

CAMPBELL AT 30: A RETROSPECTIVE APPRECIATION

Michael W. Carroll[†] & Peter Jaszi^{††}

This Article traces the intellectual history of copyright law's fair use doctrine at the Supreme Court from its first encounter with fair use to its landmark decision slightly more than three decades ago in Campbell v. Acuff-Rose Music, Inc. Campbell provided courts with a coherent, user-centered theory for applying the four statutory fair use factors set out in 17 U.S.C. § 107, a standard the Court recently ratified in Google LLC v. Oracle America, Inc. and Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith. As one of three related articles, this Article advances two principal claims to contribute to the intellectual history of fair use.

This Article demonstrates how contested the role of fair use in copyright law had been both before Congress codified the doctrine in 1976 and after codification until Campbell. Some parties and Justices treated fair use as a narrow doctrine, limited by presumptions against its application. Others understood the doctrine to be a central counterbalance to copyright law's exclusive rights. By carefully analyzing the Court's fair use jurisprudence up to, and including, Campbell, this Article shows that the Court and counsel appearing before it went through a learning process about fair use. In particular, until Campbell, the Court had not fully appreciated the impact of fair use's codification or the need for the Court to provide lower courts with a coherent theory for applying the four fair use factors in § 107.

This Article's second claim rebuts recent attempts by some courts and commentators to construe Campbell narrowly in the wake of the Court's Warhol decision. As of this writing, these revisionist arguments have been submitted in two recent appellate cases, one in the Ninth Circuit and the other in the Tenth Circuit. By analyzing both the public filings and the now-public

[†] Professor of Law and Faculty Co-Director, Program on Information Justice and Intellectual Property, American University Washington College of Law. Thanks to Pamela Samuelson, Rebecca Tushnet, Jonathan Band, Charles Duan, and participants in the 2024 Intellectual Property Scholars Conference at Berkeley Law School for helpful comments and to Jacqueline Jedrych for research assistance.

^{††} Emeritus Professor of Law, American University Washington College of Law.

internal case files of some of the Justices, this Article provides several new insights to support the case for reading Campbell capaciously. Indeed, Campbell's adoption of the transformative use standard reflects the hard-won triumph of an important idea about the role of fair use in copyright law.

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INTRODUCTION

Slightly more than three decades ago, the Supreme Court issued its landmark decision in *Campbell v. Acuff-Rose Music, Inc.*,¹ which held that 2 Live Crew’s hip-hop parody of “Oh, Pretty Woman” could qualify as fair use under § 107 of the Copyright Act of 1976 (1976 Act).² The decision marked an important turning point in the development of the fair use doctrine, which has been a distinctive part of U.S. copyright law since 1841.

Campbell was a watershed. The Court’s earlier fair use jurisprudence had demonstrated the absence of a general doctrinal theory; in every case, its reasoning was based on the particulars of the challenged use.³ The Court in *Campbell* could have followed suit and centered its analysis on the limited question of whether parody is a fair use. Instead, in a careful opinion written by Justice Souter, the Court announced a general, user-centered legal standard for interpreting and applying the four fair use factors that courts are required to consider by 17 U.S.C. § 107.⁴ This standard focuses on whether a new use is transformative, as measured by copyright law’s animating principles.

A number of scholars have documented how *Campbell*’s transformative use standard has had a measurable, and measured, impact on the law of fair use, providing courts with an analytical approach that has proven hospitable to a range of uses of copyrighted works. Many in the field of copyright law have welcomed and celebrated *Campbell*’s influence.⁵

This Article also celebrates *Campbell*’s influence to advance two principal claims relating to the intellectual history

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510 U.S. 569 (1994).

2

17 U.S.C. § 107.

3

See *infra* Part I.

4

See *Campbell*, 510 U.S. at 578–79 (interpreting 17 U.S.C. § 107).

5

See, e.g., Zahr K. Said, *Foreword: Fair Use in the Digital Age*, and *Campbell v. Acuff-Rose at 21*, 90 WASH. L. REV. 579, 589–95 (2015) (introducing and citing eight contributions to symposium volume reflecting on *Campbell*’s impact).

of fair use.⁶ By carefully analyzing the Court's fair use jurisprudence up to, and including, *Campbell*, we demonstrate how contested the role of fair use in copyright law was both before and after Congress codified the doctrine. By focusing on the specifics of the litigation history in each case—including recently published research on the publicly available internal memoranda from some of the Justices' files—this Article argues that over the course of this jurisprudential development, the Court and counsel appearing before it went through a learning process about fair use. However, until the Court issued its decision in *Campbell*, it had not fully engaged with the role of the doctrine in copyright law's overall scheme, nor had the Court appreciated the implications of the doctrine's codification.

This Article's second claim is that *Campbell* reflects the culmination of that process because the Court corrected its errors from prior cases while finally providing lower courts and counsel with a general standard for analyzing fair use questions. In doing so, this Article engages with a current debate in which the proper interpretation of *Campbell* is being contested.

The Court returned to the issue of fair use recently in *Google LLC v. Oracle America, Inc.* (*Google v. Oracle*)⁷ and *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* (*Warhol*).⁸ In both cases, the Court relied heavily on *Campbell*. Based on those decisions, some judges and commentators have advanced three revisionist arguments.

The first argument is that *Google v. Oracle* and *Warhol* reflect a retreat from *Campbell*'s transformative use standard altogether. In the alternative, the argument is that the way the Court in *Warhol* relied on *Campbell* has, in effect, reinterpreted *Campbell* to narrow the transformative use standard to apply

⁶ This Article is related to two others that trace this history. In Michael W. Carroll & Peter Jaszi, *An Intellectual History of the Fair Use Doctrine in Copyright Law, 1790–1978* (unpublished manuscript) (on file with authors) [hereinafter Carroll & Jaszi, *Intellectual History*], we trace the intellectual history of the fair use doctrine during its common law period, from enactment of the first copyright act to the effective date of the 1976 Act. In Michael W. Carroll & Peter Jaszi, *The Triumph of Three Big Ideas in Fair Use Jurisprudence*, 99 TUL. L. REV. 453 (2025) [hereinafter Carroll & Jaszi, *Three Big Ideas*], we argue that the Court's two recent fair use opinions in *Google v. Oracle* and *Warhol* reflect the triumph of three ideas, and we provide a doctrinal synthesis of these decisions to state the current law of fair use. Like this Article, *Three Big Ideas* also surveys the Court's fair use jurisprudence, but it does so at a much more general level and for a different purpose.

⁷ 141 S. Ct. 1183 (2021).

⁸ 143 S. Ct. 1258 (2023).

only to uses that “target” a preexisting copyrighted work.⁹ The final argument arrives at a similar point by a different route, claiming that the *Warhol* decision reveals that *Campbell* has always been misunderstood and that its transformative use standard was always meant to be limited to uses that target a copyrighted work or otherwise require use of that work.¹⁰

We have previously rebutted the first two revisionist arguments. We explained how and why the Court in *Google v. Oracle* and in *Warhol* strongly ratified, rather than retreated from, the transformative use standard.¹¹ We also have demonstrated that *Warhol*’s treatment of *Campbell* is fully consistent with how lower courts have interpreted *Campbell* over the past thirty years. We further showed how the Court’s discussion in *Google v. Oracle* and *Warhol* synthesizes well to answer some questions about transformative use that either *Campbell* had genuinely left open or that were treated as such by some commentators.¹²

This Article further rejects the revisionist argument that seeks to narrow *Campbell*’s original scope by providing detailed analysis of how and why the Court came to its decision in *Campbell*. By analyzing both the public filings and the now-public internal case files of some of the Justices, this Article provides a number of new insights to support the case for reading *Campbell* capaciously. Indeed, *Campbell*’s adoption of the transformative use standard reflects the hard-won triumph of an important idea about the role of fair use in copyright law. Through this adoption, the Court shifted the focus of analysis to the user’s purpose and the amount of the source work used for that purpose. In doing so, the Court corrected missteps that it had taken when interpreting § 107 in earlier cases, particularly in its adoption of unwarranted narrowing presumptions.

⁹ See *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 97 F.4th 699, 714 (10th Cir.) (arguing that fair use requires targeting of a source work), *vacated and reh’g granted*, 101 F.4th 787 (10th Cir. 2024), *aff’d on reh’g*, 174 F.4th 761 (10th Cir. 2026); Shyamkrishna Balganesh & Peter S. Menell, *Going “Beyond” Mere Transformation: Warhol and Reconciliation of the Derivative Work Right and Fair Use*, 47 COLUM. J. L. & ARTS 413, 436–37 (2024) [hereinafter Balganesh & Menell, *Going “Beyond” Mere Transformation*] (restating the argument post-*Warhol*); Appellant’s Opening Brief at 45, *Sedlik v. Von Drachenberg*, No. 24-3367 (9th Cir. May 29, 2024) [hereinafter *Sedlik Appellant’s Brief*].

¹⁰ See generally Shyamkrishna Balganesh & Peter S. Menell, *Misreading Campbell: Lessons for Warhol*, 72 DUKE L.J. ONLINE 113 (2023) [hereinafter Balganesh & Menell, *Misreading Campbell*] (arguing for a narrowing interpretation of *Campbell*).

¹¹ See Carroll & Jaszi, *Three Big Ideas*, *supra* note 6, at 460–68.

¹² See *id.* at 512–15.

This Article proceeds as follows: Part I discusses the context for the Court's first two encounters with the fair use doctrine under the Copyright Act of 1909, when fair use was a judicially implied limitation on statutory exclusive rights. During this common-law phase, courts shared a general understanding about the fair use doctrine's role in curbing overprotection by limiting the scope of statutory exclusive rights. But, the courts had not settled on a particular theory of fair use or even on a doctrinal formulation for its application.

In two cases, the Supreme Court had an opportunity to provide the lower courts with more certain guidance, but the Court divided evenly in each case. *Columbia Broadcasting System, Inc. v. Loew's, Inc.*¹³ presented the question of whether Jack Benny's television burlesque of the film *Gas Light* was a fair use. Of note, while not reaching the merits, the Court's grant of *certiorari* coupled with the Justices' questions at oral argument in this case indicate strong support for petitioners' premise that the fair use doctrine was a means by which the Constitution limited the scope of the 1909 Act's otherwise unqualified exclusive rights. *Williams & Wilkins Co. v. United States*¹⁴ presented the question of whether the copying of individual scientific journal articles made by staff at the National Institutes of Health for researchers was fair use. The briefing and oral argument transcript from this case offer fewer insights other than to show that neither the parties nor the Justices had developed a general fair use theory even in contemplation of the four factors.

Part II opens with a prelude that discusses two scholarly debates that the Court would engage with in its fair use merits decisions: (1) whether the Court should recognize an independent First Amendment defense to copyright infringement, and (2) whether to adopt a "productive use" presumption for fair use analysis.

Part III traces the development of fair use by carefully analyzing the evolving views of the litigants and the Justices engaged in the three pre-*Campbell* decisions. This Part shows that, following enactment of the 1976 Act, § 107 provided courts with more specific procedural guidance by requiring consideration of four factors when balancing the interests of the copyright owner, the user, and the general public in fair use

¹³ 356 U.S. 43 (1958).

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

analysis. But, the 1976 Act had provided no theory to guide evaluation and application of these factors. The resultant uncertainty would become apparent after 1978, when fair use was intensely contested and the Supreme Court decided fair use questions in four cases within a ten-year period, culminating in its *Campbell* decision.

In *Sony Corp. of America v. Universal City Studios, Inc.*,¹⁵ the principal issue was whether Sony could be held indirectly liable for distributing its video tape recorder, which allowed users to copy over-the-air television programming.¹⁶ To resolve this issue, the Court had to first decide whether non-commercial taping of television programs for later viewing was a fair use.¹⁷ Internal memoranda demonstrate that fair use was the issue that most divided the Justices and led the Court to rule in Sony's favor 5–4.

*Harper & Row, Publishers, Inc. v. Nation Enterprises*¹⁸ involved *The Nation's* “scoop” of President Ford's soon-to-be-published autobiography in an article that copied three to four hundred words from parts of the book.¹⁹ The Court adopted two further dubious presumptions, holding that use of an unpublished work was presumptively unfair²⁰ and that the fourth fair use factor—the effect on the copyright owner's market—was the most important among the fair use considerations.²¹ The Court also addressed whether First Amendment “values” should alter the fair use analysis,²² deciding that the free speech guardrails of the idea-expression distinction and fair use were sufficient to accommodate any First Amendment concerns raised by the case.²³

¹⁵ 464 U.S. 417 (1984).

¹⁶ See *id.* at 439 (“If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge of the fact that its customers may use that equipment to make unauthorized copies of copyrighted material.”).

¹⁷ See *id.* at 447–56 (concluding that unauthorized copying for purpose of time-shifting was fair use).

¹⁸ 471 U.S. 539 (1985).

¹⁹ See *id.* at 548–49 (noting *The Nation's* concession on the amount quoted).

²⁰ See *id.* at 554 (“We conclude that the unpublished nature of a work is ‘[a] key, though not necessarily determinative, factor’ tending to negate a defense of fair use.” (quoting S. REP. NO. 94-473, at 64 (1975))). Congress subsequently overrode the Court's adoption of this presumption by amending § 107 in 1992. See *infra* subpart IV.A.1.

²¹ See *Harper & Row*, 471 U.S. at 566 (“This last factor is undoubtedly the single most important element of fair use.”).

²² See *id.* at 555.

²³ See *id.* at 560.

Fair use was a minor issue in *Stewart v. Abend*,²⁴ which involved the Alfred Hitchcock film *Rear Window*. The principal issue required interpretation of the 1909 Act's treatment of a derivative work after rights in the underlying work reverted to the statutory heirs. The Court rejected the argument that fair use under the 1976 Act could be used to justify continued use of the derivative work even if the 1909 Act permitted such use.²⁵

Part IV provides necessary context for *Campbell* with particular focus on Judge Leval's article, *Toward a Fair Use Standard*, which introduced the transformative use standard, later adopted in *Campbell*, as a means of connecting analysis of the fair use factors to copyright law's constitutional purpose. The Part then turns to the decision itself.

Turning to *Campbell*, this Part shows that the stakes in the case were significant in light of the Sixth Circuit's interpretation of *Sony* to mean that even a favored use, such as parody, could not be fair if done commercially. The case was presented by the parties and *amici* as a case limited to the fair use doctrine's application to parody. Now-public internal memoranda from the Court's deliberations suggest that Justice Souter, who wrote the decision, appreciated the need for providing lower courts with a more generally applicable analytical approach to fair use analysis. Having at hand Judge Leval's article, Justice Souter drafted an opinion for the Court that embraced Leval's argument for the transformative use standard.

Part V then demonstrates how this Article's detailed analysis of the road to *Campbell* and the process that yielded the final decision rebuts current revisionist attempts to narrow *Campbell*'s scope. In particular, this Article demonstrates why the record does not support claims that *Campbell* treats uses as transformative only if they target a preexisting work, such as in a parody, or that a user must demonstrate a compelling need to use the preexisting work, as in a parody. This Article demonstrates instead how Judge Leval's articulation of the transformative use standard, and Justice Souter's adoption of this standard, reflected an understanding that a wide range of justifications beyond parody or specific commentary would also make a use transformative and therefore likely fair.

We conclude with an appreciation for the importance of the Court's adoption of transformative use in *Campbell* and its ratification, reaffirmation, and extension in *Google v. Oracle*

²⁴ 495 U.S. 207 (1990).

²⁵ *Id.* at 238 ("[A]ll four factors point to unfair use.").

and in *Warhol* to provide lawyers and judges with a flexible analytical approach that remains capable of addressing a range of uses, including those involving ever-evolving technologies, such as generative artificial intelligence. In doing so, we rebut revisionist views of *Campbell* that have surfaced in two pending appellate cases, in the Ninth Circuit and the Tenth Circuit, respectively, and in the views of some commentators.²⁶

I

THE COURT'S PRE-CODIFICATION ENCOUNTERS WITH FAIR USE

A. *Folsom v. Marsh* and Its Ambiguous Legacy

The fair use doctrine originates in Justice Story's 1841 opinion in *Folsom v. Marsh*²⁷—one of a trio of foundational copyright decisions written by Story while riding circuit—which involved a fictional autobiography of George Washington that relied extensively on verbatim copying of Washington's letters. The defendants relied on the “fair abridgement” doctrine to justify their use.²⁸ This limiting doctrine presented courts with a binary choice: either a book based upon another book was an infringement or it was a fair abridgement.²⁹

Recognizing the need for a more nuanced infringement inquiry than fair abridgement offered, Story introduced the concept of a “justifiable” use of a copyrighted work.³⁰ His focus was on the “substantiality” of the use, but he also identified three factors relevant to the interest-balancing inquiry into whether a use was justified.³¹ Those factors would become the inspiration for the modern version of fair use under § 107.

²⁶ See *infra* Conclusion.

²⁷ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

²⁸ See Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1375 (2011) (describing this reliance as “entirely plausible given the state of the legal authorities at the time”).

²⁹ See, e.g., *Gyles v. Wilcox* (1740) 26 Eng. Rep. 489 (Ch); see also Sag, *supra* note 28, at 1387–93 (arguing that the English courts relied on some types of contextual information that would be relevant under modern fair use analysis when deciding whether an abridgement should be deemed a “new book”).

³⁰ Story's formulation was rephrased as “fair use” in *Lawrence v. Dana*, 15 F. Cas. 26, 60–62 (C.C.D. Mass. 1869) (No. 8,139) (discussing English precedents and referring to “what is called a fair use” as a privilege to use another's publication).

³¹ When the opinion is read in context, it is clear that Justice Story did not introduce the modern concept of fair use but instead proposed a unitary infringement analysis that merged analysis of the substantiality of a use with what we think of today as fair use. Indeed, throughout the history of fair use's development as a distinct doctrine, *Folsom* stood more for the proposition that substantiality

In its aftermath, *Folsom* left an ambiguous legacy. Some courts treated the fair use question as coterminous with the question of substantial similarity while others treated fair use as a distinct non-infringement doctrine that could apply even when a use was substantially similar to a source work. As we discuss *infra*, in the Court's first two fair use cases—decided well over a century later—this remained an open issue. Because the Court divided evenly in each case, this question was eventually settled in favor of the distinct doctrine view when Congress codified fair use in § 107.

The reinterpretation of *Folsom* as support for considering fair use as a distinct doctrine began in commentary in the mid-twentieth century, gathered momentum during the 1976 Act's legislative process, and culminated in the Supreme Court's effective adoption of the decision in *Campbell* as one of its fair use precedents.³² As a result, while *Folsom* is technically only circuit precedent, it today enjoys a special position as a super precedent in the law of fair use.

Post-*Folsom*, two additional conceptual debates inflected the development of the fair use doctrine in the lower federal courts. One was the debate about copyrightable subject matter. Between the latter nineteenth century and the mid-twentieth century in particular, the fair use doctrine developed in the shadow of the sweat-of-the-brow theory of copyrightability.³³

Many disputes involved uses of material that would be unprotected today, such as unoriginal collections of facts, organizational headings in legal treatises, or even ideas. Because the parties often were direct competitors, courts avoided unresolved (or unrecognized) copyrightability issues by applying the substantiality test to determine when a use should be deemed unfair.³⁴ The courts' reasoning was often quite explicitly Lockean,

of use is the relevant infringement metric rather than pointing toward a more policy-driven analysis of whether such a use was justified. See Carroll & Jaszi, *Intellectual History*, *supra* note 6 (manuscript at 7–9) (discussing cases).

³² For evidence of *Folsom*'s continued vitality, one need look no further than its role in the briefing in *Google v. Oracle* and in *Warhol* and to Goldsmith's counsel's invocation of the case twice in oral argument. Transcript of Oral Argument at 69, 72, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023) (No. 21-869).

³³ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 352 (1991) (“[C]ourts [had] developed a new theory to justify the protection of factual compilations. Known alternatively as ‘sweat of the brow’ or ‘industrious collection,’ the underlying notion was that copyright was a reward for the hard work that went into compiling facts.”).

³⁴ See Carroll & Jaszi, *Intellectual History*, *supra* note 6 (manuscript at 15–23) (discussing cases).

asking whether the user had done independent labor to gather facts rather than merely verifying facts found in another's publication.³⁵ This line of cases constitutes the unfair competition or misappropriation branch of early fair use jurisprudence.³⁶

In the run-up to the 1976 Act's enactment, other courts had limited copyrightability to an author's original expression. One might have thought that Congress had resolved this issue in the Act, which limits copyrightable subject matter to "original works of authorship."³⁷ However, the sweat-of-the-brow or "industrious collection" view persisted. As we discuss *infra*, this question was presented and extensively argued in *Harper & Row*. Even though the Court decided to sidestep the subject matter issue to resolve the case on fair use grounds alone, we argue that this issue influenced some of the Justices' evaluations of the equities in the dispute.³⁸ The Court did not resolve the issue in favor of the originality requirement until it issued its 1991 decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*

The second conceptual disagreement concerned the justification for fair use itself. This dispute had considerable, and problematic, influence on the Court's decision in *Harper & Row*. One theory was the implied license view of fair use, under which fair use would apply only to uses for which the author would have reasonably consented. A broader version considered fair use to be justified as a license imposed on the author in order to further copyright law's purpose. This latter version is captured in Horace Ball's frequently quoted statement that fair use is "a privilege in others than the owner of [the] copyright to use the copyrighted material in a reasonable manner without his consent."³⁹ The two theories are difficult or impossible to reconcile. As is discussed in subpart III.B, Justice O'Connor's opinion in *Harper & Row* is internally inconsistent because she repeated this quote from Ball while also accepting *Harper & Row*'s implied license argument.

³⁵ *E.g.*, *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905) ("[I]t cannot be questioned that the second publisher, although he gives out exactly the same words as the first publisher, is, nevertheless, within his legal right, provided he resorts independently to the same originals that the first publisher went to.").

³⁶ *See* Carroll & Jaszi, *Intellectual History*, *supra* note 6 (manuscript at 15–23) (discussing reasoning in these cases).

³⁷ 17 U.S.C. § 102(a).

³⁸ *See infra* subpart III.B.

³⁹ HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944).

The Court might have earlier engaged with these issues that influenced development of the fair use doctrine, but in its first two attempts, the Court could not reach resolution. However, we think that cultural context and the litigation record in each case provide useful insights into the ways in which the idea of fair use was highly contested. This discussion also highlights how far the Court would have to travel conceptually to reach its adoption of the transformative use standard in *Campbell*.

