What is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law

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Abstract

The transformative test\(^1\) has risen to the top of the agenda of the copyright academic community with no less than two major studies of copyright fair use and the impact of the transformative test released in 2011 by Professors Matthew Sag and Neil Netanel\(^2\) that follow up on three recent comprehensive studies of copyright fair use published since 2008.\(^3\) The lessons learned from these two 2011 statistical studies are significant, in that both studies confirm the importance of the transformative test in terms of its application by the courts as the dominant test of fair use, and in the observation that a finding of transformation in a copyright fair use claim virtually assures a finding that the use is fair. Nevertheless, the two studies, and those that preceded them, have not made an empirical study of the entire body of appellate law on transformation with the specific intent of demonstrating the meaning and operation of the term “transformative”—in other words, how the term works—illustrated by a synthesis of the data set of appellate cases. This article seeks to address that need.

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\(1\) The transformative test is defined in section II infra. It is illustrated in section III infra.


WHAT IS TRANSFORMATIVE?

This article analyzes the entire body of United States Supreme Court and United States Courts of Appeals case law applying the transformative test in copyright fair use cases to present two points: first, that the transformative test modifies the first sentence (sometimes referred to as the preamble) of 17 U.S.C. § 107—in particular, the terms, “the fair use of a copyrighted work”—rather than simply factor one of the four factor test. Second, the implementation of the transformative test by the courts indicates that the courts are to consider transformations in the content, context, and the predominant purpose of the original work and whether the alleged fair use changes the content, context, or predominant purpose in a manner that furthers the public policies reflected in the first sentence of section 107, namely the furtherance of the progress of the arts and the promotion of the creation of new, original expression.

The transformative test has changed copyright law, and it has become the defining standard for fair use. My conclusion is that the data set of cases applying the transformative test to concrete legal situations producing final judgments in the cases highlights the importance of a change in the predominant purpose of the work rather than simply a change in the character (the form, the contents) of the work. It is evident from the record of cases that the courts take the “purpose” part of the analysis very seriously, for all of the approved fair uses in the appellate cases involved a change in the predominant purpose for the use of the work. Even if the works were not changed in form, function, or genre, the fair use works were transformed in predominant purpose either through alteration of the contents, or recontextualization of the copied material, or by the addition of significant creative expression so that the predominant purpose of the new work was significantly different from the original work. Non-alteration of the contents and expression of artistic and literary works still can be justified as fair use, but the function and purpose of the original works must be changed in the second works in a manner that fulfills fair use objectives that promote the progress of the arts and the creation of new, original expression that benefits the public, namely through research, comment and criticism, educational, archival, or historical-referential uses.

Copyright law seeks first to promote new, original expression in the arts and literature, and second to allow other public interest activities such as education, research, archiving, news reporting, and comment and criticism of existing works. Transformation requires the copier to fulfill these objectives. The duplication of works just to show off their same creative, artistic, or literary virtues in a new time, a new place, a new mode or medium of communication, or for a new audience does not fulfill the goals of copyright. No new and original expression results from simple replication of the same communication and expression found in the original. The derivative works doctrine gives those rights to the original author or artist, not to the public at large.

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

**INTRODUCTION**

In 1994, the United States Supreme Court in *Campbell v. Acuff-Rose Music*\(^4\) adopted the transformative test for the evaluation of copyright fair use. The transformative test has risen to the top of the agenda of the copyright academic community with no less than two major studies of copyright fair use and the impact of the transformative test released in 2011,\(^5\) that follow up on three recent comprehensive studies of copyright fair use published since 2008.\(^6\) The pattern of the most recent works in 2011 is to apply quantitative analysis to the data set of reported trial-level and appellate-level federal cases on fair use. The lessons learned from these two statistical studies are significant in that both studies confirm the importance of the transformative test in terms of its application by the courts as the dominant test of fair use, and in the observation that a finding of transformation in a copyright fair use claim virtually assures a finding that the use is fair.\(^7\) Nevertheless, the two studies in 2011, and those that preceded them, have not made an empirical study of the entire body of appellate law on transformation with the specific intent of demonstrating the meaning and operation of the term “transformative”—in other words, how the term works—illustrated by a synthesis of the data set of appellate cases.\(^8\) This article seeks to address that need.

\(^4\) 510 U.S. 569 (1994).


\(^6\) Paula Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009), performed a comprehensive taxonomy of fair uses examining the record of success or failure of multiple “policy relevant clusters” of fair uses.

Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions*, 1978-2005, 156 U. PENN. L. REV. 549, 623 (2008), analyzed all fair use cases since the enactment of the 1976 Copyright Act through 2005. The work performed a quantitative analysis of cases on all four of the fair use factors of section 107 and did not focus exclusively on the transformative test established by *Campbell* in 1994.

R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008), analyzed the U.S. Court of Appeals cases through 2007 and many district court cases on transformation with the purpose of examining and contrasting the use of the test in fair use compared to derivative works analysis. The work is a good example of analysis that avoids explanatory synthesis of the authorities by using a case-by-case method of analogical reasoning.


\(^8\) Professor Netanel raised the subject of what “transformative” means in his study, 15 LEWIS & CLARK L. REV. at 746-51, but chose to explore a number of cases individually and anecdotally. The result is not a synthesized definition of what is transformative, but an exposition of the many flavors of transformative uses, with some critique of the unexpected nature of some uses found to be transformative and others found not to be transformative. As mentioned above, Professor Samuelson, 77 FORDHAM L. REV. at 2541-55, 2568-80, has grouped cases to characterize uses, but does not engage in the type of synthesis that I am presenting here to define what is transformative. Her efforts have divided cases into clusters rather than using the body of cases in combination to define the common characteristics of all successful transformative uses and all unsuccessful transformative uses.
WHAT IS TRANSFORMATIVE?

Many courts⁹ and commentators¹⁰ have interpreted the transformative test as relating to the “purpose and character of the use” factor (the first factor) of the copyright fair use provision, 17 U.S.C. § 107.¹¹ This article analyzes the entire body of United States Supreme Court and United States Courts of Appeals case law applying the transformative test in copyright fair use cases to present two points: first, that the transformative test modifies the first sentence (sometimes referred to as the preamble) of 17 U.S.C. § 107—in particular, the terms, “the fair use of a copyrighted work”—rather than simply factor one of the four factor test. Second, the implementation of the transformative test by the courts indicates that the courts are to consider transformations in the content, context, and the predominant purpose of the original work and whether the alleged fair use changes the content, context, or predominant purpose in a manner that furthers the public policies reflected in the first sentence of section 107, namely the furtherance of the progress of the arts and the promotion of the creation of new, original expression.¹²

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⁹ The courts to which I refer are cited in the Appendix, Chart A, infra.
¹¹ The Copyright Act fair use provision, 17 U.S.C. § 107 (2011), states:
   Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

   (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
   (2) the nature of the copyrighted work;
   (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
   (4) the effect of the use upon the potential market for or value of the copyrighted work.

   The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

¹² This observation begins a conversation on fair use that I hope to pursue in further work, namely that the predominant purpose analysis under the transformative test converges with the analysis of predominant purpose in right of publicity fair use law and in first amendment law on the censorship of artistic expression. Transformative works add new content, meaning, and expression to existing works or valuable names, images, or likenesses, and thereby create new, valuable first amendment expression in a manner that is not exploitative of the purposes of the original works or publicity attributes. This convergence indicates there may be a common standard for fair use in both copyright and right of publicity law that also matches the public policy and standards for first amendment protection of artistic expression.

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The test of transformativeness determines the fairness of a use to evaluate whether new works that copy from existing copyrighted works “merely ‘supersede the objects’ of the original creation,” or “instead add[ ] something new, with a further purpose or different character, altering the first with new expression, meaning, or message[.]” The test “asks, in other words, whether and to what extent the new work is ‘transformative.’” Since 1994, the federal courts have wrestled with the application of the test of transformation. This article will perform an explanatory synthesis of each United States Supreme Court and United States Court of Appeals case applying the transformative test in copyright fair use disputes.

Early scholarship following the *Campbell* transformation of copyright fair use law wrestled with the concept of transformation and what it might mean in future cases. Subsequent works have marked the progress of the law in specific contexts or comparative analyses. Many scholars have looked at the concept of transformation qualitatively or quantitatively, and have questioned whether the test has any meaning at all; often, these scholars conclude that “transformative” simply is an after-the-fact

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14 Id.

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


appellate courts apply to a use when they want to find in favor of a fair use claim. I disagree with these scholars’ conclusions. I agree with the conclusions of Professors Sag and Netanel that the transformative test has meaning and is applied by the courts to determine cases, and not simply to label a completed determination of fairness.

I will look at the entire body of appellate law since *Campbell* to demonstrate how the term “transformative” works as revealed in the record of what courts actually declare to be transformative and not transformative. My goal is not to highlight disparities between cases and holdings, but to engage in synthesis—specifically, explanatory synthesis in contemporary legal rhetoric—to create meaning and induce comprehension of the term “transformation” through rhetorical synthesis of the successful narratives that can inspire the rhetorical imagination of how to advocate for particular determinations of transformative fair use using the available data set of appellate cases that have made

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19 An excellent example is David Nimmer, “Fairest of Them All” and Other Fairy Tales of Fair Use, 66 L. & CONTEMP. PROBS. 263, 279-81 (2004), which examined fair use in cases from *Campbell* (1994) to *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002). His analysis was partially qualitative and partially quantitative in that Nimmer evaluated the facts of the cases to make a prediction whether a use should be fair, and then analyzed the numbers of cases that matched and did not match the predicted outcome. His conclusion is that courts are inconsistent and unpredictable, and Congress might as well have legislated the use of a chartboard for fair use determinations. *Id. at 280.* Other authors join in these criticisms that the entire fair use equation is random, unpredictable, and often used for after-the-fact rationalization of fair use findings. See Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1284 (2008); Edward Lee, *Warming Up To User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1468; *Lawrence Lessig, Free Culture: How BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1666 (2004).


