

BRIGHT LIGHTS, BRIGHT-LINE: TOWARD SEPARATION AND REFORMATION OF THE TRANSFORMATIVE USE ANALYSIS

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INTRODUCTION

As the Internet’s utility continues to develop and expand, content and business models of websites and social networks have evolved accordingly, striving to provide the latest viral trends and news updates in real-time. BuzzFeed Inc. (“BuzzFeed”) is one of the fastest growing viral content websites available that presents some of the most popular and widely distributed articles on the Internet.¹ In an internal company memorandum, Jonah Peretti, founder and Chief Executive Officer of BuzzFeed, detailed the tremendous growth of the company since the company’s inception in 2006, highlighting a record number of eighty-five million unique visitors² to the website in August 2013.³

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¹ BuzzFeed is a social news and entertainment website. See BUZZFEED, <http://www.buzzfeed.com> (last visited Apr. 10, 2014). The website is divided into multiple categories including news, entertainment, life and video. *Id.* Within each main category are subcategories that lead to related articles written by BuzzFeed staff editors. *Id.* Pictures and images are used to illustrate the topics in the articles, often in a humorous, lighthearted manner. *Id.*

² Unique visitors is a reference to the number of distinct individuals who visit the website, regardless of the frequency at which they visit the site. *Unique Visitors*, PC MAGAZINE ENCYCLOPEDIA, <http://www.pcmag.com/encyclopedia/term/53438/unique-visitors> (last visited Apr. 10, 2014).

³ Jonah Peretti, *Memo to the BuzzFeed Team*, LINKEDIN (Sept. 4, 2013), https://www.linkedin.com/today/post/article/20130904212907-1799428-memo-to-the--team?_mSplash=1. In

BuzzFeed's business model is similar to other viral content aggregation websites. It relies on technology that detects viral content on the Internet, which is then subjected to an editorial selection process that compiles and presents the information and content to consumers.⁴ BuzzFeed rose to popularity through its notable methods of presentation, particularly for its use of "listicles," a shortened style of writing that is structured and arranged in the form of a list.⁵ However, as can be anticipated when dealing with a website with a business model that centers around collecting and sharing viral web content (e.g., photographs, images, and text from the Internet), controversies related to intellectual property, and in particular copyright protection, will inevitably arise.

BuzzFeed has been the subject of various copyright infringement lawsuits.⁶ The latest suit is a federal lawsuit filed by photographer Kai T. Eiselein.⁷ Eiselein alleges both direct and contributory copyright infringement for unauthorized use of Eiselein's photograph, "Contact," in one of BuzzFeed's infamous listicles, "The 30 Funniest Header Faces."⁸ Eiselein alleges that "Contact" was copyright protected on his Flickr account and impermissibly used by BuzzFeed's staff editor, Matt Stopera, thereby constituting copyright infringement.⁹ In response to inquiries regarding the copyright infringement lawsuits filed against BuzzFeed, Peretti advanced an argument that the fair use doctrine protects the photograph used in BuzzFeed's photomontages and listicles as a "transformative use."¹⁰ The fair use doctrine¹¹ and transformative use analysis¹² have developed over the years to address instances where

the memorandum, Peretti also noted that the company grew from zero revenue in 2009 to a profitable company with over 300 employees in 2013. *Id.*

⁴ Alyson Shontell, *INSIDE BUZZFEED: The Story Of How Jonah Peretti Built the Web's Most Beloved New Media Brand*, BUSINESS INSIDER (Dec. 11, 2012), <http://www.businessinsider.com/buzzfeed-jonah-peretti-interview-2012-12?op=1>. While the presentation of information and content to the consumers is critical, BuzzFeed's success is also largely owed to Peretti's emphasis on creating material and content that consumers will seek out and want to share with others in their lives. *Id.*

⁵ Definition of *Listicle*, COLLINS ENGLISH DICTIONARY, <http://www.collinsdictionary.com/submission/11257/Listicle> (last visited Apr. 10, 2014).

⁶ See Jeff John Roberts, *BuzzFeed Lawsuit Over Celeb Snaps Raises Copyright Questions*, GIGAOM (Oct. 17, 2012), <http://gigaom.com/2012/10/17/buzzfeed-lawsuit-over-celeb-snaps-raises-copyright-questions/>. See also DMLP Staff, *Righthaven LLC v. BuzzFeed, Inc.*, DIGITAL MEDIA LAW PROJECT (June 15, 2011), <http://www.dmlp.org/threats/righthaven-llc-v-buzzfeed-inc>.

⁷ Complaint at 1–2, *Eiselein v. BuzzFeed, Inc.*, No. 13 CV 3910 (S.D.N.Y. June 7, 2013), 2013 WL 3171845.

⁸ *Id.*

⁹ *Id.*

¹⁰ Kaylin Bugos, *BuzzFeed Faces \$3.6 Million Lawsuit for Copyright Infringement*, THE SPECTACLE BLOG (June 18, 2013), <http://spectator.org/blog/2013/06/18/BuzzFeed-faces-36-million-laws>.

¹¹ 17 U.S.C. § 107 (2012).

¹² See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

unapproved reproduction of copyrighted materials would not be considered an infringement of the author's rights.¹³

In a copyright infringement suit, the copyright owner has the burden of proving "ownership of a valid copyright and unauthorized copying by the defendant of substantial expression from the copyrighted work."¹⁴ However, when a defendant asserts fair use as an affirmative defense, he bears both the burden of production and persuasion, and must show the factors are balanced in his favor.¹⁵ *Eiselein v. BuzzFeed* illustrates the importance of analyzing transformative use in its application to the fair use doctrine and its impact on the statutory factors. Peretti's argument provides ample opportunity to reexamine the transformative use analysis.¹⁶ The current evolution of technology and expansion of the Internet will inherently necessitate affirmative defenses, such as transformative use, that future defendants, like Peretti, will likely raise in fair use cases.¹⁷

The transformative use analysis plays a critical role in deciding and influencing fair use outcomes and therefore must be of central focus to both copyright holders and secondary users. Empirical studies have been conducted on fair use opinions in an attempt to elucidate exactly which factors and sub-factors determine fair use case outcomes.¹⁸ Professor Matthew Sag's mathematical study in *Predicting Fair Use* is particularly influential through its focus on what courts have specifically done in 280 fair use cases between January 1, 1978 and May 31, 2011.¹⁹ Sag measured the statistical correlation between fair use outcomes and numerous factual patterns, and determined that a reliable and comprehensive application of the transformative use doctrine required that the use generally should be held as transformative since transformative uses are favored to be fair uses.²⁰ Sag defines

¹³ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990).

¹⁴ William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 698 (1993).

¹⁵ 17 U.S.C. § 107 (2012).

¹⁶ Alexis C. Madrigal, *Where Do All Those BuzzFeed Cute Animal Pictures Come From?*, THE ATLANTIC (Apr. 30, 2012), <http://www.theatlantic.com/technology/archive/2012/04/where-do-all-those-buzzfeed-cute-animal-pictures-come-from/256547/>.

¹⁷ As Matthew Sag explains:

In the digital age, innovation and freedom of expression increasingly require the use, reinterpretation, and remixing of copyrighted content; the fair use doctrine is often the only aspect of copyright law that makes these activities possible. It is not simply end users who rely on fair use: the doctrine is an essential part of the legal architecture of Internet search, Web 2.0 enterprises and social networking technologies.

Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 49 (2012).

¹⁸ See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003); Pamela Samuelson, *Unbundling Fair Use*, 77 FORDHAM L. REV. 2537 (2009).

¹⁹ See Sag, *supra* note 17, at 52.

²⁰ [H]olding everything else constant, the chances of a fair use win are almost double, increasing from 33% to 62%, when this kind of transformative use is present. . . . [N]ot

transformative work as “one that imbues the original ‘with a further purpose or different character, altering the first with new expression, meaning, or message.’”²¹ Sag’s study highlights the importance of transformative use in the fair use analysis in finding that “transformative use by the defendant is a robust predictor of a finding of fair use.”²²

By taking Sag’s findings further, some have argued “transformative use has no content at all and that it is simply synonymous with a finding of fair use.”²³ While it would be unwise to create such a bright-line and *per se* test for finding fair use,²⁴ the boundaries and limits of the transformative use analysis should be more narrowly tailored and defined to prevent defendants, such as BuzzFeed, from claiming this affirmative defense against blatant unauthorized use of a copyrighted work.²⁵ Some legal scholars view the current transformative use analysis as an already rigid, bright-line application to the fair use doctrine, given the strong correlation between a court’s determination of transformative use and its overall decision on fair use.²⁶ However, as illustrated by the *Eiselein v. BuzzFeed* decision, the transformative use analysis is not limited enough in its scope. The broad scope of the transformative use analysis permits exaggerated claims of protection under the fair use doctrine by infringers. Ultimately, the transformative use analysis should be tailored towards a bright-line rule, although not as rigidly definitive, to effectively apply and evolve with the increasingly vast pictorial content uploaded to the Internet.

This Note examines the development of the fair use doctrine and transformative use analysis as applied to photographs and images. It also explores the need for jurisprudence to continue to develop in order to address new issues that arise as a result of technological and Internet advancements to adequately protect the rights of copyright holders. Part

knowing anything else about the defendant’s use, a plaintiff can expect to win a clear majority of cases where there is no indication of transformative use, but otherwise expect to lose all but 38% of the time.