B. *CBS v. Loew's*

The Court first encountered fair use when it granted review in *Columbia Broadcasting System, Inc. v. Loew's, Inc.*,⁴⁰ which involved Jack Benny's television burlesque of the movie *Gas Light*, which starred Charles Boyer and Ingrid Bergman. Jack Benny later persuaded Ms. Bergman to share her shooting script from the movie with his writers, who created a fifteen-minute radio burlesque of the film starring Benny and Bergman.⁴¹ The district court held that through its conduct, Loew's had licensed this production.⁴² Six years later, when Benny had moved his show to television, CBS produced a similar burlesque featuring Benny and Barbara Stanwyck.⁴³

Loew's sued for copyright infringement and won in the lower courts. In essence, this case presented a version of the same question to which the Court would return in *Campbell*—whether the purpose of the use was relevant to how much of a preexisting work a user may rely on. In the district court, Judge Carter understood relevant precedent to be context-insensitive and rejected CBS's arguments that fair use permitted broader latitude in the context of parody or burlesque because the art form required borrowing expression to be effective.⁴⁴

⁴⁰ *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *cert. granted*, 353 U.S. 946 (1957).

⁴¹ *Loew's Inc. v. Columbia Broad. Sys., Inc.*, 131 F. Supp. 165, 168 (S.D. Cal. 1955).

⁴² While Loew's (better known as MGM) had not expressly consented to the Benny production and had little prior notice of it, the parties stipulated that Benny would have testified that he asked for, and received from Loew's, a copy of its then-current photoplay for exhibition the week prior to the radio program's production. *See id.* at 169 ("We credit Benny's testimony and find the radio program was done with Loew's consent.").

⁴³ *See id.* A version of the CBS broadcast is at PD TV, *The Jack Benny Program Season 9 Episode 9* (YouTube, Dec. 17, 2020), <https://youtu.be/mx1x10QIp0Y> [<https://perma.cc/AEG7-8TFC>].

⁴⁴ *Loew's*, 131 F. Supp. at 176–77.

However, the question had been novel at the time. And, as CBS's counsel would later point out in their reply brief in the Supreme Court, Judge Carter's own views on the subject quickly evolved such that in *Columbia Pictures Corp. v. National Broadcasting Co.*,⁴⁵ he accepted the proposition that fair use offered greater scope in the context of parody when faced with an infringement claim in the context of Sid Caesar and Imogene Coca's movie take-off "From Here to Obscurity."⁴⁶ However, Judge Carter's change of heart had no influence on the Ninth Circuit.

In *Benny v. Loew's, Inc.*,⁴⁷ the court of appeals took a very narrow view of the case. The court agreed with the position of Loew's that the 1909 Act granted copyright owners exclusive rights, and that fair use was a judicially created, limited exception to the statutory grant of exclusivity. Without citation to any authority, the Ninth Circuit's statement of the law was that "[t]he so-called doctrine of fair use of copyrighted material appears in cases in federal courts having to do with compilations, listings, digests, and the like."⁴⁸

Confining fair use to what we have called the unfair competition branch of the doctrine, the court then cited a compilation case for the proposition that "[i]n such cases the question is whether the writer has availed himself of the earlier writer's work without doing any independent work himself."⁴⁹ Comparing only the script for the dramatic play *Gas Light* and the teleplay for the burlesque version, called *Autolight*, the court determined that they were so similar that if the material from the dramatic script were removed "there are left only a few gags, and some disconnected and incoherent dialogue."⁵⁰ From this highly circumscribed view of the facts and the law, the court held that without regard to the use context, "there is only a single decisive point in the case: One cannot copy the substance of another's work without infringing his copyright."⁵¹

The Ninth Circuit's opinion received substantial criticism by one prominent legal commentator⁵² and by the popular

⁴⁵ 137 F. Supp. 348 (S.D. Cal. 1955).

⁴⁶ See *id.* at 354.

⁴⁷ 239 F.2d 532 (9th Cir. 1956).

⁴⁸ *Id.* at 536.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 537.

⁵² See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (Columbia University Press 1967) ("I will not conceal my view that [the decision] was wrong—and possibly unconstitutional . . .").

press.⁵³ CBS petitioned for *certiorari* on the grounds that the Ninth Circuit's holding was in conflict with the constitutional purpose of copyright law to promote the progress of science, and that it would deem numerous famous parodic works from the literary arts to be infringing if current law applied. The Supreme Court granted review. The legal question was whether fair use provided broader latitude where borrowing for certain purposes was concerned than would the general requirement that infringement be based on "substantial similarity."

In effect, the case for the first time squarely presented the Court with the question of whether fair use was simply an aspect of a broad non-infringement doctrine or a principle that applied to cases in which what otherwise would be infringing use is nevertheless deemed fair. Counsel for both parties argued the point both ways.⁵⁴

On the merits, defending the judgment below, Loew's counsel in its brief engaged more directly than the Ninth Circuit had on the question of how much borrowing a parodist may make.⁵⁵ In the alternative, the argument was that even if fair use was distinct from the inquiry into substantiality of the borrowing, the distinction was one without a difference.⁵⁶ Under this alternative view, Loew's counsel cited the factors from *Folsom* as the applicable test if the Court were to treat fair use as a distinct doctrine.

CBS's position was that the Court should recognize that fair use applies in many situations and that "the unifying element is the Constitution which requires that copyright protection

⁵³ See, e.g., Charles Poore, *Ardent Plea for the Art of Parody*, N.Y. TIMES, Mar. 9, 1958, at 33.

⁵⁴ Brief of Petitioners at 19, *Columbia Broad. Sys., Inc. v. Loew's, Inc.*, 356 U.S. 43 (1958) (No. 90) [hereinafter *Loew's* Petitioners Brief] ("It would appear to be less confusing and more in accord with the majority of the cases to confine the terminology of 'fair use' to the use of copyrighted material which, except for the application of the principle, would constitute an infringement."); Brief of Respondents at 7-8, 31, *Columbia Broad. Sys., Inc. v. Loew's, Inc.*, 356 U.S. 43 (1958) (No. 90) [hereinafter *Loew's* Respondents Brief] (recognizing two potential tests for fair use and arguing that both tests favored Respondent's position).

⁵⁵ See *Loew's* Respondents Brief, *supra* note 54, at 7-8 ("The so-called doctrine of fair use is not a means of avoiding the exclusivity of copyright. . . . It is, in fact, only a succinct way of referring to the proposition that unless the appropriation is substantial and of copyrightable material there is no infringement of copyright.").

⁵⁶ See *id.* at 31 ("Whether the case be one of plagiarism in the usual sense, where the test is 'substantiality,' or one where 'fair use' in its supposed narrow and technical sense is at issue, the courts apply the same criteria to determine whether there has been an infringement.").

promote, not retard, literary creativeness.”⁵⁷ In CBS’s view, the constitutional prerogative that copyright law provides a public benefit requires courts to read the statute in light of this purpose. It argued that, accordingly, courts have recognized various limits on a copyright owner’s exclusive rights, in particular that copyright does not apply to unprotectible elements of a work, and so should recognize uses such as this to be fair use.

CBS foreshadowed the reasoning in Judge Leval’s argument for transformative use in its reply brief. Responding to Loew’s argument that fair use is limited to “insubstantial use,” CBS argued that

courts under their well established “fair use” principles look not alone to the *amount* used, but also to *why* it is used and *how* it is used, and above all, whether the use is needful to promote the public interest without at the same time unduly affecting the economic interest of the copyright owner to a point which defeats the Constitutional purpose.⁵⁸

Interestingly, counsel for each of the parties recognized that adoption of a generalized fair use test would be valuable. But, even though Loew’s had cited the *Folsom* factors, neither side pressed this as the way forward. The Court’s 4–4 split decision left a number of lingering questions: Had the Court decided this case, who would have prevailed; would the Court have recognized fair use as a distinct doctrine; and would that doctrine be comprised of a general, multi-factor test?

A Reveal. On the first question, Melville Nimmer speculated that CBS would have prevailed because Justice Douglas, the recused Justice, likely would have favored CBS’s position.⁵⁹ We can now confirm that not only did Justice Douglas vote to reverse the Ninth Circuit but also that he had been assigned to write the opinion and had begun drafting it! His

⁵⁷ *Loew’s* Petitioners Brief, *supra* note 54, at 7.

⁵⁸ Reply Brief of Petitioners at 10, *Columbia Broad. Sys., Inc. v. Loew’s, Inc.*, 356 U.S. 43 (1958) (No. 90) (emphasis in original).

⁵⁹ Not long after the Court’s decision, Melville Nimmer opined that the next time the Court considered fair use in the context of parody, the outcome:

[M]ay foreshadow a future holding that parody or burlesque is per se privileged quite apart from the amount of material copied, in view of Justice Douglas’ past tendency to limit the scope of the copyright monopoly (e.g., see *Mazer v. Stein* (347 U.S. 201 (1954))). I would regard such a rule of law as unfortunate, even though I believe the doctrine of fair use should be most liberally applied in the area of parody and burlesque.

ALAN LATMAN, COPYRIGHT LAW REVISION: STUDY NO. 14, FAIR USE OF COPYRIGHTED WORKS (1958), 86th Cong., 2d Sess. at 43 (Comm. Print 1960) [hereinafter Latman Report].

difficult-to-decipher hand-written note appended to the hand-written draft opinion explained that Douglas had learned that CBS was in negotiations for the television rights to his book *An Almanac of Liberty*, leading him to recuse from further participation in the case.⁶⁰

Considerably more speculation would be required to answer the other questions. But, in light of the modern Court's adoption of *Folsom* as a *de facto* precedent of the Court in *Campbell*, *Google v. Oracle*, and *Warhol*, it would not have been surprising for the Court to have articulated a version of fair use that relied upon, or at least took account of, the *Folsom* factors.⁶¹

C. *Williams & Wilkins v. United States*

The absence of a generalized fair use standard also contributed to the Court's inability to agree on a resolution in its next encounter with the doctrine. In *Williams & Wilkins Co. v. United States*,⁶² a publisher of medical journals sued the United States for copyright infringement, claiming that the photocopies of eight of its journal articles made by the staff of the National Library of Medicine ("NLM") for intramural researchers at the National Institutes of Health ("NIH"), and for researchers requesting copies through interlibrary loan agreements, exceeded the limits of fair use.⁶³ NLM purchased two subscriptions to the journals in suit, keeping one copy of each issue in

⁶⁰ See Justice William O. Douglas, Note of Mar. 14, 1958, *Columbia Broad. Sys., Inc. v. Loew's, Inc.*, No. 90 (1958):

After I had written a draft opinion for the Court to reverse the judgment in the case I learned that CBS one of the petitioners had been negotiating with William Morris Agency and Helen Strauss for possible purchase of television rights in *An Almanac of Liberty*. So I advised the Chief Justice of the fact and withdrew from the case, leaving an 8 man Court. Today at Conference a new vote was taken by the 8 and the result was 4-4.

See also Memorandum from Justice Douglas to Chief Justice Warren (Mar. 11, 1958):

As I told you yesterday there is a possibility of a conflict of interest that I have in No. 90 - *Columbia Broadcasting System v. Jack Benny*. I think it is likely that it will be rather remote but on reflection I have thought I should lean over backwards because what seemed remote to me might not seem remote to others. And so I have decided to withdraw from the case which makes it necessary for the opinion to be reassigned.

⁶¹ See *supra* notes 32, 59.

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

⁶³ *Id.* at 1346-47.

the library and routing the other copy among researchers.⁶⁴ It also honored researchers' requests for photocopies of specific articles. NLM had adopted an internal policy that limited the number of copies of articles that individual researchers and external researchers could request through their libraries.⁶⁵

In a 4–3 decision, the Court of Claims held that the copying practices that conformed with NLM's internal policy were fair use.⁶⁶ This case arose under the Copyright Act of 1909, and the courts of appeals generally had not settled on a consistent doctrinal formulation for fair use. In this case, plaintiff's counsel, Alan Latman—who had played an important role in the legislative process⁶⁷—relied on then-pending copyright legislation to assert that the applicable law of fair use was the same four-factor test that would later be codified in § 107. The majority accepted this proposition and applied the four factors to this use.

With respect to purpose, the court emphasized that most of the copying was done to aid the non-commercial research purposes of medical and scientific researchers and that it is “settled that, in general, the law gives copying for scientific purposes a wide scope.”⁶⁸ Further, under the fair use doctrine, courts “must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.”⁶⁹

With respect to the amount used, one general proposition that the plaintiff advanced was that it could not be fair use to copy an entire work. The court disagreed. The court relied on a range of sources to support the proposition that copying entire journal articles could be fair use. These included long-accepted library practices,⁷⁰ a 1935 “gentlemen's agreement” between publishers and libraries,⁷¹ and inferences drawn from certain prior acts of Congress.⁷² The court concluded that the publisher

⁶⁴ *Id.* at 1347–48.

⁶⁵ *Id.* at 1349 (detailing use restrictions on photocopying service).

⁶⁶ *Id.* at 1352–53.

⁶⁷ See *infra* notes 83–87 and accompanying text (describing Latman's role in expert report to Congress).

⁶⁸ *Williams & Wilkins Co.*, 487 F.2d at 1354. While most of the copying was for university or governmental researchers, the record demonstrated that about twelve percent of the external copying requests came from private organizations, primarily drug companies. See *id.* at 1374.

⁶⁹ *Id.* at 1352.

⁷⁰ *Id.* at 1351 (discussing historical Library of Congress policies).

⁷¹ *Id.* at 1355–56.

⁷² *Id.* at 1356.

had not offered evidence to show that NLM's photocopying was causing it economic harm, other than its stated willingness to license article photocopying, and that an injunction against NLM's photocopying would interfere with medical research.⁷³

The dissent viewed the case altogether differently. Giving little to no weight to the limitations in the libraries' policies, the dissenting judges regarded the scale of the libraries' copying to be "so vast that it dwarfs the output of many small publishing companies."⁷⁴ With respect to purpose, the dissent treated the alleged scientific research purpose to be "far-fetched."⁷⁵ With respect to the amount used, the dissent treated copying of entire articles, each of which was separately copyrighted, as unfair because it supplanted demand for the original.⁷⁶

The Court likely accepted the case for review because of widespread interest in resolving the issue of library photocopying and because of the dissent's alarm about the potential impact of the decision on scientific publishing. Justice Blackmun did not participate in the decision.⁷⁷ Even with the benefit of the four factors, the parties' arguments before the Court reflected the same deep divisions that had surfaced in the court of appeals.

During oral argument, Latman asserted that library photocopying of articles posed a serious threat to the future existence of scientific and technical journals.⁷⁸ Echoing the lower court's

⁷³ *Id.* at 1354.

⁷⁴ *Id.* at 1364 (Cowen, C.J., dissenting). The dissent also focused on evidence that exceptions to these policies were routinely granted. *See id.* at 1365–66.

⁷⁵ *Id.* at 1367.

⁷⁶ *Id.* at 1366.

⁷⁷ *See* Jonathan Band, *A Peek Behind the Scenes at the Making of Three Decades of Supreme Court Copyright Decisions* 9 (Joint PIJIP/TLS Research Paper Series, 132, 2024) [hereinafter Band, *Peek Behind the Scenes*] (quoting Justice Harry A. Blackmun, Memorandum to File at 6, *Williams & Wilkins Co. v. United States*, No. 73-1279 (Dec. 16, 1974) (in *Williams & Wilkins* File, Blackmun Papers)), <https://digitalcommons.wcl.american.edu/research/132> [<https://perma.cc/D75N-NUC2>]:

Justice Blackmun's papers indicate why he recused himself from this case. During the 1950's, Justice Blackmun had served as in-house counsel for the Mayo Clinic for nine years. In a memorandum drafted prior to oral argument . . . He stated: "I must also look at the posture of the Mayo Foundation in one of the amicus briefs filed with the court of claims. If this is embarrassing to me, I should step out of the case."

⁷⁸ Transcript of Oral Argument at 3–4, *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (No. 73-1279). Presaging the internal discussion in *Sony* about whether a Justice's personal home taping would be infringing, discussed *infra*, when one Justice asked whether he would infringe if he copied a

dissent, Latman argued that fair use was unavailable because these copies substituted for the originals.⁷⁹ The government told the Court that the plaintiff sought “a sweeping rule that is going to upset the status quo in medical research.”⁸⁰ The government also noted that the very breadth of interest in this issue meant that Congress was better positioned to resolve it.⁸¹

All involved in this case were keenly aware of the fact that library photocopying was a central issue in the ongoing legislative negotiations over the 1976 Act and that resolving this hotly contested issue was largely responsible for the delay in Congress taking final action. This case could have influenced how Congress resolved the issue, but the Court’s even split provided no judicial guidance. Shortly thereafter, Congress took action; in so doing, it codified fair use in § 107.

D. Codifying Fair Use

The process to revise the Copyright Act of 1909 began in the mid-1950s. At the outset, Congress tasked the United States Copyright Office to commission reports on thirty-four topics,⁸² and Alan Latman, then a rising member of the copyright bar, wrote the report on fair use.⁸³ The most fundamental question the study had to address was whether Congress should expressly address fair use in the revision bill or leave it as a judicially implied limit on exclusive rights.⁸⁴

The Latman Report offered four options for dealing with fair use. These included leaving fair use as a judicially implied limit, with the “boldest” option being to codify the doctrine stated as a set of general criteria.⁸⁵ If codification were the policy preference, Latman suggested that the statute could develop “broad ground rules” for determining fair use in specific

book chapter, Latman side-stepped the issue, acknowledging it to be difficult, but also focusing on the litigation impracticalities for such a case. *See id.* at 21–22.

⁷⁹ *Id.* at 5–6.

⁸⁰ *Id.* at 28.

⁸¹ *Id.* at 34–39, 42.

⁸² *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 872 (1987) (describing process); *see also Copyright Law Revision Studies*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/history/studies.html> [<https://perma.cc/XFW9-LPZB>] (last visited Mar. 16, 2026) (hosting copies of the thirty-four reports).

⁸³ Latman Report, *supra* note 59. Latman was a mentee of Barbara Ringer’s. Barbara Ringer, *Alan Latman: An Appreciation*, 59 N.Y.U. L. REV. 247, 247–49 (1984).

⁸⁴ *See* Latman Report, *supra* note 59, at 18–24 (summarizing prior bills).

⁸⁵ *See id.* at 32–33 (explaining this approach).

cases.⁸⁶ Latman's broad ground rules were a three-factor test resembling elements of what became § 107.⁸⁷

The Copyright Office's first report to Congress on the revision process in 1961 chose to advance Latman's "boldest" option,⁸⁸ in a four-factor formulation that strongly resembled § 107.⁸⁹ Following distribution of a 1963 discussion draft bill that followed the Register's recommendations, a fair use provision with general criteria very similar to those in current § 107 was introduced in Congress in 1964.⁹⁰

The process of finalizing this language was very difficult.⁹¹ Representatives of library and educational groups on one side, and some authors and publishers on the other, opposed the draft provision. Each side demanded a bill that would decide the issue with respect to a number of specific contested uses, particularly photocopying in or by libraries and in educational institutions.⁹² Negotiations with stakeholders over inclusion of presumptions or specific uses that would be deemed fair dragged on, and in 1967, the final version of § 107 emerged, keeping the factors intact and compromising on interest group demands by listing in a preamble specific use-eligible purposes, while treating the list as illustrative rather than either exclusively or presumptively fair.⁹³

Disguising the sharply contested views about fair use presented in the legislative negotiations, the House and Senate Reports simply declared that the text of what is today § 107 was a mere restatement of what was somewhat airily described as "the common law."⁹⁴ One could argue that the claim was

⁸⁶ See *id.* at 31.

⁸⁷ See *id.* (suggesting "[1] general statements of the permissible purposes for which copyrighted material may be used, [2] conditioned with respect to the amount of such material and [3] the effect of the use on the original work"). If Latman's "purpose[]" was the same as Story's "object of the selections made," then these ground rules roughly restate the *Folsom* factors.

⁸⁸ See COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. at 24-25 (Comm. Print 1961) [hereinafter Register's 1961 Report].

⁸⁹ *Id.* at 24-25 (identifying the same four factors as in § 107: purpose of use, nature of work, amount used, and economic effect).

⁹⁰ See SUPPLEMENTARY REGISTER'S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1965), 89th Cong., 1st Sess. at 26 (Comm. Print 1965) (quoting § 6 of both the 1963 and the 1964 bills).

⁹¹ See Litman, *supra* note 82, at 875-77 (describing negotiations as "tortuous").

⁹² See *id.* at 876-77 (describing hearing testimony detailing the disagreements).

⁹³ See *id.* at 877 (describing process of finalization).

⁹⁴ "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." H.R. REP. NO. 94-1476, at 66

technically correct, but only in the limited sense that the court of appeals in *Williams & Wilkins* had accepted Latman's use of the four factors from the draft legislation as its rule statement for fair use analysis under the 1909 Act.⁹⁵

But, to be clear, § 107 is not a mere restatement of the common law. The specificity of the uses named in its preamble and the new vocabulary used to describe four factors that *shall* be considered by a court were new developments, as some courts soon recognized.⁹⁶ But, Congress had not provided a general standard to guide a court's consideration of these factors. As Parts II through IV demonstrate, the Court would struggle with this issue until it decided *Campbell*.

II

PRELUDE: PRODUCTIVE USE AND THE ROLE OF FREE SPEECH

Two scholarly and judicial developments preceded the Court's post-enactment engagement with fair use, and the Court addressed these in its first two merits decisions on the doctrine in *Sony* and *Harper & Row*. One question was how free speech interests should be considered in fair use adjudication. The petition for *certiorari* in *CBS v. Loew's* had been premised on there being a constitutional limit on the scope of copyright's exclusive rights grounded either in the Progress Clause or in the First Amendment.⁹⁷ The Court appeared to have accepted this proposition by granting the petition, but its even division in the case provided no further insights.

The second conceptual debate was about whether a general theory could explain how to balance the fair use considerations. Scholars and commentators have played an active role throughout the intellectual history of fair use. Beginning in the latter nineteenth century, various treatise authors and other commentators proposed various general approaches to

(1976) [hereinafter 1976 House Report]; S. REP. NO. 94-473, at 62 (1975) [hereinafter 1975 Senate Report].

⁹⁵ *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1352 (Ct. Cl. 1973), *aff'd by an equally divided Court*, 420 U.S. 376 (1975); *see also* *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 145-46 (S.D.N.Y. 1968) (discussing pending bills with § 107 factors as stating the law and continuing that "[t]he difficult job is to apply the relevant criteria").