21 I am intentionally using the term “demonstrate how transformation works” rather than “what the term ‘transformative’ means” to highlight the distinction between rule synthesis (what the term means based on an inductive synthesis of authorities contributing to the definition of a legal term) and explanatory synthesis (how the term works based on an inductive synthesis of authorities where the term has been applied in actual cases to produce a concrete outcome). See sources cited in note 14 *supra*. Explanatory synthesis is an empirical method, but one of qualitative analysis that leads to rhetorical demonstration through synthesis of samples to construct meaning from the samples. Sag and Netanel, *supra* n. 18, Nimmer, *supra* n. 17, Beebe and Samulon, *supra* n. 4, have each used empirical methods but they have not used the explanatory synthesis method I am applying to analyze the outcome of the application of the transformative test in appellate cases so as to construct the meaning of what is transformative and what is not transformative.


23 Fair use famously has been described as “the most troublesome [issue] in the whole law of copyright.” *Time*, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968) (citations omitted). This article will demonstrate through the method of explanatory synthesis how the cases can be used to support principles of interpretation regarding the transformative test. I have analyzed the potentially controlling authorities,
I. Methodology

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

A. United States Court of Appeals Cases

I researched and analyzed cases from the United States Supreme Court and United States Courts of Appeals from the date of Campbell until September 10, 2011. I chose United States Supreme Court and Court of Appeals cases because they have the potential to be controlling authority in copyright cases. I used a variety of methods to compile the data set. The complete list of cases is provided in the Appendix, Chart A.

24 These guidelines are defined in this article as “interpretive rules.” See Murray, Rule Synthesis and Explanatory Synthesis, 8 LEG. COM. & RHET. at 222 & nn. 18, 19; Murray & DeSanctis, Legal Writing and Analysis, at 148-51; Murray & DeSanctis, Advanced Legal Writing, at 515-17. 25 My principle search on Westlaw’s ALLFEDS and CTA databases was “Copyright & Transform! /100 fair-use & date(aft 3/6/1994).” I cross-checked the results using key note topic 99 (copyright) and transform! in the search “to(99) /p transform!” and KeyCite-checked the Campbell case itself for citations in United States Courts of Appeals containing variations on the word “transform.”
B. Rule Synthesis Methodology

Rule synthesis is an inductive synthesis of authorities found to be on point and controlling of a legal question in order to accurately determine and state the prevailing law—the rules—that govern a legal issue.\textsuperscript{26} Authorities that control the disposition of a legal issue must be reconciled for their explicit statements and pronouncements of the governing legal standards as well as examined for implicit requirements that are induced from the controlling authorities. Legal analysis employs synthesis of the rules to make a single coherent statement of the applicable legal principles that govern the legal issue at hand, and this becomes the “R” (Rule) section of the discourse, or the first half of the major premise of the legal reasoning syllogism.\textsuperscript{27} I use rule synthesis in this article to reveal the governing legal standards of transformation in copyright law, both the definitional rules\textsuperscript{28} and interpretive rules,\textsuperscript{29} from the case authorities.

C. Explanatory Synthesis Methodology

Explanatory synthesis, as distinguished from rule synthesis, is a separate process of induction of principles of interpretation and application concerning the prevailing rules governing a legal issue. The induction is from samples—namely case law—representing specific situations with concrete facts and in which the legal rules have been applied to produce a concrete outcome. While rule synthesis is the component of legal analysis that determines what legal standards apply to and control a legal issue, explanatory synthesis seeks to demonstrate and communicate how these legal standards work in various situations relevant to the legal issue at hand.\textsuperscript{30}


\textsuperscript{27} Murray & DeSanctis, \textit{Legal Writing and Analysis}, at chs. 2, 5, 6; Murray, \textit{Rule Synthesis and Explanatory Synthesis}, 8 LEG. COM. & RHET. at 222.

\textsuperscript{28} A definitional rule defines a legal rule or legal standard providing the terms, elements, or requirements of the rule or standard. Murray & DeSanctis, \textit{Legal Writing and Analysis}, at chs. 4, 5. For example, the rule defining parody as a form of comment and criticism in copyright law under 18 U.S.C. § 107 (2011), \textit{Campbell}, 510 U.S. at 579, and the definition of “parody” as the use of some elements of a prior author’s work to create a new one that, at least in part, comments on or criticizes the original author’s work. \textit{Id.} at 580.

\textsuperscript{29} An interpretive rule is a rule issued by a court or provided in another primary legal authority (constitution, statute, or administrative rule or regulation) that instructs attorneys and judges on the proper interpretation and application of a definitional rule. Murray & DeSanctis, \textit{Legal Writing and Analysis}, at chs. 4, 5. For example, the rules that the copyright fair use factors of 17 U.S.C. § 107 are to be weighed together in a case-by-case analysis in light of the purposes of copyright law where no one factor predominates over the other factors, and commercial usage is simply one factor to be weighed with the others and is not a dispositive factor. \textit{See Campbell}, 510 U.S. at 577-78, 584-85.

\textsuperscript{30} See Murray & DeSanctis, \textit{Legal Writing and Analysis}, at chs. 6, 7 (discussing explanatory synthesis); Murray, \textit{Rule Synthesis and Explanatory Synthesis}, 8 LEG. COM. & RHET. at 229-34.
Explanatory synthesis contemplates that what judges say does not always match what they do. Courts might describe a rule or legal standard (tell what the rule is), but it remains for subsequent cases to illustrate the legal standard in actual legal situations (show what the rule means). If a court says, “A transformative work is one that ‘adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning or message,’” that pronouncement gives little guidance as to what changes or additions to works actually add something new, changing the purpose or character of the original work, and altering the original work with sufficiently new expression, meaning, or message. Cases provide the answer. Cases are concrete examples of situations where the rules were applied to produce an outcome. There are winners and losers in each case, those who properly transformed original works and those who did not. Explanatory synthesis examines the data set of cases to induce the illustrations of how the rules work, and synthesizes the case illustrations into principles that provide a guide for the proper interpretation and application of the law. This method of analysis is accurate and persuasive because it uses induction in a form of open demonstrative reasoning supported by a weighty number of authorities.

Explanatory synthesis is not alien to judicial analysis, and in fact, the form of explanatory synthesis may be observed in several copyright cases on transformation.36

32 Campbell, 510 U.S. at 579.
33 Cases are not rules, they contain rules, they pronounce rules, they adopt rules and interpret rules and apply the rules to facts. Rule synthesis reports the synthesized results of courts’ adoption, interpretation, and pronouncement of legal rules. Thus, it is sometimes referred to as “rule proof.” Explanatory synthesis is different, separate from rule proof. It uses cases as a source of information on the application of the rules to facts, the concrete factual situations of the cases themselves. Explanatory synthesis is reported in the “E” section (explanation section) of TREAT (Thesis-Rule-Explanation-Application-Thesis restated) and IREAC (Issue-Rule-Explanation-Application-Conclusion) paradigms. See Murray, RULE SYNTHESIS AND EXPLANATORY SYNTHESIS, 8 LEG. COM. & RHET. at 226, 229-32.
34 The structure of an explanatory synthesis has three parts: Principle—Citations—Parentheticals. Each synthesis has one principle supported by multiple citations to authorities, and each citation has a parenthetical illustrating how the authority supports the principle. The principle is a statement concerning the proper application of the rule induced from cases. The citations are to the authorities from which the principle is induced. Parentheticals are provided for each citation to explain and illustrate how the authority supports the principle. Parentheticals allow the author to give just enough information (facts, public policy, or other relevant details) as is necessary to demonstrate how the authority supports the proposition. See MURRAY & DESANCTIS, LEGAL WRITING & ANALYSIS, supra n. 7, at ch. 6 (explaining the methodology and giving examples); Murray, RULE SYNTHESIS AND EXPLANATORY SYNTHESIS, 8 LEG. COM. & RHET. at 230.
36 E.g., Campbell, 510 U.S. at 575 n.5:
    The exclusion of facts and ideas from copyright protection serves that goal [progress of science and arts] as well. See § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery ...”); Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 359, 111
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But it is an under-utilized method of analysis, and my scholarship on this point is motivated by the potential power of explanatory synthesis as a method of legal analysis and a tool of legal rhetoric. The strength of the principles stated and supported through explanatory synthesis lies in the inductive structure and its method of open demonstration. Each principle concerning how a legal rule works is induced from multiple sources adding to the credibility and reliability of the principle stated.


and at 579-80:


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

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

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

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

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

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

E.g., sources cited in n.14, supra.

See Murray, Rule Synthesis and Explanatory Synthesis, 8 LEG. COM. & RHET. at 229-37.

See id. Authors impose artificial limitations on the method when they limit the usage to a predetermined number of sources, such as three, or limit the illustration provided in the parenthetical to superficial

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

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

II. RULE SYNTHESIS: THE INTERPRETIVE RULES OF THE TRANSFORMATIVE TEST

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

The first factor in a fair use enquiry is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” § 107(1). This factor draws on Justice Story's formulation, “the nature and objects of the selections made.” Folsom v. Marsh, supra, at 348. The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like, see § 107. The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely “supersede[s] the objects” of the original creation, Folsom v. Marsh, supra, at 348; accord, Harper & Row, supra, 471 U.S., at 562, 105 S.Ct., at 2231 (“supplanting” the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and observations, or forgo the supporting parenthetical illustrations altogether. E.g., Campbell, 510 U.S. at 575 n.5, 586; Perfect 10, 508 F.3d at 1165.

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

See generally sources cited in n.14, supra.

In an IREAC or TREAT format, this section would be the “R” or “Rule Section” of the discussion. See Linda H. Edwards, Legal Writing: Process, Analysis, and Organization, chs. 10, 11, 19, 20 (5th ed. 2010) (discussing IREAC and variations for objective and persuasive discourse); James M. Boland, Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club, 18 St. Thomas L. Rev. 711, 719-23 (2006) (discussing IRAC and IREAC); Murray & DeSanctis, Legal Writing and Analysis, chs. 2, 6, 7 (discussing IRAC and TREAT); Murray, Rule Synthesis and Explanatory Synthesis, 8 Leg. Com. & Rhet. at 218, 220, 226, 229 (discussing IREAC and TREAT).

