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AN EMPIRICAL STUDY OF U.S. COPYRIGHT FAIR USE OPINIONS, 1978–2005

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Section 107 of the Copyright Act of 1976 establishes the affirmative defense to copyright infringement of “fair use,” by far the most enigmatic doctrine in U.S. copyright law and by far the most important. Without it, much of our economic and communicative action would constitute copyright infringement.

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Yet despite the importance of the fair use defense, and despite the enormous amount of scholarly attention that it has received, we continue to lack any systematic, comprehensive account of our fair use case law and the actual state of our fair use doctrine. Instead, our conventional wisdom derives from a small set of conventionally agreed-upon leading cases. This Article presents the results of the first empirical study of our fair use case law to show that much of our conventional wisdom about that case law is mistaken. Working from a data set consisting of all reported federal opinions that made substantial use of the section 107 four-factor test for fair use through 2005, the Article shows which factors and subfactors actually drive the outcome of the fair use test in practice, how the fair use factors interact, how courts inflect certain individual factors, and the extent to which judges stampede the factor outcomes to conform to the overall test outcome. It also presents empirical evidence of the extent to which lower courts either deliberately ignored or were ignorant of fair use doctrine set forth in the leading cases, particularly those from the Supreme Court. Based on these descriptive findings, the Article prescribes a set of doctrinal practices that will improve courts' adjudication of the fair use defense.

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INTRODUCTION

Section 107 of the Copyright Act of 1976 establishes the affirmative defense to copyright infringement of “fair use.”¹ This affirmative defense represents the most important—and amorphous—limitation on the otherwise extraordinarily broad rights granted to copyright owners under section 106 of the Act.² Much of our economic and communicative action would constitute infringement of those rights but for the defense of fair use. It is the ill-defined and unpredictable point of flexibility, the “dangerous supplement,”³ that makes the rest of our copyright law possible—and bearable.⁴ Section 107 offers no definition of “fair use,” and none is offered elsewhere in the Act. The section does, however, enumerate four broadly worded factors that courts “shall” consider in determining whether a use is “fair” and thus noninfringing:

- (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

¹ Pub. L. No. 94-553, 90 Stat. 2541, 2546 (1976) (codified as amended at 17 U.S.C. § 107 (2000 & Supp. IV 2004)).

² *Id.* (codified as amended at 17 U.S.C. § 106 (2000 & Supp. IV 2004)).

³ See JACQUES DERRIDA, OF GRAMMATOLOGY 141-64 (Gayatri Chakravorty Spivak trans. 1976) (describing a “dangerous supplement” as, among other things, an area of deconstructive ambiguity and ambivalence in a theoretical edifice that threatens always to undermine the foundations of that edifice).

⁴ Cf. R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 431 (2005) (noting that the uncertainty surrounding the fair use doctrine “has the potential to erode the foundations of fair use—and with it much of the social benefit of the copyright law”).

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.⁵

For better or worse, these factors form the core of our fair use doctrine and functionally define what fair use is. For all of the ambiguity of their statutory language, they are what stand between us and what some have called, with only a touch of hyperbole, the “tyranny of copyright.”⁶

Section 107, and the concept of fair use more generally, have attracted an enormous amount of scholarly attention, ranging from broad social-theoretical treatments⁷ to precise analyses of the leading cases and their impact.⁸ Nearly all of this commentary has been highly critical of section 107’s four-factor test and how courts have applied it.⁹ Yet, remarkably, we continue to lack any systematic, com-

⁵ 17 U.S.C. § 107.

⁶ See, e.g., Robert S. Boynton, *The Tyranny of Copyright?*, N.Y. TIMES, Jan. 25, 2004, § 6 (Magazine), at 40; see also Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 357-58 (1999) (noting that the “enclosure” that results from strict copyright restrictions conflicts with the purpose of the First Amendment, which “requires a robust public domain”); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS., Winter-Spring 2003, 33, 37-40 (lamenting the emergence of a “second enclosure movement” that seeks to challenge the “baseline” rule that “intellectual property rights are the exception rather than the norm”).

⁷ See, e.g., William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982); Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004).

⁸ See, e.g., Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917 (2005); Frank Pasquale, *Breaking the Vicious Circularity: Sony’s Contribution to the Fair Use Doctrine*, 55 CASE W. RES. L. REV. 777 (2005); Pamela Samuelson, *The Generativity of Sony v. Universal: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831 (2006); Peter S. Menell & David Nimmer, *Unwinding Sony* (U.C. Berkeley Pub. Law & Legal Theory Research Paper Series, Paper No. 930728), available at <http://ssrn.com/abstract=930728>; see also *infra* note 64 (discussing the annual ratio of law review articles addressing fair use to actual federal court cases doing the same during the period sampled).

⁹ See, e.g., PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* (rev. ed. 2003); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 115 (2003) (pointing out the particular deficiencies of each of the four statutory factors); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1106 (2007) (“[L]eading courts and commentators generally acknowledge that the four-factor test as interpreted provides very little guidance for predicting whether a particular use will be deemed fair.”); Madison, *supra* note 7, at 1564 (“[T]he facial emptiness of the statutory language means that alone, it is almost entirely useless analytically, except to the extent that it structures the collection of evi-

prehensive account of our fair use case law.¹⁰ Instead, like the “great men”¹¹ approach to history, we pursue a “leading cases” (or “usual suspects”) approach to fair use. This anecdotal method, one essentially of connoisseurship, derives conventional wisdom about our case law from a limited aristocracy of hand-picked opinions appearing primarily in the U.S. Reports—or in the student casebooks.¹² Whether these opinions have any influence on or are representative of the true state of our fair use doctrine as it is practiced in the courts remains an open, and strangely unasked, question.

dence that a court might think relevant to its decision.”); *id.* at 1586-87 (“[A]cross a range of fair use cases, the Supreme Court’s formal jurisprudence has encouraged the courts of appeals, and presumably the district courts following their lead, to abstract the fair use inquiry to the point of incoherence.”); Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright’s Fair Use Doctrine*, 11 MICH. TELECOMM. TECH. L. REV. 381, 434 (2005) (referring to section 107 as a “vague and open-ended standard”). *But see* William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 667-68 (1993) (“The thorniness of fair use is not due to any failure on the part of the legislature or the judiciary. To the contrary, it is inherent in the common law nature of the doctrine as a multifaceted process by which courts can finely calibrate not only the equities between the parties in a given case, but also the fundamental public policies at stake in drawing the line between private property and free use.”); Abraham Drassinower, *Authorship as Public Address: On the Specificity of Copyright Vis-à-Vis Patent and Trade-Mark* (unpublished manuscript, on file with author).

¹⁰ Cf. Rochelle Cooper Dreyfuss, *Games Economists Play*, 53 VAND. L. REV. 1821, 1825 (2000) (“Phenomena that generate data, like collective rights organizations, are amply studied; amorphous doctrines, such as fair use, which have enormous legal significance but little by way of hard facts, do not receive as much attention from pure economists.” (footnotes omitted)).

¹¹ See, e.g., THOMAS CARLYLE, ON HEROES, HERO-WORSHIP AND THE HEROIC IN HISTORY 29 (Carl Niemeyer ed., Univ. of Neb. Press 1966) (1897) (“The History of the world is but the Biography of great men.”).

¹² We currently have one study of a cross-sectional sample of fair use opinions. See David Nimmer, *“Fairest of Them All” and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS., Winter–Spring 2003, at 263, 279-81 (concluding that in resolving fair use cases, courts first decide whether the use is fair or unfair and then align the four factors to best support that result). Nimmer studied sixty fair use opinions published in the Federal Supplement or the Federal Reports between the March 7, 1994, opinion date of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), and the February 6, 2002, opinion date of *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002). As Nimmer admits, his method was idiosyncratic. He read the facts stated in the opinions and then, based on those facts, decided for himself which party he thought each factor should favor. He then compared his own factor-specific findings to the overall finding of the court on the fair use question. See Nimmer, *supra*, at 267 & n.28. Based on a data set assembled and provided to me by Matthew Sag, I conducted a logistic regression of the courts’ determinations of the outcomes on Nimmer’s determinations of the outcomes of the four factors. On this regression, the only significant factor outcome was the second, going to the nature of the plaintiff’s work, and the coefficient was *negative*. Thanks to Matthew Sag for informing me of this curious result.

To answer this and other questions, this Article presents the results of the first empirical study of our fair use case law.¹³ Working from a data set consisting of all reported federal opinions that made substantial use of the section 107 four-factor test from the January 1, 1978, effective date of the Copyright Act through 2005, the Article shows that much of our conventional wisdom about our fair use case law, deduced as it has been from the leading cases, is wrong. The dual purpose of the Article is systematically to induce from the population of section 107 opinions what our fair use doctrine actually is in practice, and critically to induce from that population of opinions what it ought to be.

The Article proceeds as follows. Part I provides background on section 107 and identifies in the data the curious origins of the highly routinized fashion in which judges typically apply its four factors. Part II sets forth summary statistics on the 306 opinions studied, including their distribution along the dimensions of time, venue, posture, and the kind of copyrightable work at issue. The Part further reveals the full extent to which the Second and Ninth Circuits dominate our fair use case law. It also identifies and seeks to explain the remarkable increase in the prevalence of fair use summary judgment opinions that began in the mid-1990s and has continued to the present, and the just as remarkable absence of fair use bench trial opinions during the same period. It then reports the reversal, dissent, and appeal rates in the fair use case law and finds that notwithstanding strong conventional wisdom to the contrary, none of these are especially high as compared to other areas of law. Finally, and perhaps most interestingly, the Part sets out the fair use win rates (i.e., the proportion of opinions that found fair use) in the case law. For certain postures, these rates were exceptionally low. The Part seeks to explain why.

¹³ The method employed here is generally referred to as “content analysis.” See Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions* 3 (Wake Forest Univ. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 913336, 2006), available at <http://ssrn.com/abstract=913336> (defining content analysis as an empirical method by which “a scholar collects a set of documents (for instance, judicial opinions on a particular subject), reads the documents systematically, records consistent features of each one, and then draws inferences about the use and meaning of those documents”); see also Fred Kort, *Content Analysis of Judicial Opinions and Rules of Law*, in *JUDICIAL DECISION-MAKING* 133 (Glendon Schubert, ed. 1963) (providing a quantitative formulation of rules of law as a content analysis method for the interpretation of judicial decision making); Reed C. Lawlor, *Fact Content Analysis of Judicial Opinions*, 8 *JURIMETRICS* J. 107, 110 (1968) (using content analysis of fact patterns in judicial opinions to develop a method for predicting the outcome of future cases).

Parts III and IV then focus on how judges used the four-factor test. Part III engages in an *interfactor* analysis of the test as applied. It focuses on the factor outcomes and shows how these outcomes interacted with each other and with the overall test outcome. Correlation and regression analyses reveal the surprising extent to which the outcomes of the first and especially the fourth factors appear to drive the outcome of the test. The Part also reports the results of a word count analysis of the opinions across time. It concludes by considering the extent to which judges “stampeded”¹⁴ the factor outcomes to conform to the overall test outcome. The data show that, again, notwithstanding strong conventional wisdom to the contrary, and notwithstanding the examples of certain leading cases, judges do not generally stampede the factor outcomes. Rather than make a fair use determination first and then “align the four factors to fit that result as best they can,”¹⁵ courts appeared quite willing to call the factor outcomes as they saw them, even when those outcomes did not support the overall test outcome. This is a highly encouraging finding.

Part IV then turns to an *intrafactor* analysis of the fair use test as applied. It looks inside each of the four factors to determine which subfactor considerations animated courts’ determinations of the factor outcomes and, through those factor outcomes, the outcome of the overall fair use test. Regression analysis, as well as simple descriptive statistics, shows that certain subfactor findings were far more impor-

¹⁴ The metaphor of stampeding is adopted from Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1614-15 (2006). The hypothesis is that judges decide the outcome of a multifactor test based on a limited number of core factors, possibly only one. The judge then tends to ensure that most, if not all, of the remaining factors follow the lead of this dispositive factor. Alternatively, the hypothesis is that certain multifactor tests are by their own nature prone to stampeding, primarily because the factors are redundant. The idea of stampeding is based in part on the “coherence-based reasoning model” proposed by Dan Simon and others, see Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513 (2004) (“Coherence-based reasoning posits that the mind shuns cognitively complex and difficult decision tasks by reconstructing them into easy ones, yielding strong, confident conclusions.”), and in part on the “fast and frugal” heuristics research of Gerd Gigerenzer and others, see Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 PSYCHOL. REV. 650, 666 (1996) (arguing that simple psychological mechanisms that operate under constraints of limited time and knowledge can produce as many correct inferences as more complex analyses). Cf. Nimmer, *supra* note 12, at 281 n.62 (“Alternatively, as courts work their way through the four factors, at some point they decide what the ultimate conclusion should be—which, in turn, molds the way that they reach resolution as to which direction each factor points.”).

¹⁵ Nimmer, *supra* note 12, at 281.

tant to the outcome of the fair use test than is generally thought, and that others thought to be important actually had no significant influence on the outcome of the test. For example, a finding that the plaintiff's work was factual in nature or published appeared strongly to influence a court to find fair use,¹⁶ as did a finding that the defendant's use was for a noncommercial purpose.¹⁷ Meanwhile, the data suggest that a finding that the defendant's use was for a commercial (rather than noncommercial) purpose had no significant influence on the outcome of the test, and a finding that the defendant used the entirety of the plaintiff's work was far from dispositive. More generally, and more disturbingly, the Part shows the extent to which lower courts repeatedly either deliberately ignored or were ignorant of basic, albeit dictic, Supreme Court precedent. Indeed, the data show that the lower courts repeatedly and systematically inverted Supreme Court dicta to favor the defendant, so that if the Court stated, for example, only that "not *x*" favors the plaintiff, the primary lesson the lower courts would draw from this is that "*x*" favors the defendant. This may come as a pleasant surprise to fair use maximalists, who are generally pessimistic about the state of our fair use case law and the judges who produce it. But when the lower courts systematically resist the authority of the Supreme Court, and on issues of central importance to an area of law, this is cause for concern regardless of the policy outcome. The Part suggests that the indiscipline of the lower courts is largely the fault of the Supreme Court itself and its repeated unwillingness explicitly to correct its own past mistakes in its fair use opinions. This has left the lower courts with an array of "accumulating precedent" from which to choose.¹⁸

Part V concludes by reflecting on the prescriptive implications of the study's findings. In the mass of everyday fair use case law, and in the interstices of the four factors, we can identify which considerations most commonly formed the basis of judges' fair use determinations. These findings we can welcome as empirical precedent, that is, as precedent based on the empirical analysis of how the population of judges who have previously employed a legal doctrine did so. In the

¹⁶ See *infra* Part IV.B and Table 9.

¹⁷ See *infra* Part IV.A.1 and Table 9.

¹⁸ See generally Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1205-06 (2005) (studying the effect of precedent on judicial decisionmaking and finding, generally, that "[t]he growth of precedent in an area [of law] does not appear to restrict judicial discretion; if anything, the development of the law may increase such discretion").

near term, we are stuck with section 107, “botched job”¹⁹ that it may be, and the task is to make the best of what we have. But in the long term, the more important task is to induce—both systematically and critically—from the section 107 case law we have what form a new section 107 might someday take.

I. BACKGROUND

As a foundation for the discussion that follows in subsequent Parts, this Part briefly reviews the language and legislative history of section 107. It then describes the highly routinized analytical and rhetorical style that judges employed when they applied the section 107 test. This style greatly facilitated reliable coding of the data set.²⁰

A. Section 107 of the Copyright Act of 1976

Structurally, the Copyright Act leans toward protection; it gives broadly and takes away narrowly. Section 106 enumerates in expansive terms the exclusive rights that a copyright owner enjoys in a copyrighted work.²¹ Sections 107 through 122 then set forth “limitations” on these exclusive rights.²² Most of these limiting sections contain highly specific, even regulatory language.²³ Section 107, however, among the briefest of the limiting sections,²⁴ is extraordinarily broad in scope. The Section states in full:

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

¹⁹ Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1151 (1990).

²⁰ For a discussion of the process of collecting and coding the opinions that comprised the data set for this study, see the Appendix.

²¹ 17 U.S.C. § 106 (2000 & Supp. IV 2004).

²² *Id.* §§ 107–122.

²³ See generally Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004) (examining the “implications of the increasingly regulatory nature of U.S. copyright law”).

²⁴ The only limiting section shorter in word count is section 120, involving the scope of exclusive rights in architectural works. See 17 U.S.C. § 120 (2000 & Supp. IV 2004).

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.²⁵

Section 107 thus consists of three parts:²⁶ a preamble that identifies “the fair use of a copyrighted work” as an exception to the copyright owner’s exclusive rights and that gives examples of fair “purposes,” a list of four factors that courts must consider in determining whether a use is a fair use,²⁷ and an additional statement regarding unpublished works that was added in 1992.²⁸

A detailed account of the legislative history of section 107 is beyond the scope of this Article and is available elsewhere.²⁹ It is inter-

²⁵ 17 U.S.C. § 107 (2000 & Supp. IV 2004).

²⁶ Cf. Weinreb, *supra* note 19, at 1139 (“Congress adopted three considerably inconsistent ways of doing nothing: simple reference to fair use, specification of what is fair use by illustrative examples, and prescription of nonexclusive ‘factors to be considered’ in determining whether a particular use is fair. As Hercule Poirot observed about the murder on the Orient Express, the problem is not that there are too few clues but that there are too many.” (footnotes omitted)).

²⁷ Judge Posner was quite dismissive of the factors in *Ty, Inc. v. Publications International, Ltd.*, 292 F.3d 512, 522 (7th Cir. 2002) (noting that the “statutory definition” of fair use, “though extensive[,] is not illuminating”). On remand, District Court Judge Zagel nevertheless explained to the defendant, who adopted Judge Posner’s approach “[t]o its detriment,” that “regardless of what PIL claims the Seventh Circuit did, statutory and case authority mandate that the four fair use factors must be considered and applied in every case, including this remand.” *Ty, Inc. v. Publ’ns Int’l., Ltd.*, 333 F. Supp. 2d 705, 715-16 (N.D. Ill. 2004).

²⁸ Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145; see also Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1, 49-66 (1999) (discussing the legislative history of the 1992 amendment and its impact on the fair use case law).

²⁹ See, e.g., WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 261-365 (2d ed. 1995). For an account of the legislative history of the Copyright Act in general, see Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989) and Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

esting to note, however, that early on in the two decades of negotiations that led to the Act, a variety of interested parties urged that the Act not reference fair use at all, or if it did, that its reference take the form of a “bare bones”³⁰ one-sentence limitation. Their concern was that statutory recognition of fair use would “freeze” or otherwise unpredictably alter the judge-made doctrine.³¹ Indeed, in 1965, after draft provisions similar in structure to the current section 107 raised a storm of objections—many of them the same objections we hear today—the negotiations focused on the following draft provision: “Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright.”³² This proposed language failed to win consensus, however, and the next year negotiations shifted back to the consideration of a provision taking the structure of a preamble and four factors.³³

The language of the preamble and factors changed in some cases dramatically through the course of the negotiations. As for the preamble, which was explicitly referenced by 22% of the 306 opinions studied, an initial 1963 draft proposed simple language that did little other than identify fair use as a “privilege.”³⁴ Three identical 1964 bills then proposed a more involved “legitimate purpose” requirement.³⁵ Dropped in 1965, the preamble returned in 1966 in a form quite similar to the final version of section 107.³⁶ All that was missing was the parenthetical “(including multiple copies for classroom use),” which was added at the eleventh hour in early 1976.³⁷ As this addition reflects, the main controversy surrounding the section’s preambulatory language, if not the fair use section as a whole, concerned an emer-

³⁰ See, e.g., *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, and H.R. 6835 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 1216 (1965) (statement of Association of American University Presses); *id.* at 1714 (statement of the American Bar Association).

³¹ See, e.g., H. COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 3, at 158 (Comm. Print 1964) [hereinafter COPYRIGHT LAW REVISION PART 3].

³² H.R. 4347, 89th Cong. § 107 (1966); S. 1006, 89th Cong. § 107 (1967); see also PATRY, *supra* note 29, at 277-96 (providing a history of the debates surrounding the bills).

³³ PATRY, *supra* note 29, at 296-319.

³⁴ See COPYRIGHT LAW REVISION PART 3, *supra* note 31, at 6.

³⁵ See H.R. 11947, H.R. 12354, and S. 3008, 88th Cong., 2d Sess. (1964), *reprinted in* H. COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 5, at 1-32 (Comm. Print 1964) [hereinafter COPYRIGHT LAW REVISION PART 5].

³⁶ See H.R. 4347 § 107.

³⁷ PATRY, *supra* note 29, at 351.

gent technology of the time: photocopying.³⁸ The negotiating parties may have overestimated the future significance to fair use of photocopying technology, however. Only 14 opinions from 9 cases addressed facts involving photocopying, and only 5 of these opinions explicitly referenced the language of section 107's preamble.³⁹

The language of section 107's factors was largely drawn from Justice Joseph Story's 1841 circuit court opinion in *Folsom v. Marsh*,⁴⁰ an opinion whose influence on American fair use case law up to the 1976 Act we have probably overestimated, or so the data suggest,⁴¹ but whose influence since is quite clear.⁴² A 1963 draft stated that "the fol-

³⁸ See *id.* (noting that the House subcommittee chose to address multiple copying in section 107 even though it was already being addressed in privately drafted guidelines).

