Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 30 *XXX*
Number 3

Article 5

2020

Anything You Can Use, I Can Use Better: Examining the Contours of Fair Use as an Affirmative Defense for Theatre Artists, Creators, and Producers

Benjamin Reiser
Fordham University School of Law, breiser1@law.fordham.edu

Anything You Can Use, I Can Use Better: Examining the Contours of Fair Use as an Affirmative Defense for Theatre Artists, Creators, and Producers

Cover Page Footnote

Online Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXX; J.D. Candidate, Fordham University School of Law, 2020; B.A., Government and American Studies, Georgetown University, 2017. Thank you to Jason Baruch, Marc Hershberg, Susan Mindell, and Seth Stuhl for being sources of inspiration and kindness, Professor Olivier Sylvain for his encouragement and valuable recommendations, and all members of the Journal for their assistance, and in particular, Senior Writing & Research Editor Elliot Fink for his thoughtful feedback. I am especially grateful to my family—my parents, Andrea and David, my brothers, Jacob, Zachary, and Matthew, and our sweet pups, Phoebe and Maisie—for unceasing love, support, and guidance.

Anything You Can Use, I Can Use Better: Examining the Contours of Fair Use as an Affirmative Defense for Theatre Artists, Creators, and Producers

Benjamin Reiser*

*Broadway is booming. In a post-*Hamilton *world, ticket sales and attendance records for the commercial theatre industry continue to break season after season. At the same time (and perhaps not so coincidentally), litigation against theatre artists, creators, and producers has surged, especially in the realm of copyright infringement. Many theatre professionals accused of infringement in recent years have employed the doctrine of fair use—codified at 17 U.S.C. § 107—as an affirmative defense against such claims. This Note explores cases involving theatre professionals in which fair use was examined and contends that they collectively reflect broader historical trends in fair use jurisprudence. In particular, this Note argues that the fair use doctrine remains analytically unclear and difficult to follow and proposes that the transformative use inquiry—which was articulated in 1994 by the Supreme Court in* Campbell v. Acuff-Rose Music, Inc.*—be abandoned in future fair use analyses in favor of expressly following the four statutory factors enumerated in 17*

* Online Editor, *Fordham Intellectual Property, Media & Entertainment Law Journal*, Volume XXX; J.D. Candidate, Fordham University School of Law, 2020; B.A., Government and American Studies, Georgetown University, 2017. Thank you to Jason Baruch, Marc Hershberg, Susan Mindell, and Seth Stuhl for being sources of inspiration and kindness, Professor Olivier Sylvain for his encouragement and valuable recommendations, and all members of the Journal for their assistance, and in particular, Senior Writing & Research Editor Elliot Fink for his thoughtful feedback. I am especially grateful to my family—my parents, Andrea and David, my brothers, Jacob, Zachary, and Matthew, and our sweet pups, Phoebe and Maisie—for unceasing love, support, and guidance.

U.S.C. § 107. Lastly, this Note directly addresses theatre artists, creators, and producers, and advises them that when writing, developing, or mounting a new theatrical production, any reliance on the fair use doctrine ought to be avoided. Instead, alternative avenues should be explored in order to circumvent copyright ownership challenges.

INTRODUCTION

When Lin-Manuel Miranda's musical *Hamilton* opened at the Richard Rodgers Theatre on Broadway in 2015, theatre critics across the nation deemed the show a "game changer" in the history and landscape of American musical theatre.[1] Peter Marks of *The Washington Post* called it "blazingly original, restlessly innovative."[2] Ben Brantley, the co-chief theater critic of *The New York Times*, not only humorously recommended that people "mortgage their houses and lease their children" to acquire *Hamilton* tickets, he wrote also that the show is "proof that the American musical is . . . evolving in ways that should allow it to thrive and transmogrify in years to come."[3]

It is noteworthy that a show so universally considered to be "fresh"[4] and "groundbreaking"[5] is also one that substantially—and often unabashedly—uses and borrows from artistic works from the past. Indeed, in just about every one of *Hamilton*'s songs,[6] some reference can be identified, either obviously or covertly, from the worlds of musical theatre, pop, R&B, hip-hop, or rap.[7] For example,

---

1 David Rooney, *Critic's Notebook: Why 'Hamilton' Counts as a Legitimate Game-Changer*, HOLLYWOOD REP. (Aug. 31, 2015), https://www.hollywoodreporter.com/news/critics-notebook-why-hamilton-counts-818677 [https://perma.cc/QE42-DY7F].

2 Peter Marks, *'Hamilton': Making Ecstatic History*, WASH. POST (Aug. 6, 2015), https://www.washingtonpost.com/entertainment/theater_dance/hamilton-making-ecstatic-history/2015/08/06/6bc85fb4-3b72-11e5-8e98-115a3cf7d7ae_story.html?utm_term=.d4815717bc83 [https://perma.cc/P3VG-66KF].

3 Ben Brantley, *Review: 'Hamilton,' Young Rebels Changing History and Theater*, N.Y. TIMES (Aug. 6, 2015), https://www.nytimes.com/2015/08/07/theater/review-hamilton-young-rebels-changing-history-and-theater.html [https://perma.cc/LX9U-E6E9].

4 Alisa Solomon, *How 'Hamilton' Is Revolutionizing the Broadway Musical*, NATION (Aug. 27, 2015), https://www.thenation.com/article/how-hamilton-is-revolutionizing-the-broadway-musical/ [https://perma.cc/CWH2-PX48].

5 Marilyn Stasio, *Broadway Review: 'Hamilton,'* VARIETY (Aug. 6, 2015), https://variety.com/2015/legit/reviews/hamilton-review-broadway-1201557679/ [https://perma.cc/ZMW8-XZ2Q].

6 *Hamilton* is noteworthy for being a sung-through musical, meaning the full production is entirely sung or rapped through, with an occasional spoken line or two. The 2015 cast album for *Hamilton* contains forty-six tracks.

7 *See generally Here Are All the Classical Music References in Hamilton*, CLASSIC FM (Dec. 6, 2017), https://www.classicfm.com/discover-music/classical-music-hamilton-lin-manuel-miranda/ [https://perma.cc/X2JS-FUJK]; *see also* Howard Ho, *All the Theatre References in Hamilton*, YOUTUBE (Mar. 23, 2018), https://www.youtube.com/watch?v=rANf1uuiTKE [https://perma.cc/35YA-JBXE]; Forrest Wickman, *All the Hip-*

the song "Ten Duel Commandments" in Act I of *Hamilton* borrows both its title and rhythmic structure from The Notorious B.I.G.'s 1997 song "Ten Crack Commandments."[8] During George Washington's introductory song, "Right Hand Man," he calls himself "[T]he model of a modern major general / The venerated Virginian veteran whose men are all / Lining up, to put me up on a pedestal."[9] Lyrically, Washington's lines nearly exactly replicate a section from the "Modern Major-General's Song" from W.S. Gilbert and Arthur Sullivan's 1879 operetta, *The Pirates of Penzance.*[10] At the end of "Say No to This," during which Alexander Hamilton begins an extramarital affair, Hamilton sings the line, "Nobody needs to know"—the exact title of a song sung by lead character Jamie in Jason Robert Brown's 2001 musical *The Last Five Years*, as Jamie begins an extramarital affair.[11] And this is just to name a few.[12]

For readers of this Note who may be imagining the phrase "copyright infringement"[13] surrounded by flashing red lights while reading these references, there is no need for alarm. Much of Miranda's work in *Hamilton*, if challenged in court by prior copyright holders, could ostensibly be protected by the principle of fair use.[14]

Hop References in Hamilton: A Track-by-Track Guide, SLATE (Sept. 24, 2015), http://www.slate.com/blogs/browbeat/2015/09/24/hamilton_s_hip_hop_references_all_the_rap_and_r_b_allusions_in_lin_manuel.html [https://perma.cc/3PMA-REUV]; Robert Viagas & Adam Hetrick, *From Last Five Years to the Notorious B.I.G.—Hamilton Shout-Outs and References You Need to Know*, PLAYBILL (July 29, 2015), http://www.playbill.com/article/from-last-five-years-to-the-notorious-big-hamilton-shout-outs-and-references-you-need-to-know-com-355053 [https://perma.cc/VB34-CC43].

8 Lin-Manuel Miranda, *"Ten Duel Commandments" Lyrics*, https://genius.com/7860689 [https://perma.cc/9WZB-MC36].

9 Lin-Manuel Miranda, *"Right Hand Man" Lyrics*, https://genius.com/7860938 [https://perma.cc/FX9E-w85H].

10 *Id.*

11 Lin-Manuel Miranda, *"Say No to This" Lyrics*, https://genius.com/7860613 [https://perma.cc/D9H4-DF4S].

12 *See* sources cited *supra* note 7.

13 *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (in which the Supreme Court succinctly articulates the two elements that a plaintiff must prove to establish a *prima facie* case of copyright infringement: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original").

14 *See generally* Deidre Davis, *Living to See His Glory Days: Why Hamilton's Lin Manuel Miranda Is Not Liable for Copyright Infringement, But Other Writers and*

Fair use is a legal doctrine which permits the use of copyrighted material for specific purposes such as commentary, criticism, parody, research, teaching, or scholarship.[15] Furthermore, the Supreme Court has decided that the transformative nature of a work may operate as a key factor in fair use analysis, and in fact, legal scholars have noted that the transformative use inquiry "has come overwhelmingly to dominate the fair use doctrine."[16] If a party uses copyrighted material in a way that qualifies as fair use, the use would not be considered copyright infringement.[17] However, as this Note later explores, the fair use inquiry is inherently fact-specific, and the lack of a bright line for the doctrine has caused much analytical ambiguity.

Nonetheless, in recent years, litigation has increased by underlying rights owners asserting copyright infringement claims against professionals in the theatre industry.[18] These defendants have frequently employed the fair use defense against these claims, and, more often than not, have done so successfully.[19] These cases effectively demonstrate a growing "power" of the fair use defense.[20] Further, these cases collectively act as a microcosm to illustrate three contemporary trends in regard to fair use: (1) fair use has very little analytical consistency, and is, in fact, rather a mishmash of analysis; (2) the determination of a parody as a fair use is less than clear; and (3) the transformative use inquiry is both very popular and

---

Composers Are, 17 J. MARSHALL REV. INTELL. PROP. L. 92 (2017); *see also* Larry Iser, *'Hamilton' Part II—Why Lin-Manuel Miranda Didn't Really Need to Clear the Music*, FORBES (June 27, 2016), https://www.forbes.com/sites/legalentertainment/2016/06/27/hamilton-part-ii-why-lin-manuel-miranda-didnt-really-need-to-clear-the-music/#9833e9645d51 [https://perma.cc/3648-58M6].

15 *See* 17 U.S.C. § 107 (2018); *see also* Rich Stim, *What Is Fair Use?*, STAN. U. LIBR. COPYRIGHT & FAIR USE OVERVIEW, https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/ [https://perma.cc/89P2-FPWZ].

16 Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (stating that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works").

17 *See* Stim, *supra* note 15.

18 Jason Aylesworth, *The Evolution of Fair Use*, 29 N.Y. ST. BAR ASS'N ENT. ARTS & SPORTS L.J. 88 (Fall/Winter 2018), https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=87631 [https://perma.cc/3FQ8-D5EZ].

19 *Id.*

20 *Id.*

deeply problematic. Altogether, this Note examines fair use in litigation against artists, creators, and producers in the theatre industry by underlying rights owners asserting a claim of copyright infringement. In the end, this Note concludes that while fair use has become an increasingly strong defense for such defendants, it nevertheless remains particularly imprecise and unpredictable in its analysis. In particular, this Note pushes back against the swelling popularity of the transformative use inquiry.

This Note proceeds in three parts. Part I details what fair use is and briefly explores the evolution of the doctrine within the broader history of American copyright law. It then examines various cases, notable and recent, in industries outside of commercial theatre in order to observe broader trends in fair use jurisprudence. The first section of Part II surveys cases against theatre professionals in which fair use was asserted. The second section of Part II contends that the theatre cases collectively reflect broader historical trends in fair use jurisprudence, and ultimately challenges the transformative use inquiry and its prevalence in contemporary fair use analysis. Finally, Part III shifts toward an intended reading audience of theatre artists, creators, and producers—rather than an audience of lawyers and legal scholars. Part III asserts that when writing, developing, or mounting a new theatrical production, theatre artists, creators, and producers should ultimately avoid any sort of reliance on the fair use doctrine. It then concludes by offering three best practices by which theatre professionals may attempt to circumvent copyright litigation altogether: (1) creating wholly original work or borrowing from the public domain; (2) obtaining all potentially relevant licenses, clearances, and/or permissions; and (3) if ultimately necessary, preparing a remarkably sturdy defense for potential fair use analysis in court.

I. "WHAT'S THE STATE OF OUR NATION?"[21]: THE EVOLUTION OF FAIR USE IN AMERICAN COPYRIGHT LAW

A. The History of the Doctrine

To engage in a holistic analysis of fair use in contemporary cases, it is important to understand how the doctrine came to exist within the greater context of American copyright law. The history of this body of law dates as far back as 1710, when the Parliament of Great Britain enacted the Statute of Anne, widely considered to be the world's first codified copyright statute.[22] The law worked, in essence, to prevent entire appropriation by prohibiting exact reprintings of covered works.[23] However, the Statute of Anne did not address "fractional copying," which, in turn, created issues for English authors and publishers who found the statute operating adversely to their interests.[24] Eventually, English courts tested the scope of copyright under the Statute of Anne.[25] Ultimately, American colonists saw conceptions of a copyright regime in England prior to the founding of the new nation.

The United States Constitution came into force in 1789. Article I, section 8, clause 8—now commonly called the "Intellectual Property Clause"—gave Congress its power to "promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[26] The following year, the country passed its first articulation of federal copyright law: the Copyright Act of 1790.[27] Much of the 1790 Act borrowed directly from England's

---

21 A lyric from the song "My Shot" from the 2015 musical *Hamilton*.

22 Act for the Encouragement of Learning (Statute of Anne), 8 Ann., c. 19 § 1 (1710) (Eng.).

23 Matthew Sag, *The Pre-History of Fair Use*, 76 BROOK. L. REV. 1371, 1381 (2011).

24 *Id.*

25 *See, e.g.*, Gyles v. Wilcox, 26 Eng. Rep. 489, 2 Atk. 141 (1741) (No. 130). For details, the original transcripts of this document are located at The National Archives at Kew, London (TNA), C33/375/274 and C11/1828/27, m.1–4. For a commentary on the case, see Ronan Deazley, *Commentary on* Gyles v. Wilcox *(Atkyn's Reports) (1741)*, PRIMARY SOURCES ON COPYRIGHT (1450–1900), http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1741 [https://perma.cc/4L9-6RGN].

26 U.S. CONST. art. 1, § 8, cl. 8.

27 Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831).

Statute of Anne, as both statutes granted the rights to print, reprint, publish, and vend the copyrighted work.[28] However, the 1790 Act only offered fourteen-year-long copyright terms, and was limited to protecting specific works such as "maps, Charts, And books."[29] In an update forty-one years later, the Copyright Act of 1831 revised many of these terms, extending the first term of protection to twenty-eight years and expanding the subject matter of copyright to include musical compositions.[30]

A decade after the passage of the 1831 Act, the fair use doctrine was born.[31] Justice Joseph Story, then sitting as a circuit judge in Massachusetts, authored the opinion in *Folsom v. Marsh*.[32] In *Folsom*, the plaintiff, who had authored an 866-page biography of George Washington, sued the defendant for copying 353 pages verbatim to publish a work of his own.[33] Prior to Justice Story's decision, courts—operating then under the force of the Copyright Act of 1831—had held that such an abridgment did not infringe the copyright of another author, "because in doing so the second author produced a new book."[34] Following this logic, the defendant relied heavily on the "abridgment doctrine"[35] by arguing that an author "has a right to quote, select, extract or abridge from another, in the composition of a work essentially new."[36]

To the contrary, deeming their work an infringement indicative of no more than "the facile use of . . . scissors," Justice Story found the defendants guilty of infringement.[37] Justice Story rejected the abridgment doctrine and held that because the author owned the

---

28 L. Ray Patterson, *Understanding Fair Use*, 55 L. & CONTEMP. PROBS. 249, 250 (1992).

29 *See* Copyright Act of 1790, art. 1.

