

NOTE

WHAT IS FAIR?:
WHY FAIR USE SHOULD BE REEVALUATED AS A DEFENSE
TO COPYRIGHT INFRINGEMENT

Tess Toland *

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I. INTRODUCTION

“On December 3, 1981, while on assignment from Newsweek magazine, Goldsmith took a series of portrait photographs of (then) up-and-coming musician Prince Rogers Nelson (known through most of his career simply as “Prince”) in her studio.”¹ Goldsmith ended up with twenty-three photographs and retained copyright in each of them.²

In 1984, Goldsmith licensed one of her photographs “to Vanity Fair magazine for use as an artist reference.”³ Sequentially, Vanity Fair commissioned renowned visual artist Andy Warhol (“Warhol”) to use the Goldsmith photograph to create an illustration of Prince.⁴ Warhol complied, and his illustration was published in Vanity Fair’s November 1984 issue, along with an attribution to Goldsmith crediting her for the photograph Warhol used to create his illustration.⁵ Unbeknownst to Goldsmith, Warhol also created fifteen additional works based on the photograph Goldsmith licensed to Vanity Fair.⁶ Goldsmith did not discover this until May of 2016, when Condé Nast published a tribute to Prince that featured one of Warhol’s additional works.⁷ The publication did not attribute the image to Goldsmith, and instead credited the Andy Warhol Foundation as its sole creator.⁸

¹ *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 33 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022), and *aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023). The court held that “(1) print illustrations of famous musician, based on professional photographer’s copyrighted photograph of the musician, were not transformative, as would support fair use defense to claim for copyright infringement; (2) artist borrowed significantly from the photograph, both quantitatively and qualitatively; (3) harm to market of original work supported claim for copyright infringement; and (4) screenprint illustrations were substantially similar to photographs.” *Id.* at 26.

² *Id.* at 33.

³ *Id.* at 34.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Andy Warhol Found. for Visual Arts*, 11 F.4th at 35.

⁸ *Id.*

Goldsmith sued the Andy Warhol Foundation for infringement of her copyrights in her original photographs, and the case was taken all the way to the United States Supreme Court.⁹ The specific question presented to the Supreme Court was whether the Andy Warhol Foundation could avail itself of the fair use defense.¹⁰ Specifically, this case hinged on whether Warhol's works had a transformative purpose or character.¹¹

"Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances."¹² In recent times, the realm of copyright law has witnessed a significant shift, with visual art becoming a prominent arena of contention for copyright law, and many revered artists becoming embroiled in copyright issues.¹³

⁹ See *id.* at 26; *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

¹⁰ See *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 525.

¹¹ See *id.* The Supreme Court addressed the contrasting opinions of the District Court and the Second Circuit. *Id.* at 522–26, 545–46. The Court ruled that the Andy Warhol Foundation's use of Goldsmith's work did not convey a sufficiently distinct "purpose or character" from that of Goldsmith's original work as a matter of degree, and thus was not transformative. *Id.* at 525. However, this decision only clarified a minute aspect of the interpretation of the first section 107 fair use factor. *Id.* The differing rulings and interpretations in this line of cases shed light on the issues that arise under a fair use standard that is both open-ended and vague.

¹² *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/fair-use/index.html> [<https://perma.cc/SB62-G8CT>] (Nov. 2023) [hereinafter *U.S. Copyright Office Fair Use Index*].

¹³ Amy Adler, *Why We Should Abolish Copyright Protection for Visual Art* 9–10 (Jan. 3, 2017) (unpublished draft) (on file with the New York University School of Law), http://www.law.nyu.edu/sites/default/files/upload_documents/Amy%20Adler_0.pdf [<https://perma.cc/NGC9-NXAX>]. Adler's article explores the questions "swirling around the escalating battles between art and copyright law in order to upend the most basic assumptions on which copyright protection for visual art is grounded." *Id.* at 9. Adler points to the argument that "[i]t is a foundational premise of intellectual property law that copyright protection is essential for the 'progress' of the arts: uncontrolled copying would kill the incentives for artists to create." *Id.* Adler then argues that "this premise is wrong," and that modern fair use cases demonstrate the "peculiar workings of the contemporary art world and the complex relationship between copies and originals that characterize that world." *Id.* Finally, Adler juxtaposes "copyright theory with the reality of the

Cases in recent years have involved artists including Jeff Koons, Richard Prince, Shepard Fairey, Banksy, Elizabeth Peyton, and Sarah Morris.¹⁴ The incongruent results of these cases, combined with the high litigation costs that accompany “litigating against a backdrop of uncertainty” demonstrate “why a climate of ‘self-censorship’ has taken hold in the art world.”¹⁵ “[T]he cases present no coherent pattern and yield no predictable standard by which courts evaluate transformativeness, the key to the [first factor of the] fair use defense under copyright law.”¹⁶ As a result of this disparity, artists have insufficient guidance when it comes to avoiding liability in the context of copying aspects of works.¹⁷

Fair use is a “hazy area of the law,” so much so that “one court’s fair use is another’s infringement.”¹⁸ This is because court decisions regarding fair use are based on four fairly subjective factors that are evaluated on a case-by-case basis.¹⁹ Due to this subjective aspect of the current fair use analysis, it is often impossible to predict how a particular matter will turn out.²⁰ Courts have particularly struggled to apply the fair use defense in cases where the accused infringer argues that the potentially infringing work is “transformative” under the first factor.²¹

contemporary art market,” to “show the fundamental misfit between the two.” *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 9–10.

¹⁶ *Id.* at 10 n.27.

¹⁷ *Id.*

¹⁸ Michelle Kaminsky, *The State of the ‘Fair Use’ Defense in the Art World*, LEGALZOOM, <https://www.legalzoom.com/articles/the-state-of-the-fair-use-defense-in-the-art-world> [<https://perma.cc/DN8L-UU2D>] (Sept. 1, 2023) (“So, is fair use still fair game in the art world? That question has always been open to debate (sampling in the music industry is a great example) and two recent court decisions against artists who appropriated others’ photographs for use in their own work have brought it, once again, to the fore.”).

¹⁹ *See id.*

²⁰ *See id.*

²¹ Bruce R. Ewing, *Most. Important. Copyright. Fair. Use. Case. Ever!*, THEMCA.COM (Apr. 13, 2022), <https://www.thetmca.com/most-important-copyright-fair-use-case-ever/> [<https://perma.cc/7MZL-EBME>] (“It is no exaggeration to characterize *Warhol Foundation* as the most important fair use case to come before the Supreme Court since 1994, and more than reasonable to posit that *Warhol Foundation* is the most important fair use case ever.”).