³⁹ Of course, a more optimistic interpretation of these data is that the preamble of section 107, together with various privately drafted guidelines, sufficiently clarified the issue so that litigation over it was rarely necessary. For a discussion of the history of fair use and privately drafted fair use guidelines, see Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599 (2001).

⁴⁰ 9 F. Cas. 342 (D. Mass. 1841) (No. 4901). For an overview of *Folsom v. Marsh*, see R. Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in INTELLECTUAL PROPERTY STORIES 259 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

⁴¹ A total of 44 federal cases cited to *Folsom* from 1841 through 1977. This citation count is based on a search for the string "Folsom v Marsh" in the Westlaw "allfeds-old" database and the Lexis "Federal Courts Cases Before 1945, Combined" database for federal case law before 1945 (the temporal limit of both of these databases), and in the Westlaw "allfeds" database for federal case law after 1944. The Lexis pre-1945 database yielded 5 cases not found in the Westlaw pre-1945 database. For a rough scale by which to assess *Folsom's* citation count from 1841 to 1977, consider that a Westlaw search of the federal case law from the same periods for cases including the terms "fair use" and "copyright" yielded 125 cases, of which only 15 cited to *Folsom*. Early-twentieth-century treatises also failed to emphasize *Folsom*. See, e.g., RICHARD ROGERS BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 252 (1912) (referencing *Folsom* once, for a proposition relating to piracy, in a fourteen-page discussion of fair use); WILLIAM BRIGGS, THE LAW OF INTERNATIONAL COPYRIGHT (1906) (failing to refer to *Folsom* at all); RICHARD C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 140-167 (1925) (discussing fair use but failing to reference *Folsom*).

⁴² Of the 306 opinions sampled for this study, 47 opinions (15.4%) cited to *Folsom*, with 26.1% of the appellate opinions doing so, and 42.9% of the Supreme Court opinions doing so. In 40 of these 47 opinions, the judge either quoted directly from *Folsom*, quoted indirectly from *Folsom* by noting that he was quoting from an opinion that was itself quoting from *Folsom*, or otherwise discussed the facts in *Folsom*. One of these 40 purported to quote directly from *Folsom*, though, pedantically speaking, it did so in error. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 n.9 (11th Cir. 2001) ("In *Folsom v. Marsh*, . . . Justice Story created the concept of 'fair use.'"). Justice Story did not use the term "fair use" in *Folsom*. The term of art apparently first appeared in reported federal case law in *Lawrence v. Dana*, 15 F. Cas. 26, 58, 61 (D. Mass. 1869) (No. 8136).

lowing factors, among others, shall be considered,” and then listed out the four factors nearly as we have them today.⁴³ Bills from 1964 narrowed the introductory statement (“the factors to be considered shall include”) and added the phrase “market for or” to factor four.⁴⁴ Finally, in early 1976, primarily to allay the concerns of educators,⁴⁵ the Subcommittee of the House Committee on the Judiciary responsible for the Copyright Act added the following phrase to factor one: “including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁴⁶ Despite the committee’s best efforts at the time to downplay its significance in their reports,⁴⁷ this phrase has since caused no end of trouble, as we will see in Part III.

B. Courts’ Mechanical Application of the Four-Factor Test

Had the drafters of the statutory language of section 107 known how judges would end up actually applying that language, they may very well have fallen back on the 1965 one-sentence provision after all. In the opinions studied, courts often acknowledged that the four-factor test should not be applied formulaically;⁴⁸ as one court put it, the test does not “constitute an algorithm that enables decisions to be ground out mechanically.”⁴⁹ Yet the data show that after an initial pe-

⁴³ See COPYRIGHT LAW REVISION PART 3, *supra* note 31, at 6. In his earlier Tentative Draft Report, the Register of Copyrights phrased the factors slightly differently. For the exact phrasing, see PATRY, *supra* note 29, at 264.

⁴⁴ See H.R. 11947, H.R. 12354, and S. 3008, 88th Cong. (1964), *reprinted in* COPYRIGHT LAW REVISION PART 5, *supra* note 35, at 5.

⁴⁵ Patry & Perlmutter, *supra* note 9, at 678-79.

⁴⁶ PATRY, *supra* note 29, at 351; Patry & Perlmutter, *supra* note 9, at 678.

⁴⁷ See, e.g., H.R. Rep. No. 94-1476, at 66 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 (noting that the amendment “is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works,” but is rather “an express recognition that, as under the present law, the commercial or nonprofit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions”).

⁴⁸ See, e.g., *Weissmann v. Freeman*, 868 F.2d 1313, 1323 (2d Cir. 1989) (“Analysis begins not by elevating the statutory guides into inflexible rules, but with a review of the underlying equities.”); *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 751 F.2d 501, 508 (2d Cir. 1984) (“The four factors . . . are equitable considerations to be assessed and weighed by the court; they are not simply hurdles over which an accused infringer may leap to safety from liability. Rather than a sequence of four rigid tests, the fair use analysis consists of a ‘sensitive balancing of interests.’” (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984))).

⁴⁹ *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) (Posner, J.); see also Patry & Perlmutter, *supra* note 9, at 685 (“Before fair use was incorporated in the statute, courts did not treat the factors as a checklist, with each factor re-

riod of flexibility, judges shifted in the late 1980s toward a rhetorically quite formal and explicit treatment of the section 107 factors. Figure 1 shows the proportion of opinions over time in which the court adopted the rhetorical practice of explicitly stating which party each factor favored.⁵⁰ Overall, judges engaged in this practice in 59.5% of the 306 opinions. Some judges also concluded their section 107 analysis with a summary explicitly reviewing the valence of each factor. Overall, judges did so in 32.7% of the opinions.⁵¹

Interestingly, the shift toward a routinized application of the section 107 test roughly coincided with the Supreme Court's May 1985 issuance of its opinion in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁵² in which the Court found that *The Nation's* unauthorized publication of excerpts from President Gerald Ford's soon-to-be-published autobiography was not a fair use. In her opinion for the majority, Justice O'Connor was deliberate in her application of section 107, but did not engage in the kind of mechanical rhetoric that we see in most

duced to a plus or minus. The mere listing of four factors in the 1976 Act, however, has led some courts improperly to take this approach.”).

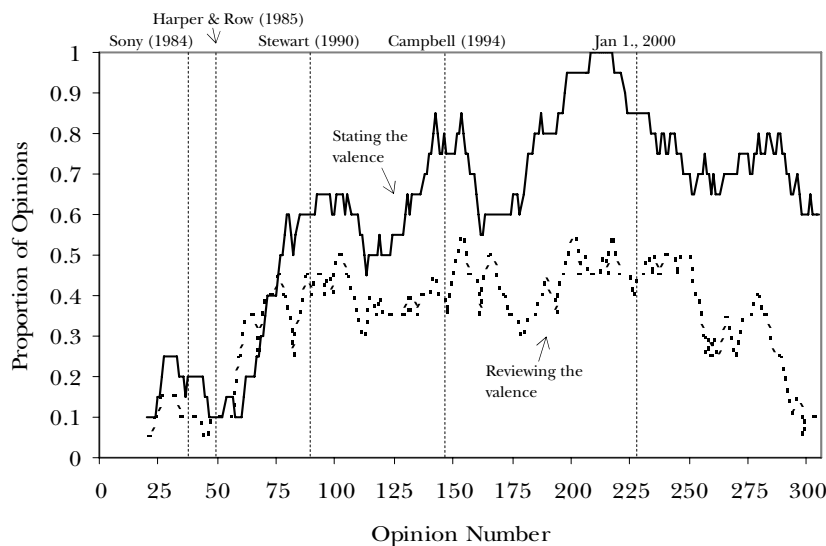
⁵⁰ See, e.g., *Schiffer Publ'g, Ltd. v. Chronicle Books, LLC*, No. 03-4962, 2004 WL 2583817, at *12-13 (E.D. Pa. Nov. 12, 2004) (“In sum, Defendants’ use of Plaintiffs’ work was not a fair use. Because the first, third, and fourth fair use factors favor Plaintiffs, and because none of the factors strongly favor Defendants, this Court holds that Defendants have not met their burden of proving that their appropriation of Plaintiffs’ works constitutes fair use.”); *Batesville Servs., Inc. v. Funeral Depot, Inc.*, No. 02-01011, 2004 U.S. Dist. LEXIS 24336, at *22-26 (S.D. Ind. Nov. 10, 2004) (“The first factor thus weighs heavily against the fair use defense. . . . This [second] factor is essentially neutral on Funeral Depot’s fair use defense. . . . This [third] factor weighs against the fair use defense. . . . This [fourth] factor tends to weigh in favor of the fair use defense . . .”).

⁵¹ See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003) (“Having considered the four fair use factors and found that two weigh in favor of Arriba, one is neutral, and one weighs slightly in favor of Kelly, we conclude that Arriba’s use of Kelly’s images as thumbnails in its search engine is a fair use.”); *Narell v. Freeman*, 872 F.2d 907, 915 (9th Cir. 1989) (“In sum, the first factor weighs strongly in Narell’s favor and the second factor slightly favors Freeman. However, a reasonable juror could only conclude that the third and final factors strongly favor Freeman.”); *Salinger v. Random House, Inc.*, 811 F.2d 90, 99-100 (2d Cir. 1987) (“On balance, the claim of fair use as to Salinger’s unpublished letters fails. The second and third factors weigh heavily in Salinger’s favor, and the fourth factor slightly so. Only the first factor favors Hamilton.”); *Coll. Entrance Exam. Bd. v. Cuomo*, 788 F. Supp. 134, 143 (N.D.N.Y. 1992) (“In conclusion, given the fact that factor one favors the State, factor two favors GMAC, and factors three and four favor neither party, the court holds that GMAC has not demonstrated a likelihood of success on the merits of its copyright infringement claim.”).

⁵² 471 U.S. 539 (1985).

fair use opinions from 1987 to the present.⁵³ Justice Brennan’s dissent, however, was highly mechanical in form. It both explicitly stated the valences of each factor⁵⁴ and explicitly summed up the balance of those valences in its conclusion.⁵⁵ This dissent arguably set American courts on a course toward a rhetorically more mechanical treatment of the section 107 inquiry⁵⁶—notwithstanding the fact that the dissent itself urged courts to recognize that the section 107 factors “do not mechanistically resolve fair use issues.”⁵⁷

Figure 1: Twenty-Opinion Moving Average of the Proportion of Opinions Explicitly Stating the Valence of the Factors and Explicitly Reviewing the Valence of the Factors



As further evidence of the generally routinized manner in which they employed the section 107 test, judges rarely explicitly considered factors beyond the four listed in section 107 and, with the exception of

⁵³ See *id.* at 549-69 (recounting the history of fair use and evaluating each factor in light of the purpose of the fair use defense).

⁵⁴ *Id.* at 590-603 (Brennan, J., dissenting).

⁵⁵ *Id.* at 604-05.

⁵⁶ Cf. Litman, *Copyright, Compromise, and Legislative History*, *supra* note 29, at 861 n.37 (noting that in *Sony* and *Harper & Row*, “the Supreme Court adopted a test that rigidifies the statute’s major flexibility principle”).

⁵⁷ 471 U.S. at 588 (Brennan, J., dissenting).

the second factor, rarely failed to consider fewer than all four factors.⁵⁸ Commentators have long called upon courts to look to additional factors,⁵⁹ such as “fairness,”⁶⁰ and in the opinions studied, the courts themselves frequently acknowledged that the section 107 test is illustrative rather than limitative.⁶¹ Yet only 17.0% of the opinions explicitly considered one or more additional factors, and only 8.8% stated that the additional factor was relevant to the fair use determination.

Thus, the methodical fashion in which judges used the four-factor test to make their fair use determinations provides an orderly framework for systematic study. Whether this particular form of “mechanical jurisprudence”⁶² has been good for the law is, of course, another matter, one which I will address in later Parts. First, however, to build a foundation for a close analysis of the operation of the four-factor test, I discuss in the next Part the general characteristics of the opinions.

II. SUMMARY STATISTICS

A. *Distributions of the Opinions*

In the twenty-eight years from the January 1, 1978 effective date of

⁵⁸ Of the 306 opinions, 6.9% failed to consider the first factor, 17.7% failed to consider the second factor, 13.4% failed to consider the third factor, and 8.8% failed to consider the fourth factor.

⁵⁹ See, e.g., Gordon, *supra* note 7, at 1614 (proposing that courts consider whether “(1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner”); Madison, *supra* note 7, at 1687 (calling upon judges to conduct a “pattern-oriented” analysis of the fair use issue); see also Fisher, *supra* note 7, at 1678-86 (discussing the relevance of various subfactor concerns to the fair use determination); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (discussing the relevance of industry “custom” to the fair use determination).

⁶⁰ See Weinreb, *supra* note 19, at 1140 (urging courts to take into account factors such as customary practice in their fairness determinations).

⁶¹ See, e.g., Bond v. Blum, 317 F.3d 385, 394 (4th Cir. 2003) (“These factors are not meant to be exclusive, but rather illustrative, representing only general guidance about the sorts of copying that courts and Congress most commonly have found to be fair uses.” (citations and internal quotations omitted)); *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 448 (C.D. Cal. 1979) (“The factors are illustrative, not definitive.”), *aff’d in part, rev’d in part*, 659 F.2d 963 (9th Cir. 1981).

⁶² Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 15-16 (1977) (criticizing the nominalist conception of law as a warehouse of rules discovered and applied mechanically by judges); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605-07 (1908) (criticizing the conception of law as science insofar as it becomes an end in itself rather than a means to administer justice).

the 1976 Act to the conclusion of 2005, the federal courts produced 306 reported opinions from 215 cases that made substantial use⁶³ of the section 107 four-factor test. This averages out to 10.9 opinions per year during the twenty-eight year period, with an average of 4.6 opinions per year actually finding fair use. Though sufficient for purposes of basic statistical analysis, this is a surprisingly low number of opinions for such an important area of copyright law, particularly one that has received so much academic attention.⁶⁴ It is all the more surprising in light of Federal Judicial Center data that suggests that a steady average of approximately 2000 copyright infringement complaints were filed per year in federal district courts during the same period.⁶⁵ A number of factors may account for the paucity of reported fair use opinions, the most obvious being that many fair use disputes may never reach the courts.⁶⁶ In any event, it is important to recognize that this study is concerned with a small but crucially important region

⁶³ The Appendix discusses the “substantial use” standard used to filter the opinions. In short, the data set included all opinions from the period sampled that cited to the section 107 test and referenced at least two factors from the test.

⁶⁴ There were typically far more law review articles than actual court opinions on fair use in each of the years sampled. A search of the Westlaw “tp-all” database for the years 1990–2005, using the search string, ti(“fair use”) & da([year]), shows that the ratio of law review articles in that database containing the phrase “fair use” in their titles to actual court opinions on fair use was about 2.4:1 during that period. For the years 2000–2005, the ratio was 3.3:1.

⁶⁵ INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2003 (ICPSR Study No. 4026, 2005); INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2002 (ICPSR Study No. 4059, 2005); INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2001 (ICPSR Study No. 3415, 2005); INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970–2000 (ICPSR Study No. 8429, 2005). According to these databases, for the years 1978 up to and including 2003, the mean number of filings per year under the Nature of Suit category “820 Copyright” was 1990.67 (standard deviation = 6.83).

⁶⁶ Even while fair use concerns may pervade the public sphere (and legal-academic commentary on it), many fair use controversies may never take the form of a filed complaint, as potential fair uses are “chilled” by the mere threat of litigation. Empirical work supports this explanation. See MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 8, 35-36 (2005) (assessing the speech-suppressing effects of cease-and-desist letters). Indeed, the very unpredictability of fair use outcomes may lead defendants to settle, whether before or after litigation has been joined, particularly when the defendant need only make narrow alterations in its speech in order to avert the risk of broad injunctive relief and the imposition of damages. For a theoretical account of the cost-benefit analysis underlying the pleading of a fair use defense, see Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=951839>.

in the larger world of fair use: its case law. The data can tell us a great deal about the case law and how the four-factor test has operated within it. Because of the fundamental problem of selection bias, however, we cannot reasonably ask the data to do more.⁶⁷

1. Distribution of the Opinions by Year and Venue

Figure 2 sets out the distribution by year of the district and circuit court opinions studied. Though the data show no clear turning point, the average number of district court fair use opinions per year shifted substantially through the course of the late 1980s and early 1990s. This shift may reflect, at least in part, the appearance in the fair use case law of disputes involving computer software, the first of which appeared in 1988,⁶⁸ and Internet technology, the first of which appeared in 1993.⁶⁹ The Supreme Court has addressed section 107 in seven opinions from four cases, all of them falling within the period studied: *Sony v. Universal City Studios, Inc.*⁷⁰ (1984), *Harper & Row, Publishers, Inc. v. Nation Enterprises*⁷¹ (1985), *Stewart v. Abend*⁷² (1990), and *Campbell v. Acuff-Rose Music, Inc.*⁷³ (1994). *Sony* and *Harper & Row* each produced one dissent,⁷⁴ while *Campbell* produced a brief concurrence.⁷⁵

⁶⁷ See generally Ahmed E. Taha, *Data and Selection Bias: A Case Study*, 75 UMKC L. REV. 171 (2006) (discussing the effects of selection bias on the results of empirical studies of whether judges' political orientations affect litigation outcomes); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=982130> ("Many authors have drawn exceedingly strong normative claims based on datasets that docketology reveals to be substantially biased.").

⁶⁸ See *Telerate Sys., Inc. v. Caro*, 689 F. Supp. 221, 228-31 (S.D.N.Y. 1988) (denying the fair use defense of a subscriber to a computerized financial information service who copied the provider's database and sold the information as part of its software package).

⁶⁹ See *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1557-59 (M.D. Fla. 1993) (holding that use of copyrighted photographs on an Internet bulletin board was not a protected fair use).

⁷⁰ 464 U.S. 417 (1984).

⁷¹ 471 U.S. 539 (1985).

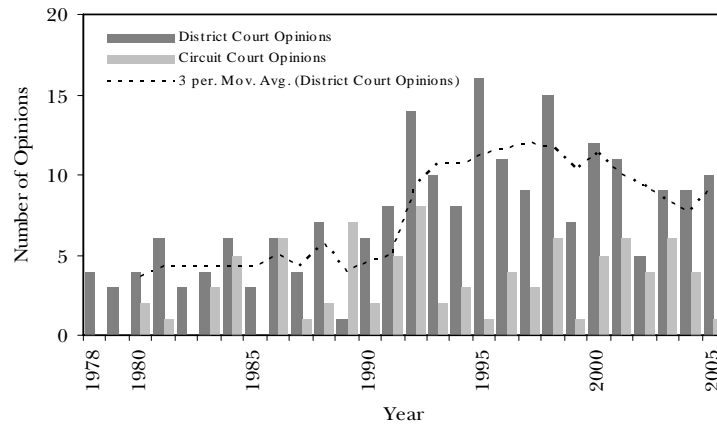
⁷² 495 U.S. 207 (1990).

⁷³ 510 U.S. 569 (1994).

⁷⁴ See *Harper & Row*, 471 U.S. at 579-605 (Brennan, J., dissenting); *Sony*, 464 U.S. at 457-500 (Blackmun, J., dissenting).

⁷⁵ See *Campbell*, 510 U.S. at 596-600 (Kennedy, J., concurring).

Figure 2: Distribution of District and Circuit Court Opinions by Year



The district and circuit courts of the Second and Ninth Circuits dominated the sample⁷⁶ across the twenty-eight-year period⁷⁷ in two closely related ways. First, their courts contributed the great bulk of the opinions sampled. Table 1 reports that Second Circuit courts accounted for 38.6% of the circuit court opinions and 35.1% of the district court opinions, while Ninth Circuit courts were responsible for 28.4% of the circuit court opinions and 18.0% of the district court opinions. Percentages for all other circuits, even the Seventh, were in the single digits. At the district court level, the Southern District of New York (S.D.N.Y.) alone accounted for 31.3% of the district court opinions, with the Northern District of California next at 7.6%.

Second, the data show that fair use opinions from courts of the Second and Ninth Circuits exerted a great deal of influence—much more than is generally thought—on fair use opinions outside of those circuits. Specifically, data on the import and export of fair use case citations between the various circuits in the opinions studied demon-

⁷⁶ I use the term “sample” because, though this project sought to study the entire population of federal opinions that applied the four-factor test from 1978 through 2005, I cannot be sure that I collected all such opinions.

