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Toward a Fair Use Standard Turns 25: How Salinger and Scientology Affected Transformative Use Today

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Cover Page Footnote

I would like to thank Professor Hugh C. Hansen for his help in examining this Note's topic. Additionally, a big thank you to my friends and family for their support, advice, and encouragement over the law school experience. Lastly, to the best editor ever—my mom—I couldn't have finished this journey without you

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Benjamin Moskowitz*

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INTRODUCTION

The fair use doctrine is one of the most divisive issues in copyright law today. As Professor Neil Weinstock Netanel wrote, “[n]umerous commentators have lambasted the fair use doctrine as hopelessly unpredictable and indeterminate.”¹ While a few countries, including the United States, have added a fair use doctrine to their legal codes, many others have criticized the defense for being

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¹ Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 716 (2001).

fickle, and for potentially leading to much uncertainty.² In 1994 the Supreme Court decided *Campbell v. Acuff-Rose Music, Inc.*, which became a seminal case in the fair use doctrine's evolution.³ With *Campbell*, the growth of the transformative nature of a work as a deciding factor in a fair use analysis began in force. Pushed forward with Justice Souter's opinion, the idea of transformativeness has only continued to grow. In 2013, amid numerous cases decided using the fair use analysis, two stood out from the rest: *Cariou v. Prince*⁴ and *Seltzer v. Green Day, Inc.*⁵ Additionally, in 2014 the Seventh Circuit added another important ruling to the canon of fair use analysis with *Kienitz v. Sconnie Nation LLC*.⁶ The rulings of these cases, which depended heavily on the idea of transformativeness, expanded the law's previous boundaries regarding what could be considered transformative.

This Note will explore the contours of the fair use doctrine, its expansion, and the increased use of transformative use as a fair use defense. Part I introduces a brief history of copyright protection and the development of fair use. Part II focuses on Judge Pierre Leval's 1990 *Harvard Law Review* article *Toward a Fair Use Standard*.⁷ This article was in part written as a reaction to the Second Circuit's disagreements with two copyright cases over which Leval presided while acting as a district court judge in the Southern District of New York. Part III discusses the immediate impact of Judge Leval's article on the Supreme Court's opinion in *Campbell*. Part IV follows the recent growth of transformative use in cases such as *Cariou*, *Seltzer*, *Sconnie*, and looks at certain issues with Leval's interpretation. Over the years fair use has changed dramatically. Judge Leval's article played a significant role in that change, advancing the doctrine and the effect of "transformativeness" to a point where even Judge Leval may not have approved.

² See *id.* at 717.

³ 114 S. Ct. 1164 (1994).

⁴ 714 F.3d 694 (2d Cir. 2013).

⁵ 725 F.3d 1170 (9th Cir. 2013).

⁶ 766 F.3d 756 (7th Cir. 2014).

⁷ Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

I. COPYRIGHT & FAIR USE: A LOOK BACK

To effectively assess the idea of fair use as brought forward in *Campbell*, it is helpful to understand the history of the doctrine and its place within copyright law. The British Crown originally saw the printing press as an instrument that needed to be controlled in order to prevent propaganda and the dissemination of dangerous ideas.⁸ As the Crown loosened its grip on granting only specific publishers the right to print and distribute books, the printers' consortiums went to parliament looking for government protections which might provide financial incentives for authors to right and publishers to publish.⁹ In response, England's parliament signed the Statute of Anne, the world's first codified copyright statute, into law in 1710.¹⁰ The law, which granted rights to authors and the printers acting as their assignees, protected works from being appropriated entirely and reprinted exactly as they had originally appeared.¹¹ Similarly, the first recognizable implementation of an implied fair use doctrine can also be traced back to English roots from approximately the same era.¹² However, the Statute of Anne did not address issues of "fractional copying" or any significant similarity among works. Soon after the Statute of Anne was enacted, English authors and publishers deemed it unfavorable to their interests.¹³ It was these publishers who lobbied for new laws making it illegal to "print, publish, import, or sell any abridgement of [a copyrighted work], or any translation thereof without the consent of the author or proprietor first obtained in writing."¹⁴

English courts began to hear cases concerning the abridgement of works and whether the creation of these condensed versions fell under the scope of the Statute of Anne's protection. Courts held that differences existed between "real and fair" abridgements and books that were "colorably shortened."¹⁵ This allowed for "real

⁸ See Pierre Leval, *An Assembly of Idiots?*, 34 CONN. L. REV. 1049, 1051 (2002).

⁹ See *id.*

¹⁰ Statute of Anne, 1710, 8 Ann., c. 19 § 1 (Eng.).

¹¹ See Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1381 (2011).

¹² See *id.* at 1380–82.

¹³ See *id.* at 1381.

¹⁴ *Id.*

¹⁵ *Id.* at 1391–93. The concept of a "real and fair" abridgement is a use taking aspects of another work but one which is used for the furtherance of learning, invention, or a basis

and fair” abridgements to qualify as new works under new copyright and left “colorably shortened” abridgments as infringing works.¹⁶ The factors in the Statute of Anne that led to a finding of infringement were similar to those maintained by the United States’ current fair use doctrine.¹⁷ Both doctrines determine infringements on a case-by-case analysis.¹⁸ Outcomes are based on the amount and context of the work taken, and include in their analyses the understanding that a work condensed for research or educational purposes would not harm the market for an original work.¹⁹ As the first copyright law of its kind, the Statute of Anne established precedent in securing protection for the works of authors and publishers, precedent that would be further advanced by the Constitution and legislature of the United States.

Until the signing of the United States Constitution in 1789, the Statute of Anne remained the basis for copyright law in colonial America.²⁰ Between 1776 and 1789 the newly formed states established copyright laws to govern the protection of works created within their territories, many of which were close approximations of the Statute of Anne.²¹ With the ratification of the Constitution, Article I, Section 8, Clause 8 granted copyright protection to its citizenry through Congress’ power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²² In 1790, the United States passed its first federal Copyright Act which established a creator’s initial rights, set time limits for copyright ownership, and made it possible to renew exist-

of judgment upon the original work. A work that is “colorably shortened” is a work that is created by merely omitting and transposing parts of an original work. A similar distinction is made by current US judges in their examination the whether a work can be protected by the fair use doctrine. *See Gyles v. Wilcox*, 26 Eng.Rep. 489 2 Atk.141 (1740) (No. 130).

¹⁶ *See Sag*, *supra* note 11, at 1390.

¹⁷ *See id.* at 1394.

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 932 (2003).

²¹ *See id.* at 933-36. (highlighting that Delaware was the only state to not ratify any sort of statute granting copyright protection to its citizens).

²² U.S. CONST. art. 1, § 8, cl. 8.

ing copyrights, features which were already established in the various state statutes, but which could now serve as a unified federal rule, pulling the states into harmony with one another.²³ Perhaps by an oversight of the drafters, the Act only protected specific works including books, maps, and charts.²⁴ However, with the advancement of technology, in 1831, Congress passed a new Copyright Act which increased the copyright terms, and added musical works to the list of protectable expressions.²⁵

Justice Story's decision in *Folsom v. Marsh* is considered one of the first opinions to incorporate these copyright protections from the newly implemented 1831 Copyright Act with the ideas which would later become part of the fair use doctrine.²⁶ Here, Justice Story was faced with an abridgement of a twelve-volume biography of George Washington.²⁷ In deciding the case, Justice Story used a number of English court decisions pertaining to the abridgement of written works, as the American judicial system had not yet deliberated on many similar abridgement issues.²⁸ Justice Story ultimately decided to enjoin the publication of the work, finding it to be an infringement of the original biography.²⁹ Some scholars consider Justice Story's decision to have been an attempt to ultimately safeguard copyrights by determining that unless a work qualified for an exception under the concept of fair use, the work should be held as an infringement.³⁰

²³ See Patterson & Joyce, *supra* note 20, at, 937–39.

²⁴ See Act of May 31, 1790, ch. 15, §1, 1 Stat. 124, 124 (repealed 1831); MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, app. 7 (Matthew Bender rev. ed. 2010); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets and Liberal Values in Early American Copyright*, 118 *YALE L.J.* 186, 196–98 (2008) (asserting that during the development of early copyright laws, “Authorship” was limited to the written works noted above, and was not extrapolated out to include the other types of work later to be protected, such as music).

²⁵ See Act of Feb. 8, 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870); NIMMER & NIMMER, *supra* note 24, App. 7(d)(4)(a).

²⁶ Laura G. Lape, *Transforming Fair Use: The Productive Use Factor In Fair Use Doctrine*, *ALB. L. REV.* 677, 687 (1995).

²⁷ See *Folsom v. Marsh*, 6 Hunt Mer. Mag. 175, 345–46 (Cir. Ct. D.Mass. 1841).

²⁸ See generally *id.* (discussing cases regarding the creation of works using large portions of already existing books in order to supersede the need for the original, or deny the right to publish letters not written by the author or publisher); Sag, *supra* note 11, at 1377.

²⁹ See *Folsom*, 6 Hunt Mer. Mag. at 349.

³⁰ See Oren Bracha, *supra* note 24, at 229.

