

TRANSFORMATIVE USE VS. MARKET IMPACT:
WHY THE FOURTH FAIR USE FACTOR SHOULD NOT BE
SUPPLANTED BY TRANSFORMATIVE USE AS THE MOST
IMPORTANT ELEMENT IN A FAIR USE ANALYSIS

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The Harry Potter series is one of the most successful book and movie franchises in history. The final book in the series, *Harry Potter and the Deathly Hallows*, broke first-day sales records,¹ and the movies have created superstars out of the lead actors and garnered passionate, loyal fans. A franchise this large has produced many other products relating to the stories and characters. Warner Brothers, which owns the movies, along with author J.K. Rowling, has either produced or licensed other related literature, action figures, calendars, etc. Not all of the work, however, is produced by those directly associated with the boy wizard himself. The question then becomes, what can outsiders put together without violating the Harry Potter copyright? In 2008, Warner Brothers, along with Rowling, sued RDR Books for infringement from a book called *The Lexicon*, which serves as an encyclopedia of Harry Potter facts.² The authors of *The*

1. Motoko Rich, *Record First-Day Sales for Last ‘Harry Potter’ Book*, N.Y. TIMES, July 22, 2007, <http://www.nytimes.com/2007/07/22/books/22cnd-potter.html?hp>.

2. Warner Bros. Entm’t Inc. v. RDR Books, 575 F. Supp. 2d 513, 519 (S.D.N.Y. 2008).

Lexicon basically created an encyclopedic database of Harry Potter information (compiled from a web site of the same name), designed to help readers who may want an outside reference to certain characters, creatures, spells, or other facts.³ The question for the court was, can they do this? Is it fair? And how do we determine how much control an author has over his or her material?

I. INTRODUCTION

American law places a premium on creative work, and the law supports the notion that the creator of new work, whether literary, musical, cinematic, etc., should have certain rights over his or her work.⁴ The drafters of the U.S. Constitution saw the benefit in providing protection to authors, creators, and inventors and thus included the Intellectual Property Clause within Article I.⁵ This Clause states that Congress shall have the power “[t]o *promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the *exclusive Right* to their respective Writings and Discoveries.”⁶ Courts battled for many years to determine what types of work should merit copyright protection under the Constitution and early versions of copyright laws.⁷ Then, in 1976, Congress further defined what qualifies for copyright protection with the enactment of the Copyright Act of 1976, which grants protection to “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated.”⁸ Generally, copyright law gives the original author exclusive control over his or her work; however, the law does make exceptions, including the doctrine of fair use.

The concept of “fair use” was recognized in American courts years before it was codified law.⁹ The drafters of the Copyright Act recognized the need for a doctrine that would allow creative use of copyrighted material and thus included § 107, more commonly known as the “fair use

3. *Id.* at 520.

4. 17 U.S.C. § 102 (2006).

5. U.S. CONST. art. I, § 8, cl 8.

6. *Id.* (emphasis added).

7. For a discussion of the types of works that should receive copyright protection, see *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248–52 (1903). The works at issue in this case were advertising posters, and the Court had to determine whether these images were “pictorial illustrations or works connected with the fine arts” under contemporaneous copyright law. *Id.* at 250. The Court decided that the pictures had worth, even though they may not be traditionally “fine arts,” and should be protected. *Id.* at 252.

8. 17 U.S.C. § 102.

9. See H.R. REP. NO. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5678.

doctrine.”¹⁰ The fair use doctrine states that certain “fair use” of copyrighted material is “not an infringement of copyright.”¹¹

The text of the fair use doctrine establishes four factors that should be considered when determining whether a use is indeed “fair.” These include

- (1) the purpose and character of the use . . . ;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used . . . ; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”¹²

Although the factors are supposed to be weighed together, court decisions have indicated both directly and indirectly that the first and fourth factors are the most significant.