⁷⁷ There was no significant variation over time in the distribution of opinions by venue or in the degree to which opinions from courts of the Second and Ninth Circuit were cited by courts outside of those circuits. It is notable, however, that 35 of the 38 opinions (or 92%) sampled from the district courts of the Ninth Circuit dated from after 1990. This does not, however, appear to reflect the rise of computer software and Internet fair use case law, as only 6 of these 35 opinions involved computer software or Internet facts.

strate that the Second and the Ninth Circuits both enjoyed substantial trade surpluses. For example, circuit and district court opinions from outside the Second Circuit cited to an average of 1.55 circuit court cases from the Second Circuit per fair use analysis, and those from outside the Ninth Circuit cited to an average of 0.68 circuit court cases from the Ninth Circuit per fair use analysis. No other circuits boasted nearly as much influence outside of their borders. The next most influential circuit after the Ninth was the Fifth, with 0.14 Fifth Circuit cases cited per fair use analysis by circuit and district courts outside of the Fifth Circuit—and this is largely the result of the authority of pre-1981 Fifth Circuit case law for courts of the Eleventh Circuit.⁷⁸ In fact, by this measure, S.D.N.Y. courts were more influential than any circuit court other than the Second and the Ninth Circuits and were nearly as influential as the Ninth Circuit. Circuit courts outside the Second Circuit cited to an average of 0.59 S.D.N.Y. cases per fair use analysis, while district courts outside the Second Circuit cited to an average of 0.60 S.D.N.Y. cases per fair use analysis. Ultimately, circuit and district courts of the Second, Fifth, and Ninth Circuits were the only courts that cited on average more often to opinions from their own circuit court than to opinions from the circuit courts of either the Second or the Ninth Circuits.

Thus, when we speak of modern U.S. fair use case law, we are speaking primarily of the 122 opinions generated by four courts—the Supreme Court, the Second and Ninth Circuits, and the Southern District of New York—and the progeny of these opinions in the other federal courts. This makes the detection of intercircuit variation in our fair use case law a hazardous enterprise. Nevertheless, as I will discuss in Part IV, the data suggest that, when taking into consideration a variety of other factors, the Second Circuit stands out as a relatively fair-use-friendly circuit.⁷⁹

⁷⁸ See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that cases decided by the Fifth Circuit prior to October 1, 1981 are the law of the Eleventh Circuit).

⁷⁹ See *infra* note 142 and Table 9.

Table 1: Distribution of Circuit and District Court Opinions

Circuit	Circuit Court Opinions		District Court Opinions				
	<i>n</i>	%	<i>n</i>	%	District	<i>n</i>	%
1	1	1.1	8	3.8	D. Mass.	7	3.3
					D.N.H.	1	0.5
2	34	38.6	74	35.1	N.D.N.Y.	3	1.4
					E.D.N.Y.	2	0.9
					S.D.N.Y.	66	31.3
					W.D.N.Y.	3	1.4
3	1	1.1	9	4.3	D.N.J.	2	0.9
					E.D. Pa.	5	2.4
					W.D. Pa.	1	0.5
					D. Del.	1	0.5
4	3	3.4	12	5.7	D. Md.	4	1.9
					E.D. Va.	5	2.4
					M.D.N.C.	1	0.5
					W.D. Va.	2	0.9
5	4	4.6	8	3.8	N.D. Tex.	2	0.9
					E.D. Tex.	1	0.5
					S.D. Tex.	4	1.9
					W.D. Tex.	1	0.5
6	8	9.1	12	5.7	E.D. Ky.	1	0.5
					E.D. Mich.	6	2.8
					W.D. Mich.	2	0.9
					N.D. Ohio	1	0.5
					E.D. Tenn.	1	0.5
M.D. Tenn.	1	0.5					
7	3	3.4	12	5.7	N.D. Ill.	11	5.2
					S.D. Ill.	1	0.5
8	2	2.3	10	4.7	D. Minn.	8	3.8
					W.D. Mo.	1	0.5
					D. Neb.	1	0.5
9	25	28.4	38	18.0	N.D. Cal.	16	7.6
					C.D. Cal.	12	5.7
					S.D. Cal.	5	2.4
					D. Nev.	2	0.9
					D. Or.	3	1.4
10	—	—	7	3.3	D. Colo.	2	0.9
					D. Kan.	4	1.9
					N.D. Okla.	1	0.5
11	6	6.8	14	6.6	M.D. Fla.	2	0.9
					S.D. Fla.	3	1.4
					N.D. Ga.	9	4.3
DC	1	1.1	7	3.3	D.D.C.	7	3.3
Total	88		211			211	

2. Distribution of District Court Opinions by Posture

Table 2 reports the distribution of postures in the district court opinions. More than half of the opinions addressed a motion or cross-motion for summary judgment, and of these 121 opinions, 86% granted the motion or one of the cross-motions. This supports the conventional wisdom that courts regularly resolve fair use issues at the summary judgment stage.⁸⁰

More interesting is the distribution of the posture of district court opinions across time. Figure 3 shows a moving average of the proportion of district court opinions that took the form of either a preliminary injunction, summary judgment, or bench trial opinion. In 1994, there was a substantial drop-off in the proportion per year of bench trial opinions, so that up to and including 1993, the sample included, in absolute numbers, an average of 1.9 bench trial opinions per year, and 0.5 bench trial opinions per year thereafter. Indeed, for the seven-year period from 1999 to 2005, the sample included only one district court bench trial opinion.⁸¹ At the same time, the data indicate a fairly dramatic increase, beginning in the early to mid-1990s, in the proportion of opinions which engaged in summary adjudication of the fair use defense.

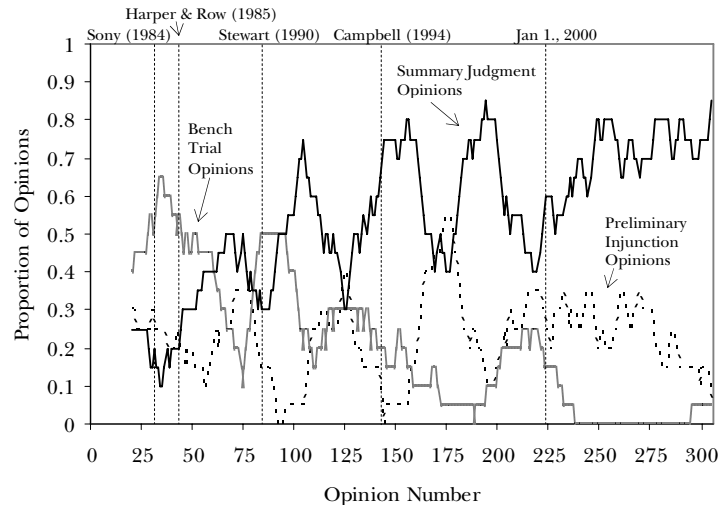
Table 2: Distribution of District Court Opinions by Posture

("Found FU" denotes the proportion of opinions that found fair use;
"Found No FU" denotes the proportion of opinions that found no fair use)

Posture	<i>n</i>	%	Found FU	Found No FU
Preliminary Injunction	50	23.7	.300	.700
SJ-Plaintiff	24	11.4	—	.875
SJ-Defendant	38	18.0	.763	—
Cross-SJs	59	28.0	.389	.525
Bench Trial	37	17.5	.324	.676
Motion To Dismiss	2	1.0	.000	1.000
JNOV Motion	1	0.5	.000	1.000
Total	211		.389	.588

⁸⁰ See, e.g., *Castle Rock Entm't, Inc., v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 137 (2d. Cir. 1998) (noting that although "[f]air use is a mixed question of law and fact," the Second Circuit has often resolved fair use issues at the summary judgment stage, where there are no genuine issues of material fact (alteration in original)).

Figure 3: Twenty-Opinion Moving Average of the Proportion of District Court Preliminary Injunction, Bench Trial, and Summary Judgment Opinions



Though these results are consistent with recent work on the “vanishing trial” in American courts,⁸² they nevertheless remain something of a mystery. The drop-off in bench trials coincides with the Supreme Court’s issuance in March 1994 of its landmark opinion in *Campbell v. Acuff-Rose*.⁸³ The district court in *Campbell* had granted summary judgment to the defendant, finding that the musical group 2 Live Crew’s appropriation of certain elements of Roy Orbison’s song “Pretty Woman” in its parody of the song constituted a fair use.⁸⁴ In reversing and remanding, the Sixth Circuit criticized the district court for giving insufficient weight to the presumption established by the *Sony* Court a decade earlier that “[e]very commercial use of copyrighted material is presumptively [unfair].”⁸⁵ In itself reversing and remanding, the Supreme Court emphatically rejected the *Sony* pre-

⁸¹ *Schiffer Publ’g, Ltd. v. Chronicle Books, LLC*, No. 03-4962, 2004 WL 2583817 (E.D. Pa. Nov. 12, 2004).

⁸² For examples, see the articles collected in the *Journal of Empirical Legal Studies*’s issue dedicated to the topic, 1 J. EMPIRICAL LEGAL STUD. 459-984 (2004).

⁸³ 510 U.S. 569 (1994).

⁸⁴ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150, 1158-59 (M.D. Tenn. 1991).

⁸⁵ *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1436-37 (6th Cir. 1992).

sumption and explicitly demoted the commerciality of the defendant's use to merely one issue among others that a court may consider as part of its analysis of the "purpose and character" of the defendant's use.⁸⁶ The Court then remanded for further fact-finding under factors three and four of section 107.⁸⁷ The mystery is thus that the reported drop-off in bench trial opinions and increase in summary judgment opinions coincided with a Supreme Court opinion that not only remanded a summary judgment ruling, but abrogated a key presumption facilitating summary adjudication of the fair use defense.

In addition to the more general vanishing-trial phenomenon, there may be two copyright-specific explanations for this coincidence—though, admittedly, neither of them is fully satisfactory. First, though the Supreme Court clearly abrogated the *Sony* presumption of unfairness in its *Campbell* majority opinion, the data show, as we will see below, that lower courts continued to cite and apply that presumption. *Campbell's* authority was and remains far from absolute. Second, the drop-off in the proportion of bench trial opinions beginning in the mid-1990s may reflect the influence not of the Supreme Court, but of the circuit courts. The early 1990s saw a wave of circuit court affirmances of summary judgment decisions in fair use cases.⁸⁸ This trend may have emboldened district court judges and litigants to turn more readily to summary adjudication.

3. Distribution of the Opinions by Subject Matter

Notwithstanding scholarly emphasis on fair use and new media, traditional two-dimensional nonvirtual print media have dominated and continue to dominate the facts of American fair use case law. Over half (52.9%) of all of the opinions studied (and 50.7% of the district court opinions) addressed facts in which both parties were en-

⁸⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583-84 (1994).

⁸⁷ *Id.* at 589.

⁸⁸ See, e.g., *Nat'l Rifle Ass'n of Am. v. Handgun Control Fed'n*, 15 F.3d 559, 560 (6th Cir. 1994); *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1370-71 (2d Cir. 1993); *McGowan v. Cross*, No. 92-1480, 1993 U.S. App. LEXIS 9134, at *1 (4th Cir. Apr. 22, 1993); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1079 (2d Cir. 1992); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 733-34 (2d Cir. 1991); *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 933 F.2d 952, 955 (11th Cir. 1991), *rev'd*, 999 F.2d 1436 (11th Cir. 1993); *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 834 (11th Cir. 1990).

gaged in the nonvirtual print medium.⁸⁹ More specifically, 36.6% of the opinions (and 31.3% of the district court opinions) addressed facts in which both parties were engaged strictly in the medium of nonvirtual text.⁹⁰ Opinions addressing facts involving computer software and/or Internet technology began to play a substantial, though far from leading, role in the case law beginning in 1988. During the period from 1988 through 2005, 21.6% of the opinions (and 22.6% of the district court opinions) addressed facts involving computer software and/or the Internet. Opinions addressing facts involving video, broadly defined as moving images in television, motion picture, or other form, constituted 20.6% of the opinions, while opinions involving music made up only 6.2% of those studied. Finally, 84.6% of the opinions addressed facts in which both parties' works appeared in the same medium. Where a shift in medium did occur, the most common was from print to video or vice versa, which was reported in thirteen (or 4.2%) of the opinions.

Unsurprisingly, First Amendment concerns figured prominently in the opinions.⁹¹ Twenty-five percent of the opinions invoked the First Amendment or more general free speech concerns through the course of the opinion, though not all did so within the fair use analysis itself. Perhaps also unsurprisingly, the proportion of opinions addressing the First Amendment increased with the authority of the court. Twenty percent of the district court opinions addressed the First Amendment in some way, while 34% of the circuit court opinions and 43% of the Supreme Court opinions did so.⁹²

⁸⁹ Here, I broadly define the print medium as a medium consisting of two-dimensional textual or graphic works on paper, canvas, or a similar substrate, but not on a computer screen; the definition also excludes computer software code. Sixty-four percent of the opinions, and 64% of the district court opinions specifically, addressed facts in which at least one party was engaged in the print medium.

⁹⁰ Forty-five percent of all opinions, and 43% of district court opinions, addressed facts in which at least one party was engaged in nonvirtual text.

⁹¹ See generally Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001) (arguing in favor of a more robust application of First Amendment doctrine to copyright infringement claims); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (arguing on First Amendment grounds that preliminary injunctions in certain copyright cases are unconstitutional); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004) (arguing that a narrow conception of permissible fair use is a threat to First Amendment freedoms).

⁹² Here, a literal approach to "content analysis" of the case law does not serve us particularly well, or at least does not produce interesting data. Of the 69 opinions that referenced the First Amendment, 40.6% found in favor of the defendant, as opposed to the 237 opinions that did not reference the First Amendment, of which 42.2% found in favor

B. *Reversal, Dissent, and Appeal Rates*

The conventional wisdom is that “reversals and divided courts are commonplace” in the fair use case law.⁹³ “The field is littered,” we are told, “with the corpses of overturned opinions.”⁹⁴ This is certainly true of the Supreme Court fair use case law. In *Sony*, *Harper & Row*, and *Campbell*, the Supreme Court reversed the circuit courts’ reversals of the district courts.⁹⁵ This, together with the fact that the Court was divided five-four in *Sony*⁹⁶ and six-three in *Harper & Row*,⁹⁷ may account for the general belief that our fair use case law is especially unstable.

The data on the case law below the Supreme Court run contrary to the conventional wisdom, however. The sample consisted of 88 circuit court opinions, of which 4 were concurrences and 13 were dissents, from 71 cases. Of the 71 majority opinions, 24 reversed the district court’s fair use holding (for a reversal rate of 33.8%) and 10 met with dissents on the fair use issue (for a dissent rate of 14.1%).⁹⁸ These results are not substantially different from recent estimates of overall circuit court reversal rates (for example, 32% across all circuits for the period 1980–2002⁹⁹) and dissent rates (for example, 9.43%

of the defendant. Nor was it possible to conduct a reliable word count analysis of courts’ discussion of the First Amendment, as discussions of fair use and the First Amendment tended to be quite discursive in nature. Here, then, a qualitative, leading cases approach seems to be the only workable method of analysis currently available to us.

⁹³ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990) (footnotes omitted).

⁹⁴ Weinreb, *supra* note 19, at 1137.

⁹⁵ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571-72 (1994), *rev’g* 972 F.2d 1429 (6th Cir. 1992); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542 (1985), *rev’g* 723 F.2d 195 (2d Cir. 1983); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 420-21 (1984), *rev’g* 659 F.2d 963 (9th Cir. 1981); see also Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPYRIGHT SOC’Y U.S.A. 133, 134 (2003) (discussing the “indeterminacy” of fair use judgments).

⁹⁶ *Sony*, 464 U.S. at 418.

⁹⁷ *Harper & Row*, 471 U.S. at 541.

⁹⁸ Two cases produced dissents from en banc hearings. See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1393-94 (6th Cir. 1996) (Boyce, C.J., dissenting); *id.* at 1394-97 (Merritt, J., dissenting); *id.* at 1397-1412 (Ryan, J., dissenting); *New Era Publ’ns Int’l, APS v. Henry Holt, Co.*, 884 F.2d 659, 662-64 (2d Cir. 1989) (Newman, J., dissenting).

⁹⁹ Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC’Y REV. 163, 177 tbl.1 (2006); see also Burton Atkins, *Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States*, 24 LAW & SOC’Y REV. 71, 83-92 (1990) (comparing reversal rates in U.S. appellate courts to those in English appellate courts).

across all circuits for published opinions during the period 1970–1988¹⁰⁰)—and the circuit court reversal rate in fair use cases is well below estimates of Federal Circuit reversal rates in patent cases (for example, 47.3% for the period January 1998 through April 2000¹⁰¹). Nor are the appellate data particularly exceptional when viewed from the perspective of district court opinions. Of the 211 district court opinions, 53 were appealed (for an unexceptional appeal rate of 25.1%¹⁰²), with 35 of the 211 (or 16.6%) affirmed and 18 (or 8.5%) reversed.¹⁰³ Overall, these data support the unexpected, if also perhaps somewhat uninspiring, finding that our fair use case law, at least outside of the cases that reached the Supreme Court (and our casebooks), has not been marked by especially high reversal, dissent, or appeal rates.

C. Fair Use Win Rates

How often have courts actually found fair use in our section 107 case law? The fair use win rate results are among the most curious in this study. I first set out the basic results and then attempt some explanations.

Tables 3 and 4 report the fair use win rate results in the district court and circuit court opinions, respectively. More specifically, Table 3 reports the proportion of unreversed district court opinions, grouped by circuit and posture, that either found fair use or, in the case of summary judgment motions by the plaintiff, found no fair use. Overall, 30.4% of the preliminary injunction opinions found fair use, while 24.1% of the bench trial opinions did so. Among summary

¹⁰⁰ DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 105 tbl.5.1 (2000); see also Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 J.L. ECON. & ORG. 299, 306 (2004) (“Empirically, federal appellate panels are overwhelmingly unanimous, with dissent rates aggregated across all circuits averaging approximately 6% to 8%, varying somewhat with respect to issue area.” (citations omitted)).

¹⁰¹ Christian A. Chu, *Empirical Analysis of the Federal Circuit’s Claim Construction Trends*, 16 BERKELEY TECH. L.J. 1075, 1098 (2001); see also Stephen P. Swinton & Adam A. Welland, *Patent Injunction Reform and the Overlooked Problem of ‘False Positives,’* 70 BNA PAT. TRADEMARK & COPYRIGHT J. 337, 338 (2005) (“Depending on the analysis employed and period examined, reversal rates for trial court judgments in patent infringement cases range from 30 to more than 60 percent.”).

¹⁰² See Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 664 & tbl.1 (2004) (noting a 10.9% appeal rate for all district court cases and a 21% appeal rate for all district court cases with a judgment for plaintiff or defendant from 1987 to 1996).

¹⁰³ Of the 18 district court opinions that were reversed, 9 found in favor of the plaintiff and 9 found in favor of the defendant.

judgment opinions, 86.4% of the opinions that addressed a plaintiff's uncrossed motion for summary judgment granted that motion, while 75.7% of the opinions that addressed a defendant's uncrossed motion for summary judgment granted that motion. The parties' win rates were sharply lower for cross-motions for summary judgment. As Table 4 reports, the fair use win rate results in the circuit court majority opinions are roughly comparable to those in the district court opinions, but as a matter of statistical significance, none of the circuit court results deviated significantly from 50%.

Considering first the district court results, it should not be surprising that a high proportion of district court opinions addressing an uncrossed summary judgment motion granted the motion. As an empirical matter, these results are consistent with similar results from a study of the multifactor test for consumer confusion in U.S. trademark cases.¹⁰⁴ As a theoretical matter, parties are less likely to incur the costs of filing a motion for summary judgment where the motion lacks merit, opposing parties are more likely to file a cross-motion where they have a reasonably strong case, and district court judges are more likely to write published opinions when they grant rather than deny motions for summary judgment.

This still leaves open the question of the exceptionally low fair use win rates in district court preliminary injunction and bench trial opinions. The Priest-Klein "selection hypothesis" predicts that, given various conditions, plaintiff win rates at trial should approach 50%, largely because it is only the close cases that survive settlement—or summary adjudication.¹⁰⁵ Evidence of the fifty-percent hypothesis has been mixed at best.¹⁰⁶ The fundamental assumption limiting the fifty-percent hypothesis, and the data that have been mustered to support it, is that the parties must have equal stakes in the litigation for it to be true.¹⁰⁷

¹⁰⁴ Beebe, *supra* note 14, at 1596-98 & tbl.2 (2006).

¹⁰⁵ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4-6, 17-18 (1984).

¹⁰⁶ See generally Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J. LEGAL STUD. 337 (1990) (testing the fifty-percent hypothesis and rejecting it as a description of all civil litigation); Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996) (noting deviations from the fifty-percent hypothesis as a result of cases that do not conform to the assumptions of Priest and Klein's model).

¹⁰⁷ Priest & Klein, *supra* note 105, at 24-29.

Table 3: Disposition of Unreversed District Court Fair Use Opinions
 (“FU” denotes the proportion of opinions that found fair use; “No FU” denotes the proportion of opinions that found no fair use.)

