

IT'S A BALANCING ACT: ANALYZING THE FIRST FAIR USE FACTOR

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*Fair use has always been an important element of copyright law. The first fair use factor, “the purpose and character of the use,” has become especially important after the U.S. Supreme Court’s decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*. The “purpose and character” is typically analyzed by determining if a secondary work is “transformative,” but lower courts do not agree on what it means to be transformative. There is also disagreement on how to balance a secondary work’s transformative nature with its commercial nature when deciding whether the first factor favors fair use.*

This Note offers a proposed standard for determining whether a secondary work is transformative and how to balance a transformative nature with a commercial one. This Note argues that a transformative analysis should focus on the purpose of the specific use at issue and consider the author’s claimed meaning of the use and industry norms in the analysis. Additionally, this Note argues that when a secondary work possesses both a transformative and a commercial nature, the transformative nature of a work should outweigh the commercial nature and the first factor should favor fair use.

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INTRODUCTION

Singer-songwriter Miley Cyrus released her song “Flowers” in January 2023.¹ The song was an immediate hit, debuting at number one on the Billboard Hot 100 Chart and becoming the “fastest song to reach one billion streams on . . . Spotify.”² “Flowers” was allegedly also immediately recognized as having similarities to Bruno Mars’s song “When I Was Your Man” in aspects of its lyrics and melody.³ On September 16, 2024, Tempo

1. Complaint at 1–2, *Tempo Music Invs. LLC v. Miley Cyrus*, No. 24-cv-07910 (C.D. Cal. Sep. 16, 2024).

2. *Id.* at 2.

3. *Id.*

Music Investments LLC filed a complaint against Miley Cyrus alleging that her song “Flowers” infringed the copyright of the song “When I Was Your Man.”⁴ Since lyrics and melodies are copyrightable, artists must often consider the issues of copyright and copyright infringement.

Copyright protections have been an integral part of federal law since 1790.⁵ Anyone who fixes an original work can be a copyright owner.⁶ Copyright protections are important to promote creativity, but the monopolies they create can harm public access.⁷ The Copyright Act of 1976⁸ (the “Copyright Act”) gives owners exclusive rights to their copyrighted work while also codifying some exceptions to the exclusivity of copyrights.⁹ As a result, it provides a balance between encouraging and rewarding creativity and promoting availability of the arts.¹⁰ One of the most important restrictions to the exclusivity of copyright is the fair use defense.¹¹ Miley Cyrus is likely to argue that her song “Flowers,” if it infringes on the copyright of “When I Was Your Man” at all, is a protected use under the fair use defense.¹² Courts decide whether the unlicensed use of a copyrighted work is protected under fair use by evaluating and balancing four factors.¹³

Since the implementation of the Copyright Act, courts have disagreed on what types of uses satisfy the factors for fair use.¹⁴ The first factor, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” is one of the most debated factors.¹⁵ In 2023, the U.S. Supreme Court attempted to clarify how to analyze the first of the four fair use factors in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.¹⁶ Since the release of this decision, several circuits have differed as to how exactly the holding requires

4. *Id.* at 2–3.

5. See *What Is Copyright?*, COPYRIGHT.GOV, <https://www.copyright.gov/what-is-copyright/> [https://perma.cc/8WF4-S2QG] (last visited Aug. 17, 2025).

6. See *id.*

7. See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1198 (2021).

8. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S. Code).

9. See COPYRIGHT.GOV, *supra* note 5.

10. See 17 U.S.C. § 106 (explaining the rights granted to copyright holders); see also *id.* § 107 (explaining the fair use exception).

11. See *id.* § 107.

12. See Jorja Seimons, *Miley Cyrus, Bruno Mars Songs’ Parallels Sit at Heart of IP Case*, BLOOMBERG L. (Sep. 24, 2024, at 05:05 ET), <https://news.bloomberglaw.com/ip-law/miley-cyrus-bruno-mars-songs-parallels-sit-at-heart-of-ip-case> (on file with the *Fordham Law Review*).

13. See § 107.

14. See generally Aaron Moss, *Let’s Go Hazy: Making Sense of Fair Use After Warhol*, COPYRIGHTLATELY (May 22, 2023), <https://copyrightlately.com/making-sense-of-copyright-fair-use-after-warhol/> [https://perma.cc/58FA-FFQH] (explaining how the *Warhol* decision will impact courts’ future fair use analyses).

15. See § 107; Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106, 1111 (1990).

16. 143 S. Ct. 1258, 1266 (2023).

them to change the ways they evaluate the first factor of fair use.¹⁷ While most circuits agree that the purpose or character of a piece means the extent to which a piece is transformative, the courts have had conflicting opinions on what it means for a piece to be transformative and how the degree of its transformative nature balances with the piece's commercial nature.¹⁸ This Note proposes a more streamlined standard for courts to follow when analyzing the first factor of the fair use balancing test. The analysis provided in this Note discusses and opines on the first fair use factor's analysis in regard to traditional copyrightable materials, such as art, literature, and software. The implications of *Warhol*—and the other cases discussed in this Note on works created by, with, or for artificial intelligence—are beyond the scope of this Note.

Part I of this Note provides legal context and background on the Copyright Act, fair use, and the *Warhol* decision. Part II of this Note discusses the different ways lower courts have analyzed the first fair use factor, with an emphasis on lower courts' interpretations of the *Warhol* holding. Part III of this Note proposes a standard for determining whether a work is transformative and a standard for how a work's transformative nature should be balanced with the work's commercial nature. Part III first argues that the transformative nature of a secondary work should be determined based on whether the use, or purpose, of the secondary work differs from the original. This analysis should allow consideration of an author's claimed purpose. Part III then argues that the commercial nature of a piece should only be considered in evaluating whether the first factor favors fair use if a piece is noncommercial. A nonprofit nature should favor fair use, but finding the presence of a commercial nature should not cut against fair use.

I. THE COPYRIGHT ACT, FAIR USE, AND THE *WARHOL* DECISION

Part I.A provides background of the Copyright Act, and Part I.B explores the legal context of the fair use defense. Part I.C then explains the first factor of the fair use analysis leading up to the *Warhol* decision, and Part I.D details the recent *Warhol* decision.

A. *The Copyright Act*

1. Overview

To protect ownership of a creative work, many people choose to copyright their creations.¹⁹ Copyright law originally stems from the Constitution, which states “Congress shall have Power . . . [t]o promote the Progress of

17. Felicity Kohn, *Key Copyright Decisions So Far and Cases to Watch in 2024*, IPWATCHDOG (June 24, 2024, at 12:15), <https://ipwatchdog.com/2024/06/24/key-copyright-decisions-far-cases-watch-2024/id=177962/> [<https://perma.cc/6YRS-RPPA>].

18. See *infra* Parts II.B–C.

19. See COPYRIGHT.GOV, *supra* note 5.

Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁰ A copyright is a type of intellectual property that protects original works of authorship after the author fixes their work in a tangible form of expression.²¹ Federal copyright law has been a staple of the U.S. legal system since the first Copyright Act of 1790²² was enacted.²³

The Copyright Act of 1976 grants the owner of a copyright a bundle of exclusive rights.²⁴ These rights include the exclusive rights of the owner to reproduce their copyrighted work, to create derivative works, and to display their work publicly.²⁵ Anyone who creates something original and fixed can be an owner of a copyright.²⁶ Once a work is copyrighted, someone other than the owner can use it only if they are given permission from the author, often through a licensing agreement.²⁷

2. Purpose and Limitations

The purpose of granting copyrights is to encourage creativity in the works of authors.²⁸ Congress passed the Copyright Act to incentivize authors to create new works for the public to enjoy.²⁹ The goal of granting owners exclusive rights is to provide economic incentives for creativity and innovation.³⁰ An increase in creativity and innovation helps the general public by increasing the amount of works for them to use and enjoy.³¹

Although there are many benefits to granting copyrights, there are also negative costs associated with their enforcement.³² Because copyrights grant exclusive rights to authors, copyrights accord authors monopolies.³³ Giving authors monopolies on creations reduces the public's access to those works. Copyright protections often raise prices for consumers through the imposition of costs, “such as the cost of contacting owners to obtain

20. U.S. CONST. art. I, § 8.

21. See COPYRIGHT.GOV, *supra* note 5; see also 17 U.S.C. § 102.

22. Ch. 15, 1 Stat. 124.

23. See COPYRIGHT.GOV, *supra* note 5.

24. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1273 (2023) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

25. See 17 U.S.C. § 106.

26. See *id.* § 102; see also COPYRIGHT.GOV, *supra* note 5.

27. See *What Is the Purpose of Copyright Law*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/copyright-basics/purpose-of-copyright/> [<https://perma.cc/E9M3-PDLV>] (last visited Aug. 17, 2025).

28. See *id.*

29. See *id.*

30. See *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (stating that the fair use doctrine “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster” (quoting *Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980))).

31. See *id.*

32. See PETER S. MENELL, ROBERT P. MERGES, MARK A. LEMLY & SHAMKRISHNA BALANESH, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*: 2023, at 527 (2023).

33. See *id.* at 527–28 (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

reproduction permission,” and these costs “can stand in the way of others exercising their own creative powers.”³⁴

By granting authors exclusive rights, the Copyright Act balances its goal of incentivizing the creation of original works with the burdens imposed.³⁵ The Copyright Act limits the copyright’s duration, the scope of an owner’s exclusive rights, and what subject matter is copyrightable.³⁶

One of the most important ways Congress makes copyrighted works more accessible to the public is through the codification of a court-made limitation to the copyright owner’s exclusive right to use their work, known as the “fair use” defense.³⁷ Courts created the fair use defense to allow copyrights while also maintaining an outlet for the freedom of speech guaranteed by the Constitution.³⁸ Fair use plays a key role in balancing creative expression and prohibition in copyright law.³⁹

B. Fair Use

Fair use originated as a common-law defense to copyright infringement claims. The defense was codified in 1976 in § 107 of the Copyright Act.⁴⁰ Under certain circumstances, the fair use defense allows one to use a copyrighted work without the consent of the copyright owner.⁴¹ Due to the common-law origin of this defense, it is a flexible standard.⁴²

The statute implementing the fair use defense states, “[T]he fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching, . . . scholarship, or research, is not an infringement of copyright.”⁴³ This preamble is not intended to be an exhaustive list of legal fair uses, it is only meant to give examples of works that may be fair use.⁴⁴ Fair use applies beyond the examples listed, and it is not a guaranteed protection for every secondary work that is listed in the statute’s preamble.⁴⁵ To help with the analysis of whether the fair use defense applies, the statute

34. See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195 (2021).

35. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1273 (2023).

