

October 2016

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TRANSFORMATIVENESS IN THE AGE OF MASS DIGITIZATION

MARIE-ALEXIS VALENTE[†]

INTRODUCTION

Whether we are aware of it or not, the concepts of the fair use defense to copyright infringement, including transformativeness, have affected our lives in some way. From accessing the Google Books database and search engines to conducting legal research, the American public has become involved in a controversy surrounding copyright law and the principles of fair use. Fair use is a defense to a copyright infringement claim that courts determine based on four statutory factors articulated in the Copyright Act.¹ Interestingly, one consideration not explicitly mentioned in the statute that courts heavily weigh in deciding fair use is what has come to be known as transformativeness. As a subfactor of factor one—“the purpose and character of the use”—transformativeness explores the extent to which the use of a copyrighted work gives the original a new purpose or meaning.² This judge-created concept has been applied more expansively since its inception, and the rise of the digital age, with mass reproduction in digital form, has led to a pivotal inflection point for reconsideration of the fair use doctrine and transformativeness.

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¹ 17 U.S.C. § 107 (2012).

² *Id.*

While copyright law has deep roots in the history of our legal system,³ transformativeness in the context of fair use is a more recent development. It was not until 1994, in *Campbell v. Acuff-Rose Music, Inc.*,⁴ that the term became part of judicial analysis. In that case, the United States Supreme Court reviewed a copyright infringement action filed by a record label against members of a rap group for what the rap group argued was a parody use of the copyrighted song.⁵ The Court indicated that parody could constitute fair use of a copyrighted work under the first factor of the fair use analysis because it was “transformative.”⁶ The Court adopted this “transformative” concept from Judge Pierre Leval’s article, *Toward a Fair Use Standard*,⁷ and determined that a transformative use of copyrighted material is one that “adds something new, with a further purpose or different character.”⁸

Since the *Campbell* case, federal courts have heard a multitude of fair use cases and have decided them based in part on this transformativeness concept. However, what began as a check on the expansion of copyright and a way to balance societal and copyright holders’ interests has since morphed into a broad application by judges when they perceive a socially beneficial use.⁹ As a result, some courts, such as the United States Court of Appeals for the Seventh Circuit, have recently rejected the approach of examining whether a use is transformative in circumstances where content is artistically altered because it replaces the § 107 factors and potentially overrides authors’ derivative work rights.¹⁰ By contrast, other recent cases involving digitized copyrighted sources have found verbatim uses of those sources to be transformative because judges have stretched their ideas of what a transformative purpose or use is, and found that making a work digitally accessible inherently

³ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1108–09 (1990) (discussing the original British copyright statute, the Statute of Anne of 1709, and quoting the statute whose purpose was “for the Encouragement of Learned Men to compose and write useful Books.” (citing Act for the Encouragement of Learning, 1709, 8 Anne, ch. 19)).

⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁵ *Id.* at 572–73.

⁶ *Id.* at 578–79.

⁷ *Id.* at 579 (citing Leval, *supra* note 3, at 1111).

⁸ *Id.*

⁹ *See infra* Part II.

¹⁰ *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

changed the work.¹¹ This continued expansion of transformativeness may be problematic for the optimal balancing of interests under copyright policy and may create more confusion about what constitutes transformativeness as the digital information age moves forward.

The digital information age has ushered in unprecedented large-scale digitized scanning of millions of copyrighted works available on the Internet and other digital mediums.¹² Consequently, many aspects of copyright law, including fair use and the rights of publishers and creators of works, are impacted by this open access.¹³ Courts must now determine whether such digital reproduction and distribution of copyrighted works qualify as fair use, and authors and creators question their roles in this process of amassing their works into digital libraries and databases.¹⁴ Business models are affected by digitization, where information was previously provided on a “pay-per-view” basis and is now free or advertiser supported,¹⁵ and questions now arise regarding whether there are efficient and cost-effective licensing options available.¹⁶

This Note examines and ultimately argues against the expansion of transformativeness in verbatim-copying cases, given the implications it will have as more copyrighted works are digitized. Part I discusses the background and objectives of the Copyright Act, the fair use exception, and the rise of the transformativeness subfactor. Part II provides a summary of some predigitization fair use cases to establish some basic principles about how courts have ruled on transformativeness. Part III examines relevant cases recently decided on the question of transformativeness in the context of mass digitization. Part IV critiques the ways courts have arrived at their holdings, specifically in overemphasizing societal benefits as a measure of transformativeness and overstating the facts of certain cases to

¹¹ See *infra* Part III.

¹² Trudi Bellardo Hahn, *Impacts of Mass Digitization Projects on Libraries and Information Policy*, ASS'N FOR INFO. SCI. & TECH. BULL. (Oct./Nov. 2006), <http://www.asis.org/Bulletin/Oct-06/hahn.html>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ U.S. COPYRIGHT OFFICE, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT i–ii (Oct. 2011), http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

find a transformative purpose or character where one may not exist. This section will also offer a more appropriate analysis that courts should follow in determining whether certain cases of verbatim-copying and digitization are transformative. Finally, it will discuss some possible licensing options to abate the judicial expansion of transformativeness.

I. OVERVIEW OF THE COPYRIGHT ACT

The grant of copyright power to Congress is fundamental, having been enumerated in the Constitution.¹⁷ This includes the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁸ The United States Supreme Court has held that this clause lends itself to the creation of copyright laws designed to further the utilitarian goals of increasing the progress of knowledge for the improvement of society.¹⁹ The underlying idea is that by granting an author a limited monopoly on her writings and works, she will become motivated to create literary and artistic works that benefit society.²⁰

The modern Copyright Act of 1976 protects “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²¹ Works protected under this definition include literary, musical, pictorial, graphic, and audiovisual works that express ideas, compilations, and derivative works.²² An owner of a copyright has the exclusive right to reproduce, adapt, distribute, publicly perform, and publicly display his or her copyrighted works.²³

¹⁷ U.S. CONST. art. I, § 8, cl. 8.

¹⁸ *Id.*

¹⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“[This] limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).

²⁰ Leval, *supra* note 3, at 1108.

²¹ 17 U.S.C. § 102(a) (2012).

²² *Id.* §§ 102–103.

²³ *Id.* § 106.

In furthering the utilitarian objectives of copyright law by stimulating the production of creative works without impeding incentives to create them, the Copyright Act provides an exception to this monopoly: the fair use doctrine.²⁴ The statute provides that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”²⁵ The factors to consider when determining if a use is covered by this doctrine are:

- (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.²⁶

Although the fair use factors are statutorily created, courts have developed their own means of interpreting the statute with additional subfactors to consider.²⁷ The first factor, the purpose and character of the use and its commerciality, carries much of the weight and is important in determining fair use.²⁸ This is evidenced by the fact that judges have focused much of their discussions in fair use cases on the first factor compared to some of the other factors.²⁹ The subfactors of factor one have developed separately through scholarly commentary and case law.³⁰ While the statutorily required commerciality inquiry became a significant focal point after *Sony Corp. of America v. Universal City Studios, Inc.*,³¹ it was not until Judge Leval proposed that courts shift their focus on the character and purpose of the use to “transformativeness” that that nonstatutory subfactors gained more attention in *Campbell* and subsequent cases.³² A court’s analysis under this subfactor considers whether the new work

²⁴ Leval, *supra* note 3, at 1110.

²⁵ 17 U.S.C. § 107 (2012).

²⁶ *Id.*

²⁷ Leval, *supra* note 3, at 1106.

²⁸ *Id.* at 1111.

²⁹ Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 587 (2008).

³⁰ *Id.* at 597–98.

³¹ 464 U.S. 417, 442 (1984). Courts began focusing on commerciality after the Supreme Court held that every commercial use of copyrighted material is presumptively unfair. Beebe, *supra* note 29, at 598.

³² Beebe, *supra* note 29, at 603.

