Volume IV - Article 4

REWARDING CREATIVITY: TRANSFORMATIVE USE IN THE JAZZ IDIOM

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Fall 2003

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Journal of Technology Law and Policy

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INTRODUCTION

A crayon drawing from a five-year-old child likely produces a copyrighted work. Notating or recording two measures of a three year-old child depressing piano keys, while not conventionally pleasing to the ear, may nevertheless be worthy of a copyright.[1] The artistic merit of a work is not a factor in determining originality. Simply stated, an author satisfies copyright formalities when she affixes an original work of authorship in a tangible medium.[2]

Case law indicates that the threshold requirement for the originality element of a copyright is a showing of some "minimal level of creativity."[3] Few could disagree that the low threshold requirement for originality encourages creativity. An inherent unfairness exists, however, when copyright law shuns creative artists from attaining a copyright.

In an effort to protect existing copyright holders, Congress empowered copyright holders to retain derivative rights.[4] Thus, in the above example, a composer/arranger would need the child's expressed permission to create a sophisticated jazz arrangement based on the child's original musical composition. Without attaining the child's permission, a highly skilled jazz arranger would be violating copyright laws for creating a musical arrangement based on the child's composition. This extreme example serves as the genesis for illustrating the irony associated with the black letter copyright law.

Significant negative repercussions exist for not receiving a derivative copyright for a new arrangement or musical interpretation. Many of these problems exist because the underlying copyright holder customarily denies permission to create a derivative work.[5] Moreover, jazz musicians acquiesce to this custom and never even attempt to seek permission to create a derivative work. Aside from not enjoying all the privileges and revenues associated with copyright ownership, other adverse consequences exist. For example, jazz musicians must pay a mandatory compulsory license fee for use of the song. Furthermore, jazz musicians may not receive statutory protection from bootleg recordings.

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* An earlier version of this article won first prize in the 2002 Boston Patent Law Association's Annual Writing Competition, second prize in the 2002 Nathan Burkan Memorial Competiton, and was One of Four Finalists for the 2002 Robert C. Watson Writing Competition.

[1] *See* 17 U.S.C. § 101 (2000) (a child randomly depressing keys, without a deliberate intent or creative thought, may fall short of the originality requirement for copyright).

[2] 17 U.S.C. § 102(a) (2000) (among the categories of works of authorship include; Section (2) musical works and section (7) sound recordings).

[3] Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 358 (1991).

[4] 17 U.S.C. § 106 (2) (2000).

[5] *See* M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 247 (7th ed.1995) (stating that the original writer of an established work may resent a new writer who takes market share away from the original recording).

A growing movement in copyright case law may effectively reconcile some of these problems. Recently, an abundance of appeals court decisions have embraced the concept of transformative use. Transformative use is primarily a defensive concept that a party may use to defend against a copyright infringement allegation. Judge Pierre Leval first articulated the concept in his 1990 law review article[6] and the Supreme Court judicially embraced the concept in *Campbell v. Acuff-Rose*.[7] Courts now analyze transformative use as a component of the purpose and character of the use factor of the fair use doctrine.

Among other factors articulated later in this note, transformative use primarily occurs when the alleged infringed work takes on a new meaning and/or incorporates a social benefit.[8] Like all fair use defensive arguments, the court balances the four factors and weighs each factor based in large part on equitable considerations.[9] Transformative use is simply a component of the purpose and character of the use factor, which Judge Leval dubbed the "soul of fair use."[10] Case law indicates that courts have continuously given deference to the transformative use concept.[11]

This article suggests that our court system has developed the concept of transformative use to the point where jazz arrangers/musicians may be able to assert the concept for transforming a popular song into the jazz idiom. A successful transformative use argument will adequately defend against a copyright infringement allegation. Furthermore, a successful transformative use argument will save jazz musicians the cost associated with paying a compulsory license or negotiated fee.

A successful transformative use argument may also enable jazz artists to apply for copyright registration for their new work. Occasionally, upon a prevailing transformative use defense, the defendant is able to subsequently register the work as an independent copyright. In essence, on these occasions, the defendant's use constituted a form of "super-transformative use" to warrant copyright entitlement.[12] A super-transformative use argument provides additional benefits when compared with a simple derivative work copyright.[13]

Part A will provide an overview of the issues and problems associated with creating a jazz arrangement based on an existing work under a traditional analysis. Next, Part B will give an historical account of jazz music and discuss the cultural and social importance associated with it. Part C will give an overview of the originality requirement of a copyright.

Next, Part D will explain the concept of a derivative right and analyze the level of originality required to attain a derivative copyright. Part E will provide an overview of

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[6] Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

[7] 510 U.S. 569 (1994).

[8] 2 PAUL GOLDSTEIN, COPYRIGHT, § 10.2 (2nd ed. 2002) (stating that the fair use assessment favors journalism and social comment); 4-13 NIMMER ON COPYRIGHT, § 13.05(C)(2) (2003) (concluding that the existence of the fair use defense enables society to benefit from transformative uses such as parody).

[9] MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 428 (1999), *citing* Iowa State Univ. Research Found., Inc. v. American Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980)(stating that the fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.").

[10] Leval, *supra* note 6, at 1116.

[11] *See Campbell*, 510 U.S. at 579 (finding that the creation of transformative works promotes the goal of copyright law); *see also* Kelly v. Arriba Soft, 2003 U.S. App. LEXIS 13562 (U.S. App. , 2003); SunTrust Bank v. Houghton Mifflin, 268 F.3d 1257 (11th Cir. 2001); On Davis v. The Gap, 246 F.3d 152 (2d Cir. 2001).

[12] The court has not used the term "super-transformative use" in any decision. The author of this article will use the term, however, in instances when the defendant was able to use the transformative use argument as a successful copyright infringement defense and as a sufficiently original work to acquire an independent copyright.

[13] E-Mail from Zick Rubin, Of Counsel at Hill & Barlow Agency, to Stephen R. Wilson, law student, Suffolk University Law School (Feb. 11, 2002, 19:13:55 EST)(on file with author).

transformative use. Also, this part will include an in-depth analysis of the concept of transformative and productive use, along with case law illustrating various types of transformative use. Part G will attempt to unravel the complex problem of differentiating between derivatives and transformative use.

Part H will provide a hypothetical example in an effort to analogize transformative use with jazz music. Additionally, this part will show that jazz music adds a new meaning, a new message, and extends a social benefit. Furthermore, this part will show, by analogy, how jazz musicians may assert a successful transformative use argument and possibly attain an independent copyright for the work. Next, Part I will continue the discussion by predicting how the courts would balance the other fair use factors.

Part J will focus on the formal requirements, such as fixation, that jazz artists should satisfy before engaging in a fair use defense. Part K will analyze the potential policy considerations for asserting transformative use in the jazz idiom. Finally, the conclusion will show that jazz musicians have a colorable fair use argument. Prospectively, the concept of transformative use may have judicially evolved to the point where a defendant author may not only raise an affirmative defense for sophisticated musical arrangements and improvisations, but also enable the defendant author to subsequently attain an independent copyright for the questioned work.

A. ISSUES / PROBLEMS

Jazz musicians include some of the most proficient composers, arrangers and musicians in the world.[14] Due to the inherent nature of jazz music, however, copyright law appears to ignore the high quality of musicianship and creativity possessed by many jazz artists.

Typically, in the jazz genre, musicians transform preexisting songs (i.e. "covers") into new works by incorporating "jazz elements" in the their performances or recordings.[15] Traditionally, when a jazz musician creates a new work based on an existing work, he/she may attain a copyright for creating a derivative work.[16] The Copyright Act, however, grants the underlying copyright holder the exclusive right to create or control derivative works.[17] Thus, without the copyright holder's permission to create a derivative work, jazz musicians do not receive a copyright for their artistic contributions.

Without copyright ownership, jazz musicians encounter other significant problems. For example, amendments to the Act protect copyright owners from unauthorized bootleg recordings.[18] These anti-bootleg amendments protect musicians who perform original compositions that they had not yet affixed in tangible form. The act of affixing the work, even in the hands of an unauthorized bootlegger, satisfies the fixation requirement.[19]

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[14] Throughout this article, the author interchanges the terms musician, arranger and artist. All jazz musicians are "arrangers" in the sense of the word because they are "arranging" harmony, melody and rhythm during their improvisation. The term composer refers to the person who authored the original work.

[15] *See, e.g.*, New Orleans Jazz Centennial Celebration, *available at* http://www.louisianamusic.org/NOJCC/basicelem.htm (last visited September 21, 2003) (elements of jazz include improvisation, syncopation, rhythm, structure, among others).

[16] 17 U.S.C. § 103 (2000). (the composer must satisfy the formalities for attaining a derivative copyright).

[17] *Id.*

[18] *Id.* § 1101(a)(1).

[19] Unitied States v. Moghadam, 175 F.3d 1269, 1280 (11th Cir. 1999) (holding that the Copyright Clause's fixation requirement did not constrain Congress's Commerce Clause power to enact copyright-like protection for unfixed works); *see also* NIMMER ON COPYRIGHT, § 8E.03[B][1] (2003) (Nimmer suggests that fixation by a bootlegger of a previously unfixed musical performance approximates, but does not equal, copyright protection): *see also* Keith V.

At the point of fixation, the performer attains the right to sue under the remedies provided in sections 502 through 505 of the Copyright Act.[20] While these statutory provisions address remedial concerns, it remains unclear whether fixation by a bootlegger rewards the performer a copyright to that work.

Additionally, it remains unclear whether copyright law affords jazz musicians the same remedial privileges. Jazz musicians typically play "covers" of popular music. Presumably, the anti-bootleg statute addresses circumstances when the artist is performing his/her own original work of authorship.[21] Therefore, if a bootlegger records a jazz musician's performance, the original composer of the performed song has standing to seek legal recourse. While the copyright holder has the right to sue for infringement, the jazz musician may have no legal recourse to due so. Jazz musicians execute a high degree of originality by improvising or altering the harmony, melody, and rhythm of the song, yet may have no legal recourse against a bootleg recorder.[22]

The derivative rights afforded to the copyright owner further compound this problem. Music composers share a reluctance to grant jazz artists the opportunity to create a derivative version of their music.[23] Secondly, jazz musicians have grown accustomed to accept this practice and typically do not request permission to create a derivative copyright.[24] If jazz musicians were successful in attaining a derivative copyright, the portion of the bootlegged recording that affixed the newly added copyright would furnish jazz musicians legal standing to bring an infringement action.