The first factor has undergone substantial change in the last twenty years with the introduction of transformative use analysis in determining the purpose and character of the use. Much of the recent commentary on copyright law breaks down this new doctrine and explains just what it means for courts dealing with infringement cases. Court opinions that have been handed down since this doctrine became law in 1994 have paid special attention to a use’s transformativeness, so much so that it appears to have become dispositive in many cases.¹³ This is an issue for courts because there does not seem to be a consistent set of guidelines for approaching transformative use.¹⁴

This Note gives a brief overview of the fair use doctrine as well as the development of current fair use analysis. It compares the effectiveness and usefulness of the transformative use doctrine within the first factor with the market impact of the fourth factor. Finally, this Note goes on to suggest that the Supreme Court was right in *Harper & Row, Publishers, Inc. v. Nation Enterprises* when it called the fourth factor the most important.¹⁵ Although transformative use analysis has become trendy and courts have given it stronger consideration, the pitfalls of transformative use, as well as the importance of market impact on copyright law, mean the fourth factor should continue to carry the most weight in fair use analysis.

10. 17 U.S.C. § 107 (2006).

11. *Id.*

12. *Id.*

13. See Jeremy Kudon, Note, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U.L. REV. 579, 583 (2000) (stating that the transformative use test has become the “presumptively dispositive factor”).

14. Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 COMM. L. & POL’Y 1, 9 (2002).

15. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

II. INTRODUCTION TO FAIR USE

Long before Congress codified the doctrine of fair use, it was a commonly used concept in American courts.¹⁶ In the Copyright Act of 1976, Congress adopted the judicial idea that, under certain circumstances, the goal of encouraging creative and original work is better served by allowing the use of copyrighted work, rather than prohibiting it.¹⁷ Section 107 of the Act, more commonly known as the fair use doctrine, was meant to “restate” the judicial doctrine, not “change, narrow, or enlarge it in any way.”¹⁸ The statute itself says that fair use of a copyrighted work is not an infringement of copyright if it is used for purposes “such as criticism, comment, news reporting, teaching . . . , scholarship, or research.”¹⁹ This particular list is non-exhaustive, as suggested by the words “such as,” so other similar purposes may also be permitted.

III. INTRODUCTION TO THE FOUR FACTORS

To help courts provide consistent fair use analysis, the Act breaks down fair use analysis into four factors. These 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.²⁰

These factors are designed to provide a framework, not rigid guidelines; they set the stage for a “totality inquiry” tailored to the particular facts of each case.²¹ There are no bright line rules as to what is or is not a fair use; courts must balance the four factors “to determine whether the public interest in the free flow of information outweighs the copyright holder’s interest in exclusive control over the work.”²² Just because one factor

16. H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

17. *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 839 (S.D.N.Y. 1995).

18. S. REP. NO. 94-473, at 62 (1976), *reprinted in* 8-4A MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. 4A § 107, at 62 (2002).

19. 17 U.S.C. § 107 (2006).

20. *Id.*

21. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991).

22. *Lamb v. Starks*, 949 F. Supp 753, 757 (N.D. Cal. 1996) (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986)).

weighs heavily for or against fair use does not mean the use may or may not be prohibited. For example, a work that uses a substantial amount of a copyrighted work may still be permitted as fair use, while a work that barely uses a copyrighted work might be infringement if the other three factors weigh heavily enough against a finding of fair use.

Each of the factors is highly fact-specific and must be given weight in the analysis; none of the factors should be dispositive in itself nor does a party automatically win because more of the factors favor her side.²³ Despite the Act's intention that the factors be balanced, the first and fourth factors have proved to carry more weight with the courts since the enactment of the Copyright Act.

IV. THE PURPOSE AND CHARACTER OF THE USE AND THE TRANSFORMATIVE USE DOCTRINE

The first fair use factor delves into the purpose of the new work, and an inquiry into the purpose of the work is often divided into two main analyses: whether the new work is commercial or nonprofit and whether the new work is transformative.