At the Supreme Court oral argument in the *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* case, Justice Elena Kagan observed an important aspect of the current subjectivity of the fair use defense in questioning counsel for the Andy Warhol Foundation:

I wonder, Mr. Martinez, if your case doesn't benefit from a certain kind of hindsight. I mean, now we know who Andy Warhol was and what he was doing and what his works have been taken to mean, so it's easy to say that there's something importantly new in what he did with this image. But, if you imagine Andy Warhol as a struggling young artist, who we didn't know anything about, and then you look at these two images, you might be tempted to say something like, well, I don't get it. All he did was take somebody else's photograph and put some color into it. So—so it seems that it's harder than you say. I mean, we can't always count on the fact that Andy Warhol is Andy Warhol to know how to make this inquiry.²²

The problem Justice Kagan seemed to be identifying here is that a notable artist such as Warhol may be able to impute a specific new purpose into his work, and a jury may feel that this is a credible assertion and allow him to invoke the fair use defense. However, would the jury be as likely to believe that argument if it came from an obscure artist, with no esteemed reputation, and with no artworks hanging on the walls of the Museum of Modern Art? Or would the jury assume that the artist's claim of an intangible new purpose for an otherwise infringing work was just an excuse to invoke the fair use defense?

²² Oral Argument at 28:35, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-869), <https://www.oyez.org/cases/2022/21-869> [<https://perma.cc/LTD6-M2AT>].

It seems that this approach creates an inherent advantage for artists who have already created a name for themselves over less established artists when it comes to invoking the fair use defense.²³ Particularly, an established or famous artist would have an easier time asserting a transformative purpose specifically because his or her style is recognizable in hindsight.²⁴ In the *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* case, the Andy Warhol Foundation asserted that “new meaning or message” made the prints “transformative.”²⁵ The Supreme Court responded to this argument by saying, “whether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic—or for that matter, a judge—draws from the work.”²⁶ However, the Supreme Court made clear that their holding in this case is narrowed to the specific issue at hand, meaning such assertions from future wellknown artists could potentially reraise questions about transformativeness in future cases.²⁷

This Note explores how the United States’ implementation of a subjective fair use defense to copyright infringement has led to disparity between courts in their evaluation of copyright infringement suits, confusion about the standards implemented and subjective factors evaluated when a fair use defense is invoked, and inequity in outcomes for parties with unequal bargaining power. This Note argues that the fair use defense’s four subjective factors should be reevaluated and replaced with a series of concrete, objective standards modeled after the European

²³ *See id.*

²⁴ *See id.*

²⁵ *Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 540-541 (2023).

²⁶ *Id.* at 545 (internal quotation marks omitted) (quoting *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021)).

²⁷ *See Andy Warhol Found. For the Visual Arts, Inc.*, 598 U.S. at 550. “Goldsmith’s original works, like those of other photographers, are entitled to copyright protection, even against famous artists. Such protection includes the right to prepare derivative works that transform the original. The use of a copyrighted work may nevertheless be fair if, among other things, the use has a purpose and character that is sufficiently distinct from the original. In this case, however, Goldsmith’s original photograph of Prince, and AWF’s copying use of that photograph in an image licensed to a special edition magazine devoted to Prince, share substantially the same purpose, and the use is of a commercial nature. AWF has offered no other persuasive justification for its unauthorized use of the photograph. Therefore, the ‘purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,’ §107(1), weighs in Goldsmith’s favor.” *Id.*

Union’s Information Society Directive. Section II.A examines the origins of fair use as a defense to copyright infringement.²⁸ Section II.B lays out the current U.S. law on invoking the fair use defense.²⁹ Section II.C argues that the fair use defense is too open-ended and too context-sensitive as it stands in the United States today, looks specifically at the first fair use factor set forth by Section 107 of the Copyright Act of 1976, and explains why it is the most subjective and therefore, the most problematic.³⁰ Section II.D looks to European Union copyright law for a solution to the problems set forth in the former sections.³¹ Finally, Part III proposes specific amendments to Section 107 of the Copyright Act, eliminating the subjectivity of the fair use defense, reshaping fair use to specifically target its original purpose,³² and tailoring the new Section 107 towards equally protecting both established artists and unestablished artists, who lack a voice and significant bargaining power in the art world.³³

II. BACKGROUND

Before delving into the strengths and pitfalls of the Copyright Act’s current Fair Use standard, it is important to understand the origins of Fair Use as a defense to copyright infringement, as well as how Fair Use is invoked.

A. THE ORIGINS OF FAIR USE AS A DEFENSE TO COPYRIGHT INFRINGEMENT

As stated in the U.S. Constitution, the purpose of copyright law is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

²⁸ See *infra* Section II.A.

²⁹ See *infra* Section II.B.

³⁰ See *infra* Section II.C.

³¹ See *infra* Section II.D.

³² See U.S. CONST. art. I, § 8, cl. 8 (stating that the purpose of the copyright law is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (suggesting that “some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose” as set out in the Constitution).

³³ See *infra* Part III.

Discoveries.”³⁴ Despite the constitutionally recognized need for the protection of scientific and artistic works, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose.”³⁵ As Justice Joseph Story explained in *Emerson v. Davies*, “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout.”³⁶ Simply put, most every creation borrows from something that came before it.³⁷

³⁴ U.S. CONST. art. I, § 8, cl. 8.

³⁵ *Campbell*, 510 U.S. at 575. The Court clarified and expanded the scope of fair use, particularly in the context of parody, *id.* at 579, established that a parody may qualify as a transformative use of a copyrighted work, which is one of the key factors in determining fair use, *id.*, and emphasized that the market effect of the parody on the original work must be considered, but that a work does not necessarily have to be noncommercial to qualify as fair use, *id.* at 590–91.

³⁶ *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436). The court made the point that the creation of new works of literature, science, and art is often influenced by and built upon preexisting works, and that truly original creations are rare. *Id.* at 619–20. This idea is reflected in the long history of copyright law, which recognizes that creators and authors build upon the works of others in creating new works. *Id.* The point is not that creativity and originality do not exist, but rather that they are often the result of building upon and transforming preexisting works and ideas. *Id.* Fair use recognizes the importance of this process of creative borrowing and transformation and seeks to balance the interests of creators and copyright holders with the broader public interest in innovation and expression. *See, e.g.* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580. (“*Campbell* was the culmination of a long line of cases and scholarship about parody’s claim to fairness in borrowing.” *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 542.)

³⁷ *See Emerson*, 8 F. Cas. at 619.