36. See *id.*; see also *MENELL ET AL.*, *supra* note 32, at 571, 574 (describing copyright subject-matter limitations, such as the idea-expression dichotomy, which suggests that ideas are not copyrightable and that only the specific expression of the idea is); 17 U.S.C. § 101 (providing that the design of a useful article is copyrightable “only to the extent that[] such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article”).

37. See *Warhol*, 143 S. Ct. at 1273–74.

38. See *supra* Part I.B.

39. *Green v. U.S. Dep’t of Just.*, 111 F.4th 81, 88 (D.C. Cir. 2024).

40. 17 U.S.C. § 107.

41. See *COPYRIGHT.GOV*, *supra* note 5; see also *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

42. See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021).

43. § 107.

44. See *Google*, 141 S. Ct. at 1197; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

45. *Campbell*, 510 U.S. at 577.

lists four factors to consider.⁴⁶ These factors are not exhaustive but are the most influential in decisions regarding fair use.⁴⁷ The first factor listed in § 107 is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁴⁸ The second factor is “the nature of the copyrighted work.”⁴⁹ The third factor is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”⁵⁰ The fourth factor is “the effect of the use upon the potential market for or value of the copyrighted work.”⁵¹

All four factors play a role in determining fair use,⁵² but historically, there is disagreement over which factor, if any, has the largest weight in the decision.⁵³ The Supreme Court has recognized that some factors may prove more important in some contexts than in others.⁵⁴ The Court has also emphasized that determining fair use is a mixed question of law and fact.⁵⁵ Recent Supreme Court decisions have exemplified how to evaluate the fair use factors when determining whether unauthorized uses of copyrighted works are fair use.⁵⁶

C. First Fair Use Factor Leading Up to the Warhol Decision

Although there is debate in the courts over whether the first or fourth fair use factor has more weight in a fair use defense analysis,⁵⁷ there is little doubt that the first factor is extremely important.⁵⁸ This factor is fairly vague in the statute and has left courts with discretion to interpret what Congress

46. § 107.

47. Some courts also analyze whether the copying was done in good faith. *See Google*, 141 S. Ct. at 1204. The U.S. Supreme Court, however, has denied commenting on the use of the good faith analysis, stating “[w]e have no occasion here to say whether good faith is as a general matter a helpful inquiry.” *Id.*

48. § 107.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (stating that no fair use factor may be treated in isolation).

53. *Compare Confirmation Hearing on the Nomination of Hon. Ketanji Brown Jackson to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary*, 117th Cong. 3190–91 (2022) (statement of Ketanji Brown Jackson, Supreme Court Justice) (describing the fourth fair use factor as the most important factor), *and Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566–69 (1985) (describing the fourth fair use factor as the most important factor), *with Campbell*, 510 U.S. at 579 (“[T]he more transformative the new work, the less will be the significance of other factors.”), *and Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021) (“[S]ome factors may prove more important in some contexts than in others.”).

54. *Campbell*, 510 U.S. at 577.

55. *Harper & Row*, 471 U.S. at 560.

56. *See generally* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023); *Google*, 141 S. Ct. 1183.

57. *See supra* note 53 and accompanying text.

58. *See* Leval, *supra* note 15, at 1111; *see also* Jennifer Pitino, *Has the Transformative Use Test Swung the Pendulum Too Far in Favor of Secondary Users?*, in *ADVOCATE*, Oct. 2013, at 26, 28–29.

meant.⁵⁹ Different circuits have varying approaches to deciding the purpose and character of the use and when the purpose or character is one that fair use protects.⁶⁰ These courts also have different interpretations of when uses are “of a commercial nature,” and they often disagree on how to balance the “purpose and character of the use” with its “commercial nature” when analyzing whether a work is protected by the fair use defense.⁶¹

1. Creation of “Transformative” Classification

The Supreme Court has explained that one way to satisfy the first fair use factor, determining if a work has a different “purpose or character of the use” than the original, is through determining whether the work is “transformative.”⁶² Judge Pierre N. Leval originally coined the idea of a work being “transformative” in a law review article.⁶³ Such a “transformativeness” analysis has no textual basis in the fair use statute.⁶⁴ Thus, there is neither a clear standard for identifying a transformative work nor a clear rule on how transformative a piece must be to satisfy the fair use standard. Instead, it is “a matter of degree.”⁶⁵

In *Campbell v. Acuff-Rose Music*,⁶⁶ the Supreme Court explained that the first factor is an inquiry into “whether the new work merely ‘supersede[s] the objects’ of the original creation.”⁶⁷ When considering the first fair use factor, courts must consider whether the copier’s use “adds something new, with a further purpose or different character, altering” the copyrighted work “with new expression, meaning or message.”⁶⁸ To be considered transformative under the first fair use factor, the secondary work does not need to comment on the original work or the original work’s author.⁶⁹ It also does not need to have a purpose that matches one of the stated examples in the fair use statute preamble.⁷⁰

Determining whether a work is transformative is important to the fair use analysis because of the connection between fair use and the policy concerns associated with granting copyrights. The theory is that if a secondary work

59. 17 U.S.C. § 107.

60. See *infra* Part II.B.

61. See *infra* Part II.C.

62. *Campbell*, 510 U.S. at 579.

63. Compare Leval, *supra* note 15, at 1111, with § 107 (demonstrating that the idea of transformativeness was coined by Judge Leval and is not written in the statute itself).

64. *Id.*

65. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1273 (2023).

66. 510 U.S. 569 (1994).

67. *Id.* at 579 (alteration in original) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)).

68. *Id.* at 579.

69. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013), *modified*, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021), *and modified*, *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021).

70. *Id.*

is different enough in look, or serves a different purpose than the original, the work constitutes a fair use to prevent the stifling of creativity resulting from copyright-created monopolies.⁷¹

Transformative works fall into two primary categories: secondary works that have undergone “physical transformation” and secondary works that have undergone “purposive transformation.”⁷² As suggested by the name, secondary works with *physical* transformation have visibly changed. On the other hand, *purposive* transformation describes secondary works that have a different purpose than the original author intended.⁷³ There is no bright-line rule as to whether a work must have a physical transformation, a purposeful transformation, or both to satisfy the “purpose or character” prong of the first fair use factor. Any mix of these transformations could be enough for a piece to be transformative, depending on the facts of the case and *to what extent* the secondary work is transformative.⁷⁴

2. “Commercial Nature” Definition

The first fair use factor requires more than an analysis of the “purpose and character of the use.”⁷⁵ The analysis must also include an inquiry into “whether such use is of a commercial nature or is for nonprofit educational purposes.”⁷⁶ What is meant by “commercial nature” is not defined in the fair use statute. Instead, the statute suggests that a copyrighted work is used for a commercial nature if it is something that is not used for nonprofit purposes, as seen in the use of “or” between the two categories “commercial nature” and “nonprofit educational purposes” in the first factor.⁷⁷ Typically, “commercial nature” is understood to be a secondary work created for a profit or to promote something that could lead to a profit.⁷⁸

3. Balancing “Transformative” with “Commercial Nature”

The first factor cannot only be analyzed by “the purpose or character of the use.” Courts must also consider the language “whether such use is of a commercial nature or is for nonprofit educational purposes.”⁷⁹ In *Campbell*, the Supreme Court made clear that “the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use.”⁸⁰ The Court neither explained how

71. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015).

72. See Jiarui Lui, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 169–70 (2019).

73. See *id.*

74. Leval, *supra* note 15, at 1111.

75. 17 U.S.C. § 107(1).

76. *Id.*

77. *Id.*

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

79. § 107(1).

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

transformative a work must be for the commercial nature to matter less nor how courts should balance the two halves of the statute.⁸¹

The Supreme Court again addressed this issue in *Google LLC v. Oracle America, Inc.*,⁸² where it stated that “there is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use. But the inverse is not necessarily true.”⁸³ As the Court pointed out, “many common fair uses are indisputably commercial,” such as news reporting, which is explicitly listed as an example of fair use in the statute’s preamble.⁸⁴ Lower courts have disagreed on how much emphasis to put on the commercial nature, or lack thereof, when analyzing the first fair use factor.⁸⁵

Prior to the *Warhol* decision, lower courts were divided in their analyses of how a secondary work’s transformative nature balances with its commercial nature, or lack thereof. The U.S. Court of Appeals for the Second Circuit tends to give more weight to whether a work is transformative than whether a work is commercial when deciding which creator the first fair use factor favors.⁸⁶ Courts in this circuit favor a “sliding scale” approach in their analysis.⁸⁷ This approach emphasizes that while transformative nature is not the only consideration when analyzing the first fair use factor, it is the most important consideration, meaning the more transformative a secondary work is, the less significantly its commercial nature impacts the court’s analysis.⁸⁸ The U.S. Court of Appeals for the Ninth Circuit, in contrast, places more weight on the “commercial nature” of a secondary work when analyzing the first fair use factor.⁸⁹ Although strong consideration is still given to whether a work is transformative, courts in the Ninth Circuit often find that a commercial purpose cuts against a finding of fair use.⁹⁰ The U.S. Court of Appeals for the Seventh Circuit primarily uses the fourth fair use factor to determine fair use and rejects the Second Circuit’s transformative standard, instead preferring to look at whether the work has a commercial nature.⁹¹

81. *Id.*

82. 141 S. Ct. 1183 (2021).

83. *Id.* at 1204.

84. *Id.*

85. *See infra* Parts II.B–C.

86. *See* *Blanch v. Koons*, 396 F. Supp. 2d 476, 481 (S.D.N.Y. 2005), *aff’d*, 467 F.3d 244 (2d Cir. 2006); *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013), *modified*, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021), *and modified*, *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021).