Aside from not attaining protection from unauthorized recordings, jazz musicians do not enjoy any performing rights revenue.[25] The copyright holder receives revenue for the public performance of her copyrighted work. Performing rights organizations such as ASCAP, BMI and SESAC collect fees from radio stations and nightclubs, among others, for publicly performing the copyrighted work.[26] Therefore, when jazz musicians perform covers/standards in a public venue, the underlying copyright holder receives a royalty from the performing rights organization that collected the licensing fee from the venue. Unfortunately, the shortfall in potential revenue is not the only consideration that adversely affects a jazz musician.

Lee, *Resolving the Dissonant Constitutional Chords Inherent in the Federal Anti-Bootlegging Statute In United States v. Moghadam*, 7 VILL. SPORTS & ENT. L. FORUM 327 (2000); Joseph C. Merschman, *Anchoring Copyright Laws in the Copyright Clause: Halting the Commerce Clause End Run Around Limits On Congress's Copyright Power*, 34 CONN. L. REV. 661 (2002).

[20] 17 U.S.C. § 1101(a) (2000).

[21] *See* NIMMER ON COPYRIGHT, § 8E.03 (2003) (Nimmer details a myriad of unresolved conflicts when analyzing unauthorized recordings under Chapter 11 of the Copyright Act).

[22] A sympathetic court *may* find that the unauthorized recording contains an original expression (e.g. in the improvised portion of a recording) resulting in the jazz musician attaining legal recourse.

[23] Reasons include 1) control of the end result, 2) being usurped in the market by the derivative work, 3) if the derivative is a musical work, the derivative may be a direct competitor, 4) little incentive to do so, 5) receiving revenue through compulsory license scheme.

[24] *See* American Society of Composers, Authors, and Publishers *at* www.ascap.com (last visited August 14, 2003) (searching through the registered works there appears to be very few derivative works for "standards.").

[25] 17 U.S.C. § 106 (2000) (granting a copyright owner the right to perform the work publicly); *see also* 17 U.S.C. § 101 (2000) (the work is performed publicly if performed at a place open to the public or any place where there is a gathering of a substantial number of people, outside of the normal circle of a family);. s*ee generally* NIMMER ON COPYRIGHT, § 8.19 (2003) (a music copyright owner may engage the services of a performance rights organization, such as ASCAP or BMI, which subsequently licenses the music and collects royalties for public performances (i.e. played on the radio, nightclubs, etc) of that song).

[26] DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 233 (2000).

Under a compulsory licensing scheme, jazz musicians must pay for the privilege of recording another artist's composition. The copyright holder issues a compulsory license to allow the jazz musician to record and subsequently distribute the copyrighted material. A jazz musician must obtain a compulsory license or alternatively negotiate with the copyright holder, even if she significantly adds to the underlying copyright.[27]

Furthermore, the Act grants a separate copyright to the owner of the sound recording.[28] For many jazz musicians, recording a sophisticated jazz arrangement of a popular song results in no copyright ownership. Without allowing a derivative copyright, the original composer receives all of the benefits from owning the underlying composition. Moreover, the record company enjoys all the benefits of owning the sound recording.[29] Finally, copyright ownership in these instances is not only unavailable, but jazz musicians also have to pay a compulsory license fee or negotiate separately with the songwriter for the use of the song.[30]

Arguably, the transformative use defense may reconcile these unfair issues. Before embarking on a substantive analysis, an understanding of the historical development of jazz music is critically important.

B. HISTORICAL & CULTURAL DEVELOPMENT– JAZZ MUSIC

A full understanding of the musical, social, and cultural development of jazz music is critical when analyzing a possible transformative use argument. For the purposes of a transformative use analysis, the social utility of the use sits at the core of these three distinct developments. A primary factor in a court's transformative use analysis inquires whether the new work extends a social benefit to the public.[31] To fully understand the social impact and importance of jazz music in general, one needs information on the genre's historical development.

Jazz music began its development in the late nineteenth century.[32] In the decade prior to the twentieth century, African Americans began interjecting native rhythmic and melodic influences into the traditional European musical style. Many historians characterize jazz as a convergence of six sources.[33] Jazz music mixes rhythms from West Africa, harmonic structure from European classical music, and melodic and harmonic qualities from nineteenth-century American folk music, religious music, work songs, and minstrel show music.[34]

The development of jazz erupted from a specific social environment.[35] Primarily conditioned by slavery, a group of African Americans developed highly personal cultural traits when they were shut off from the rest of society.[36] Soon after its development, Caucasian

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[27] 17 U.S.C. § 115 (a)(2) (2000) (ironically, the Act prohibits the compulsory licensee from substantially altering the underlying copyright; this prohibition directly opposes the inherent nature of jazz music).
[28] *Id.* at § 102(a)(7).
[29] PASSMAN, *supra* note 26, at 308.
[30] 17 U.S.C. § 118(b) (2000) (in accordance with the Act, parties may negotiate royalty terms and rates in a licensing agreement) *see also* 17 U.S.C. §§ 801 et seq. (2000) (alternatively, the Act provides for an arbitration panel (The Copyright Royalty Tribunal) to determine royalty terms and rates).
[31] Campbell v. Acuff-Rose, 510 U.S. 569, 579 (1994) (stating that parody "can provide a social benefit by shedding light on an earlier work").
Fisher v. Dees, 794 F.2d 432, 437- 438 (9th Cir. 1986).
[32] *See* JIM GODBOLT, THE WORLD OF JAZZ 10 (1990).
[33] *See* LEONARD FEATHER, THE ENCYCLOPEDIA OF JAZZ 23 (1960).
[34] *Id.*
[35] *Id.*
[36] *Id.*

performers began to play an early form of jazz at minstrel shows.[37] Originally dubbed "jass," an all-Caucasian band called *The Original Dixieland Jass Band*, recorded the first jazz record in 1917.[38] In 1923, King Oliver's orchestra became the first African American band to record for a major label.[39]

Theorists and scholars continue to tout varied historical accounts of the development of jazz.[40] Under the critical race theory, which seeks to understand the causes and history of racial supremacy in law and culture, jazz music's relationship to transformative use comes to focus.[41] Some commentators suggest jazz music best exemplifies the critical race theory.[42] Additionally, legal scholars believe jazz music represents the best analogy for how critical race theorists could challenge discourse in the legal community.[43]

One element of critical race theory, in context with jazz music, suggests that jazz musicians effectively deconstructed racism by transforming traditional European style of music into a predominately African American influenced music.[44] In an effort to express themselves against the oppression of racism, African American musicians embraced their cultural identity.[45] For example, the development of bebop music, which is a genre of jazz music incorporating a series of abstract notes played at a very fast tempo, serves as an expression of rage felt by many African Americans at the time.[46] An effective way to musically deconstruct the dominant culture was to transform a popular song into the jazz idiom.

The historical treatment of African American musicians provides insight on the reasons why copyright law does not reward improvised and reinterpreted creativity. In the early days (even today), African American performers routinely found their works appropriated and exploited by non-African Americans.[47] After decades of victimization, discrimination, and prejudice, African Americans acquiesced to being afforded less copyright protection than their Caucasian counterparts.[48] Thus, when reinterpreting existing works, regardless of the level of creativity, African American musicians did not seek derivative copyrights or make claim to independent copyrights.[49]

Despite disparate treatment, African American musicians, as well as others, continued to develop jazz throughout the remainder of the century. Jazz music has since splintered into no

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[37] *Id.*
[38] *See* LEONARD FEATHER, THE ENCYCLOPEDIA OF JAZZ 24 (1960).
[39] *Id.*
[40] *See e.g.*, ALYN SHIPTON, A NEW HISTORY OF JAZZ (2001); Richard Knight, *All That Jazz*, GEOGRAPHICAL, Oct 2001, at 14; Charles Hersch, *Ken Burns, Jazz: A Film by Ken Burns*, POLITY, Fall 2001, at 107; Ronald Radano, *Myth Today:The Color of Ken Burns Jazz*, BLACK RENAISSANCE/RENAISSANCE NOIRE, Summer-Fall 2001, at 42.
[41] *See* Jonathan A. Beyer, *The Second Line: Reconstructing the Jazz Metaphor In Critical Race Theory*, 88 GEO. L.J. 537, 538 (2000).
[42] *Id.* at 539.
[43] *Id.*
[44] *Id.*
[45] *Id.* at 540.
[46] Jonathan A. Beyer, *The Second Line: Reconstructing the Jazz Metaphor In Critical Race Theory*, 88 GEO. L.J. 537, 542 (2000).
[47] *See* K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM & ENT. L.J. 339, 357 (1999).
[48] *See id.*
[49] *See id.*

less than ten separate styles.[50] Many modern styles of popular music may credit its ancestry to one of these styles of jazz.

C. COPYRIGHT - ORIGINALITY REQUIREMENT

As illustrated in the introduction, attaining a copyright requires an original expression fixed in a tangible form.[51] Works affixed in a tangible medium includes such works that an individual may hear or see with or without the aid of a machine. An area of some debate exists regarding the length of time required to satisfy a "tangible fixation."[52] Suffice it to say, a couple of seconds satisfies the tangible fixation requirement.[53]

The originality requirement is applicable to our discussion, though most authors easily satisfy this element. Congress chose not to define the threshold requirement for an "original" work of authorship in the 1909 and 1976 Copyright Acts; however, beginning approximately one hundred years ago, a long line of case law established that a mere modicum of creativity satisfied the originality requirement.[54]

Our court system embraced this low threshold because judges were reluctant to decipher the artistic merits of a work of authorship.[55] In essence, judges realized that a deep level of subjectivity exists to determine whether a work satisfied the originality requirement. To illustrate, Justice Holmes stated that it would be a "dangerous undertaking for persons trained only to the law to constitute themselves final judges of [art]."[56]

D. DERIVATIVES

The Copyright Act of 1976 grants a bundle of exclusive rights to creators of original works of authorship.[57] One of these exclusive rights is the right to create derivative works.[58] The Act defines a derivative work as a new work that is based on a preexisting work.[59] Procedurally, the author of the new work needs approval from the author of the existing work before creating a derivative work. To illustrate, a film producer must receive approval from a book author (or copyright holder) before creating a derivative work (i.e. film) based on that book. Similarly, a music arranger must seek approval from the songwriter before creating a derivative work (i.e. an orchestral arrangement) based on the song.

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[50] Examples of the different jazz categories include; blues, ragtime, dixieland, bebop, swing, cool, latin-jazz, avant-garde, free jazz, modern, fusion, and others.

