IS TRANSFORMATIVE USE EATING THE WORLD?¹

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Fair use is copyright law’s most important defense to claims of copyright infringement. This equitable defense allows courts to relax copyright law’s application when courts believe doing so will promote creativity more than harm it. As the Supreme Court has said, without the fair use defense, copyright law would often “stifle the very creativity [it] is designed to foster.”

In today’s world, whether use of a copyrighted work is “transformative” has become a central question within the fair use test. The U.S. Supreme Court first endorsed the transformative use term in its 1994 Campbell decision. Since then, lower courts have increasingly made use of the transformative use doctrine in fair use case law. In fact, in response to the transformative use doctrine’s seeming hegemony, commentators and some courts have recently called for a significant scaling back of the transformative use concept. So far, the Supreme Court has yet to respond. But growing divergences in transformative use approaches may eventually attract its attention.

But what is the actual state of the transformative use doctrine? Some previous scholarship has empirically examined the fair use defense, including the transformative use doctrine’s role in fair use case law. But none has focused specifically on empirically assessing the transformative use doctrine in as much depth as is warranted. This Article does so by collecting a number of data from all district and appellate court fair use opinions between 1991, when the transformative use term made its first appearance in the case law, and early 2017. These data include how frequently courts apply the doctrine, how often they deem a use transformative, and win rates for transformative users. We also collect data relating to which types of uses courts are most likely to deem transformative, what sources courts rely on in defining and applying the concept, and how frequently the transformative use doctrine bleeds into and influences other portions of the fair use test. Overall, we find that the transformative use doctrine is, in fact, eating the world of fair use.

We end by analyzing some implications of our findings, including the controversial argument that, going forward, courts should rely even more on the transformative use doctrine in their fair use opinions, not less.

¹ This Article’s title is a play on the title of a well-known article from noted venture capitalist Marc Andreessen articulating his view that software is the most important technology in the modern economy. Marc Andreessen, Why Software Is Eating the World, WALL ST. J. (Aug. 20, 2011), https://www.wsj.com/articles/SB10001424053111903480904576512250915629460.

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“It would seem that the pendulum has swung too far in the direction of recognizing any alteration as transformative, such that [the transformative use] doctrine now threatens to swallow fair use. It is respectfully submitted that a correction is needed in the law.”

“We’re skeptical of [the Second Circuit’s] approach, because asking exclusively whether something is ‘transformative’ not only replaces the [fair use factor] list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works…We think it best to stick with the statutory list.”

INTRODUCTION

Fair use is copyright law’s most important defense to claims of copyright infringement. The defense enables numerous uses of copyrighted material that would otherwise violate copyright law. Google’s copying of millions of copyrighted books as part of Google Books, for instance, is possible because courts have ruled that Google copying those books into its database is fair use. Search engines’ display of copyrighted materials in response to search queries also depends on the fair use defense, as do other technological uses of copyrighted materials (including, in days gone by, using VCRs). Similarly, parodists, bloggers, news reporters, researchers, authors, artists, consumers, and educators all rely on the fair use defense for a number of socially beneficial uses of copyrighted materials. In short, fair use matters in

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2 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[B][6], at 13.224.20
3 Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014) (Easterbrook, J.).
4 Margot E. Kaminski & Guy A. Rub, Copyright’s Framing Problem, 64 UCLA L. REV. 1102, 1141 (2017).
7 Joe Mullin, Google Beats Oracle – Android Makes “Fair Use” of Java APIs, ARSTECHNICA (May 26, 2016, 2:03 PM), https://arstechnica.com/tech-policy/2016/05/google-wins-trial-against-oracle-as-jury-finds-android-is-fair-use/ (summarizing a case where Google’s use of limited portions of Oracle’s Java API was found to be a fair use); Sony Corp. of America v. Universal City Studios, Inc., 454 U.S. 417 (1984) (finding using VCRs to time-shift recorded shows was a fair use).
8 See, e.g., 17 U.S.C. § 107 (2017) (listing “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” as types of use that may qualify for the fair use defense).
a number of important contexts. Without it, the Supreme Court has opined, copyright law would frequently “stifle the very creativity [it] is designed to foster.”

Given its importance, scholars have devoted an enormous amount of time to studying fair use. And increasingly more of that effort has focused on assessing what it means for a use to be “transformative.” This shift has occurred in large measure since and because the Supreme Court explicitly endorsed the “transformative use” term in its 1994 Acuff-Rose v. Campbell fair use decision. Since that time, the transformative use inquiry has gained momentum in case after case, with some labeling it the most critical question in the overall fair use analysis. Indeed, once courts determine that a use is transformative, that determination often seems to dictate the rest of the fair use analysis and, ultimately, the case’s outcome. In fact, as noted above, some prominent copyright commentators and courts—particularly the Seventh Circuit—believe that courts have expanded the transformative use concept too far, in ways that undermine copyright law’s overall effectiveness.

Despite the importance of the transformative use concept, however, we have mostly anecdotal accounts of its role within the fair use inquiry. To date, only a few scholars have studied the transformative use concept empirically. And though these studies provide useful information on what

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10 In his influential fair use study, for instance, Barton Beebe notes that there were typically more law review articles devoted to fair use in any given sampled year than actual fair use judicial opinions in the same year. Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005, 156 U. PA. L. REV. 549, 565 n.64 (2008).
13 Netanel, supra note 11.
14 See Clark D. Asay, Transformative Use in Software, 70 STAN. L. REV. ONLINE 9, 12-13 (2017) (summarizing some of the cases and literature espousing this view).
15 See infra note 215 and accompanying text. Both Judge Posner and Easterbrook on the Seventh Circuit have expressed skepticism about the role the transformative use concept should play. See Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014) (Easterbrook, J.) (criticizing focusing on the transformative use concept in fair use analyses); Ty, Inc. v. Publication International Ltd., 292 F.3d 512 (2002) (Posner, J.) (calling use of the transformative use concept “confusing”). See also Jennifer Pitino, Has the Transformative Use Test Swung the Pendulum Too Far in Favor of Secondary Users?, 56 ADVOCATE 26 (2013) (arguing that courts have taken transformative use too far).
16 See Beebe, supra note 10 (presenting empirical findings relating to fair use decisions between 1978-2005, including findings relating to the transformative use concept); Netanel, supra note 11 (providing empirical data relating to fair use decisions, with a particular focus on more recent decisions and their adoption of and emphasis on the transformative use...
types of uses courts are most likely to view as transformative\(^\text{17}\) and how frequently parties with a transformative use finding win their cases,\(^\text{18}\) they fall short of capturing the full impact of the transformative use concept in a number of important respects.

For starters, each of the most important fair use studies is increasingly dated. Barton Beebe’s influential fair use study, for instance, ends its empirical investigation in 2005.\(^\text{19}\) Pamela Samuelson’s helpful taxonomy finishes up in 2009.\(^\text{20}\) Neil Netanel’s follow-up study to Beebe’s research ends its data collection in 2010.\(^\text{21}\) And Matthew Sag’s 2012 empirical study is based on district court data with a cutoff date of early 2011.\(^\text{22}\) Yet in the years since, both district and appellate courts have decided some of the most important fair use cases in decades,\(^\text{23}\) including some that commentators view as fundamentally expanding the transformative use concept.\(^\text{24}\) Hence, while

\(^{17}\) See Sag, \textit{ supra} note 16; Samuelson, \textit{ supra} note 16.

\(^{18}\) Beebe, \textit{ supra} note 10 (providing statistics on this question); Netanel, \textit{ supra} note 11 (providing statistics on this question as a follow-up to the Beebe study).

\(^{19}\) Beebe, \textit{ supra} note 10.

\(^{20}\) Samuelson, \textit{ supra} note 16.

\(^{21}\) Netanel, \textit{ supra} note 11.

\(^{22}\) Sag, \textit{ supra} note 16.

\(^{23}\) See, e.g., Cambridge University Press v. Patton, 769 F.3d 1232 (11th Cir. Ga. 2014) (assessing fair use of copyrighted material by universities in the Georgia university system); Author’s Guild v. Hathitrust, 755 F.3d 87 (2d Cir. 2014) (finding that Google’s copying of millions of copyrighted books into a searchable database was a transformative use and, overall, a fair use); Cariou v. Prince, 714 F.3d 694 (2d. Cir. 2013) (finding that a famous artist’s reuse of copyrighted materials in his own “appropriation” artistic efforts was transformative and, overall, a fair use); Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014) (finding reproduction of a photograph of a major on a t-shirt was fair use); Fox News Network, LLC v. TVEyes, Inc., No. 15-3885 (2d Cir. 2018) (finding that TVEyes recording and making available Fox News’ content for searching purposes was not a fair use, despite finding that the use was transformative); Katz v. Chevaldina, 802 F.3d 1178 (11th Cir. 2015) (finding that reproduction of an unflattering photo of a real estate tycoon on a critical blog was fair use).

\(^{24}\) NIMMER & NIMMER, \textit{ supra} note 2 (critiquing a recent Ninth Circuit case and its
these previous studies provide a number of important insights about fair use generally and transformative use specifically, they fail to capture a number of important recent fair use—and transformative use—developments.25 This Article picks up where these previous studies left off by incorporating nearly a decade of additional fair use case law into its ambit.

But this study does more than merely filling in the chronological gaps. Previous studies assessing fair use and the transformative use component thereof have typically focused on providing general statistics of how frequently transformative users win their cases,26 or, in one instance, identifying proxies for transformative use that predict whether a court will find a use to be fair.27 In empirically addressing the role of transformative use, therefore, previous scholarship has mostly confined itself to noting correlations between a finding of transformative use and an overall finding of fair use.28 From such statistics, scholars have drawn conclusions as to what role the transformative use concept plays within fair use doctrine more generally.29

While these general statistics are useful, this Article tracks a number of additional transformative use metrics to better understand the concept’s role within the fair use inquiry. These include new data relating to the sources courts use in defining and applying the transformative use doctrine, as well as metrics relating to what types of uses courts are likely to find transformative and, thus, fair.30

We’ve also collected, for the first time, metrics relating to how frequently courts take into account transformative use when deciding other fair use factors.31 These data are useful because they give us a clearer understanding of how courts actually apply the transformative use concept throughout the fair use inquiry. To briefly illustrate: the fair use test typically involves courts assessing four statutorily defined factors, and courts traditionally examine the application of the transformative use concept in that case).

25 One recent student note does include some analysis of case law between 2010-2015, but the note focuses solely on appellate case law to assess a circuit split between the Second and Seventh Circuits regarding what role transformative use should play in the overall fair use inquiry. See Tomassian, supra note 16. This Article, conversely, includes case law into 2017, including district court opinions, and tracks a much broader range of metrics in assessing transformative use and fair use more generally.

26 Beebe, supra note 10; Netanel, supra note 11. Netanel in particular does provide some useful statistics focused more particularly on the transformative use concept. This study builds on his findings as well as going beyond them. See infra Part II.

27 Sag, supra note 16.

28 Id.; Beebe, supra note 10; Netanel, supra note 11.

29 Id.

30 See infra Part II.

31 Id.
transformative use concept as part of the first of these four factors. 32 But what becomes clear when reading fair use opinions is that courts also often discuss the transformative use concept within discussions of the remaining three factors. Indeed, the Supreme Court case that officially endorsed the transformative use concept—Campbell v. Acuff-Rose—teaches courts to do so. 33 Hence, courts often discount the impact of factor two—the nature of the work—in light of the court deeming that a defendant’s use of the copyrighted work is transformative. 34 Courts frequently engage in similar discounting on factor three—the amount and substantiality of the copyrighted work used—and factor four—the use’s effect on the market for the copyrighted work—when a court considers a defendant’s use to be transformative. 35

By tracking how often the transformative use concept affects resolution of the remaining three factors, this Article thus helps shed light on how courts actually use the transformative use concept more broadly within the fair use inquiry. And we track this data not only for more recent fair use cases, but also for fair use case law that earlier studies already incorporate. As part of assessing whether transformative use is actually “eating the world” of fair use, as some commentators suggest,36 this Article thus examines a number of previously untracked metrics to more fully decipher transformative use’s meaning and impact on the fair use doctrine’s application.37

Our results provide a number of important findings. Transformative use is eating the fair use world, and it is doing so more than we previously suspected. This conclusion is based on several pieces of empirical evidence that we have gathered. First, over time a vast majority of both appellate and district courts have come to utilize the transformative use paradigm in their

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32 17 U.S.C. § 107 (2017) (listing the four non-exclusive factors that courts are to consider when assessing whether use of copyrighted materials constitutes fair use); Campbell v. Acuff-Rose Music, Inc., 114 S.Ct. 1164, 1171 (1994) (indicating that the transformative use concept is a key piece of assessing fair use’s first factor).

33 Campbell, 114 S.Ct. at 1170.

34 See, e.g., Warren Publishing Co. v. Spurlock, 645 F. Supp. 2d 402 (E.D. Penn. 2009) (finding that though factor two disfavored fair use, its impact in the overall fair use calculus was limited because the use was transformative).

35 See, e.g., Perfect 10, Inc. v. Google, Inc., 2010 WL 9479060 (C.D. Cal. 2010) (finding the third factor to be neutral, despite the fact that Google copied the entirety of the work, because of Google’s critical, research purposes that the court earlier deemed to be transformative); Authors Guild, 755 F.3d at 100 (finding that copying entire books into a digital repository did not result in market harm because the use was deemed transformative).

36 See Amy Adler, Fair Use and the Future of Art, 91 N.Y.U. L. REV. 559 (2016) (bemoaning modern courts’ focus on transformative use as applied to visual arts fair use cases because that focus is difficult to square with modern art’s foundational premises).

37 What is equally clear when reading fair use opinions is that inter-factor influence is not limited to factor one and the transformative use inquiry. We thus also track as part of this study how frequently all of the factors appear to affect resolution of the others.
opinions, with district courts in particular adopting the transformative use concept in over 90% of their opinions since 2011. Our district court data stand in stark contrast to some previous studies, which showed that district court opinions used the transformative use concept at much lower rates than appellate court. District Courts’ widespread adoption of transformative use is particularly important because very few litigants make it past the district court, meaning that what happens with regards to transformative use at the district court level is of utmost importance.

Second, consistent with previous studies, parties that win the transformative use question win the overall fair use question at extremely high rates. Contrary to some commentators’ arguments, however, our data do not indicate that merely invoking the transformative use concept means the court will find the use to be transformative or fair. Indeed, we present a number of metrics showing that particular types of uses are unlikely to ever be found transformative. Furthermore, our data indicate that win rates between opinions that raise the transformative use concept and those that don’t are near equal. And of the opinions that discuss transformative use, only about half of defendants win the transformative use inquiry. But when they do, those defendants nearly always succeed on their fair use defense. And when they don’t, they nearly always lose. Winning the transformative use inquiry, then, is vital. And in today’s fair use case law, it is nearly always on the table.

Finally, transformative use affects resolution of other factors within the fair use inquiry more than any other subfactor or factor. This remains true even when including hundreds of opinions in our data that don’t even invoke the transformative use doctrine; when removing those opinions, the frequency with which courts use the transformative use concept to resolve other fair use factors skyrockets. Hence, while other factors and subfactors show up in places within the overall fair use analysis where we wouldn’t necessarily expect, none does more often than transformative use. This piece of evidence, tracked for the first time in this study, thus provides additional evidence of the transformative use concept’s powerful impact on fair use law

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38 See infra Part II.B.
39 Beebe, supra note 10, at 604-05.
40 See, e.g., Theodore Eisenberg, Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes, 1 J. EMP. L. ST. 659 (2004) (showing that a high percentage of cases are never even appealed, let alone accepted for adjudication).
41 Beebe, supra note 10, at 604-05.
42 See, e.g., Nimmer, supra note 2.
43 See infra Part II.
44 Id.
45 Id.
more generally.

This Article has three Parts. Part I provides background on the fair use doctrine and previous empirical studies examining it. Part II lays out our methodology and results. Part III concludes by examining some normative and theoretical implications relating to our study’s findings, including the claim that transformative use should play an even bigger role in the fair use inquiry going forward.

I. FAIR USE BACKGROUND

This Part lays out some basic background on the fair use defense and its historical development in the courts. It then provides a brief overview of how previous scholars have empirically assessed how courts apply the fair use doctrine, including the transformative use concept, in practice.

A. Fair Use 101 – A Primer

The fair use doctrine’s history is well-known. This Section does not attempt to capture all of its details, but instead provides a snapshot of it to lay the groundwork for subsequent parts of this Article.