The origins of fair use date all the way back to the Statute of Anne of 1710, in which “English courts held that in some instances ‘fair abridgments’ would not infringe an author’s rights.”³⁸ In the United States, “the First Congress enacted our initial copyright statute, Act of May 31, 1790, 1 Stat. 124, without any explicit reference to ‘fair use.’”³⁹ However, the fair use doctrine was recognized by the American courts very early on in the development of U.S. common law.⁴⁰ The protections promulgated by the later-codified fair use defense were imputed into common law due to rationales like those set forth by Justice Story in *Emerson v. Davies*.⁴¹ Justice Story first outlined the four fair use factors in the case of *Folsom v. Marsh*, a case that is commonly recognized as the first fair use case and the basis of the doctrine of fair use.⁴² A more recent 2013 Second Circuit case, *Cariou v. Prince*, expressed a similar perspective on the utility and necessity of fair use:

Because “‘excessively broad protection would stifle, rather than advance, the law’s objective,’” fair use doctrine “mediates between” “the property rights [copyright law] establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them—or

³⁸ *Campbell*, 510 U.S. at 576 (footnote omitted) (citations omitted); see WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 6–17 (1985) (reviewing the origination of the English “fair abridgement” doctrine in various English court opinions); Pierre N. Leval, *Commentary, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990) (stating that, in English law, under the Statute of Anne, “courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as ‘fair abridgment,’ later ‘fair use,’ would not infringe the author’s rights”).

³⁹ *Campbell*, 510 U.S. at 1170; see PATRY, *supra* note 38, at 27 (citing *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136)) (stating that the first American case to utilize the term “fair use” was *Lawrence v. Dana*).

⁴⁰ See PATRY, *supra* note 38, at 18 (explaining that while “Justice Story’s opinion in *Folsom v. Marsh* is proverbially considered to be the first American expression on the doctrine of fair use, in truth many of the points raised in *Folsom* were anticipated two years earlier [in 1839] by Justice Story”).

⁴¹ See *Emerson*, 8 F. Cas. at 619 (explaining that fair use is necessary because writers and thinkers frequently borrow from each other to create their works, and creating works solely from an author’s thought is impossible).

⁴² Oren Bracha, *Commentary on Folsom v. Marsh (1841)*, in *PRIMARY SOURCES ON COPYRIGHT (1450-1900)* (Lionel Bently & Martin Kretschmer eds., 2008), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_us_1841 [<https://perma.cc/B3DF-U4VG>].

ourselves by reference to the works of others, which must be protected up to a point.”⁴³

Fair use remained an exclusively judge-made doctrine until the passage of the Copyright Act of 1976.⁴⁴ Section 107 of the Copyright Act, titled “Limitations on exclusive rights: Fair Use,” states that:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.

⁴³ See *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (alteration in original) (quoting *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006)) (considering fair use factors such as transformative use, nature of copyrighted works, and potential impact on the market, holding that defendant’s use of photographs taken by plaintiff in defendant’s series of paintings was transformative and therefore qualified as fair use); *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 42–43, 51 (2d Cir. 2021) (holding that Warhol’s use of the photograph did not sufficiently transform it into a new work of art, and that his use did not add any new meaning or message beyond the original photograph, and that the use had a significant impact on the potential market for the photograph, since it effectively usurped Goldsmith’s right to license derivative works based on the photograph), *cert. granted*, 142 S. Ct. 1412 (2022), *and aff’d sub nom.* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

⁴⁴ *Campbell*, 510 U.S. at 576.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁴⁵

Section 107's codification of fair use established that "the fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."⁴⁶ Section 107—not common law—now governs the invocation of fair use as a defense to copyright infringement in the United States.⁴⁷

B. INVOKING THE FAIR USE DEFENSE

Section 107 of the Copyright Act of 1976 "provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use."⁴⁸ As the law stands today,

[i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.⁴⁹

⁴⁵ Copyright Act of 1976 § 107, 17 U.S.C. § 107.

⁴⁶ *Id.*

⁴⁷ See *U.S. Copyright Office Fair Use Index*, *supra* note 12.

⁴⁸ *Id.*

⁴⁹ 17 U.S.C. § 107.

Upon first glance, the fair use test and its four factors seem fairly straightforward.⁵⁰ However, despite the seemingly well-outlined parameters that numbered factors usually tend to provide, the four fair use factors are anything but straightforward.⁵¹ As demonstrated by *Cariou*, an examination of case law relating to fair use quickly makes evident that “the fair use determination is an open-ended and context-sensitive inquiry.”⁵² As is eloquently explained in the Second Circuit’s decision in *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*:

The fair-use doctrine seeks to strike a balance between an artist’s intellectual property rights to the fruits of her own creative labor, including the right to license and develop (or refrain from licensing or developing) derivative works based on that creative labor, and “the ability of [other] authors, artists, and the rest of us to express them—or ourselves by reference to the works of others.”⁵³

⁵⁰ *Id.*

⁵¹ See *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (first citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994); and then citing *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)) (“As the statute indicates, and as the Supreme Court and our court have recognized, the fair use determination is an open-ended and context-sensitive inquiry.”); e.g., *Campbell*, 510 U.S. at 583–85 (finding that the Sixth Circuit erred in placing such great emphasis on the commercial nature of 2 Live Crew’s parody and in presuming that the commercial nature of the “Oh, Pretty Woman” parody made the work unfair).

⁵² *Cariou*, 714 F.3d at 705 (citing *Campbell*, 510 U.S. at 577–78).

⁵³ *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 36 (2d Cir. 2021) (alteration in original) (quoting *Blanch*, 467 F.3d at 250) (holding that defendant infringed plaintiff’s copyright in her photograph and that defendant’s use of the photograph to create a sculpture based on the photograph did not constitute fair use), *cert. granted*, 142 S. Ct. 1412 (2022), and *aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

Simply put, the fair use defense requires the courts to apply a subjective balancing test.⁵⁴ This subjectivity means that the fair use defense requires a case-by-case determination.⁵⁵ Thus, in each case, courts must first look at the value in protecting the original work and the original artist and the value in allowing others to use and reference the original work, and then determine which factors weigh more heavily toward a conclusion.⁵⁶

A more in-depth examination of each of the four fair use factors may better demonstrate their subjectivity. The U.S. Copyright Office Fair Use Index (“Fair Use Index”)—a page run by the U.S. Copyright Office and dedicated to making the principles and application of fair use more accessible and understandable to the public—breaks down each factor and explains the thought processes and analyses that are required under each one.⁵⁷

In evaluating the first factor, which is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,”⁵⁸ courts analyze how the party claiming fair use is using the copyrighted work in question.⁵⁹ A commercial use would likely conflict with the original copyright holder’s use and is thus likely not fair use, whereas a nonprofit educational or noncommercial use is likely fair use.⁶⁰ “This does not mean, however, that all nonprofit education and noncommercial uses are fair and

⁵⁴ *See id.*

⁵⁵ *See Kaminsky, supra* note 18 (“Court decisions regarding fair use are made on a case-by-case basis, and are based on four potentially subjective factors, so there is often no way to tell how a particular matter will turn out before it turns out.” (citing Rich Stim, *Measuring Fair Use: The Four Factors*, STAN. COPYRIGHT & FAIR USE CTR., <https://fairuse.stanford.edu/overview/fair-use/four-factors/> [https://perma.cc/2BJZ-S62T])).