⁹⁶ *See, e.g., Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984) ("[T]he House Committee . . . may have overstated its intention to leave the doctrine of fair use unchanged, because the statute clearly offers new guidance for courts considering fair use defenses [by] establish[ing] a minimum number of inquiries that a court must carry out.").

⁹⁷ *See Loew's Petitioners Brief*, *supra* note 54, at 3, 11-12.

interpretation and application of the fair use doctrine.⁹⁸ Prior to the 1976 Act's enactment, many of these proposals focused on itemizing relevant factors courts should consider.⁹⁹ Courts relied on these sources in a number of cases, but that reliance was not consistent.¹⁰⁰

Post-codification, the scholarly proposition that drew attention was whether applying the four statutory factors should focus on whether a use was "productive."¹⁰¹ As adopted by the Ninth Circuit in its *Sony* opinion, a court should first determine whether a use was productive as a threshold matter before balancing the relevant factors. As is discussed *infra*, when the *Sony* case reached the Court, the debate about fair use generally, and whether to affirm the adoption of productive use specifically, divided the Court, leading to Justice O'Connor's decision to reject Justice Blackmun's adoption of the Ninth Circuit's analysis. But, the Court did not dismiss the concept of productive use outright, instead providing it breathing room by demoting it to a relevant consideration under the first fair use factor. Its continued vitality in the literature and in the case law led to Judge Leval's reframing of the idea as transformative use.

A. Free Speech and Fair Use

At various points in the development of the fair use doctrine, courts have incorporated solicitude for free speech concerns explicitly or implicitly in their decisions.¹⁰² But, they have

⁹⁸ See Carroll & Jaszi, *Intellectual History*, *supra* note 6 (manuscript at 12–13, 23–25).

⁹⁹ See, e.g., Leon R. Yankwich, *What Is Fair Use?*, 22 U. CHI. L. REV. 203, 213 (1954) ("[C]ertain tests have been evolved to determine whether the taking of copyrighted material does or does not exceed the limits of 'fair use.' They require consideration of (1) the quantity and importance of the portions taken; (2) their relation to the work of which they are a part; (3) the result of their use upon the demand for the copyrighted publication.").

¹⁰⁰ See Carroll & Jaszi, *Intellectual History*, *supra* note 6 (manuscript at 14–15, 27–32) (discussing courts' adoption of commentators' statements of law).

¹⁰¹ See *infra* notes 121–125 and accompanying text.

¹⁰² E.g., *New York Trib. v. Otis & Co.*, 39 F. Supp. 67, 68 (S.D.N.Y. 1941) (denying motion for summary judgment on fair use grounds due to disputed issues of fact); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) ("The normal reluctance to impose a summary restraint in advance of a full and complete trial is particularly acute in a case such as this which deals with the publication of a book. Before the court will intrude into an area fraught with sensitivity in its possible impingement upon fundamental democratic and intellectual institutions, it will require a showing by the movant of a right, both legal and factual, in most unequivocal terms.").

not done so consistently.¹⁰³ One reason is that the Court's free speech jurisprudence was underdeveloped.

In at least one important early post-World War II case, the Court adopted a largely *ad hoc* approach to analyzing regulations that burdened speech.¹⁰⁴ As the Court further developed First Amendment doctrine during the 1960s, copyright scholars recognized that the question of whether copyright law and the First Amendment were in conflict would require doctrinal clarification in the wake of the Court's decision in *New York Times Co. v. Sullivan*.¹⁰⁵ Having decided that private law tort actions for defamation and libel were subject to First Amendment scrutiny,¹⁰⁶ the Court had opened the door to such scrutiny over other putatively private rights causes of action that could lead to the suppression of speech, such as a claim for copyright infringement.¹⁰⁷

Copyright scholars differed in their specific approaches to this issue, but they generally sought to articulate general principles that would leave existing copyright infringement analysis largely undisturbed. Melville Nimmer argued against context-specific balancing in favor of what he called "definitional balancing." Under this approach, the idea-expression distinction would do most of the work of harmonizing copyright and freedom of expression, tracking a distinction between the speech acts that are protected within the meaning of the First

¹⁰³ See, e.g., *Henry Holt & Co., Inc. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938) (holding that tobacco company's quotation of three sentences from plaintiff-physician's book minimizing the health risks of smoking was not fair use because of impact on physician's reputation).

¹⁰⁴ In *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382 (1950), the Court rejected the "clear and present danger" test for speech regulation in favor of a balancing test: "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." *Id.* at 399.

¹⁰⁵ 376 U.S. 254 (1964).

¹⁰⁶ *Id.* at 285 (holding that the Court must independently review the record "to see . . . whether [the statements at issue] are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect," and that the Court must "make an independent examination of the whole record, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression" (citations omitted)); see also *Time, Inc. v. Hill*, 385 U.S. 374, 389–91 (1967) (extending *Sullivan's* reasoning to privacy-based claim).

¹⁰⁷ See *Rosemont Enters., Inc.*, 366 F.2d at 309, 311 (reversing award of injunction based on equitable interest balancing that strongly resembled the Court's approach in First Amendment cases).

Amendment and those that copyright could regulate.¹⁰⁸ Even this required a bit of fiddling: Nimmer also identified a class of visual works, “news photographs,” for which use of expression would be permitted as necessary to communicate the underlying ideas embodied in the images.¹⁰⁹ Critically, for purposes of this account, he rejected as unnecessary the idea that fair use should also be deemed part of the balancing act.¹¹⁰ Lionel S. Sobel agreed with Nimmer’s approach, criticizing courts for importing a First Amendment “public interest” consideration into fair use decision-making and arguing that the First Amendment and the Copyright Clause have “entirely separate spheres of influence.”¹¹¹

Paul Goldstein took a more context-sensitive approach, arguing that two “accommodative principle[s]” reconciled any conflict between the First Amendment and copyright law. Under Goldstein’s first principle, “copyright infringement [should] be excused if the subject matter of the infringed material is relevant to the public interest and the appropriator’s use of the material independently advances the public interest.”¹¹² He argued that both specific statutory limitations and the fair use doctrine operationalized this principle. For this reason, he supported the inclusion of public interest considerations in fair use. Under Goldstein’s second principle, the First Amendment would have operated to limit subject matter to original expression, required proof of actual damages to succeed on an infringement claim, and would have treated damages as the default remedy to avoid the speech-suppression that an injunction would entail.¹¹³

Like Nimmer, Robert Denicola argued that copyright’s internal safeguards would largely accommodate free speech

¹⁰⁸ See Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1184 (1970).

¹⁰⁹ *Id.* at 1197–99.

¹¹⁰ See *id.* at 1200–01 (arguing that fair use is limited to uses that do not harm the marketability of a work; whereas, the First Amendment might require permitting such use).

¹¹¹ Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. 43, 80 (1969) (arguing that Nimmer’s definitional balancing would “reveal that the interests of all . . . are best served by the maintenance of a sound system of copyright protection for all literary material—even that which is in the public interest”).

¹¹² Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 988 (1970); PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 12.4 (3d ed. 2024).

¹¹³ See Goldstein, *Copyright and the First Amendment*, *supra* note 112, at 983, 988.

concerns, but unlike Nimmer, he argued that idea-expression alone was inadequate and that fair use had a more important role to play because free speech interests would justify certain uses of protected expression, such as parody.¹¹⁴ Because of his somewhat constrained interpretation of fair use, however, he argued that an independent First Amendment defense also would be needed in a narrow class of cases “in which a defendant establishes a first amendment interest in making substantial use of the copyrighted expression of another in a manner that threatens to cause significant economic harm to the copyright owner.”¹¹⁵

As is discussed *infra*, free speech concerns in *Sony* generally centered around the relevance, if any, of the role of broadcast licensing in providing free over-the-air access to television programming. The First Amendment played a more significant role in *Harper & Row*. Harper & Row’s petition for *certiorari* claimed that the Second Circuit had skewed its statutory interpretation to avoid conflict with the First Amendment.¹¹⁶ In addition, even though *The Nation* relied only on § 107 for its defense, Harper & Row persuaded the Court to answer the question of whether the First Amendment provided a defense to a claim of copyright infringement that was independent from the fair use defense.¹¹⁷ The Court in *Harper & Row*, and then again in *Eldred v. Ashcroft*¹¹⁸ and *Golan v. Holder*,¹¹⁹ while not ruling out the possibility of independent First Amendment scrutiny, accepted the proposition that the idea-expression distinction and the fair use doctrine are sufficiently speech-protective to accommodate First Amendment concerns. But although the discussion of fair use and the First Amendment would play itself out over time, in the run-up to the Court’s first substantive fair use opinions it was lively and top-of-mind.

¹¹⁴ Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283, 299 n.84 (1979) (arguing that in the case of parody, “[i]t is instead the fair use doctrine that maintains the internal flexibility needed to avoid a direct confrontation with first amendment interests.”).

¹¹⁵ *Id.* at 304.

¹¹⁶ See Brief for Petitioners at i, 11–13, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (No. 83-1632) [hereinafter *Harper* Petitioners’ Brief].

¹¹⁷ See *id.* at 22–23 (criticizing Second Circuit’s reliance on First Amendment interests to narrow its copyrightability analysis).

¹¹⁸ 537 U.S. 186 (2003).

¹¹⁹ 565 U.S. 302 (2012).

B. Productive Use

With respect to fair use itself, the 1976 Act provided the list of relevant factors to be considered, but questions remained about how these factors could be synthesized. Leon Seltzer, the then-Director of the Stanford University Press,¹²⁰ offered a theory of fair use as part of a broader argument that limits on copyright's exclusive rights should distinguish between judicially managed "exceptions" and legislatively created "exemptions."¹²¹ Under this economically oriented theory, exceptions, such as fair use, were inherent limits in the copyright scheme which, by definition, could not impinge upon a copyright owner's expected reward.¹²² Exemptions would cover uses that would affect the economic interests of copyright owners, such as library or educational photocopying, but would be permitted for reasons of public policy as determined by Congress.

On this view, fair use should be limited to uses of only portions of a work and only by a follow-on author. In Seltzer's view, these limits were inherent in the list of uses in the Register's 1961 Report as having been approved as fair use by the courts:

The list, casual or studied as it may be, reflects what in fact the subject matter of fair use has in the history of its adjudication consisted in: *it has always had to do with the use by a second author of a first author's work*. Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose—to make what might be called the "ordinary" use of it. When copies are made for the work's "ordinary" purposes, ordinary *infringement* has customarily been triggered, not notions of fair use.¹²³

One clear goal of Seltzer's theory was to cabin any permission for unauthorized photocopying (which, as a publisher, he took very seriously indeed) to uses explicitly provided for by Congress.

Seltzer recognized that Congress had not agreed with his exception-exemption distinction or other parts of this theory

¹²⁰ See Leon Seltzer, 69, *Dies; Led a University Press*, N.Y. TIMES (Jan. 16, 1988), <https://www.nytimes.com/1988/01/16/nyregion/leon-seltzer-69-dies-led-a-university-press.html> [<https://perma.cc/TSN2-4LG3>] ("Mr. Seltzer served as director of the Stanford University Press from 1956 until 1983 . . .").

¹²¹ See LEON E. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT LAW 49 (Harvard University Press 1978). Seltzer, a career publisher, earned his law degree at Stanford in 1974.

¹²² See *id.*

¹²³ *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 970 (9th Cir. 1981) (quoting SELTZER, *supra* note 121, at 24), *rev'd*, 464 U.S. 417 (1984).

because, among other reasons, the 1976 Act included copying for classroom use in § 107's preamble and made clear that fair use supplements the library copying uses specified in § 108. Nonetheless, the proximity of his book's publication and the emerging issue of whether home taping of television programming was fair use attracted attention to the theory's possible utility.

A student author, writing about the fair use issue in the *Sony* case, adopted Seltzer's theory and branded this distinction between fair use and "ordinary" use as a distinction between "productive" use and "intrinsic" use.¹²⁴ The Ninth Circuit agreed, relying on this version of the theory to make this productive-intrinsic use distinction a nearly irrebuttable threshold test for fair use.¹²⁵

In the interim between the Ninth Circuit's and the Court's decisions in *Sony*, other commentators were split about the viability of productive use. Some, such as Wendy Gordon, thought that the inflexibility of the productive use approach conflicted with the open-ended character of § 107.¹²⁶ Others approved of the Ninth Circuit's approach.¹²⁷

As is discussed *infra*, the Court in *Sony* demoted the significance of productive use while elevating other presumptions, and did so again in *Harper & Row*.¹²⁸ But, contrary to Seltzer's

¹²⁴ See C.H.R., III, Note, *Universal City Studios, Inc. v. Sony Corp.: "Fair Use" Looks Different on Videotape*, 66 VA. L. REV. 1005, 1012-14 (1980) ("Productive use is a necessary but not a sufficient condition of fair use . . . having determined that a particular use is productive, a court considers whether the use is a *fair* use by applying the traditional four factors of fair use analysis.").

¹²⁵ See *Universal City Studios, Inc.*, 659 F.2d at 971-72 ("Without a 'productive use', i.e. when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use.").

¹²⁶ See Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1655 (1982) (calling the Ninth Circuit's adoption of productive use "questionable" because "the open-ended nature of the congressional approach to fair use suggests that endorsement of an inflexible standard like 'intrinsic use' would be inappropriate"); accord Jon R. Mostel, Comment, *The Home Videotaping Controversy: Fair Use or Fair Game?* *Universal City Studios, Inc. v. Sony Corp. of America*, 49 BROOK. L. REV. 363, 386-88 (1983) (criticizing Ninth Circuit's adoption of Seltzer's intrinsic/extrinsic use distinction); see also Note, *Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era*, 96 HARV. L. REV. 450, 457 n.43 (1982) (finding copying "for its own sake" to be incoherent).

¹²⁷ See William C. Walker, Jr., *Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium*, 43 LA. L. REV. 735, 755 (1983); Laurie Schuster, *Home Use of Videotape Recorders (VTRs): Infringement or Fair Use?* *Universal City Studios, Inc. v. Sony Corp. of America*, 59 CHI.-KENT L. REV. 209, 218 (1982).

¹²⁸ See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1686 (1988) ("It would be an exaggeration to say that the decisions in

original formulation, in *Sony*, Justice Blackmun's four-Justice dissent treated all of the uses in § 107's preamble—including making multiple copies for classroom use—as examples of productive use, and thereby effectively would have adopted productive use as a threshold determination in fair use decision-making.¹²⁹ Consequently, the productive use idea remained in circulation,¹³⁰ wounded but far from dead.

Some commentators, such as Gary Francione, recognized that the Court's treatment of productive use as a still-relevant consideration under the first fair use factor in *Sony* (and in *Harper & Row* to come) provided potential ammunition for those seeking to restrict fair use's scope.¹³¹ Terry Fisher instead sought to repurpose productive use. He argued that one analyzing fair use from an economic perspective should understand the question of a use's productivity to really be a question of whether the use is "transformative," using the term capaciously.¹³²

Sony and *Harper & Row* have expunged the concept of productivity from the fair use doctrine. In combination, however, the two decisions have sharply reduced the role played by this factor." (footnote omitted)).

¹²⁹ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 478-79 (1984) (Blackmun, J., dissenting).

¹³⁰ See, e.g., *Fin. Info., Inc. v. Moody's Invs. Serv.*, 751 F.2d 501, 509 (2d Cir. 1984); *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) (stating that the unproductive use of news clips "affect[ed] the balance" of fair use considerations); Dan Rosen, *A Common Law for the Ages of Intellectual Property*, 38 U. MIA. L. REV. 769, 820-23 (1984) (agreeing with Justice Blackmun's dissent); cf. *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (treating evidence of productive use as relevant under the first fair use factor); *Rubin v. Brooks/Cole Publ'g Co.*, 836 F. Supp. 909, 916-18 (D. Mass. 1993) (treating productive use as a sub-factor under the purpose and character of the use); see also *Penelope v. Brown*, 792 F. Supp. 132, 136 (D. Mass. 1992) (same).

¹³¹ See Gary L. Francione, *Facing The Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519, 551 (1986) (arguing that productive use "truncated significantly the broad fair use doctrine that had been used to assure broad dissemination of factual works," ultimately diminishing the utility of fair use).

¹³² See Fisher, *supra* note 128, at 1730:

[A] judge should hesitate before declaring transformative or productive uses of copyrighted material unfair. In many contexts, an artist's ability to engage in creative work depends on his freedom to make use of other copyrighted works in ways that might be considered infringements. A parodist, to be successful, must mimic an original work at least enough to make the object of his ridicule recognizable to his audience. The designer of a computer operating system can generate a better system more rapidly if he is permitted to incorporate portions of other copyrighted systems. Proscribing unauthorized activities of these kinds risks diminishing the stock of intellectual creations available for popular consumption.

Like Fisher and other scholars, Judge Leval recognized that courts needed a fair use theory to guide application of the statutory factors, and he recognized the value of focusing on the purpose of a use as the central concern of the fair use doctrine, subsuming the productive use criterion within his more general transformative use approach.¹³³ We discuss the details of Leval's transformative use proposal *infra* in subpart IV.A.2. But, here we draw attention to how that proposal was linked to what had by then become the familiar idea of productive use. For Seltzer, a productive use was limited to one that changed the content of the source work. For Leval, however, the purpose or manner of a use was also inflected by whether it had the capacity to produce a public benefit by adding something new to the general store of knowledge, as (for example) in the following passage:

I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.¹³⁴

Later, while comparing two hypothetical uses of unpublished sources, he wrote: "Both examples seem convincing cases of fair use, in which the critic's productive and transformative justification would take precedence over the author's interest in maintaining the privacy of the unpublished draft."¹³⁵ And the phrase "productive and transformative" reappears in the argument against use of good faith as a factor—and to tie the goals of fair use to the larger public aims of copyright law itself:

The same considerations govern fair use. The inquiry should focus not on the morality of the secondary user, but on whether her *creation* claiming the benefits of the doctrine is of the type that should receive those benefits. This decision is governed by the factors reviewed above — with a primary focus on whether the secondary use is productive and

See also *id.* at 1768 (arguing that under a more "utopian" analysis that transformative uses, defined as "uses of copyrighted material that either constitute or facilitate creative engagement with intellectual products," should be given preference when considering the purpose of a use).

¹³³ While recognizing some commonalities, Judge Leval distinguished his version of "transformative use" from Fisher's. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 n.31 (1990).

¹³⁴ *Id.* at 1111.

¹³⁵ *Id.* at 1121.

transformative and whether it causes excessive injury to the market for the original. No justification exists for adding a morality test. This is of course not an argument in favor of immorality. It favors only proper recognition of the scope and goals of a body of law.¹³⁶

For Judge Leval, moreover, the preeminence of this concept was not only a guide to future policy but a key to understanding accumulated jurisprudence. Characterizing the early fair use case law, he wrote, “[i]f they found no productive use justifying the taking, judges adorned the conclusion of infringement with words like piracy or *animus furandi*.”¹³⁷

Just as Judge Leval traced his own intellectual path from productive use to transformative use, the Court also struggled with the need for a general theory to balance fair use considerations, and those two lines of intellectual development finally merged when the Court adopted the transformative use standard in *Campbell*.

III

THE POST-CODIFICATION ROAD TO *CAMPBELL*

In this Part we trace the post-codification intellectual history of fair use at the Court. We think that to understand how the Justices’ respective conceptions of fair use evolved, and how this evolution appears in the Court’s opinions, it is important to contextualize this evolution with specific attention to the parties’ respective litigation strategies and the various legal propositions they offered the Court. Understanding which of these the Court accepted and rejected helps explain some of the Court’s assertions in earlier opinions that it later found necessary to revise in *Campbell*.

This Article argues that in its early attempts to interpret fair use, the Court underwent a learning process because of its lack of experience in deciding fair use questions. While enactment of § 107 invited increased engagement from the Court because fair use was now straightforwardly a statutory interpretation issue, the Court did not fully appreciate Congress’s directive that fair use cases should be decided on the basis of a unified approach based on broad ground rules.¹³⁸ Instead,

¹³⁶ *Id.* at 1126.

¹³⁷ *Id.* at 1127.

¹³⁸ See 17 U.S.C. § 107 (directing that all four factors “shall” be considered by the court).

in *Sony Corp. of America v. Universal City Studios, Inc.*,¹³⁹ and in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹⁴⁰ the Court gave little weight to codification, treating the legal analysis as tied to the category of use, while also adopting several adventitious presumptions.

A. *Sony v. Universal City Studios*

The dispute in *Sony Corp. of America v. Universal City Studios, Inc.*¹⁴¹ arose when Sony's advertising agency sent Universal a copy of its forthcoming advertisement for the Betamax for approval.¹⁴² The advertisement demonstrated how viewers could now watch two of Universal's television shows that were broadcast at the same time on different networks. Instead of granting its approval, Universal launched the opening salvo of what continues to be a contest about whether copyright law permits device manufacturers and merchants to help consumers achieve their desire to watch audiovisual programs at any time, in any place, and on any device.¹⁴³

The principal issue in the case was whether Sony could be held contributorily liable for copies of television programs made by its customers.¹⁴⁴ If copyright law were to borrow a standard from patent law, then a relevant issue was whether Sony's device had non-infringing uses that would justify its continued distribution. Sony argued that a range of uses were non-infringing, including fair use.

The district court had ruled in Sony's favor, but the Ninth Circuit ruled against Sony on all counts.¹⁴⁵ With respect to fair

¹³⁹ 464 U.S. 417 (1984).

¹⁴⁰ 471 U.S. 539 (1985).

¹⁴¹ 464 U.S. 417 (1984).

¹⁴² See JAMES LARDNER, *FAST FORWARD* 60–82 (2002); see generally NICK LYONS, *THE SONY VISION* 202–15 (1976).

¹⁴³ See, e.g., *Newmark v. Turner Broad. Network*, 226 F. Supp. 2d 1215, 1218 (C.D. Cal. 2002); *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 140 (2d Cir. 2008) (holding temporary copying of programming to support remote DVR service to be non-infringing); *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 573 U.S. 431, 451 (2014) (holding that service permitting consumers to record and stream over-the-air broadcast television infringed the right of public performance).

¹⁴⁴ Congress adopted judicial development of secondary liability principles that originated in the early twentieth century by granting the exclusive right “to authorize” the exercise of the rights enumerated in § 106. See 17 U.S.C. § 106; see also *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 62–63 (1911) (grounding defendant's liability for selling an infringing motion picture made by another “on principles recognized in every part of the law”).