In general, copyright law provides authors with exclusive rights pertaining to whatever works the authors create.46 For instance, an author of a book has exclusive rights with respect to that book, including under today’s copyright laws the right to reproduce, prepare derivative works of, distribute, publicly perform, and publicly display the book.47 This means that if a third party would like to exercise any of these rights, in general that third party must obtain the author’s permission or risk being sued for copyright infringement.48 If the third party would like to reproduce the book, for instance, or make a movie based on it, typically that third party must clear those rights with the copyright owner.49

But what if the third party only wants to reproduce a small portion of the book for purposes of critiquing it in a newspaper article? Or the third party would like to copy substantial portions of the book into their own book, which they consider a parody of the original? In response to these and similar situations, courts developed the fair use doctrine at common law.50 Courts

47 Id.
49 Id.
use fair use as an “equitable rule of reason” to permit socially beneficial uses of copyrighted works that copyright law, strictly applied, would otherwise bar.51 The doctrine thereby guarantees “breathing space within the confines of copyright.”52

But what counts as a socially beneficial use of copyrighted works such that courts relax copyright law’s rigid application? Fair use has no clear definition; instead, four factors have long guided courts in answering this question, and Congress codified those four factors as part of the Copyright Act of 1976.53 These factors were briefly mentioned in the Introduction, but we list them here again: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work.54

Each of these factors includes subfactors that courts often consider in resolving the fair use question. For instance, under factor one, courts typically consider whether the purported fair use is for a commercial purpose.55 Generally, when defendants make commercial uses of copyrighted works, winning factor one, and the fair use question more generally, becomes more difficult, though certainly not insurmountable.56 Courts also often consider under factor one the propriety of the defendant’s conduct and whether the use fits into one of the enumerated categories in Section 107’s preamble.57

Factor two often includes two distinct inquiries. The first is whether the work is factual or creative in nature, with factual works being subject to a greater scope of fair use and creative works to a narrower one.58 The second subfactor concerns the copyrighted work’s publication status; uses of unpublished works are less likely to be deemed fair, while courts are more likely to consider uses of published works as fair.59

Under factor three, courts consider subfactors relating to both the

52 Campbell, 114 S.Ct. at 1171.
54 Id.
55 Beebe, supra note 10, at 618.
56 Id.
57 Id.
59 Id.
quantitative and qualitative amount of the taking. If some party purportedly making fair use of a copyrighted work takes a substantial percentage of the underlying work, in general a fair use finding becomes less likely. Relatedly, even small takings of a copyrighted work can count against fair use if that taking relates to the “heart,” or most important part, of the copyrighted work.

Factor four, as Barton Beebe notes, may have no real subfactors of its own; instead, it often becomes a place for courts to synthesize their discussion of the other three factors and their subfactors. As part of such syntheses, courts often incorporate a presumption that commercial uses of the copyrighted work result in market harm. Courts also often consider how market opportunities for both the original work and derivatives thereof would fare if the use in question became widespread. Furthermore, sometimes courts restrict themselves to assessing market harm to “traditional, reasonable, or likely to be developed markets.”

As with any multi-factor test, courts have applied the fair use test inconsistently. Indeed, one of the most frequent complaints about the fair use doctrine is that it is incoherent and unpredictable. As Lawrence Lessig famously put it, the fair use defense may boil down to the “right to hire a lawyer” because its unpredictability means that parties can’t actually rely on it ex ante, instead having to resort to judicial adjudication before they know their rights.

Be that as it may, part of that unpredictability is by design. Fair use is

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61 Id.
63 Beebe, supra note 10, at 618.
64 See, e.g., Monge v. Maya Magazines, Inc. 688 F.3d 1164, 1181 (9th Cir. 2012); Leadsinger, Inc. v. BMG Music Pub., 512 F.3d 522, 531 (9th Cir. 2008) (presuming market harm under the fourth factor because the defendant’s use was commercial in nature).
66 Seltzer v. Green Day, Inc. 725 F.3d 1170, 1179 (9th Cir. 2013).
67 See, e.g., Michael W. Carroll, Fixing Fair Use, 85 N.C. L. Rev. 1087, 1090 (2007) (“While the doctrine's attention to context has many salutary attributes, it is so case-specific that it offers precious little guidance about its scope to artists, educators, journalists, Internet users, and others who require use of another's copyrighted expression in order to communicate effectively”); Neil Weinstock Netanel, Copyright's Paradox 66 (2008) (“Given the doctrine's open-ended, case-specific cast and inconsistent application, it is exceedingly difficult to predict whether a given use in a given case will qualify.”).
69 See Samuelson, supra note 16, at 2540 (“A well-recognized strength of the fair use
meant to be a flexible standard “defy[ing] definition” that courts can adapt to bring about the most just results in any given situation. Indeed, even the four factors listed in the Copyright Act are non-exhaustive, meaning that courts are permitted to, and sometimes do, take into account additional factors that may be merited in a given situation. Hence, codification of the fair use doctrine as part of the 1976 Copyright Act was not meant to stifle its ongoing development under the common law.

Courts have taken to heart this flexibility in further refining the fair use doctrine over the years. One of the most important refinements to the fair use doctrine occurred in the Supreme Court’s 1994 *Campbell v. Acuff-Rose* decision. In that case, the Court explicitly adopted for the first time the transformative use subfactor as part of the first fair use factor discussion (the purpose and character of the use). The Court defined transformative uses as those that add “something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message” rather than simply “superseding the objects” of the original work. In the actual case, the Court held that 2 Live Crew’s rap parody of Roy Orbison’s “Pretty Woman” was transformative in part because it “provide[d] social benefit, by shedding light on an earlier work, and, in the process, creating a new one.” And although the Court noted that “transformative use is not absolutely necessary for a finding of fair use,” it also indicated that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”

Given the *Campbell* Court’s emphasis on the transformative use concept, transformative use has gained traction as one of the most important subfactors that courts consider when assessing whether a use of a copyrighted work is fair. This shift in focus stands in stark contrast to previous fair use case law,

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71 TCA Television Corp. v. McCollum, 839 F.3d 168, 178 (2d Cir. 2016) (“That codification does not so much define ‘fair use’ as provide a non-exhaustive list of factors to guide courts' fair use determinations.”).
72 Id.
73 *Campbell*, 510 U.S. at 569.
74 Id. at 578-79.
75 Id.
76 Id. at 579-583.
77 Id. at 579.
78 Netanel, *supra* note 11 (pointing to case law metrics that indicate the rising importance and prevalence of the transformative use concept).
which emphasized factor four—the use’s effect on the copyrighted work’s potential market and value—as the dominant consideration in the fair use inquiry.\textsuperscript{79} Indeed, prior to its \textit{Campbell} decision, the Supreme Court in its earlier \textit{Harper & Row} case had identified factor four as by far the most important factor in the fair use inquiry.\textsuperscript{80} \textit{Campbell} retracted from that position, instead emphasizing the importance of factor one and the transformative use concept within it.\textsuperscript{81}

In focusing the fair use inquiry on the transformative use concept, the \textit{Campbell} Court included a number of admonitions to future courts about how to suffuse the entire fair use inquiry with transformative use considerations. For instance, as briefly discussed above, under factor two—the nature of the copyrighted work—courts typically assess whether the copyrighted work is more creative or factual in nature. In general, copyright law affords factual works (such as a biography or news report) less protection; indeed, mere facts on their own cannot be copyrighted at all.\textsuperscript{82} Factor two attempts to incorporate this tenet of copyright law into the fair use inquiry by acknowledging that use of factual works is more likely to be considered fair, while use of highly creative works is less likely to be a fair use. Consequently, one might reasonably conclude that factor two would favor Roy Orbison in the actual \textit{Campbell} decision, since “Pretty Woman” is the type of creative work “closer to the core of intended copyright protection than others.”\textsuperscript{83}

Yet the \textit{Campbell} court noted in considering factor two that in cases involving transformative uses such as parodies, the nature of the work, whether factual or creative, is unlikely to matter much in determining the overall fair use question.\textsuperscript{84} This is so because transformative uses—such as 2 Live Crew’s rap parody of “Pretty Woman”—often rely on highly creative, well-known works to effectively carry out their transformative purpose.\textsuperscript{85} Hence, though the Court noted that Orbison’s work was the type of creative expression copyright law was meant to protect, 2 Live Crew’s transformative purpose meant that the creative nature of the work carried little weight in the overall fair use analysis.\textsuperscript{86}

The Court provided a similar admonition with respect to the third fair use factor, the amount and substantiality of the copyrighted work used. Typically,
as mentioned above, the more a second-comer takes of the original work, the more difficult it becomes to sustain a fair use defense. And even relatively minor uses of the work may count against fair use if the small amount used is the heart, or most important part, of the copyrighted work. But in considering factor three, the Campbell Court again pointed back to the transformative use concept, suggesting that parties making transformative uses of copyrighted works must often take the most important parts of well-known works to achieve their transformative purposes; they may also sometimes need to take substantial portions of the copyrighted work for those transformative purposes. Hence, according to the Court, the “the extent of permissible copying varies with the purpose and character of the use,” with transformative users having greater leeway in taking significant portions of copyrighted works (whether qualitatively or quantitatively) if the transformative purpose justifies that taking.

Finally, the Court also discussed the transformative use concept within its discussion of how to apply the fair use inquiry’s fourth factor. The Court noted that transformative uses of works are less likely to affect the potential market for or value of the original work. This is so because transformative uses, by creating a new work with a different meaning or purpose, are less likely to act as a substitute for the original work in the marketplace. Furthermore, even transformative uses that undermine the value of a copyrighted work by, say, critiquing or parodying it, are permissible. This is so because the fourth factor is meant to guard against uses that substitute for the original, not uses that happen to decrease the work’s value by, for instance, convincing the public that the work is not worthy of their pocketbooks.

These admonitions to take the transformative use concept into account when considering factors two through four are part of the Campbell Court’s more general instruction that courts should not treat the fair use factors “in isolation, one from another.” Instead, the Court insisted, “[a]ll are to be explored, and the results weighted together, in light of the purposes of copyright.” But while the Court suggested in several instances such a broader role for the fourth factor, the Court failed to highlight factors two or three’s salience in any other part of the broader fair use inquiry. Instead,

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87 Id. at 586-88.
88 Id.
89 Id. at 590-94.
90 Id.
91 Id.
92 Id.
93 Id. at 578.
94 Id.
95 Id. at 580, n.14 (discussing the relevance of market substitution, the fourth factor’s
other than factor four, the Court reserved its especial attention for highlighting the transformative use’s impact on each of the fair use factors.

Courts since *Campbell* have increasingly taken these admonitions to heart in suffusing the entire fair use inquiry with inter-factor analyses, particularly with respect to the transformative use concept. Yet scholars studying fair use empirically have not tracked this reality, instead typically focusing on correlations between overall fair use win rates and win rates for each of the factors and some of the more important subfactors such as transformative use. The next section briefly reviews these studies and highlights some of this Article’s differences from them.

**B. Empirically Studying Fair Use**

One of the more influential empirical assessments of fair use is Barton Beebe’s 2008 study. Beebe’s study is important for a number of reasons. For our purposes, its primary importance stems from it being one of the first studies to systematically analyze fair use case law. In contrast to the “anecdotal” approach to studying fair use, where scholars analyze leading fair use cases and derive conventional wisdom about fair use from them, Beebe’s study analyzed 306 reported fair use opinions between 1978 and 2005, tracking a number of important metrics from each of those opinions. We do not include here a full summary of the metrics Beebe tracked, instead focusing on some of the more important ones in light of our study’s focus.

One important metric Beebe’s study tracked was correlations between fair use findings and each of the four fair use factors. For instance, Beebe’s study finds that winning factor four is highly correlated with an overall fair use victory. Similarly, winning factor one also correlates with high overall fair use win rates (though in Beebe’s study, factor one is less highly correlated concern, in the context of parody), 587 (highlighting the fourth factor’s relevance in factor three’s assessment at least twice).

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96 Netanel, *supra* note 11.


98 By “reported,” we take Beebe to mean reported by either Westlaw or Lexis, rather than only opinions reported as part of a hardcopy Federal reporter, which is one meaning of the term that is often used. We came to this conclusion by examining the spreadsheet Beebe used to track his opinions, which included a number of opinions that were unreported in this technical sense, but that Lexis and/or Westlaw did “report” within their databases. See, e.g., *What Is the Difference Between “Unpublished” and “Unreported” Cases?*, LEXIS ADVANCE, https://help.lexisnexis.com/tabula-rasa/newlexis/unpublishedunreported_reference?lbu=US&locale=en_US&audience=res (last visited July 17, 2018).

99 *Id.* at 552-54.

100 *Id.* at 584-86.

101 *Id.*
with the overall fair use outcome than factor four). Outcomes with respect to factors two and three, meanwhile, do not have as strong of a correlation with overall fair use outcomes, meaning that their resolution one way or the other may be less important to determining whether a use is fair.

But Beebe’s study goes beyond this macro view of fair use by delving into an analysis of which subfactors within each factor seem to drive the outcomes for each factor and, ultimately, the overall fair use question. As discussed supra, each factor of the fair use test includes various subfactors within them that courts often consider when resolving the fair use inquiry. Beebe’s study conducts regression analysis with respect to many of these subfactors, including the transformative use concept, to better isolate which subfactors carry the most influence in resolving factor and overall fair use factor decisions.

For instance, Beebe’s study shows that transformative use, when a court chooses to invoke the concept, plays a significant role in determining the outcome with respect to both factor one and the overall fair use inquiry. However, his study also indicates that a significant percentage of opinions fail to even reference the transformative use concept, let alone allow it to dictate resolution of the fair use analysis. He goes on to test other subfactors within factor one, as well as those relating to factors two and three, to better isolate the impact of each of those subfactors.

Beebe also notes that courts do not tend to “stampede” results, meaning that most opinions call each factor “as they see it.” Hence, for instance, rather than allowing a finding of fair use under factors one or four to dictate courts’ decisions on factors two and three, for the most part courts appear to simply decide each of those factors as the situation merits, even if a finding of fair use under factors one or four (or both) ultimately helps persuade the court to find fair use overall. Furthermore, Beebe specifically notes in his analysis of transformative use that a finding of transformative use typically does not result in courts conforming the rest of the factors to that finding—

102 Id.
103 Id.
104 Id. at 594-621.
105 Id.
106 Id. at 603-07.
107 Id.
108 Id. at 597-603 (assessing the commerciality subfactor), 607-09 (assessing the bad faith inquiry), 609-10 (assessing the preambular purposes inquiry), 611-12 (assessing the creative/factual distinction), 612-15 (assessing the published/unpublished inquiry), 615-16 (assessing the amount and substantiality of the use).
109 Id. at 588-93.
110 Id.
instead, they appear in most cases to decide the factors as they merit. 111

Yet a lack of stampeding, as Beebe defines it, does not mean that the transformative use concept (and other factors and subfactors within fair use more generally) do not influence the other factors’ outcomes, even when their outcomes differ from the transformative use outcomes. As discussed above, *Campbell* taught that courts should take into account the transformative use concept in assessing each of the fair use inquiry’s four factors. But there are a number of ways to do so without the type of stampeding that Beebe means. For instance, a court need not align the transformative use finding with the outcome of each of the other factors for de facto stampeding to occur. Courts may rule that a use is transformative and then, upon reviewing factor two, still decide that factor two disfavors fair use because the work is highly creative in nature. Yet in making such a ruling, the court may also rule that, in light of its transformative use finding, factor two carries very little weight in the overall fair use analysis. In fact, courts engage in this type of discounting frequently when a finding of transformative use coincides with uses of substantial portions of highly creative works. 112 Hence, stampeding by another name is often happening in such cases because the transformative use concept is still dictating resolution of those factors’ overall impact by effectively neutralizing them (whatever their outcomes may technically be). Yet Beebe’s and others’ studies fail to track this type of inter- and intra-factor influence, which questions this study, among others, addresses.

Subsequent to Beebe’s study, several other scholars took up the task of empirically assessing fair use and the transformative component thereof. Neil Netanel built on Beebe’s study by assessing five additional years of fair use case law. 113 Netanel distinguished between the cases chronologically in order to argue that the fair use case law is more consistent and predictable than previous studies suggest. 114 Beebe’s study, for instance, analyzed its 306 opinions as part of a single group of like cases, though Beebe did analyze some specific questions with chronological considerations in mind. 115 Netanel’s insight is that lumping together opinions from different time periods inevitably leads to a seeming lack of consistency and predictability because that approach fails to explicitly take into account dramatic shifts in the fair use doctrine, as articulated by the Supreme Court. 116

For instance, clumping pre-*Campbell* and post-*Campbell* cases together

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111 Id. at 606.
112 See supra notes 34-35 and accompanying text.
113 Netanel, supra note 11, at 731.
114 Id.
115 For instance, when assessing what percentage of opinions took transformative use into account, Beebe does distinguish between pre- and post-*Campbell* opinions. Beebe, supra note 10, at 605.
116 Netanel, supra note 11, at 731.
in an empirical analysis is bound to manifest greater variance than warranted because courts applied quite different fair use standards in each of those time periods.\textsuperscript{117} Hence, Netanel’s study focuses on cases from 2006-2010, a time period Netanel argues that the Supreme Court’s \textit{Campbell} teachings had finally become more established in the case law.\textsuperscript{118} And during this time period, his study argues that courts have become more consistent and predictable in applying the teachings of \textit{Campbell} in their fair use decisions.\textsuperscript{119} For example, Netanel shows that the transformative use concept has not only made more frequent appearances in recent fair use cases, but also seems to dictate more completely the overall fair use question in this time period (and, presumably, going forward).\textsuperscript{120}

While helpful, Netanel’s study still lacks the empirical depth that this Article provides. Missing from Netanel’s study, for instance, are metrics relating to how frequently transformative use influences resolution of other parts of the fair use analysis, as well as other data that we have collected relating to how courts define and apply the transformative use concept. Part II below examines how this Article addresses this and other empirical gaps. Furthermore, Netanel’s empirical investigation ends in 2010, since which time courts have decided nearly a decade of important fair use and transformative use cases.\textsuperscript{121}

Pamela Samuelson and Matthew Sag have also conducted empirical studies of the fair use doctrine subsequent to Beebe’s investigation. Samuelson’s study seeks to make greater sense of the seeming incoherence of fair use case law by creating a taxonomy of fair uses, or “policy-relevant clusters.”\textsuperscript{122} By creating this taxonomy, Samuelson shows that the seeming chaos of fair use case law exhibits a greater coherence than previous commentators had imagined.\textsuperscript{123} Part of her taxonomy focuses on transformative uses, and she points to considerations courts frequently take into account when deciding whether a use counts as transformative and fair use generally.\textsuperscript{124} Yet as with Beebe’s study, Samuelson’s study also fails to

\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 736-46.
\textsuperscript{120} Id.
\textsuperscript{121} As noted earlier, a student note recently looked at appellate fair use case law between 2010-2015, but that note focuses on a circuit split between the Second and Seventh Circuits, thus only focusing on appellate cases and a narrower range of data. \textit{See supra} note 25. Anthony Reece has also looked at appellate opinions since \textit{Campbell}, but, while useful, the questions his study focused on are narrower than those that we investigate. His data collection also ends in 2007. \textit{See} R. Anthony Reese, \textit{Transformativeness and the Derivative Work Right}, \textit{31 COLUM. J.L. & ARTS} 467, 485 (2008).
\textsuperscript{122} Samuelson, \textit{supra} note 16.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 2548-55.
systematically track the type of inter-factor (and subfactor) interactions that this study examines, as well as the other transformative use data that we’ve collected. Her study also ends nearly a decade ago.

