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Decoding Academic Fair Use: Transformative Use and the Fair Use Doctrine in Scholarship

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Abstract

Fair use in copyright law is an enormously complex legal doctrine. Although much scholarly attention has been paid to fair use in the context of teaching—particularly in on-line education—relatively little research exists on the problem of fair use in scholarship. This article analyzes reported federal cases on fair use in scholarly contexts, with a particular emphasis on the transformative use doctrine that has become enormously influential in fair use determinations. The article explores insights from this body of case law that may assist future scholars wishing to fairly use copyrighted expression in their scholarship.

Keywords: Copyright, fair use, transformative use

Decoding Academic Fair Use: Transformative Use and the Fair Use Doctrine in Scholarship

Copyright law is full of enormous complexity. It could hardly be otherwise for an area of legal doctrine that governs intangible property rights in literary, artistic, and other creations. That complexity is only enhanced when copyright's claims of ownership come up against the need for open access and free expression required in a society in which First Amendment rights of free expression are a bedrock principle. The tension between ownership and free expression is strongly felt in many quarters, but perhaps most especially in the world of scholarship.

For scholars, engaging with others' copyrighted expression through criticism, commentary, and synthesis is fundamental to the academic enterprise. Scholars across many fields—especially those that engage in scholarly analysis of works protected by copyright—simply could not effectively carry out the goals of academic scholarship without the ability to appropriate, borrow from, alter, and remix the copyrighted expression of others, whether that expression consists of text, sounds, photographs, video, or some other medium.

Copyright law is for the most part immune from direct First Amendment scrutiny, (*Eldred v. Ashcroft*, 2003), although scholars have certainly suggested this should not be the case (Lange & Powell, 2009). Nonetheless, this reality means that the fair use doctrine is one of the primary means by which the law seeks to ameliorate the tension between ownership and free expression (*Harper & Row Publishers, Inc. v. Nation Enterprises*, 1985, p. 560). Fair use, which is an affirmative defense contained in the federal Copyright Act, allows some unspecified degree of borrowing from copyrighted work without consent by, or payment to, the copyright holder. Since fair use is an equitable doctrine that must be applied case by case, it is not always possible to confidently predict which uses will be held to be fair (Netanel, 2008, p. 66).

The fair use section of the Copyright Act enumerates four nonexclusive factors designed to assist courts in determining whether a use is fair (Copyright Act, 2012). The Supreme Court has added an additional consideration, the “transformative use” doctrine, that has become an especially important component in many fair use cases (Netanel, 2011; Sag, 2012). Transformative use is a sort of value-added borrowing that emphasizes adding new meaning or message to the borrowed work or, in some cases, the use of the work in a different functional context. Certainly, one must be skeptical of any blanket statements about fair use, including those that assert a borrower can appropriate X number of words from a book or X bars from a musical

composition—these kinds of simplistic claims are simply not reflected in the case law. Despite some level of doctrinal uncertainty, a deep engagement with the cases may yield useful insights.

A few caveats about the scope of this article are in order. While there has been a great deal of legal scholarship dealing with the fair use of copyrighted expression for *teaching* purposes (Ezor, 2013; Jaszi, 2013; Simon, 2010), particularly in the context of online teaching, this work will concentrate exclusively on the fair use doctrine in the context of *scholarship*, an issue which has received less attention. Moreover, although there are interesting doctrinal questions about copyright disputes between scholars and the universities that employ them (Packard, 2002), this article will avoid that issue and assume, for purposes of the analysis, that the copyright in scholarly works resides with the scholars.

Among the few works that address scholarship specifically, none has undertaken exactly the approach of this article. For example, Bezanson & Miller (2010) provided an impressive historical and theoretical exploration of why scholarship deserves extensive protection under the fair use doctrine, but did not engage in the sort of doctrinal analysis of the case law that this work undertakes. On the other hand, Gerhardt & Wessell (2010) provided empirical data highlighting the importance of fair use on campus and sought to dispel copyright myths through a big-picture examination of fair use principles, but without this article's focus on different forms of scholarship and the implications of related caselaw. Ryan (1999) is less focused on doctrinal developments and more concerned with developing the theoretical argument that a neoclassical economic justification for copyright and fair use should not be deployed in the university context. Thus, this article offers an original contribution to the literature, one that is enhanced by the fact that other works in this general area were written some years ago and were therefore unable to capture the most recent developments in the case law.

This article will explore the problem of scholarly fair use through an examination of relevant case law, with a particular emphasis on the transformative use factor that has taken on considerable significance in most recent courts' fair use analyses. The article will first describe the foundations of fair use law. Next, it will explore and analyze illustrative cases that have analyzed scholarly fair use, including uses that have some connection to scholarship or criticism, even if not in "pure" scholarly contexts. Finally, the article will offer concluding perspectives and offer guidance for navigating this sometimes-confusing area of copyright law.