¹⁴⁵ *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

use, the Ninth Circuit cited only Seltzer, without reference to either case law or to § 107, in holding that, as a threshold matter, fair use was available only for "productive" uses of other works and not for "intrinsic" uses.¹⁴⁶ Since copying programs for later viewing was using them for their ordinary or intrinsic purpose, home taping was ineligible for fair use consideration as a matter of law.

The Court granted review on a number of questions, but the two most important were whether home taping for time-shifting purposes was a fair use and, if so, whether Sony could nonetheless be held contributorily liable for making and distributing its Betamax videotape recorder.¹⁴⁷ Sony also specifically sought review of the Ninth Circuit's holding that the fair use doctrine is limited to "productive use" as opposed to "intrinsic use."

1. *Competing Conceptions of Fair Use*

In this first case in which the Court reached the merits of a fair use dispute under the Copyright Act of 1976, the briefing, oral argument, and the Court's opinion reflect the ways in which the conceptual underpinnings and applicable doctrine remained contested.¹⁴⁸ As discussed above, the elastic use of fair use in the lower courts prior to codification had provided little basis for disputed questions of law to attract the Court's review.¹⁴⁹ Even though the question of statutory interpretation was now squarely presented, the parties were slow to recognize the changed circumstances, or (perhaps) uncertain about whether the Court would do so. Interestingly, notwithstanding § 107's direction that its four factors *shall* be considered by the court, each party first argued, as they would have under the

¹⁴⁶ *Id.* at 970.

¹⁴⁷ Like many aspects of this case, the *certiorari* grant was unusual insofar as only three Justices voted in favor presumably to reverse the Ninth Circuit's ruling in favor of Universal/Disney; Justice Blackmun supplied the fourth vote for purposes of affirming that ruling. See Jonathan Band & Andrew J. McLaughlin, *The Marshall Papers: A Peek Behind the Scenes at the Making of Sony v. Universal*, 17 COLUM.-VLA J.L. & ARTS 427, 432 (1992) (citing a Bench Memorandum circulated among all Justices found in Justice Marshall's papers).

¹⁴⁸ Codification did not formally affect these contested views. Some home taping uses in suit were covered by the 1909 Act while others were covered by the 1976 Act. The parties and the lower courts agreed that this was irrelevant to the analysis because the legislative history recited Congress's intent to codify existing law. "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 1976 House Report, *supra* note 94, at 66; 1975 Senate Report, *supra* note 94, at 62. See Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 970 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

¹⁴⁹ See *supra* notes 33-39 and accompanying text.

1909 Act, that the Court could adjudicate a fair use dispute on the basis of common law-style principles or presumptions without having to consider the statutory factors. Each party then followed with their arguments under the four factors.

a. *Sony*

Sony relied on legislative history to emphasize the generality of fair use reasoning and concentrated its argument on the doctrine's fact-sensitivity.¹⁵⁰ For this reason, the bulk of Sony's argument in the briefs focused on the record evidence showing that non-infringing uses of the thirty-two broadcast programs in suit, including time-shifting, were the primary uses of the VTR.¹⁵¹ In addition, Universal/Disney had produced no evidence of economic harm from home taping.¹⁵²

The closest Sony came to offering the Court structured guidance for fair use analysis was an invocation of the Second Circuit's adoption of Ball's formulation that the doctrine permitted reasonable use without the copyright owner's consent.¹⁵³ Sony relied on two additional propositions to bolster its fair use argument—both of them highly fact-specific.

First, Sony cited to Supreme Court precedent under the First Amendment and the Communications Act of 1934 to emphasize that under the broadcast licensing scheme, broadcasters receive free spectrum in exchange for an obligation to broadcast in the public interest. With this in mind, Sony opened its argument in the language of users' rights: "[t]he touchstone in testing for fair use as to the recordings in issue, even before applying these four factors, is an understanding of the extent of the public's *right* to receive free off-the-air TV."¹⁵⁴ Since users were simply using the Betamax to exercise their right to receive programs for which Universal/Disney had already been

¹⁵⁰ See, e.g., Brief for the Petitioners at 22–23, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (No. 81-1687) (“[O]ne of the most important and well-established limitations on the exclusive right of copyright owners’; ‘an equitable rule of reason’ where ‘no generally applicable definition is possible, and each case raising the question must be decided on its own facts’” (quoting 1975 Senate Report, *supra* note 94, at 61–62)).

¹⁵¹ See *id.* at 23–31.

¹⁵² *Id.* at 14–15.

¹⁵³ See *id.* at 21 (citing *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966) (quoting BALL, *supra* note 39, at 260)).

¹⁵⁴ See *id.* at 24 (emphasis added); see also *id.* at 25 (“The importance of free off-the-air TV to the American way of life, coupled with various pronouncements of this Court over the years, suggest that the public’s entitlement today to receive TV for personal use in the privacy of the home approaches, if in fact does not attain, the status of a First Amendment right.” (citations omitted)).

compensated, the Court could decide the case in Sony's favor on this basis alone.¹⁵⁵

Sony's second additional source of support was the legislative history (as distinct from the text) of the 1976 Act, in which representatives of the motion picture industry, including a representative from Disney, expressly acknowledged that Sony's VTR would soon be on the market without any suggestion that this would be a legal problem. Also, in the context of the 1971 amendment to the 1909 Act that added sound recordings to copyrightable subject matter, the issue of home taping of audio recordings was explicitly discussed and all involved concluded that it would be permissible.¹⁵⁶ On Sony's view, Congress implicitly intended home taping of broadcast television to be treated the same for the same reasons. Sony's argument continued that even if the Court reached the four-factor analysis, its application was a question of fact subject to clear-error review, and the district court had not erred.¹⁵⁷

The one statutory issue Sony contested concerned purpose, arguing that the Ninth Circuit had erred by holding under the first factor that fair use was limited to "productive" uses through which a second author created a new work from the work in suit. Sony argued that the Ninth Circuit's presumption that home taping was unfair because it was an "intrinsic" use of the work without alteration was error.

b. *Universal/Disney*

In contrast, Universal defended the Ninth Circuit's adoption of the productive-intrinsic use distinction.¹⁵⁸ On Universal's

¹⁵⁵ See *id.* at 26-31.

¹⁵⁶ [I]t is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years.

Id. at 36 (quoting H.R. REP. NO. 92-487, at 7 (1971)).

¹⁵⁷ *Id.* at 26-31 (outlining the standard of review and endorsing the district court's findings related to the four statutory factors).

¹⁵⁸ See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 971-72 (9th Cir. 1981) ("Without a 'productive use', i.e. when copyrighted material is reproduced for its intrinsic use, the mass copying of the sort involved in this case precludes an application of fair use.").

telling, a productive use requirement aligned with the purpose of fair use:

The doctrine is not an omnibus defense applicable in all contexts. It is available only in those few situations where rigid application of the copyright statute would stifle the very creativity which that law is designed to foster. Thus, application of the fair use doctrine is limited to uses by subsequent authors who build on the works of others to create new works. Without some independent creation, there can be no fair use.¹⁵⁹

Universal then made three specific legal arguments: (1) under the first factor, only uses mentioned in § 107's preamble or that are otherwise productive are favored under the first factor, even when the use is non-commercial; (2) under the fourth factor, the copyright owner receives a presumption of harm unless the secondary user rebuts it; and (3) more generally, the secondary user bears the burden of proof on all of the elements because fair use is an affirmative defense. To rebut Sony's argument concerning the legislative history's treatment of home taping of sound recordings, Universal/Disney argued that Congress conferred special status on motion pictures that make this history inapposite.

2. *The Oral Arguments*

The case was argued twice without additional briefing, and the parties' strategies changed between arguments.¹⁶⁰ In the first argument in January 1983, fair use was the least of Sony's counsel's worries. The Justices were far more interested in the issue of whether to transplant the staple article of commerce doctrine from patent into copyright law.¹⁶¹ After using all of his time on that issue, Sony's counsel gave up his rebuttal time to squeeze in an argument that the broadcasters had impliedly licensed home taping through the act of broadcasting and

¹⁵⁹ Brief for Respondents at 17, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (No. 81-1687) (arguing that, as a threshold matter, the Ninth Circuit had "correctly reasoned that such non-productive use does not qualify as fair use" (internal citations and quotations omitted)).

¹⁶⁰ See Jessica Litman, *The Story of Sony v. Universal Studios: Mary Poppins Meets the Boston Strangler*, in *INTELLECTUAL PROPERTY STORIES* 358, 378 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., Foundation Press 2006) ("On July 6, the final day of the 1982 term . . . [t]he Court issued an order restoring the case to the argument calendar. It asked for no new briefs and identified no new issues it wanted counsel to address.").

¹⁶¹ Transcript of Oral Argument at 11-14, 21-24, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (Jan. 18, 1983) (No. 81-1687).

argued simply that the Ninth Circuit's productive use holding was "manifestly wrong."¹⁶²

Fair use was more salient during Universal/Disney's turn at the lectern when Justice Stevens asked first whether home taping should be considered commercial under the first factor, obtaining a concession that it would not.¹⁶³ Justice Stevens then asked about the evidence of harm under the fourth factor, to which Universal/Disney responded that the district court had erroneously placed the burden of proof on them.¹⁶⁴ When Justice Stevens asked whether his showing of a recorded program to a reunion of his law clerks would be fair use, Universal responded that it would not be.¹⁶⁵

In the re-argument in October 1983, Sony's counsel made fair use the centerpiece of the argument.¹⁶⁶ Demonstrating the contested nature of what Congress had codified, Justice Rehnquist challenged Sony's counsel, asking "[i]sn't it accurate to say, with respect to the law at the time Congress codified it, that fair use required some sort of a productive use, like one author—a book reviewer quoting a text in a book review or something like that?"¹⁶⁷

Sony's counsel demurred, arguing, somewhat weakly, that the photocopying at issue in the *Williams & Wilkins* case would be classified as "intrinsic" use, and such use was affirmed as fair use by an equally divided Court.¹⁶⁸ Additionally, in the legislative history of the 1976 Act, Congress specifically approved of time-shifting of broadcast programs by educational institutions, which would be inconsistent with a productive use requirement under the first factor.¹⁶⁹ The remainder of Sony's fair use argument related to the evidence presented at trial in relation to the fourth factor.

¹⁶² *Id.* at 24–26.

¹⁶³ *Id.* at 35–37.

¹⁶⁴ *Id.* at 48–49.

¹⁶⁵ *See id.* at 50.

¹⁶⁶ One can only speculate as to why, but some likely explanations are that: (1) the Justices appeared ready to accept the staple article of commerce doctrine at the end of the first argument; (2) Justice Stevens had specifically pursued a fair use justification during the first argument; or (3) (perhaps) additional evidence that time-shifting was the primary use of the recording technology had become available.

¹⁶⁷ Transcript of Oral Argument at 6, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (Oct. 3, 1983) (No. 81-1687).

¹⁶⁸ *Id.* at 6–7.

¹⁶⁹ *Id.* at 7–8.

Fair use arose late in Universal/Disney's argument, but its role is illuminating because counsel now presented the Court with a narrow version of fair use cobbled together from highly fact-specific pre-1976 Act decisions. In Universal/Disney's telling, "[f]air use was a very narrow doctrine designed for very limited application, for use in the creation of scholarly or research works or works for contemporary comment or news reporting purposes, and only then when a small amount was taken."¹⁷⁰ For that reason, the argument went, all of the focus on proof of harm under the fourth factor was beside the point because:

[W]hen you realize that this can't be a fair use because it doesn't advance one of the traditional purposes and it takes too much of the copyrighted work, then you realize that you never have to get to the fourth factor, the prospective harm factor, because you don't have fair use in the first place.¹⁷¹

3. *Debate During Drafting*

What parties' counsel presumably did not know, and we now know from the public release of Justice Marshall's and Justice Blackmun's papers, is that the Justices' consideration of the fair use issue evolved quickly during deliberation after the first argument. Initially, Justice Stevens would have treated home taping as subject to an implied private-copying exception to the reproduction right.¹⁷² Chief Justice Burger and Justices White and Brennan thought home taping was fair use; Justice Powell appeared to agree but could not articulate how to draw the line between fair and infringing uses and was therefore ready to join Justices Blackmun, Marshall, Rehnquist, and O'Connor in ruling in favor of Universal/Disney.¹⁷³ In Justice Blackmun's initial draft opinion, the Court would have adopted productive use as a rebuttable requirement for fair use. On this view, if the copyright owner introduced some evidence of potential harm from an unproductive use, the user would have to rebut such evidence to succeed on a fair use claim.¹⁷⁴

¹⁷⁰ *Id.* at 40.

¹⁷¹ *Id.* at 41.

¹⁷² See Band & McLaughlin, *supra* note 147, at 433 (noting that the "central question for Justice Stevens was whether the making of a single copy of any copyrighted work for a private, noncommercial use is a copyright infringement" and outlining the factors that Stevens identified in favor of non-infringement).

¹⁷³ See Litman, *supra* note 160, at 367–68.

¹⁷⁴ *Id.* at 369.

Justice Blackmun's slim majority began to fray quickly. While Justice O'Connor initially thought that the "'fair use' exemption is not applicable in this case[.]"¹⁷⁵ five days later she disagreed with Justice Blackmun's draft, arguing that fair use applied to unproductive as well as productive uses and that the copyright owner bore the burden of proof on harm.¹⁷⁶ Justice Blackmun was willing to compromise on other issues, accepting Justice O'Connor's argument about adopting the staple article of commerce doctrine measured by the "*capable* of substantial noninfringing uses" standard. But, on fair use, he remained committed to the productive use requirement and to limiting the copyright owner's burden to a showing of at most a "reasonable possibility of harm."¹⁷⁷ In his view, Congress intended copyright owners to be protected from the effects of new technologies and a more demanding standard of proof would fail to achieve that goal.

From the Justices' exchange of memoranda, it is now clear that this conceptual conflict about the law of fair use cost Justice Blackmun Justice O'Connor's vote and his majority. One might reasonably ask why Justice Powell did not also change his vote in light of his initial ambivalence on the fair use issue. He may well have found some of the alternative dispositions offered by other Justices more attractive, but he wrote to Justice Blackmun: "As the case was assigned to you—in part I suppose—on the basis of my Conference vote, I feel some obligation to remain with you absent a genuine conviction to the contrary."¹⁷⁸

Justice Stevens circulated a draft opinion, revising an earlier "Memorandum," that accepted the changes Justice O'Connor had sought from Justice Blackmun.¹⁷⁹ In his June 23, 1983 draft, Justice Stevens's abbreviated attention to fair use would have placed the burden on the copyright owner to show that a use was unfair and that the absence of proof of market harm under the fourth fair use factor was one reason that

¹⁷⁵ Band & McLaughlin, *supra* note 147, at 443 (quoting Letter from Justice O'Connor to Justice Blackmun (June 16, 1983)).

¹⁷⁶ *Id.* Justice O'Connor also disagreed with the draft, favoring adoption of the staple article of commerce doctrine. *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 441 (quoting Memorandum from Justice Powell to Justice Blackmun 1 (June 20, 1983)).

¹⁷⁹ See Litman, *supra* note 160, at 375 (citing Memorandum from Justice Stevens to the Conference (June 23, 1983), which "seemed designed to attract O'Connor's vote by adopting the proposals Blackmun had rejected.").

the studios had not met their burden.¹⁸⁰ As Justice Stevens's drafts evolved, he added language about a presumption against commercial use in his discussion of harm under the fourth factor rather than as a consideration under the first factor—the positioning that the final opinion ultimately was to reflect.¹⁸¹

While the final opinion includes copious citations to the legislative history in footnotes, Justice Stevens did not include any analysis of the other three fair use factors until after re-argument, when he circulated a November 23, 1983 draft that closely matches the final opinion.¹⁸² That draft discussed the other factors in a single paragraph, shifting the discussion of the presumption of harm from commercial use to the first factor. In this draft, Justice Stevens added a footnote responding to Justice Blackmun's dissent that demoted the productive use doctrine from a presumption to a potentially relevant consideration.¹⁸³

4. *The Court's Opinion*

The Court first answered the principal question in the case by borrowing from patent law's "staple article of commerce" doctrine to hold that the provider of a copying device would not be contributorily liable if the device were "capable of substantial noninfringing uses."¹⁸⁴ Justice Stevens's opinion then concluded that the Betamax qualified for this safe harbor.¹⁸⁵ Notwithstanding the range of such use cases proffered by Sony, the Court limited consideration of non-infringing use to those authorized by other copyright owners and those covered by the fair use doctrine.¹⁸⁶

In its fair use discussion, the Court introduced fair use as the most pertinent of the statutory limits on the exclusive rights provided in § 106. Treating the factors as guides that

¹⁸⁰ Band & McLaughlin, *supra* note 147, at 445.

¹⁸¹ See *id.* at 445–46 (discussing and comparing the fair use sections of Justice Stevens's June 27 and June 28 draft opinions).

¹⁸² See *id.* at 449 (discussing Justice Stevens's November 23 draft opinion).

¹⁸³ See *id.* One can only speculate about whether the Court would have addressed fair use had this case been litigated solely under the 1909 Act. Justice White's suggestion that the Court resolve the case solely on secondary liability grounds might well have been more attractive without the statutory text and extensive legislative history.

¹⁸⁴ Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

¹⁸⁵ *Id.* at 456.

¹⁸⁶ See *id.* at 442.

enable a court to apply an "equitable rule of reason" analysis,¹⁸⁷ the Court treated only the first and fourth factors as worthy of limited discussion.

Under the first factor, the Court did not explicitly address the purpose and character of the use other than to accept the district court's finding that the predominant use of the Beta-max was time-shifting.¹⁸⁸ Without offering a general explanatory theory of its own, the Court addressed the Ninth Circuit's and Justice Blackmun's extensive reliance on productive use analysis only in a substantive footnote in the opinion's closing summary. Said the Court: "[F]air use analysis calls for a sensitive balancing of interests. The distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance, but it cannot be wholly determinative."¹⁸⁹

Instead, the Court's first factor discussion was limited to whether the use should be deemed commercial or non-commercial. The Court quoted the legislative history explaining why that language was added to the fair use provision: "[The Committee's amendment] is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions."¹⁹⁰

Without explanation, the Court did more than weigh commerciality but instead adopted offsetting presumptions: "If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity."¹⁹¹

The Court then coupled this presumption in favor of non-commercial use under the first factor with an acceptance of Sony's argument about the public's right to access broadcast television to justify a user's copying of complete works. Justice Stevens undercut the generality of this point by treating the

¹⁸⁷ See *id.* at 448 ("That section identifies various factors that enable a court to apply an 'equitable rule of reason' analysis to particular claims of infringement." (footnotes omitted)).

¹⁸⁸ *Id.* at 448-50.

¹⁸⁹ See *id.* at 455 n.40.

¹⁹⁰ *Id.* at 449 n.32 (quoting 1976 House Report, *supra* note 94, at 66, as reprinted in 1976 U.S.C.C.A.N. 5659, 5679).

¹⁹¹ *Id.*

third factor as a normally isolated consideration under which use of an entire work will usually tip the third factor against fair use,¹⁹² turning quickly to accept Sony's argument that a user's right to access broadcast television justified copying of complete works under the third factor, in an analysis explicitly connecting the purpose of a use and the amount used. The Court merely mentioned the second factor in passing.¹⁹³

The Court did elaborate on the standards and evidence relevant to the fourth factor, holding that a plaintiff must demonstrate some meaningful likelihood of harm from the use.¹⁹⁴ The Court presumed such harm for commercial uses and stated that for non-commercial ones, it would be sufficient to show that if a type of use became widespread, it would harm the market for the work.¹⁹⁵

Justice Blackmun's lengthy dissenting opinion demonstrates how differently copyright law likely would have evolved had the Court adopted his views. The structure of the dissent was to first provide a version of what Justice Blackmun's majority opinion would have been followed by his critique of the Court's opinion.

With respect to the standard for secondary liability, Justice Blackmun retreated from his concession to Justice O'Connor concerning the staple article of commerce standard during the deliberative negotiations. He would not have imported the staple article of commerce doctrine as such, but he nevertheless recognized its relevance.¹⁹⁶ He would have crafted a much narrower safe harbor under which "if a *significant* portion of [a]

¹⁹² See *id.* at 449–50 (noting that in this case "that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use").

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 450–51.

¹⁹⁵ See *id.* at 451 (stating fourth factor standard).

¹⁹⁶ In Justice Blackmun's view, assuming direct liability, Sony would have been secondarily liable in the absence of safe harbor protection. He adopted the formulation that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer." See *id.* at 487 (Blackmun, J., dissenting) (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). Anticipating later developments in the law of secondary liability, Justice Blackmun focused on the facts that the VTR was necessary for consumers to copy television shows and that Sony's advertising campaign had encouraged them to do so. For him, "if off-the-air recording is an infringement of copyright, Sony has induced and materially contributed to the infringing conduct of Betamax owners." *Id.* at 490. Subsequently, the Court agreed to adopt an inducement standard for which advertising evidence is relevant in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

product's use is *noninfringing*, the manufacturers and sellers cannot be held contributorily liable for the product's infringing uses."¹⁹⁷ He would have remanded for findings on the relative proportion of non-infringing use.

While the Court had not adopted Justice Stevens's first proposed resolution of finding an implied "home use" or "private use" exception to liability, Justice Blackmun extensively explained why he disagreed with that proposition. Recognizing that the Court's fair use holding was the lynchpin to its ultimate conclusion on liability, Justice Blackmun discussed the issue extensively when stating his own views and critiquing the Court's opinion.¹⁹⁸ Citing Wendy Gordon, Justice Blackmun framed fair use as a subsidy to the user that could be justified for certain uses that provided a public benefit.¹⁹⁹

Under the first factor, he would have adopted a version of productive use that was defined largely as Seltzer's version but that would pose a somewhat milder rebuttable presumption than the Ninth Circuit's version. Citing Seltzer, Justice Blackmun argued that uses identified as fair use in the Latman Report, the Register's 1961 Report, and the case law were productive uses that required "some added benefit to the public beyond that produced by the first author's work."²⁰⁰ This did not mean that a productive use was necessarily a fair use depending on the facts of the case and particularly on "whether . . . it is reasonable to expect the user to bargain with the copyright owner for use of the work."²⁰¹ Under Justice Blackmun's formulation of the productive use presumption: "[W]hen a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use usually does not apply."²⁰²

Justice Blackmun did recognize that some "unproductive" uses would have only a *de minimis* impact on the copyright owner's incentive to produce and should therefore also be recognized as fair use.²⁰³ Connecting this point under the first factor to his view of market harm under the fourth factor, Justice Blackmun would have held that "at least when the proposed

¹⁹⁷ *Sony*, 464 U.S. at 491 (Blackmun, J., dissenting).

