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**Second Circuit Fair Use Survey:
Assessing the Impact of “Transformative Use”
Theory, by case (1982-2016)**

Authored by:

The Council on Intellectual Property

Reporting Subcommittee:

Dale Cendali - Kirkland & Ellis LLP

Claudia Ray - Kirkland & Ellis LLP

Charles S. Sims - Proskauer Rose LLP

Barry Werbin - Herrick, Feinstein LLP

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SECOND CIRCUIT SURVEY OF COPYRIGHT FAIR USE DECISIONS ASSESSING THE IMPACT OF “TRANSFORMATIVE USE” THEORY

This three decade-plus survey project arose from an informal study of “transformative use” under Section 107 of the Copyright Act that the New York City Bar Association’s Copyright & Literary Property Committee conducted in 2012 -2013. That led to a City Bar “Great Hall” public program entitled *Copyright Fair Use: The Importance of Being Transformative - Has Transformative Use Gone Too Far*, held on March 11, 2014, which was co-sponsored by the Copyright & Literary Property, Art Law and Entertainment Law Committees.

Having seen how dramatically Second Circuit Judge Pierre Leval’s transformative use theory—originally expounded in his 1990 Harvard Law Review commentary entitled “Toward a Fair Use Standard”—has impacted fair use jurisprudence, several current and former members of the IP Council, including former Chairs of the Copyright and Literary Property, Communications, Trademarks and Unfair Competition, and Media Law Committees, suggested that there might be value in conducting a detailed survey of all fair use decisions issued by the Second Circuit since the era of the Supreme Court’s seminal decision in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).¹

The City Bar’s IP Council concluded that it would be very useful to the copyright bar, judges and scholars to provide a survey that delves into fair use decisions issued over time by the Second Circuit, which, along with the Ninth Circuit, remains a leader in addressing cutting-edge

¹ A national Copyright Fair Use Index of all federal courts was published by the Copyright Office in 2015 and is periodically updated at <http://copyright.gov/fair-use/>. The Index discloses whether decisions found the existence of fair use or not and provides useful summaries, but does not provide detailed analysis of each fair use factor as is contained in this IP Council survey focusing only on the Second Circuit.

copyright issues. In particular, the authors of this survey wanted to examine how each of the Section 107 statutory fair use factors has been affected, if at all, by the advent of transformative use, and whether the Second Circuit could be construed as having shifted from a more pro-copyright owner stance to a more pro-user oriented stance.

The survey covers the period from 1982 through 2016. For context, although it was a Ninth Circuit decision that was reversed, the survey includes the Supreme Court's seminal fair use decision in *Sony*, as well as the Supreme Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), which reversed the Second Circuit. We then focus on the "before and after" period following the official introduction into jurisprudence of transformative use theory by the Supreme Court in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), which reversed the Sixth Circuit and first applied Judge Leval's theory to an actual copyright case.² The survey culminates (as of this writing) with the Second Circuit's most recent opinion in *TCA Television Corp. v. McCollum*, in October 2016.³

Each decision in the survey has been examined for its treatment of the four Section 107 statutory fair use factors, which federal courts must assess in every fair use case, although the factors are not exclusive. As a fair use refresher, the first part of Section 107 informs us that:

² The Supreme Court characterized the "transformativeness of the use" as "the degree to which 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." *Campbell*, 510 U.S. at 579.

³ As of the publication date of this survey, another key fair use case is pending before the Second Circuit in *Fox News LLC v. TVEyes, Inc.*, appeal docketed, Nos. 15-3885, 15-3886 (2d Cir. Dec. 3, 2015) [District Court opinions at 43 F.Supp.3d 379 (S.D.N.Y. 2014) and 124 F.Supp.3d 325 (S.D.N.Y. 2015)]. The case involves a TV and radio monitoring service that recorded all content from over 1,400 stations to create a searchable database to which government agencies, businesses, and news and non-profit organizations subscribed. The IP Council and the authors hope to update this survey online on an ongoing basis as new Second Circuit decisions emerge.

the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

This is followed by the second part of Section 107, which directs courts to consider at least the following four non-exclusive factors in conducting a fair use analysis:

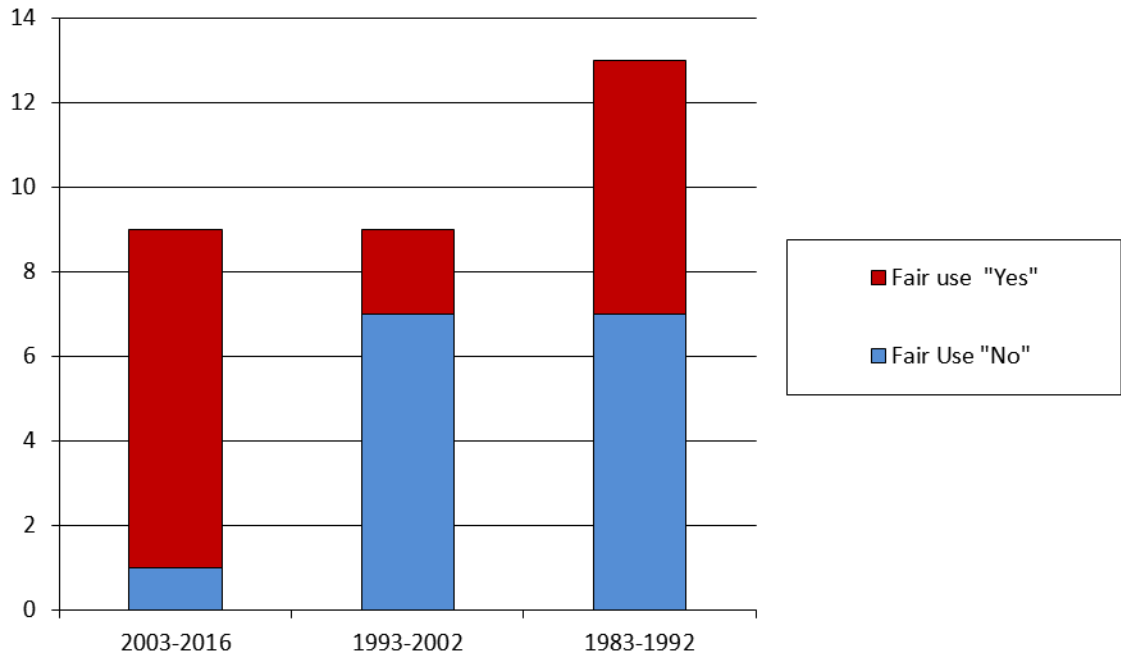
- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect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

Not unexpectedly, the survey results reveal that transformative use, as a subfactor of the first fair use factor (purpose and character of the use), has played an increasingly significant role in every substantive fair use decision issued by the Second Circuit since *Campbell*. Indeed, since 2003, eight out of the nine fair use cases decided by the Second Circuit found fair use, as summarized by the following data:

Period	No. of Cases	Fair Use Found	Fair Use Not Found
2003-2016	9	8	1
1993-2002	9	2	7
1983-1992	13 ⁴	6	7
Totals:	31	16	15

⁴ Excludes the Supreme Court's decisions in *Sony* and *Stewart v. Abend*, 495 U.S. 207 (1990), which was remanded for further fact development. Although it was reversed by the Supreme Court, we have counted the Second Circuit's opinion in *Harper & Row* that found fair use.

For those who are more graphically minded, this is how the data presents itself:



This survey is intended to report on the cases and does not reflect any opinion on the part of either the authors or the City Bar as to how the fair use factors should be weighed or what role transformative use should play in that analysis. We leave it to the readers to draw their own conclusions, including as to whether the Second Circuit in fact has over time adopted a more expansive view of fair use than it had previously. We invite your thoughts and comments.

The authors would like to thank the City Bar, IP Council former Chairs David A. Schulz and the late Edward J. Davis, retired City Bar General Counsel Alan Rothstein, and the IP Council members for their support of this project. Several summer and full time associates at the authors' respective firms also made valuable contributions that are acknowledged. In particular, we acknowledge with great sadness Ed Davis's untimely passing — Ed was a guiding light and staunch supporter of this project, and a wonderful, caring person who will be missed.

The Authors:

Dale Cendali - Kirkland & Ellis LLP

Claudia Ray - Kirkland & Ellis LLP

Charles S. Sims - Proskauer Rose LLP

Barry Werbin - Herrick, Feinstein LLP

Acknowledged for their assistance:

Gabriel Wilson - Associate, Herrick, Feinstein LLP

Jordan Romanoff - Associate, Kirkland & Ellis LLP

Joshua Simmons, - Associate, Kirkland & Ellis LLP

John Song - Associate, Kirkland & Ellis LLP

Sara Winik - Associate, Kirkland & Ellis LLP

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Consumers Union of United States, Inc. v. Gen. Signal Corp.,
724 F.2d 1044
(2d Cir. 1983)
Nos. 522, 541, Docket 83-7855
Timbers Opinion
December 6, 1983

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Preliminary injunction by content owner denied. Reversed and vacated; Rehearing and rehearing en banc denied, 730 F.2d 47.
Brief Summary of Facts.	General Signal manufactured a vacuum that had received favorable reviews in the copyright owner Consumer Union's "Consumer Reports" magazine. General Signal wanted to briefly quote Consumer Reports in its televised commercials (with proper attribution and disclaimers). Consumer Union objected to use of its content in the commercials and moved for a preliminary injunction.
Factor 1 - Purpose/Character.	Pro-User Despite commercial nature of use, General Signal was using factual information that educates the public and is "of significant public interest." The purpose of the use was to report factual information, which "is more conducive to the concept of fair use." 724 F.2d at 1049
Factor 2 - Nature of Original Work.	Pro-User The content is informational rather than creative, but "the scope of permissible fair use is greater" for informational work. Using Consumer Reports' wording/findings is promoting accuracy, not piracy. 724 F.2d at 1049
Factor 3 - Amount/Substantiality.	Pro-User Quantity of the work used in commercials was insubstantial: 29 words and 1 phrase, out of the 2100 words that were part of the magazine article.
Factor 4 - Market Effect.	Pro-User Copyright laws are meant to protect owners in their existing works, not for "recompensing damages which may flow indirectly from copying." 724 F.2d at 1050. Plaintiff's fear is in decreased value of future sales of Consumer Reports, not the copyrighted volume in question; correct inquiry is about demand for existing work. Reiterated that the 4th factor is the most important.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	Preliminary injunction posture; court mainly focused on the merits of the likely fair use defense.
Presumption of "Most Important" Factor?	Factor 4 is "widely accepted to be the most important." 724 F.2d at 1050.
Concern for Owners vs. Users	Pro-User: Little concern for owner, where goal of accuracy in user's commercial justifies quoting (drawing analogies to journalistic contexts at 1050-51).

**Sony Corp. of Am. v. Universal City
Studios, Inc.
464 U.S. 417 (1984)
Docket No. 81-1687
Stevens Opinion
January 17, 1984**

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Reversed. No subsequent history.
Brief Summary of Facts.	Owners of copyrights on television programs broadcast to the public brought suit against manufacturer of home videotape recorders (Sony).
Factor 1 - Purpose/Character.	Pro-User District court findings clearly establish that time-shifting for private at home use “must be characterized as a noncommercial, nonprofit activity.” 464 U.S. at 449.
Factor 2 - Nature of Original Work.	Pro-User The televised copyrighted audiovisual work was already offered free of charge; device merely allows time shifting.
Factor 3 - Amount/Substantiality.	Factor is pro-Content Owner—but doesn’t matter here. Although entire programs were copied, this factor does not “mitigate against a finding of fair use” given that the programs were offered “free of charge” and the time shifting provided by Betamax simply allows for viewing. 464 U.S. at 449-50.
Factor 4 - Market Effect.	Pro-User “A use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited.” 464 U.S. at 450. Noncommercial use requires showing that the specific use is harmful, “or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.” 464 U.S. at 451. Future harm from time shifting is “speculative, and at best, minimal.” Owners also concede no present actual harm. 464 U.S. at 454. Court also considered “the fact that to the extent time-shifting expands public access to freely broadcast television programs, it yields societal benefits.” 464 U.S. at 454.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	Holding was in light of (1) the empirical data, where copyright owners had conceded lack of actual present harm and could not establish future harm and (2) Sony demonstrating that the majority of copyright holders who license products for free public broadcast would not object to time shifting.
Presumption of “Most Important” Factor?	Factor 1 and the emphasis on time shifting dominated the entire fair use discussion.
Concern for Owners vs. Users	Pro-User: allowed a noncommercial use (time shifting) to outweigh all potential infringing uses.

Diamond v. Am-Law Pub. Corp.,
745 F.2d 142
(2d Cir. 1984)
No. 1342, Docket 84-7136
Winter Opinion
September 10, 1984

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed lower court finding against copyright claim. Suit dismissed.
Brief Summary of Facts.	After The American Lawyer ran an article about an issue involving Diamond, Diamond wrote a scathing letter to the editor to explain the issue, with the caveat that the letter can only be published if it appears in its entirety. The magazine only published select excerpts of Diamond's letter. Diamond initiated suit; the magazine claimed fair use.
Factor 1 - Purpose/Character.	Pro-User The use was "not wrongful under Section 107. That section expressly protects comments and news reporting." 745 F.2d at 147. The underlying event was newsworthy and there is no difference between a paraphrase of his letter, which would not have been the basis for an infringement suit, and publishing Diamond's own letter.
Factor 2 - Nature of Original Work.	Pro-User The underlying work was informational in nature, which can be more freely published than creative works.
Factor 3 - Amount/Substantiality.	Pro-User Atypical situation where owner is claiming too little of his work is published. Factor 1 and 2 analysis sufficiently resolves this in favor of user.
Factor 4 - Market Effect.	Pro-User "Weighs entirely" in favor of the defendant, because plaintiff conceded that there was no effect on the present or future use of the letter. 745 F.2d at 148.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	No explicit limitations, but factual situation was unique because the content owner alleged that the use was only permissible if more content were used.
Presumption of "Most Important" Factor?	Factor 1 seemed to drive the analysis; court gave deference to the comment or news reporting immunity of Factor 1.
Concern for Owners vs. Users	Pro-User: Journalistic context allowed use of the letter.