In his decision, Justice Story noted the factors which would later become the categories of fair use as codified in the Copyright Act:

So, in cases of copyright . . . the question of piracy, often depend[s] upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work . . . [f]or example, no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.³¹

This statement most accurately reflected Justice Story's decision. He continued "[i]f [an author] thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work . . . such a use will be deemed in law a piracy."³² Justice Story ultimately decided that if a "fair and bona fide abridgement" were produced, the work would not be held to be a piracy, but rather a new work protectable on its own.³³ While the decision in *Folsom* instilled in the law a sense of what would be considered fair use, the decision also formed a broad enlargement of the copyright laws in general, which greatly limited the ability of authors to use direct passages of works created by others.

The Copyright Act of 1976, signed into law by President Ford in 1978, was the first major overhaul of American copyright law since the 1909 Act—which had mainly extended the terms of copyright available under the 1831 Act.³⁴ By the 1970s, with the advent and growth of television, motion pictures, sound recordings, and

³¹ See *Folsom* 6 Hunt Mer. Mag. 175 at 344–45.

³² *Id.*

³³ See *id.* at 345 (“[W]hat constitutes a fair and bona fide abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.”).

³⁴ Pub. L. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–810 (2012)).

radio, the Copyright Act of 1909 had become severely outdated.³⁵ After becoming party to the Universal Copyright Convention, a multinational treaty signed by forty total nations in 1951, Congress determined it was time to reevaluate America's copyright laws.³⁶ Congress amended the Copyright act of 1909 to reflect the ratification, adding subsection (c) to section 9 of the Act.³⁷ The 1976 Copyright Act, which remains the basis for contemporary US copyright law, established protections for new categories of works, extended the terms of copyrights from previous acts, and among other things, instituted the fair use doctrine in 17 U.S.C. § 107.³⁸

The fair use provision of the Copyright Act adopted many of the same elements Justice Story noted in *Folsom*.³⁹ The fair use factors acknowledge the importance of copyright protection while still recognizing certain uses of copyrighted material as legal.⁴⁰ The Act notes four factors that are to be considered in any fair use analysis:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect on the potential market or value of the copyrighted work.⁴¹

The legislative history of the Act speaks to the understanding that during periods of technological advancement there should be a

³⁵ See 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:45 (2014).

³⁶ See *id.* § 1:72.

³⁷ Act of Aug. 31, 1954, Pub. L. 83-743, 61 Stat. 655. See also PATRY, *supra* note 35, § 1:63 (“The subsection (1) provided national eligibility for works whose country of origin was another UCC country; (2) exempted such works from the need to provide reciprocal mechanical reproduction rights similar to those found in 17 U.S.C.A. § 1(e); (3) exempted from the deposit requirement all works by authors of a UCC country and those works first published in a UCC country; and (4) exempted such works from the manufacturing clause requirements, provided that a ‘UCC notice’ was affixed.”).

³⁸ See Act of Oct. 19, 1978, Pub L. 94-553, 90 Stat. 2541.

³⁹ See *Folsom v. Marsh*, 6 Hunt Mer. Mag. 175, 9 F.Cas. 342, 344–45 (C.C. Mass. 1841).

⁴⁰ See 1 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBL. & THE ARTS § 1:72 (3d ed. 2014).

⁴¹ 17 U.S.C. § 107 (2012).

broad explanation of what fair use is and how it is to be applied.⁴² The House Report examined that an “endless variety of situations and combinations of circumstances that can arise in particular cases preclud[ing] the formulations of exact rules in the statute.”⁴³ Therefore, “the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.”⁴⁴ While it was Congress’ intention to give judges a significant amount of discretion regarding their application of fair use analyses, there were critics of this decision, specifically regarding Congress’ choice to give so much power to judges—limiting the congressional power to establish a proper schema for solving fair use issues. As Leon Seltzer wrote in 1977, “Congress . . . has failed to articulate a coherent rationale for copyright . . . failed to define fair use . . . introduced confusions between fair use and exempted use . . . and it has in the end tossed the fair use question, now thoroughly enmeshed in contradictions, back to the courts.”⁴⁵

II. TOWARD A FAIR USE STANDARD AND ITS EFFECT

Judge Leval attempted to reduce the confusion left by both Congress and inconsistent judicial opinions regarding fair use analysis with his article *Toward a Fair Use Standard*.⁴⁶ The Copyright Act, Judge Leval explained, gives “little guidance” as to how judges should actually analyze fair use in real world situations.⁴⁷ Leval observed that the Act offered no assistance for determining how to distinguish what is “acceptable” from what is “excessive” in terms of material taken from one work and used in another.⁴⁸ Judges, Leval believed, had not yet come to a consensus regarding the correct way to perform a proper fair use analysis. As such,

⁴² See H.R. REP. NO. 94-1476, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ LEON SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT: THE EXCLUSIVE RIGHTS TENSIONS IN THE 1976 COPYRIGHT ACT 17 (1977).

⁴⁶ See Leval, *supra* note 7, at 1106–07 nn.9–10. (pointing out a number of inconsistent judgments in which the court of appeals reversed the district court’s finding for the defendant, and was in turn reversed by the Supreme Court and considering the instances of “divided courts” where the Supreme Court was split on an issue of fair use).

⁴⁷ See *id.* at 1105–06.

⁴⁸ See *id.* at 1106.

judgments were rendered on cases, only later to be overruled, overturned, or remanded by judges of higher courts.⁴⁹ Judge Leval ended his introduction by expressing the opinion that fair use “need not be so mysterious or dependent on intuitive judgments.”⁵⁰ However, he proceeded to explain fair use according to a system of his own belief, one that may have been developed out of his displeasure at having had the Second Circuit challenge and overturn cases he himself had decided.⁵¹

Toward a Fair Use Standard was in part influenced by Judge Leval’s opinion in *Salinger v. Random House, Inc.* and the judgment’s later reversal by the court of appeals.⁵² *Salinger* concerned the author J.D. Salinger and an unauthorized biography of his life written by Ian Hamilton.⁵³ Hamilton approached Salinger looking for information and seeking Salinger’s approval of the project but Salinger refused both.⁵⁴ Salinger had always been a private person, spending much of the previous thirty years outside the public eye, “avoiding all publicity.”⁵⁵ In spite of Salinger’s refusal, Hamilton proceeded with his research and writing, relying on letters either sent or received by Salinger which had subsequently been donated to library collections throughout the country.⁵⁶ Salinger received a copy of Hamilton’s work prior to its publication and promptly went about securing copyrights for each of his seventy-nine unpublished letters from which Hamilton had taken quotations.⁵⁷ Salinger de-

⁴⁹ *See id.* at 1106–07.

⁵⁰ Leval, *supra* note 7, at 1107.

⁵¹ *See id.* at 1111. Leval specifically points to analyzing the fair use defense not “simply to conclude whether or not justification exists,” but rather, “[t]he question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user’s justification against factors favoring the copyright owner.” *Id.* To this question Leval puts forth his own explanation, stating, “I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative.” *Id.*

⁵² *Id.* at 1105 (“The court of appeals’ disagreement with two of my decisions provoked some rethinking, which revealed that my own decisions had not adhered to a consistent theory, and, more importantly, that throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values.”).

⁵³ *Salinger v. Random House, Inc.*, 650 F. Supp 413, 416 (S.D.N.Y. 1986).

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *See id.* at 417.

manded that Hamilton remove all quotations lifted from the unpublished letters. Hamilton responded by revising the work, dramatically reducing the number of direct quotations and the number of words each quotation used.⁵⁸ After being provided with a revised copy of the book to review, Salinger brought suit against Hamilton and Random House, the publisher. Salinger claimed that Hamilton's work not only infringed on the copyright of Salinger's letters, but also that Salinger would also be irreparably harmed if the biography were published and distributed.⁵⁹ For those reasons, Judge Leval granted a temporary restraining order to allow for discovery and trial.⁶⁰

After arguments, Judge Leval denied the permanent injunction Salinger had requested, determining that Hamilton's use of the copyrighted materials in the biography was not an infringement and was protected as a fair use.⁶¹ Leval based the decision on his understanding of the fair use analysis—where the first factor and the transformation of the original work is paramount—and the protections he felt the doctrine afforded to Hamilton's work.⁶² Leval used careful consideration in examining each of the passages either directly quoted or paraphrased from Salinger's letters. Leval's understanding rested on the idea that "Salinger's letters are full of information about his life upon which the biographer has drawn."⁶³ Judge Leval determined that "virtually every passage taken by Hamilton from the [fifty-nine] letters consists primarily of a report of such historical fact which is not protected by copyright."⁶⁴

Leval's understanding and interpretation of the Supreme Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises* likely influenced his decision in *Salinger*. *Nation* stated that copyright protection for unpublished materials should outweigh any claim of fair use only under ordinary circumstances.⁶⁵ As Leval

⁵⁸ *Id.* at 417.

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *See id.* at 428.

⁶² *See id.* at 423.

⁶³ *Id.* at 418.