30 *See* Act to Amend the Several Acts Respecting Copy Rights, 4 Stat. 436 (1831); *see also* Benjamin W. Rudd, *Notable Dates in American Copyright, 1783–1969*, Q.J. LIBR. CONGRESS (Apr. 1971), https://copyright.gov/history/dates.pdf [https://perma.cc/Z7FR-KVZY].

31 *See* Patterson, *supra* note 28, at 255.

32 *See generally* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).

33 *Id.* at 345.

34 *See* Patterson, *supra* note 28, at 255.

35 *Id.*

36 *See Folsom*, 9 F. Cas. at 344.

37 *See id.* at 345.

entire copyright, it was not a defense to appropriate part, but not the whole, of the work.[38] In *Folsom*, Justice Story penned the first articulation of the factors that courts still use today in fair use analysis:

> In short, we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions.[39]

By Justice Story's logic, then, when a judge combines these "mixed ingredients" and finds the use of a copyrighted material to be fair on balance, the use would not constitute copyright infringement.[40] It is evident, then, that from the introduction of fair use analysis in the United States, judges intended for it to involve a holistic and varied approach rather than a bright-line standard.[41]

Following *Folsom* in 1841, fair use developed as a common law doctrine in American courts for nearly a century and a half.[42] Fair use was ultimately codified when President Gerald Ford signed into law the Copyright Act of 1976.[43] Among its many significant changes, the 1976 Act—which remains the central basis for copyright law in the United States today—broadened copyright to include the rights to reproduce, adapt, publicly distribute, publicly perform, and publicly display the copyrighted work.[44] Section 107 of the Act specifically set forth the four factors to be considered when determining whether a particular use of a copyrighted work is a fair use:

---

38 *See id.* at 348.

39 *Id.*

40 This is the opposite of the holding in *Folsom*, in which Justice Story did *not* find the "mixed ingredients" of the defendants' argument to sufficiently lead to a finding of fair use. *Id.* at 349.

41 *See generally Folsom*, 9 F. Cas. 342.

42 Jay Dratler Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 235 (1988).

43 *See* 17 U.S.C. § 107 (2018).

44 *See id.* § 106.

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[45]

The statute, however, did not establish any additional guidelines or strategies for analyzing the four articulated factors, nor did it prioritize any one as more important than another. As a result, since the codification of fair use in 17 U.S.C. § 107, courts have grappled—rather messily—with how to consistently apply the doctrine. To be sure, Congress expressly intended for courts to "be free to adapt the doctrine to particular situations on a case-by-case basis."[46] But for some judges, this has proven tricky: some consider fair use to be "so flexible as to virtually defy definition."[47] In fact, in a pivotal 1990 article titled *Toward a Fair Use Standard*, Judge Pierre N. Leval wrote that the fair use statute both "leav[es] open the possibility that other factors may bear on the question" but "identifies none."[48] Questions as to the appropriate balancing of the four factors have persisted in judicial scholarship since 1976.[49]

In 1994, the Supreme Court offered a major answer to questions surrounding fair use when it emphasized the particular importance of the first factor: the "purpose and character" of the use.[50] In *Campbell v. Acuff-Rose Music, Inc.*, the Court determined that the more that a new work is found to be "transformative," the less significant the other three factors should weigh on an ultimate finding of fair use.[51]

---

45 *See id.* § 107.

46 *See* H.R. Rep. No. 94–1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680.

47 Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (citing Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968)).

48 Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106 (1990).

49 *See, e.g.*, *id.*; *see also* Netanel, *supra* note 16, at 720.

50 17 U.S.C. § 107; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

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

In *Campbell*, Acuff-Rose Music, Inc. filed suit against the rap group 2 Live Crew, claiming that the group's 1989 song "Pretty Woman" infringed on Acuff-Rose's copyright of Roy Orbison's 1964 song "Oh, Pretty Woman."[52] The district court granted summary judgment for 2 Live Crew, holding that their song was a parody that made fair use of the original song.[53] However, the Sixth Circuit reversed this decision and held that the commercial nature of 2 Live Crew's parody made the song's use presumptively unfair.[54]

In a unanimous decision, the Supreme Court held that 2 Live Crew's commercial parody of Orbison's song constituted a fair use.[55] In an opinion by Justice David Souter, the Court took note of the appeals court's fixation on the "commercial nature" of 2 Live Crew's song.[56] Justice Souter wrote that the lower court erred in giving "virtually dispositive weight" to that element of fair use analysis, and that the statute made it clear that a work's commercial nature is simply one of four total statutory factors to be considered altogether.[57]

In *Campbell*, Justice Souter emphatically endorsed the transformative use inquiry in determining whether an unauthorized use of a copyrighted work is fair.[58] In fact, his opinion draws heavily from Justice Story's words in *Folsom*, and concludes that the focus of fair use analysis is to see "whether the new work merely 'supersede[s] the objects' of the original creation."[59] Although Justice Souter noted that transformative use is not necessarily required in order to find fair use, he nevertheless argued that the

---

52 *See id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.* at 583 (and note that leading up to *Campbell* in 1994, the 1985 case of *Harper & Row Publishers, Inc. v. Nation Enterprises* inclined courts to regard the fourth factor as the most important).

57 *Campbell*, 510 U.S. at 584.

58 David Tan, *The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the "Transformative Use" Doctrine Twenty-Five Years On*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 311, 311 (2016).

59 *See Campbell*, 510 U.S. at 579 (citing Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841)).

goal of copyright is "generally furthered by the creation of transformative works."[60]

Additionally, the Supreme Court described fair use in *Campbell* as "an affirmative defense."[61] As such, the defendant bears the burden of proving that their use of a copyrighted material was fair.[62]

B. Fair Use and the Current State of Play

For a doctrine that has developed in American copyright law for well over two centuries, it is rather remarkable how unpredictable and uncertain fair use remains for copyright holders and users alike across an array of industries. For years after the 1976 codification of 17 U.S.C. § 107, courts widely regarded the fourth statutory factor—the effect of a use on the market—to be "undoubtedly the single most important element of fair use."[63] But after *Campbell* in 1994, the first statutory factor and the transformative use inquiry came to instead dominate fair use analysis.[64] Moreover, in a perpetually changing, twenty-first-century world, fair use analysis has become even less ascertainable for certain kinds of technologies; in fact, some scholars assert that fair use analysis ought to be abandoned entirely, and argue that it is not suited to "counterbalance . . . copyright owner's rights" in today's society.[65]

---

60 *Id.* (Justice Souter also stated that the goal of copyright is "to promote science and the arts").

61 *Id.* at 590.

62 Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 687 (2015).

63 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

64 Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 163 (2019) (stating that "of all the dispositive decisions that upheld transformative use, 94% eventually led to a finding of fair use"); *see also* Benjamin Moskowitz, *Toward a Fair Use Standard Turns 25: How Salinger and Scientology Affected Transformative Use Today*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1057, 1058 (2015) (noting "the increased use of transformative use as a fair use defense"); Netanel, *supra* note 16, at 719 (finding "a dramatic increase in defendant win rates on fair use that correlates with the courts' embrace of the transformative use doctrine").

65 Gideon Parchamovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 91 (2010).

To the contrary, however, courts continue to mold fair use in order to adapt the doctrine to new technologies and industries.[66] While this has left us still with a "vague [and] open-ended analysis," it is nonetheless helpful to examine recent notable cases to illuminate the current state of play for fair use.[67]

For example, in 2007, the Ninth Circuit determined that the use of thumbnails in an image search engine constitutes fair use.[68] In *Perfect 10, Inc. v. Amazon.com, Inc.*, the plaintiff, a company which owned the copyrights to photographs of nude models, sued Google, Inc. and Amazon.com, Inc., and argued that the defendants had infringed on their copyrights by displaying their photographs on their sites through "thumbnail images and in-line linking."[69] The court found that the display of thumbnail images of the copyright holder's photographs was a fair use by focusing primarily on the first statutory factor in tandem with the transformative use inquiry articulated in *Campbell*.[70] According to the court, because a search engine "transforms [an] image into a pointer directing a user to a source of information," it effectively renders any such copyrighted material used therein a fair use.[71] The court even drew from the theory behind parody as a form of fair use: it articulated that a search engine provides a "social benefit" similar to that of parody, as both lead to the creation of new works by commenting on previous work.[72] In this particular case, then, the "new work" was an electronic reference tool.[73] In *Perfect 10*, the Ninth Circuit ushered in a twenty-first-century era of fair use jurisprudence: not only would the transformative use inquiry apply to traditional works, such as songs like "Oh, Pretty Woman," but it could also be applied to Internet- and computer-related works.

---

66 *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (holding that unauthorized home videotaping of television broadcasts for non-commercial "time-shifting" purposes was fair use).

67 *See* Parchamovsky & Weiser, *supra* note 65, at 93.

68 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007).

69 *Id.* at 1154, 1157.

70 *Id.* at 1164.

71 *Id.* at 1165.

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

73 *Id.*

In 2013, the Second Circuit "moved the dial further" toward finding transformative use in cases involving the assertion of a fair use defense.[74] In *Cariou v. Prince*, photographer plaintiff Patrick Cariou brought a copyright infringement action against Richard Prince, an appropriation artist who used several of Cariou's photographs in a series of paintings and collages he exhibited at a gallery.[75] Agreeing that Prince's work constituted infringement, the district court ruled in favor of the plaintiff.[76] On appeal, the Second Circuit reversed the district court's contention with regard to twenty-five of the thirty photos in question, and found those works to be sufficiently transformative.[77] The twenty-five photos that the appellate court identified "manifest[ed] an entirely different aesthetic from Cariou's photographs."[78] The court further held that the law "imposes no requirement that a [secondary] work comment on the original [for it] to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those . . . identified in the preamble to the statute."[79] Scholars have noted that the *Cariou* case represents one of the widest expansions of the definition of transformative use.[80] Further, some consider the case as having effectively relaxed the standards for transformativeness "such that a work need only show 'new expression, meaning, or message.'"[81]

The transformative use inquiry saw another expansion of its scope in 2015, when the Second Circuit again employed it as a rationale for finding that it was fair use for Google to digitally copy entire books from library collections for its Google Books project.[82]

---

74 Marc D. Ostrow, *Are Transformative Fair Use Principles Foul to Musicians?*, LEXOLOGY (Nov. 23, 2015), https://www.lexology.com/library/detail.aspx?g=57b1ddd6-f6e7-47b6-aac3-4d2ffeb9bc64 [https://perma.cc/LM2J-W622].

75 Cariou v. Prince, 714 F.3d 694, 698 (2d Cir. 2013).

76 Cariou v. Prince, 784 F. Supp. 2d 337, 337 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

77 *Cariou*, 714 F.3d at 698–99.

78 *Id.* at 706.

79 *Id.* (referring to 17 U.S.C. § 107 (2018)).

80 Recent Case, *Copyright Law—Fair Use—Second Circuit Holds That Appropriation Artwork Need Not Comment on the Original to Be Transformative*, 127 HARV. L. REV. 1228, 1228 (2014) [hereinafter Recent Case, *Copyright Law*].

81 *Id.*

82 Authors Guild v. Google, Inc., 804 F.3d 202, 207–08 (2d Cir. 2015).

In *Authors Guild, Inc. v. Google, Inc.*, Google entered into several agreements with some of the world's major research libraries to advance its Google Books search database.[83] In the process, Google scanned more than twenty million books—without permission or payment of license fees to any original copyright holders—and made the digital copies available to its library partners.[84] Plaintiffs alleged that because Google lacked permission to copy from the rights holders, it committed copyright infringement.[85] Holding that all four factors of statutory analysis favored fair use, the Southern District of New York held that Google's digitization and use of the works was fair use, and the Second Circuit agreed.[86]

Writing for the court, Circuit Judge Pierre N. Leval—author of the influential 1990 "Toward a Fair Use Standard" article—explained that for the first factor, Google's "making of a digital copy to provide a search function"[87] was a transformative use and "augment[ed] public knowledge by making available information *about* Plaintiffs' books without providing the public with a substantial substitute for matter protected by the Plaintiffs' copyright interests."[88] Next, the court concluded that the second factor, the nature of the copyrighted work, favored fair use because the secondary use "transformatively provides valuable information about the original, rather than replicating protected expression in a manner that provides a meaningful substitute for the original."[89] Third, looking to the amount and substantiality of the portion used, the court found that Google's copying of entire texts to enable the Google Books full-text search function "was not dispositive of a finding of fair use because Google limited the amount of text it

---

83 *Id.* at 208.

84 *Id.*

85 *Id.* at 207.

86 *See* Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *aff'd sub nom.* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015); *see also Authors Guild*, 804 F.3d at 207.

87 *Authors Guild*, 804 F.3d at 207.

88 *Id.*

89 *Id.* at 220.

displayed to users in search engine results."[90] Fourth and finally, analyzing the market effect of the use, the court decided that the manner by which Google displays its Books project "do[es] not provide a significant market substitute for the protected aspects of the originals."[91] Yet again, an appeals court found that a transformative purpose overrode a copyright infringement claim.

A very recent exploration of the bounds of fair use by the Second Circuit came in the 2018 case of *Fox News Network, LLC v. TVEyes, Inc.*[92] Defendant TVEyes operated a media-monitoring service which "aggregated news reports into [a] searchable database."[93] TVEyes worked to offer a range of public, private, and non-profit customers the text-searchable access to television and radio programming clips—meaning, the ability to search for past broadcasts, and then the ability to watch, archive, download, and email such clips—in exchange for a $500 monthly fee.[94] However, TVEyes did not license the programming it recorded from the broadcasters themselves; instead, it chose to rely on the fair use exception "as the foundation for its entire business."[95] This fact propelled the plaintiff, Fox News Network, LLC, to sue for copyright infringement.[96]

The district court held that some of TVEyes' features constituted fair use, such as those which enabled TVEyes subscribers to "archive" clips to a subscriber's Media Center on the company's server.[97] However, the court also held that several of its services did not constitute fair use, such as those which allowed users to download video clips to one's own computer, or to "search for and

---

90 U.S. COPYRIGHT OFF., FAIR USE INDEX, AUTHORS GUILD, INC. V. GOOGLE INC. SUMMARY (2015), https://www.copyright.gov/fair-use/summaries/authorsguild-google-2dcir2015.pdf [https://perma.cc/9MRM-ZVRW]; *see also Authors Guild*, 804 F.3d at 222.

91 *Authors Guild*, 804 F.3d at 229.

92 *See generally* Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169 (2d Cir. 2018).

93 *Id.* at 169.

94 *Id.* at 175.

95 Rachel Kim, *Exploring the Bounds of Fair Use:* Fox News v. TVEyes, COPYRIGHT ALLIANCE (Feb. 28, 2018), https://copyrightalliance.org/ca_post/fair-use-fox-news-v-tveyes/ [https://perma.cc/4A48-QMRC].

96 *Fox News Network*, 883 F.3d at 174.

97 Fox News Network, LLC v. TVEyes, Inc., No. 13–5315, 2015 WL 8148831, at *1 (S.D.N.Y. Nov. 6, 2015).

view television content by the date, time, and channel on which a program aired."[98] Therefore, the court awarded Fox an injunction with respect to the TVEyes functions that were found to not be fair use, but allowed the company's functions that were otherwise considered fair use to continue.[99]

On review, the Second Circuit conducted the four-step statutory analysis to consider whether TVEyes' "Watch function" (which "allows TVEyes clients to *view* up to ten-minute, unaltered video clips of copyrighted content"[100]) constituted fair use. Ultimately, the appellate court held that it was not a fair use. Notably, even though the court decided that the "Watch function" had a "modest transformative character" in its analysis of the first statutory factor, it ultimately weighed against its own finding of transformativeness and concluded that the fourth statutory factor was the most important.[101] In observing the fourth factor (the effect on the potential market), the court first noted that TVEyes' operations inherently demonstrated that "deep-pocketed consumers are willing to pay well" for such a media-viewing service, "and that this market is worth millions of dollars in the aggregate."[102] The court therefore concluded that because the media-monitoring market existed, TVEyes was effectively displacing potential revenues for Fox.[103] Given this displacement of revenue and TVEyes' failure to properly license content from Fox, the court held that TVEyes had "usurp[ed] a market that properly belongs to the copyright-holder."[104] In the end, it decided that the fourth factor favored Fox, and that altogether, fair use did not exist in this case.[105] The *TVEyes* case is significant in that it marked a moment where the Second Circuit returned to the past in its fair use analysis. Rather than finding fair use simply because of some remote indication of transformativeness, the Court

---

98 *Id.*

99 *Id.*

100 *Fox News Network*, 883 F.3d at 176.

