative purposes, the Second Circuit regarded Google's uses of the books as having a different purpose than the originals.[137]

Warhol explicitly agreed with *Authors Guild* that "provid[ing] otherwise unavailable information about the original" was a justifiable fair use purpose.[138] It quoted the Second Circuit for the following proposition:

> The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives, shrinking the protected market opportunities of the copyrighted work.[139]

This statement recognizes a larger range of fair use justifications than targeting for criticism or comment.

A fourth justification recognized in *Warhol* is shown by its approving citation to the First Circuit's decision in *Núñez v. Caribbean Int'l News Corp.*,[140] which held that a newspaper had a transformative purpose in reproducing Núñez's nude photographs of Miss Puerto Rico Universe to cover the controversy about whether she should still wear that crown.[141] *Warhol* quoted that court's explanation: "[The] newspaper's reproduction, without alteration, of photograph[s] of beauty pageant winner to explain controversy over whether her title should be

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134. *Authors Guild*, 804 F.3d at 209–10 (discussing Google Book Search).

135. *Id.* at 207. The court reached the same conclusion as to the snippet function. *Id.*

136. *See id.* at 212–14, 229.

137. *Id.* at 215–18.

138. *Warhol*, 143 S. Ct. at 1284 (citing *Authors Guild*, 804 F.3d at 215–16).

139. *Warhol*, 143 S. Ct. at 1276 (quoting *Authors Guild*, 804 F.3d at 214).

140. 235 F.3d 18 (1st Cir. 2000).

141. *Id.* at 21–23, *cited in Warhol*, 143 S. Ct. at 1275 n.5. Judge Leval's decision in *Romanova* also gives *Núñez* as an example of a justifiable fair use. *Romanova v. Amilus, Inc.*, 138 F.4th 104, 116–17 (2d Cir. 2025).

withdrawn had a transformative purpose because 'the pictures were the story.'"[142] The newspaper was not targeting the photographs to comment on or criticize the quality of Núñez's work.[143] The photographs informed the public about the controversy.[144]

Warhol's fifth example was its positive citation to *Sony Corp. of America v. Universal City Studios, Inc.*, yet another non-targeting case, for the proposition that consumers who used video tape recorders to make copies of broadcast television programs to watch at a later time (so-called time-shifting) were fair users.[145] This suggests that the Justices continue to consider this kind of private noncommercial use as justifiable, despite its non-transformative character.

Justice Sotomayor's opinion for the Court also identified two types of uses of the *Prince Series* works that would likely be treated differently than the commercial license to Condé Nast: uses of the prints and drawings for teaching purposes and uses of the works for a magazine article about Warhol.[146] While the Court's opinion did not go so far as to say these uses would necessarily be fair, it is worth noting that educational uses and informative uses like these would be for very different purposes than the magazine licensing for Prince-related-content purposes of Goldsmith's and Warhol's originals. These uses would have transformative purposes under *Warhol*'s formulation, and because Goldsmith's photograph would not be viable substitutes for either use, the risk of supplanting demand for Goldsmith's work would be very low or non-existent.

Justice Gorsuch's concurrence identified two additional non-competitive different purposes that might qualify as fair uses: display of the *Prince Series* works in a nonprofit museum and reproductions in a for-profit book commenting on twentieth century art.[147] Justice Gorsuch added that "while the Foundation may often have a fair use defense for Mr. Warhol's work, that does not mean it always will."[148] These statements imply that the Justices did not believe that the Foundation's

142. *Warhol*, 143 S. Ct. at 1275 n.5 (quoting *Núñez*, 235 F.3d at 22).

143. It also mattered in *Núñez* that the photographer had not established a licensing market for uses of his works by newspapers. The photographs at issue were prepared for her modeling portfolio. *Núñez*, 235 F.3d at 23, 25.

144. *Id.* at 22.

145. *Warhol*, 143 S. Ct. at 1277 (citing *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 499–51 (9th Cir. 1984)). That passage of *Warhol* also cited *Campbell* for contrasting a parody performed a single time by students at a school with a commercial parody advertisement. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994)).

146. *Id.* at 1278 n.10, 1279 n.12.

147. *Id.* at 1291 (Gorsuch, J., concurring).

148. *Id.* (Gorsuch, J., concurring).

ability to use the *Prince Series* was heavily encumbered by Goldsmith's photograph.

By recognizing multiple justifications for fair uses, *Warhol* left the door open for courts to continue to consider a wide range of possible justifications for fair uses, especially when the secondary works have different purposes than the originals.[149]

D. Warhol *on Justifications and Targeting in* Campbell

Warhol traces the principle that putative fair users need to provide a justification for their uses of other authors' works, such as targeting earlier works for criticism or commentary, to *Campbell v. Acuff Rose Music, Inc.*[150] Although the Court in *Campbell* referred to justifications in the course of its fair use analysis, it did so more sparingly than in *Warhol* and with a much lighter touch.[151] The Court's only textual reference to justification in relation to the purpose factor referred to the need for authors of satires, not parodies, to justify "the very act of borrowing."[152] In a footnote, *Campbell* indicated that satire's borrowing might be justified if the user did not take too much expression from the plaintiff's work and/or did not undermine the market for the original.[153] If the satire's market is remote from the source work's market, for instance, the satire would seemingly pose little or no risk of supplanting demand for the original.

Campbell's second textual reference to justifications can be found in its discussion of the third factor. The Court noted that "[h]ere [in the amount taken factor], attention turns to the persuasiveness of a parodist's justification for the particular copying done," which "harken[s] back" to the purpose factor.[154] Justification, in other words, is not just a first factor

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149. Judge Leval's *Romanova* decision discusses *Warhol* and affirms that, consistent with that decision, numerous types of uses may qualify as fair uses. *Romanova v. Amilus, Inc.*, 138 F.4th 104, 115–18 (2d Cir. 2025).

150. *See Warhol*, 143 S. Ct. at 1276, 1285 (tracing targeting to *Campbell*); *id.* at 1276, 1280–81, 1283, 1285–86 (tracing justification to *Campbell*).

151. *Campbell* used the "justif" words only five times, twice in relation to other topics. *See Campbell*, *v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (regarding justifications for injunctive relief in infringement cases); *id.* at 581 (rejecting a proposed presumption of fairness for parodies). *Cf. supra* note 115.

152. *Campbell*, 510 U.S. at 581.

153. *Id.* at 580–81 n.14; *see, e.g.*, *Blanch v. Koons*, 467 F.3d 244, 254–55 (2d Cir. 2006) (recognizing artist's justification in making use of a "slick fashion photograph" to "satirize life as it appears when seen through the prism of slick fashion photography").

154. *Campbell*, 510 U.S. at 586.

consideration, for the amount taken is also an important consideration in assessing whether secondary uses are justifiable fair uses.[155]

Importantly, *Campbell* did not say, let alone hold, that satire was ineligible for fair uses, but only that satirists needed to justify their takings. Parodic uses, by contrast, draw their justifications from the statutorily favored uses of criticism and comment.[156] Even so, the amount taken must, in keeping with *Campbell*'s interweaving of the fair use factors, be reasonable in light of the second author's parodic purpose.[157] The challenged work's parodic purpose, moreover, needed only "reasonably [to] be perceived."[158] This was important in *Campbell* because 2 Live Crew's song could also be perceived as a comment on the group's perceptions of women, not just on the Orbison song.[159] *Campbell* went on to say that when "the alleged infringer merely uses [the first work] 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."[160]

Warhol quotes the second half of this passage twice,[161] both times with ellipses to give the impression that *Campbell* said that any time that a challenged work does not comment on the original, the chances of a fair use victory diminish. What *Campbell* actually said was that diminishment is warranted when an alleged infringer appropriates expression from the plaintiff's work "to get attention or to avoid the drudgery" of creating something new.[162] By removing references to the attention-or-drudgery point, *Warhol* gives the impression that *Campbell*

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155. *Campbell* also observed in a footnote that the smaller the taking, the less critical was the need to show a parodic purpose; only satirists' borrowings from earlier works require justification. *Id.* at 580–81 n.14. For an extended defense of satire as fair use, see Tyler T. Ochoa, *Dr. Seuss, The Juice and Fair Use: How the Grinch Silenced a Parody*, 45 J. COPYRIGHT SOC'Y USA 546, 594–98 (1998).

156. *Campbell*, 510 U.S. at 580–83.

157. *Id.* at 586.

158. *Id.* at 582.

159. *Id.* at 582–83.

160. *Id.* at 580. The Court further clarified the point in a footnote:

> [W]hen there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.

Id. at 581 n.14.

161. *Warhol*, 143 S. Ct. at 1276, 1285 (both times omitting "which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh" from its quotations of *Campbell* (quoting *Campbell*, 510 U.S. at 580)).

162. *See Campbell*, 510 U.S. at 580.

requires defendants to show that they are criticizing or commenting on the earlier work to justify fair uses. In this way, *Warhol* suggests that *Campbell* endorsed a more restrictive fair use framework than it did. The *Campbell* attention-or-drudgery emphasis is the more persuasive explanation for why the prospect of fair use might diminish. One should not read too much into the ellipses, however, in view of *Warhol*'s endorsement of the other fair use justifications it acknowledges.

Warhol also gives the mistaken impression that targeting the plaintiff's work for criticism or comment was highly important in *Campbell*. The *Campbell* majority, in fact, makes only one reference to targeting, and then only in a footnote.[163] It suggests that even if a second work only loosely targets an earlier work, it may still qualify as having a parodic purpose.[164]

Justice Kennedy's *Campbell* concurrence, by contrast, expressed the view that targeting the first work for criticism or comment was an essential prerequisite for fair use in parody cases.[165] He favored a rule that "parody may qualify as fair use only if it draws upon the original composition to make humorous or ironic commentary about that same composition," adding, "[t]he parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well)."[166] He would have "confine[d] fair use protection to works whose

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163. *Id.* at 580 n.14.

164. *Id.* ("A parody that more loosely targets an original than the parody presented here may still be sufficiently aimed at an original work to come within our analysis of parody."). *Warhol* did not cite *Campbell*'s note 14 in this context, though Justice Kagan's dissent acknowledged it. *See Warhol*, 143 S. Ct. at 1304 (Kagan, J., dissenting) ("[*Campbell*] observed that as the 'extent of transformation' increases, the relevance of targeting decreases. *Google* proves the point." (citation omitted) (quoting *Campbell*, 510 U.S. at 581 n.14)).

165. *Campbell*, 510 U.S. at 596–600 (Kennedy, J., concurring). *See* Carroll & Jaszi, *supra* note 123 (manuscript at 58–61) (explaining that some Justices would initially have preferred to decide *Campbell* as a parody case, but Justice Souter persuaded them to support a more general framework for fair use analysis, which he drew from Judge Leval's Harvard article).

166. *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring) ("[T]hough the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody." (citing and quoting *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992))) ("[A] humorous or satiric work deserves protection under the fair-use doctrine only if the copied work is at least partly the target of the work in question." (citing and quoting *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986))). The words "target" or "targeting" appear eight times in the Kennedy concurrence. In addition, the Kennedy concurrence cited two contemporary law review articles, one written by Judge Richard Posner, which itself used the word "target" 10 times in arguing that a parody should use the first work as a target and not as a weapon. *See Campbell*, 510 U.S. at 597–98 (Kennedy, J., concurring) (citing Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 73 (1992)).

very subject is the original composition and so necessitates some borrowing from it."[167] Justice Kennedy alone considered targeting to be a requirement for secondary works to be characterized as parodies.[168]

Justice Souter's unanimous opinion in *Campbell* had a much more nuanced and flexible view of fair use than Justice Kennedy's concurrence (or than Justice Sotomayor's opinion in *Warhol*). *Campbell* certainly does not characterize targeting as a precondition for successful fair use claims. Indeed, *Campbell* is not just—or even mainly—a case about why parodies may qualify as fair uses. That decision's main contribution to fair use jurisprudence was its articulation of a general framework for assessing whether a second comer's use was fair or unfair.[169] It directed courts to consider each of the fair use factors, to assess the degree to which each weighed in favor or against fair use or was neutral, to reflect on each factor in relation to other factors, and finally to make a holistic assessment about fairness (or not) of the challenged use in light of copyright law's purposes.[170] *Campbell* said that the task of assessing fair uses "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[171]

After *Campbell*, fair use analysis is no longer a math game or "a score card that promises victory to the winner of the majority" of the fair use factors.[172] *Warhol* reaffirmed *Campbell* by recognizing that transformativeness should be thought of as a matter of degree, and the more transformative the second comer's purpose, the more this would affect how the other factors should be weighed.[173] In the rich and varied post-*Campbell* case law, courts have well understood that this framework was *Campbell*'s main contribution to fair use jurisprudence. Despite *Warhol*'s rearticulation of the transformative purpose standard, *Campbell*

167. *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring) ("[I]f the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up." (citing and quoting *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981))).

168. *Id.* at 597–98 (Kennedy, J., concurring).

169. For a thorough assessment of *Campbell* as a "watershed" decision that articulated a general framework for analyzing fair uses, see Carroll & Jaszi, *supra* note 123 (manuscript at 3, 54–71).

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

171. *Id.* at 577 (first citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985); and then citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984)). Balganesh and Menell interpret *Warhol* as having limited transformative fair uses to those that target the original for criticism or comment. *See* Balganesh & Menell, *supra* note 4, at 442–43. Their proposed bright-line rule is inconsistent with the Court's rejection of such rules. *See supra* note 123.

172. Leval, *supra* note 51, at 1110.

173. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1275 (2023).

should continue to be applied as it has generally been for the past three decades.

II. JUSTIFICATIONS GROUNDED IN THE TEXT OF § 107

The codification of fair use in the 1976 Act has enabled courts to develop a rich and varied jurisprudence interpreting and applying this doctrine.[174] This Part discusses justifications that can be derived from the text of § 107. By articulating in § 107 six types of purposes for uses of pre-existing works that are likely to favor fair use and setting forth four factors to be considered, Congress signaled that criticism, comment, news reporting, teaching, scholarship, and research were justifiable purposes for using another author's work and would qualify as fair uses if consideration of the other factors did not tip the balance against one of these statutorily enumerated and socially valuable purposes.

Because § 107's distinction between commercial and nonprofit educational purposes sometimes looms large in fair use cases, this Part begins by explaining how that distinction came to be part of § 107. It also explains how courts have generalized the distinction so that noncommercial purposes, not just nonprofit educational ones, tend to be favored over commercial purposes. It then discusses how fair use defenses have fared in cases involving each of the statutorily favored categories. Falling within one of the favored purposes supplies a justification for the use which must, of course, be weighed in relation to the other factors. While fair use case law and commentary have tended to couple justifications with the purpose factor, sometimes other fair use factors have provided the principal justifications for fair uses.

A. Commercial and Noncommercial Purposes

The text of § 107's purpose factor directs consideration of whether the challenged use "is of a commercial nature or is for [a] nonprofit educational purpose[]."[175] Notwithstanding the textual reference to nonprofit educational purposes, courts have generalized the distinction as one between commercial and noncommercial purposes, which the courts

174. *See generally* PATRY, *supra* note 22 (relating the legislative history of § 107); *see also* WILLIAM F. PATRY, PATRY ON FAIR USE § 9 (2025) (updated, online reference relating the legislative history of § 107); Carroll & Jaszi, *supra* note 5, at 474–79 (discussing the significance of codification). Professor Beebe has reported that between 1978 and 2019, courts issued 579 fair use opinions in 435 cases. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 1 (2020). Beebe also reports that there are far more law review articles written about fair use than fair use opinions. *Id.* at 3 n.4.