⁶⁴ *Id.*

⁶⁵ *See generally* *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) (concerning a copyright infringement claim brought against a magazine publisher

understood the holding in *Nation*, fair use could be determined with regard to unpublished works if the “secondary use is fair, giving due regard for the creator’s right to control the first publication”⁶⁶ and in such a situation, the use of unpublished material would “be permitted.”⁶⁷ Had Salinger’s letters never previously been exposed or accessible by the public, perhaps Leval would not have found Random House’s use as qualifying for a fair use defense. However, because the Salinger letters had been on display in museums and libraries, these items should not be afforded the same protection as was the unpublished quotations in *Nation*.⁶⁸ Accordingly, Judge Leval focused a portion of his fair use analysis on whether the use of quotations and paraphrasing from the unpublished letters for biographical purposes would decrease the commercial value of the letters if Salinger chose to publish them at a later time.⁶⁹ After reviewing each of the four fair use factors, Leval found no reason to grant the injunction against publication and distribution, concluding “the use of copyrighted matter in the present form of the book is so minimal and the case favoring a finding of fair use is so convincing that an injunction cannot be justified.”⁷⁰

Less than a year later, the Second Circuit reversed Leval’s decision on appeal.⁷¹ In an opinion by Judge Newman, the court took a different position than that advocated by Judge Leval.⁷² While the court of appeals agreed that guidance should come from the decision in *Nation*, it indicated that Leval might have misunderstood *Nation*’s ruling,⁷³ noting that “[p]ertinent to our case is the fact that the Court underscored the idea that unpublished letters normally enjoy insulation from fair use copying.”⁷⁴ In *Nation*, the Court gave “special weight to the fact that the copied work is unpublished when considering the second factor, the nature of the

for the use of unauthorized quotations and passages from President Ford’s upcoming memoir, which had yet to be published).

⁶⁶ *Salinger*, 650 F. Supp. at 422.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 423.

⁷⁰ *Id.* at 426.

⁷¹ *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987) [hereinafter *Salinger II*].

⁷² *See generally id.*

⁷³ *See id.* at 96.

⁷⁴ *Id.* at 95.

copyrighted work.”⁷⁵ In *Salinger II*, the Second Circuit found that the first fair use factor weighed in favor of Hamilton because the quotations and information “enriched” the scholarship behind his book.⁷⁶ However, the second factor, buoyed by the ruling in *Nation*, heavily favored Salinger, outweighing any potential fair use defense Hamilton may have gained from the first factor test.⁷⁷ That the letters were unpublished was a critical aspect of their nature. Though the Second Circuit agreed with Leval that the Supreme Court’s decisions regarding unpublished works left some ambiguity, the Court also recognized that “Judge Leval gave no explicit consideration to the second factor. Since the copyrighted letters were yet unpublished, the second factor was found to weigh more heavily in favor of Salinger.”⁷⁸

The court also disagreed with Leval’s understanding and conclusion regarding the third and fourth factors of the fair use analysis. With respect to the third factor—the amount and substantiality of the portion used—the court held that “[t]he taking is significant not only from a quantitative standpoint but from a qualitative standpoint as well. . . . To a large extent, they make the book worth reading.”⁷⁹ The court weighed the fourth factor—the effect on the market—slightly in Salinger’s favor, reasoning that Salinger could have earned in excess of \$500,000 from selling the right to publish his letters.⁸⁰ Whereas Judge Leval decided each of the four factors in the fair use analysis fell in favor of Hamilton and Random House, the Second Circuit found only the first factor to have worked in their favor, holding that this was not an extraordinary circumstance under *Nation* to allow the unpublished works to qualify for fair use protection.⁸¹

The second case which led Judge Leval to write *Toward a Fair Use Standard* dealt with another unauthorized biography, that of L. Ron Hubbard, founder of the Church of Scientology. Henry Holt & Co. (“Holt”) first published *Bare-Faced Messiah: The True Story of*

⁷⁵ See *id.* at 96.

⁷⁶ *Id.*

⁷⁷ *Id.* at 97.

⁷⁸ *Id.*

⁷⁹ *Id.* at 98–99.

⁸⁰ *Id.* at 99.

⁸¹ *Id.*

L. Ron Hubbard, a critical look at Hubbard's life and the development and growth of Scientology, in England in 1987.⁸² New Era Publications International ApS, ("New Era") a company established to "hold and exploit" the copyrights owned by Hubbard and the Church of Scientology, sought a preliminary injunction against the book in the English courts.⁸³ This request was denied.⁸⁴ British courts deemed that the injunction was requested with the intention of blocking criticism of the Church and its founder.⁸⁵ The following year the book was published in Australia and Canada—where New Era also unsuccessfully attempted to block its publication.⁸⁶

On May 5, 1988 New Era requested a temporary restraining order be issued against Holt to stop publication of *Bare-Faced Messiah* in the United States.⁸⁷ By that date, 12,000 copies had already been distributed in the United States and a second printing was scheduled for the following morning.⁸⁸ Judge Leval denied that first request. However, after New Era agreed to indemnify Holt in case of production losses, Leval granted a temporary restraining order.⁸⁹ The parties agreed to proceed directly to an expedited trial to determine whether a permanent injunction was warranted.⁹⁰

Just as in the Salinger cases, *New Era Publications International, ApS v. Henry Holt and Co., Inc.* hinged on a fair use analysis. In particular, the case depended on whether unpublished copyrighted materials used in an unauthorized biography should qualify for protection under the fair use defense, and whether a work using such potentially infringing material should be restrained from publication.⁹¹ Bound by precedent, Judge Leval examined each of the four factors of fair use analysis to settle the dispute. Leval began by assessing the second factor—the nature of the copyrighted work—

⁸² See *New Era Publ'ns Intern., ApS v. Henry Holt and Co., Inc.*, 695 F. Supp. 1493 (S.D.N.Y. 1988).

⁸³ *Id.* at 1498.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *Id.* at 1499.

because New Era had contended that the use of the unpublished materials was clear copyright infringement.⁹² Judge Leval again took the position that the fair use defense could be raised in relation to the use of material from unpublished works.⁹³ Leval even noted the issues that arose in the court's reversal of his decision in *Salinger II*.⁹⁴ Leval indicated that the *Salinger II* court was aware that the Supreme Court's decision in *Nation* was ambiguous regarding whether the fair use doctrine could be applied to the use of unpublished material.⁹⁵ Judge Leval determined that, in light of the ambiguity, it was reasonable to consider that using unpublished materials would diminish the likelihood of a finding of fair use, though in certain situations the use of those unpublished materials might be protected.⁹⁶

Leval examined the passages that quoted or paraphrased Hubbard's unpublished letters and accounts, eventually concluding that "[i]t does not follow that the critic may never take copyrighted expression from unpublished documents."⁹⁷ Leval contended that an author merely has to make a

compelling demonstration of justification . . . must show that her use of the protected expression is not done simply to enliven her text . . . must be reasonably necessary to the communication and demonstration of significant points being made about the subject and must have no significant adverse effect on the market for the copyrighted work.⁹⁸

Because Leval found that the use of the unpublished material could be acceptable under a fair use analysis on that basis, he proceeded to analyze the other factors to determine whether or not the work was an infringement.⁹⁹

⁹² See *id.* at 1500.

⁹³ See *id.*

⁹⁴ *Id.* at 1500.

⁹⁵ See *id.* at 1501.

⁹⁶ See *id.* at 1501-03.

⁹⁷ *Id.* at 1503.

⁹⁸ *Id.* at 1504.

⁹⁹ *Id.* at 1504 1523.

Leval's decision ultimately became a balancing test among the fair use factors. His conclusion was, in his own words, "complex."¹⁰⁰ With regard to the published materials, Judge Leval found them to be sufficiently covered by the fair use doctrine and used appropriately in Holt's publication.¹⁰¹ As to the unpublished materials, Leval determined that to conform to the narrowly focused decision in *Nation*, Holt was required to "establish a highly convincing case in favor of fair use."¹⁰² Fortunately for Holt, both the variety of passages submitted and the scope of the work appropriated in *Bare-Faced Messiah* persuaded Leval to recognize these takings as a violation of the fair use doctrine.¹⁰³ Leval agreed that the use of Hubbard's own words demonstrated personal qualities which were impossible to demonstrate through paraphrasing. The book's literary value seemingly rested on many of those specific quotations. Leval also determined that the market for the unpublished material would not be affected by the publication and distribution of Holt's work.¹⁰⁴ However, Leval did note that, unlike in *Salinger*, a number of the quotations were used for a purpose greater than merely "enlivening the text," the amount used were still held as infringements by the court of appeals.¹⁰⁵ Leval concluded that within the work there existed "a body of material of small, but more than negligible size, which, given the strong presumption against fair use of unpublished material, cannot be held to pass the fair use test."¹⁰⁶

However, Judge Leval's finding against fair use still did not meet the necessary threshold to enjoin the publication of the work.¹⁰⁷ The portions of the book Judge Leval found to be infringing were "insignificant."¹⁰⁸ The quotes used did not seem to reach the "heart" of the book as determined by *Nation*, nor did the use of these quotes warrant the award of a permanent injunction relating

¹⁰⁰ *Id.* at 1523.

¹⁰¹ *See id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See id.* at 1523.

¹⁰⁵ *Id.* at 1524.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* at 1528.