¹⁹⁸ *Id.* at 470-75.

¹⁹⁹ *Id.* at 478.

²⁰⁰ *See id.* at 478.

²⁰¹ *Id.* at 479.

²⁰² *Id.* at 480.

²⁰³ *See id.* at 481-82 (providing example of posting a copy of a newspaper article on a bulletin board).

use is an unproductive one, a copyright owner need prove only a *potential* for harm to the market for or the value of the copyrighted work.”²⁰⁴

Justice Blackmun reiterated these points in his critique of the Court’s fair use analysis. That discussion illuminates how differently the fair use doctrine may have evolved had his views prevailed. Without the benefit of the more capacious and forward-looking transformative use standard that the Court would later announce in *Campbell*, consider how courts would have applied fair use to new technologies, such as search engines, web browsers, or artificial intelligence technologies if the law had been that “[f]air use is intended to allow individuals engaged in productive uses to copy small portions of original works that will facilitate their own productive endeavors.”²⁰⁵

Sony is an important decision. With Justice O’Connor’s change of views on fair use, the Court avoided saddling copyright law with a narrowly constrained interpretation of fair use as codified in § 107 and providing only a very narrow secondary liability safe harbor. Indeed, the Court’s adoption of its safe harbor for secondary liability has played an important role in stimulating innovation, even if it left open questions requiring further clarification by the Court.²⁰⁶

But, the Court’s own fair use analysis produced mixed results and contributed to conceptual confusion. With regard to the purpose and character of a use, the Court helpfully rejected productive use as a threshold inquiry, but the Court left nothing in its wake to guide future analysis. The Court’s discussion of the second factor was an afterthought. While the Court cursorily linked the purpose of the use under the first factor to the amount used under the third factor on the facts of this case, it revealed a general predisposition to treat the amount and substantiality used as a standalone consideration. Finally, the Court provided limited guidance about how to assess market effects of a use without relying on an unfounded and counterproductive presumption which it has since disavowed. More conceptual work would be needed to link the fair use factors into a coherent, generally applicable standard for fair use analysis.

²⁰⁴ *Id.* at 482.

²⁰⁵ *Id.* at 497.

²⁰⁶ See *Cox Commc’ns, Inc. v. Sony Music Ent.*, 146 S. Ct. 959, 959 (2026); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

B. *Harper & Row v. Nation Enterprises*

To the surprise of some, the Court accepted another high-profile fair use case in the following Term, *Harper & Row, Publishers, Inc. v. Nation Enterprises*.²⁰⁷ About two weeks before Harper & Row was to publish President Gerald Ford's autobiography, a reporter for *The Nation* had obtained an unauthorized advance copy of the book. Over a weekend, the reporter wrote an article that paraphrased a number of descriptions of episodes leading to Ford's pardon of President Nixon. The article also quoted a total of three hundred to four hundred words taken from different parts of the book. *Time* had paid Harper & Row \$12,500 for an exclusive license to publish an excerpt from the book prior to the book's publication. After *The Nation's* article appeared, *Time* canceled the license and did not publish the excerpt.

Harper & Row sued *The Nation* for copyright infringement, and *The Nation* defended primarily on the grounds of fair use. The district court ruled in Harper & Row's favor, but the Second Circuit reversed 2-1. This case did not present a clear circuit split about fair use.²⁰⁸ But, it did implicate a split in the lower courts about copyrightable subject matter.

The subject matter issue in dispute was the standard for determining how much of *The Nation* article had incorporated Ford's protected expression. The district court and Circuit Judge Meskill in dissent would have extended broader protection over combinations of uncopyrightable facts and copyrightable expression, relying on "industrious collection" of facts as an alternative ground for copyrightability.²⁰⁹ In particular, they would have treated *The Nation's* paraphrasing of facts from the

²⁰⁷ 471 U.S. 539 (1985).

²⁰⁸ In a memorandum in Justice O'Connor's files, the law clerk who reviewed the petition recommended against granting review because "I do not see a clear-cut issue of law that the Court should address if it were to grant cert in this case." Band, *Peek Behind the Scenes*, *supra* note 77, at 42.

²⁰⁹ The sweat of the brow, or "industrious collection," view of copyrightability was in the case. Judge Meskill's dissent cited with approval the Seventh Circuit's holding that copying of a list of names and addresses of gardening suppliers was infringing on the view that "[t]he copyright protects not the individual names and addresses but the compilation, the product of the compiler's industry. Another is entitled to make his own compilation of the same names and addresses, using information in the public domain, but he is not entitled merely to copy the copyrighted list." *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5-6 (7th Cir. 1977). Justice O'Connor's majority opinion ambiguously cites *Schroeder* with approval at least for the proposition that a compilation of uncopyrightable facts combined with original descriptions is copyrightable. *Harper & Row*, 471 U.S. at 547.

autobiography as infringing; whereas, the majority did not.²¹⁰ For the majority below, only about three hundred words in the article borrowed copyrightable expression, in the form of direct quotations, and the court readily held this to be fair use.

In its petition for *certiorari*, Harper & Row persuaded the Court that the Second Circuit had not applied the Copyright Act appropriately. The petition asserted that to avoid conflict with the First Amendment, the lower court had adopted an overly narrow understanding of the fact-expression distinction and an overly broad interpretation of fair use.²¹¹ Thus, Harper & Row successfully attracted the Court's review by turning a statutory interpretation case into a constitutional dispute.²¹²

As discussed *infra*, the Justices recognized that this case could have been the vehicle to resolve the circuit split about whether originality was a subject matter requirement. But, a dispute over paraphrasing of a factual account in an autobiography would have been an improbable candidate to resolve a question posed most often in relation to the scope of copyright in compilations or directories. Moreover, the issue of whether the First Amendment should influence the scope of copyrightability arguably was present, unlike in a typical directory case. Finally, Justice O'Connor, who wrote the decision, did not want to risk her slim majority on the fair use issue by taking on yet another vexed copyright issue.

This case also proved to be a poor vehicle for interpreting § 107. Fair use turned out to be more central in this case than it had been in *Sony*, but the issue's presentation was clouded by the constitutional overlay and by questions of journalistic ethics in a democracy. This case was as much about whether *The Nation* had made a "fair scoop"²¹³ as it was about whether its quotations were fair use.

²¹⁰ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 204 (2d Cir. 1983), *rev'd*, 471 U.S. 539 (1985).

²¹¹ See *Harper* Petitioners' Brief, *supra* note 116, at 11–13.

²¹² The presence of Floyd Abrams, well known for his First Amendment practice, and the ACLU as *The Nation's* counsel may have also persuaded the Court that this case required constitutional interpretation, notwithstanding Abrams's contentions in the brief and at oral argument to the contrary.

²¹³ See *Harper & Row*, 471 U.S. at 556 (characterizing *The Nation's* argument as "advanc[ing] the substantial public import of the subject matter of the Ford memoirs as grounds for excusing a use that would ordinarily not pass muster as a fair use—the piracy of verbatim quotations for the purpose of 'scooping' the authorized first serialization.").

Moreover, as we show *infra*, before turning to interpretation of § 107, the Court had adopted (or invented) the presumption that quoting from an unpublished source infringed an author's fundamental "right of first publication," and therefore could not be fair use. This was the central pillar of the Court's reasoning. It proved to be a weak foundation because after the Court released its decision a broad coalition of publishers, libraries, and public interest organizations persuaded Congress to amend § 107 to override this presumption against recognizing the fair use of unpublished sources.²¹⁴

1. *The Briefs: Contested Conceptions of Fair Use*

Demonstrating that *Sony* had done little to provide conceptual clarity about the law of fair use, the parties advanced starkly contrasting understandings of the doctrine in their briefs. Harper & Row relied heavily on the proposition that § 107 was a restatement of the common law.²¹⁵ Harper & Row argued that the common law had provided a general fair use theory—the implied license theory. On this view, only uses that an author could be said to have impliedly consented to could be fair. Relatedly, the argument continued that pre-codification sources and some parts of the 1976 Act's legislative history regarded use of unpublished works to be nearly irrefutably unfair because an author could not reasonably be said to forfeit a right of first publication.

The Nation, aided by an amicus brief filed by Melville Nimmer on behalf of the country's largest newspapers, focused instead on the text of the § 107 factors.²¹⁶ They each argued that the pre-codification fair use doctrine had not been based on the implied license theory and that Harper & Row had overstated the historical treatment of uses of unpublished sources. Moreover, they argued that under the § 107 framework, whether the source work was published was a sub-factor that could not be given dispositive weight.

The parties split on two other issues. *Sony's* ambiguous demotion of the productive use doctrine led the parties to differing

²¹⁴ See *infra* subpart IV.A.1.

²¹⁵ See *Harper* Petitioners' Brief, *supra* note 116, at 29–31.

²¹⁶ See Brief for Respondents at 27–40, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (No. 83-1632) [hereinafter *Harper* Respondents' Brief] (sequentially applying four fair use factors); Brief for Gannett Company et al. as Amicus Curiae at 22–30, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (No. 83-1632) [hereinafter *Gannett* Brief] (same).

positions about whether productive use even remained relevant in fair use analysis. In addition, the parties divided sharply about how the Court should view the journalistic context for this dispute. Harper & Row asserted that industry-standard licensing practices were at risk while *The Nation* asserted that the legality of common investigative reporting tactics was on the line.

a. *Harper & Row*

In its briefing, Harper & Row divided its argument generally evenly between the subject matter issues and fair use. The bulk of Harper & Row's fair use argument focused on the use of unpublished materials. Treating the implied license theory of fair use as a policy consideration in its favor, it argued that "an author who has published a work may be deemed to have consented to its 'fair use' by others. Obviously, no such consent may be said to apply to unpublished material."²¹⁷

On Harper & Row's view, to overcome the presumption against finding fair use of unpublished works, the law required that "[a] user of material from an unpublished manuscript who invokes the fair use defense should therefore demonstrate that the public will derive some benefit from his dissemination of the material in advance of its dissemination by the author which outweighs the author's right of first publication."²¹⁸ It argued that *The Nation* had failed to adduce a public benefit from its publication two weeks before the *Time* article would appear and four weeks before the book would be publicly available.

Harper & Row also tried to resuscitate the productive use doctrine, without any discussion of § 107's text, in attempting to rebut *The Nation*'s argument that it had engaged in news reporting, a use specifically named in the statute. Arguing from *Sony* that four members of the Court would have treated productive use as a threshold requirement while the rest of the Court treated it as a helpful guide to calibrating the balance of interests in fair use adjudication,²¹⁹ Harper & Row treated productive use as an independent non-statutory fair use factor.

²¹⁷ *Harper* Petitioners' Brief, *supra* note 116, at 31. The argument continued that Congress had endorsed this view in the Senate Report. *Id.*

²¹⁸ *Id.* at 31.

²¹⁹ *Id.* at 34–35.

b. *The Nation*

In contrast, *The Nation's* argument followed the now-familiar sequential treatment of the § 107 factors. Under the purpose and character of the use, *The Nation* argued that its use was news reporting, a favored use.²²⁰ *The Nation* accepted productive use as the relevant inquiry under the first factor, defining productive use as one that confers a public benefit. It argued that even the *Sony* dissenters treated news reporting as presumptively productive.

With respect to the nature of the work, *The Nation* emphasized the factual nature of what was reported and used.²²¹ The argument then took on the unpublished work issue, first discrediting reliance on a portion of the Senate Report concerning copying for classroom use and not repeated in the House Report. The argument went on to note that significant amounts of news reporting include reporting on unpublished materials.²²² For these reasons, the Court should reject the extraordinary circumstances test for fair use of unpublished works.

Anticipating the approach that ultimately would become the law under *Campbell*, *The Nation* argued that under the third factor, the amount should be judged in relation to purpose. Rejecting the district court's view that *The Nation* had taken the "heart" of the book, the magazine argued that only three hundred words of the book's protected contents had been used—and then only for purposes of illustration.²²³ Under the fourth factor, the argument was that the canceled *Time* license is irrelevant because it was not the use of the quotes that caused cancellation but the reporting of uncopyrightable facts.²²⁴

The Nation also contested the premise of Harper & Row's petition. Two of the questions it presented assume that the Second Circuit had altered its statutory analysis in deference to the First Amendment, but *The Nation* countered that this was not so.²²⁵ Instead, the argument went, it is the idea-expression distinction and fair use that accommodate First Amendment concerns in copyright law, and the Second Circuit simply applied these well-established principles to the facts of this case.

²²⁰ *Harper Respondents' Brief*, *supra* note 216, at 27.

²²¹ *Id.* at 31–32.

²²² *Id.* at 32–37.

²²³ *Id.* at 38–39.

²²⁴ *Id.* at 40.

²²⁵ *Id.* at 41–42.

Perhaps undermining this point, the brief then continued with a substantial section detailing the ways in which acceptance of Harper & Row's interpretation of the Copyright Act would create a conflict with the First Amendment.²²⁶

c. *The Nimmer Amicus Brief*

The role of Nimmer as authority in the case is interesting. *The Nation* cited an earlier version of his treatise to support its view of the scope of fair use in unpublished materials, while Harper & Row countered that the update to the treatise considered fair use to be "considerably narrower" with respect to unpublished works.²²⁷ Meanwhile, Nimmer-the-advocate was counsel of record on the amicus brief on behalf of Gannett, the Los Angeles Times Co., Newsweek, Inc., the New York Times Co. and the Washington Post in support of *The Nation*.²²⁸

Nimmer first set forth his argument that the idea-expression and fact-expression distinctions, and fair use were necessary First Amendment accommodations.²²⁹ With respect to fair use, Nimmer first argued that the Ninth Circuit below had erred in adopting a productive use requirement under the first factor.

With respect to unpublished works, Nimmer distinguished his treatise to argue that fair use is narrower for unpublished works that the author intends to keep unpublished, but since Ford intended to publish, no narrowing was necessary in this case.²³⁰ He also rejected the argument that heightened protection for unpublished works reflects copyright law's implied license theory of fair use: "This is manifestly a fiction. The applicability of the fair use defense is simply not triggered by the consent of the author."²³¹ Finally, with respect to market harm, Nimmer pointed out that *Time* was still willing to go ahead with serialization if the date could be moved up, and it was Harper & Row's rejection of this approach that led to cancellation.²³²

²²⁶ *Id.* at 43–44.

²²⁷ *Harper Petitioners' Brief*, *supra* note 116, at 31.

²²⁸ *Gannett Brief*, *supra* note 216, at 31.

²²⁹ *Id.* at 4–5.

²³⁰ *Id.* at 24–27.

²³¹ *Id.* at 27.

²³² *Id.* at 29.

2. Oral Argument

The Justices focused most of their attention at oral argument on the subject matter issue, trying to pin down each party's position on how much of *The Nation* article contained copyrighted expression taken from the book. The most Harper & Row's counsel could say about fair use was to reiterate the position on the legislative history's treatment of unpublished works.²³³ Justice O'Connor also asked about whether the "first publication right" is a factor for consideration, a proposition which counsel for *The Nation* rejected, saying that Congress knew how to distinguish published and unpublished works and didn't here.²³⁴

Highlighting how central the unpublished status of the biography was in this case, even though Harper & Row gave up its rebuttal time, Justice O'Connor extended the argument by asking counsel whether, if *The Nation* had published its article after the book's release, its story still would be infringing.²³⁵ Counsel responded that he would have to know the economic impact, and if that were different it could change the balance.²³⁶

3. The Court's Deliberations

The available records from the Justices' files offer two important insights. One is that this was a closer case than many have thought. The initial vote to reverse was 5-4, with Justice Stevens switching sides to reversal—and making a more decisive 6-3 majority—only two weeks before the opinion's release.²³⁷ The other is that these exchanges reinforce how central the unpublished nature of the Ford manuscript—and the implication that it somehow had been misappropriated—were to the Court's decision. As Jonathan Band, who reviewed these files, writes:

The discussion of fair use at Conference underscores that although judicial fair use opinions typically proceed through all four factors in an orderly way, there can be one salient fact on which the case really turns in the mind of the decision-maker.

²³³ Transcript of Oral Argument at 21-22, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (No. 83-1632).

²³⁴ *Id.* at 37-38.

²³⁵ *Id.* at 46.

²³⁶ *Id.* at 46-47.

²³⁷ Band, *Peek Behind the Scenes*, *supra* note 77, at 44 (quoting Letter from Justice Stevens to Justice Brennan (May 6, 1985) (in Harper & Row file, O'Connor Papers)).

Here, that fact was that *The Nation* printed excerpts of a purloined copy of Ford memoir before its publication.²³⁸

Justice O'Connor's hand-written notes from the November 9, 1984 Conference make the point clear that five Justices viewed the case in this way.²³⁹ Justice Blackmun made the point lightly, saying only that "prepublication was a factor to be considered."²⁴⁰ Justice O'Connor added other considerations in favor of reversal: "This is a first publication case which is an important element of what is a fair use of copyrighted material."²⁴¹ She further stated, "other factors here which are significant are respondent's knowledge that the manuscript was unauthorized for distribution, and that publication would have a negative effect on potential market value."²⁴²

For the other three Justices in the initial majority, the matter was far simpler. Justice Powell thought this could not be fair use because *The Nation* had "used stolen goods contemptibly."²⁴³ Chief Justice Burger thought that "these birds got this manuscript by larceny. They even copied directly or flagrantly plagiarized. The District Court had it right. This is the easiest reverse I have seen this Term. If this is fair use so is bank robbery."²⁴⁴ Justice Rehnquist agreed "emphatically" with these views, adding only that "[p]republication is an important factor here."²⁴⁵

Justice Brennan tried to convince his colleagues that the news reporting context for this prepublication use was important, arguing that the Court must "consider the prepublication nature of the use in this case but I do not think the timing is dispositive."²⁴⁶ He explained:

News reporting may often implicate prepublication use, as in the New York Times' recent article about the forthcoming Cardinal Spellman biography. In light of this fact, the minimal amount and proportion of quoted material, and

²³⁸ Band, *Peek Behind the Scenes*, *supra* note 77, at 44.

²³⁹ Justice O'Connor's notes used shorthand abbreviations. The text quoted in relation to notes 240-251 has been written in full to improve legibility, using underlined text to indicate where abbreviations have been expanded into full text.

²⁴⁰ Band, *Peek Behind the Scenes*, *supra* note 77, at 43.

²⁴¹ *Id.* at 43-44.

²⁴² *Id.* at 44.

²⁴³ *Id.* at 43.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Justice William Brennan, Conference Memorandum at 3 (Nov. 1984) (in *Harper & Row* file, Brennan Papers).

the important public affairs nature of the quoted material, I think the fact of prepublication use should not preclude a finding of fair use.²⁴⁷

Justice Brennan initially had three other votes, Justices White, Marshall, and Stevens.²⁴⁸ But, according to Justice O'Connor's notes, Justice Stevens's vote to affirm was tentative. He called it a "close case."²⁴⁹ He stated that:

The fact that it was pre publication is a significant factor in the analysis. There is damage here to the ability of the author to publish & market the work. However, the infringing words were mostly as to Nixon's hospital time which was not as significant. Damage was covered mostly by the other parts concerning the pardon. Don't know if it is a harmless error analysis.²⁵⁰

Two weeks prior to the opinion's release, Justice Stevens changed his vote to join the majority to reverse.²⁵¹

The most revealing information to be gleaned from the exchange of memoranda during the drafting process was that the Justices had differing views on the subject matter question.²⁵² Although Justice Powell tried to persuade Justice O'Connor to reverse the Second Circuit on this ground as well, she decided to leave the issue for another day to keep her majority.²⁵³ When that day came, six years later, Chief Justice Burger and Justice Powell were no longer on the Court. By that time, Justice O'Connor had changed her views quite markedly, writing an opinion for an eight-Justice majority that copyrightability is limited to original expression in *Feist Publications, Inc. v. Rural Telephone Service Co.*²⁵⁴

²⁴⁷ *Id.*

²⁴⁸ Band, *Peek Behind the Scenes*, *supra* note 77, at 44 (drawing from Justice Blackmun's notes).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Justice Stevens wrote that "after wrestling with this difficult case, I have decided to change my vote and to join" Justice O'Connor's opinion. *Id.* at 44 (quoting Letter from Justice Stevens to Justice Brennan (May 6, 1985) (in *Harper & Row* file, O'Connor Papers)).

²⁵² *See id.* at 49 ("This correspondence reveals that at least three Justices—Burger, O'Connor and Powell—seemed willing to extend relatively thick copyright protection to a fact work such as a biography. This protection encompassed far more than the literal text of the work.").

²⁵³ *See id.* at 48–49.

²⁵⁴ 499 U.S. 340 (1991). Justice Blackmun concurred in the judgment without filing a separate opinion. *See id.*

4. *The Court's Opinion*

With Justice Stevens now in the majority, the Court decided the case in Harper & Row's favor by a 6–3 margin. In an opinion written by Justice O'Connor, the Court avoided engaging with the fact-expression issues in the case, limiting its consideration to the three to four hundred words *The Nation* conceded that it had quoted.²⁵⁵ The structure of Justice O'Connor's opinion demonstrates that the Court's conception of fair use was still in transition. As was the case in *Sony*, the Court relied on Congress's stated intent to codify the common law by first adjudicating, and essentially deciding, the case on non-statutory common law principles, albeit with references to the legislative history made to reinforce the Court's view of that law.²⁵⁶

For a theory of fair use, the Court turned to Ball for the proposition that:

[T]he author's consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained.²⁵⁷

With this theory in hand, the Court focused on consent being derived from the author's choice to publish. As a result, the Court relied on a selective account of legislative history, finding that Congress had intended to codify in the 1976 Act a right of first publication as a distinct, subsidiary right, going on to reason that this right enjoyed a special status because it could be exercised only once.²⁵⁸ With this assertion, the die was cast because, in the Court's view, "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."²⁵⁹

²⁵⁵ Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548–49 (1985) (noting that "[e]specially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression.").

²⁵⁶ *Id.* at 555 (concluding that author's right of first publication will generally outweigh user's fair use claim).

²⁵⁷ *Id.* at 549 (quoting BALL, *supra* note 39, at 260).

²⁵⁸ *Id.* at 553 ("First publication is inherently different from other § 106 rights in that only one person can be the first publisher; as the contract with Time illustrates, the commercial value of the right lies primarily in exclusivity.").