[51] 17 U.S.C. § 102(a) (2000).

[52] *See* Ira L. Brandiss, *Writing in Frost on a Window Pane: E-Mail and Chatting on RAM and Copyright Fixation*, 43 J. COPYRIGHT SOC. OF THE U.S.A. 237 (1996).

[53] A detailed discussion of the time requirement for a "tangible" medium of expression is beyond the scope of this paper. *See* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) (finding that loading MAI's operating system software into RAM makes a copy and satisfies the fixation requirement); Triad Systems Corp. v. Southeastern Express System, 64 F.3d 1330 (9th Cir. 1995).

[54] *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951); Original Appalachian Artworks, Inc., v. Toy Loft, Inc., 684 F.2d 821 (11th Cir. 1982).

[55] *See Bleistein*, 188 U.S. at 251-52.

[56] *Id.* at 251.

[57] 17 U.S.C. § 106 (2000).

[58] *Id.* § 106(2).

[59] *Id.* § 101 (examples of derivative works include translations, musical arrangements, dramatizations, fictionalization, motion picture version, sound recording, and other forms of work that may be "recast, transformed, or adapted.").

Once the author of the preexisting work grants approval, the author of the derivative work may seek a copyright for any additional original elements created in the derivative work.[60] In essence, the derivative work author may receive a copyright for any excess copyrightable material not included in the preexisting work. One of the many examples may include a film producer adding a primary character to the film that does not appear in the book. The film producer would be able to attain a copyright for that particular definable character. Additionally, the film producer may attain a copyright for any character dialogue that incorporates an original expression that does not appear in the book.

The secondary author's "transformation" of an existing work is among the type of permissible derivative works contained in the statutory definition.[61] Thus, a fundamental question surfaces whether creating a new work based on an existing work falls within the definition of a derivative work or under the transformative use component of the fair use doctrine. These diametrically opposing concepts cause confusion.[62]

Characterizing a new work, which incorporates copyrightable elements of an existing work, as a derivative work requires approval from the author of the existing work. Without approval, and absent an affirmative defense, the author of the preexisting work would have an actionable claim against the creator of the new work. Alternatively, if the court characterizes the new work as a transformative use, the author of the new work does not need approval from the author of the preexisting work to produce a derivative.[63] More importantly, a sufficiently transformative use may not only constitute an affirmative fair use defense to a copyright infringement claim, but the new work may also yield its own independent copyright (i.e. super-transformative use).[64] Thus, distinguishing between an unauthorized derivative creation and a creation that warrants transformative use status is not only a paramount challenge, but is virtually the difference between infringing a copyright and enjoying the fruits of a copyright.

No bright line rules exist for determining the distinction between a transformative and derivative work. Courts lack judicial guidance; thus, employ an ad hoc evaluation when determining whether the work constitutes transformative use or a derivative version of the original. In the overwhelming majority of cases analyzing transformative use, the dispositive factor turned on whether the new work constituted a transformative use.[65] Therefore, finding transformative use generally equates with finding fair use.[66] The historical development of the concept of transformative use may help with determining some distinguishing characteristics.

E. HISTORICAL DEVELOPMENT OF TRANSFORMATIVE USE

The concept of transformative use has given our court system additional opportunities to find fair use for otherwise infringing works. Courts have analyzed an abundance of

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[60] *Id*.
[61] *Id*.
[62] *See* Jeremy Kudon, note, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579 (2000) (stating that Judge Leval's transformative use test virtually mirrors Professor Goldstein's definition of a derivative work); Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell*, 7 COMM L. & POL'Y 1 (2002).
[63] Leval, *supra* note 6, at 1111-12 ("The creator of a derivative work based on the original creation of another may claim absolute entitlement because of the transformation.").
[64] *Suntrust*, 268 F.3d at 1257 (after successfully asserting a fair use defense for a copyright infringement allegation, author Alice Randall subsequently registered an independent copyright for *The Wind Done Gone*, Registration # TX-5-424-912, *available at* http://www.loc.gov/cgi-bin/formprocessor/copyright/locis.pl).
[65] *See* Kudon, *supra* note 62, at 592.
[66] *See id*. at 583.

transformative use cases over the past eight years.[67] First articulated in 1990, the concept of transformative use may share a historical relationship to the ancient doctrine of abridgements.[68] Though the relationship between abridgements and transformative use appears attenuated, many would agree that the doctrine of productive use bares a strong relationship to transformative use.[69] A historical summary of transformative use follows.

ABRIDGMENTS

The concept of transformative use may share a historical relation to the concept of abridgments.[70] In a 1740 case, *Gyles v. Wilcox*,[71] the court found that while shortening a book constituted infringement, making real, fair, and substantial abridgments to a book may not constitute infringement.[72] Additionally, Judge Leval states that some early courts stressed the concept of transformative use though related it to abridgments.[73]

Despite some evidence to the contrary, one commentator concluded that the abridgment doctrine did not antedate the productive use factor.[74] One primary difference between the two doctrines is that if the second author changed the original too much, the abridgment doctrine would be unavailable.[75] Secondly, the rationale for the abridgment doctrine was to increase access to existing works by creating cheaper and condensed alternatives.[76] In some cases, the court used the term abridgment to describe an infringing use, rather than a privileged use.[77] While it appears the historical relationship between abridgments and productive use remains unsettled, the relationship between productive use and transformative use appears sound.

PRODUCTIVE USE

The concept of transformative use shares a closer relationship with productive use. The Ninth Circuit Court raised the productive use analysis in *Universal City Studios v. Sony Corp*.[78] In *Universal*, the court articulated that fair use should not be found when the defendant merely reproduced a work without adding original expression.[79] The Supreme Court reversed, finding

[67] *See, e.g.*, Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994) (analyzing parody as a transformative use); Kelly v. Arriba Soft Corp., 336 F.3d 811, 822 (9th Cir. 2003) (holding that Arriba's thumbnail use of photographers images constitutes transformative use); American Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2nd Cir. 1994) (finding defendant's photocopying of plaintiff's copyrighted works was not transformative).
[68] *See* Leval, *supra* note 6, at 1112; *see also Abridgement Must Be Transformative Use in Order to Qualify for Fair Use Defense*, PAT. TRADEMARK & COPYRIGHT J., June 17, 1993, at 158.
[69] *See* Steven D. Smit, *"Make a Copy for the File…": Copyright Infringement by Attorneys*, 46 BAYLOR L. REV. 1 (1994) (stating that the term "transformative use" is better than "productive use" because fair use in this context occurs when the defendant transforms the work); *see also* Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 684 (1995).
[70] *See* Leval, *supra* note 6, at 1112.
[71] 26 Eng.Rep. 489 (1740).
[72] *See id.* at 490.
[73] *See* Leval, *supra* note 6, at 1112.
[74] *See* Lape, *supra* note 69, at 684.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 685.
[78] 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).
[79] *Id.* at 970.

the resolution of whether productive use occurred was not determinative for finding fair use, but rather simply one of the factors.[80]

In *Campbell v. Acuff-Rose*[81] the Supreme Court enthusiastically embraced productive use. The Court stated that the primary inquiry under the first fair use factor is whether the secondary use supersedes the original work or adds something new, thereby incorporating a new meaning or message.[82] By placing an emphasis on determining whether the secondary use was productive, the Court effectively embraced Justice Blackmun's definition of productive use, which he articulated in his *Sony*[83] dissent. Furthermore, *Campbell* adopted Justice Blackmun's inquiry into whether the secondary work incorporated some "added benefit to the public beyond that produced by the first author's work."[84]

F. TRANSFORMATIVE USE – THEN AND NOW

Scholars in the field of copyright law credit Judge Pierre Leval with coining the phrase "transformative use" in his law review article, *Toward a Fair Use Standard*.[85] Additionally, in articulating the transformative use concept, Judge Leval broadened the scope of the first fair use factor (the purpose and character of the use factor). Speaking of fair use, Judge Leval stated that, "the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."[86]

Courts analyze other factors within transformative use. Aside from analyzing whether the new work adds new meaning, serves a different purpose, or extends a social benefit, courts often freely relate transformative use to some First Amendment privileges.[87] Congress codified a few of these privileges in the preamble to the fair use exceptions.[88] While finding a work to parody, criticize or comment on an existing work is not dispositive of finding fair use, such an analysis includes an inquiry of its transformative nature.[89]

TRANSFORMATIVE USE GENERALLY

Judge Leval embraced Justice Story's articulation of what we now know as the purpose and character of the use factor. In his landmark decision in *Folsom v. Marsh*,[90] Justice Story articulated the precursor to the statutory fair use exception.[91] Generally, the use must be productive and must use the quoted material in a different manner without merely superseding

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[80] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 455 n. 40 (1984) (the court noted that copying a work for a blind person might be an unproductive use which falls within the purview of an adequate fair use defense).
[81] 510 U.S. 569 (1994).
[82] *Id.* at 579.
[83] *Sony*, 464 U.S. at 457.
[84] *Id.* at 478; *see also Campbell*, 510 U.S. at 579.
[85] Leval, *supra* note 6, at 1105.
[86] *Id.* at 1110.
[87] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555-60 (1985) (finding that the First Amendment extends the traditional equities of fair use); Comedy III Productions, Inc. v. Gary Saderup, Inc., 21 P.3d 797, 808 (Cal. 2001) (stating that the "inquiry into whether a work is 'transformative' appears to us to be necessarily at the heart of any judicial attempt to square the right of publicity with the First Amendment.").
[88] 17 U.S.C. § 107 (2000) (providing illustrative, rather than exclusive, examples of the types of fair uses).
[89] *See Campbell*, 510 U.S. at 581 (finding that if the parodic version substitutes the market for the original or licensed derivatives, the defendant must establish the extent of transformation).
[90] 9 F. Cas. 342 (C.C.D. Mass. 1841).
[91] *Id.* at 345.

the objects of the original.[92] Among the many examples of transformative uses are "parody, symbolism and aesthetic declarations."[93] However, despite evidence to the contrary, finding a transformative use is not a dispositive fair use defense.[94] The court must balance the other fair use elements along with other factors favoring the copyright owner.

The court analyzes transformative use by resolving "whether the new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[95] The *Campbell* Court also stated, "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weight against a finding of fair use."[96] The essential goal of copyright law is "generally furthered by the creation of transformative works."[97]

As previously mentioned, various circuit courts have analyzed the concept of transformative use under the purpose and character factor. As the decisions indicate, courts use a broad and/or varied definition of transformative use. Nevertheless, a recurring theme suggests that supplanting the original is an important consideration. A summary of some recent cases follows.