**Fin. Info., Inc. v. Moody's Investors Serv., Inc.,
751 F.2d 501
(2d Cir. 1984)
No. 1321, Docket 84-7110
Carter Opinion
December 18, 1984**

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	Remand to lower court on issue of whether material was copyrightable, but no fair use regardless.
Brief Summary of Facts.	Financial Information Inc. published daily index cards with up to date bond market information to subscribers. Moody's had a similar service and copied the factual information from FII's cards, while adding some of its own analysis. Copying was confirmed when FII began intentionally inserting small errors and saw that Moody was duplicating those errors.
Factor 1 - Purpose/Character.	Pro-Content Owner Emphasized Sony's presumption of unfair use for commercial uses and found that Moody's use was commercial. Moody's use does not provide a "public function." 751 F.2d at 508.
Factor 2 - Nature of Original Work.	Factor is slightly against owner/neutral FII's information is mainly factual, and thus "more susceptible to fair use." 751 U.S. at 509. That Moody's use, however, is similarly non-creative and purely commercial, means that less importance is placed on this factor.
Factor 3 - Amount/Substantiality.	Pro-Content Owner Evidence of substantial/wholesale copying by user from FII. This was bolstered by empirical expert witness' statistical analysis.
Factor 4 - Market Effect.	Pro-Content Owner Although lower court concluded that the parties are not competitors, because of differences in scope and coverage, the fact that Moody's did copy means that FII might at least be able to license the use. Noted Sony's statement that when the intended use is for commercial gain, "harm to the copyright owner 'may be presumed.'" 751 F.2d at 510.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	None; relied heavily on Sony's presumption of unfair use if commercial in nature.
Presumption of "Most Important" Factor?	Factor 1 commercial use drove analysis here; court repeatedly emphasized Sony's presumption of unfair use if commercial in nature. Emphasis on presumption of unfair use carried through to analysis on both Factor 2 and Factor 4.
Concern for Owners vs. Users	Pro-Owner: commercial user was presumptively not fair.

Harper & Row Publishers, Inc. v. Nation Enterprises,
471 U.S. 539 (1985)
Docket No. 83-1632
O'Connor Opinion
May 20, 1985

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	Reversed Second Circuit opinion at 723 F.2d 195 (1983); original judgment of District Court finding no fair use is affirmed.
Brief Summary of Facts.	Gerald Ford's unpublished memoirs were in negotiations for a prepublication licensing agreement with Time Magazine when an unauthorized source provided The Nation Magazine with the unpublished manuscript. The Nation published a 2,250 word article with at least 300-400 words of verbatim quotes of copyrighted expression taken from the manuscript, "scooping" Time Magazine on the most interesting parts of Ford's memoirs (having to do with the Nixon pardon). Time canceled its planned article on the memoir and refused to pay the remaining amount of money pursuant to its prior negotiations with Ford.
Factor 1 - Purpose/Character.	<p>Pro-Content Owner</p> <p>The subject material was news, which is "one of the examples enumerated in § 107 to 'give some idea of the sort of activities the courts might regard as fair use under the circumstances.' ... This listing was not intended ... to single out any particular use as presumptively a 'fair' use." 471 U.S. at 561. That the work is news is just one factor. The commercial nature of The Nation's use is a separate factor that tends to weigh against fair use.</p> <p>The Nation's stated purpose was to "scoop" the forthcoming Time article and was meant to supplant the copyright holder's commercially valuable right of first publication, without having paid for it (right of first publication discussed extensively earlier in opinion). 471 U.S. at 562.</p> <p>The defendant's conduct is also relevant to the "character" of the use. The defendant "knowingly exploited a purloined manuscript." 471 U.S. at 563.</p>
Factor 2 - Nature of Original Work.	<p>Pro-Content Owner</p> <p>Although quantitatively the use was insubstantial, the Nation took "what was essentially the heart" of Ford's memoirs. 471 U.S. 564-5.</p> <p>A taking cannot be excused merely because it makes up a small portion of the infringing work (quantitatively). The excerpts played a key role in the infringing work.</p>

**Harper & Row Publishers, Inc. v. Nation Enterprises,
471 U.S. 539 (1985)
Docket No. 83-1632
O'Connor Opinion
May 20, 1985**

Factor 3 - Amount/Substantiality.	<p>Pro-Content Owner Although quantitatively the use was insubstantial, the Nation took “what was essentially the heart” of Ford’s memoirs. 471 U.S. 564-5.</p> <p>A taking cannot be excused merely because it makes up a small portion of the infringing work (quantitatively). The excerpts played a key role in the infringing work.</p>
Factor 4 - Market Effect.	<p>Pro-Content Owner “Rarely will a case of copyright infringement present such clear-cut evidence of actual damage.” 471 U.S. at 567. Here, the actual damages were the \$12,500 in lost payment from Time.</p> <p>Also, the Nation’s actions caused huge harm to the potential market because the Nation took the most interesting part of the Ford memoirs that affected the value of the publication itself.</p> <p>Actual damages not need be shown. Instead, “to negate fair use one need only show that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work ... Placed in larger perspective, a fair use doctrine that permits extensive republication quotations from an unreleased manuscript without the copyright owner’s consent poses substantial potential for damage to the marketability of first serialization rights in general.” 471 U.S. at 568-9.</p>
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	None explicitly; the unpublished nature of the work was a predominant issue for the court.
Presumption of “Most Important” Factor?	Factor 4 was noted as the most important factor and emphasized the value of first publication for a work that was not yet published.
Concern for Owners vs. Users	Pro-Owner: special concern for the rights of the owner where the work was unpublished and the owner had not yet exploited the work.

Maxtone-Graham v. Burtchaeil
803 F.2d 1253
(2d Cir. 1986)
No. 92, Docket 86-7349
Kaufman Opinion
October 15, 1986

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed district court's grant of summary judgment for defendants.
Brief Summary of Facts.	<p>Plaintiff was an author who published "Pregnant by Mistake," a pro-choice book of interviews with women discussing their experiences with abortion and unwanted pregnancy.</p> <p>Several years later, defendant Burtchaeil prepared a series of essays critiquing published accounts of women's abortion experiences. Despite the plaintiff's denial of permission, he included verbatim quotes from plaintiff's book in one of his essays. Plaintiff sued.</p>
Factor 1 - Purpose/Character.	<p>Pro-User</p> <p>The Copyright Act "expressly mentions 'criticism' and 'comment' as favored under the statute, and we think it indisputable that the [defendant] employed the material from Pregnant by Mistake for just such purposes." 803 F.2d at 1260. Defendant's use takes plaintiff's quotes and interviews and organizes them into a topical framework to make a case against abortion. The defendant "applied substantial intellectual labor to the verbatim quotations." 803 F.2d at 1260.</p> <p>Distinguished and retreated from <i>Sony</i>'s holding that every commercial use is presumptively unfair. Noted <i>Harper & Row</i> when stating that commercial nature is a separate factor to consider. "The commercial nature of a use is a matter of degree, not an absolute." 803 F.3d 1262.</p> <p>Here, the use was commercial, but only 6,000 copies were sold. Second Circuit concludes that educational elements in defendant's work "far outweigh the commercial aspects" of the book. 803 F.2d at 1262.</p>
Factor 2 - Nature of Original Work.	<p>Pro-User</p> <p>Although plaintiff's book contains elements of "creative journalistic effort," the book was still "essentially factual in nature," and subsequent authors may rely more heavily on such works. 803 F.2d 1262-63.</p>
Factor 3 - Amount/Substantiality.	<p>Pro-User</p> <p>Defendant included only 4.3% of the words from plaintiff's book, which was "not incompatible with a finding of fair use" and the defendant did not take the "heart" of Pregnant by Mistake. 803 F.2d at 1263.</p>

Maxtone-Graham v. Burtchaell
803 F.2d 1253
(2d Cir. 1986)
No. 92, Docket 86-7349
Kaufman Opinion
October 15, 1986

Factor 4 - Market Effect.	<p>Pro-User Emphasized <i>Harper & Row</i>'s ruling that the 4th Factor was the most important element and retreated from Sony's "dicta" of a presumption of market harm for commercial uses.</p> <p>Defendant's book was not a threat of economic damage to the plaintiff and would not hurt demand for a second edition of the plaintiff's book.</p> <p>"Indeed, it is unthinkable that potential customers for a series of sympathetic interviews on abortion and adoption would withdraw their requests because a small portion of the work was used in an essay sharply critical of abortion...the two works served fundamentally different functions, by virtue both of their opposing viewpoints and disparate editorial formats." 803 F.2d at 1264.</p>
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	None
Presumption of "Most Important" Factor?	Factor 4 was presumed the most important factor; court refused to find market interference in two books that served different customer bases and were in different editorial formats (one a collection of interviews, another a series of essays).
Concern for Owners vs. Users	Pro-User: Court allowed quotation, even over the owner's denial of permission, for the purpose of criticism and comment.

Salinger v. Random House, Inc.
811 F.2d 90 (2d Cir. 1987)
opinion supplemented on denial of reh'g, 818 F.2d 252 (2d Cir. 1987)
No. 657, Docket 86-7957
Newman Opinion
Jan 29, 1987

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	Reversed and remanded with directions to issue preliminary injunction barring publication of the biography in its present form.
Brief Summary of Facts.	An author gained access to some of Salinger's unpublished letters and included quotes from them in a Salinger biography. Upon pre-publication review of the galleys, which were provided to Salinger by the author, Salinger refused to have the biography include any content from his unpublished letters. Salinger then registered copyrights in his letters and sued for infringement. Defendant biographer, Ian Hamilton, and Random House asserted fair use.
Factor 1 - Purpose/Character.	Pro-User Book "fits comfortably within several of the statutory categories of uses illustrative of uses that can be fair," including "criticism," "scholarship" and "research." 811 F.2d at 96. "[F]irst fair use factor weighs in Hamilton's favor, but not that the purpose of his use entitles him to any special consideration." 811 F.2d at 97.
Factor 2 - Nature of Original Work.	Pro-Content Owner Cites <i>Harper & Row's</i> observation that the scope of fair use is narrower with respect to unpublished works. There is a "diminished likelihood that copying will be fair use when the copyrighted material is unpublished." 811 F.2d at 97.
Factor 3 - Amount/Substantiality.	Pro-Content Owner Significant taking "not only from a quantitative standpoint, but from a qualitative one as well." 811 F.2d at 98. The letters are used (either quoted or paraphrased) on approximately 40 percent of the book's 192 pages. These passages are an "important ingredient of the book" and "make it worth reading"; the passages also "exceed[] that necessary to disseminate the facts." 811 F.2d at 98-99.
Factor 4 - Market Effect.	Slightly pro-Content Owner That Salinger did not intend to publish the works during his lifetime does not lessen the need to assess the effect on the market. The author is allowed to change his mind. Court states that the book would not displace the market for the letters, but "some impairment of the market seems likely." 811 F.2d at 99. "Virtually all of the most interesting passages of the letters" are in the biography. 811 F.2d at 99.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A

Salinger v. Random House, Inc.
811 F.2d 90 (2d Cir. 1987)
opinion supplemented on denial of reh'g, 818 F.2d 252 (2d Cir. 1987)
No. 657, Docket 86-7957
Newman Opinion
Jan 29, 1987

Limitations to Holding?	None explicitly; seemed to focus on unpublished nature of Salinger's letters.
Presumption of "Most Important" Factor?	Factor 4 was reiterated as the most important factor (quoting <i>Harper & Row</i>).
Concern for Owners vs. Users	Pro-owner: gave deference to unpublished nature of the work, even though Salinger himself said he didn't want to publish/sell the letters within his lifetime. Court said Salinger had a right to change his mind. Public interest in the letters could wait till the expiration of his copyright.

Weissmann v. Freeman
868 F.2d 1313
(2d Cir. 1989)
Nos. 225, 353, Dockets 88-7435, 88-7465
Cardamone Opinion
February 23, 1989

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	Reversed and remanded with directions that judgment be entered for plaintiff.
Brief Summary of Facts.	Plaintiff and Defendant collaborated on a series of medical publications. Plaintiff then solely authored a “syllabus” paper reviewing many of their prior joint works. In preparation for a lecture, Defendant deleted Plaintiff’s name and substituted his own, then printed about 50 copies for distribution. Plaintiff found out and requested that the article not be used; Defendant complied and conceded at trial that the article in question was prepared solely by Plaintiff.
Factor 1 - Purpose/Character.	Pro-Content Owner While defendant did not make a lot of money, the recognition he stood to gain was profit. Profit at the academic level is not measured in dollars, but, rather, in recognition and “sweat of [the] brow.” 868 F.2d at 1324. Use was for the same intrinsic purpose as the original work, which weakens the claim for fair use. Noted that an unproductive use might decrease likelihood of fair use. 868 F.2d at 1324.
Factor 2 - Nature of Original Work.	Factor is neither against nor for content owner. While fair use is all about disseminating work to the public, in the science and research world, this cuts both ways because of the need to incentivize authors to continue to research. Paper is factual/scientific (pro fair use finding), but the interest in encouraging authors to do research “balances the scale so this factor favors neither.” 868 F.2d at 1325.
Factor 3 - Amount/Substantiality.	Pro-Content Owner The work was photocopied word-for-word and the “trial court's finding that it was de minimis is clearly erroneous.” 868 F.2d at 1325.
Factor 4 - Market Effect.	Pro-Content Owner Money is not the only way to measure the market. In scholarly circles, publishing is a marketable commodity; recognition of one's scientific achievements is a vital part of professional life. Finding “fair use would tend to disrupt the market for works of scientific research without conferring a commensurate public benefit.” 868 F.2d at 1326.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	No explicit limitations, but court was very concerned with the implications of allowing fair use defense for wholesale copying in the context of scholarly scientific research and publication.

Weissmann v. Freeman
868 F.2d 1313
(2d Cir. 1989)
Nos. 225, 353, Dockets 88-7435, 88-7465
Cardamone Opinion
February 23, 1989

Presumption of “Most Important” Factor?	Factor 4 was reiterated as the most important factor. Its implications in the academic world seems to drive the discussion.
Concern for Owners vs. Users	Pro-Owner: court was concerned with incentivizing scholarly research.