In his study, Matthew Sag takes a different approach to studying fair use than Beebe and Samuelson. His study focuses on better predicting fair use outcomes based on case characteristics apparent to litigants prior to judicial resolution. For instance, rather than focus on fair use outcomes and correlating those outcomes to outcomes for each factor and subfactor, Sag seeks to identify characteristics of the purported fair use and the parties involved in the case that help predict whether the court will ultimately decide that the use is fair. His findings include the proposition that uses involving a “creative shift”—a partial proxy for transformative use—have significant predictive power as to whether a court will deem the use to be fair. “Direct commercial use”—another partial proxy for transformative use—also has significant predictive power as to whether a court will find a use to be fair, especially when combined with the “creative shift” consideration.

Sag’s findings are certainly helpful in isolating some of the impact of the transformative use concept and other factors within the fair use inquiry. But like the other studies discussed above, his study fails to explicitly and systematically capture the inter-factor influence that is apparent when reading fair use opinions. His findings are also based entirely on district court opinions between 1978 and 2011, and his proxies for transformative use certainly do not capture all types of uses that courts may deem transformative. Our study, in contrast, includes both district and appellate court opinions spanning the life of the transformative use concept. Furthermore, our study includes a number of other transformative use (and fair use) metrics that expand upon Sag’s and others’ earlier findings. The next Part lays out our methodology and presents our primary findings.

II. METHODOLOGY AND RESULTS

Below we provide details on our study’s methodology, followed by our most important findings.

A. Methodology

This Article’s analysis is based on the results of a Westlaw advanced

125 Sag, supra note 16.
126 Id. at 49-50.
127 Id. at 76-77.
128 Id.
129 Sag, supra note 16, at 52.
search for federal opinions containing the terms “fair use,” “copyright,” and “107” between January 1, 1990 and May 2, 2017. The initial search yielded 956 cases. Subsequently, we decided to eliminate all cases prior to January 1, 1991. We did so because the focus of our study is on the transformative use concept; realistically courts were unlikely to have adopted the concept into their fair use analyses before at least 1991, since Pierre Leval first coined the transformative use term late in 1990 in a now famous Harvard Law Review article.

We then further excluded opinions that mentioned the word “copyright” but did not concern an actual copyright issue, as well as opinions that mentioned but did not actually concern fair use. Of the remaining opinions, we then excluded a number of others from our analysis. In particular, we excluded opinions that failed to explicitly analyze at least two of the four fair use factors in rendering fair use decisions, since these conclusory opinions tended to provide us with little information behind the courts’ decisions.

We also excluded opinions with “non-substantive” fair use outcomes. These consist of opinions in which the court denied a party’s motion for dismissal or summary judgment because the court determined that too many outstanding factual issues remained for it to make a substantive determination. For instance, often a court denied a party’s motion for summary judgment on the issue of fair use because the court determined that it possessed insufficient evidence to decide the issue as a matter of law. Instead, the court punted the issue to the jury for additional fact-finding. One might reasonably view this is a fair use outcome—the use was fair if the court denied the plaintiff’s motion, or not fair if the court denied the

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130 To replicate this search, type `adv:copyright & “fair use” & 107` into the Westlaw search bar, or search for each term under Westlaw’s advanced search feature, with filters set to (1) Federal Cases Only, (2) “After 12-31-1989” and (3) “Before 05-03-2017.” These search terms are the same as those used by Barton Beebe in his earlier analysis. See Beebe, supra note 10, at 623. The validity of the search string was confirmed by consulting with two separate Westlaw research attorneys.

131 Note that replicating this search, even using the same time constraints, will yield a number greater than 956. For example, on March 21, 2018, this same search yielded 994 results. This is because Westlaw adds opinions—in this case, slip opinions—to its databases, months or even years after they are first written. Our March search contained twice as many slip opinions as the May search.


133 Barton Beebe made the same choice in his earlier study. See Beebe, supra note 10, at 623.

134 See, e.g., Basquiat v. Baghoomian, 1991 WL 253334 (S.D.N.Y. 1991) (“However, where, as here, numerous issues of material fact remain in dispute, summary judgment would be inappropriate on the infringement issue.”)

135 Id.
defendant’s. In fact, Beebe appears to follow this approach in his study.\(^{136}\)

We chose to exclude these types of cases because, in our view, the court in
denying these types of motions did not actually opine whether the use was
fair or not—instead, the court indicated in these situations that it could not
definitively say one way or the other due to outstanding factual issues that a
jury must further investigate and, ultimately, decide.

After excluding all of the above, we were left with 393 cases.\(^{137}\) Those
393 cases yielded six dissenting opinions and ten cases containing multiple
fair use opinions (e.g., separate opinions in the same case for different types
of uses). After including these opinions, our final tally consists of 417
opinions that include a substantive fair use outcome utilizing at least two of
the four fair use factors in rendering their opinions.

We then catalogued each of the 417 opinions based on 70 factors,
including whether the court discussed the transformative use concept and
outcomes for each fair use factor and some of the more important subfactors
such as transformative use. We also analyzed whether any factor (or the
subfactors of factor one, including transformative use) affected resolution of
the other fair use factors. We then summarized the data using well-known
statistical tools.\(^{138}\) Section II.B below presents our main findings.

Before turning to our results, we note several general limitations of this
study. First, our data analysis is constrained by the reality that Westlaw may
not provide access to the entire population of relevant fair use opinions. The
company chooses to exclude some opinions from its database, and it may
never even encounter yet other opinions.\(^{139}\) Furthermore, no combination of
available databases is likely to change this reality, since judges may simply
choose not to make some of their opinions available.\(^{140}\) As a result, we are
left with a potentially imperfect universe of opinions for the 1991-2017 time
period of our study. We still elected to treat that universe as census data (i.e.,
the entire population of opinions meeting our criteria) rather than a sample,
since labeling something a probability sample entails random selection from
a population, and there is certainly nothing random about our or Westlaw’s

\(^{136}\) See Beebe, supra note 10, at 585.

\(^{137}\) These cases include those reported in a hardcopy federal reporter, as well as
unpublished and unreported cases that Westlaw nonetheless made available through its
electronic database.

\(^{138}\) The authors consulted with a statistician after developing a basic analytical approach
to this research. The authors used several R packages (v. 3.5.1) in summarizing these data,
including “Stargazer.” See Marek Hlavac, Stargazer: Well-Formatted Regression and

\(^{139}\) See generally Ellen Platt, Unpublished vs. Unreported: What’s the Difference?, 5
PERSPECTIVES 26 (1996) (discussing how Westlaw and Lexis choose which opinions go into
their databases).

\(^{140}\) Id. at 27.
selection criteria. Because of this lack of randomization, we were reluctant to employ statistical tests of significance to our data that depend on a random sample being present. Hence, with a few exceptions, we present our results as metrics relating to the entire population of opinions meeting our criteria at the time of our Westlaw search, with the caveat that it is possible that Westlaw does not include some relevant opinions.

Second, as with previous studies, our opinion data are not representative of all fair use opinions because of the parameters we set. For instance, we chose to only include those opinions that rely on at least two of the four fair use factors in rendering a substantive fair use outcome. While we believe this choice has merit, it does mean that some selection bias is inherent in our data. Furthermore, the opinions in our dataset are not representative of cases before 1991. We actually think this latter limitation is a virtue in some ways, though, since fair use law prior to 1991 is arguably increasingly irrelevant given the transformative use paradigm’s ascendance.

Indeed, despite these limitations, we feel confident that our study’s results provide a number of important insights about the fair use and transformative use doctrines’ evolution. We believe our dataset includes practically all relevant opinions for the specified time period, since Westlaw focuses on including all substantive cases in its database and attempts to be thorough in doing so. Furthermore, whatever else might be said, opinions reported through services like Westlaw remain “the most salient indication of what fair use doctrine is.” With these thoughts in mind, we proceed to our results.

B. Results

In the following sections, we present evidence supporting our argument that transformative use is eating the world of fair use. This evidence consists of at least the following two realities. First, increasingly more courts rely on

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143 The exceptions apply where we conducted regression analysis. In those cases, we treated our data as a sample of a theoretical infinite population.

144 Pratt, supra note 139.

145 Netanel, supra note 11, at 733.

146 See id. at 730-34 for a helpful overview of biases inherent in this type of study in general.
the transformative use concept in their opinions. And second, when a court uses the transformative use concept, the doctrine more often than not dictates the court’s analysis of the remaining factors and, ultimately, the overall fair use outcome.\textsuperscript{147}

1. How Frequently Do Courts Consider Transformative Use?

One important figure to consider at the outset is the percentage of opinions that actually employ the transformative use concept. After all, if a large proportion of courts fail to even utilize the transformative use doctrine in their opinions, it becomes difficult to argue that transformative use is eating the fair use world.

In his earlier study, Beebe makes precisely this point, arguing that commentators have exaggerated the extent to which the transformative use paradigm dictates fair use case law.\textsuperscript{148} He backs up this claim by highlighting that about 41\% of post-	extit{Campbell} district court opinions in his dataset fail to invoke the transformative use concept, while 18.6\% of post-	extit{Campbell} appellate opinions omit a discussion of transformative use.\textsuperscript{149} He also indicates that “the [transformative use] doctrine appears to be losing strength,” pointing out that the relative number of opinions utilizing the doctrine began to decline in the early 2000\textsuperscript{s}.\textsuperscript{150}

In his follow-up study to Beebe, Neil Netanel argues that part of the reason behind Beebe’s results is that Beebe’s study collects aggregate data that include periods of time when the transformative use paradigm was not yet fully entrenched in the case law.\textsuperscript{151} In support of this point, Netanel indicates that the percentage of opinions making use of the transformative use concept has dramatically risen since Beebe’s study, particularly between 2006-2010, when 85.5\% of district court opinions and 93.75\% of appellate opinions in his dataset embraced the transformative use paradigm.\textsuperscript{152}

Before looking at our data, we note a general disagreement with Beebe’s interpretation of his own dataset. In our view, the fact that over 81\% of post-	extit{Campbell} appellate opinions and nearly 60\% of district court opinions in his dataset explicitly considered transformative use is actually strong evidence that transformative use is one of the most dominant considerations in fair use.

\textsuperscript{147} It should be noted that many of the statistics that we offer in support of this argument are correlations, and we do not mean to suggest that the correlations that we report somehow are equivalent to causation. We will discuss this issue in greater detail below, in particular when we report our regression results.

\textsuperscript{148} Beebe, \textit{supra} note 10, at 604-05.

\textsuperscript{149} \textit{Id}.

\textsuperscript{150} \textit{Id}.

\textsuperscript{151} Netanel, \textit{supra} note 11, at 736-37.

\textsuperscript{152} \textit{Id}.
case law. Transformative use may not play a role in every fair use case for any number of reasons. But that is no different than for any other factor or subfactor within the fair use inquiry—in our review of fair use case law, courts often chose to omit various factors and subfactors from their fair use discussions. The fact that transformative use shows up in fair use discussions so frequently, despite neither the Supreme Court nor the Copyright Act mandating it, is thus evidence of its significance.

Of the 417 fair use opinions in our dataset, 319 are district court opinions, and 98 are appellate opinions. Overall, courts discussed transformative use in 292 (70.02%) of all our opinions. When excluding pre-Campbell opinions, the overall percentage of opinions that considered transformative use rises to 77.30%. The overall percentages were slightly higher for appellate opinions (71/98, or 72.45%) than district court ones (221/319, or 69.28%). Like some previous scholars, we included a few opinions that applied the transformative use concept, even if those opinions didn’t explicitly use the term. Table 1 below summarizes these findings.

Table 1. Breakdown of Fair Use Opinions by Court Level and Use of the Transformative Use Doctrine.

<table>
<thead>
<tr>
<th>Court Level</th>
<th>Fair Use Opinions</th>
<th>Trans. Use Opinions</th>
<th>% Trans. Use Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>District</td>
<td>319</td>
<td>221</td>
<td>69.28%</td>
</tr>
<tr>
<td>Appellate</td>
<td>98</td>
<td>71</td>
<td>72.45%</td>
</tr>
<tr>
<td>Total</td>
<td>417</td>
<td>292</td>
<td>70.02%</td>
</tr>
</tbody>
</table>

District courts in our dataset used the transformative use concept more frequently than the post-Campbell district court opinions in Beebe’s study (about eleven percentage points higher). This result is perhaps unsurprising since, as Netanel argued subsequent to Beebe’s study, it took some time for the transformative use paradigm to become more fully entrenched in the case law. Hence, since our dataset includes nearly twenty-three years of opinions subsequent to the Supreme Court endorsing the term (compared to just eleven in Beebe’s study), it is reasonable to expect a rise in the percentage of opinions that embrace the transformative use concept.

153 One important reason is that the Supreme Court did not absolutely mandate it, indicating that “transformative use is not absolutely necessary for a finding of fair use.” Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 579 (1994). For this reason, litigants may not even raise the issue, and courts may therefore not consider it in their opinions.

154 Netanel, supra note 11, at 736-37.

155 Netanel, supra note 11.
Furthermore, our inclusion of some opinions prior to *Campbell* suppressed our increased percentages for district court opinions some.\(^{156}\) We included these opinions in our overall dataset because, though the Supreme Court had yet to endorse the transformative use term during this time period, Pierre Leval had coined the term, and some courts had begun to utilize the doctrine.\(^{157}\) Hence, we believed opinions from this time period belonged in a larger study about the transformative use doctrine’s evolution from birth to the present. But for purposes of comparison to Beebe’s earlier findings, removing cases in our dataset prior to *Campbell* results in about 77% of district court opinions considering transformative use in their fair use analyses, an 18% jump from Beebe’s earlier results. Since *Campbell*, then, over three-quarters of all district court opinions took into account transformative use, an impressive feat given the transformative use concept’s non-statutory and non-Supreme Court mandated status.

Our percentages for district court opinions are lower than Netanel’s (69.28% for our entire dataset and about 77% post-*Campbell* compared to 85.5% for the 2006-2010 timeframe that he focuses on). The lower percentage for our entire dataset when compared to Netanel’s results does not seem surprising, since, as discussed earlier, our entire dataset includes opinions from earlier periods when the transformative use concept was not yet fully entrenched in the case law. Furthermore, even our post-*Campbell* results include eleven years of opinions (1995-2005) in which Netanel argues that courts were still in the process of embracing the transformative use paradigm.\(^{158}\) It was only after 2006, according to Netanel, that courts experienced more widespread conversion to the transformative use standard.\(^{159}\)

Our own data tell a somewhat different story at the district court level. For instance, for the 2006-2010 time period, our data indicate that 78.33% (47/60) of the district court opinions adopted the transformative use concept. Of course, this difference between our data and Netanel’s (85.5%) for the same time period is, in reality, slight—the relatively few number of district court opinions during the time period means that changing a few opinions either way would make the percentages between our data and his nearly identical.

Nonetheless, the slight differences between our findings and Netanel’s

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\(^{156}\) We nonetheless included opinions from these years since Pierre Leval had introduced the transformative use concept to the legal community, and some courts had begun using it prior to the Supreme Court’s endorsement of the term.


\(^{158}\) Netanel, *supra* note 11, at 754.

\(^{159}\) *Id.*
could owe to any number of factors, including the fact that we limited ourselves to “substantive” opinions where the opinion author ultimately opined whether the use was fair.\textsuperscript{160} We also made other opinion selection choices that we believe are merited, but that differ from those of previous scholars, and those choices may certainly have affected this (and other) results of our study.\textsuperscript{161}

Furthermore, we also note that databases such as Westlaw and Lexis continuously update their repositories with additional opinions. Hence, when dealing with a broad area of case law such as fair use, these databases are likely to yield different results when searches occur at different times, even when otherwise using identical search terms.\textsuperscript{162} This, too, may account for some of the discrepancies between our results and those of earlier studies.\textsuperscript{163}

We do note that in the time period subsequent to Netanel’s study (2011-2017), 90.57% (96/106) of district court opinions in our dataset utilized the transformative use concept. Hence, this later data indicate that in the last six years in particular, district courts have more fully embraced the transformative use concept than ever before. Transformative use may not always eat the world at the district court level, but in at least the last six years, it almost always has a seat at the district court table.

Our appellate opinion data also present some interesting contrasts to previous studies. Beebe’s post-\textit{Campbell} appellate opinions employed the transformative use concept 81.4% of the time, whereas appellate opinions in our overall dataset utilized the concept 72.45% of the time. This result seems strange given the reasons we discussed above regarding why it was reasonable to expect district court opinion percentages to rise: our data include nearly twenty-three years of post-\textit{Campbell} opinions, when courts are said to have more fully adopted the transformative use concept, compared to Beebe’s eleven years of such opinions. Indeed, Netanel’s study shows that in

\textsuperscript{160} We discussed this issue above in our methodology section, and we think this choice has merit since it is difficult, in our opinion, to characterize denial of a motion as a fair use outcome when the denial occurs, not because the opinion author decided whether the use is fair, but instead because the opinion author doesn’t believe she has enough information to actually make that determination.