American Geophysical Union, a publisher of scientific journals, filed a copyright infringement action against Texaco for making unauthorized copies of copyrighted articles for research purposes.[98] The Second Circuit Court of Appeals affirmed Judge Leval's district court decision.[99] Texaco argued that the photocopying constituted transformative use because it allowed researchers to transform the journal article into a form more easily used in a laboratory setting.[100]

The court ruled that Texaco's copying was not transformative because Texaco simply made mechanical photocopies of the entire articles without adding new meaning.[101] The appeals court agreed that a showing of transformative use is not a requirement of fair use but "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[102] Here, weighing all the fair use factors, the court found that the copying did not constitute fair use.[103]

A recent Ninth Circuit case, *Kelly v. Arriba Soft*,[104] analyzed transformative use. Photographer Leslie Kelly filed a copyright infringement action against Internet search engine company Arriba Soft.[105] Arriba Soft developed a search engine that searched for images and photographs on the Internet.[106] A keyword search would display a thumbnail version of the

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[92] Leval, *supra* note 6, at 1111.
[93] *Id.*
[94] *Campbell*, 510 U.S. at 579 (explaining that transformative use is not absolutely necessary for finding a fair use).
[95] *Id*.
[96] *Id.*
[97] *Id.*
[98] American Geophysical Union v. Texaco, Inc., 60 F. Supp. 1, 2 (S.D.N.Y. 1992).
[99] American Geophysical Union v. Texaco, Inc., 60 F.3d 913, 932 (2d Cir. 1994).
[100] *Id.* at 926.
[101] *Id.* at 920.
[102] *Id.* at 923 (quoting *Campbell*, 510 U.S. at 579).
[103] *Id.* at 932.
[104] Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).
[105] *Id*. at 815.
[106] *Id*.

image or photograph.[107] Affirming the district court, the appeals court held that displaying a thumbnail version was fair use.[108]

The appeals court found that displaying the thumbnail version constituted fair use because Arriba's use of the photos did not supplant Kelly's use.[109] In effect, Arriba's use was sufficiently transformative because it created a different purpose for the image.[110] The appeals court found, however, that the district court erroneous broadened the scope of the party's motion for summary judgment.[111] Thus, the appeals court remanded the issue of whether displaying the full sized image constituted fair use.[112]

SATIRE / PARODY / COMMENT

The Act provides examples of the types of fair uses of copyrighted works. Codified in the preamble to the four fair use factors, an illustrative list of "fair use," for copyrighted works includes use for the "purposes such as criticism, comment, news reporting, teaching . . . ."[113] The proffered fair use examples are by no means exclusive.[114] Furthermore, the court must still analyze the use under the four factors with the court weighing each factor "together in light of the purposes of copyright."[115]

In *Campbell*, the Supreme Court judicially accepted parody as a significant consideration for a finding of fair use.[116] The plaintiff, rap group 2 Live Crew, sought to overturn an appeals court decision holding that their rap version of Roy Orbison's song *Pretty Woman* was not a fair use of the work.[117] Like all fair use defenses, a parodic work must toil its way through all the factors. After weighing through all the factors, the *Campbell* Court found the parodic rap version of *Pretty Woman* to be a fair use of the original primarily due to its transformative use of the work.[118]

Rearticulating Judge Leval's argument, the Court found that the appeals court placed too much emphasis on the commercial nature of the parody.[119] Additionally, the Court found that the appeals court erred in holding that 2 Live Crew's version contained an excessive amount of the original version.[120]

For parody to work effectively, it must draw upon enough of the copyright from the existing work to conjure up the intended comment, criticism or humor.[121] Copying a significant amount of an existing work under the umbrella of parody, however, in of itself, does not

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[107] *Id.*
[108] *Id*. at 817 (on another issue, the appeals court reversed the district court, however, finding that it should not have reached the issue that the use of full-sized images through online linking and framing was not a fair use because neither party moved for summary judgment).
[109] *Id*. at 818.
[110] *Id*.
[111] *Id*. at 822.
[112] *Id*.
[113] 17 U.S.C. § 107 (2000).
[114] *See Campbell*, 510 U.S. at 577-78.
[115] *Id.* at 578.
[116] *Id.* at 594.
[117] *Id.* at 571.
[118] *Id*. at 570 (finding that parody has an "obvious claim to transformative value").
[119] *Id.* at 574.
[120] *Id.* at 588.
[121] *Id.* (finding that parody must conjure up enough of the original work as to make the parody recognizable).

extinguish a viable infringement claim.[122] Thus, even if the intended new work falls under the definition of a parody, the new author may not use more than is necessary to allow the public to draw the parodic relationship between the existing work and the new work.[123]

Campbell distinguished parody from satire by stating that parody comments upon particular artistic work whereas satire broadly addresses the "institutions and mores of a slice of society."[124] Determining whether a work is parody or satire was central in *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*,[125] where the defendant used the plaintiff's *The Cat In The Hat* character to tell the story of the O.J. Simpson murder trial.[126]

The court found that the defendant neither held Dr. Seuss's character up to ridicule, nor had any "critical bearing on the substance or style of *The Cat In the Hat*."[127] The defendant's use of *The Cat In the Hat* character was satirical rather than parodic.[128] In essence, the court found that the defendant did not use the plaintiff's character to parody it but rather to use it as a conduit to comment on something else.[129]

In *Leibovitz v. Paramount Pictures Corp.*,[130] the Second Circuit found the defendant's use to fall within the parody exception.[131] Photographer Leibovitz sued Paramount for mimicking her Vanity Fair photo of a nude and pregnant Demi Moore by depicting actor Leslie Nielson in the same pose for its promotion of the film *Naked Gun 33 1/3*.[132] The court found the ad to be transformative and reasonably perceived as commenting on the original.[133] Rejecting the plaintiff's argument relating to market harm, the court quoted *Campbell*, stating, "parody and the original usually serve different market functions."[134] After weighing all the fair use factors, the court ruled in favor of the defendant.

Ascertaining whether the new work extends a social benefit is paramount when analyzing any First Amendment fair use argument, such as parody, criticism or comment. Such was the case in *Suntrust v. Houghton Mifflin*.[135] Author Alice Randall wrote *The Wind Done Gone* ("*TWDG*") to comment on, or parody, Margaret Mitchell's classic book *Gone With the Wind* ("*GWTW*").

Alice Randall, an African American woman, wrote her book using fifteen of the same copyrightable characters expressed in *GWTW*.[136] Randall transformed many of these characters, however, by depicting the Caucasian characters in the same negative light as Margaret Mitchell's depiction of African American characters in *GWTW*.[137] While Randall altered the characters'

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[122] *See id.* at 588-89 (concluding that while parody often requires copying of the heart of the work for the parody to be effective, verbatim copying of more than necessary is not fair use); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268 (11th Cir. 2001) (finding that although by definition parody must borrow elements from an existing work, the parodic work does not necessarily shield the defendant from a copyright infringement claim).
[123] *Campbell*, 510 U.S. at 588.
[124] *Suntrust*, 268 F.3d at 1268.
[125] 109 F.3d 1394 (9th Cir. 1997).
[126] *Id.* at 1400.
[127] *Id.* at 1401 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 580).
[128] *See id.* at 1400-01.
[129] *See id.*
[130] 137 F.3d 109 (2d Cir. 1998).
[131] *Id.* at 117.
[132] *Id.* at 111.
[133] *Id.* at 114.
[134] *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 591).
[135] 269 F.3d 1257 (11th Cir. 2001).
[136] *Id.* at 1266.
[137] *Id.* at 1270.

names, readers of *GWTW* would easily recognize many of the characters' idiosyncrasies.[138] The style and prose expressed in *TWDG*, however, was a departure from that found in *GWTW*.[139]

The *Suntrust* court did not focus on identifying the similarity between the two works. The dispositive inquiry focused on whether Randall's version was sufficiently parodic or transformative for a finding of fair use. The court did not fully embrace Randall's contention that her work constituted parody (in this sense meaning comedy) because it contained elements of African American humor.[140] Defining Randall's work as comedic, however, was not dispositive for the court to find fair use. Randall's work substantially transformed *GWTW* by historically commenting on race relations, which added a new meaning and a significant social utility.[141]

Furthermore, the court defined a work as parody if "its aim is to comment upon or criticize a prior work by appropriating elements of the original in creating a new artistic, as opposed to scholarly or journalistic work."[142] This expansive definition of parody derives from a discriminating look at the language in *Campbell*.[143] While the *Campbell* Court suggested that the aim of parody is to provide comic effect or ridicule, it continued to discuss parody under the auspices of the First Amendment's right to comment on a work of authorship.[144] The *Suntrust* court adopted this broader interpretation for the rights associated with parodic works.[145] Under the broader definition of parody, the *Suntrust* court effectively reconciled the problem by categorizing a non-comedic work as parody.[146]

G. DIFFERENTIATING DERIVATIVE FROM TRANSFORMATIVE USE?

Invoking the transformative use defense may cause adverse consequences because the court may view the secondary work as an unauthorized derivative work. Due to proliferation of transformative use cases, it now appears that virtually every plaintiff claiming an infringement of the exclusive right to create derivative works will have to address a transformative use counter-argument.[147] Differentiating between the two opposing theories is not an easy task.

The Second Circuit addressed these opposing arguments in *Castle Rock Entertainment Inc. v. Carol Publishing Group*.[148] The defendant published a 132-page book containing 643

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[138] *Id.* at 1267.

[139] *Suntrust*, 268 F.3d. at 1270; *see also id.* at 1279 (concurring opinion)(suggesting that Randall's version takes on a diary form while Mitchell's version was a "linear third-person narrative").

[140] *Id.* at 1269 n.23 (ignoring Houghton's argument that TWDG was an example of African American humor due to its subjectivity).

[141] *Id.* at 1270.

[142] *Id.* at 1268-69.

[143] *See Campbell*, 510 U.S. at 580.

[144] *Suntrust*, 268 F.3d at 1268.

[145] *Id.* (finding that Campbell defined parody as comedic on the one hand and more expansive in terms of commenting on the original work on the other hand. In *Suntrust*, the court adopted the broader definition of parody by reasoning that the court should not engage in determining the success of the attempted humor).

[146] *See id.* (in doing so, one may reasonably conclude that parody directly relates to commentary. *See id.* Generally, the only substantive difference may be that commenting on a work may not add enough new meaning or extend a social benefit. Accordingly, the combination of commenting upon a work with adding ample new meaning and extending a social benefit will generally tip fair use in favor of the alleged infringer).