“merely ‘supersede[s] the objects’ ”³³ of the original work or adds something new “with a further purpose or different character, altering the first with new expression, meaning, or message.”³⁴ The Supreme Court has held that the more transformative a new work is, the less significant the other factors will be in a finding of fair use.³⁵

Throughout the many transformative inquiries courts have analyzed in fair uses cases, two main types have informed courts’ analyses under the first factor: transformative use and transformative purpose.³⁶ A transformative use repurposes the copyrighted work to create a new work, such as a parody or other artistic use of the work, and changes the work’s character.³⁷ By contrast, a transformative purpose exists when a copyrighted work is copied verbatim but is put to a new purpose.³⁸ Physical changes are not necessary to find a transformative purpose; where the work is put into a new context, given new insights, or serves a different function than the original, courts may find in favor of transformativeness.³⁹ The difference is that a transformative use produces a new work while a transformative purpose takes an exact copy of the work and applies it to a new purpose. The Supreme Court has thus far only addressed the concept of transformativeness as it applies to parody in *Campbell*—that is, transformative use—and not verbatim copying.⁴⁰

Against this evolutionary background, today’s technological advancements, including the digitization of artistic and literary works, have further complicated copyright law and the fair use doctrine, and have created a problem for transformative purpose. Since the electronic information age began and copyrighted works started appearing on the Internet, courts have followed a

³³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (alteration in original) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 9,401)).

³⁴ *Campbell*, 510 U.S. at 579 (citing *Leval*, *supra* note 3, at 1111).

³⁵ *Id.*

³⁶ Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 836 (2010).

³⁷ *Id.*

³⁸ Michael D. Murray, *What is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law*, 11 CHI.-KENT J. INTELL. PROP. 260, 273 (2012).

³⁹ *Id.*

⁴⁰ Barry Sookman, *The Google Book Project: Is It Fair Use?*, 61 J. COPYRIGHT SOC’Y U.S.A. 485, 497 (2014).

trend in expanding the concept of transformativeness.⁴¹ In many cases, courts have surprisingly found that verbatim copying and digitizing of copyrighted documents were transformative because they became part of an online search system.⁴² In the context of books, the Copyright Office has adopted the term “mass digitization” to encompass large-scale scanning and left open the possibility that scanning fewer books may also qualify as mass digitization.⁴³ Music, photographs, and other works are also capable of being mass-digitized.⁴⁴ The Copyright Act did not directly address mass digitization, so the issue requires examining long-established copyright and fair use principles and applying them to this new context.

II. EARLY CASES ESTABLISHING CONTOURS OF TRANSFORMATIVENESS IN THE VERBATIM COPYING CONTEXT

To understand the development of transformativeness in mass digitization cases today, it is helpful to examine some of the early contexts in which this doctrine was applied to pre-mass digitization verbatim copying. One of the earliest and most cited cases involving verbatim copying is *Sony Corp. of America v. Universal City Studios, Inc.*, where Universal City Studios and other members of the film industry sued Sony for copyright infringement of their television broadcasts.⁴⁵ Sony manufactured and sold Betamax video tape recorders that were able to record commercially sponsored television programs broadcast on public airwaves.⁴⁶ The plaintiff studios alleged that some individuals used Betamax recorders to record their copyrighted works on television and had infringed their copyrights, and that the defendant corporation was liable for selling the Betamax recorders.⁴⁷ The United States Supreme Court ruled in favor of Sony, determining that the recording of copyrighted television programs for later viewing was a noncommercial, nonprofit activity for individuals watching privately at home.⁴⁸ The Court

⁴¹ 1 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBL. & THE ARTS § 1:31:70 (3d ed. 2004).

⁴² 1 Information Law § 4:14, Westlaw (database updated Nov. 2015).

⁴³ U.S. COPYRIGHT OFFICE, *supra* note 16, at 8–9.

⁴⁴ *Id.* at 15.

⁴⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 449.

determined that recording in this instance allowed viewers to see a work they could have viewed for free at an earlier time—so-called “time-shifting”—and the fact that the entire work was reproduced did not preclude fair use.⁴⁹ In fact, the Court found that there was no potential harm to the studio in the broadcasting market, and that there was a public interest in making television broadcasts more available to a wider audience.⁵⁰ This was one of the first times a court held that reproducing a copyrighted work with no new purpose could still pass the first factor of fair use.⁵¹

After the concept of transformativeness was introduced in *Campbell*,⁵² it was applied in another well-known verbatim copying case, *American Geophysical Union v. Texaco, Inc.*⁵³ The defendant, Texaco, employed researchers to conduct scientific research and develop new products and technology in the petroleum industry, and subscribed to various scientific and technical journals.⁵⁴ The plaintiffs, publishers of the scientific and technical journals, brought suit against Texaco for the unauthorized photocopying of articles from their journals.⁵⁵ Chickering, a chemical engineer at one of Texaco's facilities, reviewed published works in one of the publisher's journals, and was found to have photocopied articles from the journal and stored them in his files for later use.⁵⁶ Texaco asserted a fair use defense, and the district court held that the copying was not fair.⁵⁷

On appeal, the United States Court of Appeals for the Second Circuit affirmed the lower court's ruling, and determined that Chickering had photocopied the articles for the same basic purpose that subscribers would normally obtain the original journal articles—“to have it available on his shelf for ready

⁴⁹ *Id.* at 449–50.

⁵⁰ *Id.* at 454.

⁵¹ Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1383 (2014).

⁵² *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁵³ 60 F.3d 913 (2d Cir. 1994).

⁵⁴ *Id.* at 915.

⁵⁵ *Id.* at 914.

⁵⁶ *Id.* at 915. It was presumed that many other employees at the facility had done the same, but the parties agreed to choose one researcher at random as a representative of the group to avoid expenses of exploring the photocopying practices of each researcher. *Id.*

⁵⁷ *Id.* at 914.

reference if and when he needed to look at it.”⁵⁸ Overall, the Second Circuit found the purpose to be archival, primarily to provide Texaco scientists with a copy of the original articles without having to purchase more than one copy of the original journal, and it “‘supersed[ed] the objects’ of the original creation.”⁵⁹ It held that “the making of copies to be placed on the shelf in Chickering’s office [was] part of a systematic process of encouraging employee researchers to copy articles so as to multiply available copies while avoiding payment.”⁶⁰ The court noted that the use may lead to a public benefit of greater research and technical developments, but that the defendant would still reap an unfair economic advantage from the unauthorized copying without paying the copyright holder.⁶¹ Importantly, the photocopying merely transformed the material object embodying the intangible article from the journal format to a photocopy, and did not transform the copyrighted article itself.⁶² While it may have converted the original into a more useful format:

[W]hatever independent value derives from the more usable format of the photocopy does not mean that every instance of photocopying wins on the first factor. In this case, the predominant archival purpose of the copying tips the first factor against the copier, despite the benefit of a more usable format.⁶³

The Sixth Circuit also reviewed the issue of transformativeness in verbatim copying.⁶⁴ In *Princeton University Press v. Michigan Document Services*,⁶⁵ the defendant, a commercial copyshop, reproduced substantial portions of copyrighted scholarly works and bound them into coursepacks for student use in reading assignments given by professors at the University of Michigan.⁶⁶ The copyshop did so without seeking or obtaining permission from copyright owners, and the plaintiff

⁵⁸ *Id.* at 918.

⁵⁹ *Id.* at 919–20 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

⁶⁰ *Id.* at 920.

⁶¹ *Id.* at 922.

⁶² *Id.* at 923.

⁶³ *Id.* at 924.

⁶⁴ See *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996).

⁶⁵ *Id.*

⁶⁶ *Id.* at 1383.

publishers filed suit for copyright infringement.⁶⁷ The district court found that the copyshop did not have a fair use defense, and on appeal, the Sixth Circuit agreed.⁶⁸ In considering the transformativeness of the coursepacks, the court stated, "If you make verbatim copies of 95 pages of a 316-page book, you have not transformed the 95 pages very much—even if you juxtapose them to excerpts from other works and package everything conveniently."⁶⁹

Transformativeness in the verbatim-copying context was again analyzed by the Second Circuit in *Infinity Broadcast Corp. v. Kirkwood*.⁷⁰ In that case, the defendant, Kirkwood, designed Dial-Up, a system that allowed customers to listen to radio broadcasts around the United States by connecting a radio receiver to a phone line.⁷¹ The receiver would receive broadcasts over the air, transmit them into phone lines, and allow callers to listen to whatever radio station to which the receiver was tuned.⁷² The plaintiff owned a network of radio stations, including stations in markets where Dial-Up had receivers, and it owned certain syndicated programs broadcast in other markets in exchange for a fee or advertising time.⁷³ Upon learning that Dial-Up users could gain access to and record radio programs broadcast on its stations, it filed claims against the defendant for copyright infringement.⁷⁴ The district court held that Kirkwood's use was fair, but the Second Circuit reversed on appeal.⁷⁵ While the district court found transformative purpose in Kirkwood's use of the broadcast for information rather than entertainment, the Second Circuit stated that a difference in purpose is not the same as a lawful transformation.⁷⁶ Kirkwood sold unaltered radio broadcasts, and its target audiences did not exactly transform the broadcasts either; they may not have been listening to entertain themselves but they still derived entertainment value

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 1389.