Id. at 76.

²¹ *Id.* at 84 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579).

²² *Id.*

²³ *Id.* at 57.

²⁴ As William F. Patry and Shira Perlmutter explain:

The damage to fair use extends to every aspect of the doctrine. The most serious problems, however, have been manifested in application of the first and fourth factors set out in section 107 By misinterpreting the language of the statute and reading too much into dicta . . . some courts have altered radically the traditional approach to the doctrine.

Patry & Perlmutter, *supra* note 14, at 670–71.

²⁵ “[O]ver 40% of the 2006–2010 opinions where the defendant copied the entire work without alteration found that the defendant’s use was transformative, and over 90% of those uses were held to be fair use.” Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 748 (2011).

²⁶ Sag, *supra* note 17, at 57.

I discusses the history and unique business model of BuzzFeed. Part II provides a discussion of the corresponding legal issue of the copyrightability of photographs and images, with an emphasis on the difficulties faced in this area of law. Part III discusses the development and codification of the fair use doctrine, including a brief overview of its four factors. Part IV analyzes the development of the transformative use analysis, and explores the rationale behind the transformative use test. It also surveys its advantages, shortcomings, and its application in recent cases involving photographs on the Internet. Part V will provide the legal framework under which the transformative use test will be analyzed. This section utilizes *Eiselein v. BuzzFeed* as a test case to discuss how the court is likely to hold, as well as the implications that the court's potential holdings will have, on similar websites with viral business models. Lastly, this section provides recommendations for how the transformative use test should be interpreted in future cases involving photographs used on viral content websites, as well as suggestions for more defined revisions to both the transformative use analysis and guidelines for website staff editors in procuring and sharing photographs from the Internet.

I. BUZZFEED'S VIRAL CONTENT BUSINESS MODEL

Peretti has been referred to as “the Web’s king of viral content.”²⁷ His first renowned Internet creation was “The Huffington Post,” a collaboration with Ken Lerer and Arianna Huffington in 2005.²⁸ The Huffington Post’s success is credited in part to Peretti’s focus and keen interest in the mechanism behind the spreading of ideas and scientific characteristics of viral content— “[u]sing search optimization, he knew what people wanted almost before they did.”²⁹ Peretti created BuzzFeed as a side project while working at The Huffington Post.³⁰ He used BuzzFeed to explore what types of content people were interested in and likely to share on the Internet.³¹

BuzzFeed’s success is attributed greatly to Peretti’s development

²⁷ Shontell, *supra* note 4. Peretti’s interest and ability in generating viral web content began long before his creation of BuzzFeed, dating as far back as Peretti’s college career, when an e-mail from Nike refusing his request to customize a pair of shoes reading “sweatshop” on the side went viral. *Id.* The email exchange between Peretti and Nike was featured in the Wall Street Journal and on primetime news. *Id.*

²⁸ *Id.* Peretti graduated from MIT Media Lab with an expertise in viral content. “He took those skills to The Huffington Post, where he was the wizard in back of the curtain, brewing a bubbling cauldron of tatty celebrity news and goofy cat shots behind a front page of serious news and commentary.” David Carr, *Significant and Silly at BuzzFeed*, N.Y. TIMES (Feb. 5, 2012), <http://www.nytimes.com/2012/02/06/business/media/at-buzzfeed-the-significant-and-the-silly.html>.

²⁹ *Id.*

³⁰ Shontell, *supra* note 4.

³¹ Carr, *supra* note 28.

of technology that helped identify viral media content that was being posted and shared widely, as well as his realization that people “want to see content that someone else in their life that they care about will like, even if they don’t like it very much.”³² Peretti’s realization transformed the business model from simply having readers visit the website to view popular content, to an emphasis on finding content that drives readers to the website in order to find content to share with others in their lives.³³ Peretti explains to the New York Times:

As the consumer Web has matured, readers have become minipublishers, using social media platforms to share information they think will entertain and enlighten their friends. No longer is it just about so-called sticky content that keeps readers around, or even clicky content that causes them to hit a link; it’s also about serving up content that is spreadable.³⁴

Peretti has stated, “I care a lot about whether we’re consistently creating content that people think is worth sharing We’re focused on the long term of having really healthy metrics and having people really love the site.”³⁵

Peretti’s emphasis on finding content that will attract unique visitors to the website has also contributed to the distinct technique of “native advertising” employed by BuzzFeed, which is the use of “sponsored posts that can be about particular products or anything that might interest a company’s target audience.”³⁶ Such native advertising has enabled Peretti to boast of \$20 million in revenue generated in 2012 without the use of a single banner advertisement.³⁷ The new standard of advertisement, in Peretti’s opinion, should be ads that are “engaging and are ripe for sharing.”³⁸ The use of native advertising is a unique aspect of BuzzFeed’s business model. Advertisements featured on BuzzFeed are co-created by the staff and positioned among the regular content.³⁹ The advertisements are sponsored posts that may generate interest among the company’s target audience.⁴⁰ However, the major difference between BuzzFeed’s ads and the more common single banner

³² Shontell, *supra* note 4.

³³ *Id.*

³⁴ Carr, *supra* note 28.

³⁵ Shontell, *supra* note 4.

³⁶ Andy Goldberg, *BuzzFeed’s Website: Is it the Enemy or the Future?*, BUSINESS RECORDER, (Oct. 6, 2013), <http://www.brecorder.com/pages/article/1238552/2013-10-06/BuzzFeeds-website:-is-it-the-enemy-or-the-future.html>.

³⁷ Peretti, *supra* note 3.

³⁸ Ryan Kim, *BuzzFeed’s Peretti: Design Engaging Ads Made for Sharing*, GIGAOM (Apr. 17, 2012, 10:51 AM), <http://gigaom.com/2012/04/17/BuzzFeeds-peretti-design-engaging-ads-made-for-sharing/>.

³⁹ *Id.* Advertisements are distinguishable from regular posts by the different color used and partner tag mark. *Id.*

⁴⁰ Goldberg, *supra* note 36.

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advertisements is the potential for the ad content itself to go viral.⁴¹ “Peretti [has] said every company has content: it’s just a matter of packaging it in a way that’s easy to share.”⁴² Peretti forecasts the trend is shifting from search algorithms to social—encouraging advertisers to create more personal and creative ads to engage their target demographic, create conversations with users, and build momentum for the product and company through continued sharing of the ad.⁴³

Another contributing factor to BuzzFeed’s prominence as a social website is the creative way in which the editors package and present information to consumers. As previously mentioned, BuzzFeed’s name is synonymous with its use of listicles, which include pictures and images that BuzzFeed’s staff editors procure from the Internet and organize into a photo montage.⁴⁴ However, it is also this inventive method that has contributed to the initiation of the website’s legal issues and questioned liability—the impermissible use of a photograph in a listicle and its potential to be considered fair use under the transformative use analysis.⁴⁵

This issue of copyright protection is significant, particularly in our digital age, because many other websites, such as “Upworthy”⁴⁶ and “For the Win,”⁴⁷ mirror BuzzFeed. The successful editorial model of finding viral web content, developed and perfected by BuzzFeed, leaves these webpages similarly vulnerable and susceptible to litigation in the event of improper or complete absence of attribution, where a license has not been acquired from the copyright holder.⁴⁸ Setting aside the viral content aggregation nature of these webpages, the issue of

⁴¹ As an example, Schick’s Shave the World “Razorbombing” campaign on BuzzFeed garnered 19 million views on the website alone. Shontell, *supra* note 4.

⁴² Kim, *supra* note 38.

⁴³ *Id.*

⁴⁴ See BUZZFEED, *supra* note 1.

⁴⁵ In addition to *Eiselein v. BuzzFeed*, BuzzFeed was also sued by Mavrix Photo in 2012 for publishing nine celebrity photographs. Mavrix alleges BuzzFeed intentionally misused the photographs in an effort to drive more traffic to its website and claims damages of up to \$150,000 per infringement. Mavrix’s complaint was dismissed with prejudice on February 5, 2013. Jeff John Roberts, *BuzzFeed Lawsuit Over Celeb Snaps Raises Copyright Questions*, GIGAOM (Oct. 17, 2012), <http://gigaom.com/2012/10/17/buzzfeed-lawsuit-over-celeb-snaps-raises-copyright-questions/>. See also DMLP Staff, *Righthaven LLC v. BuzzFeed, Inc.*, DIGITAL MEDIA LAW PROJECT (June 15, 2011), <http://www.dmlp.org/threats/righthaven-llc-v-buzzfeed-inc> (Righthaven LLC filed a copyright infringement lawsuit against BuzzFeed for impermissible use of a photograph of a TSA agent originally published in The Denver Post. BuzzFeed counterclaimed for copyright abuse and unfair and deceptive trade practices as evidenced by Righthaven’s fifty-seven other filed copyright infringement litigations. The action was stayed following BuzzFeed’s answer and counterclaims).

⁴⁶ Upworthy, similar to BuzzFeed, is a website for viral content. See UPWORTHY, <http://www.upworthy.com> (last visited Apr. 10, 2014). Upworthy emphasizes positive and “meaningful” content and messages. *Id.*

⁴⁷ For the Win displays viral sports-related content. See FOR THE WIN, <http://ftw.usatoday.com> (last visited Apr. 10, 2014).