[147] Kelly v. Arriba Soft Corp., 2003 U.S. App. LEXIS 13562 at *16 (U.S. App., 2003)(finding that defendant's use of thumbnail versions of photographer's images were transformative); Winter v. DC Comics, 30 Cal. 4th 881, 891 (2003)(finding that a comic book depicting popular musicians as worm-like creatures was sufficiently transformative).

[148] 150 F.3d 132 (2d Cir. 1998).

trivia questions and answers relating to various episodes of NBC's sitcom Seinfeld.[149] The lower court found that the trivia book constituted a transformative use because it qualified as either a criticism, comment, scholarship or research.[150] The district court reasoned that the trivia book added new meaning by altering the original work.[151]

Despite finding transformative use, the court surprisingly held that, although the secondary work transformed the original, it nonetheless violated the plaintiff's derivative rights.[152] After balancing the other fair use factors, the district court held that the defendant's work did not constitute not fair use.[153] Upon appeal, the Second Circuit agreed finding no fair use, but disagreed with the lower court's characterization of the trivia book as transformative use.[154] Alternatively, the Second Circuit found the use was not transformative because the defendant merely repackaged the original in book form.[155] Moreover, the defendant neither commented or criticized the original work, nor added new meaning to the work.[156]

The Second Circuit attempted to differentiate between derivative works and transformative works. According to the *Castle* Court, if the secondary work sufficiently transforms the expression of the original work in such as way that the two works are no longer substantially similar, then the secondary work ceases to be a derivative work and does not infringe the original work.[157] Unfortunately, this characterization of the two theories does not provide clear judicial guidance.

Commentators provide ample discussion on the differentiation between derivative and transformative works.[158] In an effort to clarify, some have even proffered redefining derivative work.[159] For example, one commentator suggests that the Act should define a derivative work as based substantially upon an existing work without exhibiting more than a modicum of creativity.[160] This reinterpreted definition excludes most musical arrangements due to its inherent creative alterations. Other commentators suggest that applying a functionality test may assist the courts in differentiating between the opposing theories.[161]

FUNCTIONALITY

Commentators and copyright law authorities suggest another method for expanding the transformative use analysis through the concept of functionality.[162] The concept of functionality, as applied to transformative use, addresses whether the secondary work performs a different

[149] *Id.* at 135.
[150] *See* Castle Rock Entm't v. Carol Publ'g Group, Inc., 955 F. Supp. 260, 267-68 (S.D.N.Y. 1997).
[151] *Id.* at 268.
[152] *See id.* (finding that a derivative right, by definition, transforms an original work).
[153] *Id.* at 272.
[154] *See Castle Rock Entmt*, 150 F.3d at 146.
[155] *Id.* at 142.
[156] *Id.*
[157] *Id.* at 143 n.9.
[158] *See*, *e.g.*, Kudon, *supra* note 62; Bunker, *supra* note 62; Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOKLYN L. REV. 1213 (1997).
[159] *See*, *e.g.*, Voegtli, *supra* note 158 (arguing that derivative work should be defined as either a work based significantly upon one or more pre-existing works, "such that it exhibits little originality of its own or that it unduly diminishes economic prospects of the works used; or a translation, sound recording, art reproduction, abridgment, and condensation").
[160] *See id.* at 1267.
[161] *See* Kudon, *supra* note 62, at 583.
[162] *Id.*

function than that of the original.[163] Nimmer suggests that the court should apply the functionality test under the fourth fair use factor. The first and fourth fair use defense factors, however, share a synergistic relationship. Thus, one commentator hypothecated that in our post-*Campbell* world, the functionality test may better operate as an inquiry of transformative use.[164]

Infinity Broadcasting Corp. v. Kirkwood[165] was the first court to apply the functionality analysis. The court found that the defendant's reproduction, which allowed customers to listen to broadcast radio using their phone, constituted transformative use because it provided a functional service.[166] The Second Circuit Court reversed, however, finding the defendant's service did not constitute transformative use because it neither added a new meaning nor a new message.[167]

Our court system has not universally adopted the functionality test as it relates to a transformative use inquiry.[168] Although the functionality test is not categorically part of the transformative use analysis, some elements of the test permeate judicial opinions. For example, in *Ringgold v. B.E.T.*,[169] the Second Circuit compared the function of both works when analyzing transformative use.[170] Finding for the plaintiff, the court concluded that the defendant did not use the plaintiff's art for functional purposes, but rather for decorative purposes.[171]

H. TRANSFORMATIVE USE – JAZZ ANALOGY

Jazz musicians may effectively assert the transformative use defense. While jazz musicians may add new meaning to an existing work, doing so under the auspices of the traditional definition of parody may be an unconvincing defense. Recent parody cases, however, indicate that parody need not be comedic. Additionally, the secondary author need not categorize her work as parody for the parody defense to be available.[172]

Nevertheless, the jazz musician should wait for the court to characterize or analyze transformative use under the parody exception rather than the musician asserting a parody exception claim for her jazz interpretation of a pre-existing song. Instead, a more efficient and convincing argument exists for categorizing the use as "transformative" because the jazz musician adds new meaning to an existing work by "commenting on it" and subsequently "extending a social benefit" to the public.

ADDING NEW MEANING

As *Campbell* and its progeny have illustrated, "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[173] The transformative use defense inquires, "whether the new work merely supersedes the objects of the original creation or instead adds something new, with a further

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[163] *See* NIMMER ON COPYRIGHT, § 13.05[B] at 13-195 to 13-208 (2003).
[164] *See* Kudon, *supra* note 62, at 607.
[165] 965 F. Supp. 553, 557 (S.D.N.Y. 1997).
[166] *See id.*
[167] *See* Infinity Broad Corp. v. Kirkwood, 150 F.3d 104, 112 (2d Cir. 1998).
[168] It is important to note that for our purposes here, the term "functional" does not relate to the utilitarian function of a work.
[169] 126 F.3d 70 (2d Cir. 1997).
[170] *See id.* at 74 (referring to NIMMER, § 13.05[D] at 13-229 (1997).
[171] *Id.* at 78.
[172] *Suntrust*, 268 F.3d at 1274 n.27 (finding that labeling a particular work as a "parody" or a "novel" or anything else is irrelevant to the court's inquiry).
[173] *Campbell*, 510 U.S. at 579.

purpose or different character, altering the first with new expression, meaning, or message."[174] Thus, for a court to find transformative use, the musician must incorporate one or more of the listed elements into the new work.

A jazz musician's interpretation or arrangement of an existing work fits virtually every type of transformative use. For illustrative purposes, Cole Porter's *Love For Sale* will serve as an example. In 1930, Cole Porter composed *Love For Sale* for the musical comedy *The New Yorkers*.[175] While lyrically coy, the lyrics nevertheless conveyed a story about prostitution. Regarded as one of the great standards of popular music, jazz artists have recorded *Love For Sale* more than one hundred times.[176]

In 1958, jazz great Miles Davis recorded a version of *Love For Sale*.[177] In Davis's version, the song begins with the piano player vamping on chords for two measures. Once the familiar melody begins, the listener notices that the tempo is faster than the original version. The instrumentation is also a substantial departure from the original. In the original version, Porter's arrangement included a string section and a trio of female vocalists. Davis's version, however, contains brass and woodwind instruments, sans strings, and does not include a vocal performance. Furthermore, the chord structure and key signature are completely different.

The fundamental difference, however, subsists in the improvisational section. Generally, jazz artists, including Davis, set up a song by playing the familiar melody before engaging in improvisational playing. Similarly, it is important to note that jazz musicians also sprinkle elements of improvisation throughout the entire song by incorporating grace notes in the melody, ghosting notes, improvising harmony both in the form of chords and bass lines, and changing the rhythm.[178] The only familiar relation to the original song, for most non-musician listeners, is the instrumentalist playing the melody.

Davis's version of *Love For Sale* is approximately twelve minutes long, nearly seventy-five percent of which incorporated an instrumental improvisation instead of the familiar melody.[179] Conversely, the original musical version plays for less than four minutes. The musical differences are too numerous to mention. Undoubtedly, Davis's version alters the existing work with "new expression." This analogy contains other transformative uses, which the following sections discuss.

The jazz version serves a "different purpose" because the expression occurs at the performance level. Presumably, in the original version, Porter composed detailed chart arrangement (or paid a professional arranger to do so) and suggested the singer to rehearse vocal phrasings to ensure complete accuracy. Conversely, Davis's version presumably included the very loose framework of only predetermining the key signature and tempo. The musicians in Davis's version, John Coltrane, Bill Evans, and Cannonball Adderley to name a few, have the talent to improvise their solos without any direction. Furthermore, Davis likely allowed the rhythm section, which consisted of Jimmy Cobb, Paul Chambers and Bill Evans, the creative freedom to change the harmonic or rhythmic structure of the song during the performance.

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[174] *Id.*
[175] As recorded by the original cast, FRED WARING'S PENNSYLVANIANS, LOVE FOR SALE (Victor 1930).
[176] *See* U.S. Copyright Office, Copyright Registration for music sound recordings, *available at* http://www.loc.gov/cgi-bin/formprocessor/copyright/locis.pl.
[177] Miles Davis, *Love For Sale*, *on* CIRCLE IN THE ROUND (Columbia 1958).
[178] *See* FEATHER, *supra* note 33, at 60-78.
[179] *See* Davis, *supra* note 177.

Additionally, each version caters to a "different audience." In 1930, jazz fans were listening to music composed and/or performed by Charlie Parker and Cab Calloway.[180] Popular music fans were listening to music composed by Cole Porter, George Gershwin and Harold Arlen and performed by an array of popular artists such as Bing Crosby and Fred Astaire. At that time, the recording industry likely marketed Porter's music to the mainstream audience even if the performer was not necessarily "popular."

As the years advanced, the market for popular music and jazz music continued to diverge. By 1958, popular artists such as Connie Francis and Bill Haley topped the charts.[181] While many jazz aficionados regard Miles Davis as a giant of jazz, he never achieved the type of commercial success enjoyed by popular music artists. Music industry statistics provide ample documentation of the differences between the popular music market and the jazz market.[182]

Arguably, transforming a lyrical song into an instrumental version changes the "message" of the song. The Porter – Davis example provides ample support for this contention. Porter composed *Love For Sale* for a musical comedy, for a scene depicting Manhattan prostitutes.[183] The radio industry considered the lyrics so racy that many radio stations banned playing the song.[184] Thus, in this example, the lyrics were absolutely critical to the message of the song. Without the lyrics, the song does not have the same affect on the listener.