⁷⁰ 150 F.3d 104 (2d Cir. 1998).

⁷¹ *Id.* at 106.

⁷² *Id.*

⁷³ *Id.* at 107.

⁷⁴ *Id.*

⁷⁵ *Id.* at 105.

⁷⁶ *Id.* at 108.

from them, rather than informational content.⁷⁷ The court reasoned that “[t]alent scouts, who admittedly would not be listening in order to be entertained themselves, would nevertheless be listening for the entertainment value of the broadcasts rather than the factual content.”⁷⁸ The court was also unconvinced by the argument that the service provided the societal benefit of enabling advertisers to confirm that their commercials were being played.⁷⁹ There were other means of accomplishing that goal and it was not enough to overcome the nontransformative retransmission.⁸⁰

These earlier cases of fair use provide several basic principles about transformativeness in the context of verbatim reproduction. First, a change in the context of a work without changing the content may be transformative if the purpose and function of the new work is sufficiently different from the original;⁸¹ however, without a new purpose that communicates a new meaning, the subsequent use may fail.⁸² Second, archival usage of original copyrighted works has “the potential to create a new function and meaning for the work, and may meet fair use objectives if the use has a proper purpose that is different from exploitation of the creative original value and meaning of the original work.”⁸³ Third, simply copying the original work will not meet the transformative requirement, even if there is an educational or other general public benefit, unless there is a change in the meaning and purpose of the work.⁸⁴ Lastly, copying a work that merely places it in a new medium of communication without changing its purpose or meaning may not be transformative.⁸⁵

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 108–09.

⁸⁰ *Id.*

⁸¹ *See id.*; Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1389 (6th Cir. 1996); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 923 (2d Cir. 1994).

⁸² Murray, *supra* note 38, at 279–80.

⁸³ *Id.* at 285.

⁸⁴ *Id.* at 287.

⁸⁵ *Id.* at 261. *See also* Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 143 (2d Cir. 1998) (holding that presenting an audiovisual work into a new medium does not amount to transformative use where the content of the work is not altered).

III. CASES OF VERBATIM COPYING AND DIGITIZATION OF COPYRIGHTED WORKS

With the rise of mass digitization over the last decade, copyrighted works have been reproduced on a much larger scale.⁸⁶ In such cases, many copyright holders have brought infringement suits in response, but the courts have applied the fair use and transformative inquiries differently compared to previous verbatim copying cases.⁸⁷ Public benefit has played a larger role in courts' analyses than previously, and even where a second use has no new purpose, courts have surprisingly found that the use is transformative largely based on their perceived notions of a societal benefit.⁸⁸ This section analyzes several categories of cases where this expansion of transformativeness has occurred. While many cases fall into overlapping categories, this Note attempts to distinguish and organize them more coherently.

A. *Internet Search Engines*

Two seminal cases that exemplify courts' evolving approaches to the transformativeness of copies on Internet search engines are *Perfect 10, Inc. v. Amazon.com, Inc.*⁸⁹ and *Kelly v. Arriba Soft Corp.*⁹⁰ In *Perfect 10*, Google had an agreement with Amazon whereby Amazon routed users' search queries to Google and transmitted Google's responses back to users.⁹¹ Plaintiff, Perfect 10, Inc., marketed and sold images of nude models and offered a monthly subscription to users to view password-protected images.⁹² It also licensed a third party to sell and distribute reduced-size copyrighted images for download and use on cell phones.⁹³ When certain websites began republishing Perfect 10's images without authorization, Google's search engine began indexing the webpages containing the unauthorized images and provided thumbnail versions of the images on its

⁸⁶ See U.S. COPYRIGHT OFFICE, *supra* note 16, at 8–9.

⁸⁷ See *infra* Part III.A–D.

⁸⁸ See *infra* Part III.A–D.

⁸⁹ 508 F.3d 1146 (9th Cir. 2007).

⁹⁰ 336 F.3d 811 (9th Cir. 2002).

⁹¹ *Perfect 10*, 508 F.3d at 1157.

⁹² *Id.*

⁹³ *Id.*

Google Image Search database.⁹⁴ When a user clicked on the thumbnail, “the user’s browser accesse[d] the third-party webpage and in-line link[ed] to the full-sized infringing image stored on the website publisher’s computer. This image appear[ed], in its original context, on the lower portion of the window on the user’s computer screen framed by information from Google’s webpage.”⁹⁵

Perfect 10 claimed that Google’s display of its thumbnail images and in-line linking to the full-sized images infringed Perfect 10’s copyright in those images and sought a preliminary injunction.⁹⁶ Google asserted a fair use defense.⁹⁷ The district court granted in part and denied in part the preliminary injunction against Google and denied the preliminary injunction against Amazon, and Perfect 10 appealed.⁹⁸

In reviewing the transformativeness factor, the United States Court of Appeals for the Ninth Circuit looked to *Kelly v. Arriba Soft Corp.*,⁹⁹ where a photographer brought suit against Arriba, operator of an Internet search engine, for copyright infringement.¹⁰⁰ This search engine also provided thumbnail images of copyrighted photographs, and the Ninth Circuit held that these thumbnail images were transformative because of the transformative nature of a search engine’s function and its public benefit.¹⁰¹ That is, Arriba’s use of the images served a different purpose and function than the photographer’s, and such use improved access to information on the Internet.¹⁰² Relying on the holding from *Kelly*, the court in *Perfect 10* likewise determined that a search engine is transformative because it “transforms the image into a pointer directing a user to a source of information”¹⁰³ and is socially beneficial because it “incorpor[ates] an original work into a new work, namely, an electronic reference tool.”¹⁰⁴ Contrasting this case with *Infinity Broadcast Corp. v.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1163.

⁹⁸ *Id.* at 1157.

⁹⁹ 336 F.3d 811 (9th Cir. 2003).

¹⁰⁰ *Perfect 10*, 508 F.3d at 1164 (citing *Kelly*, 336 F.3d at 815–16).

¹⁰¹ *Id.* (citing *Kelly*, 336 F.3d at 818–22).

¹⁰² *Id.* at 1165 (citing *Kelly*, 336 F.3d at 819).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Kirkwood,¹⁰⁵ where a broadcaster's retransmission of a radio broadcast was not transformative since its purpose and meaning were the same as the original, the Ninth Circuit held that Google's use of Perfect 10's images as thumbnails provided "a new context to serve a different purpose."¹⁰⁶ Moreover, the significantly transformative nature of Google's use and the public benefit provided by its search engine outweighed any superseding or commercial aspects of its use of Perfect 10's images.¹⁰⁷

B. Mass Digitization for Student-Oriented and Research Purposes

Similar to the copying in *Texaco*, digital copying and archiving involves making copies of a work and storing them digitally on a server for access at any time.¹⁰⁸ This mass digitization has recently become an issue in the context of student-related uses and general research needs.¹⁰⁹ However, courts are split on the issue. Some courts have found this type of digital copying transformative since its purpose is different from that of the original, while others find no new purpose just because the copying is digital.

In *A.V. ex rel. Vanderhye v. iParadigms, LLC*,¹¹⁰ plaintiff students brought suit against iParadigms for copyright infringement of essays they wrote for submission to their high school teachers through the defendant's online plagiarism detection service.¹¹¹ The defendant owned and operated "Turnitin Plagiarism Detection Service" which allowed high school and college educators to evaluate the originality of their students' work.¹¹² A school could subscribe to iParadigms' service, and students would be required to submit their work through the web-based system.¹¹³ Turnitin would then compare

¹⁰⁵ 150 F.3d 104, 108 (2d Cir. 1998).

¹⁰⁶ *Perfect 10*, 508 F.3d at 1165.

¹⁰⁷ *Id.* at 1166.

¹⁰⁸ Dale Flecker, *Digital Archiving: What Is Involved?*, EDUCAUSE REVIEW (Jan./Feb. 2003), <https://net.educause.edu/ir/library/pdf/erm0316.pdf>.

¹⁰⁹ See *infra* Part III.B.

¹¹⁰ 562 F.3d 630 (4th Cir. 2009).

¹¹¹ *Id.* at 633–34.

¹¹² *Id.* at 634.