Circuit	Distribution by Circuit		Preliminary In-junction		Bench Trial		SJ-Plaintiff		SJ-Defendant		SJ-Cross		
	<i>n</i>	%	<i>n</i>	FU	<i>n</i>	FU	<i>n</i>	No FU	<i>n</i>	FU	<i>n</i>	No FU	FU
1	8	4.2	2	.500	3	.667	—	—	2	1.000	1	.000	1.000
2	64	33.7	12	.500	9	.000	6	.667	18	.778	19	.421	.526
3	9	4.7	4	.000	2	.000	—	—	2	1.000	1	1.000	.000
4	12	6.3	1	1.000	1	1.000	1	1.000	4	.750	5	.800	.000
5	7	3.7	1	1.000	5	.200	—	—	—	—	1	.000	.000
6	11	5.8	1	.000	1	.000	3	.667	1	1.000	5	.600	.400
7	10	5.3	4	.000	1	.000	1	1.000	—	—	4	.750	.000
8	9	4.7	2	.000	1	.000	1	1.000	2	.500	3	1.00	.000
9	34	17.9	11	.181	2	1.000	4	1.000	6	.500	11	.273	.636
10	7	3.7	3	.667	1	.000	1	1.000	1	1.000	1	.000	1.000
11	12	6.3	3	.000	2	.500	4	1.000	—	—	3	1.000	.000
D.C.	7	3.7	2	.500	1	.000	1	1.000	1	1.000	2	1.000	.000
Total	190*		46		29				37		56		
Circuit-Wide:			.304		.241		.864		.757		.536		.375

* Three unreversed district court opinions are not represented in this table. None of them found fair use. See Chicago Sch. Reform Bd. of Trs. v. Substance, Inc., 79 F. Supp. 2d 919 (N.D. Ill. 2000) (motion to dismiss); In-Elect Eng'g, Inc. v. Clinton Hartley Corp., 92-20718, 1993 U.S. Dist. LEXIS 11510 (N.D. Cal. June 24, 1993) (same); Roy Export Co. v. Columbia Broad. Sys., Inc., 503 F. Supp. 1137 (S.D.N.Y. 1980) (motion for JNOV).

Table 4: Distribution and Disposition of Unreversed Circuit Court Majority Opinions
 (“FU” denotes the proportion of opinions that found fair use; “No FU” denotes the proportion of opinions that found no fair use.)

Circuit	Distribution by Circuit		Preliminary Injunction		Bench Trial		SJ-Plaintiff		SJ-Defendant		SJ-Cross		
	n	%	n	FU	n	FU	n	No FU	n	FU	n	No FU	FU
1	1	1.6	—	—	—	—	—	—	1	1.000	—	—	—
2	24	37.5	5	.400	7	.143	2	.500	4	.750	6	.167	.667
3	1	1.6	—	—	—	—	—	—	—	—	1	1.000	.000
4	3	4.7	—	—	1	1.000	—	—	1	1.000	1	.000	1.000
5	2	3.1	—	—	1	1.000	—	—	—	—	1	1.000	.000
6	3	4.7	—	—	1	1.000	—	—	—	—	2	.500	.500
7	2	3.1	—	—	—	—	1	.000	1	.000	—	—	—
8	2	1.6	—	—	—	—	—	—	—	—	1	.000	.000
9	21	32.8	8	.375	2	.500	1	1.000	3	.333	7	.286	.714
10	—	—	—	—	—	—	—	—	—	—	—	—	—
11	5	7.8	1	1.000	1	.000	2	1.000	—	—	1	1.000	.000
D.C.	1	1.6	1	.000	—	—	—	—	—	—	—	—	—
Total	64*		15		13		6		10		20		
Circuit-Wide:				.400		.385		.667		.600		.350	.550

* Three unreversed circuit court opinions are not represented in this table. See *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849 (8th Cir. 2004) (finding certain uses at issue fair and others unfair); *Ty, Inc. v. Publ'ns Int'l*, 292 F.3d 512 (7th Cir. 2002) (same); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70 (2d Cir. 1997) (remanding on the fair use issue for further findings of fact).

Yet, as William Landes has argued, intellectual property plaintiffs tend to be parties with higher stakes because they face the risk that an adverse judgment will limit or extinguish their rights.¹⁰⁸ We would therefore expect intellectual property plaintiffs to settle even the near-close cases, Landes argues, with the result that plaintiff win rates in intellectual property cases that make it to trial should exceed 50% by a comfortable margin.¹⁰⁹ Landes finds strong support for this hypothesis in Federal Judicial Center data showing, for example, a 73% copyright plaintiff trial win rate in federal district courts for the years 1978–2000, as against a 48% plaintiff trial win rate for civil trials generally.¹¹⁰

The high plaintiff win rates in the district court preliminary injunction and bench trial opinions are certainly consistent with Landes's more general hypothesis and the evidence he presents in support of it. Yet the Landes hypothesis runs counter to the conventional view among commentators (including myself) of plaintiffs in fair use litigation, if not of copyright owners more generally.¹¹¹ This view holds that in our "clearance culture,"¹¹² owners of valuable copyrightable expression quite rationally tend to be very aggressive litigants, and not simply because they expose themselves to the defenses of acquiescence or laches if they are not. More importantly, they have a stake in establishing a *reputation* for being aggressive litigants in order

¹⁰⁸ William M. Landes, *An Empirical Analysis of Intellectual Property Litigation: Some Preliminary Results*, 41 HOUS. L. REV. 749, 772 (2004).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 774 tbl.5. The Federal Judicial Center data are highly suspect. See generally Beebe, *supra* note 14, at 1652-54 (noting various problems with the reliability of Administrative Office data); Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003) (same).

¹¹¹ Cf. Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 1 (1997) ("It has become fashionable, among some thinkers and activists in copyright and related fields, to disparage or to deplore copyright protection."). See generally Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61 (2002) (discussing overreaching by copyright owners, but defending certain new media copyright reforms).

¹¹² See generally PATRICIA AUFDERHEIDE & PETER JASZI, CTR. FOR SOC. MEDIA, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS (2004), available at http://www.centerforsocialmedia.org/rock/backgrounddocs/printable_rightsreport.pdf (documenting the effect of a rights acquisition "thicket" on filmmakers' creative experiences); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2005), available at <http://www.freeculture.cc/freeculture.pdf> (arguing that media companies use copyright law to stifle culture and creativity).

to benefit from the “chilling effects” that such a reputation may generate.¹¹³ These forces may play out largely at the cease-and-desist stage of fair use disputes,¹¹⁴ but we expect them to play a role in the plaintiff’s decision to litigate rather than settle as well.

It is important to emphasize that the data set collected for this study cannot tell us whether the plaintiffs in the opinions sampled conform to the conventional view just outlined. But I want to take advantage of this view to open the door to a different and tentative explanation for the low fair use win rates in district court preliminary injunction and bench trial opinions. This explanation assumes that some defendants who are otherwise committed to defending against a copyright infringement claim on grounds such as copyrightability or substantial similarity may find it relatively inexpensive also to plead a fair use defense, even when the defense may be frivolous or at least very weak in light of the facts. Because conscientious judges will dutifully consider each of the four factors, as section 107 instructs them to do, even when the outcome of the fair use test is obvious, opinions addressing even essentially extraneous fair use defenses will have come within those sampled for this study. This would drive down overall fair use win rates.

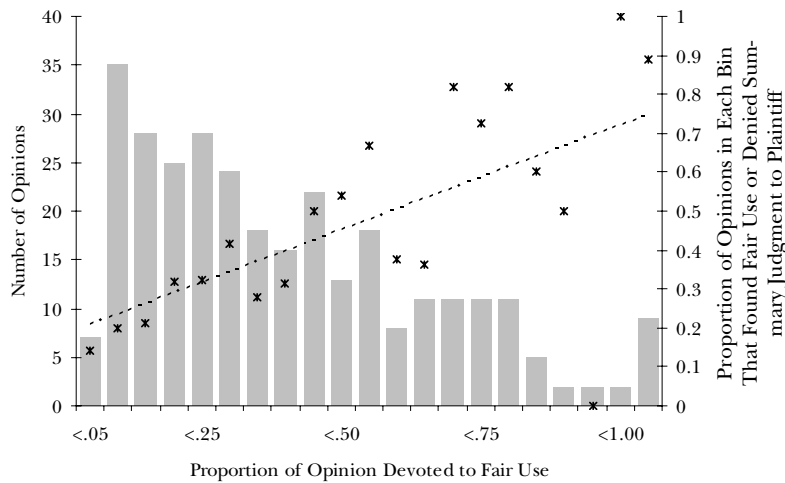
The problem is how objectively to determine whether an opinion addressed a frivolous fair use defense. There is no good way to do so. However, one reasonably workable quantitative index of the weakness or marginality of the defendant’s fair use defense may be the proportion of the opinion—in words—that the judge devoted to the defense. We would expect that, as a general matter, opinions that addressed a frivolous fair use defense would devote a smaller proportion of the opinion to that defense, while opinions that addressed a claim of fair use that was at least reasonable would spend more time analyzing the defense. Consider, then, Figure 4, which presents a histogram of all 306 opinions distributed according to the proportion of the word count of the opinion devoted to the fair use defense. The figure also reports the defendant win rates for opinions falling within each bin of the histogram. As expected, there is a clear and fairly steady positive relation between the proportion of an opinion devoted to the fair use defense

¹¹³ See generally Chilling Effects Clearinghouse, <http://www.chillingeffects.org> (last visited January 20, 2008) (providing background material and legal explanations for people who receive cease-and-desist letters claiming intellectual property violations).

¹¹⁴ See *id.* (providing a database of cease-and-desist letters sent by intellectual property holders to web publishers).

and the likelihood that the opinion ultimately ruled in favor of the defendant on the fair use issue. Indeed, if we exclude the 42 opinions that devoted less than 10% of the opinion to the fair use issue (which are represented in the two leftmost bins), we quickly come to a very respectable defendant win rate in the remaining opinions of 45.5%. To be sure, this is not a comprehensive explanation of the low preliminary injunction and bench trial win rates reported in Table 3, but it may account for at least some of the sub-50% nature of the results.

Figure 4: Distribution of Opinions by Proportion of Word Count Devoted to Fair Use Analysis and Fair Use Win Rate in Those Opinions
($n = 306$)



Two final issues deserve mention with respect to the fair use win rate results. First, the far more moderate win rates at the circuit court level, none of them statistically significantly different from 50%, are fully consistent with the underlying logic of the Priest-Klein selection hypothesis. Second, though the data set is not large enough to make strong claims about intercourt variation in fair use win rates, it is remarkable to note that the district courts of the Seventh Circuit did not find fair use in any of their 10 unreversed opinions, while the district courts of the Second Circuit did not find fair use in any of their 9 unreversed bench trial opinions. Meanwhile, only 2 of the 11 unreversed preliminary injunction opinions from the district courts of the Ninth Circuit found fair use.

III. INTERFACTOR ANALYSIS

I turn now to the main focus of this study: how judges use the four-factor test set forth in section 107 to adjudicate the fair use defense. To begin this analysis, I first consider here how the factor outcomes interacted with one another and with the overall test outcome in the opinions. I also consider the extent to which judges stamped the factors to conform to the overall test outcome. This will prepare the ground for the analysis in the next Part of what *subfactor* considerations influenced specific factor outcomes as well as the overall test outcome.

A. *Correlation and Regression Analysis*

In practice, which factor or factors drive the outcome of the section 107 test? This question has produced an enormous amount of speculation. Each factor, it seems, has its champions and its detractors,¹¹⁵ though most courts and commentators assume that, in practice, the outcome of the section 107 test relies primarily on the outcome of the fourth factor,¹¹⁶ which calls for an economic analysis of the effect of the defendant's use on the market for the plaintiff's work. Indeed, the *Harper & Row* Court called the fourth factor "un-

¹¹⁵ On the first factor, see *Hofheinz v. Discovery Communications, Inc.*, No. 00-3802, 2001 WL 1111970, at *5 (S.D.N.Y. Sept. 20, 2001) ("[T]his first and foremost factor strongly favors defendant."), *On Davis v. Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001) (Leval, J.) (referring to the first factor as "[t]he heart of the fair use inquiry"); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1121 (C.D. Cal. 1999) ("The first factor of the fair use test is the most important in this case."), *rev'd in part*, 336 F.3d 811 (9th Cir. 2003), and Leval, *supra* note 93, at 1116 (stating that "Factor One is the soul of fair use"). On the second factor, see *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 553 (1985) (referring to the second factor as "highly relevant to whether a given use is fair"), and *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 844 (11th Cir. 1990) ("This factor is 'highly relevant to whether a given use is fair.'" (quoting *Harper & Row*, 471 U.S. at 553)). *But see Dow Jones & Co. v. Bd. of Trade*, 546 F. Supp. 113, 120 (S.D.N.Y. 1982) ("The nature of the copyrighted work seems to be the least important and most unclear of the four factors enumerated in § 107."); *Carroll*, *supra* note 9, at 18 (arguing that factor two "tends to do little work in swaying the outcome" of the test); *Sag*, *supra* note 9, at 390 ("The nature of the copyrighted work, while fairly objective, nonetheless remains unhelpful in assessing whether an activity is protected by fair use or not because it is overwhelmed by the other factors."). On the third factor, see *Compaq Computer Corp. v. Procom Tech., Inc.*, 908 F. Supp. 1409, 1421 (S.D. Tex. 1995) ("The third factor . . . is generally considered the least important factor of the fair use analysis." (citing *Sony Corp v. Universal City Studios*, 464 U.S. 417, 449-50 (1984))).

¹¹⁶ *See, e.g., Nimmer*, *supra* note 12, at 267 n.25 ("My own opinion is that the fourth factor is the most important.").

doubtedly the single most important element of fair use.”¹¹⁷ The *Campbell* Court subsequently tried to overwrite that dictum,¹¹⁸ but with only limited success, as we will see in the next Part. Commentators tend further to assume that, in practice, the outcomes of the first factor (concerning the purpose and character of the defendant’s use) and the fourth factor often coincide—so often, in fact, that several commentators have expressed concern about courts’ “double counting” the same considerations under the two factors.¹¹⁹ This concern is based on the nature of the doctrine informing the first and fourth factor analyses. If a court finds that the defendant’s use is “transformative” or “noncommercial” under factor one, and that factor one therefore favors the defendant, a court will also likely find that the defendant’s use, precisely because it is transformative or noncommercial, will not adversely affect the market for the plaintiff’s work. The expected result is that factor four will also favor the defendant.¹²⁰ The inverse is thought to hold as well, particularly if a court finds that the defendant’s use is “commercial” under factor one. This is because the *Sony* Court established that a use found to be commercial under factor one is presumptively harmful to the market for plaintiff’s work under factor four.¹²¹ The *Campbell* Court also tried to overwrite—or at least modify—this dictum,¹²² again with little success, as we will see in the next Part. As for factors two and three (concerning the nature of the plaintiff’s work and the quantitative and qualitative extent of the defendant’s taking, respectively), commentators tend to regard these, if they regard them at all, as peripheral to the outcome of the test.¹²³

¹¹⁷ *Harper & Row*, 471 U.S. at 566.

¹¹⁸ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (“All [factors] are to be explored, and the results weighed together, in light of the purposes of copyright.”).

¹¹⁹ Fisher, *supra* note 7, at 1672-73; see also Jeremy Kudon, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 605 (2000) (“Essentially, the court incorporated the fourth factor’s analysis into the first factor’s test.”).

¹²⁰ See, e.g., *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 485 (2d Cir. 2004) (“As *Campbell* pointed out, these inquiries, specified in the first and fourth listed factors of § 107, are correlated: the greater the transformative purpose of the secondary use, the less potential purchasers will see it as an alternative means of acquiring the original.”).

¹²¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (“If the intended use is for commercial gain, [the] likelihood [of significant market harm] may be presumed.”).

¹²² *Campbell*, 510 U.S. at 591.

¹²³ See *supra* note 115 (discussing the comparative importance of each factor). *But see* Leval, *supra* note 93, at 1123 (“[The third factor] plays a role in consideration of justification under the first factor (the purpose and character of the secondary use);

Correlation analysis provides one simple means to test the conventional wisdom on the relative importance of and interactions among the fair use factors. Table 5 reports the correlation coefficients for the relations between each of the factor outcomes and the overall test outcome, as well as among each of the factor outcomes in the 297 dispositive opinions studied, regardless of posture.¹²⁴ These results show that the outcomes of factors one and four very strongly correlated with the test outcome and fairly strongly correlated with each other, while the outcome of factor two correlated weakly, if at all, with the outcome of the test and with the outcomes of the other factors. Factor three did better than factor two with respect to the overall test outcome, but the strength of its correlations with the outcomes of factors one and four was not impressive.¹²⁵

Putting these coefficients in perhaps more easily understood and starker terms, the outcome of factor four coincided with the outcome of the overall test in 83.8% of the 297 dispositive opinions while the outcome of factor one coincided with the outcome of the overall test in 81.5% of these same opinions. By comparison, the outcome of factor two coincided with the outcome of the overall test in 50.2% of these opinions. As for the combined influence of factors one and four, in 214 (or 72.1%) of the opinions, factors one and four either both favored or both disfavored fair use. In all but one of these opinions,¹²⁶ the outcome of the fair use test followed the outcome of these two factors. What happened when, if ever, factor one favored (or disfavored) fair use while factor four disfavored (or favored) fair use? Did one of these leading factors consistently trump the other? Factors one and four pointed in opposite directions in only 20 of the opinions. In 14 of these opinions, the outcome of the test followed the outcome of factor four, while in 6, the outcome of the test followed

and it can assist in the assessment of the likely impact on the market for the copyrighted work under the fourth factor (the effect on the market).”).

¹²⁴ Note that the sum of the absolute values of the two correlation coefficients shown for each factor does not equal zero because the court could also have found the factor to be neutral, not relevant, or a fact issue, or the court's finding was unclear. For this correlation analysis, each factor outcome is represented with two binary variables: favors a finding of fair use (1 = yes, 0 = no) and disfavors a finding of fair use (1 = yes, 0 = no). Thus, if the first variable is coded as one, then the second variable will be coded as zero, and vice versa. But if the court found the factor to be neutral, irrelevant, or not argued, then both variables were coded as zero.

¹²⁵ There was no significant variation over time in the strength of the correlations.

¹²⁶ See *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 923 F. Supp. 1231, 1242-50 (N.D. Cal. 1995) (finding no fair use where factors two and three disfavored fair use while factors one and four favored fair use).

the outcome of factor one. Though hardly conclusive, this breakdown is consistent with the conventional view that factor four exerts the stronger influence on the outcome of the test.

Table 5: Correlations Between a Finding of Fair Use and the Factor Outcomes and Among the Factor Outcomes in 297 Dispositive Opinions

		FU Found/ SJ-P Denied	<u>Factor One</u>		<u>Factor Two</u>		<u>Factor Three</u>		<u>Factor Four</u>	
			Favors	Dis-favors	Favors	Dis-favors	Favors	Dis-favors	Favors	Dis-favors
	FU Found/ SJ-P Denied	1.000								
Factor One	Favors	.747*	1.000							
	Disfavors	-.780*	-.735*	1.000						
Factor Two	Favors	.321*	.310*	-.192*	1.000					
	Disfavors	-.281*	-0.087	.267*	-.491*	1.000				
Factor Three	Favors	.646*	.559*	-.496*	.339*	-.190*	1.000			
	Disfavors	-.680*	-.471*	.631*	-.146*	.370*	-.630*	1.000		
Factor Four	Favors	.823*	.713*	-.616*	.364*	-.174*	.637*	-.504*	1.000	
	Disfavors	-.806*	-.557*	.673*	-.205*	.331*	-.474*	.688*	-.722*	1.000

“FU Found/SJ-P Denied” denotes that the court found fair use or otherwise denied the plaintiff’s motion for summary judgment on the issue. “Favors” denotes outcomes in which the factor was found to favor fair use. “Disfavors” denotes outcomes in which the factor was found to disfavor fair use. * denotes that the coefficient is statistically significant at the .05 level.

Table 6 reports the results of logistic regression analysis of an overall finding of fair use as a function of the outcomes of each of the four factors in the 297 dispositive opinions. The regression model used here is highly stylized in that, first, it specifies the factor outcomes in the form of trinary explanatory variables—coded as favors fair use (1), disfavors fair use (-1), and other (0)—and second, it does not include interaction variables. Nevertheless, this very rudimentary model correctly classified 95.6% of the test outcomes. The regression results are consistent with conventional wisdom and with the results of

correlation analysis. Controlling for the effects of the other three factors, the first and fourth factors are shown each to exert an enormous amount of influence on the outcome of the test, with the fourth very much in the driver's seat, while factor two is shown to exert no significant effect on the test outcome.

Table 6: Logistic Regression of the Outcome of the Fair Use Test as a Function of the Outcomes of the Section 107 Factors in 297 Dispositive Opinions

	Odds Ratio	Coefficient	Standard Error	P> Z	95% C.I.	
Factor One	15.005*	2.708*	.683	.000	1.370	4.047
Factor Two	2.702	.994	.772	.198	-.519	2.507
Factor Three	7.339*	1.993*	.743	.007	.538	3.449
Factor Four	39.167*	3.668*	.829	.000	2.043	5.293
Constant		.198	.389	.610	-.565	.962

* denotes statistical significance at the .05 level.