⁵⁶ *See Cariou*, 714 F.3d at 705.

⁵⁷ *See U.S. Copyright Office Fair Use Index, supra* note 12. The Fair Use Index is a searchable database of cases that have been decided by U.S. courts, in which fair use has been raised as a defense to copyright infringement. *Id.* The Fair Use Index provides summaries of cases and includes information about the court’s decision, the factors that were considered in the fair use analysis, and the outcome of the case. *Id.* The Fair Use Index is intended to be a helpful resource for individuals who are looking for guidance on the application of fair use principles in various contexts. *Id.*

⁵⁸ Copyright Act of 1976 § 107, 17 U.S.C. § 107.

⁵⁹ *See U.S. Copyright Office Fair Use Index, supra* note 12.

⁶⁰ *See id.*

all commercial uses are not fair.”⁶¹ Rather, “courts will balance the purpose and character of the use against the other factors.”⁶²

Finally, the first factor requires consideration of “transformative” uses. “A work is ‘transformative,’ for purposes of [a] fair use defense to [a] copyright infringement claim, when it adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁶³ Put more simply, “[a] ‘transformative’ use is one that ‘employ[s] the quoted matter in a different manner or for a different purpose from the original,’ thus transforming it.”⁶⁴ Transformative uses tend to be deemed fair uses by the courts.⁶⁵

A court evaluates whether a work is “transformative” by examining how the work may “reasonably be perceived.”⁶⁶ “The alteration of an original copyrighted work with new expression, meaning, or message, whether by the use of new aesthetics, by placing the work in a different context, or by any other means is the sine qua non of transformativeness, for purposes of fair use analysis.”⁶⁷ In simpler terms, a secondary work must create a “new expression, meaning, or message” to satisfy the “transformativeness” requirement.⁶⁸

⁶¹ *See id.*

⁶² *See id.*

⁶³ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 100 (2d Cir.), *opinion withdrawn and superseded on reh’g sub nom. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), *cert. granted*, 142 S. Ct. 1412 (2022), *and aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

⁶⁴ *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 638 (4th Cir. 2009) (alteration in original) (quoting *Leval*, *supra* note 38, at 1111).

⁶⁵ *U.S. Copyright Office Fair Use Index*, *supra* note 12.

⁶⁶ *Andy Warhol Found. for the Visual Arts*, 992 F.3d at 110 (quoting *Cariou v. Prince*, 714 F.3d 694, 707 (2d Cir. 2013)).

⁶⁷ *Id.* at 100.

⁶⁸ *Id.* at 110 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

The transformativeness of a secondary work is usually gleaned from examining its purpose and comparing it to the purpose of the primary work.⁶⁹ This comparison allows the court to ascertain the extent to which the secondary work's purpose differs from that of the primary.⁷⁰ In *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, the Second Circuit observed a "common thread" running through fair use cases such as *Rogers v. Koons*, *Blanch v. Koons*, and *Cariou*:

[W]here a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a "higher or different artistic use," is insufficient to render a work transformative. Rather, the secondary work itself must reasonably be perceived as embodying an entirely distinct artistic purpose, one that conveys a "new meaning or message" entirely separate from its source material.⁷¹

However, the district court in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* held a different opinion. The district court granted summary judgment for the Andy Warhol Foundation on its fair use claim, concluding that "the Prince Series was 'transformative' because, while the Goldsmith Photograph portrays Prince as 'not a comfortable person' and a 'vulnerable human being,' the Prince Series portrays Prince as an 'iconic, larger-than-life figure.'"⁷² The stark contrast between these two opinions regarding transformative use illustrates the arguably problematic level of confusion that the subjectivity of the first prong of the fair use analysis can create.⁷³

⁶⁹ See *id.* at 112.

⁷⁰ See *id.*

⁷¹ *Id.* at 113 (citation omitted) (quoting *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992)).

⁷² *Andy Warhol Found. for the Visual Arts*, 992 F.3d at 108 (quoting *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019), *rev'd and remanded*, 992 F.3d 99 (2d Cir. 2021), *opinion withdrawn and superseded on reh'g sub nom. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), *aff'd sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023), *and rev'd in part, vacated in part sub nom. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), *and aff'd sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023)).

⁷³ See *id.* at 110–11.

The second factor, which is the “nature of the copyrighted work,” is meant to determine “the degree to which the work that was used relates to copyright’s purpose of encouraging creative expression.”⁷⁴ That purpose informs courts’ tendencies to less often deem the use of more creative and imaginative works—such as songs, movies, or novels—as fair use, and more often deem the use of factual works—such as news items or technical articles—as fair use.⁷⁵ “In addition, use of an unpublished work is less likely to be considered fair.”⁷⁶

Under the third factor, which is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”⁷⁷ “courts look at both the quantity and quality of the copyrighted material that was used.”⁷⁸ If only a small amount of copyrighted material is used, successful invocation of the fair use defense is more likely.⁷⁹ On the other hand, if the use employs a large portion of the copyrighted work in question, a court is much less likely to find fair use.⁸⁰ That said, courts have, on occasion, found that the use of even a small amount of a copyrighted work was not fair “because the selection was an important part—or the ‘heart’—of the work.”⁸¹ Meanwhile, courts have, in some instances, found that the use of an entire work was fair under the circumstances.⁸²

Finally, under the fourth factor, which is “the effect of the use upon the potential market for or value of the copyrighted work,”⁸³ “courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner’s original work.”⁸⁴ When analyzing this factor, the central concern is “whether the use is hurting the current market for the original work.”⁸⁵ If, for example, the secondary work is displacing the sales of the original work so that the original artist is harmed by the claimed fair use, then that use is harming

⁷⁴ *U.S. Copyright Office Fair Use Index, supra* note 12.

⁷⁵ *See id.*

⁷⁶ *Id.*

⁷⁷ Copyright Act of 1976 § 107, 17 U.S.C. § 107.

⁷⁸ *U.S. Copyright Office Fair Use Index, supra* note 12.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Copyright Act of 1976 § 107, 17 U.S.C. § 107.

⁸⁴ *U.S. Copyright Office Fair Use Index, supra* note 12.