²⁵⁹ *Id.* at 555.

The Court then rejected the assertion, attributed to *The Nation*, that this case arose in extraordinary circumstances under which First Amendment values require a different result.²⁶⁰ The Court first agreed with Nimmer's proposition that the idea-expression distinction provides a definitional balance of interests.²⁶¹ The Court's First Amendment discussion rejected a straw person version of a free press argument, saying that merely dubbing a use as news reporting does not immunize it.²⁶² Perhaps more to the point, the Court found no journalistic need justified *The Nation's* quotations in this case. It would always be free to report any facts found in even an unpublished source, but "[t]he fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication."²⁶³ The Court similarly rejected the argument that the public's interest in receiving the protected expression should automatically justify its use.²⁶⁴

The Court then explicitly embraced the fair use doctrine's constitutional footing, rooting it in the First Amendment rather than in the Progress limit on the constitutional grant to Congress.²⁶⁵ While not citing Denicola, the Court embraced his extension of Nimmer's concept of structural interest balancing to include fair use.²⁶⁶ While not further declaring that an independent First Amendment defense may be necessary on facts different from those in this case, the Court also did not rule out that possibility. Instead:

In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the

²⁶⁰ See *id.* ("Respondents, however, contend that First Amendment values require a different rule under the circumstances of this case.").

²⁶¹ See *id.* at 556.

²⁶² *Id.* at 557 ("The promise of copyright would be an empty one if it could be avoided merely by dubbing the infringement a fair use 'news report' of the book.").

²⁶³ *Id.*

²⁶⁴ See *id.* at 559 (stating that when the public interest favors access to protected expression, that interest neither automatically makes a use fair, citing and quoting Lionel Sobel, nor does it automatically justify a use whenever the public interest outweighs the harm to the copyright owner, citing and quoting Wendy Gordon).

²⁶⁵ *Id.* at 560 (holding that fair use already provides First Amendment protections).

²⁶⁶ *Id.* (declining to adopt an independent "public figure exception to copyright" on grounds that idea/expression and fair use provide sufficient First Amendment protection).

latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.²⁶⁷

Having, in essence, decided the case, the Court then turned to § 107 and its factors. The Court treated the statutory text—no longer quite an afterthought, as it had been in *Sony*—as giving primacy to the author's economic interests to reinforce its views about ensuring that the author have the opportunity to be first to market with their expression.²⁶⁸ Having created a *de facto* presumption against use of an unpublished work as a general proposition applicable to all fair use analysis, Justice O'Connor then emphasized legislative history showing that Congress resisted attempts to adopt subject matter-specific presumptions.²⁶⁹

The Court's discussion of the purpose and character of the use accepted the proposition that *The Nation's* use was news reporting, a use named in § 107's preamble.²⁷⁰ The Court also ambiguously accepted the argument that as such the use was a productive use without discussion of the productive use theory's doctrinal role.²⁷¹

However, while holding that the statutory position assigned to reporting amounted merely to a consideration rather than a presumption favoring fair use, the Court then repeated its view expressed in *Sony* that commercial uses are presumptively unfair.²⁷² The Court went on to say that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying

²⁶⁷ *Id.* at 560.

²⁶⁸ See *infra* notes 333–351 and accompanying text (arguing the Court's treatment of each fair use factor tilted in favor of the copyright holder on economic grounds).

²⁶⁹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) ("The drafters [of § 107] resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case-by-case analysis."); see also *id.* at 562 (fair use does not favor use of unpublished work in ordinary circumstance); Band & McLaughlin, *supra* note 147, at 440 (identifying Justice O'Connor's position in the Justices' correspondence that the copyright owner should bear the burden to prove market harm under the fourth fair use factor).

²⁷⁰ *Harper & Row*, 471 U.S. at 561.

²⁷¹ *Id.* ("The fact that an article arguably is 'news,' and therefore a productive use, is simply one factor in a fair use analysis.").

²⁷² *Id.* at 562 ("The fact that a publication was commercial as opposed to non-profit is a separate factor that tends to weigh against a finding of fair use.").

the customary price,”²⁷³ thus implicitly importing the fourth factor’s market definition into the first factor. For how else does one identify “the customary price” to evaluate the impact of a commercial use under the first factor than by considering whether the use has occurred in a well-structured market under the fourth factor?

The Court also relied on good faith as relevant to the character of a use. Repeating its version of an implied consent theory of fair use,²⁷⁴ and reinforcing the “fair scoop” nature of this dispute, the Court characterized *The Nation*’s conduct as “knowingly exploit[ing] a purloined manuscript”;²⁷⁵ whereas the dissent called it “standard journalistic practice.”²⁷⁶ The Court’s discussion of the nature of the use largely repeated and embellished upon its discussion of its view of the right of first publication and use of unpublished works.

As the comments at Conference of the Justices in the majority reflect, the Court’s focus on a first publication right appears less to be in support of the utilitarian justification for copyright law in the Constitution and more consonant with the moral right of divulgation recognized in numerous countries other than the United States.²⁷⁷ Relying on this moral rights intuition, the Court treated first publication as a subsidiary exclusive right and added a new fair use presumption against use of unpublished works.²⁷⁸

With respect to the amount and substantiality of the use, the Court adopted the district court’s view that *The Nation* had taken “the heart of the book.”²⁷⁹ Although the text of the third factor is aimed specifically at the portion of the copied work, the Court redirected it to the copying work to emphasize that

²⁷³ *Id.*

²⁷⁴ *Id.* at 563 (“Unlike the typical claim of fair use, *The Nation* cannot offer up even the fiction of consent as justification.”).

²⁷⁵ *Id.*

²⁷⁶ See *id.* at 593 (Brennan, J., dissenting) (“Indeed the Court’s reliance on this factor would seem to amount to little more than distaste for the standard journalistic practice of seeking to be the first to publish news.”).

²⁷⁷ See, e.g., Dane S. Ciolino, *Moral Rights and Real Obligations: A Property-Law Framework for the Protection of Authors’ Moral Rights*, 69 TUL. L. REV. 935, 937 (1995) (“The right of divulgation gives the author the right to decide when a work of art is completed and whether it should be published.”).

²⁷⁸ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555 (1985) (“Under ordinary circumstances, the author’s right to control the first public appearance of his undissemminated expression will outweigh a claim of fair use.”).

²⁷⁹ *Id.* at 564–65 (“The District Court, however, found that ‘[T]he Nation took what was essentially the heart of the book.’” (citation omitted)).

the quotes comprised approximately thirteen percent of *The Nation's* article.²⁸⁰

In considering whether this holding about the “heart” of a work should have general applicability, it is important to point out how the unresolved issue of which aspects of *The Nation* article copied protected subject matter undermined the Court’s reliance on the lower court’s finding. The district court had adopted an overly broad, if imprecise, interpretation of which aspects of the Ford memoir were copyrightable, including at a minimum any paraphrases of factual material.²⁸¹ It was this much broader understanding of copyrightability that led the district court to characterize what was copied as the autobiography’s “heart.”²⁸² But, the Court had restricted its analysis to the three to four hundred words quoted in the article.²⁸³ Ignoring this apples-to-oranges problem with the unit of analysis for fair use purposes, the Court stated that “[w]e believe the Court of Appeals erred in overruling the District Judge’s evaluation of the qualitative nature of the taking.” The Court compounded its error in focusing the third factor analysis on the role of the copied material in the infringing work with its adoption of the district court’s third-factor analysis based on a different understanding of what material was infringing to conclude that “[i]n view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the ‘magazine took a meager, indeed an infinitesimal, amount of Ford’s original language.’”²⁸⁴

Turning to the fourth factor, the Court relied on the Nimmer treatise and the then-popular law-and-economics approach to legal interpretation to say that “[t]his last factor is undoubtedly the single most important element of fair use.”²⁸⁵ Interestingly, even though she had characterized fair use as an affirmative defense earlier in the opinion, Justice O’Connor reiterated her view expressed in the *Sony* correspondence that the copyright

²⁸⁰ *Id.* at 565–66.

²⁸¹ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983):

The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected together with Ford’s reflections that made them of value to *The Nation*. Correspondingly, it is this same totality that is protected by the copyright laws.

²⁸² *Id.* (focusing on the value of the Nixon pardon material).

²⁸³ *Harper & Row*, 471 U.S. at 548–49.

²⁸⁴ *Id.* at 566.

²⁸⁵ *Id.*

owner has to make the first move under the fourth factor: “Similarly, once a copyright holder establishes with reasonable probability the existence of a causal connection between the infringement and a loss of revenue, the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression.”²⁸⁶

The Court viewed the evidence as the district court had, disagreeing with the Second Circuit’s view that cancellation of the *Time* publication was due to preemptive publication of facts rather than expression.²⁸⁷ Defining the market with narrow precision, as it would again in *Warhol*,²⁸⁸ the Court held that *The Nation*’s publication of the quotations to let the reader know President Ford’s views in his own words “directly competed for a share of the market for prepublication excerpts.”²⁸⁹

Justice Brennan, joined by Justices White and Marshall in dissent, first discussed at length the copyrightability issue, concluding that the quotes by themselves did not amount to improper appropriation of expression and that *The Nation*’s paraphrasing and structuring of the article also were not similar enough to support a prima facie infringement determination.²⁹⁰

Turning to fair use, the dissent disagreed about the role of commerciality in the Court’s analysis of the first factor, noting that many of the uses in § 107’s preamble are usually done commercially,²⁹¹ and offering a narrowing interpretation of the *Sony* presumption. The dissent also rejected the Court’s interpretations of pre-codification fair use law and of the legislative history, as they pertained to unpublished works.²⁹²

²⁸⁶ *Id.* at 567.

²⁸⁷ *Id.* at 567 (“Rarely will a case of copyright infringement present such clear-cut evidence of actual damage.”).

²⁸⁸ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1278 (2023) (limiting analysis to use in which “[b]oth [images] are portraits of Prince used in magazines to illustrate stories about Prince.”); *see also id.* n.9 (noting that Goldsmith had “abandoned all claims to relief other than her claim as to the 2016 . . . license [to Vanity Fair] and her request for prospective relief as to similar commercial licensing.”).

²⁸⁹ *Harper & Row*, 471 U.S. at 568.

²⁹⁰ *Id.* at 587 (Brennan, J., dissenting) (“When *The Nation* was not quoting Mr. Ford, therefore, its efforts to convey the historical information in the Ford manuscript did not so closely and substantially track Mr. Ford’s language and structure as to constitute an appropriation of literary form.”).

²⁹¹ *Id.* at 592 (“Many uses § 107 lists as paradigmatic examples of fair use, including criticism, comment, and *news reporting*, are generally conducted for profit in this country, a fact of which Congress was obviously aware when it enacted § 107.”).

²⁹² *Id.* at 595–97.

With respect to the amount and substantiality of the use, the dissent pointed out that the district court's finding that *The Nation* had taken the "heart" of the book was based on its view that far more than three hundred words of protected material was used.²⁹³ The dissent agreed that the quoted material was qualitatively important, and that this is relevant under the third factor, but it tied amount to purpose to conclude that use of the quoted material was appropriate to *The Nation's* journalistic objectives.²⁹⁴

With respect to the fourth factor, the dissent accepted the Court's characterization of the fourth factor as "most important" but then faulted the Court for analyzing the market impact of the entire article rather than only the protected expression it contained.²⁹⁵ The dissent agreed with the Second Circuit that publication of the quotes, as distinct from the newsworthy facts to which they related, was not the cause of *Time's* cancellation of its license.²⁹⁶

In sum, *Harper & Row*, taken as a whole, has limited precedential value. Its central premise was highly questionable at the time and has since been overridden by Congress.²⁹⁷ Perhaps its most lasting contribution has been to help harmonize the scope of fair use and the First Amendment. Nevertheless, the decision's fourth factor discussion continues to be cited by those who would prefer to ignore *Campbell's* rejection of it.

C. *Stewart v. Abend*

Fair use was a relatively minor issue in *Stewart v. Abend*,²⁹⁸ which involved interpretation of the § 24 renewal provisions of the 1909 Act. Applied to the facts of this case, the question was whether the owners of the film *Rear Window* could continue to exploit it without a new license covering the copyright renewal term in the underlying story.²⁹⁹ Petitioners' primary argument was that precedent under the 1909 Act supported such continued use of derivative works.³⁰⁰

²⁹³ *Id.* at 600.

²⁹⁴ *Id.* at 601 ("Thus, while the question is not easily resolved, it is difficult to say that the use of the six quotations was gratuitous in relation to the news reporting purpose.").

²⁹⁵ *Id.* at 602.

²⁹⁶ *Id.* at 602–03.

²⁹⁷ See *infra* subpart IV.A.1 (describing legislative process and purpose).

²⁹⁸ 495 U.S. 207, 237 (1990).

²⁹⁹ See *id.* at 211 (stating the question presented).

³⁰⁰ See Brief for the Petitioners at 28–31, *Stewart v. Abend*, 495 U.S. 207 (1990) (No. 88-2102) (arguing that prior case law from the Second Circuit correctly held

In the alternative, they argued that since Congress decided to permit continued exploitation of previously licensed derivative works after "terminations of transfer" under the new mechanism introduced in the 1976 Act, the fair use doctrine should be mobilized to achieve the same result where rights had been recaptured through renewal.³⁰¹ The argument continued that to the extent fair use is premised on implied consent, in this case there was actual consent by the author of the preexisting work during the first term of protection.³⁰² Emphasizing that fair use is designed to achieve equitable outcomes, the argument was that permitting continued exhibition of the film would be the equitable outcome.³⁰³

Respondents argued that fair use should not be used to create a "loophole" to defeat Congress's intent to enjoy second-chance royalties.³⁰⁴ Under the first factor, Respondents relied on the *Sony* presumption against commercial use.³⁰⁵ Under the third factor, they asserted that taking the whole of a work was presumptively unfair except in the case of non-commercial time-shifting approved in *Sony*.³⁰⁶ Under the fourth factor, Petitioners had conceded that the film's re-release had affected Respondents' ability to license the story.³⁰⁷

As might be expected, the Court affirmed the Ninth Circuit's dutiful march through the § 107 fair use factors without adding anything further to help resolve the unresolved and widely contested issues concerning the doctrine's scope,³⁰⁸ or providing general guidance on its application. Of note, the Court reasserted the *Sony* presumption against commercial use under the first factor, and it quoted Nimmer's gloss on the "central" role of the fourth factor.³⁰⁹

that a derivative work enjoyed an independent copyright that could continue to be exploited even after reversion of underlying copyright).

³⁰¹ See *id.* at 39–42.

³⁰² See *id.*

³⁰³ See *id.*

³⁰⁴ See Brief for the Respondent at 44, *Stewart v. Abend*, 495 U.S. 207 (1990) (No. 88-2102).

³⁰⁵ See *id.* at 45 (quoting *Sony* presumption against unauthorized commercial use).

³⁰⁶ See *id.* at 46 (treating *Sony*'s treatment of time-shifting as an exception to the general rule that "[t]he fair use doctrine is generally inapplicable to the copying of a dramatic work in its entirety").

³⁰⁷ See *id.* at 46–47 (citing Petitioners' counsel's concession at oral argument).

³⁰⁸ *Stewart v. Abend*, 495 U.S. 207, 238 (1990) ("[A]ll four factors point to unfair use.").

³⁰⁹ See *id.* at 238 (calling the fourth factor "the 'most important, and indeed, central fair use factor.'" (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A], at 13–81)).

IV

CAMPBELL *v.* ACUFF-ROSE MUSIC, INC.

The shortcomings of the Court's analyses in *Sony* and in *Harper & Row* became readily apparent by the early 1990s. When the dispute in *Campbell v. Acuff-Rose Music, Inc.*³¹⁰ reached the Court, it had enough evidence to see that a course correction in its fair use jurisprudence was in order.

A. The Road to *Campbell*

Two developments called into question *Harper & Row*'s heavy reliance on its presumption against uses of unpublished works as the guidepost for its fair use analysis. In a pair of cases concerning biographies, the Second Circuit's application of *Harper & Row* led to a conceptual tug-of-war over fair use, featuring sharp disagreements about the amount of latitude fair use afforded a biographer to quote from the subject's writings.³¹¹ In response to the Second Circuit's heavy reliance on *Harper & Row*'s presumption, Congress overrode the presumption by amending § 107, and Judge Pierre Leval was provoked into writing his influential *Harvard Law Review* article,³¹² in which he introduced his conception of a transformative use standard for fair use analysis.

1. Congress Overrides *Harper & Row*'s Central Presumption

The Second Circuit's application of *Harper & Row* in *Salinger* and *New Era* had unsettled expectations of those with an interest in the publishing industry.³¹³ A broad coalition of publishers, librarians, and public interest advocates successfully convinced Congress that in order to retain the flexibility that fair use was intended to provide, it needed to amend § 107 (for the first and only time since 1976) to eliminate this presumption.³¹⁴

³¹⁰ 510 U.S. 569 (1994).

³¹¹ See *New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 576–77 (2d Cir. 1989); *Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987).

³¹² Leval, *supra* note 133.

³¹³ These two decisions caused attorneys “for historians, biographers, other authors and publishers [to] routinely advise their clients that almost any unauthorized use of previously unpublished materials [would] subject them to a serious risk of liability for copyright infringement.” 137 CONG. REC. 24462 (1991). The Amendment's legislative history makes clear that the legislation was intended to remedy the perceived chilling effect of *Salinger* and *New Era*. See 137 CONG. REC. 10485–86 (1991) (statements of Sens. Simon and Leahy); 137 CONG. REC. 24462–63 (1991) (Judiciary Comm. Rep.); H.R. REP. NO. 102-836, at 1, 4 (1992).

³¹⁴ See Fair Use of Copyrighted Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992).

Amended § 107 now concludes, “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”³¹⁵

The House Report accompanying the bill criticized certain aspects of *Harper & Row* along with *Salinger* and *New Era*. After doing so, it reiterated Congress’s original purpose reflected in § 107:

This [amendment] has a narrow, but important purpose: to reiterate Congress’s intention in codifying fair use that in evaluating a claim of fair use, including claims involving unpublished works, the courts are to examine all four statutory factors set forth in Section 107, as well as any other factors deemed relevant in the court’s discretion.³¹⁶

That is, Congress sought to provide structure for fair use decision-making without too great a cost to the doctrine’s flexibility.

By overriding a presumption that short-circuited fair use analysis, Congress reiterated its intention that courts undertake holistic contextual comparison when applying fair use. But, the problem remained—courts still lacked a general theory for how to synthesize consideration of the fair use factors.

2. Judge Leval Introduces Transformative Use

Judge Pierre N. Leval had been the district judge in both *Salinger* and *New Era*. His experience with the Second Circuit’s review of his decisions led him to reflect on why he thought its approach to fair use had become misaligned with fundamental purposes of the doctrine. In turn, this process of reflection led to his introduction of the concept of transformative use in his influential *Harvard Law Review* article.³¹⁷ He was not alone, because some of the circuit judges involved in the cases also had taken to the pages of law journals to further explicate their respective positions.³¹⁸

³¹⁵ 17 U.S.C. § 107.

³¹⁶ H.R. REP. NO. 102-836, at 9 (1992).

³¹⁷ Leval, *supra* note 133.

³¹⁸ See, e.g., James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983, 985 (1990); Roger J. Miner, *Exploiting Stolen Text: Fair Use or Foul Play?*, 37 J. COPYRIGHT SOC’Y U.S.A. 1, 1 (1989); Jon O. Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC’Y U.S.A. 12, 12 (1989); see also *New Era Publ’ns Int’l, ApS v. Carol Publ’n Grp.*, 904 F.2d 152, 155 (2d Cir. 1990) (noting the controversy and including Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990) as part of the conversation); *New Era Publ’ns Int’l, APS v. Henry*

Recognizing that, as a doctrinal matter, courts' reasoning in fair use cases had been generally *ad hoc* throughout the doctrine's history,³¹⁹ Leval nonetheless asserted that judges had demonstrated an inchoate understanding that the fair use doctrine is "a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law."³²⁰ While lamenting Congress's lost opportunity during the codification process to provide guidance for evaluation and application of the § 107 factors,³²¹ Leval asserted that careful attention to the doctrine revealed that "a cogent set of governing principles exists [that are] soundly rooted in the objectives of the copyright law."³²²

For present purposes, the most important of his proposed principles was that a user's reason, or justification, for a use is the "heart of the fair user's case."³²³ A court should evaluate the user's justification in light of copyright's purpose to stimulate creativity. How should this be done?

As we have noted, Leval had refashioned the productive use doctrine as transformative use, under which the eligibility of fair use was not limited to cases where existing content had been modified.³²⁴ Instead:

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.³²⁵

Here, it is important to note that even though the immediate provocation for Leval had been consideration of fair use in the context of biographies, his reflections had led him to appreciate the value of a more general, capacious standard that would apply to a wide range of socially beneficial uses across a broad domain of information practices: "Transformative uses

Holt, Co., 884 F.2d 659, 662–63 (2d Cir. 1989) (Newman, J., dissenting from denial of rehearing en banc) (noting that five of twelve judges would have granted rehearing to correct *dicta* reflecting a narrow understanding of fair use).

³¹⁹ Leval, *supra* note 133, at 1105.

³²⁰ *See id.* at 1107.

³²¹ *See id.* at 1106.

³²² *See id.* at 1105.

³²³ *Id.* at 1111.

³²⁴ *See supra* notes 133–135 and accompanying text.

³²⁵ Leval, *supra* note 133, at 1111.

may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it. They also may include parody, symbolism, aesthetic declarations, and innumerable other uses.”³²⁶

Leval further demonstrated how interpreting fair use in light of copyright law’s purposes connected the analysis of individual factors. While the Court in *Sony* had connected the purpose of a use under the first factor with the amount used under the third factor to justify home taping of full programs, the *Sony* Court otherwise had treated the third factor as a free-standing consideration in most cases.³²⁷ Leval, however, directed attention to how fairness should be judged consistently by considering the close connection between a user’s purpose and the amount used to accomplish that purpose: “[A]n important inquiry is whether the selection and quantity of the material taken are reasonable in relation to the purported justification.”³²⁸

Similarly, Leval disputed the *Harper & Row* Court’s assertion of fourth factor primacy and argued that if a court were to give “serious deference” to the proposition, fair use would become “defunct.”³²⁹ In his view, “[t]he fourth factor disfavors a finding of fair use only when the market is impaired because the quoted material serves the consumer as a substitute, or, in Story’s words ‘supersede[s] the use of the original.’”³³⁰

With respect to the second factor, Leval argued persuasively that the *Harper & Row* Court’s presumption against uses of unpublished works was unjustified because numerous kinds of use of unpublished material could be socially beneficial.³³¹ He also engaged with the question of remedies in cases in which a fair use justification fell short, arguing against the then-extant presumption in favor of injunctive relief for any case of infringement.³³²

³²⁶ *Id.*

³²⁷ See *supra* note 168 and accompanying text.