⁴⁸ Roberts, *supra* note 45.

copyrightability of photographs and images on the Internet holds broader implications for both the photographer who uploads his original work and Internet users, or website and domain owners.⁴⁹ Given the relative ease and access with which one can now acquire an image shared by the photographer, as the volume of content made available on the Internet increases, the potential of violating copyright protections and subsequent threats of litigation accordingly rises.⁵⁰ Therefore, lawmakers must propose regulations to protect copyright owners.

II. COPYRIGHT PROTECTION OF PHOTOGRAPHS AND IMAGES

The Copyright Act of 1976 provides copyright protection in the United States.⁵¹ The Act extends protection to “pictorial” work, which is specifically deemed to include “photographs.”⁵² The copyright statute historically had a utilitarian purpose at its core. As Judge Pierre N. Leval explains in *Toward a Fair Use*, the relevant text of the Constitution provides several indicators in confirmation of the statute’s goal.⁵³ First, Leval argues that by grouping “authors and inventors” and “writings and discoveries,” the framers were suggesting a likeness between the two classifications.⁵⁴ The Constitution also implies that the authors’ and inventors’ “exclusive right” to their “respective Writings and Discoveries” were provided solely by virtue of statutory enactment.⁵⁵ The right given to the authors and inventors was granted “for limited times,” confirming that the right was an inherent one, as opposed to an absolute or moral right.⁵⁶ However, the copyright law and the protection subsequently afforded by it, clearly signifies acknowledgment of the vitality that creative intellectual activity provides to societal well-being.⁵⁷

Copyright law has evolved over the years, particularly and necessarily in response to rapid technological advancements.⁵⁸ The

⁴⁹ See Justin Hughes, *The Photographer’s Copyright – Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 327, 328 (2012).

⁵⁰ *Id.*

⁵¹ 17 U.S.C. § 107 (2012). “Congress’s power to enact this statute derives directly from the Constitution, which states that “[t]he Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings and Discoveries.” See also Jeremy Kudon, *Form Over Function: Expanding the Transformative Use Test For Fair Use*, 80 B.U. L. REV. 579, 584 (2000).

⁵² Daxton R. “Chip” Stewart, *Can I Use This Photo I Found on Facebook? Applying Copyright Law and Fair Use Analysis to Photographs on Social Networking Sites Republished for News Reporting Purposes*, 10 J. TELECOMM. & HIGH TECH. L. 93, 98 (2012).

⁵³ Leval, *supra* note 13, at 1108; see also 17 U.S.C. § 107 (2012).

⁵⁴ Leval, *supra* note 13, at 1108.

⁵⁵ *Id.*; U.S. CONST. art. I, § 8, cl. 8.

⁵⁶ 17 U.S.C. § 302(a) (2012).

⁵⁷ Leval, *supra* note 13, at 1109.

⁵⁸ “It is a truism that developments in copyright law are largely driven by technological change.” Hughes, *supra* note 49, at 328.

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question of the copyrightability of photographs and images was no exception and has been the subject of debate and discussion for years.⁵⁹ “Photography was the technological development that posed the most serious challenge to copyright’s theoretical structure in the nineteenth century, and it did this because it challenged our understanding of creativity.”⁶⁰

According to Professor Justin Hughes, the main difficulty lies in reconciliation of the protection of photographs with copyright’s originality standard.⁶¹ Courts acknowledge that “[c]opyrights attach to photographs at the moment they are created, with the copyright belonging to the photographer as the author.”⁶² However, in order to serve as prima facie evidence of originality of the work, a photographer must register his or her copyright within five years of creation.⁶³ Amateur photographers are susceptible to unauthorized uses since they publish photographs on the Internet without formally filing for copyright, resulting in increased cost and difficulty in litigation against a secondary user.⁶⁴ Even more challenging are the fair use arguments advanced by secondary users that photographers must contend with, which will only become progressively more difficult to litigate as the quantity of information and content shared on the Internet grows.⁶⁵

III. FAIR USE DOCTRINE

The fair use doctrine formed in response to the judicial recognition of specific situations in which the unauthorized use of copyrighted material would not infringe on the author’s rights.⁶⁶ The goal of allowing certain otherwise impermissible uses under the fair use doctrine was to continue to encourage creativity and innovation, which aligns with the purpose and objective in the initial formation of copyright law—“to increase and not to impede the harvest of knowledge.”⁶⁷ According to Judge Leval, the necessity of the fair use doctrine, separate from and seemingly in opposition to copyright protection, acknowledges the concept that “excessively broad protection would stifle, rather than advance, the objective.”⁶⁸ Leval advances three reasons in support of the existence of the fair use doctrine: (1) the

⁵⁹ *Id.*

⁶⁰ *Id.* at 329. (Professor Hughes emphasizes, however, that there are few artistic or creative practices that did not already exist, albeit on a smaller scale, before the Internet).

⁶¹ *Id.* at 330.

⁶² Stewart, *supra* note 52, at 98.

⁶³ 17 U.S.C. § 411(a) (2012).

⁶⁴ Stewart, *supra* note 52, at 99.

⁶⁵ *Id.*

⁶⁶ Leval, *supra* note 13, at 1109.

⁶⁷ *Id.* at 1107.

⁶⁸ *Id.* at 1109.

necessity of protection against monopolies in order to continue to foster creativity and authorship;⁶⁹ (2) the idea that “all intellectual creative activity is in part derivative;”⁷⁰ and (3) that “important areas of intellectual activity are explicitly referential.”⁷¹

While Congress and the courts have recognized the importance of continued intellectual creativity and authorship, they also recognized the potential for authors and inventors to exploit these limited inherent rights.⁷² Thus, Congress incorporated the fair use doctrine under Section 107 of the Copyright Act of 1976, through an amendment enacted in 1978, which expressly states that “the fair use of a copyrighted work . . . is not an infringement of copyright.”⁷³ The doctrine provides four factors to evaluate whether a particular use falls under fair use:

- (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 on the potential market for or value of the copyrighted work.⁷⁴

The apparent straightforwardness of the factors is misleading, given the various interpretations and tests that courts have employed in applying the factors in a case-by-case analysis of this initially judge-made doctrine.⁷⁵ Judge Leval addresses the confusion created by the fair use factors and criticizes what has been previously accepted by most judges as “assumed common ground,”⁷⁶ that “[t]hese formulations . . . furnish little guidance on how to recognize fair use.”⁷⁷

The first factor focuses on the “purpose and character of the use,” which can be illustrated as a continuum of purely commercial works on one end of the spectrum and purely nonprofit educational works on the

⁶⁹ Leval describes the copyright protection as “a pragmatic measure by which society confers monopoly-exploitation benefits for a limited duration on authors and artists . . . in order to obtain for itself the intellectual and practical enrichment that results from creative endeavors.” *Id.*

⁷⁰ Leval explains that all ideas and inventions are premised and “stands on building blocks fashioned by prior thinkers.” *Id.*

⁷¹ Intellectual activity requires “continuous reexamination of yesterday’s theses.” *Id.*

⁷² *Id.*

⁷³ *Id.* at 1105.

⁷⁴ 17 U.S.C. § 107 (2012). See generally 1 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBL. & THE ARTS § 1:25 (3d ed. 2013).

⁷⁵ “[C]ourts have twisted the literal language many times in order to arrive at a desired result.” 1 LINDEY & LANDAU, *supra* note 74, § 1:25.

⁷⁶ Leval, *supra* note 13, at 1106.

⁷⁷ *Id.* at 1105–06.

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other.⁷⁸ Most importantly, this factor evolved in the 1990s to include the concept of “transformative use.”⁷⁹ The argument advanced for the concept of transformative use is that, “an unauthorized use that transforms an underlying work into a new work should be more ‘fair’ than a use that merely copies the work.”⁸⁰ Judge Leval states that “[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”⁸¹ The first factor holds great weight among the four statutory factors in determining fair use: “[a] finding of justification under this factor seems indispensable to a fair use defense.”⁸²

The second factor, “the nature of the copyrighted work,” can be illustrated through a continuum where purely creative works, such as music, film, and nonrepresentational art work are on one end and informational works are on the other.⁸³ The second factor protects the incentives of authorship and inherently implies that certain copyrighted materials are more easily considered fair use than others.⁸⁴ As a general principle, “[t]he more creative the work, the less one should be able to appropriate without liability.”⁸⁵ Judge Leval states that “[t]he more the copyrighted matter is at the center of the protected concerns of the copyright law, the more the other factors, including justification, must favor the secondary user in order to earn a fair use finding.”⁸⁶

The third factor, the “amount and substantiality of the portion used in relation to [the] copyrighted work as a whole,” is very indeterminate and consequently, subject to debate and litigation.⁸⁷ “In general, the larger the volume (or the greater the importance) of what is taken, the greater the affront to the interests of the copyright owner, and the less likely that a taking will qualify as a fair use.”⁸⁸ In its initial application, the substantiality of the portion of the copyrighted work used was determined and examined on the basis of whether the amount was “quantitatively substantial,” which examines the portion taken in comparison to the total underlying copyrighted work.⁸⁹ The amount of the work taken is arguably irrelevant because it would not have been

⁷⁸ Courts are typically more willing to find a secondary use is fair when it produces value that benefits the broader public interest. 1 LINDEY & LANDAU, *supra* note 74, § 1:25.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Although identification of transformative use holds great weight, the transformative justification must still overcome other factors that work in the favor of the copyright owner. Leval, *supra* note 13, at 1111.