A. *Commercial Nature of the Work*

Whether the use is commercial or nonprofit is a significant consideration because commercial uses are more likely to be considered infringements than nonprofit uses.²⁴ In fact, the Supreme Court said in *Sony Corp. of America v. Universal City Studios, Inc.* that a “commercial use of copyrighted material is presumptively . . . unfair,”²⁵ although the Court backed off this strong statement later the same year in *Harper & Row*, saying that the commercial nature of a use is merely a factor that “tends to weigh against a finding of fair use.”²⁶

While drafting the fair use statute, the House of Representatives purposely included the commercial consideration in order to “amplify” this first factor and clarify what types of purposes are “fair.”²⁷ For almost twenty years, the commercial nature of the use was the most important part of the first factor; then, in 1994, the landmark case *Campbell v. Acuff-Rose Music, Inc.* changed the first factor dramatically.²⁸ In this case, the

23. *Wright*, 953 F.2d at 740.

24. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991).

25. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

26. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

27. H.R. REP. 94-1733, at 70 (1976) (Conf. Rep.), reprinted in 1976 U.S.C.C.A.N. 5810, 5811.

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

Supreme Court established what is known as the “transformative use doctrine.”²⁹

B. Development of Transformative Use

Though not widely applied, the concept of transformativeness, or transformative use, did in fact exist prior to *Campbell*. Transformative use can be said to have grown out of the concept of “productive use,” which actually had been part of fair use analysis since the nineteenth century.³⁰ The Supreme Court’s influential discussion of productive use occurred in *Sony Corp. of America v. Universal City Studios, Inc.*, specifically in Justice Blackmun’s dissent.³¹ In *Sony*, Justice Blackmun described a productive use as one that results “in some added benefit to the public beyond that produced by the first author’s work. . . . [I]n other words, [it] permits works to be used for ‘socially laudable purposes.’”³² Although future courts did not adopt productive use as an integral part of the first factor, the concept was important and would eventually grow into the transformative use doctrine.³³

The concept of “transformative” use was introduced by Judge Pierre N. Leval in 1990 in an influential article appearing in the *Harvard Law Review*.³⁴ According to Leval, a work could be transformative:

If . . . the secondary use adds value to the original—if the quoted matter 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.³⁵

Leval went on to provide examples of transformative uses, including “criticizing the quoted work, exposing the character of the original author, proving a fact, . . . parody, symbolism, . . . and innumerable other uses.”³⁶ Leval suggested that using a transformative use analysis would bring some consistency to the application of the fair use doctrine.³⁷

29. *Id.*

30. Bunker, *supra* note 14, at 3–4.

31. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 427 (1984).

32. *Id.* at 478–79.

33. See Bunker, *supra* note 14, at 4 (asserting that productive use analysis is basically synonymous with transformative use analysis).

34. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

35. *Id.* at 1111.

36. *Id.*

37. *Id.* at 1135.

C. Supreme Court's Endorsement of Transformative Use

The Supreme Court took Leval's suggestion and, in *Campbell*, made transformative use an integral part of fair use analysis. In *Campbell*, Acuff-Rose, the publisher of Roy Orbison's song, *Oh, Pretty Woman*, sued the rap group 2 Live Crew for its parody of Orbison's classic hit.³⁸ The group did not have permission to use the song, but the Court found the defendant's parody to be a fair use.³⁹ Key to the Court's analysis was how 2 Live Crew altered the character of the original song—in essence, the transformative nature of the parody.

Justice Souter wrote that in order to determine the character of the use under the first factor, it is necessary to look at whether the use is transformative, meaning whether it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁴⁰ While a work's transformativeness was not meant to be dispositive, the Court stressed that this aspect lies “at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright.”⁴¹

Later courts have described transformative use as the “[combination of] copyrighted expression with original expression to produce a new creative work”⁴² or “where the defendant uses a copyrighted work in a different context to serve a different function than the original.”⁴³ Simply transforming the medium used is not transformative if the purpose of the use is the same.⁴⁴ Transformative use has largely been defined on a case-by-case, court-by-court basis because when the Supreme Court established the transformative use doctrine, it did not establish concrete guidelines for what constitutes transformativeness, and as this Note will later discuss, the doctrine has proved difficult to implement consistently.