\textsuperscript{161} For example, both Beebe and Netanel exclude from their datasets for certain purposes uncrossed motions for summary judgment. Netanel, \textit{supra} note 11, at 751-52.

\textsuperscript{162} We confirmed this reality with several Westlaw representatives. We also confirmed it by conducting the same search we performed on May 2, 2017 nearly a year later. The results a year later yielded quite a few more cases than our May 2, 2017 search.

\textsuperscript{163} This same reality means that our census data likely have some gaps, as discussed above. Nonetheless, we still believe treating our findings as census data rather than a sample is the better approach. Neither approach is perfect, but using statistical tests designed for random samples on a non-random sample is bound to result in errors. Our census may be missing some cases, but we’d be surprised if those missing cases ultimately affected our results much if they were, in fact, located and included.
the years following the end of Beebe’s study (2006) until 2010, 93.75% of appellate opinions employed the transformative use concept.\textsuperscript{164} Our own data for the 2006-2010 time period indicate that 87.5% (14/16) of appellate opinions considered transformative use, a result quite close to Netanel’s. Since our dataset includes these years as well as nearly seven additional years until May 2017, one might reasonably expect our appellate opinion percentages to surpass those of Beebe’s study. Instead, they are about 9% lower than his.

Part of this result is attributable to the fact that our dataset includes some opinions prior to the \textit{Campbell} decision. When we exclude these, the percentage of appellate opinions that employ the transformative use concept rises from about 72% to 79.31% (69/87 opinions), a result quite close to Beebe’s. Yet our district court opinion percentages rose relative to Beebe’s despite inclusion of these earlier opinions in our larger dataset. Another possible explanation is that in the time period 2011-2017, appellate opinions used the transformative use concept less frequently than in the 2006-2010 time period. And our data confirm this: during the 2011-2017 time period, twenty out of twenty-six appellate opinions (76.92%) employed the transformative use concept, a lower percentage than the percentage both we and Netanel found between 2006-2010.

While appellate opinions may have regressed to the mean somewhat following the 2006-2010 transformative use bonanza, we still note that over three-quarters of recent appellate opinions utilize the transformative use concept, an impressive feat given that neither the Copyright Act nor the Supreme Court mandate its inclusion in fair use discussions. Combined with the recent over 90% clip at which district courts take transformative use into account, nearly 88% of all opinions (116/132) during the 2011-2017 time period considered transformative use. It is thus clear that the transformative use concept is a crucial consideration in the vast majority of modern fair use opinions. Indeed, only a few outlier opinions omit it from their fair use deliberations. Figure 1 below depicts this aggregate data graphically for the 2011-2017 time period. Note that for 2017, our data cut off in early May.

\textsuperscript{164} Netanel, \textit{supra} note 11, at 736.
2. Which Circuits Utilize Transformative Use the Most?

It is also worth considering whether particular circuits embrace the transformative use paradigm more than others. Similar to previous studies, opinions from courts within the Second and Ninth Circuits dominate our study. A little over 25% of our opinions (106/417) come from district and appellate courts within the Second Circuit, where Pierre Leval, the transformative use concept’s originator, currently resides as a senior circuit judge. Meanwhile, nearly 30% (124/417) of our opinions come from courts within the Ninth Circuit. The next closest is the Fourth Circuit (7.43% of the opinions we studied). Table 2 below provides these and additional details.

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165 Beebe, supra note 10, 568-69.
Table 2. Number of Fair Use Opinions by Circuit.

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Number of Opinions</th>
<th>Percentage of Total Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Cir.</td>
<td>15</td>
<td>3.60%</td>
</tr>
<tr>
<td>2d Cir.</td>
<td>106</td>
<td>25.42%</td>
</tr>
<tr>
<td>3d Cir.</td>
<td>16</td>
<td>3.84%</td>
</tr>
<tr>
<td>4th Cir.</td>
<td>31</td>
<td>7.43%</td>
</tr>
<tr>
<td>5th Cir.</td>
<td>15</td>
<td>3.60%</td>
</tr>
<tr>
<td>6th Cir.</td>
<td>30</td>
<td>7.19%</td>
</tr>
<tr>
<td>7th Cir.</td>
<td>23</td>
<td>5.52%</td>
</tr>
<tr>
<td>8th Cir.</td>
<td>10</td>
<td>2.40%</td>
</tr>
<tr>
<td>9th Cir.</td>
<td>124</td>
<td>29.74%</td>
</tr>
<tr>
<td>10th Cir.</td>
<td>12</td>
<td>2.88%</td>
</tr>
<tr>
<td>11th Cir.</td>
<td>29</td>
<td>6.49%</td>
</tr>
<tr>
<td>D.C. Cir.</td>
<td>3</td>
<td>0.72%</td>
</tr>
<tr>
<td>Fed. Cir.</td>
<td>3</td>
<td>0.72%</td>
</tr>
<tr>
<td>Total</td>
<td>417</td>
<td>100.00%</td>
</tr>
</tbody>
</table>

Figure 2 provides a graphical depiction of how much the Second and Ninth Circuit dominate fair use case law in our dataset.

While the Ninth and Second Circuits dominate fair use case law, opinions from courts in those circuits have not universally adopted the transformative
use paradigm. Our data indicate that courts within the Second Circuit utilize transformative use in 75.47% of their opinions, while courts within the Ninth Circuit do so at a nearly identical 76.61% clip. We might expect that opinions emanating from courts in the Second Circuit in particular would have even higher percentages of transformative use adoption, since the concept’s originator, Pierre Leval, is a senior judge on that Circuit. But it appears that about a quarter of the time, Judge Leval’s colleagues choose to ignore his opus magnum. It is worth noting, however, that these overall percentages increase for opinions from both circuits when excluding pre-Campbell opinions: nearly 87% for opinions from within the Second Circuit and nearly 83% for opinions from within the Ninth Circuit.

When looking at opinions from other circuits, the percentage of opinions that adopt the transformative use paradigm seem somewhat sporadic. The next four circuits in terms of volume are the Fourth (31 opinions), Sixth (30), Eleventh (29), and Seventh (23) Circuits. Adoption rates in the Seventh (73.91%) and Eleventh (72.41%) Circuits are similar to those found within the Second and Ninth Circuits. In the Sixth Circuit, a little over half the opinions adopt the transformative use paradigm (53.33%), while in the Fourth Circuit, 61.29% of the opinions do. However, the small number of opinions within these (and the remaining) Circuits makes drawing broad conclusions based on these percentages difficult. Table and Figure 3 below summarize these findings.

**Table 3. Number and Percentage of Transformative Use Opinions by Circuit.**

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Fair Use Opinions</th>
<th>Trans. Use Opinions</th>
<th>% Trans. Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Cir.</td>
<td>15</td>
<td>11</td>
<td>73.33%</td>
</tr>
<tr>
<td>2d Cir.</td>
<td>106</td>
<td>80</td>
<td>75.47%</td>
</tr>
<tr>
<td>3d Cir.</td>
<td>16</td>
<td>12</td>
<td>75.00%</td>
</tr>
<tr>
<td>4th Cir.</td>
<td>31</td>
<td>19</td>
<td>61.29%</td>
</tr>
<tr>
<td>5th Cir.</td>
<td>15</td>
<td>7</td>
<td>46.67%</td>
</tr>
<tr>
<td>6th Cir.</td>
<td>30</td>
<td>16</td>
<td>53.33%</td>
</tr>
<tr>
<td>7th Cir.</td>
<td>23</td>
<td>17</td>
<td>73.91%</td>
</tr>
<tr>
<td>8th Cir.</td>
<td>10</td>
<td>7</td>
<td>70.00%</td>
</tr>
<tr>
<td>9th Cir.</td>
<td>124</td>
<td>95</td>
<td>76.61%</td>
</tr>
<tr>
<td>10th Cir.</td>
<td>12</td>
<td>4</td>
<td>33.33%</td>
</tr>
<tr>
<td>11th Cir.</td>
<td>29</td>
<td>21</td>
<td>72.41%</td>
</tr>
<tr>
<td>D.C. Cir.</td>
<td>3</td>
<td>1</td>
<td>33.33%</td>
</tr>
<tr>
<td>Fed. Cir.</td>
<td>3</td>
<td>2</td>
<td>66.67%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>417</strong></td>
<td><strong>292</strong></td>
<td><strong>70.02%</strong></td>
</tr>
</tbody>
</table>
Suffice it to say that these data, on their own, may not tell us as much as we’d like about how courts within different circuits approach the transformative use question. But supplementing them with other information gleaned from the opinions can. For instance, while opinions in the Seventh and Second Circuits appear to adopt the transformative use paradigm in near equal measure, judges in the Seventh Circuit have recently begun to criticize overreliance on the transformative use concept, identifying the Second Circuit as the fosterer of this erroneous emphasis. In fact, some of the opinions from the Seventh Circuit that use the transformative use concept (and thus count towards increasing the Seventh Circuit’s adoption rate) mostly do so in order to criticize the role the doctrine plays in fair use jurisprudence, in several instances labeling the term “confusing.” Hence, opinion data spanning the transformative use concept’s entire history mask a growing divergence in approaches to transformative use, with the Seventh Circuit in particular appearing to be moving away from the concept. If these divergences continue, they may ultimately force the Supreme Court to revisit

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167 See, e.g., Campinha-Bacote v. Evansville Vanderburgh School Corp., 2015 WL 12559889 1, 4 (S.D. Ind. 2015); Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758–59 (7th Cir. 2014); Ty, Inc. v. Publications Intern’l Ltd., 292 F.3d 512, 518 (7th Cir. 2002) (indicating that the transformative use term is “confusing”).
168 Id.
the fair use doctrine and transformative use concept within it, something the Court hasn’t done since its 1994 *Campbell* decision.

3. What Sources Do Courts Use in Defining and Applying the Transformative Use Concept?

Much has been made about what the transformative use term even means. The Supreme Court’s definition in *Campbell*—a use that “alter[s] the original with new expression, meaning, or message”—is quite open-ended. Furthermore, the *Campbell* Court applied the transformative use concept in the specific context of a parody. But most subsequent courts have been forced to apply the transformative use doctrine outside of that context. In fact, our data show that of the 292 transformative use opinions, only about 14% (42) grappled specifically with whether the use involved parody. Hence, courts following in *Campbell*’s transformative use wake have necessarily wrestled with refining the concept in a variety of non-parodic contexts.

In doing so, what sources have courts relied on? The *Campbell* decision is one obvious candidate, and our data confirm that nearly 86% of transformative use opinions cite to *Campbell* in applying the transformative use concept. By comparison, Pierre Leval, the party responsible for coining the phrase, is cited to in only about 15% of the opinions that we studied. As the saying goes, “here today, gone tomorrow.”

Given the Second and Ninth Circuit’s significant shares of fair use and transformative use opinions, it is also worth investigating to what extent other circuits follow their transformative use lead. As noted above, the Seventh Circuit in particular has recently pushed back against the Second Circuit’s approach to transformative use. But do other circuits, including the Seventh Circuit, rely on opinions emanating from the Second and Ninth Circuits in defining and applying transformative use in their own cases? The answer is in the affirmative. Nearly 38% of opinions emanating from courts outside the Second Circuit cite to Second Circuit case law when defining and applying the transformative use concept. When adding the Second Circuit’s self-citations to its own transformative use case law, the percentage rises to nearly 47%. Courts within the Ninth Circuit, itself a heavyweight in defining the transformative use doctrine, cite to the Second Circuit a little over 32% of the time. And even courts within the Seventh Circuit, the Second Circuit’s self-declared transformative use antagonist, cite to Second Circuit case law about 59% of the time when defining and applying transformative use.

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169 See, e.g., Netanel, *supra* note 11, 746-47 (summarizing some of this literature).
171 *Id.*
the transformative use doctrine. In fact, courts within the Seventh Circuit cite Second Circuit transformative case law more frequently than their own.

The Ninth Circuit also boasts a significant percentage of opinions outside of it relying on its transformative use case law: a little over 27% of non-Ninth Circuit opinions cite to Ninth Circuit case law when defining and applying the transformative use concept. When self-citations are factored in, Ninth Circuit case law is cited in a little over 41% of all transformative use opinions. The Second Circuit also fairly regularly patronizes Ninth Circuit case law when defining and applying transformative use, with nearly 24% of Second Circuit court opinions citing to Ninth Circuit transformative use opinions. Overall, when we look at the entire set of non-Ninth and Second Circuit opinions, over 55% of them rely on either Ninth Circuit or Second Circuit opinions (or both) in defining and applying the transformative use doctrine. Table 4 below provides a breakdown of how often courts within each Circuit cite to various sources in defining and applying transformative use.

Table 4. Percentage of Opinions by Circuit That Cite to Various Transformative Use Sources.

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Acuff</th>
<th>S.Ct.</th>
<th>Other</th>
<th>Leval</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
<th>9</th>
<th>10</th>
<th>11</th>
<th>DC</th>
<th>Fed.</th>
<th>Other</th>
</tr>
</thead>
<tbody>
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<td>1</td>
<td>82%</td>
<td>55%</td>
<td>0%</td>
<td>27%</td>
<td>36%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>9%</td>
<td>0%</td>
<td>27%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>2</td>
<td>91%</td>
<td>11%</td>
<td>39%</td>
<td>1%</td>
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<td>3%</td>
<td>7%</td>
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<td>1%</td>
<td>8%</td>
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<td>24%</td>
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<td>5%</td>
<td>0%</td>
<td>0%</td>
<td>9%</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>83%</td>
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<td>8%</td>
<td>8%</td>
<td>17%</td>
<td>25%</td>
<td>8%</td>
<td>0%</td>
<td>0%</td>
<td>8%</td>
<td>0%</td>
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<td>68%</td>
<td>16%</td>
<td>26%</td>
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<td>50%</td>
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</tr>
<tr>
<td>9</td>
<td>84%</td>
<td>8%</td>
<td>5%</td>
<td>11%</td>
<td>33%</td>
<td>2%</td>
<td>4%</td>
<td>0%</td>
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<td>1%</td>
<td>0%</td>
<td>69%</td>
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<td>15%</td>
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<td>1%</td>
<td>3%</td>
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</tr>
<tr>
<td>10</td>
<td>100%</td>
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<td>0%</td>
<td>0%</td>
<td>50%</td>
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<td>0%</td>
<td>0%</td>
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<td>0%</td>
<td>0%</td>
<td>0%</td>
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<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>76%</td>
<td>5%</td>
<td>0%</td>
<td>14%</td>
<td>29%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>33%</td>
<td>0%</td>
<td>38%</td>
<td>0%</td>
<td>0%</td>
<td>5%</td>
</tr>
<tr>
<td>DC</td>
<td>100%</td>
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<td>0%</td>
<td>0%</td>
<td>0%</td>
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<td>0%</td>
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<td></td>
</tr>
<tr>
<td>Fed.</td>
<td>100%</td>
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<td>0%</td>
<td>0%</td>
<td>100%</td>
<td>0%</td>
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<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Total</td>
<td>86%</td>
<td>11%</td>
<td>15%</td>
<td>7%</td>
<td>47%</td>
<td>3%</td>
<td>8%</td>
<td>0%</td>
<td>3%</td>
<td>7%</td>
<td>1%</td>
<td>41%</td>
<td>0%</td>
<td>5%</td>
<td>0%</td>
<td>0%</td>
<td>5%</td>
<td></td>
</tr>
</tbody>
</table>

As Table 4 shows, no other circuits come close to the Second and Ninth Circuit in terms of how frequently other circuits cite their transformative use case law. For instance, the Seventh Circuit’s deemphasis of the transformative use doctrine remains a clear minority position, at least as shown by how infrequently courts outside the Seventh Circuit cite to Seventh Circuit transformative use case law (about 3% of the time; self-citations
within the Seventh Circuit double that Circuit’s percentage to a little over 6%). This low rate is not terribly surprising, in part because the Seventh Circuit’s push against the transformative use doctrine is of somewhat recent origin. Courts from other circuits may eventually choose to follow the Seventh Circuit’s lead. But, at least for now, the Second and Ninth Circuits are the clear leaders in defining and applying the transformative use doctrine, both within their own circuits and more broadly.

Some circuits don’t even have their own transformative use case law on which to rely. For instance, our dataset only includes ten opinions from courts within the Eighth Circuit, all of which are district court opinions. Seven of these ten opinions apply the transformative use concept, and only two of those seven cite to Eighth Circuit case law when doing so. Each of those citations, furthermore, is to a sole Eighth Circuit district court opinion; apparently the Eighth Circuit has never issued a transformative use appellate opinion worthy of citation by Eighth Circuit courts. Indeed, it is astonishing that in the nearly twenty-six years that this study spans, not once has the Eighth Circuit issued an appellate opinion applying the transformative use doctrine. Meanwhile, Fifth Circuit case law has never been cited in defining and applying the transformative use doctrine, even within the Fifth Circuit itself.

Hence, when modern courts discuss what “transformative use” means, they more often than not do so in the context of the Campbell definition, as further refined by courts within the Second and Ninth Circuits. We will discuss below in greater detail data that helps us better understand what exactly that means. But for now, suffice it to say that the Ninth and Second Circuits dominate that discussion relative to other circuits, such as the Seventh, that may wish to have a greater say in the matter.