**New Era Publications Int'l, ApS v. Henry Holt
& Co., Inc.
873 F.2d 576
(2d Cir. 1989)
Nos. 388, 421, Dockets 88-7707, 88-7795
Miner Opinion
April 19, 1989**

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed denial of preliminary injunction (on laches grounds, not fair use).
Brief Summary of Facts.	Defendant was a biographer of Scientology founder L. Ron Hubbard who tried to use extensive reproductions of Hubbard's published and unpublished writings in a biography. Holders of Hubbard's copyrights sued.
Factor 1 - Purpose/Character.	Pro-User Defendant's book was for purposes of criticism, scholarship, and research, but like in <i>Salinger</i> , the fair purpose of the use does not entitle it to any special consideration.
Factor 2 - Nature of Original Work.	Pro-Content Owner Unpublished works normally enjoy complete protection (quoting <i>Salinger</i>), so Second Factor "weighs heavily in favor of" the owner here. 873 F.2d at 583.
Factor 3 - Amount/Substantiality.	Pro-Content Owner Agreed with the district court that even if the plaintiff's count of 201 instances of infringement was exaggerated, a "[s]ubstantial amount of taking remains." 873 F.2d at 583.
Factor 4 - Market Effect.	Pro-Content Owner Owner intends to publish its own authorized biography of Hubbard, so "some impairment of the market seems likely." 873 F.2d 583.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	Preliminary injunction was denied despite lack of fair use defense because of laches.
Presumption of "Most Important" Factor?	Court noted that Factor 2 weighed heavily in favor of owner here because of the unpublished nature of the copyrighted works, but did not specifically claim any single factor was presumed to be the most important.
Concern for Owners vs. Users	Pro-Owner: gave deference to unpublished copyrighted letters in Factor 2 analysis.

Stewart v. Abend
495 U.S. 207 (1990)
Docket No. 88-2102
O'Connor Opinion
April 24, 1990

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed and remanded for further proceedings consistent with this opinion. No subsequent history thereafter.
Brief Summary of Facts.	Petitioners received an original, though expired, grant to prepare a derivative motion picture from Woolrich's stories. Woolrich passed away without renewing plaintiff's rights; executor of his estate then assigned those same rights to Abend. Petitioners re-released their movie; Abend sued for infringement of his rights. Petitioners asserted fair use defense.
Factor 1 - Purpose/Character.	Pro-Content Owner The work does not "fall[] into any of the categories enumerated in Section 107." 495 U.S. at 237. Secondary work was a commercial use and thus presumptively unfair. Although Petitioners claimed that the work was for educational use, there was nothing in the record to support the assertion.
Factor 2 - Nature of Original Work.	Pro-Content Owner Original work was creative rather than factual and fair use defense is more likely to be found for factual works.
Factor 3 - Amount/Substantiality.	Pro-Content Owner The work "expressly uses the story's unique setting, characters, plot, and sequence of events." 495 U.S. at 238. Although petitioners argue that the work constituted only 20% of the movie's storyline, a "substantial portion" of the original story was used. 495 U.S. at 238.
Factor 4 - Market Effect.	Pro-Content Owner The "re-release of prior movie impinged on ability to market new versions of the same story." 495 U.S. at 238.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	Concluded that this case was a "classic example of unfair use: a commercial use of a fictional story that adversely affects the story owner's adaptation rights." 495 U.S. at 238
Presumption of "Most Important" Factor?	Factor 4 was the "most important, and indeed, central fair use factor." 495 U.S. at 238.
Concern for Owners vs. Users	Pro-Owner: Used market factor to profess concern for a story owner's adaptation rights.

New Era Publications Int'l, ApS v. Carol Pub. Grp.
904 F.2d 152
(2d Cir. 1990)
Nos. 1204-1376, Dockets 90-7181, 90-7193
Feinberg Opinion
May 24, 1990

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Reversed lower court's finding against fair use.
Brief Summary of Facts.	Defendant wrote an unfavorable biography to L. Ron Hubbard and Scientology, drawing upon Hubbard's published works. Plaintiff was owner of Hubbard's copyrights and sued for infringement.
Factor 1 - Purpose/Character.	Pro-User A critical biography fits "comfortably within" the "statutory categories of uses illustrative of uses that can be fair." (Quoting Salinger). 904 F.2d at 156. Distinguished the present case from <i>Harper & Row</i> , where the defendant obtained unpublished copyright material for undeserved economic profit. Here, author included Hubbard's works purely for critique and comment.
Factor 2 - Nature of Original Work.	Pro-User The quoted passages were all published, which expands the scope of possible fair use. Although Hubbard's works are not solely factual or non-factual, the material used, on balance, is more properly viewed as factual or informational and "[t]he scope of fair use is greater with respect to factual than non-factual works." 904 F.2d at 157.
Factor 3 - Amount/Substantiality.	Pro-User "[T]he book uses overall a small percentage of Hubbard's works" and "the use is [is not] qualitatively unfair." Passages are not at the heart of original work. 904 F.2d at 158. The important consideration under this factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 904 F.2d at 159.
Factor 4 - Market Effect.	Pro-User Very unlikely that "that potential customers for the authorized favorable biography of Hubbard in the future will be deterred from buying because the author's unfavorable biography quotes from Hubbard's works." 904 F.2d at 160. The audience for Hubbard's writings are likely to be his followers. That there may be harm to sales of a positive biography because of a successful critique of Hubbard is "not necessarily actionable under the copyright laws." 904 F.2d at 160.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	No explicit limitations.
Presumption of "Most Important" Factor?	Factor 4 was noted as the most important factor, but this case is distinguished from the other Hubbard biography because of the published vs. unpublished nature of the copyrighted works used.

New Era Publications Int'l, ApS v. Carol Pub. Grp.
904 F.2d 152
(2d Cir. 1990)
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Concern for Owners vs. Users

Pro-User: use of published works for comment and critique is a fair use.

Ass'n of Am. Med. Colleges v. Cuomo
928 F.2d 519
(2d Cir. 1991)
Nos. 595, 690, Dockets 90-7269, 90-7309
Altimari Opinion
March 12, 1991

Fair Use?	Genuine issues of material fact exist.
Subsequent Disposition (Remand, Cert Denied, etc.).	Reversed lower court's grant of summary judgment and remanded to explore genuine issues of material fact in 4th Factor.
Brief Summary of Facts.	The New York Standardized Testing Act (STA) instituted disclosure requirements upon testing organizations. The AAMC, which holds copyrights in the MCAT (exam for medical school admissions), claims that STA facilitates infringement of its copyrights. State asserted fair use defense, and therefore, the state statute would not be preempted by federal copyright.
Factor 1 - Purpose/Character.	Pro-User The STA is intended to serve the public interest by fostering "criticism, comment, ... scholarship, and research" and does not seek to exploit the materials commercially. 928 F.2d at 524.
Factor 2 - Nature of Original Work.	Pro-Content Owner Although the state claims that the MCAT is outside of the published/unpublished dichotomy, "the secure nature of the MCAT weighs in favor of [copyright holder]." 928 F.2d at 524. The MCAT is a "creative, imaginative, and original work" and not a mere compilation of facts. 928 F.2d at 525.
Factor 3 - Amount/Substantiality.	Pro-Content Owner STA requires comprehensive disclosure and distribution of all the test material. This is both quantitatively and qualitatively extensive use.
Factor 4 - Market Effect.	Pro-User Genuine issues of material fact preclude summary judgment. Expert witness testimony shows that disclosed MCAT questions can still be used and may not present adverse market effects. Given the "laudable goals" of the State, the copyright owner may be expected to accommodate the use and change their operations. 928 F.2d at 526.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	No explicit limitations.
Presumption of "Most Important" Factor?	Factor 4 was most important, but genuine issues of material fact exist.
Concern for Owners vs. Users	Court seemed in favor of the state, because of its "laudable goals," as long as the record establishes that the owner would not be adversely harmed by disclosure.

**Wright v. Warner Books, Inc.,
953 F.2d 731
(2d Cir. 1991)
No. 1762, Docket 90-9054
Meskill Opinion
November 21, 1991**

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed.
Brief Summary of Facts.	Defendant author wanted to use the published and unpublished letters and journals of Richard Wright to write his biography. Plaintiff holds the copyrights of her late husband Wright and initially refused permission to use large portions of Wright's unpublished and published works in the biography. Defendant then rewrote the biography and released it for publication (despite lack of consent from plaintiff), but only sparingly used Wright's published and unpublished works in the final version of the biography. On appeal, plaintiff only challenges the use of the unpublished portions of Wright's works.
Factor 1 - Purpose/Character.	Pro-User The use "fits comfortably within several of the statutory categories of uses that Congress has indicated may be fair" and "strong presumption that factor one favors the defendant" if the work falls into the description of uses described in Section 107. 953 F.2d at 736. The research done by the defendant also "furthers the goals of the copyright laws by adding value to prior intellectual labor." 953 F.2d at 736. Plaintiff alleges bad faith use, which would be relevant to the nature of the use, but the Second Circuit refused to find bad faith.
Factor 2 - Nature of Original Work.	Pro-Content Owner Unpublished work requires narrower scope of fair use and in the context of a biographers' use of unpublished materials, "the second factor weighs heavily in favor" of plaintiff. 953 F.2d at 737. The passages convey the original author's expressive language, not just facts.
Factor 3 - Amount/Substantiality.	Pro-User Defendant used only 1% of journal entries and the use did not take from the "heart" of the work. The court also found that factor three should not be considered in relation to the work accused of infringement, but "this perspective gives an added dimension to the fair use inquiry." 953 F.2d at 740.
Factor 4 - Market Effect.	Pro-User Only marginal amounts of expressive content were taken. The biography "does not pose a significant threat to the potential market for Wright's letters or journals." 953 F.2d at 739.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	No explicit limitations; emphasis on how insignificant the use was and how the biography was a scholarly work.

**Wright v. Warner Books, Inc.,
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Presumption of “Most Important” Factor?	Factor 4 was noted as most important, quoting <i>Sony</i> .
Concern for Owners vs. Users	Pro-User: biography was a scholarly work that only sparingly used unpublished material.

Rogers v. Koons
960 F.2d 301
(2d Cir. 1992)
Nos. 234, 388 and 235, Dockets 91-7396, 91-7442 and 91-7540
Cardamone Opinion
April 2, 1992

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	Remand was necessary to determine amount of damages.
Brief Summary of Facts.	Defendant sculptor deliberately copied plaintiff photographer's expression of a husband and wife holding a litter of puppies. Defendant made sculpture as part of the "Banality Show" exhibit, which was supposed to give secondary meaning to some original object. He chose Plaintiff's original photograph "Puppies" because it was typical, commonplace, and familiar.
Factor 1 - Purpose/Character.	Pro-Content Owner Commercial use is presumptively unfair and the defendant acted "primarily for profit-making motives." 960 F.2d at 310. Court noted bad faith as being relevant to the nature of the use inquiry. Defendant's tearing off of the copyright mark showed bad faith. Court rejects defendant's contention that the work is a parody and thus fair use (defendant claims his sculpture is a parody of society at large and social commentary). Court defines parody or satire as "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original." 960 F.2d at 309-310. Additionally, the court required that the "audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist." 960 F.2d at 310. Even if the sculpture was a satirical critique of our materialistic society, the work is not a parody of the original photograph itself.
Factor 2 - Nature of Original Work.	Pro-Content Owner As a published work of art, the original "Puppies" is expression that has more in common with fiction than telephone directories.
Factor 3 - Amount/Substantiality.	Pro-Content Owner Essence of photograph was copied. The defendant went beyond the factual subject matter of the photograph to incorporate the very expression of the work created by Rogers. Court described the use as under "the flag of piracy" rather than the "flag of parody." 960 F.2d at 311.

Rogers v. Koons
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(2d Cir. 1992)
Nos. 234, 388 and 235, Dockets 91-7396, 91-7442 and 91-7540
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Factor 4 - Market Effect.	Pro-Content Owner When the use is intended for commercial profit, a “meaningful likelihood of future harm is presumed.” 960 F.2d at 312. Koons’ work is commercial in nature. “There is simply nothing in the record to support a view that Koons produced ‘String of Puppies’ for anything other than sale as high-priced art.” 960 F.2d at 312. Plaintiff needs to show that if the unauthorized use becomes widespread, it would cause harm to the potential market for the work or the derivative works. There is harm to market in derivative works here because another artist could purchase the rights. 960 F.2d at 312.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	No explicit limitations.
Presumption of “Most Important” Factor?	Factor 4 was noted as most important, quoting <i>Sony</i> .
Concern for Owners vs. Users	Pro-owner: there was concern for future market of the work if widespread copying was allowed.

Arica Inst., Inc. v. Palmer, 970 F.2d 1067
(2d Cir. 1992)
No. 771, Docket 91-7859
Walker Opinion
July 22, 1992

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed
Brief Summary of Facts.	Plaintiff was a Zen self help institute that owned copyrights in certain techniques, one of which involves a nine-pointed figure called the enneagon. Defendant was a clinical psychologist who wrote books about the “enneagram,” also a nine-pointed figure, involved in Zen and self help techniques. Defendant talked about plaintiff, but also drew upon other sources in her discussions.
Factor 1 - Purpose/Character.	Pro-User Even though commercial, D's use was for “criticism, comment ... scholarship [or] research” and therefore there is a strong presumption that the use is fair. 970 F.2d at 1077. That the defendant anticipates profits does not offset that presumption. 970 F.2d at 1077-78.
Factor 2 - Nature of Original Work.	Pro-User Original work was published and available to the general public, therefore this factor favors defendant.
Factor 3 - Amount/Substantiality.	Pro-User The amount copied was a “minor if not minuscule portion.” 970 F.2d at 1078. The actual nine pointed figure and its labels, which plaintiffs argue is the heart of the work, are noncopyrightable. Plaintiff’s only creative decision was to link the labels to the figure. That decision was insubstantial in relation to the work as a whole.
Factor 4 - Market Effect.	Pro-User Although both works might interest those pursuing emotional and psychological self help, the relevant market effect is only “that which stems from Defendant’s use of Plaintiff’s ‘expression,’ not ... the work as a whole.” 970 F.2d at 1078. The actually infringing aspects of defendant’s use have a negligible effect on the market for plaintiff’s techniques. There were only marginal amounts of expressive content taken.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	Court seemed driven by the fact that very little of the owner’s work is actually expression, and therefore minimized the taking.
Presumption of “Most Important” Factor?	Factor 4 was noted as most important, quoting <i>Sony</i> .
Concern for Owners vs. Users	Pro-user: court was not concerned with the owner’s rights where it found that the majority of the work taken was not expressive.