V. THE EFFECT OF THE USE UPON THE POTENTIAL MARKET

The fourth fair use factor focuses on the market of the copyrighted product. If a use interferes too substantially with the market, courts may be unwilling to grant a fair use exception. The Supreme Court in *Harper &*

38. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994).

39. *Id.* at 571–72.

40. *Id.* at 579.

41. *Id.*

42. *Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 541 (S.D.N.Y. 2008).

43. *Id.*

44. See *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010), a case in which the Court of Appeals for the Federal Circuit determined that a stamp depicting a photo of a Korean War Veterans' Memorial structure was not transformative. While the stamp muted the colors of the photograph, it served the same purpose of the memorial, to honor veterans. *Id.* at 1373.

Row called this particular factor the “single most important element” in determining fair use.⁴⁵ In his study of fair use opinions, Barton Beebe found that fifty-nine percent of the court decisions that followed *Harper & Row* (but preceded *Campbell*) “explicitly cited this proposition.”⁴⁶ In the *Campbell* opinion, the Court seemed to backtrack on its statement, saying each factor should be analyzed and the results “weighed together.”⁴⁷ This statement did not deter many courts from emphasizing the fourth factor, however, as even after *Campbell*, 26.5% continued to state that the fourth factor was most important.⁴⁸

When analyzing the impact on the market, the proper inquiry is twofold. First, a court must assess whether the particular use harmed the market for the original.⁴⁹ This is a fact specific inquiry that determines what harm has already occurred. The second inquiry, which the Supreme Court calls more important,⁵⁰ is whether “‘widespread’” use “‘would adversely affect the *potential* market’” for the plaintiff’s work.⁵¹ This requires courts to look to the future to determine what type of impact the new use would have on the original’s marketability. Thus, even if the market has not yet been harmed, a plaintiff may still prohibit another’s use if he or she can prove that the use could have an adverse effect on the *potential* market.⁵²

Importantly, this inquiry also applies to derivative works.⁵³ Derivative works are those that “‘recast’, transform[], or adapt[] into another medium, mode, language, or revised version, while still representing the ‘original work of authorship.’”⁵⁴ The Copyright Act defines “derivative works” as works “consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.”⁵⁵ Derivative works are spawned from the author’s original work, though a work is not derivative simply because it is somehow “based upon” the original.⁵⁶ The court in *Warner Bros.* pointed out that this definition would affect certain permitted uses under the fair use doctrine,

45. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

46. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 617 (2008).

47. *Id.*

48. *Id.*

49. *Harper & Row*, 471 U.S. at 567.

50. *Id.* at 568.

51. *Id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

52. *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000).

53. *Harper & Row*, 471 U.S. at 568.

54. *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538 (S.D.N.Y. 2008) (quoting 17 U.S.C. § 101 (2006)).

55. 17 U.S.C. § 101 (2006).

56. *Id.*

like book reviews⁵⁷ or parodies.⁵⁸ Derivative works can be a lucrative source of income for the holder of the copyright to the original work, so they also fit into the fourth factor of fair use.

Whether or not the new use is considered derivative, it is still subject to a market analysis to determine whether the new use interferes with the potential market for the first. In other words, the question posed by the fourth factor is “not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work” by substituting itself for the original or harming the market for the original.⁵⁹

The market impact factor is also important because it tends to synthesize the other factors. It can be called a “metafactor under which courts integrate their analyses of the other three factors and, in doing so, arrive at the outcome not simply of the fourth factor, but of the overall test.”⁶⁰ The finding regarding the impact on the market tends to correspond with the finding of fair use in general.⁶¹

VI. WHY THE MARKET EFFECT SHOULD NOT BE SUPPLANTED BY TRANSFORMATIVE USE ANALYSIS AS THE MOST IMPORTANT FINDING IN THE APPLICATION OF FAIR USE

Since *Campbell*, courts have given stronger consideration to whether copyrighted material is used in a “transformative” way. However, the Supreme Court was right when it said the fourth fair use factor—the effect of the use upon the original’s potential market—is the most important. Courts should not be pressured to change the emphasis from market impact to the nature of the work when deciding which factor is most significant. Despite the trend toward transformative analysis, the impact on the market is still the most central factor to protecting a person’s copyrighted material.