¹¹³ *Id.*

the students' work with content already available online.¹¹⁴ The students' work would subsequently become archived for future comparisons.¹¹⁵ But for this process to occur, students had to agree through a "Clickwrap Agreement" when creating a profile to use the service.¹¹⁶

Four high school students brought suit against iParadigms, claiming that they submitted a disclaimer on their assignments, which objected to the archiving of their work.¹¹⁷ In reviewing the defendant's fair use defense, the district court held that iParadigms' use of the plaintiffs' work was transformative because "its purpose was to prevent plagiarism by comparative use, and that iParadigms' use of the student works did not impair the market value for high school term papers and other such student works."¹¹⁸ On appeal, the Fourth Circuit held that while the commercial factor of the analysis tended to weigh against fair use, it had to be weighed alongside the other factors and was thus not determinative.¹¹⁹ The plaintiffs argued that the district court erred in holding that iParadigms did not add anything new to a work to make it transformative, but simply stored the work in its archives.¹²⁰ They argued in the alternative that iParadigms still failed the transformativeness test because its service did not always prevent plagiarism and therefore did not have a transformative purpose.¹²¹ The appellate court disagreed, holding that "[t]he use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work."¹²² Furthermore, the court determined that the use did not need to achieve its purpose perfectly, and that iParadigms' use of the works was transformative because it was "completely unrelated to expressive content" and was intended to discourage plagiarism.¹²³

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 635.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 636.

¹¹⁹ *Id.* at 639.

¹²⁰ *Id.*

¹²¹ *Id.* at 639–40.

¹²² *Id.* at 639.

¹²³ *Id.* at 640.

Another case involving the issue of digital copying is *Cambridge University Press v. Becker*.¹²⁴ Plaintiffs were university presses that published scholarly books and journals, marketed these books to professors in colleges and universities, and even sent them complimentary copies.¹²⁵ Georgia State University maintained an electronic uLearn course management system and used ERES, an online reserves system of digital files, to distribute course material.¹²⁶ Professors at the university posted excerpts of copyrighted works on ERES for student access.¹²⁷ There were seventy-five excerpts of copyrighted books at issue, selected from sixty-four books by twenty-three professors, which on average made up 10.1% of pages in the copyrighted books.¹²⁸ The school's Copyright Policy included a set of fair use factors that professors were to consider before distributing copyrighted materials.¹²⁹ Moreover, professors were told at training sessions that copying as much as 20% of the copyrighted source would be ideal to pass the fair use test.¹³⁰ Students could then access these copyrighted readings from the ERES system and could print, save, and download copies of the readings.¹³¹

In 2008, Cambridge University Press and other academic publishers brought suit against Georgia State University officials for copyright infringement in the form of electronically posting unlicensed portions of copyrighted books and making them electronically available to students.¹³² The plaintiffs sought injunctive and declaratory relief and attorney fees.¹³³ The defendants argued, among other things, that there was no copyright infringement and claimed the defense of fair use.¹³⁴

In reviewing the defendants' fair use defense, the district court looked to *Campbell* and the language of § 107 of the Copyright Act for guidance, determining that the first factor—the

¹²⁴ *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), *rev'd sub nom.* *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

¹²⁵ *Id.* at 1211.

¹²⁶ *Id.* at 1218.

¹²⁷ *Id.*

¹²⁸ *Id.* at 1218–19.

¹²⁹ *Id.* at 1219.

¹³⁰ *Id.*

¹³¹ *Id.* at 1220.

¹³² *Id.* at 1201.

¹³³ *Id.*

¹³⁴ *Id.*

purpose and character of the use—favored the defendants.¹³⁵ The plaintiffs argued that the straight copying of copyrighted sources onto the ERES system was nontransformative; they relied on cases such as *Basic Books, Inc. v. Kinko's Graphics Corp.*,¹³⁶ which involved commercial copiers that produced printed coursepacks using copyrighted materials but unsuccessfully attempted to characterize their copying as noncommercial and nonprofit.¹³⁷ The court in *Cambridge University Press* largely found for the defendants based on the education-prompting language in § 107, which states that “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as . . . teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”¹³⁸ It agreed, however, with the plaintiff’s characterization of the copying as nontransformative.¹³⁹ That characterization did not preclude fair use since “[t]he obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.”¹⁴⁰

On appeal, the Eleventh Circuit reversed and remanded the case.¹⁴¹ It agreed that the defendants’ use was not transformative since the excerpts of the plaintiffs’ works posted on ERES were mere verbatim copies of the original works; they were simply converted into digital format and gave the copies no new meaning.¹⁴² The secondary use was done with the same intrinsic purpose as the original—to provide students with reading material for university courses.¹⁴³ Further, while electronic reserve systems enhanced and simplified access to excerpts of the plaintiffs’ works, they did not transform those works, but merely superseded the objects of the original

¹³⁵ *Id.* at 1224.

¹³⁶ 758 F. Supp. 1522 (S.D.N.Y. 1991).

¹³⁷ *Cambridge Univ. Press*, 863 F. Supp. 2d at 1224.

¹³⁸ 17 U.S.C.A. § 107 (2012); *Cambridge Univ. Press*, 863 F. Supp. 2d at 1224–25.

¹³⁹ *Cambridge Univ. Press*, 863 F. Supp. 2d at 1224–25.

¹⁴⁰ *Id.* at 1224–25 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579, n.11 (1994)).

¹⁴¹ *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1237 (11th Cir. 2014).

¹⁴² *Id.* at 1263.

¹⁴³ *Id.*

creation.¹⁴⁴ However, despite the nontransformative nature of the use, the court still found that the use satisfied factor one of § 107 due to its educational purpose and noncommercial nature.¹⁴⁵ The court stated:

Although GSU certainly benefits from its use of Plaintiffs' works by being able to provide the works conveniently to students, and profits in the sense that it avoids paying licensing fees, Defendants' use is not fairly characterized as "commercial exploitation." Even if Defendants' use profits GSU in some sense, we are not convinced that this type of benefit is indicative of "commercial" use. There is no evidence that Defendants capture significant revenues as a direct consequence of copying Plaintiffs' works. At the same time, the use provides a broader public benefit-furthering the education of students at a public university.¹⁴⁶

Accordingly, while it did not find a new purpose that made the use transformative, the Eleventh Circuit still focused on the public benefit of furthering education as part of its rationale for finding an educational, noncommercial use.

C. *Digital Libraries*

The rise of digital libraries or repositories, where users scan and aggregate books digitally, which are accessible over a network,¹⁴⁷ has led to lengthy litigation involving whether these uses are copyright infringements. Digital libraries store collections of information systematically, and, unlike other types of digital repositories, "information is organized on computers and available over a network, with procedures to select the material in the collections, to organize it, to make it available to users, and to archive it."¹⁴⁸ Two major cases to come out of this digital library dispute are *Authors Guild, Inc. v. HathiTrust*¹⁴⁹ and *Authors Guild, Inc. v. Google, Inc.*¹⁵⁰

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1263, 1267.

¹⁴⁶ *Id.* at 1267.

¹⁴⁷ WILLIAM Y. ARMS, DIGITAL LIBRARIES 2 (2015), as reprinted in *Definitions of Digital Library*, WASHINGTON & LEE UNIVERSITY, <http://home.wlu.edu/~whaleyt/classes/DigiLib/Whaley/Definition.html> (last visited Apr. 13, 2016).

¹⁴⁸ *Id.*

¹⁴⁹ 755 F.3d 87 (2d Cir. 2014).

¹⁵⁰ 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *aff'd*, 804 F.3d 202 (2d Cir. 2015).

In *Authors Guild, Inc. v. HathiTrust*, several research universities, including the University of Michigan, the University of California at Berkeley, Cornell University, and the University of Indiana, allowed Google to electronically scan the books stored in their collections.¹⁵¹ In 2008, thirteen universities announced that they were forming an organization called HathiTrust to create a digital repository for the digital copies.¹⁵² HathiTrust would create a library known as “HathiTrust Digital Library,” or “HDL,” containing over ten million works.¹⁵³ HDL permitted the general public to search for terms across all the digital copies in the library and only showed the page numbers on which the search terms were located and the number of times the search term appeared on the page.¹⁵⁴ It did not display text from the copyrighted work to the users, so the users could not view the page or any other part of the copyrighted source.¹⁵⁵ However, member libraries permitted patrons with print disabilities to access the full text of the copyrighted material and allowed them to create replacement copies of the works.¹⁵⁶ HDL stored copies of the works on servers across the member universities with the full text of the work and images of each page in the work as they appeared in print version.¹⁵⁷

The Authors Association sued HathiTrust for copyright infringement, and the district court granted summary judgment in favor of HathiTrust on fair use grounds.¹⁵⁸ On appeal, the Second Circuit described transformativeness as a use that “serves a new and different function from the original work and is not a substitute for it.”¹⁵⁹ With respect to search functionality, it found that the HDL had to create digital copies of all copyrighted books to carry out this transformative use and only permitted users to search for terms.¹⁶⁰ In the Second Circuit’s view, this was different in “purpose, character, expression, meaning, and message from the page (and the book) from which

¹⁵¹ 755 F.3d at 90.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 91.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 91–92.