4. When Courts Use the Transformative Use Concept, What Role Does It Play?

a. Transformative Use by the Numbers

Having examined how frequently courts utilize transformative use and

172 The first opinion from a court within the Seventh Circuit that we can find that appears to put the transformative use doctrine in question is Ty, Inc. v. Publications Int’l, Ltd., 81 F. Supp. 2d 899 (N.D. Ill. 2000) (calling use of the transformative use concept “confusing”). But calling something confusing is not a clear renunciation of the concept. That renunciation comes across most clearly in Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014) (criticizing the Second Circuit’s emphasis on transformative use, while expressing the opinion that “we think it best to stick with the statutory list”).

what sources they rely on, we now turn to some of the most important findings in our study: how frequently do transformative users win?

Overall, 52.04% of our opinions (217/417) found the use to be fair. Table 5 breaks this total out by which Circuit the opinion writer sits in, whether district or appellate court. Overall win rates in the Second Circuit are above average (58.49%), while in the Ninth Circuit, fair use win rates are below average (48.39%). Astonishingly, opinions emanating from courts within the Fourth Circuit show a nearly 75% overall fair use win rate during the time period of our study.

Table 5. Overall Fair Use Win Rates by Circuit.

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Not Fair</th>
<th>Fair</th>
<th>Total</th>
<th>Win Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Cir.</td>
<td>8</td>
<td>7</td>
<td>15</td>
<td>46.66%</td>
</tr>
<tr>
<td>2d Cir.</td>
<td>44</td>
<td>62</td>
<td>106</td>
<td>58.49%</td>
</tr>
<tr>
<td>3d Cir.</td>
<td>9</td>
<td>7</td>
<td>16</td>
<td>43.75%</td>
</tr>
<tr>
<td>4th Cir.</td>
<td>8</td>
<td>23</td>
<td>31</td>
<td>74.19%</td>
</tr>
<tr>
<td>5th Cir.</td>
<td>9</td>
<td>6</td>
<td>15</td>
<td>40.00%</td>
</tr>
<tr>
<td>6th Cir.</td>
<td>14</td>
<td>16</td>
<td>30</td>
<td>53.33%</td>
</tr>
<tr>
<td>7th Cir.</td>
<td>12</td>
<td>11</td>
<td>23</td>
<td>47.83%</td>
</tr>
<tr>
<td>8th Cir.</td>
<td>6</td>
<td>4</td>
<td>10</td>
<td>40.00%</td>
</tr>
<tr>
<td>9th Cir.</td>
<td>64</td>
<td>60</td>
<td>124</td>
<td>48.39%</td>
</tr>
<tr>
<td>10th Cir.</td>
<td>8</td>
<td>4</td>
<td>12</td>
<td>33.33%</td>
</tr>
<tr>
<td>11th Cir.</td>
<td>14</td>
<td>15</td>
<td>29</td>
<td>51.72%</td>
</tr>
<tr>
<td>D.C. Cir.</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>0.00%</td>
</tr>
<tr>
<td>Fed. Cir.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>66.67%</td>
</tr>
<tr>
<td>Total</td>
<td>200</td>
<td>217</td>
<td>417</td>
<td>52.04%</td>
</tr>
</tbody>
</table>

Of the opinions that utilized the transformative use concept, the win-rate was nearly identical (51.71%) to the overall fair use win rate in our dataset. Hence, the mere fact that an opinion discusses transformative use does not appear to increase a party’s odds that the opinion’s author will find the use to be fair. In fact, win rates in some Circuits are actually lower when the court considers transformative use. Fair use win rates in the Second Circuit, for instance, are more than 2% lower when only looking at transformative use opinions than when examining the combined fair use win rate in the Second Circuit. In fact, when only looking at Second Circuit opinions that do not take transformative use into account, the win rate is a little over 65%. 

174 In fact, when only looking at Second Circuit opinions that do not take transformative use into account, the win rate is a little over 65%.
don’t. Even the Fourth Circuit’s high fair use win rate dips slightly (to 73.68%) when taking into account only those opinions that address the transformative use concept.

Hence, transformative use may be eating the fair use world by playing a role in increasingly more fair use opinions. But our data, on their face, do not suggest that when courts rely on the transformative use concept, the fair use outcome is predetermined in any way. Table 6 below breaks out by Circuit overall fair use win rates for only opinions that utilize the transformative use doctrine by Circuit, regardless of whether the opinion found the use transformative.

Table 6. Overall Fair Use Win Rates by Circuit in Opinions That Consider Transformative Use.

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Transformative Use Opinions</th>
<th>Not Fair</th>
<th>Fair</th>
<th>Win Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Cir.</td>
<td>11</td>
<td>7</td>
<td>4</td>
<td>36.36%</td>
</tr>
<tr>
<td>2d Cir.</td>
<td>80</td>
<td>35</td>
<td>45</td>
<td>56.25%</td>
</tr>
<tr>
<td>3d Cir.</td>
<td>12</td>
<td>8</td>
<td>4</td>
<td>33.33%</td>
</tr>
<tr>
<td>4th Cir.</td>
<td>19</td>
<td>5</td>
<td>14</td>
<td>73.68%</td>
</tr>
<tr>
<td>5th Cir.</td>
<td>7</td>
<td>3</td>
<td>4</td>
<td>57.14%</td>
</tr>
<tr>
<td>6th Cir.</td>
<td>16</td>
<td>8</td>
<td>8</td>
<td>50.00%</td>
</tr>
<tr>
<td>7th Cir.</td>
<td>17</td>
<td>8</td>
<td>9</td>
<td>52.94%</td>
</tr>
<tr>
<td>8th Cir.</td>
<td>7</td>
<td>4</td>
<td>3</td>
<td>42.86%</td>
</tr>
<tr>
<td>9th Cir.</td>
<td>95</td>
<td>49</td>
<td>46</td>
<td>48.42%</td>
</tr>
<tr>
<td>10th Cir.</td>
<td>4</td>
<td>3</td>
<td>1</td>
<td>25.00%</td>
</tr>
<tr>
<td>11th Cir.</td>
<td>21</td>
<td>9</td>
<td>12</td>
<td>57.14%</td>
</tr>
<tr>
<td>D.C. Cir.</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0.00%</td>
</tr>
<tr>
<td>Fed. Cir.</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>50.00%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>292</strong></td>
<td><strong>141</strong></td>
<td><strong>151</strong></td>
<td><strong>51.71%</strong></td>
</tr>
</tbody>
</table>

None of this is to suggest, however, that the transformative use outcome is immaterial to the overall fair use determination. Far from it. Of the 292 opinions that made use of the transformative use concept, 145 found the use to be transformative (49.66%). Of these 145 opinions, 133 (91.72%) also found the overall outcome to be fair. In the two most important copyright circuits—the Ninth and the Second—the win rates for transformative users are even higher. In other circuits, the win rates for transformative users are one hundred percent. Table 7 below breaks these opinions out by the circuit in which the opinion writer sits.
Table 7. Win Rates by Circuit for Transformative Users.

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Trans. Use Opinions</th>
<th>Use Found Trans.</th>
<th>Use Found Fair</th>
<th>Win Rate for Trans. Users</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st Cir.</td>
<td>11</td>
<td>6</td>
<td>4</td>
<td>66.67%</td>
</tr>
<tr>
<td>2d Cir.</td>
<td>80</td>
<td>44</td>
<td>41</td>
<td>93.81%</td>
</tr>
<tr>
<td>3d Cir.</td>
<td>12</td>
<td>4</td>
<td>4</td>
<td>100.00%</td>
</tr>
<tr>
<td>4th Cir.</td>
<td>19</td>
<td>13</td>
<td>13</td>
<td>100.00%</td>
</tr>
<tr>
<td>5th Cir.</td>
<td>6</td>
<td>4</td>
<td>3</td>
<td>75.00%</td>
</tr>
<tr>
<td>6th Cir.</td>
<td>16</td>
<td>6</td>
<td>5</td>
<td>83.33%</td>
</tr>
<tr>
<td>7th Cir.</td>
<td>17</td>
<td>9</td>
<td>8</td>
<td>88.89%</td>
</tr>
<tr>
<td>8th Cir.</td>
<td>7</td>
<td>3</td>
<td>3</td>
<td>100.00%</td>
</tr>
<tr>
<td>9th Cir.</td>
<td>95</td>
<td>44</td>
<td>42</td>
<td>95.45%</td>
</tr>
<tr>
<td>10th Cir.</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>100.00%</td>
</tr>
<tr>
<td>11th Cir.</td>
<td>21</td>
<td>9</td>
<td>7</td>
<td>77.78%</td>
</tr>
<tr>
<td>D.C. Cir.</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>N/A</td>
</tr>
<tr>
<td>Fed. Cir.</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>100.00%</td>
</tr>
<tr>
<td>Total</td>
<td>292</td>
<td>145</td>
<td>133</td>
<td>91.72%</td>
</tr>
</tbody>
</table>

Relatedly, parties that lose the transformative use inquiry rarely win the fair use inquiry. Of the 147 such opinions, only 18 defendants (12.24%) emerged victorious on fair use overall. These win rates for defendants were low regardless of whether the opinion came from a district or appellate court judge, though our data suggest appellate courts were slightly more likely to deem a use fair even if the use was not transformative.

b. Regression Results

While these win rates are interesting in their own right, we also conducted regression analysis to better isolate which fair use factors and subfactors have the most significant role in influencing fair use outcomes. Table 8 below provides our regression results when examining overall fair use outcomes as a function of the four statutory fair use factors. Essentially, this table shows which of the fair use factors is most influential in determining fair use outcomes. Similar to previous studies, it shows that outcomes for factors one, three, and four exhibit statistically significant relationships with the overall fair use outcome, while factor two does not.175 As with previous studies, factor four appears to exert the strongest influence on fair use outcomes, though factors one and three appear to have made up some ground.176 In fact,

175 See, e.g., Beebe, supra note 10, at 586.
176 Id.
contrary to previous studies, in our model factor three even slightly outpaces factor one in its overall relationship to fair use outcomes.\textsuperscript{177}

### Table 8. Logistic Regression of the Outcome of the Fair Use Defense as a Function of the Four Statutory Factors in 417 Dispositive Opinions.\textsuperscript{178}

<table>
<thead>
<tr>
<th>Dependent Variable: Fair Use Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Log likelihood = -32.7484</td>
</tr>
<tr>
<td>n = 417</td>
</tr>
<tr>
<td>Average classification accuracy = 0.9685854</td>
</tr>
<tr>
<td>Pseudo R(^2) = 0.8865643</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Odds Ratio</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>Z Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factor 1</td>
<td>7.831***</td>
<td>2.058</td>
<td>0.374</td>
</tr>
<tr>
<td>Factor 2</td>
<td>1.741</td>
<td>0.555</td>
<td>0.391</td>
</tr>
<tr>
<td>Factor 3</td>
<td>9.186***</td>
<td>2.218</td>
<td>0.598</td>
</tr>
<tr>
<td>Factor 4</td>
<td>12.393***</td>
<td>2.517</td>
<td>0.424</td>
</tr>
<tr>
<td>Constant</td>
<td>2.054</td>
<td>0.720</td>
<td>0.486</td>
</tr>
</tbody>
</table>

***denotes significance at the 0.01 level

But as previous scholars have noted, analyzing fair use outcomes at this level of abstraction may not actually tell us much in terms of what drives those outcomes.\textsuperscript{179} For instance, though factor four appears to be the most influential on overall fair use outcomes, Beebe has rightly pointed out that judges rarely actually make factual findings under factor four, instead often synthesizing their findings under the first three factors when deciding whether factor four favors fair use.\textsuperscript{180} Hence, since factor four often functions as a quasi-conclusion of the court’s reasoning under the earlier fair use

\textsuperscript{177} Id.

\textsuperscript{178} For logistic regression models, the closer the Pseudo R\(^2\) value is to 1, the better the model is in explaining the observed variation. Hence, our Pseudo R\(^2\) value for this regression suggests high statistical reliability. Furthermore, the model accurately classified nearly 97% of the observations.

\textsuperscript{179} Id. at 586.

\textsuperscript{180} Id. at 586, 621.
factors, it is not terribly surprising that factor four, more than any other factor, often proves to be the best predictor of overall fair use outcomes.

So which factors actually drive fair use outcomes? Beebe in his earlier study makes the case that examining each factor’s subfactors helps get us closer to the truth, in part because doing so moves us away from high levels of abstraction to the court’s actual factual findings under each factor. He then finds that factor one’s subfactors are the most influential in terms of predicting fair use outcomes. And of those factor one subfactors, he finds that when a court invokes the transformative use subfactor, it exerts near dispositive force on not only factor one’s resolution, but on the fair use outcome more generally.

Our data confirm some of these earlier findings, while also expanding on them. First, our own regression results, the remainder of which are presented in Appendix A, confirm that transformative use outcomes have a statistically significant relationship to overall fair use outcomes. Our results also show that the transformative use-fair use relationship is stronger than the relationships that other factor one subfactors have with the overall fair use outcome. Put simply, these statistical results show that fair use outcomes tend to follow transformative use outcomes more than any other factor one subfactor. And since factor one’s subfactors are the most significant in the overall fair use inquiry in terms of impact, these findings further cement the transformative use doctrine’s status as leader of the subfactor pack.

Beyond this, we also tested whether transformative use outcomes exhibited statistically significant relationships to outcomes for factors one, three, and four. This is useful to know because, as we discussed above, how courts resolve each of these factors appears to play an important role in how courts resolve the overall fair use question. Hence, determining which subfactors have the strongest relationships to each of these factors’ outcomes also brings us closer to understanding the role that transformative use plays in fair use doctrine more generally.

Again, our regression results in Appendix A provide additional evidence in support of the argument that transformative use is eating the world. Transformative use outcomes exhibit a statistically significant relationship to outcomes for each of factors one, three, and four, each of which plays a major

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181 Id. at 594.
182 Id.
183 Id.
184 See infra Appendix A.
185 While our results show that the good faith/bad faith inquiry has a statistically significant coefficient, the fact that this inquiry is so rarely applied means that particular statistic is somewhat meaningless.
186 See, e.g., Beebe, supra note 10, at 595.
role in determining fair use outcomes. And the transformative use doctrine’s role in influencing outcomes for each of these factors appears to be greater than any of the other factor one subfactors, traditionally thought of as the most significant fair use subfactors. This all means that outcomes for each of factors one, three, and four tend to follow the transformative use doctrine’s lead more than outcomes for any of the other factor one subfactors.

In light of these findings, it is worth stressing again that a court merely invoking the transformative use concept does not appear to predetermine the transformative use or fair use outcomes. But our findings provide substantial evidence supporting the contention that however a court answers the transformative use inquiry is vitally important to predicting how the court will decide fair use’s most important factors and the fair use outcome more generally. For litigants, therefore, winning the transformative use fight is paramount. And as our findings show, that fight is nearly always present.

c. Stampeding Revisited

The transformative use doctrine’s hegemony in the overall fair use inquiry appears to be true despite a lack of “stampeding,” as Beebe calls it. In other words, our data confirm that although a finding of transformative use appears to have a significant relationship to whether the use is ultimately fair (and on resolution of factors one, three, and four as well), a finding of transformative use does not always dictate outcomes on these other factors. Hence, courts tend to call the factors as they see them, while still affording significant weight to transformative use in determining overall whether the use is fair.

Be that as it may, another metric we tracked is how often courts take into account different factors and subfactors when resolving other factors within the broader fair use inquiry. For instance, although transformative use outcomes may not strongly predict outcomes for factor two, how frequently do courts discuss transformative use within their factor two analyses? What about factors three and four? Overall, how often do courts discuss each of the factors and most important subfactors within their discussion and resolution of the others?

We thought this metric was important to track for several reasons. First, inter-factor analysis is how the Supreme Court in *Campbell* instructed future courts to carry out their fair use discussions. Despite this, previous studies have not specifically tracked how often these inter-factor discussions occur.

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187 See infra Table 8.
188 Beebe, *supra* note 10, at 595.
189 *Id.* at 588-89.
190 See *supra* Part I.
Second, we also thought it important to track these occurrences because they suggest stampeding by another name. In fact, though courts may call the factors as they see them in terms of overall factor outcomes, courts often explicitly note in their discussions of the various factors the influence of one or another “outside” factor. For instance, courts often decide a particular factor is not fair, but note within that discussion that that determination doesn’t matter much because other factors outweigh it. We see this frequently in the context of factors two and three when courts deem the use to be transformative; courts concede that one or the other factor weighs against fair use, but then explicitly note that neither carries much weight overall because of the transformative nature of the use.\footnote{See, e.g., Kane v. Comedy Partners, 2003 WL 22383387 (S.D.N.Y. 2003) (discounting the weigh afforded to factor two due to the transformative nature of the use); Gaylord v. United States, 85 Fed. Cl. 59 (Ct. Fed. Claims 2008) (strongly implying under its analysis of factor three that, though disfavoring fair use, factor three’s weight in the overall analysis was less due to the transformative nature of the use).} Or courts sometimes determine a particular factor is fair, and as part of that determination, they indicate that some other fair use factor outside of the particular factor under discussion influenced that determination.\footnote{See, e.g., Sofa Entertainment, Inc. v. Dodger Productions, Inc., 782 F. Supp. 2d 898 (C.D. Cal. 2010) (deciding factor one favored the defendant in part because the amount of copying—seven seconds of a film—was limited, a concern that courts typically address under factor three).}

Finally, this metric is also important to track because it helps substantiate (or disaffirm) previous studies’ claims about the roles different factors play. For instance, as discussed previously, Beebe in his earlier study claims that factor four is largely a place where courts synthesize their analyses of the previous three factors.\footnote{Beebe, supra note 10, at 617, 621.} This claim, if true, helps explain why factor four so strongly correlates with overall fair use outcomes—if factor four truly is where courts essentially summarize their previous findings under the first three factors, then factor four should nearly always align with the overall fair use outcome.