¹⁰⁸ *Id.* at 1525.

to the publication or distribution of the book.¹⁰⁹ Judge Leval additionally noted that the book had been widely published in England, Australia, and Canada, and copies had already been printed and sold within the United States, “the expense and waste involved in republishing after deleting infringing material would be prohibitive.”¹¹⁰ Leval offered the justification that an injunction would “diminish public knowledge” regarding a subject of public interest.¹¹¹ He added that a decision to enjoin the book’s publication would go against First Amendment reasoning, as “an injunction is not available to suppress defamatory speech.”¹¹² Thus, in the interest of balancing the fair use analysis and the potential free speech issue, Judge Leval denied a permanent injunction and allowed the book’s publication and distribution to resume.

On appeal, the Second Circuit upheld Judge Leval’s ruling, but for different reasons.¹¹³ In an opinion drafted by Judge Minor, the court agreed that the “permanent injunction should be denied, but for a reason wholly different from any of those set forth in the district court’s opinion.”¹¹⁴ The court continued, “[m]oreover, we disagree with a great deal of what is said in the opinion.”¹¹⁵ As in *Salinger II*, the court of appeals found that only the first factor favored the publisher who had used copyrighted material, while factors two, three, and four weighed in favor of the party requesting the injunction.¹¹⁶ The court of appeals further distinguished Judge Leval’s reasoning with regard to the second factor.¹¹⁷ In *Salinger II* the court had clearly noted that unpublished works “normally enjoy complete protection.”¹¹⁸ In *New Era*, Leval attempted to create

¹⁰⁹ *Id.*; see also *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 600 (1985). (determining the “heart” of the book settled on whether or not the information taken was pivotal to the book, and would affect the sale of the book and the profits resulting from those sales).

¹¹⁰ *Id.*

¹¹¹ *New Era*, 695 F. Supp. at 1525.

¹¹² *Id.* at 1525 (citing *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 557–60 (1976)).

¹¹³ *New Era Publ’ns Int’l, ApS v. Henry Holt and Co., Inc.*, 873 F.2d 576, 577 (2d Cir.1989) [hereinafter *New Era II*].

¹¹⁴ *Id.* at 583.

¹¹⁵ *Id.*

¹¹⁶ See *id.* at 581–83.

¹¹⁷ See *id.* at 583.

¹¹⁸ *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987).

a distinction between unpublished works used in order to “enliven” texts and those used to elucidate “significant points” about the topic, a distinction which the Court of Appeals did not believe was warranted in this instance.¹¹⁹

In *New Era II*, the court explained that even though Judge Leval had found each of the infringements to be relatively small in nature, collectively these small infringements created a larger work that could not pass a fair use analysis.¹²⁰ Perhaps, if each individual infringement found in *Bare-Faced Messiah* was the only infringement used in the work, and the infringements originally published, then the court might have held it to be a fair use of the material.¹²¹ However, in the case of *Bare-Faced Messiah* the individual infringements must have been seen as a larger infringing work. Nevertheless, the court of appeals was required to uphold the district court’s judgment under the theory of laches, citing *New Era*’s inexcusable delay in bringing the suit.¹²² The court further found that publication should not be enjoined because it was economically infeasible to reprint the book without the infringing material at the time of the suit.¹²³

Judge Oakes, concurring with the court of appeals’ judgment, wrote to explain that though he did not completely agree with Judge Leval’s fair use analysis, the court should not have “unnecessarily” gone out of its way to differentiate its opinion from Leval’s.¹²⁴ Regarding *Bare-Faced Messiah*, Judge Oakes agreed that the

¹¹⁹ *New Era II*, 873 F.2d at 583

¹²⁰ *See id.* at 584; *New Era*, 695 F. Supp. at 1523 (“I conclude that there is a body of material of small, but more than negligible size, which, given the strong presumption against fair use of unpublished material, cannot be held to pass the fair use test. I therefore find, under mandate of the *Salinger* opinion, that *Bare-Faced Messiah* to some degree infringes Hubbard’s copyrights in some of his previously unpublished works.”).

¹²¹ *See id.* at 583–84. (While the court does not state so explicitly, the opinion does note “Following an exhaustive analysis of the doctrine of fair use, the district court finds in any event that a small, but more than negligible, body of unpublished material cannot pass the fair use test, given the strong presumption against fair use of unpublished work. Although we would characterize the use here as more than “small,” it makes no difference insofar as entitlement to injunctive relief is concerned.”).

¹²² *Id.* at 577, 584–85 (citing *New Era Publ’ns Intern., ApS v. Henry Holt and Co., Inc.*, 695 F. Supp. 1493 (S.D.N.Y. 1988)).

¹²³ *See id.* at 584.

¹²⁴ *See id.* at 585 (Oakes, J. concurring).

district court made the correct assessment of the first factor and distinguished the case properly from *Salinger II*.¹²⁵ Here Judge Oakes specifically notes that while too much was taken by the author of *Bare-Faced Messiah*, his understanding was that not all takings from unpublished works should be considered a per se infringement.¹²⁶ Judge Oakes' interpretation of the second factor diverged from that of the other judges who decided the case. He noted that under *Nation*, the Supreme Court had merely narrowed the scope of protection when dealing with unpublished materials and had not cut off the possibility that fair use protections might apply to works created using unpublished content.¹²⁷ Oakes remarked that in *New Era* the second factor "help[ed] to define the burden that is placed on the defendant to justify its use of copyrighted material."¹²⁸ Judge Oakes' allegiances were split with the final two factors, as he approved of the court of appeals' conclusion with regard to the third factor, but then agreed with the distinction made in Judge Leval's assessment of the fourth factor.¹²⁹ Ultimately, Judge Oakes' fair use analysis falls between Judge Leval's and that raised by Judge Minor in the majority opinion.

In *New Era Publications International, ApS v. Henry Holt, Co.*, Holt petitioned for a rehearing en banc.¹³⁰ The court of appeals decided in a 7-5 decision to deny the request. However, in addition to the basic opinion stating that the rehearing was denied, four judges signed on to a separate concurring opinion to counter points made by the dissenting judges. The dissent, written by Judge Newman—who had also written the opinion reversing Leval's original *Salinger* decision—spoke of the court's need to clarify its stance on the fair use issue regarding unpublished copyrighted material and avoid any misunderstanding stemming from the Court's recent opposition to Judge Leval's position.¹³¹ The dissent also requested that the court of appeals both determine whether an injunction was an appropriate remedy for infringement, and also decide whether the

¹²⁵ *See id.* at 593.

¹²⁶ *Id.*

¹²⁷ *See id.* at 593.

¹²⁸ *Id.*

¹²⁹ *See id.* at 593-94.

¹³⁰ 884 F.2d 659 (2d Cir. 1989).

¹³¹ *See id.* at 662-63.

court should have granted injunctions in *Salinger*, or if equitable relief was a sufficient award.¹³²

In response, the opinion by Judge Minor concurring with the denial for the rehearing en banc noted three main points: (1) the opinion of the court had been consistent with settled law; (2) Judge Newman's dissent for the rehearing lacked the authority to dispel any of the misunderstandings which may have existed; and (3), Judge Newman's dissent did not speak for the full complement of appellate judges in stating that they were not committed to the language of the prior opinion.¹³³ While the appellate judges may have decided that clarifying these issues with an en banc decision was not necessary at that time, clearly, the varying opinions showed a lack of consensus among the judges. Perhaps, the judges were looking for a clarification that might prove helpful. In this regard it was Leval who attempted to provide that guidance in *Toward a Fair Use Standard*.

Clarifying the issues he saw with the court of appeals' opinions in *Salinger II* and *New Era II*, and attempting to settle his own issues with the fair use doctrine, Judge Leval wrote, "[t]he court of appeals' disagreement with two of my decisions provoked some rethinking, that throughout the development of the fair use doctrine, courts had failed to fashion a set of governing principles or values."¹³⁴ *Toward a Fair Use Standard* intertwines those overarching fair use analysis issues with questions he had faced in his challenged opinions regarding the use of unpublished copyrighted materials.¹³⁵ Judge Leval contends that by developing a deeper understanding of the four fair use factors judges can achieve a more consistent fair use analysis.

In Leval's view, "factor one is the soul of fair use."¹³⁶ In appraising the first factor he presents the idea of "transformative use" which later became critical in Justice Souter's opinion in *Campbell*.¹³⁷ Leval discusses that the purpose and character of the

¹³² See *id.* at 663.

¹³³ See *id.* at 660.

¹³⁴ Leval, *supra* note 7, at 1105.

¹³⁵ See generally *id.* at 1105–06.

¹³⁶ *Id.* at 1116.

¹³⁷ *Id.* at 1111; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

secondary use turns on the idea of whether that use is transformative, that it must be “productive and employ the quoted matter in a different manner or for a different purpose from the original.”¹³⁸

While Leval does not paint the idea of transformative as singularly focused, he specifically states “[t]ransformative uses may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it.”¹³⁹ It stands to reason that the reference to these “transformative” uses of information is intended to hearken back to his decisions in *Salinger* and *New Era*.