101 *Id.* at 178–79.

102 *Id.* at 180.

103 *Id.*

104 *Id.* (quoting Infinity Broadcast Corp. v. Kirkwood, 150 F.3d 104, 110 (2d Cir. 1998)).

105 *Id.* at 181.

returned to the prior notion that the fourth factor of fair use analysis is the "most important."[106]

This brings us to today: a time when courts, judges, and legal scholars alike continue to reconcile what exactly fair use means, and what it ought to mean. And for some practitioners, this is particularly problematic: one critic of the ever-evolving nature of contemporary fair use analysis argues that "we have strayed far afield from the doctrine's genesis,"[107] and now, it is an "increasingly muddy morass."[108] Although the first statutory factor has demonstrably gained significance in fair use jurisprudence over the past two-and-a-half decades, there is yet to be a bright-line rule that transformativeness—whatever "transformativeness" truly means—necessarily equals fair use.[109] Moreover, as the *TVEyes* case suggests, the fourth factor is still regarded by some judges as the most important factor.[110] This leaves a lingering question still unanswered: which fair use factor *is* analytically most important?

II. "REVIEWING THE SITUATION"[111]: A SURVEY OF FAIR USE LITIGATION INVOLVING THEATRICAL WORKS

As Part I has detailed, fair use is difficult to define in the broad scope of contemporary American copyright law. Its analysis is not only highly fact-specific, but also court- and judge-specific, simply because no single factor is dispositive. Despite this, most fair use decisions have regarded the first or the fourth factor to be more important than others.[112] To add to this messiness, courts that have

---

106 *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

107 Scott Alan Burroughs, *The Tyranny of Fair Use: How a Once-Humble Copyright Doctrine Tormented a Generation of Litigants*, ABOVE L. (Feb. 20, 2019), https://abovethelaw.com/2019/02/the-tyranny-of-fair-use-how-a-once-humble-copyright-doctrine-tormented-a-generation-of-litigants/ [https://perma.cc/JE3D-QSYQ].

108 Scott Alan Burroughs, *The Tyranny of Fair Use (Part III): A Judge's Critique, Explosive Data, and One Sad Saga*, ABOVE L. (Mar. 6, 2019), https://abovethelaw.com/2019/03/the-tyranny-of-fair-use-part-iii-a-judges-critique-explosive-data-and-one-sad-saga/ [https://perma.cc/7F3N-YPY7].

109 See *infra* Part II.B.3, which examines the hazy definition of "transformativeness."

110 Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 179 (2d Cir. 2018).

111 The title of a song from the 1960 musical *Oliver!*

112 Richard Stim, *Fair Use: The Four Factors Courts Consider in a Copyright Infringement Case*, NOLO, https://www.nolo.com/legal-encyclopedia/fair-use-the-four-

veered toward emphasizing the first factor have an added analytical layer of a significant piece of case law: the Supreme Court's *Campbell* opinion in 1994, which catalyzed the advent of the transformative use inquiry in fair use analysis.[113] Fair use is thus a highly dynamic and ever-changing area of U.S. copyright law.

In Part II.A, this Note will turn to an examination of fair use cases in an industry about which there exists limited academic literature: theatre. By focusing on fair use developments in this specific area, this Note seeks to refine scholarly understanding of the doctrine and its evolution. Part II.A surveys cases from 1981 to 2018 that involve a fair use analysis and which center around a stage play or musical. Afterwards, in Part II.B, the Note takes a step back to observe the broader trends in fair use jurisprudence that the II.A cases collectively illustrate and to more prescriptively analyze such trends.

A. *The Theatre Cases: From "Boogie Woogie" (1981) to Cindy Lou Who (2018)*

Prior to *Campbell* in 1994, copyright infringement suits against theatre professionals were less likely to result in a finding of fair use in favor of the defendant. For example, the 1981 Second Circuit case of *MCA, Inc. v. Wilson* looked at *Let My People Come*, a cabaret show produced by the defendants which ran off-Broadway from January 1974 to July 1976.[114] The show—which was "doing sell-out business"[115] in the first year of its run—advertised itself as a "sexual musical,"[116] and a *New York Times* critic described the

factors.html [https://perma.cc/79KK-39Y8] (stating that "courts often focus on the first and fourth factors, considering the nature of the infringement and the effect on the copyright holder's market").

113 Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 818 (2015).

114 MCA, Inc. v. Wilson, 677 F.2d 180, 181 (2d Cir. 1981).

115 Mei. Gussow, *Stage More Success Than Just Blurbs*, N.Y. TIMES (May 7, 1974), https://www.nytimes.com/1974/05/07/archives/stage-more-success-than-just-blurbs-let-my-people-come-a-sexual.html [https://perma.cc/SF8W-S7X5].

116 John Corry, *Broadway*, N.Y. TIMES (July 2, 1976), https://www.nytimes.com/1976/07/02/archives/broadway-billy-dee-williams-will-play-dr-king-in-i-have-a-dream.html [https://perma.cc/3WGE-HR58].

music as sounding "like something we've heard before but definitely not with these words."[117] Plaintiff, the music publisher MCA, Inc. ("MCA"), argued that in *Let My People Come*, one musical number, titled "Cunnilingus Champion of Company C" ("'Champion'"), infringed on its copyrighted song, "Boogie Woogie Bugle Boy" ("'Bugle Boy'").[118] "Champion"—which sounded so alike to "Bugle Boy" that cast members of *Let My People Come* "told [defendant Wilson] that they thought it was similar"[119]—borrowed from the original tune musically, but substituted different, "dirty"[120] lyrics.

At trial, Wilson stated that "Champion" was not conceived to be a parody of "Bugle Boy" specifically, but rather, that the creators of the cabaret intended the song to "be a burlesque of the music of the 1940s."[121] He testified that they borrowed from "Bugle Boy" because it was "immediately identifiable as something happy and joyous and it brought back a certain period in our history when we felt that way."[122] Contending that the use of MCA's copyrighted song was done reasonably and that therefore, they were not required to secure MCA's consent, Wilson asserted the defense of fair use.[123]

The district court disagreed with Wilson, and the Second Circuit affirmed.[124] The Second Circuit held that the use was not a fair use, and stated that if it held otherwise, the court would be extending "an open-ended invitation to musical plagiarism."[125] The court referred to the four factors of fair use found in 17 U.S.C. § 107 as "guideposts," not relying on one factor more than another, before ultimately deciding that "Champion" did not constitute a sufficient

---

117 *See* Gussow, *supra* note 115.

118 "Boogie Woogie Bugle Boy" is a song originally performed by The Andrews Sisters during the World War II era. Bette Midler further popularized the song during her 1972 pop recording. *See* Stephen Holden, *POP VIEW; Wartime Dreams Revisited*, N.Y. TIMES (Jul. 23, 1995), https://www.nytimes.com/1995/07/23/arts/pop-view-wartime-dreams-revisited.html [https://perma.cc/297D-EBNW].

119 MCA, Inc. v. Wilson, 677 F.2d 180, 184 (2d Cir. 1981).

120 *Id.* at 185.

121 *Id.* at 184.

122 *Id.*

123 *Id.* at 182.

124 *Id.* at 185.

125 *MCA*, 677 F.2d at 185.

parody or burlesque of "Bugle Boy," and therefore, was not a fair use.[126] Instead, in copying "Bugle Boy," the court asserted that the composers' purpose was "simply to reap the advantages of a well-known tune and short-cut the rigors of composing original music."[127] Notably, the Second Circuit remarked that it was "not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society."[128]

In his dissent, Circuit Judge Walter R. Mansfield disagreed and argued that the fair use doctrine as codified in the 1976 Copyright Act entitled defendants to protection.[129] He asserted that defendants used only enough of MCA's song "to conjure up a recollection of that image and thereby make possible a parody with a completely new, mocking, satirical turn to it."[130] He added, too, that there was no evidence that MCA sustained any damage as a result of the parody.[131]

The Second Circuit's *MCA* opinion came thirteen years before the Supreme Court's 1994 ruling in *Campbell*, which expanded the scope of fair use analysis to include that of transformative use.[132] The first major fair use case centering around a musical that found in favor of defendants following a transformative use inquiry was *SOFA Entertainment, Inc. v. Dodger Productions, Inc*. in 2013.[133] In this case, defendants were producers of the Tony-winning musical *Jersey Boys*, which opened on Broadway in 2005 and

---

126 *Id.* at 183.

127 Fisher v. Dees, 794 F.2d 432, 439 n.5 (9th Cir. 1986) (referring to *MCA* in a footnote as an example of a Second Circuit case in which the court held the doctrine of fair use as inapplicable).

128 *MCA, Inc.*, 677 F.2d at 185.

129 *Id.* at 188.

130 *Id*.

131 *Id*.

132 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (as examined in Part I, in *Campbell*, Justice Souter argued that the central purpose of fair use analysis is to see whether the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative'").

133 *See generally* SOFA Entm't, Inc. v. Dodger Prods., Inc., 709 F.3d 1273 (9th Cir. 2013).

dramatized the story of the musical group Frankie Valli and the Four Seasons. Toward the end of Act I of *Jersey Boys*, the character Bob Gaudio—one of the four founding members of the Four Seasons—addresses the audience while the other three members of the band can be seen on a CBS studio stage preparing for a performance on "The Ed Sullivan Show" during the early 1960s.[134] As Gaudio finishes speaking, a screen hanging over the stage shows a seven-second clip of Ed Sullivan introducing the Four Seasons on his show, before the live actors and band perform the song "Dawn."[135] Capping off the first act of *Jersey Boys* with the band's appearance on Sullivan's show was meant to demonstrate the Four Seasons' rise in popularity.

SOFA owned the copyright for the entire run of "The Ed Sullivan Show," a television series which ran from 1948 to 1971.[136] SOFA's founder, Andrew Solt, attended a performance of *Jersey Boys*, saw that the clip appeared in the show, determined that Dodger used the clip without permission or a license, and in 2008, filed a complaint against Dodger alleging copyright infringement.[137] In 2009, Dodger filed a summary judgment motion, asserting that its use of the seven-second clip constituted fair use, and the district court agreed.[138]

The Ninth Circuit affirmed the district court's holding that the use of the clip was transformative and thus constituted fair use.[139] The court applied the four statutory factors of fair use, and argued that all four weighed in favor of defendants.[140] First, looking to the purpose and character of the use, the court agreed with the defendants that they used the clip as a "biographical anchor" in the context of the show to demonstrate the swelling success of the Four Seasons, sufficiently "put[ting] the clip to its own transformative

---

134 *Id.* at 1276–77.

135 *Id.* at 1277.

136 *Id.* at 1276.

137 *See* Demand for Jury Trial, SOFA Entm't, Inc. v. Dodger Prods., Inc., No. 208–02616, 2008 WL 2072033 (C.D. Cal. Apr. 21, 2008).

138 *See* SOFA Entm't, Inc. v. Dodger Prods., Inc., 782 F. Supp. 2d 898 (C.D. Cal. 2010), *aff'd*, 709 F.3d 1273 (9th Cir. 2013).

139 *See SOFA Entm't*, 709 F.3d at 1278.

140 *Id.*

ends," and thus favored Dodger on that factor.[141] Second, with regard to the nature of the copyrighted work, the court concluded that the clip "conveys mainly factual information," rather than any form of creative or fictional work, thus favoring Dodger.[142] Third, in observing the amount and substantiality of the portion used, the court found that a seven-second clip was "hardly qualitatively significant," again favoring Dodger.[143] Fourth and finally, when considering the market effect of the use, the court decided that the use of the clip in *Jersey Boys* "advances its own original creation without any reasonable threat" to the market for "The Ed Sullivan Show."[144] Moreover, the court wrote that *Jersey Boys* is "not a substitute" for "The Ed Sullivan Show," and that the former is not reproduced on videotape or DVD, which "would allow for repeated viewing of the clip."[145] All four factors of fair use analysis favored Dodger, and the court wrote that this case was "a good example of why the fair use doctrine exists."[146]

Two years after *SOFA* was decided, the Southern District of New York granted declaratory judgment in *Adjmi v. DLT Entertainment, Ltd.* to a playwright following another finding of fair use.[147] Plaintiff David Adjmi penned *3C*, a play based on the popular 1970s television series "Three's Company."[148] *3C*, which ran off-Broadway in 2012, copied the premise, characters, sets, and scenes from the TV show, but turned it into "a nightmarish version of itself, using the familiar 'Three's Company' construct as a vehicle to criticize and comment on the original's light-hearted, sometimes superficial, treatment of certain topics and phenomena."[149] Shortly after the show opened, DLT—the copyright holder of "Three's Company"—sent a cease and desist letter, asserting that *3C* infringed on DLT's copyright in "Three's Company" and demanding

---

141 *Id.* at 1278–79.
142 *Id.* at 1279.
143 *Id*.
144 *Id.* at 1280.
145 *SOFA Entm't*, 709 F.3d at 1280.
146 *Id*.
147 *See* Adjmi v. DLT Entm't Ltd., 97 F. Supp. 3d 512, 515 (S.D.N.Y. 2015).
148 *See id.*
149 *Id.* at 531.

that performances cease.[150] The question for the court was whether *3C* sufficiently constituted a fair use of "Three's Company."[151]

The court—which concluded that "there can be no set of facts to support an action for copyright infringement by DLT against Adjmi"—focused its fair use analysis heavily on the first factor: the purpose and character of the use.[152] The court concluded that *3C* constituted the type of parody that the Supreme Court sought to protect in *Campbell* in 1994.[153] Borrowing language from *Campbell*, the court stated that it is "well recognized that '[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination,'" and so, because "the 'purpose and character' analysis assumes that the alleged parody will take from the original[,] the pertinent inquiry is how the alleged parody uses that original material."[154] The court concluded that *3C* was "hardly a 'repeat'" of "Three's Company," and that it was instead a "deconstruction" of the show.[155] Whereas "Three's Company" has become widely known for its nature as a "happy, light-hearted, run-of-the-mill, sometimes almost slapstick situation comedy,"[156] *3C*, in contrast, "proceeds in a frenetic, disjointed, and sometimes philosophical tone . . . often difficult to follow and unrelentingly vulgar."[157] The court further determined that *3C* used the "raw material of 'Three's Company' 'in the creation of new information, new aesthetics, new insights and understandings'"—precisely the type of benefit to society that the fair use doctrine works to protect.[158]

When looking to the second and third factors of fair use (the nature of the copyrighted work and the amount and substantiality of the portion used), the court acknowledged that both weighed

---

150 *See id.* at 515.
151 *See id.* at 528.
152 *Id.* at 526.
153 *See Adjmi*, 97 F. Supp. 3d at 530.
154 *Id*.
155 *Id.* at 531.
156 *Id*.
157 *Id.* at 532.
158 *Id.* at 531 (citing Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 141 (2d Cir. 1998) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990)) (quotations omitted).

"somewhat against a finding of fair use," but that it nevertheless did "little to sway the overall determination."[159] After looking to the fourth factor and determining that *3C* is "not a potential market substitution" for "Three's Company" and that the parodic piece of theatre posed no harm to the television show, the court ultimately awarded declaratory judgment for the playwright.[160] The *3C* case is noteworthy for the specific emphasis placed by the court on the first and fourth factors of fair use analysis.

Also in 2015, the Second Circuit defined the scope of copyright protection in light of fair use in the case of *Keeling v. Hars*.[161] At issue in this case was the script of *Point Break Live!*, a stage play parodying the 1991 film "Point Break," which starred Keanu Reeves and Patrick Swayze.[162] The play "added jokes, props, exaggerated staging, and humorous theatrical devices to transform the dramatic plot and dialogue of the film into an irreverent, interactive theatrical experience."[163] The playwright, Jaime Keeling, did not obtain authorization or a license from the film's copyright holders.[164] In 2007, Keeling executed a production agreement with Eve Hars, the owner of a production company, to stage a two-month run of *Point Break Live!* later that year.[165] During the run of the show, Hars "came to believe" that Keeling did not lawfully own the rights to the parody play.[166] After the two-month run, Hars sought to renegotiate the terms of the contract and, "in effect, continue to produce [the play] without further payment to Keeling."[167] Keeling refused negotiation and registered a copyright in the play, which became effective in January 2008.[168] Hars continued to stage performances of the play for four years thereafter "without payment to or authorization from Keeling."[169]

---

159 *Adjmi*, 97 F. Supp. 3d at 532.
160 *Id.* at 535.
161 *See generally* Keeling v. Hars, 809 F.3d 43 (2d Cir. 2015).
162 *See id.* at 45.
163 *Id*.
164 *See id.*
165 *Id*.
166 *Id*.
167 *Keeling*, 809 F.3d at 45.
168 *Id.*
169 *Id*.