87. *See* *Fioranelli v. CBS Broad. Inc.*, 551 F. Supp. 3d 199, 242 (S.D.N.Y. 2021) (finding fair use applies given the transformative nature of the work and that the commercial nature “carries little weight in [the court’s] analysis”).

88. *Id.*

89. *See infra* Part II.C.2.a.

90. *See, e.g.,* *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 451 (9th Cir. 2020) (“[The secondary work’s] indisputably commercial use of [the original work] counsels against fair use.”).

91. *See* *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“We’re skeptical of *Cariou*’s approach, 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.”); *FameFlynet, Inc. v. Jasmine Enters., Inc.*, 344 F. Supp. 3d

D. The Warhol Decision

In 2023, the Supreme Court heard the *Warhol* case.⁹² This case involved Andy Warhol's artwork called *Orange Prince*, which used Lynn Goldsmith's photograph.⁹³ Originally, Goldsmith licensed her photograph of Prince to *Vanity Fair* as a one-time only license for the use of her photo as an artist reference for an illustration.⁹⁴ *Vanity Fair* then licensed the photograph of Prince to Warhol so he could create an image of Prince for *Vanity Fair*'s use. Warhol created the image using a purple silkscreen.⁹⁵ Without Goldsmith's permission, Warhol used her photograph to create multiple additional artworks of Prince using other silkscreens, collectively titled the "Prince Series."⁹⁶

After Warhol's death, the Andy Warhol Foundation for the Visual Arts ("AWF") licensed one of the unauthorized pieces from the Prince Series, *Orange Prince*, to Condé Nast for use in a magazine article about Prince.⁹⁷ Goldsmith informed AWF that she believed the licensing of *Orange Prince* was an infringement of her copyright, but AWF asserted a fair use defense.⁹⁸ After the district court granted summary judgment in favor of AWF for its use of the fair use defense, the Second Circuit reversed.⁹⁹ AWF then appealed the case to the Supreme Court, arguing only that the first fair use factor weighed in AWF's favor.¹⁰⁰ In this decision, the majority took a somewhat unprecedented approach in their analysis of the first factor.¹⁰¹

The majority began their decision with a discussion of the Copyright Act and fair use generally, emphasizing that the Court has discretion in applying § 107, as it is a very fact specific analysis.¹⁰² This is particularly true because it must be analyzed through the lens of balancing the goals of the Copyright Act.¹⁰³ In analyzing the first fair use factor, the majority focused on whether the use of a secondary work has "a further purpose or different character,"

906, 912 (N.D. Ill. 2018) (explaining that the use of a photograph on a blog did not satisfy the first fair use factor since the blog was designed to act as a draw for customers, giving it a commercial purpose).

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

93. *Id.* at 1267–70.

94. *Id.* at 1266.

95. *Id.* at 1267–70.

96. *Id.* at 1268.

97. *Id.* at 1269.

98. *Id.* at 1271.

99. *Id.*

100. *Id.* at 1272.

101. See Niki Kuckes, *From Andy Warhol to Barbie: Copyright's Fair Use Doctrine After Andy Warhol Foundation v. Goldsmith*, 29 ROGER WILLIAMS U. L. REV. 177, 245–46 (2024).

102. *Warhol*, 143 S. Ct. at 1274 (explaining that the fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster" (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990))).

103. *Id.* at 1273 ("The Act . . . 'reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.'" (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975))).

emphasizing that finding transformation “*is a matter of degree.*”¹⁰⁴ This degree of difference must also be weighed against the secondary work’s commercial nature.¹⁰⁵

The majority continued defining the first factor by stating that it “considers the reasons for, and nature of, the copier’s use of an original work.”¹⁰⁶ The Court explained that its previous holding in *Campbell* did not “mean that § 107(1) weighs in favor of *any* [secondary] use that adds some new expression, meaning, or message” to the original; it also must not substitute for the original work.¹⁰⁷ The Court explained that the meaning attributed to the secondary work should be considered only “to the extent necessary to determine whether the purpose of the use is distinct from the original.”¹⁰⁸ The Court indicated that the more similar the secondary work’s use is to the original work’s use, the more likely the secondary work is a substitute for the original work and therefore will not be considered transformative.¹⁰⁹ This decision also emphasized the fact that “[t]he same copying may be fair when used for one purpose but not another.”¹¹⁰ Thus, the Court called for the lower courts to analyze fair use not only on a case-by-case, fact-specific basis but also by analyzing each use of potentially infringing work.¹¹¹

The Court illustrated this use analysis standard by explicitly limiting its finding exclusively to the licensing of *Orange Prince* to Condé Nast for the magazine article on Prince, not the creation of the artwork.¹¹² The Supreme Court then differentiated the facts in this case from the facts in *Campbell*.¹¹³ The Court explained that, unlike the song in *Campbell*, which was a parody, the licensing of *Orange Prince* served the same purpose as Goldsmith’s original photograph—depicting Prince for an article devoted to the singer.¹¹⁴

The Court then discussed the commercial nature prong of the fair use analysis, explaining that if there is no compelling justification for copying the work, its commerciality is more likely to prevent a finding of fair use.¹¹⁵ The decision ultimately stated that because this specific licensing of *Orange Prince* shared virtually the same purpose as Goldsmith’s original photograph and possessed a commercial nature, there was not enough of a transformative use of the original photograph to satisfy the first fair use factor as a defense for AWF.¹¹⁶

104. *Id.* (emphasis added).

105. *Id.*

106. *Id.* at 1274.

107. *Id.* at 1282 (emphasis added).

108. *Id.* at 1284.

109. *Id.* at 1274.

110. *Id.* at 1277.

111. *Id.*

112. *Id.* at 1278 (“[T]he Court expresses no opinion as to the creation, display, or sale of any of the original Prince Series works.”).

113. *Id.* at 1275.

114. *Id.* at 1284.

115. *Id.* at 1276.

116. *Id.* at 1272–73.

Concurring, Justice Gorsuch took a textualist approach to explain the reasons the first fair use factor favored Goldsmith.¹¹⁷ Justice Gorsuch emphasized that § 107(1) asks judges only to examine the purpose and character of the work's "use" and not to consider the work itself.¹¹⁸ If the work itself was considered, Justice Gorsuch explained, it could lead to courts evaluating a piece's artistic merit, which is not something they can or should do.¹¹⁹ Justice Gorsuch also rejected the consideration of AWF's claimed reasoning behind *Orange Prince*'s creation to provide a commentary on the idolization of celebrities.¹²⁰ Based on the word "use" in the statute, the reasons for creating a piece should not be considered in the analysis, just the actual use of the piece in each case.¹²¹ Here, Justice Gorsuch explained that the use at issue is the licensing of *Orange Prince* to Condé Nast, which was a clear substitute for the original Goldsmith photograph and was of a commercial nature, meaning the first factor weighed against a finding of fair use.¹²²

Justice Kagan's dissent began with a very flattering description of Warhol; she then stated, "[I]t may come as a surprise to see the majority describe [*Orange Prince*] as a 'modest alteration[]' of Lynn Goldsmith's photograph."¹²³ She then explained that the majority did not care about whether the photograph and artwork are different and look different, it only cared that *Orange Prince* was licensed to a magazine, the same use Goldsmith had for her photographs.¹²⁴ The dissent stated that the majority followed an incorrect interpretation of § 107(1) and that "the majority transplants factor 4 into factor 1" in their analysis.¹²⁵ Justice Kagan pointed out that the majority placed an unreasonable emphasis on the commercial nature of the secondary work, since even the uses given in the preamble of § 107 include examples of fair use that are typically done for commercial purposes.¹²⁶ The dissent quoted Samuel Johnson saying, "[n]o man but a blockhead" ever completed writings or art except to gain money and explained that Congress had this understanding as well when they codified fair use in § 107.¹²⁷ The dissent argued that narrowing fair use by requiring compelling justifications for copying is concerning because many artists

117. See generally *id.* at 1288 (Gorsuch, J., concurring).

118. *Id.*

119. *Id.* at 1289.

120. *Id.* (describing the analysis of the first fair use factor as "a comparatively modest inquiry focused on how and for what reason a person is using a copyrighted work in the world, not on the moods of any artist or the aesthetic quality of any creation").

121. *Id.*

122. *Id.*

123. *Id.* at 1291–92 (Kagan, J., dissenting) (second alteration in original).

124. *Id.* at 1292.

125. *Id.* at 1303.

126. *Id.* (discussing the examples of fair use in the preamble of 17 U.S.C. § 107 and explaining that "an emphasis on commercialism would 'swallow' those uses—that is, would mostly *deprive* them of fair-use protection" (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994))).

127. *Id.* (quoting 3 BOSWELL'S LIFE OF JOHNSON 19 (George Birkbeck Hill & L. F. Powell eds., 1934)).

create new works by borrowing from preexisting ones. Justice Kagan feared that a limitation on fair use could stifle creativity and the advancement of art—the ultimate goal of both the Copyright Act and the fair use exception.¹²⁸

II. HOW LOWER COURTS ANALYZE THE FIRST FAIR USE FACTOR

This part explains the different ways circuit courts have interpreted what is necessary for a secondary work to possess a transformative nature and how heavily a commercial nature, or lack thereof, should be weighed in the first fair use factor analysis. After the *Warhol* decision, the disagreements that existed in the courts prior to the decision prevail.

There is division and inconsistency among lower courts, even within the same district, regarding interpreting transformative nature and how much value to place on commercial nature when evaluating the first factor. This part highlights trends of how transformative nature and commercial nature are defined and analyzed in different districts. It serves to emphasize that there are examples of reasoning in some districts that conflict with the reasoning for decisions in other districts when deciding cases with similar facts. Overall, this part demonstrates the lack of a clear standard for how to determine if a secondary work has a transformative nature and the extent to which courts should consider its commercial nature, or lack thereof, in the first factor analysis.

Part II.A discusses the ambiguities in the *Warhol* decision itself. Part II.B describes the different ways lower courts have analyzed a secondary work's "transformative nature." Part II.C examines the different ways lower courts have analyzed a secondary work's "commercial nature."