⁸² *Id.* at 1116. (“Factor One is the soul of fair use.”).

⁸³ 1 LINDEY & LANDAU, *supra* note 74, § 1:25.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Leval, *supra* note 13, at 1122.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 1 LINDEY & LANDAU, *supra* note 74, § 1:25.

used if it had not been “qualitatively substantial.”⁹⁰ This mistakenly leads to potentially considering all unauthorized uses as “qualitatively substantial,” arguably defeating the purpose of the fair use doctrine.⁹¹

Furthermore, some courts have deviated from the original test of analyzing the taken work in comparison to the underlying copyrighted work.⁹² Instead, some courts have compared the portion taken to the size of the defendant’s work rather than comparing the portion taken to the plaintiff’s entire original work, ultimately leading to incorrect conclusions.⁹³ However, the third factor has been a significant influence in the assessment of “transformative use factors,” which include the purpose and character of secondary use, as well as the market effects factors.⁹⁴ In regards to the first factor of purpose and character of secondary use, the substantiality of portion used in relation to the copyrighted work as a whole affects the justification that may exist for transformative work. For example, “[a] solid transformative justification may exist for taking a few sentences that would not, however, justify a taking of larger quantities of material.”⁹⁵ As to the second factor, it follows that generally “the more taken the greater the likely impact on the copyright holder’s market, and the more the factor favors the copyright holder.”⁹⁶ The intersection of the factors illustrates a necessity for courts to evaluate the significance of the third factor against the copyright objectives to determine justification for the unauthorized use.

The final factor, designated by the Supreme Court as “the single most important element of fair use,”⁹⁷ is the “effect of the use upon the potential market for or value of the copyrighted work.”⁹⁸ This fourth factor, in conjunction with the first factor of the “purpose and character of the use,” embodies and influences the transformative use test.⁹⁹ Although courts typically determine whether a use is transformative to serve a different purpose than the copyrighted work under the first factor, the outcome will inevitably affect the market value of the copyrighted work.¹⁰⁰ General application of the factor dictates that “[w]hen the injury to the copyright holder’s potential market would substantially impair the incentive to create works for publication, the objectives of the copyright law require that this factor weigh heavily

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Leval, *supra* note 13, at 1123.

⁹⁶ *Id.*

⁹⁷ Leval disagrees and states that “the Supreme Court has somewhat overstated its importance.” *Id.* at 1124.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 1 LINDEY & LANDAU, *supra* note 74, § 1:25.

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against the secondary user.”¹⁰¹

In addition to the four factors explicitly stated in the Copyright Act of 1976, unnamed factors also have a substantial effect on fair use determinations. The fair use analysis considers three unnamed “false factors”: (1) good faith; (2) artistic integrity; and (3) privacy.¹⁰² The false factor of good faith, in particular, relates to our discussion of fair use and the transformative use analysis.¹⁰³ This “morality” factor focuses on “whether [the secondary user’s] creation claiming the benefits of the doctrine is of the type that should receive those benefits.”¹⁰⁴ Judge Leval stresses that this morality test supports recognition of the scope and goals of copyright laws in protecting profits of activity that is beneficial to society, such as public education.¹⁰⁵ This false factor, although largely embodied in the first and fourth factor of the fair use doctrine, adds a unique dimension to the deliberation of transformative use.

As illustrated by the brief review of the four established fair use factors and the relevant “false factor,” the standard for fair use consideration is inherently unclear and far from a bright-line test. Judge Leval questions whether this imprecision of the fair use doctrine should be considered a strength or a weakness.¹⁰⁶ On the one hand, the lack of a clear guide for secondary users as to what constitutes fair use and clear rules to govern their conduct makes it significantly more difficult for users to comport with the fair use doctrine.¹⁰⁷ However, courts find it immensely difficult to create general principles that can be applied to all cases.¹⁰⁸ “A definite standard would champion predictability at the expense of justification and would stifle intellectual activity to the detriment of the copyright objectives.”¹⁰⁹ This argument led Leval to conclude that “[w]e should not adopt a bright-line standard unless it were a good one—and we do not have a good one.”¹¹⁰ Nevertheless, the fair use doctrine, and more specifically, transformative use analysis, would benefit from approaching closer to a bright-line rule, as opposed to the unpredictable standard that has been applied by courts. A well-defined standard would provide greater certainty and stability to both copyright

¹⁰¹ Leval, *supra* note 13, at 1125.

¹⁰² *Id.* at 1125–30.

¹⁰³ *Id.* at 1125.

¹⁰⁴ *Id.* at 1126. (“This decision is governed by the factors reviewed above – with a primary focus on whether the secondary use is productive and transformative and whether it causes excessive injury to the market for the original.”). *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1135.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

owners and secondary users.¹¹¹

IV. TRANSFORMATIVE USE ANALYSIS

The transformative use analysis developed organically through application and interpretation of the fair use doctrine. The first factor in fair use analysis, the “purpose and character of the use,” emphasizes determination of whether the secondary work achieves stimulation of creativity for the public’s benefit.¹¹² Some consider the most important aspect of the “purpose and character of the use” to be the “existence and extent of the secondary work’s transformative nature.”¹¹³ In order to be considered transformative use:

The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A [secondary work] that merely repackages or republishes the original is unlikely to pass the test . . . it would merely ‘supersede the objects’ of the original. If, on the other hand, 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—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.¹¹⁴

Adding a transformative use dimension to the first fair use factor would bring clarity to the imprecision and vague application of the doctrine.

Professor Sag defined a transformative work as “one that imbues the original ‘with a further purpose or different character, altering the first with new expression, meaning or message’ . . . [and] it requires a judgment of the motivation and meaning of those differences.”¹¹⁵ This definition embodies the difference between a transformative and derivative work, a crucial difference to understand the transformative use analysis. A derivative work tends to look to the degree of difference between the two works, whereas a transformative work focuses on the difference in meaning and addition of value to the original work.¹¹⁶

The Supreme Court first applied and endorsed the transformative use analysis in *Campbell v. Acuff-Rose Music, Inc.*¹¹⁷ The court

¹¹¹ *Id.*

¹¹² Leval refers to the first factor as “the heart and soul of a fair use case” assessment. Kudon, *supra* note 51, at 589.

¹¹³ *Id.* at 590.

¹¹⁴ Leval, *supra* note 13, at 1111.

¹¹⁵ See Sag, *supra* note 17, at 56.

¹¹⁶ See *id.* See also Kudon, *supra* note 51, at 592 (Kudon states “the only recognizable differences between the tests are: (1) Leval appears to require a socially enriching contribution rather than independent expression and (2) the secondary use must be for a different purpose or manner, rather than just a different market.”).

¹¹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

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embraced the transformative use analysis as a key ingredient of fair use in deciding the extent of permissible copying in a musical parody of the popular song *Oh, Pretty Woman* performed by the rap group 2 Live Crew without permission from the publisher, Acuff-Rose.¹¹⁸ The Supreme Court reviewed the four statutory factors, emphasizing transformative use in consideration of the first factor of purpose and character of the use, and held that parody is a form of transformative use that “provide[s] social benefit, by shedding light on an earlier work, and, in the process, creating a new one.”¹¹⁹ The Court stated that transformative use was not absolutely necessary in finding fair use.¹²⁰ However, transformative works further the goal of copyright law, that is, to encourage creative intellectual activity.¹²¹ The Court also applied transformative use to the fourth factor, the effect of the use upon the potential market for the copyrighted work, and found that the effect of the secondary transformative work on market substitution was “at least less certain, and market harm may not be so readily inferred.”¹²²

The significance of the *Campbell* decision in establishing the transformative use test “as a mandatory requirement in future fair use adjudication”¹²³ extends beyond its importance as the first application and only interpretation of the transformative use analysis by the Supreme Court. According to the *Campbell* Court, transformativeness not only goes to the heart of the fair use doctrine, but also diminishes the importance of the other factors in a way that “the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use.”¹²⁴ Further, the Court defined two potential alternatives for transformative use: “[t]he first involves transforming the expressive content of the original work by modifying or adding new expression to the original The second involves transforming the meaning or message of the original.”¹²⁵

Since *Campbell*, the lower courts’ application of the transformative use test has varied widely.¹²⁶ The variation in opinion suggests that courts generally classify allegedly infringing works using three categories: “(1) [s]econdary works that add no original expression; (2) secondary works that add original expression, but not in the form of criticism, commentary or scholarship; and (3) secondary works that add

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 579.

¹²⁰ *Id.*

¹²¹ Leval, *supra* note 13, at 1109.

¹²² *Campbell*, 510 U.S. at 591. Justice David H. Souter found that in the context of a parody, the parody and original work usually serve different market functions and the parody would be less likely to act as a substitute for the original work. Kudon, *supra* note 51, at 594.

¹²³ Kudon, *supra* note 51, at 595.

¹²⁴ *Campbell*, 510 U.S. at 579.

¹²⁵ Netanel, *supra* note 25, at 746.