Fair Use Basics

Although the statutory text of the fair use doctrine is stated simply enough, its application by the courts is not necessarily easily predictable. Fair use arose as an equitable doctrine intended to be applied flexibly on a case-by-case basis; that flexibility, however, diminishes to some extent the degree of legal certainty the doctrine can offer potential fair users. “The tradeoff for this flexibility,” as one commentator has noted, “is an elusive legal doctrine, reputed to be the most troublesome in copyright law” (Leaffer, 2010, p. 428). Some scholars have asserted that the doctrine is broken beyond repair—noted copyright scholar David Nimmer (2003, p. 280) observed that “basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.” Other scholars are more sanguine about theorizing predictable patterns in fair use cases (Samuelson, 2009). Certainly, recent scholarship has added clarity to how courts view one of the crucial aspects of contemporary fair use decisions, the transformative use doctrine (Butler, 2015). Butler suggests that the new emphasis on transformativeness by courts (discussed in more detail below) can liberate those wishing to engage in educational borrowing of copyrighted expression from outdated fair use paradigms that have dominated educational uses. As well, various codes of best practices promulgated by the Center for Media & Social Impact (2017) and others have helped to demystify fair use issues in various educational and artistic contexts. Although best practices statements are not without their critics (Rothman, 2010) and do not carry the force of law, they unquestionably provide helpful guidelines and greater clarity for educators and practitioners (Aufdeheide & Jaszi, 2011).

Fair use is one of the key statutory limitations on the monopoly power of copyright owners. It is intended to allow some reasonable scope of borrowing to encourage the dissemination of copyrighted works, even against the copyright holder’s wishes. As one often-quoted federal court noted, the doctrine “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster” (*Iowa State University Research Foundation, Inc. v. American Broadcasting Co.*, 1980, p. 60).

The preamble to the fair use section of the federal Copyright Act explicitly refers to scholarly activity in several ways when it cites recognized categories of fair use, “such as *criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research*” (Section 107, Copyright Act, 2012, emphasis added). The stated fair uses are normally considered illustrative rather

than an exhaustive account of possible fair uses. Moreover, the Supreme Court has made clear that the fact that a work falls into the one of the preamble categories does not make the use presumptively fair. (*Harper & Row Publishers, Inc. v. Nation Enterprises*, 1985, p. 561). The section then enumerates nonexclusive four factors designed to identify uses that are fair: “(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 the copyrighted work” (Section 107, Copyright Act, 2012).

The commercial versus noncommercial issue in factor one, according to one major treatise, “divides the world into a Procrustean bed of questionable validity” (Nimmer & Nimmer, 2016, § 13.05 [A] [1] [a]). Quite a number of uses contain elements of both—and this includes borrowings that are ostensibly scholarly or academic. Of course, even purely “nonprofit” scholarship can have an economic or pecuniary motivation that is less direct than, say, the payment of book royalties. Published scholarship can result in the granting of tenure, promotions, raises, and even the possibility of lateral moves to other institutions at a higher salary.

The general precariousness of the commercial/noncommercial dichotomy was apparently one of the motivating factors behind the adoption of the most influential judicial supplement to the four statutory factors—the “transformative use” factor. First proposed by federal judge Pierre N. Leval (1990) in an influential *Harvard Law Review* article, transformative use was engrafted onto copyright doctrine by the U.S. Supreme Court in its decision in *Campbell v. Acuff-Rose Music, Inc.* (1994).

In *Campbell*, the Court suggested that a finding that a borrowing was transformative—that is, that it added value to the borrowed work rather than simply appropriating it—reduced the importance of the commercial/noncommercial determination under factor one and had positive implications for other fair use factors as well. As the Court expressed it, the question is whether the borrowing work adds “new expression, meaning or message” to the original work such that the use was transformative (*Campbell v. Acuff-Rose Music, Inc.*, 1994, p. 579). Or, as Judge Leval proposed in his law review article, “if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—that is the type of activity that the fair use doctrine intends to protect for the enrichment of society” (Leval, 1990, p. 1111).

In the *Campbell* case itself, the Court applied its new transformative use doctrine to a hip hop parody of the Roy Orbison hit *Oh, Pretty Woman* by rappers 2 Live Crew. The Court noted that transformation was not necessary for fair use, but 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” (*Campbell v. Acuff-Rose Music, Inc.*, 1994, p. 579). Although the Court did not explicitly find that 2 Live Crew’s parody was transformative, it strongly hinted that the work would qualify for that status.

The Court also noted that a transformative use had implications for other factors in the fair use analysis. As to the third factor (amount and substantiality of the portion used), the Court suggested that the transformative nature of the 2 Live Crew use—and specifically, its parodic intent—dictated that the user might be able to borrow, with impunity, more of the original work in order to evoke the original in the minds of the audience. As to the fourth factor (effect on the market for the original), the Court concluded that a transformative work would be less likely to serve as a substitute for the original and thus less likely to cause commercial harm to sales of the borrowed work. In the case of a transformative work, the Court wrote, “market substitution is at least less certain, and market harm may not be so readily inferred” (p. 591).

In the more than twenty years since *Campbell*, lower courts have expanded upon the notion of transformativeness. Although the term as applied in *Campbell* seemed to involve a change in aesthetic form of the original—in that case, from a plaintive love song to a sneering rap parody—later cases have found uses to be transformative even when the original work is not altered in the least, but is employed for a different purpose than the original (*Authors Guild, Inc. v. HathiTrust*, 2014; *Authors Guild v. Google, Inc.*, 2013). Thus, it is possible, as several cases discussed later will highlight, for a scholar to use a work—even, potentially, the entire work—unaltered and still have the use declared transformative if the borrowed work is deployed for a different purpose (say, scholarly analysis) than that for which it was created (for example, entertainment or artistic purposes).