By omitting the lyrics entirely, Davis effectively changed the message of the song. Gone are any images of life on the streets. Davis instead focused on Porter's melodic elements and transforming those elements into the jazz idiom. Without hearing the original version's lyrics, the listener has no inkling that the song told a story. Even so, the style and feel of Davis's version would not conjure up an aural impression of Porter's version. The message of Davis's version bares little, if any, relation to the original.

Looking back in a historical context, one may successfully argue that Davis's version incorporated traditional African American elements inherent in jazz music. The alternating tenor and alto sax solos reflect upon the call and response elements of African American spirituals and work songs. In contrast, music recorded by popular artists rarely deviated from its European-influenced arrangements. It is important to note that Davis recorded his version before his persona was in the public spotlight.[185]

EXTENDING A SOCIAL BENEFIT

As case law and commentators indicate, a significant consideration for finding transformative use is showing that the new work benefits society. In a general sense, all art benefits society. For the purposes of transformative use, however, the courts are seemingly searching for specific reasons why society incurs a benefit from the new work. Transforming popular music into the jazz idiom benefits society in a number of ways.

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[180] *See* National Endowments for the Arts *at* http://arts.endow.gov/endownews/news01/songlist.html.

[181] History of Charts, *available at* http://www.xs4all.nl/~eh308/History%20of%charts.htm (last visited Sept. 19, 2003).

[182] The Recording Industry of America: 2002 Consumer Profile (demonstrating that for the last ten years, jazz recordings have accounted for an annual average of approximately 3% of all music recording sales), *available at* http://www.riaa.com/news/marketingdata/pdf/2002consumerprofile.pdf (last visited Sept. 19, 2003).

[183] *See* WILLIAM MCBRIEN, COLE PORTER: A BIOGRAPHY 138 (1998).

[184] *See* British Broadcasting Corporation *available at* http://www.bbc.co.uk/shropshire/interactive/competitions/2002/01/music_comp_02.shtml (last visited August 13, 2003).

[185] Arguably, Davis was the most popular jazz artist in the early sixties. He never enjoyed the popularity, however, of popular artists such as Connie Francis. Both Cole Porter and Miles Davis are deceased.

A court may embrace a jazz musician imitating Alice Randall's argument. While Cole Porter's *Love For Sale* does not disparage African Americans like *GWTW* did, Davis may argue that he incorporated African American harmony, melody, and rhythm into a European style popular song. Furthermore, Davis may cite specific instances where the structure of the song is reminiscent of an African American spiritual with call and response elements (i.e. in the improvisation).

Additionally, Davis may effectively argue that the element of improvisation itself, predominantly derives from the African American culture. With this heavy dose of African American influences now included in the song, society benefits because it has the opportunity to listen to a new work enriched with African American cultural expression.[186]

Arguing as Randall did, Davis may effectively assert that throughout the development of jazz music, African American musicians performed songs that were popular in mainstream America. African Americans chose to reinterpret popular songs into the jazz idiom to deconstruct popular culture. Just as Randall selected a classic American novel to comment on race relations, Davis may suggest that he selected a popular American song, *Love For Sale,* so he may inject European influenced melodies, harmonies and rhythms with African American influenced musical elements. Similarly, many jazz artists may assert this same reasoning to address why reinterpreting popular songs became so widespread.

The best possible "social benefit" argument is not as philosophical. Society at large has embraced jazz music to be an educational endeavor. Virtually every high school music program has both a "jazz band" and individual jazz music lessons. Furthermore, community and college programs teach jazz music more than any other genre of music.[187] Jazz music recording sales, however, account for only 2.9% of total records sold in the United States.[188] Suffice it to say, educational institutions are not teaching jazz music because market studies indicate that the general public craves additional jazz recordings.

Educational institutions ostensibly recognize that jazz music benefits society. It benefits society not only because of its historical relationship to the plight of African Americans, but for some less altruistic reasons. Jazz music teaches musicians how to artistically express themselves. No other musical genre creates a musical structure that encourages expression through meaningful improvisation.[189]

This vast departure from the traditional European style of learning benefits society because it re-educates the public that music includes elements of creativity and subjective

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[186] Admittedly, this argument may not work when a Caucasian artist incorporates African American influences into a popular song composed by an African American. Nevertheless, in many instances, the Porter – Davis example provides ample ammunition for the court to find transformative use.

[187] *See* Jazznet, *available at* http://www.jazznet.org/recipient.cfm?RID=21 (last visited August 13, 2003) (aside from jazz education as part of the school curriculum, organizations such as Jazznet offer grants to institutions to further promote and nurture jazz education. Past recipients include Thelonious Monk Institute of Jazz Performance, National Jazz Curriculum, Thelonious Monk International Jazz Competition, Jazz in the Classroom, and a myriad of other organizations).

[188] Recording Industry Association of America, *available at* http://www.riaa.org/pdf/2000_consumer_profile3.pdf (showing consumer trends in 2000).

[189] At every stage of teaching jazz music, students learn how to work within the structure of a song without being bound to a set of rules. Students now have a significant opportunity to express themselves by altering the harmonic and rhythmic elements at the performance level. What used to be "wrong notes" are now "approach notes." Borrowing an old European phrase, "wolf tones (tri-tones)" are now categorized as "dissonant tones."

aesthetics. Beauty is in the ear of the beholder.[190] Furthermore, educators and the public at large recognize that many modern musical styles owe its origin to one of jazz music's many sub genres. To conclude its relevancy to society, the Library of Congress has categorized jazz music as "America's music" and holds the largest collection of jazz sheet music and recordings in the world.[191] Furthermore, numerous federal and state sponsored organizations exist to keep jazz on the forefront of education.[192]

As stated earlier, even though the overwhelming amount of cases where transformative use is synonomous with fair use, courts still weigh the other factors before rendering a decision. The Porter – Davis fact pattern will examine the other fair use factors.

I. BALANCING OTHER FAIR USE FACTORS

In every fair use defense case, the courts balance all the fair use factors. Commentators and jurisprudence indicate that the purpose and character of the use and the effect of the use on the market represent the two most important factors.[193] The section above summarized the argument for one component of the purpose and character of the use.

PURPOSE AND CHARACTER OF THE USE

Aside from an inquiry into the transformative nature of the work, this factor examines whether the secondary use serves a commercial purpose. Generally, if the secondary use shows a commercial gain, the court may presume a likelihood of harm.[194] Nevertheless, the more transformative the new work, the less the court will focus on other factors, like commercialism, that may weigh against a finding of fair use.[195]

In the fabricated Porter – Davis dispute, the alleged infringing work is commercial. Davis incurs a commercial benefit for using Porter's copyrighted work. In effect, Davis's work may generate compulsory license revenue from other artists wanting to rerecord his work.[196] Additionally, Davis's use would derive increased revenue from the record company and performance rights organizations. Thus, before factoring in the transformative nature of the use, the court may find Davis's use to be presumptively unfair.

Once the court balances the transformative nature of the use, however, the pendulum swings back towards finding fair use. For the reasons stated herein, a court may reasonably find that Davis's version does not supplant the need for the original. Additionally, Davis's version adds new meaning with a new message and serves a different purpose and function. Lastly, Davis's version extends a social benefit because an African American musician is commenting on race relations by deconstructing popular music and reconstructing it with African American musical elements. Furthermore, America has adopted jazz as its primary musical learning tool.

NATURE OF THE COPYRIGHTED WORK

[190] Obviously, many bad jazz artists exist. One does not become a good musician just by attempting to play jazz music. The foundation or structure of the song needs to be solid before the student creates a meaningful improvised expression.
[191] Library of Congress, *available at* http://memory.loc.gov/ammem/award97/rpbhtml/aasmrel.html#Else.
[192] *See* Jazznet, *supra* note 187.
[193] *See* Levall, *supra* note 6, at 1116; *see also Campbell*, 510 U.S. at 579.
[194] *See Sony*, 464 U.S. at 451.
[195] *Campbell*, 510 U.S. at 579.
[196] Under the assumption that Davis lists himself as the songwriter for *Love For Sale*.

The second factor recognizes that "some works are closer to the core of intended copyright protection than others."[197] Public access to certain works extends the goal of copyright. A more extensive fair use privilege exists for works of scientific nature than for works satisfying entertainment purposes.

A musical work deserves a high level of copyright protection due to its creative elements. Generally, the more creative the secondary work, the more our courts should afford protection.[198] Copyright law, however, recognizes the existence of a hierarchical protection system depending on the basis of the work. For example, copyright law affords original creative works more protection than derivative works.[199]

In our musical example, the nature of the copyrighted work encompasses two copyrights. The Porter estate presumably holds the musical composition copyright; whereas the record company would hold the sound recording copyright to any recorded rendition.[200] While the issue of bootleg recordings impact the sound recording copyright, our Porter - Davis discussion relates to the copyright of the musical composition. If the court analyzes the Porter -Davis dispute in the context of parody, it appears the court will give little weight to this factor because parodies typically comment on well-known works.[201]

AMOUNT AND SUBSTANTIALITY OF THE PORTION USED

This factor examines whether the defendant has taken more than necessary to satisfy a fair use purpose.[202] Additionally, this factor analyzes how much of the original work the defendant incorporated into the infringing work.[203] A traditional analysis inquires how much the defendant took from the original work rather than how much the defendant appropriated into the infringing work.[204] The courts are likely to find fair use if the defendant copied a trivial or de minimis amount of the plaintiff's work.[205] No bright line rules exist, however, indicating what constitutes a trivial or de minimis amount.