¹²⁶ Kudon, *supra* note 51, at 583.

original expression that clearly constitute criticism, commentary or scholarship.”¹²⁷ Generally, only works belonging to the third category qualify under the transformative use analysis.¹²⁸ Works within the first category are “never considered transformative due to their lack of explicit, additional creative value.”¹²⁹ Works that fall under the second category typically meet the statutory definition of a derivative work.¹³⁰ However, they present the greatest ambiguity because Judge Leval and Justice David H. Souter do not sufficiently address the distinction between a derivative and transformative work in *Toward A Fair Use Standard* and the *Campbell* decision, respectively.¹³¹ Finally, the third group of secondary works falls within either the preamble to Section 107¹³² or *Campbell*’s reasoning, which allows for application of “*per se* transformative use.”¹³³ As a result of this favorable outcome, alleged infringing users within the first two categories typically advance arguments that stress a purpose embodied in the third category.

This sorting system is a function of judicial resolution of inherent issues in Leval’s initial formulation of the transformative use test—“the lower courts’ lack of guidance regarding the distinction between transformative and derivative work¹³⁴ . . . [and] Leval’s *per se*, non-transformative finding for secondary uses that add no original expression or creative modification to the original work.”¹³⁵ The latter

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 597–98.

¹³⁰ The statutory definition of a derivative work includes “any . . . form in which a work may be recast, transformed, or adapted.” 17 U.S.C. § 101 (2012).

¹³¹ See Leval, *supra* note 13; see generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹³² Notwithstanding the provisions of 17 U.S.C. §§ 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. 17 U.S.C. §107 (2012).

¹³³ Kudon, *supra* note 51, at 583.

¹³⁴ Kudon, *supra* note 51, at 605.

Leval confirmed the difficulty of distinguishing a derivative from a transformative work He stated that “[t]he creator of a derivative work based on the original creation of another, may claim absolute entitlement [of a transformative use] because of the transformation.” This statement indicates that a derivative work is, by its very nature, a transformative use. Leval, however, never adequately addressed this problem, essentially claiming that other statutory factors may outweigh the transformative nature of such a secondary use and preclude a finding of fair use.

Id. at 592–93 (alteration in original) (footnotes omitted).

¹³⁵ Kudon’s article provides the opposing view to this Note and argues that “the transformative use test has removed ‘the equitable rule of reason’ from the fair use analysis.” Kudon attempts to advance another method for analyzing the transformative use test to expand its availability and to “eliminate the rigid, bright-line application of the current test,” specifically through the addition of a functionality component. The functionality component is intended to be raised when the alleged infringing work, containing substantially similar material, can be shown to perform a different function than the original work. *Id.* at 583.

issue, in conjunction with the three categories, is relevant to BuzzFeed's use of Eiselein's photograph because it arguably adds "no original expression or creative modification to the original work," because the inclusion of the photograph within a photomontage did not involve any alterations or additions to the photograph itself.¹³⁶

The post-*Campbell* case, *Nunez v. Caribbean International News Corp.*,¹³⁷ illustrates the First Circuit's analysis of transformative use involving photographs that add "no original expression or creative modification to the original photograph."¹³⁸ In *Nunez*, a newspaper reprinted controversial photographs of a model who held the title of "Miss Puerto Rico Universe 1997" without the photographer's permission. The court held that the newspaper transformed the purpose of the photographs into news, and gave the photographs a new meaning through its conjunctive use with editorial commentary.¹³⁹ In *Kelly v. Arriba Soft Corp.*,¹⁴⁰ the Ninth Circuit Court of Appeals compared the facts of *Kelly* to those of *Nunez*.¹⁴¹ In *Kelly*, the court held that the defendant's search engines that copied the plaintiff's photographs and made them available in "thumbnail" miniatures were transformative because the thumbnails served a different function than the original photographs did, and further noted that the thumbnails did not replace the need for the original photographs.¹⁴² A general reluctance to find transformative use when an alleged infringing use simply copies a work in a different medium than the original was also acknowledged. However, in this case, the court distinguished the use since it served a different function than the original photographer's use.

Gaylord v. United States involved a U.S. postage stamp featuring the Korean War Veterans' Memorial through the use of an unauthorized photograph.¹⁴³ The United States Court of Federal Claims held that the creation of the stamp was transformative through the photographer's talent and vision.¹⁴⁴ However, the United States Court of Appeals for

¹³⁶ Kudon's idea of adding a functionality component would provide a counterargument for BuzzFeed's transformative use argument that placing the photograph in a photomontage as opposed to displaying it individually, as Eiselein did in his online photograph album, served a different function than the original work. *Id.*

¹³⁷ *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

¹³⁸ Kudon, *supra* note 51, at 583.

¹³⁹ *Nunez*, 235 F.3d 18.

¹⁴⁰ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002).

¹⁴¹ *Id.* at 818–20.

¹⁴² *Id.*

¹⁴³ *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010).

¹⁴⁴ [Alli] transformed this expression and message, creating a surrealistic environment . . . where the viewer is left unsure whether he is viewing a photograph of statutes or actual human beings[.] Alli's efforts resulted in a work that has a new and different character . . . and is thus a transformative work [and] the Postal Service further transformed the character and expression of [the memorial] when creating the Stamp.

Frank Houston, *The Transformation Test: Artistic Expression, Fair Use, and the Derivative*

the Federal Circuit differed on the assessment of the works involved and did not draw a comparison between the photograph and the stamp as the lower court did.¹⁴⁵ Instead, the court argued that the evaluation should have focused on the stamp and the original memorial sculpture.¹⁴⁶ Because the stamp and sculpture both served the same purpose of honoring those who served in the Korean War, and were not used for commentary or criticism, the work was not transformative.¹⁴⁷

The Court of Appeals for the Federal Circuit distinguished *Gaylord* from *Blanch v. Koons*,¹⁴⁸ a significant case from 2005 demonstrating growing judicial acceptance of transformative fair use.¹⁴⁹ *Blanch* found transformation in a defendant's work that copied a portion of a widely distributed photograph entitled *Silk Sandals by Gucci*, and included the copied features, namely a model's legs, feet and sandals, in a series of oil paintings about modern culture.¹⁵⁰ The Second Circuit Court of Appeals found that the purpose of the photograph was to display nail polish while the defendant's oil paintings used it as raw material in a novel context to create "new information, new aesthetics, [and] new insights."¹⁵¹ *Blanch* illustrates the tacit understanding that a finding of substantial transformation reduces the importance of the other three statutory fair use factors.¹⁵² The court also expanded the distinction between parody (lawful fair use) and satire (unlawful fair use).¹⁵³ In finding that the oil painting constituted a transformative use, the court recognized satirical use,¹⁵⁴ which marks a shift in judicial attitude toward transformative uses.¹⁵⁵ The *Blanch* decision has been viewed as a suggestion that "transformativeness figures as a kind of metaconsideration arching over the fair use analysis."¹⁵⁶

Following the finding of transformative use in differential meanings in *Blanch*, the Second Circuit held similarly in *Bill Graham Archives v. Dorling*¹⁵⁷ that the defendant's miniature reproduction of posters of the Grateful Dead, a rock band, also constituted a transformative use.¹⁵⁸ The plaintiff in *Dorling* owned the copyright to

Right, 6 FIU L. REV. 123, 144 (2010) (alteration in original) (footnotes omitted).

¹⁴⁵ *Id.*

¹⁴⁶ *Gaylord*, 595 F.3d at 1374.

¹⁴⁷ *Id.* at 1373.

¹⁴⁸ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

¹⁴⁹ Houston, *supra* note 144, at 143.

¹⁵⁰ *Blanch*, 467 F.3d at 248.

¹⁵¹ *Id.* at 251–52.

¹⁵² Houston, *supra* note 144, at 143.

¹⁵³ *Id.*

¹⁵⁴ The oil paintings were meant to display Koon's "belief that the mass production of commodities and media images has caused a deterioration in the quality of society." *Id.* at 144.

¹⁵⁵ *Id.* at 143.

¹⁵⁶ *Id.* at 144.

¹⁵⁷ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

¹⁵⁸ *Id.* at 612.

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the posters and attempted to enjoin the defendant's miniature reproduction in his biography of the Grateful Dead.¹⁵⁹ The court found that the defendant's use of the posters in its biography was starkly different from the original purpose for which the posters were created—the posters were originally distributed to generate public interest and convey information to the masses about the band's upcoming concerts, whereas the defendant's use was meant to represent historical artifacts to document Grateful Dead concert events.¹⁶⁰ The court viewed this difference as “a purpose separate and distinct from the original artistic and promotional purpose for which the images were created.”¹⁶¹ The court further held that the defendant's use did not pose any harm to the potential market because if the use were found to be transformative, even actual market substitution would be insufficient to negate fair use—effectively illustrating and reemphasizing the dominance of the first factor over the fourth.¹⁶²

In a highly publicized consolidation of lawsuits against Google and Amazon.com, an owner of magazine photographs alleged copyright infringement for miniature photographs that appeared in grids produced by the defendants' search engines.¹⁶³ The Ninth Circuit, in *Perfect 10, Inc. v. Amazon.com, Inc.*,¹⁶⁴ found transformative use in a similar manner to how it did in *Kelly*.¹⁶⁵ The court reasoned that a search engine provides a social benefit through its incorporation of an original work into a new work in its electronic reference tool.¹⁶⁶ The Ninth Circuit viewed the search engine as placing the images in a different context, which transformed them into a new creation.¹⁶⁷ The “public benefit” that Google contributed through its search engine particularly influenced the court's decision.¹⁶⁸

The defendant in *Monge v. Maya Magazines Inc.*, the most recent case involving unauthorized use of photographs, published photographs of a celebrity's wedding.¹⁶⁹ Monge sued for copyright infringement and Maya Magazines claimed fair use under *Nunez*.¹⁷⁰ The Ninth Circuit diverged from its prior opinions and found no transformative use based on the newsworthiness surrounding an event.¹⁷¹ The court noted that the

¹⁵⁹ *Id.* at 607.