The rise of the transformative use doctrine—which was not an entirely original innovation, but built upon the earlier judicial notion of “productive use” (*Universal City Studios v. Sony Corp. of America*, 1981)—has had a major impact on the fair use landscape. Lower courts embraced the doctrine with enthusiasm, which is one reason this article focuses exclusively on post-*Campbell* scholarship cases. The influence of *Campbell* has been so great that one recent empirical study of fair use cases concluded that “fair use doctrine today is overwhelmingly

dominated by the *Leval-Campbell* transformative use doctrine” (Netanel, 2011, p. 736). This study found that those uses that courts declare to be “transformative” almost inevitably are declared fair uses.

In addition to the highly significant transformative use inquiry, under factor one of the statute (purpose and character of the use), the fair use provision includes three other nonexclusive factors. Factor two (nature of the copyrighted work) asks, among other things, whether the work is factual or informational in nature, in which case there is wider latitude for a fair use; on the other hand, if the work is fictional or entertainment oriented, a fair use finding may be less likely. As one commentator put it: “the second factor would allow wider use of a treatise on physics than a video tape of a rock concert” (Leaffer, 2010, p. 497). Another consideration under the second factor is whether the work is unpublished or not.

The third factor (amount and substantiality of the portion used) explores how much the putative fair user has borrowed from the original work, both quantitatively and qualitatively. Although there is no bright-line rule as to how much can be borrowed relative to the size of the original work, clearly less is better. Still, borrowing entire works is sometimes considered fair, particularly in cases of highly transformative uses, such as facilitating Internet search or access for print-disabled users (*Authors Guild, Inc. v. HathiTrust*, 2014). Nonetheless, even relatively small borrowings can be ruled unfair if a qualitatively important portion of a work—sometimes referred to as the “heart of the work”—is taken. (*Harper & Row Publishers, Inc. v. Nation Enterprises*, 1985).

The fourth and final statutory fair use factor contemplates the effect of the putative fair use on the market value of the original work. As one treatise described the analysis, “while copyright owners may certainly present evidence of actual harm in the form of direct loss of sales or licensing, potential harm may also be considered” (Patry, 2014, p. 553). The *Campbell* Court made clear that when a use is transformative, market harm may be less likely since there is less likelihood of market substitution of the borrowing work for the original (*Campbell v. Acuff-Rose Music, Inc.*, 1994, p. 591).

The next section will turn to an examination of scholarly and related fair use cases in the hope of clarifying the state of the law for potential scholarly users.

Scholarly Appropriation

Unfortunately, there are few reported cases with useful analyses dealing with “pure” scholarly borrowing post-*Campbell*. For example,

Cambridge University Press v. Patton (2014) did involve scholarship, but the facts of the case pertained to student access to those works rather than borrowing by other scholars. Similarly, *American Geophysical Union v. Texaco, Inc.* (1994) also involved the use of scholarship, but in the commercial context of a for-profit research department in a major oil company. Thus, few helpful cases seem to have been litigated that involve fair use claims in which the borrower was the author (or publisher) of a serious scholarly book or a refereed journal article, for example. Fortunately, however, there are quite a number of cases, some from influential federal appellate courts, that address what one might call quasi-scholarly appropriation, such as borrowings for popular biographies, biographical films, and reference works that relate to popular culture but that may lack significant academic gravitas. These quasi-scholarship cases, while not perfectly on all fours with scholarly fair use situations, are close enough legally to provide helpful insights into the topic.

One legal analysis that included an empirical study of scholarly fair use found that since the adoption of the 1976 Copyright Act, scholarship has fared quite well in the courts overall. According to legal scholars Randall P. Bezanson and Joseph M. Miller (2010), of 36 cases that claimed to involve scholarship, 27 of the scholarly borrowings were ruled fair. Thus, it seems a genuine scholarly borrowing has a favorable chance of being declared a fair use. However, it should be cautioned that sheer numbers of reported cases may have less predictive power than it might appear at first glance. This is because it is often a matter of mere fortuity that infringement claims are litigated (rather than settled) at all, much less that they happen to produce reported judicial opinions at the trial or appellate level. There is no way of knowing how many infringement claims against scholarly uses have been asserted (including through lawyerly demand letters that never matured into filed legal petitions) during any relevant period; thus, the relatively small sample of actual decided cases noted above may, based purely on numbers, lack significant predictive power. The following sections will explore different genres of scholarship and attempt to articulate key aspects of why borrowing in scholarship or quasi-scholarship was or was not found to be a fair use.

Reference Guides

Consider, for example, *Warner Bros. Entertainment, Inc. v. RDR Books* (2008), a case in which J. K. Rowling and Warner Brothers claimed copyright infringement against the publisher of *The Lexicon*, a series of encyclopedia entries describing the people, places, creatures, and other

facts about Rowling's wildly successful Harry Potter series of fantasy novels and two companion guidebooks to the series created by Rowling. Although the publisher of *The Lexicon* claimed fair use, the court found the work infringing and permanently enjoined its publication. *The Lexicon* was based upon a website created by one Steven Vander Ark, titled *The Harry Potter Lexicon*. At various stages of the litigation, the defendant claimed that *The Lexicon* was a work of scholarship, although that claim was ultimately abandoned. Nonetheless, *The Lexicon* is sufficiently similar to the type of work literary scholars might create that it is instructive for purposes of this analysis (Cousins, 2009; Fargnoli & Gillespie, 1995).