³²⁸ Leval, *supra* note 133, at 1123.

³²⁹ *Id.* at 1125.

³³⁰ *Id.* (internal citations omitted).

³³¹ See *id.* at 1116–22.

³³² See *id.* at 1130–35. A version of this view has since prevailed. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–94 (2006) (overruling presumption in the patent context); *Salinger v. Colting*, 607 F.3d 68, 79–80 (2d Cir. 2010) (concluding that *eBay* also dispenses with the presumption in copyright cases).

B. *Campbell* Arrives at the Court

The dispute in *Campbell v. Acuff-Rose Music, Inc.*³³³ offered the Court an opportunity to reflect on its recent experience with fair use because the case presented only one issue—whether 2 Live Crew had made a fair use of “Oh, Pretty Woman”—as a purely statutory dispute.³³⁴ The pioneering hip-hop group 2 Live Crew had copied a guitar riff and other portions of the composition “Oh, Pretty Woman” by Roy Orbison and William Dees for their song “Pretty Woman.”

In analyzing the fair use factors, the Sixth Circuit below reluctantly agreed to characterize 2 Live Crew’s song as a parody, a traditionally favored fair use, in its treatment of the first factor.³³⁵ Nonetheless, the court held that this factor still weighed against 2 Live Crew because the use was commercial, and therefore presumptively unfair: “We find that the admittedly commercial nature of the derivative work—the *purpose* of the work being no less important than its *character* in the Act’s formulation—requires the conclusion that the first factor weighs against a finding of fair use.”³³⁶ Doubling down, the court chided the district court for its skepticism about market harm under the fourth factor, stating that “[i]n the instant case, the use of the copyrighted work is wholly commercial, so that we presume that a likelihood of future harm to Acuff-Rose exists.”³³⁷

Internal evidence from the now-public files of some Justices suggests that the very process of framing the case for decision may have contributed to Justice Souter’s ultimate decision to adopt the transformative use standard. The petition for *certiorari* was framed in a very case-specific manner. It identified four questions presented about discrete elements of fair use.³³⁸ The petition succeeded in persuading at least four

³³³ 510 U.S. 569 (1994).

³³⁴ To be sure, *amici* supporting Campbell also relied on First Amendment arguments, and Campbell made reference to “First Amendment values” in the application of fair use to parody, Reply Brief on the Merits for Petitioners at 9, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (No. 92-1292) [hereinafter *Campbell* Reply Brief], but the question presented and the focus of argument was on the interpretation and application of § 107.

³³⁵ *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1435 (6th Cir. 1992).

³³⁶ *Id.* at 1437 (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984)).

³³⁷ *Id.* at 1438.

³³⁸ These questions were: (1) whether *Sony* and *Harper & Row* had effectively overruled prior appellate rulings in favor of parody; (2) whether the Sixth Circuit violated a Federal Rule of Evidence in applying the commercial use presumption;

Justices that the ramifications of the errors made below were of sufficient magnitude to justify granting review.³³⁹

Dissatisfied with the Petitioners' framing of the case, Justice O'Connor wrote a post-conference memorandum in which she first concluded that if one were to break down the discrete issues in dispute, there were six, not four. After trying her hand at reformulating these questions, she concluded that "[g]iven the ungainly nature of asking all those questions, I would prefer to throw in the towel on separate questions presented; instead, we should simply ask the parties to brief whether the use at issue here was fair."³⁴⁰ Her colleagues readily agreed, and the Court reformulated the question to ask simply whether the use in dispute was fair under § 107,³⁴¹ thus opening up an opportunity to consider all aspects of the doctrine.

C. The Briefing and Oral Argument

Given the centrality of Judge Leval's transformative use standard to the Court's opinion, one might ask how much to attribute this to the briefing. Not much. Campbell cited the Leval article only in his reply brief with respect to the amount and substantiality of the use.³⁴² He may indirectly have drawn the Court's attention to the article with a glancing citation in his reply brief to the Second Circuit's then-recent decision in *Twin Peaks Productions, Inc. v. Publications International, Ltd.*,³⁴³ which cited the article as "useful" without any more attention.³⁴⁴

(3) whether parody can be fair use if commercial; and (4) whether the copyright owner has a protected market to license parodies. See Memorandum on Cert. Petition, *Campbell v. Acuff-Rose Music, Inc.*, at 1 (Mar. 1993) (in *Campbell* file, Stevens Papers) (on file with authors); see also Band, *Peek Behind the Scenes*, *supra* note 77, at 67 (discussing memorandum).

³³⁹ The law clerk apparently responsible for screening this petition perceived this to be a case limited to the parody context, but nonetheless recommended granting the petition on the ground that the case presented "an opportunity to address the circumstances under which a parody may be 'fair use,'" an issue that "has caused confusion in the CAs in which it regularly arises—CA2 (New York), CA9 (Los Angeles, [sic] and CA6 (Nashville)." Band, *Peek Behind the Scenes*, *supra* note 77, at 67–68.

³⁴⁰ *Id.* (quoting Justice Sandra Day O'Connor, Memorandum to the Conference at 2 (Mar. 23, 1993) (in *Campbell* file, Stevens Papers) (on file with authors)).

³⁴¹ See *id.* at 3–4.

³⁴² See *Campbell* Reply Brief, *supra* note 334, at 9.

³⁴³ 996 F.2d 1366 (2d Cir. 1993); see *Campbell* Reply Brief, *supra* note 334.

³⁴⁴ See *Twin Peaks*, 996 F.2d at 1375 (discussing types of works that comment on or criticize a work of fiction and stating that "[i]n identifying plot, the author of the second work may or may not be said to have made what Judge Leval has usefully called a 'transformative' use" (citation omitted)).

Of the nine amicus briefs filed in the case, only the ACLU brief cited the article for general propositions about the role of fair use in copyright law.³⁴⁵

The brief for Composers and Songwriters did not cite the Leval article as such, but it also cited *Twin Peaks* for the proposition that a “heavily transformative” use could outweigh the *Sony* presumption against commercial use.³⁴⁶ Again without citation to Leval, the brief accepted that the relevant vocabulary for analyzing the first fair use factor was whether a use was “productive and transformative,”³⁴⁷ implicitly acknowledging Leval’s potential influence to broaden the scope of fair use. Then, in an act of rhetorical jujitsu, the brief tried to undercut the substance of Leval’s argument by redefining the meaning of his terminology to be coextensive with productive use as originally conceived.³⁴⁸

At oral argument, three issues predominated in the discussion: how to define parody and its limits, how to define the market under the fourth fair use factor, and which party bears the burden on market harm, including how that should apply to the sparse record in this case.³⁴⁹ Judge Leval’s article made a brief appearance in the argument, but not at all for its central propositions. Instead, counsel for Acuff-Rose relied on the portion of the article in which he claims to have erred in *Salinger* by not giving enough weight to the commercial appeal of some quotes used in the biography.³⁵⁰ But, when asked by Justice

³⁴⁵ Brief Amicus Curiae of The American Civil Liberties Union in Support of Petitioners at 11–12, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (No. 92-1292) (quoting Leval to argue that “[t]he factors do not represent a score card that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.”).

³⁴⁶ Brief of Composers and Songwriters et al., Amici Curiae, in Support of Respondent at 18–19, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (No. 92-1292).

³⁴⁷ *Id.* at 20.

³⁴⁸ See *id.* at 20–21 (“Whether the new work serves a transformative purpose, i.e., uses and transforms a limited portion of a prior copyrighted work in the course of creating a new work for a socially desirable purpose, such as literary criticism, is part of first factor analysis.”).

³⁴⁹ See, e.g., Transcript of Oral Argument at 3–10, 27–31, 50–51, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (No. 92-1292) (colloquies on parody); *id.* at 11–24, 40–50 (colloquies on market harm and proper procedure for proving it).

³⁵⁰ See *id.* at 26 (Sidney S. Rosdeitcher, counsel for Respondent calling to the Court’s attention “a wonderful article by Judge LaValle [sic] in which he modestly reassesses his own opinion on the *Salinger* letters case, and he acknowledges he made an error.”); see also *id.* at 29 (citing the article again for this point).

Ginsburg whether counsel would also agree with Leval's argument that injunctions may be inappropriate if a parody took too much, he demurred.³⁵¹

The parties had litigated this as a parody case, and the Court could have followed its use-specific pattern of legal reasoning deployed in *Sony* and in *Harper & Row*. While we can only speculate about how and why Justice Souter instead chose to write an opinion resolving the case according to the general transformative use standard, we infer that Justice Souter appreciated that the Court needed to provide more general, flexible fair use guidance than it had done so to date.

General evidence of the need for such a standard would have included the brouhaha in the Second Circuit following *Harper & Row* and the eventual congressional override. More specifically, the case at hand illustrated the problem of shoe-horning fair use issues into a predefined typology, as manifested first by Petitioners' decision to frame their case in such granular fashion.³⁵² Further, even if the Court were to limit the opinion's scope to parodic uses, the Court would still have had to counter the Sixth Circuit's overreliance on *Sony* to rule against a traditionally favored use.³⁵³ Further evidence of why a parody-specific ruling would have been unattractive emerged in the Justices' exchange of views during the opinion's drafting.

D. The Discussion During Drafting

Justice Souter circulated five drafts of the opinion.³⁵⁴ In response to the first draft, Justice Ginsburg sought changes to the discussion of the amount taken to soften its impact. In

³⁵¹ See *id.* at 33–34 (question from the Court, saying “you have featured Judge [Leval] and . . . he has put forth a very interesting idea that there may be infringingments that are not properly subject to injunction because you take into account the value of parody” responded to by counsel, who would “be very reluctant to . . . follow Judge [Leval] all the way down that path for this reason.”); Oral Argument at 34:37–35:42, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (No. 92-1292), <https://www.oyez.org/cases/1993/92-1292> [<https://perma.cc/48FJ-YSYR>] (identifying Justice Ginsburg as the interlocutor, including the laughter following her riposte to counsel that “You take the sweet but not the bitter from [Leval]”).

³⁵² See *supra* note 340 (listing the very specific questions presented in the *certiorari* petition).

³⁵³ See *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1437 (6th Cir. 1992) (after acknowledging that Campbell's work was a parody, the court held that “the admittedly commercial nature of the derivative work—the *purpose* of the work being no less important than its *character* in the Act's formulation—requires the conclusion that the first factor weighs against a finding of fair use.”).

³⁵⁴ See Band, *Peek Behind the Scenes*, *supra* note 77, at 68.

Justice Ginsburg's view, the amount taken "went beyond what was necessary to 'assure identification,'" and she questioned whether 2 Live Crew's version sold because of its copying or its "transformative lyrics."³⁵⁵

Justice Souter's exchange of memoranda with Justice Kennedy is illuminating. Justice Kennedy expressed three concerns about the draft. He thought: (1) parody should be presumptively fair and therefore market effects are irrelevant; (2) the definition of commenting on a preexisting work should be drawn narrowly; and (3) remand was necessary to determine whether 2 Live Crew's version was a parody.³⁵⁶

Perhaps informed by the Court's checkered recent history with fair use presumptions, Justice Souter responded by giving his reasons for opposing "a doctrinal shift to creating a presumptively protected category for parody."³⁵⁷ He thought defining a parody category would not be feasible because a "work may parody some earlier composition weakly or powerfully, and (whatever degree of effectiveness it can claim) it may run the gamut from pure parody to a combination of parody, satire and straight-out criticism without a touch of irony."³⁵⁸ In addition, "in *Harper v. Row* [sic], the Court rejected just such a conceptual shift when it held against creating a presumptively (or absolutely) fair use category for news reporting of borrowed material."³⁵⁹ Finally, and most tellingly, the impact of codification appears to have taken on greater weight because Justice Souter thought *Harper & Row* and the statute would not permit the Court to "abbreviate the fair use enquiry" with a parody presumption.

Justice Souter nonetheless tried to attract Justice Kennedy's vote by circulating a penultimate draft that included a definition of parody. That sparked rapid disagreement from Justices O'Connor, Ginsburg, and Blackmun.³⁶⁰ Justice Kennedy said that he would join if the new language were included, but he recognized that seven members of the Court held different

³⁵⁵ *Id.* (quoting Letter from Justice Ginsburg to Justice Souter (Jan. 7, 1994) (in *Campbell* file, Blackmun Papers) (on file with authors)).

³⁵⁶ *See id.* at 70 (describing Letter from Justice Kennedy to Justice Souter at 1–2 (Jan. 21, 1994) (in *Campbell* file, Blackmun Papers) (on file with authors)).

³⁵⁷ *Id.* (describing Letter from Justice Souter to Justice Kennedy at 1 (Feb. 2, 1994) (in *Campbell* file, Blackmun Papers) (on file with authors)).

³⁵⁸ *Id.* at 70–71.

³⁵⁹ *Id.* at 71 (describing Letter from Justice Souter to Justice Kennedy at 2 (Feb. 2, 1994) (in *Campbell* file, Blackmun Papers) (on file with authors)).

³⁶⁰ *See id.*

views. If Justice Souter reverted to his earlier language, Justice Kennedy would write a separate concurrence.³⁶¹

In his fifth and final draft, Justice Souter reverted to his earlier language, and Justice Kennedy wrote his concurrence. Some members of the Court who had signed on to the earlier language had signaled their understanding that this was an important opinion when asking Justice Souter to join them to it.³⁶² Justice Souter sent a note to Justice O'Connor that "[i]t looks as though the baby will be delivered on Monday morning."³⁶³

E. The Court's Opinion

Justice Souter's elegant opinion for the Court engaged with the parties' arguments as far as they went, and it responded to concerns raised during deliberations, particularly those of Justice Kennedy.³⁶⁴ But, the opinion did much more by clearing away the Court's errant presumptions in *Sony* and in *Harper & Row*. Instead, by accepting Judge Leval's proposal to connect modern fair use analysis to its origins in *Folsom*, the Court adopted and applied a general, constitutionally inspired, fair use standard that centers attention on the purpose of a use and the amount used in light of that purpose.

In light of the Sixth Circuit's disproportionate reliance on the commerciality of the use, the first order of business in the opinion was to free fair use analysis from the Court's prior *dicta* adopting a presumption against commercial uses in *Sony*, along with *Harper & Row*'s related elevation of the fourth factor to a position of preeminent importance. Without specifically acknowledging the Court's prior *dicta*, Justice Souter wrote, "[t]he task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."³⁶⁵

The Court accused the Sixth Circuit of misreading its statement in *Sony* that "every commercial use of copyrighted

³⁶¹ *Id.*

³⁶² See Letter from Justice O'Connor to Justice Souter (Jan. 7, 1994) ("I join your opinion. It will make a significant and useful contribution to the law of copyright."); Letter from Justice Ginsburg to Justice Souter (Jan. 10, 1994) ("With appreciation for your willingness to entertain the changes I suggested, I am pleased to join this fine opinion.").

³⁶³ Band, *Peek Behind the Scenes*, *supra* note 77, at 72 (quoting Letter from Justice Souter to Justice O'Connor (Mar. 4, 1994) (in *Campbell* file, Blackmun Papers) (on file with authors)).

³⁶⁴ See *supra* notes 356–361 and accompanying text.

³⁶⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

material is presumptively . . . unfair” as creating a “hard” presumption.³⁶⁶ As the Court importantly noted:

If . . . commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities “are generally conducted for profit in this country.”³⁶⁷

Responding to *Harper & Row*’s declaration that the fourth factor is the first among equals, the Court held that no factor is superior to the other considerations, “[n]or may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”³⁶⁸ Having cleared away this doctrinal underbrush, the Court focused most of its attention and energy on establishing transformative use as the appropriate specific focus of analysis under the first factor but also as a means of synthesizing the analysis by linking purpose to the amount used under the third factor.

As Judge Leval had done, Justice Souter elevated *Folsom* to a *de facto* precedent of the Court. *Sony* had mentioned *Folsom* only in a footnote,³⁶⁹ and *Harper & Row* had cited *Folsom* primarily to provide historical context.³⁷⁰ In *Campbell*, however, Justice Souter traced the transformative use idea back to the original distinction Justice Story had drawn, and he anchored the analysis of the first statutory factor to it. Justice Souter wrote that the inquiry into the purpose and character of the use asks whether the use merely “supersede[s] the objects of the original creation” or whether the use “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks,

³⁶⁶ *Id.* at 584 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

³⁶⁷ *Id.* (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 592 (1985) (Brennan, J., dissenting)).

³⁶⁸ *Id.* at 578.

³⁶⁹ *Sony*, 464 U.S. at 476 n.27 (quoting portion of *Folsom* that introduces the factors and noting that “similar lists were compiled by later courts”).

³⁷⁰ *Harper & Row*, 471 U.S. at 550 (“As Justice Story’s hypothetical illustrates, the fair use doctrine has always precluded a use that ‘supersede[s] the use of the original.’” (citing *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4,901))).

in other words, whether and to what extent the new work is 'transformative.'"³⁷¹

Justice Souter then modeled for lower courts how this inquiry into transformativeness involves not simply adding weight on a scale but a thematic inquiry that cascades through analysis of all of the factors.³⁷² Specifically, by overruling the Sixth Circuit's approach to commerciality under both the first and fourth factors, *Campbell* instead focused analysis on the purpose of the use, viewed in light of copyright law's constitutional role.

[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.³⁷³

Having outlined a general approach, Justice Souter then turned to the parodic use specifically at issue, nesting this type of use within the broader category of comment or criticism identified as an example in § 107's preamble.³⁷⁴ He further demonstrated that the transformative use inquiry focuses on the user's reason for using a preexisting work, writing that "[f]or the purposes of copyright law . . . the heart of any parodist's claim to quote from existing material[] is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works."³⁷⁵

Echoing points made in his correspondence with Justice Kennedy,³⁷⁶ Justice Souter further clarified that parody is a use on a spectrum of related uses that may also be transformative.

³⁷¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (quoting *Folsom*, 9 F. Cas. at 348 and *Leval*, *supra* note 133, at 1111, respectively).

³⁷² *Id.* at 586–87, 592 (showing how the parodic purpose under the first factor justified use of a substantial amount of the original work under the second and third factors and that the markets that count under the fourth factor do not include markets for types of transformative uses such as criticism).

³⁷³ *Id.* at 579 (citation omitted). When read in context, Justice Souter's reference to "transformative works" meant new works created through a transformative use of a preexisting work. See Carroll & Jaszi, *Three Big Ideas*, *supra* note 6, at 519.

³⁷⁴ See *Campbell*, 510 U.S. at 579 ("We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107.").

³⁷⁵ *Id.* at 580.

³⁷⁶ See *supra* notes 350–351 and accompanying text.

Rejecting the argument that parody should be presumptively fair, he wrote that “no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and nonparodic elements.”³⁷⁷

Justice Souter further explained that when a satirist has chosen a particular “creative artifact” through which to lampoon society, the satirist’s explanation for why the use of that particular work is transformative will be different from the parodist’s reason for using the parodied work: “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.”³⁷⁸ Nothing in the opinion, however, suggests that such justification is impossible or even necessarily arduous.

Indeed, while stating that the satirist needs a different explanation for a use than the parodist, Justice Souter also made clear that under the transformative use approach, where either type of use poses a minimal risk of market substitution, the user’s explanatory burden is not particularly heavy. This is the heart of the transformative use approach:

[W]hen there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work’s minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.³⁷⁹

Again, the opinion addresses the interrelatedness of the fair use factors—here, in particular, the first and the fourth.

Justice Souter’s treatment of the other fair use factors demonstrated how the transformative use inquiry binds them all together. Under the second factor, even if use of a creative work rather than a factual work may favor the copyright owner in other contexts, where the purpose of the use justifies use of

³⁷⁷ *Campbell*, 510 U.S. at 581; see also *id.* at 579 (stating that parody, “[l]ike less ostensibly humorous forms of criticism . . . can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”).

³⁷⁸ *Id.* at 580–81.

³⁷⁹ *Id.* at 580 n.14.

a creative work, such as to make a parody, the second factor adds little to the analysis.³⁸⁰

Similarly, Justice Souter invoked *Folsom* to link the evaluation of the purpose of a use to the amount used: “[F]or, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use”—whether, that is, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole” are reasonable in relation to the purpose of the copying.³⁸¹

Clearly, there are no bright-line tests or reliable rules of thumb that will obviate the need to apply this holistic standard. While not explicitly rejecting the proposition that use of an entire work is presumptively unfair, Justice Souter effectively did just that by showing that in some contexts, such as the home taping in *Sony*, use of an entire work is appropriate; whereas, in others, such as the quotations at issue in *Harper & Row*, the amount used may be excessive. In the case of a parodic use, extensive borrowing is permitted.

A transformative use also will receive different treatment under the fourth factor because its object is not to supersede the original. Reiterating that there is no presumption against commercial use, Justice Souter wrote that “when . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.”³⁸² Although the Court remanded the case for lack of evidence about the market for a potential authorized rap derivative work, the Court made clear that arguments based on harm to licensing markets must be rooted in general practice. Such arguments must recognize “the rule that there is no protectable derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”³⁸³

* * *

Campbell represents the triumph of the central idea that to achieve the Constitution’s purposes for copyright law, the fair use doctrine plays a central limiting role that creates space for a range of downstream uses of copyrighted works based on a nuanced inquiry into a user’s purpose and into the amount used for that purpose. Each aspect of this idea had previously

³⁸⁰ See *id.* at 586.

³⁸¹ *Id.* at 586–87.

³⁸² *Id.* at 591.

³⁸³ *Id.* at 592.

been contested. But, *Campbell* is now settled law, and attempts by some courts and commentators to limit its scope ignore the important steps along the road to a capacious understanding of fair use described in this Article.

V

READING *CAMPBELL* IN THE POST-WARHOL ERA

After the Court's four encounters with fair use discussed in Parts III and IV, the Court appears to have concluded that *Campbell* had successfully done its job. The Court left well enough alone and did not take a fair use case for another three decades. This is not because fair use had become an issue of diminished importance.