Twin Peaks Prods. v. Publ'ns Int'l, Ltd.,
996 F.2d 1366
(2d Cir. 1993)
Nos. 919, 1392, Docket Nos. 92-7933, 92-7985
Newman Opinion
June 7, 1993

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	N/A
Brief Summary of Facts.	Defendant infringer Publications International, Ltd. ("PIL") published an unauthorized guidebook to Twin Peaks, a show that premiered on ABC and ran for two seasons. The 128-page book had seven chapters; chapter 3 included an "elaborate recounting of plot details" of the first season, which amounted to 46 pages.
Factor 1 - Purpose/Character.	Favors the content owner. "PIL's detailed report of the plots goes far beyond merely identifying their basic outline for the transformative purposes of comment or criticism. What PIL has done is simply to recount for its readers precisely the plot details of each teleplay. Whether such a detailed summary serves a purpose that weighs in favor of fair use requires some consideration of a genre often called 'abridgments.' . . . Where, as here, the abridgment serves no transformative function and elaborates in detail far beyond what is required to serve any legitimate purpose, the first factor cannot be weighted in favor of the fair use defense." 996 F.2d at 1375-76.
Factor 2 - Nature of Original Work.	Favors the content owner. "PIL attacks only briefly the District Court's finding that, because the copyrighted work is a work of fiction, the second factor favors TPP. PIL seems to contend that the magnitude of public reaction to the televised programs made the entire content of the teleplays a fact that could be reported and analyzed. Yet the second factor, if it favors anything, must favor a creative and fictional work, no matter how successful." 996 F.2d at 1376.
Factor 3 - Amount/Substantiality.	Favors the content owner. "[T]he District Court's determination that the Book was substantially similar to the teleplays so as to be prima facie infringing should suffice for a determination that the third fair use factor favors the plaintiff, whether the copyrighted works are the teleplays or the videotapes. . . . What PIL lifted was plainly substantial in relation to the copyrighted works as a whole." 996 F.2d at 1377.

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(2d Cir. 1993)
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Factor 4 - Market Effect.	<p>Favors the content owner.</p> <p>However, the Second Circuit acknowledges that “application of this factor presents a fairly close question.” 996 F.2d at 1377. “A copyright holder’s protection of its market for derivative works of course cannot enable it to bar publication of works of comment, criticism, or news reporting whose commercial success is enhanced by the wide appeal of the copyrighted work. The author of ‘Twin Peaks’ cannot preserve for itself the entire field of publishable works that wish to cash in on the ‘Twin Peaks’ phenomenon. But it may rightfully claim a favorable weighting of the fourth fair use factor with respect to a book that reports the plot in such extraordinary detail as to risk impairment of the market for the copyrighted works themselves or derivative works that the author is entitled to license.” 996 F.2d at 1377.</p>
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	<p>No.</p> <p>“Transformative use” is part of the Factor 1 analysis. <i>See</i> Factor 1 summary for application of “transformative use” idea to this case. “Works of criticism, teaching, and news reporting customarily do so. In identifying plot, the author of the second work may or may not be said to have made what Judge Leval has usefully called a ‘transformative’ use. <i>See</i> Pierre N. Leval, <i>Toward a Fair Use Standard</i>, 103 Harv. L. Rev. 1105, 1111 (1990). Such use would occur, for example, if a plot was briefly described for purposes of adding significant criticism or comment about the author’s plotting technique.” 996 F.2d at 1375.</p>
Limitations to Holding?	N/A
Presumption of “Most Important” Factor?	<p>“The fourth factor, market effect, is ‘undoubtedly the single most important element of fair use.’” 996 F.2d 1377 (citing <i>Harper & Row</i>, 471 U.S. at 566).</p>
Concern for Owners vs. Users	<p>Though the Second Circuit has “found fair use in works that are plainly ‘commercial,’ it also has “rejected a fair use defense for works that could be characterized as ‘commercial exploitation,’” observing that “[w]e have been more solicitous of the fair use defense in works, which though intended to be profitable, aspired to serve broader public purposes.” 996 F.2d at 1375.</p> <p>“Though appellants may be correct in arguing that works like theirs provide helpful publicity and thereby tend to confer an economic benefit on the copyright holder, we nevertheless conclude that the Book competes in markets in which TPP has a legitimate interest, and that the fourth factor at least slightly favors TPP.” 996 F.2d at 1377.</p>

**American Geophysical Union v. Texaco Inc.,
60 F.3d 913
(2d Cir. 1994)
No. 1479, Docket No. 92-9341
Newman Opinion
October 28, 1994**

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed by Second Circuit with some language amendments; writ of certiorari dismissed.
Brief Summary of Facts.	The parties stipulated that one scientist would be chosen at random as representative of all scientists employed by Texaco, numbering about 400-500 nationwide. That scientist was Chickering, employed since 1981 at Texaco. Texaco had initially purchased one subscription to <i>Catalysis</i> , a monthly scientific journal, and increased that to three subscriptions by 1988. For consideration at trial, plaintiffs selected from Chickering's files photocopies of eight particular articles from <i>Catalysis</i> , which were photocopied in their entirety either by Chickering or by other Texaco employees at his request. Chickering believed that the articles would facilitate his current or future professional research and generally filed them away for later reference as needed. As it turned out, Chickering did not have occasion to make use of five of the articles that were copied. Based on the stipulated procedure, the specific issue presented was "whether the copying of these eight articles, as representative of the systematic copying that Texaco encouraged, was properly determined not to be fair use." 60 F.3d at 916.
Factor 1 - Purpose/Character.	Favors the content owners. "The photocopying of these eight <i>Catalysis</i> articles may be characterized as 'archival' — <i>i.e.</i> , done for the primary purpose of providing numerous Texaco scientists (for whom Chickering served as an example) each with his or her own personal copy of each article without Texaco's having to purchase another original journal. The photocopying 'merely "supersedes the objects" of the original creation,' . . . and tilts the first fair use factor against Texaco. We do not mean to suggest that no instance of archival copying would be fair use, but the first factor tilts against Texaco in this case because the making of copies to be placed on the shelf in Chickering's office is part of a systematic process of encouraging employee researchers to copy articles so as to multiply available copies while avoiding payment." 60 F.3d at 919-20.
Factor 2 - Nature of Original Work.	Disfavors the content owner. "Though a significant measure of creativity was undoubtedly used in the creation of the eight articles copied from <i>Catalysis</i> , even a glance at their content immediately reveals the predominantly factual nature of these works. . . . Ultimately, then, the manifestly factual character of the eight articles precludes us from considering the articles as 'within the core of the copyright's protective purposes,' <i>Campbell</i> . . ." 60 F.3d at 925.

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<p>Factor 3 - Amount/Substantiality.</p>	<p>START Favors the content owner. “However, as the District Court recognized, each of the eight articles in Catalysis was separately authored and constitutes a discrete ‘original work[] of authorship,’ 17 U.S.C. § 102. . . . Despite Texaco’s claims that we consider its amount of copying ‘minuscule’ in relation to the entirety of Catalysis, we conclude, as did the District Court, that Texaco has copied entire works.” 60 F.3d at 925-26. “[B]y focussing [sic] on the amount and substantiality of the original work used by the secondary user, we gain insight into the purpose and character of the use as we consider whether the quantity of the material used was ‘reasonable in relation to the purpose of the copying.’ That Texaco photocopied the eight Catalysis articles in their entirety weakens its assertion that the overriding purpose and character of its use was to enable the immediate use of the article in the laboratory and strengthens our view that the predominant purpose and character of the use was to establish a personal library of pertinent articles for Chickering.” 60 F.3d at 926.</p>
<p>Factor 4 - Market Effect.</p>	<p>Favors the content owner. The effect on the market for sales of additional journal subscriptions, back issues and back volumes only slightly favors the content owners; the effect on the market for licensing revenues and fees favors the content owner. “Primarily because of lost licensing revenue, and to a minor extent because of lost subscription revenue, we agree with the District Court that ‘the publishers have demonstrated a substantial harm to the value of their copyrights through [Texaco’s] copying,’ 802 F. Supp. at 21, and thus conclude that the fourth statutory factor favors the publishers.” 60 F.3d at 929 - 931.</p>
<p>Transformative? Scope of Transformative Finding (Effect on Other Factors)?</p>	<p>No. “Texaco’s photocopying merely transforms the material object embodying the intangible article that is the copyrighted original work. <i>See</i> 17 U.S.C. §§ 101, 102 (explaining that copyright protection in literary works subsists in the original work of authorship ‘regardless of the nature of the material objects . . . in which they are embodied’). Texaco’s making of copies cannot properly be regarded as a transformative use of the copyrighted material.” 60 F.3d at 923 (emphasis original).</p>

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Limitations to Holding?	<p>Yes.</p> <p>“We do not deal with the question of copying by an individual, for personal use in research or otherwise (not for resale), recognizing that under the fair use doctrine or the de minimis doctrine, such a practice by an individual might well not constitute an infringement. [O]ur opinion does not decide the case that would arise if Chickering were a professor or an independent scientist engaged in copying and creating files for independent research, as opposed to being employed by an institution in the pursuit of his research on the institution’s behalf.” 60 F.3d 916. “We do not decide how the fair use balance would be resolved if a photocopying license for Catalysis articles were not currently available.” 60 F.3d 931.</p>
Presumption of “Most Important” Factor?	<p>No.</p> <p>However, the first and fourth factors are singled out as “important.” 60 F.3d at 931. Post-<i>Campbell</i>, which conspicuously omits this “single most important element of fair use” phrasing of <i>Harper & Row</i>, no single factor enjoys primacy. 60 F.3d at 926.</p>
Concern for Owners vs. Users	<p>N/A</p> <p>Cf. Judge Jacobs’ dissent, which expresses much more concern for users, <i>i.e.</i>, concern for scientists collecting articles as part of their individual and collective participation in the scientific method.</p>

**Ringgold v. Black Entertainment TV,
126 F.3d 70
(2d Cir. 1997)
No. 1736, Docket No. 96-9329
Newman Opinion
September 16, 1997**

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	N/A
Brief Summary of Facts.	Ringgold, a contemporary artist, created and owned the copyright in a multimedia quilt work (“Church Picnic Story Quilt”), which incorporated idiomatic text and images to communicate parables about aspects of the African American experience in the early 1900’s. The High Museum owned the actual work itself and held a non-exclusive license to reproduce “Church Picnic” as a poster and sell those reproductions, selling for \$20.00 a copy and displaying identifying words on the bottom of the poster, including the artist’s name, work’s title and museum’s name. Thousands of copies were sold, and copies of the poster remained available for sale. HBO Independent Productions produced “ROC,” a sitcom series concerning a middle-class African-American family living in Baltimore, and produced a particular episode in which a “Church Picnic” poster was used as part of the set decoration in the concluding five minute scene. In the scene, at least a portion of the poster is shown a total of nine times for a span of 1.86 to 4.16 seconds; the aggregate duration of all nine sequences is 26.75 seconds. The poster is sometimes in the center of the screen, though nothing in the dialogue, action or camera work particular calls the viewer’s attention to it.
Factor 1 - Purpose/Character.	Favors the content owner. “The defendants have used Ringgold’s work for precisely a central purpose for which it was created— to be decorative. Even if the thematic significance of the poster and its relevance to the ROC episode are not discernible, the decorative effect is plainly evident. Indeed, the poster is the only decorative artwork visible in the church hall scene. Nothing that the defendants have done with the poster ‘supplants’ the original or ‘adds something new.’ The defendants have used the poster to decorate their set to make it more attractive to television viewers precisely as a poster purchaser would use it to decorate a home.” 126 F.3d at 79. “Of course, no one would buy a videotape of the ROC episode as a substitute for the poster, but the challenged use need not supplant the original itself, only, as Justice Story said, the ‘objects’ of the original.” 126 F.3d at 79.
Factor 2 - Nature of Original Work.	Favors the content owner. The analysis is cursory, finding that the second factor favors the content owner because of the “creative nature” of the work. 126 F.3d at 80.
Factor 3 - Amount/Substantiality.	Disfavors the content owner. The third factor disfavors the content owner because of the brevity of intervals in which the poster or merely a part of the poster was observable.

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Factor 4 - Market Effect.	Seems to favor the content owner, “Ringgold contends that there is a potential market for licensing her story quilts . . . and earned \$ 31,500 from licensing her various artworks and that she is often asked to license her work for films and television.” 126 F.3d at 81. “We have endeavored to avoid the vice of circularity by considering ‘only traditional, reasonable, or likely to be developed markets’ when considering a challenged use upon a potential market. . . . Ringgold’s affidavit clearly raises a triable issue of fact concerning a market for licensing her work as set decoration. She is not alleging simply loss of the revenue she would have earned from a compensated copying; she is alleging an ‘exploitation of the copyrighted material without paying the customary price.’” 126 F.3d at 81. “Ringgold is not required to show a decline in the number of licensing requests for the ‘Church Picnic’ poster since the ROC episode was aired. The fourth factor will favor her if she can show a ‘traditional, reasonable, or likely to be developed’ market for licensing her work as set decoration. Certainly ‘unrestricted and widespread conduct of the sort engaged in by the defendants . . . would result in substantially adverse impact on the potential market for [licensing of] the original.’” 126 F.3d at 81.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	No. The “transformative” inquiry is part of the first factor analysis. See first factor cell <i>supra</i> , with the “supplants” and “adds something new” language.
Limitations to Holding?	N/A
Presumption of “Most Important” Factor?	“[T]he erstwhile primacy of the fourth factor . . . has been considerably modulated by the requirement announced by the Supreme Court in <i>Campbell</i> . . . that ‘all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright,’ . . . and we have recently recognized the existence of a licensing market as relevant to the fourth factor analysis, see <i>American Geophysical</i>” 126 F.3d at 82 n.8.
Concern for Owners vs. Users	N/A

**Leibovitz v. Paramount Pictures Corp.,
137 F.3d 109
(2d Cir. 1998)
Docket No. 97-7063
Newman Opinion
February 19, 1998**

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	N/A
Brief Summary of Facts.	Leibovitz was a well-known and widely published photographer. Among her most recognizable works was a photograph of the actress Demi Moore-pregnant, nude, with a serious facial expression, in a pose evocative of Botticelli's Birth of Venus, and wearing a ring-which appeared on the August 1991 cover of Vanity Fair magazine. As part of its ad campaign for <i>Naked Gun 33 1/3: The Final Insult</i> , Paramount commissioned a photograph to be taken of a nude, pregnant model, similarly posed and digitally enhanced to make the skin tone and shape of the body more closely match Moore in Leibovitz's photograph, wearing a gaudier ring, and with Leslie Nielson's face and mischievous smirk superimposed on the model's face. The caption slyly proclaimed, "DUE THIS MARCH."
Factor 1 - Purpose/Character.	Disfavors the content owner. The Second Circuit held that although the ad is commercial, which tends to tip away from fair use, the ad is transformative because it may be perceived as a new work and "comments" on the photograph by expressing parodic ridicule of its pretension and self-importance, and also may be reasonably perceived as expressing disagreement with the photograph's premise of extolling the stoic beauty of the pregnant female body. 137 F.3d at 114-15. "On balance, the strong parodic nature of the ad tips the first factor significantly toward fair use, even after making some discount for the fact that it promotes a commercial product. 'Less indulgence,' . . . does not mean no indulgence at all. This is not a case like <i>Steinberg v. Columbia Pictures Industries, Inc.</i> , 663 F. Supp. 706 (S.D.N.Y. 1987), where a copyrighted drawing was appropriated solely to advertise a movie, without any pretense of making a comment upon the original. . . ." 137 F.3d at 115.
Factor 2 - Nature of Original Work.	Favors the content owner, but only slightly because the content, although highly creative, was parodied. "Though Paramount concedes the obvious point that Leibovitz's photograph exhibited significant creative expression, Campbell instructs that the creative nature of an original will normally not provide much help in determining whether a parody of the original is fair use. <i>Campbell</i> , 510 U.S. at 586. The second factor therefore favors Leibovitz, but the weight attributed to it in this case is slight." 137 F.3d at 115.