The federal district court that decided the case noted that "The Lexicon entries cull every item and character that appears in the Harry Potter works, no matter if it plays a significant or insignificant role in the story" (*Warner Bros. Entertainment, Inc. v. RDR Books*, 2008, p. 525). Of particular concern to the court was the fact that *The Lexicon* engaged in extensive direct quotation and close paraphrase of Rowling's imaginative language from her books, sometimes indicated through the use of quotation marks, but often not. As the court noted, "Although it is difficult to quantify how much of the language in the Lexicon is directly lifted from the Harry Potter novels and companion books, the Lexicon indeed contains at least a troubling amount of direct quotation or close paraphrasing of Rowling's original language" (p. 527). In addition to appropriating Rowling's language, the court expressed concern that *The Lexicon* summarized key scenes or events in the series, often providing at least a condensed account of the plot. For example, the court pointed out, the entry for Harry Potter himself "is eleven pages long and chronicles each year in Harry Potter's life at the fictional Hogwarts School, providing the reader with all of the main events of the story through all seven of Rowling's novels" (p. 532). *The Lexicon* also used significant portions of several brief companion guides to the series that Rowling herself had written.

After easily finding that *The Lexicon* was infringing, the court turned to the fair use analysis. As is standard practice in fair use cases, the court evaluated each of the four statutory factors point by point before determining the overall balance of the fair use calculus.

As to factor one (purpose and character of the use), the *Warner Bros.* court had a mixed view of whether *The Lexicon* was a transformative use of Rowling's works. On the one hand, the court found that *The Lexicon* had a transformative purpose since the reference volume used the Harry Potter material for a different purpose than that of the original author. Rowling's purpose was that of "telling an entertaining

and thought provoking story,” while *The Lexicon* borrowed Potter material “for the practical purpose of making information about the intricate world of Harry Potter readily accessible to readers . . .” (p. 541). This “purpose” or function-based approach to transformation follows a number of important lower federal court decisions that have focused on the function of the borrowing work relative to the original, rather than on any particular aesthetic or intellectual alteration performed by the borrower (Bunker, 2010). The court, however, found much less transformative use in the appropriations from Rowling’s companion works to the novels.

Moreover, the court reasoned that *The Lexicon* was not “consistently transformative” since it employed too much verbatim copying of Rowling’s original expression. “A finding of verbatim copying in excess of what is reasonably necessary diminishes a finding of transformative use,” the court wrote (*Warner Bros. Entertainment, Inc. v. RDR Books*, 2008, p. 544). This overuse of Rowling’s imaginative and distinctive language, the court found, meant that *The Lexicon* was using the language for its “inherent entertainment and aesthetic value” rather than purely for informational purposes (p. 544). The court also found that *The Lexicon*’s somewhat spotty citation to the location in the Potter canon where the incidents or characters originated also diminished its transformative character. Because its “value as a reference guide lapse[d]” in such omissions, it was not consistently carrying out its purpose of providing citations to users (p. 544).

In considering the second fair use factor (nature of the original work), the court unsurprisingly concluded that the Harry Potter series and companion guides were highly creative original works. This factor thus favored Warner Brothers and Rowling.

As to the third fair use factor (amount and substantiality of the borrowing), the court seemed reluctant to embrace with enthusiasm the plaintiffs’ argument that *The Lexicon* had taken far more of the imaginative language from the novels than was necessary to provide a reference guide. The court noted that in order to provide a thorough picture of the world of Harry Potter, it might be necessary to borrow more than a bare bones entry on each topic. However, the court did concede that “there are a number of places where the Lexicon engages in the same sort of extensive borrowing that might be expected of a copyright owner, not a third party author” (p. 548).

Nonetheless, the court found that the borrowings from the two Rowling companion books to the series were indeed clearly excessive. “The Lexicon takes wholesale from these books,” the court wrote (p. 548). Although there are fair use decisions suggesting that even borrowing

an entire work—such as a photograph—may still be fair (*Nunez v. Caribbean Int'l News Corp.*, 2000), the *Warner Bros.* court found that the minimal transformative purpose of *The Lexicon* vis-à-vis the companion books led the conclusion that the amount taken was less likely a fair use.

On the fourth and final statutory factor (market harm), the court found that although *The Lexicon* would indeed potentially affect the market for an encyclopedia about the series that Rowling had planned, that fact did not weigh in Rowling's favor. The court reasoned that "the market for reference guides to the Harry Potter works is not exclusively hers to exploit or license, no matter the commercial success attributable to the popularity of the original works" (*Warner Bros. Entertainment, Inc. v. RDR Books*, 2008, p. 550). Reference guides to literary works, which the court went on to say should actually be encouraged, were not in the court's view derivative works that the copyright holder could control. Nor was it likely that *The Lexicon* could act as a substitute for the actual Potter novels such that it would discourage potential readers from buying the series. However, the court did find that *The Lexicon* could diminish sales of Rowling's two companion books. As a result, the court found, the fourth factor went in favor of the plaintiffs.

In its comprehensive weighing of the factors, the court found that the balance tipped toward the plaintiffs. The borrowing work was transformative, but not consistently so (purpose and character of the use). It also took more of Rowling's original expression than necessary to achieve its purpose (amount borrowed). In addition, the Potter series was highly creative (nature of the original work), and *The Lexicon* was a potential substitute for Rowling's companion works (market harm). Thus, the four statutory factors led the court to the conclusion that this use was not fair.