⁸⁵ *Id.*

the market for the copyrighted work.⁸⁶ The wording of the fourth factor, in examining the “potential market,”⁸⁷ indicates that extensive harm to the value of the copyrighted work is not necessary to deem a use unfair.⁸⁸ Rather, if the use *could* cause substantial harm if it were to become widespread, that is sufficient for a court to rule that the use is not fair use.⁸⁹

It is important to note that, in practice, there is an implicit, open-ended, fifth fair use factor that is left to the discretion of the courts.⁹⁰ Significantly, “other factors may also be considered by a court in weighing a fair use question, depending upon the circumstances.”⁹¹ Because “[c]ourts evaluate fair use claims on a case-by-case [sic] basis,” and because “the outcome of any given case depends on a fact-specific inquiry,” there is “no formula” to a fair use analysis.⁹² As Section 107 is applied today, there is no steadfast way to delineate a “predetermined percentage or amount of a work—or specific number of words, lines, pages, [or] copies—[that] may be used without permission.”⁹³ The Ninth Circuit’s model civil jury instructions demonstrate this “fifth” fair use factor:

One who is not the owner of the copyright may use the copyrighted work in a reasonable way under the circumstances without the consent of the copyright owner if it would advance the public interest. Such use of a copyrighted work is called a fair use. The owner of a copyright cannot prevent others from making a fair use of the owner’s copyrighted work.

Defendant contends that defendant made fair use of the copyrighted work for the purpose of [criticism] [comment] [news reporting] [teaching] [scholarship] [research] [*other purpose alleged*]. The defendant has the burden of proving this defense by a preponderance of the evidence.

⁸⁶ *See id.*

⁸⁷ 17 U.S.C. § 107.

⁸⁸ *See U.S. Copyright Office Fair Use Index, supra* note 12.

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *Id.*

⁹² *See id.*

⁹³ *Id.*

In determining whether the use made of the work was fair, you should consider the following factors:

- (1) the purpose and character of the use, including whether the 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;
 - (4) the effect of the use upon the potential market for or value of the copyrighted work; and
- [(5)] [*insert any other factor that bears on the issue of fair use*].**

If you find that the defendant has proved by a preponderance of the evidence that the defendant made a fair use of the plaintiff's work, your verdict should be for the defendant.⁹⁴

Under this jury instruction, courts can, quite literally, "insert any other factor" that they believe "bears on the issue of fair use."⁹⁵ This gives courts extreme discretion in what they may deem relevant to a fair use analysis. It is, in part, what makes fair use such a subjective test.

- C. "THE FAIR USE DETERMINATION IS AN OPEN-ENDED AND CONTEXT-SENSITIVE INQUIRY."⁹⁶

In *Cariou v. Prince*, a photographer brought a copyright infringement action against an artist, a gallery, and the gallery owner for the artist's use of the photographer's copyrighted photographs.⁹⁷ The court explained that Section 107

⁹⁴ MANUAL OF MODEL CIV. JURY INSTRUCTIONS FOR THE DIST. CTS. OF THE NINTH CIR. § 17.22 (NINTH CIR. JURY INSTRUCTIONS COMM. 2023) (second emphasis added).

⁹⁵ *Id.*

⁹⁶ *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (first citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994); and then citing *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)); see *Campbell*, 510 U.S. at 577–78 (stating that fair use analysis "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis," and that all four factors of fair use "are to be explored, and the results weighed together, in light of the purposes of copyright").

⁹⁷ See *Cariou*, 714 F.3d at 695.

“employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the illustrative and not limitative function of the examples given.”⁹⁸ This statement illustrates fair use’s “open-ended and context-sensitive” qualities.⁹⁹ It further demonstrates that Section 107 really only provides “general guidance” about the types of copying that are fair uses.¹⁰⁰ These general guidelines stem from fair use’s time as a judge-made doctrine,¹⁰¹ and lay out the sorts of copying that courts and that Congress most commonly deemed fair uses before the Copyright Act of 1976 codified fair use as a defense to copyright infringement.¹⁰²

The Second Circuit’s characterization of fair use as an “open-ended and context-sensitive inquiry”¹⁰³ is supported by the Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.*, in which the copyright holders in a song sued a rap music group for copyright infringement for making a parody of the song.¹⁰⁴ In *Campbell*, Justice David Souter wrote that Section 107 requires a case-by-case analysis, not a rigid application of bright-line rules.¹⁰⁵ The opinion went on to say that statutory examples of permissible uses provide only general guidance as to what qualifies as fair use.¹⁰⁶ Essentially, Section 107 only provides a skeletal outline of how courts should approach fair use.¹⁰⁷ The rest is determined in light of the

⁹⁸ *Id.* at 705 (quoting *Campbell*, 510 U.S. at 577–78).

⁹⁹ *See id.* (first citing *Campbell*, 510 U.S. at 577–78; and then citing *Blanch*, 467 F.3d at 251).

¹⁰⁰ *Cariou*, 714 F.3d at 705 (quoting *Campbell*, 510 U.S. at 577–78).

¹⁰¹ *See Campbell*, 510 U.S. at 576 (explaining that “fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act”).

¹⁰² *See Cariou*, 714 F.3d at 705 (highlighting that fair use under the Copyright Act of 1976 is not copyright infringement); *Campbell*, 510 U.S. at 577–78.

¹⁰³ *Cariou*, 714 F.3d at 705; *see Campbell*, 510 U.S. at 577 (noting that the fair use analysis varies case-by-case and does not adhere to a rigid application or bright-line rules).

¹⁰⁴ *See Campbell*, 510 U.S. at 569.

¹⁰⁵ *See id.* at 577 (providing that the statute requires analysis of each case and cannot be simplified by bright-line rules).

¹⁰⁶ *See id.* at 577–78 (noting that the text of the statute uses the language “including” and “such as” to give examples of fair use rather than saying what does not constitute fair use, thus only providing general guidance on fair use).

¹⁰⁷ *See id.* at 569 (noting that the four statutory factors of fair use should be weighed together in a fair use analysis); *Cariou*, 714 F.3d at 705 (providing the text of section 107).

overarching constitutional purpose of copyright law and specified in jury instructions based on the specific facts of the case.¹⁰⁸ This is why fair use is described as “open-ended and context-sensitive.”¹⁰⁹

It is worth noting that in *Google LLC v. Oracle America, Inc.*, the Supreme Court shed light on the fact that fair use is “a flexible concept,” whose “application may well vary depending upon context.”¹¹⁰ This case, which centered on the copyrightability and fair use of a computer program,¹¹¹ can be related to cases involving artistic creations because any discussion of statutory revisions to the current fair use standard would impact use of software alongside use of artworks.