Keeling brought suit against Hars, who asserted a counterclaim seeking a declaration that Keeling's copyright registration was invalid.[170] The district court ruled in 2010 that a parody that fairly uses previously copyrighted material may contain "sufficient originality to merit copyright protection itself."[171] On appeal, Hars argued that an unauthorized derivative work like Keeling's play was not entitled to independent copyright protection, "regardless of whether it makes fair use of its source material."[172] The Second Circuit recognized the "unusual" posture of this argument:

> Typically, fair use is invoked as a *defense* against a claim of copyright infringement brought by the source-material rightsholder. Here, however, Keeling invoked the fair-use principle to establish an *affirmative claim* against defendants for unauthorized use of her . . . parody. Hars concedes that Keeling could use the "fair use" doctrine as a "shield" against a claim of copyright infringement[] but argues that she may not use the doctrine as a "sword" to vest a work with independent copyright protection against third-party infringement.[173]

The Second Circuit found Hars' argument to be inconsistent with the Copyright Act, which specifically cautions that protection "does not extend to any part of the work in which such material has been used unlawfully."[174] The Court engaged in a close reading of the statute to hold that if "a work employs preexisting copyrighted material *lawfully*—as in the case of a 'fair use'—nothing in the statute prohibits the extension of the 'independent' copyright protection."[175] The court's decision ultimately strengthened copyright protection for creators of derivative works who use preexisting material without authorization so long as the creator's product is sufficiently original and constitutes a fair use.

---

170 *See id.* at 46.

171 Keeling v. New Rock Theater Prods., LLC, No. 10–9345, 2011 WL 6202796, at *1 (S.D.N.Y. Dec. 13, 2011).

172 *Keeling*, 809 F.3d at 49.

173 *Id.*

174 17 U.S.C. § 103(a) (2018); *see also Keeling*, 809 F.3d at 49.

175 *Keeling*, 809 F.3d at 49.

One notable decision that serves as an exception to the growing trend of courts asserting the strength of fair use came via the Second Circuit in 2016 in the case of *TCA Television Corp. v. McCollum*.[176] In 2015, the play *Hand to God* opened on Broadway.[177] In the first act of *Hand to God*, written by Robert Askins, the main character, Jason, performs "Who's on First?"—the signature routine of the early-to-mid-1900s comedy duo Abbott and Costello—along with his sock puppet, Tyrone, to try to impress his crush.[178] The routine is performed "verbatim" in the play for over a minute.[179] In June 2015, the plaintiffs, successors-in-interest to the estates of Abbott and Costello, filed an action against the defendants, asserting copyright infringement.[180] The defendants moved to dismiss, arguing, threefold, that "(1) plaintiffs did not hold a valid copyright; (2) the [r]outine was in the public domain; and (3) [the play]'s incorporation of the [r]outine was sufficiently transformative to qualify as a permissible fair use."[181] The district court granted defendants' motion to dismiss specifically on fair use grounds.[182] On appeal, the Second Circuit affirmed the district court's decision to grant the motion to dismiss, but on substantially different grounds: the Second Circuit actually found that the facts collectively weighed against a finding of fair use, and that the defendants were only entitled to a victory because the heirs failed to assert a valid copyright interest in the "Who's on First?" routine.[183]

The Second Circuit held that all four statutory factors weighed against a finding of fair use. First, looking to the purpose and character of the use, the Second Circuit disagreed with the district

---

176 839 F.3d 168, 176 (2d Cir. 2016).

177 Michael Paulson, *Robert Askins Brings 'Hand to God' to Broadway*, N.Y. TIMES (Apr. 2, 2015), https://www.nytimes.com/2015/04/05/theater/robert-askins-brings-hand-to-god-to-broadway.html [https://perma.cc/HR8P-P2BP].

178 *See* TCA Television Corp. v. McCollum, 839 F.3d 168, 176 (2d Cir. 2016).

179 *Id*.

180 Andrew R. Chow, *'Hand to God' Play Sued by Abbott and Costello Heirs Over Use of 'Who's on First?'*, N.Y. TIMES (June 4, 2015), https://www.nytimes.com/2015/06/05/theater/hand-to-god-play-sued-by-abbott-and-costello-heirs-over-use-of-whos-on-first.html [https://perma.cc/KT5N-399E].

181 *Id.* at 177.

182 TCA Television Corp. v. McCollum, 151 F. Supp. 3d 419 (S.D.N.Y. 2015), *aff'd on other grounds*, 839 F.3d 168 (2d Cir. 2016).

183 *See TCA Television Corp.*, 839 F.3d at 192.

court that the defendant's use was transformative in nature.[184] The Second Circuit specified that its inquiry centered on whether the new work used the copyrighted material "for a purpose, or imbues it with a character, different from that for which it was created,"[185] and concluded that *Hand to God*'s use of the routine did not demonstrate such a transformative use.[186] Second, in analyzing the nature of the copyrighted work, the court found that "Who's on First?," as "an original comedy sketch created for public entertainment," was of a creative nature, thus weighing against a finding of fair use.[187] Third, in regard to the amount and substantiality of the portion used, the court decided that the use of the routine in the show was "substantial copying."[188] Fourth and finally, concerning the market effect of the use, the court decided that the defendants' use of the routine could "adversely affect" the licensing market for the work.[189] Three years following the Second Circuit's expansive definition of transformative use in *Cariou*, *TCA Television Corp. v. McCollum* represented a boundary line for the court, and signified that it was unwilling to deem every "different" use a transformative one.[190]

While many fair use cases involving theatrical properties have turned on the significant first factor of fair use analysis and an inquiry into the transformative nature of the work, the 2017 case of *Corbello v. DeVito*—another case involving parties to the musical *Jersey Boys*—in the District Court for the District of Nevada represents an example of a court emphasizing the fourth factor as most important.[191] Plaintiff Donna Corbello was the widow and heir of Rex Woodward, who, in 1988, agreed to write the authorized biography of Tommy DeVito, one of the original members of The Four Seasons.[192] Woodward and DeVito decided they would be considered co-authors and would share equally in any profits arising

184 *See id.* at 183.
185 *Id.* at 180.
186 *See id.* at 192.
187 *Id.* at 184.
188 *Id.* at 185.
189 *TCA Television Corp.*, 839 F.3d at 186.
190 *Id.* at 180.
191 262 F. Supp. 3d 1056 (D. Nev. 2017).
192 *See* Corbello v. DeVito, 777 F.3d 1058, 1060 (9th Cir. 2015).

from the book.[193] By 1991, the biography neared completion, but that year, Woodward died.[194] Shortly before Woodward's death, DeVito registered the manuscript for the biography with the U.S. Copyright Office "in his own name."[195] Eight years later, in 1999, DeVito entered into an agreement to transfer his right to adapt the biography "for the purpose of creating a musical," which eventually turned into *Jersey Boys*.[196]

After *Jersey Boys* won the 2006 Tony Award for Best Musical, Corbello "surmised that there might be more interest in a book about the Four Seasons."[197] She "hired some lawyers to handle the copyright matters, and was surprised to learn that Woodward did not own a copyright in the book."[198] In 2007, she filed a supplementary application to add Woodward as a co-author and co-claimant of the biography, which was accepted and certified by the U.S. Copyright Office in 2009. Thereafter, plaintiff sued DeVito for an accounting of her share of the profits derived from the biography that had "inspired the form, structure, and content" of *Jersey Boys*.[199] In 2016, after extensive motion practice, a Ninth Circuit appeal, and eventual remand, a federal jury returned a verdict in plaintiff's favor.[200] However, in a post-verdict motion for judgment as a matter of law, defendants sought to set that verdict aside.[201]

In 2017, the district court agreed, and reversed the jury's verdict by finding that all four factors of analysis supported a finding of fair use.[202] In the process, the court called the fourth factor of analysis "the most important."[203] In observing the effect of the musical on

---

193 *See* Corbello v. DeVito, 832 F. Supp. 2d 1231, 1233 (D. Nev. 2011).

194 *See id.* at 1234.

195 *Corbello*, 777 F.3d at 1061.

196 Corbello v. DeVito, 262 F. Supp. 3d 1058, 1063 (D. Nev. 2017).

197 Marc Hershberg, *Creators Of 'Jersey Boys' Found Guilty of Copyright Infringement*, FORBES (Nov. 29, 2016), https://www.forbes.com/sites/marchershberg/2016/11/29/jury-reaches-verdict-in-jersey-boys-copyright-case/#6719c52342be [https://perma.cc/3W5J-HNVQ].

198 *Id.*

199 *Corbello*, 262 F. Supp. 3d at 1062.

200 *See* Hershberg, *supra* note 197.

201 *See Corbello*, 262 F. Supp. 3d at 1068.

202 *See id.* at 1077.

203 *Id.* at 1068.

the market for the copyrighted biography, the court decided that before *Jersey Boys* opened, the book "had no market value," demonstrated by the fact that Woodward and DeVito had trouble striking a deal with a publishing company, and "because interest in the Four Seasons was not great enough to make sales of the [biography] profitable."[204] The court further argued that the profitability of the biography today would be "almost certainly only because of [*Jersey Boys*]."[205] *Corbello* thus serves as an example of a court emphasizing the fourth factor as most important in its fair use analysis.

Most recently, in 2018, the Second Circuit—an especially crucial court, due to the location of Broadway in New York City—affirmed a district court's ruling in *Lombardo v. Dr. Seuss Enterprises, L.P.*, and again reiterated the broad nature of transformative use and the strength of bona fide parodies against infringement claims.[206] Plaintiff Matthew Lombardo authored *Who's Holiday!*, a comedic stage play which borrows the "character, plot, and setting"[207] as well as the "rhyming couplet"[208] writing structure of the 1957 Dr. Seuss book, "How the Grinch Stole Christmas!," though the play included themes far more adult and provocative than those in the source material.[209] In July 2016, a few months before the play's scheduled off-Broadway premiere, defendant sent

---

204 *Id.*

205 *Id.* at 1069.

206 Elizabeth Altman & Scott J. Sholder, *Lombardo v. Dr. Seuss Enterprises, L.P.: Parody Hasn't Outgrown Fair Use*, COWAN, DEBAETS, ABRAHAMS & SHEPPARD LLP L. BLOG (Jul. 27, 2018), https://cdas.com/drseuss-fair-use/ [https://perma.cc/ F7NJ-B5RM].

207 Lombardo v. Dr. Seuss Enters., L.P., 279 F. Supp. 3d 497, 502 (S.D.N.Y. 2017), *aff'd*, 729 F. App'x 131 (2d Cir. 2018).

208 *Id.* at 503.

209 *See id.* (stating that in *Who's Holiday!*, Cindy Lou Who "drinks hard alcohol, abuses prescription pills, and smokes a substance she identifies as 'Who Hash'"); *see also Jennifer Simard Will Play a Grown-Up Cindy Lou Who in Who's Holiday Off-Broadway*, BROADWAY.COM (Sept. 26, 2016), https://www.broadway.com/buzz/186115/jennifer-simard-will-play-a-grown-up-cindy-lou-who-in-whos-holiday-off-broadway/ [https://perma.cc/C328-8RN3] (reporting that *Who's Holiday!* "follows a middle-aged Cindy Lou Who as she prepares for a Christmas Eve party in her trailer on Mount Crumpit").

plaintiffs cease and desist letters.[210] Plaintiffs called off the forthcoming run of the show and filed suit seeking a declaration that the play constituted fair use.[211] The district court held that Lombardo's play was a parody, and thus qualified as fair use.[212]

The Second Circuit affirmed the district court's holding that the play was fair use.[213] First, in looking at the purpose and character of the use, the Second Circuit agreed with the district court's determination that *Who's Holiday!* is a parody, "recontextualiz[ing] *Grinch*'s easily-recognizable [sic] plot and rhyming style by placing Cindy–Lou Who—a symbol of childhood innocence and naiveté—in outlandish, profanity-laden, adult-themed scenarios involving topics such as poverty, teen-age pregnancy, drug and alcohol abuse, prison culture, and murder."[214] Second, with regard to the nature of the copyrighted work, the district court glossed over this consideration, a decision which the Second Circuit considered proper for analysis of a parody: "The second factor is rarely useful 'in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.'"[215] Third, the Second Circuit decided that in terms of the amount and substantiality of the portion used, the original *Grinch* material was used in a manner which serviced the parody simply by invoking the original work, rather than verbatim copying or quoting.[216] Fourth and finally, when considering the market effect of the use, the court agreed that because *Who's Holiday!* was a "parody pure and simple," there was little likelihood of harm for either the consumer or licensing markets for *Grinch*.[217] The *Lombardo* case, thus, strengthened the fair use protection of parodies.

---

210 *See Lombardo*, 279 F. Supp. 3d at 504.

211 *See id.* at 504.

212 *See id.* at 502.

213 *See* Lombardo v. Dr. Seuss Enters., L.P., 729 F. App'x 131, 133 (2d Cir. 2018).

214 *Lombardo*, 279 F. Supp. 3d at 508.

215 *Lombardo*, 729 F. App'x at 133 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994)).

216 *Id.*

217 *Lombardo*, 279 F. Supp. 3d at 512.

B. *Life Imitates Art: Using the Theatre Cases to Understand Fair Use Today*

The aforementioned cases—each of which relate to or center on a stage play or musical—collectively serve as a microcosm of broader fair use trends to offer three main findings in how courts engage in fair use analysis today, discussed further in this Part II.B. First, fair use is a "choose-your-own-adventure" jumble of legal analysis. Second, the definition of "parody" is arguably ambiguous. Third, and finally: (1) the transformative use inquiry is now employed almost universally in contemporary fair use analyses; (2) the inquiry generally benefits parties accused of copyright infringement; but (3) "transformative" is an elusive term that ultimately undermines the importance of 17 U.S.C. § 107 as the central statute that articulates the factors for fair use analysis. Following an examination of these three trends, this Part II.B concludes with the argument that judges engaging in future fair use discussions ought to forsake the transformative use inquiry.

1. Fair Use Remains a Hodgepodge of Legal Analysis

First, the theatre cases indicate that fair use—nearly two centuries after *Folsom* and a quarter of a century after *Campbell*—remains a hodgepodge of legal analysis: "a checklist of things to be considered rather than a formula for decisions."[218] In the theatre cases alone, the balancing mechanisms by which judges weighed the four factors of fair use analysis varied widely. In *SOFA Entertainment*, the Ninth Circuit balanced all four factors rather evenly and equally before weighing in favor of Dodger and concluding that "society's enjoyment of Dodger's creative endeavor [was] enhanced" with the inclusion of the Ed Sullivan clip in *Jersey Boys*.[219] In *Adjmi*, the Southern District of New York focused its analysis considerably on the first and fourth factors, outright admitting that the second and third factors were of "lesser importance."[220] In *Corbello*, the District Court for the District of Nevada decided

---

218 Ty, Inc. v. Publ'ns Int'l, Ltd., 292 F.3d 512, 522 (7th Cir. 2002).

219 SOFA Entm't, Inc. v. Dodger Prods., Inc., 709 F.3d 1273, 1280 (9th Cir. 2013).

220 Adjmi v. DLT Entm't Ltd., 97 F. Supp. 3d 512, 534 (S.D.N.Y. 2015).

that the fourth factor of analysis was the "most important."[221] By contrast, in *Lombardo*, the Southern District of New York emphasized the dispositive determination of the first factor: "once a work is determined to be a parody, the second, third, and fourth factors are unlikely to militate against a finding of fair use."[222]

This varying range of analysis and jurisprudence is not limited to litigation involving theatrical stage plays and/or musicals. Returning to the broader fair use cases listed in Part I.B, some cases, like *Cariou*, focused heavily on the first factor, affirming the Supreme Court's decision in *Campbell* and emphasizing the profound strength of transformativeness in a finding of fair use.[223] Other cases, such as *TVEyes*, echoed case law prior to *Campbell*—specifically, the 1985 case of *Harper & Row Publishers, Inc. v. Nation Enterprises*—to contend that the fourth factor is the most important.[224] In fact, the cases that refer back to *Harper & Row* tend to echo the state of the law for the years between the passage of the 1976 Copyright Act and *Campbell* in 1994, where the fourth factor was indeed "paramount in importance."[225] In the years following *Campbell*, despite the fact that courts continue to cite *Harper & Row* to restate the understanding that the fourth factor is most important,[226] some ultimately pursue an analysis that centers chiefly around the importance of the transformative use inquiry instead.[227] At the end of the day, this puts the framework of fair use in a state that is particularly difficult to understand.