510 U.S. at 578-79.
to what extent the new work is “transformative.” Leval 1111. Although such transformative use is not absolutely necessary for a finding of fair use, Sony, supra, 464 U.S., at 455, n. 40, 104 S.Ct., at 795, n. 40, [footnote 11] the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, see, e.g., Sony, supra, at 478-480, 104 S.Ct., at 807-808 (BLACKMUN, J., dissenting), and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Thus, the Supreme Court used Judge Leval’s definition of a transformative work as a work that “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” It also stated an interpretation of when a work is not transformative, that is, when it “merely supersedes[s] the objects of the original creation,” “supplanting’ the original.” The Court held that the “central purpose” of the analysis of fair use was to be the evaluation of whether works are transformative, and endorsed transformative works as being “at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.” The Court further held that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”

Although the Court held that transformativeness creates a manifestly favorable outcome on the purpose and character of the use factor (factor 1), it also empowered transformative character as a factor that would weigh favorably on all of the other factors in the fair use analysis. Thus, the Supreme Court interpreted its own statements made both earlier and later in the case that there was to be equilibrium between the fair use factors with no one factor, such as commerciality, being “dispositive” or “conclusive.”

The Court referred to the “preamble” (sentence one) of section 107 in defining the transformative test, and connected the test to the public policies favoring free expression and the creation of new, original expression. Transformation is not tied to one factor because a properly transformative use of original work would tip the scales in favor of fair use on all of the factors when they all are considered together.

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44 Footnote 11 states: The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.
45 510 U.S. at 579.
46 Id.
47 Id.
48 Id. My explanatory synthesis reveals that this construction of 17 U.S.C. § 107 by the Court applies the transformative test as a test of “the fair use of a copyrighted work” in the first sentence of section 107 rather than a test only of the “purpose and character of the use” under factor 1 of the four factor test in section 107.
49 Id. at 578, 584-85, 594: “Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright” and that there are “no hard evidentiary presumption[s]. . . . [T]he commercial . . . character of a work is ‘not conclusive,’ . . . but rather a fact to be ‘weighed along with other[s] in fair use decisions.’ . . . No such evidentiary presumption is available to address . . whether a transformative use . . . is a fair one.” [inner citations omitted].
50 510 U.S. at 579.
51 See id. at 578, 579, 594.
The Court only gave one concrete example of a properly transformative use that would lead to a fair use determination, that of parody. Parody, as it turned out in the Court’s analysis, is a near perfect example of a transformative use with an overwhelmingly positive character that produces a favorable rating on all four of the fair use factors. But fair use is not limited to parody. The United States Courts of Appeals took on the task of defining what is a “properly transformative character,” and in so doing established several interpretive rules to give guidance as to types of use and purposes and characters of uses that also indicate appropriate transformation.

Several Courts of Appeals’ opinions suggested the broader application of the transformative test to the “fair use of a copyrighted work” language of sentence one of section 107 when the courts interpreted transformation as furthering and fulfilling the goals of copyright—“to promote the progress of science and the . . . arts”—and to avoid “excessively broad protection [that] would stifle, rather than advance, the [law’s] objective—which is “the very creativity the copyright law is designed to foster.” In truth, in literature, science and art, and must necessarily borrow, and use much which was well known and used before.” The Copyright Act recognizes “that science and art generally rely on works that came before them and rarely spring forth in a vacuum, [therefore] the Act limits the rights of a copyright owner regarding works that build upon, reinterpret, and reconceive existing works.”

Fair use involves an evaluation of the copying of an earlier work for various reasons, some of which are held to further the goals of copyright and others of which are not. Referential uses of earlier works present a particular problem because certain references are held to further the goals of copyright and the First Amendment (news, comment and criticism, parody), and others hinder the goals of copyright (references that exploit the creative content of original works). “Monopoly protection of intellectual property that impeded[s] referential analysis . . . would strangle the creative

---

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

53 See id.

54 U.S. Const. art. I, § 8, cl. 8.

55 Blanch, 467 F.3d at 250 (quoting Leval at 1109).

56 Perfect 10, 508 F.3d at 1163 (quoting Campbell, 510 U.S. at 577; Stewart, 495 U.S. at 236).

57 Campbell, 510 U.S. at 575 (quoting Emerson v. Davies, 8 F. Cas. 615, 619 (C.D. Mass. 1845) (No. 4,436)).

58 Mattel, 353 F.3d at 799 (citing Campbell, 510 U.S. at 575-77).

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

60 E.g., Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010); Gaylord v. U.S., 595 F.3d 1364 (Fed. Cir. 2010); Bridgeport Music v. UMG Recordings, 585 F.3d 267 (6th Cir. 2009).
process.” 61 “Copyright law must address . . . the ability of authors, artists, and the rest of us to express them- or ourselves by reference to the works of others, which must be protected up to a point.” 62 If “the secondary use adds value to the original—if [copyrightable expression in the original work] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” 63 Such transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space.” 64 But if the reference is made “merely . . . to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.” 65

The Courts of Appeals have held that transformation is not limited to physical changes to the original work but also includes transformation by recontextualizing the original work: “A use is considered transformative only where a defendant changes a plaintiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the plaintiff’s work is transformed into a new creation.” 66 “[E]ven making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.” 67 A search engine, for example, puts images “in a different context” so that they are “transformed into a new creation.” 68 New content, meaning, or expression must be created through the process, because the courts “have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work.” 69

III. EXPLANATORY SYNTHESIS: THE OPERATION OF THE TRANSFORMATIVE TEST

The rules above give guidance on the accepted interpretation and application of the transformative test to actual legal situations. The following section demonstrates the actual operation of the transformative test based on principles induced from the actual cases with their holdings based on concrete factual situations. 70

61 Blanch, 467 F.3d at 250 (quoting Leval at 1108).
62 Id.
64 Blanch, 467 F.3d at 251 (quoting Campbell, 510 U.S. at 579).
65 Campbell, 510 U.S. at 580.
66 Perfect 10, 508 F.3d at 1165; Wall Data Inc. v. L.A. County Sheriff’s Dep’t, 447 F.3d 769, 778 (9th Cir. 2006).
67 Perfect 10, 508 F.3d at 1165 (citing Kelly, 336 F.3d at 818-19).
68 Perfect 10, 508 F.3d at 1165 (quoting Wall Data, 447 F.3d at 778).
69 Blanch, 467 F.3d at 252.
70 As discussed above, this section provides the material for the “E section” (“explanation” section) of the IREAC or TREAT paradigm. See supra text accompanying n.31.

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<table>
<thead>
<tr>
<th>Style and Citation</th>
<th>Fair Use?</th>
<th>Content or Context Changes to Original(^7)</th>
<th>Changes in Function or Purpose(^8)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murphy v. Millennium Radio Group LLC, 650 F.3d 295 (3d Cir. 2011) (&quot;Murphy&quot;)</td>
<td>No</td>
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<tr>
<td>Bouchat v. Baltimore Ravens, 619 F.3d 301 (4th Cir. 2010) (&quot;Bouchat 1&quot;) (use of image as logos and team identifiers)</td>
<td>No</td>
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<tr>
<td>Bouchat v. Baltimore Ravens, 619 F.3d 301 (4th Cir. 2010) (&quot;Bouchat 2&quot;) (use of image in archival, historical context)</td>
<td>Yes</td>
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<td>2</td>
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<tr>
<td>Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010) (&quot;Salinger&quot;)</td>
<td>No</td>
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<td>Gaylord v. U.S., 595 F.3d 1364 (Fed. Cir. 2010) (&quot;Gaylord&quot;)</td>
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<tr>
<td>Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267 (6th Cir. 2009) (&quot;Bridgeport-UMG&quot;)</td>
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<td>A.V. v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009) (&quot;A.V. Vanderhyde&quot;)</td>
<td>Yes</td>
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<td>Peter Letterese and Assocs., Inc. v. World Inst. of Scientology Enters., 533 F.3d 1287 (11th Cir. 2008) (&quot;Peter Letterese&quot;)</td>
<td>No</td>
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<tr>
<td>Lead singer, Inc. v. BMG Music Publ’g., 512 F.3d 522 (9th Cir. 2008) (&quot;Lead singer&quot;)</td>
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<td>Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574 (6th Cir. 2007) (&quot;Zomba&quot;)</td>
<td>No</td>
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<tr>
<td>Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (&quot;Perfect 10&quot;)</td>
<td>Yes</td>
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<td>Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (&quot;Blanch&quot;)</td>
<td>Yes</td>
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<td>3</td>
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<tr>
<td>Wall Data, Inc. v. L.A. County Sheriff’s Dep’t, 447 F.3d 769 (9th Cir. 2006) (&quot;Wall Data&quot;)</td>
<td>No</td>
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<tr>
<td>Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) (&quot;Bill Graham&quot;)</td>
<td>Yes</td>
<td>1</td>
<td>2</td>
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<tr>
<td>NXIVM Corp. v. Ross Inst., 364 F.3d 471 (2d Cir. 2004) (&quot;NXIVM&quot;)</td>
<td>Yes</td>
<td>0</td>
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<tr>
<td>Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003) (&quot;Mattel-Walking Mtn&quot;)</td>
<td>Yes</td>
<td>2</td>
<td>3</td>
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<tr>
<td>Elvis Presley Enters. v. Passport Video, 349 F.3d 622 (9th Cir. 2003) (&quot;Elvis-Passport Video&quot;)</td>
<td>No</td>
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<td>1</td>
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<tr>
<td>Video Pipeline, Inc. v. Buena Vista Home Entmt., Inc., 342 F.3d 191 (3d Cir. 2003) (&quot;Video Pipeline&quot;)</td>
<td>No</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Bond v. Blum, 317 F.3d 385 (4th Cir. 2003) (&quot;Bond&quot;)</td>
<td>Yes</td>
<td>0</td>
<td>3</td>
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<tr>
<td>L.A. News Serv. v. CBS Broad., 305 F.3d 924 (9th Cir. 2002), amended &amp; reh. denied, 313 F.3d 1093 (9th Cir. 2002) (&quot;LA News-CBS&quot;)</td>
<td>No</td>
<td>0</td>
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<tr>
<td>Ty, Inc. v. Publ’ns. Int’l Ltd., 292 F.3d 512 (7th Cir. 2002) (&quot;Ty, Inc.&quot;)</td>
<td>No</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) (&quot;Kelly&quot;)</td>
<td>Yes</td>
<td>1</td>
<td>2</td>
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<tr>
<td>SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir.)</td>
<td>Yes</td>
<td>3</td>
<td>3</td>
</tr>
</tbody>
</table>

\(^7\) Content or Context Changes from Original Use to Second Use: 0 = No change in content or context; 1 = Change in size or amount, e.g., creation of reduced size image, but not simply selecting portions of original without other alteration; 2 = Change in context, recontextualization; 3 = Significant changes in content and context.