Noting that transformative changes can apply to parodies, symbolic transformations, and “innumerable other uses,” Judge Leval supports the idea that “the existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use.”¹⁴⁰ In his article, Leval identifies the issues the court of appeals found with his decisions in both *Salinger* and *New Era*, and accepts that his opinions may have been incorrect.¹⁴¹ At the same time, he focuses on the idea that quotations from unpublished copyrighted works are not necessarily outside the scope of the transformative concept he has espoused. In concluding his assessment of the first factor, Leval writes that “[the first factor] calls for a careful evaluation *whether the particular quotation* is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another’s creation.”¹⁴² The idea that Leval would contend that the quotation must be transformative resonates with the fact that the underlying purpose of writing *Toward a Fair Use Standard* may have been more directed at rebutting the decisions rendered by the court of appeals overturning Judge Leval’s opinions in *Salinger* and *New Era*, and rather than clarifying the fair use analysis as Judge Leval maintained. Here, Leval uses his own overturned case as part of the basis for the new reasoning of how *all* judges should identify and assign weight to the four factors of the fair use defense.

¹³⁸ Leval, *supra* note 7, at 1111.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See id.* at 1113–15.

¹⁴² *Id.* at 1116 (emphasis added).

In assessing the second factor, the nature of the copyrighted work, Leval explains that this factor originated from the idea of the “value of the materials used” as noted in *Folsom*.¹⁴³ Leval suggests that while important, “the second factor should not turn solely, nor even primarily” on the nature of the work as published or unpublished.¹⁴⁴ Again, as in his opinion in *New Era*, Leval justifies the position by noting that the Supreme Court did not exclude unpublished works from qualifying for fair use protections in *Nation*.¹⁴⁵ Leval focuses the discussion of the second fair use factor on both of his cases which the court of appeals had distinguished, in addition to asserting that a court has the ability to allow quotations from unpublished works.¹⁴⁶

Judge Leval’s article does not bring any significantly new perspective to the third or fourth fair use factors.¹⁴⁷ For the third factor, Leval notes that generally, the larger the amount taken, the less likely it is that the new work will qualify as a fair use. Again, to illustrate this point Leval cites the Supreme Court’s decision in *Nation*.¹⁴⁸ Judge Leval also states that courts must be fluid in their assessment of the third factor, and argues that to perform their duties historians and journalists must be allowed to quote and use certain historically accurate statements in secondary work.¹⁴⁹ The fact that the court is given the authority to determine whether material lifted is substantial or not must go hand in hand with the fourth factor, proving the real affect of the substantiality of the taking.¹⁵⁰ For the fourth factor, Judge Leval asserts that judges and courts should recognize that the release of a new product will always have some effect on the existing market.¹⁵¹ Leval cautions against the Supreme

¹⁴³ *Id.* at 1117 (citing *Folsom v. Marsh*, 6 Hunt Mer. Mag. 175 (Cir. Ct. D.Mass. 1841)).

¹⁴⁴ *See* Leval, *supra* note 7, at 1118.

¹⁴⁵ *See id.*

¹⁴⁶ *Id.* at 1117–21.

¹⁴⁷ *See id.* at 1122–25 (evaluating the third and fourth factors of the fair use analysis in light of the Copyright Act, the Supreme Court decision in *Nation*, and *Folsom v. Marsh* but bringing in no alternative scholarship rebutting the traditional view of these factors).

¹⁴⁸ *See id.* at 1123.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 1124.

¹⁵¹ *See id.* (“By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties. . . . It does not necessarily follow that the fair use doctrine diminishes the revenue of copyright holders. If a royalty obligation attached

Court's reasoning in *Nation*, which focused on the fourth factor being ultimately important in determining a fair use analysis.¹⁵² Whereas the Supreme Court was concerned with the marketability of President Ford's memoir, Leval maintains that "not every type of market impairment opposes fair use."¹⁵³ If Leval were to concede that the fourth factor was at times most important, it would limit his own thesis, holding the first factor and the transformative nature of copyrighted uses as most important.

In addition to Leval's assessment of the four factors enumerated in the Copyright Act, he also writes of the false fair-use factors and injunctions for infringing works. Leval explains that while the four factors are specifically enumerated in the Copyright Act, there may be other additional "false" factors a judge might consider to play a role in the application of a fair use defense, but which should not be allowed to impact a judgment: (1) good faith; (2) artistic integrity; and (3) privacy.¹⁵⁴ Judge Leval also writes of injunctions, and whether they are a proper remedy for a failed fair use defense.¹⁵⁵ Leval specifically noted that with the types of cases he spoke of in the article, those dealing with the use of unpublished material in a commercial publication, "the customary bias in favor of the injunctive remedy" should not apply.¹⁵⁶ Leval proposed that copyright law does not provide injunctive relief for a public figure to stop the publication of material which might reveal them to be "dishonest, cruel, or greedy," nor does it prevent the printing of information which a private individual might "prefer to keep secret."¹⁵⁷ Injunctions granted for copyright infringements should

to every secondary use, many would simply forgo use of the primary material in favor of free substitutes.")

¹⁵² *See id.*

¹⁵³ *Id.* at 1125.

¹⁵⁴ *See* Leval, *supra* note 7, at 1125-30. (noting that these false factors "may have bearing on the appropriate remedy, or on the availability of another cause of action to vindicate a wrong, but not on the fair use defense").

¹⁵⁵ *See id.* at 1130-1135 ("When a court rejects a fair use defense, it should deal with the issue of the appropriate remedy on its merits. The court should grant or deny the injunction for reasons, and not simply as a mechanical reflex to a finding of infringement. Plaintiffs should be required to demonstrate irreparable harm and inadequacy of compensation in damages.").

¹⁵⁶ *Id.* at 1133.

¹⁵⁷ *Id.* at 1134.

only be declared based on the merits of the copyright law issues.¹⁵⁸ Leval concludes the article by reinforcing the idea that there is no good bright-line standard for determining fair use.¹⁵⁹ However, through establishing a system of analysis which takes into account the factors as he sees them, there would be a chance for “greater consistency and predictability of court decisions by disciplined focus on the utilitarian, public enriching objectives of copyright—and by resisting the impulse to import extraneous policies.”¹⁶⁰

Both the reasoning behind Leval’s article and the motive for its writing have been criticized since its release. Published in same *Harvard Law Review* edition, Professor Lloyd Weinreb’s article *Fair’s Fair: A Comment on the Fair Use Doctrine* acts as a foil for the arguments raised in *Toward a Fair Use Standard*.¹⁶¹ Professor Weinreb similarly finds the courts and Congress have left a confusing set of decisions regarding fair use.¹⁶² However, Weinreb argues that many commentators, including Judge Leval, “considerably mistake what fair use is all about.”¹⁶³ Weinreb explains that Leval’s system which sets out to, in principle, delineate when a secondary use should be considered fair and when such a use would be an infringement, is not as reliable as a system developed out of judge-determined rulings.¹⁶⁴ Weinreb’s notion is that the judicial interpretations and determinations as to what is “fair,” are in actuality more beneficial in developing a clear fair use doctrine.¹⁶⁵ Weinreb recognized that copyright cases involving fair use had become confusing for judges, as evidenced by overturned decisions. Such decisions, like those presided over by Leval, had become common nature.¹⁶⁶ Perhaps ultimately, by amassing a larger volume of judicial precedent, Congress may be better able to supply the judiciary with clearer legislative guidelines, narrowing the leeway given to judges

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1135.

¹⁶⁰ *Id.*

¹⁶¹ Lloyd Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990).

¹⁶² *See id.*

¹⁶³ *Id.* at 1138.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 1137–38 (“Development of the doctrine of fair use out to proceed, therefore, not by deduction from principle but by induction from concrete cases.”).

in determining the applicability of a fair use defense. Weinreb's opinion differs from Judge Leval's presupposition that fair use should be decided strictly according to the "utilitarian premises of the copyright scheme as a whole, to the exclusion of every other consideration."¹⁶⁷ His focus revolves around the idea of "fairness" as opposed to the determination which Leval professes focuses primarily on the promotion of "production and dissemination of works of creative authorship."¹⁶⁸

Disagreeing with many of Leval's main points, Professor Weinreb works his way through each of Judge Leval's arguments, noting differences in their understanding of the four factors.¹⁶⁹ For the first factor, Weinreb recognizes the importance that Leval places on what is "transformative" and what is not.¹⁷⁰ However, Weinreb comments, "transformative use is at most a limiting test, apt for uses that demonstrably serve neither a public purpose nor a socially recognized private purpose."¹⁷¹ To give this higher standing than the other factors—as Judge Leval does—is to conceal the other factors behind a veil of unimportance, which was not Congress' intent in crafting the Copyright Act as a balancing test.¹⁷² Unlike Leval, Weinreb sees the second factor as more than just an argument for the ability to use unpublished works, but rather as a need to guard against public use of private works, protecting the interests of privacy as well as property.¹⁷³

While Weinreb concludes that Leval is correct in noting that a strict quantity test is not adequate and that the third factor must be viewed in concert with the first and fourth factors, he disagrees that a "transformative" use may be able to overcome the obstacle of using too liberal a quantity of copyrighted work.¹⁷⁴ With regard to the fourth factor, Weinreb accepts that Judge Leval's inclination is correct, and that there may always be an effect on the market

¹⁶⁷ *Id.* at 1140.

¹⁶⁸ *See id.* at 150.

¹⁶⁹ *See id.* at 1141–1148.

¹⁷⁰ *Id.* at 1142–43.

¹⁷¹ *Id.* at 1144.

¹⁷² *Id.*

¹⁷³ *See id.* at 1145–46.