175. 17 U.S.C. § 107(1).

treat as subfactors of the purpose factor.[176] The noncommerciality of a defendant's purpose has tended to favor fair use defenses while commerciality tends to tip against fair use, although less so when the purpose of the challenged use is transformative.[177] Commerciality, like transformativeness, is a matter of degree.[178]

The first notable fair use case to challenge the lawfulness of noncommercial copying was *Williams & Wilkins Co. v. United States*.[179] Williams & Wilkins (W&W), a publisher of medical journals, sued the U.S. government for infringement because library staff at the National Institutes of Health (NIH) and National Library of Medicine (NLM) made photocopies of individual scientific articles for research scientist patrons, including eight published by W&W.[180] A majority of the appellate panel ruled in favor of the government's fair use defense, in part because of this activity's noncommercial character and its role in advancing scientific knowledge.[181]

While the *Williams & Wilkins* case was pending in the courts,[182] Congress was mulling over what to do about noncommercial

176. *See, e.g.*, *Harper & Row*, 471 U.S. at 562–63.

177. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1204 (2021).

178. *Warhol*, 143 S. Ct. at 1276–77, 1277 n.8 (discussing *Google*). Courts have sometimes decided that commercial actors have made noncommercial uses of protected works. *See, e.g.*, *Am. Soc'y for Testing & Materials v. UpCodes, Inc.*, 752 F. Supp. 3d 480, 489, 512 (E.D. Pa. 2024) (online posting of building codes, after being adopted as laws, may be fair uses).

179. 487 F.2d 1345, 1349 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). For a fuller discussion of the *Williams & Wilkins* case, see Pamela Samuelson, *Fair Use Defenses in Disruptive Technology Cases*, 71 UCLA L. REV. 1484, 1494–98 (2024); *see also infra* notes 300–304 and accompanying text (discussing *Williams & Wilkins*). The Latman Study did not identify any cases challenging noncommercial uses of a work, although it indicated that a noncommercial use would be more likely than a commercial use to be found fair. LATMAN STUDY, *supra* note 23, at 13. *But see Wihtol v. Crow*, 309 F.2d 777, 778–83 (8th Cir. 1962) (nonprofit educational use held to infringe copyright).

180. NIH and NLM made far more copies than just those eight. *Williams & Wilkins*, 487 F.2d at 1348 (NIH fulfilled 85,744 researcher requests for copies of scientific articles in 1970, about 930,000 total copied pages).

181. *Id.* at 1354, 1356–57, 1362.

182. The major omnibus copyright law revision process commenced in the 1950s with a series of studies on various copyright issues. PATRY, *supra* note 22, at 213. The Copyright Office, which had been authorized by Congress to lead the revision process, prepared a preliminary draft bill in 1963, and the legislative process went through numerous revisions in the 1960s. *See id.* at 222–61. Passage of the bill in the 1970s was held up by several new technology issues. Congress ended up spinning those issues off to the National Commission on New Technological Uses of Copyrighted Works in 1974. *See id.* at 262–63, 280–81. The revision bill finally passed both houses of Congress in 1976 and was duly signed into law. *Id.* at 316. The legislative history of that Act is voluminous. *See generally* OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 2001) (17 volumes).

photocopying by libraries, educators, and individuals, issues that were then highly contentious.[183] Publisher and author groups wanted Congress to require that these actors get permission for every copy made of in-copyright materials, and library and educator organizations sought outright exemptions from copyright liability.[184] The first compromise reached in this copyright war was adding "criticism, comment, news reporting, teaching, scholarship, or research" to the draft fair use provision to signal that these were favored purposes.[185] A second compromise was a statutory exemption for libraries to allow them to make single copies for patrons if done without direct financial reward.[186] A third compromise added language to § 107's preamble to indicate that teachers could make multiple copies for classroom use, and a fourth added the clause "whether [a challenged] use is of a commercial nature or is for nonprofit educational purposes" to the text of the purpose factor.[187]

Litigation challenging the legality of private, noncommercial home copying commenced soon after enactment of the 1976 Act when two movie studios sued Sony Corp., the manufacturer of Betamax video tape recorder (VTR) machines, which enabled consumers to make unauthorized copies of broadcast television programs, in *Sony Corp. of America v. Universal City Studios, Inc.*[188] Although some commentators and judges thought that noncommercial uses of protected works were and should be unlawful,[189] the Supreme Court in *Sony* disagreed with this

183. *See* PATRY, *supra* note 22, at 262.

184. *Id.* at 225–26.

185. *Id.* at 229.

186. *Id.* at 321–22 (discussing 17 U.S.C. § 108(a)). This essentially codified the Court of Claims's ruling in *Williams & Wilkins*.

187. *Id.* at 304. Legislators who were shepherding the copyright revision bill persuaded representatives of publishers, authors, and educators to negotiate some guidelines ("Classroom Guidelines") for multiple copies for classroom use. *Id.* at 307–08; *see also* H.R. REP. NO. 94-1476, at 67 (1976) (describing efforts of Judiciary Subcommittee Chairman Kastenmeier and others to bring about these meetings). These guidelines later were given some deference in litigation over copy shop coursepack copying of parts of in-copyright works. *See, e.g.*, *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1535–36 (S.D.N.Y. 1991). *But see Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1274 (11th Cir. 2014) (rejecting plaintiffs' argument that copying beyond that allowed by the Classroom Guidelines disfavored fair use defenses).

188. 464 U.S. 417, 419–20 (1984). The Latman Study had identified personal use copying as one category of plausible fair uses, although there was no case law on the issue. Latman anticipated that this might become a more significant issue because of photocopying. LATMAN STUDY, *supra* note 23, at 11–12. For a more contemporary perspective on personal use copying, see generally Jessica D. Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

189. Some commentators believed that the very act of making unauthorized copies of in-copyright works, even for noncommercial purposes, was and should be

view.[190] Sony was, of course, a commercial entity, but it successfully argued that purchasers of its VTR machines were making fair uses when taping broadcast television programs because of the private and noncommercial nature of this copying.[191]

The trial court held that all private home tapings were fair uses.[192] And because Sony's Betamax machines had these substantial non-infringing uses, the trial court decided Sony was free to continue to sell VTRs to the public.[193] The Ninth Circuit reversed, ruling that all unauthorized home copying of in-copyright programs infringed copyrights and that Sony was contributorily liable for its consumers' infringements because it knowingly made material contributions to those infringing copies.[194]

The Supreme Court reversed the Ninth Circuit, deciding that the most popular use of VTRs, namely, making time-shift copies of programs for later viewing, was fair use.[195] It agreed with the trial court that private noncommercial copying by VTR users favored fair use.[196] Indeed, the Court opined that courts should generally presume that private noncommercial copying is fair use, a presumption that should only be overcome if copyright owners showed the use had caused harm or posed "some meaningful likelihood of future harm."[197] Because Universal stipulated that it had suffered no harm to date and introduced only speculative evidence of future harms, the Court ruled that it had not overcome this presumption.[198]

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unlawful. *See, e.g.*, David Ladd, *Home Recording and Reproduction of Protected Works*, 68 A.B.A. J. 42, 43 (1982); Melville B. Nimmer, *Copyright Liability for Audio Home Recording: Dispelling the* Betamax *Myth*, 68 VA. L. REV. 1505, 1524–25 (1982); Project, *New Technology and the Law of Copyright: Reprography and Computers*, 15 UCLA L. REV. 939, 954 (1968) [hereinafter UCLA Project]; PATRY, *supra* note 22, at 201. The Ninth Circuit's *Sony* decision did not address the market effects factor, but viewed the non-productive, consumptive nature of home taping and copying of entire commercially valuable programs to be unfair. *See Sony*, 464 U.S. at 427 & n.9 (discussing *Universal City Studios, Inc., v. Sony Corp of Am.*, 659 F.2d 963, 971–72, 974 (9th Cir. 1981)); *see also id.* at 496 (Blackmun, J., dissenting) (purely consumptive uses are not what fair use was designed to achieve).

190. *Sony*, 464 U.S. at 421. For a more extensive discussion about home taping and fair use debates, see, for example, Samuelson, *supra* note 179, Section II.B.

191. *Sony,* 464 U.S. at 456.

192. *Id.* at 425.

193. *Id.* at 426–27.

194. *Id.* at 427–28.

195. *Id.* at 454–56.

196. *Id. Sony* thereby broadened the not-for-profit purpose in § 107 beyond educational ones.

197. *Id.* at 451.

198. *Id.*

Sony also announced that courts should presume that commercial uses of in-copyright works were unfair,[199] a dictum that the Court repeated the very next year in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, which held that a magazine publisher had not made fair use of parts of a soon-to-be-published memoir in an article that quoted a few hundred words from it.[200] For much of the next decade, courts routinely invoked this commercial purpose presumption in subsequent fair use cases.[201]

The Court finally abrogated the commercial use presumption in its 1994 *Campbell* decision, offering a far more nuanced view about commercial purposes. *Campbell* opined that whether a challenged use is commercial or noncommercial is "only one element of the first factor enquiry" and should be part of "a broader investigation into 'purpose and character'" of the challenged use.[202] It noted that the statutory reference to commercial or noncommercial purposes was preceded by the word "including," which suggested that commercial uses may also be fair.[203] The Court added: "Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence."[204] Just as "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement," the commercial character of a use should not bar a finding of fairness.[205]

Campbell observed that if "commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'"[206] *Campbell* expressed doubt that Congress intended to adopt a presumption of unfairness when uses were commercial.[207]

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199. *Id.*

200. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 569 (1985).

201. *See, e.g.*, Beebe, *supra* note 174, at 26 fig. 7.

202. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

203. *Id.*

204. *Id.* (first citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985); and then citing H.R. REP. NO. 94-1476, at 66 (1976)).

205. *Id.*

206. *Id.* (quoting *Harper & Row*, 471 U.S. at 592) (Brennan, J., dissenting).

207. *Id.* The Court added that such a rule "certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that '[n]o man but a blockhead ever wrote, except for money.'" *Id.* (quoting 3 JAMES BOSWELL, BOSWELL'S LIFE OF JOHNSON 19 (George Birkbeck Hill & L.F. Powell eds., 1934) (1791)).

Although the Court in *Campbell* acknowledged that 2 Live Crew's use of the Orbison song had a commercial purpose, it gave relatively little weight to this aspect of the group's purpose because their song posed little threat of supplanting demand for the Orbison song.[208] The Court reasoned that a parody or other lethal criticism of the original work might hurt the market for the original and interest in it might dry up because the criticism was so effective, but this was not the kind of market harm that copyright law should rectify.[209] It also pointed out that copyright owners are unlikely to be willing to license parodies or other kinds of critical commentaries on their works.[210] Hence, the Court concluded, these uses are unlikely to harm plausible markets.[211] Yet, the Court also recognized that fair use rulings should consider the potential of the challenged use to supplant demand for authorized derivatives.[212] Because Campbell had not shown the nonexistence of a rap parody market, the Court remanded the case for further findings.[213]

Campbell's caution about giving relatively little weight to commerciality in transformative purpose cases has been influential in many subsequent decisions,[214] including in the Court's *Google* decision.[215] No one doubted that Google's use of the Java API declarations was commercial, but the Court said this was "not dispositive of the first factor, particularly in light of the inherently transformative role that the reimplementation [of the Java API declarations] played in the new Android system."[216] *Google* noted that many common fair uses

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208. *Id.* at 591, 594. No one who purchased 2 Live Crew's song did so, for instance, to experience Orbison's original song.

209. *Id.* at 591–92.

210. *Id.* at 592.

211. *Id.*

212. *Id.* at 592–93.

213. *Id.* at 593–94.

214. *See, e.g.*, WILLIAM F. PATRY, PATRY ON FAIR USE § 3:4 (2025); Beebe, *supra* note 16, at 556. *But see* PATRY, *supra* (noting that some courts, "particularly the Ninth Circuit," continue to cite the *Sony* presumption in error); Beebe, *supra* note 16, at 600–01 (noting, after an initial decline, some renewed use of the *Sony* presumption post-*Campbell*). Professor Beebe attributes the persistence of the *Sony* presumption regarding commerciality in part to the Court's preference to "reconstrue" prior opinions that he thinks it should have "explicitly rescinded and replaced." *Id.* at 602.

215. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1204 (2021).

216. *Id.* Google did not, however, charge fees to developers for use of the Android platform, *id.* at 1190, so its use was arguably less explicitly commercial than secondary uses in many other fair use cases. *See, e.g.*, *Campbell*, 510 U.S. at 571–72 (recognizing commercial character of 2 Live Crew's song). The *Google* decision referred to the parts of the Java API that Google used as "declaring code." *Google*, 141 S. Ct. at 1192. However, "declarations" is the technically accurate term. *See, e.g.*, Joshua Bloch & Pamela Samuelson, *Some Misconceptions about Software in the Copyright Literature*,

are "indisputably commercial," including those involving news reporting, another statutorily favored fair use purpose.[217] The Court had "no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use," and referred to teaching and scholarship as among the types of noncommercial uses which were "paradigmatic examples of privileged copying."[218]

In *Warhol*, the Court emphasized that the Foundation's commercial purpose in granting Condé Nast a license to use the *Orange Prince* as a magazine cover counted against fair use, but that was chiefly because the Court thought it used that work for the same purpose and in the same marketplace as Goldsmith's work.[219] This presented "the problem of substitution—copyright's bête noire."[220] *Warhol* noted that Google's commercial use of the Java declarations was justified and accepted fair use must be based on a holistic understanding of the challenged use in light of copyright's larger purposes.[221] *Warhol*, like *Google*, also reiterated that "[t]he commercial nature of the use is not dispositive."[222] Indeed, the Court's opinion and the Gorsuch concurrence suggested that the Foundation's commercial licensing of *Prince Series* works for uses for which Goldsmith's photograph would be an unsuitable alternative should be treated differently.[223] Only uses that overlapped with and were competitive with Goldsmith's markets for that photograph were likely to be unfair. Some post-*Warhol* cases have held that commercial, yet non-competitive, uses may be fair uses.[224]

CSLAW '22: Proceedings of the 2022 Symposium on Computer Science and Law 131, 133 (Nov. 2022).

217. *Google*, 141 S. Ct. at 1204.

218. *Id.*

219. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1287 (2023).

220. *Id.* at 1274 ("The use of an original work to achieve a purpose that is the same as, or highly similar to, that of the original work is more likely to substitute for, or 'supplan[t],' [demand for] the work.").

221. *Id.* at 1276, 1277 n.8, 1287.

222. *Id.* at 1276.

223. *Id.* at 1279 n.12, 1289 (Gorsuch, J., concurring). *See also supra* text accompanying notes 146–148.

224. *See, e.g.*, *Keck v. Mix Creative Learning Ctr., LLC*, 116 F.4th 448, 454 (5th Cir. 2024); *Apple, Inc. v. Corellium, Inc.*, 510 F. Supp. 3d 1269, 1289 (S.D. Fla. 2020), *aff'd in part, vacated in part and remanded on other grounds*, No. 21-12835, 2023 WL 3295671 (11th Cir. May 8, 2023) (per curiam). *Apple* is discussed *infra* text accompanying notes 246–252; *Keck* is discussed *infra* text accompanying notes 290–296.

B. Criticism and Comment

Criticism and comment are more richly textured bases for using others' works than some commentators have recognized. This subsection shows that fair use may be justified not only when the second work targets a first work's expression, such as the parody in *Campbell*, but also when the secondary work targets the first work's subject or its author or otherwise enables the secondary work author's customers to target and interact with the first author's work.

Before discussing these types of targeting, it is worth noting that *Campbell* changed the terminology about fair use in the criticism-or-comment cases. Prior to *Campbell*, a second author's uses of an earlier work for criticism and comment were generally characterized as "productive" uses of those works.[225] That is, the second author produced a second work of authorship which used the earlier work in a manner that contributed to the progress of knowledge in keeping with copyright's constitutional purposes.[226] After *Campbell*, the terminology to describe such uses shifted from characterizing them as "productive" to describing them as "transformative" insofar as the secondary work's use of the earlier work had a different character or was for a different purpose than the original.[227]

When the author of a secondary work criticizes some expression in a preexisting work by parodying (or targeting, to use *Warhol*'s

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225. The Ninth Circuit ruled against fair use in *Sony*, for instance, because its use was not productive in this sense. *Universal City Studios v. Sony Corp. of Am.*, 659 F.2d 963, 971–72 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984). The Ninth Circuit described VTR copying as "intrinsic," *i.e.*, copying the work to consume it. *Id.*; *see also id.* at 970 (quoting LEON SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 24 (1978)) (explaining a work's intrinsic, or "ordinary," purpose). Justice Blackmun picked up on this argument throughout his dissent in *Sony*, *id.* at 478–80, 495–97 (Blackmun, J., dissenting), however, the *Sony* majority rejected a categorical requirement of a "productive" use and considered instead whether Sony VTRs were capable of "substantial noninfringing uses." *Id.* at 442, 455 n.40 (majority opinion).