¹⁶⁰ *Id.* at 609.

¹⁶¹ *Id.* at 610.

¹⁶² *Id.* at 614–15.

¹⁶³ *Perfect 10 Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1166–67.

¹⁶⁶ *Id.* at 1165.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 1166.

¹⁶⁹ *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012).

¹⁷⁰ *Id.* at 1175.

¹⁷¹ *Id.*

publication did not transform the photograph in any way since “[e]ach of the individual images was reproduced essentially in its entirety; neither minor cropping nor the inclusion of headlines or captions transformed the copyrighted works.”¹⁷² This overview of the nuanced debate between finding transformativeness in photographs that are used in a completely or minimally unaltered fashion provides a vague layout in which *Eiselein v. BuzzFeed* can be analyzed and compared.

V. LEGAL FRAMEWORK—*EISELEIN V. BUZZFEED*

Eiselein, an independent photographer, filed a copyright infringement suit against BuzzFeed in June of 2013.¹⁷³ According to the complaint, Eiselein posted his photograph, “Contact,” to his Flickr account on October 12, 2009.¹⁷⁴ The photograph depicted a girl being struck in the head by a soccer ball and displaying a silly facial expression.¹⁷⁵ BuzzFeed’s staff editor, Matt Stopera, used the photograph without authorization in a photomontage published to the BuzzFeed website, titled “The 30 Funniest Header Faces” on June 14, 2010.¹⁷⁶ Eiselein sent a takedown notice to BuzzFeed on May 26, 2011.¹⁷⁷ Soon after, the photograph disappeared from the photomontage and BuzzFeed conspicuously renamed the page “The 29 Funniest Header Faces.”¹⁷⁸

On June 25, 2011, Eiselein registered the photograph with the United States Copyright Office.¹⁷⁹ Eiselein alleges that BuzzFeed is responsible for sixty-four copyright infringements of his photograph and that BuzzFeed has subsequently failed to remove the infringing images from its server.¹⁸⁰ The basis of his argument rests on allegations that BuzzFeed’s editor knowingly bypassed Eiselein’s copyright protections on Flickr and damaged Eiselein’s marketability of the photographic image.¹⁸¹ Eiselein identified and individually named the sixty-four copyright infringements in his complaint, forty-one of which occurred before he obtained copyright registration on his photograph.¹⁸² Eiselein alleges that the photographs found on infringing websites are the same as those chosen by Stopera, constituting mere derivatives of the photograph that was originally displayed by BuzzFeed.¹⁸³

¹⁷² *Id.* at 1174.

¹⁷³ Complaint, *supra* note 8.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Complaint, *supra* note 8.

¹⁷⁸ Bugos, *supra* note 10.

¹⁷⁹ Complaint, *supra* note 8, at 1.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

Eiselein's lawsuit has attracted public attention because of its unique claim of contributory copyright infringement.¹⁸⁴ To sustain a claim for contributory copyright infringement, the alleged infringer must be "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another"¹⁸⁵ Eiselein's contributory copyright infringement claim is based on BuzzFeed's viral news model that encourages readers to share content that they find on the website without regard as to whether the images and content are owned by or licensed to BuzzFeed.¹⁸⁶ He alleges that BuzzFeed utilizes this method to convince potential advertisers to purchase and place ads on their website.¹⁸⁷

Eiselein asserts that his issue is not with sharing photographs,¹⁸⁸ but rather with "massive content factories" such as BuzzFeed, who "bulldoze their way through the web with no regard for others' IP rights in search of content to drive traffic to their site"¹⁸⁹ He further asserts that "[i]t is time for creatives to stand up and say 'This is enough'. We work hard at our crafts and others should not be able to profit from our talents without compensating us."¹⁹⁰ According to Jonah Peretti, founder and Chief Executive Officer of BuzzFeed, BuzzFeed pays to license images from companies such as Reuters and Getty, but also obtains content from amateur sites like Tumblr and Flickr, where "the provenance of images can be unclear."¹⁹¹ *Eiselein v. BuzzFeed* represents a major challenge to the viral content business model that

¹⁸⁴ Ryan Garcia, *Is BuzzFeed Worse Than Pinterest When It Comes to Copyright?*, SOMELAW THOUGHTS BLOG (June 19, 2013), <http://somelaw.wordpress.com/2013/06/19/is-buzzfeed-worse-than-pinterest-when-it-comes-to-copyright/>.

¹⁸⁵ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (internal quotation marks omitted). See also Ed Lang, *Photographer Sues Buzzfeed for Millions Over 'Header Face'*, THE AMERICAN UNIVERSITY INTELLECTUAL PROPERTY BRIEF (June 27, 2013), <http://www.ipbrief.net/2013/06/27/photographer-sues-buzzfeed-for-millions-over-header-face/>.

¹⁸⁶ Complaint, *supra* note 8, at 2.

¹⁸⁷ Jeff John Roberts, *Photographer Sues BuzzFeed for \$3.6M Over Viral Sharing Model*, GIGAOM (June 18, 2013), <http://paidcontent.org/2013/06/18/photographer-sues-buzzfeed-for-3-6m-over-viral-sharing-model/>.

¹⁸⁸ Eiselein clarifies that he would not have a problem with sharing photographs if it were done correctly, namely through a hotlinked photograph. "Hotlinking provides tangible benefits by helping to drive traffic and getting works in front of people. . . . I do have a problem with companies like BuzzFeed making a buck off the backs of creative people while the creatives get nothing." Christopher Zara, *BuzzFeed Copyright Lawsuit May Test Legal Limits Of Fair Use in Listicles: Photographer Seeking \$3.6 Million*, INTERNATIONAL BUSINESS TIMES (June 18, 2013), <http://www.ibtimes.com/Buzzfeed-copyright-lawsuit-may-test-legal-limits-fair-use-listicles-photographer-seeking-36-million>.

¹⁸⁹ Lang, *supra* note 185 (internal quotation marks omitted).

¹⁹⁰ Josh Halliday, *Buzzfeed Sued by Photographer for \$3.6m Over 'Copyright Breach'*, THE GUARDIAN (June 18, 2013), <http://www.theguardian.com/media/2013/jun/18/buzzfeed-sued-photographer-copyright-breach> (internal quotation marks omitted).

¹⁹¹ "[I]n some cases, the photographer has made them available for public use while other times the author is simply unknown." Roberts, *supra* note 187.

many websites are currently adopting,¹⁹² a demand for reconsideration of protection for copyright owners and, tangentially, an examination of the blurred lines of the fair use doctrine and the transformative use analysis.

A. *Analysis of Transformative Use Using Eiselein v. BuzzFeed and its Legal Implications*

The article at issue in *Eiselein v. BuzzFeed*, “The 30 Funniest Header Faces,” can no longer be accessed on the Internet. However, the edited version of the article, “The 29 Funniest Header Faces,” which removed Eiselein’s photograph from the montage, can still be viewed on BuzzFeed’s website in the Sports section.¹⁹³ For the purposes of analyzing BuzzFeed’s work in question under the transformative use analysis, it can be assumed that Eiselein’s photograph followed a similar arrangement. Under the title “The 29 Funniest Header Faces” lies a short explanation of the listicle—“Header faces are right up there with figure skating faces. Both are unfortunately hilarious.”¹⁹⁴ The site then includes twenty-nine numbered photographs (with no other added content by BuzzFeed) of various individuals suffering the impact of a soccer ball colliding with their heads.¹⁹⁵ Notably, a few of the photographs include a watermark, presumably inserted by the original photographers.¹⁹⁶ Eiselein’s photograph, which can be viewed on his Flickr page, follows a similar format to the other twenty-nine photographs, with the exception of a watermark when viewed on his Flickr page.¹⁹⁷

BuzzFeed’s transformative use argument elucidates the broad nature of the transformative use analysis by allowing alleged infringers, such as BuzzFeed, to advance arguments for protection under fair use for secondary works that are clearly unaltered with no additional original expression, or modified meaning or content.¹⁹⁸ While the focus of the analysis remains on the transformative use of BuzzFeed’s photomontage, a cursory analysis under the broader umbrella of the fair

¹⁹² Michael Zhang, *Photographer Sues BuzzFeed for \$3.6M for Using Photo Without Permission*, PETAPIXEL (June 18, 2013), <http://petapixel.com/2013/06/18/photographer-sues-buzzfeed-for-3-6m-for-using-photo-without-permission/>.

¹⁹³ Matt Stopera, *The 29 Funniest Header Faces*, BUZZFEED (June 14, 2010), <http://www.buzzfeed.com/mjs538/the-30-funniest-header-faces>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Kai Eiselein, *Contact*, FLICKR (Oct. 12, 2009), <http://www.flickr.com/photos/eiselein/4006046187/in/photolist-7712XR/>.

¹⁹⁸ Kudon, *supra* note 51 at 597-98. (“[S]econdary works in which the defendant has failed to add any additional creative value to the original copyrighted work. . . . are never considered transformative. . . . [but] it seems unduly restrictive to classify all of these reproductive works as non-transformative.”).