¹⁷⁴ *See id.* at 1146.

from a fair use of a work.¹⁷⁵ Weinreb also seems to agree with Leval that the Supreme Court's analysis of the fourth factor as the most important should not be adhered to at the exclusion of the other factors.¹⁷⁶ However, Weinreb disagrees with Leval that the importance of the effect on the market should be disregarded in exchange for a highly transformative work, which may reject an owner's privacy or property claims.¹⁷⁷

While Judge Leval's article attempted to explain fair use in a way which might provide greater consistency to the doctrine and offer judges a more standardized path to follow when deciding cases, Weinreb maintained his belief that judges need not exclude other considerations, seemingly including the "false factors" noted by Leval, from the fair use analysis. Weinreb also asserted that the Copyright Act intended factors other than those mentioned in the Act to be taken into account.¹⁷⁸ "Fairness is a particularly open concept," wrote Weinreb, "on which almost any of the facts in a concrete situation may have a bearing."¹⁷⁹ Though even Weinreb admits that the concept of fairness is rather ambiguous, perhaps even a bit "too vague," he still contends that the even without the best possible legislative guidance, if the courts use use normative reasoning then perhaps they will still able to determine what is "fair."¹⁸⁰ Justice Souter's opinion in *Campbell* seemed to draw upon *Toward a Fair Use Standard*, in effect requiring judges to conform to Leval's methodology for dealing with fair use analyses.¹⁸¹

III. TOWARD A NEW FAIR USE STANDARD

Even though *Toward a Fair Use Standard* was mainly intended as a reactionary piece in part focused on the idea of applying the fair use doctrine to unpublished works, the article became a focal point for the development of transformative works protected under the fair use doctrine. Justice Souter's use of the article as a basis for

¹⁷⁵ *See id.*

¹⁷⁶ *See id.* at 1146–47.

¹⁷⁷ *See id.* at 1151.

¹⁷⁸ *See id.* at 1152.

¹⁷⁹ *Id.* at 1152.

¹⁸⁰ *See id.* at 1153.

¹⁸¹ *See generally* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

his opinion in *Campbell* set the tone for how transformative works would be viewed under fair use analyses in the future. In *Campbell*, the copyright owners of the song “Oh, Pretty Woman” by Roy Orbison sued the hip-hop group 2 Live Crew for copyright infringement, based on the group’s lewd rendition entitled “Pretty Woman.”¹⁸² The district court granted summary judgment for the defendants, but the court of appeals, reversed that decision, finding the rap group’s parody was not fair use of copyrighted song.¹⁸³ In an opinion by Justice Souter, the Supreme Court held that commercial character of song parody did not create presumption against fair use.¹⁸⁴ Although Justice Souter first notes Judge Leval’s article when discussing the history of “fair abridgments,”¹⁸⁵ the most important references are at the end of the opinion’s introduction. Judge Souter noted that each of the factors “are to be explored, and the results weighed together, in light of the purposes of copyright.”¹⁸⁶ By stating this and referring to Leval, Justice Souter seems to indicate that courts should adhere to the standard Leval set for weighing the fair use factors. The second major reference to Judge Leval’s article is found in Justice Souter’s explanation of the first factor of copyright. Justice Souter explains that a first factor test boils down to whether the potentially infringing work is transformative, and to what extent.¹⁸⁷ Here Justice Souter seems to accept the premise of Judge Leval’s article calling for the examination of fair use under the guise of creating a more utilitarian copyright scheme: “Although such transformative use is not absolutely necessary for a finding of fair use . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of trans-

¹⁸² *Id.* at 573. Orbison’s original song spoke of a “pretty woman, walkin’ down the street” and the ensuing attempt of a man to get her to notice him as she walks by him. Alternatively, the version created by 2 Live Crew was of a different ilk. The parody spoke of four different women, one pretty, one hairy, one bald, and yet another who was cheating on her boyfriend. In each of those verses the women are either objectified or derided. The two songs were about as different as possible while still employing the same basic underlying musical composition.

¹⁸³ *See id.*

¹⁸⁴ *See id.* at 584.

¹⁸⁵ *Id.* at 576.

¹⁸⁶ *Id.* at 578.

¹⁸⁷ *See id.* at 579.

formative works.”¹⁸⁸ Thus, Justice Souter refocused copyright and the application of the fair use doctrine into a concept based on the idea of transformative use. Although Justice Souter examined the other three fair use factors, it was the transformative nature of the song as a parody identified in the first factor that outweighed the other factors.¹⁸⁹ By utilizing Judge Leval’s article in the opinion, Justice Souter himself transformed into law an article that was seemingly written as a response to the court of appeals distinguishing two of Leval’s cases.

A month after the *Campbell* opinion was handed down, Judge Leval delivered an address at Cardozo Law School, which was transcribed and published in the *Cardozo Arts and Entertainment Law Journal*, titled *Campbell v. Acuff-Rose: Justice Souter’s Rescue of Fair Use*.¹⁹⁰ Amid the flowery language and the thanks Judge Leval extended to Justice Souter for having cited his article, Judge Leval explained that the opinion suggested copyright law was finally on the right track after having “been lost adrift for a turbulent decade.”¹⁹¹ Leval asserted that with the decision in *Sony Corporation of America v. Universal City Studios, Inc.* the Supreme Court had lost sight of the necessity of finding productivity as an essential requirement for a fair use.¹⁹² This, Judge Leval explained, was how fair use and copyright law had originally lost its way. Now, with Justice Souter’s holding in *Campbell*, Leval proclaimed that the Supreme Court had “fixed the rudder and restored the compass bearing” for copyright.¹⁹³

While he believed the ship had been righted, Leval acknowledged that Souter’s opinion would not satisfy the entire “copyright community.”¹⁹⁴ In spite of this, Leval felt the Supreme Court had

¹⁸⁸ *Id.*

¹⁸⁹ *See id.* at 585–95.

¹⁹⁰ Pierre Leval, *Campbell v. Acuff-Rose: Justice Souter’s Rescue of Fair Use*, 13 *CARDOZO ARTS & ENT. L.J.* 19 (1994).

¹⁹¹ *Id.* at 19.

¹⁹² *See id.* at 19–20 n.4. (“The Court in *Sony* held that private home videotaping of a copyrighted television program to be used solely to permit a one-time private non-commercial home viewing at a time more convenient than the hour of broadcast, would not infringe the copyright because it would constitute a fair use.”) (emphasis added).

¹⁹³ *Id.* at 22.

¹⁹⁴ *See id.* at 23.

set right the fair use analysis' focus, emphasizing that courts should view the factors in concert with one another, while placing an emphasis on the "productive" or "transformative use."¹⁹⁵ For Leval, *Campbell* was a vindication of his opinions in *Salinger* and *New Era*. His lecture was a victory lap, producing no new salient insights on copyright or fair use. Rather, it was "a toast to fair use . . . now refixed . . . on its goal," for which Leval felt he had been an inspiration.¹⁹⁶

Judge Leval again spoke about his article and the fair use doctrine at the annual Nimmer Lecture at UCLA in 1997. He concluded his speech with the following,

I return, in conclusion, to the great Mel Nimmer. He recognized that the inclusion of superfluous words in the [copyright] statute was likely to cause trouble. While the fair use statute was under consideration, he recommended that it be pared down to the bare bones: "fair use . . . is not an infringement." Had his wisdom been followed, many of these quixotic misadventures might have been avoided.¹⁹⁷

Yet this is perhaps the opposite of what Judge Leval advocated for in *Toward a Fair Use Standard*. *Toward a Fair Use Standard* can be seen as having a dual nature. The article asserts that Leval's opinions in *Salinger* and *New Era* were correct and that the court of appeals was misguided in reversing and challenging his judgments.¹⁹⁸ At the same time, however, it advocates for the utilitarian purpose of the copyright act as it applies to the fair use doctrine.¹⁹⁹ Both natures, are linked under the guise of discussing the issues, pitfalls, and solutions to dealing with fair use.²⁰⁰ Thereby, it is

¹⁹⁵ *Id.* (noting the most important footnote of *Campbell* was likely to be footnote 10, which directly referenced his article, commenting that injunctions are not always the most appropriate remedy in cases of borrowing).

¹⁹⁶ Leval, *supra* note 184, at 26.

¹⁹⁷ Pierre Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1466 (1997).

¹⁹⁸ *Id.* at 1461-62.

¹⁹⁹ See Leval, *supra* note 7, at 1135.

²⁰⁰ Mitch Tuchman, *Judge Leval's Transformation Standard: Can it Really Distinguish Foul from Fair?*, 51 J. COPYRIGHT SOC'Y U.S.A. 101, 106 (2003). Tuchman himself offers a critique of Leval that eventually reaches the conclusion that Leval's standard has been

possible that those who subscribe to Leval's view "might easily . . . fail to ponder whether transformative use is a diaphanous veil . . . behind which subscribing judges . . . continue in close cases to permit aesthetics to operate as an inarticulable test in copyright law."²⁰¹ Leval himself made no claim for the utility of this doctrine beyond its relation to "the second author" including historians, biographers, journalists, and critics.²⁰²

IV. TRANSFORMATIVE USE TODAY AND LEVAL'S LEGACY

In the twenty years since *Campbell* was decided, there has been an increase of cases in which courts find that transformative secondary use is fair use.²⁰³ There are two specific trends which must be noted when discussing the growth of transformative uses as an aspect of the fair use defense: that the transformative use test is applied by almost all courts when faced with a fair use defense; and that courts are placing much more apparent worth on the first factor and the transformative nature of the secondary use, almost to the exclusion of the other three factors.²⁰⁴ This trend is alarming as Judge Leval's article was not intended to make the first factor the only factor taken into consideration, but rather to prove that transformative uses should be weighed according to the utilitarian value of the product created by the secondary user in relation to the other factors.²⁰⁵ However, even though there may still be debate as to the

used by a variety of courts, but there has been little consistency or predictability with the outcome of such cases.