226. *See, e.g.*, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1259 (2d Cir. 1986) ("From the earliest days of the doctrine, courts have recognized that when a second author uses another's protected expression in a creative and inventive way, the result may be the advancement of learning rather than the exploitation of the first writer."); *Diamond v. Am-Law Publ'g Corp.*, 745 F.2d 142, 147 (2d Cir. 1984) (describing the fair use defense as arising out of concern for the public interest in the development of intellectual property); *see also Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (discussing the constitutional grant concerning copyright to achieve an important public purpose); *infra* note 297 and accompanying text. The Latman Study reported that criticism and review were the sorts of uses that should be fair; yet, no cases had been decided on that basis. LATMAN STUDY, *supra* note 23, at 8–9.

227. *Compare Maxtone-Graham*, 803 F.2d at 1255 (referring to certain productive uses as favoring fair use), *with NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004) (quoting *Campbell*'s directive on transformativeness).

characterization) it, such a transformative purpose will favor fair use, as the Court signaled in *Campbell*.[228] Having this sort of transformative purpose is not dispositive of the fair use claim, as fairness must ultimately depend on a holistic analysis of the facts of the case.[229] Although *Campbell* rejected proposals that parodies should be presumed fair,[230] courts in the post-*Campbell* case law have overwhelmingly found fair use in parody cases.[231]

A good example of a second author's targeting of an earlier work not involving a parody is in *Suntrust Bank v. Houghton Mifflin Co.*[232] Alice Randall wrote a book entitled *The Wind Done Gone* (*TWDG*), which retold the story of *Gone With the Wind* (*GWTW*) from the viewpoint of an enslaved person, shattering *GWTW*'s romantic myth of plantation life and depicting the cruelty enslaved persons suffered in those days.[233] Even though Randall's book made substantial use of *GWTW* characters, settings, plot elements, and even dialogue, the court viewed *TWDG* as having a transformative purpose because it was "a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in *GWTW*."[234] *TWDG* did not just target the story in *GWTW*, however; it also sought to debunk a wider literature that romanticized Southern slaveowners' lives and culture, plantation

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228. The *Campbell* Court recognized that 2 Live Crew's song was not a clear-cut case of parody, defining parody as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994) (quoting AMERICAN HERITAGE DICTIONARY 1317 (3d ed. 1992)). But it decided that the song could be reasonably perceived as commentary or criticism of the original "to some degree":

> 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.

510 U.S. at 583. The Court concluded: "It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works." *Id.*

229. *Id.* at 577–78.

230. *Id.* at 581.

231. *See, e.g.*, *Keeling v. Hars*, 809 F.3d 43, 47 (2d Cir. 2015) (jury found parody play based on a movie was fair use); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114–15, 117 (2d Cir. 1998) (poster parodying famous photos of actress was fair use); *Master Card Int'l, Inc. v. Nader 2000 Primary Comm., Inc.*, No. 00 Civ. 6068, 2004 WL 434404, at *12–13, 15 (S.D.N.Y. Mar. 8, 2004) (political ad parody of credit card ads was fair use); *see also* Samuelson, *Unbundling*, *supra* note 16, at 2550 (discussing win rate of parody fair use defenses post-*Campbell*).

232. 268 F.3d 1257 (11th Cir. 2001).

233. *Id.* at 1259, 1270. The Eleventh Circuit considered *TWDG* as commentary or criticism of *GWTW*. *Id.* at 1268–69, 1271 (also discussing *Campbell* and parody).

234. *Id.* at 1269.

life, the role of slavery in the South's pre-Civil War society, and the nobility of the causes for which the Confederate soldiers fought.

The Eleventh Circuit thought that Randall's fair use defense was not undermined by her choice to criticize slavery in a commercial novel, rather than in a scholarly article.[235] Having found *TWDG* to be transformative because of its very different purpose and message,[236] the court gave little weight to the book's commercial purpose, decided the amount taken was reasonable in light of the transformative purpose, and concluded that *TWDG* was unlikely to harm markets for *GWTW* or licensed derivatives.[237]

Both *Campbell* and *Suntrust* involved targeting an earlier work's expression for criticism, but that is not the only kind of targeting that may qualify as fair use. Some secondary works use parts of an earlier author's works to criticize that author, rather than the works (as works) or the works' expressions. In *New Era Publications, Int'l v. Carol Publishing Group*,[238] for example, a biographer of L. Ron Hubbard, founder of Scientology, quoted extensively from Hubbard's writings to prove that he was "a thoroughgoing charlatan who lied relentlessly about his accomplishments," as well as being "'an arrogant, amoral egomaniac,' 'a paranoid, power hungry, petty sadist,' and — perhaps ironically in light of the claims in this case—'an outright plagiarist.'"[239] The biographer thus targeted Hubbard for criticism, not the quality of his writings. The other fair use factors also favored the biography's use of these materials.[240]

Targeting has sometimes aimed at the subject of the protected work, not that work's expression or its author.[241] Consider the Seventh Circuit's

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235. *Id.* Randall thought that a novel would be "a more powerful vehicle for her message." *Id. Suntrust* is an example of a case in which the "new meaning or message" of the secondary work was an important consideration. After *Warhol*, this new meaning/message would support a finding that Randall's use of *GWTW* elements was for a different purpose than the book's author's purpose.

236. *Id.* at 1269–71.

237. *Id.* at 1271–76. The court vacated the grant of a preliminary injunction against publication of *TWDG* because the defendants were likely to prevail with their fair use defense. *Id.* at 1277.

238. 904 F.2d 152 (2d Cir. 1990).

239. *Id.* at 153–54.

240. *Id.* at 157–60.

241. *See, e.g.*, *Peterman v. Republican Nat'l Comm.*, 320 F. Supp. 3d 1151, 1156 (D. Mont. 2018) (RNC raised fair use defense to Peterman's infringement claim for using her photograph in a mass mailing aimed at defeating a Democratic candidate); *Hill v. Pub. Advoc. of U.S.*, 35 F. Supp. 3d 1347, 1351–52 (D. Colo. 2014) (fair use case involving conservative group that used photo of gay couple to target political candidate who supported gay marriage).

decision in *Kienitz v. Sconnie Nation LLC*,[242] which upheld a fair use defense in which a secondary work targeted for criticism the mayor of Madison, Wisconsin, not the photographer-plaintiff Kienitz or the quality of his depiction of the mayor.[243] Kienitz sued Sconnie Nation because it made and sold T-shirts featuring an image of the mayor based on his photograph as part of a protest of the mayor's opposition to a block party that Sconnie favored.[244] Judge Easterbrook's opinion noted that Sconnie's T-shirts would not supplant demand for Kienitz's photograph, Kienitz had no plans to license the photograph for wearing apparel, and Sconnie had removed considerable details in making the colorful protest shirts, so they would not serve as substitutes for the photograph.[245] Under *Warhol*, this use would be considered transformative because of its very different purpose than the original.

Sometimes a putative fair users' customers want to target the plaintiff's copyrighted work, not the secondary work's expression, its author, or its subject. In *Apple, Inc. v. Corellium, Inc.*,[246] Apple sued Corellium for copyright infringement because Corellium's CORSEC platform was designed to enable its computer security researcher customers to make virtualization copies of iPhone operating systems (iOS) to study security features of the iOS.[247] The CORSEC platform enabled particular features and modifications germane to security research, for example, giving researchers the ability to view and examine system processes, take snapshots in certain states, and download software not otherwise permitted on an iOS device.[248]

A trial court ruled that Corellium had made fair uses of the Apple iOS programs. Its purpose was different than Apple's and hence, transformative; the nature-of-the-work factor was neutral; copying of whole iOS programs was reasonable in light of Corellium's purpose; and CORSEC's uses of the iOS had had no discernible effect on the market for iOS software.[249]

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242. 766 F.3d 756 (7th Cir. 2014).

243. *Id.* at 759. *Cf. Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22–23 (1st Cir. 2000) (unauthorized use of a professional photograph can be fair use under certain circumstances).

244. *Kienitz*, 766 F.3d at 757. Judge Easterbrook criticized the frequent emphasis on "transformative" purposes in other circuits' fair use decisions. *Id.* at 758. He nonetheless supported the lower court's fair use analysis. *Id.* at 760.

245. *Id.* at 759.

246. 510 F. Supp. 3d 1269 (S.D. Fla. 2020), *aff'd in part, vacated in part and remanded on other grounds*, No. 21-12835, 2023 WL 3295671 (11th Cir. May 8, 2023) (per curiam).

247. 2023 WL 3295671, at *1–2.

248. *Id.* at *2–3.

249. *Id.* at *4.

On appeal, Apple argued that CORSEC did not need to copy the whole of its iOS programs because this virtualization was not proportional to Corellium's customers' needs.[250] In affirming the lower court's ruling, the Eleventh Circuit pointed out that "Corellium can't know which parts of iOS any given customer will be interested in studying or where a customer's initial research might lead. So Corellium must make iOS broadly available so that researchers can target the portions of iOS relevant to their work."[251] Apple suggested that Corellium could give "*each* researcher access to only a portion of iOS based on what each *particular* researcher needs," but the appellate court considered this "infeasible" and stated that "[c]opyright doesn't require such inefficiencies."[252]

C. News Reporting

News reporting, long a highly valued purpose in First Amendment law, is also a statutorily favored purpose under § 107.[253] Despite the strong public interest in the widespread dissemination of news, the fair use case law involving news reporting is mixed. News-purpose defenses have tended to fail when the news disseminator scooped a copyright owner's right of first publication, took too much, or interfered with established licensing markets. Yet, such defenses have tended to succeed when the value of the disseminated news lay in the factual character of the content, not its expressiveness, or was reasonable in light of the news vendor's purpose.

The Court gave relatively little weight to a news reporting purpose when reviewing a ruling that a magazine had engaged in fair use when publishing excerpts from a forthcoming memoir about a historical event in the *Harper & Row* case.[254] It held that The Nation's excerpting of over 300 words from Gerald Ford's soon-to-be-published memoir about his pardon of Richard Nixon was unfair use of that book's expression.[255] The

250. *Id.* at *11.

251. *Id.*

252. *Id.* Apple petitioned for rehearing of the *Corellium* ruling, arguing that the *Warhol* decision had implications for the case, but the Eleventh Circuit denied Apple's petition, stating that *Warhol* did not alter any of its fair use conclusions. *Corellium*, No. 21-12835 (11th Cir. Aug. 23, 2023) (per curiam).

253. *See, e.g.*, Timothy B. Dyk, *News Gathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 931–34 (1992); H.R. REP. NO. 94-1476, at 65–66 (1976). The Latman Study lists news reporting as a favored fair use purpose. LATMAN STUDY, *supra* note 23, at 12 (discussing and citing cases).

254. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

255. *Id.* at 548–49.

Court gave far more weight to The Nation's commercial purpose, its intent to "scoop" the publisher's right of first publication, and its selection of the most telling part of the memoir.[256] Market harm existed because of Time Magazine's cancellation of the contract to publish excerpts concurrent with the book's publication.[257]

In the immediate post-*Harper & Row* case law, courts often presumed that a secondary work's uses of unpublished material was unfair.[258] This upset historians, biographers, journalists, and publishers who often need to use unpublished materials in their writings for historical context and/or accuracy.[259] Congress heeded these concerns in 1992 by amending § 107 to clarify that the use of unpublished materials does not preclude fair use as part of an overall assessment of this defense.[260] Yet, the unpublished nature of works still tends to weigh against news-purpose fair use defenses.[261]

When news purveyors take too much and/or interfere with established licensing markets, news-purpose defenses have generally failed.[262] Consider *Associated Press v. Meltwater U.S. Holdings, Inc.*[263] The court identified Meltwater as a news monitoring service with more than 4,000 U.S. subscribers, including businesses, nonprofit organizations, and government agencies.[264] Its Global Media Monitoring service enabled users "to monitor the news based on the presence of

256. *Id.* at 561–65.

257. *Id.* at 567. Had The Nation published these same excerpts after publication of the memoir, the fair use calculus would have been much different.

258. *See, e.g.*, Diane Conley, *Author, User, Scholar, Thief: Fair Use and Unpublished Works*, 9 CARDOZO ARTS & ENT. L.J. 15, 16 (1990). *But see Wright v. Warner Books, Inc.*, 953 F.2d 731, 734 (2d Cir. 1991) ("sparing" use of unpublished letters and journals in biography held fair use).

259. Conley, *supra* note 258, at 16, 18.

260. *See* Fair Use of Copyrighted Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992); *see also* Daniel E. Wanat, *Fair Use and the 1992 Amendment to Section 107 of the 1976 Copyright Act: Its History and an Analysis of Its Effect*, 1 VILL. SPORTS & ENT. L.F. 47 (1994) (discussing the 1992 congressional amendment regarding unpublished works and fair use).

261. *See, e.g.*, *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1168, 1172 (9th Cir. 2012) (magazine's publication of private wedding photos held unfair).

262. *See, e.g.*, *McGucken v. Pub Ocean Ltd.*, 42 F.4th 1149, 1153, 1164 (9th Cir. 2022) (website's use of photos of lake for online story held nontransformative interference with photographer's licensing market); *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 171, 180 (2d Cir. 2018) (news monitoring service's copying & distribution of news stories held unfair interference with licensing market); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 990, 994 (9th Cir. 1998) (broadcaster's use of video of violent altercation competed with licensed use for same purpose); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1120, 1123 (9th Cir. 1997) (same).

263. 931 F. Supp.2d 537 (S.D.N.Y. 2013).

264. *Id.* at 543.

certain words or phrases in news articles appearing on the Internet and to receive excerpts of those news articles."[265] Meltwater likened its service to search engines whose webscraping, indexing, and snippet-providing activities have been deemed fair uses.[266] The court distinguished those cases because the search engines' uses of in-copyright works were transformative due to their different purposes than the originals, whereas Meltwater supplied so much news contents to its subscribers that it supplanted demand for AP news and interfered with AP's licensing markets.[267]

A news-purpose fair use defense was successful, however, in *Swatch Group Management Services Ltd. v. Bloomberg L.P.*[268] Swatch claimed copyright in an audio recording of a telephone call in which Swatch executives informed more than one hundred investment analysts about its recent earnings record.[269] Although Bloomberg staff did not participate in the call, they obtained a copy of the recording and posted it online.[270] A trial court granted summary judgment to Bloomberg on its fair use defense.[271] On appeal, Swatch emphasized the nontransformative nature of Bloomberg's posting, its commercial purpose, its bad faith in posting content that Bloomberg must have known was recorded against Swatch policy, the unpublished nature of the recording, the copying and dissemination of the entire work, and the harm to a potential market for licensing this type of content.[272]

The Second Circuit agreed with the lower court that "Bloomberg's purpose in obtaining and disseminating the recording at issue was to make important financial information about Swatch Group available to investors and analysts," characterizing this information as "of critical importance to securities markets."[273] It discounted the commercial purpose because news reporting almost always has such a purpose, and

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265. *Id.*

266. *Id.* at 541, 544, 555.

267. *Id.* at 555–56; *see also Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 173–74 (2d Cir. 2018) (holding a digital news clipping service that enabled customers to watch and download parts of programs to be unfair use because it deprived Fox of licensing revenues).