¹⁵⁷ *Id.* at 92.

¹⁵⁸ *Id.* at 92–93.

¹⁵⁹ *Id.* at 96.

¹⁶⁰ *Id.* at 98.

it [was] drawn.”¹⁶¹ This was a different purpose from the original since authors did not create these works for the purpose of enabling a text-searchable database.¹⁶² The court further explained that compared to other cases where it approved a use as transformative,¹⁶³ the use in this case was even more transformative because full-text search capabilities added more to the copyrighted materials.¹⁶⁴ By contrast, providing access to the print-disabled person was not transformative in the court’s view because the underlying purpose of HDL’s use was the same as the authors’ original purpose.¹⁶⁵ The format was changed to one that was accessible to the disabled, but the underlying purpose of HDL’s use was to allow the authors’ books to be read.¹⁶⁶ Simply enabling a new audience to access a copyrighted work did not pass the transformativeness test, although the use was still ultimately fair.¹⁶⁷

In a related case, *Authors Guild, Inc. v. Google, Inc.*,¹⁶⁸ the Authors Guild sued Google for copyright infringement after the search engine scanned copyrighted books and included them in a digital library on its Google Books database.¹⁶⁹ The books were available for its library project partners to download, and excerpts of the books were displayed to the public.¹⁷⁰ The district court found Google’s use to be transformative.¹⁷¹ According to the court, this digital library was a research tool for other libraries, and it digitized books and transformed the text into an index that allowed users to find other books.¹⁷² It reasoned:

The display of snippets of text for search is similar to the display of thumbnail images of photographs for search or small

¹⁶¹ *Id.* at 97.

¹⁶² *Id.*

¹⁶³ *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013) (explaining that the Second Circuit found certain photograph collages were transformative, even though the collages were cast in the same medium as the copyrighted photographs). It also compares it to the transformative use found in *Perfect 10*, *iParadigms*, and *Kelly Hathitrust*, 755 F.3d at 97–98.

¹⁶⁴ *Hathitrust*, 755 F.3d at 97.

¹⁶⁵ *Id.* at 101.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 101–02. A third use, copying for preservation, was deemed not appropriate for determination by the court. *Id.* at 103–04.

¹⁶⁸ 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *aff’d*, 804 F.3d 202 (2d Cir. 2015).

¹⁶⁹ *Id.* at 286–89.

¹⁷⁰ *Id.* at 289.

¹⁷¹ *Id.* at 291.

¹⁷² *Id.*

images of concert posters for reference to past events, as the snippets help users locate books and determine whether they may be of interest. Google Books thus uses words for a different purpose—it uses snippets of text to act as pointers directing users to a broad selection of books.¹⁷³

Furthermore, the court stated that Google Books was not created to read books, but created new information and transformed book text into data for research in unprecedented ways.¹⁷⁴ Google Books provided a public benefit in that readers, scholars, researchers, and libraries were able to easily find books, and so the use was “highly transformative.”¹⁷⁵ Although the court acknowledged that Google would benefit commercially from the digital library since it would draw more users to its website, the court determined that the educational benefit the use provided was more important, thus it determined that factor one favored fair use.¹⁷⁶

The Second Circuit affirmed the district court’s finding of transformativeness.¹⁷⁷ The court stated that transformative works have the purpose of commenting, criticizing or providing information about the original work, and do not necessarily involve a change or transformation in form like derivative works do.¹⁷⁸ The search function of Google’s digital library had the transformative purpose of providing users with information about the original works according to the court, and “Google allows readers to learn the frequency of usage of selected words in the aggregate corpus of published books in different historical periods. . . . [T]he purpose of this copying is the sort of transformative purpose described in *Campbell*”¹⁷⁹ Furthermore, the snippet view added to the library’s highly transformative purpose because it identified books of interest to the user by providing just enough context for the user to know if a work is responsive or not.¹⁸⁰ The commerciality of Google’s use did not dissuade the court from a fair use finding because of the highly transformative purpose of the digital library, and because

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 291–92.

¹⁷⁷ *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202, 205 (2d Cir. 2015).

¹⁷⁸ *Id.* at 215–16.

¹⁷⁹ *Id.* at 217.

¹⁸⁰ *Id.* at 217–18.

many of the other accepted fair use purposes, such as commentary, criticism, and parody, are conducted for profit as well.¹⁸¹

D. *Databases of Legal Documents*

White v. West Publishing Co. exemplifies an instance where a copyright owner contested his legal works being placed on Internet databases.¹⁸² In *White*, the plaintiff filed suit for copyright infringement against West Publishing Corp. and Reed Elsevier, Inc. when he discovered that the briefs he wrote on behalf of clients for litigation were included on the Westlaw and LexisNexis databases without his authorization.¹⁸³ The documents were converted into text-searchable electronic files and saved in the databases' formats.¹⁸⁴ Editors then reviewed the documents and redacted private information, coded and/or extracted key characteristics from the documents to allow users to find the documents, and linked the documents to decisions or other filings in the same or related cases.¹⁸⁵ The court provided two reasons for deeming this use transformative.¹⁸⁶ First, White had created the brief on behalf of his client for purposes of litigation, while the publishing corporations used it to create an interactive legal research tool.¹⁸⁷ Second, the corporations "add[ed] something new, with a further purpose or different character"¹⁸⁸ from the briefs in reviewing, coding, linking, and converting the documents into the documents on its databases.¹⁸⁹ While the purpose may have been commercial, the court stated that the transformative nature of the use outweighed this factor.¹⁹⁰ Furthermore, although the use did not do much to alter the content of the work, the court followed a view of transformativeness that examined a purpose different from the original and the addition of some new element to the document. The defendants' use of the briefs as part of an interactive legal

¹⁸¹ *Id.* at 218–19.

¹⁸² *White v. West Publ'g Corp.*, 29 F. Supp. 3d 396 (S.D.N.Y. 2014).

¹⁸³ *Id.* at 397.

¹⁸⁴ *Id.* at 398.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 399.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

¹⁸⁹ *Id.* at 399.

¹⁹⁰ *Id.*

research tool was enough for the court to determine it was transformative in purpose, possibly implying that the court saw a public benefit in what the defendants had done.

IV. ANALYSIS OF JUDICIAL EXPANSION OF TRANSFORMATIVENESS

Courts have applied factor one of the fair use doctrine to mass digitization cases in a contorted variety of ways¹⁹¹, and some of these approaches have been too broad and potentially harmful. Many courts have strayed from the statutory language of § 107 and earlier fair use cases. They have imposed judge-made transformativeness exceptions in setting out how fair use should be applied to copyrighted works that have been transferred from their original medium onto a digital format. An analysis of how courts have strayed from previously established transformativeness doctrine and applied a broader concept in the new context of mass digitization follows.

A. *Changes in How Courts Have Applied Transformativeness in Mass Digitization Cases*

1. Lack of a New Purpose with a New Meaning

Transformativeness has been interpreted as creating a new work that alters the original with a new expression, meaning, insight or message, and does not merely supersede the original.¹⁹² As established early on in *Texaco* and *Infinity*, transformativeness turns on whether the use of a copyrighted work has a new purpose, which creates a new meaning.¹⁹³ In both of those cases, that new purpose was not established since the secondary works were merely verbatim copies of the original and were used for the same purposes of retaining original journal articles and listening to a transmission of a radio broadcast.¹⁹⁴ However, courts recently found in favor of transformativeness where no new purpose exists.¹⁹⁵ In many of the cases mentioned earlier, with the exception of *Georgia State University* and *HathiTrust*, the courts have determined that the fact that the

¹⁹¹ See *supra* Part III.

¹⁹² See *Fair Use in Digital Works*, *supra* note 42.

¹⁹³ See *supra* Part II.

¹⁹⁴ *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918 (2d Cir. 1994).