Our data provide some substantiation to these claims. For instance, Table 9 below shows that in 58% of the opinions in our dataset, the court discussed factor one considerations within the context of its factor four discussion. The Table also shows that courts discussed factor three considerations in over 25% of factor four discussions. Factor two considerations, not surprisingly, came up in only about 3% of factor four discussions. In total, nearly 65% of our opinions involved the court discussing factors one, two, or three considerations (or some combination thereof) in the context of their factor four discussions. Hence, our data confirm that, more than any of the other factors, courts do in fact often use factor four as a space in which to discuss...
other factors in resolving factor four (and fair use) questions.

Table 9. Frequency With Which Each Factor and Factor One Subfactors Affect Resolution of Other Fair Use Factors.

<table>
<thead>
<tr>
<th>Affected Factor</th>
<th>Factor 1 (Total)</th>
<th>Factor 2</th>
<th>Factor 3</th>
<th>Factor 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factor 1 (Total)</td>
<td>100 (23.98%)</td>
<td>232 (55.64%)</td>
<td>242 (58.03%)</td>
<td></td>
</tr>
<tr>
<td>Transformative Use</td>
<td>71 (17.03%)</td>
<td>174 (41.73%)</td>
<td>157 (37.65%)</td>
<td></td>
</tr>
<tr>
<td>Commercial Use</td>
<td>8 (1.92%)</td>
<td>17 (4.08%)</td>
<td>103 (24.70%)</td>
<td></td>
</tr>
<tr>
<td>Preamble</td>
<td>22 (5.28%)</td>
<td>73 (17.51%)</td>
<td>82 (19.66%)</td>
<td></td>
</tr>
<tr>
<td>Parody</td>
<td>21 (5.04%)</td>
<td>25 (6.00%)</td>
<td>26 (6.24%)</td>
<td></td>
</tr>
<tr>
<td>Bad Faith</td>
<td>0 (0%)</td>
<td>1 (.24%)</td>
<td>0 (0%)</td>
<td></td>
</tr>
<tr>
<td>Factor 2</td>
<td>20 (4.80%)</td>
<td>14 (3.36%)</td>
<td>12 (2.88%)</td>
<td></td>
</tr>
<tr>
<td>Factor 3</td>
<td>126 (30.22%)</td>
<td>15 (3.60%)</td>
<td>106 (25.42%)</td>
<td></td>
</tr>
<tr>
<td>Factor 4</td>
<td>79 (18.94%)</td>
<td>30 (7.19%)</td>
<td>53 (12.71%)</td>
<td></td>
</tr>
</tbody>
</table>

What becomes equally clear when examining this data, however, is that courts also frequently engage in inter-factor analysis outside of factor four. Factors three and four, for instance, show up somewhat frequently in courts’ factor one discussions. In fact, courts discuss factor three considerations slightly more frequently in the context of factor one than they do in the context of factor four (though factor four remains the most frequent venue for discussion of outside factors in general). Courts also discuss factor one considerations at a fair clip (about 24% of the time) in the context of factor two, though our data show that factor two is not a typical place for courts to discuss factors three and four considerations. Overall, factor four remains the predominant area in which courts engage in inter-factor syntheses. But factors one and three, and to a lesser extent factor two, also sometimes prove to be fertile grounds for courts to discuss other fair use factors in resolving them.

Importantly for our purposes, our data also show that the transformative use concept affects resolution of “non-native” fair use factors more frequently than any other factor or subfactor that we tracked (besides factor one’s composite score, much of which is driven by the transformative use concept). This means that the transformative use doctrine bleeds into analyses outside of its home base (factor one) more frequently than any other factor or subfactor. Astonishingly, this is true even when we include opinions that omit discussion of the transformative use concept altogether—transformative use remains, by the percentages, the most frequent interloper in other factor
discussions. And when we look at only opinions that utilize the transformative use doctrine, it is astonishing how frequently the transformative use doctrine ends up influencing factor discussions outside of factor one. For instance, nearly 54% of our transformative use opinions discussed the transformative use concept within their factor four discussions, and about 60% did so when discussing factor three. Furthermore, of the factors and subfactors that we studied, transformative use was the most frequent visitor to factor two discussions as well (about 25%). Table 9 below lists the frequencies with which each of the fair use factors and factor one subfactors affected resolution of other fair use factors when considering only transformative use opinions.

Table 10. Frequency With Which Each Factor and Factor One Subfactors Affect Resolution of Other Fair Use Factors, Transformative Use Opinions Only.

<table>
<thead>
<tr>
<th>Affected Factor</th>
<th>Factor 1</th>
<th>Factor 2</th>
<th>Factor 3</th>
<th>Factor 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Factor 1 (Total)</td>
<td>87 (29.79%)</td>
<td>204 (69.86%)</td>
<td>195 (66.78%)</td>
<td></td>
</tr>
<tr>
<td>Transformative Use</td>
<td>71 (24.32%)</td>
<td>174 (59.59%)</td>
<td>157 (53.77%)</td>
<td></td>
</tr>
<tr>
<td>Commercial Use</td>
<td>5 (1.71%)</td>
<td>14 (4.79%)</td>
<td>72 (24.66%)</td>
<td></td>
</tr>
<tr>
<td>Preamble</td>
<td>19 (6.51%)</td>
<td>66 (22.60%)</td>
<td>67 (22.95%)</td>
<td></td>
</tr>
<tr>
<td>Parody</td>
<td>20 (6.85%)</td>
<td>22 (7.53%)</td>
<td>22 (7.53%)</td>
<td></td>
</tr>
<tr>
<td>Bad Faith</td>
<td>0 (0.00%)</td>
<td>1 (.34%)</td>
<td>0 (0.00%)</td>
<td></td>
</tr>
<tr>
<td>Factor 2</td>
<td>15 (5.14%)</td>
<td>9 (3.08%)</td>
<td>8 (2.74%)</td>
<td></td>
</tr>
<tr>
<td>Factor 3</td>
<td>115 (39.38%)</td>
<td>10 (3.42%)</td>
<td>89 (30.48%)</td>
<td></td>
</tr>
<tr>
<td>Factor 4</td>
<td>62 (21.23%)</td>
<td>17 (5.82%)</td>
<td>44 (15.07%)</td>
<td></td>
</tr>
</tbody>
</table>

Notably, our data indicate that factor three may be more influential in how courts resolve the remaining fair use factors than factor four, which commentators have traditionally viewed as one of the most important in the overall fair use calculus. Unsurprisingly, factor two appears to play a quite limited role in influencing resolution of the other fair use factors. As we will

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194 It is important to note that when we say opinions discussed the transformative use term within these other factor discussions, they often did so implicitly by, for instance, using the definition of transformative use within those discussions, or referring back to their transformative use discussion under factor one, even if they do not explicitly use the term again.

195 This is based largely on the fact that the Supreme Court at one time explicitly said it was so. See Harper & Row Publications, Inc. v. Nation Enterprises, 471 U.S. 539, 566 (1985) (“This [fourth] factor is undoubtedly the single most important element of fair use.”).
explore below, we think this result is not because factor two considerations are irrelevant, but, rather, because other factors within the fair use test already address those considerations more effectively.

Hence, not only does transformative use appear to play a significant role in determining overall fair use outcomes, it is also the factor that shows up the most frequently (and by a significant margin) in how courts decide the other fair use factors. The presence of transformative use in these other factor discussions may not predetermine their outcome by “stampeding” results. But its frequent presence does suggest that the transformative use concept is likely helping shape those discussions, and fair use outcomes generally, more than any other fair use factor.

5. Are Certain Types of Uses More Likely to Be Found Transformative?

This final subsection considers yet another important transformative use question: what exactly does the term mean? While we may have a better sense of what sources courts rely on in defining the term and how often transformative users win their cases, the transformative use concept remains difficult to corral. Indeed, this difficulty is one of the primary complaints with the doctrine.\(^\text{196}\)

In his earlier study, Matthew Sag attempted to better predict fair use outcomes by assessing the characteristics of uses that would have been known to litigants pretrial.\(^\text{197}\) A large part of his study thus focuses on identifying particular types of uses that are more likely to be found fair.\(^\text{198}\) He uses “creativity shift” as a proxy for transformative use, which he defines as when a defendant uses the plaintiff’s creative copyrighted work for an informational purpose, or vice versa (i.e., the defendant uses the plaintiff’s informational work for a creative purpose).\(^\text{199}\) He finds that when defendants use copyrighted works for such fundamentally different purposes, courts tend to find that those uses are fair.\(^\text{200}\)

In his study, Sag thus relies on one prevalent meaning of transformative use—a shift in purpose.\(^\text{201}\) In our study, we wanted to go beyond this finding and assess other characteristics of uses that may be relevant to the transformative use and fair use questions. We thus gathered a number of additional data in hopes of better understanding what courts mean when they use the transformative use term. These include data about whether the use

\(^{196}\) See NIMMER, supra note 2.
\(^{197}\) Sag, supra note 16, 47, 49.
\(^{198}\) Id.
\(^{199}\) Id. at 58.
\(^{200}\) Id. at 74.
\(^{201}\) Id. at 58.
involved altering the original work with new expression, using the work in a new context, and a shift in medium between the original work and the purported fair use.

First, what role, if any, does altering the original work with new expression play? Some have argued that courts should limit the transformative use doctrine to situations where the defendant actually alters the original work in some way or another.\textsuperscript{202} For instance, if a party uses a copyrighted photo as part of a montage but otherwise leaves the photo unchanged, some believe such uses should be ineligible for a transformative use finding because the purported fair user did nothing to alter the original work itself.\textsuperscript{203} Yet courts routinely note that merely altering a copyrighted work with new expression does not a transformative use make.\textsuperscript{204} A sequel to a movie is a clear example of altering the original copyrighted work with new expression that would not automatically qualify as a transformative use.\textsuperscript{205} Instead, such a use would typically qualify as a derivative work, one of the core rights of copyright holders.\textsuperscript{206}

Hence, as part of our study we wanted to investigate what role altering the original work with new creative expression plays. Do courts frequently find unaltered uses of works to be transformative and fair? And does altering an original work with new creative expression even help a party’s transformative use and fair use chances?

The data we collected provide some insights to these questions. Of our 292 transformative use opinions, 78 involved uses where the defendant altered the original work with new creative expression. To be clear, we only included uses in this category instances where the party actually made alterations to the original work; we did not count uses that left the copyrighted work unaltered, even if the use occurred in a different context or in conjunction with new creative expression. Of these 78 opinions, 50 found the use to be transformative, and 42 of these 50 found the use fair. Hence, while altering the original work with new expression may not be necessary to a finding of transformative use and fair use, it often seems to be sufficient.

Of the 214 transformative use opinions where the defendant failed to alter the original work with new creative expression, 95 of these (44.39\%) still found the use to be transformative, and 91 of those 95 opinions found the overall outcome to be fair (95.79\%). Hence, while altering the original with

\textsuperscript{202} Nimmer, supra note 2.
\textsuperscript{203} Id.
\textsuperscript{204} See, e.g., Cariou v. Prince, 714 F.3d 694, 708 (2d Cir. 2013) (“A secondary work may modify the original without being transformative”).
\textsuperscript{205} See, e.g., Salinger v. Colting, 641 F. Supp. 2d 250, 267-68 (S.D.N.Y. 2009) (finding a sequel to Catcher in the Rye to be a derivative work of the same).
\textsuperscript{206} Id.
new expression may in some cases aid defendants in their fair use quests, many defendants who fail to alter the original work with new expression still come out on top.

Using copyrighted works in new contexts, without otherwise altering the copyrighted work, is another piece of data we collected in hopes of better understanding what courts mean by the transformative use term. We defined uses involving a new context broadly, covering any use that went beyond mere replication of the copyrighted work in the same medium or for the same purpose. Hence, posting verbatim a news article online for purposes of discussion would qualify as a use in a new context, as would altering the Mona Lisa by adding a mustache and beard to the painting.

We defined this category broadly in order to assess how much a difference a mere change in venue makes. Based solely on anecdotal statements in the fair use case law, it is difficult to tell. For instance, courts frequently stress the new context in which the defendant placed the copyrighted work in finding uses to be transformative and fair. In an important Second Circuit case, the court relied on just such reasoning in finding that a party’s use of unaltered artwork in a historical book about the Grateful Dead was transformative and, accordingly, a fair use. Yet courts also routinely conclude that a mere change in medium is insufficient, on its own, to guarantee a favorable fair use outcome. So which is it, or, is it both?

Our data suggest that a mere change in context, on its own, does not answer the transformative use question decisively. Of our 292 transformative use opinions, 251 included using the copyrighted work in a new context (85.96%). Of these, 140 found the use to be transformative, while 111 did not. Based on these percentages alone, it seems that using a copyrighted work in a new context may provide a slight transformative use edge, though the substantial number of transformative use losers in this category suggests that that edge is just that: slight, if at all.

On the other hand, the 41 transformative use opinions that did not involve use in a new context almost all resulted in the court finding the use to be non-transformative (36, or 87.80%). And of these 36 opinions, only 2 ultimately

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207 Perfect 10, Inc. v. Amazon.com, Inc. 508 F.3d 1146, 1165 (9th Cir. 2007) (finding Google’s use of thumbnail images as part of its search engine transformative in part because the use involved using the images in a new context); Wall Data Inc. v. Los Angeles County Sheriff’s Dept., 447 F.3d 769, 778 (9th Cir. 2006) (indicating that uses are transformative when defendants use plaintiffs’ copyrighted works “in a different context such that the plaintiff’s work is transformed into a new creation”).
208 Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).
209 See, e.g., Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998) (holding that the unaltered retransmission of a radio broadcast through a different medium was not a transformative use).
found the use to be fair (5.56%). Hence, while changing contexts may not ensure a favorable transformative use and fair use finding, failing to use a copyrighted work in a new context does appear to put parties at a significant transformative use and fair use disadvantage.

What about parties that both alter the original with new expression and use the original work in a new context? Based on our data, a party’s odds only went up slightly when combining these two metrics (50/73) rather than solely looking to whether the party altered the original with new creative expression.

Another metric we tracked is the medium in which the original work appeared, and whether that medium changed with the alleged fair use. For instance, in many cases parties copied copyrighted music into a film, or parties took traditional print media (such as books), digitized that media, and made it available online (Google Books, for example). The reason we wanted to track this metric was to better assess whether courts are more likely to consider uses of some media transformative, and to determine whether a change in medium appears to relate to the transformative use inquiry. One might expect it to do so since “transforming” copyrighted materials might reasonably include situations in which the copyrighted material goes from one medium to the other. Note that shifts in medium are a subset of our earlier category of uses in a new context.

The mediums we used in coding the opinions are similar to those used by previous scholars: non-virtual, two-dimensional textual material (such as books); non-virtual, two-dimensional images, graphics, illustrations, and other artwork (such as photographs); technological media, including software and Internet technology; videos (including traditional television, film, and movies); music; performances; and three-dimensional artwork (such as sculptures). Note that in some cases, the original copyrighted work overlapped several mediums.

Similar to previous studies, the most frequent original medium for copyrighted works in our opinions was non-virtual, two-dimensional textual material (32.29%), followed by non-virtual, two-dimensional imagery (23.86%). Thus, non-virtual texts and imagery combined accounted for a little over 56% of the copyrighted works at the center of our opinions’ fair use fights.

As one might expect, technological mediums accounted for a higher percentage of uses than in previous studies. While only 19.51% of our opinions concerned works that were originally embodied in a technological medium, 41.69% of our opinions concerned technological uses of the copyrighted works, including digitizing and making available online a variety

210 See Beebe, supra note 10, at 573.
211 Id.
of traditional print media. In total, 43.86% of all our opinions implicated technological mediums, a dramatic increase from earlier studies.\textsuperscript{212} Furthermore, from 2006-2017, this trend accelerated significantly, with 53.62% of all opinions implicating technological uses of copyrighted works.

Scholars in the past have called for some form of “technological fair use” in order to make fair use more responsive to technological advances.\textsuperscript{213} Does the transformative use paradigm already help update fair use by incorporating technological considerations within its ambit? Our summary figures do not clearly answer this question. Of the 292 opinions in our dataset that utilized the transformative use concept, 130 (44.52%) implicated technological uses of the copyrighted material. This percentage doesn’t tell us much about how courts may or may not be utilizing the transformative use concept to address technological changes; it merely tells us that in nearly half of all transformative use opinions, courts end up having to apply the transformative use paradigm to facts implicating technological uses of the copyrighted work. Outside of transformative use, as mentioned above, nearly half (and over half more recently) of all our opinions implicated technological mediums. This means that, in general, courts frequently have to apply fair use to technological mediums, with and without the transformative use concept. While a more technologically focused fair use doctrine may still make sense, it seems clear from our data that courts are having plenty of practice in applying fair use (and transformative use) to technological contexts.

Courts do not appear to favor technological uses of copyrighted works when deciding whether the use is transformative. For instance, less than half (56/130, or 43.07%) of our transformative use opinions that involved technological uses of copyrighted works resulted in a finding of transformative use. Of these transformative uses, 92.86% ultimately found the use to be fair. By contrast, of the 151 opinions in which the copyrighted work was neither originally in a technological medium nor later used in one, courts found 80 (53%) of these to be transformative (and 90% of these transformative uses to be fair overall). Hence, since a finding of transformative use is so strongly associated with a finding of fair use overall, it actually appears that non-technological uses may have the upper hand, at least percentage-wise, in terms of being deemed fair.