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Factor 3 - Amount/Substantiality.	Neither favors nor disfavors the content owner. Though protectable elements were copied to an extreme degree, this does not necessarily tip against fair use in a parody case so long as the first and fourth factors favor the parodist. “The copying of [protectable photographic] elements, carried out to an extreme degree by the technique of digital computer enhancement, took more of the Leibovitz photograph than was minimally necessary to conjure it up, but Campbell instructs that a parodist’s copying of more of an original than is necessary to conjure it up will not necessarily tip the third factor against fair use.” <i>Campbell</i> , 510 U.S. at 588.
Factor 4 - Market Effect.	Disfavors the content owner. “Leibovitz all but concedes that the Paramount photograph did not interfere with any potential market for her photograph or for derivative works based upon it. . . . Her only argument for actual market harm is that the defendant has deprived her of a licensing fee by using the work as an advertisement. . . . But she is not entitled to a licensing fee for a work that otherwise qualifies for the fair use defense as a parody. <i>See Campbell</i> , 510 U.S. at 592. The fourth factor favors the defendant.” 137 F.3d at 116.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	Yes. Transformativeness is part of the first factor inquiry. In a parody case, the inquiry is whether the advertisement is a “new work” that “comments on” the photograph. “Plainly, the ad adds something new and qualifies as a ‘transformative’ work. Whether it ‘comments’ on the original is a somewhat closer question. Because the smirking face of Nielsen contrasts so strikingly with the serious expression on the face of Moore, the ad may reasonably be perceived as commenting on the seriousness, even the pretentiousness, of the original. The contrast achieves the effect of ridicule that the Court recognized in <i>Campbell</i> would serve as a sufficient ‘comment’ to tip the first factor in a parodist’s favor.” 137 F.3d at 114.
Limitations to Holding?	Some of the legal analysis is specific to parody fair use cases.
Presumption of “Most Important” Factor?	No single most important factor, but the second and third factors are relatively less important because it is a parody case, as discussed in the Factor 2 and Factor 3 segments.
Concern for Owners vs. Users	“We have some concern about the ease with which every purported parodist could win on the first factor simply by pointing out some feature that contrasts with the original. Being different from an original does not inevitably ‘comment’ on the original. Nevertheless, the ad is not merely different; it differs in a way that may reasonably be perceived as commenting, through ridicule, on what a viewer might reasonably think is the undue self-importance conveyed by the subject of the Leibovitz photograph.” 137 F.3d at 114-15.

Infinity Broad. Corp. v. Kirkwood,
150 F.3d 104
(2d Cir. 1998)
Docket No. 97-7764
Feinberg Opinion
July 2, 1998

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	N/A.
Brief Summary of Facts.	<p>Kirkwood (d/b/a “Media Dial-Up”) designed the “Dial-Up” system, which enabled his customers to listen, through the phone line, to radio broadcasts originating in various large cities in the United States. In each city, Kirkwood placed a radio receiver to a phone line, and the receiver took regular over-the-air radio broadcasts and transmitted them into the phone line such that a caller could contemporaneously listen to whatever station the receiver was tuned to (and use touch-tone commands to tune the receiver to different stations). Kirkwood’s subscribers paid a fee in exchange for a list of the phone numbers connected to the receivers. Aside from phone bill costs, there was nothing to prevent Dial-Up customers from listening to a particular station for 24 hours a day, seven days a week. Dial-Up was marketed to members of the entertainment and advertising industry for purposes such as auditioning on-air talent, verifying the broadcast of commercials, listening to a station’s programming format and feel, and assisting performance rights organizations in the enforcement of copyrights.</p>

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<p>Factor 1 - Purpose/Character.</p>	<p>Favors the content owner.</p> <p>“The district court found that this factor ‘cuts to some extent in Kirkwood’s direction,’ primarily because Kirkwood ‘is using [Infinity’s] broadcasts for a quite different purpose,’ namely for information rather than entertainment. 965 F. Supp. at 557. Kirkwood, too, argues at length about the differences between Infinity’s purposes for its broadcasts and the reasons his customers use Dial-Up. We agree that the difference in purposes tends to support Kirkwood’s fair use claim. However, difference in purpose is not quite the same thing as transformation, and Campbell instructs that transformativeness is the critical inquiry under this factor.” 150 F.3d at 108. “Here, as the district judge observed, ‘Kirkwood’s retransmissions leave the character of the original broadcasts unchanged. There is neither new expression, new meaning nor new message.’ 965 F. Supp. at 557. In short, there is no transformation.</p> <p>As then-District Judge Leval noted in his frequently-cited article on fair use, a use of copyrighted material that ‘merely repackages or republishes the original’ is unlikely to be deemed a fair use.” 150 F.3d at 108. “Kirkwood argues that Dial-Up’s users transform the broadcasts by using them for their factual, not entertainment, content. However, it is Kirkwood’s own retransmission of the broadcasts, not the acts of his end-users, that is at issue here and all Kirkwood does is sell access to unaltered radio broadcasts.” 150 F.3d at 108. “In sum, we think the different, and possibly beneficial, purposes of Kirkwood’s customers are outweighed by the total absence of transformativeness in Kirkwood’s acts of retransmission.” 150 F.3d at 109.</p>
<p>Factor 2 - Nature of Original Work.</p>	<p>Favors the content owner.</p> <p>“The second factor is the nature of the copyrighted work, which recognizes that creative works are ‘closer to the core of intended copyright protection’ than more factual works.” <i>Campbell</i>, 510 U.S. at 586. The district court found that this factor favored Infinity, 965 F. Supp. at 557, and the Second Circuit agreed. 150 F.3d at 109.</p>

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Factor 3 - Amount/Substantiality.	Favors the content owner. “Like the district court, we are convinced that in this case the potential scope of retransmission is more relevant than evidence of actual retransmission by Dial-Up users thus far. Dial-Up permits essentially unlimited access to radio broadcasts in the cities in which it has receivers and there is thus the potential for retransmission of entire copyrighted programs.” 150 F.3d at 109-10 (emphasis original). Societal benefit “does not guarantee a finding of fair use. Nor does it, by itself, answer the question most relevant to this factor: whether ‘no more was taken than necessary.’ <i>Campbell</i> , 510 U.S. at 589. Even if Kirkwood is correct that society benefits from his provision of access to Infinity’s broadcasts, he still must justify potentially providing his subscribers with access to every radio station in the cities Kirkwood serves, 24 hours a day, seven days a week.” 150 F.3d at 110.
Factor 4 - Market Effect.	Favors the content owner. “On balance, we think the fourth factor is a very close question. Infinity admits that it has no present interest in operating separate for-profit listen lines, but has demonstrated at least the potential for interference with its inclusion of listen lines as part of its advertising package. . . . Considering that Kirkwood bears the burden of showing an absence of ‘usurpation’ harm to Infinity, believe that it tips toward Infinity.” 150 F.3d at 111.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	No. Transformativeness is the critical inquiry under the first factor, discussed under Factor 1.
Limitations to Holding?	N/A
Presumption of “Most Important” Factor?	No.
Concern for Owners vs. Users	N/A

**Castle Rock Entertainment v. Carol Publ'g Group,
150 F.3d 132
(2d Cir. 1998)
Docket No. 97-7992
Walker Opinion
July 10, 1998**

Fair Use?	No.
Subsequent Disposition (Remand, Cert Denied, etc.).	N/A
Brief Summary of Facts.	<p>Plaintiff Castle Rock was the producer and copyright owner of each episode of the Seinfeld television series. The series revolves around the petty tribulations in the lives of four single, adult friends in New York. Defendants are Beth Golub, the author, and Carol Publishing Group, Inc., the publisher, of <i>The Seinfeld Aptitude Test</i> ("The SAT"), a 132-page book containing 643 trivial questions and answers about the events and characters depicted in Seinfeld, drawing on 84 of 86 episodes that had been broadcast at the time of publication. These questions included 211 multiple choice questions, in which only one out of three to five answers is correct, along with 93 matching questions and a number of short answer questions. Golub created the incorrect answers to the multiple choice questions, but every correct answer had its source in an episode. For instance, twenty questions in the book directly quoted between 3.6% and 5.6% of "The Cigar Store Indian" episode, the most drawn upon episode in the book. The back cover of The SAT included the language: "So twist open a Snapple, double-dip a chip, and open this book to satisfy your between-episode cravings." There was no evidence that The SAT's publication diminished Seinfeld's profitability; Seinfeld's audience grew after The SAT was first published. Castle Rock had nevertheless been highly selective in marketing products associated with Seinfeld, and claimed that it planned to pursue a more aggressive marketing strategy for Seinfeld-related products, including books.</p>

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<p>Factor 1 - Purpose/Character.</p>	<p>Favors the content owner. “We reject the argument that The SAT was created to educate Seinfeld viewers or to criticize, ‘expose,’ or otherwise comment upon Seinfeld. The SAT’s purpose, as evidenced definitively by the statements of the book’s creators and by the book itself, is to repackage Seinfeld to entertain Seinfeld viewers. The SAT’s back cover makes no mention of exposing Seinfeld to its readers, for example, as a pitifully vacuous reflection of a puerile and pervasive television culture, but rather urges SAT readers to ‘open this book to satisfy [their] between-episode [Seinfeld] cravings.’ Golub, The SAT’s author, described the trivia quiz book not as a commentary or a Seinfeld research tool, but as an effort to ‘capture Seinfeld’s flavor in quiz book fashion.’ Finally, even viewing The SAT in the light most favorable to defendants, we find scant reason to conclude that this trivia quiz book seeks to educate, criticize, parody, comment, report upon, or research Seinfeld, or otherwise serve a transformative purpose.” 150 F.3d at 142-43. “Although a secondary work need not necessarily transform the original work’s expression to have a transformative purpose, . . . the fact that The SAT so minimally alters Seinfeld’s original expression in this case is further evidence of The SAT’s lack of transformative purpose. To be sure, the act of testing trivia about a creative work, in question and answer form, involves some creative expression. . . . However, the work as a whole, drawn directly from the Seinfeld episodes without substantial alteration, is far less transformative than other works we have held not to constitute fair use. <i>See, e.g., Twin Peaks</i>, 996 F.2d at 1378 [(discussed in this chart, <i>supra</i>)].” 150 F.3d at 143.</p>
<p>Factor 2 - Nature of Original Work.</p>	<p>Favors content owner. “Although this factor may be of less (or even of no) importance when assessed in the context of certain transformative uses, . . . the fictional nature of the copyrighted work remains significant in the instant case, where the secondary use is at best minimally transformative. Thus, the second statutory factor favors the plaintiff.” 150 F.3d at 144.</p>

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<p>Factor 3 - Amount/Substantiality.</p>	<p>Favors the content owner. “The inquiry must focus upon whether ‘the extent of . . . copying’ is consistent with or more than necessary to further ‘the purpose and character of the use.’” 150 F.3d at 144. “In the instant case, it could be argued that <i>The SAT</i> could not expose <i>Seinfeld</i>’s ‘nothingness’ without repeated, indeed exhaustive examples deconstructing <i>Seinfeld</i>’s humor, thereby emphasizing <i>Seinfeld</i>’s meaninglessness to <i>The SAT</i>’s readers. That <i>The SAT</i> posed as many as 643 trivia questions to make this rather straightforward point, however, suggests that <i>The SAT</i>’s purpose was entertainment, not commentary. Such an argument has not been advanced on appeal, but if it had been, it would not disturb our conclusion that, under any fair reading, <i>The SAT</i> does not serve a critical or otherwise transformative purpose. Accordingly, the third factor weighs against fair use.” 150 F.3d at 144.</p>
<p>Factor 4 - Market Effect.</p>	<p>Favors the content owner. “Our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps or substitutes for the market of the original work. . . . The more transformative the secondary use, the less likelihood that the secondary use substitutes for the original. . . . As noted by the district court, ‘by the very nature of [transformative] endeavors, persons other than the copyright holder are undoubtedly better equipped, and more likely, to fill these particular market and intellectual niches.’ . . . And yet the fair use, being transformative, might well harm, or even destroy, the market for the original.” 150 F.3d at 145. “Unlike parody, criticism, scholarship, news reporting, or other transformative uses, <i>The SAT</i> substitutes for a derivative market that a television program copyright owner such as Castle Rock ‘would in general develop or license others to develop.’” 150 F.3d at 145. “Although Castle Rock has evidenced little if any interest in exploiting this market for derivative works based on <i>Seinfeld</i>, such as by creating and publishing <i>Seinfeld</i> trivia books (or at least trivia books that endeavor to ‘satisfy’ the ‘between-episode cravings’ of <i>Seinfeld</i> lovers), the copyright law must respect that creative and economic choice.” 150 F.3d at 145-46.</p>
<p>Transformative? Scope of Transformative Finding (Effect on Other Factors)?</p>	<p>No. The degree of transformativeness impacted the analysis of all four factors, as reflected in the discussion of each factor <i>supra</i>.</p>
<p>Limitations to Holding?</p>	<p>N/A</p>
<p>Presumption of “Most Important” Factor?</p>	<p>No.</p>
<p>Concern for Owners vs. Users</p>	<p>N/A</p>

Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.,
166 F.3d 65
(2d Cir. 1999)
Docket No. 98-7842
Walker Opinion
January 22, 1999

Fair Use?	No.
Subsequent Disposition (Remand, Cert Denied, etc.).	N/A
Brief Summary of Facts.	Nihon Keizai Shimbun (“Nikkei”) published financial, business and industry news in a variety of Japanese newspapers. Comline Business Data gathered news articles from a variety of sources and sold rough translations called “abstracts” to their customers. Comline editors would select articles and forward them to “abstractors” or “translators,” sometimes pre-editing them to a desired length. The abstractors translated the stories into English. Comline “rewriters” then edited the abstracts into a consistent style. The District Court found that it took a total of approximately 36 minutes for Comline to convert a single news article into an abstract. Comline published about 17,000 abstracts in 1997, approximately one-third of which were derived from Nikkei sources. In 1997, Nikkei began filing periodic applications for U.S. copyright registration of its news articles, and in January, Nikkei filed this action against Comline alleging that its “abstracts” unlawfully infringed Nikkei’s copyrights.
Factor 1 - Purpose/Character.	Favors the content owner. “It is true that Comline’s abstracts were for the purpose of news reporting. But the fair use factor of purpose and character of use ‘is not an all-or-nothing matter.’ <i>Twin Peaks</i> , 996 F.2d at 1374. It requires a more nuanced analysis: it asks whether and to what extent the new work ‘adds something new, with a further purpose or different character, altering the first with new expression, meaning or message.’ [<i>Campbell</i> , 510 U.S. at 579]. If the second work is substantially transformative, this factor favors a finding of fair use. <i>See id.</i> In addition, use for commercial purposes tends to point this factor against fair use. <i>See [Leibovitz</i> , 137 F.3d at 113].” 166 F.3d at 72. “Comline’s infringing abstracts are ‘not in the least ‘transformative.’ Defendants added almost nothing new in their works. This factor weighs strongly against fair use.” 166 F.3d at 72.
Factor 2 - Nature of Original Work.	Neither favors nor disfavors the content owner. “The law recognizes that ‘some works are closer to the core of intended copyright protection than others.’ <i>Campbell</i> , 510 U.S. at 586. As predominantly factual news articles, Nikkei’s articles are less close to the core than more fictional pieces, and their expressive elements, while protectible, are not dominant features of the works. . . . This factor is at most neutral on the question of fair use.” 166 F.3d at 72-73.

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Factor 3 - Amount/Substantiality.	Favors the content owner. “In applying the third factor, ‘what is relevant is the amount and substantiality of the copyrighted expression that has been used, not the factual content of the material in the copyrighted works.’ <i>Salinger v. Random House, Inc.</i> , 811 F.2d 90, 97 (2d Cir. 1987).” 166 F.3d at 73. “[T]his factor weighs against a finding of fair use. Just as the quantity of copying was sufficient to support a finding of substantial similarity for most of the challenged abstracts, the amount of copying of protectible [sic] expression tips this factor against fair use. <i>See Ringgold</i> , 126 F.3d at 75 n.4.” 166 F.3d at 73.
Factor 4 - Market Effect.	Favors the content owner. With respect to “effect of the use on the market for the copyrighted work, we assess not only the harm caused by the alleged infringer, but also whether widespread conduct of this sort would have a substantial impact on the market for the original. <i>See Campbell</i> , 510 U.S. at 590. The district court found that this factor weighed strongly against fair use because Comline’s abstracts compete with and supersede the Nikkei articles. We entirely agree.” 166 F.3d at 73.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	No. Relevant to factor 1 analysis, <i>supra</i> .
Limitations to Holding?	N/A
Presumption of “Most Important” Factor?	No presumption apparent, though this presumption is not expressly discounted.
Concern for Owners vs. Users	N/A

**Davis v. Gap, Inc.,
246 F.3d 152
(2d Cir. 2001)
Docket No. 99-9081
Leval Opinion
April 3, 2001**

Fair Use?	No.
Subsequent Disposition (Remand, Cert Denied, etc.).	N/A
Brief Summary of Facts.	Davis created and designed nonfunctional jewelry worn over the eyes in the manner of eyeglasses, which he marketed under the name “Onoculii Designs.” Each piece of jewelry was made of gold, silver or brass, and was constructed in a manner similar to eyeglasses. The frames supported decorative, perforated metallic discs or plates in the place that would be occupied by the lenses in a pair of functional eyeglasses. The Gap, a major international retailer of clothing and accessories marketed largely to a youthful customer base, without Davis’s permission, used a photograph of an individual wearing Davis’s copyrighted eyewear in an advertisement for the stores operating under the “Gap” trademark that was widely displayed throughout the United States. The central figure in the ad wore a piece of Davis’s highly distinctive Onoculii eyewear.
Factor 1 - Purpose/Character.	Favors the content owner. “In this case, as in <i>Sony</i> , the secondary use is not transformative. The question whether the new use is commercial thus acquires an importance it does not have when the new work is transformative. . . . Here the work, being an advertisement, is at the outer limit of commercialism. <i>See Campbell</i> , 510 U.S. at 585 (‘The use, for example, of a copyrighted work to advertise a product . . . will be entitled to less indulgence under the first factor . . . than the sale of the new work for its own sake.’)” 246 F.3d at 175.
Factor 2 - Nature of Original Work.	Favors the content owner. The Second Circuit says that this factor is “rarely found to be determinative,” 246 F.3d at 175, and thus seems relatively less important in the analysis. “In this case, as in <i>Campbell</i> , the plaintiff’s copyrighted work is in the nature of an artistic creation that falls close to ‘the core of the copyright’s protective purposes.’” 246 F.3d at 175.
Factor 3 - Amount/Substantiality.	Favors the content owner. The third factor “recognizes that fragmentary copying is more likely to have a transformative purpose than wholesale copying. In this case, the Gap’s ad presents a head-on full view of Davis’s piece, centered and prominently featured. The Gap cannot benefit from the third factor.” 246 F.3d at 175.

**Davis v. Gap, Inc.,
246 F.3d 152
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Factor 4 - Market Effect.	Favors the content owner. “In this case, as noted, the Gap’s use is not transformative. It supersedes. By taking for free Davis’s design for its ad, the Gap avoided paying ‘the customary price’ Davis was entitled to charge for the use of his design. . . . Davis suffered market harm through his loss of the royalty revenue to which he was reasonably entitled in the circumstances, as well as through the diminution of his opportunity to license to others who might regard Davis’s design as preempted by the Gap’s ad.” 246 F.3d at 176.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	No. Transformativeness is part of the analysis in Factors 1, 3 and 4.
Limitations to Holding?	N/A
Presumption of “Most Important” Factor?	Unclear. The Second Circuit states that “[t]he heart of the fair use inquiry is into the first specified statutory factor. . . .” 246 F.3d at 174.
Concern for Owners vs. Users	N/A

Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.,
312 F.3d 94
(2d Cir. 2002)
Docket No. 02-7465
Per Curiam
November 25, 2002

Fair Use?	No.
Subsequent Disposition (Remand, Cert Denied, etc.).	None relevant
Brief Summary of Facts.	Otsar copied an English translation of Hebrew prayers that appeared in Merkos' prayerbook. Plaintiff obtained a preliminary injunction enjoining Otsar from disseminating a new version of Siddur Tehillat Hashem, a prayerbook widely used within the Lubavitch movement of Hasidic Judaism, pending resolution of Merkos' claim that Otsar's new version of the prayerbook violated Merkos' copyright in the original Siddur Tehillat Hashem. Otsar argued, inter alia, that its prayerbook made fair use of the Mangel translation, pointing out that its prayerbook added user-friendly instructions to the translation and utilized a different layout than did the original Siddur Tehillat Hashem.
Factor 1 - Purpose/Character.	Factor cited, but no specific holding
Factor 2 - Nature of Original Work.	Factor cited, but no specific holding
Factor 3 - Amount/Substantiality.	Favors the content owner. "[T]he third and fourth factors overwhelmingly favor Merkos, because Otsar has copied the entire Mangel translation and used it for a purpose identical to Merkos' use." 312 F.3d at 99.
Factor 4 - Market Effect.	Favors the content owner. "[T]he third and fourth factors overwhelmingly favor Merkos, because Otsar has copied the entire Mangel translation and used it for a purpose identical to Merkos' use." 312 F.3d at 99.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	N/A
Limitations to Holding?	N/A
Presumption of "Most Important" Factor?	N/A
Concern for Owners vs. Users	N/A

**NXIVM Corp. v. Ross Inst.,
364 F.3d 471
(2d Cir. 2004)
Docket No. 03-7952
Walker Opinion
April 20, 2004**

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed denial of preliminary injunction.
Brief Summary of Facts.	Plaintiffs-appellants, NXIVM and First Principles, Inc. produced a course manual in conjunction with their exclusive and expensive seminar training program called “Executive Success.” The manual contained a copyright notice and was unpublished to the extent it was only available to paying participants. Defendant ran a nonprofit website on which he published two reports that critiqued the manual and quoted sections of the manual obtained indirectly by a one-time program participant.
Factor 1 - Purpose/Character.	Pro-User The secondary work was for the purpose of criticism. Court found “the websites’ use of quotations from the manual to support their critical analyses of the seminars [was] transformative.” Transformative nature of the work discounted the secondary commercial nature of its use. 365 F.3d at 477. However, Court’s assumption of defendants’ bad faith, to the extent they knew that their access to the manuscript was unauthorized, weighed in favor of plaintiffs. <i>Id.</i> at 478. Court found plaintiff’s reliance on <i>Harper & Row Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985) to establish that defendants scooped their first publication rights misplaced. 364 F.3d at 477-79.
Factor 2 - Nature of Original Work.	Pro-Content Owner Because the copyrighted work was unpublished, the Court found that the second factor weighed in favor of the content owners. <i>Id.</i> at 480.
Factor 3 - Amount/Substantiality.	Pro-User Despite some discrepancy regarding the number of pages quoted from the manual (District Court found 17/500 pages were copied, NXIVM argued 25/191 pages were quoted, and the Second Circuit found both estimates slightly off), the quantity of the work copied did not weigh in favor of NXIVM. No objective core of expression could be identified. “It was reasonably necessary for defendants to quote liberally from NXIVM’s manual.” <i>Id.</i> at 481.
Factor 4 - Market Effect.	Pro-User “[C]riticisms of a seminar or organization cannot substitute for the seminar or organization itself or hijack its market.” Fourth factor weighed “heavily” in favor of defendants, not content owner. 364 F.3d at 482.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	Court weighed heavily that the secondary use was transformative, and this assesment influenced its application of the first factor. As a result, the Court gave little weight to the commercial nature of defendant's use.
Limitations to Holding?	None stated.
Presumption of “Most Important” Factor?	Factor 1: Fact that secondary work was a “criticism” greatly influenced the Court’s decision.

**NXIVM Corp. v. Ross Inst.,
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Concern for Owners vs. Users

Pro-User: Fact that writings were “transformative secondary uses intended as a form of criticism” essentially drove the fair use determination.

Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) Docket No. 05-2514 Restani Opinion [Chief Judge of the United States Court of International Trade, by designation] May 9, 2006	
Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed grant of summary judgment to defendant user.
Brief Summary of Facts.	Plaintiff Bill Graham Archives, LLC claimed copyright ownership in seven images from concert tickets and posters that were depicted in Dorling Kindersley's ("DK") 480-page coffee table book <i>Grateful Dead: The Illustrated Trip- a Cultural History of the Grateful Dead</i> . Initially DK sought permission to use the images, but the parties could not agree on an appropriate licensing fee. Nevertheless, DK published the book with the reproduced images that were minimally resized.
Factor 1 - Purpose/Character.	Pro-User <i>Illustrated Trip</i> was a biographical work, which weighed in favor of DK. The work was transformative: (1) DK's purpose in using the images as "historical artifacts" was different from the original purpose of "artistic expression and promotion" for which they were created. (2) DK combined the images with textual material into a timeline which "minimized the expressive value" of the work. (3) The images accounted for "less than one-fifth of one percent" of the user's work. The use of the images were only incidental to the commercial value of the work. Court also emphasized that "courts have frequently afforded fair use protection to the use of copyrighted material in biographies, recognizing such works as forms of historic scholarship, criticism, and comment." 448 F.3d at 608-12.
Factor 2 - Nature of Original Work.	Pro-Content Owner Even though the images were creative works, which are at the core of copyright protection, the Court gave this factor limited weight due to the transformative nature of <i>Illustrated Trip</i> . 448 F.3d at 612-13.
Factor 3 - Amount/Substantiality.	Pro-User The Court incorporated the first factor into the third factor, "tak[ing] into account that the extent of permissible copying varies with the purpose and character of the use." Although DK used the entire images, she minimized the size of the original images and intermingled them with other original art and text for historical context. The use "further[ed] its transformative purpose." 448 F.3d at 613.
Factor 4 - Market Effect.	Pro-User DK's use did not harm the market for BGA's sale of the copyrighted images. Because the use of BGA's images fell within a "transformative market," there was no market harm due to the loss of licensing fees. BGA's previous willingness to pay fees did not bar its ability to make fair use of the images.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	The transformative finding greatly influenced all of the factors. This finding also limited the weight given to the second factor.
Limitations to Holding?	None stated.

**Bill Graham Archives v. Dorling Kindersley Ltd.,
448 F.3d 605
(2d Cir. 2006)
Docket No. 05-2514**

**Restani Opinion [Chief Judge of the United States Court of International Trade, by designation]
May 9, 2006**

Presumption of “Most Important” Factor?	Factor 1: Analysis was driven by the transformative nature of the work. All factors were considered equally, except for the second factor which was given limited weight.
Concern for Owners vs. Users	Pro-User: Finding that the work was “transformative” ultimately led to a determination that the use was fair, although the analysis of the First Factor also resolved to a more traditional finding that the use in a biography-type work fell within one or more of the statutory examples of “scholarship, criticism and comment.”