\(^8\) Changes in Function or Purpose from Original Use to Second Use: 0 = No change in function or purpose; 1 = Minimal change in function or purpose but still exploits creative original expression of the original work; 2 = Adds additional function and purpose to original; 3 = Significant, overwhelming change in function and purpose.
### What Is Transformative?

<table>
<thead>
<tr>
<th>Case Details</th>
<th>Verbal Use</th>
<th>Visual Use</th>
<th>Transformativeness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Davis v. Gap, Inc., 246 F.3d 152 (2d Cir. 2001) (“On Davis”)</td>
<td>No</td>
<td>0</td>
<td>0</td>
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<tr>
<td>A&amp;M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (“A&amp;M Records”)</td>
<td>No</td>
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<tr>
<td>Veeck v. S. Blg., Code Cong. Int'l, Inc., 241 F.3d 398 (5th Cir. 2001), rev'd on other grounds, 293 F.3d 791 (5th Cir. 2002) (“Veeck”)</td>
<td>No</td>
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<td>1</td>
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<tr>
<td>Nunez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000) (“Nunez”)</td>
<td>Yes</td>
<td>0</td>
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<tr>
<td>Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110 (9th Cir. 2000) (“Worlddw Ch”)</td>
<td>No</td>
<td>0</td>
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<tr>
<td>Sony Computer Entm't. America, Inc. v. Bleem, LLC, 214 F.3d 1022 (9th Cir. 2000) (“Sony-Bleem”)</td>
<td>Yes</td>
<td>1</td>
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<td>Sony Computer Entm't., Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000) (“Sony-Connectix”)</td>
<td>Yes</td>
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<td>3</td>
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<td>Nihon Keizai Shim bun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65 (2d Cir. 1999) (“Nihon Keizai”)</td>
<td>No</td>
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<td>Micro Star v. Formgen Inc., 154 F.3d 1107 (9th Cir. 1998) (“Micro Star”)</td>
<td>No</td>
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<td>L.A. News Serv. v. Reuters Television Int'l Ltd., 149 F.3d 987 (9th Cir. 1998) (“LA News-Reuters”)</td>
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<tr>
<td>Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998) (“Infinity”)</td>
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<td>Castle Rock Entm't. v. Carol Pub'l'g. Group., 150 F.3d 132 (2d Cir. 1998) (“Castle Rock”)</td>
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<tr>
<td>Sundeman v. The Seajay Soc'y, 142 F.3d 194 (4th Cir. 1998) (“Sundeman”)</td>
<td>Yes</td>
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<tr>
<td>Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998) (“Leibovitz”)</td>
<td>Yes</td>
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<tr>
<td>Ringgold v. Black Entm't. Television, 126 F.3d 70 (2d Cir. 1997) (“Ringgold”)</td>
<td>No</td>
<td>0</td>
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<tr>
<td>Dr. Seuss Enters., L.P. v. Penguin Books USA, 109 F.3d 1394 (9th Cir. 1997) (“Dr. Seuss”)</td>
<td>No</td>
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<tr>
<td>L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997) (“LA News”)</td>
<td>No</td>
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<tr>
<td>Allen v. Academic Games League of Am., 89 F.3d 614 (9th Cir. 1996) (“Allen”)</td>
<td>Yes</td>
<td>0</td>
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<tr>
<td>Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1995) (Am Geophys)</td>
<td>No</td>
<td>1</td>
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</tr>
</tbody>
</table>

The data set of cases indicates that artistic and literary uses—by reference or by incorporation—may be properly transformative and satisfy the fair use factors, or they may be insufficiently or inconsequentially transformative, leading to a finding of no fair use. The difference is drawn through examination of the content, context, and purpose of the transformation.

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73 See the Appendix at the end of this article for more detailed information concerning the cases from which the principles stated in this section are induced.

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

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

76 See sections A and B below.

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In general, a use that changes the content or context of the work that also works a change in the purpose or function\textsuperscript{77} of the original work tends towards a finding of transformation and a finding of fair use, while a use that makes changes in content or context but still primarily exploits the creative virtues of the original in a new mode or medium will not be held to be fair.\textsuperscript{78} This principle may be seen in many areas: a change in purpose or function through comment, criticism, parody, or satire,\textsuperscript{79} and change in purpose or function from an expressive or creative use to one of archival, referential, or historical value\textsuperscript{80} or to a new purpose or function of education or research,\textsuperscript{81} may be held to be transformative and a fair use of the original work. Taking existing copyrighted material and placing it in a new context so as to change the predominant purpose and function of the original material is transformative if the use creates a new meaning and new expression for the original with a further purpose and different character than the original.\textsuperscript{82}

This section also explores the lessons to be learned from the application of the transformative test in situations where transformation failed—where transformation was accomplished but the use was held not to be fair,\textsuperscript{83} or where no transformation was attempted or accomplished and the courts determined the use to be not fair as a result of lack of transformation.\textsuperscript{84}

\textit{A. Transformation of Artistic Works}

The first chart below compiles in four quadrant format the cases reported in the chart above that involve artistic works and fair uses. The coding of each case is based on the facts and description of the case:

\textsuperscript{77} The explanatory synthesis of the data set of cases leads to a distinction between purpose and function that relates to the concept of predominant purpose. A predominant purpose is the objective (and sometimes subjective) revelation of a motive toward a public policy of copyright law or the first amendment, such as the creation of new, original expression or the furtherance of the progress of the arts, as opposed to a motive to exploit, replicate, recast, reproduce, and reveal the same expression as the original. A function is more instrumental—whether the function of the original overlaps the function of the copy in some meaningful way. As revealed below, predominant purpose is a more important factor than function. For example, an original photograph and a thumbnail-sized image of the same photograph in an internet search-results screen both function to reveal the contents of the photograph, but the meaningful, legally significant distinction is found in the completely different predominant purpose of the display of the original photograph compared to the display in the search engine (art, entertainment, aesthetic predominant purpose of the original vs. referential, archival, research predominant purposes of the internet search copy). \textit{See}, \textit{e.g., Perfect 10}, 508 F.3d at 1165; \textit{Kelly}, 280 F.3d at 934.
\textsuperscript{78} \textit{See} sections C—E below.
\textsuperscript{79} \textit{See} section C below.
\textsuperscript{80} \textit{See} section D below.
\textsuperscript{81} \textit{See} section E below.
\textsuperscript{82} \textit{See} \textit{Campbell}, 510 U.S. at 579. \textit{See also} sections C-E below.
\textsuperscript{83} \textit{See} section F below.
\textsuperscript{84} \textit{See} section G below.
**WHAT IS TRANSFORMATIVE?**

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

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

**Chart 1: Synthesis of “Artistic” Cases involving Original Artwork, Film, Music, Radio, Photography, and Toys**

<table>
<thead>
<tr>
<th>Limited or No Content &amp; Context Changes (0, 1) with Significant Purpose and Function Changes (2, 3)</th>
<th>Significant Content &amp; Context Changes (2, 3) with Significant Purpose and Function Changes (2, 3)</th>
<th>Fair Use</th>
</tr>
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<tr>
<td>Fair Use</td>
<td>Perfect 10 (1/2)</td>
<td>Campbell (3/3)</td>
</tr>
<tr>
<td></td>
<td>Bill Graham (1/2)</td>
<td>Bouchat 2 (2/2)</td>
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<tr>
<td></td>
<td>NXIVM (0/3)</td>
<td>Blanch (2/3)</td>
</tr>
<tr>
<td>No Fair Use</td>
<td>None</td>
<td>Gaylord (3/2)</td>
</tr>
<tr>
<td>Fair Use</td>
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<td>None</td>
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<tr>
<td>No Fair Use</td>
<td>Bridgeport-UMG (2/1)</td>
<td>Murphy (0/0)</td>
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<td></td>
<td>Castle Rock (3/1)</td>
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<td>Leadsinger (0/0)</td>
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<td></td>
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<td></td>
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<td>Elvis-Passport Video (0/1)</td>
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<td></td>
<td></td>
<td>Video Pipeline (1/1)</td>
</tr>
<tr>
<td>+/--</td>
<td>Significant Content &amp; Context Changes (2, 3) with Limited or No Purpose and Function Changes (0, 1)</td>
<td>Limited or No Content &amp; Context Changes (0, 1) with Limited or No Purpose and Function Changes (0, 1)</td>
</tr>
</tbody>
</table>

Because my purpose in explanatory synthesis is to synthesize common fact patterns and copyright narratives, I have coded the cases based on the facts of the case and categorized them based on the outcome of the case on the fair use issue.  

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

86 For example, based on the facts of the case, I have coded the Gaylord case, 595 F.3d 1364, as being a case involving a significant content and context change (Content, Context score of 3) and as adding an additional function and purpose to the original (Purpose, Function score of 2), but categorized it as a non-fair use case because the court refused to find a fair use when the Postal Service made significant changes to the context and content of the original Korean War Memorial sculpture, and in fact found that that the purpose and function of the copy and the original was, for all intents and purposes, the same. Similarly, in the next section, based on its facts, I have coded Dr. Seuss Enterprises case, 109 F.3d 1394, as being a case of significant content and context changes (Content, Context score of 3) and as involving a significant, overwhelming change in function and purpose from the original (Purpose, Function score of 3), but categorized it as a non-fair use case because the court found no fair use when the authors of “The Cat Not in the Hat” used some of the rhyming style, cartoon figurative images, and graphic design of Dr. Seuss’s “The Cat in the Hat” for its spoof of the O.J. Simpson trial.
The synthesized principles induced from the data set regarding artistic original material are further charted below.\textsuperscript{87} In most instances, I have charted two or more synthesized principles to show the point induced from two or more perspectives: the authorities demonstrating copyright narratives of successful transformative fair uses, and the authorities demonstrating copyright narratives of unsuccessful transformative fair uses. I have provided the explanatory synthesis (the citations and supporting parentheticals) in footnotes to demonstrate the induction and supporting authorities:

<table>
<thead>
<tr>
<th>-/+</th>
<th>None</th>
<th>Campbell (3/3)</th>
<th>Blanch (2/3)</th>
<th>Leibovitz (3/3)</th>
<th>Gaylord (3/2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>+/-</td>
<td>Bridgeport v UMG (2/1)</td>
<td>Murphy (0/0)</td>
<td>Bouchat 1 (0/0)</td>
<td>+/-</td>
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</tbody>
</table>

The use of an artistic original work will be deemed transformative when the use adds valuable artistic changes to the original giving the resulting work new artistic meaning and artistic expression.\textsuperscript{88}

The artistic changes must create a new meaning and new expression; if the original is simply redisplayed, reproduced, rebroadcast, or redistributed in a new mode or method of exploiting the same creative artistic virtues of the original work, the use will not be deemed transformative and not a fair use.\textsuperscript{89}

\textsuperscript{87} I am charting the principles induced from the data set and citing the cases in the footnotes of this article to draw attention to the mode of demonstration of explanatory synthesis which requires specific attention both to the principle induced from the data set and the parentheticals provided after each citation supporting the principle.