Several points from *Warner Bros.* are particularly relevant for scholarly appropriators. First, the court took the fairly unusual approach of assigning a *degree* of transformativeness to the borrower's work. In the decisions of most post-*Campbell* courts, transformative use is a binary determination—the putative fair user either does or does not engage in a transformative use. The *Warner Bros.* court, on the contrary, attempted a fairly nuanced calibration of the precise degree of transformative use present in *The Lexicon*. The court particularly noted that the degree of transformativeness dipped on two counts—the amount of verbatim taking from Rowling's imaginative expression and the excessive borrowing from the Rowling companion works. Thus, a future fair user could attempt to steer a safer course by avoiding excessive direct taking of imaginative expressive language from another author, in proportion to the amount necessary to convey information

about the literary work, and by keying any borrowing to the literary works themselves and not to any other explanatory works that an author had created. Second, the court expressly noted that the fourth factor (market harm) was driven in this case by the harm to the market for the companion works, not by harm to the novels themselves. Since the existence of Rowling's companion works is probably a fairly anomalous situation for most works of fiction, this analysis suggests that reference works, guide books, and the like would not cause market harm to literary works themselves in most cases. The different purpose for which such works are created (informational versus the aesthetic or entertainment purposes of works of fiction) suggests that any "substitution" effect in the marketplace is quite unlikely.

Thus, while *Warner Bros.* is simply the opinion of one federal district court and has only persuasive significance outside of the Southern District of New York, a frequent site of copyright disputes, the reasoning seems persuasive and thus could help future scholars avoid the pitfalls encountered by the creator of *The Lexicon*. It seems likely that had the borrowing not included the material from the companion guides, the entire fair use analysis might well have gone the other way.

Analysis and Criticism of Literary and Artistic Works

Courts have generally been quite receptive to the idea that scholarly analysis and criticism of literary and artistic works is both transformative and fair. For example, in a case decided by the U.S. Court of Appeals for the Fourth Circuit, a scholarly analysis of a work by author Marjorie Kinnan Rawlings was declared a fair use. In *Sundeman v. The Seajay Society, Inc.* (1998), Rawlings's literary executor sued, among others, Dr. Anne Blythe for copyright infringement after Blythe delivered orally (and sought to publish) a critical analysis of *Blood of My Blood*, Rawlings's first (and unpublished) novel. Blythe's analysis both quoted and paraphrased from portions of the novel. Although the court's opinion dealt primarily with the creation of an entire copy of the novel by another entity, the analysis below focuses on the court's evaluation of Blythe's use of the novel in her paper.

The Fourth Circuit agreed with a lower court that Blythe's scholarly analysis of the book was transformative: "A reading of Blythe's paper clearly indicates that she attempted to shed light on Rawlings's development as a young author, review the quality of *Blood of My Blood*, and comment on the relationship between Rawlings and her mother" (p. 202). The change in purpose of the borrower and the "different character" of the scholarly paper, the court wrote, "make it transformative, rather

than an attempt to merely supersede *Blood of My Blood*" (p. 202).

Interestingly, the court also discussed a possible profit motive that Blythe might have in publishing her paper. Although scholars who publish regularly in refereed journals may regard this contention with some incredulity, the court wrote that Blythe "may have received royalties if her paper were published" (p. 203). However, the court noted that Blythe was only planning to publish the work had she received permission from the copyright holder, something that was not forthcoming, and thus the paper remained unpublished. The interesting point from this dubious discussion of possible royalties is that the court was willing to at least consider in the fair use balance the possibility of royalties from a scholarly use. Thus, for example, scholarly borrowings for purposes of a book might cause a court to factor in the profit motive, even if the work is dubbed transformative. Still, the court went on to note that Blythe's use was primarily for purposes of scholarship, criticism, and comment and thus largely noncommercial and educational in nature.

As to the second fair use factor (nature of the original work), the court found the Rawlings's novel to be both creative and unpublished, two considerations that placed it "closer to the core of works protected by the Copyright Act" (p. 204). In considering the third factor (amount and substantiality of the borrowing), the court considered, as is standard in fair use analyses, both the quantity and quality of the material quoted and paraphrased in Blythe's paper. The court reasoned that the material Blythe used was important, but not necessarily the "heart of the work" in a qualitative sense, largely because there was no evidence from the court below as to the qualitative dimension of factor three. Quantitatively, the court found that Blythe had quoted between four and six percent of the novel, in addition to substantial paraphrasing. The Fourth Circuit had no difficulty finding this degree of borrowing to be appropriate in light of Blythe's scholarly purpose: "It seems apparent that a scholarly criticism of a book will require the critic to quote and paraphrase from the work it is analyzing" (p. 206). Thus, although the court did not specifically approve any particular quantitative amount of borrowing—something that, contrary to folk wisdom, judicial fair use opinions almost never do—it did find that Blythe had not taken any more than was necessary for her critical purposes.

Evaluating the fourth factor (market harm), the Fourth Circuit reasoned that Blythe's activities neither would have impaired the market for the novel nor served as a market substitute for the work. Thus, given the balance of the equities, the lower court's fair use finding was affirmed.

Sundeman demonstrates how relatively low the bar for fair use can be when it comes to critical scholarly analysis of an artistic or literary

work. Such uses can easily be declared transformative because of the very different purposes served by the original work (generally an aesthetic or entertainment purpose) as opposed to the borrowing work (a scholarly or critical purpose). A work of genuine scholarship in this realm is almost never a serious threat to the market value of the original work because there is little chance of any substitution effect between the works. Thus, the first and fourth fair use factors are generally quite favorable to the borrower in this scenario (Gerhardt & Wessell, 1990). The third factor (amount borrowed) may be an issue, but if future courts follow the reasonably generous assumptions of the Fourth Circuit in *Sundeman*, it would require a tremendous amount borrowed (either quantitatively or qualitatively) to tip the third factor toward the plaintiff. This particular constellation of favorable factors make it very difficult to envision a case of this type in which a fair use finding is not a strong possibility.