But perhaps the main teaching of this simple model is that we ultimately learn very little from evaluating the section 107 test at so abstract a level as that of the factor outcomes. It is certainly interesting to observe, now based on empirical evidence, that the outcome of the fourth factor appears to drive the outcome of the test, and that the outcome of the first factor also appears to be highly influential. But of course these findings beg the question of what subfactor considerations lead judges to conclude that the fourth or first factors—or the second or third, for that matter—favored or disfavored fair use. This is the subject of Part IV. Before turning to these intrafactor concerns, however, and as further background for their consideration, I consider two final interfactor questions: to which factors do judges devote the bulk of their written analysis and to what extent do the factors stampede?

B. Word Count Analysis

Because judges tended to conduct their section 107 analyses in a highly methodical and explicit manner, it was a relatively simple task to establish in the opinions where their discussion of one factor ended and that of another began. This in turn facilitated the analysis of the word count of each opinion devoted to the discussion of a particular factor as a proportion of the word count of the opinion devoted to the overall discussion of the fair use issue. The results of this analysis are reported in Table 7 and Figure 5.

Table 7: Mean Proportion of Fair Use Discussion Devoted to Each Factor in 306 Fair Use Opinions

	Mean	Std. Dev.	Min/Max
Factor One	.23	.16	.00/.72
Factor Two	.09	.09	.00/.61
Factor Three	.11	.09	.00/.67
Factor Four	.20	.15	.00/.67

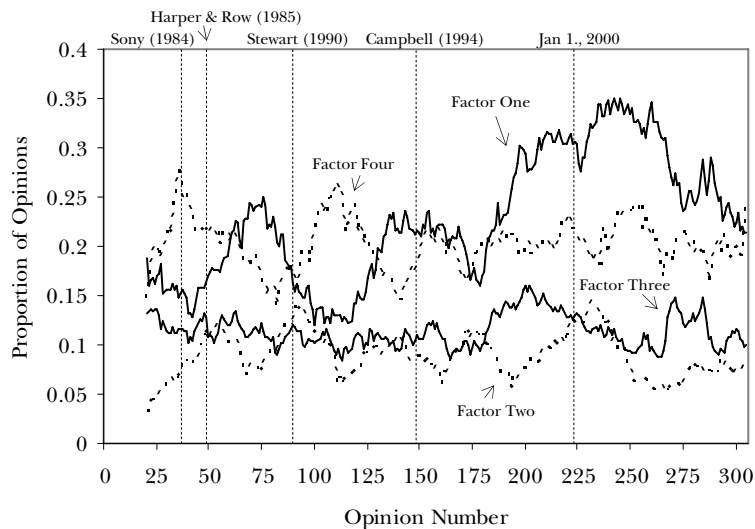
By their terms, none of the factors necessarily call for more written analysis than the others, and, as the standard deviations reported in Table 7 suggest, the opinions varied widely in how much attention each devoted to certain factors. Yet, as Table 7 shows, for the 306 opinions, judges tended to devote a far greater share of their discussions of the fair use issue to analyses under factors one and four than to those under factors two and three. If we accept that in explaining (or defending) their analysis of a legal issue, judges are generally more likely to dedicate a greater share of their explanations to considerations that they deem to be more important, then these results lend further support to the finding that, in practice, the first and fourth factors—or more specifically, the subfactors considered under them—drive the outcome of the test.

Figure 5 depicts judges' proportional attention to each factor across time. Most interesting is the story of the first factor. The *Sony* presumption that commercial uses are presumptively unfair¹²⁷ likely accounts for the early rise in proportional attention to factor one. This attention then decreased and factor four rose to prominence until Judge Pierre Leval's 1990 *Harvard Law Review* article, *Toward a Fair Use Standard*,

¹²⁷ See discussion *infra* Part IV.A.1 (discussing Justice Stevens's creation of this commercial use presumption).

urged courts to attend more closely to the question of transformativeness.¹²⁸ In 1994, the *Campbell* Court cited to and amplified Judge Leval's teaching,¹²⁹ which very likely gave rise to factor one's golden age in the late 1990s. We then see a fairly precipitous drop-off in attention to factor one, which continued through 2005. What is remarkable is not so much that judges' proportional attention to factor one increased after *Sony* and then again after *Campbell*. Rather, it is that this proportional attention repeatedly subsided. First the commerciality inquiry and then the transformativeness inquiry came into and then fell out of fashion. Of this I will have more to say in the next Part.

Figure 5: Twenty-Opinion Moving Average of the Proportion of Fair Use Discussion Devoted to Each Factor



C. *Stampeding*

The interfactor correlation coefficients in Table 5 show the degree to which an individual factor outcome correlated with another individual factor outcome. But to what extent did multiple factor out-

¹²⁸ See Leval, *supra* note 93, at 1111 (“I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*.”).

¹²⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-79 (1994) (citing to Judge Leval’s explanation of why fair use factor one hinges on transformativeness).

comes correlate in the opinions? In other words, to what extent did all or most of the factor outcomes tend to “stampede” in one or the other direction? In a previous study of judges’ use of the multifactor test for trademark infringement, I found strong evidence that judges tended to stampede the factors of that test. I argued that this revealed the degree to which judges engaged in “coherence-based reasoning” in applying that test.¹³⁰ The conventional wisdom in copyright law is that judges also stampede the factors of the fair use test. David Nimmer, the author of the authoritative copyright treatise, has argued this in strong terms:

Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.¹³¹

He further asserts, as an empirical matter, that “judges who uphold fair use almost always find that three, if not four, of the factors incline in its favor; judges who deny the fair use defense almost always find that three, if not four, of the factors incline against it.”¹³²

As is the case with respect to reversal rates in the fair use case law, the conventional wisdom with respect to the degree to which courts stampede the fair use factors appears to be based on two Supreme Court cases: *Sony* and *Harper & Row*. Certainly, these cases show stampeding. In *Sony*, the district court found that three (or perhaps four) factors favored fair use,¹³³ while the Ninth Circuit found that all four factors disfavored fair use.¹³⁴ At the Supreme Court, the five-justice majority then found that all four factors favored fair use,¹³⁵ while the four

¹³⁰ See Beebe, *supra* note 14, at 1615-17 (“[Coherence-based reasoning] hypothesizes that the ‘decision-making process progresses bi-directionally: premises and facts both determine conclusions and are affected by them in return.” (quoting Simon, *supra* note 14, at 511)).

¹³¹ Nimmer, *supra* note 12, at 281 (footnote omitted).

¹³² *Id.* at 280.

¹³³ See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 450-56 (C.D. Cal. 1979) (holding that home recording and playback of television programs “is noncommercial and does not reduce the market for plaintiffs’ works”), *rev’d*, 659 F.2d 963 (9th Cir. 1981).

¹³⁴ See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972-74 (9th Cir. 1981) (“It is our conviction that the fair use doctrine does not sanction home videorecording.”), *rev’d sub nom.* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹³⁵ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454-55 (1984) (“When [the fair use] factors are all weighed in the ‘equitable rule of reason’

dissenters found that all four factors disfavored fair use.¹³⁶ *Harper & Row* stampeded back and forth in essentially the same way.¹³⁷

But what of the rest of the fair use case law? Figure 6 reports the distribution of “stampede scores” by posture and outcome among the district court opinions. An opinion’s stampede score is the sum of the factors that the opinion found to favor a finding of fair use minus the sum of the factors that it found to disfavor a finding of fair use. Thus, a stampede score of -4 indicates that the opinion found all four factors to disfavor fair use, while a score of, say, -2 indicates that the opinion found one factor to favor and three factors to disfavor fair use. Figure 6 makes clear that, regardless of posture, judges do not generally stampede the factors when they find fair use. For example, judges found that all four factors favored a finding of fair use in only 1 out of 15 preliminary injunction opinions and 3 out of 12 bench trial opinions.

In opinions in which judges found no fair use, however, the data are more open to interpretation. Judges found that all four factors disfavored fair use in 40.0% of the preliminary injunction opinions and 44.0% of the 25 bench trial opinions that found no fair use. Of the cross-motion opinions that found no fair use, 58.5% found that all four factors favored that result. The problem with these data is that we cannot be sure how many of these opinions addressed frivolous fair use defenses that fully merited a -4 stampede score. Indeed, one index of the frivolousness of the defense, particularly in the cross-motion context, may be the stampede score itself. Yet the data showed no relation between the degree of stampeding in an opinion and, if we accept it as an alternative index of the strength or weakness of the fair use defense, the proportion of that opinion devoted to the defense.¹³⁸ In any event, even on their face, these percentages are not

balance, we must conclude that this record amply supports the District Court’s conclusion that home time-shifting is fair use.”).

¹³⁶ See *id.* at 486 (Blackmun, J., dissenting) (“[T]ime-shifting cannot be deemed a fair use.”).

¹³⁷ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560-69 (1985) (finding that all four factors disfavored fair use over the dissent’s objection that all four factors favored fair use), *rev’g* 723 F.2d 195, 207-08, 214-16 (2d Cir. 1983) (finding that all four factors favored fair use, with the dissent finding that at least two factors disfavored fair use), *rev’g* 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983) (finding that all four factors disfavored fair use); see also *Harper & Row*, 471 U.S. at 590-605 (Brennan & Meskill, JJ., dissenting).

¹³⁸ A histogram like that in Figure 4, but indicating the mean of the absolute value of the opinions’ stampede scores, rather than their fair use win rate, would show a flat stampede score line running across the bins.

so high as to support the claim that, in practice, the factors “tend to degenerate into *post-hoc* rationales for antecedent conclusions.”¹³⁹ On the contrary, at least outside of the cross-motion context, the majority of district court opinions that found no fair use were willing to acknowledge, as were opinions that found fair use, that at least one factor, and sometimes more, did not support the overall test outcome.¹⁴⁰

Finally, from the 215 cases that produced the opinions studied, 32 cases produced both a district court opinion and a circuit court opinion that reviewed the fair use reasoning of the district court opinion. For these 32 cases, Table 8 cross-tabulates the stampede score of the district court opinion with the stampede score of the reviewing circuit court majority opinion. In the 15 cases in which the circuit court reversed the district court on the fair use issue, the difference between the two courts’ stampede scores was in certain instances fairly dramatic. Yet in 11 of these 15 cases, neither the district nor the circuit court opinions yielded stampede scores with absolute values of 3 or 4. In other words, in these 11 cases, both the district and the circuit courts, even when reversing, declined fully or even partially to conform their factor analysis to the overall test outcome. Meanwhile, in 9 of the 17 cases in which the circuit court affirmed the district court, the circuit court did not call the factors as the district court had. Here, again, we see no evidence of any strong inclination on the part of the circuit courts to bend the factor outcomes one way or the other. Rather, they appear simply to have called the factors as they saw them.

¹³⁹ 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05, at 13-206 (2007).

¹⁴⁰ As one plausible explanation for this finding, the subfactor doctrine under each of the four factors may play a role in limiting courts’ ability to stampede the factor outcomes. It is well recognized that the statutory language of the section 107 factors is ambiguous. See *supra* note 11. This might facilitate stampeding. See Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 101 (1998) (“Ambiguous propositions are malleable and thus especially susceptible to restructuring.”); *id.* at 101 n.387 (citing multiple empirical studies showing the malleability of ambiguous propositions). However, the subfactor doctrine is arguably far more specific and less open to manipulation, and as Part IV, *infra*, shows, certain subfactor doctrines significantly influence the outcomes of the factors and the overall test.

Table 8: Cross-Tabulation of the Stampede Scores of Appealed District Court Opinions by the Stampede Scores of the Reviewing Circuit Court Decisions, in 32 Fair Use Cases

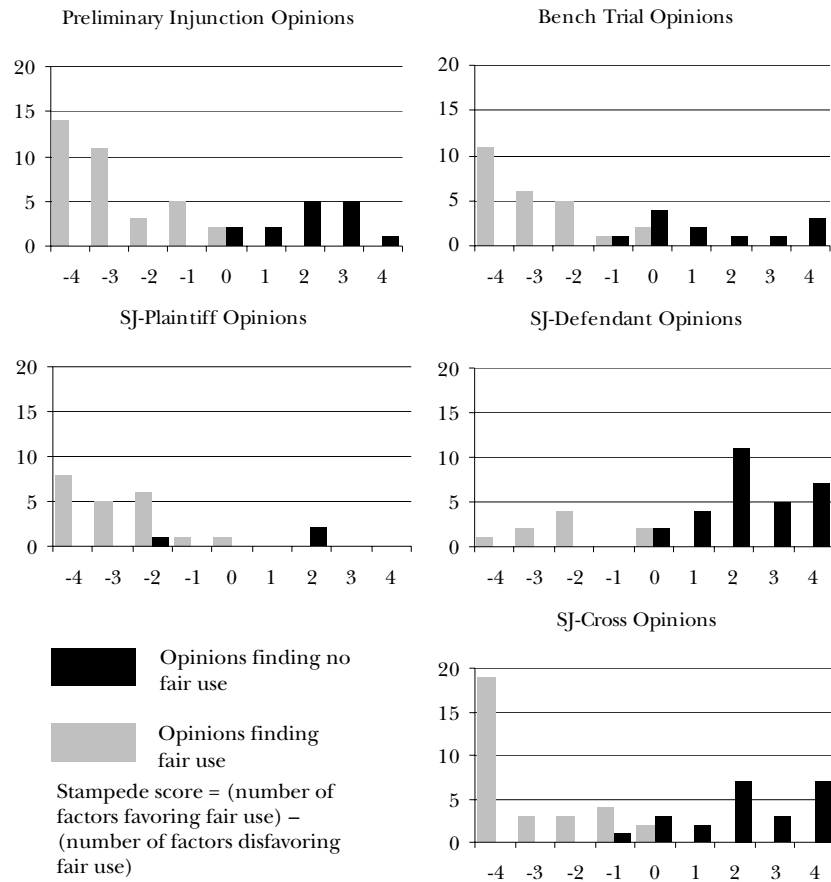
		Stampede Score of Reviewing Circuit Court Opinion								
		-4	-3	-2	-1	0	1	2	3	4
Stampede Score of Appealed District Court Opinion	-4	4	1		1			<u>1</u>		<u>1</u>
	-3			1			<u>1</u>	<u>1</u>		<u>1</u>
	-2	1		2	<u>1</u> [*]					
	-1			<u>1</u> [†]						
	0	<u>1</u>					1			
	1									
	2	<u>1</u>		<u>2</u>			2			
	3	<u>1</u>	<u>1</u>	<u>1</u>						
	4			<u>1</u>				1	1	2

The number in each box of the cross-tabulation indicates the number of cases producing a district court opinion and an appellate court majority opinion meeting the values of the x and y coordinates of the cross-tabulation. For example, 4 cases produced district court and appellate court majority opinions that both yielded stampede scores of -4. Underlined numbers indicate the number of cases in which the appellate court reversed the district court.

^{*} In *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991), the Second Circuit reversed the district court's granting of summary judgment to the plaintiff in *Association of American Medical Colleges v. Carey*, 728 F. Supp. 873 (S.D.N.Y. 1990).

[†] In *Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 241 F.3d 398 (5th Cir. 2001), the Fifth Circuit reversed the district court's granting of summary judgment to the defendant in *Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 49 F. Supp. 2d 885 (E.D. Tex. 1999).

Figure 6: Distribution of Four-Factor Stampede Scores by Outcome and Posture in 208 District Court Opinions*



* Three district court opinions were excluded from the sample used to construct this figure. See *Chi. Sch. Reform Bd. of Trustees v. Substance, Inc.*, 79 F. Supp. 2d 919, 930-34 (N.D. Ill. 2000) (denying a motion to dismiss on a stampede score of -4); *Int-Elect Eng'g, Inc. v. Clinton Harley Corp.*, No. 92-20718, 1993 U.S. Dist. LEXIS 11510, at *5-6 (S.D. Cal. June 24, 1993) (denying a motion to dismiss on a stampede score of -1); *Roy Export Co. Establishment of Vaduz, Liecht., Black Inc. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1143-47 (S.D.N.Y. 1980) (denying the defendant's motion for judgment notwithstanding the verdict on a stampede score of -4).

IV. INTRAFACOR ANALYSIS

Having established in previous Parts a macro view of the section 107 test and the factors that structure it, I seek in this Part to look within the factors themselves to determine which subfactor considerations drive the outcomes of the factors, and through these factor outcomes, the outcome of the overall test. To aid in this inquiry, Table 9 sets out the results of a logistic regression model of the outcome of the fair use test as a function of (1) a variety of factual findings made by judges in the 297 dispositive opinions,¹⁴¹ and (2) whether the opinion was written by a district or circuit court of the Second or the Ninth Circuits.¹⁴² The results of this model, which correctly classified 85.1% of the 297 opinion outcomes, suggest a number of surprising hypotheses that will merit closer investigation in what follows.

Through the course of this primarily descriptive account, this Part will also consider a number of more theoretical (or at least generalizable) themes. One theme might be termed “the irony of the inverted precedent.” We will see repeatedly that though the Supreme Court established, for example, that a finding of “*x*” disfavors fair use, the Court said nothing about a finding of “not *x*.” The irony is that in the case law that followed, a finding of “*x*” appeared to have no significant effect on a court’s fair use determination, but a finding of “not *x*” ended up exerting a significant effect in favor of a determination of fair use.¹⁴³ This irony has played out in a number of areas of subfactor doctrine.

A second general theme involves the “nonergodicity” of the operation of legal precedent in the fair use case law.¹⁴⁴ The system-theoretic concept of nonergodicity posits that as a system develops, small, even

¹⁴¹ On the problem of the “circularity of facts” in judicial opinions, see Hall & Wright, *supra* note 13, at 18-21.

¹⁴² Table 9 suggests that, controlling for all other variables listed in the table, defendants had a significantly better chance of prevailing in their fair use defense in a district or circuit court of the Second Circuit than in the courts of any of the other circuits.

¹⁴³ See *infra* text accompanying notes 158-164.

¹⁴⁴ Cf. Johan Deprez, Comment, *Risk, Uncertainty, and Nonergodicity in the Determination of Investment-Backed Expectations: A Post Keynesian Alternative to Posnerian Doctrine in the Analysis of Regulatory Takings*, 34 LOY. L.A. L. REV. 1221, 1223-24 (2001) (applying economic theories of ergodicity and nonergodicity to regulatory takings doctrine). See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001) (employing path dependence theory to assess the evolution of the common law).

Table 9: Logistic Regression of the Outcome of the Fair Use Test as a Function of Factual Findings in 297 Dispositive Opinions

Dependent variable: Fair Use Found (1) n = 297
 Fair Use Not Found (0) Pseudo R² = .425
 Log likelihood = -116.341 Correctly Classified: 85.14%

	Factual Finding	Odds Ratio	Coefficient	Standard Error	P> Z	95% C.I.	
Factor One	D's use is for commercial purpose	.702	-.353	.403	.381	-1.143	.437
	D's use is for noncommercial use	9.466*	2.248	.580	.000	1.111	3.385
	D's use is transformative use	33.572*	3.514	.843	.000	1.861	5.167
	D's use is for parodic purpose	11.215*	2.417	.930	.009	.594	4.241
	D's use is for educational purpose	.377	-.976	.701	.164	-2.349	0.398
	D's use is for research purpose	1.263	.233	.680	.731	-1.099	1.566
	D's use is for critical purpose	1.369	.314	.681	.645	-1.020	1.648
	D accessed P's work improperly	3.761	1.325	.779	.089	-.202	2.851
	D's use is bad faith use	.116	-2.150	1.156	.063	-4.416	.115
	Factor Two	P's work is a creative work	.402*	-.912	.406	.025	-1.707
P's work is a factual work		2.979*	1.091	.484	.024	.142	2.041
P's work is unpublished		1.031*	.031	.569	.957	-1.084	1.146
P's work is published		3.631*	1.290	.611	.035	.092	2.487
Factor Three	D took entirety of P's work	.247*	-1.399	.409	.001	-2.201	-.597
	D took heart of P's work	.018*	-4.019	.945	.000	-5.870	-2.167
	Litigated in Second Circuit	2.348*	.853	.428	.046	.014	1.693
	Litigated in Ninth Circuit	1.993	.690	.442	.119	-.177	1.557
	Constant		-.622	.385	.107	-1.377	.134

* Denotes statistical significance at the .05 level.

trivial, initial events may end up having an enormous impact on the system in the long run.¹⁴⁵ In the fair use context, the initial events were Supreme Court dicta that ended up powerfully changing the course of our fair use doctrine. Related to this is the theme of the perdurability of overturned legal precedent. Even after the Supreme Court sought to correct its initial mistakes, lower courts continued to cite to those mistakes, particularly when they supported the outcome that the lower court reached.