A. Lack of Clarity in the *Warhol* Decision

Because *Warhol* was only analyzing the first fair use factor and the holding was explicitly limited to the licensing of *Orange Prince* to Condé Nast, there are many ambiguities in the first fair use factor analysis and fair use generally.¹²⁹ The majority opinion stated that Warhol's portrait was not transformative *and* was of a commercial nature.¹³⁰ This does not offer much clarity on how the lower courts should balance and evaluate transformative nature and commercial nature when evaluating the first fair use factor. From this opinion, it appears that the Court has changed its understanding of transformative nature. To be transformative, the contested use of a secondary work must have a different use than the original work and there must be an exceptionally compelling justification for the copying, such as commentary

128. *Id.* at 1293.

129. *See infra* Parts II.B–C.

130. *Warhol*, 143 S. Ct. at 1272–73.

on the original work.¹³¹ This new standard is stricter than the standard in previous cases evaluating fair use.¹³²

Although the extent of the balancing is not clear, the Court emphasized that the secondary work's commercial nature "is relevant" to the analysis.¹³³ The decision seemed to find that the commercial nature was more influential to the first fair use factor than it had been previously.¹³⁴

The dissent argued that the majority's analysis of the commercial nature conflated the first fair use factor with the fourth. The dissent claimed that the majority's discussion of the secondary work substituting the original work in its ability to license derivatives and to license the original piece itself is a fourth factor consideration.¹³⁵ Previously, the licensing of derivative works and the original work would have been analyzed under the fourth fair use factor (rather than the first) when determining if the secondary work had an impact on the market of the original work.¹³⁶

B. "Transformative" Interpretation Post-Warhol

In the *Warhol* decision, the majority discussed the different ways a work could possess a transformative nature.¹³⁷ The opinion explained that to satisfy the transformative nature requirement, the actual work could be transformed, meaning its look or fixation is changed, or its purpose could be changed from the original.¹³⁸ The opinion stressed that the secondary work having a different purpose than the original was a requirement to find fair use.¹³⁹ The holding did not, however, seem to explicitly require a different look¹⁴⁰ to satisfy the first fair use factor.¹⁴¹ The majority explained that *Orange Prince* did not look different enough from Goldsmith's original

131. See *id.* at 1285 ("Like satire that does not target an original work, AWF's asserted commentary 'can stand on its own two feet and so requires justification for the very act of borrowing.'" (quoting *Campbell*, 510 U.S. at 581)).

132. See *id.* 1292–93 (Kagan, J., dissenting).

133. *Id.* at 1276.

134. Compare *id.* at 1277, with *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1204 (2021), and *Campbell*, 510 U.S. at 579. See also Kuckes, *supra* note 101, at 248 (describing the Court's discussion of commercial nature as "a particularly problematic departure in tone from the Court's past fair use decisions").

135. *Warhol*, 143 S. Ct. at 1303 (Kagan, J., dissenting).

136. *Id.* (stating "the majority transplants factor 4 into factor 1."); see Kuckes, *supra* note 101, at 251 (explaining that the Court "blurred some lines" when analyzing the fair use factors).

137. See *Warhol*, 143 S. Ct. at 1275.

138. See *id.*

139. *Id.* at 1277.

140. By "transformative look" this Note means anything in a secondary work that is obviously changed from the original work. In an art piece, for example, it is likely the appearance or look of a piece that is changed in a secondary work from an original one, but this Note also includes the sound of music or the coding of a computer software or any other changes between a secondary and original piece. The use of the term "transformative look" is not meant to limit this Note's analysis to visual arts; it is being used to avoid wordiness and should not be taken literally.

141. *Warhol*, 143 S. Ct. at 1277.

photograph to be found transformative because the pieces have the same purpose.¹⁴² Nevertheless, the decision did not offer clarity as to when or if a physical change in the secondary work from an original piece could be considered transformative.

Since this decision, various lower courts have issued differing opinions on what the standard is for a secondary work to satisfy the transformative nature requirement. It seems clear that the secondary work must be used in a different way, or have a different purpose, than the original work to satisfy the first fair use factor.¹⁴³ Lower courts, both before and after the *Warhol* decision, have reached different conclusions as to whether a transformative look is also necessary for a secondary work to be transformative under the first factor.¹⁴⁴

1. A Transformative Look Is Not Necessary

The U.S. Courts of Appeals for the First, Fifth, and Ninth Circuits have decided cases where they determined that the first fair use factor could be satisfied when the look of a secondary work was almost identical, if not entirely identical, to the original work.¹⁴⁵

The Ninth Circuit decision in *Perfect 10, Inc. v. Amazon.com, Inc.*¹⁴⁶ offers an example of this.¹⁴⁷ In that case, Perfect 10, a website that offered subscribers access to their copyrighted photographs, sued Google (along with Amazon and other defendants) for their use of Perfect 10's photographs as thumbnails.¹⁴⁸ Although the images in the thumbnails were identical to those on Perfect 10's website, the court explained that the thumbnails served an entirely different function and were therefore transformative.¹⁴⁹ The Ninth Circuit found that Google's secondary work was transformative because of its different use than the original work and the fact that the works looked the same did not change its transformative nature.¹⁵⁰

The Fifth Circuit took a similar approach to the Ninth Circuit regarding requiring a transformative purpose, but not a transformative look, to find a transformative nature.¹⁵¹ In *Keck v. Mix Creative Learning Center, L.L.C.*,¹⁵² Mix Creative Learning Center, an art studio selling art kits online for children to learn art at home during the 2020 pandemic, was sued for

142. See *id.* at 1284–85.

143. See *id.* at 1287.

144. See *infra* Part II.B.

145. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Keck v. Mix Creative Learning Ctr., L.L.C.*, 116 F.4th 448, 454 (5th Cir. 2024); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).

146. 508 F.3d 1146 (9th Cir. 2007).

147. See *generally id.*

148. *Id.* at 1157, 1165.

149. *Id.* at 1165.

150. See *id.*

151. See *Keck v. Mix Creative Learning Ctr., L.L.C.*, 116 F.4th 448, 454 (5th Cir. 2024).

152. 116 F.4th 448 (5th Cir. 2024).

copyright infringement for including printouts of Michel Keck's artwork in the art kits.¹⁵³ Although the printouts of Keck's artwork were not visually different from Keck's original work, the court found that the art kits were transformative because they had an entirely different purpose than the original work.¹⁵⁴

The First Circuit found a transformative nature of a secondary work in *Núñez v. Caribbean International News Corp.*¹⁵⁵ when the secondary work had a transformative purpose but no transformative look.¹⁵⁶ In *Núñez*, a publication wrote articles about nude photographs taken by Sixto Núñez, and the articles included the copyrighted photographs.¹⁵⁷ The court ruled that because "the pictures were the story" and they were originally taken for modeling portfolios and not to illustrate newspaper articles, the change in the use gave the secondary work a transformative nature.¹⁵⁸

The U.S. District Court for the Western District of Pennsylvania has also adopted the interpretation that a transformative look is not necessary when there is a transformative purpose in the secondary work. Specifically, the court determined that when the transformative purpose at issue is listed in the preamble of the fair use statute, such as a criticism of the original work, the secondary work need not look different.¹⁵⁹ Moreover, the court explained the uses in the preamble may guide the first factor inquiry, even if they are mainly illustrative.¹⁶⁰ In *Cramer v. Netflix*,¹⁶¹ the court found that the use of a photograph of a tattoo of Joe Exotic in the *Tiger King* Netflix series was fair use. The decision reasoned that it was fair use because the photograph was used for a different purpose than the original photograph.¹⁶² The secondary work was used for the purpose of criticizing the tattoo and people's reaction to *Tiger King*, whereas the original photograph was used for the purpose of selling gift cards. As a result, the secondary work was sufficiently transformative to find the first factor favored fair use.¹⁶³

2. A Transformative Look May Be Necessary

The Second Circuit does not take a clear stance on whether a transformative look is necessary. However, it has been clear that a secondary work with a transformative use is more likely to possess a transformative

153. *Id.* at 451–52.

154. *See id.* at 454 (stating that "[Mix Creative's] use of Keck's copyrighted works was transformative, as the art kits had an educational purpose that was significantly different from the original, decorative purpose of Keck's dog-themed artworks").

155. 235 F.3d 18 (1st Cir. 2000).

156. *See id.* at 23.

157. *Id.* at 21.

158. *Id.* at 22–23.

159. *See Cramer v. Netflix, Inc.*, No. 22-CV-131, 2023 WL 6130030, at *6 (W.D. Pa. Sep. 18, 2023).

160. *See id.*

161. No. 22-CV-131, 2023 WL 6130030 (W.D. Pa. Sep. 18, 2023).

162. *See id.*

163. *Id.*

nature.¹⁶⁴ With appropriation art,¹⁶⁵ specifically, the Second Circuit has found that to possess a transformative nature, the secondary work often must look different than the original work.¹⁶⁶ A recent case in the U.S. District Court for the Southern District of New York, *August Image, LLC v. Girard Entertainment & Media LLC*,¹⁶⁷ found that a secondary work had a transformative nature, even though it did not change the appearance of the original work.¹⁶⁸ The court granted a motion to dismiss based on fair use of a photograph that was taken as a screenshot of the legally posted photograph on Instagram. The screenshot was used in a news article about the show that the photograph was depicting.¹⁶⁹ The court held that a use can be transformative under the first fair use factor as long as it serves a new purpose, such as commenting on the original subject matter of the work without altering or adding to the work. The decision determined the first factor favored fair use, stating that when a work is used to illustrate a news story about that work, it “is transformative because it goes beyond merely displaying the photograph ‘for the precise reason it was created.’”¹⁷⁰ Although this example was after the *Warhol* decision, it did not cite that case at all, demonstrating the narrowness of *Warhol* and the amount of discretion left to lower courts in interpreting the first factor of fair use.¹⁷¹

The U.S. Court of Appeals for the Fourth Circuit has also interpreted *Warhol* to hold that the purpose of a secondary use is the most important part of determining whether the work was transformative.¹⁷² In *Philpot v. Independent Journal Review*,¹⁷³ the court found that an article’s use of a photograph of Ted Nugent was not transformative because, like in *Warhol*, the purpose of both the original work and the secondary work was the same.¹⁷⁴ The case did not, however, state that the lack of a transformative

164. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (“[T]ransformative uses tend to favor a fair use finding”); *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 181 (2d Cir. 2024) (finding that digitizing books was not transformative when the purpose of the digitized books was the same as the original works—to be read).