**Blanch v. Koons,
467 F.3d 244
(2d Cir. 2006)
Docket No. 05-6433
Sack Opinion
November 16, 2006**

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed grant of summary judgment to user.
Brief Summary of Facts.	Jeff Koons is well-known for incorporating objects and images from popular media into his artwork, a practice known as “appropriation art.” In his collage painting “Niagara,” commissioned by Deutsche Bank in collaboration with Guggenheim, Koons incorporated a portion of a photograph (“Silk Sandals”) from a fashion magazine that was taken by Andrea Blanch. Koons’ painting depicted four pairs of women’s feet, with one pair adapted from Blanch’s photograph. Koons’ net compensation for the painting was \$126,877. Blanch received \$750 for her photo.
Factor 1 - Purpose/Character.	Pro-User Koons’s purpose in using the copyrighted image as “fodder for his commentary on social and aesthetic consequences of media” was different from Blanch’s goal “to show some sort of erotic sense” when she created the photograph. Because Blanch’s photograph was used as “raw material” to further Koons’s creative objective, the use was transformative. Although Koons profited greatly from the sale of “Niagara,” the Court gave little weight to this factor due to the transformative nature of the work. The Court accepted Koons’s justification for his borrowing. There was insufficient evidence of “bad faith” on the part of Koons, including his failure to ask permission to use Blanch’s photograph. 467 F.3d at 251-56.
Factor 2 - Nature of Original Work.	Pro-Content Owner Published status of the work favored user. Although the photograph may have been considered a “creative work,” the Court, citing <i>Bill Graham Archives</i> , gave limited weight to the second factor because the work was used in a “transformative manner.” 467 F.3d at 256-67.
Factor 3 - Amount/Substantiality.	Pro-User Because Koons solely appropriated the legs and feet from the background in which lay Blanch’s creative decisions, the Court found that he copied only the portion of the image that was necessary to the purpose of his copying. 467 F.3d at 257-8.
Factor 4 - Market Effect.	Pro-User Blanch admitted that she had not further published or licensed the photograph after its appearance in a fashion magazine. She also admitted that Koons’ use of her photograph did not harm her career, disrupt any plans she had to use the photograph, or diminish the value of the photograph. 467 F.3d at 258.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	The transformative finding greatly influenced the first and second factors, making the second factor virtually moot.
Limitations to Holding?	None stated.

**Blanch v. Koons,
467 F.3d 244
(2d Cir. 2006)
Docket No. 05-6433
Sack Opinion
November 16, 2006**

Presumption of “Most Important” Factor?	Factor 1: The first factor is “[t]he heart of the fair use inquiry.” Analysis was driven by the transformative nature of the work.
Concern for Owners vs. Users	Pro-User: The fact that the work was transformative, and that Blanch admitted she had experienced no market harm from Koons’ use of her photograph, influenced a finding of fair use.

Hollander v. Steinberg
Summary Order
(April 5, 2011) Docket No. 10-1140
McLaughlin, Lynch, Circuit Judges, Hon. Jed S. Rakoff
[by designation], District Judge

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed. Note: As a summary order this has no precedential effect.
Brief Summary of Facts.	Plaintiff, a <i>pro se</i> attorney, sued for infringement based on use of his unpublished essays by another attorney in two judicial proceedings, where the essays were reproduced in full.
Factor 1 - Purpose/Character.	Pro-User “Purpose and character” of the use was not commercial, but part of a litigation strategy. Congress listed numerous examples of “the sort of activities the courts might regard as fair use under the circumstances,” including “reproduction of a work in legislative or judicial proceedings or reports.” House Comm. on the Judiciary, H.R. Rep. No. 94-1476 (1976). Steinberg reproduced Hollander's essays “in... judicial proceedings.”
Factor 2 - Nature of Original Work.	Plaintiff objected to the District Court’s characterization of his essays as being “published” because they had been posted temporarily on his website, but the Court held it was unnecessary to address this issue because “[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” 17 U.S.C. § 107. The district court had considered all four statutory factors, “which taken together compel a finding of fair use....”
Factor 3 - Amount/Substantiality.	Initially weighs in plaintiff’s favor because the essays were reproduced in full; however, “the quantity of the material used was reasonable in relation to the purpose of the copying,” quoting <i>Am. Geophysical Union v. Texaco Inc.</i> , 60 F.3d 913, 926 (2d Cir. 1994). “[I]n judicial proceedings, litigants regularly reproduce documents in full [and defendant’s] reproduction of [plaintiff’s] essays would therefore appear to be reasonable.”
Factor 4 - Market Effect.	Pro-user “Clearly favors” defendant. “The focus... is on whether defendants are offering a market substitute for the original.” <i>NXIVM Corp. v. Ross Inst.</i> , 364 F.3d 471, 481 (2d Cir. 2004). Even if plaintiff offered his essays for sale, it was “highly unlikely that potentially interested readers would even be aware of the essays’ presence in a court file, let alone choose to acquire copies by the cumbersome methods of visiting a courthouse to make copies or using PACER.” Moreover, plaintiff failed to submit any evidence of market usurpation.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	Not mentioned (not relevant).
Limitations to Holding?	None.
Presumption of “Most Important” Factor?	None cited, but the underlying nature of the use by defendant primarily influenced the ultimate ruling.
Concern for Owners vs. Users	None mentioned (not relevant).

**Cariou v. Prince,
714 F.3d 694
(2d Cir. 2013)
Docket No. 11-1197
Parker Opinion
April 25, 2013**

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Reversed in part, vacated in part, remanded. Case settled after remand. Court held that 25/30 of Prince's challenged artworks were entitled to fair use defense as a matter of law, but remanded as to remaining five works for the District Court to determine fair use defense.
Brief Summary of Facts.	Patrick Cariou, a professional photographer, published a book of intimate photographs called <i>Yes Rasta</i> that he took over the course of six years living among Rastafarians in Jamaica. As of 2010, the book was out of print. Richard Prince, a famous appropriation artist, incorporated 35 of Cariou's photographs into a collage, titled " <i>Canal Zone (2007)</i> ," which he displayed in a show in St. Barthélemy. He later created 30 additional artworks in the <i>Canal Zone</i> series, 29 of which incorporated partial or whole images from <i>Yes Rasta</i> . New York's Gagosian Gallery then held an exhibition of 22 of Prince's <i>Canal Zone</i> works, and also published and sold an exhibition catalog from the show that included all but one of the <i>Canal Zone</i> works (including those not in the Gagosian show).
Factor 1 - Purpose/Character.	Pro-User Court emphasized a work "need not comment on the original or its author in order to be considered transformative." With respect to 25 of Prince's works the Court determined were entitled to a fair use defense, it found such works "manifest[ed] an entirely different aesthetic from Cariou's photographs." Cariou's works were "serene" and depicted the "natural beauty" of Rastafarian life, whereas Prince's works were "crude," "jarring" and "provocative." Prince's works incorporated color and measured between ten and nearly a hundred times the size of Cariou's photographs. Moreover, Cariou's photographs added "new expression." Although Prince's artwork was commercial, the Court gave limited weight to this factor due to the transformative nature of the work. 714 F.3d at 705-08. Prince's failure in his deposition to provide explanations of his use as being transformative was not dispositive. "What is critical is how the work in question appears to the reasonable observer not simply what an artist might say about a particular piece or body of work." With respect to the other five works, the Court could not determine whether the minimal alterations in these works were enough to render them transformative. 714 F.3d at 710-11.
Factor 2 - Nature of Original Work.	Pro-Content Owner Cariou's work is undoubtedly creative; however, the Court gave this factor little weight due to the "transformative purpose" of the use of the work. 714 F.3d at 710.
Factor 3 - Amount/Substantiality.	Pro-User "Prince used key portions of certain of Cariou's photographs. In doing that, however, we determine that in twenty-five of his artworks, Prince transformed those photographs into something new and different and, as a result, this factor weighs heavily in Prince's favor." 714 F.3d at 710.

**Cariou v. Prince,
714 F.3d 694
(2d Cir. 2013)
Docket No. 11-1197
Parker Opinion
April 25, 2013**

Factor 4 - Market Effect.	Pro-User “[T]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original.” Prince’s use of Cariou’s images did not usurp the primary or derivative markets for Cariou’s photographs because both artists have very different audiences. Cariou’s book was not marketed to a great extent, with Cariou only receiving \$8,000 from the sale of the book. Prince’s artworks, on the other hand, sell for two million or more dollars each, and his works have attracted the attention of many wealthy and famous celebrities. 714 F.3d at 708-10.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	The transformative finding greatly influenced all of the factors. This finding also limited the weight given to the second factor and the commercial nature of the secondary work.
Limitations to Holding?	None stated. Noted dissent by Judge Walker, who agreed with the majority’s position that fair use does not require that the challenged work “comment on” the original work, but disagreed that the Court should have decided on its own the fair use question as a matter of law as to the 25 images, instead of remanding that to the District Court for further determination.
Presumption of “Most Important” Factor?	Factor 1: The first factor is “the heart of the fair use inquiry.”
Concern for Owners vs. Users	Pro-User: Transformative nature of the work ultimately led to a determination that the use was a fair use. Court’s observation that “the fair use determination is an open-ended and context-sensitive inquiry” leaves it largely to judges to make this assessment.

**Swatch Group Mgmt. Servs. v. Bloomberg L.P.,
756 F.3d 73 (Amended Opinion)
(2d Cir. 2014)
Docket Nos. 12-2412, 12-2645
Katzmann, CJ, Opinion
May 30, 2014**

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed district court's granting of sua sponte motion for summary judgment for defendant; denied defendant's cross-appeal for lack of standing.
Brief Summary of Facts.	Swatch conducted a quarterly earnings conference call that was not open to the public, where listeners were instructed not to record the call for publication or broadcast. Bloomberg obtained the recording and transcript, which it posted to its pay-site, Bloomberg Professional.

**Swatch Group Mgmt. Servs. v. Bloomberg L.P.,
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<p>Factor 1 - Purpose/Character.</p>	<p>Pro user.</p> <p>“[T]here can be no doubt that Bloomberg’s purpose in obtaining and disseminating the recording at issue was to make important financial information about Swatch Group available to investors and analysts. . . . At a minimum, such public dissemination of financial information serves this public purpose in the nature of news reporting.” 756 F.3d at 82.</p> <p>“Here, Swatch does not contest that Bloomberg Professional is a multifaceted research service, of which disseminating sound recordings of earnings calls is but one small part. Moreover, it would strain credulity to suggest that providing access to Swatch Group’s earnings call more than trivially affected the value of that service. So while we will not ignore the commercial nature of Bloomberg’s use, we assign it relatively little weight.” 756 F.3d at 83.</p> <p>“Regardless of what role good or bad faith plays in fair use analysis, <i>see Blanch</i>, 467 F.3d at 255–56, we need not tarry over it here. Even assuming that Bloomberg was fully aware that its use was contrary to Swatch Group’s instructions, Bloomberg’s overriding purpose here was not to ‘scoop[]’ Swatch or ‘supplant the copyright holder’s commercially valuable right of first publication,’ <i>Harper & Row</i>, 471 U.S. at 562, 105 S.Ct. 2218, but rather simply to deliver newsworthy financial information to investors and analysts. That kind of activity, whose protection lies at the core of the First Amendment, would be crippled if the news media and similar organizations were limited to sources of information that authorize disclosure.” 756 F.3d at 83-84.</p> <p>“Here, Bloomberg provided no additional commentary or analysis of Swatch Group’s earnings call. But by disseminating not just a written transcript or article but an actual sound recording, Bloomberg was able to convey with precision not only the raw data of the Swatch Group executives’ words, but also more subtle indications of meaning inferable from their hesitation, emphasis, tone of voice, and other such aspects of their delivery. This latter type of information may be just as valuable to investors and analysts as the former, since a speaker’s demeanor, tone, and cadence can often elucidate his or her true beliefs far beyond what a stale transcript or summary can show Furthermore, a secondary work ‘can be transformative in function or purpose without altering or actually adding to the original work.’” 756 F.3d at 84.</p>
<p>Factor 2 - Nature of Original Work.</p>	<p>Pro-user. Swatch’s copyright in the call is “at best thin.” The earnings call is unpublished, but Swatch was still able to control the first public appearance of the work. Courts commonly look past the statutory definition of published works when considering this issue. Because Swatch disseminated the spoken performance before Bloomberg’s use, the publication status favors fair use.</p>

**Swatch Group Mgmt. Servs. v. Bloomberg L.P.,
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Factor 3 - Amount/Substantiality.	Neutral. Copying the work in its entirety was necessary to make a fair use, and the public interest in the recording balances with Swatch’s interest.
Factor 4 - Market Effect.	Pro-user. Agreed with District Court’s finding that nothing in the record suggests “any possible market effect stemming from Bloomberg’s use.” 742 F.3 at 34. The possibility of receiving licensing royalties for the call played no role in the creation of the earnings call, it was instead held to convey information about the company.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	While the Court did find the use transformative, the opinion focused on Bloomberg’s use serving a useful public function without harming the copyright holder and that allowing this use would not impair the value of earnings calls.
Limitations to Holding?	None stated.
Presumption of “Most Important” Factor?	None stated explicitly, but first factor dominated analysis.
Concern for Owners vs. Users	Pro-User: The compelling public interest component of Bloomberg’s use, which the Court equated with news reporting, was the driving factor in the fair use finding. “Transformative” use was not necessary to this conclusion.

Authors Guild, Inc. v. HathiTrust,
755 F. 3d 87
(2d Cir. 2014)
Docket No. 12-4547
Parker Opinion
June 10, 2014

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed summary judgment in favor of defendants to permit them to create searchable database of scanned books and provide access to works to those with disabilities, but vacated grant of summary judgment for preservation of copyrighted works due to lack of standing.
Brief Summary of Facts.	HDL is a trust comprised of colleges, universities and non-profits who have created a digital library that contains copies of more than ten million works. There are three uses of the library: searching for terms in available works, providing access to copyrighted materials for patrons with certified print disabilities, and creating a digital backup in the event an original work is destroyed and the library cannot replace it for a reasonable cost.
Factor 1 - Purpose/Character.	Pro-user. Important focus is the transformative nature of the use (“the more transformative the new work, the less will be the significance of other factors”). Creating a full-text searchable database is a “quintessentially transformative use.” 755 F.3d at 97. The word search result is different in purpose and character from the original work; it adds something new that is greater than other transformative uses that were fair. While promoting access of material to the print-disabled is not a transformative use because the underlying purpose of the work remains the same, factor one nonetheless favors defendants. The Supreme Court has already found that providing copies of works for the blind is a fair use, a notion supported by the legislative history on which the Supreme Court relied.
Factor 2 - Nature of Original Work.	Pro-user/owner. This issue is not dispositive, particularly in light of the transformative character of defendant’s use in creating the database. For access to the print-disabled, this factor weighs against fair use.
Factor 3 - Amount/Substantiality.	Pro-user. The crux of the inquiry is whether no more was taken than was needed; here it was reasonably necessary for defendant to copy the works in full. Further, creating additional copies of the database at four locations was not excessive, particularly when steps were taken to secure the databases and the copies were made to mitigate the risk of disaster or data loss. Retention of digital as well as text files is not excessive, as the image files may provide a more useful method for certain print-disabled patrons to access the work. Thus, it is reasonable for the libraries to retain both types of files.