Finally, and related in turn to the perdurability of overturned precedent, this Part will consider the operation of “syntactic” versus “cybernetic” feedback¹⁴⁶ in the context of accumulating precedent.¹⁴⁷ This terminology, taken from communications theory, is infelicitous, but it is very important to understanding why our fair use doctrine has to some extent run off the rails of section 107. The Supreme Court has sought to correct its mistakes in its fair use case law primarily by means of “syntactic feedback.” Rather than admit that its initial communication was inapposite to the world it meant to describe (through cybernetic feedback), the Court has invariably stated that lower courts have simply misunderstood its initial communication (providing syntactic feedback).¹⁴⁸ In other words, the Court has repeatedly sought to

¹⁴⁵ See, e.g., Hathaway, *supra* note 144, at 629 (“[T]he increasing returns nature of the common law system has three predictable consequences. The first is nonergodicity—small early events have a large impact on the eventual outcome. Because judges cannot fully anticipate the ways in which public and private actors will react to their decisions, they have difficulty determining the likely effect of their decisions over time. For this reason, decisions may have large, unanticipated, and unintended effects. For example, a single sentence in an early case may take on increasing significance over time.”).

¹⁴⁶ See generally Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 126 (1972). Shapiro’s work deserves far more attention than it has received. Shapiro differentiates between syntactic and cybernetic feedback as follows:

It is important to distinguish syntactic from cybernetic feedback. The former involves transmission back concerning error in the sense of incorrect transmission or receipt of information between sender and receiver within the system; the latter involves transmission concerning error in the sense of incorrect adjustment by the system to the outside world. Thus high levels of syntactic feedback indicate trouble in the transmission facilities of the system, rather than the sensitivity and learning that are typically imputed where high levels of cybernetic feedback are present.

Id.

¹⁴⁷ On accumulating precedent, see generally Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156 (2005).

¹⁴⁸ See Shapiro, *supra* note 146, at 133-34. Shapiro explains:

reconstrue what it should have explicitly rescinded and replaced. This practice has proven to be a disaster for fair use doctrine.

A. *Factor One: Purpose and Character of the Use*

Factor one calls upon courts to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁴⁹ We saw previously that outcomes under this factor correlated very strongly with the outcome of the overall fair use test. Indeed, 95.3% of the 148 opinions that found that factor one disfavored fair use eventually found no fair use, while 90.2% of the opinions that found that the factor favored fair use eventually found fair use. Only factor four can boast of higher percentages. To determine what motivated courts to declare that factor one favored or disfavored fair use, we need to look beneath the statutory language, which appears to have had only limited influence on the actual application of the factor, and evaluate how judges considered factor one’s various subfactors. These subfactors are the commercial or noncommercial character of the defendant’s use, the degree to which the defendant’s use is transformative of the plaintiff’s work or otherwise “productive,” the propriety or good faith of the defendant’s conduct, and whether the purpose of the defendant’s use falls within one of the categories of purposes mentioned in the preamble of section 107. I review here each of these in turn.

1. The Commerciality Inquiry

While the concept of transformativeness has received far more attention in the scholarly commentary,¹⁵⁰ I begin with commerciality be-

Following the rules of *stare decisis*, requests for legal changes, which are actually inspired by the failure of law to adjust correctly to the environment, and are thus cybernetic feedback, are put in the form of syntactic feedback, statements that some judge or lawyer has not correctly received the real message that was transmitted by the previous cases (their “true principles”). In this way much cybernetic feedback information can be squeezed into a communications system that demands very high levels of redundancy, and it can be squeezed in without interfering with that sense of mutual support necessary to the coordination of nonhierarchical organizations.

Id.

¹⁴⁹ 17 U.S.C. § 107(1) (2000 & Supp. IV 2004).

¹⁵⁰ See, e.g., Kudon, *supra* note 119; Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677 (1995); Diane Leenheer Zim-

cause it has received far more attention in the case law, particularly among the lower courts. Of the 306 opinions, 84.0% explicitly considered whether the use was commercial or noncommercial in nature under factor one, while only 38.2% explicitly considered the transformativeness of the defendant's use under the factor. Furthermore, as Figure 7 shows, courts' greater attention to commerciality was consistent across time. This is regrettable. It is also inconsistent with the actual statutory language of section 107 and the expectations of its drafters. Indeed, many commentators and some courts, including the Supreme Court in *Campbell*, have been highly critical, even dismissive, of the commerciality inquiry, primarily on the ground that nearly all expression in our culture is produced for profit or is otherwise income-producing in some sense.¹⁵¹ In his opinion for the majority in *Campbell*, Justice Souter was moved to quote Samuel Johnson, that “[n]o man but a blockhead ever wrote, except for money.”¹⁵² Yet the commerciality inquiry survives, as the data clearly show.

The perdurability of the commerciality inquiry appears largely to be the result of a series of mistakes by the Supreme Court that began with its 1984 *Sony* opinion, mistakes from which fair use doctrine, at least as it is promulgated in our fair use cases, has yet to fully recover. In *Sony*, the Court held, inter alia, that the unauthorized home use of a Betamax video tape recorder to “time-shift”¹⁵³ the performance of a television program was a fair use. Writing for the majority, Justice Stevens set forth in his discussions of the first and fourth fair use factors what came to be called the “*Sony* presumption.”¹⁵⁴ His formulation of this presumption has caused so much trouble in our fair use case law that it deserves to be quoted at length. In discussing the first factor, Justice Stevens explained:

Although not conclusive, the first factor requires that “the commercial or nonprofit character of an activity” be weighed in any fair use decision. If the Betamax were used to make copies for a commercial or profit-

merman, *The More Things Change, the Less They Seem “Transformed”*: Some Reflections on *Fair Use*, 46 J. COPYRIGHT SOC’Y U.S.A. 251 (1998).

¹⁵¹ See Zimmerman, *supra* note 150, at 252-55.

¹⁵² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (alteration in original) (quoting 3 BOSWELL’S LIFE OF JOHNSON 22 (George Birkbeck Hill ed. 1934)).

¹⁵³ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 423 (1984) (defining “time-shifting” as “the practice of recording a program to view it once at a later time, and thereafter erasing it”).

¹⁵⁴ See, e.g., James Boyle, *Intellectual Property Policy Online: A Young Person’s Guide*, 10 HARV. J.L. & TECH. 47, 99 (1996); Stacey L. Dogan, Comment, *Sony, Fair Use, and File Sharing*, 55 CASE W. RES. L. REV. 971, 973 (2005).

making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however, because the District Court's findings plainly establish that time-shifting for private home use must be characterized as a noncommercial, nonprofit activity.¹⁵⁵

Justice Stevens returned to this presumption in discussing, under factor four, the effect of home video recording on the value of and market for copyrighted television programs:

Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.¹⁵⁶

Taken together, these two passages constituted a quite stunning interpretation of section 107, especially since the first factor referred to the “commercial nature” of the defendant’s use as only one consideration among others that the factor encompassed, and even more so since the dependent clause in which the reference appeared was inserted very much at the eleventh hour of the drafting process, primarily to address the concerns of those who were engaged in “nonprofit educational purposes.”¹⁵⁷ The fourth factor, meanwhile, made no explicit reference to the commerciality of the defendant’s use. Nevertheless, as handed down, *Sony* stood for the propositions that, under factor one, a commercial “purpose” is presumptively unfair and a noncommercial purpose presumptively fair, and that, under factor four, a commercial use may be presumed to harm the market for the plaintiff’s work.

The next year, in *Harper & Row*, the Court only made matters worse. Clearly sensing that it had overreached, the Court sought, in its factor one analysis, to bend what it had said in *Sony*. Writing for

¹⁵⁵ *Sony*, 464 U.S. at 448-49 (footnote omitted).

¹⁵⁶ *Id.* at 451.

¹⁵⁷ See PATRY, *supra* note 29, at 351-53.

the majority, Justice O'Connor stated, "The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."¹⁵⁸ So far, so good. But then she quoted the very dictum from *Sony* that she was seeking to overwrite—"every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege"¹⁵⁹—as if a tendency to disfavor fair use and a presumption against fair use were the same. In an effort to maintain the appearance of "redundancy,"¹⁶⁰ the Court resorted to "syntactic feedback" where "cybernetic feedback" was in order.¹⁶¹ Then, in its 1990 *Stewart* opinion, the Court again quoted in its factor one analysis the same phrase from *Sony* that *Harper & Row* had, but this time *without* the *Harper & Row* modification.¹⁶² Neither *Harper & Row* nor *Stewart* addressed commerciality under factor four.¹⁶³ Finally, in 1994, the *Campbell* Court made it clear that the *Sony* presumption was no longer good law. It did so, however, syntactically, through reconstrual: "[A]s we explained in *Harper & Row*, *Sony* stands for the proposition that the 'fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.'"¹⁶⁴

And so, through *Sony*, the *Harper & Row* gloss on *Sony*, *Stewart's* revival of *Sony*, and then *Campbell's* revival of the *Harper & Row* gloss, we see not so much a refinement of precedent as an accumulation of precedent. The sheer mass of this precedent, perhaps even regardless of what it said, appears to have kept the commerciality inquiry in the foreground of the factor one fair use analysis, far from where the drafters of section 107 originally intended that it should be. Figure 7 suggests that courts' attention to the commerciality inquiry under fac-

¹⁵⁸ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

¹⁵⁹ *Id.* (alteration omitted) (quoting *Sony*, 464 U.S. at 451).

¹⁶⁰ See Shapiro, *supra* note 146, at 127 ("[L]egal discourse organized by the rules of *stare decisis* emphasizes, and itself insists that its success rests upon, high levels of redundancy . . .").

¹⁶¹ *Cf. id.* at 133 ("If the system employs high levels of syntactic redundancy, it does not have the 'space' to transmit much cybernetic feedback information to its receiving parts.").

¹⁶² *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

¹⁶³ See *Harper & Row*, 471 U.S. at 566-69 (applying factor four, effect on the market, without mentioning commerciality); *Stewart*, 495 U.S. at 238 (upholding the circuit court's conclusion that release of a film would affect the market for a short story without discussion of commerciality).

¹⁶⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (quoting *Harper & Row*, 471 U.S. at 562).

tor one peaked soon after *Sony* and *Harper & Row* and then declined until *Stewart*, which appears to have revived it. The proportion of courts conducting the commerciality inquiry declined somewhat after *Campbell* but then returned more or less to its pre-*Campbell* level.

What about courts' treatment under factor one of the *Sony* presumption in particular? Figure 7 suggests that the proportion of opinions citing the *Sony* presumption in their factor one analysis peaked soon after *Sony* and *Harper & Row*, and then declined to a level that held until *Campbell*, the Court opinion which explicitly, albeit syntactically, repudiated the presumption and should have buried it once and for all. Writing soon after the Supreme Court handed down *Campbell*, Judge Leval spoke of it as "Justice Souter's [r]escue of [f]air [u]se."¹⁶⁵ Before *Campbell*, Judge Leval explained, courts would invoke the *Sony* presumption if they otherwise thought that the commercial use at issue was unfair, but if they wanted instead to find fair use, they "would simply omit any mention of the 'commercial' thing."¹⁶⁶ Now, *Campbell* "has dispelled all those unhelpful slogans from the fair use discussions—particularly the pernicious 'commercial use' presumption."¹⁶⁷

The data do not bear this out. On the contrary, they suggest that Judge Leval may have been overly pessimistic with respect to how judges used the *Sony* presumption before *Campbell*, but overly optimistic with respect to how they would use it after *Campbell*. Of the 108 opinions produced between *Sony* and *Campbell*, 45 (41.7% of 108) cited the *Sony* presumption in their factor one analysis. Of these, 29 found the defendant's use to be commercial and 14 found fair use, for a fair use win rate in these opinions of 0.311. Of the 61 opinions during that period that did not cite the *Sony* presumption, 29 found fair use, for a fair use win rate of 0.475. Though statistically significant, the difference in win rates between the two sets of opinions does not, of course, support the proposition that courts invoked the *Sony* presumption only when finding for the plaintiff. For the 162 opinions produced after *Campbell*, however, the story is somewhat different, and contrary to Judge Leval's hopes. As Figure 7 shows, *Campbell* triggered a decline in the proportion per year of opinions citing the *Sony* presumption in their factor one analysis, but this decline was then followed by a renewal of interest in the presumption among some lower

¹⁶⁵ Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 19 (1994).

¹⁶⁶ *Id.* at 20-21.

¹⁶⁷ *Id.* at 22.

courts. Specifically, 12 of the 162 opinions produced after *Campbell* invoked the *Sony* presumption under factor one—and 11 of these 12 found that the defendant’s use was commercial, that factor one favored the plaintiff, and ultimately that there was no fair use.¹⁶⁸ This is good evidence of certain courts’ willful—or, at best, unknowing—use of the *Sony* presumption notwithstanding *Campbell*.¹⁶⁹

Overall, despite the language of section 107, the commerciality inquiry and the *Sony* presumption in particular remain exceptionally tenacious memes in the fair use case law.¹⁷⁰ No doubt this reflects in part their high fitness for a litigation environment pervaded with commercial expression. But it is also a consequence of the Supreme Court’s repeated attempts to maintain appearances by reconstruing what it should simply have rescinded and replaced. Even so, there is a strange final irony to all of this attention to the commerciality of the defendant’s use. The regression results presented in Table 9 suggest that notwithstanding the *Sony* presumption, and notwithstanding *Campbell*’s revival of the *Harper & Row* gloss that a “commercial as opposed to [a] nonprofit [use] is a separate factor that tends to weigh against a finding of fair use,”¹⁷¹ a finding that the defendant’s use was for a commercial purpose (which was made in 64.4% of the opinions) did not significantly influence the outcome of the fair use test in favor of an overall finding of no fair use. Rather, it was a finding that the defendant’s use was for a *noncommercial* purpose (which was made in 15.4% of the opinions) that strongly influenced the outcome of the test in favor of an overall finding of fair use. We are familiar with vertical and horizontal precedent. But if there is such a thing as empirical or popular precedent, based on the empirical analysis of how the population of judges who have previously employed a legal doctrine did so, then this is one such precedent worth following. While the fact that a defendant’s use is for a commercial purpose should gener-

¹⁶⁸ See, e.g., *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 886 F. Supp. 1120, 1130 (S.D.N.Y. 1995) (finding that the reprinting of a competitor’s newspaper articles was not fair use). Of these 12 opinions, none found that the defendant’s use was transformative. Specifically, 6 explicitly found that the defendant’s use was not transformative and 6 did not address the issue of transformativeness.

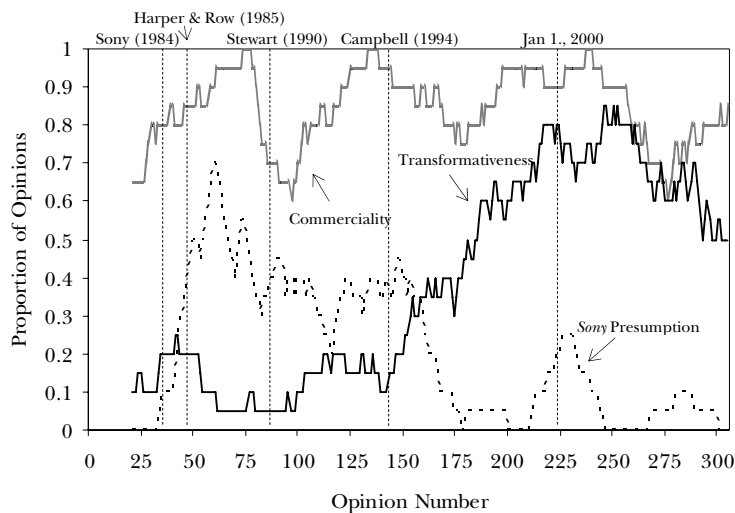
¹⁶⁹ Thirty-five of the 162 post-*Campbell* opinions sampled explicitly recognized under factor one that *Campbell* had abrogated the commercial use presumption under that factor.

¹⁷⁰ On the tenacity of memes, see J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 74-90 (1998).

¹⁷¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (quoting *Harper & Row, Publishers, Inc., v. Nation Enters.*, 417 U.S. 539, 562 (1985)).

ally play no significant role in a fair use determination, the fact that a defendant’s use is for a noncommercial purpose should be understood, as it appears it already is in practice, strongly to support a finding of fair use.

Figure 7: Twenty-Opinion Moving Average of the Proportion of Opinions Making the Commerciality and Transformativeness Inquiries and Citing the *Sony* Commercial Use Presumption



2. The Transformativeness Inquiry

In his 1990 *Harvard Law Review* article, *Toward a Fair Use Standard*,¹⁷² Judge Leval encouraged courts to attend more closely in their fair use analyses to the degree to which a defendant’s use was “transformative.” Judge Leval argued that in weighing “the strength of the secondary user’s justification against factors favoring the copyright owner,”¹⁷³ the court should consider if “the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings,”¹⁷⁴ because “this is the very type of activity

¹⁷² Leval, *supra* note 93, at 1111.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

that the fair use doctrine intends to protect for the enrichment of society.”¹⁷⁵ Four years later, the *Campbell* court relied heavily on the concept of transformativeness and on Judge Leval’s exposition of it in its factor one analysis of 2 Live Crew’s parody.¹⁷⁶ Courts and commentators have since spoken of the concept of transformativeness as the cynosure of fair use analysis: we are told that it is “vitally important to the fair use inquiry”;¹⁷⁷ it goes to the “heart of the fair use inquiry.”¹⁷⁸ As one court has put it, “[a]lthough ‘transformativeness’ is primarily analyzed in connection with the first fair use factor, it forms the basis of the entire fair use analysis.”¹⁷⁹ Indeed, some have suggested that the transformativeness inquiry has essentially superseded section 107 as the backbone of our fair use doctrine.¹⁸⁰

It appears, however, that courts and commentators have exaggerated the influence of transformativeness doctrine on our fair use case law. At the district court level, 41.2% of the 119 district court opinions following *Campbell* failed even to refer to the doctrine, while 90.2% of the 92 opinions preceding *Campbell* failed to reference it (either under the rubric of transformativeness or, as it was sometimes

¹⁷⁵ *Id.*

¹⁷⁶ *Campbell*, 510 U.S. at 578-79 (citing Leval, *supra* note 93, at 1111) (asserting that the goal of copyright is “furthered by the creation of transformative works”).

¹⁷⁷ Leval, *supra* note 93, at 1111.

¹⁷⁸ *On Davis v. Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001) (Leval, J.) (citing *Campbell*, 510 U.S. at 579).

¹⁷⁹ *Hofheinz v. Discovery Commc’ns, Inc.*, No. 00-3802, 2001 WL 1111970, at *3 (S.D.N.Y. Sept. 20, 2001) (citing *On Davis*, 246 F.3d at 174-76).

¹⁸⁰ Compare this proposition with NIMMER, *supra* note 139, at § 13.05[A][1] (footnote omitted), highlighting the importance of transformativeness:

Those Second Circuit cases appear to label a use ‘not transformative’ as a shorthand for ‘not fair,’ and correlatively ‘transformative’ for ‘fair.’ Such a strategy empties the term of meaning—for the ‘transformative’ moniker to guide, rather than follow, the fair use analysis, it must amount to more than a conclusory label.

Also compare to *Sag*, *supra* note 9, at 388 (footnote omitted), noting the importance of transformativeness:

The dominance of the transformativeness test makes the actual statutory language regarding noncommercial and educational uses largely irrelevant.

Also, ‘transformativeness’ is clearly a meta-factor: the extent to which a use transforms the work cannot be determined without reference to the other factors, such as the nature of the original work, the quantitative and qualitative similarity between the works and the effect of the use on the value of the original work.

called, “productive use”¹⁸¹). At the circuit court level, the percentages are better, but still far from what we would expect for a doctrine now said to be the basis of the fair use inquiry. Of the 43 circuit court opinions that followed *Campbell*, 18.6% failed to invoke the concept, while 84.4% of the 45 circuit court opinions that preceded *Campbell* failed to invoke it. Furthermore, the doctrine appears to be losing strength. Figure 7 shows the proportion of opinions over time that made some reference to transformativeness. The doctrine’s citation curve began its downward slope sometime in the early part of this decade.

Nevertheless, in those opinions in which transformativeness did play a role, it exerted nearly dispositive force not simply on the outcome of factor one but on the overall outcome of the fair use test. More specifically, the data suggest that while a finding of transformativeness is not necessary to trigger an overall finding of fair use, it is sufficient to do so. We can infer that it is not necessary in light of the fact that 25 (or 36.8%) of the 68 post-*Campbell* opinions that found fair use made no reference to transformativeness and 4 explicitly found that the defendant’s use was not transformative. We can infer that it is sufficient (or nearly sufficient) in light of the fact that each of the 13 circuit court opinions and 27 of the 29 district court opinions that found the defendant’s use to be transformative also found it to be a fair use—and one of the two district court outliers was reversed on appeal.¹⁸² Furthermore, as several courts explicitly noted,¹⁸³ a finding of transformative-

¹⁸¹ See, e.g., *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 970 (9th Cir. 1981) (“As the first sentence of § 107 indicates, fair use has traditionally involved what might be termed the ‘productive use’ of copyrighted material.”), *rev’d*, 464 U.S. 417 (1984).

¹⁸² See *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357, 1378-85 (N.D. Ga. 2001) (finding no fair use and granting preliminary injunction where a parody’s commerciality and other characteristics outweighed its transformativeness), *vacated*, 252 F.3d 1165 (11th Cir. 2001) (per curiam) and 268 F.3d 1257 (11th Cir. 2001). The one unreversed outlier was *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, 955 F. Supp. 260 (S.D.N.Y. 1997), *aff’d*, 150 F.3d 132 (2d Cir. 1998). For further discussion of these cases, see Julie E. Cohen, *The Place of the User in Copyright Law*, 74 *FORDHAM L. REV.* 347, 363-64 & nn.54-55 (2005) (discussing *SunTrust Bank* and *Castle Rock*).