When the Supreme Court decided in *Campbell* that the fair use defense was "not to be simplified with bright-line rules" but rather, to be examined through "case-by-case analysis," it prescribed an

---

221 Corbello v. DeVito, 262 F. Supp. 3d 1058, 1069 (D. Nev. 2017).

222 *Lombardo*, 279 F. Supp. 3d at 507 (quoting Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F. Supp. 2d 84, 89 (S.D.N.Y. 2003)).

223 Cariou v. Prince, 714 F.3d 694, 706 (2d Cir. 2013) (referring to 17 U.S.C. § 107 (2018)).

224 Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 179 (2d Cir. 2018).

225 *See* Burroughs, *supra* note 107.

226 *Fox News Network*, 883 F.3d at 179.

227 *See* Liu, *supra* note 64, at 198 (finding that in recent years, even though factor four continues to have a strong correlation with fair use outcome because of the Supreme Court's claim in *Harper & Row*, it actually has a "slightly smaller effect than factor one" does).

inexact, subjective style of fair use analysis.[228] This remains the case today. This constantly evolving, case-specific framework of analysis has troubled some scholars:

> A threshold issue . . . concerns the fuzziness of fair use. In particular, the fair use doctrine requires courts and users to engage in a complex multivariate analysis whose result is nearly impossible to predict. Compounding this problem is the fact that courts generally keep the doctrine as vague as possible and decline to provide a formula for what constitutes fair use. Given that courts use such an open-ended analysis, their failure to converge on a shared understanding of what constitutes fair use is unsurprising.[229]

Indeed, the lack of a consistent set of guidelines for approaching fair use analysis is arguably concerning, if not because of a lack of predictability for parties to a copyright infringement lawsuit, then at least because these guidelines are explicitly codified by statute.[230] After all, 17 U.S.C. § 107 serves as Congress's articulation of the contours that should govern the courts' fair use analyses. However, instead of strictly adhering to the statute's language, many courts have subscribed to the influence of a single word from a 1990 law review article used in one Supreme Court opinion, and have rolled forward analyzing fair use through a "transformative" factor that was manufactured decades after the statute's passage.[231] The fact that so many courts are deciding fair use cases based on a criterion that did not even exist when the fair use statute was enacted by Congress suggests a systemic statutory ignorance. Thus, case law since the statutory codification of fair use in 1976 has further complicated its analysis, which has become "amorphous . . . veer[ing] into the metaphysical and evanescent."[232]

---

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

229 *See* Parchamovsky & Weiser, *supra* note 65, at 92–93.

230 17 U.S.C. § 107 (2018).

231 *See generally Campbell*, 510 U.S. 569 (citing Judge Leval's 1990 law review article in its then-novel emphasis of the now-important "transformative" factor in fair use analysis).

232 *See* Burroughs, *supra* note 107.

2. Parody Is Art, Not Science

Second, the theatre cases suggest that while 17 U.S.C. § 107 helps to protect parodies that make fair use of copyrighted material, what sufficiently constitutes "parody" is also not entirely settled. To be sure, prior to *Campbell*, parody cases were decided on a subjective, sometimes even normative basis, such as in *MCA, Inc. v. Wilson*.[233] When *Campbell* was decided, it imbued parody with sturdier legal grounds.[234] However, the definition of "parody" set forth in *Campbell* was particularly imprecise: amorphously, the "joinder of reference and ridicule."[235] Although the Supreme Court generously bestowed parody with a rather broad definition under the parameters of fair use, the key question for courts thereafter remained: what constitutes an effective such "joinder?"[236]

Certainly, in some cases, courts have found a stage play or musical to be an obvious parody. For example, the Second Circuit was quick to deem *Point Break Live!* a parody because it added to the "raw material" of the original 1991 film "jokes, props, exaggerated staging, and humorous theatrical devices to transform the dramatic plot and dialogue . . . into an irreverent, interactive theatrical experience."[237] Similarly, *Who's Holiday!* sufficiently "subvert[ed] the expectations of the Seussian genre, and lampoon[ed] the *Grinch*" for the Second Circuit to characterize the play as a parody.[238] However, in *TCA Television Corp.*, neither the district court nor the Second Circuit seemed interested in engaging in a discussion of whether the play's inclusion of "Who's on First" constituted a parody; instead, the former court simply cited a previous case to contend that, "It is hardly parodic to repeat [the] same exercise . . . just because society and the characters have

---

233 *See* Samuelson, *supra* note 113, at 824 (noting that courts "sometimes commented on bad taste or indecency when denying fair use defenses in parody cases").

234 Parody "'has an obvious claim to transformative value,' and thus deciding that the new work is a parody necessarily entails finding that the new work is transformative." *See* Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F. Supp. 2d 84, 89 (S.D.N.Y. 2003) (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

235 *See Campbell*, 510 U.S. at 583.

236 *Id.*; *see als*o Stacey Dogan & Mark Lemley, *Parody as Brand*, 47 U.C. DAVIS L. REV. 473, 474 (2013).

237 Keeling v. Hars, 809 F.3d 43, 45 (2d Cir. 2015).

238 Lombardo v. Dr. Seuss Enters., L.P., 279 F. Supp. 3d 497, 508 (S.D.N.Y. 2017).

aged."[239] To be sure, courts over the last four decades have granted theatrical creators and producers far more leeway in their ability to create and produce off-color parodies.[240] But the question remains how obviously parodic a stage play needs to be for a court to deem it so.[241] This ambiguity drives home, again, the jurisprudential problems created when courts and judges continue to emphasize the importance of "transformativeness" when transformativeness itself has little real meaning beyond one singular piece of aging case law.[242]

3. The Transformative Use Inquiry Is Increasingly Popular, Beneficial to Defendants, and Yet Ever-Mystifying (and Should Be Abandoned)

Third, and finally, the theatre cases illustrate three key points about the transformative use inquiry in contemporary fair use jurisprudence: (1) the transformative use inquiry has dramatically grown in fair use jurisprudence in recent years[243]; (2) more often than not, it has resulted in findings of fair use to the benefit of parties accused of copyright infringement[244]; and yet, puzzlingly, (3) the term "transformative" remains far from settled as a legal term of art.[245] These three details—when operating in concert as they currently do—are rather troubling, and ought to demand greater attention from legal scholars and practitioners, as they altogether

---

239 TCA Television Corp. v. McCollum, 151 F. Supp. 3d 419, 436 (S.D.N.Y. 2015) (citing Adjmi v. DLT Entm't Ltd., 97 F. Supp. 3d 512, 530 (S.D.N.Y. 2015)).

240 *See* MCA, Inc. v. Wilson, 677 F.2d 180, 180 (2d Cir. 1981).

241 Rachel Brooke, *Theatrical Parody in an Age of Uncertain Fair Use in the Second Circuit*, N.Y.U. J. INTELL. PROP. & ENT. L. BLOG (Apr. 4, 2018), https://blog.jipel.law.nyu.edu/2018/04/theatrical-parody-in-an-age-of-uncertain-fair-use-in-the-second-circuit/ [https://perma.cc/34RP-NZ6T].

242 *See infra* Part II.B.3.

243 *See* Moskowitz, *supra* note 64, at 1058 (noting "the increased use of transformative use as a fair use defense").

244 *See* Liu, *supra* note 64, at 163 (stating that "of all the dispositive decisions that upheld transformative use, 94% eventually led to a finding of fair use"); *see also* Netanel, *supra* note 16, at 715 (finding "a dramatic increase in defendant win rates on fair use that correlates with the courts' embrace of the transformative use doctrine").

245 *See* Liu, *supra* note 64, at 163 (contending that courts "diverge widely on the meaning of transformative use"); Brian Sites, *Fair Use and the New Transformative*, 39 COLUM. J.L. & ARTS 513, 515, 517 (2016) (highlighting the "malleable," ever-evolving nature of the transformative use inquiry).

portend great uncertainty and vagueness in fair use jurisprudence. Indeed, studies show that the transformative use inquiry has been involved in as many as 90% of fair use decisions in recent years, "gradually approaching total dominance in fair use jurisprudence since *Campbell*."[246] Notably, all of the post-*Campbell* theatre cases examined in this Note engaged in a transformative use discussion.

Further, this "judicial embrace"[247] of transformative use has resulted in a "dramatic increase in defendant win rates on fair use."[248] Some scholars now note that transformative use by the defendant is "a robust predictor" of a finding of fair use.[249] According to a study published in 2019 by the *Stanford Technology Law Review* (and evidenced by the law review article's chart, reproduced below), the share of transformative use decisions in fair use decisions has increased dramatically over the last two decades, when it jumped from 8% in 1994 (the year that *Campbell* was handed down by the Supreme Court) to 88% in 2016.[250]

---

246 *See* Liu, *supra* note 64, at 166; *see also* Netanel, *supra* note 16, at 736 ("[W]e see that fair use doctrine today is overwhelmingly dominated by the Leval–*Campbell* transformative use doctrine.").

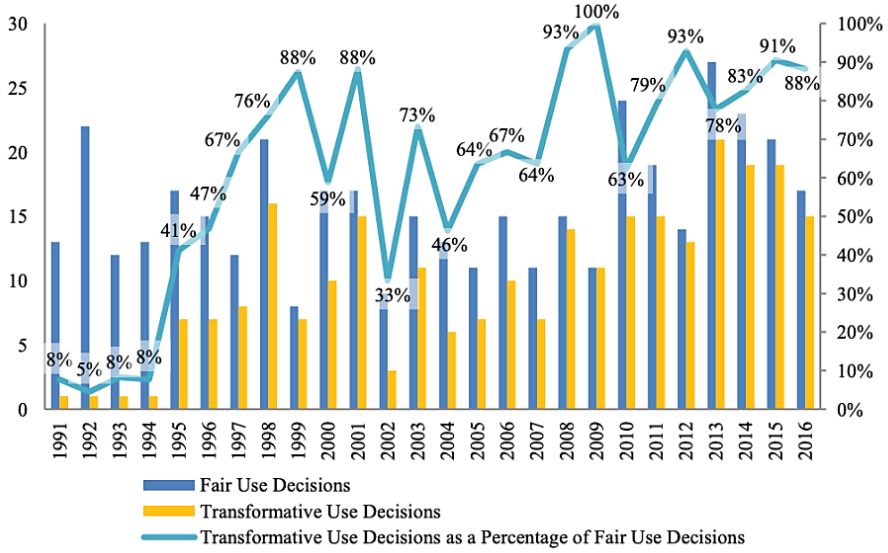
247 *See* Netanel, *supra* note 16, at 736.

248 *Id.* at 715.

249 Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 84 (2012).

250 *See* Liu, *supra* note 64, at 174.

Figure 1: Transformative Use and Fair Use Cases Over Time[251]



This trend of increasing transformative use decisions as a percentage of fair use decisions is illustrated further—albeit anecdotally, but still, as examples—by the six theatre cases post-*Campbell* explored in this Note, in which all but one resulted in a finding of fair use. This jurisprudential trend has, no doubt, been a result of the Supreme Court's assertion in *Campbell* that when looking at the first factor of fair use analysis, courts should investigate "whether the new work merely 'supersede[s] the objects' of the original . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[252] Cases that have followed, notably *Cariou*, have echoed the importance of the transformative use inquiry.[253] According to the aforementioned Stanford study, influential fair use decisions led to

---

[251] *See id.* at 175.

[252] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)); *see also* Netanel, *supra* note 16, at 719; Adjmi v. DLT Entm't Ltd., 97 F. Supp. 3d 512, 529–30 (S.D.N.Y. 2015) (referring to "purpose and character" inquiry identified in *Campbell* and acknowledging that courts "refer to this property by the shorthand 'transformative'").

[253] See Recent Case, *Copyright Law*, *supra* note 80, at 1228 (*Cariou* "relaxed the requirements for transformativeness such that a work need only show 'new expression, meaning, or message'").

immediate surges in transformative use decisions, such as *Perfect 10* in 2007 and the series of *Google Books* decisions that began emerging in 2012.[254]

However, judges "diverge widely on the meaning of transformative use,"[255] and this divergence has had tangible jurisprudential consequences. The most glaring example of this was the Second Circuit's broad decision in 2013 in *Cariou* that once a secondary work was found to be transformative, the other fair use factors were "mitigated."[256] Further, in *Adjmi*, the Southern District of New York concluded that *3C* was "highly transformative" because the new play was such "a drastic departure from the original" television series, even though the situation and circumstances were unchanged.[257] By contrast, in *TCA Television Corp.*, the Second Circuit did not consider the use of a comedy routine—in a differing situation and circumstance from the original—to be sufficiently transformative.[258] Even though the transformative use inquiry has increasingly been used in fair use litigation, and even though judges seem to side increasingly with parties accused of infringement on the demonstration of transformativeness, there still exists a wide array of thought on what transformativeness even means.

While the transformative use inquiry affords creative liberty to artists and creators in court, its existence as a non-statutory goalpost is jurisprudentially dangerous, has created unignorable judicial skepticism, and effectively lessens the importance of the actual fair use statute: 17 U.S.C. § 107.[259] By deeming the singular issue of

---

254 *See* Liu, *supra* note 64, at 174.

255 *See id.* at 163; *see also* Moskowitz, *supra* note 64, at 1093 (pondering that allowing judges to determine what is transformative may fall outside what is actually "fair" for the creators of original works).

256 *See* Samuelson, *supra* note 113, at 830.

257 *Adjmi*, 97 F. Supp. 3d at 535.

258 *See* TCA Television Corp. v. McCollum, 839 F.3d 168, 180 (2d Cir. 2016) ("[E]ven if the Play's purpose and character are completely different from the vaudevillian humor originally animating 'Who's on First?,' that, by itself, does not demonstrate that defendants' use of the Routine in the Play was transformative of the original work.").

259 *See* Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (in which Judge Easterbrook expresses skepticism of the advancement of the transformative use inquiry after *Cariou* "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").

what "transformative" means as essentially dispositive, judges over the last two decades have effectively rendered the other fair use factors—the ones that are actually specified in the Copyright Act—"virtually worthless in favor of a fabricated factor."[260] Judges and legal scholars should be more distressed by this trend than they presently seem to be; after all, the proposal of the transformative use inquiry in Judge Leval's influential 1990 article was not meant to exclusively prioritize the first factor, 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."[261] Although the wholesale elimination of the transformative use inquiry would be a radical change, doing so would offer parties in a copyright infringement suit significantly more clarity and transparency, and would encourage judges to adhere more closely to the language codified by Congress in 1976.[262]

In 1841, Justice Story wrote that in regard to the possibility of a bright-line standard in fair use cases, it is "not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases."[263] The boundaries of a fair use standard still await formal demarcation, and as a result, fair use analysis remains doctrinally ambiguous, and the balancing test of the four statutory factors inevitably ends up determined by the whim of the specific judge or court assessing the case.[264] Further, in recent decades, prevailing normative values among the judiciary have shifted what may be appropriately considered a parody.[265] And perhaps most

---

260 *See* Burroughs, *supra* note 108.

261 *See* Moskowitz, *supra* note 64, at 1085.

262 17 U.S.C. § 107 (2018).

263 *See* Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

264 *Fair Use*, CLAREMONT C. LIBR., http://libraries.claremont.edu/achontutorial/pages/achon_mod04pg06.html [https://perma.cc/9TU3-N7RK] (referring to fair use as a "relatively subjective determination").

265 *Compare* MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) (in the year 1981, a court was "not prepared to hold that a commercial composer can . . . substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody"), *with* Lombardo v. Dr. Seuss Enters., L.P., 279 F. Supp. 3d 497, 509 (S.D.N.Y. 2017) (by 2018, courts praised such takes: "The Play's coarseness and vulgarity lampoons *Grinch* by highlighting the ridiculousness of the utopian society depicted in the original work: society is not good and sweet, but coarse, vulgar and disappointing").

critically, even though the transformative use inquiry has dominated and determined fair use jurisprudence since *Campbell* in 1994, courts still differ on how to determine sufficient transformativeness.[266] Because fair use analysis remains entirely case-by-case and highly fact-specific, today there is "no formula" for a successful fair use defense.[267]

III. "YOU'VE GOT TO BE CAREFULLY TAUGHT"[268]: CREATING THEATRE, BEST PRACTICES, AND AVOIDING RELIANCE ON FAIR USE

While most of this Note has, thus far, been written with legal and academic audiences in mind, this final Part is offered primarily for the benefit of theatre artists, creators, and producers. The recommendations that follow hereafter may seem intuitive to lawyers and legal scholars, but they have indeed been penned expressly as a roadmap for practitioners in the theatre industry, who, until now, lacked a quality source of guidance as to the permissibility of using previously copyrighted material in new theatrical works.