²⁰¹ *Id.* at 102.

²⁰² *See id.* at 118.

²⁰³ *See generally* Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009).

²⁰⁴ *See* Jennifer Pinto, *Has the Transformative Use Test Swung the Pendulum Too Far in Favor of Secondary Users?*, 56 *ADVOC. (Idaho)* 26, 28–29 (2013) (discussing collected empirical evidence to show the statistics for each of these contentions. Between 2001–2010 the Defendant won in 100% of cases when the court found the secondary use is transformative).

²⁰⁵ Leval, *supra* note 7, at 1110–11. ("Following Story's articulation, the statute lists four pertinent 'factors to be considered' 'in determining whether the use made of a work in any particular case is a fair use.' They are, in summary, the purpose and character of the use, the nature of the copyrighted work, the quantity and importance of the material used, and the effect of the use upon the potential market or value of the copyrighted work. Each factor directs attention to a different facet of the problem. The factors do not represent a

reasons for the creation of copyright law, whether for the utilitarian purpose Leval holds, or to “promote and foster creative growth in the sciences, arts and other creative endeavors,” the two are best balanced when a compromise can be struck between the rights of copyright holders and the legitimate need to protect the creative pursuits of secondary users.²⁰⁶

Leval’s *Toward a Fair Use Standard* spoke of the “writers, publishers and other would-be fair-users,” who “lack a reliable guide on how to govern their conduct.”²⁰⁷ That ever-expanding guide on conduct has been clearly advanced by three recent decisions: *Seltzer v. Green Day, Inc.*,²⁰⁸ *Cariou v. Prince*,²⁰⁹ and *Kienitz v. Sconnie Nation LLC*²¹⁰. The two former cases illustrate that the recent shift toward favoring the first fair use factor and the transformative use over the three other fair use factors has taken too large a foothold in the determinations of what can be held as a fair use, the latter that judges and circuits are still split as to how to proceed with a fair use analysis. Decided by the Second Circuit, *Cariou* dealt with the fair use appropriation of portraits and landscape photographs taken by Patrick Cariou, a professional photographer who collected images over a six-year period of living among the Rastafarians.²¹¹ Cariou compiled the portraits into a coffee-table book entitled *Yes Rasta*, which, prior to the suit, had sold 5,791 copies.²¹² Aside from those sales, which netted Cariou approximately \$8,000, Cariou never licensed or sold the photographs to any other individual.²¹³ Richard Prince, a well-known appropriations artist, came across *Yes Rasta* in a bookstore, and proceeded to create thirty pieces of art using images from Cariou’s work.²¹⁴ Some of the images were merely the

scorecard that promises victory to the winner of the majority. Rather, they direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.”).

²⁰⁶ See Pinto, *supra* note 204, at 30.

²⁰⁷ Leval, *supra* note 7, at 1135.

²⁰⁸ *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013).

²⁰⁹ *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013).

²¹⁰ *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014).

²¹¹ See *id.* at 699.

²¹² See *id.*

²¹³ See *id.*

²¹⁴ See *id.*

original *Yes Rasta* prints with altered color schemes and separate images photoshopped and layered on top of the print. Others were more overtly changed, with multiple layers of color and additional elements altering the perspective and theme.²¹⁵ Cariou found out about Prince's appropriation of his work and filed suit for copyright infringement.²¹⁶ Despite the district court's initial finding that all of Cariou's works were protected by fair use, the Second Circuit found that all but five of the thirty works created by Prince were protected as fair uses and the remaining five works would be decided by the district court on remand.²¹⁷ The opinion based its interpretation on the theory that Prince's secondary use was transformative, with support taken both from *Campbell* and from Leval's *Toward a Fair Use Standard* stating that the secondary use "must be productive and must employ the quoted matter in a different manner or for a different purpose from the original."²¹⁸ However, the works appropriated by Prince were, even by his own admission, not transformed to a great degree.²¹⁹

Though twenty-five of the images qualified for the fair use defense, the court took issue with five of Prince's altered images.²²⁰ It recognized that these works neither provided sufficient commentary on the originals, nor a distinct enough image or feeling from the original to be seen as transformative. When examining the fourth of the fair use factors, the court concluded that the five images the court took issue with did "not sufficiently differ from the photographs of Cariou's that they incorporate", and retained the "cumulative effect" presented in the originals.²²¹ Judge Wallace, concurring and dissenting with the opinion, remarked "I fail to see how the majority in its appellate role can 'confidently' draw a dis-

²¹⁵ See *id.* at 699–700.

²¹⁶ See *id.* at 704.

²¹⁷ *Cariou v. Prince*, 714 F.3d 694, 712 (2d Cir. 2013) (citing *Cariou v. Prince*, 784 F. Supp. 2d 337, 337 (S.D.N.Y. 2011)).

²¹⁸ Leval, *supra* note 6, at 1111.

²¹⁹ See *Cariou*, 714 F.3d at 707. (As a part of his deposition Prince noted that "do [es]n't really have a message," that he was not "trying to create anything with a new meaning or a new message," and that he "do[es]n't have any . . . interest in [Cariou's] original intent.").

²²⁰ *Id.* at 698–9.

²²¹ See *id.* at 710–11.

inction between the twenty-five works that do not readily lend themselves to a fair use determination.”²²² He continued:

Certainly we are not merely to use our personal art views to make the legal application to the facts of this case . . . I mean no disrespect to the majority, but I, for one, do not believe that I am in a position to make these fact and opinion intensive decisions on the twenty-five works that passed the majority’s judicial observation.²²³

The ruling in *Cariou* became the broadest application of what had been considered transformative.²²⁴ The problem presented was that, especially with appropriation art, judges are now called to question what is transformative in the first place. In addition, judges are seemingly required to make determinations about fair use according to their subjective opinions and not according to a principled set of guidelines as Leval hoped to formulate.²²⁵ Judge Leval’s proposed system may serve to further confuse what is a derivative work and what is a transformative work, requiring that decision to come from a judge’s subjective artistic impression. While this distinction poses a rather focused doctrinal issue, the necessity for a clear framework would be called into question, forcing artists to risk more by publicly presenting their work.²²⁶

The problem of applying the fair use doctrine with regard to transformative secondary uses is not, however, confined to the Second Circuit. The Ninth Circuit court of appeals recently built on the Second Circuit’s decision in *Cariou* and gave even greater deference to the transformation of copyrighted material in *Seltzer v. Green Day, Inc.* The case involved Green Day’s use of the image entitled *Scream Icon* created by artist and illustrator Derek Seltzer.²²⁷ The image appears as a woman’s face, mid scream with a

²²² *Id.* at 713.

²²³ *Id.* at 714.

²²⁴ See Harv. L. Rev. Ass’n, *Copyright Law – Fair Use – Second Circuit Holds That Appropriation Artwork Need Not Comment on the Original to be Transformative – Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), 127 HARV. L. REV. 1228, 1228 (2013).

²²⁵ See *id.* at 1234.

²²⁶ See *id.* at 1235.

²²⁷ *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1173–74 (9th Cir. 2013).

close perspective on the mouth, seemingly mid-scream. *Scream Icon* appeared in a video incorporated into the backdrop for the band's concerts between July and November 2009.²²⁸ The only visible changes made to the original image were a red cross placed over the middle of the face and black streaks added to the right side of the image.²²⁹ Just as the Second Circuit had done, the Ninth Circuit found that the appropriation of the image was a fair use, even though the work was not significantly altered, and in spite of the fact that Green Day's use still featured the image as "street art."²³⁰ Not only was the image appropriated by Green Day in the same "street art" setting as the artist originally intended it, but it was used by the band for a commercial purpose. Instead of finding in favor of Seltzer, the court held that the additional content incorporated to the original to slightly alter the image was enough to consider it transformative.²³¹

Under the court's analysis of the first factor, the transformative use in *Seltzer* does not necessarily conform to the standard set by Leval and utilized by *Campbell*. The court in *Seltzer* specifically cites, and implicitly accepts Leval's explanation of what is transformative.²³² "Green Day used the original as 'raw material' in the construction of the four-minute video backdrop. It is not simply a quotation or a republication, although *Scream Icon* is prominent, it remains only a component of what is essentially a street-art focused music video."²³³ Although, in his article, Judge Leval holds fast to the idea that "the existence of any identifiable transformative objective does not, however, guarantee success in claiming fair use."²³⁴

Leval persisted that the extent and use of the material must still be taken in concert with the other factors, each of which should be scrutinized to determine if the use of copyrighted material may still

²²⁸ See *id.* at 1174.