¹⁸³ See, e.g., *Leibovitz v. Paramount Pictures Corp.*, 948 F. Supp. 1214, 1223 (S.D.N.Y. 1996) (“I find that the purposes of copyright are best served by a finding that the highly transformative character of the Nielsen ad trumps its admittedly commercial purpose and that the first fair use factor therefore weighs in favor of the defendant, albeit perhaps by only a slight margin.”); *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 12-13 (S.D.N.Y. 1992) (“Thus courts have repeatedly found in favor of transformative secondary uses on the first factor, notwithstanding the presence of profit motivation. Thus, although courts ritualistically proclaim, almost as a mantra, that

ness trumped a finding that the defendant's use was commercial for purposes of determining whether factor one favored fair use. In 28 opinions, the court found the defendant's use to be both commercial and transformative under factor one, and in 26 of these opinions, the court found both that factor one and the overall test favored fair use—with one of the two outliers reversed on appeal.¹⁸⁴

These data may go far toward explaining why Table 9 reports such a high coefficient and odds ratio for a finding of transformativeness. Putting the Table's regression results in more easily understood terms, consider that, based on the regression model used to produce the Table, a defendant has a 35.5% chance of winning the fair use defense where it has made a nontransformative, commercial use of a creative, published work (with all other variables set at zero). If that same use were found to be transformative, the defendant's chance of winning the fair use defense would increase to 94.9%.

Interestingly, while a finding of transformativeness may be dispositive of the outcome of the fair use test, such a finding does not stamper the outcomes of the other factors. Of the 43 opinions that found the defendant's use to be transformative, only 6 found that all four factors favored a finding of fair use. Instead, 26 of these 43 opinions found that factor two, going to the nature of the plaintiff's work, disfavored fair use, and 6 of these 26 further found that factor three, going to the amount and substantiality of the defendant's taking, also disfavored a finding of fair use. This makes sense. Defendants are far more likely to make a transformative use of a creative rather than a factual work, and their transformative use is likely to involve a substantial taking of plaintiffs' expression. To their credit, in opinions addressing a transformative use, courts were generally willing to call factors two and three as they saw them rather than bend those factor outcomes to conform to the overall test outcome. There were exceptions, however. Among those opinions that found that a defendant's use was transformative, but that factors two or three nevertheless favored fair use, there appear several fine examples of judicial slight of hand.¹⁸⁵

every commercial use is 'presumptively' unfair, that presumption is easily overcome by a transformative, nonsuperseding use." (citations omitted), *order amended and superseded*, 60 F.3d 913 (2d Cir. 1994).

¹⁸⁴ See *supra* note 182.

¹⁸⁵ See, e.g., *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000) (stating, in a discussion of the third factor, that "[i]n this case, El Vocero admittedly copied the entire picture; however, to copy any less than that would have made the picture useless to the story," and that "[a]s a result, like the district court, we count this

3. The Bad Faith Inquiry

Must a defendant's use be "fair" in order to qualify as a "fair use"? Should the "propriety" of the defendant's conduct play any role in the court's fair use analysis? Lloyd Weinreb thought so, and urged courts to consider the "fairness" of the defendant's use as an additional overarching factor.¹⁸⁶ Other commentators have questioned the feasibility of the fairness inquiry on the ground that fairness is too subjective—or circular—a standard.¹⁸⁷ Still others argue that the fairness inquiry unnecessarily complicates the fundamental utilitarian question, which looks at what outcome will ultimately promote the progress of human creativity and should inform any fair use determination.¹⁸⁸

The data suggest that considerations of fairness, propriety, and good or bad faith have not played a significant role in our fair use case

factor as of little consequence to our analysis"); *Blanch v. Koons*, 396 F. Supp. 2d 476, 481-82 (S.D.N.Y. 2005) ("The photograph as a whole is sufficiently creative and original to receive copyright protection, and it is copyrighted. Yet its general publication throughout the United States favors fair use . . . Blanch has no right to the appearance of the Gucci sandals (perhaps the most striking element of the photograph), and Koons appropriated nothing else of the photograph except the crossed legs. Viewed alone (disregarding the sandals) they are banal rather than creative. The second factor favors the defendants." (citations omitted)); *Newport-Mesa Unified Sch. Dist. v. Cal. Dep't of Educ.*, 371 F. Supp. 2d 1170, 1177-78 (C.D. Cal. 2005) ("Under the second fair use factor, the nature of the copyrighted work is creative rather than informational. '[D]evelopment of the test questions as well as their compilation in a particular test form is a creative, imaginative, and original process.' This ordinarily would weigh against finding fair use. But, with the addition of a student's answers, the questions and answers are informational in nature, which weighs in favor of fair use." (quoting *Coll. Entrance Examination Bd. v. Pataki*, 889 F. Supp. 554, 569 (N.D.N.Y. 1995)) (alteration in original) (citations marks omitted)); *Penelope v. Brown*, 792 F. Supp. 132, 138 n.7 (D. Mass. 1992) (stating under the second factor that "Penelope's work is scholarly and hence . . . the law should favor its dissemination").

¹⁸⁶ See Weinreb, *supra* note 19, at 1138 ("[F]air use has historically been and ought to remain what its name suggests: an exemption from copyright infringement for uses that are *fair*"); *id.* at 1141 ("Although the courts were presumably construing the statute according to the legislative intent, it has from the beginning had the flavor of an equitable doctrine, importing, as its name indicates, considerations of fairness not directly related to the statutory purpose.").

¹⁸⁷ See, e.g., BRUCE P. KELLER & JEFFREY P. CUNARD, COPYRIGHT LAW § 8:1 (2003) ("The central concept underlying the doctrine—an assessment of the 'fairness' of the use in question, based on a balancing of several factors—is inherently subjective. As a result, what one judge in his or her personal view regards as a 'fair use' may sharply contrast with what another judge down the hall may think.").

¹⁸⁸ See, e.g., Leval, *supra* note 93, at 1126 (arguing that "[n]o justification exists for adding a morality test" to the fair use inquiry); Madison, *supra* note 7, at 1555-56 (urging courts to consider not the legitimacy of the defendant's use, but rather its effect on social welfare);

law—notwithstanding the frequency with which opinions intoned that fair use is an “equitable doctrine.”¹⁸⁹ However, in the few cases where courts explicitly found that the defendant’s conduct was undertaken in bad faith, courts almost invariably found no fair use. Forty-nine (or 16.0%) of the 306 opinions made some reference to the propriety of the defendant’s conduct or to the relevance of the fairness analysis, with 25 of them doing so under factor one.¹⁹⁰ Fourteen opinions found improper conduct, 12 of which found no fair use and 7 of which found that all four factors favored that overall outcome. Conversely, of the 28 opinions in which the court found the defendant’s conduct not to be improper, 24 found fair use. Unlike opinions that found bad faith, opinions that found good faith did not tend to stampede the factors.¹⁹¹

Though the data strongly suggest that a finding of bad faith will trigger a finding of no fair use, they should be interpreted with caution. More so than any other subfactor consideration, the fairness determination appears to be susceptible to a basic circularity: did the court find the defendant’s use to be unfair because the defendant’s conduct was improper, or did the court find the defendant’s conduct to be improper because its use was unfair? The opinions that made a fairness determination tended to do so on highly fact-specific grounds, so no strong generalizations can be made to help answer this question. Still, there was only one opinion in which the court explicitly found that but for the defendant’s bad faith, the court would have found fair use.¹⁹²

¹⁸⁹ By this, courts typically meant simply that the fair use doctrine is “an equitable rule of reason, which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (citations and internal quotation marks omitted) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) and *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)); see also Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 485 (2003) (“Even though fair use is a rule of law rather than an equitable rule, equitable principles often inform the manner in which the doctrine is applied.”).

¹⁹⁰ One opinion considered the defendant’s bad faith under both the first factor and as an additional factor. See *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 211 (D. Mass. 1986) (stating that the propriety of the defendant’s conduct is relevant to the “character” of the use under factor one); *id.* at 214 (reconsidering equitable conduct as an additional factor).

¹⁹¹ The mean stampede score in the 14 opinions that found bad faith was -2.43 (standard deviation = 2.06), while the mean stampede score in the 28 opinions that found no bad faith was 1.82 (standard deviation = 2.31).

¹⁹² See *Softel, Inc. v. Dragon Med. & Scientific Commc’ns, Inc.*, No. 87-0167, 1992 U.S. Dist. LEXIS 9502, at *57 (S.D.N.Y. June 29, 1992) (“In this case, defendants’ lack

Otherwise, the fairness consideration appeared rarely to be decisive.¹⁹³ This is consistent with the regression results reported in Table 9, in which the bad faith variable failed to produce a significant coefficient. More commonly, a fairness finding appeared to function as merely an additional consideration in support of an outcome already determined—or overdetermined—by other considerations.

4. The Preambular Purposes Inquiry

Section 107 volunteers in its preamble certain examples of fair purposes. Specifically, it provides that the defendant's use of the plaintiff's expression might be deemed fair if it is made "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."¹⁹⁴ Table 10 sets out the number and proportion of opinions that found the defendant's use to fall within one of these categories. While defendants generally enjoyed very high fair use win rates in these opinions, defendants engaged in "educational" purposes did not. There is nothing remarkable about the 27 educational purpose opinions that can explain this surprising result.¹⁹⁵ In any event, the regression model suggests that when controlling for the effects of other findings, a finding that the defendant's use fell within one of the preambular categories did not significantly affect the outcome of the fair use test. Instead, as with a finding of bad faith, other considerations appear to have determined the outcome otherwise endorsed by the preambular purposes inquiry.

of good faith in utilizing the routines tips the balance of the factors against a finding of fair use. Accordingly, plaintiff is entitled to recover on its claim of copyright infringement with respect to defendants' literal copying of plaintiff's image retrieval routines in the programs Hairy Cell Roche and Low Back Pain."). In this case, *Softel* yielded a stampede score of 0.

¹⁹³ See, e.g., *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992) (considering the defendant's bad faith conduct in relation to the purpose and character of the use); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1530 (S.D.N.Y. 1988) ("The Court's conclusion is also bolstered by examining the propriety of Zomba's conduct in this case."); *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031, 1036 (N.D. Ga. 1986) (finding the defendant's intention to trade on the plaintiff's good will to be an element of bad faith, which weighs against fair use).

¹⁹⁴ 17 U.S.C. § 107 (2000 & Supp. IV 2004). See generally Madison, *supra* note 7, at 1552-57 (discussing the relevance of the listing of fair uses in the preamble of section 107).

¹⁹⁵ Only 4 of these opinions involved standardized testing.

**Table 10: Distribution and Fair Use
Win Rates of Opinions Explicitly
Addressing Preambular Purposes**

(“Found FU” denotes the proportion of opinions that found fair use.)

Preambular Purpose	<i>n</i>	% of 306	Found FU
Research purpose	22	7.2	.409
Critical purpose	29	9.5	.621
News reporting	27	8.8	.778
Educational purpose	27	8.8	.482

B. Factor Two: Nature of the Copyrighted Work

Factor two instructs courts to consider “the nature of the copyrighted work.”¹⁹⁶ The data with respect to factor two are seemingly as ambiguous and open to interpretation as the statutory language itself. Despite section 107’s command that “the factors to be considered shall include”¹⁹⁷ factor two, 17.7% of the 306 opinions failed even to refer to the factor, while an additional 6.5% did so only to call it irrelevant. We saw above that the correlation coefficients in Table 5 and the regression coefficients in Table 6 suggest that the outcome of factor two typically has no significant effect on the overall outcome of the fair use test. Many courts and commentators have long asserted as much. Yet the regression coefficients reported in Table 9 for certain subfactor considerations under factor two suggest that we cannot write off the factor entirely. On the contrary, certain findings under factor two appear significantly to affect the outcome of the fair use test, sometimes in ways that run contrary—or obliquely—to the original intent of the doctrine underlying those findings.

From the rather open-ended statutory language of the second factor have emerged two subfactor considerations: whether the plaintiff’s work is creative or factual in nature and whether it is published or unpublished. I consider each of these in turn.

¹⁹⁶ 17 U.S.C. § 107.

¹⁹⁷ *Id.*

1. The Creative/Factual Work Inquiry

As the *Campbell* Court explained, factor two “calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.”¹⁹⁸ According to this framework, creative works “of fiction or fantasy”¹⁹⁹ stand at the core of copyright protection, making a finding of their fair use less likely, while factual works stand at the periphery, making a finding of their fair use more likely.

Though courts and commentators have belittled the significance of the creative/factual work inquiry along with the rest of factor two, the data suggest that in the opinions studied, there is in fact a significant inverse relation between the creativity of the plaintiff’s work and the likelihood of its fair use. Of the 306 opinions, 41.1% explicitly found that the plaintiff’s work was creative rather than factual in nature, and 34.1% of these opinions found fair use. Meanwhile, 16.3% of the opinions explicitly found that the plaintiff’s work was factual rather than creative in nature, and 54.0% of these opinions found fair use. Though it is probably impossible to establish any degree of causality, it is also interesting to note that opinions in which a court explicitly found the plaintiff’s work to be creative or factual also exhibited a good deal of stampeding. Among the 126 opinions that found the plaintiff’s work to be creative in nature, a strong plurality of 43.4% found all four factors to disfavor fair use, while among the 50 opinions that found the plaintiff’s work to be factual in nature, a plurality of 28.0% found all four factors to favor fair use.²⁰⁰

It should not be surprising, then, that the regression model reported in Table 9 predicts that a defendant has a 35.5% chance of prevailing in its fair use defense when it has made commercial use of a published work that is found to be creative in nature (with all other variables set at zero), and an 80.3% chance of prevailing in its fair use defense when it has made commercial use of a published work that is

¹⁹⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

¹⁹⁹ *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

²⁰⁰ An additional 26.0% of these 50 opinions yielded a stampede score of -2, meaning that three factors disfavored and one factor favored fair use. All of these opinions found no fair use, and all but one found that the sole factor not supporting that outcome was factor two.

found instead to be factual in nature (again, with all other variables set at zero). This is a substantial difference in the probability of success, one which suggests that notwithstanding the correlation and regression coefficients reported in Tables 5 and 6, the creative or factual nature of the plaintiff's work does in fact play a role in judges' determinations of the fair use issue.

As a normative matter, this is again an empirical precedent altogether worth following. In principle, the four factors of section 107 seek to "balanc[e] the need to provide individuals with sufficient incentives to create public works with the public's interest in the dissemination of information."²⁰¹ As such, the section 107 test should do more than simply evaluate, under factor four, the extent to which the defendant's use impacts the "potential market for or value of the copyrighted work."²⁰² That inquiry addresses only one side of the balance. The first and second factors of section 107 exist to remind courts to consider the other side of the balance, going to the "public's interest in the dissemination of information."²⁰³ Happily, it appears—at least with regard to the creative/factual inquiry—that many courts are doing just that.

2. The Published/Unpublished Work Inquiry

The story of the published-versus-unpublished-work inquiry under factor two is a story of nonergodicity, unintended consequences, and accumulating precedent. In her 1984 *Harper & Row* opinion for the majority, Justice O'Connor stated that "[t]he fact that a work is unpublished is a critical element of its 'nature'" and that "the scope of fair use is narrower with respect to unpublished works."²⁰⁴ She also wrote that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use."²⁰⁵ Writing in dissent, Justice Brennan declared that this latter statement "introduces into analysis of this case a categorical presumption against prepublication fair use."²⁰⁶ Three

²⁰¹ *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986).

²⁰² 17 U.S.C. § 107.

²⁰³ See generally Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 286-90 (2007) (discussing the importance of positive externalities, or "spillovers," to a proper understanding of the fair use defense).

²⁰⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985).

²⁰⁵ *Id.* at 555.

²⁰⁶ *Id.* at 595 (Brennan, J., dissenting).

years later, in *Salinger v. Random House*, the Second Circuit adopted the *Harper & Row* dissent's aggressive interpretation of the majority opinion: "[W]e think that the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression."²⁰⁷ A variety of opinions from the Second Circuit and elsewhere subsequently advanced this reading,²⁰⁸ so that by 1991, the Second Circuit would declare in *Wright v. Warner Books, Inc.* that "[u]npublished works are the favorite sons of factor two" and that "[o]ur precedents . . . leave little room for discussion of this factor once it has been determined that the copyrighted work is unpublished."²⁰⁹ It seemed at the time that the courts had built a new *Sony*-like presumption, this time against uses of unpublished works.²¹⁰ In 1992, Congress intervened. It amended section 107 to include at its conclusion, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."²¹¹

The strange result of this series of events, a result which the *Harper & Row* court could hardly have foreseen, is that in the opinions studied, the fact that the plaintiff's work was unpublished appears to have exerted no significant effect on the outcome of the fair use test, but the fact that the plaintiff's work was *published* appears to have exerted a strong effect on the outcome of the test in favor of a finding of fair use.²¹² Meanwhile, a wide array of precedents developed around the published/unpublished work inquiry, so that courts could draw upon previous case law to assert that the unpublished or published status of

²⁰⁷ 811 F.2d 90, 97 (2d Cir. 1987).

²⁰⁸ See, e.g., *New Era Publ'ns Int'l v. Henry Holt & Co., Inc.*, 873 F.2d 576, 583 (2d Cir. 1989) ("Where use is made of materials of an 'unpublished nature,' the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here."); *Ass'n of Am. Med. Colls. v. Carey*, 728 F. Supp. 873, 885 (N.D.N.Y. 1990) ("[A] copyrighted work which is both published and factual in nature is more properly subject to a fair use than an unpublished work that is fictional in nature . . ."), *rev'd sub nom.* *Ass'n of Am. Med. Colls. v. Cuomo*, 928 F.2d 519 (2d Cir. 1991); *Love v. Kwitny*, 706 F. Supp. 1123, 1133-34 (S.D.N.Y. 1989) (finding that the unpublished status of the plaintiff's work weighs "heavily" in the plaintiff's favor despite the work's factual nature and limited distribution).

²⁰⁹ 953 F.2d 731, 737 (2d Cir. 1991).

²¹⁰ See generally *Crews*, *supra* note 28, at 40-42 (analyzing the impact these cases had on the Second Circuit's effectively establishing "a conclusive presumption" operating against a claim of fair use for unpublished works).

²¹¹ Pub. L. No. 102-492, 106 Stat. 3145 (1992) (codified as amended at 17 U.S.C. § 107 (2000 & Supp. IV 2004)).

²¹² See *supra* Table 9.

the work either favored or disfavored a finding of fair use. Thirty-seven opinions explicitly found that the plaintiff's work was unpublished, with 29 of these asserting that this fact disfavored a finding of fair use, 3 asserting that it favored a finding of fair use (because the plaintiff's expression was not otherwise available to the public),²¹³ and 5 concluding that the unpublished status of the plaintiff's work was unimportant to the fair use analysis. Courts found fair use in roughly half (48.6%) of these opinions. By comparison, 42 opinions explicitly found that the plaintiff's work was published, with 36 asserting that this fact favored a finding of fair use, 4 asserting that it disfavored a finding of fair use (because the plaintiff's work was otherwise available to the purchasing public),²¹⁴ and 2 asserting that it made no difference to the outcome of the fair use test. Courts found fair use in 77.8% of the 36 opinions that asserted that the published status of the plaintiff's work favored a finding of fair use, and in 69.1% of the 42 opinions overall. As with the subfactor variables discussed above, the inner workings of these data help to explain why the regression model predicts (with commercial use set to one and all other variables set to zero) that the defendant's chances of succeeding in its fair use defense increase from 27.4% to 57.8% when the status of the plaintiff's work shifts from not-published to published—and not at all when the status of the plaintiff's work shifts from unpublished to not-unpublished.

From the perspective of a fair use maximalist, the data once again reveal an encouraging, and ironic, result. As above, the Supreme Court sought to establish that a certain finding (here, that the work is unpublished) *disfavors* fair use. Lower courts appear not to have acted on that

²¹³ See, e.g., *Maxtone-Graham v. Burtchaell*, 631 F. Supp. 1432, 1437 (S.D.N.Y. 1986) (“The advancement of the social sciences and public discourse on an important issue is enhanced by permitting liberal, but fair, use of such materials.”); cf. *Penelope v. Brown*, 792 F. Supp. 132, 138 (D. Mass. 1992) (“Although *Teaching About Doublespeak* is still in print and is sold in college bookstores, it cannot be said to be widely available to the public. Lack of availability lends Brown greater justification for reproducing it.”).