¹⁹⁵ See *supra* Part III.

original work was digitized and aggregated in an electronic form somehow transformed it in a new and insightful way with a different purpose from the original.¹⁹⁶ These courts have held that the existence of digital versions of the copyrighted sources added a layer of transformativeness to the use where previously, similar uses may not have been transformative.¹⁹⁷ For example, although it was done for the purpose of spreading information rather than entertainment, the United States Court of Appeals for the Second Circuit in *Infinity Broadcast Corp.* reasoned that the retransmission of radio broadcasts from distant cities was not transformative.¹⁹⁸ However, the court noted that a difference in purpose is not the same as transformativeness.¹⁹⁹ Kirkwood's retransmission of the broadcast left its character unchanged, and the court found no new expression or meaning in it.²⁰⁰ Further, the court stated that talent scouts—the audience of these transmissions—would be listening for informational value, but would still receive the entertainment value of the content rather than the factual content.²⁰¹

In some cases discussed in Part III, such as *Perfect 10*, *White*, and *Google*, the purpose of the secondary use persuaded the courts to find that the use was transformative without much change to its character or meaning.²⁰² *Perfect 10* illustrates this judicial expansion of the new purpose principle: the images in Google's search engine were claimed to have a different purpose from the original because a search engine is inherently transformative—it turns copyrighted images into pointers that direct users to information.²⁰³ This argument seems tenuous for a number of reasons. First, comparing this case to *Infinity Broadcast Corp.*, the audience would still derive the original benefit from this secondary use. The Second Circuit stated in *Infinity* that the talent scouts could still be entertained from the informational broadcasts.²⁰⁴ Here, while Google and Arriba provided these thumbnail images as links to other informational

¹⁹⁶ See *supra* Part III.

¹⁹⁷ See *supra* Part III.

¹⁹⁸ *Infinity Broad.*, 150 F.3d at 108.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See *supra* Part III.

²⁰³ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

²⁰⁴ *Infinity Broad.*, 150 F.3d at 108.

websites, they are still linking to the full-size images from which users will derive the original entertainment value and compete with plaintiff's copyrighted images. Because these thumbnail images happened to be digitized, the court found they served a transformative purpose.

Second, smaller, lower-resolution versions of a copyrighted image should not necessarily be seen as transformative. In *Gaylord v. U.S.*, the Federal Circuit determined that a stamp displaying images of a Korean War memorial sculpture, called The Column, was not transformative in character.²⁰⁵ While the stamp portrayed an image of the sculptures surrounded by snow and muted the color to suggest "a dream-like presence of ghostly figures,"²⁰⁶ the court found no transformation of character, meaning or message.²⁰⁷ Snow and muted color changed nothing about the character of The Column. If a small-sized stamp of an image of a sculpture is not seen as transformative in character, it is questionable why a smaller and lower-resolution copy of a photograph could be seen as such just because it is part of an electronic search engine. While the image acts as a pointer to sources of information, it still directs users to an unlawful full-size version of the copyrighted image. The holding in *Perfect 10* effectively muddles the already unclear understanding of what constitutes transformative use and could lead to more confusion in future cases involving digitization of copyrighted materials.

Furthermore, the Ninth Circuit did acknowledge that Perfect 10 licensed a third party to sell and distribute its reduced-size copyrighted images for download and use on cell phones.²⁰⁸ Mobile users could download and save the images from Google and use them on their cell phones for free rather than purchase Perfect 10's copyrighted images,²⁰⁹ which would suggest that Google's use superseded Perfect 10's use and interfered with the market for these types of images. Instead, the Ninth Circuit, at an early stage of the proceedings, concluded that "the transformative nature of Google's use is more significant than any incidental superseding use or the minor commercial aspects

²⁰⁵ *Gaylord v. U.S.*, 595 F.3d 1364, 1373 (Fed. Cir. 2010).

²⁰⁶ *Id.* at 1373–74.

²⁰⁷ *Id.*

²⁰⁸ *Perfect 10*, 508 F.3d at 1157.

²⁰⁹ *Id.* at 1165–66.

of Google's search engine and website."²¹⁰ In this way, the Ninth Circuit expanded the previous concept of a new purpose that does not exploit the original's value, and found that even when secondary use provides the same value as the original and supersedes the commercial rights of the copyright holder, a use can still be transformative.

The Eleventh Circuit's rationale in *Cambridge University Press* was more consistent with prior findings of transformativeness, such as the Sixth Circuit's reasoning in *Princeton University Press*. Its finding that Cambridge University Press had not made a secondary use of the original with a new purpose was based on the fact that the purpose for the use was the same—to provide university students with reading material.²¹¹ It exploited the original's value and meaning because it superseded the University's need to purchase more reading materials for students.²¹² As in *Princeton University Press*, copying and providing students with course materials was not transformative and did not have a new purpose from that of the original work's purpose. The court's holding is also more in line with earlier fair use cases such as *Campbell*, which established that transformativeness adds a new purpose and meaning to a work and does not supersede the value of the original.²¹³

2. Expansion of Educational and Social Benefit Considerations Beyond Statutory Limits

Section 107 states that the first factor to consider under a fair use exception is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”²¹⁴ Beyond referring to educational purposes, this provision does not mention considerations of a general social benefit derived from the use. Since the 1976 Copyright Act was enacted, social benefit considerations have been part of courts' analyses of the first factor of § 107, and they further the objectives of copyright in the

²¹⁰ *Id.* at 1167.

²¹¹ *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1263 (11th Cir. 2014).

²¹² *Id.*

²¹³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

²¹⁴ 17 U.S.C.A. § 107 (1992).

progress of the arts.²¹⁵ However, courts have increasingly begun to find transformativeness based largely on a perceived public benefit from such verbatim copying regardless of a lack of a new purpose.²¹⁶ This trend runs counter to United States Supreme Court precedent. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,²¹⁷ the Court stated:

It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike. “[T]o propose that fair use be imposed whenever the ‘social value [of dissemination] . . . outweighs any detriment to the artist,’ would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.”²¹⁸

Earlier precedent established that merely copying an original work should not count as transformative even if there is an educational or social benefit of the copy. The court in *Texaco* found that the secondary use of the photocopied journal articles could not pass as transformative, regardless of the potential for more efficient research processes and greater scientific developments, since the use superseded the journal’s original creation.²¹⁹ By contrast, the Ninth Circuit in *Kelly* held that the thumbnail images at issue were transformative because a search

²¹⁵ See *Campbell*, 510 U.S. at 579 (“Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”); Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2607 (2009) (“While agreeing that *Accolade* had a commercial purpose in making copies of Sega games, the court thought that Sega’s insistence that it must presume unfairness was ‘far too simple and ignores a number of important considerations.’ A closer look at *Accolade*’s purpose revealed that it had the legitimate and nonexploitative purpose of studying the functional requirements for achieving compatibility with the Genesis console. The court was, moreover, ‘free to consider the public benefit resulting from a particular use,’ which in *Sega* had ‘led to an increase in the number of independently designed video game programs offered for use with the Genesis console,’ which was ‘precisely the kind of growth in creative expression . . . that the Copyright Act was intended to promote.’” (quoting *Sega Enters. Ltd. v. Accolade, Inc.* 977 F.2d 1510, 1522–24 (9th Cir. 1992) (footnotes omitted)).

²¹⁶ See *infra* Part IV.A.2.

²¹⁷ 471 U.S. 539 (1985).

²¹⁸ *Id.* at 559 (quoting Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 *COLUM. L. REV.* 1600, 1615 (1982)) (alterations in original).

²¹⁹ *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2nd Cir. 1994).

engine is transformative in nature and provides a public benefit.²²⁰ By enhancing Internet users' ability to gather information, Arriba Soft was promoting the goals of the Copyright Act.²²¹ The court did not elaborate further on why a public benefit was such a substantial part of the transformative use finding, but it seemed to circularly hold that the use was transformative because it was fair.²²² Similarly, in *Perfect 10*, the Ninth Circuit again held that the search engine was transformative because it was socially beneficial in converting an original work into an electronic reference tool, and this outweighed any superseding and commercial use of the images.²²³ This was similar to the Supreme Court's analysis in *Sony*, where the Court reviewed the public benefits of time-shifting, the start of a later trend holding that copyright law should "accommodate new technological developments that benefit the public."²²⁴ However, recalling the Court's words in *Harper & Row* several years later, granting less protection for works when new technologies make use of them simply because they are perceived as beneficial to the public would be injurious not only to the incentivizing goals of copyright law, but also in diminishing authors' rights in their creations.²²⁵

Courts also seem to rule in favor of transformativeness in digital library cases because of the general benefit they perceive. The court in *Authors Guild v. Google* held that scanning entire copyrighted works and making them available to supplying libraries, and publicly displaying snippets of them on the Google Books library was transformative because of the resulting benefit of increased access to and identification of books.²²⁶ In his analysis of the Google Books project, Barry Sookman questions the district court's rationale in finding the project to be transformative.²²⁷ He states that Google's only activities were to provide libraries with digital copies of books, but that the copies

²²⁰ Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2002).