268. 756 F.3d 73 (2d Cir. 2014); *see also Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22, 25 (1st Cir. 2000) (fair use to publish photo for news purposes); *Payne v. Courier-Journal*, 193 F. App'x 397 (6th Cir. 2006) (fair use for a newspaper to quote from convicted rapist's unpublished children's book). *Swatch* and *Núñez* are among the cases that Judge Leval said are justifiable fair uses in *Romanova v. Amilus Inc.*, 138 F.4th 104, 116–17 (2d Cir. 2025).

269. *Swatch*, 756 F.3d at 78.

270. *Id.* at 78–79.

271. *Id.* at 77.

272. *Id.* at 82–92.

273. *Id.* at 82.

"it would strain credulity to suggest that providing access to Swatch Group's earnings call more than trivially affected the value of that service."[274] The scope of Swatch's copyright was "thin" because the content was highly factual and had been disseminated to more than one hundred people on the call, so it was not "unpublished" in the *Harper & Row* sense.[275] The court noted that copying entire works does not favor fair use, but Bloomberg's copying was reasonable in light of its purpose. It found Swatch's argument about harm to a licensing market unpersuasive, observing that "the 'value' of the copyrighted expression for Swatch Group . . . lay not in its capacity to generate licensing royalties, but rather in its capacity to convey important information about the company to the investment analysts . . . ."[276] This particular news use was justified by its news purpose and a holistic assessment of the facts in relation to the fair use factors.

D. Teaching

Although Congress was unwilling to create an outright exemption for nonprofit educators to make copies of protected works for teaching purposes,[277] it added "including multiple copies for classroom use" to § 107 to clarify that teaching purposes should not be narrowly construed.[278] It is no secret that educators have made vast quantities of copies of in-copyright works for teaching purposes (*e.g.*, to prepare for class) and for in-classroom purposes. There has been relatively little litigation over educational use copying, but the results have been mixed when courts had to decide whether educational copying was or was not fair.[279]

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274. *Id.* at 83.

275. *Id.* at 87–89.

276. *Id.* at 90–92.

277. *See supra* note 35 and accompanying text (describing House Report on educational reproduction).

278. 17 U.S.C. § 107. *See supra* text accompanying notes 183–187 (discussing these amendments to draft § 107 to respond to concerns raised by educators during the copyright revision process). Under pressure from members of Congress, publisher and educator representatives negotiated guidelines for multiple copies for classroom use, which became significant in later educational use cases. *See supra* note 187.

279. The expense of litigation, relative to the monetary awards if publisher lawsuits succeeded, has probably been a significant deterrent to lawsuits challenging educational uses, especially given the Supreme Court's Eleventh Amendment jurisprudence, which precludes awards against state-related institutions. *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020) (affirming that Congress, in enacting the Copyright Remedy Clarification Act of 1990, did not validly abrogate states' sovereign immunity from copyright infringement suits).

One set of cases involved commercial services that made photocopies of protected works for educational purposes in the 1990s.[280] Copy-shop services made and distributed multiple copies of compiled materials (known as "coursepacks," consisting of book chapters, individual articles, and the like) prepared by professors as course readings and distributed to students for a price.[281] Courts ruled in the publishers' favor in those cases. The Copyright Clearance Center (CCC) thereafter provided a rights clearance service for photocopied coursepacks.[282]

Electronic course websites and electronic library reserves were treated somewhat differently in *Cambridge University Press v. Patton*.[283] Patton was an official at Georgia State University, whose policy allowed professors to post in-copyright materials, such as book chapters, on electronic library reserves or course websites.[284] Cambridge University Press (CUP) and two other publishers challenged this policy, arguing that the electronic postings of book chapters infringed copyrights, as in the coursepack cases.[285] The Eleventh Circuit regarded the nonprofit educational purpose of posting these chapters as an important consideration supporting GSU's fair use defense, as was the lack of an existing licensing market for most of the book chapters at issue in the case.[286] After nearly a decade of litigation, CUP's claims were upheld as to only a small percentage of the accused infringements.[287] The case

280. *See Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1383 (6th Cir. 1996) (not fair use for commercial shops to copy parts of plaintiffs' works in educational coursepacks sold to students); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991) (same). For a fuller discussion of these coursepack cases, see Samuelson, *supra* note 179, Section II.A.5.

281. *Princeton Univ. Press*, 99 F.3d at 1384; *Basic Books*, 758 F. Supp. at 1526. Although neither decision mentioned the availability of licenses to enable coursepack copying, the Copyright Clearance Center (CCC) has provided this service to many copy shops. *See* Samuelson, *supra* note 179, at 1507–10.

282. *Paper Coursepacks*, COPYRIGHT CLEARANCE CTR., https://www.copyright.com/education-campus-guide-to-copyright/using-content/#main [https://perma.cc/DP4F-U58N] (last visited Aug. 29, 2025.

283. 769 F.3d 1232, 1239–40 (11th Cir. 2014).

284. *Id.* at 1237, 1239.

285. *Id.* at 1241–42, 1260–61. See Samuelson, *supra* note 179, at 1510–16 for a detailed account of the *CUP* case.

286. *Cambridge*, 769 F.3d at 1262–67, 1276–79.

287. Upon remand, the trial court found that eleven of the challenged uses were infringements. *See Cambridge Univ. Press v. Becker*, 446 F. Supp. 3d 1145, 1271–74 (N.D. Ga. 2020) (relating the history of this lawsuit and conducting a revised fair use analysis on an excerpt-by-excerpt basis). The publishers chose not to appeal the court's decision.

settled without establishing the broad mandate for licensing that CUP had sought.[288]

Educational purpose fair use defenses have succeeded in some unconventional cases.[289] Consider, for instance, *Keck v. Mix Creative Learning Center, LLC*.[290] The case was unusual because the defendant was a commercial entity, not a nonprofit educational institution. Mix Creative, an art studio, began to sell art kits online to help children learn about art at home during the pandemic.[291] The kits included "printed-out PowerPoint slides featuring an artist's biography and artwork samples, along with a lesson plan and supplies for students to make their own art in the artist's style."[292] Keck's art was among the graphic works that Mix Creative included in these kits, which triggered Keck's infringement lawsuit.

Mix Creative's fair use defense emphasized the educational purpose of the copying.[293] The Fifth Circuit recognized that Mix Creative was a commercial enterprise, but "its use of Keck's copyrighted works was transformative, as the art kits had an educational purpose that was significantly different from the original, decorative purpose of Keck's dog-themed artworks."[294] And because Mix Creative and Keck operated in different market segments, the court thought a licensing market for uses of Keck's work for art kits was unlikely to develop; consequently, the market effects factor also supported Mix Creative's fair use defense.[295] The court insisted that its ruling was consistent with *Warhol*'s directive to consider the specific use and purpose of the two works,

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288. *See* Porter Anderson, *AAP and CCC End Georgia State 'E-Reserves' Copyright Litigation*, PUBL'G PERSPECTIVES (Nov. 12, 2020), https://publishingperspectives.com/2020/11/aap-and-copyright-clearance-center-end-georgia-state-e-reserves-litigation/ [https://perma.cc/P2H8-LAHB].

289. Another unconventional fair use case was *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.* (*ASTM*), 82 F.4th 1262, 1265–69 (D.C. Cir. 2023) (holding that it was fair use for the defendant to post privately drafted standards adopted as laws in part because of defendant's nonprofit educational purpose). *ASTM* is discussed *infra* Section III.B.

290. 116 F.4th 448 (5th Cir. 2024); *see also Bell v. Eagle Mountain Saginaw Indep. Sch.*, 27 F.4th 313, 319, 325–26 (5th Cir. 2022) (high school student's tweet of motivational message from book held fair use); *Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638, 649 (9th Cir. 2020) (educational copying and performance of music for medley of songs for a school fundraising event to support the school choir held transformative fair use).

291. *Keck*, 116 F.4th at 451–52.

292. *Id.* at 452.

293. *Id.* at 452, 454–55.

294. *Id.* at 454.

295. *Id.* at 455–56.

which, if different, made the challenged work less likely to compete in the same market as the original.[296]

E. Scholarship and Research

Promoting the progress of knowledge for the public good has long been deemed an important purpose of U.S. copyright law.[297] Relatively few cases have challenged scholars and researchers for unauthorized copying of in-copyright materials.[298] This is noteworthy because scholars and researchers commonly make copies of other authors' works.[299] In the few cases in which copyright owners have sued nonprofit scholars or researchers for infringement, fair use defenses have generally been successful, but when copyists were for-profit researchers, at least one notable fair use defense failed.

Williams & Wilkins[300] was an important precedent that addressed infringement claims based on copying for nonprofit research purposes.[301] As noted earlier, an appellate court ruled in favor of the government's fair use defense and observed that to advance the constitutional purpose of copyright, courts "must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."[302] The court emphasized that the libraries were nonprofit institutions "devoted solely to the advancement and dissemination of medical knowledge," and the copies were made for scientific research purposes, which must be given

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296. *Id.* at 454–55.

297. *See, e.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (invoking U.S. CONST. art. I, § 8, cl. 8); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (same).

298. The Latman Study identified scholarship and research in its taxonomy of fair uses, assessing such purposes as an "extremely significant factor." LATMAN STUDY, *supra* note 23, at 10–11.

299. *See Rosemont*, 366 F.2d at 307:

> Whether [fair use] may justifiably be applied to particular materials turns initially on the nature of the materials, *e.g.*, whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history and biography.

Id. (alteration in original) (citing LATMAN STUDY, *supra* note 23, at 10)

300. 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975).

301. *Id.* at 1346–47; *see also supra* notes 179–181 and accompanying text (discussing *Williams & Wilkins* and noncommercial copying).

302. *Id.* at 1352 (quoting *Berlin v. E.C. Publ'ns, Inc.*, 329 F.2d 541, 544 (2d Cir. 1964)).

"a wide scope."[303] The court noted that the libraries placed limits on the amount of copying they would do for researchers and that W&W had produced no evidence of market harm.[304]

The 1976 Act codified the specific holding in *Williams & Wilkins*,[305] signaling Congress's intent to allow nonprofit libraries to make research purpose copies for patrons. However, scientific and technical journal publishers prevailed in a class action lawsuit against Texaco, a large corporation whose researchers routinely made copies of scientific or technical journal articles relevant to their work, in *American Geophysical Union v. Texaco, Inc.*[306] A key factor in the publishers' favor in *Texaco* was the availability of a licensing regime that covered for-profit research article copying.[307]

Yet, the Second Circuit heeded concerns expressed by nonprofit libraries and educators about the implications of the *Texaco* ruling for their institutions by amending its opinion against Texaco to clarify that, "copying by an individual, for personal use in research or otherwise (not for resale) . . . might well not constitute an infringement" under the fair use or the *de minimis* doctrines.[308] It also distinguished "a professor or an independent scientist engaged in copying and creating files for independent research" from copying by researchers who were "employed by an institution in the pursuit of his research on the institution's behalf."[309] No similar lawsuit has been brought against nonprofit research institutions.[310]

Another fair use case involving nonprofit research and scholarship was *Sundeman v. Seajay Society, Inc.*[311] Sundeman, who represented the

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303. *Id.* at 1354.

304. *Id.* at 1348–49, 1354–55, 1359.

305. 17 U.S.C. § 108(a) (exempting single use copies by nonprofit libraries and archives).

306. 60 F.3d 913, 914 (2d Cir. 1994).

307. *Id.* at 930.

308. *Id.* at 916.

309. *Id.*

310. *See supra* text accompanying notes 283–288 (discussing *Cambridge University Press v. Patton*, which involved multiple copies for classroom use, not photocopying or digitizing copies of research articles for scholarly purposes).

311. 142 F.3d 194 (4th Cir. 1998); *see also Warren Publ'g Co. v. Spurlock*, 645 F. Supp. 2d 402, 406, 428 (E.D. Pa. 2009) (use of artists' depictions of monsters in biographical book about the artist to illustrate his creativity held fair use); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 734, 741 (2d Cir. 1991) (quotations from author's unpublished letters and journals in biography held fair use). *But see Salinger v. Random House*, 812 F.2d 90, 92 (2d Cir. 1987) (biographer's use of unpublished letters held unfair use). *See also* Rebecca F. Ganz, *A Portrait of the Artist's Estate: A Copyright Problem*, 41 LOYOLA L.A. L. REV. 739, 743–45 (2009) (discussing James Joyce estate's effort to stop publication of unpublished works in a scholarly book, with the aim to suppress evidence about and unwelcome commentary on Joyce's family).

estate of Marjorie K. Rawlings, a well-known Southern author, sued Seajay, a small, nonprofit organization, because its staff made unauthorized copies of and disseminated some parts of Rawlings's works for scholarly purposes. Seajay's mission was to "enhanc[e] public awareness of, and interest in, unduly neglected aspects of South Carolina and southern culture."[312] In pursuit of that mission, Seajay purchased physical copies of Rawlings's writings, including a manuscript of her unpublished first novel, *Blood of My Blood*.[313] One of Seajay's researchers prepared a critical analysis of this manuscript for presentation at a symposium on Rawlings's work.[314] This researcher hoped to publish the paper in a journal devoted to Rawlings and perhaps also for an introduction to a proposed publication of the novel, but the Rawlings estate did not give permission for these publications.[315]

Instead, the Rawlings estate charged Seajay with infringement based on copies made of the manuscript as well as the researcher's paper and conference presentation that quoted extensively from the novel.[316] The court held that quotations from Rawlings's novel in the paper and presentation were fair uses.[317] The paper was a scholarly work that "attempted to shed light on Rawlings' development as a young author, review the quality of *Blood of My Blood*, and comment on the relationship between Rawlings and her mother."[318] Hence, it had a "further purpose" and "'different character' . . . [which made] it transformative, rather than an attempt to merely supersede *Blood of My Blood*."[319] The court found further that "the amount and substantiality of the portion of *Blood of My Blood* copied for [this research] . . . did not exceed the amount necessary to accomplish [the defendants'] legitimate purposes."[320] It was also unlikely that preparation of the article and presentation had impaired the market for or value of Rawlings's first book.[321]

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312. *Sundeman*, 142 F.3d at 194, 199.

313. *Id.* at 199.

314. *Id.* Of course, this aspect of the *Sundeman* case involved targeting Rawlings's manuscript for comment, but Seajay made copies of the work for scholarship, preservation, and authentication purposes, about which Sundeman complained. *See id.*

315. *Id.*

316. *Id.* at 199 & n.7.

317. *Id.* at 202–03.

318. *Id.* at 202.

319. *Id.* (internal quotations omitted) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

320. *Id.* at 206. Seajay also made a partial copy to have it authenticated and considered for publication. *Id.* at 199, 203. The court found this to be fair use as well. *Id.* at 203–04.

321. *Id.* at 207–08.

F. "Such As" Justifications

The text of § 107 indicates its openness to other types of justifications for fair uses through the introductory phrase "such as" that precedes its recitation of the six statutorily favored purposes.[322] In the legislative history of the 1976 Act, Congress identified several other plausible justifications for fair uses of copyrighted works, including: reproductions for purposes of legislative or judicial proceedings or reports; library reproduction of portions of works to replace part of a damaged copy; archival preservation of films; educational broadcasting; making copies of works in a form accessible to disabled persons; and making copies to rebut unfair, inaccurate, or derogatory statements.[323] This Article revisits some of the "such as" justifications in Part III.

G. Justifications Based on Other Fair Use Factors

Judicial assessments of fair use justifications have typically focused on the purpose factor.[324] However, *Campbell* teaches that one must assess all factors and weigh them in relation to one another to analyze the overall equities of the challenged use in a holistic manner.[325] In some cases, the other fair use factors may provide important justifications for a second comer's uses of earlier works.

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322. 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work . . . for purposes *such as* criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright." (emphasis added)); *see also* 17 U.S.C. § 101 ("The terms 'including' and 'such as' are illustrative and not limitative."); 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:12 (2025) (explaining Congress's intent as to the § 107 preamble).