Of the 292 transformative use opinions in our dataset, 134 of those included a shift in medium (e.g., from print to video), while 158 did not. Eighty-three of these 158 no-medium-shift opinions (52.53%) found the use

\textsuperscript{212} Id.

to be transformative, while only 61 of the 134 opinions (45.52%) where the medium did shift found the use to be transformative. Hence, at least based on these summary figures, a shift from one medium to another does not appear to result in a higher likelihood that the court will find the use to be transformative. In fact, some of our regression results presented in Appendix A suggest a negative relationship, if anything—medium shifts may predict a greater likelihood of a non-transformative use finding.

Overall, then, it remains difficult to say what types of alterations or new uses courts are likely to deem transformative. Altering copyrighted works with new expression appears to be associated with an improvement in a party’s fair use chances, though doing so does not appear essential. Using a work in a new context seems nearly necessary but insufficient for a finding of transformative use. Medium shifts and technological uses also fall far short of guaranteeing a transformative use victory—in fact, they may push in the opposite direction. And the regression analysis we performed using these factors as independent variables on transformative use outcomes confirm this messy state of affairs: though we found some of these factors exhibit statistically significant relationships to transformative use outcomes, the regression model itself suffered from a significant amount of statistical unreliability.\(^{214}\) Hence, though the transformative use doctrine is increasingly crucial to the fair use doctrine more generally, it remains an elusive concept to pin down.

III. IMPLICATIONS

This Part examines some of the more important implications of this Article’s findings.

A. Has Transformative Use Gone Too Far?

One question worth revisiting in light of this Article’s findings is whether courts have taken the transformative use concept too far, as some suggest.\(^ {215}\) In other words, if transformative use is eating the world, is that a bad thing? Fair use, after all, is meant to be a flexible standard that courts adapt to whatever the circumstances merit, all in order to bring about the most just

\(^{214}\) See infra Appendix A.

\(^{215}\) See Adler, supra note 30; Nimmer & Nimmer, supra note 2; Jennifer Pitino, Has the Transformative Use Test Swung the Pendulum Too Far in Favor of Secondary Users?, 56 Advocate 26 (2013); Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (“We’re skeptical of Cariou’s approach [that placed emphasis on transformativeness], because asking exclusively whether something is ‘transformative’ not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works.”).
results. Neither the doctrine’s codification in 1976 nor any particular fair use decision was meant to stymie that flexibility and the doctrine’s ongoing evolution. But if transformative use is dominating the overall fair use analysis, as this Article suggests is happening to a greater degree than previously imagined, that reality could be preventing flexible application of fair use in ways that would otherwise yield overall social benefits.

Consider, for instance, application of the fair use doctrine in the software context. Software is functional in nature; reusing software as software typically implicates the very same computing functions that the software was originally designed to perform. Under some interpretations of the transformative use concept, therefore, reuse of software is almost never transformative, since those reuses are for the “same intrinsic purpose” as the original software—to perform the only computing function of which the software is capable. In fact, in a recent high-profile copyright infringement suit between Oracle and Google, Oracle made this precise point in arguing that Google’s reuse of some of its software was not transformative because Google used that software to perform the same computing functions for which the software was designed.

But accepting such an argument would mean that third parties can almost never rely on the fair use defense in the software context. This is so because, as we have seen, if a party loses the transformative use argument, they are likely to lose the overall fair use question as well, particularly in the modern era. Hence, to the extent that transformative use has come to stifle flexible application of the fair use doctrine in key contexts such as software, that reality may end up, ironically, stifling the very creativity that the doctrine

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216 Cambridge University Press v. Patton, 769 F.3d 1232, 1258-1259 (2014) (“[T]he fair use inquiry is a flexible one. The four statutory factors provide courts with tools to determine—through a weighing of the four factors in lights of the facts of a given case—whether a finding of fair use is warranted in that particular instance.”); Northland Family Planning Clinic, Inc. v. Center for Bio-ethical Reform, 868 F. Supp. 2d 962, 982 (C.D. Cal. 2012) (““The case-by-case analysis resists bright-line determinations and the resulting decisions inevitably represent a sort of rough justice”).

217 H.R. Rep. No. 83, 90th Cong., 1st Sess., 37 (1967) (In drafting Section 107, Congress “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.”).

218 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (“Congress meant § 107 ‘to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way’ and intended that courts continue the common-law tradition of fair use adjudication”).

219 Asay, supra note 14, at 14.


221 Id.

222 Asay, supra note 14, at 14.

223 Netanel, supra note 11.
is meant to help facilitate. This may be particularly so since fair use has become an important part of enabling innovative reuses of software.\textsuperscript{224}

Amy Adler has highlighted the modern visual arts world as another context where the dominance of the transformative use inquiry may have negative repercussions.\textsuperscript{225} In that world, modern visual artists often copy the works of others in their entirety in part as a rejection of the concept of “newness” or any real stability in artistic meaning.\textsuperscript{226} The famous appropriation artist Richard Prince is the quintessential example of this type of art—some of his recent artwork, for example, involves copying others’ Instagram posts verbatim, in their entirety, and simply increasing the posts’ scale.\textsuperscript{227} His only other alteration is to include emoji-filled, often lewd comments beneath the actual Instagram post.\textsuperscript{228} Prince (and other similar artists) may have a claim to transformativeness in such cases; he does, after all, include some commentary to otherwise identical artwork. And perhaps appropriation is the message itself.\textsuperscript{229} But courts have often found that simply adding some material to otherwise unaltered copies of works does not a transformative use make.\textsuperscript{230} Indeed, the modern transformative use inquiry focuses on the second comer’s added expression or meaning in using the copyrighted material, the “very criteria that contemporary art rejects” in the act of appropriation.\textsuperscript{231} Hence, to the extent modern courts rely on typical understandings of the transformative use concept, modern visual artists face significant, and perhaps insurmountable, hurdles in winning fair use cases.\textsuperscript{232}

Of course, one solution to such issues is for courts to take the \textit{Campbell} Court at its word. As that Court explained, uses need not be transformative to be fair.\textsuperscript{233} Courts thus have leeway to emphasize other factors in the software and modern art (and possibly other) contexts so that fair use

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\textsuperscript{224} Pamela Samuelson & Clark D. Asay, \textit{Saving Software’s Fair Use Future}, 31 HARV. J. L. TECH. 1, 3 (2018) (“Fair use in the digital age has come to play an important role in balancing the interest of first- and second-generation creators in software as well as other creative fields”).  \\
\textsuperscript{225} Adler, \textit{supra} note 30.  \\
\textsuperscript{226} \textit{Id.} at 563.  \\
\textsuperscript{227} Hannah Jane Parkinson, \textit{Instagram, an Artist and the $100,000 Selfies – Appropriation in the Digital Age}, THE GUARDIAN (Jul. 18k, 2015, 5:00 PM EDT), https://www.theguardian.com/technology/2015/jul/18/instagram-artist-richard-prince-selfies.  \\
\textsuperscript{228} \textit{Id.}  \\
\textsuperscript{229} \textit{Id.}  \\
\textsuperscript{230} \textit{See, e.g.,} Los Angeles Time v. Free Republic, 1999 WL 33644483, 10 (“Adding commentary to a verbatim copy of a copyrighted work or portions thereof does not transform the work…”).  \\
\textsuperscript{231} Adler, \textit{supra} note 30, at 563.  \\
\textsuperscript{232} \textit{Id.}  \\
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defenses can succeed in them. There are some examples where courts rely on such flexibility in rendering fair use decisions. But it takes a confident, brave court to do so. Indeed, taking the *Campbell* Court at its word also means acknowledging the importance of the transformative use concept in the vast majority of cases, since, according to the Court, transformative uses are precisely the type of uses most likely to help achieve copyright’s goals. And as the data show, increasingly more courts have followed this admonition in rendering their fair use decisions. Hence, to the extent that courts mechanically apply the transformative use concept in contexts where it may not make sense to do so, the transformative use concept may end up stymieing the very creativity it is meant to enable.

On the other side of the ledger, of course, is the argument that courts’ widespread adoption of the transformative use concept has actually facilitated a significant amount of socially beneficial creativity. In fact, the concept’s application in a variety of new contexts is precisely the basis for some parties’ complaints that courts have taken the transformative use concept too far. Hence, though instances may arise where an undue focus on the transformative use concept may prevent uses that would otherwise provide overall social benefits, by and large emphasizing transformative uses may still prove to be fair use’s best bet.

For instance, today we take search engines for granted. But there was a time in their historical development that search engines’ survival depended on courts’ finding their use and display of copyrighted materials to be fair. These fair use determinations, furthermore, depended in large part on the

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234 See, e.g., *Sony Computer Entertainment v. Connectix Corp.*, 302 F.3d 596 (9th Cir. 2000) (beginning its fair use analysis with the second factor, therewith implicitly signaling that factor’s greater importance in software reuse cases); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (arguing against focusing on transformative use in fair use analyses).


236 See supra Part II.

237 *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 9 (2014) (statement of Professor Peter Jaszi, Washington College of Law, American University); Netanel, *supra* note 11 (pointing to greater consistency in fair use case law since the transformative use concept’s ascendancy).

238 See, e.g., *The Authors Guild, Authors Guild v. Google*, https://www.authorsguild.org/where-we-stand/authors-guild-v-google/ (last visited Mar. 19, 2018) (critiquing the “expansion of fair use” in light of a Second Circuit ruling that Google’s copying of millions of books verbatim into its Google Books project was transformative because of its significant public utility).

courts’ flexible application of the transformative use concept in a new technological environment.240

Since that time, many courts have continued to apply the transformative use concept flexibly in enabling innovative technological uses of copyrighted materials. The Second Circuit, for instance, only recently found that Google’s copying of tens of millions of books into its Google Books service to be transformative and, overall, a fair use.241 The use was transformative because the Google Books service allowed for uses of the works that the original author hadn’t, including data mining and digital searching.242 The Second Circuit came to this conclusion despite the reality that authors lost out on a large sum of money for those digital copies—in fact, the parties had negotiated several iterations of a settlement agreement over nearly a decade that would have paid authors a significant amount of money for Google’s use of the works.243 But courts rejected those settlement attempts for a variety of reasons, and ultimately the Second Circuit found that Google’s use was transformative (and fair), anyway.244

Indeed, modern courts’ focus on the transformative use concept may overall be a positive development, whatever problems that emphasis entails, primarily because it means the fourth factor receives less deference in how courts apply fair use. More colloquially, transformative use’s ascendance and the fourth factor’s demise may be a classic example of addition by subtraction. The transformative use concept itself may not be the perfect vehicle for ensuring fair use helps copyright achieve its intended purposes. But it is certainly a better vehicle than the fourth factor such that deemphasizing the fourth factor yields positive results in its own right.

The fourth factor, after all, has been notoriously difficult to apply.245 In fact, as mentioned earlier, Barton Beebe notes that courts often simply use it as a space to summarize their analyses of the preceding three factors; in most cases, courts make few actual fourth factor findings.246 Making findings under the fourth factor can be difficult in part because of an oft-noted circularity problem.247 This problem lies in the reality that any uncompensated use can be said to harm the work’s market because the

240 Id.
241 Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).
242 Id.
243 The Authors Guild, supra note 238.
244 Id.
245 Beebe, supra note 10, at 620-21.
246 Id.
copyright holder losses out on a fee for that use.\textsuperscript{248} And while many courts acknowledge that this type of reasoning should not dictate resolution of the fourth factor,\textsuperscript{249} it is difficult to say what else should. Courts sometimes import a presumption based on the first factor—if the court considers the use to be commercial under the first factor, then the court presumes market harm unless the defendant rebuts that presumption.\textsuperscript{250} But that presumption suffers from circular reasoning itself, particularly since, as courts have noted, “no man but a blockhead ever wrote, except for money.”\textsuperscript{251} Or courts sometimes look to whether the uncompensated uses concern traditional or likely to be developed markets for the copyrighted works.\textsuperscript{252} But that inquiry also suffers from a circularity problem, since based on it copyright owners would seem to be able to guarantee victories under the fourth factor simply by demanding license fees for any use of their work.\textsuperscript{253} In fact, only recently a court engaged in this type of circular reasoning in resolving a high-profile fair use case against the defendants.\textsuperscript{254}

Hence, given the difficulty courts face in applying the fourth factor, displacing its earlier predominance in fair use doctrine with the transformative use concept is almost certainly a positive development. This is not to say that the transformative use concept does not suffer from its own set of issues, some of which we’ve noted above. But its deficiencies appear to be less dire than those that have long afflicted the fourth factor.

Furthermore, addressing the transformative use concept’s deficiencies, while not an easy fix, is certainly within courts’ discretion. As discussed above, the \textit{Campbell} Court made clear that the transformative use concept, while important, is not a necessary finding for a use to be fair.\textsuperscript{255} Hence, courts are explicitly permitted to emphasize other factors where the context warrants.

In the software context, the functional nature of software would seem to

\textsuperscript{248} See, \textit{e.g.}, American Geophysical Union v. Texaco Inc., 60 F.3d 913, 928-29 (2d Cir. 1994) (discussing the pitfalls of this type of circular reasoning under the fourth factor).

\textsuperscript{249} See, \textit{e.g.}, Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1357 (Ct. Cl. 1973).


\textsuperscript{251} Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998).

\textsuperscript{252} American Geophysical Union, 60 F.3d at 928-29.


\textsuperscript{254} Fox News Network, LLC v. TVeeyes, Inc., 883 F.3d 169, 180 (2d Cir. 2018) (finding that the fourth factor favored plaintiffs since they had developed a market with respect to defendant’s use of their copyrighted works).

\textsuperscript{255} Campbell, 114 S.Ct. at 1170.
warrant a greater focus on factor two in the overall fair use equation.256 This factor typically carries little weight in fair use analyses.257 But the functional nature of software has traditionally meant that it enjoys a narrower scope of copyright in general,258 and emphasizing factor two considerations would allow courts to more effectively implement that tenet of copyright law in software fair use cases. Greater attention to factor two in software reuse cases would not necessarily always weigh in favor of fair use; one can imagine situations where a second comer copies the more expressive components of a software program for reasons unrelated to functionality, which copying would generally weigh against a finding of fair use under factor two. But in situations where a follow-on user copies functionally dictated elements of a software program, emphasizing that reality under factor two would allow courts to do greater fair use justice in software fair use cases.

In the modern arts context, redirecting attention away from transformative use to other factors may also be warranted, as Amy Adler argues.259 For instance, given the norms of contemporary art, focusing on whether the appropriation art functions as a market substitute for the original under factor four, rather than attempting to decipher new meaning in the use as part of the transformative use inquiry, may be a better approach to deciding contemporary art fair use cases.

Or, alternatively, courts may continue to emphasize the transformative use inquiry, but simply apply it flexibly rather than mechanistically. The transformative use standard that the Campbell Court articulated, after all, is not a definition. Instead, it is a broad standard that seems capable of encompassing all sorts of uses, so long as those uses do not “merely supersede the objects of the original creation…[but] instead add[,] something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”260 Amy Adler notes that courts have developed a number of different approaches to applying this definition, none of which work well in the contemporary art context.261 But it need not be so. Recognizing the norms and practices of contemporary art, courts could almost certainly find room for contemporary art fair uses within the Campbell Court’s broad transformative use standard.

In fact, we have already seen courts flexibly apply the transformative use concept in other contexts, particularly technological ones.262 It thus remains

256 Asay, supra note 14, at 9.
258 Samuelson & Asay, supra note 224.
259 Adler, supra note 30, at 563.
260 Campbell, 114 S.Ct. at 1171.
261 Adler, supra note 30, at 563-64.
262 See supra notes 237-244 and accompanying text.
crucial that courts not become too wedded to particular applications or understandings of the transformative use standard itself. Of course, the United States’ precedential tradition makes it tempting for courts to confine the transformative use inquiry to the dustbin of whatever historical uses courts have previously considered to be transformative. Indeed, because the Supreme Court case that endorsed the transformative use concept concerned a parody, courts attempting to apply the transformative use concept may have difficulty applying it outside of the parodic context with confidence. Yet that is precisely what courts must do for the transformative use concept to continue to serve its intended purpose within the overall fair use doctrine.

In sum, while transformative use may be eating the world of fair use, that trend is arguably better than courts relying on the fourth factor and its commerciality compatriot from factor one. Furthermore, there are ways for courts to mitigate whatever ills a focus on transformative use entails. First, Supreme Court precedent provides courts with leeway to emphasize other factors within the fair use inquiry when the context warrants. And second, courts should continue to apply the transformative use standard itself flexibly, rather than reducing that standard to a more limited definition that was never intended.

B. Reforming Fair Use

Another implication from this study’s findings is that simplifying the fair use doctrine by eliminating several of its factors may be warranted. In particular, eliminating factors two and four from the analysis may help streamline the doctrine without affecting fair use’s overall efficaciousness. In fact, doing so may help courts to apply the fair use doctrine more effectively.

For instance, this study finds that factor two, the nature of the work, seems to play only a modest role in the fair use inquiry: factor two outcomes do not predict overall fair use outcomes, nor does factor two appear to explicitly affect resolution of the other factors much at all. In fact, factor two explicitly affected resolution of other fair use factors less than any other factor or subfactor that we examined. Beebe’s earlier empirical study also found that factor two outcomes failed to strongly correlate with overall fair use outcomes, thus suggesting a lack of effect. However, when testing the

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263 For a review of the different transformative use approaches courts take, see Murray, supra note 16.
264 Cf. Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111-1112 (1990) (coining the transformative use term and arguing that the standard is key to enabling fair use to serve its goals of promoting creativity under copyright law).
265 See supra Part II.B.
266 Id.
significance of factor two’s dominant subfactors—whether the work is more creative than factual and the work’s publication status—Beebe found that these subfactors seemed to significantly affect fair use outcomes. This finding suggests factor two’s concerns are not irrelevant in how courts assess fair use, which stands in some contrast to others’ claims that factor two is inconsequential and thus should be abolished. This Article also proposes eliminating factor two, but not because factor two is irrelevant. Instead, we suggest that factor two’s concerns are better (and already are) addressed in other parts of the fair use inquiry.