57. *Warner Bros.*, 575 F. Supp. 2d at 538; *see Ty, Inc. v. Publications Int’l Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) (“Book reviews that quote from (‘copy’) the books being reviewed increase the demand for copyrighted works; to deem such copying infringement would therefore be perverse, and so the fair-use doctrine permits such copying.”).

58. *Warner Bros.*, 575 F. Supp. 2d at 538; *see Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 969 (C.D. Cal. 2007) (holding that parody of Carol Burnett on the Fox show *Family Guy* was fair use in part because the parody put Burnett’s animated character in an “awkward, ridiculous, crude, and absurd situation,” so that she was recognizable but obviously parodied).

59. William S. Coats & Jennifer L. Co, *More to Fair Use than Fairey: The Effect of Recent Decisions on the Evaluation of the Four Fair Use Factors*, in PRACTISING LAW INSTITUTE, INTELLECTUAL PROPERTY LAW INSTITUTE 621, 635 (2010) (quoting *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 510 (S.D.N.Y. 2009)).

60. Beebe, *supra* note 46, at 617.

61. *Id.*

A. Idea Behind Copyright Law

To determine which of the four factors should carry the most weight, it is necessary to analyze the purpose behind copyright law. The Copyright Act itself focuses on a creative person's gaining or losing "exclusive rights" over his or her work.⁶² These exclusive rights include reproduction, adaptation, publication, performance, and display, and are referred to as the "bundle of rights" that is a copyright.⁶³

The fair use doctrine establishes one of the exceptions to this bundle, however, and the fair use factors set out those things that must be considered before a use is permitted. When determining which of the factors should be most significant, consideration should be given to the rights listed in the statute, as these have been identified as most important to the copyright holder. While an author's right to adaptation, performance, or perhaps display may be called into question when doing a transformative use analysis, each of the rights in this bundle directly affects the fourth factor of fair use. An author's reproduction, adaptation, publication, performance, and display all impact the market of his original work, or more specifically, the potential market for both the original and derivative works, as each of these rights leads to a product entering the market.

The U.S. Constitution's Intellectual Property Clause establishes that Congress should "promote the Progress of Science and useful Arts."⁶⁴ The purpose of allowing copyrights is to capture the value of works of authorship and put it in the right place so as to encourage those creative works to be produced.⁶⁵ The idea is that because the public benefits from these works, it is important to protect the market for individuals who might want to enter it. More time and effort will go into creative works if they can be turned into a paying proposition.⁶⁶

Therefore, it is this fourth factor that should be considered most significant because "any real harm to the copyrighted work or its exploitation (via market substitution, rather than criticism or comment) will defeat the purpose of copyright protection."⁶⁷ While it is possible that a creative individual would want to have her work copyrighted solely to prevent another from claiming the idea as his own, in reality, the market drives copyright. The purpose of legal protection over the exclusive rights

62. 17 U.S.C. § 106 (2006).

63. See H.R. REP. NO. 94-1476, at 61 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5674.

64. U.S. CONST. art. I, § 8, cl. 8.

65. Alan Durham, Judge Robert S. Vance Professor of Law, University of Alabama School of Law, Class Lecture at the University of Alabama School of Law (Jan. 11, 2011).