Biographies

In *Elvis Presley Enterprises, Inc. v. Passport Video* (2003), the U.S. Court of Appeals for the Ninth Circuit found the use of video clips, photographs, and portions of songs to be unfair in the context of a film biography of Elvis Presley. Although *Passport Video* was not a pure scholarship case, it contains lessons for similar uses in scholarship—particularly scholarship that focuses on popular culture.

The case arose in the context of an injunction sought by various copyright holders to halt the distribution of a video documentary about Elvis. Passport's work, *The Definitive Elvis*, was a 16-hour documentary that included television appearances, songs, and photographs of the King, all of which were copyrighted works owned by various plaintiffs in the case. Although some of the television performances included in the documentary had voice-over narration, others were included, for durations of up to one minute, with no voice-over. The copyrighted photographs were shown on screen during voice-over narration, but were not themselves the subject of analysis in any way. The songs were included "both as background music and in excerpts from Elvis's concerts, television appearances, and movies" (p. 625). A lower court had found the use of the copyrighted works was not fair and issued an injunction barring distribution of the film. On appeal, the Ninth Circuit upheld the injunction, finding that the lower court had not abused its discretion in enjoining the film. (For an excellent resource on how documentarians can avoid such problems, see *Documentary Filmmakers' Statement of Best Practices in Fair Use*, in Center for Media and Social Impact (2017).

As to factor one (purpose and character of the use), the Ninth

Circuit found that the use was for a commercial purpose and was not consistently transformative. The court noted that Passport had marketed the documentary as including every Elvis film and television appearance: "Passport is not advertising a scholarly critique or historical analysis, but instead seeks to profit at least in part from the inherent entertainment value of Elvis' appearances on such shows as *The Steve Allen Show* [and] *The Ed Sullivan Show* . . ." (p. 628).

The court particularly focused on the fact that not all of the television clips were used for reference purposes, with voice-overs explaining the significance of the performance in the context of Elvis's career. While the Ninth Circuit acknowledged the difficulty of producing an Elvis biography without some clips of his performances, it also concluded that a number of the clips in the documentary were simply used to serve "the same intrinsic entertainment value that is protected by Plaintiffs' copyrights" (p. 629). Moreover, the court pointed out that the mere presence of voice-overs, without substantial content, was not sufficient to create transformation.

The Ninth Circuit compared Passport's use of the clips with several cases in which the use of film clips have been found to be transformative. For example, in *Hofheinz v. A&E Television Networks* (2001), A&E showed a movie trailer from a "B" movie made by actor Peter Graves as part of a biography of Graves. The trailer was used not for the entertainment value of the clip, but to demonstrate (and voice-over narration made this point) how far Graves's career had evolved since its humble beginnings. This kind of genuinely transformative use was a far cry, the Ninth Circuit implied, from that of the Elvis clips in Passport's documentary.

The fact that some of the borrowed material was used transformatively and some was not made the factor one determination a close one, the court wrote. Ultimately, however, it agreed with the district court that this factor weighed against fair use.

The second factor (nature of the original work) also tilted against fair use. The court found that the creative nature of the performances and of the original musical compositions justified their treatment as highly protected copyrighted works.

The Ninth Circuit also agreed with the lower court that the third factor (amount and substantiality of the use) weighed against a finding of fair use. Here, Passport repeated many of the clips throughout its documentary. As the court reasoned: "While using a small number of clips to reference an event for biographical purposes seems fair, using a clip over and over will likely no longer serve a biographical purpose" (*Elvis Presley Enterprises, Inc. v. Passport Video*, 2003, p. 630). The

court also expressed concern that the length of some of the clips was excessive, particularly one that lasted nearly one minute. Moreover, the court concluded that many of the clips constituted the “heart of the work,” which is the qualitative dimension of factor three. These key clips consisted of Elvis “singing the most familiar passages of his most popular songs” (p. 630). Additionally, the photographs were taken in their entirety, also tending to weight factor three against Passport.

Finally, the Ninth Circuit found the fourth factor (market harm) to be a close call. The use of the television clips clearly had the potential, in the court’s view, to undermine the market for the plaintiff’s copyrighted television shows. As well, some of the uses of the clips were not transformative, “and therefore these uses are likely to affect the market because they serve the same purpose as Plaintiff’s original works” (p. 631). However, the use of the photographs and music would not, in the court’s view, undermine the market for those works since it was unlikely someone would buy Passport’s documentary as a substitute for those works. As a result, the Ninth Circuit found sufficient support for the conclusion of the court below that Passport’s use would not be likely to harm the plaintiff’s markets.

In the overall fair use determination, given the four factors, the Ninth Circuit deferred to the lower court’s finding that the use was probably unfair and that the plaintiffs would likely succeed on the merits of their infringement claim. From the analysis explicated above, it seems clear that the perceived lack of consistent transformative use and the somewhat connected finding that too much material was borrowed were particularly critical aspects of the overall conclusion that the use was not fair. That conclusion is buttressed by a dissent in the case, in which the dissenting judge focused largely on what he viewed as factual errors in the lower court that led to the finding of a paucity of transformative use.