165. Appropriation is the intentional borrowing, copying, and alteration of existing images and objects. *Appropriation*, MUSEUM OF MOD. ART, <https://www.moma.org/collection/terms/pop-art/appropriation>. [<https://perma.cc/4B7W-6FSD>] (last visited Aug. 17, 2025).

166. See generally *Blanch v. Koons*, 396 F. Supp. 2d 476 (S.D.N.Y. 2005), *aff’d*, 467 F.3d 244 (2d Cir. 2006) (finding that Jeff Koon’s secondary use of Andrea Blanch’s photograph created an entirely different looking piece of art); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (explaining that Prince’s secondary work was hardly recognizable as Patrick Cariou’s original work), *modified*, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021), *and modified*, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021).

167. No. 23-CV-1492, 2024 WL 1375480 (S.D.N.Y. Apr. 1, 2024).

168. *Id.* at *4.

169. *Id.* at *1.

170. *Id.* at *4 (quoting *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 407 (S.D.N.Y. 2016)).

171. See generally *id.*

172. *Philpot v. Indep. J. Rev.*, 92 F.4th 252, 258 (4th Cir. 2024).

173. 92 F.4th 252 (4th Cir. 2024).

174. *Id.* at 258.

nature was due to the fact that the photographs were nearly identical. Instead, the court simply emphasized that when an original and secondary work look the same and have a similar purpose, there is no possibility that the secondary work has a transformative nature.¹⁷⁵ *Philpot* determined that for a secondary work to have a transformative use, it “must generate a societal benefit by imbuing the original with new function or meaning.”¹⁷⁶ Although this case has a very similar fact pattern to those of *August Image* and *Núñez* (as they all analyzed a photograph being used in an article), those two cases offered commentary on the photograph itself.¹⁷⁷ Alternatively, the article in *Philpot* merely used the photograph to illustrate its subject, Ted Nugent, and offered no commentary on him. This may explain the discrepancy in the courts’ rulings.¹⁷⁸

*C. Importance of Commercial Nature
in the First Fair Use Factor
After the Warhol Decision*

Prior to the *Warhol* decision, the Supreme Court’s fair use rulings emphasized evaluating the first fair use factor on the basis of whether a secondary work possessed a transformative nature, hardly considering the piece’s commercial nature in its decisions.¹⁷⁹ The majority opinion in *Warhol* clarified that the commercial nature of a secondary work should not be ignored in the analysis of the first fair use factor.¹⁸⁰ However, the opinion did not offer clarity on how much the commercial nature of a secondary work should be considered if the secondary work is determined to have a strong transformative nature.¹⁸¹ Since the *Warhol* decision, the lower courts still disagree on how to balance the transformative nature of a piece with its commercial nature.

The Second and Fifth circuits emphasize that having a transformative nature almost always outweighs having a commercial nature when analyzing the first factor.¹⁸² In contrast, the U.S. Courts of Appeals for the Ninth, First,

175. *Id.* at 258–59.

176. *Id.* at 260 (quoting *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 263 (4th Cir. 2019)).

177. See *Aug. Image, LLC v. Girard Ent. & Media LLC*, No. 23-CV-1492, 2024 WL 1375480, at *5–6 (S.D.N.Y. Apr. 1, 2024); *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).

178. See *Philpot*, 92 F.4th at 259–60.

179. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (“[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. . . . [T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”); *Lui*, *supra* note 72, at 167–68 (“[T]ransformative use was the only subfactor that had a statistically significant effect when factor one favored fair use.”).

180. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1273 (2023); *Kuckes*, *supra* note 101, at 248 (describing the Court’s discussion of commercial nature as “a particularly problematic departure in tone from the Court’s past fair use decisions”).

181. See *Warhol*, 143 S. Ct. at 1277.

182. See *infra* Part II.C.1.

and Seventh Circuits tend to place a heavier weight on the commercial nature of a work.¹⁸³ Whether the courts actually determine cases differently, or just claim to, it is important to note the difference in their verbiage and written reasoning to understand the lack of clarity in their analyses of the first fair use factor.

1. Circuits Where Transformative
Nature Most Often Outweighs
Commercial Nature

The Second and Fifth Circuits appear to deemphasize the commercial nature of a work. These courts often highlight that many of the uses listed in the preamble of § 107 are commercial themselves and instead focus their first factor analysis on whether the piece was transformative.¹⁸⁴ The next sections of this Note offer case illustrations that demonstrate this trend.

a. Second Circuit Cases

In their decisions both before and after *Warhol*, courts in the Second Circuit tended to find that a transformative nature outweighs a commercial nature in favoring fair use in most cases. At times, decisions in the Second Circuit have even characterized the analysis over a transformative nature as the “central question.”¹⁸⁵ While the Second Circuit courts consider both commercial and transformative nature, they point out that a work can be transformative and commercial and still be fair use. However, if a work is neither commercial nor transformative, it cannot satisfy the first fair use factor.¹⁸⁶

In *Hachette Book Group, Inc. v. Internet Archive*,¹⁸⁷ the Second Circuit emphasized that a secondary work’s transformativeness is more important than whether it possesses a commercial nature.¹⁸⁸ In *Hachette*, Internet Archive was sued for creating and distributing digital copies of copyrighted books.¹⁸⁹ In this decision, the court emphasized that Internet Archive’s secondary use of the digital books did not satisfy the first fair use factor

183. See *infra* Part II.C.2.

184. See *infra* Part II.C.1.

185. See *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 179 (2d Cir. 2024) (“Though we consider both transformativeness and commerciality, transformativeness is the ‘central’ question.” (quoting *Warhol*, 143 S. Ct. at 1274)); see also *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013) (stating that the consideration of the commercial nature of a secondary work “must be applied with caution” when analyzing the first fair use factor), *modified*, *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021), and *modified*, *Andy Warhol Found. For Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021).

186. See *Grant v. Trump*, 749 F. Supp. 3d 423, 437 (S.D.N.Y. 2024) (holding that President Donald J. Trump’s use of Edmond Grant’s song without permission in his political ad was not fair use because although it was used for a noncommercial purpose, it was not used in a transformative way).

187. 115 F.4th 163 (2d Cir. 2024).

188. *Id.* at 179.

189. *Id.* at 181.

because it was not transformative and the secondary work served the same purpose as the original books. The opinion noted that courts should assess commerciality “with caution.”¹⁹⁰ Even though Internet Archive’s secondary work was found to be noncommercial, it did not matter for the first factor analysis since their secondary use was not transformative.¹⁹¹

In *Fox News Network, LLC v. TVEyes, Inc.*,¹⁹² TVEyes was sued for creating a platform where users could search and watch recorded Fox News clips.¹⁹³ Although the court found that TVEyes’s use was only somewhat transformative, and clearly possessed a commercial nature, the court decided that the first fair use factor still weighed in favor of TVEyes because it was somewhat transformative.¹⁹⁴ This case’s finding that the first factor weighed in favor of fair use clearly emphasizes the importance of a secondary work possessing a transformative nature and the lack of importance of commercial nature in the Second Circuit.

In *Authors Guild v. Google, Inc.*,¹⁹⁵ the court offered an explanation as to why it emphasizes transformative nature over commercial nature in its first factor analysis. The Second Circuit explained that it is the transformative use that typically “communicates something new and different from the original or expands its utility,” which is the crux of the fair use defense’s purpose: to serve copyright’s goal of contributing to public knowledge.¹⁹⁶

b. Fifth Circuit Cases

The Fifth Circuit also deems a “transformative nature” more important than the “commercial nature” of secondary work in analyzing the first fair use factor.¹⁹⁷ In *Keck*, a post-*Warhol* case discussed above, the court determined that, although the art kits were being used in a commercial enterprise, their use was sufficiently transformative to satisfy the first factor.¹⁹⁸ The decision emphasized that when evaluating the first fair use factor, one must “distinguish the commercial-nature inquiry from the more nuanced inquiry into whether a secondary use has a further purpose or different character.” The court explained that the commercial nature of the infringing art kits did not matter as much as the inquiry into their different purpose from the original work.¹⁹⁹

However, in a pre-*Warhol* case, *Bell v. Eagle Mountain Saginaw Independent School District*,²⁰⁰ the same court took a different approach to

190. *Id.* at 184 (citing *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 44 (2d Cir. 2021)).

191. *See id.* at 185.

192. 883 F.3d 169 (2d Cir. 2018).

193. *Id.* at 177–78.

194. *See id.*

195. 804 F.3d 202 (2d Cir. 2015).

196. *See id.* at 204.

197. *See Keck v. Mix Creative Learning Ctr., LLC*, 116 F.4th 448, 454–55 (5th Cir. 2024).

198. *See id.* at 454.

199. *See id.* at 455.