D. THERE IS NO FAIR USE DOCTRINE IN EUROPEAN UNION COPYRIGHT LAW

The European Union’s (“EU”) Information Society Directive (“InfoSoc Directive” or “Directive”) provides several laws for European member states related to copyright, including the exclusive rights of reproduction, communication to the public, and distribution.¹¹² It also includes limitations and

¹⁰⁸ See *Cariou*, 714 F.3d at 705 (explaining that the ultimate test of fair use is whether allowing the use of copyrighted material would better serve copyright goals than preventing its use would); *Campbell*, 510 U.S. at 569 (“The four statutory factors are to be explored and weighed together in light of copyright’s purpose of promoting science and the arts.”); *U.S. Copyright Office Fair Use Index*, *supra* note 12 (noting that, in practice, there is an implicit, open-ended, fifth fair use factor that is left to the discretion of the courts).

¹⁰⁹ See *Cariou*, 714 F.3d at 705; *Campbell*, 510 U.S. at 569 (reiterating that fair use requires a case-by-case analysis).

¹¹⁰ *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1185, 1197 (2021) (“[T]he [fair use] concept is flexible, . . . courts must apply it in light of the sometimes conflicting aims of copyright law, and . . . its application may well vary depending upon context. Thus, copyright’s protection may be stronger where the copyrighted material is fiction, not fact, where it consists of a motion picture rather than a news broadcast, or where it serves an artistic rather than a utilitarian function.”).

¹¹¹ *Id.* at 1187.

¹¹² Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 10–12, 16–17 [hereinafter Directive 2001/29/EC]. Directive 2001/29/EC outlines the EU’s approach to copyright law; it harmonizes certain aspects of copyright law in the EU, including reproduction rights, distribution rights, and

exceptions to these rights, such as for private copying, education, and criticism/review.¹¹³ The Directive sets out specific criteria for determining whether a use falls under these exceptions and provides guidelines for how to interpret them.¹¹⁴ Additionally, the Directive mandates that member states provide legal protection for technological measures used to protect copyright works and provides for remedies and penalties for infringement.¹¹⁵

But EU copyright law does not have a “fair use” doctrine comparable to that of the United States.¹¹⁶ In place of a fair use defense, the InfoSoc Directive provides “an explicit list of exceptions” to the copyright protections granted to copyright holders.¹¹⁷ The Directive also delineates the specific scope of each exception.¹¹⁸ The Directive lists many exceptions, but there are six in particular that are most relevant to United States copyright law. The first is quotations for criticism and review: this allows the use of copyrighted material for criticism or review, as long as the use is proportionate and the source is clearly indicated.¹¹⁹ The second is caricature, parody or pastiche: this authorizes the use of copyrighted material for caricature, parody, or pastiche, provided that the use is in accordance

communication to the public rights; it also introduces new provisions for technological measures and exceptions to copyright law. *Id.* at 10–12.

Directive 2001/29/EC reflects the EU’s efforts to update copyright law to reflect the digital age, and to balance the interests of creators, users, and other stakeholders in the copyright ecosystem. *Id.* at 11–12.

¹¹³ *See id.* at 16–17.

¹¹⁴ *See id.*

¹¹⁵ *See id.* at 17–18.

¹¹⁶ Stefan Haßdenteufel, *European Union*, in *GETTING THE DEAL THROUGH: COPYRIGHT 2023* 21, 25 (Steven R. Englund et al. eds., 2023), <https://www.lexology.com/gtdt/workareas/copyright> [<https://perma.cc/X8LU-BU4F>]. Haßdenteufel notes that copyright protection in the EU is governed by various international treaties and EU directives, including the Berne Convention and the World Intellectual Property Organization Copyright Treaty. *Id.* at 33–34. Copyright protection in the EU covers a wide range of works, including literary, artistic, musical, and audiovisual works. *Id.* at 24. Haßdenteufel also discusses the limitations and exceptions to copyright law in the EU. *Id.* at 25.

¹¹⁷ *Id.*; *see* Directive 2001/29/EC, *supra* note 112, at 16–17.

¹¹⁸ Directive 2001/29/EC, *supra* note 112, at 16–17; Haßdenteufel, *supra* note 116, at 25.

¹¹⁹ *See* Directive 2001/29/EC, *supra* note 112, at 17.

with fair practice and does not unduly harm the interests of the copyright holder.¹²⁰ The third is reporting of current events: this exception allows the use of copyrighted material for reporting current events, as long as the source is clearly indicated.¹²¹ The fourth is teaching, research, and private study: this permits the use of copyrighted material for teaching, research, or private study, as long as the use is noncommercial and the source is clearly indicated.¹²² The fifth is regarding scientific research purposes: this allows researchers to analyze copyrighted works for scientific research, without the need for the copyright holder's permission.¹²³ The sixth and final relevant exception is the use of works in libraries and archives: this allows libraries and archives to make copies of copyrighted works for preservation, research, or study, as long as the use is noncommercial and the source is clearly indicated.¹²⁴

The InfoSoc Directive came into effect on June 22, 2001 as part of the Lisbon Agenda of 2000, which aimed to promote the growth of the EU's knowledge-based economy by standardizing the principles and rules of copyright law, both to protect intellectual property rights and provide legal certainty for market players.¹²⁵ The InfoSoc Directive's approach to a fair use type of exception was a response to the impact of emerging digital technologies and the Internet on cross-border circulation of protected works covered by an exception, and it is aimed at harmonizing copyright exceptions into a coherent, across-the-board EU standard.¹²⁶ The Directive seeks to balance the rights and interests of copyright holders with those of the public, while achieving an adequate level of synchronization of exceptions in the member states.¹²⁷ The Directive also clarifies that the promotion of culture and public interest should not compromise the high

¹²⁰ *See id.*

¹²¹ *See id.*

¹²² *See id.* at 16–17.

¹²³ *See id.* at 16.

¹²⁴ *See id.*

¹²⁵ Francisco Javier Cabrera Blázquez et al., *Exceptions and Limitations to Copyright*, IRIS PLUS 1, 19 (2017), https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/report_s/Exceptions_and_limitations_to_copyright_en.pdf [<https://perma.cc/KYZ3-B6FR>].

¹²⁶ *See id.* at 19–20.