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use doctrine's statutory factors provides background context. The first factor—the purpose and character of the use, in conjunction with the fourth factor—the effect of the use on the potential market of the copyrighted work, comprises the crux of the transformative debate between Eiselein and BuzzFeed.¹⁹⁹ The second and third factors influence the fair use outcome as well, albeit on a smaller scale.²⁰⁰

The second factor, the nature of the copyrighted work as illustrated on the continuum of purely creative works to informational works, will likely advance Eiselein's argument.²⁰¹ BuzzFeed has a strong argument negating the creativity of Eiselein's "Contact" photograph, particularly given the multitude of other photographs with the same subject matter exhibited in the BuzzFeed article.²⁰² More specifically, BuzzFeed can argue that Eiselein had no creative control in directing the subject's facial expression and that he simply happened to capture the image at the right place and time. However, Eiselein has an equally convincing argument that his creativity is illustrated in the capturing of the photograph at that precise moment, as well as choices that he made in the photograph's composition.²⁰³ This particular factor will turn on whether the court finds that Eiselein's "original creative expression for public dissemination falls within the core of the copyright's protective purposes,"²⁰⁴ namely the extent of artistic expression exhibited in the secondary work. Nevertheless, similar to the transformative use cases previously considered in Part IV of this Note, the second factor likely has limited weight in the analysis.

Consideration of the third factor will be based on the assumption that BuzzFeed's articles editor used Eiselein's entire photograph, similar to the other twenty-nine photographs used in the listicle. Typically, the greater the amount of the copyrighted work that was taken, the less likely the taking will be considered a fair use.²⁰⁵ BuzzFeed will likely raise arguments against both the "quantitative" and "qualitative" analyses.²⁰⁶ The "quantitatively substantial" argument will revolve around the idea that it was simply one photograph used from

¹⁹⁹ 17 U.S.C. § 107 (2012).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Stopera, *supra* note 193.

²⁰³ In *Burrow-Giles Lithographic v. Sarony*, 111 U.S. 53 (1884), Burrow-Giles argued that "a photograph was a reproduction, on paper, of the exact features of some natural object, or of some person." Essentially meaning, that a photograph is simply a compilation and recordation of facts, which involves no creativity or originality. However, the court was unwilling to view photographs as simple fact-recording mediums but instead adopted the viewpoint that "the camera is no different than the painter's box of brushes and colors." Hughes, *supra* note 49, at 344.

²⁰⁴ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

²⁰⁵ Leval, *supra* note 13, at 1122.

²⁰⁶ *Campbell*, 510 U.S. at 586–87.

Eiselein's entire Flickr photostream in the questioned work.²⁰⁷ However, assuming the third factor is "correctly" applied according to the purpose of this factor, emphasis should be placed on the amount of the copyrighted work taken and not on the percentage of the defendant's work that is made up of the copyrighted work.²⁰⁸ BuzzFeed's "qualitatively substantial" argument will be advanced in support of the idea that the entire photograph would not have been used if it did not substantially relate to the secondary work's general purpose and content. The court's evaluation of this factor will likely depend on the consequences that use of the entire photograph has on the transformative use factors of the purpose and character of the use and the potential effect on market value.

The fourth factor relates to the main arguments relied on by Eiselein.²⁰⁹ He argues that "the marketability of the image has been irretrievably damaged by the scope of the infringement," particularly in regard to his sixty-four contributory infringement claims.²¹⁰ As a self-proclaimed award-winning professional photographer who licenses his images through direct contact and representation, BuzzFeed's use and alleged distribution of his photograph to the subsequent sixty-four websites has caused financial harm to Eiselein, at a total amount estimated by the photographer at \$3.6 million.²¹¹ While the court likely will not award this amount even if no fair use is found, Eiselein has undeniably suffered some economic injury as BuzzFeed bypassed Eiselein's copyright and licensing rights.²¹² Conversely, BuzzFeed could argue that Stopera's article not only had no negative market effect on Eiselein's original photograph, but it potentially increased its market value.²¹³ In addition, Eiselein can still pursue his original purpose of licensing the photograph to others, and the photograph maintains its value. Similar to the previous two factors, the indeterminateness of these three factors funnel into and to a certain extent, depend on the outcome of the transformative analysis.

In conjunction with consideration of the economic aspect of BuzzFeed's misappropriation of the photograph, the purpose and character of the use is at the center of the transformative analysis.²¹⁴

²⁰⁷ *Id.* at 587.

²⁰⁸ *Id.*

²⁰⁹ See Complaint, *supra* note 8.

²¹⁰ *Id.* at 3.

²¹¹ *Id.* at 8.

²¹² *Id.*

²¹³ See generally *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (while Accolade affected Sega's market by disassembling its software in order to create Genesis-compatible games, the court notes that consumers are likely to purchase more than one game, stating that there is no basis for assuming that Accolade has harmed Sega's market and implying that it has the potential of increasing the market appeal).

²¹⁴ Kudon, *supra* note 51, at 590.

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Two different aspects of the secondary work—its content and purpose—are evaluated by transformativeness.²¹⁵ It is important to consider and speculate as to the purpose of Eiselein’s original copyrighted photograph in order to compare and potentially differentiate it from BuzzFeed’s intended purpose and use of the photograph in its listicle.²¹⁶ As mentioned in the complaint, Eiselein had a commercial use and purpose behind taking the photograph and uploading it to his Flickr photostream.²¹⁷ Similarly, based on BuzzFeed’s viral content business model, in particular its fundamental motivation of attracting unique visitors interested in sharing its articles as well as its progressive form of native advertising, it is not difficult to imagine that BuzzFeed’s purpose was to utilize the photograph’s anticipated comedic and entertainment value. However, the commercial nature of the secondary work is only a sub-factor; the analysis must also include consideration of the transformation of the content and whether BuzzFeed’s new work supersedes the original creation by adding new purpose or character or altering the expression, meaning, or message.²¹⁸

Eiselein has a strong argument that BuzzFeed’s use of his photograph falls under the first category of secondary works, which add no original expression. As previously mentioned, Stopera essentially gathered photographs from various sources and simply displayed them in numbered form.²¹⁹ However, BuzzFeed could argue that its use falls within the second or third category. BuzzFeed’s argument that the secondary work adds original expression, but not in the form of criticism, commentary or scholarship, is likely a more feasible and applicable argument given the comedic nature of BuzzFeed’s article and the lack of any discernible purpose other than for commercial use. Alternatively, BuzzFeed could strive to develop an argument that its secondary use adds original expression that clearly constitutes criticism, commentary or scholarship, since secondary works that fall under this category are generally considered fair uses.²²⁰ Nevertheless, this will be difficult given the lack of altered or added content.

The debate between BuzzFeed and Eiselein over the

²¹⁵ *Id.*

²¹⁶ It is important to acknowledge the fact that courts have left unanswered many questions related to the analysis of purpose. In *Transformativeness and the Derivative Work Right*, Reese identifies the transformativeness analysis as “inescapably comparative: the court must have a sense of the plaintiff’s purpose in order to determine whether the defendant is using the work for a transformative purpose” and the various issues related to properly identifying both the plaintiff and defendant’s purpose, especially when the work may serve multiple purposes. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 494 (2008).

²¹⁷ Complaint, *supra* note 8, at 3.

²¹⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

²¹⁹ Stopera, *supra* note 193.

²²⁰ *See Kudon, supra* note 51, at 583.

transformativeness of a secondary work that has no added or altered content is reflected in the clash between the Ninth Circuit's holding that "even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work"²²¹ and the majority of courts, including the Ninth Circuit in certain instances, that have rejected the fair use defense in cases where there is little to no alteration of the plaintiff's work.²²² In the previous cases considering transformative use of photographs and visual arts, with the exception of *Gaylord* and more recently *Monge*, courts have generally found transformative use and thus fair use in cases of unaltered works; however, these cases can be distinguished from the present because of their identified different purposes.²²³

The recent Ninth Circuit *Monge* holding that deviated from previous decisions may signify a move toward a more stringent standard when considering transformative use in unaltered works, rectifying the Court's previous misapplication of the doctrine.²²⁴ Primarily, the court emphasized the unaltered nature of the photographs in denying a finding of fair use, notably after acknowledging that "[a]rrangement of a work in a photo montage . . . can be transformative where copyrighted material is incorporated into other material."²²⁵ The court considered the defendant's use and held that "[the defendant] did not transform the photos into a new work . . . [defendant] left the inherent character of the images unchanged . . . [defendant's] use—wholesale copying sprinkled with written commentary—was at best minimally transformative."²²⁶ The court should hold similarly in *Eiselein v. BuzzFeed*; Stopera's written commentary was sparse, and as mentioned, there is strong support for the argument that there is no different or altered expressive content or purpose in the secondary work.²²⁷ Although there is capacity for debate in each of the four statutory factors, courts should follow the *Monge* decision going forward in cases

²²¹ *Perfect 10 Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

²²² See *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010); *Monge v. Maya Magazines, Inc.* 688 F.3d 1164, 1174 (9th Cir. 2012). For related cases, see generally *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (where defendant published a parody titled *The Cat NOT In The Hat*, and the court found it was not a transformative work because the expression, meaning and message were not different from the famous children's book, *The Cat In The Hat*) and *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (defendant copied plaintiff's religious book in its entirety for the same use—religious observance).