As we assessed how frequently each of the factors affects resolutions of the others, for instance, it became apparent that courts often address the concerns factor two is meant to safeguard under other fair use factors. And, arguably, these other fair use factors address the second factors’ concerns more effectively than factor two itself. This may help explain Beebe’s counterintuitive finding that overall factor two seems irrelevant, even though its primary subfactors do not. Consequently, eliminating factor two would simplify the fair use analysis without undermining—and perhaps better serving—factor two’s purported role.

To illustrate: factor two largely focuses on ensuring that creative expression receives a narrower scope of fair use, while factual and functional works receive a broader scope. Yet factor three already asks courts to assess the amount and substantiality of the copyrighted work the second comer has taken. In fact, in applying the third factor, courts often take into account whether the second comer has copied qualitatively important expression versus simply elements of the copyrighted work undeserving of much protection (such as facts or other non-expressive portions of the work). The “heart” of a work, indeed, is often the most expressive, creative portions of the work. Hence, factor three’s application typically already

268 Id.
269 See Liu, supra note 257 (arguing for elimination of factors two and three from the fair use analysis).
270 Though we have no statistical basis for this supposition, it seems intuitive that if factor two outcomes diverge from factor two subfactor outcomes and those subfactor outcomes seem to actually affect resolution of fair use overall, then perhaps those subfactor outcomes are reflected in other factor outcomes that also correlate with overall fair use outcomes.
271 Campbell, 114 S.Ct. at 1175 (“This factor calls for recognition that [creative] works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”).
273 Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 564-65 (1985) (finding against the defendant under the third factor because it took the most expressive parts of the copyrighted work, rather than just the information underlying that expression).
274 Id. (identifying the expressive portions taken as the “heart” of a biography about
addresses the most important concerns factor two is meant to address: whether the user has taken highly creative portions of the work. In fact, this may be why overall factor two typically doesn’t end up mattering much—because factor three already effectively addresses factor two’s primary concerns.

At times factor one’s transformative use subfactor also ends up helping address the concerns that factor two is meant to protect. For instance, in some cases courts focus as part of that inquiry on whether the defendants used the copyrighted material for its original expressive purposes or, instead, for a transformative purpose that primarily relied on the factual or informational components of the copyrighted work. Indeed, when defendants repurpose copyrighted materials for news reporting, comment, criticism, and other favored uses, courts often take into account as part of the transformativeness inquiry factor two’s concern of protecting the underlying expression while allowing for informational uses of the content. Factor one is thus also sometimes a space where courts get at the real concerns underlying factor two.

Furthermore, factor two’s presence in the fair use analysis may do more harm than good because it asks courts to assess the nature of the work as a whole, rather than the nature of the portion of the copyrighted work that the second comer has actually taken (which, again, the first and third factors often end up addressing). The possible harm of factor two’s focus is to distract courts from the more relevant inquiry concerning what the second comer actually took and how they used it. Of course, given the second factor’s near statistical irrelevance, at least at a macro-level, it seems this distraction rarely leads courts down many rabbit holes. But factor two’s presence nonetheless leads courts to clutter their fair use analyses with mostly irrelevant tidbits relating to the nature of the work overall, rather than the creativity relating to the portion of the work the second comer actually used. Given factors one’s and three’s focus on this latter issue, judicial economy

Gerald Ford).

275 See, e.g., A.V. Ex rel. Vanderhye v. iParadigms, LLC, 562 F.3d 630, 640 (4th Cir. 2009) (finding under the first factor that the defendant’s use was transformative in part because use of the copyrighted works “was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism,” i.e., factual or functional uses).

276 See, e.g., Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1175 (9th Cir. 2012) (finding duplication of clandestine celebrity photos in a magazine not to be transformative because that duplication copied creative expression that was unnecessary to reporting the facts underlying the photos).


278 Cf. Liu, supra note 257 (arguing for elimination of factors two and three because allowing courts to focus on factors one and four exclusively would help courts better achieve the purpose of the fair use doctrine).
would be well served with factor two’s removal.

This proposal, furthermore, is entirely consistent with the admonition above that courts should give more weight to factor two in the software context due to software’s functional nature. Because courts already address the primary concerns factor two is meant to tackle under factors one and three (and, arguably, more effectively), courts could simply stress factor one and three in software fair use cases if factor two were, in fact, eliminated.

Factor four also deserves strong consideration for an early retirement. This is so because factors one (and several of its subfactors) and three also already address the concerns factor four is meant to protect. And again, arguably they do so more effectively than factor four itself. For instance, factor four’s focus on whether the use “harms the potential market or value of the copyrighted work” largely boils down to whether the use substitutes for the original work in the marketplace. In assessing whether a particular use “supersedes the objects of the original” work, the transformative use subfactor already essentially asks whether the use acts as a market substitute for the original work. Indeed, this overlap is precisely why so many courts hark back to the transformative use concept when analyzing factor four, as the *Campbell* Court did itself.

Factor one also already includes a “commercial use” inquiry, which asks whether the user is exploiting the copyrighted work without paying the “customary price.” This inquiry thus gives courts additional opportunities to assess whether the use supplants a traditional market for the copyrighted work, thereby harming the market for it. In fact, as with the transformative use concept, this subfactor’s connection to the concerns factor four is meant to address often leads courts to import this subfactor into their fourth factor analyses as well. Indeed, as we have seen with this study and others, factor one subfactors such as transformativeness and commerciality often end up dictating the results under factor four. For these and related reasons, Barton Beebe has characterized factor four as vacuous in terms of having its own

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279 17 U.S.C. § 107(4) (2017); *Campbell*, 114 S.Ct. at 1177-78 (discussing how transformative uses are less likely to function as market substitutes for the original, in which case market harm for the original is more difficult to infer).

280 *Campbell*, 114 S.Ct. at 1171.

281 *Id.* at 1177-78.

282 *Harper & Row Publishers, Inc.*, 471 U.S. at 562 (“The crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”).

283 *See, e.g.*, National Rifle Ass’n of America v. Handgun Control Federation of Ohio, 15 F.3d 559, 561 (6th Cir. 1994) (pointing to a presumption of market harm under the fourth factor based on a finding of commercial use under the first factor, but finding in the actual case that the use was noncommercial and, therefore, the presumption did not apply).
Factor three’s focus on “the amount and substantiality” of the copyrighted work that the defendant took also already helps address factor four’s concerns. Uses of quantitatively or qualitatively insignificant portions of the copyrighted work, for instance, are less likely to result in market harm, as courts often recognize in their fair use analyses. On the other hand, using significant portions of copyrighted works verbatim is more likely to result in market harm because such uses are more likely to function as a substitute for the original work. Hence, factor three also provides coverage for the issues factor four is meant to highlight.

If mere duplication of efforts was the end of the story, that may not be enough to justify eliminating factor four. But factor four’s duplicative efforts also carry the possibility of real detriment. One such harm of retaining duplicative inquiries across the factors is that what may be a relatively straightforward analysis under factors one and three becomes more confused under factor four. This is so for reasons already discussed; factor four’s lack of clear standards tempts courts to resort to circular reasoning in analyzing whether the use harms the copyrighted work’s market. And courts at least sometimes give in to that temptation. While factor one’s commerciality prong also presents opportunities for circular logic, the transformative use concept helps temper that inclination. Furthermore, case law over the years has already done much to reign in the first factor’s commerciality prong such that the possibility of courts grossly misapplying it going forward seems less likely.

In sum, another implication from this study’s findings is that streamlining the fair use inquiry seems warranted. While factors two and four may point to legitimate concerns under the overall fair use rubric, other factors already address those concerns and, arguably, do so more effectively. Relying on them exclusively thus seems warranted.

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284 Beebe, supra note 10, at 620-21.
285 See, e.g., Sarvis v. Polyvore, Inc., 2015 WL 5934759 (D. Mass. 2015) (“[T]he record belies any significant copying of the copyrighted art images. Consequently, the degree of market harm, part of the fourth factor, is de minimus.”)
286 See, e.g., Perfect 10, Inc. v. Google, Inc., 2010 WL 9479060 (C.D. Cal. 2010) (reviewing the opposite situation in concluding that thumbnail versions of images did not substitute for full-sized versions of the same images, and thus resolving factor four in favor of defendants)
287 See supra notes 247-254 and accompanying text.
288 See supra note 254 and accompanying text.
289 See Netanel, supra note 11 (discussing the ascendance of the transformative use subfactor under the first factor and overall fair use case law, particularly between 2006-2010).
CONCLUSION

In this Article, we have empirically examined the role transformative use plays in the overall fair use inquiry. Our results confirm some commentators’ worst fears: transformative use is eating the fair use world. First, modern courts take transformative use into account more than ever before. And second, our data show that the vast majority of modern courts use the transformative use concept throughout the fair use inquiry as the dominant means of resolving various fair use questions.

But we suggest this development is to be celebrated, not mourned. That celebration comes with a few caveats. First, transformative use and the fair use doctrine must remain flexible constructs. Some contexts, such as software and modern art, may be ill-suited for typical understandings of transformative use and fair use. In such settings, courts must show adaptability in applying these doctrines. Second, though we believe the transformative use concept’s hegemony is overall a positive development in fair use jurisprudence, we believe fair use still has room for improvement. In particular, removing factors two and four from the fair use inquiry would improve judicial economy without sacrificing those factors’ concerns. This is so because other fair use factors, such as the transformative use doctrine and factor three, already effectively address the concerns that factors two and four are meant to safeguard.
Appendix A

Regression Results

Table 11 shows that transformative use outcomes exhibit a statistically significant relationship to overall fair use outcomes, meaning that transformative use outcomes are a reliable predictor of fair use outcomes generally. Furthermore, as reflected by its coefficient and odds ratio values, transformative use’s relationship to fair use outcomes is stronger than that of any other factor one subfactor (the higher these values, the greater the variable’s predictive capability with respect to the dependent variable, in this case fair use outcomes).

Table 11. Logistic Regression of the Fair Use Test’s Outcome as a Function of Factor One’s Subfactors in 417 Dispositive Opinions.290

<table>
<thead>
<tr>
<th>Dependent Variable: Fair Use Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Log likelihood = -114.0031</td>
</tr>
<tr>
<td>Average classification accuracy = 0.9030976</td>
</tr>
<tr>
<td>n = 417</td>
</tr>
<tr>
<td>Pseudo R^2 = 0.60511</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Subfactor</th>
<th>Odds Ratio</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>Z Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commerciality</td>
<td>4.143***</td>
<td>1.421</td>
<td>0.220</td>
<td>6.469</td>
</tr>
<tr>
<td>Preamble</td>
<td>4.287***</td>
<td>1.456</td>
<td>0.283</td>
<td>5.143</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>7.163***</td>
<td>1.969</td>
<td>0.595</td>
<td>3.309</td>
</tr>
<tr>
<td>Trans. Use</td>
<td>9.090***</td>
<td>2.207</td>
<td>0.262</td>
<td>8.422</td>
</tr>
<tr>
<td>Constant</td>
<td>1.489**</td>
<td>0.398</td>
<td>0.198</td>
<td>2.014</td>
</tr>
</tbody>
</table>

***denotes significance at the 0.01 level
**denotes significance at the 0.05 level

290 The closer the Pseudo R^2 value is to 1, the better the model is in explaining the observed variation. Our Pseudo R^2 value here, 0.60511, indicates an acceptable level of statistical reliability. Furthermore, the model accurately classified about 90% of the observations.
Tables 12-13 below show that transformative use outcomes exhibit a statistically significant relationship to factor one outcomes. Furthermore, transformative use’s relationship to outcomes for factors one and four is stronger than that of any other factor one subfactor, as evidenced by its higher coefficient and odds ratio values.

**Table 12. Logistic Regression of Factor One’s Outcome as a Function of Factor One’s Subfactors in 406 Dispositive Opinions.**

<table>
<thead>
<tr>
<th></th>
<th>Odds Ratio</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>Z Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commerciality</td>
<td>12.868***</td>
<td>2.555</td>
<td>0.375</td>
<td>6.816</td>
</tr>
<tr>
<td>Preamble</td>
<td>15.001***</td>
<td>2.708</td>
<td>0.446</td>
<td>6.072</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>1.324</td>
<td>0.280</td>
<td>0.681</td>
<td>0.412</td>
</tr>
<tr>
<td>Trans. Use</td>
<td>19.933***</td>
<td>2.992</td>
<td>0.395</td>
<td>7.573</td>
</tr>
<tr>
<td>Constant</td>
<td>2.664***</td>
<td>0.980</td>
<td>0.307</td>
<td>3.193</td>
</tr>
</tbody>
</table>

***denotes significance at the 0.01 level
Table 13. Logistic Regression of Factor Four’s Outcome as a Function of Factor One’s Subfactors in 404 Dispositive Opinions.\textsuperscript{291}

<table>
<thead>
<tr>
<th>Dependent Variable: Factor Four Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Log likelihood = -155.6088</td>
</tr>
<tr>
<td>Average classification accuracy = 0.864375</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Predicative Factor</th>
<th>Odds Ratio</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>Z Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commerciality</td>
<td>3.282***</td>
<td>1.188</td>
<td>0.185</td>
<td>6.431</td>
</tr>
<tr>
<td>Preamble</td>
<td>2.591***</td>
<td>0.952</td>
<td>0.225</td>
<td>4.229</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>1.347</td>
<td>0.298</td>
<td>0.405</td>
<td>0.736</td>
</tr>
<tr>
<td>Trans. Use</td>
<td>4.718***</td>
<td>1.551</td>
<td>0.202</td>
<td>7.674</td>
</tr>
<tr>
<td>Constant</td>
<td>1.770***</td>
<td>0.571</td>
<td>0.175</td>
<td>3.272</td>
</tr>
</tbody>
</table>

\*\*\*denotes significance at the 0.01 level

\textsuperscript{291} While the Pseudo R\(^2\) value for this regression is less than ideal at 0.441, previous studies addressing similar questions have accepted lower levels of reliability in reporting their results. See Beebe, supra note 10, at 595. Furthermore, this model accurately classified a little over 86\% of the observations.
Table 14 below provides similar findings with respect to factor three outcomes. We do note that this model, based on tests of accuracy, appears to be the least reliable regression model of the three models testing transformative use’s relationship to the individual factor outcomes, though its results appear to be statistically significant.

Table 14. Logistic Regression of Factor Three’s Outcome as a Function of Factor One’s Subfactors in 347 Dispositive Opinions.292

<table>
<thead>
<tr>
<th>Dependent Variable: Factor Three Outcome</th>
<th>Odds Ratio</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>Z Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commerciality</td>
<td>1.623***</td>
<td>0.484</td>
<td>0.155</td>
<td>3.130</td>
</tr>
<tr>
<td>Preamble</td>
<td>2.320***</td>
<td>0.842</td>
<td>0.222</td>
<td>3.798</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>2.226**</td>
<td>0.800</td>
<td>0.394</td>
<td>2.029</td>
</tr>
<tr>
<td>Trans. Use</td>
<td>3.084***</td>
<td>1.126</td>
<td>0.193</td>
<td>5.825</td>
</tr>
<tr>
<td>Constant</td>
<td>0.496***</td>
<td>-0.701</td>
<td>0.161</td>
<td>-4.343</td>
</tr>
</tbody>
</table>

*** denotes significance at the 0.01 level
** denotes significance at the 0.05 level

292 Because of the relatively low Pseudo R^2 value for this regression, we urge caution in trusting this model’s predictive capability. With that said, the model did exhibit an average classification accuracy of about 77%.
Finally, Table 15 below presents our regression results testing whether medium shifts, uses in new contexts, and altering the original work with new expression reliably predict whether a court will find the use to be transformative. Our results show that each of these variables exhibits a statistically significant relationship with transformative use outcomes, including a negative relationship between mediums shifts and a finding of transformative use (i.e., a shift in medium may actually predict a non-transformative use finding more often than not). However, we note that the relevant statistical indicators of this particular regression model suggest we should be wary of trusting the model’s predictive capabilities.

**Table 15. Logistic Regression of Transformative Use Outcomes as a Function of Medium Factors in 290 Dispositive Opinions.**

<table>
<thead>
<tr>
<th>Dependent Variable: Transformative Use Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Log likelihood = -178.8836</td>
</tr>
<tr>
<td>Average classification accuracy = 0.6044138</td>
</tr>
<tr>
<td>n = 290</td>
</tr>
<tr>
<td>Pseudo $R^2 = 0.1100881$</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Medium Factor</th>
<th>Odds Ratio</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>Z Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medium Shift</td>
<td>0.500***</td>
<td>-0.693</td>
<td>0.265</td>
<td>-2.612</td>
</tr>
<tr>
<td>New Context</td>
<td>3.484***</td>
<td>1.248</td>
<td>0.259</td>
<td>4.824</td>
</tr>
<tr>
<td>New Expression</td>
<td>1.373**</td>
<td>0.317</td>
<td>0.148</td>
<td>2.148</td>
</tr>
<tr>
<td>Constant</td>
<td>0.619*</td>
<td>-0.479</td>
<td>0.270</td>
<td>-1.774</td>
</tr>
</tbody>
</table>

***denotes significance at the 0.01 level  
**denotes significance at the 0.05 level  
*denotes significance at the 0.1 level

293 Though the model accurately predicted about 60% of the results, the model’s Pseudo $R^2$ value was 0.110, which means that the model fit to the data is quite poor. Hence, though the results appear statistically significant, we urge caution in trusting this model’s predictive capability.