323. The House Report repeated examples mentioned in the Register's 1961 Report and added several others. *See* H.R. REP. NO. 94-1476, at 65–66, 72–75; *supra* note 34; *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13F.15 [A]–[B] (Matthew Bender rev. ed., 2025) (discussing these other favored uses). Section 108 also indicates that libraries can rely on fair use, not just on the special exemptions in that section. *See* 17 U.S.C. § 108(f)(4). Cases from the 1960s, such as *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968), upheld fair use defenses for evidentiary uses of the sort discussed *infra* Section III.A.

324. *See* 17 U.S.C. § 107(1) ("[T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . . .").

325. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

1. Nature-of-the-Work Factor

The nature-of-the-work factor has been a principal justification for reuses of parts of other authors' works in relatively few cases.[326] The nature factor was, however, highly significant in *Google v. Oracle*[327] because of the substantial investments that Java programmers had made in learning to develop programs with Java interfaces and the functionality of the interface declarations which were closely bound with method calls and implementing code, neither of which Oracle claimed as infringements.[328] According to the Court, the value of the declarations (and thereby the justification for their reuse) "lies in [Sun's] efforts to encourage programmers to learn and to use that system so that they will use (and continue to use) Sun-related implementing programs that Google did not copy."[329] *Harper & Row* was another decision in which the nature factor was highly significant, for the unpublished nature of the memoir weighed heavily against The Nation's fair use defense.[330] This use interfered with President Ford's and his publisher's right to control the first publication of that work.[331]

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326. *See* 17 U.S.C. § 107(2) ("[T]he nature of the copyrighted work . . . ."). Analysis of this factor has often turned on characterizing the first work as creative or factual. *See, e.g.*, *Campbell*, 510 U.S. at 586 ("This [second] factor calls for recognition that some works are closer to the core of intended copyright protection than others . . . ."); *Stewart v. Abend*, 495 U.S. 207, 237 (1990) ("In general, fair use is more likely to be found in factual works than in fictional works."); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992) ("Works of fiction receive greater protection than works that have strong factual elements . . . ."); *Consumers Union of U.S. v. Gen. Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983) ("Since the risk of restraining the free flow of information is more significant with informational work, the scope of permissible fair use is greater.").

327. 141 S. Ct. 1183 (2021).

328. *Id.* at 1201–02 (discussing the functional nature of Java declarations and their value relative to third-party users' investments in learning and using them).

329. *Id.* at 1202. In many cases, however, the nature-of-the-work factor plays a minor or neutral role in fair use analysis. *See, e.g.*, Beebe, *supra* note 16, at 610; Asay, Sloan & Sobczak, *supra* note 59, at 942–43.

330. *Harper & Row, Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985).

331. *Id.* at 551–55 (discussing at length the significance of the unpublished nature of a work). Recall, however, that Congress amended § 107 to clarify that the unpublished nature of a right holder's work does not preclude a finding of fair use. *See supra* note 260 and accompanying text.

2. Amount Taken Factor

Justifications for fair uses have sometimes been grounded mainly on the amount taken factor,[332] particularly when the taking was qualitatively and quantitatively small in relation to the work as a whole. In *Faulkner Literary Rights, LLC v. Sony Pictures Classics Inc.*,[333] for instance, the court decided that a movie's quotation of nine words from William Faulkner's work was "of miniscule quantitative importance to the work as a whole" and hence, Sony's fair use defense was upheld.[334] Uses of very small parts of pre-existing works are often justifiable because their uses cannot undermine incentives to create and disseminate authorial works.[335]

3. Market Effects Factor

Courts have sometimes said that the market effects factor is the most significant factor in fair use cases.[336] This factor may indeed be dispositive in some cases, either against fair use, as when secondary uses are likely to supplant demand for the original, or favoring fair uses, as when secondary uses are not substitutive or market harm is speculative.[337]

Courts consider not only effects on the primary markets for the plaintiff's works, but also reasonably foreseeable derivative work markets.[338] But when secondary uses are unlikely to have any discernible

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332. *See* 17 U.S.C. § 107(3) ("[T]he amount and substantiality of the portion used in relation to the copyrighted work as a whole . . . .").

333. 953 F. Supp. 2d 701 (N.D. Miss. 2013).

334. *Id.* at 710; *see also SOFA Ent., Inc. v. Dodger Prods., Inc.*, 782 F. Supp. 2d 898, 900, 911 (C.D. Cal. 2010) (finding use of a seven-second clip from *The Ed Sullivan Show* in the production *Jersey Boys* to be fair use).

335. *See, e.g.*, *Cramer v. Netflix, Inc.*, No. 3:22-cv-131, 2023 WL 6130030, at *8–10 (W.D. Pa. Sep. 18, 2023) (less than three-second display of entire image of copyrighted tattoo as part of onscreen montage was a minor taking); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 929, 942 (9th Cir. 2002) (finding Courtroom Television Networks' use of a few seconds from "Beating of Reginald Denny" in the background of an introductory montage to be fair use); *see also* Beebe, *supra* note 16, at 615 ("An insubstantial taking of the plaintiff's work will not likely have an appreciable effect on the market for or value of that work and, perhaps on that ground alone, will likely trigger a finding of fair use.").

336. *See* 17 U.S.C. § 107(4) ("[T]he effect of the use upon the potential market for or value of the copyrighted work."); *Harper & Row*, 471 U.S. at 566 ("This [fourth] factor is undoubtedly the single most important element of fair use.").

337. *See* Beebe, *supra* note 16, at 617 (observing the dominating influence of factor four in determining the outcome of fair use cases).

338. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592–93 (1994).

impact on the market for or value of the works being used or are speculative, fair uses are more likely to be found.[339]

The *Google* decision directs courts to consider, as part of the market effects analysis, not only possible harms to the plaintiff's markets, but also public benefits arising from the challenged use that may offset plaintiff's market harm arguments.[340] Courts sometimes also indicate that to undermine fair use defenses, market harms must be substantial enough to affect authorial incentives to create and disseminate their works.[341] The market effects factor can sometimes support fair uses if the secondary uses are unlikely to have substitutive effects.[342]

The Supreme Court has also recognized that certain types of market harms, such as withering criticism that lowers demand for the original, do not count against fair use defenses.[343] Moreover, when copyright

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339. *See, e.g.*, *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 451 (1984) (harm to motion picture markets from private noncommercial time-shifting of broadcast programs was speculative); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 645 (4th Cir. 2009) (alleged harms were too speculative to undermine the fair use defense). Incidental uses are also unlikely to have substitutive effects. *See, e.g.*, *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044, 1049–50 (S.D.N.Y. 1994) (incidental use of copyrighted baby mobile in movie was fair use because it caused no demonstrable harm to plaintiff's market); LATMAN STUDY, *supra* note 23, at 8 (discussing incidental uses that may be found fair). On occasion, courts have dismissed infringement cases on *de minimis* grounds. *See, e.g.*, *Gottlieb Dev. Corp. v. Paramount Pictures, Inc.*, 590 F. Supp. 2d 625, 632–33 (S.D.N.Y. 2008). *See generally* Jessica M. Silbey & Samantha Zyontz, De Minimis *Copying: An Empirical Study*, N.Y.U. J. INTELL. PROP. & ENT. L. (forthcoming 2025) (manuscript on file with author) (reporting *de minimis* defenses have become more common although they are less successful than one might expect). In some cases, however, courts address what should be *de minimis* cases as fair use defense cases. *See, e.g.*, *Cramer v. Netflix, Inc.*, No. 3:22-cv-131, 2023 WL 6130030, at *8–10 (W.D. Pa. 2023) (fair use for documentary to display tattoo for two to three seconds).

340. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1206 (2021); *see also Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 742 F.3d 17, 33–35 (2d Cir. 2014) (weighing potential economic losses to the copyright owner against the social benefits of the use).

341. *See, e.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d 202, 224–25 (2d Cir. 2015).

342. For a discussion of fair use cases in which courts have given weight to secondary uses that promote fair competition and ongoing innovation, see *infra* Section III.C.

343. *See, e.g.*, *Campbell*, 510 U.S. at 591–92 ("[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act."); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 482 (2d Cir. 2004) ("[O]ur concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work."); *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986) ("[T]he economic effect of a parody with which we are concerned is not its potential to destroy or diminish the market for the original—any bad review can

owners are unlikely to license uses, such as for critical commentary, that may tip in favor of fair use defenses.[344] Courts have also stated that when a second comer's use of a first author's work has a transformative purpose, market harms are less likely, and the more transformative the purpose, the lower the risk that the secondary use will serve as a market substitute.[345]

Among the other types of market effects that should not count against fair use defenses are those affecting reputations. In *Suntrust*, for example, Judge Marcus's concurring opinion accepted that "Suntrust can choose to license its derivatives however it wishes and insist that those derivatives remain free of content it deems disreputable . . . [B]ut it may not use copyright to shield *Gone With the Wind* from unwelcome comment."[346] He characterized the lower court's grant of a preliminary injunction against publication of *TWDG* as tantamount to censorship.[347] He observed that "[t]he law grants copyright holders a powerful monopoly in their expressive works," but "[i]t should not also afford them windfall damages for the publication of the sorts of works that they themselves would never publish, or worse, grant them a power of indirect censorship."[348] This consideration too supported Randall's and the publisher's fair use defense.

Along similar lines, Judge Pierre Leval's fair use article expressed his opposition to "converting our copyright law, by a wave of a judicial magic wand, into an American *droit moral*," even though some authors may feel harmed by certain uses of their works to which they object.[349] Enabling copyright to protect these kinds of authorial interests would cause "much unintended mischief" because U.S. "copyright law has developed over hundreds of years for a very different purpose and with

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have that effect—but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it.").

344. *Campbell*, 510 U.S. at 592 ("[T]here is no protectible derivative market for criticism.").

345. *See, e.g.*, *id.* at 591–93.

346. *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282–83 (11th Cir. 2001) (Marcus, J., concurring). *Suntrust* is discussed *supra* text accompanying notes 232–237.

347. *Suntrust*, 268 F.3d at 1283.

348. *Id. See also Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306, 313 (2d Cir. 1966); *Katz v. Google Inc.*, 802 F.3d 1178, 1184 (11th Cir. 2015) ("Due to Katz's attempt to utilize copyright as an instrument of censorship against unwanted criticism, there is no potential market for his work."); *Triangle Pub'lns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1176–78 (5th Cir. 1980) (explaining that the plaintiff's apparent motive in seeking to enjoin defendant's comparative ad featuring plaintiff's copyrighted magazine cover was to ward off competition in the TV magazine trade).

349. Leval, *supra* note 51, at 1128.

rules and consequences that are incompatible with the *droit moral.*"[350] *Cariou v. Prince*[351] is an example of a fair use case in which the plaintiff's copyright claims were aimed, at least in part, at protecting his works from the mutilations that the Second Circuit considered to be fair uses as a matter of law.[352]

Judge Leval's article also explained why the fair use doctrine should not be distorted to address harms to authorial privacy interests.[353] "Placing all unpublished private papers under lock and key, immune from any fair use, for periods of fifty to one hundred years, conflicts with the purposes of the copyright clause. Such a rule would use copyright to further secrecy and concealment instead of public illumination."[354] Some courts, such as the Second Circuit in *Rosemont*, have found fair use in part because copyright claims were being asserted to protect the privacy interests of plaintiffs.[355]

III. OTHER FAIR USE JUSTIFICATIONS

The Supreme Court's *Google* decision characterized fair use as having a "basic purpose of providing a context-based check that can help

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350. *Id.*

351. 714 F.3d 694 (2d. Cir. 2013).

352. *Id.* at 710, 712 (finding fair use as to all but five of Prince's Canal Zone works). The court, in vacating the district court's decision and remanding the remaining five works, expressed some concern and caution over the district court's earlier "sweeping injunctive relief," *id.* at 704, which may have reflected the district court's (and Cariou's) disapproval towards Prince's use of Cariou's photographs. *Id.* at 704, 712 & n.5.

353. Leval, *supra* note 51, at 1119. It was for privacy law to protect such interests, not copyright. *Id.*; *see also Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (en banc) (reversing order requiring Google to remove access to video that resulted in death threats against a performer). The *Garcia* court opined: "Although we do not take lightly threats to life or the emotional turmoil Garcia has endured, her harms are untethered from—and incompatible with—copyright and copyright's function as the engine of expression. In broad terms, 'the protection of privacy is not a function of the copyright law . . . .'" *Id.* at 745 (quoting *Bond v. Blum*, 317 F.3d 385, 395 (4th Cir. 2003)).

354. Leval, *supra* note 51, at 1119. While I agree with Judge Leval on this point, some courts do seem to allow such claims. *See, e.g.*, Pamela Samuelson, *Protecting Privacy Through Copyright Law?*, *in* VISIONS OF PRIVACY IN THE MODERN AGE 191, 191–99 (Marc Rotenberg, Julia Hortwitz & Jeramie Scott eds., 2015) (discussing cases in which plaintiffs have used copyright as a tool for protecting privacy interests).

355. *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 309–10 (2d Cir. 1966); *see also* Eric Goldman & Jessica Silbey, *Copyright's Memory Hole*, 2019 BYU L. REV. 929, 951–57 (2019) (giving examples in which individuals have acquired copyright to pre-existing content, including negative consumer reviews, in order to assert copyright to erase the reviews and suppress their dissemination).

to keep a copyright monopoly within its lawful bounds."[356] Because fair use applies to all manner of copyrighted works and to myriad uses that can be made of them, there are far more grounds for justifying uses as fair than the six statutorily favored uses in § 107 discussed in Part II. Nor is it possible to name all of the justifiable purposes for which such defenses might be raised.[357]

This Part highlights three well-established justifications for making fair uses of earlier authors' works that go beyond the favored uses identified in the text of § 107. They are (1) evidentiary justifications, (2) public access to information justifications, and (3) competition and innovation justifications.[358] Cases in these categories are consistent with *Campbell*'s directive that all four factors must be considered and weighed in relation to one another to make holistic determinations about fair use claims. Differences between the purposes of source work authors and those of the challenged users (in other words, their transformativeness under the *Warhol* standard) were typically key elements in these fair use decisions.

Section A focuses on justifications grounded in a second comer's need to copy some or all of a first author's works as evidence in support of their thesis or otherwise to illustrate or set context for the second work's contribution to knowledge. Section B considers justifications based on secondary uses that enable greater public access to information for different purposes than the originals. Section C focuses on justifications when a second comer's uses of earlier works fosters fair competition and ongoing innovation. While these categories of fair use justifications do not exhaust viable bases for engaging in fair uses, they provide ample support for giving a wide berth to justifications for fair uses in the post-*Warhol* case law.

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356. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2021); *id.* (citing H.R. REP. NO. 94-1476, at 66 (1976), described as "explaining that courts are to 'adapt the doctrine [of fair use] to particular situations on a case-by-case basis' and in light of 'rapid technological change'").

357. Recall that the House Report accompanying the 1976 Act expected that fair use going forward would be applied to an "endless variety of situations and combinations of circumstances," which was why it was impossible to formulate "exact rules in the statute." *See supra* text accompanying note 39. Congress expected the fair use doctrine to evolve over time. *See* H.R. REP. NO. 94-1476, at 65–66.

358. See also Samuelson, *Unbundling*, *supra* note 16, at 2576–80, for a qualitative study of fair use cases featuring a rich taxonomy of the 330-some fair use cases decided between 1978 and 2007. The article gives examples of many fair uses that can be justified on other grounds than those set forth in § 107.

A. Justifications Based on Uses of Works for Evidentiary Purposes

Judge Leval's principal motivation for writing his influential article *Toward a Fair Use Standard* was to persuade his audience that authors of various kinds of nonfiction works may need to quote from or otherwise reproduce parts of earlier works. This is especially true of works such as biographies and histories to prove the authors' points or to accurately illustrate the phenomena on which the secondary work authors have focused.[359]

Leval's article expressed frustration about a Second Circuit ruling against fair use in a case in which the alleged infringer quoted at length from unpublished works, arguing this borrowing was necessary to show that the subject of the biography was despicable.[360] Some quoting from unpublished works was, Leval argued, justifiable due to "the value of accurate quotation as a necessary tool of the historian or journalist."[361] Biographers need to be able to quote from their subjects' writings "to accomplish the biographer's objective."[362] The secondary use "must be productive and must employ the quoted matter in a different manner or for a different purpose from the original," and must not appropriate "dazzling passages . . . without sufficient transformative justification."[363] Leval emphasized that fair use analysis should take account of "the underlying goals of the copyright law to stimulate the creation and publication of edifying matter."[364] Secondary works that add to the store of human knowledge without undermining incentives to create advance copyright's constitutional goals.