Although Broadway is not the be-all and end-all destination for theatrical creators and producers in presenting their works before an audience, it arguably offers the highest chance for commercial visibility and, thus, positive financial prospects.[269] For example, the 2018–2019 Broadway season saw a total box office gross of $1.8 billion.[270] Ticket prices have soared over recent years, and so, too,

---

266 *See* Liu, *supra* note 64, at 163.

267 U.S. COPYRIGHT OFF., MORE INFORMATION ON FAIR USE, https://www.copyright.gov/fair-use/more-info.html [https://perma.cc/X8K2-KT5K] [hereinafter MORE INFORMATION ON FAIR USE].

268 The title of a song from the 1949 musical *South Pacific*.

269 "Broadway" refers to venues in the Theatre District near Times Square in Midtown Manhattan with 500 or more seats. Such theaters have been certified by The Broadway League, the trade association for the Broadway industry, and productions that open in one of the (currently) 41 Broadway houses are usually eligible for consideration for that season's Tony Awards. *See* Ludovic Coutaud, *The Difference Between Broadway, Off-Broadway, and Off-Off Broadway*, NYFA MUSICAL THEATRE STUDENT RESOURCES (Jan. 18, 2019), https://www.nyfa.edu/student-resources/difference-broadway-off-off-broadway/ [https://perma.cc/L7RA-4E8N].

270 *See* Michael Paulson, *Broadway's Box Office Keeps Booming. Now Attendance Is Surging, Too.*, N.Y. TIMES (May 29, 2019), https://www.nytimes.com/2019/05/29/theater/broadway-box-office.html [https://perma.cc/SYE6-VV36].

have record industry grosses.[271] When a production secures a Broadway house (and thus, secures the opportunity to be considered for that season's Tony Awards[272]), producers are incentivized to fill as many seats at as high a price point as feasible. This may illustrate why, of the eleven original musicals that opened during the 2018–2019 Broadway season, seven were based on a previous film, book, or popular musical artist's life story, and another was a separate jukebox musical.[273] Commercial producers may anticipate that built-in fan bases for existing properties will generate ticket sales in turn.[274]

---

[271] *See* Michael Paulson, *High Ticket Prices Are Fueling a Broadway Boom*, N.Y. TIMES (May 23, 2017), https://www.nytimes.com/2017/05/23/theater/high-ticket-prices-are-fueling-a-broadway-boom.html [https://perma.cc/A3AJ-M9SU].

[272] *See Rules and Regulations of the American Theatre Wing's 73rd Annual Tony Awards—2018–2019 Season*, TONY AWARDS, https://www.tonyawards.com/documents/4/2019_Tony_Rules__Regulations.pdf [https://perma.cc/4C4W-JTDK] (listing, in Section I-2, certain requirements for the Tony Awards Administration Committee to determine that a production is eligible in the various categories for nomination for a Tony Award, such as officially opening in an eligible Broadway theatre).

[273] These seven musicals from the 2018–2019 Broadway season were: (1) *Ain't Too Proud* (a jukebox musical based on the story of The Temptations), (2) *Beetlejuice* (based on the 1988 film of the same name), (3) *Be More Chill* (based on the 2004 novel of the same name), (4) *The Cher Show* (a jukebox musical based on the life story of Cher), (5) *King Kong* (based on the 1933 film of the same name), (6) *Pretty Woman* (based on the 1990 film of the same name), and (7) *Tootsie* (based on the 1982 film of the same name). *Head Over Heels* was another jukebox musical from the season, though it was not a bio-musical like that of *Ain't Too Proud* or *The Cher Show*; rather, its score featured music exclusively from The Go-Go's, set to a different story. *See* Ben Brantley, *What's Broadway Got to Do With It?*, N.Y. TIMES (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/theater/broadway-pop-musicals.html [https://perma.cc/632J-P5R3] (contending that the 2001 ABBA jukebox musical *Mamma Mia!* opened "the floodgates" to an ongoing trend of jukebox musicals on Broadway).

[274] Ken Davenport, *Some Startling New Statistics on Broadway Musical Adaptations vs. Original Shows*, PRODUCER'S PERSPECTIVE (May 1, 2014), https://www.theproducersperspective.com/my_weblog/2014/05/some-startling-new-statistics-on-broadway-musical-adaptations-vs-original-shows.html [https://perma.cc/6EWV-78SW]; *see also* Peter Marks, *As Tourist-Friendly Musicals Take Over, Broadway No Longer Belongs to Playwrights*, WASH. POST (Dec. 27, 2017), https://www.washingtonpost.com/lifestyle/as-tourist-friendly-musicals-take-over-broadway-no-longer-belongs-to-playwrights/2017/12/27/2826fd20-d930-11e7-8e5f-ccc94e22b133_story.html [https://perma.cc/ZMT8-QDDL].

To be sure, the creation of an original musical or stage play quite commonly involves the borrowing of some previous idea.[275] Many well-known Broadway shows are based off of books or poems.[276] Others have been inspired by previous stage productions.[277] An increasing number of Broadway productions come directly from the screen, whether film or television.[278] Given, then, the frequent basis with which new theatrical properties are inspired by previous works, it is unsurprising that many industry professionals are "cautious about utilizing pre-existing copyrighted materials in their new works."[279]

While this Note has, thus far, explored the history of fair use in American copyright law and examined the doctrine's analysis in recent litigation involving theatrical properties, this Part III now turns to an ultimate recommendation for theatre professionals: when writing, developing, or mounting a new production, theatre artists, creators, and producers should avoid any sort of reliance on the fair use doctrine. Despite several recent successes at trial for copyright infringement defendants in the theatre industry, fair use remains a mystifying and muddy defense.[280] As this Note has established, fair

---

[275] Ken Davenport, *50 Years of Broadway Musical Source Material: A By the Numbers Infographic*, PRODUCER'S PERSPECTIVE (Nov. 20, 2015), https://www.theproducersperspective.com/my_weblog/2015/11/50-years-of-broadway-musical-source-material-a-by-the-numbers-infographic.html [https://perma.cc/9QNE-NKC8] (illustrating that between 1965 and 2014, only 24.3% of new Broadway musicals were truly original, rather than being based on a film, play, life story, etc.).

[276] Andrew Lloyd Webber's 1981 musical *Cats*, for example, was inspired by T.S. Eliot's 1939 poetry book *Old Possum's Book of Practical Cats*. *See* Kathryn Hughes, *The Nine Lives of* Cats*: How Poetry Became a Musical, Then a Film . . .*, GUARDIAN (Dec. 16, 2019), https://www.theguardian.com/books/2019/dec/16/nine-lives-ts-eliot-book-practical-cats-andrew-lloyd-webber-taylor-swift [https://perma.cc/ZT8B-TNW8].

[277] Jonathan Larson's 1996 musical *Rent*, for example, was loosely based on Giacomo Puccini's 1896 opera *La Bohème*. *See* Anthony Tommasini, *Like Opera Inspiring It, 'Rent' Is Set to Endure*, N.Y. TIMES (Sept. 5, 2008), https://www.nytimes.com/2008/09/06/arts/music/06rent.html [https://perma.cc/F49M-MD76].

[278] Patrick Healy, *Like the Movie, Only Different*, N.Y. TIMES (Aug. 1, 2013), https://www.nytimes.com/2013/08/04/movies/hollywoods-big-bet-on-broadway-adaptations.html [https://perma.cc/B885-LYWX].

[279] *See* Aylesworth, *supra* note 18.

[280] See *supra* Part II.B.

use is "too indeterminate a doctrine to provide a reliable touchstone for future conduct."[281]

The remainder of this Part offers and examines three best practices for theatrical artists, creators, and producers to employ when putting pen to paper, whether writing a new musical or play, or whether bringing a script to the stage: (1) ensure that the work being created is an entirely original idea, or, based off of a property that is unquestionably in the public domain; (2) if the first option is impossible, obtain explicit licenses, clearances, or permissions from relevant copyright holders; and (3) if all else fails, look to legal resource organizations in the theatre industry for litigation support and prepare an extraordinarily strong fair use defense for your potential day in court.

A. Original Work and The Public Domain

It is generally considered to be both difficult and atypical within the commercial theatre industry for a bona fide original piece of theatre to arrive on Broadway.[282] In fact, this specific observation was presented directly to the audience before each performance of the original 2018 Broadway musical, *Gettin' the Band Back Together*: "In a scripted welcome before the curtain, Ken Davenport, the lead producer and a co-author of the [show's] book, delivers a supercharged spiel[:] 'What you're about to see is one of those rare things on Broadway these days . . . A totally original musical.'"[283]

---

[281] James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 192 (2005).

[282] Logan Culwell-Block, *15 Completely Original Musicals Every Theatre Fan Should Know*, PLAYBILL (Oct. 5, 2018), http://www.playbill.com/article/15-completely-original-musicals-every-theatre-fan-should-know [https://perma.cc/9D6Z-SMND] (arguing that new musicals "are often based on source material, be it a film, a book, a play," and that original musicals, "meaning shows without any source material whatsoever," have generally been "the exception, not the rule"); Peter Marks, *Broadway's Producers: A Struggling, Changing, Breed*, N.Y. TIMES (Apr. 7, 1996), https://www.nytimes.com/1996/04/07/theater/broadway-s-producers-a-struggling-changing-breed.html [https://perma.cc/5F7V-5CC5] (illustrating that Broadway was once "a fertile field" for original dramas and musicals in the early twentieth century, but that the industry has since become "hard and unyielding" for such works, and that instead, over the decades, revivals and long-running mega-musicals have taken over Broadway).

[283] Jesse Green, *Review: Familiar Rock Dreams in 'Gettin' the Band Back Together'*, N.Y. TIMES (Aug. 13, 2018), https://www.nytimes.com/2018/08/13/theater/review-gettin-

From a legal perspective, that rare, new, original stage play is the truest way to safeguard theatre industry professionals against copyright infringement suits, given the prevailing uncertainties around the fair use doctrine and the test of transformativeness. If a musical or play is written or opens with no validly copyrighted underlying material in its script, plaintiffs seeking to sue writers or producers for infringement will lack proper legal standing to do so.[284] Further, because the Supreme Court has described fair use as an affirmative defense, such doctrine will not even need to be raised in litigation if a plaintiff fails to show a *prima facie* case of copyright infringement.[285]

However, given both the intellectual and commercial challenges of conceiving and mounting an original play or musical, theatre artists, creators, or producers may feel the need or desire to draw inspiration from previously existing material. If this is the case, then the public domain offers the safest possible route to avoid copyright litigation later on. In essence, the public domain refers to the catalog of creative materials that are not protected by intellectual property laws, which means that the public owns the works and that anyone can use the works without obtaining permission.[286]

There are several ways for works to become part of the public domain. One common way is for their copyrights to expire. Since January 1, 2019, upon each new year, all works governed by the Copyright Act of 1909 will enter the public domain at the end of the

---

the-band-back-together-broadway.html [https://perma.cc/EB83-ZJP4]. Also, the new, original musicals, while rare, are not unheard of (notable examples include *A Chorus Line*, *Come From Away*, *Dear Evan Hansen*, and *Hedwig and the Angry Inch*, among others).

[284] *See* U.S. COPYRIGHT OFF., COPYRIGHT BASICS—CIRCULAR 1, https://www.copyright.gov/circs/circ01.pdf [https://perma.cc/87Y7-G6AG] ("Before an infringement suit may be filed in court, registration (or refusal) is necessary for works of U.S. origin."); *see also Standing to Sue in Copyright Infringement Suits*, 29 U. CHI. L. REV. 200 (1961) (asserting that the Copyright Act gives only "copyright proprietors" the right to sue for infringement); *see also generally* TCA Television Corp. v. McCollum, 839 F.3d 168 (2d Cir. 2016) (a case in which plaintiffs lost due to failure to demonstrate standing).

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

[286] Rich Stim, *Welcome to the Public Domain*, STAN. U. LIBR. COPYRIGHT & FAIR USE OVERVIEW, https://fairuse.stanford.edu/overview/public-domain/welcome/ [https://perma.cc/AP2Y-3E39].

95th calendar year from publication.[287] For example, the copyright for all works published in the United States in the year 1923 expired on January 1, 2019.[288] On January 1, 2020, this took effect for all works published in 1924—and this will continue so on and so forth.[289] However, for works published on or after January 1, 1978, the copyright lasts for the full life of the author plus an additional seventy years.[290]

Another way for works to become part of the public domain is for a copyright holder to expressly place the work into the public domain by dedicating it to the public.[291] While this method for works to enter the public domain is "rare," it is not unheard of in the theatrical space.[292] For example, in 2000, National Public Radio deemed American playwright Charles L. Mee the "Public-Domain Playwright" for his decision to make "the texts of his plays freely available on the Web, and forgo . . . royalties."[293] Mee, who contends that there is "no such thing as an original play," runs a website called "the (re)making project," through which users may download and use the texts of any of Mee's plays for free.[294] Mee encourages anyone to "pillage" his plays and use his texts to "build your own, entirely new, piece—and then, please, put your own name to the work that results."[295]

Many well-known theatrical properties have been inspired by works from the public domain. Most recently, *Hadestown*, the winner of the 2019 Tony Award for Best Musical, "borrows the

---

[287] U.S. COPYRIGHT OFF., DURATION OF COPYRIGHT—CIRCULAR 15A, https://www.copyright.gov/circs/circ15a.pdf [https://perma.cc/W3VX-5JX5] [hereinafter DURATION OF COPYRIGHT].

[288] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998).

[289] *Id.*

[290] *See* DURATION OF COPYRIGHT, *supra* note 287.

[291] Phillip Johnson, *'Dedicating' Copyright to the Public Domain*, 71 MOD. L. REV. 587 (2008).

[292] *See* Stim, *supra* note 286.

[293] Charles Mee, *Public-Domain Playwright*, NPR (Aug. 17, 2000), https://www.npr.org/templates/story/story.php?storyId=1080842 [https://perma.cc/N3ET-TZEW].

[294] Charles Mee, *About the (Re)making Project*, (RE)MAKING PROJECT, http://www.charlesmee.org/about.shtml [https://perma.cc/K3PN-D6BV].

[295] *Id.* (note, however, that Mee requests artists to clear performance rights if people want to perform his play "essentially or substantially as I have composed them").

myths of Orpheus and Eurydice, and of Hades and Persephone and marries them in a New Orleans jazz-folk-musical retelling of the ancient Greek tales."[296] *Hadestown*'s book writer and composer, Anaïs Mitchell, ostensibly did not need to obtain any licenses or permissions to use age-old Greek mythology—clearly part of the public domain—as a storytelling premise. The works of William Shakespeare offer another example of a popular source of inspiration for stage plays in the public domain. Swapping out the Capulets and the Montagues for the Sharks and the Jets, the classic 1957 musical *West Side Story* is essentially a retelling of *Romeo and Juliet*.[297] Within the storyline of the Tony-winning 1948 musical *Kiss Me, Kate*, the show's lead characters perform a musical version of Shakespeare's *The Taming of the Shrew*.[298] Most recently, The Public Theater in New York City put up musicalized versions of both *As You Like It* and *Twelfth Night* through its Shakespeare in the Park summer series, and each musical included new, "jaunty and entertaining" musical numbers in between Shakespeare's original text.[299]

While the public domain offers a safe haven for inspired creators, a pertinent inquiry for those borrowing from the public domain is ensuring that all elements being borrowed or used are indeed in the public domain.[300] This was a central issue in the 2011 case of *Canal+ Image UK Ltd. v. Lutvak*.[301] In *Canal+*, the plaintiff,

---

[296] Hayley Levitt, *In Hadestown, What Is Myth and What Is Musical?*, THEATERMANIA (May 11, 2019), https://www.theatermania.com/broadway/news/in-hadestown-what-is-myth-and-what-is-musical_88694.html [https://perma.cc/9QA8-UTZA].

[297] *Leonard Bernstein and West Side Story*, FOLGER SHAKESPEARE LIBR., https://www.folger.edu/shakespeare-unlimited/west-side-story-leonard-bernstein [https://perma.cc/2NAW-2VSJ].