200. 27 F.4th 313 (5th Cir. 2022).

balancing transformativeness and commercial nature. In this case, Dr. Keith Bell, an author, sued a school district for posting a one-page excerpt of Bell's book on Twitter.²⁰¹ Although the school district did not argue (and the court did not find) that its use of Bell's work was transformative, the Fifth Circuit still held that the secondary work satisfied the first fair use factor.²⁰² The court emphasized that the secondary work was entirely nonprofit and that transformative use merely strengthens the claim to fairness, but it is not necessary.²⁰³ This holding points to the idea that if a secondary work is not commercial at all, it can be found to be fair use even if it is not clearly transformative.²⁰⁴

While this holding seems to conflict with the decision in *Keck*, both cases can be reconciled. The Fifth Circuit's emphasis on the importance of transformative nature (as opposed to commercial nature) can be interpreted to mean that the commercial nature of a secondary work is less relevant as long as the work has a transformative nature. The transformative nature is less relevant if the secondary work is entirely noncommercial.²⁰⁵ A work can be considered fair use if it is (1) noncommercial and transformative, (2) commercial and transformative, or (3) nontransformative and noncommercial; but a work is not fair use if it is commercial and nontransformative.²⁰⁶

2. Circuits with Greater Emphasis on Commercial Nature

The Ninth, Seventh, and First Circuits place a heavier weight on the commercial nature of a piece when analyzing the first factor than the Second and Fifth Circuits.²⁰⁷

a. Ninth Circuit

The Ninth Circuit is not always consistent in how heavily the commercial nature of a piece weighs in the analysis of the first factor, but it does appear to place a stronger emphasis on commerciality than some of the other circuits.²⁰⁸ In *Perfect 10*, for example, Perfect 10 sued Google for using its images as thumbnails, and the use was found to have a commercial nature.²⁰⁹ However, the commercial nature did not stop the court from finding that the

201. See *id.* at 322.

202. See *id.* at 322–23.

203. See *id.* at 323.

204. See *id.*

205. See generally *id.*; *Keck v. Mix Creative Learning Ctr., LLC*, 116 F.4th 448 (5th Cir. 2024).

206. See *Bell*, 27 F.4th at 323; *Keck*, 116 F.4th at 448.

207. See *infra* Parts II.C.2.a–c.

208. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 451 (9th Cir. 2020); *Teradyne, Inc. v. Astronics Test Sys., Inc.*, No. CV 20-2713, 2023 WL 9284863, at *20 (C.D. Cal. Dec. 6, 2023).

209. See generally *Perfect 10*, 508 F.3d 1146.

first factor was satisfied. The court found that the commercial nature did not stop the work from being transformative, explaining that “the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s . . . commercial uses of the thumbnails in this case.”²¹⁰ The decision stressed the need of a *significant* transformative nature and a “public benefit” to outweigh the secondary work’s commercial nature.²¹¹ This is a higher standard than that of the Second Circuit, which states that the commercial nature should be considered cautiously.²¹²

Additionally, in *Seltzer v. Green Day, Inc.*,²¹³ Green Day was sued for their use of Dereck Seltzer’s image *Scream Icon* as the backdrop during their concert.²¹⁴ The court ruled that the use of the image was transformative²¹⁵ and “only incidentally commercial” since the image was used as a backdrop at the concert but was not used in marketing or merchandise.²¹⁶ Since the secondary work was found to be transformative and “only incidentally commercial,” Green Day’s use satisfied the first fair use factor.²¹⁷ The court twisted its reasoning to explain that the work was “incidentally commercial” to excuse the commercial nature, even after the court decided that the use was transformative. This exemplifies the Ninth Circuit’s view that the first fair use factor requires a large consideration into whether a piece has a commercial nature and that the nature has a significant impact on the satisfaction of the first factor.²¹⁸

Notably, in *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*,²¹⁹ the Ninth Circuit noted that commercial uses are not “presumptively unfair.”²²⁰ The court does not offer much more analysis on the importance of the commerciality outside of emphasizing that a commercial nature cuts against a finding of fair use.²²¹ In this case, ComicMix created and sold a book that was a mashup of *Oh, the Places You’ll Go!* and *Star Trek*, which the court ruled did not have a transformative look or purpose and was clearly commercial.²²² Since the secondary book was determined to be nontransformative and commercial, the first fair use factor easily favored Dr. Seuss Enterprises.

Cases in the district courts within the Ninth Circuit have emphasized the importance of considering the commercial nature as well.²²³ In a case heard

210. *Id.* at 1166.

211. *Id.*

212. *See supra* Part II.C.1.a.

213. 725 F.3d 1170 (9th Cir. 2013).

214. *Id.* at 1176.

215. *See id.* at 1174–78 (finding Green Day’s use of *Scream Icon* transformative because it was visually altered from the original and used for a new purpose—to critique religion).

216. *See id.* at 1178.

217. *See id.*

218. *See id.* at 1176–78.

219. 983 F.3d 443 (9th Cir. 2020).

220. *Id.* at 451.

221. *See id.*

222. *Id.*

223. *See Sedlik v. Drachenberg*, No. CV211102, 2023 WL 6787447 (C.D. Cal. Oct. 10, 2023); *Sedlik v. Drachenberg*, No. CV211102, 2024 WL 248581 (C.D. Cal. Jan. 11, 2024);

by the U.S. District Court for the Central District of California, *Sedlik v. Dranchenberg*,²²⁴ Jeffrey B. Sedlik sued Kat Von D for using his photograph in creating a tattoo and posting an image of the tattoo on her social media account.²²⁵ The court denied a motion to dismiss on several grounds, one of which was that evidence of profits could be admitted to demonstrate commercialism under the first factor.²²⁶ Additionally the court stated that the use of social media may be evidence of a commercial purpose.²²⁷ While the court's discussion did not explicitly state that a commercial nature is given a strong weight against the first fair use factor, its extensive discussion of the possibility of a commercial nature hints that if a commercial nature is found, the use is not likely to satisfy the first fair use factor.²²⁸

Emphasis of commercial nature's weight in the fair use analysis is clearest in *Teradyne, Inc. v. Astronics Test Systems, Inc.*²²⁹ There, the district court, after finding that Astronics' use of Teradyne's code was "somewhat transformative,"²³⁰ stated that the use was "indisputably commercial."²³¹ The court found that the first factor "might most-appropriately be described as in equipoise with just a slight lean towards fair use," demonstrating that the commercial nature was cutting against a finding of fair use.²³²

This holding on the first factor can be compared to the ruling in the Second Circuit case *Fox News Network v. TVEyes*, where TVEyes's use was also found to be only "somewhat transformative"²³³ and commercial, like in *Teradyne*. In *TVEyes*, the court found that the first factor "favors TVEyes, albeit slightly."²³⁴ Both cases found that the first factor favored fair use, but the courts at least claimed to use different reasoning in reaching these conclusions. The district court placed a stronger emphasis on the commercial nature, while the Second Circuit spent much more of its analysis on whether the work was transformative. The Second Circuit reasoned that whether the use was transformative mattered, and it was the "somewhat transformative" classification that made the first factor favor fair use only slightly.²³⁵ The district court found that the piece's commerciality made the first factor only slightly favor fair use.²³⁶

Teradyne, Inc. v. Astronics Test Sys., Inc., No. CV 20-2713, 2023 WL 9284863 (C.D. Cal. Dec. 6, 2023).

224. No. CV211102, 2024 WL 248581 (C.D. Cal. Jan. 11, 2024).

225. *See id.* at *2.

226. *See id.*

227. *Sedlik*, 2023 WL 6787447, at *5.

228. *See Sedlik*, 2024 WL 248581, at *2.

229. No. CV 20-2713, 2023 WL 9284863 (C.D. Cal. Dec. 6, 2023).

230. *Id.* at *21.

231. *Id.*

232. *See id.*

233. *Fox News Network, LLC v. Tveyes, Inc.*, 883 F.3d 169, 178 (2d Cir. 2018).

234. *Id.*

235. *See id.* at 178.

236. *See Teradyne*, 2023 WL 9284863, at *21.

b. Seventh Circuit

The Seventh Circuit has the clearest opinion on how to balance the transformative nature and commercial nature of a work in an analysis of the first factor.²³⁷ In *Kienitz v. Sconnie Nation*,²³⁸ Michael Kienitz sued Sconnie Nation for selling a t-shirt using Kientz's photograph of the Mayor of Madison.²³⁹ The t-shirt was protesting the Mayor's desire to shut down the Mifflin Street Block Party.²⁴⁰ When deciding if Sconnie Nation's use of Kienitz's photograph was protected as fair use, the court rejected any consideration of transformative nature in its analysis of the first factor.²⁴¹ Instead, the court discussed the commercial nature, namely, selling the shirts, while also considering that the main purpose was not just profit but to make political commentary.²⁴² The Seventh Circuit declined to make a ruling on the first fair use factor at all, stating that they thought the fourth factor carried the most weight in a fair use analysis.²⁴³ However, there is a clear difference in the Seventh Circuit's analysis because it was willing to discuss commercial nature but would not discuss the possibility of a transformative nature.²⁴⁴

c. First Circuit

The First Circuit also weighs the commercial nature of a piece "heavily against a finding of fair use" when analyzing the first factor if it "involve[s] more than simply publication in a profit-making venture."²⁴⁵ In *Núñez v. Caribbean International News Corp.*, the court showed that it does not take much for a secondary work to be considered "more than mere reproduction for a profitable use."²⁴⁶ Núñez sued Caribbean International News Corporation for its use of his photographs in its article about the photographs' subject matter, nude photographs that were to be used in modeling portfolios.²⁴⁷ The secondary use of the photographs was found to be significantly commercial because they "were used in part to create an enticing lead page that would prompt readers to purchase the newspaper."²⁴⁸ After deciding that the use was transformative,²⁴⁹ the court decided that the first factor was "either *neutral* or favors a finding of fair use."²⁵⁰ The possibility of the first factor being neutral, even after the court found a clear

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

238. 766 F.3d 756 (7th Cir. 2014).

239. See *id.* at 757–58.

240. See *id.* at 757.

241. See *id.* at 758 (stating they were skeptical of determining transformative nature).

242. See *id.* at 759.

243. See *id.* at 758.

244. See *id.*

245. See *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000).

246. *Id.* at 22.

247. See *id.* at 21.

248. *Id.* at 22.

249. See *id.* at 23.

250. *Id.* (emphasis added).

transformative purpose, demonstrates the weight given to the commercial nature of the secondary work.²⁵¹

III. A PROPOSED STANDARD OF ANALYSIS OF THE FIRST FAIR USE FACTOR

The *Warhol* decision emphasized that the analysis of the first fair use factor requires courts to determine and balance the transformative nature and commercial nature of a secondary work. *Warhol* did not, however, offer much guidance as to how to complete the analysis. Defining the exact standard of what is necessary to satisfy the first fair use factor is not possible, since it must remain a nuanced and fact-specific inquiry to further the goals of copyright and fair use.²⁵² Some elements of the inquiry can be clarified, however, and this part offers a proposal for how lower courts should evaluate the first factor elements. Part III.A sets the standard under which a transformative nature should be found in a secondary work. Part III.B explains how the commercial nature component of the first factor should be interpreted and applied to the analysis.