Courts have understood *Campbell*'s endorsements of Leval's analysis as supporting evidentiary uses of earlier works in numerous cases involving nonfiction works.[365]

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359. Leval, *supra* note 51, at 1111–12. *Núñez*, discussed *supra* text accompanying notes 140–144, is an evidentiary purpose news reporting case. This section shows that the need for second comers to use earlier works for evidentiary purposes goes well beyond news purposes.

360. Leval, *supra* note 51, at 1113–14. The case was *New Era Publ'ns Int'l v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d. Cir. 1989) (unfair to quote extensively from unpublished writings). Leval was the trial court judge in that case. *Id.* at 577.

361. Leval, *supra* note 51, at 1114.

362. *Id.* at 1113. Leval censored himself from quoting from the *New Era* biography in his law review article for fear of opening himself to copyright infringement claims. *Id.* at 1113–14 n.39.

363. *Id.* at 1112.

364. *Id.* at 1134.

365. *See, e.g.*, *Warren Publ'g Co. v. Spurlock*, 645 F. Supp. 2d 402, 423 (E.D. Pa. 2009) (fair use to copy from plaintiff's works to illustrate points in book); *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 147–48 (N.D. Cal. 1994) (fair to use quotes from letters in a biography). For a comprehensive review of copyright doctrines that support

1. Uses in Histories, Biographies, Documentaries, and Other Nonfiction Works

Even before its codification in 1976, the fair use doctrine protected second comers' uses of earlier authors' works for historical and biographical purposes. For example, when an agent for Howard Hughes, a famous businessman, bought copyrights in *Look* magazine articles so it could sue the author and publisher of an unauthorized biography of Hughes for infringement because they copied some of the articles' contents, fair use came to the rescue in *Rosemont Enterprises, Inc. v. Random House, Inc.*[366]

The *Rosemont* trial court issued a preliminary injunction against the book's publication because it assumed that only scholarly works of scientific or educational value, not books aimed at popular audiences, qualified as fair uses.[367] The Second Circuit disagreed with this overly narrow conception of the doctrine, saying that it was "both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works."[368] It recognized "the public benefit in encouraging the development of historical and biographical works and their public distribution, e.g., so 'that the world may not be deprived of improvements, or the progress of the arts be [impeded].'"[369] It further observed that "whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use."[370] Regarding the public interest, the court added that to enjoin this biography's publication would

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uses of in-copyright works to extract unprotectable elements for evidentiary and other purposes, see generally Molly Van Houweling, *The Freedom to Extract in Copyright Law*, 103 N.C. L. REV. 445 (2025).

366. 366 F.2d 303, 305 (2d. Cir. 1966). Random House was using the *Look* articles for a highly similar purpose as the articles' author's purpose and the uses were commercial, which would make the use nontransformative under *Warhol.* However, the outcome in *Rosemont* was sound because this productive work contributed new knowledge about a public figure and the second author did not take too much. *See also Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968) (fair use to make copies of frames from Zapruder video of Kennedy assassination to support the author's theory that more than one shooter had participated in it). Judge Leval has recognized *Time* as a justifiable fair use case. *Romanova v. Amilus Inc.*, 138 F.4th 104, 117 (2d Cir. 2025).

367. *Rosemont*, 366 F.2d at 304.

368. *Id.* at 307.

369. *Id.* (quoting *Sayre v. Moore*, (1801) 102 Eng. Rep. 138, 139 (KB)).

370. *Id.* The court cited numerous cases involving commercial or popular audience works whose fair use defenses succeeded. *Id.* at 308.

deprive the public "of an opportunity to become acquainted with the life of a person endowed with extraordinary talents who, by exercising these talents, made substantial contributions in the fields to which he chose to devote his unique abilities."[371]

Forty years after *Rosemont*, the Second Circuit once again upheld an evidentiary fair use defense based on a publisher's reproduction of several Grateful Dead concert posters in a book depicting a cultural history of the band in *Bill Graham Archives v. Dorling Kindersley Ltd.*[372] Dorling Kindersley (DK) initially sought a license from Bill Graham Archives (BGA) to include some Grateful Dead concert posters in its book, but after failing to agree on terms, DK decided it could include the posters in the book under the fair use doctrine.[373] The Second Circuit agreed with the trial court that DK's use was transformative under *Campbell* because of its different purpose. The posters' original purposes were to advertise concerts and provide information about when and where they would be held, whereas DK's purpose was to "enhance[] the reader's understanding of the biographical text."[374] Also supporting the fair use defense were the facts that DK had significantly reduced the size of the posters in the book and displayed them adjacent to a timeline, captions, and biographical text; moreover, the posters were an "inconsequential" part of the 480-page book.[375]

DK's transformative purpose also affected the court's view of the market effects factor. BGA conceded that DK's use of the graphics had no impact on the primary market for the posters, but asserted that DK's use harmed its licensing market.[376] The court observed that a copyright owner's willingness to license a use does not mean that the use must be licensed, especially when the purpose is transformative and the amount

371. *Id.* at 309. A concurring opinion expressed First Amendment-based reservations about issuing an injunction in *Rosemont* because "[i]t has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity." *Id.* at 311 (Lumbard, C.J., concurring). Moreover, "[i]t would be contrary to the public interest to permit any man to buy up the copyright to anything written about himself and to use his copyright ownership to restrain others from publishing biographical material concerning him." *Id.* This concurrence explained the concerted effort that Hughes had made to purchase, through Rosemont, copyrights for purposes of suppressing publication of the biography. *Id.* at 311–13.

372. 448 F.3d 605 (2d Cir. 2006). *See also Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) (biography quoting from author's works held fair use). *But see Craft v. Kobler*, 607 F. Supp. 120, 129 (S.D.N.Y. 1987) (biographer's use held unfair because taking was quantitatively and qualitatively substantial).

373. *Bill Graham Archives*, 448 F.3d at 607.

374. *Id.* at 609–10. The appellate court agreed with the trial court that it was not necessary to discuss the artistic merits of the posters. *Id.* at 611.

375. *Id.* at 611–13.

376. *Id.* at 614.

used was reasonable in light of that purpose.[377] The court asserted that transformative fair use markets should be beyond copyright owners' control.[378]

The Ninth Circuit rendered a similar decision in *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*,[379] holding that a musical's use of a seven-second clip from *The Ed Sullivan Show* in which the host introduced the Four Seasons musical group before its performance was transformative because it was used as a "biographical anchor" rather than "for its own entertainment value."[380] Because the musical's producers' use of the clip was transformative, "the fact that *Jersey Boys* is a commercial production is of little significance."[381] The musical was certainly not a substitute for the television program, *The Ed Sullivan Show*.[382] The court concluded that "Dodger's use of the clip did not harm SOFA's copyright . . . and society's enjoyment of Dodger's creative endeavor is enhanced with its inclusion. This case is a good example of why the 'fair use' doctrine exists."[383]

In affirming the lower court's award of attorney fees to Dodger, the Ninth Circuit agreed with the trial court that "lawsuits of this nature . . . have a chilling effect on creativity insofar as they discourage the fair use of existing works in the creation of new ones."[384] It observed that fair use "is an integral part of copyright law precisely because it gives authors 'breathing space within the confines of copyright' to build upon their predecessors' works,"[385] as Dodger had done in this case.

Documentary films, like other historical works, sometimes need to make use of other people's video footage to set context or prove a point. Sometimes it is not feasible for them to get permission, whether because the license fee is too high, other terms of the license are unacceptable, or the videographer cannot be found.[386] Documentary filmmakers

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377. *Id.*

378. *Id.* at 614–15.

379. 709 F.3d 1273 (9th Cir. 2013).

380. *Id.* at 1278.

381. *Id.* at 1278–79.

382. *Id.* at 1280.

383. *Id.*

384. *Id.* (alteration in original) (internal quotation omitted) (quoting

385. *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

386. *See, e.g.*, Karen Shatzkin & Dale Cohen, *Picture This: Applying the Fair Use Doctrine to Documentary Films After* Google*/*Oracle *and* Warhol, 30 UCLA ENT. L. REV. 1, 7–8 (2023). *See generally* PAT AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT LAW, ch. 7 (2d ed. 2018) (recounting the difficulties faced by documentary filmmakers in using copyrighted material, leading to creation of a Statement of Best Practices for documentary filmmakers); AM. U. CTR. FOR SOC. MEDIA, DOCUMENTARY FILMMAKERS' STATEMENT

"explore topics of public importance, often instructing on their historical, political, or cultural context and offering insights that were not available when the covered events were occurring."[387] Infringement litigation against documentary filmmakers has been fairly common, although fair use defenses have succeeded in most of them.[388]

One such case was *Monster Communications, Inc. v. Turner Broadcasting System, Inc.*[389] Monster owned copyright in footage of the 1974 heavyweight title boxing match between Muhammad Ali and George Foreman held in Zaire.[390] Monster used some of this footage in its soon-to-be-released documentary about the fight.[391] When it found out that Turner was planning to disseminate a documentary about Ali which included some footage from the Zaire fight, it sought a preliminary injunction to stop Turner from showing this documentary on its cable channel.[392] By the time of the preliminary injunction hearing, the Turner documentary contained between nine and fourteen clips from Monster's footage, totaling between forty-one seconds to two minutes.[393]

OF BEST PRACTICES IN FAIR USE (2005), https://cmsimpact.org/wp-content/uploads/2016/01/Documentary-Filmmakers.pdf [https://perma.cc/CET3-ZCU7] (statement concerning principles of fair use as applied in four common documentary film situations). Since publication of the Best Practices statement, documentary filmmakers have reported greater confidence when relying on fair use along with increased acceptance from insurers, lawyers, and broadcasters. *See* AUFDERHEIDE & JASZI, *supra*, at 116–118.

387. Shatzkin & Cohen, *supra* note 386, at 6.

388. *See, e.g.*, *Brown v. Netflix, Inc.*, 855 F. App'x 61, 63 (2d Cir. 2021) (fair use of children's song in documentary as cultural commentary); *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 935 (4th Cir. 2013) (use of logo in videos was fair use); *Red Label Music Publ'g, Inc. v. Chila Prods.*, 388 F. Supp. 3d 975, 984 (N.D. Ill. 2019) (football documentary's use of clip of song was transformative because it was "not serving its original function of entertainment in the film"); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 327 (S.D.N.Y. 2008) (use of song music and lyric in film was likely a transformative fair use); *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 136–38 (E.D.N.Y. 2001) (use of film clips in documentary was likely fair use); *Hofheinz v. Discovery Commc'ns, Inc.*, No. 00 CIV. 3802, 2001 WL 1111970, at *1 (S.D.N.Y. Sep. 20, 2001) (use of film clips in documentary programs was fair use); *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, No. 98 CIV. 7128, 2001 WL 1518264, at *1, *9 (S.D.N.Y. Nov. 28, 2001) (fair use of clips of video in news story about actor's death). *But see Whyte Monkee Prods., LLC v. Netflix, Inc.*, 97 F.4th 699, 714 (10th Cir. 2024) (holding use of video clip in documentary film was nontransformative because it did not comment on the video), *opinion vacated and reh'g granted in part*, 101 F.4th 787 (10th Cir. 2024), No. 22-6086 (10th Cir. argued July 10, 2024).

389. 935 F. Supp. 490 (S.D.N.Y. 1996).

390. *Id.* at 491.

391. *Id.*

392. *Id.*

393. *Id.* at 492–93. Facts about the extent of Turner's usage of Monster's footage were somewhat unclear.

The court concluded that the first fair use factor favored Turner because "Ali is a figure of legitimate public concern and . . . his television biography is a subject of public interest."[394] Monster urged the court to rule that the second factor favored it, but the court perceived "a public interest in receiving information concerning the world in which we live," and "[t]he more newsworthy the person or event depicted, the greater the concern that too narrow a view of the fair use defense will deprive the public of significant information."[395] The court did not question the creativity of Monster's footage of the Zaire fight, but thought "the degree of protection that properly may be afforded to [the film clips] must take into account that too narrow a view of the fair use defense could materially undermine the ability of other Ali biographers to tell, in motion picture or perhaps still photographic form, an important part of his story."[396] Turner's uses of Monster's footage in the documentary were "too few, too short, and too small in relation to the whole" to undercut the market for Monster's forthcoming film, and if the Turner cablecast had an impact on Monster's film, "it almost surely will be as a result of their common subject, not their minute or so of common footage."[397] Hence, the court concluded that Turner's use was likely fair and consequently denied Monster's preliminary injunction motion.[398]

2. Uses in Legal Proceedings

The Latman Study and the legislative reports accompanying the 1976 Act anticipated that copyrighted works might sometimes be copied for use in litigation and governmental proceedings. Latman thought these uses would provide plausible justifications for fair uses,[399] although noting that such uses had not been tested in court cases.[400] That is no longer true.

Numerous post-1976 Act cases have considered the use of copyrighted works as evidence in legal proceedings. Fair use defenses

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394. *Id.* at 494. The court did not say whether it considered the use to be transformative or nontransformative and did not cite *Campbell*.

395. *Id.*

396. *Id.*

397. *Id.* at 495–96.

398. *Id.* at 496–97. *Monster* is another case in which the plaintiff and defendant had the same (and a commercial) purpose and yet Turner's use of the footage was held fair.

399. *See* LATMAN STUDY, *supra* note 23, at 13–14; H.R. REP. NO. 94-1476, at 65 (1976). For a discussion of the case law on uses of works in legal proceedings between 1978 and 2009, see Samuelson, *Unbundling*, *supra* note 16, at 2592–97.

400. LATMAN STUDY, *supra* note 23, at 13.

have generally prevailed when the purpose of the uses in litigation, investigations, or similar governmental proceedings have had evidentiary significance.[401] One such case was *Bond v. Blum*.[402] In a lawsuit to determine whether Bond, Blum's daughter's second husband, should have custody of Blum's grandchildren, Blum obtained copies of Bond's unpublished memoir about killing his father and getting away with it.[403] His lawyer introduced the manuscript as evidence that Bond was unfit to be a custodian of the children.[404] After Bond registered his manuscript with the Copyright Office, he sued Blum and Blum's lawyers for copyright infringement.[405] Blum's purpose in making copies for the legal proceedings was certainly different than Bond's when writing the memoir.[406] Although the memoir was unpublished and substantial parts were copied, the court was unpersuaded that use of the memoir in litigation would adversely affect the memoir's marketability.[407]

Sometimes the government requires companies or members of the public to submit documents relevant to its decisions. The U.S. Patent and Trademark Office (USPTO), for instance, requires patent applicants to submit relevant non-patent literature, such as scientific or technical journal articles, to aid patent examiners in understanding the prior art on which claimed inventions build.[408] Publishers of such journals sued several patent law firms for making electronic and physical copies of articles from their journals pertinent to the lawyers' work in prosecuting

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401. *But see Images Audio Visual Prods., Inc. v. Perini Bldg. Co.*, 91 F. Supp. 2d 1075, 1086 (E.D. Mich. 2000) (finding litigation use of in-copyright works unfair because the works were specially created for litigation purposes), *discussed in* Samuelson, *Unbundling*, *supra* note 16, at 2594–97.

Although the U.S. government cannot be enjoined from infringement under 28 U.S.C. § 1498, courts can order the federal government to pay money damages for infringement if its fair use defense fails. Federal courts can enjoin state-related entities from infringements, but under the Court's Eleventh Amendment jurisprudence, they cannot order states or state-related institutions to pay money damages. *See Allen v. Cooper*, 140 S. Ct. 994, 1007 (2020).