Three years after *Passport Video* was decided, the Second Circuit looked more generously on a fair use claim in a biography—this one of the Grateful Dead. In *Bill Graham Archives v. Dorling Kindersley Ltd.* (2006), the defendant had incorporated artistic concert posters owned by the plaintiff into *Grateful Dead: The Illustrated Trip*, a cultural history of the iconic San Francisco jam band. The book incorporated over 2,000 images of the band over the course of its career, along with commentary and analysis. Seven of the 2,000 images were concert posters, the copyright to which was owned by Bill Graham Archives (BGA); the posters were reproduced in their entirety, although at a reduced size from the originals.

The Second Circuit agreed with a lower court decision that the book’s use of the posters was transformative. The court reasoned that

“DK’s [Dorling Kindersley’s] purpose in using the copyrighted images . . . is plainly different from the original purpose for which they were created” (p. 609). While the original posters were created both for artistic and marketing purposes, the book used the images “as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on the *Illustrated Trip*’s timeline” (p. 609). As a result, the court concluded that the use was transformative. The court also made clear that the book was not required to discuss the artistic merits of the images in order for the use to be transformative—the use for historical reference was sufficiently transformative standing alone.

Moreover, the court reasoned, the reduced size of the images strengthened the conclusion that the use was transformative: “While the small size is sufficient to permit readers to recognize the historical significance of the posters, it is inadequate to offer more than a glimpse of their expressive value. In short, DK used the minimal image size necessary to accomplish its transformative purpose” (p. 611). The court also found that the book’s creation of a “collage” look on its pages, a layout that included a timeline and textual material as well as the borrowed images, tended to minimize the book’s taking of the pure artistic value of the posters. Given the entire analysis, the court found that the first factor (purpose and character of the use) weighed in favor of the borrower.

The Second Circuit downplayed the influence of the second factor (nature of the original work), even though the posters themselves were highly creative. The court, following *Campbell*, found that the transformative purpose of the *Illustrated Trip* made this factor less important in the overall fair use calculus.

As to the third factor (amount and substantiality of the use), the court found that even though the defendant had used the entire image, the fact that it had done so for historical purposes and displayed only reduced images interspersed with other visual elements meant this factor did not weigh against fair use. The court cited *Kelly v. Arriba Soft Corp.* (2003), a Ninth Circuit decision that had found a visual search engine’s use to be fair despite reproducing entire images at reduced size for search purposes. Prior to *Kelly* and a few other visual cases, there had been a general assumption that reproducing a work in its entirety was usually not a fair use. (However, a number of federal court decisions have now repudiated that idea, particularly where the use was for a different purpose than that of the original work; *Nunez v. Caribbean Int’l News Corp.* [2000], *Kelly v. Arriba Soft Corp.* [2003]). As the Second Circuit put it, “such use by DK is tailored to further its transformative purpose because DK’s reduced size reproductions of BGA’s images in their entirety displayed the minimal image size and quality necessary to

ensure the reader's recognition of the images as historical artifacts . . ." (*Bill Graham Archives v. Dorling Kindersley Ltd.*, 2006, p. 613).

Transformative use also played a critical role in the Second Circuit's analysis of factor four (market harm). The court reasoned that the transformative purpose for which DK had used the poster images preempted BGA's ability to claim that its market for licensing such images to book publishers was harmed. Unsurprisingly, the overall fair use balance went in favor of DK, the borrower.

What is striking about *Bill Graham Archives*, as compared to *Passport Video*, is the extent to which the transformative use finding almost completely dominated the analysis under each of the four factors. The fact that the transformative purpose was for historical reference, and that the images were reproduced at a reduced size that diminished their ability to serve as substitutes for the expressive value of the posters, trumped almost every other consideration under the four-part analysis. What this suggests for future fair users, of course, is that establishing a plausible and highly transformative use is enormously helpful in a successful fair use defense. Of course, not all courts place quite the monistic emphasis on transformative use that the Second Circuit did in *Bill Graham Archives*, but the transformative factor, as noted earlier, is nonetheless frequently a dominant analytical element. Compared to the *Passport Video* case, in which the court appeared unconvinced that the biographer was not using the borrowed television clips for their intrinsic expressive value rather than as historical artifacts to be analyzed or for reference purposes, one sees the remarkable protective properties of a credible transformative use.

Reproduction of Social Scientific Instruments

Although there appear to be few cases on the use by later scholars of social scientific instruments, one 1993 case does shed some light on how courts might view this type of borrowing. Although the decision by a federal district court in *Rubin v. Brooks/Cole Publishing Co.* (1993), is somewhat idiosyncratic and was decided pre-*Campbell*, it may nevertheless provide some useful insights.

The copyrighted psychological instrument at issue in *Rubin* was the "Love Scale," along with a companion "Liking Scale," each of which consisted of "13 questions designed to elicit and rate one's feelings toward another person" (p. 913). The scales were developed as part of the plaintiff's doctoral dissertation in social psychology and also used by him in other works, including a journal article and several books. The "Love Scale" was reproduced without permission in several editions

of a textbook in social psychology published by defendant Brooks/Cole Publishing.

In analyzing the purpose and character of the use, the court found the use to be productive, which is the rough equivalent of a finding of transformative use. However, it is interesting to speculate whether the scholarly taking here is really for a different purpose than that for which the scale was created. At least as more recent courts have developed the transformative inquiry, if the purpose of the borrower is similar to that of the creator—and where, as here, the instrument was reproduced in its entirety but apparently not subjected to serious critical analysis—it is not clear how transformative the use might be. The court also noted, but downplayed, the commercial purpose behind the textbook. The first factor thus favored the borrower.