²²⁹ See *id.*

²³⁰ Kim J. Landsman, *Does Cariou v. Prince Represent the Apogee or Burn-out of Transformativeness in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 321, 366-67 (2014).

²³¹ See *id.* at 367.

²³² See *Seltzer*, 725 F.3d at 1176 (citing Leval, *supra* note 7, at 1111).

²³³ *Id.*

²³⁴ Leval, *supra* note 6, at 1111.

be considered a fair use.²³⁵ Following this procedure, the Ninth Circuit engaged in the necessary analysis of the other fair use factors. The second factor in the fair use test favored Seltzer. Though the image had been publicly displayed, it was still a “creative work, meriting strong protection under this factor.”²³⁶ The court held that the third factor, the extent of the work taken, “does not weigh against Green Day.”²³⁷ However, this assertion appears to be mistaken. Though the court noted that the image was “not meaningfully divisible,” even Leval recognized that the greater the percentage of a work taken the less likely a fair use could be found.²³⁸ In *Seltzer* the entire image was appropriated.²³⁹ Lastly, the Ninth Circuit found that the fourth factor weighed in favor of Green Day as Seltzer accepted that the value of his work had not decreased.²⁴⁰

It seems that, perhaps as trends indicate, the court was swayed more by the idea that the use of the image was transformative, and therefore a fair use, then it was by whether Green Day’s appropriation of the work met the utilitarian aspect of copyright as suggested by Leval. This forces one to reflect on an excerpt from the conclusion of Leval’s article. “The stimulation of creative thought and authorship for the benefit of society depends assuredly on the protection of the author’s monopoly. But it depends equally on the recognition that the monopoly must have limits.”²⁴¹ What value then, according to Leval’s reasoning, does the use of a copyrighted image have in the background of a Green Day concert? It is unlikely that the band’s use would have met the threshold of which Judge Leval spoke in *Toward a Fair Use Standard*. Leval had been swayed by the fact that he believed the appropriation of unpublished letters added value to the biographies referenced in *Salinger* and *New Era*.²⁴² There is the likelihood that even Leval may not have view *Seltzer* through the same lens of transformativeness.

²³⁵ See *id.* at 1122–23.

²³⁶ *Seltzer*, 725 F.3d at 1178.

²³⁷ *Id.* at 1179.

²³⁸ See *Seltzer*, 725 F.3d at 1179; Leval, *supra* note 6, at 1122.

²³⁹ See *Seltzer*, 725 F.3d at 1178–79.

²⁴⁰ See *id.*

²⁴¹ Leval, *supra* note 6, at 1136.

²⁴² See *id.* at 1114.

Although *Cariou* had been criticized by both law review articles and amicus curie, until the decision in *Kienitz v. Sconnie Nation LLC*, no circuit court decision had ever disagreed with the transformative ideas behind the Second Circuit's decision. Much like with *Cariou* and *Seltzer*, *Sconnie* pertained to the unauthorized use of a copyrighted photograph, out of which a new "work" was created. *Sconnie Nation LLC*, an apparel company dedicated to creating clothes for University of Wisconsin students and fans, created a shirt design for the school's 2012 Mifflin Street Block Party.²⁴³ The shirt featured an image of Paul Soglin, Mayor of Madison, Wisconsin. The image had been copied, tinted a green color, and the words "Sorry for Partying" were written next to his face.²⁴⁴ The photographer of the original image, Michael Kienitz, became aware that his image was being used for this purpose, copyrighted the work, and initiated the lawsuit for copyright infringement against *Sconnie Nation LLC*.²⁴⁵ Though the circuit court upheld the district court's decision that the use of the copyrighted image was protected by the fair use defense, Judge Easterbrook's opinion questioned whether the "transformative use" argument is appropriate in making such determinations.²⁴⁶ Judge Easterbrook specifically targets the idea of transformative as decided in *Cariou* noting:

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. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do no explain how every "transformative use" can be "fair use" without extinguishing the author's rights under § 106(2).²⁴⁷

²⁴³ See *Sconnie*, 766 F.3d at 757.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 758.

²⁴⁷ *Id.*

Judge Easterbrook settles his assessment of the fair use argument by looking at the statutory list as noted in 17 U.S.C. § 107, focusing on the fourth factor.²⁴⁸

In focusing on the fourth factor, the circuit court's assessment of the fair use defense fell mostly on the understanding that although Scennie Nation LLC could have used any image of the Mayor, there was, in effect, no market for the copyrighted image.²⁴⁹ Kienitz had licensed the image to the Mayor's office for no royalty.²⁵⁰ The image was available for all to download and view at no cost.²⁵¹ There was also no real secondary market for the image, nor did Kienitz have any plans to distribute the image as a part of any apparel.²⁵² While the use of the image may have injured the future opportunities Kienitz was offered due to negative publicity, that was not the argument he presented in the suit.²⁵³

Judge Leval's *Toward a Fair Use Standard*, which was in effect canonized by Justice Souter's opinion in *Campbell*, and later referenced in *Cariou* and *Seltzer* as a foundation for the broad scope of transformativeness, seemingly removes a portion of what had once been considered "fair" about the fair use doctrine. Professor Weinreb criticized this very issue. Weinreb delved into the idea that the transformative approach espoused by Judge Leval is not necessarily as fair as he had contended.²⁵⁴ By equating the first factor of the fair use defense to the "soul of fair use," the concept of a work being transformative is no longer merely part of one of the four factors that must all be given equal weight. Leval's doctrine holds transformativeness paramount in achieving the utilitarian purpose of the Copyright Act. But what exactly is transformative? As is evidenced by his decision in *American Geophysical Union v. Texaco, Inc.*, even Judge Leval did not find all secondary uses of co-

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 758–59.

²⁵⁰ *Id.* at 759.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See Weinreb, *supra* note 161, at 1138–40.

pyrighted material transformative.²⁵⁵ In many ways, Leval's article has helped to usher in a period when a "transformative" or "productive" use is simply creating a new work or product with enough differences from the original to be considered something new.²⁵⁶ Allowing judges to determine what is productive or transformative may fall outside of the scope of what is in actuality "fair" for the creators of original works.²⁵⁷

Judge Leval's conclusion in *Toward a Fair Use Standard* attempted to bring his discussion of the fair use factors full circle. He reminded readers of the trouble Justice Story experienced with *Folsom* when determining whether an appropriation of copyrighted material was acceptable. "It is not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases."²⁵⁸ To that end, Judge Leval wrote his article to propose a better test, a "bright-line standard" which could be used to give fair use "greater consistency and predictability" in court decisions.²⁵⁹ As fate would have it, the fair use mantle was passed from Story to Leval through Justice Souter and the Supreme Court, who made it law in *Campbell*. Today, fair use remains problematic. Decisions such as *Cariou* and *Seltzer*, which extend the reach of the transformative use as a fair use defense, seem to push Leval's rather focused article further and further away from its original purpose. Others, such as *Sconnie*, show a disagreement between the circuit courts and judges as to the application of Leval's principles, reminding readers that transformativeness is "not one of the statu-

²⁵⁵ 802 F. Supp. 1, 13 (S.D.N.Y. 1992) (not requiring that a transformative use test be taken to judge the question of fair use despite engaging in a transformative analysis), *aff'd*, 60 F.3d 913 (2d Cir. 1994).

²⁵⁶ See Tuchman, *supra* note 200, at 125.

²⁵⁷ See *id.* ("In truth, the facts in *Texaco* do not require transformation to adjudicate the question of fair use. Scientists at the defendant oil company admitted routinely photocopying articles in academic journals in order to keep bound copies circulating efficiently among their colleagues, in order to amass personal libraries at their fingertips, in order to have disposable copies available for use in their laboratories. Whether or not xerography is transformational seems irrelevant to the fair use question—*Sony* should have provided that answer—but Leval imposed his test, preceding his conclusions with a curious retelling of the history of fair use.").

²⁵⁸ *Folsom v. Marsh*, 6 Hunt Mer. Mag. 175, 344 (Cir. Ct. D.Mass. 1841).

²⁵⁹ Leval, *supra* note 7, at 1135.

tory factors, though the Supreme Court mentioned it in *Campbell v. Acuff-Rose*.”²⁶⁰

Toward a *Fair Use Standard*, initially a reaction to overturned and distinguished rulings, may have led a once “fair” public policy into rather “foul” territory.

CONCLUSION

Toward a Fair Use Standard has grown from humble beginnings as a law review article, perhaps written as a reaction to the displeasure Judge Leval felt at having two of his decisions overturned, into a pillar on which current copyright law is shakily based. While it is unlikely that such a statement will ever fully be substantiated, the growth and change of transformativeness in regard to fair use defenses is clear. Perhaps, due to recent circuit disagreements, in the years to come, legislative changes will be made to the Copyright Act. Hopefully such changes will eliminate some of the ambiguity in the fair use analysis, taking the decisions out of the hands of judges and placing it into a clearly defined doctrine. For now though, Leval, his judgments, and the impact of his work are clearly recognized.

²⁶⁰ *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758. Judge Easterbrook also critiques the Second Circuit’s suggestion “that ‘transformative use’ is enough to bring a modified copy within the scope of § 107.” *Id.*