66. *Id.*

67. I. Fred Koenigsberg, *Copyrights*, in PRACTICING LAW INSTITUTE, UNDERSTANDING COPYRIGHT LAW 49, 65 (2010).

to a work is to protect exploitation in the market of something a person worked hard to create. So while it is necessary to see how much a new work transformed the original, it is more important to copyright law in general to analyze the market impact, as this is the driving force behind copyrighting work in the first place.

B. *Issues with Transformative Use Findings*

One of the key reasons transformative use should not be the most influential factor is that the concept is still not applied consistently, and there are no clear guidelines. It makes little sense for a confusing doctrine to be the most significant finding in any sort of court analysis.

While the Supreme Court in *Campbell* gave a definition of what it means to be transformative,⁶⁸ the opinion did not specify exactly how a transformative finding should be made. Just how transformative must a work be? Courts are forced to apply the doctrine with no clear roadmap, which has led to inconsistent results.⁶⁹ This inconsistency has caused many scholars to question the doctrine's effectiveness. One author suggests that a transformative use analysis is both under- and over-inclusive.⁷⁰ It is too narrow because it would seem to disallow those uses that are identified as permissible in the preamble of the statute.⁷¹ For example, the preamble suggests mere copying (like making duplicates for classroom use) can itself be fair use, without the user changing the form at all; yet this would likely *not* be found transformative.⁷² This is an issue because with the increasingly dispositive nature of transformative analysis, some uses of which the drafters appeared to approve may now be prohibited because they are not transformative. One of the key reasons for fair use is to encourage new and creative work to enter the information marketplace, but "the tendency of lower courts since *Campbell* to emphasize transformative use may well lead to overprotection of copyright holders at the expense of the free flow of information in nontransformative contexts."⁷³

The transformative use doctrine is also too broad, in that it may infringe on an original author's right to derivative works if the new product changes or transforms the first enough to pass the Court's vague test.⁷⁴ Authors should have the first right to derivative works based on original

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

69. Bunker, *supra* note 14, at 9.

70. Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y U.S.A. 251, 262 (1998).

71. *Id.*

72. *Id.* at 260.

73. Bunker, *supra* note 14, at 2.

74. Zimmerman, *supra* note 70, at 261.

publications that grow from their own creativity. Just because a person takes someone else's work and changes it the tiniest bit does not mean the original author should have to let that person use his or her work (especially if the author has future plans for his work). There are other aspects at stake in the realm of derivative works, including the author's reputation (if consumers think the work is directly associated with the original author) and artistic integrity.⁷⁵ Each of these, as well as the risk of overexposure of the content of the original work, could negatively impact the market for the original or future, licensed derivative works.⁷⁶

Many authors have also lamented the lack of consistency and even confusion at the lower court level as to what constitutes transformative use.⁷⁷ Some cases that would seem to be fair use slam dunks are considered not transformative enough, while others that do not seem to be transformative are found to be so without much explanation as to why.⁷⁸ This is not only a problem at the district court level, but "influential" circuit courts are also not providing satisfactory guidance for the lower courts in their circuits.⁷⁹

An example of the inconsistency can be found by comparing the decisions in two cases that involve the publication of a photo in a newspaper and magazine. In *Nunez v. Caribbean International News Corp.*, a newspaper story used photos that had originally been taken for inclusion in a portfolio.⁸⁰ The newspaper attributed the photos and provided editorial comments.⁸¹ The First Circuit held that this was enough to find the photo transformative.⁸² This decision contrasts starkly with a district court finding in *Psihoyos v. National Examiner*, where a magazine used a photo of a car in order to show readers the vehicle.⁸³ The court reasoned that the magazine's use of the photo to "show what it depicts," as opposed to altering the meaning or purpose in some way, was not fair use.⁸⁴ Matthew Bunker, a journalism professor at the University of Alabama, tried to reconcile these two findings. In comparing the difference in the courts' reasoning, Bunker used the term "meta-use,"⁸⁵ which he described as going

75. Durham, *supra* note 65.

76. *Id.*

77. See, e.g., Bunker, *supra* note 14.

78. *Id.* at 9.