[298] *The Gender Politics of 'Kiss Me, Kate,'* FOLGER SHAKESPEARE LIBR., https://www.folger.edu/shakespeare-unlimited/kiss-me-kate [https://perma.cc/XXS2-VY2B].

[299] Logan Culwell-Block, *12 Musicals on Broadway and Beyond That Came from Shakespeare Plays*, PLAYBILL (Sept. 29, 2018), http://www.playbill.com/article/12-musicals-on-broadway-and-beyond-that-came-from-shakespeare-plays [https://perma.cc/UY5A-9XA5].

[300] For example, look to translation: per section 7 of the 1909 Copyright Act, if you translate an old work that of itself is in the public domain, the translation itself would be protected by copyright because the translation would be considered a derivative work; *see also Copyright and Scholarship: Public Domain*, B.C. LIBR., https://libguides.bc.edu/copyright/publicdomain [https://perma.cc/V5TQ-R5LS].

[301] 773 F. Supp. 2d 419 (S.D.N.Y. 2011).

a production company, owned the copyright to the 1949 film *Kind Hearts and Coronets*, a comic adaptation of "Israel Rank," a 1907 novel by Roy Horniman.[302] The 1949 film, which "tells essentially the same story" as the novel, was famous for the lead performance of Sir Alec Guinness, who played eight different characters murdered by the story's protagonist.[303] Canal+ argued in litigation that this element of "having all of the murder victims played by the same leading comic actor [was] central to the artistic expression" of "Kind Hearts and Coronets."[304]

In 2003, Canal+ entered into a licensing agreement with defendants, Steven Lutvak and Robert L. Freedman, for them to adapt the film into a stage musical.[305] The following year, Canal+, acting within its contractual rights, decided not to proceed further in production of the musical with the defendants.[306] However, Lutvak and Freedman continued to develop their musical, and revised it to remove elements unique to the copyrighted film, but still maintained the general plot of the 1907 novel, which had passed into the public domain.[307] As such, their musical in draft form continued to "use one actor to play all of the victims."[308]

Following an early 2010 announcement[309] about a pre-Broadway commercial production of the musical, which was eventually titled *A Gentleman's Guide to Love and Murder* ("*Gentleman's Guide*"), Canal+ sued, arguing that the musical "retained the central [element] of 'Kind Hearts and Coronets:' the comedy inherent in having all eight of the aristocratic murder victims played by a single

---

302 *Id.* at 424.

303 *Id.* at 425.

304 *Id.*

305 *See id.*

306 *See id.* at 425–26.

307 *IP/Entertainment Case Law Updates:* Canal+ Image UK Ltd. v. Lutvak, LOEB & LOEB, LLP (Mar. 29, 2011), https://www.loeb.com/en/insights/publications/2011/04/canal-image-uk-ltd-v-lutvak [https://perma.cc/B94S-6BQA] [hereinafter LOEB & LOEB, LLP].

308 *Canal+*, 773 F. Supp. 2d at 426.

309 Kenneth Jones, *Mays to Star in Premiere of* Gentleman's Guide *Musical at La Jolla Playhouse; Season Announced*, PLAYBILL (Jan. 24, 2010), http://www.playbill.com/article/mays-to-star-in-premiere-of-gentlemans-guide-musical-at-la-jolla-playhouse-season-announced-com-165224 [https://perma.cc/4SJH-W69U].

actor."[310] Defendants moved to dismiss on the ground that Canal+ failed to state a claim for copyright infringement.[311]

The Southern District of New York dismissed Canal+'s claim.[312] It cited precedent from the Second Circuit to first note that in "the case of a derivative work based on an underlying work that is in the public domain, only the material added to the underlying work is protected by copyright."[313] The court found that the film "Kind Hearts and Coronets" contained "limited original elements" compared to the original novel.[314] As such, the court disagreed with the central argument made by Canal+ and decided that the dramatic device of having one actor play multiple roles is not only not protectible, but that it is simply "use of a standard convention."[315] Moreover, the court stated that while the dramatic device of the composite victim "may add to the amusement" of both the film and the new musical, it decided that it was hardly the "heart and soul" of either work.[316] Ultimately, the defendants won because their use of the material cautiously and properly toed the line of content it borrowed from the original novel in the public domain (which constituted permissible use) versus that from the film (which they would not have been allowed to use).[317] This level of caution was critical to the defendants' victory, and thanks to the novel's existence in the public domain, development on *Gentleman's Guide* continued thereafter, and the show ultimately won the 2014 Tony Award for Best Musical.[318]

To be sure, the public domain offers a legally dependable avenue for theatre practitioners seeking to borrow previous material;

---

310 *Canal+*, 773 F. Supp. 2d at 426.

311 *See id*.

312 *See id.* at 446.

313 *Id.* at 430 (quoting Waldman Publ'g Corp. v. Landoll, Inc., 43 F.3d 775, 782 (2d Cir. 1994)).

314 *Id.* at 433.

315 *Id*.

316 *Canal+*, 773 F. Supp. 2d at 439.

317 *See* LOEB & LOEB, LLP, *supra* note 307.

318 *See* Patrick Healy, *2014 Tony Awards: 'Gentleman's Guide' and 'All the Way' Are Named Top Shows*, N.Y. TIMES (June 8, 2014), https://www.nytimes.com/2014/06/09/theater/theaterspecial/audra-mcdonald-and-neil-patrick-harris-win-acting-honors.html [https://perma.cc/9MK8-82UC].

however, one non-legal consideration worth making is the potentially lost sense of a truly new, creative artistic expression. The use of material in the public domain generally means the use of material that the mass public already knows about in some capacity. As such, simply regurgitating an age-old story is unlikely to drive modern audiences to a show.

In order to create an artistically novel work, then, theatre practitioners creating works borrowed from the public domain will need to imbue their shows with a sense of newness and immediacy. For example, rather than repeating the story of "The Wizard of Oz," the 2003 musical *Wicked* tells the origin story of the Wicked Witch of the West, giving her the name Elphaba—inspired by the phonetic pronunciation of the initials of L. Frank Baum, the author of the 1900 children's novel, "The Wonderful Wizard of Oz," which is in the public domain.[319] In another example, the previously mentioned *Hadestown* sets an ancient Greek myth to New Orleans-style music and its initial Broadway production was "inventively staged."[320] Altogether, the use of material from the public domain will require a balancing test for theatre creators between the legal (yes, it is lawful) and the creative (but is it artistically interesting?) and is ultimately only one option for theatre practitioners in their creators' toolkit.

B. Licensing, Clearances, and Permissions

Another way to attempt to circumvent copyright infringement litigation in one's new musical or play is by obtaining a license, clearance, or permission from the relevant copyright holder for use of previous material in the new work.[321]

In some instances, this may simply entail figuring out who the controlling party or estate is to a copyright and asking him or her for

---

[319] *See* Eriq Gardner, *Warner Bros. Wins Key Legal Ruling Impacting All 'Wizard of Oz' Remakes (Exclusive)*, HOLLYWOOD REP. (July 6, 2011, 11:40 AM), https://www.hollywoodreporter.com/thr-esq/warner-bros-wins-key-legal-208255 [https://perma.cc/Q2DW-Y4MU].

[320] Jonathan Mandell, *Hadestown on Broadway: Review, Pics, Video*, N.Y. THEATER BLOG (Apr. 17, 2019), https://newyorktheater.me/2019/04/17/hadestown-on-broadway [https://perma.cc/Q42K-LYDM].

[321] *See* Stim, *supra* note 15.

permission. In the arguably small world of musical theatre, this may be facile enough through preexisting professional or personal relationships. For example, when Lin-Manuel Miranda, in the process of writing *Hamilton*, decided to insert a line into the show from an existing Jason Robert Brown musical, Miranda—who already knew Brown—simply sent Brown a text message asking if he could use the line.[322] Brown then replied to Miranda: "Go, write, be happy. I extend my blessing."[323] This request—indeed, as casual as a text message—effectively constituted a clearance.[324] After such an informal request, however, it would be wise for the new user to follow up with the copyright holder with a more detailed, formal written instrument specifying additional deal terms as necessary, and should probably not officially use the work until such a contract has been fully executed.[325] Additionally, because not everybody has preexisting industry connections, many artists or producers may benefit from hiring a music rights clearance expert to assist in navigating the intricate music licensing landscape.[326]

---

[322] *See* Jason Robert Brown (@mrjasonrbrown), TWITTER (May 8, 2019, 5:37 PM), https://twitter.com/mrjasonrbrown/status/1126239791656382465 [https://perma.cc/22YM-7X4Q].

[323] *Id.*

[324] *See* Rich Stim, *The Basics of Getting Permission*, STAN. U. LIBR. COPYRIGHT & FAIR USE OVERVIEW, https://fairuse.stanford.edu/overview/introduction/getting-permission/ [https://perma.cc/ZPW9-YD56].

[325] Interview with Susan Mindell, Partner, Entertainment/Theatre Law Firm Levine Plotkin & Menin, LLP, in N.Y., N.Y. (Sept. 3, 2019) (Mindell explained further that such a formal follow-up written instrument should include specific details about the work being used, reasons for its use, and material terms for the use, such as how long it will be used for, how many times it will be used, etc. In addition, for those obtaining permissions from musical theater writers and composers, such as Jason Robert Brown, copyright users should ensure that the formal written instrument requires the copyright holder to instruct the relevant licensing organization that owns the rights to the property itself—such as, for example, how Music Theatre International owns the licensing rights for Brown's *The Last Five Years*—to authorize any such licenses for a new use.).

[326] *See* Iser, *supra* note 14 (stating that Deborah Mannis-Gardner worked as "the music clearance guru . . . responsible for clearing all of Lin-Manuel Miranda's references to musical theatre and popular music"); Sopan Deb, *How Can 'Moulin Rouge! The Musical' Upstage the Movie? With 70 Songs*, N.Y. TIMES (July 17, 2019), https://www.nytimes.com/2019/07/17/theater/moulin-rouge-musical-songs.html [https://perma.cc/L3MF-MNN7] (stating that the lead producer of *Moulin Rouge!* hired a music producer named Janet Billig Rich "to help with the clearances").

Ultimately, when obtaining clearances and permissions, it is important for copyright users to have as comprehensive an understanding as possible how he or she would or might like to use the original work. A "grand rights license," for example, is what any user will need to obtain from a copyright holder in order to use parts of a previously copyrighted musical composition in a dramatic performance that tells a narrative story, or, in other words, a musical or stage play.[327] If a new musical's creative team has plans to produce a cast recording or album, the copyright user will also need to obtain a "mechanical license" from the copyright holder in order to distribute CDs or records that contain the copyrighted material therein.[328] Moreover, if producers have intentions to mount international productions of a show, rights shall need to be cleared for the relevant territories.[329]

Moulin Rouge!, which opened on Broadway in 2019, offers a case study of licensing and clearances for a new musical.[330] The show is the stage version of Baz Luhrmann's 2001 film, which became known partly for its wide-ranging jukebox soundtrack, including the likes of popular musical artists such as Elton John, Madonna, and The Police, to name just a few. Over a decade after the film's debut, when a creative team assembled to develop a Broadway stage production of the film, the team made a commitment to "more music," which resulted in a final set list of musical numbers for the Broadway show that includes 70 songs credited to 161 writers.[331] The list, updated for newer ears, includes an array of full tracks and samples from songs including Lady Gaga's "Bad Romance," Katy Perry's "Firework," and Sia's "Chandelier."[332]

---

327 *See Common Licensing Terms Defined*, ASCAP, https://www.ascap.com/help/ascap-licensing/licensing-terms-defined [https://perma.cc/XF86-LYTP].

328 Rebecca Milzoff, *How Broadway's 'Moulin Rouge!' Got the Rights to 'Torn,' 'Don't Speak' & More Pop Smashes*, BILLBOARD (Aug. 23, 2019), https://www.billboard.com/articles/news/broadway/8527999/moulin-rouge-broadway-soundtrack-rights-pop-hits [https://perma.cc/N7EM-QGQJ].

329 *See* Deb, *supra* note 326.

330 *See id.*; *see also* Milzoff, *supra* note 328.

331 *See* Deb, *supra* note 326.

332 Madison Malone Kircher, *You Can Tell Everybody These Are All the Songs in Broadway's* Moulin Rouge, VULTURE (Aug. 30, 2019), https://www.vulture.com/2019/08/moulin-rouge-broadway-soundtrack-full-list-of-songs.html [https://perma.cc/6HGN-K5FK].

The creative team for *Moulin Rouge!* enlisted the assistance of a music supervisor to help obtain grand rights to use the songs in the show.[333] Each agreement had highly specific deal terms, because the "permissions and costs vary depending on how much of an individual song is in the musical and for how long."[334] Moreover, each agreement had to be approved by each and every composer and publisher who held rights to a particular song, even if it did not include the original performer of the song itself.[335] While some songwriters, such as Lorde and David Byrne, agreed quickly to licensing grand rights to *Moulin Rouge!*, others did not sign off—notably, Bruno Mars was the only one of eleven credited songwriters of "Uptown Funk" to decline its use in the show.[336] Now, following the clearances process, the 161 songwriters who signed off on the show receive a royalty payment upon each performance of *Moulin Rouge!*[337] Further, the creative team successfully secured mechanical rights from pertinent songwriters, and a cast recording of the Broadway production was released in 2019.[338]

One potential caveat of asking for a license or permission is that if a copyright holder declines authorization of a new user's right to use the material, that copyright holder is effectively on alert for the user's planned work.[339] This is essentially what transpired in the *Canal+* case: because the production company plaintiff was already aware that the defendant writers had created a draft of a musical connected to their copyrighted material, they already had a litigious hat on by the time they discovered that a production of *Gentleman's Guide* was ready to debut.[340]

---

333 *See* Deb, *supra* note 326.

334 *Id.*

335 *Id.* (demonstrating that the use of Britney Spears's song "Toxic" in the musical "did not require Ms. Spears's permission . . . but four songwriters had to give the thumbs up").

336 *See* Milzoff, *supra* note 328.

337 *Id.*

338 *Id.*

339 Interview with Steven Chaikelson, Head of the Theatre Management & Producing Concentration, Columbia Univ. Sch. of the Arts Theatre Program, in N.Y., N.Y. (May 24, 2019).

340 *See* Canal+ Image UK Ltd. v. Lutvak, 773 F. Supp. 2d 419, 425–26 (S.D.N.Y. 2011).

However, in an instance like *Hamilton*, the payoffs of undertaking a clearances process evidently outweigh the risk of surreptitiously sneaking a reference or two into a new work: "Not only are none of Miranda's sources of inspiration or lyrics suing Miranda, they are lining up to praise him."[341] In an interview with *Forbes*, Deborah Mannis-Gardner—the music rights clearances expert who cleared the references in *Hamilton*—noted that Miranda specifically wanted to pay homage and tribute to those he referenced in the show: "By clearing the songs, Lin was tipping his hat to the hip-hop community . . . . When he wrote [*Hamilton*], he was listening to Notorious B.I.G. and Eminem . . . . It was as if Lin wanted to take that community of hip hop and rap and make the rest of the world recognize that music."[342]

The use of licensing and clearances for a new theatrical work offers both pros and cons. As for pros, theatre practitioners may encourage audience members to see a show because of the promise that they will recognize material in the show.[343] Further, it may perfectly suit the creative endeavor of a particular show to have certain pieces of copyrighted material in it.[344] As for cons, some may find there to be a lost sense of total originality in the final form of the show, since not everything is entirely new.[345] Moreover, once license agreements are effectuated, producers then have to cut a check

---

341 Larry Iser, *'Hamilton' and Copyright: Lin-Manuel Miranda Had His Eyes on Music History*, FORBES (June 16, 2016, 9:00 AM), https://www.forbes.com/sites/legalentertainment/2016/06/16/hamilton-and-copyright-lin-manuel-miranda-had-his-eyes-on-music-history/#2130abd50f8b [https://perma.cc/3ZF5-W3PD].

342 *See* Iser, *supra* note 14.

343 Madison Malone Kircher, *I Hated* Moulin Rouge! *on Broadway but I Can't Stop Listening to It*, VULTURE (Sept. 10, 2019), https://www.vulture.com/2019/09/the-moulin-rouge-broadway-cast-album-is-surprisingly-good.html [https://perma.cc/XQ5W-T6QC] ("What's difficult, and what *Moulin Rouge!* does right, is mashing songs you already recognize and, ideally, like.").