¹²⁷ *Id.* at 20.

level of protection for copyright holders.¹²⁸ Additionally, the Directive provides a comprehensive list of exceptions and limitations to the reproduction right and the right of communication to the public.¹²⁹ The Directive provides one mandatory exception that applies to all EU member states: technical copies.¹³⁰ “Apart from this mandatory exception, the Directive provides for an exhaustive list of optional exceptions to the reproduction right and right of communication to the public,” and each member state may choose whether to implement them or not.¹³¹

Examining the structures of U.S. and EU copyright law surrounding exceptions and limitations demonstrates two different types of copyright systems.¹³² The United States uses an “open system,” featuring a general clause providing exceptions to copyright protection, known as the fair use doctrine.¹³³ In contrast, the EU uses a “closed system” based on an exhaustive list of exceptions and limitations introduced by the InfoSoc Directive.¹³⁴ This system applies listed exceptions and limitations to copyright laws across EU member states, preventing individual member states from having unlimited discretion to create their own exceptions and limitations to the rights of copyright holders.¹³⁵

III. ANALYSIS

The first fair use factor is the most subjective and, thus, the most problematic for the purposes of this Note. “Of course, the alteration of an original work ‘with ‘new expression, meaning, or message,’” whether by the use of ‘new aesthetics,’ by placing the work ‘in a different context,’ or by any other means is the *sine qua non* of transformativeness.”¹³⁶ However, that standard is still so broad

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*; Haßdenteufel, *supra* note 116, at 25.

¹³¹ Blázquez et al., *supra* note 125, at 20–21; Haßdenteufel, *supra* note 116, at 25.

¹³² Blázquez et al., *supra* note 125, at 4.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *See id.* at 21.

¹³⁶ *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 38 (2d Cir. 2021) (citations omitted) (first quoting *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013); then quoting *id.*; and then quoting *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007)), *cert. granted*, 142 S. Ct. 1412 (2022), *and aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

and subjective that courts seem to approach each fair use analysis with entirely different concepts of “new expression,” “new meaning,” and “new message.”¹³⁷ This was well-demonstrated by the starkly different approaches that the district court and the Second Circuit applied to “transformativeness” in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.¹³⁸ The Supreme Court granted certiorari to clarify whether, and to what degree, recasting an original work in a new aesthetic form is transformative of its use and purpose.¹³⁹ However, the Supreme Court took a narrow approach to its analysis of fair use, and only clarified a minute aspect of the first fair use factor, namely that “purpose” in the context of the first fair use factor does not refer to the artist’s intention in creating a work, but rather refers to “whether such use is of a commercial nature or is for

¹³⁷ See, e.g., *Cariou*, 714 F.3d at 706 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)) (citing *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006)); *Perfect 10*, 508 F.3d at 1164–65; *Andy Warhol Found. for Visual Arts*, 11 F.4th at 38–39.

¹³⁸ See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 326 (S.D.N.Y. 2019), *rev’d and remanded*, 992 F.3d 99 (2d Cir. 2021), *opinion withdrawn and superseded on reh’g sub nom. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), *aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 143 S. Ct. 1258, 215 L. Ed. 2d 473 (2023), and *rev’d in part, vacated in part sub nom. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26 (2d Cir. 2021), and *aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, (2023) (holding that Warhol’s works, which used loud, unnatural colors, in contrast to the black-and-white photograph, could reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure, removed from the humanity embodied in the photograph, and were immediately recognizable as being some of Warhol’s famous representations of famous persons); see *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 43 (2d Cir. 2021), *aff’d sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (holding that although secondary works displayed the distinct aesthetic sensibility that many would immediately associate with Warhol’s signature style, they presented the same work in a different form, that form being a high-contrast screenprint, which still retained the essential elements of the photograph without significantly adding to or altering its elements).

¹³⁹ See *Ewing*, *supra* note 21.

nonprofit educational purposes.”¹⁴⁰ It is but one example of the questions that arise from a standard so vague, and so open-ended, as “transformativeness.”¹⁴¹

Thus, Congress should amend the fair use factors in Section 107 to make them more objective. However, Congress should not take this amendment of the fair use doctrine too far in the other direction, lest they create a series of unintended consequences. At the most extreme example, eliminating fair use altogether would inadvertently create negative results, not the least of which would be to stifle education in the arts by taking many copyrighted works out of the classroom.

Instead, Congress should rewrite the fair use defense so that it serves the purpose for which it was originally created. In particular, looking back to the origins of fair use, its creation was seemingly motivated by the rationale that “excessively broad protection would stifle, rather than advance, the law’s objective.”¹⁴² So, the fair use doctrine was intended to strike a balance between “the property rights [copyright law] establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them—or ourselves by reference to the works of others, which must be protected up to a point.”¹⁴³ This purpose of fair use, highlighted in *Cariou*, speaks of a balancing test that essentially weighs the interests of creators, authors, artists, etc., against the interests of the public.¹⁴⁴ However, just because the intent of the fair use doctrine delineates weighing factors on both sides that does not mean that those factors must be so subjectively weighted themselves.

¹⁴⁰ Copyright Act of 1976 § 107, 17 U.S.C. § 107; see *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 547–48 (“Copying might have been helpful to convey a new meaning or message. It often is. But that does not suffice under the first factor. Nor does it distinguish AWF from a long list of would-be fair users: a musician who finds it helpful to sample another artist’s song to make his own, a playwright who finds it helpful to adapt a novel, or a filmmaker who would prefer to create a sequel or spinoff, to name just a few. As Judge Leval has explained, “[a] secondary author is not necessarily at liberty to make wholesale takings of the original author’s expression merely because of how well the original author’s expression would convey the secondary author’s different message.” (alteration in original) (quoting *Authors Guild v. Google, Inc.*, 804 F.3d 202, 215 (2d Cir. 2015))).

¹⁴¹ See *Andy Warhol Found. for the Visual Arts*, 992 F.3d at 109–10.

¹⁴² *Cariou*, 714 F.3d at 705 (quoting *Blanch*, 467 F.3d at 250).

¹⁴³ *Id.* (alteration in original) (quoting *Blanch*, 467 F.3d at 250).

¹⁴⁴ See *id.*

The four-pronged fair use test does nothing to resolve the subjectivity inherent in evaluating what is “fair use.”¹⁴⁵ Laws function to create “fairness” under conventional or broadly held views of what is “fair.” A law that hinges on a legal determination of what is fair use will be dysfunctional if it requires more subjective interpretation. The fair use doctrine should function to simplify the already difficult task of deciding which actions are fair use in copyright law, and which are not. Yet currently, all four factors of the fair use test are extremely broad and open to interpretation, thus making them innately subjective.¹⁴⁶ A case-by-case determination of what is fair use, when the only tool for aiding that decision is a set of four open-ended, context-sensitive factors, will always lead to disparate and conflicting results.