A number of tests exist to determine substantial similarity. Under the ordinary observer test (or "audience test"), the trier of fact compares the two works without trying to pick out the disparities between the two works.[206] In other words, the observer shall listen as they would "ordinarily" (i.e. first impression feel) without necessarily trying to pick out the differences.[207]

The quantitative analysis includes inquiry into the amount of the appropriation taken from the original work.[208] Conversely, a qualitative analysis may include inquiry into the

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[197] *See Campbell*, 510 U.S. at 586.
[198] *See* NIMMER ON COPYRIGHT, § 13.05[A][2][a] (2003).
[199] *See Suntrust*, 268 F.3d at 1271.
[200] *See* KRASILOVSKY & SHEMEL, *supra* note 5, at 38.
[201] *See id*.
[202] 17 U.S.C. § 107(3) (2000).
[203] *See* NIMMER ON COPYRIGHT, § 13.03 (2003).
[204] *Id.* at § 13.03 [A][1].
[205] *Id.* at § 13.03 [A][2].
[206] *Id.* at § 13.03 [E][1][a].
[207] *Id.*
[208] *See* Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 569 (1985) (holding that a 2250 word article copying 300 words from a 200,000 word book was not *de minimis* and too great to justify fair use defense): *But see* Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 267 (5th Cir. 1988) (holding that 30 characters copied out of 50 pages of source code was *de minimis*).

peculiarity of the appropriation taken from the original work or inquiry into the alleged infringer's purpose for choosing that particular work.[209]

The courts have not judicially ascertained the requisite quantitative and or qualitative threshold to determine whether the unauthorized use rises to the level of an unlawful appropriation.[210] If the trier of fact determines that the level of unauthorized use does not rise above the threshold of substantial similarity, then the trier should find the unauthorized use to be de minimis.[211]

Recently, the Second Circuit established a new test for determining substantial similarity. In *Ringgold*, the television series ROC displayed a poster created by Ringgold as a set decoration in a particular episode.[212] The show displayed a portion of the poster nine times with an aggregate duration of approximately twenty-seven seconds.[213] The court held that both quantitatively and qualitatively the appropriation was not de minimis.[214]

The application of the *Ringgold* quantitative analysis departs from the traditional analysis of solely determining the quantity taken from the original work.[215] The court introduced an observability analysis.[216] This analysis, or test, measures the amount of time the copyrighted work appears in the allegedly infringing work and its prominence in that work.[217] This judicial reasoning provides a better test for analyzing substantial similarity because the amount appropriated from the original work may be significantly different from the amount contained in the infringed work.

In our hypothetical Porter-Davis case, Davis incorporated virtually all the melody from *Love For Sale*. The melody of a song, however, is arguably only half of the composition. Aside from the detailed musical arrangements, a song such as *Love For Sale* has a harmonic component (i.e. chord structure) that the court should factor in when determining substantial similarity.

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[209] *See* Roy Export Company Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1106 (2d Cir. 1982) (suggesting that a network's quantitative taking of a small portion of copyrighted Charlie Chaplin films was qualitatively great and therefore infringing); *But see* Sandoval Corp. v. New Line Cinema, 147 F.3d 215, 218 (2d Cir. 1998) (finding photographs appearing in film were not displayed with sufficient detail for the average lay person to discern the subject matter).

[210] *See* Nichols v. Universal Pictures Co., 45 F.2d 119, 122 (2d Cir. 1930) (stating that whenever the line for substantial similarity boundaries is drawn it will *seem* arbitrary); s*ee also* Peter Pan Fabrics Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (stating the test to determine substantial similarity in copyright infringement cases "is of necessity, vague").

[211] *See* Ringgold v. Black Entertainment Television, Inc., Home Box Office, Inc., 126 F.3d 70, 74 (1997).

[212] *Id.* at 72.

[213] *Id.* at 73, 76 (in the nine sequences the poster, or portion thereof, was visible from between 1.86 to 4.16 seconds. In the four second segment, as much as eighty percent of the poster was visible).

[214] *Id.* at 77 (holding that from a "quantitative assessment of the segments" the longer segments coupled with the shorter segments are not *de minimis* copying). The court found that from a "qualitative sufficiency" analysis, the production staff purposely selected the poster for its thematic relevance and that the poster's theme was discernible to the show's viewers. *See id.*

[215] *See* NIMMER ON COPYRIGHT, § 13.03[A][2](2003)(citing Worth v. Selchow & Righter Co., 827 F.2d 569, 570 (9th Cir. 1987)(stating the question is whether the similarity relates to matter that constitutes a substantial portion of plaintiff's work - not whether such material constitutes a substantial portion of defendant's work); *But see* Turner v. Century House Publ'g Co., 290 N.Y.S.2d 637, 646 (N.Y. Sup. Ct. 1968) (holding that the copied material was a substantial part of the plaintiff's work but finding for the defendant because it was not a substantial part of the defendant's book).

[216] *See Ringgold,* 126 F.3d at 76; *see also Sandoval*, 147 F.3d at 217 (applying *Ringgold*, "observability is determined by the length of time the copyrighted work appears in the allegedly infringing work." The court noted one factor was its prominence in that work as revealed by the lighting and positioning of the copyrighted work).

[217] *Id.*

For example, a composition incorporating the notes F, A, C, when played over a C chord will sound different then when played over a F# chord (extremely dissonant). Thus, in instances where Davis's underlying chords are different than Porter's chords, the result sounds different.[218] In Davis's version, however, the chord selection and structure does not deviate too far from Porter's version. Therefore, a trier of fact may reasonably conclude that Davis appropriated a substantial amount of Porter's song.

In contrast, under the *Ringgold* observability test, a trier of fact may reasonably conclude that Porter and Davis's works are not substantially similar because Davis's version only contains approximately 25% of Porter's version. By focusing on the alleged infringing work, the observability test changes the substantial similarity analysis. The *Ringgold* analysis, however, does not depart from the traditional analysis, but rather asks the trier of fact to consider the other.[219] The jury instructions will likely dictate this factor's outcome.

EFFECT OF THE USE UPON THE MARKET

The fourth factor examines "the effect of the use upon the potential market for or value of copyrighted work."[220] This factor essentially requires evaluating both the extent of the market harm caused by the defendant's use and whether the type of conduct engaged by the defendant would result in a substantial adverse market impact on the potential market for the original.[221]

In *Harpers & Row*, the Supreme Court designated the effect of the use upon the potential market factor as "the single most important element of fair use."[222] The Court rationalized that any secondary use that significantly interferes with the author's revenue stream adversely impacts his/her incentive to create additional works.[223] Providing an economic incentive to authors to continue to create additional works furthers the purpose of copyright law. This incentive results from the monopolistic protection established by the copyright law.

Judge Leval repudiated the importance of the effect of the market factor when balancing all the factors.[224] While recognizing its relative importance, Leval posits that the fair use inquiry does not end upon finding no market harm.[225] In effect, the fourth factor alone is not determinative of finding, or not finding, fair use.[226] Leval declares that no assurances exist that the court will justify secondary use when the secondary use does not harm the market for the original.[227] Conversely, Leval asserts that no justification exists for finding fair use when the purpose and character of the use is not fair.[228]

In the Porter – Davis example, arguments exist for both sides. To show market harm, Porter will assert that customers searching the record shelves for *Love For Sale* would purchase Miles Davis's version believing that Davis paid a license to record Porter's version. Additionally, Porter will claim that not receiving a compulsory license (or a negotiated fee) creates market harm.

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[218] Both artists recorded their versions in a different key so every note and chord is "different." The real difference is in the relationship between the melodic note and chord, (i.e. this melody note is the 5th note in this chord.).
[219] *See Ringgold*, 126 F.3d at 76.
[220] 17 U.S.C. § 107(4) (2000).
[221] *See* NIMMER ON COPYRIGHT, § 13.05 [A][4] (2003).
[222] *Harpers & Row*, 471 U.S. at 566.
[223] *Id.* at 558.
[224] *See* Leval, *supra* note 6, at 1124.
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*

Furthermore, Porter may assert that Davis's version may deplete his performance royalties.[229] In effect, Davis would receive public performance royalties for any performance of his version of *Love For Sale* instead of Porter. Moreover, Porter will allege that granting Davis a fair use defense will effectively supplant the need for other jazz artists to pay for the use of his song.

Alternatively, Davis will assert that no market harm exists because each version of the song serves a different market. Consumers interested in purchasing the original version of *Love For Sale*, as performed in *The New Yorker*, are not likely to mistakenly choose Miles Davis's version. Furthermore, to address the potential market harm claim, Davis may assert that his version may actually help increase sales of Porter's version. By performing a jazz arrangement, consumers of jazz music are likely to purchase other versions of the song knowing that the harmonic, melodic, and rhythmic structures are substantially different. Thus, given the nature of jazz music, it is not unreasonable to assume that consumers may trace the song back to its roots and purchase the original version.

J. FORMALITY

Jazz musicians should conform to the copyright requirements before affirmatively claiming a transformative use argument. As a review, the Act extends copyright protection for original works of authorship affixed in a tangible form. Jazz musicians easily meet the originality requirement of a "minimal level of creativity."

The fixation requirement may represent an obstacle. Record companies may be reluctant to finance a recording without assurances from the musicians that they attained all the requisite compulsory licenses for the use of the work. Thus, attaining a copyright through fixation in the form of a sound recording appears unlikely. In any event, the jazz musician would be unable to attain a sound recording copyright even if the record company overlooked the lack of compulsory license because the entity financing the recording typically owns the sound recording copyright.

Attaining a copyright in the same manner as virtually all other songwriters also appears problematic. Many musicians notate the melody, harmony and rhythm in written form on notation paper (or pay someone to do it). The act of notation satisfies the fixation requirement to attain a copyright. Satisfying this formality, however, may be unlikely for jazz musicians in many instances.

First, jazz musicians play music from a lead sheet, which often includes only the melody and suggested chords.[230] Virtually all jazz musicians alter the harmonic structure of a song while performing. Furthermore, it is not uncommon for jazz musicians to alter the melody, chord structure, time signature, key signature, rhythm, feel, tempo, and length of a song during performance. Improvisation is the cornerstone of jazz music.

Jazz arrangers, in the traditional sense of the word, may alleviate this problem when charting an orchestral score. Often, the arranger notates the harmonic, melodic and rhythmic

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[229] *See* RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW 110 (1999) (again, Porter's actually arguing in a defensive posture by addressing the negative implications of Davis's successful transformative argument).

[230] JOHN F. SZWED, JAZZ 101 - A COMPLETE GUIDE TO LEARNING & LOVING JAZZ 49 (2000) (the lead sheet often appears in a musical compilation book titled the "Fake Book"); *See also* THE ULTIMATE JAZZ FAKE BOOK (Hal Leonard Publishing, 1991) (copyright authorities continue to debate whether the sale of the Fake Book constitutes copyright infringement or fair use); *see also* National Music Publishers Association Inc., *at* http://www.nmpa.org/nmpa/expression.html (last visited Oct. 24, 2003).

structure of a musical score for each and every instrument. In these instances, the jazz artist would satisfy the fixation requirement. That said, a jazz arrangement still allows ample opportunity for an orchestra musician to improvise during a predetermined section of the song. Thus, the artist would be unable to copyright the improvised portion of the song unless she had affixed it in some manner.