344 Michael Paulson, *Lin-Manuel Miranda, Creator and Star of 'Hamilton,' Grew Up on Hip-Hop and Show Tunes*, N.Y. TIMES (Aug. 12, 2015), https://www.nytimes.com/2015/08/16/theater/lin-manuel-miranda-creator-and-star-of-hamilton-grew-up-on-hip-hop-and-show-tunes.html [https://perma.cc/LY87-SB54] (quoting *Hamilton* creator Lin-Manuel Miranda, who thought that Alexander Hamilton's difficult childhood echoed of Jay Z, Eminem, and Biggie Smalls: "I recognized the arc of a hip-hop narrative in Hamilton's life").

345 Marilyn Stasio, *Broadway Review:* 'Moulin Rouge!', VARIETY (July 25, 2019, 3:00 PM), https://variety.com/2019/legit/reviews/moulin-rouge-review-broadway-musical-2-

following every performance week, which affects the amount that can be paid back to investors, as well as the speed of production recoupment.[346]

In the end, though, the process of rights clearances is actually an area of the law in which lawyers may achieve a rare moment of public acknowledgment. The day that the Broadway cast album for *Moulin Rouge!* was released, Twitter user @kafine tweeted, "shout out to the lawyer who negotiated music clearances for moulin rouge."[347]

C. The Four Factors of Fair Use and Legal Resources for Theatre Industry Professionals

If the above-listed strategies are unattainable, and a theatre artist, creator, or producer is served with a copyright infringement suit, the final remaining strategy is to ensure the preparation of an extraordinarily strong fair use defense. As this Note has examined, fair use is a mystifying affirmative defense in litigation; however, there are certain elements to keep in mind to strengthen the assertion of the defense in court. Defendants asserting fair use should look primarily to the four statutory factors of the defense laid out in 17 U.S.C. § 107 and recognize the circumstances during which the assertion of fair use is likelier to prevail. This section serves as a very brief "go-to guide" to understand when and how the four statutory factors weigh in favor of or against fair use. Additionally, theatre professionals may seek the counsel or assistance of organizations such as The Dramatists Legal Defense Fund during litigation.[348]

1203278036/ [https://perma.cc/NAV4-DW7H] (cautioning that for any jukebox musical, "good as you are, you're still at the mercy of memory").

346 Interview with Marc Hershberg, Associate at the Entertainment/Theatre Law Firm Cowan, DeBaets, Abrahams & Sheppard LLP, in N.Y., N.Y. (Oct. 25, 2019); *see also* Deb, *supra* note 326 ("Each night the cast [of *Moulin Rouge!*] takes the stage, the 161 composers receive a royalty payment, which is proportional to how long a given song is in the show and based on a cut of revenue.").

347 Kaitlin Fine (@kafine), TWITTER (Aug. 30, 2019, 1:27 PM), https://twitter.com/kafine/status/1167488981006790656 [https://perma.cc/P2NK-FVA8].

348 *See* Aylesworth, *supra* note 18 ("For those artists who choose to create works that would survive a fair use test, but nevertheless get challenged by the underlying rights owners, organizations such as The Dramatists Legal Defense Fund have significantly contributed to protecting their First Amendment rights, not to mention a number of

1. Purpose and Character of the Use

When looking to the first statutory factor, courts are likelier to find that nonprofit education and noncommercial uses are fair.[349] However, this is not a bright line, and courts generally weigh this first factor against the other three factors.[350] Moreover, pursuant to the Supreme Court's decision in *Campbell*, courts generally consider transformative uses to be fair.[351] Courts are likelier to find a use not to be fair in this first factor if the new use does not effectively "transform" the original work, or if the defendant simply copies or reuses the original material, particularly in a commercial setting.

For most properties in the theatre space, then, defendants should seek to ensure that the use is effectively "transformative;" that it somehow relates back to the copyrighted material by transforming it into something either entirely new or so considerably different from the original work that the use could no longer be considered as infringing. For example, if *Hamilton* were ever the subject of a copyright infringement case, most uses in the show could probably be argued as transformative: "Its hip-hop history lesson . . . incorporates musical works from the past with—undeniably—a completely different aesthetic, purpose, and audience than the original works."[352]

Defendants who can argue that their use functions as commentary, criticism, parody, or satire will also generally benefit from this first statutory factor.[353] A recent proliferation in theatrical parody premieres in New York theatre suggest that many theatre professionals enjoy this protection, even when premiering unauthorized parodies.[354] Certainly, parodic playwrights will also

---

attorneys who worked for those without the financial resources to front the exorbitant costs of litigation.").

349 *See* MORE INFORMATION ON FAIR USE, *supra* note 267.

350 *See id.*

351 *See id.*

352 *See* Iser, *supra* note 14.

353 *See supra* Part II.B.3.

354 David Gordon, *From* Full House *to* Hamilton, *Theatrical Parodies Are All the Rage*, THEATERMANIA (Oct. 18, 2017), https://www.theatermania.com/off-broadway/news/parody-musicals-off-broadway-special-report_82796.html [https://perma.cc/NXL8-SMEY] (quoting Steven Brandon, the writer of *Game of Thrones: The Rock Musical—An Unauthorized Parody*: "We're not using direct lines from the script . . . . We're changing

have a stronger legal claim if the original author of the work in some way supports, endorses, or licenses the parody.[355] However, playwrights should remain wary about relying on a parody defense: just because an author considers a new work to be a parody does not prevent an original rightsholder from suing.[356] Moreover, the determination of whether a new stage play or musical effectively constitutes a parody is dependent on the particular judge.[357]

2. Nature of the Copyrighted Work

When looking to the second statutory factor, courts are more likely to find fair use when a defendant has borrowed from a factual, informational, or educational work, as opposed to a creative or imaginative work.[358] The use of a latter kind of work generally hinders a fair use argument because courts consider creative works to lie "closer to the heart of copyright."[359] Fortunately for most theatre defendants, courts generally consider this factor to assume "less importance in the overall fair use analysis relative to the other three factors," but defendants will be better positioned if the work from which they borrow was not creative to begin with.[360] Additionally, this factor considers whether the work used was originally

it enough that it's different, but follows the same story."); other recent off-Broadway parodies include *The Big Bang Theory: A Pop-Rock Musical Parody*, *Friends! The Musical Parody*, *The Office! A Musical Parody*, and *Spamilton*.

355 *See* Lin-Manuel Miranda (@Lin_Manuel), TWITTER (Aug. 10, 2016), https://twitter.com/Lin_Manuel/status/763561586959187968 [https://perma.cc/X8PK-HFCA] (showing that *Hamilton* creator Lin-Manuel Miranda attended a performance of the show's off-Broadway parody, *Spamilton*, posted a photograph with the "talented young man" who plays Miranda in the parody, and "laughed [his] brains out").

356 *See* Gordon, *supra* note 354 (Andrew Lloyd Webber threatened the creators of *Katdashians! Break the Musical!*—a dual parody mashing up *Cats* and "Keeping Up With The Kardashians"—with legal action, "alleging that the show contained tunes taken directly from his long-running hit. Rather than go to court, the [creators of *Katdashians!*] quickly replaced the music with original material.").

357 See *supra* Part II.B.2.

358 *See* MORE INFORMATION ON FAIR USE, *supra* note 267.

359 Adjmi v. DLT Entm't Ltd., 97 F. Supp. 3d 512, 532 (S.D.N.Y. 2015) (quoting Leibovitz v. Paramount Pictures Corp., 948 F. Supp. 1214, 1217 (S.D.N.Y. 1996), *aff'd*, 137 F.3d 109 (2d Cir. 1998)).

360 *Id.*

published or unpublished. The use of an unpublished work is likely to hurt a defendant's claim of fair use.[361]

3. Amount and Substantiality of the Portion Used

When looking to the third statutory factor, courts consider "both the quantity and quality of the copyrighted material that was used."[362] If the use was large or substantial, fair use is less likely to be found.[363] Similarly, if the use constituted "the heart" of the work, even if the use was quantitatively small, fair use is less likely to be found.[364] Altogether, defendants have a stronger case if the use was quantitatively minimal or from a qualitatively insignificant part of the original work.

Appropriate defendants may also seek to assert the de minimis defense in order to argue that the material used was so small that it ought to be permitted.[365] If a court were to accept the de minimis defense, the fair use analysis would not even need to be conducted.[366] An example of a use that could ostensibly be protected under a de minimis defense—were it ever to be challenged—is the song "A Musical" from the 2015 Broadway musical *Something Rotten!*[367] "A Musical" is a large-scale production number toward the middle of the show's first act, which features "rapid-fire" references to over twenty different famous Broadway musicals, such as *A Chorus Line*, *Les Misérables*, and *Sweeney Todd*.[368] The "nods" take many different forms, such as "lyrics, musical phrases or visual cues," and are often presented so fleetingly that the song has been

---

361 *See* MORE INFORMATION ON FAIR USE, *supra* note 267.

362 *Id.*

363 *See id.*; *see also* TCA Television Corp. v. McCollum, 839 F.3d 168, 185 (2d Cir. 2016) (showing that "substantial copying" will prompt a court to find against fair use).

364 *See* MORE INFORMATION ON FAIR USE, *supra* note 267.

365 Rich Stim, *Measuring Fair Use: The Four Factors*, STAN. U. LIBR. COPYRIGHT & FAIR USE OVERVIEW, https://fairuse.stanford.edu/overview/fair-use/four-factors/#too_small_for_fair_use_the_de_minimis_defense [https://perma.cc/6XLM-DKQX].

366 *Id.*

367 Jonathan Band, *Can't Get Away from Fair Use*, ASS'N RES. LIBR. POL'Y NOTES (Mar. 1, 2018), http://policynotes.arl.org/?p=1643 [https://perma.cc/DR26-DDKN].

368 Eben Shapiro, *The Tune That Samples Decades of Broadway Hits*, WALL ST. J. (June 3, 2015), https://www.wsj.com/articles/the-tune-that-samples-decades-of-broadway-hits-1433380790 [https://perma.cc/E9PB-772Z].

deemed "the reference races."[369] This is an example of a use that could be granted a de minimis defense.[370]

4. Effect of the Use on the Potential Market

Finally, when looking to the fourth statutory factor, courts examine the extent to which the defendant's use has or may hurt the market for the copyright holder's original work.[371] If an unauthorized use has the potential to harm the market—such as for licensing or for sales—for the original work, courts are less likely to find fair use.[372]

CONCLUSION

In the words of attorney and stage producer Lindsay W. Bowen, "Everyone has their eyes on the stage."[373] Indeed, the commercial theatre industry is far from dead,[374] and as total Broadway box office revenues hit new records year after year,[375] producers are perpetually seeking out the next sensation, in hopes of scoring a Tony Award or landing on the rare blockbuster and raking in the big bucks.

And yet, there seems to be a stark incongruity between commercial titles and success on Broadway today. Some of Broadway's biggest flops are those with the biggest, most commercially recognizable brand names.[376] By contrast, shows with arguably smaller

---

369 *Id.*

370 *See* Band, *supra* note 367.

371 *See* MORE INFORMATION ON FAIR USE, *supra* note 267.

372 *Id.*

373 Bill Donahue, *The Show Must (Not) Go On: Theater's Copyright Woes*, LAW360 (Feb. 8, 2017), https://www-law360-com.fls.idm.oclc.org/articles/889544/the-show-must-not-go-on-theater-s-copyright-woes [https://perma.cc/X4DT-CZ8J].

374 Michael Riedel, *The Great Green Way: Inside Broadway's Economic Boom*, VARIETY (May 22, 2019), https://variety.com/2015/legit/reviews/hamilton-review-broadway-1201557679/ [https://perma.cc/67W8-RS77].

375 *See* Paulson, *supra* note 270.

376 *See* Lee Seymour, *Broadway Investors Set to Lose $100 Million as a Dozen Shows Close*, FORBES (July 11, 2019), https://www.forbes.com/sites/leeseymour/2019/07/11/investors-set-to-lose-100-million-as-broadway-undergoes-huge-market-correction/#7adcf51847d2 [https://perma.cc/YK92-BLPQ] (revealing that even though *King Kong* opened on Broadway in 2018 with a title name that audiences have known for almost a century, the production did not come close to recouping its $36.5 million capitalization when it closed in August 2019); *see also* Patrick Healy, *'Spider-Man' Investors Shaken by*

names but stronger word of mouth and Tony season buzz have achieved financial success on the Great White Way.[377] This trend demonstrates that Broadway audiences are more discerning than one might expect. With limited real estate[378] and limited performance options,[379] theatergoers today are shelling out money for tickets where the boundary-pushing is happening on Broadway. They are willing—and sometimes even eager[380]—to see something new and fresh take place on stage, rather than revisit the old or familiar.[381]

That Broadway is burgeoning reflects a fascinating cultural moment. Even as the world increasingly values technology and the immediate access of entertainment from the home, audiences nevertheless continue to attend live theater in record force.[382]

Projected $60 Million Loss, N.Y. TIMES (Nov. 19, 2013), https://www.nytimes.com/2013/11/20/theater/spider-man-investors-shaken-by-projected-60-million-loss.html [https://perma.cc/T7AW-5RGW] (highlighting a most infamous example of a Broadway flop: *Spider-Man: Turn Off the Dark* saw historic losses of up to $60 million when it closed in January 2014).

377 *See* Olivia Clement, The Band's Visit *Recoups on Broadway*, PLAYBILL (Sept. 10, 2018), http://www.playbill.com/article/the-bands-visit-recoups-on-broadway [https://perma.cc/4ZHT-5GUX] (reporting that *The Band's Visit*, the 2018 Tony winner for Best Musical—a particularly small, subdued musical about an Egyptian police band that stays the night in a rural Israeli town—recouped its $8.75 million capitalization in less than a year after opening).

378 At the time of this Note's publication, a maximum of forty-one Broadway shows can possibly be running at any given time.

379 Broadway productions generally do eight shows per performance week.

380 *See Hadestown Grosses*, BROADWAYWORLD, https://www.broadwayworld.com/grosses/HADESTOWN [https://perma.cc/G2F4-FD79] (demonstrating, as an example, that in the months after opening on Broadway in April 2019, the new musical *Hadestown* consistently played to above-capacity audiences); *see also* Seymour, *supra* note 376 ("[D]emand remains high for live theater.").

381 To compare two plays during the 2018–2019 Broadway season: the new, politically ambitious play *What the Constitution Means to Me* recouped its $2.5 million capitalization and the revival of William Shakespeare's *King Lear*, which opened on Broadway only five days after *Constitution* opened, closed its run early at a financial loss. *Compare* Ryan McPhee, *Broadway's* What the Constitution Means to Me *Recoups Ahead of August Final Bow*, PLAYBILL (July 15, 2019), http://www.playbill.com/article/broadways-what-the-constitution-means-to-me-recoups-ahead-of-august-final-bow [https://perma.cc/JET6-WN6F**],** *with* Michael Paulson, *'King Lear' Revival Will Close Early on Broadway*, N.Y. TIMES (June 3, 2019), https://www.nytimes.com/2019/06/03/theater/king-lear-revival-broadway-closing.html [https://perma.cc/E9DW-CUE8].

382 Ryan McPhee, *Broadway Sees Highest-Grossing and Best Attended Season in History*, PLAYBILL (May 29, 2018), http://www.playbill.com/article/broadway-sees-highest-grossing-and-best-attended-season-in-history [https://perma.cc/HU3V-55X9].

Perhaps singularly propelled by the cultural phenomenon of *Hamilton*, the fact remains: the commercial theatre industry is growing and evolving.[383] And as theatrical producers' pockets grow ever deeper, it is rather unsurprising that fair use has become a more commonly litigated issue for the industry in recent years. But just as the theatre industry continues to evolve, we should encourage the doctrine of fair use to evolve along with it.

[383] Michael Hiltzik, *Another Reason Live Theater Is Dying: Stupid Theater Managements*, L.A. TIMES (Jan. 13, 2014), https://www.latimes.com/business/hiltzik/la-xpm-2014-jan-13-la-fi-mh-live-theater-20140112-story.html [https://perma.cc/6F86-5B4M**]** (illustrating that in 2014, prior to *Hamilton* opening in 2015, some considered live theater to be "dying"). *Cf.* Jesse Green, *28 Reasons Why New York Theater Is, Improbably, Thriving*, VULTURE (Mar. 7, 2016), https://www.vulture.com/2016/03/new-york-theater-new-golden-age.html [https://perma.cc/5X6K-CESC] (showing that barely a year later—and after *Hamilton*'s opening—the theater scene seemed to experience a revival of sorts).