\textsuperscript{88} See Campbell, 510 U.S. 577-80 (rap group added new musical style and genre and new lyrics to original rock ballad creating a new musical composition with a new meaning); Blanch, 467 F.3d 244 (artist placed original fashion magazine photographic image into painting combining image with additional images of junk food and Niagra Falls to make new expression concerning the appetites flowing through modern society); Leibovitz, 137 F.3d 109 (movie poster changed original photograph from a work of serious art with historical Renaissance art reference to one of comic art with a new message of buffoonery).

\textsuperscript{89} See Murphy, 650 F.3d 295 (slightly cropped photo of radio shock jocks used for same news and promotional purposes as the original photo was not transformative and not fair use); Bouchat, 619 F.3d 301 (plaintiff’s Shield Drawing was adapted for a highly stylized Raven’s “Flying B” logo on helmets and uniforms, on the playing field, and in posters, tickets, and advertising, but all such uses as a logo still revealed and reproduced the same valuable artistic expression as the original Shield Drawing, and the product of the changes and adaptations still carried the same meaning and message as the original); Gaylord, 595 F.3d 1364 (photograph and postage stamp depicting plaintiff’s Korean War Memorial each adapted and altered the appearance of the war memorial to display a different tone and mood in the depiction—gray, murky, fog of war in the photograph, and stark, cold, loneliness of war in winter in the stamp—but the ultimate meaning and message of the original memorial and the two artistic adaptations was held to be the same: to remember and celebrate Korean War Veterans; thus, the uses were not fair); Bridgeport v. UMG, 585 F.3d 267 (although defendant’s sampling placed the iconic Atomic Dog funk lyric and funk track in an updated hip-hop recording, the funk track was reproduced with little variance or alteration from the original and was reused for the same musical artistic purposes as the original, and the
WHAT IS TRANSFORMATIVE?

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<tr>
<th>+/-</th>
<th>Perfect 10 (1/2)</th>
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<td>Bill Graham (1/2)</td>
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<td>Kelly (1/2)</td>
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<td>Nunez (1/2)</td>
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<td>Sony-Bleem (1/2)</td>
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<th>+/-</th>
<th>Bouchat 2 (2/2)</th>
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<td>Mattel-Walking Mt. (2/3)</td>
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<th>+/-</th>
<th>Bouchat 1 (0/0)</th>
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<td>Leadsinger (0/0)</td>
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<td>Zomba (0/0)</td>
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<td>Elvis-Passport Video (0/1)</td>
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<td>Video Pipeline (1/1)</td>
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<td>Ty, Inc. (0/0)</td>
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<td>Infinity (0/1)</td>
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<td>Ringgold (0/0)</td>
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</table>

A change in context for an artistic work even without any changes to the content of the work may be sufficient if the predominant purpose and function of the new work is sufficiently different from the original work and fulfills one of the principle goals of the copyright laws.

A hip-hop version of the sample carried the same meaning and expression as the original: a low tone beat and syncopated vocalization of the same word, “dog,” as heard in the original; thus, the use was not fair; *Castle Rock*, 150 F.3d 132 (changing the format and medium of entertainment material from the *Seinfeld* television series to a trivia quiz format did not add new and valuable artistic or entertainment content to the original material, and did not change the meaning, message, expression, or purpose of the original material; thus, the use of the original entertainment content was not fair).

*See Bouchat*, 619 F.3d 301 (use of original Shield Drawing in logos held and displayed for historical and archival reasons at the Baltimore Ravens’ headquarters was a use with a purpose and function different from the artistic purpose and meaning of the original work; historical, referential, and archival uses are appropriate fair use purposes); *Perfect 10*, 508 F.3d 1146 (original photographs were reduced in size to thumbnail images but otherwise reproduced verbatim, but the purpose and function of the thumbnails within a search engine image search results screen was a completely new function with a new and different purpose and meaning from the artistic purposes and meaning of the original photographs; the use fulfilled proper fair use reference and research purposes); *Bill Graham Archives*, 448 F.3d at 605 (original images of concert posters were reduced in size but otherwise reproduced verbatim, but the purpose and function of the new use of the images—to document a timeline of concert performances of the Grateful Dead—was completely new and different from the artistic purposes and meaning of the original poster images and fulfilled proper fair use archival, historical, referential, and educational purposes); *Kelly*, 280 F.3d 934 (as in *Perfect 10*, use of original images in reduced size for purpose of displaying search results in internet image search engine was new function with a new purpose and meaning for the images that fulfilled proper fair use reference and research purposes); *Nunez*, 235 F.3d 18 (republication of original modeling portfolio photographs without alteration but within new context of news reporting of the actual existence of the photographs themselves after subject became Puerto Rico’s Miss Universe contestant was a new function with a new meaning and new purpose for the photographs that met fair use news and reference purposes); *Sony Computer v. Bleem*, 214 F.3d 1022 (use of screen shots from original computer game in comparative advertising to critique the original images was fair use).
A change in context alone for artistic works is not necessarily sufficient if the change does not have a new purpose and function that communicates a new meaning with new, valuable expression furthering a goal of the copyright laws.\(^{91}\)

A use of a toy that adds new content, material, and expression in a manner that changes the function and purpose of the original toy will be permitted, but one that exploits the creative virtues of the toy in new media but for the same purposes as the original will not be fair.\(^{92}\)

B. Transformation of Literary Works

As mentioned above, this section reports the analysis of literary works. I am referring to printed and verbal works of a literary, scholarly, scientific, or educational nature including computer programs, news reporting, and journalism.

\(^{91}\) See *Bouchat*, 619 F.3d 301 (aside from historical and archival uses at Baltimore Ravens’ headquarters, the general use of the plaintiff’s Shield Drawing in stadium advertising, on the field, on uniforms, on tickets and other merchandise did not represent a new appropriate function for the drawing and did not fulfill a different artistic or creative purpose for the original work, and thus, did not constitute a fair use); *Gaylord*, 595 F.3d 1364 (function and meaning of the original sculpture and the images in the photograph and postage stamp were held to be the same: to celebrate and remember Korean War Veterans); *Leadsinger*, 512 F.3d 522 (change in form and function from audio recording to karaoke soundtrack audio recording was not a new function carrying new meaning or purpose from original musical recordings); *Zomba*, 491 F.3d 574 (same); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (recombining video and audio segments from performances of Elvis were placed in new context—a comprehensive video biography work—but were reproduced for the same purpose and carried the same function and meaning as the original video and audio recordings); *Video Pipeline*, 342 F.3d 191 (copying two-minute segments of original motion pictures for use as internal reference for proprietary video database did not create a new function carrying a new appropriate fair use meaning and purpose different from the original artistic works); *On Davis*, 246 F.3d 152 (depiction of original artwork in print ad was a new context for the work without any change in artistic purpose and function of the original work); *A&M Records*, 239 F.3d 1004 (facilitating a change in format from CD to MP3 format and changing context of recording to facilitate unlicensed uncompensated file transfer did not create a new function carrying a new appropriate fair use meaning and purpose different from the original artistic works); *Infinity Broad. Co.*, 150 F.3d 104 (change in mode and medium of communication from radio broadcast to telephone communication did not create a new function carrying a new appropriate fair use meaning and purpose different from the original artistic works); *Ringgold*, 126 F.3d 70 (reproduction of story quilt image from authorized museum poster to unauthorized use as set dressing on television program did not create a new function carrying a new appropriate fair use meaning and purpose different from the original artistic work).

\(^{92}\) Compare *Mattel v. Walking Mt. Prod.*, 353 F.3d 792 (defendant placed Barbie in unusual contexts and settings, often with kitchen appliances, to criticize Barbie’s status as a beauty icon and feminine role model for young girls), *with Ty, Inc.*, 292 F.3d 512 (collectors catalog of Beanie Babies exploited the virtues of the original in a new format that worked as an competing derivative work and not a fair use).
Chart 2: Synthesis of “Literary” Cases involving Literature, Computer Programs, and News Reporting

<table>
<thead>
<tr>
<th></th>
<th>Limited or No Content &amp; Context Changes (0, 1) with Significant Purpose and Function Changes (2, 3)</th>
<th>Significant Content &amp; Context Changes (2, 3) with Significant Purpose and Function Changes (2, 3) +/+</th>
</tr>
</thead>
</table>
| **Fair Use**     | A.V. Vanderhye (0/3)  
                      | NXIVM (0/3)  
                      | Bond (0/3)  
                      | Sundeman (0/3)  
                      | Allen (0/2)  
                      | Sony–Bleem (1/2) | Suntrust (3/3)  
                      | Sony-Connectix (3/3) | Fair Use |
| **No Fair Use**  | None | Salinger (3/2)  
                      | Dr. Seuss (3/3) | No Fair Use |
| **Fair Use**     | None | Peter Lettsre (0/0)  
                      | Am. Geophys (1/1) | Fair Use |
| **No Fair Use**  | None | Wall Data (0/0)  
                      | LA News-CBS (0/0) | No Fair Use |
| **/+/-**         | Significant Content & Context Changes (2, 3) with Limited or No Purpose and Function Changes (0, 1) | Limited or No Content & Context Changes (0, 1) with Limited or No Purpose and Function Changes (0, 1) +/- |

The cases are synthesized as follows:

Synthesized Principle 6: Changes in the content of literary works that add new meaning and expression and further an appropriate fair use purpose that is different from the meaning and purpose of the original work are found to be transformative and fair.

Synthesized Principle 7: Courts look for a significant alteration in the style, theme, meaning, tone, and purpose of literary works in order to declare them fair uses rather than infringing, unauthorized, derivative works that take the same content, characters, plot, or themes as are found in the original and simply advance them to new contexts and situations.