²²¹ *Id.*

²²² *Id.*

²²³ Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007).

²²⁴ Manali Shah, *Fair Use and the Google Book Search Project: The Case for Creating Digital Libraries*, 15 COMMLAW CONSPPECTUS 569, 605–06 (2007); see *Sony Corp. of Am. v. Univ. City Studios, Inc.*, 464 U.S. 417, 454 (1984).

²²⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985).

²²⁶ *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 291 (S.D.N.Y. 2013).

²²⁷ Sookman, *supra* note 40, at 487–88.

themselves were not transformative just because they were in a different format.²²⁸ He cites to a long line of case law, which establishes that “commercial for-profit enterprises have not been able to stand in the shoes of their customers who make non-profit [sic] or non-commercial [sic] uses and to claim the benefit of their transformative non-commercial [sic] activities.”²²⁹ The court did not consider these authorities when finding transformativeness based on the benefits to readers, scholars, and researchers.²³⁰

3. Transformativeness of Copies in a New Medium Without a New Purpose

The courts in the cases discussed above have strayed from the principle established in *Texaco* that changing the object embodying the original work does not alone constitute transformativeness.²³¹ The Ninth Circuit in *Perfect 10* found that a search engine automatically transforms a work since it transforms images into pointers of information²³² without considering whether any new expression was added to the work itself. The Second Circuit in *HathiTrust* found that the digital library was transformative in purpose since the authors of the original works did not create them for purposes of a full-text search database,²³³ implying that the copied works were automatically transformed since they were digitally reproduced. However, the Eleventh Circuit in *Cambridge University Press* did follow this precedent when it held that the copies on the electronic reserve system were merely verbatim copies with no new meaning, and were not transformative just because they had been converted into an electronic format.²³⁴

B. *Cautionary Implications of the Further Expansion of Transformativeness*

The advantages of finding a transformative purpose for many of the new digital means of reproducing and distributing works are plenty. Users have increased access to information,

²²⁸ *Id.*

²²⁹ *Id.* at 488 (footnote omitted).

²³⁰ *Id.* at 495.

²³¹ See *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 923 (2d Cir. 1994).

²³² *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

²³³ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014).

²³⁴ *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1262 (11th Cir. 2014).

have more efficient research tools at their disposal, reap numerous benefits in education, and society in general is able to make use of a copyright holder's work for the creation of other works. In a sense, this does further the Copyright goals of advancing society's progress in science and the useful arts. However, as Barry Sookman stated:

The question is not whether projects like Google Books that have social benefits should be encouraged. It is whether authors that invested years of front-end efforts in creating copyrighted works, and to whom the Copyright Clause seeks to incentivize to continue to make such investments, should have the right to authorize these new uses.²³⁵

The courts in *iParadigms* and *White* both found a transformative purpose in that the electronic services prevented plagiarism in a way that did not impair the market for high school papers²³⁶ and created an interactive legal research tool that did not impair the market for litigation briefs.²³⁷ While this finding may work for these two situations, it creates a slippery slope in other circumstances. If transformativeness continues to expand, copyright holders may lose control over their works and how they are used in digital contexts where a minimally different purpose is shown and where courts do not perceive a significant impact on the market.²³⁸ They may not even be entitled to receive a reasonable compensation for the uses, and commercial for-profit entities such as Google may successfully claim a nonprofit use of a copyrighted work and benefit from the transformative finding of their activities.²³⁹ If transformativeness continues to be so liberally applied—potentially increasing the amount of fair use outcomes—it could potentially decrease economic incentives to create new works and harm the overarching goal of copyright law.²⁴⁰ While profit is not the sole factor that spurs creativity,²⁴¹ creators require some

²³⁵ Sookman, *supra* note 40, at 514.

²³⁶ *A.V. ex rel Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 636 (4th Cir. 2009).

²³⁷ *White v. West Publ'g Corp.*, 29 F. Supp. 3d 396, 399 (S.D.N.Y. 2014).

²³⁸ Sookman, *supra* note 40, at 513–14.

²³⁹ *Id.* at 513.

²⁴⁰ *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1257–58 (11th Cir. 2014).

²⁴¹ See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515–16 (2009) (“[T]he individual reports of how creativity is experienced as unpredictable, tyrannical, obsessive, and joyful are consistent with the thesis that creativity arises from unplanned and stochastic encounters with the world around us. One reason that economic narratives are so

recoupment of their investments to continue to create, and there is genuine concern that certain works that require a substantial up-front investment will no longer be created.²⁴² Furthermore, “digital technology can make libraries and creators competitors by eliminating all of the distinctions between library and right holder enabled access *except* cost. It is virtually impossible to compete with ‘free.’”²⁴³ Incentives to continue to create would diminish, and copyright holders’ exclusive rights to their own works and control over the market for their works would be compromised.

Part of the reason for the expansion of transformativeness is courts’ over-emphasis of a user’s public benefit. Professor Jane Ginsburg believes this trend is a way that courts “bless uses of entire works in the perceived public interest.”²⁴⁴ The courts in *HathiTrust* and the Google Books case believed that rejecting a transformative and fair use defense would be adverse to the public interest, and this was a major reason why they found for transformativeness and, ultimately, fair use.²⁴⁵ Ginsburg makes an interesting point that illustrates how some courts may already decide to find in favor of transformativeness due to public benefits and then tailor their analyses of the four factors to match that finding—a phenomenon Professor Barton Beebe calls “stamped[ing].”²⁴⁶ She provides the example that in *Perfect 10*, the Ninth Circuit ruled that the plaintiff failed to show there was a market for its images for cell phone use.²⁴⁷ Once it was reminded that fair use is an affirmative defense and the defendant had the burden of showing it did not interfere in the market for plaintiff’s work, the court amended its opinion, but did not change its result.²⁴⁸ This may suggest, as Ginsburg does,

limited is that they cannot tell us how preferences to create are shaped, nourished, or crushed by the social structures that inevitably frame all human interaction.”)

²⁴² Lois F. Wasoff, *If Mass Digitization Is the Problem, Is Legislation the Solution? Some Practical Considerations Related to Copyright*, 34 COLUM. J.L. & ARTS 731, 742 (2011).

²⁴³ *Id.*

²⁴⁴ Ginsburg, *supra* note 51, at 1411.

²⁴⁵ See *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014); *Authors Guild, Inc. v. Google Inc.*, 954 F.Supp. 2d 282, 291 (S.D.N.Y. 2013).

²⁴⁶ Beebe, *supra* note 29, at 555.

²⁴⁷ Ginsburg, *supra* note 51, at 1413.

²⁴⁸ *Id.*

that the burden was of no matter to the court since it had already decided it would rule in favor of fair use due to the public benefit of the search engine.²⁴⁹

In determining whether a use qualifies for the fair use exception, the courts' overall objective is to determine if the use is fair and socially beneficial enough that it should overcome the copyright owner's monopoly.²⁵⁰ In considering all four factors of § 107, a court attempts to ascertain whether the use is so creative and insightful that it should be allowed to exist to further the progress of the creative arts in society. Utilizing the canon of construction of avoiding surplusage,²⁵¹ if a court considers whether or not a particular use is socially beneficial under the first factor, it may defeat the purpose of the fair use analysis as a whole. Put another way, a character and purpose that is socially beneficial would determine the social utility and fair use of the secondary user's use without analyzing the rest of the factors. Congress did not include social benefit as a consideration in the statute and likely did not intend to make the rest of the factors it enumerated in § 107 unnecessary after determining a public benefit in the first factor. For this reason, courts should not give so much weight to a public benefit as a transformative purpose or character of a use. The first factor analysis may be better suited for the nonprofit, educational, and commerciality inquiry as it was applied in *Sony*.

C. *Considerations To Abate the Expansion of Transformativeness*

Concern about the current status and future of transformative use also exists at the legislative level. Two months after the district court decided the Google Books case,

²⁴⁹ *Id.*

²⁵⁰ Samuelson, *supra* note 215, at 2540 ("A well-recognized strength of the fair use doctrine is the considerable flexibility it provides in balancing the interests of copyright owners in controlling exploitations of their works and the interests of subsequent authors in drawing from earlier works when expressing themselves, as well as the interests of the public in having access to new works and making reasonable uses of them.").