402. 317 F.3d 385 (4th Cir. 2003). Judge Leval considers *Bond* as a justifiable fair use case. *Romanova v. Amilus Inc.*, 138 F.4th 104, 115 (2d Cir. 2025).

403. *Bond*, 317 F.3d at 393.

404. *Id.* at 391, 393.

405. *Id.* at 391.

406. *Id.* at 390, 397–98.

407. *Id.* at 396–97.

408. *See* 37 C.F.R. § 1.56(a) (2024). Patent applicants and their lawyers have a "duty of candor and good faith in dealing with the [USPTO]," which "includes a duty to disclose to the Office all information known to [an individual associated with the prosecution of a patent application] to be material to patentability." *Id.* USPTO rules require patent applicants to submit such information regardless of whether it helps or harms their claims of patentability. *Id.* § 1.56(b)(1)–(2).

patent applications.[409] Besides submitting prior art to the USPTO, patent lawyers also made copies of journal articles for client files and sometimes shared copies with other patent lawyers and/or with clients on whose patent applications they were working.[410]

The trial courts found the law firms' uses to be transformative because of the very different purposes for which the lawyers had made copies than the publishers' purposes in distributing the journals.[411] Patent lawyers copy such articles "to determine if they are relevant to the invention they seek to patent for their client," so they are using "the articles not to learn the scientific material contained therein, but to identify whether the article discusses scientific information related to the client's potential patent."[412] The publishers' purpose, by contrast, is to "distribute the scientific articles in their journals to inform the scientific community of advancements in scientific research and new scientific discoveries that have been made, and to allow the scientific community to test the quality of the authors' methods and conclusions."[413]

The publishers argued that *Texaco* supported their market harm arguments because the CCC had developed a license for patent law firm uses of scientific and technical articles for patent prosecution-related purposes akin to the CCC license for commercial scientific copying at issue in *Texaco*, and some patent law firms had paid for the new CCC license.[414] However, the courts pointed to the circularity of this claim and distinguished *Texaco* because of the law firms' transformative purpose.[415] Making copies of these articles for evidentiary purposes does not exploit their expressiveness.[416]

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409. *See Am. Inst. of Physics v. Winstead PC*, No. 12-CV-1230-M, 2013 WL 6242843, at *1 (N.D. Tex. Dec. 3, 2013); *Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A.*, Civ. No. 12-528, 2013 WL 4666330, at *2 (D. Minn. Aug. 30, 2013); *see also id.* at *2 n.2 (identifying a third such lawsuit).

410. Initially, the publishers claimed that submitting copies of relevant prior art articles to the USPTO constituted infringement, even though this was required by law. *See, e.g.*, *Schwegman*, 2013 WL 4666330, at *2–3. After the USPTO intervened to contest these claims, the publishers amended their claims to focus on copies made in client files and shared among patent lawyers and/or their clients. *Id.*

411. *Winstead*, 2013 WL 6242843, at *5–6; *Schwegman*, 2013 WL 4666330, at *10–11.

412. *Winstead*, 2013 WL 6242843, at *5. The publishers also argued that the law firms' uses of the articles were commercial, but the court found this unpersuasive. *Id.* at *6–8; *see also Schwegman*, 2013 WL 4666330, at *12.

413. *Schwegman*, 2013 WL 4666330, at *10.

414. *Id.* at *15.

415. *Id.*; *Winstead*, 2013 WL 6242843, at *11.

416. *See Schwegman*, 2013 WL 4666330, at *12.

B. Justifications Based on Promoting Public Access to Information

Second comers sometimes seek to justify their unauthorized uses of authorial works because the uses have enabled greater public access to information. Such uses may be transformative if they have a different purpose than the plaintiffs' works. Also pertinent is the extent to which the challenged uses advance the progress of knowledge in keeping with copyright's constitutional purpose.

1. Information Locating and Text Analytics Cases

Several twenty-first century fair use cases have challenged copying of Internet-posted content by search engines for purposes of making those materials more findable.[417] Courts have found such uses to be fair and justifiable mainly because these defendants facilitated greater public access to information.[418] In each case, search engines' uses were deemed transformative because of their very different purposes than the plaintiffs' purposes in creating the works.[419] Whole works may have been copied, but courts have regarded this as necessary to achieve transformative purposes or as reasonable in light of those purposes.[420] Because the search engines facilitated greater access to information without serving as

417. *See Authors Guild v. Google, Inc.*, 804 F.3d 202, 208–09, 229 (2d Cir. 2015) (fair use to digitize millions of books to index their contents); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014) (fair use to create digital library of digitized books for socially beneficial purposes); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1176–77 (9th Cir. 2007) (fair use to link to thumbnail images of Internet content); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003) (fair use for search engine to create thumbnail of images on the Internet); *see also Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1123 (D. Nev. 2006) (fair use to make copies of Internet content to index and cache contents). I discuss these cases at some length in Samuelson, *supra* note 179, Section II.C. Judge Leval regards *HathiTrust*, *Perfect 10*, and *Kelly* as justifiable fair use cases. *Romanova v. Amilus Inc.*, 138 F.4th 104, 115–16 (2d Cir. 2025).

418. A pre-1976 Act case in which a court found fair use for developing an index to the plaintiff's works was *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977) (fair use to publish an index to the newspaper's annual indices of news contents because this index "appears to have the potential to save researchers a considerable amount of time and, thus, facilitate the public interest in the dissemination of information").

419. *See supra* note 417 (listing cases); *Authors Guild v. Google, Inc.*, 804 F.3d at 216–17 (finding highly transformative Google's search-function purpose of identifying books of interest to the searcher).

420. *See, e.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d at 221–22. Of course, if the developer displays too much content and evades established licensing markets, making information more publicly accessible may be ruled unfair. *See, e.g.*, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 558–61 (S.D.N.Y 2013); *see also supra* text accompanying notes 263–267 (discussing *Meltwater*).

market substitutes, the prospect of market harm was low, and the overall balancing yielded fair use outcomes.[421]

Enabling print-disabled people to gain access to the contents of digitized books was a socially valuable search engine purpose recognized in *Authors Guild, Inc. v. HathiTrust*.[422] The Guild sued HathiTrust for infringement, claiming that its digital library of millions of books infringed their right holders' copyrights.[423] HathiTrust hosts a collection of digitized books that Google gave back to partner libraries in exchange after digitizing them.[424] Users of the HathiTrust digital library can perform a full-text keyword search for books in the HathiTrust collection and receive results that identify relevant works, on what page(s) the search term appears, and the number of times the term appears.[425] HathiTrust also provides persons who verify their print disability full access to book contents using adaptive technologies such as software capable of converting book text into spoken words or enlarging the text.[426] In this way, print-disabled people could have the same access to book contents as sighted persons.

Although the Second Circuit characterized HathiTrust's purpose in providing such access as non-transformative,[427] it decided that HathiTrust's purpose in providing this service was consistent with congressional intent to enable fair use to facilitate print-disabled access to books.[428] It concluded that HathiTrust's use of the books for this purpose was unlikely to harm publisher markets, for they rarely distribute editions of their books to serve this community.[429] HathiTrust was thus

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421. *See, e.g.*, *Authors Guild v. Google, Inc.*, 804 F.3d at 224–25. *But see Meltwater*, 931 F. Supp. 2d at 561 (defendant's use unfair because it supplanted demand for the originals). Meltwater tried repeatedly to characterize its business as like a search engine, but the court described it as "a classic news clipping service." *Id.*

422. 755 F.3d 87, 101–02 (2d Cir. 2014).

423. *Id.* at 91–92, 94. At the time of its founding, the HathiTrust repository consisted of the scanned volumes of thirteen universities. *Id.* at 90. Its member institutions now number over 200 from all over the world. *See Member List*, HATHITRUST, https://www.hathitrust.org/member-libraries/member-list/ (last visited Sep. 25, 2025).

424. *HathiTrust*, 755 F.3d at 90–91. Google retained its own digital copy. *Id.* at 92 n.3. Google's copy was used to create its Google Books search engine and was the subject of a separate lawsuit brought by Authors Guild. *See infra* text accompanying notes 432–441.

425. *HathiTrust*, 755 F.3d at 91. Unlike Google, HathiTrust did not serve snippets of book contents, but only identifying information. *Id.*

426. *Id.*

427. *Id.* at 101. HathiTrust had simply made the contents of books as accessible to print-disabled as to sighted persons. *Id.*

428. *Id.* at 102 (quoting from the legislative history of the 1976 Act).

429. *See id.* at 103.

providing a service that publishers had declined to provide.[430] Given that the first and fourth fair use factors strongly favored HathiTrust's fair use defense, the court affirmed the lower court's ruling that this use of book contents was fair.[431]

Serving up snippets of book contents in response to user search queries was another purpose that Google had for its GBS project.[432] Because snippets display some expressive parts of book contents, Google offered a different justification for snippets than for its scanning-to-index use. The court considered Google's snippet search function as "a transformative use, which augments public knowledge by making available information *about* Plaintiffs' books without providing the public with a substantial substitute for matter protected by the Plaintiffs' copyright interests in the original works or derivatives of them."[433] The court noted Google had taken measures to limit the amount and type of texts for which it provided snippets, which reduced the risk that snippets would supplant demand for the originals.[434]

The Second Circuit agreed with the Authors Guild that snippets might supplant some demand for the originals, but said that "the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original" because "[t]here must be a *meaningful* or *significant* effect 'upon the potential market for or value of the copyrighted work'" for snippets to be ruled unfair.[435] The court further observed that "the brevity of a single snippet and the cumbersome, disjointed, and incomplete nature of the aggregation of snippets made available through snippet view" made it unlikely that "snippet view could provide a significant substitute for the purchase of the author's book."[436] People do not use

430. *See id.* The court did not address another of HathiTrust's purpose arguments, namely, using the HathiTrust digital library books to preserve book contents and to make book contents available if physical books in research library collections were damaged or destroyed. *Id.* at 103–04. The court considered the record too undeveloped on this issue, but it also questioned whether the Guild had standing to complain about this use. *Id.*

431. *Id.* at 101–03, 105.

432. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 217–18 (2d Cir. 2015).

433. *Id.* at 207.

434. *Id.* at 222–23.

435. *Id.* at 224 (quoting 17 U.S.C. § 107(4)) (emphasis added). A recent study has concluded that the GBS project has, in fact, enhanced the market for copies of physical books. *See* Abhishek Nagaraj & Imke Reimers, *Digitization and the Market for Physical Works: Evidence from the Google Books Project*, 15 AM. ECON. J.: ECON. POL. 428, 442 (2023).

436. *Authors Guild v. Google, Inc.*, 804 F.3d at 224–25.

GBS to search for authorial expression, but rather for facts and information relevant to their queries.[437]

An additional feature of GBS that impressed the Second Circuit was its enablement of "new forms of research, known as 'text mining' and 'data mining.'"[438] To facilitate this type of research, Google developed the ngrams research tool, through which users can search the GBS corpus "to furnish statistical information to Internet users about the frequency of word and phrase usage over centuries."[439] Users of the ngram tool can, for example, "discern fluctuations of interest in a particular subject over time and space by showing increases and decreases in the frequency of reference and usage in different periods and different linguistic regions."[440] The ngram tool "comb[s] over the tens of millions of books Google has scanned in order to examine 'word frequencies, syntactic patterns, and thematic markers,'" which further shows "how nomenclature, linguistic usage, and literary style have changed over time."[441] This too fosters copyright's goal of advancing knowledge for the public good.

2. Other Public Access to Information Fair Use Cases

Public.Resource.Org (PRO) is a nonprofit organization whose mission is to make publicly available for free all documents that constitute government edicts,[442] broadly conceived, including standards published by private sector organizations such as the American Society for Testing & Materials (ASTM) insofar as those standards have been adopted as the laws of some U.S. jurisdictions.[443] ASTM appealed a trial court ruling

437. *Id.* at 224.

438. *Id.* at 209. The court did not do a separate fair use analysis of text and data mining or of the ngram tool.

439. *Id.*

440. *Id.*

441. *Id.* (quoting *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282, 287 (S.D.N.Y. 2013), *aff'd sub nom, Authors Guild v. Google, Inc.*, 804 F.3d 202).

442. *Georgia v. Public.Resource.Org*, 140 S. Ct. 1498, 1505 (2020). The state of Georgia sued PRO for copyright infringement for its online posting of the Official Code of Georgia Annotated (OCGA) in whose annotations Georgia claimed copyright. *Id.* The Supreme Court ruled that the annotations were uncopyrightable government edicts because government officials created these work products as part of their official duties. *Id.* at 1509.

443. *See Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.* (*ASTM*), 82 F.4th 1262, 1265–66 (D.C. Cir. 2023). The D.C. Circuit's 2018 decision had reviewed an earlier grant of summary judgment against PRO and directed the lower court to reassess PRO's fair use defense. *See Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.* (*ASTM*), 896 F.3d 437, 445, 458 (D.C. Cir. 2018). It did not reach PRO's argument that the ASTM codes had become unprotectable government edicts upon their adoption as laws. *See id.* at 446, 453. PRO is not the only defendant to have

that PRO's posting of ASTM's standards that legislatures had incorporated by reference into laws of various jurisdictions was fair use.[444] To ASTM's chagrin, the D.C. Circuit affirmed that ruling.[445]

The court considered PRO to have a nonprofit educational purpose in posting those codes, which favored its fair use defense.[446] It decided that these postings were transformative because PRO's purpose was to "provide the public with a free and comprehensive repository of the law," which was fundamentally different from ASTM's purpose of seeking "to advance science and industry by producing standards reflecting industry or engineering best practices."[447] Because the standards at issue have the force of law and are far from the core of copyright, the nature-of-the-work factor also favored the defense.[448] Although PRO posted the entirety of these standards, the court thought this was reasonable in light of its transformative purpose.[449]

ASTM relied on the common sense idea that people would be less inclined to purchase copies of its standards if they could download them from PRO for free, but the court noted that ASTM's revenues had risen during the years that PRO's codes-as-laws were online.[450] Besides, ASTM frequently updated standards to take account of new or refined industry practices, which regulators were often slow to reincorporate in their laws, so ASTM could generate revenues by selling the updates.[451] ASTM's expert offered his opinion that market harms could happen, but the court thought the expert failed to quantify market effects to show that harms had happened or were likely.[452] But even if the postings might have some negative effects on ASTM markets, the court recognized that

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raised these defenses. *See Am. Soc'y for Testing & Materials v. UpCodes, Inc.*, 752 F. Supp. 3d 480, 506–08, 512 (E.D. Pa. 2024) (denying preliminary injunction because UpCodes' noncommercial use of ASTM's codes-adopted-as-laws was likely fair use). The Fifth Circuit has twice ruled that codes-adopted-as-laws lose copyright upon enactment. *See Canadian Standards Ass'n v. P.S. Knight Co.*, 112 F.4th 298, 307 (5th Cir. 2024) (CSA's standards-as-laws held uncopyrightable), *cert. denied*, 145 S. Ct. 1135 (2025); *Veeck v. So. Bldg. Code Cong. Int'l*, 293 F.3d 791, 806 (5th Cir. 2002) (en banc) (SBCCI codes-as-laws held uncopyrightable government edicts), *cert. denied*, 539 U.S. 969 (2003). Standard-setting organizations support legislation to overturn the *ASTM* and *Veeck* rulings. *See* PRO Codes Act, H.R. 1631, 118th Cong. (2d Sess. 2023).

444. *See ASTM*, 82 F.4th at 1266, *aff'g*, 597 F. Supp. 3d 213 (D.D.C. 2022).

445. *Id.* at 1273. ASTM did not petition the Court for certiorari of the D.C. Circuit's ruling. *ASTM* is a post-*Warhol* case which did not involve targeting the codes for criticism or comment.

446. *Id.* at 1267.

447. *Id.* at 1267–68.

448. *Id.* at 1268.

449. *Id.* at 1269.

450. *Id.* at 1271.