Changes in the content of literary works that add new meaning and expression and further an appropriate fair use purpose that is different from the meaning and purpose of the original work are found to be transformative and fair.  

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93 See *NXIVM*, 364 F.3d 474 (2d Cir. 2004) (Ross Institute added commentary and criticism to copied portions of NXIVM training materials to create a new meaning and purpose—that being commentary on and criticism of the cult-like nature of NXIVM and its training materials); *Suntrust Bank*, 268 F.3d 1257 (author of “The Wind Done Gone” copied large portions of the dialogue, characters, and plot of the original “Gone With the Wind” novel but added new character names and new situations and new plot to create an entirely new work with new content, meaning, and expression that was different from and in fact critical of the meaning and message of the original work’s pro-slavery and pro-white antebellum societal viewpoints); *Sundeman*, 142 F.3d 194 (professor published portions of unpublished manuscript in combination with lecture and presentation notes regarding the historical significance of the original author and her development as a writer; purpose and meaning of the work was transformed); *Allen*, 89 F.3d 614 (games were “reproduced” and played in context of academic, educational contest changing meaning and purpose from that of the original).
Courts look for a significant alteration in the style, theme, meaning, tone, and purpose of literary works in order to declare them fair uses rather than infringing, unauthorized, derivative works that take the same content, characters, plot, or themes as are found in the original and simply advance them to new contexts and situations.\(^4\)

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<thead>
<tr>
<th>+/-</th>
<th>A.V. Vanderhye (0/3)</th>
<th>None</th>
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<tr>
<td>+/−</td>
<td>None</td>
<td>Peter Letterese (0/0) Worldwide Church (0/0) Veeck (0/1) Princeton Press (0/0) Am. Geophysical Union (1/1)</td>
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</tbody>
</table>

Literature can be copied verbatim but placed in a new context and used in such a way that the resulting use has a completely different function and purpose from the original.\(^5\)

When the second use of a literary work does not involve the addition of new material \(\textit{ad \emph{nl}}\) does not change the function, meaning, or purpose of the literature, the use is held to be not fair.\(^6\)

\(^4\) Compare \textit{NXIVM}, 364 F.3d 474 (copied materials were subject to significant criticism as “cult materials” in second use), \textit{Suntrust Bank}, 268 F.3d 1257 (second work ridiculed and criticized the racist views and attitudes of the original work through changes in characters, perspective, dialogue, and theme), \textit{with \textit{Salinger v. Colting}}, 607 F.3d 68 (although Colting attempted to change the meaning and purpose of the material he copied from “The Catcher in the Rye,” the court found that Colting’s book, “60 Years Later: Coming Through the Rye” still exploited the main character and many of the plot devices and themes of the original in an unfair manner; Colting advanced the plot 60 years and added Salinger himself to the story, but still exploited the purpose and meaning of the themes, characters, tone, and genre of the original work in the manner of an unauthorized derivative work), \textit{Dr. Seuss Enterprises}, 109 F.3d 1394 (although the storyline, characters, plot, theme, tone, and genre of the original “Cat in the Hat” book were completely changed in the satirical work, “The Cat Not in the Hat,” the court held that the artistic and literary value of the original artwork and poetic rhyming style of the original work was exploited solely to grab attention to the second work and not for a proper fair use purpose).

\(^5\) See \textit{A.V. ex rel. Vanderhye v. iParadigms}, 562 F.3d 630 (students’ papers were copied verbatim for purpose of checking content for plagiarism and were copied and archived for present and future comparison to other papers by plagiarism checking software; this use and purpose was completely different from the creative, literary purposes of the original and served reference, education, archival, and research fair use purposes); \textit{NXIVM}, 364 F.3d 474 (copied materials were presented in new work for the purpose of criticizing the original work); \textit{Bond v. Blum}, 317 F.3d 385 (attorneys copied manuscript of autobiographical work to use it as evidence against original author in child custody dispute); \textit{Sundeman}, 142 F.3d 194 (unpublished manuscript was copied and displayed for the purpose of comment and educational study and research concerning the early work of the original author).

\(^6\) See \textit{Peter Letterese and Associates}, 533 F.3d 1287 (marketing materials used in scientology training were copied and distributed in the same form and for the exact same purposes as the original work); \textit{Veeck}, 241 F.3d 398 (model codes were reproduced verbatim for same purposes as the original model codes; later ruling reversed and declared the original material to be non-copyrightable); \textit{Worldwide Church of God}, 227 F.3d 1110 (original works of the founder of Worldwide Church of God were copied verbatim and republished and distributed by splinter Philadelphia Church for the same purposes as the original texts); 282
Computer programs may receive copyright protection under a general category of literature and writings, but the fair use of such materials is affected by the originality doctrines of merger and scènes à faire in a way that differs from the standard literature cases discussed above.\textsuperscript{97}

\begin{center}
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{Synthesized Principle 11: Copying a computer program and using its creative, original attributes for the same purposes for which the original program was created is not fair use even if it serves general public interest or expressive purposes.} & \\
\hline
\hline
\textbf{+/-} & Sony–Bleem (1/2) & None & +/- \\
\hline
\end{tabular}
\end{center}

Copying a computer program and using its creative, original attributes for the same purposes for which the original program was created is not fair use even if it serves general public interest or expressive purposes.\textsuperscript{98}

News reporting cases do not differ greatly from the standard literature fair use cases already discussed above:

\begin{center}
\begin{tabular}{|c|c|c|c|}
\hline
\textbf{Synthesized Principle 12: There is no general exemption for news reporting that allows broader and greater fair uses of copyrighted material when used in a news reporting context.} & \\
\hline
\textbf{Synthesized Principle 13: If the existence of the original material itself is newsworthy, copying the original material for the purpose of reporting on its existence may be fair, but copying the content of the original in order to republish the content of the original for the same purposes as the original material was published (\textit{i.e.}, for news reporting purposes) is not fair.} & \\
\hline
\textbf{+/-} & Nunez (0/2) & None & +/- \\
\hline
\textbf{+/-} & None & Murphy (0/0) & +/- \\
& & LA News-CBS (0/0) & \\
& & LA News-Reuters (0/0) & \\
& & LA News-KCAL (0/0) & \\
& & Nihon Keizai (0/0) & \\
\hline
\end{tabular}
\end{center}

There is no general exemption for news reporting that allows broader and greater fair uses of copyrighted material when used in a news reporting context.\textsuperscript{99}

\textit{Princeton Univ. Press}, 99 F.3d 1381 (significant portions of scholarly and literary works were copied verbatim for commercial sale at university bookstores, but for same function and purposes as the original copyrighted works); \textit{Am. Geophysical Union}, 60 F.3d 913 (Texaco copied and abstracted the content of scientific magazine for internal reference and research, but in fact simply exploited the content of the magazines for the same function and purposes for which the original works were created and sold).\textsuperscript{97} \textit{E.g.}, \textit{Sony Computer Ent. v. Connectix Corp.}, 203 F.3d 596 (court allowed interim copying of code in process of reverse engineering of operation of source code to make PlayStation emulator program for use on personal computers because it was the only way to study the operation of the source code to be able to replicate its noncopyrightable procedures and functioning under the Merger Doctrine).\textsuperscript{98}

\textit{See Wall Data}, 447 F.3d 769 (sheriff’s office benefited from unauthorized copying and installation of Wall Data’s program, but program was copied and used for the same function and purpose for which the original work was sold); \textit{Micro Star v. Formgen Inc.}, 154 F.3d 1107 (replication of characters and images from original Duke Nukem game in the context of compiling a collection of user-generated levels for the computer game was not fair use as it exploited the creative contents of the game; Formgen allowed creation of user-generated levels with its level development kit, but did not expressly or impliedly authorize the commercial sale of user-generated game levels). \textit{But see Sony Computer v. Bleem}, 214 F.3d 1022 (use of screen shots from original computer game in comparative advertising to critique the original images was fair use).\textsuperscript{99} \textit{See Murphy}, 650 F.3d 295 (slightly cropped photo of radio personalities was used without permission for the same news and promotional purposes as the original and was not fair use); \textit{L.A. News Service v. CBS}, 283
If the existence of the original material itself is newsworthy, reprinting the original material for the purpose of reporting on its existence is fair, but copying the content of the original in order to republish the content of the original for the same purposes as the original material was published (i.e., for news reporting purposes) is not fair. 100

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

| +/+ | NXIVM (0/3) | Campbell (3/3) | Synthesized Principle 14: The use of original material copied from other work for the purpose of criticizing, spoofing, ridiculing, or commenting on the original works is a well established fair use. |
| Sony-Bleem (1/2) | Salinger (3/2) | Blanch (2/3) | Dr. Seuss (3/3) |
| Sundeman (0/3) | Mattel-Walking Mtn (2/3) | Leibovitz (3/3) | Suntrust (3/3) |
| +/- | Castle Rock (3/1) | None |

The use of original material copied from other works for the purpose of criticizing, spoofing, ridiculing, or commenting on the original works is a well established fair use. 101

305 F.3d 924 (replication of a few key seconds of copyrighted footage of beatings during post-Rodney King verdict Los Angeles riots was not fair use as news reporting even during the time frame of the riots, nor was it fair use when it was used later in abstracted news montage form with added text and commentary; the secondary use exploited the copyrighted news footage for the exact same purposes for which the original was created); LA News Service v. Reuters, 149 F.3d 987 (same—even the rebroadcasting of a few seconds of footage of the beating of Reginald Denny in Los Angeles riots could not be justified solely on the grounds of news reporting); L.A. New Service v. KCAL-TV, 108 F.3d 1119 (same); Nihon Keizai, 166 F.3d 65 (copying and abstracting Japanese financial and business news data was not fair use as it replicated the copyrighted materials for the same purposes for which the original news items were created).

100 E.g., Jimenez, 235 F.3d 18 (modeling portfolio pictures of Puerto Rico’s Miss Universe contestant became the news story because her status as a contestant made the existence of nude and partially nude photographs newsworthy and replication of the actual photos documented and proved their existence fulfilling the news reporting fair use requirements).