²¹⁴ See, e.g., *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 558 F. Supp. 1247, 1251 (W.D.N.Y. 1983) (“[C]opies of plaintiffs’ works may be obtained for short periods through normal channels, and this factor does not shift any weight towards defendants’ fair use contentions.”); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp. 1156, 1177 (W.D.N.Y. 1982) (“[A]ll the plaintiffs testified that they were readily able to supply and sell copies of their works In short, there are no factual characteristics necessary to justify fair use based upon the unavailability of the specific copyrighted works in this case.”).

dictum, however, other than to invert it to conclude that the opposite of that finding (here, that the work is published) *favors* fair use.²¹⁵

C. *Factor Three: Amount and Substantiality of the Use*

The third factor instructs courts to consider “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”²¹⁶ In other words, and as the great majority of the opinions recognized, this factor calls upon courts to evaluate—both on a quantitative and a qualitative scale—what proportion of the plaintiff’s work the defendant used.²¹⁷ We saw above that the outcome of factor three correlated strongly with the outcome of the overall test as well as with the outcomes of factors one and four. These correlations were especially strong when the third factor was found to favor fair use. This is not surprising. An insubstantial taking of the plaintiff’s work will not likely have an appreciable effect on the market for or value of that work and, perhaps on that ground alone, will likely trigger a finding of fair use. Indeed, of the 79 opinions that found that factor three favored fair use, 76 subsequently found fair use, and 72 of these also found that factor four favored that result.

Of all of the factors, the third factor boasts the most settled and easily understood doctrine. In general, the more the defendant takes of the plaintiff’s work, the less likely it is that the taking will qualify as a fair use. What if the defendant takes the entirety of the plaintiff’s work? Courts and commentators have asserted that, “generally, it may not constitute a fair use if the entire work is reproduced,”²¹⁸ though

²¹⁵ As between the creative/factual work inquiry and the published/unpublished work inquiry, which inquiry had the greater impact on the outcome of factor two? The data are inconclusive. All of the 11 opinions that addressed the use of a creative, unpublished work found that factor two disfavored fair use, and 6 of the 7 opinions that addressed the use of a factual, published work found that factor two favored fair use. These results are not surprising. What happens, however, when the two subfactors under the second factor point in opposite directions? Twenty-two opinions addressed the use of a creative, published work, and 19 of these found that factor two disfavored fair use, while 6 opinions addressed the use of a factual, unpublished work and 4 of these found that factor two disfavored fair use. From this, we can tentatively conclude that a work’s creative status trumps its published status, but that a work’s factual status does not necessarily trump its unpublished status.

²¹⁶ 17 U.S.C. § 107.

²¹⁷ Nevertheless, 10 opinions evaluated the extent of the taking as a proportion of the defendant’s work, and 2 evaluated the extent of the taking both as a proportion of the plaintiff’s work and as a proportion of the defendant’s work.

²¹⁸ *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998) (quoting *NIMMER*, *supra* note 139, § 13.05[A][3]).

“there may be certain very limited situations wherein copying of even the entire work for a different functional purpose may be regarded as a fair use.”²¹⁹ The data tell a slightly different story, one that suggests that these situations are not so limited. Of the 99 opinions that addressed facts in which the defendant took the entirety of the plaintiff’s work, 27.3% found fair use (albeit with 9 of these 27 opinions finding a transformative use, and 4 finding a nontransformative use). The story is more extreme in situations where the court finds that the defendant did or did not take the “essence” or the “heart” of the plaintiff’s work. Courts explicitly found that the defendant took the heart of the plaintiff’s work in 37 opinions, and found no fair use in 35 of these. Courts made the opposite finding—that the defendant did not take the heart of the plaintiff’s work—in 25 opinions, and found fair use in 23 of these.

Given the apparent dominance of the first and fourth factors, it is easy to underestimate the importance of the third-factor analysis to the outcome of the fair use test. But if we accept, as I will argue in a moment, that in nearly all situations, the fourth factor functions as a kind of metafactor under which courts synthesize their analyses of the first three factors, then we are in a position to appreciate how much of an impact the third factor actually has on the outcome of the fair use test—that is, on the outcome of the fourth factor. Here, the regression results reported in Table 9 are of special interest. They show that the subfactor considerations going to the taking of the entirety of the work, and in particular the heart of the work, exert a significant influence on the outcome of the test. Specifically, the regression analysis predicts that if a defendant makes a commercial use of a creative, published work, its chances of succeeding in its fair use defense decline from 35.5% to 12.0% if it is found to take the entirety of that work, and to 1.0% if it is found to take the heart of that work.

D. *Factor Four: Effect on the Market*

The fourth factor calls upon courts to consider “the effect of the use upon the potential market for or value of the copyrighted work.”²²⁰ As mentioned above, the *Harper & Row* Court declared that this factor was “undoubtedly the single most important element of fair

²¹⁹ NIMMER, *supra* note 139, § 13.05[D][1].

²²⁰ 17 U.S.C. § 107.

use,”²²¹ and 59.0% of the opinions following *Harper & Row* (but preceding *Campbell*) explicitly cited this proposition. A decade later, the *Campbell* Court attempted to bend the *Harper & Row* dictum. Again choosing to reconstrue rather than rescind and replace, the Court obliquely stated that, in determining the question of fair use, “[a]ll [factors] are to be explored, and the results weighed together, in light of the purposes of copyright.”²²² This intervention had a modest effect on the lower courts, as Figure 8 shows. Of the opinions following *Campbell*, 26.5% continued explicitly to state that factor four was the most important factor.

Whether the Supreme Court in its dicta on the issue was trying to describe the current state of the doctrine or prescribe what the doctrine should be is unclear. The conventional wisdom is that regardless of what the Supreme Court has said, the fourth factor analysis remains the most influential on the outcome of the overall test. The data support a different account, however, one which suggests that we have failed to appreciate the true role of the fourth factor analysis in the section 107 test as applied. The fourth factor essentially constitutes a metafactor under which courts integrate their analyses of the other three factors and, in doing so, arrive at the outcome not simply of the fourth factor, but of the overall test. Consider that of the 141 opinions that found that factor four disfavored fair use, 140 found no fair use. The one outlying opinion that found fair use reasoned, quite obtusely, that factor four “slightly disfavors a finding of fair use since plaintiff’s and defendant’s books are both directed towards the same audience.”²²³ Meanwhile, of the 116 opinions that found that factor four favored fair use, all but 6 found fair use. Four of the outliers reasoned that because there was no market for the plaintiffs’ works the factor could not favor the plaintiff,²²⁴ and the other 2 were Scientology cases in which the court reasoned that the defendants’ limited uses

²²¹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

²²² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

²²³ *Williamson v. Pearson Educ.*, No. 00-8420, 2001 U.S. Dist. LEXIS 17062, at *19 (S.D.N.Y. Oct. 19, 2001).

²²⁴ See *Batesville Servs. v. Funeral Depot, Inc.*, No. 02-01011, 2004 U.S. Dist. LEXIS 24336, at *25 (S.D. Ind. Nov. 10, 2004); *Lamb v. Starks*, 949 F. Supp. 753, 757 (N.D. Cal. 1996); *Lish v. Harper’s Magazine Found.*, 807 F. Supp. 1090, 1104 (S.D.N.Y. 1992); *Softel, Inc. v. Dragon Med. & Scientific Commc’ns, Inc.*, No. 87-0167, 1992 U.S. Dist. LEXIS 9502, at *54 (S.D.N.Y. June 30, 1992).

did not substantially impact the religion's efforts to retain or gain members.²²⁵

The synthetic and dispositive nature of the fourth factor analysis may explain why no real subfactors have developed under factor four—other than the three section 107 factors that precede it—and why courts have very rarely made specific factual findings under the factor. Instead, the vast majority of the opinions simply conducted what amounted to little more than an unstructured and conclusory rule-of-reason analysis.²²⁶ To the extent that courts structured their factor four analysis around anything, they structured it around various relatively feeble propositions of law. One is the presumption established by *Sony* that “[i]f the intended use is for commercial gain,” then a likelihood of market harm under factor four “may be presumed.”²²⁷ The *Campbell* Court sought to overwrite this dictum on which the Sixth Circuit majority opinion in *Campbell* had so heavily relied. The *Campbell* Court first simply rejected the presumption outright as “a presumption which as applied here we hold to be error.”²²⁸ Then the Court formulated a highly sensible refinement of the original presumption:

No “presumption” or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes. *Sony*'s discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the noncommercial context of *Sony* itself (home copying of television programming). In the former circumstances, what *Sony* said simply makes common sense: when a commercial use amounts to mere duplication of the entirety of an original, it clearly “supersede[s] the objects” of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.²²⁹

²²⁵ See *Religious Tech. Ctr. v. Lerma*, No. 95-1107, 1996 U.S. Dist. LEXIS 15454, at *28-31 (E.D. Va. Oct. 4, 1996); *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs., Inc.*, 923 F. Supp. 1231, 1248-49 (N.D. Cal. 1995).

²²⁶ Cf. Leval, *supra* note 93, at 1107 (“Decisions are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.”).

²²⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

²²⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

²²⁹ *Id.* (alteration in original) (citations omitted) (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (D. Mass. 1841)) (citing *Sony*, 464 U.S. at 451). The *Sony* Court stated that “[a] challenge to a noncommercial use of a copyrighted work requires proof ei-

But as Figure 8 shows, in the years following *Campbell*, many lower courts ignored or were ignorant of this refinement.²³⁰ Of the 108 opinions following *Sony* and preceding *Campbell*, 33 cited to *Sony*'s market harm presumption.²³¹ Of the 162 opinions following *Campbell*, 25 continued to cite to the original presumption (with 76.0% of these ultimately finding no fair use),²³² while only 14 cited to the *Campbell* modification of it (with 57.1% of these ultimately finding no fair use).²³³

Sony established another proposition of law, essentially a slippery slope principle, around which courts tended to structure their fourth factor analysis.²³⁴ *Campbell* reinforced this proposition, stating that the fourth factor “requires courts to consider not only the extent of mar-

ther that the particular 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. Though this dictum was directed toward noncommercial uses, courts, such as the *Campbell* Court, applied it, a fortiori, to commercial uses.

²³⁰ Consider the remarkable post-*Campbell* Ninth Circuit opinion that cited to *Harper & Row* for the proposition that the fourth factor is the most important and then cited both to the *Campbell* modification and to the original *Sony* presumption:

The last, and “undoubtedly the single most important” of all the factors, is the effect the use will have on the potential market for and value of the copyrighted works. *Harper & Row*, 471 U.S. at 566 The more transformative the new work, the less likely the new work’s use of copyrighted materials will affect the market for the materials. See *CBS Broad.*, 305 F.3d at 941. Finally, if the purpose of the new work is commercial in nature, “the likelihood [of market harm] may be presumed.” *A & M Records*, 239 F.3d at 1016 (quoting *Sony*, 464 U.S. at 451 . . .).

Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 630-31 (9th Cir. 2003) (alteration in original).

²³¹ Only 2 of these opinions found that the defendant’s use was transformative, and both of these opinions found that factor four, as well as the overall test, favored fair use. See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986) (finding fair use where the borrowing author “applied substantial intellectual labor to the verbatim quotations”); *Rubin v. Brooks/Cole Publ’g Co.*, 836 F. Supp. 909, 916 (D. Mass. 1993) (finding fair use where the unauthorized reprinting of a psychological scale was “productive and scholarly” and “encourage[d] the reader to question the validity of” the scale).

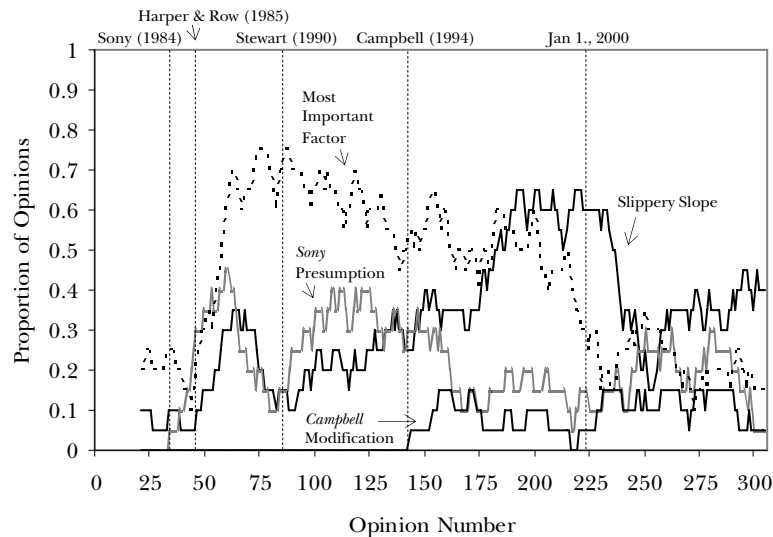
²³² In 5 of these opinions, the court explicitly found that the defendant’s use was transformative. Nevertheless, the court’s failure in each of these opinions to apply the *Campbell* modification does not appear to have adversely affected the outcome of the fair use test. In each of these 5 opinions, the court found that factor four and the overall test favored a finding of fair use.

²³³ In 6 of these 14 opinions, the court found under factor one that the defendant’s use was transformative, and in all but one of these 6, the court found that factor four and the overall test favored fair use. The one outlier was, as usual, *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D. Ga. 2001), *vacated*, 252 F.3d 1165 (11th Cir. 2001).

²³⁴ *Sony*, 464 U.S. at 451.

ket harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”²³⁵ Figure 8 shows the impact on the fair use case law, first of *Sony*’s, and then of *Campbell*’s endorsement of this principle. Like many other doctrinal statements made by the Court, the slippery slope principle enjoyed an initial rapid rise in fashion after each of its Supreme Court endorsements and then suffered just as rapid a fall, until it reached a kind of equilibrium, so that it has recently been cited in about 35% of lower courts’ fair use opinions. The data suggest that there was no significant relation at any time between a court’s citing to the slippery slope principle and its finding of no fair use.

Figure 8: Twenty-Opinion Moving Average of the Proportion of Opinions Citing Various Fourth Factor Propositions of Law



Ultimately, the paradox of the fourth factor is that it is everything in the fair use test and thus nothing. To assert, as a descriptive matter, that it is the most important factor—or, as a normative matter, that it

²³⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (citations omitted) (omission in original) (quoting NIMMER, *supra* note 137, § 13.05[A][4]).

is too important²³⁶—is meaningless, primarily because it is no factor, no independent variable, at all. Instead, regardless of what we might hope—or fear—it would be, the actual doctrine of the fourth factor consists in practice of a few propositions of law that judges should keep in mind as they synthesize the various factual findings that they have made under the previous factors—and 93.6% of the opinions analyzed the factors in their numerical order. In theory, section 107 instructs courts to conduct a balancing test along the four dimensions of its factors, “in light,” explains *Campbell*, “of the purposes of copyright.”²³⁷ In practice, judges appear to apply section 107 in the form of a cognitively more familiar two-sided balancing test in which they weigh the strength of the defendant’s justification for its use, as that justification has been developed in the first three factors, against the impact of that use on the incentives of the plaintiff.²³⁸ Factor four provides the analytical space for this balancing test to occur, and the various doctrinal propositions under factor four are merely there to tilt the scales one way or the other. In essence, like the four factors themselves, they are not legal propositions, but policy propositions.

V. CONCLUSION

At a general level, this Article has sought to show that the leading cases approach to our fair use case law is fundamentally flawed—both as a descriptive and as a prescriptive enterprise. It is flawed as a descriptive enterprise in that it fails accurately to represent the actual state of our fair use doctrine as that doctrine is applied in the courts.

²³⁶ As Leval noted,

Although the market factor is significant, the Supreme Court has somewhat overstated its importance. When the secondary use does substantially interfere with the market for the copyrighted work, as was the case in [*Harper & Row*], this factor powerfully opposes a finding of fair use. But the inverse does not follow. The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified. Thus, notwithstanding the importance of the market factor, especially when the market is impaired by the secondary use, it should not overshadow the requirement of justification under the first factor, without which there can be no fair use.

Leval, *supra* note 93, at 1124 (footnote omitted).

²³⁷ *Campbell*, 510 U.S. at 578.

²³⁸ See generally Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Commodification and Market Perspectives*, in *THE COMMODIFICATION OF INFORMATION* 149 (Neil W. Netanel & Niva Elkin-Koren eds., 2002) (applying tort law concepts of excuse and justification to fair use doctrine).

Its anecdotal method is unequal to the task of accounting for a complex system consisting of a multitude of judges, cases, and lines of doctrine. More importantly, but more subtly, the leading cases method is flawed as a prescriptive enterprise in that it perpetuates—because it requires—the myth that nonleading cases follow the leading cases. It is one thing to learn that academic scholarship has little apparent impact on the mass of our fair use case law,²³⁹ but it is something else entirely to learn that Supreme Court and renowned circuit court opinions do not necessarily have much of an impact either. We cannot hope to better the true state of our fair use doctrine—the doctrine as it is practiced in the courts—if we continue to assume that conventionally agreed upon leading cases carry prescriptive force.

At a more specific level, this Article has sought to induce, albeit selectively and critically, a set of salutary doctrinal practices in the area of fair use. If this empirical precedent deserves any degree of deference, if it should itself carry any prescriptive force, it is not because it comes from a higher court, but because it represents what most judges who have applied fair use doctrine have seen fit to do. The assumption that the Article has made in this regard, and certainly one that is open to criticism, is that we may trust a population of judges over time systematically to point the way to the better practice of the doctrine. It appears that for all of their fractiousness, judges applying fair use doctrine have done just that. Where the nonleading cases declined to follow the leading cases, they repeatedly—and systematically—did so in ways that expanded the scope of the fair use defense. To be sure, the data reveal many popular practices that impair the doctrine: courts tend to apply the factors mechanically and they sometimes make opportunistic uses of the conflicting precedent available to them. These are systematic failures that require intervention. Nevertheless, as a whole, the mass of nonleading cases has shown itself to be altogether worthy of being followed.

²³⁹ One rough index of the impact of academic scholarship on the fair use case law is the proportion of opinions that cited a law review article of any kind through the course of their fair use analysis. Of the 7 Supreme Court opinions, 4 (or 57.1%) did so, while 25.0% of the 88 circuit court opinions and 10.9% of the district court opinions did so. However, if we exclude Judge Leval's *Toward a Fair Use Standard* article, *supra* note 93, from this tabulation, the percentages decline to 50.0% of the Supreme Court opinions, 14.7% (or 13 of 88) of the circuit court opinions, and 5.7% (or 12 of 211) of the district court opinions. The law review article other than Leval's cited by the most courts was Gordon, *supra* note 7. Six courts cited to it.

APPENDIX: THE COLLECTION AND CODING OF THE OPINIONS

To collect a sample of the relevant opinions, I ran the following Lexis search in the Lexis *Federal Court Cases, Combined* database: copyright and “fair use” and 107 and date(geq (1/1/1978) and leq (12/31/2005)). This search yielded 557 opinions. I then ran the following Westlaw search in the Westlaw *All Federal Cases* database: copyright & “fair use” & 107 & da(aft 1977) & da(bef 2006). This yielded 575 opinions. A research assistant then reviewed the Lexis and Westlaw search results to identify any opinions reported uniquely in either Lexis or Westlaw. This review yielded a total 578 opinions from the two databases. A research assistant then reviewed each of these opinions to exclude those that did not involve in any way an issue of copyright fair use. This left 327 opinions. I then read each of these opinions and excluded an additional 20 opinions as irrelevant or only marginally relevant to copyright fair use. Of the 307 remaining opinions, 306 made substantial use of the section 107 four-factor test, which I defined as any use of the test that made reference, however briefly, to at least two test factors. I then coded each of the opinions directly into an Excel 2003 SP2 spreadsheet according to a coding instrument consisting of 72 variables. I did the same in a new spreadsheet a second time and then compared the two spreadsheets for errors.

The coding instrument was designed to record (1) general data about the opinion (e.g., caption, citation, judge, venue, posture), (2) copyright-specific data about the opinion (e.g., the extent of the court’s treatment of the fair use defense, the disposition of the defense, whether the facts involved software, the reverse engineering of software, and/or the Internet, whether the opinion addressed the First Amendment or parody), (3) factor-specific information about the opinion (e.g., which party the court found each factor to favor, how the court treated certain subfactor doctrine such as transformativeness or commerciality), and (4) various miscellaneous data about the opinion (e.g., whether the court cited any law review article, whether it cited legislative history, whether it relied on industry practice).

In a third round of coding, I loaded digital versions of the 306 opinions into Atlas.ti.²⁴⁰ I then conducted qualitative coding of each

²⁴⁰ For other legal scholarship employing Atlas.ti, a qualitative data analysis program widely used in the social sciences, see, for example, Art Jipson, *The Post-September 11th Era: Interpretations of Security and Civil Liberties in the Political Margins of the Left and Right*, 2003 J. INST. JUST. INT’L STUD. 40 (examining the attitudes of political figures to-

opinion according to a code list of 248 codes. One advantage of using Atlas.ti is that other researchers may review the Atlas.ti hermeneutic unit used for this study to verify each coding decision against the text of the opinions.

The coding instrument, Excel spreadsheet, Stata data file, and Atlas.ti hermeneutic unit are available upon request from the author and will be posted to the author's website upon publication of this Article.

ward terrorism using Atlas.ti); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129, 132 (2000) (analogizing qualitative questionnaire data using Atlas.ti).