Any suggestion that the artist should transcribe the improvisational section would undermine a critical element of jazz music. Arranging an improvisation or transcribing a past one for future use, does not provide a realistic solution because a jazz musician never plays an improvised arrangement the same way.

K. POLICY CONSIDERATIONS

Policy considerations represent the "wildcard" for rewarding creativity to jazz artists under a super-transformative use argument. While a combination of *Campbell* and *Suntrust* yield some meaningful parallel arguments for the present context, the consequences for allowing a successful transformative use defense, and possibly enabling the defendant to attain an independent copyright for the new work, may lead the court down the proverbial slippery slope. Accordingly, identifying the ideal representative presents the biggest obstacle.[231]

For illustrative purposes, the Porter - Davis dispute provided an example of the types of colorable transformative use arguments available to jazz musicians. The arguments become somewhat dilluted, however, when a non-African American jazz musician transforms a popular song into the jazz idiom. While some of the transformative use arguments transcend racial lines, arguments relating to the deconstruction of a racist society appear unavailing when purported by a non-African American.

Analyzing the similarities between *Campbell* and *Suntrust*, it appears the court provides transformative use deference for African American reinterpretations.[232] Nevertheless, the court may still find fair use for non-African American jazz musicians who satisfy the elements for a transformative use defense. A non-African American representative, however, would seem to significantly reduce the possibility for attaining an independent copyright for such reinterpretations (i.e. super-transformative argument). Identifying the racial classifications of the representative is not the sole policy consideration.

The court may juxtapose a myriad of factors when attempting to identify some threshold requirements. Such factors may include identifying the popularity and audience for the original work and comparing the results with the popularity and audience of the reinterpreted work.

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[231] *See* 17 U.S.C. §§ 106, 115, 501 (2000) (the "representative" would be a jazz musician who purposely uses a copyright without attaining a compulsory license or permission for its use); *see also* David Mehegan, *Public But Still Unpublished Push To Destroy 'The Wind Done Gone' Gives Parody A Strange Life*, BOSTON GLOBE, C1 (May 23, 2001) (like Alice Randall, who received acquiescence from Houghton Mifflin to proceed without attaining copyright permission from Margaret Mitchell's estate, the representative in the current context would need authorization from the record company to proceed without attaining a compulsory license or permission).

[232] *See Campbell*, 510 U.S. at 569 (although the Court does not affirmatively state such a reason, the Court may have given deference to 2 Live Crew because the musical group consisted of African Americans performing a musical genre developed by African Americans. Furthermore, 2 Live Crew was commenting on a popular musical work by incorporating an African American musical style (i.e. rap) to a mainstream song); *see also*, *Suntrust*, 269 F.3d at 1270 (finding transformation in the author's social commentary on race relations): *But see id*. at 1278 (concurring, Judge Marcus stated "we deal here with a book that seeks to rebut a classic novel's particular perspective on the Civil War and slavery. This fact does not, of course, mean that we ought to grant Randall and Houghton Mifflin any special deference in making a fair use determination; the copyright laws apply equally to all expressive content, whether we might deem it of trifling import or utmost gravity").

Additionally, given that lyrics may convey social messages, the court may inquire whether the original work contained lyrics and compare whether the reinterpreted work added, omitted or changed any lyrics in full or in part. Lastly, a court may consider the deviation between the two works in terms of traditional European musical elements and African musical influences. Ultimately, the trier of fact would analyze the aforementioned considerations, though the court may need to consider these factors in various pre-trial motions.

CONCLUSION

Our court system appears ready to analyze transformative use in the jazz idiom. The ideal representative for a transformative use defense/super-transformative use assertion would be a prolific non-composing African American touring jazz arranger/musician. For purposes of familiarity, the Porter – Davis example provided ample support for the transformative use argument. Although, admittedly, Miles Davis was also a prolific composer, so he may not be the ideal representative.[233]

Balancing all the fair use factors, a colorable argument exists for accepting the transformative use defense. First, the purpose and character of the use factor indicates that although the use is commercial, its highly transformative nature tilts this factor, as well as others, in favor of fair use. Secondly, in the nature of the copyrighted work factor, popular music deserves a high level of copyright protection. Thus, this factor weighs against finding fair use. Third, the amount and substantiality of the portion used factor indicate that Davis used most of Porter's melody and more than half of his chord structure. Under the traditional substantial similarity analysis, the court will likely find in favor of the plaintiff. Two other considerations exist, however, that may change a court's interpretation of the appropriation.

First, the language of the statute indicates that the dispositive query asks whether the defendant appropriated more than necessary to invoke a fair use privilege. Under the broad transformative use argument, the defendant may suggest that the secondary work is a form of non-comedic parody such as the secondary work found in *Suntrust*. By characterizing the work as a parody, the court has stated that the defendant may appropriate as much as needed to assist the public in conjuring up the relationship between the original and secondary works.[234]

In our hypothetical dispute, Davis may have needed to appropriate the majority of Porter's melody because he wanted to effectively comment on racial oppression by using a traditional popular song and injecting it with African American musical elements. Thus, in this instance, Davis needed to appropriate (or deconstruct) the majority of Porter's melody to enable him to reconstruct it with a culturally suppressed art form such as African American influenced jazz music.[235]

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[233] ASHLEY KAHN, KIND OF BLUE: THE MAKING OF THE MILES DAVIS MASTERPIECE 1 (2001); *See* U.S. Copyright Office *at* http://www.copyright.gov/records/cohm.html (researching Miles Davis as an author to view his compostions. The ideal representative would be an African American jazz musician who does not compose his/her own music. Furthermore, the ideal representative would primarily reinterpret lyrically-based popular mainstream songs from the 1920's and 1930's by transforming the music into be-bop jazz style).

[234] *Campbell*, 510 U.S. at 588.

[235] *See generally* Kalamu ya Salaam, *It Didn't Jes Grew: The Social and Aesthetic Significance of African American Music*, AFRICAN AMERICAN REVIEW Summer 1995 v29 n2 p351; *see also* Norman Weinstein, *Jazz In the Caribbean Air*, WORLD LITERATURE TODAY, Autumn 1994 v68 n4 p717 (citing John Coltrane's ability to "deconstruct conventional artistic forms creatively and subversively for the sake of adding spiritual dimensions to the performance of superficially banal art works"); Paul R. Kohl, *Reading Between the Lines: Music and Noise in Hegemony and Resistance*, POPULAR MUSIC AND SOCIETY, Fall 1997 v21 i3 p3 (noting that white artists attempted to emulate rhythm and blues songs; whereas bebop players like Charlie Parker and Dizzy Gillespie routinely

Secondly, under *Ringgold's* observability test, the court instructs the trier of fact to consider how the infringed work incorporated the original work. Porter's version of *Love For Sale* is under four minutes long, while Davis's version is twelve minutes long. Thus, even if Davis appropriated Porter's entire song (melody, harmony and rhythm), the amount used in the infringing work represents only 25%. Applying either the First Amendment argument (comment) or the *Ringgold* observability test, it is not unreasonable for the court to weigh the substantially similar factor in favor of the Davis version.

The final fair use factor inquires about the actual and potential market harm. As the analysis earlier indicates, courts disagree whether they should give this factor more weight than others.[236] In decisions where transformative use is the primary issue, however, the courts tend to apply due deference to the purpose and character of the use factor. That said, each side of the Porter - Davis dispute raises compelling arguments.

Porter may find it difficult to provide evidence of actual market harm. To prove market harm, the court may compel Porter to provide evidence, such as proof of a decline in sales when compared to the sales figures immediately preceding the secondary works entry into the market. Alternatively, to show potential market harm, Porter will assert that each work is competing in the same market because both works are in the same art form (i.e. songs).

Absent actual evidence to the contrary, Davis will assert that Porter defines the term "market harm" too broadly. In an alternative definition, Davis's work would not adversely affect the potential market harm for Porter's work because each work serves a different customer base. Porter's work serves the popular music market and Davis's work serves the niche jazz market. Conceivably, the court may weigh this factor against finding fair use because consumers may purchase Davis's version of *Love For Sale* rather than Porter's version.

When balancing all four factors, it is reasonable to believe that the court will not find fair use. In transformative use cases, however, courts typically consider other relevant issues that may tip the scales favoring fair use. Well-settled jurisprudence indicates that the more transformative the use, the less the court will weigh the other fair use factors.

As the Porter – Davis hypothetical indicates, the secondary work establishes virtually every type of court-recognized transformation. The discussion provides ample support to show that Davis's version adds new meaning to the existing work by transforming a popular song into the jazz idiom. Davis's version also adds a new message by transforming a structured lyrical song into a highly improvisational instrumental version. Additionally, by omitting the descriptive lyrics, Davis's version presents a new message because consumers now hear the melodic and harmonic phrases instead of a song about prostitution. In essence, listeners of Davis's version do not conjure up images of prostitution.

Davis's version serves a different purpose due to its expression at the performance level. At the performance level, patrons of Davis will experience an original expression from the time of inception. Thus, even listening to Davis's recording, listeners know that they are hearing uncharted melodies and harmonies. Conversely, listeners of Porter's version hear a deliberate recording of well-charted musical notes and phrases.

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fashioned new compositions out of the standard popular songs). Not suggesting that jazz continues to be a culturally suppressed art form. Possibly the attitude of early African American jazz musicians, regarding cultural expression against suppression, continued throughout the decades.

[236] *See* LEAFFER, *supra* note 9, at 439 (concluding that case law indicates that the effect of the use upon the potential market factor is the most important factor); *But see* NIMMER ON COPYRIGHT, § 13.05 (2003) (challenging the presumption that the fourth factor is the most important, especially in transformative use cases).

The social benefit served by the use completes the other major component of the transformative use defense. The discussion provides ample support that society values jazz music as an important educational and cultural endeavor. Government entities at both the state and federal level subsidize jazz education programs. Jazz music permeates our education system.

This article suggests that our court system appears ready to embrace a transformative use defense for jazz performers. Following the precedent set in *Campbell*, *Suntrust* and *Ringgold*, the court seems to give additional deference to African American cultural considerations. Historical scholars credit the African American culture with development of jazz music.

Furthermore, scholars and theorists have a compelling argument that African American inspired jazz music developed from a sense of frustration and cultural suppression. The court may effectively address the esoteric relationship of commenting on an existing work with musical expression by embracing the deconstruction/reconstruction theory. The combination of all these elements makes the transformative use defense for jazz performers a compelling argument. Moveover, like Alice Randall in *Suntrust*, a jazz musician may ultimately attain an independent copyright for the questioned work after a successful transformative use defense.

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