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Factor 4 - Market Effect.	Pro-user. Plaintiffs were unable to identify “any specific, quantifiable past harm” resulting from the use. Court emphasized that this factor only concerned harm from when secondary use serves as a substitute, and in transformative cases such harm cannot be found because transformative uses do not serve as substitutes for the underlying work. Lost-licensing is only relevant under Factor 4 when the use serves as a substitute, and the full-text search does not serve as a substitute use. Heavily in favor of fair use — the market for books accessible to the print-disabled is miniscule; publishers forego royalties that are generated from such works and often do not produce them at all.
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	Court gave great credence to the transformative nature of the use with respect to the full-text search, but did not find that providing access to the print-disabled was transformative.
Limitations to Holding?	None stated.
Presumption of “Most Important” Factor?	Factor 1: For full text search, court found that transformative nature of the use was most important factor and colored the remaining analysis. For the print-disabled use, no factor predominated.
Concern for Owners vs. Users	Pro-user: highly transformative nature of full-text search allowed defendant to use entirety of work, while providing access to print-disabled users was a “quintessential” fair use.

The Authors Guild, Inc. v. Google, Inc.,
804 F.3d 202
(2d Cir. 2015)
cert. denied, 136 S. Ct. 1658 (2016)
Docket No. 13-4829
Leval Opinion
October 16, 2015

Fair Use?	Yes
Subsequent Disposition (Remand, Cert Denied, etc.).	Affirmed summary judgment in favor of Google. <i>Cert. denied sub nom. The Authors Guild v. Google, Inc.</i> , 136 S. Ct. 1658 (2016).
Brief Summary of Facts.	Under its Library and Google Books Project, Google scanned and made digital copies of millions of books submitted to it by major libraries, and set up a publicly accessible free search tool. Most of the books are non-fiction and many are out of print. The tool allows users to search for specified search terms and read “snippets” of text containing the searched terms. Participating libraries can download copies of submitted books under agreements that restrict the libraries’ uses in violation of copyright law. Google Books also occasionally provides links to buy a book online and identifies libraries where a book can be found. No advertising is displayed to a user of the search function.
Factor 1 - Purpose/Character.	Pro user/user. The making of digital copies to permit searches of terms of interest was a “highly transformative” purpose, designed to make available to users “significant information about those books.” The use of snippets allows users to evaluate whether a book is within their scope of interest. Scanning of entire books was necessary to achieve this transformative purpose. Although Google’s commercial motivation distinguished this case from <i>HathiTrust</i> , Judge Leval emphasized that since the Supreme Court’s <i>Campbell</i> decision, the Second Circuit “has...repeatedly rejected the contention that commercial motivation should outweigh a convincing transformative purpose and absence of significant substitutive competition with the original,” citing <i>Cariou v. Prince</i> . 804 F.3d at 219.
Factor 2 - Nature of Original Work.	Neutral. Judge Leval noted that the “second factor has rarely played a significant role in the determination of a fair use dispute” and it was not dispositive in <i>Hathi Trust</i> either. “[C]ourts have hardly ever found that the second factor in isolation played a large role in explaining a fair use decision....Nothing in this case influences us one way or the other with respect to the second factor considered in isolation.” However, while “transformative purpose...is conventionally treated as a part of first factor analysis, it inevitably involves the second factor as well.” 804 F.3d at 220.

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<p>Factor 3 - Amount/Substantiality.</p>	<p>Pro user. Judge Leval noted that “courts have rejected any categorical rule that a copying of the entirety cannot be a fair use.” As in <i>Hathi Trust</i>, Google's scanning of entire books was done to “enable the search functions to reveal limited, important information about the books” and, as such, with respect to search, the third factor is satisfied. With respect to snippets, the focus is on “the amount and substantiality of what is thereby made accessible to a public for which it may serve as a competing substitute.” Google constructed the snippet feature in a manner that “protects against its serving as an effectively competing substitute for Plaintiffs’ books.” Judge Leval noted that because of a “blacklisting” feature of the snippets and other text viewing limitations, “a searcher cannot succeed, even after long extended effort to multiply what can be revealed, in revealing through a snippet search what could usefully serve as a competing substitute for the original....The fragmentary and scattered nature of the snippets revealed, even after a determined, assiduous, time-consuming search, results in a revelation that is not ‘substantial’.” <i>Id.</i> at 222-23.</p>
<p>Factor 4 - Market Effect.</p>	<p>Pro user. Snippets did not disclose content that would have provided a competing substitute for the copyrighted works in the marketplace. Judge Leval characterized the fourth factor as of “great importance in making a fair use assessment” [citing <i>Harper & Row</i>] and observed: “In <i>Campbell</i>, the Court stressed also the importance of the first factor, the ‘purpose and character of the secondary use.’...The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright’s goal of enriching public knowledge and the less likely it is that the appropriation will serve as a substitute for the original or its plausible derivatives, shrinking the protected market opportunities of the copyrighted work.” “[W]hen the secondary use is transformative, ‘market substitution is at least less certain, and market harm may not be so readily inferred.’” 804 F.3d at 214 (quoting <i>Campbell</i>, 510 U.S. at 591). There is, therefore, “a close linkage between the first and fourth factors....” While there is a possibility of some lost book sales, that does not have a significant effect on the potential market for each work. The snippets “[do] not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue.” 804 F.3d at 224.</p>
<p>Transformative? Scope of Transformative Finding (Effect on Other Factors)?</p>	<p>The transformative finding influenced all of the factors, especially the 4th. This finding also limited any weight given to the second factor.</p>

**The Authors Guild, Inc. v. Google, Inc.,
804 F.3d 202
(2d Cir. 2015)
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Limitations to Holding?	None explicitly stated. Although The Authors Guild had raised security as a significant concern, the Court found that “all of the digital information created by Google in the process is stored on servers protected by the same security systems Google uses to shield its own confidential information.” 804 F.3d at 208. The Court also cited to its <i>Hathi Trust v. Google</i> opinion, where it observed that “the record ... document[ed] the extensive security measures [the secondary user] ha[d] undertaken to safeguard against the risk of a data breach...” <i>Id.</i> at 227. The court did emphasize the limitations that Google placed on its service, such as the snippet view, which “does not reveal matter that offers the marketplace a significantly competing substitute for the copyrighted work.” <i>Id.</i> at 222.
Presumption of “Most Important” Factor?	As in <i>Hathi Trust</i> , Factor 1’s finding of transformative use permeates the opinion, albeit with some caution on overextending the concept.
Concern for Owners vs. Users	Pro-user. However, Judge Leval cautioned: “The word ‘transformative’ cannot be taken too literally as a sufficient key to understanding the elements of fair use. It is rather a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author’s original text will necessarily support a finding of fair use.” <i>Id.</i> at 214. There must be “justification” for the taking. Judge Leval also observed: “A further complication that can result from oversimplified reliance on whether the copying involves transformation is that the word ‘transform’ also plays a role in defining ‘derivative works’ [under Section 106 of the Copyright Act], over which the original rights holder retains exclusive control.” However, “derivative works” are more aptly construed under Section 106 of the Act as those that “represent the protected aspects of the original work, <i>i.e.</i> , its expressive content, converted into an altered form.... If Plaintiffs’ claim were based on Google’s converting their books into a digitized form and making that digitized version accessible to the public, their claim would be strong.” <i>Id.</i> at 225-26.

TCA Television Corp. v. McCollum
839 F.3d 168
(2d Cir. 2016)
Docket No. 16-134
Raggi Opinion
October 11, 2016

Fair Use?	No
Subsequent Disposition (Remand, Cert Denied, etc.).	Reversed District Court’s fair use finding [151 F. Supp. 3d 419 (S.D.N.Y. 2015)] but affirmed dismissal under Rule 12(b)(6) on alternative ground of lack of standing based on invalid copyright assignment and ownership.
Brief Summary of Facts.	Hit Broadway show “Hand of God” used more than a minute of Abbott and Costello’s famous “Who’s on First” comedy routine (“Routine”) verbatim in a scene involving the lead character, Jason, and his hand puppet. The scene was also used in a promotional video clip. In the scene, Jason uses the Routine to impress a female love-interest character, but the puppet becomes increasingly hostile when the lead character lies that he wrote the Routine himself. The lie leads to laughter in real world audiences, as audiences are very familiar with the famous Abbott & Costello Routine.

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Factor 1 - Purpose/Character.

Pro copyright owner.

District Court had found that use of the Routine was “highly transformative” because “by having a single character perform the Routine, the Play’s authors were able to contrast ‘Jason’s seemingly soft-spoken personality and the actual outrageousness of his inner nature, which he expresses through the sock puppet.’... This contrast was ‘a darkly comedic critique of the social norms governing a small town in the Bible Belt.’” 839 F.3d at 179. Second Circuit criticized this reasoning as “flawed in that what it identifies are the general artistic and critical purpose and character of the Play. The district court did not explain how defendants’ extensive copying of a famous comedy Routine was necessary to this purpose, much less how the character of the Routine was transformed by defendants’ use.” *Id.*

Focus of first fair use factor “is not simply on the new work, *i.e.*, on whether that work serves a purpose or conveys an overall expression, meaning, or message different from the copyrighted material it appropriates. Rather, the critical inquiry is whether the new work uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created.” *Id.* at 180. Even if, as the District Court found, “Hand to God” is a “darkly comedic critique of the social norms governing a small town in the Bible Belt,” and “even if the Play’s purpose and character are completely different from the vaudevillian humor originally animating Who’s on First?, that, by itself, does not demonstrate that defendants’ use of the Routine in the Play was transformative of the original work.” *Id.*

Court reviewed its decision in *Cariou v. Prince*, noting: “Insofar as *Cariou* might be thought to represent the high-water mark of our court’s recognition of transformative works, it has drawn some criticism.” *Id.* at 181. Contrasting the photographs that were altered in *Cariou* to the point where some were “barely recognizable,” the Court emphasized that the Routine as used in “Hand of God” was not altered at all: “The Play may convey a dark critique of society, but it does not transform Abbott and Costello’s Routine so that it conveys that message. To the contrary, it appears that the Play specifically has its characters perform Who’s on First? without alteration so that the audience will readily recognize both the famous Routine and the boy’s false claim to having created it.” *Id.*

“[D]efendants’ taking is identically comedic to that of the original authors, that is, to have two performers expand on a singular joke in order to generate increasing audience laughter. As this Court has recognized, there is ‘nothing transformative’ about using an original work ‘in the manner it was made to be’ used.” *Id.* at 181-82. Nothing

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[Factor 1 continued]	
	<p>in the record demonstrated that the “Play imbued the Routine with any new expression, meaning, or message” and the District Court erred in finding it was transformative, which therefore weighs in favor of plaintiffs.</p> <p>The commercial use of the Routine without any transformative purpose also weighed in favor of the plaintiffs because such use “duplicated to a significant degree the comedic purpose of the original work.” <i>Id.</i> at 184.</p>
Factor 2 - Nature of Original Work.	<p>Pro-copyright owner.</p> <p>Court found the Routine to be a creative work, which was used for dramatic effect by “perform[ing], verbatim, some dozen variations on the Routine's singular joke,” thereby “provoke[ing] audience laughter in exactly the same way as the Routine's creators had done.” <i>Id.</i> at 184-85</p>
Factor 3 - Amount/Substantiality.	<p>Pro-copyright owner.</p> <p>Factor “weighs strongly” in favor of the plaintiffs because the portion of the Routine used “plainly reveals the singular joke underlying the entire Routine: that words understood by one person as a question can be understood by another as an answer. Moreover, defendants repeatedly exploit that joke through a dozen variations. This manifests substantial copying.” <i>Id.</i> at 185.</p>
Factor 4 - Market Effect.	<p>Pro- copyright owner.</p> <p>“[T]he district court disregarded the possibility of defendants’ use adversely affecting the licensing market for the Routine.” <i>Id.</i> at 186. The Court clarified that derivative markets, while not the focus of this factor, are nevertheless not irrelevant. As the plaintiffs at the pleading stage alleged that there existed a traditional and active derivative market for licensing the Routine, this factor also would weigh in plaintiffs’ favor, and the District Court erred in dismissing the complaint.</p>
Transformative? Scope of Transformative Finding (Effect on Other Factors)?	<p>No. Court defines the limit of transformative use under <i>Cariou</i> as requiring some transformation of the copyrighted work itself as opposed to verbatim copying used against a different background setting, such as here where “[t]he ‘dramatic’ purpose served by the Routine in the Play appears to be as a ‘McGuffin,’ that is, as a theatrical device that sets up the plot, but is of little or no significance in itself.” Jason needed to lie about something, and the Routine was used as the prop without changing its own essence. “Such unaltered use of an allegedly copyrighted work, having no bearing on the original work, requires justification to qualify for a fair use defense.” <i>Id.</i> at 182.</p>
Limitations to Holding?	<p>None stated, but Court emphasized: “Fair use is not limited to transformative works” and still extends to “commentary or criticism on another’s work.” <i>Id.</i>, notes 9 and 10.</p>

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Presumption of “Most Important” Factor?	The District Court’s misplace application of transformative use skewed the rest of its decision. Here, with transformative use nonexistent, all four statutory factors favored the copyright owner.
Concern for Owners vs. Users	Pro-Copyright Owner. Court observed that “even a correct finding of transformative use is not necessarily determinative of the first statutory factor, much less of fair use” and quoted Judge Leval’s own observation that “‘existence of... transformative objective does not... guarantee success in claiming fair use’ because ‘transformative justification must overcome factors favoring the copyright owner [Leval, <i>Toward a Fair Use Standard</i> , 103 Harv. L. Rev. at 1111]. ”” <i>Id.</i> at note 13.