The court also found that, under factor two (nature of the original), the Love Scale was a scientific work that received less protection than some other types of creative, copyrighted works. The court justified this conclusion by noting that scientific works are created to facilitate common progress in the field in question. “Thus,” the court wrote, “although as a creative work the Love Scale might normally receive heightened protection, the putative degree of enhanced protection is significantly outweighed by the Love Scale’s scientific nature and the scientific nature of its reproduction” (p. 919). The second factor thus favored Brooks/Cole, the publisher.

The court found that the third factor (amount and substantiality of the use) only slightly favored Rubin. The borrower had used the entire Love Scale, but that instrument was only a small portion of Rubin’s dissertation or later published article. Still, on the qualitative side, the Love Scale was a “critical and central component” (p. 920) of a number of Rubin’s works, and thus tipped the factor toward the plaintiff. Despite the defendant’s use of what some courts might term the heart of the work, the court also found that the borrower was able to make a more productive use of the entire scale in terms of the scholarly discussion in the book than if it had just borrowed a few items from the scale.

Finally, the court found that the fourth factor (market harm) pointed slightly in Rubin’s favor, based largely on potential harm to future licensing markets for his instrument. Based on all the factors, the court made the odd ruling that Rubin was not entitled to infringement damages for past uses by Brooks/Cole, but that future uses of the Love Scale by Brooks/Cole would be enjoined. As the court put it: “while Brooks/Cole’s use may have been ‘fair’ in the necessarily inchoate world of private ordering, once the historic rights of the parties are balanced by the court, the very fact of judicial decision affects private conduct in

ways that, if continued, will not be fair to Rubin (p. 922).

The court thus sliced things very thinly indeed, holding the prior uses fair but enjoining future uses. This Solomonic approach is sufficiently idiosyncratic that the case may have limited predictive value for future fair users. However, the case at least suggests that a “pure” scholarly use of a social scientific instrument, unlike the semi-commercial use here, might stand a better chance of fairness, particularly if accompanied by sufficient amounts of transformative criticism and comment on the validity of the scale.

Conclusion

Fair use is a constantly evolving area of copyright doctrine. The rise of the transformative use doctrine over the last several decades has had a profound impact on how most federal courts view fair use analysis. On the whole, this seems a positive development for scholarly borrowers of other’s expression. To the extent a borrowing can be shown to be genuinely transformative by virtue of use for a different purpose, critical analysis of the borrowed artifact, or by the sort of “historical reference” use endorsed in the *Bill Graham Archives* case, the putative fair user would seem to be in a very favorable position on the first factor (purpose and character of the use). This is true even if there is the potential for profit from the scholarly work.

Most scholarly fair users will likely have little success on the second factor (nature of the original work), unless the borrowed material is from a strictly factual work that has little creative expression. Still, as the cases analyzed here have demonstrated, courts can tend to downplay this factor when a transformative use is present.

The third factor (amount and substantiality of the use) is complex because of the quantitative and qualitative dimension. If one is doing a literary or artistic analysis of a work, there will naturally be a need to reproduce significant portions of the work to frame and illustrate the analysis. Sometimes these appropriations can include the qualitative “heart of the work,” or may, particularly in the case of visual works, necessitate use of the entire work (for example, a painting or photograph). Although there is no precise rule on the quantity question, a strongly transformative use can encourage a generous assessment of this factor by a court.

The fourth factor (market harm) would seem to tilt toward the borrower in most genuinely scholarly appropriations. Since an academic analysis or use of a work would rarely substitute for the work itself in the marketplace or otherwise disrupt the income stream of the plaintiff

(say, from licensed uses), it appears that few bona fide scholarly uses should run seriously afoul of this factor.

The cases analyzed here suggest a number of specific recommendations for scholarly work seeking to come within the fair use doctrine:

1. Scholarly borrowers should attempt to calibrate the amount of borrowing to the needs of the scholarly analysis. Most courts do not suggest that one must borrow as little as possible, but instead simply require that the amount borrowed be proportional to the needs of the scholarly work. For example, extensive borrowing of imaginative language from a work of fiction, without being tied to specific analytical points being made by the scholar/borrower, could convince a court that the taking was excessive and thus not fair.
2. Establishing that one's appropriation is transformative is the single most important element in a successful fair use defense. Transformative use is not required, but it is tremendously helpful nonetheless. Transformative uses can include alterations of the work itself, but need not do so. Repurposing an unaltered work for a scholarly purpose, such as criticism or analysis, is a widely accepted means of establishing that the use is transformative. This use for a different purpose can frequently justify taking significant portions of works being analyzed, and even the entire work in some cases, particularly visual works or works appropriated to facilitate online search. Most academics producing genuine scholarship should have little difficulty establishing transformativeness, since the works being examined or analyzed were frequently created for entertainment or artistic purposes and thus are sufficiently different than the academic purpose to which they are being put in scholarship.
3. When taking entire works, such as paintings or photographs, courts tend to look favorably on efforts to reduce the chance the borrower is capitalizing on the expressive value of the works. For example, reproducing the works at a smaller size or reduced quality may reassure the court the defendant is not attempting to exploit the expressive value of the borrowed work.
4. To the extent a scholar is borrowing the work of other *scholars*, the different purpose strand of transformative use may be less available. Borrowing a social scientific instrument, for example, could lead to a finding that the borrower is using the instrument for the same purpose as that of its creator, and thus that the use is not transformative. Nonetheless, it is possible that a thorough analysis of the instrument could render the use transformative.

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