451. *Id.*

452. *Id.*

consistent with *Google v. Oracle*, it should consider "the substantial public benefits of free and easy access to the law."[453] On balance, then, PRO had justified its online postings of the ASTM standards.[454]

The public interest in access to information about election security was the justification that election security researchers offered for posting an email archive of employees' discussions of security problems with a company's technology in *Online Policy Group v. Diebold, Inc.*[455] Researchers posted the archive or hyperlinked to it "for the purpose of informing the public about the problems associated with Diebold's electronic voting machines" and the court found it "hard to imagine a subject the discussion of which could be more in the public interest."[456] The use was transformative because of its different purpose than the emails.[457] No evidence of market effects could be attributed to the posting of the archive posting, nor did the researchers who posted the archive intend to usurp Diebold's copyright market for the mails.[458]

C. Justifications Based on Promoting Competition and Ongoing Innovation

The fair use doctrine has sometimes mediated conflicting interests of initial developers of copyrighted computer programs and of subsequent developers who want to use that software in a manner to which the first developer objects. When courts perceive copyright owners to be asserting infringement to thwart fair competition and ongoing innovation, fair use

453. *Id.*
454. *Id.* at 1272.
455. 337 F. Supp. 2d 1195 (N.D. Cal. 2004).
456. *Id.* at 1203.
457. *Id.*
458. *Id.*

defenses have succeeded.[459] Some non-software cases have also found fair use when the challenged use promoted fair competition.[460]

1. Fair Uses of Software

The first significant software case in this vein was the pre-*Campbell* Ninth Circuit decision in *Sega Enterprises Ltd. v. Accolade, Inc.*[461] Accolade developed videogame software initially designed to run on PCs.[462] It later decided to port the games to Sega's popular game platform.[463] Because Sega had not published the specifications of its application program interfaces (APIs), Accolade disassembled Sega code

459. Several other software fair use cases deserve some mention for holdings that promoted competition and innovation. *See Apple Inc. v. Corellium, LLC*, 510 F. Supp. 3d 1269, 1275–76 (S.D. Fla. 2020), *aff'd in relevant part*, No. 21-12835, 2023 WL 3295671, at *1 (11th Cir. 2023) (per curiam) (fair use to make virtualizing copies of iPhone OS to enable security research); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 544–45 (6th Cir. 2004) (first and fourth fair use factors may favor reuse of code necessary for printer cartridge to be compatible with printer); *Lewis Galoob Toys, Inc. v. Nintendo Am., Inc.*, 964 F.2d 965, 970–72 (9th Cir. 1992) (fair use for consumers to use Galoob's add-on software to enjoy variations of videogames); *Evolution, Inc. v. SunTrust Bank*, 342 F. Supp. 2d 943, 955–57 (D. Kan. 2004) (fair use to reverse engineer software to extract user's data to enable it to switch to a different provider); *Splunk Inc. v. Cribl, Inc.*, No. C 22-07611 WHA, 2024 WL 2701627, at *5 (N.D. Cal. 2024) (fair use to reverse-engineer Splunk's S2S protocol and use it for testing and troubleshooting purposes); *Teradyne, Inc. v. Astronics Test Sys., Inc.*, No. CV 20-2713-GW-SHKx, 2023 WL 9284863, at *28 (C.D. Cal. 2023), *aff'd*, No. 24–239, 2025 WL 341828, at *1 (9th Cir. 2025) (reuse of software interfaces is fair use). *But see Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1325–26 (Fed. Cir. 2003) (enforcing shrinkwrap restriction on reverse engineering software notwithstanding fair use). *See generally* Pamela Samuelson & Clark D. Asay, *Saving Software's Fair Use Future*, 31 HARV. J.L. & TECH. 535 (2018) (defending application of the fair use defense in computer software cases). *Teradyne* is a post-*Warhol* appellate fair use decision that does not cite to *Warhol*, saying that the Court's *Google* decision controlled the case. *Teradyne*, 2025 WL 341828, at *1.

460. *See infra* Section III.C.2.

461. 977 F.2d 1510 (9th Cir. 1992). Although the Federal Circuit's decision in *Atari Games Corp. v. Nintendo America Inc.*, 975 F.2d 832 (Fed. Cir. 1992), preceded *Accolade* in ruling that disassembly of software code to get access to interface information could be fair use, that court was anticipating that the Ninth Circuit would so rule and could not bind that circuit on this point. The Ninth Circuit reaffirmed its *Accolade* ruling in *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 602–03, 607 (9th Cir. 2000) (fair use to reverse engineer code to develop compatible product). *Google* cited approvingly to these Ninth Circuit precedents. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198–99 (2021).

462. *See Accolade*, 977 F.2d at 1514.

463. *Id.*

to get access to information necessary to enable it to modify its programs to run on the Sega platform.[464] Sega sued Accolade for infringement.[465]

The trial court agreed with Sega's claims that Accolade's reverse engineering copies infringed its copyright and were not fair uses.[466] Accolade's purpose was commercial, so the later-discredited *Sony* presumption applied, and Accolade's competitive product was affecting Sega's markets.[467] The judge issued an injunction forbidding not only further disassembly of Sega's code, but also dissemination of Accolade's Sega-compatible games because they were products of Accolade's infringement.[468]

The Ninth Circuit disagreed with Sega and the trial court on every point. It thought the *Sony* presumption had been overcome because Accolade had a legitimate purpose in disassembling Sega's code for research purposes.[469] Disassembly of the Sega program was the only way Accolade could obtain interface information necessary to make its software compatible with the Sega platform.[470] Accolade's copying was, moreover, an intermediate step in the process of developing a new non-infringing program to run on Sega's platform.[471] The court took account of the public benefit Accolade's disassembly had produced: "Accolade's identification of the functional requirements for Genesis compatibility has led to an increase in the number of independently designed video game programs offered for use with the Genesis console."[472] The court added that "[i]t is precisely this growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works, that the Copyright Act was intended to promote."[473] To rule in Sega's favor would have granted it "a *de facto* monopoly over the functional aspects of [its] work — aspects that were expressly denied copyright protection by Congress" under § 102(b).[474]

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464. *Id.* at 1514–15.

465. *Id.* at 1516.

466. *Sega Enters. Ltd. v. Accolade, Inc.*, 785 F. Supp. 1392, 1400 (N.D. Cal. 1992), *rev'd*, 977 F.2d 1510 (9th Cir. 1992).

467. *Accolade*, 785 F. Supp. at 1398.

468. *Id.* at 1402.

469. *Accolade*, 977 F.2d at 1522–23. *See also Splunk, Inc. v. Cribl, Inc.*, No. 22-07611 WHA, 2024 WL 2701627 (N.D. Cal. 2024) (reverse engineering of software to enable compatibility held fair use).

470. *Accolade*, 977 F.2d at 1525–26.

471. *Id.* at 1522.

472. *Id.* at 1523.

473. *Id.*

474. *Id.* at 1526. For a discussion of the wider implications of the *Accolade* case for copyright challenges to technologies that enable unanticipated uses, see, for example, Samuelson, *Implications of* Sony, Galoob *and* Sega, *supra* note 50.

Google v. Oracle, decided by the Supreme Court in 2021, is the most notable of post-*Accolade* cases to consider fair use defenses in software cases.[475] Justice Breyer's opinion for the Court characterized Google's reimplementation of the Java API declarations as transformative because it enabled Java programmers to develop creative apps for Google's smartphone platform.[476] The highly functional nature of the declarations and the investments programmers had made in learning them were the most significant considerations in the Court's assessment of the nature-of-the-work factor.[477] Because the API declarations Google used constituted a very small part of the Java Standard Edition (SE), the copyrighted work at issue, and Google took only those parts of the Java SE that its smartphone platform needed to execute common computing functions, the Court thought the amount taken factor weighed in Google's favor.[478] Although Oracle claimed it sustained substantial losses in licensing revenues and in the ability to compete in smartphone markets, the Court noted that the jury had heard evidence that countered those claims.[479] It regarded the Android smartphone platform as operating in a very different and more advanced market than Oracle was able to enter.[480]

As in *Accolade*, *Google* expressed concern that a ruling favoring the plaintiff might have anti-competitive effects. "[G]iven programmers' investment in learning the Sun Java API, to allow enforcement of Oracle's copyright here would risk harm to the public."[481] The Court recognized that it would be difficult for Google to attract programmers to create apps for the Android platform if it had to create an alternative to the Java API declarations that programmers had already learned. "[A]llowing enforcement here would make of the Sun Java API's declaring code a lock limiting the future creativity of new programs" and "Oracle alone would hold the key," and this would "interfere with, not further, copyright's basic creativity objective."[482] *Google* directed courts

475. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1190 (2021). See *supra* note 459 for citations to other software fair use cases. Mark Lemley and I have explained why fair use was a less optimal rationale for ruling in Google's favor than holding that the Java API declarations were unprotectable by copyright law. *See* Mark A. Lemley & Pamela Samuelson, *Interfaces and Interoperability After* Google v. Oracle, 100 TEX. L. REV. 1, 32–39 (2021).

476. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. at 1202–04.

477. *Id.* at 1201–02.

478. *See id.* at 1204–05.

479. *Id.* at 1206–07.

480. *Id.* at 1207.

481. *Id.* at 1208. *See also Teradyne, Inc. v. Astronics Test Sys., Inc.*, No. 24-239, 2025 WL 341828, at *1 (9th Cir. 2025) ("A contrary holding [against fair use] would promote the type of monopolistic lock-in that fair use law protects against . . . .").

482. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. at 1208.

to consider public benefits of a challenged use as part of its market effects assessment, and noted that among the public benefits of Google's use of the Java declarations was the large numbers of programmers who were able to use their skills to create more programs for the public to enjoy.[483]

2. Other Competition-Enabling Fair Uses

Gulfstream Aerospace Corp. v. Camp Systems International[484] resolved a dispute between an aircraft manufacturer and one of its competitors in the business of tracking maintenance tasks because of the latter's uses of the former's copyrighted maintenance manuals.[485] Gulfstream produced and distributed maintenance manuals to its aircraft customers, as required by the Federal Aviation Administration (FAA).[486] That agency specifies the format and much of the contents of these manuals as well as requiring regular schedules for maintaining particular parts of the planes.[487] Gulfstream charges its customers $8,500 per year for access to the maintenance manuals, in which it claims proprietary rights.[488] Camp approached Gulfstream to acquire a copy of its manual to help its customers figure out when they should schedule regular maintenance tasks and report on their completions.[489] After Gulfstream refused this request, Camp obtained copies of the Gulfstream manual from its customers.[490] Camp also wrote to the FAA to inform it of Gulfstream's refusal to provide it with the manuals and its need to get the manuals to provide maintenance services to its customers.[491] FAA wrote back to say that while Gulfstream was not required to provide

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483. *Id.* at 1206–07.

484. 428 F. Supp. 2d 1369 (S.D. Ga. 2006).

485. *Id.* at 1371–72, 1381; *see also Ty, Inc. v. Publ'ns Int'l Inc.*, 292 F.3d 512, 518–23 (7th Cir. 2002) (remanding case for district court to reconsider fair use defense to publish reference book about plush toys which competed with the plaintiff's licensed books about the toys); *Sinai v. Bureau of Auto. Repair*, No. C-92-0274-VRW, 1992 WL 470699, at *3–4 (N.D. Cal. 1992) (fair use for repair service to copy emissions manual to enable repairs); *Dow Jones & Co. v. Bd. of Trade of Chi.*, 546 F. Supp. 113, 119–22 (S.D.N.Y. 1962) (Board made fair use of Dow's stock market listings). In a few cases, fair use has enabled comparative advertising uses of another firm's images. *See, e.g.*, *Sony Comp. Ent. Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1029 (9th Cir. 2000) (fair use of screen shot from Sony game in ads for emulation software); *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1178 (5th Cir. 1980) (fair use to reproduce cover of TV Guide to advertise newspaper's new competing guide).

486. *Gulfstream*, 428 F. Supp. 2d at 1371–72.

487. *Id.*

488. *Id.* at 1372.

489. *Id.*

490. *Id.* at 1372–73.

491. *Id.* at 1373.

manuals to Camp, it assured Camp that it should be able to get the manuals from customers who are required to have them and who are authorized to hire contractors to service their needs.[492]

Camp raised a fair use defense to Gulfstream's infringement complaint. In assessing that defense, the court recognized that Camp's use of the manuals was commercial and non-transformative, which cut against fair use.[493] But the manuals were fact-intensive and Camp used the manuals to extract parts that were necessary to inform its customers about needed maintenance activities.[494] Gulfstream admitted that it had not lost any sales as a result of Camp's copying,[495] but what most strongly tipped the scales in favor of fair use was that the court perceived Gulfstream's copyright claim as an effort "to gain a judicially-enforced monopoly in maintenance-tracking services for Gulfstream aircraft," an outcome that "would be injurious to the free-market public policy advanced through antitrust and restraint-of-trade laws."[496]

CONCLUSION

One of this Article's main goals has been to explain why the *Warhol* decision should not be construed as having brought about a sea change in fair use law, as some commentators have asserted, and why it did not limit the range of fair use justifications to those involving targeting an earlier work's expression for criticism or comment. *Warhol* itself recognized several other types of justifications for fair uses, and the Court in *Warhol* characterized its holding as a narrow one.[497] While *Warhol* emphasized targeting as a justifiable purpose, it retained *Campbell*'s definition of transformative purpose as a positive vector in fair use cases when second comers have different purposes in using earlier works than their authors had. And by citing approvingly to *Sony*, *Warhol* did not disrupt the expectation that non-transformative uses may also qualify as fair uses.[498] The Court also gave weight to a secondary

492. *Id.*

493. *Id.* at 1377–78.

494. *Id.* at 1378.

495. *Id.* at 1379.

496. *Id.* at 1380. The court characterized this as "especially egregious" given that FAA regulations required Gulfstream to make and distribute the manuals and its "regulations leave Gulfstream little room to make decisions regarding either the format or the content of those manuals." *Id.*

497. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1266 (2023). It offered a general acknowledgement that "a use may be justified because copying is reasonably necessary to achieve the user's new purpose." *Id.* at 1263.

498. *Id.* at 1277 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–51 (1984)).

user's commercial purpose only insofar as the secondary use posed risks of market substitution.

Although *Warhol* did not discuss the other § 107 preambular purposes as providing plausible justifications for fair uses, there is no reason to think the Court would give the other four purposes less weight than it gave to criticism and comment. This Article has shown that courts have given due weight to the other preambular purposes in numerous fair use cases. It has also shown that fair uses may sometimes be justified based on other fair use factors, such as miniscule takings and lack of market harm. Finally, this Article discussed some categories of different purpose uses beyond those set forth in the statute that have been held justifiable fair uses, such as serving as evidence to support a thesis, facilitating greater public access to information, and enabling competition and ongoing innovation.

To date, only one of the eight appellate fair use decisions citing *Warhol* has interpreted *Warhol* as requiring the second work to target the first work for criticism or comment as the sole fair use justification, but after receiving a petition to rehear the case to reconsider its interpretation of *Warhol* and its implications for fair use involving documentary filmmaking, the Tenth Circuit panel vacated this opinion and reheard the case.[499] More recently, Judge Leval issued a Second Circuit fair use ruling that recognizes numerous types of fair use justifications, citing approvingly to numerous cases and characterizing the holdings as justifiable under *Warhol*.[500] In future fair use cases, courts should bear in mind the wide range of permissible purposes recognized in the fair use case law to give this doctrine the broad scope that Congress intended.

499. *See Whyte Monkee Prods., LLC v. Netflix, Inc.*, 97 F.4th 699, 714–15 (10th Cir.), *vacated and reh'g granted in part*, 101 F.4th 787 (10th Cir. 2024), No. 22-6086 (10th Cir. argued July 10, 2024). *See also supra* note 4.

500. *See Romanova v. Amilus Inc.*, 138 F.4th 104, 115–17 (2d Cir. 2025) (Leval, J.). After listing examples of different justifications, Judge Leval adds: "There may well be other effective justifications. Like the rest of the fair use analysis, whether a justification is sufficient 'calls for case-by-case analysis' and 'is not to be simplified with bright-line rules.'" *Id.* at 118 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)).

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