102 See Campbell, 510 U.S. 569 (original rock ballad was copied so as to convert the work to one that openly criticized the naiveté of the original); NXIVM, 364 F.3d at 471 (original work was copied so as to comment on the cultlike nature of the work); Blanch, 467 F.3d 244 (the use of a paradigmatic example of the depiction of women in fashion magazines was used in part to comment on the meaning of such images); Mattel v. Walking Mt., 353 F.3d 792 (use of Barbie doll in images was intended to comment on the iconic status of Barbie as a model of feminine grace, beauty, and perfection for young girls); Sony v. Bleem, 214 F.3d 1022 (use of screen shots in comparative advertising was fair use; images were modified and were used for new function and purpose to compare computer emulator's screen shots with original console screen shots); Suntrust Bank, 268 F.3d 1257 (“Wind Done Gone” book was intended to ridicule and expose the prejudices and racism of the original work, “Gone With the Wind”); Leibovitz, 137 F.3d 109 (“Naked Gun” movie ad intended to ridicule the serious, artistic posing and pretentiousness of the original work by
What is Transformative?

Parody is one of the safest fair uses because it intentionally copies the original work in order to criticize and ridicule the original work, but for the most certain results of fair use, the criticism should be blatant and obvious rather than subtle or indirect.\(^{102}\)

Satire may be accepted as fair use, but the new work must be highly transformed and not exploit the same creative artistic virtues of the original for the same or similar purposes as the original.\(^{103}\)

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

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

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\(^{102}\) Compare Campbell, 510 U.S. 569 (2 Live Crew copied the bass riff and musical scheme of the beginning of “Pretty Woman” and proceeded to distort the music and lyrics to make a raunchy rap song that ridiculed the romantic tone and naïveté of the original rock ballad), and Suntrust Bank, 268 F.3d 1257 (“Wind Done Done” copied characters and situations from “Gone With the Wind” but distorted the dialogue and point of view of the work adding a new tone and new meaning that ridiculed the racist perspective and themes of the original), and Mattel v. Walking Mt., 353 F.3d 792 (Walking Mountain placed Barbie dolls in unusual settings with kitchen appliances to comment on and criticize Barbie’s iconic status as a model for feminine beauty, grace, and style for young American girls), and Leibowitz, 137 F.3d 109 (Paramount created poster with famous portrait of pregnant star and distorted the image by superimposing a male comedian’s head onto the female star’s body to ridicule the pretentious artistic styling of the original), with Salingar, 607 F.3d 68 (Colting attempted to advance the plot of “Catcher in the Rye” 60 years and added Salinger as a character in Salinger’s own story to comment on and critique the original work, the main character, and Salinger’s reclusive lifestyle, but in the end, the court found the new work merely exploited the same creative aspects of the original novel in the manner of a derivative work, not a parody or other proper commentary or criticism), and Dr. Seuss Enters., 109 F.3d 1394 (although O.J. Simpson trial story changed the entire genre, theme, tone, characters, dialogue, and plot of the original “Cat in the Hat” work, the court found no critical commentary or statement of any kind regarding or reflecting on the original Dr. Seuss work, and the court concluded that the second work merely stole and exploited the Dr. Seuss work to grab attention).

\(^{103}\) Compare Blanch, 467 F.3d 244 (Blanch’s work was used as one example of the genre of fashion imagery, and the additional creative, artistic material added by Koons and his recontextualization of the work overwhelmed any exploitive purpose in the use of the creative content reflected in Blanch’s photograph), with Salingar, 607 F.3d 68 (whatever additional comment and message added by Colting did not change the fact that his work generally exploited the creative material of the original work by advancing the plot rather than changing the function and purpose of the work), and Castle Rock, 150 F.3d 132 (Seinfeld Aptitude Test did not make commentary or criticism regarding the Seinfeld series but still exploited the same creative value and meaning of the original for the same entertainment purpose as the original), and Dr. Seuss Enters., 109 F.3d 1394 (“Cat Not in the Hat” author’s commentary and criticism of the O.J. Simpson trial and the U.S. court system did not justify the exploitation of the creative artwork and rhyming style of the original Dr. Seuss work).
Archival and historical usage of original material has the potential to create a new function and meaning for the work, and may meet fair use objectives if the use has a proper purpose that is different from exploitation of the creative original value and meaning of the original work.\(^4\)

Copying for reference would swallow all of copyright’s protection in one fair use exception if any original material could be freely reproduced simply to acknowledge and refer to its existence.\(^5\)

\(^4\) Compare Bouchat 1 and 2, 619 F.3d 301 (the holding on two separate issues in the case reveals that a change in context from artwork to commercial exploitation as a logo for team uniforms, stadium, tickets, and other merchandise is not a sufficient change in the meaning and purpose of the work, but a change from an artistic use in the original to an archival and historical use to record the history of the franchise in a display at the franchise’s headquarters was an appropriate change in the purpose and function of the use of the original work), and Perfect 10, 508 F.3d 1146 (verbatim reproduction of images in thumbnail size was fair because the use in the context of an internet image search engine created a completely new function and purpose for the images that met fair use reference, research, and public interest objectives), and Kelly, 280 F.3d 934 (same), and Bill Graham Archives, 448 F.3d 605 (use of concert poster images in historical timeline in work documenting the career of the Grateful Dead band was appropriate archival and historical reference use that did not simply seek to exploit the artistic and creative virtues of the original works), with Elvis Presley Enters. v. Passport Videos, 349 F.3d 622 (compilation of historical recordings and video of famous musical artist into one package for archival, historical purposes did not change the fact that each copied segment was exploited for the same artistic, creative virtues and for the same purpose as the original works were created to fulfill), and Video Pipeline, 342 F.3d 191 (film clips were copied and compiled for internal reference and archiving in a proprietary, commercial database of videos, and thus exploited the creative content of the original videos in the same way and for the same purpose that the copyright owners create and distribute trailers of the works), and Ty, Inc., 292 F.3d 512 (collectors catalog reproduced images of Ty, Inc.’s Beanie Babies for archival and reference purposes that duplicated the purposes for Ty’s creation and distribution of similar images of the Beanie Babies, and thus functioned as an unauthorized derivative work and not a fair use of the original images).

\(^5\) See Peter Letterese, 533 F.3d 1287 (copying of sales and marketing materials for reference in scientology sales training was unauthorized infringement not fair use); Leadsinger, 512 F.3d 522 (adaptation of original musical works for use in karaoke did not change the fact that the creative, artistic value of the original works was being exploited in a new medium); Zomba, 491 F.3d 574 (same); Veeck, 241 F.3d 398 (copying and display of text of model building code for reference on information website was infringement, not fair use); Worldwide Church, 227 F.3d 1110 (copying of religious texts for reference in religious study and education still was copying of original texts to exploit them for the same purposes for which they were created); Castle Rock, 150 F.3d 132 (copying material from Seinfeld show to make trivia questions simply exploited the entertainment value of the original work); A&M Records v. Napster, 239 F.3d 1004 (adaptation of works for a new medium and archiving and referential use in search service that facilitated unauthorized duplication and transfer of the original works did not change the fact that the creative, artistic value of the original works was being exploited for the same purposes for which the original works were created).
What Is Transformative?

Instead, a proper referential use is one that is undertaken for a completely new and separate purpose from the purpose the original work was created to fulfill.\textsuperscript{106}

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

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Simple reference to original works by copying the content of the works is not sufficient to meet fair use objectives even if the copying occurs in an educational, research, religious, or other general public interest context unless the meaning and purpose of the use of the work changes.\textsuperscript{107}

Compilation of excerpts of original material is not sufficient even if the material is combined for educational, archival, research, or other reference uses if the contents of the work ultimately are used for the same creative, literary, or scientific purposes as the original works.\textsuperscript{108}

\textsuperscript{106} See Perfect 10, 508 F.3d 1146 (display of images in an internet image search engine created a completely new function and purpose for the images that met fair use reference, research, and public interest objectives); Kelly, 280 F.3d 934 (same); Bill Graham Archives, 448 F.3d 605 (use of concert poster images to illustrate historical record of music group was a new function and purpose for the images that met fair use reference, archival, and research objectives).

\textsuperscript{107} Compare Sundeman, 142 F.3d 194 (use of portions of original unpublished novel was undertaken by an academic in an educational setting to explain the author’s research and analysis of the early writing of the famous author of the unpublished original work; the work was not copied simply to exploit the creative, literary virtues of the work), with Peter Letterese, 533 F.3d 1287 (copying of sales and marketing materials for reference in scientology sales training was unauthorized infringement not fair use); Veeck, 241 F.3d 398 (copying and display of text of model building code for reference on information website was infringement, not fair use); Worldwide Church, 227 F.3d 1110 (copying of religious texts for reference in religious study and education still was copying of original texts to exploit them for the same purposes for which they were created); Princeton Univ. Press, 99 F.3d 1381 (copying of portions of literary, scholarly, and scientific works for sale in university course packets was a commercial exploitation of the creative, literary virtues of the original works); Am. Geophysical, 60 F.3d 913 (copying and abstracting contents of scientific and technical manuals for internal distribution for research, reference, and archival purposes still exploited the original works for the same purposes for which they were created).

\textsuperscript{108} See Peter Letterese, 533 F.3d 1287 (sales training materials were copied and used for same purposes for which the original materials were created); Veeck, 241 F.3d 398 (model building code was copied and displayed for same purposes for which the original materials were created); Worldwide Church, 227 F.3d 1110 (religious texts were copied and republished for the same purposes for which the original texts were created); Princeton Univ Press, 99 F.3d 1381 (literary, scholarly, and scientific works were copied and sold in university course packets for same purposes for which the original materials were created); Am.
F. Alteration of Content, Form, or Genre without Fair Use

The cases above in which fair uses were found involved uses that added content and expression in a way that changed the function and purpose of the original work to a function and purpose that furthered one of the primary goals of copyright—education, research, commentary, criticism, and other functions and purposes that benefited the public. This section looks at cases that involve a significant alteration of the original without accomplishing the appropriate change in function or purpose. I have included this section of the analysis to bring some seemingly “outlying” cases into the fold, explaining through explanatory synthesis how these cases still reveal that the transformative test interprets the first sentence of section 107 to require content, context, or purpose changes that further the overall goals and public policy of copyright law to promote the progress of the arts and to encourage the creation of new, original, creative works that do not copy earlier works simply to exploit their creative content.

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<th>Salinger (3/2)</th>
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Artistic changes that allow the creative artistic expression of the original work to shine through, and merely work an embellishment of the original artistic virtues and expression, are not properly transformative and are not fair use.109

Geophysical, 60 F.3d 913 (scientific and technical manuals were copied for the same purposes for which they were created).