79. *Id.*

80. *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 21 (1st Cir. 2000).

81. *Id.* at 23.

82. *Id.* at 25.

83. *Psihoyos v. Nat'l Examiner*, 1998 WL 336655 at *3 (S.D.N.Y. 1998).

84. *Id.*

85. Matthew D. Bunker, *Transforming the News: Copyright and Fair Use in News-Related Contexts*, 52 J. COPYRIGHT SOC'Y U.S.A. 309, 317 (2005).

“beyond simply using a photograph to illustrate a news story,”⁸⁶ and instead involves a news story “about the photographs themselves, or at least public reaction to them.”⁸⁷ Under this analysis, *Nunez* did present a “meta-use,” while *Psihoyos* did not. However, Bunker laments that the “*Campbell* Court’s definition of transformative use merely requires that the user add new meaning, message, or expression to the original work, not that the use be a meta-use.”⁸⁸ Therefore, given only the Court’s definition, it is difficult to reconcile the inconsistent holdings of these two cases.

What this analysis suggests is that there is just no clear standard for how a photo may be used under fair use (and thus how other copyrighted material may be used in similar circumstances). It is perfectly reasonable to assume that other district courts would come to a conclusion different than that reached in *Psihoyos*, given that a photo’s meaning may change depending upon the context in which it appears.⁸⁹ This type of uncertainty in transformative use findings is one of the major pitfalls of the doctrine.

This move to focus on the transformative nature of the use has even been called a “significant and dangerous shift” in fair use application.⁹⁰ The finding of transformativeness has become seemingly dispositive, which is problematic since courts seem to be unsure as to just what is transformative. The focus on whether a use transforms the original to a sufficient extent has “removed ‘the equitable rule of reason’ from the fair use analysis.”⁹¹

This stands in contrast to the fourth fair use factor, that of the impact on the market. There is much less confusion regarding this factor, as it is more quantifiable. The *Campbell* Court described market impact as “a substantially adverse impact on the potential market.”⁹² If a plaintiff can show there is a potential market for his or her derivative products, or that the market for the original has already been harmed, then the fourth factor should go his or her way. Although there is some controversy relating to what all constitutes the “market,” the Sixth Circuit described the “markets” at issue to be “traditional, reasonable, or likely to be developed.”⁹³ This includes the traditional market for the work itself and also licensing fees for the product.⁹⁴ Unlike transformative use, which is highly subjective, a

86. *Id.*

87. *Id.*

88. *Id.*

89. See 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:21 (2011) (“[T]ransformation may involve . . . no change or alteration, but rather the presentation of the original intact in a new context or with new insights.”).

90. Bunker, *supra* note 14, at 2.

91. Kudon, *supra* note 13, at 583.

92. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

93. *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1387 (6th Cir. 1996).

94. *Id.* at 1387–88.

market analysis (once the court determines the appropriate market) is more objective and thus less dangerous as a significant factor.

C. Interplay Between the Two Concepts

While the first and fourth factors of the fair use doctrine are distinct and involve separate analyses, they also interact. Proponents of transformative use may argue that the transformative analysis is more significant because whether a work is transformative can have a direct effect on market impact. If a use fits the description of transformativeness, then it must somehow serve a different purpose, add something new, or change the character of the original; therefore, it may serve a different market than the original or its derivatives. If a “work is found to be transformative, neither market substitution nor market harm may be so easily shown.”⁹⁵ If the new work serves a different audience, then its impact on the market for the original is negligible.

This is especially true when the second use is a parody, as the parody serves a different market function than the original.⁹⁶ Parody is a common theme in fair use cases, and the Court in *Campbell* said that the threshold question to be asked when a fair use defense is raised for parody is “whether a parodic character may reasonably be perceived.”⁹⁷ If the work is found to have a “parodic character,” then it has necessarily transformed the character of the first work and is transformative. As a transformed use, the market for the parody is usually quite different than the market for the original, so there is no usurpation of the market. This argument suggests that a court must make a transformative finding before it can rule on whether the market has been impacted, which tends to give more weight to the first factor.