A. How “Transformative Nature” Should Be Defined

Analyzing the “purpose and character of the use” of a secondary work should, as the courts have determined, be analyzed to determine if the use is transformative.²⁵³ This inquiry should be broken into two pieces: (1) whether the piece was noticeably physically transformed, meaning it looks different from the original work²⁵⁴ and (2) whether the piece is being used for a different purpose than the original work.²⁵⁵ Analyzing the “purpose and character of the use” section of the statute by examining if a work is transformative is well supported by precedent in the Supreme Court.²⁵⁶

Although there are clear discrepancies in the lower courts over the understanding of what this means *exactly*, the basic idea is identifying creative change that makes a work new, whether that be physically or through a new use.²⁵⁷ Keeping the transformative inquiry is important to maintain

251. *See id.*

252. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1274 (2023); *see also* Leval, *supra* note 15, at 1135.

253. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

254. By the phrase “noticeably physically transformed,” this Note means a recognizable change or difference in the secondary work. Some works cannot be physically transformed, such as software or music, but this Note is still referring to works like these. For example, in an art piece, it may be the look; in software, it may be the code; or in music it may be the sound. For brevity, this Note refers to these types of changes as either “physical transformation” or “transformative look.”

255. *See* *Lui*, *supra* note 72, at 169–70 (citing 17 U.S.C. § 107(1)).

256. *See* *Campbell*, 510 U.S. at 579; *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021); *Warhol*, 143 S. Ct. at 1275 (2023).

257. *See supra* Part II.B.

the goals of the fair use defense.²⁵⁸ The fair use defense was codified to ensure that the monopolies created by copyrights did not overly stifle the public's access to creativity and art.²⁵⁹ Keeping the goals of copyright in mind, the inquiry into whether a purpose of a secondary work is transformative (compared to the original work) should follow the "use" inquiry as defined by the majority and concurrence in *Warhol*.²⁶⁰ This requires analyzing the specifically contested use of the secondary work, not the secondary work's creation as a whole.²⁶¹ The secondary work's specific use should be considered because it is how a court will determine if the use is one that furthers a goal of fair use, such as allowing for criticisms or making art more accessible to the public.²⁶²

1. Overview of the Standard

Overall, the first factor inquiry should adopt a similar approach to the Second, Fourth, and Fifth Circuits. For example, courts should look at the purpose of each specific use of a secondary work and prioritize the purpose inquiry over the consideration of whether the work looks different.²⁶³ This inquiry should look at the purpose of the use at issue in facts specific to the case, as explained in the *Warhol* concurrence.²⁶⁴ The reason for considering the use more heavily than the look of the work is exemplified clearly in *Keck*²⁶⁵ and *Warhol*.²⁶⁶

In *Keck*, although the printouts of the artwork in the secondary work were identical to the original work, they were used to send to children to create their own art, not to be hung as decoration themselves like the original works.²⁶⁷ Promoting creativity and accessibility is a goal of copyright. It is common knowledge that to create art, people often must see and be inspired by other art precedent to their own.²⁶⁸ As such, it does not make sense that for a child to gain exposure to artwork, they would have to purchase or license an original work from an artist. Instead, just as they would be able to search for a picture of art on the internet, it makes sense to allow them to receive an already printed inspiration picture. The purpose of the secondary work is so entirely different from the purpose of the original work that it cannot be seen as replacing or superseding the original work.²⁶⁹

258. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015).

259. See COPYRIGHT ALL., *supra* note 27.

260. See *Warhol*, 143 S. Ct. at 1258–91.

261. See *Kuckes*, *supra* note 101, at 246 (arguing that while analyzing *Warhol*, the Supreme Court decided "to create what is essentially new fair use doctrine").

262. See COPYRIGHT ALL., *supra* note 27.

263. See *supra* Part II.B.1.

264. *Warhol*, 143 S. Ct. at 1289 (Gorsuch, J., concurring).

265. See *Keck v. Mix Creative Learning Ctr., L.L.C.*, 116 F.4th 448, 455 (5th Cir. 2024).

266. See *Warhol*, 143 S. Ct. at 1287.

267. *Keck*, 116 F.4th at 455.

268. See *Warhol*, 143 S. Ct. at 1293 (Kagan, J., dissenting).

269. See *Keck*, 116 F.4th at 455.

The same reasoning explains why *Orange Prince* was not transformative in *Warhol*. Whether one agrees with the majority or the dissent on how different *Orange Prince* may or may not look from Goldsmith's original photograph, there is no question that the use was the same—to be licensed to a magazine to illustrate Prince for an article.²⁷⁰ Since their uses are the same, it follows that the secondary work is not furthering the goals of increasing creativity and new meanings, and *Orange Prince* undoubtedly supersedes the original work, meaning it is not transformative.

Unlike the decision in *Warhol*, which rejected consideration of the author's claimed meaning of their piece,²⁷¹ the purpose inquiry should include an investigation into what the secondary work's author claims is the purpose or meaning of their work to be able to properly assess if a use is furthering the aims of the Copyright Act and the fair use defense. The claimed meaning or purpose should only be considered in the court's analysis, however, if an ordinary person would reasonably believe the claimed purpose in viewing the secondary work and the stated meaning or purpose does not contradict the use of the secondary work at issue. If the purpose of the work is one that clearly furthers the goals of copyright, the bar of how different the secondary work must look from the original should be lower. If, however, the purpose is one that is not clearly furthering the goals of copyright, there should be a higher requirement of visual difference the secondary work must meet.

Additionally, the court should consider industry norms when analyzing the purpose of the copying and how high the bar must be for visual difference between the original and secondary works. If something is typically taboo in an industry—a tattoo artist directly copying a photograph or a screenwriter turning a book into a movie without permission, for example—the contradiction with industry norms should be weighed against a finding of transformativeness, even if the secondary work could be argued to be otherwise transformative.

2. Visual Transformation

Whether a piece is visually transformative should matter to a degree that is entirely based on the secondary work's purpose. Typically, a piece should have some level of apparent change to satisfy the transformative prong. The balancing of prioritizing the purpose over the visuals of the secondary work will prevent the court from having to judge the artistic merits of a piece or subjectively determine the standard for when one work is *sufficiently different* from the original work.²⁷² Prioritizing the purpose will also allow

270. *Warhol*, 143 S. Ct. at 1287.

271. *See id.* at 1282.

272. *See* Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 448 (2008) (explaining that transformative nature should be determined based on the purpose perceived, not the artistic merit of the piece); *see also* Mark Marciszewski, *What Do Andy Warhol and Google Have in Common?: Transformative Uses and the Effect Upon the Potential Market: The Next Question for Fair Use and the Right to Prepare Derivative Works*, 92 UMKC L. REV. 291, 294 (2023) (arguing

courts to better evaluate fair use by determining if a secondary work furthers the goal of copyright, since it is the purposes that are often exemplifying an innovation or increasing public accessibility.²⁷³

A transformative look is not always necessary if the secondary piece was used for a purpose that furthers the goals of fair use and copyright. Since purposes like criticisms, parodies, education, and news reporting are long-standing reasons that fair use was created, they must be able to be considered transformative, even if the secondary work looks similar to the original work.²⁷⁴ For example, if a professor is printing a poem for their students' English final, it would not make sense to require the professor to pay a licensing fee or to have to change the writing of the poem, when the purpose of the use is to test on the words of the specific poem. As demonstrated in *Campbell*, this reasoning also applies to criticisms and parodies, since a certain amount of an original work must be in the secondary work to convey the parody or criticism to the viewer.²⁷⁵

The only time a piece can be analyzed in a way where its transformative look is dispositive without also having a different purpose from the original work is when it has been so transformed that the secondary piece is unrecognizable from the original one. If a piece was changed that much, however, it is unlikely that there would be a copyright infringement claim to begin with, as there can be no infringement without substantial similarity between the works, so the fair use defense would not be needed.²⁷⁶

This is not to say that the visual transformation of a piece does not matter. It must be balanced with the purpose of the piece, with the purpose being given the most weight in the decision. The more different the purpose of the secondary work than the original work, the less visually transformed the secondary piece must be to satisfy the prong of transformative nature.

3. Transformative Purpose

When analyzing whether a secondary work has a transformative purpose, the court should consider what an author states is the purpose of their piece. Since the meaning or purpose of a piece is so often intertwined with the goals of copyright and is a subjective inquiry, the standard for considering an author's meaning in the transformative nature analysis should be whether an ordinary person would reasonably believe that the claimed commentary or purpose of the copying is what the piece accomplishes.

The author's claimed meaning should be considered because it offers a baseline from which to analyze the purpose of the piece from an ordinary observer's view. This means that the court will not determine the piece's purpose but instead only determine whether the artist's claimed purpose is

that the current transformation analysis calls for judges to analyze the artistic merit of secondary works).

273. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015).

274. See 17 U.S.C. § 107.

275. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581–82 (1994).

276. See *MENELL ET AL.*, *supra* note 32, at 665, 670.

believable. Considering the author's claimed purpose will prevent the judge or jury from having to evaluate the artistic merit of a piece or interpret something that they may have no background in understanding. For example, since judges likely are not art critics, music producers, or sociologists, if an artist or songwriter claims that a song or artwork is criticizing society, the court should determine if that purpose is believable, even if it is not a commentary the court recognized itself before learning the claimed meaning. Recall the case discussed at the outset of this Note. If Miley Cyrus's song is found to be infringing, under this first factor analysis, she should have the chance to argue that her song "Flowers" has a transformative purpose, and she will likely argue that the song is a parody of "When I Was Your Man."²⁷⁷

The standard cannot be as simple as considering what the author says their purpose was, since authors could then retroactively argue that they copied as a form of commentary any time they were accused of copyright infringement.²⁷⁸ However, it also would not make sense to ignore an artist's claimed purpose entirely. If it was the court's decision to determine the secondary work's purpose, it would be too subjective and could end up defeating the fair use defense in many cases where it should be allowed, such as appropriation art.²⁷⁹ To balance an artist's ability to overreach with their claimed purpose and to allow artists to claim a specific purpose, there must be a discussion of whether the author's claimed purpose is reasonably believed by an ordinary person in the specific work's use.²⁸⁰ This standard will allow the required balance between copyright monopolies and incentivizing the arts to flourish.