It is little surprise that in the post-*Campbell* era, uses that respond to a specific work—such as parodies³⁸⁴ or those engaged in critical commentary³⁸⁵—have been deemed transformative. But, the analysis in these and other cases has demonstrated that the generality of the *Campbell* transformative use analysis also supports determinations that a wide range of uses beyond targeting were justified as transformative uses of copyrighted works.³⁸⁶

Such other justified uses include institutional, wholesale, and systematic copying for commercial purposes to create search engines and related tools,³⁸⁷ to detect plagiarism,³⁸⁸ or to identify word frequency in a corpus of books.³⁸⁹ They also

³⁸⁴ See, e.g., *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 689 (7th Cir. 2012); *Lyons P'ship v. Giannoulas*, 179 F.3d 384, 386 (5th Cir. 1999) (parody of Barney the dinosaur being assaulted by chicken at sporting event); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 111 (2d Cir. 1998) (poster parodying magazine cover photo of pregnant nude actress).

³⁸⁵ See, e.g., *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 796 (9th Cir. 2003) (photographs of Barbie dolls in threatening situations); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264–65 (11th Cir. 2001) (critical reimagining of *Gone with the Wind*); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 198 (4th Cir. 1998) (use of quotations in critical review of novel).

³⁸⁶ See generally Pamela Samuelson, *Justifications for Fair Uses*, 2025 Wis. L. REV. 1047 (analyzing wide range of uses courts deemed to be justified as transformative).

³⁸⁷ *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202, 209 (2d Cir. 2015); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003).

³⁸⁸ See *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 640 (4th Cir. 2009).

³⁸⁹ *Authors Guild v. Google*, 804 F.3d at 217 (singling out Google's nGram feature as a transformative use).

include a range of uses in which a work was used in the creation of a new work, such as for illustrative purposes,³⁹⁰ in appropriation art,³⁹¹ and in the performing arts.³⁹² As *Campbell* noted, news reporting is a named use in § 107 that also is usually done commercially. Transformative use has helped courts distinguish journalistic use for new purposes³⁹³ from those that are competitive and therefore potentially superseding.³⁹⁴ The attraction of post-*Campbell* fair use analysis has led some courts to rely on fair use as grounds for decision even when other limits on copyright's exclusive rights, such as lack of copyrightable subject matter³⁹⁵ or lack of substantial similarity, would have been more appropriate.³⁹⁶

Then, the Court chose to revisit fair use in *Google LLC v. Oracle America, Inc. (Google v. Oracle)*³⁹⁷ and in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith (Warhol)*.³⁹⁸ In

³⁹⁰ See *Marano v. Metro. Museum of Art*, 844 F. App'x 436, 438 (2d Cir. 2021) (concert photograph used in museum exhibition); *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 936 (4th Cir. 2013); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 611, 614 (2d Cir. 2006) (use of concert poster in "biography" of the Grateful Dead).

³⁹¹ See *Cariou v. Prince*, 714 F.3d 694, 703 (2d Cir. 2013); *Blanch v. Koons*, 467 F.3d 244, 254–55 (2d Cir. 2006).

³⁹² See, e.g., *Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638, 649 (9th Cir. 2020) (musical compositions rearranged for high school medley); *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1276–77 (9th Cir. 2013) (use of television footage in musical); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1173 (9th Cir. 2013) (image used as background in concert).

³⁹³ See, e.g., *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014); *Payne v. Courier-J.*, 193 F. App'x 397, 399 (6th Cir. 2006) (fair use for a newspaper to quote from convicted rapist's unpublished children's book); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 938 (9th Cir. 2002); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000).

³⁹⁴ See *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 992 (9th Cir. 1998) (use of video of violent altercation competitive with licensed use for same purpose); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1123 (9th Cir. 1997) (same).

³⁹⁵ See, e.g., *Nat'l Rifle Ass'n v. Handgun Control Fed'n*, 15 F.3d 559, 561 (6th Cir. 1994) (use of NRA's list of state legislators who would vote on handgun control legislation by proponents of such legislation was transformative use); see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347–63 (1991) (explaining that facts are not copyrightable and that factual compilations require original selection or arrangement).

³⁹⁶ See, e.g., *Oyewole v. Ora*, 291 F. Supp. 3d 422, 436 (S.D.N.Y. 2018) (holding that repeated use of a three-word phrase was fair use), *aff'd*, 776 F. App'x 42 (2d Cir. 2019) (adopting district court's fair use analysis).

³⁹⁷ *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1190 (2021).

³⁹⁸ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1266 (2023).

Google v. Oracle, Oracle sued Google for copying lines of computer code used by programmers from its Java SE platform to reimplement on the platform for its Android operating system.³⁹⁹ The case presented a subject matter issue, whether user interfaces are copyrightable, and fair use. The Court chose to resolve the case in Google's favor on fair use grounds, relying extensively on *Campbell* in its analysis of all four fair use factors.⁴⁰⁰

In *Warhol*, professional photographer Lynn Goldsmith had done a photoshoot with Prince Rogers Nelson (known for most of his performing life as Prince) in the early 1980s.⁴⁰¹ She had licensed use of one of her photographs to a visual artist, who turned out to be Andy Warhol, to use the photograph as an artist reference for creating a silkscreen image to use with an article about Prince in *Vanity Fair*. Warhol subsequently created a series of silkscreen images based on the same photograph. After Prince passed, the Andy Warhol Foundation (AWF) gave a license for *Vanity Fair* to use one of these other images on its cover for its retrospective edition.

Before the Court, Goldsmith's copyright infringement claim did not reach Warhol's creation of the image but was limited to AWF's license only.⁴⁰² The only issue before the Court was whether this licensing use qualified as a transformative use under the first fair use factor.⁴⁰³ The Court decided the use was not transformative because AWF had competed directly with Goldsmith in the narrow market for use of an image of Prince on a magazine cover in connection with an article about Prince.⁴⁰⁴ As it had in *Google v. Oracle*, the Court quoted and cited *Campbell* extensively—both directly and indirectly by way of its reliance on the earlier decision.⁴⁰⁵

Some commentators and advocates, however, have argued that Warhol's "re-reading" of *Campbell* means that lower courts should now understand *Campbell*'s transformative use

³⁹⁹ *Google*, 141 S. Ct. at 1190.

⁴⁰⁰ *Id.* at 1203–08.

⁴⁰¹ *Warhol*, 143 S. Ct. at 1266–67.

⁴⁰² *Id.* at 1278, 1278 n.9.

⁴⁰³ *Id.* at 1273.

⁴⁰⁴ *Id.* at 1278–80.

⁴⁰⁵ Accepting that the Court chose to reinforce *Campbell*'s fair use analysis in both cases, we reiterate that *Google v. Oracle* should have been resolved on copyrightability grounds and *Warhol* should have been resolved, or at least remanded, on the issue of substantial similarity. See Carroll & Jaszi, *Three Big Ideas*, *supra* note 6, at 525.

standard to apply only to uses that target a specific work of authorship.⁴⁰⁶

For example, in *Sedlik v. Von Drachenberg*,⁴⁰⁷ involving a tattoo of Miles Davis based on plaintiff's photograph, plaintiff's counsel argued that if the court were to reach the fair use issue, it should read *Warhol* as requiring targeting of the source work.⁴⁰⁸

The courts of appeals have uniformly rejected this argument.⁴⁰⁹ In *Sedlik*, the Ninth Circuit limited its published opinion to the issue of substantial similarity and applied the traditional transformativeness standard in a separate unpublished opinion on fair use.⁴¹⁰

The only exception—a 2024 Tenth Circuit opinion in *Whyte Monkee Productions, LLC v. Netflix, Inc.*—was vacated and has been superseded by an opinion that also rejects this argument. The case arose from Netflix's use of video footage in its documentary *Tiger King* about a keeper of big cats named Joe Exotic.⁴¹¹ The videographer who filmed the funeral of Mr. Exotic's husband sued for Netflix's use of slightly more than one minute from the nearly twenty-four-minute video. The documentary's use of portions of Mr. Exotic's eulogy was primarily to comment on Joe Exotic's megalomania.⁴¹²

In its 2024 opinion, the Tenth Circuit read *Warhol's* treatment of the discussion of parody and satire in *Campbell* to create a new requirement for a "compelling" justification for any use that does not target a source work.⁴¹³ On this view, the use

⁴⁰⁶ See *infra* notes 407–429 and accompanying text.

⁴⁰⁷ 163 F.4th 667 (9th Cir. 2026).

⁴⁰⁸ *Sedlik* Appellant's Brief, *supra* note 9, at 45–46 (arguing that *Warhol* stands for proposition that "to be transformative, the use should 'target' or have a 'critical bearing' on the original work itself, not what it depicts"). The tattoo in question is based on Jeffrey Sedlik's photograph of Miles Davis. The defendant's position rested on lack of substantial similarity or, in the alternative, fair use.

⁴⁰⁹ See *infra* note 435 (collecting cases).

⁴¹⁰ See *Sedlik v. Von Drachenberg*, No. 24-3367, 2026 WL 18912, at *2 (9th Cir. Jan. 2, 2026) (mem.) (applying *Warhol's* restatement of *Campbell* to hold that jury could reasonably conclude that "the purpose of the Photograph was to display a portrait of Miles Davis, whereas the purpose of the 'Process Posts' were to show KVD 'in the process of creating a tattoo.'").

⁴¹¹ *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 97 F.4th 699, 707–08 (10th Cir.), *vacated and reh'g granted*, 101 F.4th 787 (10th Cir. 2024), *aff'd on reh'g*, 174 F.4th 761 (10th Cir. 2026).

⁴¹² *Id.* at 714.

⁴¹³ *Id.* at 715 ("Here, however, Defendants do not appear to have a sufficiently compelling justification for their use.").

could not be transformative because it focused on Joe Exotic rather than on the videographer's work.⁴¹⁴

This reading of *Campbell* and *Warhol* provoked a strong reaction. Netflix petitioned for rehearing with support from a wide range of *amici*, including documentary filmmakers and copyright scholars.⁴¹⁵ The court granted the motion.⁴¹⁶ With the benefit of supplemental briefing, argument, and additional authority from other circuits, the court issued a lengthy opinion affirming the district court's judgment.⁴¹⁷ While the court generally followed the reasoning of other post-*Warhol* appellate decisions, the court read *Warhol* to have differentiated uses that are inherently likely to be transformative from those that require an independent justification. Three points stand out in the court's careful reevaluation of the fair use analysis.

First, the court read *Campbell/Warhol* to enable a user to justify a use because it is sufficiently distinct from uses of the original and therefore furthers the constitutional purpose of copyright law.⁴¹⁸ Second, even when a user needs to provide an independent justification for a challenged use, the court recognized a range of justifications beyond targeting.⁴¹⁹ Third, the court decidedly did *not* treat *Warhol* as a departure or revision of *Campbell*, instead weaving citations to *Campbell*, *Google v. Oracle*, and *Warhol* throughout its fair use analysis.⁴²⁰

⁴¹⁴ *Id.* at 714 ("Here, Defendants did not comment on or 'target' Mr. Sepi's work at all; instead, Defendants used the Funeral Video to comment on Joe Exotic . . . *Warhol* has deemed such a use to not be sufficiently transformative.").

⁴¹⁵ [Disclosure: The authors both signed on to this brief.] *Amici Curiae Brief on Behalf of 34 Copyright and Media Law Professors in Support of Defendants-Appellees, Whyte Monkee Prods., LLC v. Netflix, Inc.*, 174 F.4th 761 (10th Cir. 2026) (No. 22-6086).

⁴¹⁶ *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 101 F.4th 787 (10th Cir. 2024).

⁴¹⁷ *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 174 F.4th 761 (10th Cir. 2026).

⁴¹⁸ *Id.* at 785 ("That is because such a secondary use is more likely to be justified in the broad sense because its transformativeness itself advances the goals of copyright."); *id.* at 786 ("If the secondary use is transformative in this broad sense, then no independent justification is likely to be necessary, and the use will be justified by furthering the goals of copyright.").

⁴¹⁹ *Id.* at 795 ("justification is often found when the copying serves to critique, or otherwise comment on, the original, or its author, but can *also be found in other circumstances*, such as when the copying provides useful information about the original, or on other subjects." (citing and quoting *Romanova v. Amilus, Inc.*, 138 F.4th 104, 119 (2d Cir. 2025) (emphasis added by the court))).

⁴²⁰ See *id.* at 792–95 (citing *Campbell*, *Google v. Oracle*, and *Warhol*, including *Warhol's* quotations from *Campbell*). Of particular note, while the court frequently cited and quoted Balganesch & Menell, *Going "Beyond" Mere Transformation*, *supra* note 9, for general fair use propositions, it did not accept their interpretation of *Warhol*.

Among commentators, Professors Shyamkrishna Balganesh and Peter Menell assert that *Campbell* was always intended to be limited to uses that “qualify” as acceptable for fair use and that a wide range of lower courts have been mistaken in taking a broader view of transformative use.⁴²¹ They further argue that *Warhol* reinforces this limited view of transformative use.⁴²²

In their article *Misreading Campbell*, the authors read the lessons from the litigation record and the Court’s opinion in *Campbell* quite differently than we do.⁴²³ There are a few points of preliminary agreement concerning the productive use doctrine’s antecedent role in the development of transformative use. We generally are in agreement that neither the parties nor the *amici* relied on Judge Leval’s theory of transformative use in their respective arguments, although the Leval article received some brief citations, discussed *supra*.⁴²⁴ We also found it somewhat surprising that it was Acuff-Rose’s counsel who drew the Justices’ attention to the article in oral argument.⁴²⁵ And, like them, we credit Justice Souter as the source of the Court’s adoption of the transformative use standard in fair use analysis.⁴²⁶

But as to the substantive analysis of the Court’s opinion in *Campbell*, we have expressed a considerably different view. The primary points on which we differ are the following. They argue that Justice Souter’s methodology should be understood to tie *Campbell*’s adoption of transformative use closely to the facts of the case rather than announcing a general analytical standard.⁴²⁷ As we have argued, the very point of Judge Leval’s article was to provide a general standard that centers transformative use.⁴²⁸ For the reasons stated, we think the historical record and the litigation record in the case support our claim that it was precisely the appeal of this general synthesis of the

⁴²¹ Balganesh & Menell, *Misreading Campbell*, *supra* note 10, at 117 (“[W]e argue that the nearly three decades of jurisprudence around the idea of ‘transformative use’ has been based on a reductive and simplistic misreading of the Court’s decision in *Campbell*.”).

⁴²² Balganesh & Menell, *Going “Beyond” Mere Transformation*, *supra* note 9, at 436–38.

⁴²³ See *infra* notes 428–434 and accompanying text.

⁴²⁴ Balganesh & Menell, *Misreading Campbell*, *supra* note 10, at 120–25; *supra* notes 342–351 and accompanying text.

⁴²⁵ Balganesh & Menell, *Misreading Campbell*, *supra* note 10, at 124–25.

⁴²⁶ *Id.* at 125.

⁴²⁷ *Id.* at 126–27.

⁴²⁸ See *supra* notes 325–330 and accompanying text.

fair use factors, especially after its frustrating experiences with *Sony* and *Harper & Row*, that led the Court to adopt transformative use.

They also read *Campbell* to create preferential tiers of use under the transformative use standard. They argue that under *Campbell*, a court should first assess whether a use “qualifies” for the “*a priori*” category claimed by the user, such as parody or a book review.⁴²⁹ If it does not, then the court should require greater justification than for such categories, such as the uses listed in § 107’s preamble.⁴³⁰

We disagree with this effort to discover yet another set of non-statutory fair use presumptions in Supreme Court decisions that reject such categorical approaches. As we have argued, *Campbell*’s discussion of the parody-satire distinction, and *Warhol*’s reiteration of that discussion, should be understood to simply mean that the user’s purposes in the two cases are related but distinct, and therefore will support different arguments in justification.⁴³¹ Under the transformative use standard, the user explains their purpose for using the work under the first factor. The idea of transformative use as presented by Judge Leval, and as reiterated by the Court in *Campbell*, *Google v. Oracle*, and *Warhol*, is foundational—it asks if a use is justified in relation to whether it is of a type that furthers copyright law’s constitutional purpose. In none of these articulations of transformative use can one find a categorical or preferential standard that cabins this inquiry.⁴³² Instead, it is a flexible analysis that is sensitive to context. A variety of justifications readily fit under this constitutional-purpose umbrella.⁴³³

⁴²⁹ Balganesch & Menell, *Misreading Campbell*, *supra* note 10, at 134–36.

⁴³⁰ See *id.* at 142 (when a use does not target a source work, the “burden translates into a need for the secondary user to show a higher degree of transformativeness, especially when the purpose is not among § 107’s preamble categories.”).

⁴³¹ See *supra* notes 378–380 and accompanying text; see also *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1275–77 (2023).

⁴³² See *Leval*, *supra* note 133, at 1111; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–81 (1994); *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1202–04 (2021); *Warhol*, 143 S. Ct. at 1274–84. We previously have responded at length to arguments that *Google v. Oracle* is merely a “software case” by showing that the Court was invited to, and refused to, renounce or modify *Campbell*’s transformative use standard. Instead, Justice Breyer’s fair use analysis for the Court first emphasized the generality of the legal principles before applying them to the software-industry-specific facts. *Carroll & Jaszi, Three Big Ideas*, *supra* note 6, at 501, 503–05.

⁴³³ See generally Samuelson, *supra* note 386 (identifying and categorizing a wide range of justified uses beyond targeting a source work).

The fact that the purpose of using a work to create a parody varies from such use to engage in satire does not mean one is preferred above the other. We should note that they acknowledge that our non-hierarchical and capacious reading of *Campbell* is supported by three decades of appellate jurisprudence.⁴³⁴ Moreover, post-*Warhol* appellate decisions read *Warhol* as we do—a ratification rather than a reinterpretation of Justice Souter’s persuasive reasoning in *Campbell*.⁴³⁵

CONCLUSION

This Article has traced the intellectual history of copyright law’s fair use doctrine at the Supreme Court from its first encounter with fair use in *CBS v. Loew*’s to its landmark decision slightly more than three decades ago in *Campbell*, which provides courts with a coherent, user-centered theory for applying the four statutory fair use factors under 17 U.S.C. § 107 that the Court recently ratified in *Google v. Oracle* and *Warhol*.

⁴³⁴ See *supra* notes 384–396 and accompanying text (collecting cases).

⁴³⁵ See generally *Whyte Monkee Prods., LLC v. Netflix, Inc.*, 174 F.4th 761 (10th Cir. 2026) (treating wide range of pre-*Warhol* decisions as good law); see *Santos v. Kimmel*, 154 F.4th 30, 34–35 (2d Cir. 2025) (quoting *Warhol*’s restatement of *Campbell*’s standard for transformativeness and affirming dismissal on fair use grounds); *Romanova v. Amilus, Inc.*, 138 F.4th 104, 110–17 (2d Cir. 2025) (Leval, J.) (citing *Warhol* and *Campbell* for proposition that a transformative use requires a justification and that wide range of justifications accepted in pre-*Warhol* decisions remain good law); *Wilder v. Hoiland*, No. 24-1436, 2025 WL 783642, at *1–2 (2d Cir. Mar. 12, 2025) (summary order) (relying on *Warhol*’s restatement of *Campbell* standard for transformativeness and affirming dismissal on fair use grounds); *Teradyne, Inc. v. Astronics Test Sys., Inc.*, No. 24-239, 2025 WL 341828, at *1 (9th Cir. Jan. 30, 2025) (relying on *Google v. Oracle* to hold use of plaintiff’s software was transformative even though not targeted at contents of that software); *Designworks Homes v. Colum. House of Brokers, Inc.*, 126 F.4th 589, 596–600 (8th Cir. 2025) (relying on *Warhol*’s restatement of *Campbell* under the first factor and on *Campbell* for the second, third, and fourth factor analysis); *Keck v. Mix Creative Learning Ctr., L.L.C.*, 116 F.4th 448, 453–55 (5th Cir. 2024) (rejecting argument that *Warhol* created more demanding standard for evaluating user’s purpose and stating “[t]his framing oversimplifies *Warhol*’s inquiry into objectives and fails to distinguish the commercial-nature inquiry from the more nuanced inquiry into whether a secondary use has a further purpose or different character.”); *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 179–81 (2d Cir. 2024) (treating transformative standard under *Campbell*, *Google v. Oracle*, and *Warhol* as synonymous); *Griner v. King*, 104 F.4th 1, 9–10 (8th Cir. 2024) (applying *Campbell/Warhol* transformativeness standard to hold defendant’s commercial use of meme to be the same as plaintiff’s commercial licensing purpose); *Philpot v. Indep. J. Rev.*, 92 F.4th 252, 258–60 (4th Cir. 2024) (citing *Campbell/Warhol* standard for transformativeness and holding that use of photograph was for same purpose); *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 82 F.4th 1262, 1267–68 (D.C. Cir. 2023) (relying on *Warhol* and *Google v. Oracle* to hold non-targeting purpose to be transformative).

This Article has demonstrated how contested the role of fair use in copyright law had been both before and after Congress codified the doctrine until *Campbell*. Some parties and Justices treated fair use as a narrow doctrine limited by presumptions against its application. Others understood the doctrine to be a central counterbalance to copyright law's exclusive rights. By carefully analyzing the Court's fair use jurisprudence up to, and including, *Campbell*, this Article has shown how the Court and counsel appearing before it went through a learning process about fair use. In particular, it was not until *Campbell* that the Court fully appreciated the impact of fair use's codification and the need for the Court to provide lower courts with a coherent theory for applying the four fair use factors in § 107.

Of the various interesting through-lines one can find in reading the litigation records in these cases, one is worth a note here. Parties have regularly asked the Court to adopt some form of subject matter exceptionalism in its application of fair use. In *Sony*, the studios argued that the 1976 Act gave audiovisual works a special, more protected status; in *Harper & Row*, *The Nation* argued that news reporting deserved a plus factor because of its role in preserving democracy; in *Abend*, the studios again argued that motion pictures were special; and in *Campbell*, some *amici* sought a parody-specific ruling in favor of that use. To its credit, the Court has turned these appeals away, leading it to provide a more generally applicable statement of fair use principles in *Campbell* and *Google v. Oracle*.

This Article's second claim has rebutted recent attempts by some courts and commentators to construe *Campbell* narrowly in the wake of the Court's *Warhol* decision. Instead, by analyzing both the public filings and the now-public internal case files of some of the Justices, this Article has provided a number of new insights to support the case for reading *Campbell* capaciously. Indeed, *Campbell*'s adoption of the transformative use standard reflects the hard-won triumph of an important idea about the role of fair use in copyright law.