²⁵¹ Katherine Clark & Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes*, GEORGETOWN U. L. CENTER 6 (Apr. 2006), <http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf> ("This rule is based on the principle that each word or phrase in the statute is meaningful and useful, and thus, an interpretation that would render a word or phrase redundant or meaningless should be rejected.").

Congress held a subcommittee hearing regarding transformativeness before the House Judiciary Committee's subcommittee.²⁵² Among the concerns expressed by the members present at the hearing were that "specific statutory limitations have not kept pace with emerging technologies"²⁵³ and "that the transformative use standard has become 'all things to all people.'"²⁵⁴ Copyright law seeks to protect the interests of the copyright holder while balancing the interests of society in the progress of the arts, but recent cases involving mass digitization have expanded transformativeness to encompass any digitization with a public benefit.²⁵⁵ Some have argued that the balance of copyright law has shifted to giving potential infringers the benefit of the doubt in the increased findings of transformativeness.²⁵⁶

Furthermore, there is the potential for transformativeness to grow out of control in future digitization cases where the purported use is for research and dissemination of information. A digital library that allows free public access to entire copies of works could potentially pass the transformativeness inquiry under the current trend. With the continued expansion of this concept of transformativeness, it is not unimaginable that a court may view a digital library with certain search functions similar to those in *White* and the Google Books case that gives unfettered access to whole works as a public benefit with a purpose of promoting research and information. Under a fair use determination, copyright owners would lose control over the entirety of their works. While there is an exception for educational purposes as evidenced by § 107 of the Copyright Act, many uses can be claimed as educational or furthering research and information gathering as the courts found in *HathiTrust*, *White*, and the Google Books case. As a result, courts should carefully examine to what extent the particular digitization project changes the purpose or character of the original. It is untenable that verbatim copying, digitizing, and aggregating a particular source changes its original purpose and character to

²⁵² Edward E. Weiman, *Transforming Use*, L.A. LAW., June 2014, at 19.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See *infra* Part IV.A.2.

²⁵⁶ Kelly Morris, "Transforming" Fair Use: *Authors Guild, Inc. v. Google, Inc.*, 15 N.C. J.L. & TECH. ONLINE EDITION 170, 203–04 (2014).

one that is so fundamentally different that it is a different work. If it serves the same purpose as the original and the only difference is that it is converted to a different medium such as the Internet, then this should weigh against a finding of transformativeness. As the court in *Princeton University Press* suggested, a holding that finds verbatim copies of a work to be transformative—and ultimately fair use, because they were packaged with other works—contradicts the incentivizing goals of copyright. An author who loses control over exercising his or her statutory rights to a copyrighted work because a secondary user made exact copies of that work, and digitized and aggregated it with numerous other works, would at least have reservations about creating further copyrightable works, whether because of lost income or the appropriation of their personal creations.

To balance the objectives of copyright law, the harm to the copyright holder should also be considered. While public benefit of a use is important to the overall fair use doctrine, it should not be the pivotal consideration in determining transformativeness. It is not within the judicial realm to decide what use benefits society, especially one involving the relatively new practice of digitization whose benefits may be inconclusive at the beginning.²⁵⁷ A case such as *Perfect 10* may not pass this analysis, since as a digitized image, it does not add anything new by being on the Internet and still allows users to view the full-sized copyrighted image as they would have offline. By contrast, the *iParadigms* case may pass this digital transformative test since the digitization of the paper allows the teacher to compare it to other digitized writings to ascertain originality, which could not be done offline.

Licensing is another possible solution discussed by both the Copyright Office and by scholars who are concerned about uses that profit from a fair use defense.²⁵⁸ While mass digitization may make licensing difficult due to the large-scale number of works involved and the barriers to obtaining the necessary rights to them,²⁵⁹ several recommendations have been made. The Copyright Office discusses the use of direct licensing as the most basic option where voluntary agreements are made between

²⁵⁷ Lee, *supra* note 36, at 839.

²⁵⁸ U.S. COPYRIGHT OFFICE, *supra* note 16.

²⁵⁹ Ginsburg, *supra* note 51, at 1407.

digitizers and copyright holders on an individual basis.²⁶⁰ Copyright holders and potential licensees could find resources and information on licensing on the Internet, and could connect with each other to explore and reach an agreement about licensing a work.²⁶¹ The drawbacks of this option, however, are that potential licensees would need to undertake significant efforts to identify copyright owners, locate them, and negotiate a licensing arrangement for voluminous amounts of works.²⁶² The costs of clearing rights may outweigh the benefits, making a fair use defense more appealing to potential licensees seeking to digitize works.²⁶³

A second type of licensing scheme, which may reduce transaction costs, is collective licensing, where copyright holders authorize third party organizations to administer reproduction, distribution, and display rights of their works.²⁶⁴ The third party organizations negotiate licenses with users, collect royalties, and distribute them to copyright holders.²⁶⁵ Rights are precleared and prepriced.²⁶⁶ However, collective licensing has primarily been used for licensing excerpts of works for specified uses, such as educational uses for coursepacks and e-reserve systems, and not for entire works or digital distribution.²⁶⁷ There are some surmountable challenges to collective licensing:

The information that has to be collected is not static. It is dynamic and changes constantly. Rights are assigned or revert; companies are bought and sold; individuals move, get married and divorced and eventually die. All those changes have to be tracked in the database for millions of works, individuals and entities.²⁶⁸

While some believe that mass digitization uses are fair and should be entirely free because of their public benefit and the lack of feasible licensing structures to enable the uses,²⁶⁹ a better approach to consider might be Professor Ginsburg's concept of

²⁶⁰ U.S. COPYRIGHT OFFICE, *supra* note 16, at 30.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Ginsburg, *supra* note 51, at 1410.

²⁶⁴ U.S. COPYRIGHT OFFICE, *supra* note 16, at 31.

²⁶⁵ *Id.*

²⁶⁶ Wasoff, *supra* note 242, at 732.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 735.

²⁶⁹ Weiman, *supra* note 252, at 20.

“Permitted but Paid.” She argues that copyright law should distinguish new distributions from new works, and free fair use should only be applied to new works, while “Permitted by Paid” uses would fall under the new distributions category.²⁷⁰ She divides uses into the categories subsidy uses—socially worthy redistributions—and market failure uses—where transaction costs are too high for licensing solutions.²⁷¹ Furthermore:

Where the use confers a public benefit and the choice is all-or-nothing, a fair use outcome is virtually assured. But were permitted-but-paid an option, we would not be lured by a dichotomy falsely pitting authors against a perceived social good. The licensing mechanism would allow both broader dissemination and provide payment to authors. One might rejoice that there is no need to license if the use is fair. But in that class of cases where the use is “fair” only because it supposedly cannot reasonably be licensed, then permitted-but-paid should replace fair use for free.²⁷²

With the unpaid nature of fair use comes potential pressures on courts which may lead to a distorted analysis, and may explain why courts have expanded the boundaries of transformativeness.²⁷³ Due to the technological advancements that are able to increase access to information through digital means, courts equate transformativeness with the social benefits they perceive from these uses.²⁷⁴ Having certain uses remain paid may lead courts to more judiciously analyze the true transformativeness of a use.

CONCLUSION

Transformativeness has itself undergone a transformation since its inception in *Campbell* and during the evolution of the way works are copied. The doctrine began as a way of ascertaining that a secondary use had not superseded the original work but had made a significant change so that it provided some new purpose or character. It has since evolved into a measure of court-perceived social benefits. With increasing digitization of copyrighted works, this doctrine that

²⁷⁰ Ginsburg, *supra* note 51, at 1386.

²⁷¹ *Id.*

²⁷² *Id.* at 1386–87.

²⁷³ *Id.* at 1385.

²⁷⁴ *Id.*

has already been inconsistently interpreted and applied by courts has become even murkier. There seems to be little uniformity or rationale among the way courts have defined and applied a transformative use test. In the future, this could lead to more overly-broad findings of transformativeness where a digitized version of a copyrighted work does not add any new or insightful purpose or character, and would disrupt the balance of copyright law objectives. Courts must conduct a more in-depth analysis when examining digital fair use and take care not to find in favor of transformativeness simply because the verbatim digital copies may provide public benefits. In addition, licensing options should be further examined to find possible solutions, which will maintain the progress of public knowledge while respecting copyright owners' exclusive rights, and may halt the continued expansion of transformativeness.