The purpose must be believable in the *specifically* contested use, and not just generally, to qualify as fair use, which can be well demonstrated with the facts of *Warhol*. In *Warhol*, AWF argued *Orange Prince* was created as commentary on the idolization of celebrities and celebrity culture.²⁸¹ This purpose is reasonably believed if *Orange Prince* is hung in a museum or used to illustrate an article critiquing celebrity culture.²⁸² This purpose is not reasonably believed, however, when the art is being used to depict Prince in an article memorializing and celebrating Prince to exemplify the perception of celebrities as icons, the exact thing that AWF claimed the art piece was critiquing.²⁸³ When considering the purpose in relation to the use, the same

277. See Seimons, *supra* note 12.

278. See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1285–86 (2023).

279. See Benjamin A. Spencer, *It Ain't Real Funky Unless It's Got That Pop: Artistic Fair Use After Goldsmith*, 18 DUKE J. CONST. L. & PUB. POL'Y, 103, 103–04 (2023).

280. See Heymann, *supra* note 272, at 455. Professor Laura A. Heymann explains that transformative nature could be identified if an ordinary reader would find a different meaning in the secondary work. This Note departs from Professor Heymann's views because, while it adopts the ordinary person standard, this Note proposes that the question is whether the ordinary person would see the author's claimed meaning, not if an ordinary person would themselves come up with a meaning.

281. See *Warhol*, 143 S. Ct. at 1285.

282. See *id.* at 1291 (Gorsuch, J., concurring).

283. See *id.* at 1285 (majority opinion).

art piece will be transformative in some instances and not transformative in others. *Orange Prince* should be considered transformative, for example, if it is hung in a museum or featured in an article on appropriation art or critiquing celebrity culture. It should not be considered transformative when it is being used in a way that does not reasonably support its stated purpose, such as *Orange Prince*'s use in an article commemorating Prince, not offering a critique, as AWF claimed.²⁸⁴

Notably, this standard leaves open the question of what to do if an author chooses not to provide a purpose for their use of the original work. If an author does not want to provide a purpose for their copying, the court should not invent one for them. The goal of fair use is to prevent the stifling effects of the monopolies created by copyright, not to provide an opportunity to evade copyright restrictions without a reasonable and socially beneficial purpose.²⁸⁵

4. Balancing Transformative Look and Purpose

One commonly articulated fear associated with extending fair use or determining clearer standards to decide which secondary works are transformative is that it could allow for protection of works that should not be protected.²⁸⁶ For example, some fear that movie adaptations of books could be considered “transformative works” and protected under the fair use defense instead of solely “derivative works” that are illegal under the Copyright Act.²⁸⁷ If the standard set for a work to satisfy the first fair use factor includes works that are transformative in appearance and purpose and were created for commercial reasons, it is understandable that one would worry that this description would include a movie based on a book, since a book looks different than a movie and was made to be watched instead of read. This need not be of concern, however, because transformative look and purpose must be considered in a matter of degrees.²⁸⁸

Although a movie looks different than a book, the actual copyrightable information from the book does not look very different in the movie. The heart of the copyright is not the fact that the characters or scenes were written on a piece of paper but the way characters or scenes were described and copied to create the movie. Simply putting the work in a new style or medium cannot be considered a sufficient change to render a piece transformative in nature without a compelling purpose for the copying.²⁸⁹ In creating a movie based on a book, the purpose of making the movie is almost always the same as the purpose of making the original book, which is to showcase the story

284. *See id.* at 1269.

285. *See* COPYRIGHT ALL., *supra* note 27.

286. *See generally* Marciszewski, *supra* note 272.

287. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1219 (2021) (Thomas, J., dissenting).

288. *See Warhol*, 143 S. Ct. at 1273.

289. *See id.* at 1274–75.

and characters in the book to an audience. The fact that it is done on a moving screen instead of in print does not change that it shares the same reasons for doing so. As long as a change in purpose is considered more important to determining if a work is “transformative” than the secondary work’s actual look, there does not need to be as much concern that fair use will overstep a copyright owner’s exclusive right to create derivative works.

Additionally, the court should look to the relevant industry norms, if the plaintiff or defendant provide them, to see if the copied material is something that the industry typically accepts. Returning to the example of a book turned into a movie, it is commonly known in that industry that the taking of someone else’s work to create a movie without a license is highly disfavored. Similarly, when photographs are copied directly into tattoos, there is an industry norm that tattoo artists are expected to change something from the photograph in their tattoo to create new art and not directly copy the photographer’s art.²⁹⁰ If the court considers industry norms, and the copying is something that is not typically accepted, the court should weigh that consideration against a finding of transformativeness, absent a purpose that furthers the goals of copyright. The consideration of industry norms will fill in some of the gaps that are otherwise left to intuition and allow the standard of deciding what is transformative to be somewhat more objective and predictable for plaintiffs and defendants in these cases.

Admittedly, this Note’s definition of analyzing the purpose in determining the degree to which a work must be transformative is asking for a somewhat intuition-based decision on whether the purpose furthers the goals of copyright. Although it is problematic to request that a court decide something based on intuition, instead of laws, the creation of a more explicit rule is not possible when the nature of a fair use inquiry is so fact specific.

B. How Commercial Nature Should be Analyzed

The commercial nature of work should not itself cut against a finding of fair use under the first fair use factor, but it should raise the bar on what is needed to be considered a secondary work with a transformative nature. The statute and case precedent should be interpreted to mean that a noncommercial nature is a good indicator that a use was fair.²⁹¹ As such, there should be a lower bar for what a secondary work must possess to be transformative if it has a noncommercial nature. Commerciality, or lack thereof, should only serve as an indicator for how high the bar for a piece must be to be transformative, and the transformativeness is what should guide the decision as to whether the author of a secondary work is favored by the

290. See generally Brief for Ross C. Berg, Jonny Gomez, & Maxime Plesciabuchi as Amici Curiae Supporting Plaintiff-Appellant, *Sedlik v. Drachenberg*, No. 24-3367 (9th Cir. May 29, 2024).

291. *Google*, 141 S. Ct. at 1204 (“There is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use. But the inverse is not necessarily true.”).

first factor. As discussed in Part III.A, if a secondary work has a *noncommercial* nature, there are times where it may not need to have any physical transformations.²⁹² If the secondary work has a *commercial* nature, however, there must be some sort of physical transformation as well as a transformative purpose for the secondary work to satisfy the first factor.

The goal of copyright indicates that the purpose of fair use is to allow works to be used in a way that benefits the public or society.²⁹³ This goal emphasizes the balancing of the fair use defense within copyright. Since it is important for art to be publicly available, forcing people to pay for it through licensing or permission from the original work's author when people plan to use the art to better society or further innovation cuts directly against the purpose of copyrights. As such, a piece could not be transformed at all and be for a nonprofit use, such as a teacher giving students an excerpt of a textbook for class, and be found to satisfy the first prong of the fair use test. Similarly, a piece could not be used for a commercial reason with no change to the original material, such as a student selling an excerpt of their textbook to another student, and satisfy the first prong of the fair use test.

As long as there is an argument that a piece has a somewhat transformative look and purpose, the fact that it also has a commercial nature should not impact its ability to satisfy the first fair use factor.²⁹⁴ If a piece being made for commercial benefit to the creator impacted whether the art was considered transformative, this would increase the confusion between the first factor and the fourth factor of fair use, as stated in the *Warhol* dissent. The fourth factor of fair use is "the effect of the use upon the potential market for or value of the copyrighted work."²⁹⁵ In the analysis of the fourth factor, the court must look at whether the new piece takes over the same market as the original piece, and that is where the issues with commerciality should be analyzed.

The Supreme Court merged a fourth factor analysis into their first factor decision in *Warhol* by considering the effect of licensing *Orange Prince* on the market for derivative works and the effect of licensing the original Goldsmith photograph.²⁹⁶ The fourth factor analysis in this decision should be read as dicta and not as binding precedent for an analysis of the first factor of fair use. The fourth factor determines whether a work is a substitution for the original in the marketplace; this analysis does not belong in the discussion of whether a piece is transformative in nature.²⁹⁷ Separating the analysis in this way will lead to less confusion in the lower courts over the importance of a commercial nature.

292. See *supra* Part III.A.

293. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015).

294. See *Google*, 141 S. Ct. at 1204 (explaining that "many common fair uses are indisputably commercial").

295. 17 U.S.C. § 107.

296. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258, 1277 (2023); Kuckes, *supra* note 101, at 249.

297. See *Warhol*, 143 S. Ct. at 1303 (Kagan, J., dissenting); Kuckes, *supra* note 101, at 253.

The Copyright Act was not created to prevent authors from making profits generally; it is meant to prevent individuals from freeloading off of another's idea and profiting off of someone else's originality instead of their own.²⁹⁸ As such, the commercial nature should only be considered to the extent that a noncommercial purpose weighs in favor of fair use. If there is a commercial purpose, a work must have a somewhat transformative look and use to be considered transformative.

All four of the fair use factors are to be considered in a fair use analysis, and there are debates as to whether the first or fourth factor is more dispositive in the analysis. Thus, when the first factor cuts in favor of fair use and the fourth factor cuts against it, it will be up to the court to decide, on a fact-specific basis, which factor is more important to the goals of copyright—creativity and innovation—to decide a final finding of fair use.

CONCLUSION

The analysis of the first fair use factor has been completed in different ways in different circuits. Although analyzing the first fair use factor must continue to be a fact-specific analysis, there are some ways the analysis can be more streamlined. Keeping in mind the goals of copyright and fair use, courts should weigh a transformative nature above a commercial nature but should also give a heavier weight to noncommercial natures. Within the inquiry into a transformative nature, more weight should be given to a secondary work's transformative purpose than its transformative look. Courts should also consider the author's claimed purpose if it can be reasonably believed by an ordinary observer. Lastly, in their transformative analyses, courts should consider industry norms and conclude that uses contrary to industry norms cut against a finding of fair use.

298. See COPYRIGHT ALL., *supra* note 27.