This subjectivity problem can be ameliorated by reworking the fair use doctrine so that it is more objective. Congress should pull from the sharply delineated list of fair uses and not fair uses of the InfoSoc Directive to develop a more strict and detailed approach to fair use.¹⁴⁷ Imputing more objectivity into current U.S. fair use law by implementing the strict standards of the EU’s InfoSoc Directive into an amended Section 107 would spare our legal system and creators a significant amount of inequity when it comes to a fair use analysis.

Specifically, Section 107 should be amended as follows:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, ~~including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research,~~ is not an infringement of copyright.¹⁴⁸ One who is not the owner of the copyright may use the copyrighted work in a reasonable way under the one of the

¹⁴⁵ See *supra* Section II.A.

¹⁴⁶ See Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 733 (2012) (“[W]e start with a vague and difficult concept; we then proceed to apply it in a formal legal context that is foundationally inhospitable to the kinds of contextual judgments infringement doctrine asks factfinders to make.”).

¹⁴⁷ See Directive 2001/29/EC, *supra* note 112, at 15–17; Haßdenteufel, *supra* note 116, at 25.

¹⁴⁸ 17 U.S.C. § 107.

following circumstances without the consent of the copyright owner if it would advance the public interest:¹⁴⁹

- (1) Quotation for criticism or review;
- (2) Caricature, parody, or pastiche;
- (3) Reporting of current events;
- (4) Teaching, research, or private study;
- (5) Scientific research purposes; or
- (6) Use of works in libraries and archives.¹⁵⁰

Such use of a copyrighted work is called a fair use. The owner of a copyright cannot prevent others from making a fair use of the owner's copyrighted work.¹⁵¹

~~In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—~~

- ~~(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.~~

~~The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.~~¹⁵²

¹⁴⁹ MANUAL OF MODEL CIV. JURY INSTRUCTIONS FOR THE DIST. CTS. OF THE NINTH CIR. § 17.22 (NINTH CIR. JURY INSTRUCTIONS COMM. 2023).

¹⁵⁰ See Directive 2001/29/EC, *supra* note 112, at 16–17; Haßdenteufel, *supra* note 116, at 30–31.

¹⁵¹ MANUAL OF MODEL CIV. JURY INSTRUCTIONS FOR THE DIST. CTS. OF THE NINTH CIR. § 17.22 (NINTH CIR. JURY INSTRUCTIONS COMM. 2023).

¹⁵² 17 U.S.C. § 107.

Amending the fair use doctrine under Section 107 so that fair use is determined by categorization in the InfoSoc Directive's objective list will ameliorate the slew of problems and inconsistencies that have inevitably continued to arise in the United States under the current subjective fair use law.¹⁵³ These problems include disparity between courts in their evaluation of copyright infringement suits, confusion about the standards implemented and the subjective factors evaluated when a fair use defense is invoked, and inequity in outcomes for parties with unequal bargaining power.

Had the case of *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith* been decided under the adaptation of the EU standard proposed above, the determination that such a use of Goldsmith's photograph by Warhol did not constitute fair use would have been clear-cut. The district court would have been able to apply the new Fair Use factors directly to the facts of the case, and it would have straightforwardly concluded that Warhol's use of Goldsmith's photographs did not fall into one of the six amended Fair Use categories: (1) quotations for criticism and review; (2) caricature, parody, pastiche; (3) reporting of current events; (4) teaching, research, or private study; (5) scientific research purposes; or (6) use of works in libraries and archives.¹⁵⁴ There would have been no need for appeals, and the case certainly would not have reached the Supreme Court. The same can be said for the majority of fair use cases cited throughout this Note. Application of the standardized test proposed as an amendment to section 107 above to notable fair use cases evidences the fact that adoption of such an amendment would save the courts a substantial number of costs and a great deal of time.

IV. CONCLUSION

The fair use defense to copyright infringement, and its four subjective factors, should be reevaluated and replaced with a series of concrete, objective standards modeled after the EU's InfoSoc Directive,¹⁵⁵ because the subjectiveness of the current fair use doctrine in the United States creates too much disparity between courts in the standards and outcomes of copyright infringement cases, and potentially creates inequity between parties with unequal bargaining power, such as famous artists versus less established artists, by making it easier for more

¹⁵³ See Directive 2001/29/EC, *supra* note 112, at 12, 16–17; Haßdenteufel, *supra* note 116, at 34.

¹⁵⁴ See Directive 2001/29/EC, *supra* note 112, at 16–17.

¹⁵⁵ See *id.*

resourced parties to push the subjective factors in their favor by claiming a transformative purpose.¹⁵⁶

Examination of the origins of fair use as a defense to copyright infringement demonstrates that its existence as a judge-made doctrine before its loose codification in section 107 of the Copyright Act of 1976 caused it to be potentially subjective.¹⁵⁷ In particular, Section 107, the sole standing statutory U.S. law on the fair use defense, lays out four arguably subjective factors that give courts and factfinders significant discretion in their evaluation of fair use.¹⁵⁸ Worse still, fair use's development over time has implicitly created an open-ended fifth factor that allows courts to consider any other facts in the fair use analysis that they deem significant.¹⁵⁹ As demonstrated by a number of Second Circuit and Supreme Court opinions, the fair use test is an "open-ended and context-sensitive inquiry."¹⁶⁰ The first fair use factor is the most subjective, and thus, the most problematic and confusion-inducing.¹⁶¹ EU copyright law provides insight into a potential solution to the problems that a subjective fair use test creates.¹⁶²

¹⁵⁶ See Oral Argument, *supra* note 22, at 28:35.

¹⁵⁷ See Kaminsky, *supra* note 18.

¹⁵⁸ See Copyright Act of 1976 § 107, 17 U.S.C. § 107.

¹⁵⁹ See U.S. Copyright Office Fair Use Index, *supra* note 12.

¹⁶⁰ *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994)).

¹⁶¹ See *id.* at 706 (first quoting *Campbell*, 510 U.S. at 579; and then quoting *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006)); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007); *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 38 (2d Cir. 2021) (arguing that the transformativeness standard is still so broad and subjective that a court can approach the fair use analysis with an entirely different standard), *cert. granted*, 142 S. Ct. 1412 (2022), and *aff'd sub nom. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

¹⁶² See Directive 2001/29/EC, *supra* note 112, at 10.

The solution to these problems lies in amending Section 107 to eliminate the extreme subjectivity of the fair use doctrine by adding objectivity into it, which would subsequently reshape fair use to specifically target its original purpose.¹⁶³ These changes would tailor the new, amended section 107 towards ameliorating the disparity between courts in their evaluation of copyright infringement suits, the confusion about the standards implemented and the subjective factors evaluated when a fair use defense is invoked, and the inequity in outcomes for parties with unequal bargaining power.

¹⁶³ See *Campbell*, 510 U.S. at 575.