However, it is important to note that while a finding that a work is transformative may make it less likely that the court rules against the new work on the issue of market impact, it is not a foregone conclusion. Even works that are found to be transformative may still be infringements if the market may still be harmed. For example, after comparing *The Lexicon* to the *Harry Potter* novels and other copyrighted companion books, the court in *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 551 (S.D.N.Y. 2008), decided that the encyclopedia was not a permitted fair use, despite being transformative to a certain extent.⁹⁸ The problem, according

95. Coats & Co, *supra* note 59, at 636.

96. *Id.*

97. *Campbell*, 510 U.S. at 582.

98. *Warner Bros. Entm’t Inc. v. RDR Books*, 575 F. Supp. 2d 513, 551 (S.D.N.Y. 2008).

to the court, was that while the new work was transformative, it was not consistently so.⁹⁹

In relation to the novels themselves, *The Lexicon* was found to be transformative, as it served a referential, rather than entertaining purpose (which was the purpose of the novels).¹⁰⁰ In relation to the copyrighted, licensed companion books, however, *The Lexicon* was found less transformative.¹⁰¹ While the companion books can be said to be referential, they also have an entertainment purpose, which is different from *The Lexicon*. While *The Lexicon* was to be marketed as more of an encyclopedia, the *Harry Potter* companion books were written by fictional authors and were meant to “bring[] to life the fictional schoolbooks they represent in the *Harry Potter* novels.”¹⁰² Because the entertainment aspect of the companion books was so obvious, the referential nature of the texts was not enough to find *The Lexicon* not transformative.

The transformative nature of *The Lexicon* was not consistent however, because it included some verbatim language from the novels (without commentary or new expression), and in some instances, the value of the work as a reference guide was diminished by inadequate citations to other *Harry Potter* works.¹⁰³ Although *The Lexicon*’s transformative nature was found to be inconsistent, it was still found to be transformative overall.

Despite this transformative finding, the court declined to extend the exception of fair use to *The Lexicon*. The court explained that while the reference guide would not likely harm the market for the novels themselves, it would likely supplant the market for Rowling’s companion books because “[u]nless [consumers] sought to enjoy the companion books for their entertainment value alone, consumers who purchased the Lexicon would have scant incentive to purchase either of Rowling’s companion books, as the information contained in these short works has been incorporated into the Lexicon almost wholesale.”¹⁰⁴ Even though the court decided the books were transformative in nature (albeit marginally), it still decided the market could be harmed. The court also said publication of *The Lexicon* “would impair the market for derivative works that Rowling is entitled or likely to license.”¹⁰⁵ The court emphasized that:

In striking the balance between the property rights of original authors and the freedom of expression of secondary authors,

99. *Id.*

100. *Id.* at 541.

101. *Id.*

102. *Id.* at 541.

103. *Id.* at 545.

104. *Id.* at 550.

105. *Id.* at 551.

reference guides to works of literature should generally be encouraged by copyright law as they provide a benefit to readers and students; but to borrow from Rowling's overstated views, they should not be permitted to "plunder" the works of original authors . . . "without paying the customary price" . . . lest original authors lose incentive to create new works that will also benefit the public interest¹⁰⁶

This reasoning strikes at the core of the market analysis and also copyright law in general and emphasizes that transformative use should not save a new work if it would "plunder" the original.

VII. CONCLUSION

While the market may be affected by any of the four factors, transformative use is one of the most influential findings for a court. However, in order to protect a copyright holder, the market for that author's product must be protected. Whether a work transforms the original material can affect this final finding, but it is the actual market finding that should be most important. Without a market, there is no need for copyright protection. Therefore, despite the current trend to focus more on the nature of the work, the Supreme Court's determination that the fourth factor is most significant should still stand.

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106. *Id.* (internal citations omitted).

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