109 Compare Gaylord, 595 F.3d 1364 (the appearance of the Korean War Memorial was significantly altered in the photograph and postage stamp but still depicted the same artistic design and expression of the original sculpture; the artistic embellishments of the photograph and stamp did not change the meaning and function of the artistic expression present in the original work), and Bridgeport Music v. UMG, 585 F.3d 267 (hip hop group’s sampling of the iconic Atomic Dog sound and lyric significantly altered the genre and context of the original, but allowed the iconic sound and expression of the original work to shine through, that being the primary purpose of the inclusion of the same in the second work, and this improperly exploited the creative, artistic virtues of the original work), and Castle Rock, 150 F.3d 132 (Seinfeld trivia book significantly altered the form and presentation of the original television show content, but the transformation did not change the entertainment function and purpose of the original work and allowed the creative, entertaining content and expression of the original material to shine through in the second work), and Dr. Seuss Enters., 109 F.3d 1394 (original artwork, graphic design, and poetic style of original Dr. Seuss work was allowed to shine through in the second work although the style, genre, tone, and function of the plot and story of the second work was completely different from the original), with Blanch, 467 F.3d 244 (the original work was used as raw material—a placeholder for a certain genre of fashion photographic depiction of women—and the artistic changes added by Koons were meant to completely change the meaning and message of the depiction for a new function and purpose), and Leibovitz, 137 F.3d 109
WHAT IS TRANSFORMATIVE?

A work of literature that makes literary changes that advance the plot of the original or alter the form of the work but still allow the main literary and creative virtues of the original work to be appreciated in the new work will not lead to a finding of fair use.110

G. Non-Alteration Cases

The last section of the analysis examines cases that involve no alteration of the original in content or context, or no change in function or purpose. Principles may be induced from cases that have one form of alteration and change but not the other.

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The cases of limited or no alteration of the original, artistic work reveal that failure to alter, distort, adapt, or otherwise change the contents of the original work raises a significant bar to fair use.111

(Original photograph was altered specifically to change the meaning, function, and purpose of the original from a serious artistic portrait to a ridiculous, comic spoof of the original work).

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

111 See Murphy, 650 F.3d 295 (no fair use when photo of radio personalities was only slightly cropped to remove original photographer’s copyright notice, and otherwise used without permission for the same news and promotional purposes as the original); Bouchat I, 619 F.3d 301 (no fair use of non-altered drawing that formed the basis of the team’s logo when the logo was used in dozens of items associated with the team); Leadsinger, Inc., 512 F.3d 522 (non-alteration of basic elements of music when adapted for karaoke lead to
Literary works that are not altered in the second use also present a significant burden in establishing a fair use of the original work.\textsuperscript{112} Lack of alteration of the contents and expression of artistic works can only be overcome if the second use reveals a significant change in the function and purpose of the original work, and the new function and purpose of the second work must fulfill one of the public policy objectives of fair use.\textsuperscript{113}

Literary works may also be copied fairly without alteration of the contents if there is a significant change in the function and purpose of the original work, and the new function and purpose of the second work fulfill a proper objective of the fair use doctrine.\textsuperscript{114}

\footnotesize

a finding of no fair use); Zomba Enterprises, 491 F.3d 574 (same); Elvis Presley Enter., 349 F.3d 622 (no fair use when the original video clips and recordings were not altered or modified in content when compiled for biographical video compilation); Video Pipeline, 342 F.3d 191 (no fair use when the film contents were excerpted without other alteration for use in proprietary video database); A&M Records, 239 F.3d 1004 (no fair use when the content and expression of the original audio recordings was not altered or modified when the works were changed in digital format and compiled to assist file-sharing); Infinity Broad. Co., 150 F.3d 104 (no fair use when the only change in the work was a change in mode and medium of communication from radio broadcast to telephone communication); Ringgold, 126 F.3d 70 (appearance of story quilt poster was not altered or modified, only the amount shown or the timing of each display varied in the non-fair use display of the work).

\textsuperscript{112} See Peter Letterese, 533 F.3d 1287 (original marketing materials were reformatted in places, but the basic contents were copied in whole in a non-fair use replication); Veeck, 241 F.3d 398 (no fair use when contents of model building code were replicated in their entirety); Worldwide Church, 227 F.3d 1110 (no fair use when religious texts were reproduced and republished without alteration); Princeton Univ. Press, 99 F.3d 1381 (portions of literary, scholarly, and academic texts were reproduced verbatim in course packets and led to a finding of no fair use); Am. Geophysical, 60 F.3d 913 (scientific and technical journals were reproduced and abstracted without further addition to or alteration of the contents and led to a finding of no fair use).

\textsuperscript{113} Bouchat 2, 619 F.3d 301 (the only use of the unaltered Shield Drawing image that appears in the Baltimore Ravens Flying “B” logo was a limited fair use for historical, archival display the Ravens’ headquarters); Perfect 10, 508 F.3d 1146 (limited alteration in the size of the reproduced photographs was overcome by a complete change in the function and purpose of the display of the images in an internet image search engine results screen, leading to a finding of fair use); Kelly, 280 F.3d 934 (same); Bill Graham Archives, 448 F.3d 605 (limited change in the size of reproductions of concert posters was overcome by the significant change in the function and purpose of the display of the images when they were placed in a historical reference work showing a timeline of concert engagements of the Grateful Dead, and this new function and purpose met historical, reference, and archive fair use objectives); Nunez, 235 F.3d 18 (unaltered display of nude and semi-nude modeling photographs was permitted because the function and purpose of the new display was to prove the existence of these photographs in the context of news reporting).

\textsuperscript{114} A.V. ex rel. Vanderhye, 562 F.3d 630 (verbatim replication of students’ papers was undertaken for brand new academic, educational, archival, and reference purposes and copying the works for this new function and purpose was fair); NXIVM, 364 F.3d 471 (portions of NXIVM texts were copied verbatim, but the works were reproduced to criticize the cult-like approach of the materials and reproduction was held to be fair); Sundeman, 142 F.3d 194 (portions of unpublished novel of famous author were reproduced verbatim, but the reason and purpose for the reproduction was to allow scholarly, education, and critical examination of the merits of the author’s early writings, and this effort was deemed fair); Allen, 89 F.3d 614 (plaintiff's games were played openly without alteration or modification, but the educational, academic contest setting permitted this fair use).
CONCLUSIONS ABOUT THE FUNCTIONING OF THE TRANSFORMATIVE TEST

The data set of cases applying the transformative test to concrete legal situations producing final judgments in the cases highlights the importance of certain interpretive rules and gives guidance to authors, artists, and all secondary users of original works about the character and nature of proper uses of the works. Campbell established that “transformation” requires a change in the purpose and character of the work. It is evident from the record of cases above that the courts take the “purpose” part of that interpretive rule very seriously, for all of the approved fair uses in the appellate cases involved a change in the predominant purpose for the use of the work rather than simply a change in the character (the form, the contents) of the work. Even if the works were not changed in form, function, or genre, the fair use works were transformed in predominant purpose either through alteration of the contents, or recontextualization of the copied material, or by the addition of significant creative expression so that the predominant purpose of the new work was significantly different from the original work. Non-alteration of the contents and expression of artistic and literary works still can be justified as fair use, but the function and purpose of the original works must be changed in the second works in a manner that fulfills fair use objectives—promoting the progress of the arts and the creation of new, original expression that benefits the public, namely through research, comment and criticism, educational, archival, or historical-referential uses.

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

The most troubling fair use cases for secondary users of artistic or literary works are those that appear to have greatly altered significant aspects of the original works, but were not found to be fair uses. These seemingly incongruous outcomes are addressed by explanatory synthesis when all of these cases are considered together to explain the common underpinning and public policy objectives pursued by the courts in these opinions: even significant alteration of the form, or genre, or theme, or tone, or even the overall meaning of the works will not be found to be fair use if some of the creative, artistic, and expressive virtues of the original works are not replaced or overwhelmed by the expression in the second work. If the creative, artistic, and expressive virtues of the

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115 510 U.S. 579.
116 E.g., Campbell, 510 U.S. 569; Perfect 10, 508 F.3d 1146; Bill Graham Archives, 448 F.3d 605; Blanch, 467 F.3d 244; Suntrust Bank, 268 F.3d 1257.
117 E.g., A.V. ex rel. Vanderhye, 562 F.3d 630; Perfect 10, 508 F.3d 1146; Bill Graham Archives, 448 F.3d 605.
118 E.g., Campbell, 510 U.S. 569; Blanch, 467 F.3d 244; Mattel, 353 F.3d 792; Suntrust Bank, 268 F.3d 1257; Leibowitz, 137 F.3d 109.
119 E.g., Leaskinger, Inc., 512 F.3d 522; Zomba Enterprises, 491 F.3d 574; Elvis Presley Enters., 349 F.3d 622; Video Pipeline, 342 F.3d 191; A&M Records, 239 F.3d 1004; Infinity Broad. Co., 150 F.3d 104; L.A. News Service v. CBS Brdest., 305 F.3d 924; LA News Service v. Reuters Television Int'l Ltd., 149 F.3d 987; Ringgold, 126 F.3d 70.
original works still are discernable in the second work and still add value to the secondary work, the use of the original work will be deemed unfair.\textsuperscript{120}

The transformative test has changed copyright law, and it has become the defining standard for fair use. Copyright law seeks first to promote new, original expression in the arts and literature, and second to allow other public interest activities such as education, research, archiving, news reporting, and comment and criticism of existing works. Transformation requires the copier to fulfill these objectives. The duplication of works just to show off their same creative, artistic, or literary virtues in a new time, a new place, a new mode or medium of communication, or for a new audience does not fulfill the goals of copyright. No new and original expression results from simple replication of the same communication and expression found in the original. The derivative works doctrine gives those rights to the original author or artist, not to the public at large.

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

\textbf{Appendix available at www.ckjip.com}

\textsuperscript{120} E.g., \textit{Salinger}, 607 F.3d 68; \textit{Gaylord}, 595 F.3d 1364; \textit{Bridgeport Music v. UMG}, 585 F.3d 267; \textit{Castle Rock}, 150 F.3d 132; Dr. \textit{Seuss Enters.}, 109 F.3d 1394.