²²³ See *Perfect 10*, 508 F.3d 1146; *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002); *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

²²⁴ The Ninth Circuit found transformative use in unaltered secondary works in *Kelly* and *Perfect 10*. See *Perfect 10*, 508 F.3d 1146; *Kelly*, 336 F.3d 811.

²²⁵ *Monge*, 688 F.3d at 1174.

²²⁶ *Id.* at 1176.

²²⁷ *Stopera*, *supra* note 193.

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involving photographs in secondary uses that remain completely unchanged.

B. *Legal Implications and Recommendations*

The difficulty in weighing the four statutory factors of fair use, and more importantly, the transformative use analysis, transcends a debate between a copyright owner and alleged infringer. Decisions in fair use cases, including the forthcoming *Eiselein* decision, hold significant legal implications for future cases, as well as providing implicit guidelines for future works of secondary users. If the United States District Court for the Southern District of New York finds no transformative use in *Eiselein*, as this Note suggests, the court will send a message to viral content aggregators like BuzzFeed that images and content acquired without express permission from the original author that do not serve an apparent transformative purpose and which are not altered in a way to convey a different message will no longer be tolerated.²²⁸

There seems to be some merit in *Eiselein*'s proposed stance of differentiating between individual "creatives" and underhanded companies that lack the creativity found in the "creatives" of artistic works.²²⁹ Courts deciding future fair use cases could take the identity of the plaintiff and defendant into consideration—particularly in cases such as the one in question where a vast disparity between the economic power and anonymity of the parties exists. More specifically, BuzzFeed's reputation as a lucrative, widely read website is in stark contrast to *Eiselein*'s relative obscurity. Although this certainly will not be a dispositive factor, the identity of the plaintiff and defendant should be a sub-factor that courts consider, especially where the identities of the parties relates to the fourth factor of the potential effect on the market for the copyright owner.

Although the District Court should find BuzzFeed's use not transformative, finding for *Eiselein* could pose potential negative implications, albeit insignificant ones when considered against blatant misappropriation of copyrighted works. A major concern lies in the possibility of an onslaught of litigation, perhaps some frivolous, from small-time "creatives" like *Eiselein*, against every misuse or unauthorized use of copyrighted materials, regardless of the substantiality or context.²³⁰ However, the potential opening of the floodgates to copyright infringement litigation is unlikely to deter courts

²²⁸ "[A]pplying the designation of 'transformative use' to contexts where the original copyrighted work has not actually been altered renders the term meaningless, or at least hopelessly imprecise." Sag, *supra* note 17, at 57.

²²⁹ Zara, *supra* note 188.

²³⁰ Halliday, *supra* note 190.

from compensating the copyright owner in appropriate cases.

Conversely, a holding in favor of BuzzFeed would weaken the efficacy and intended purpose of copyright law.²³¹ Copyright law and the fair use doctrine fundamentally protect original works in an effort to encourage innovation, while also seeking not to stifle the same creativity it promotes.²³² If a corporation such as BuzzFeed is allowed to impermissibly appropriate copyrighted works like Eiselein's and subsequently be excused for it, the implication is that the courts place more emphasis on ensuring stimulation of alleged secondary creativity than on proper attribution, such as through licensing agreements, to the copyright holder. This, in turn, would give pause to other photographers and artists from widespread uploading and sharing of their works.

A seemingly straightforward solution to this predicament is for BuzzFeed, and other websites that similarly acquire content and images from the Internet, to request permission directly from the copyright holder for each work they intend to use in their own work.²³³ Requiring permission or a license in order to use copyrighted works can hardly be characterized as unduly burdensome on the secondary user, especially since, more often than not, the secondary acquisition is for gain and not purely aesthetical. However, as can be imagined, this is not a readily feasible solution for every secondary user. In these circumstances, websites should be required to contract or enter into licensing agreements directly with the image-hosting websites. BuzzFeed has existing licensing agreements with prominent sites like Getty and Reuters, and should be required to expend a good faith effort to enter into comparable licensing agreements with other image-hosting websites. This prerequisite directly correlates with the fourth statutory fair use factor, as well as Leval's unnamed factor of good faith, and has been considered in other fair use cases.²³⁴ In the event BuzzFeed is unable to reach an agreement with the hosting website and unable to receive direct permission from the owner, the site should take great care in crediting its original source through means including hotlinks,

²³¹ "Any claim that a possessor and purveyor of technological power should be privileged to copy all of the world's copyrighted expression without permission in order to facilitate global access to that expression challenges the core of copyright's premise." Matt Williams, *Recent Second Circuit Opinions Indicate that Google's Library Project is not Transformative*, 25 CARDOZO ARTS & ENT. L.J. 303, 331 (2007).

²³² Leval, *supra* note 13, at 1107.

²³³ "Because the copyright remains with the copyright holder, secondary users such as news media that plan to republish social networking photos either need permission or they must argue that their use qualifies as 'fair use' under federal copyright law." Stewart, *supra* note 52, at 96.

²³⁴ The famous Barack Obama "Hope" poster was involved in a copyright infringement suit in which bad faith was frequently discussed. "AP alleges that Fairey acted in bad faith because, among other things, he failed to request a license to use the Obama photograph, though he has requested at least one license for a similar purpose from other photographers in the past." Rachael L. Shinoskie, *In Defense of Fairey and Fair Use*, 28 SPG ENT. & SPORTS LAW 16, 19 (2010).

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watermarks, or citations. Otherwise, bad faith in either acquisition or crediting of the work should factor against a finding of fair use, especially when the defendant has the means or has been proven to have previously requested licensing agreements in comparable situations.²³⁵ In this case, BuzzFeed did not make a good faith effort to contact either Eiselein or Flickr for use of Eiselein's copyrighted image.²³⁶ BuzzFeed also cannot claim that it was unaware of the necessity to obtain permission given that it previously acquired licenses for other photographs.²³⁷

As evidenced by the analysis of the transformative use test in conjunction with the fair use doctrine as applied in *Eiselein*, a court must take into consideration various factors beyond the express statutory language. Application of the transformative use doctrine alone is incredibly complex. The indeterminate nature of the four statutory factors further exacerbates the already complex transformative use doctrine. Therefore, in an effort to move toward a bright-line analysis, the transformative use test should be separate from the fair use analysis, creating an additional affirmative defense to copyright infringement claims.²³⁸

While the transformative use test and fair use doctrine will inevitably parallel and, to a certain extent, overlap with one another, Frank Houston's proposal to separate the test and utilize it instead as a second line of defense, thus creating intermediate liability when the fair use doctrine is insufficient, has merit. Houston outlines the remedies that can be applied to this new framework of the fair use doctrine and transformative use analysis.²³⁹ I propose that, as part of the independent transformativeness analysis, courts should also apply the sub-factors of the identities of the parties and the degree of good faith on the part of the defendant to legitimately acquire permission to use the copyrighted work. In an effort to be mindful of the delicate balance between "true creative labor and mere coattail-riding,"²⁴⁰ the transformative use analysis needs to be more clearly defined and isolated from the fair use

²³⁵ A finding of bad faith will necessarily be a contextual analysis since there is "no controlling authority to the effect that the failure to seek permission for copying, in itself, constitutes bad faith." Moreover, in circumstances where the court finds fair use, defendants are typically not found to have been acting in bad faith in not requesting or obtaining permission from the copyright owner. *Id.* at 20.

²³⁶ "Acting in good faith should not be underestimated. Courts have recognized that a good-faith belief by a defendant that it was engaging in fair use is evidence that infringement is not willful for damages purposes." Stewart, *supra* note 52, at 115.

²³⁷ Roberts, *supra* note 45.

²³⁸ Houston, *supra* note 144, at 150.

²³⁹ Houston suggests that "[t]he secondary author-defendant would be required to register her work as a transformative use . . . the 'original author of the copyrighted work and the transformative user of that work would evenly divide all profits resulting from the commercial exploitation' of the later work." *Id.*

²⁴⁰ *Id.* at 160.

doctrine in order to be more consistently applied to cases where the defendant claims transformative use, with no socially beneficial purpose.

CONCLUSION

Admittedly, photographs like *Eiselein*'s are "perhaps the hardest type of copyrighted work to use for many transformative purposes without using the entire image unaltered and unexcerpted . . . and still convey the message or meaning of the image."²⁴¹ Courts have the difficult task of balancing the factors, and more importantly, should "not allow the fair use doctrine to become a catch-all defense for those who object to copyright's foundation."²⁴²

"While technological innovation is an extremely important facet of our copyright system, we should not celebrate innovative distribution mechanisms when they injure our 'engine of free expression.'"²⁴³ Courts have applied the fair use doctrine and the transformative use analysis differently, resulting in undefined guidelines for secondary users claiming transformative use in their works.²⁴⁴ The majority of courts look to whether the secondary work involves new expressive content that produces a different expressive purpose.²⁴⁵ Mere reproduction of the work in a different format or medium is insufficient to qualify as transformation.²⁴⁶ However, courts have also found transformative use in defendant's works where both the content and purpose of the original work were entirely without modification, creating the issue and debate that exists in analyzing *Eiselein v. BuzzFeed*.²⁴⁷

Overall, in circumstances where there is no obvious different expressive content or purpose, the secondary work should not be protected under a transformative use argument. Further, the transformative use analysis should be separated from the fair use doctrine and its specific factors elucidated to facilitate more reliable application by the courts and, subsequently, in guidelines for future secondary users.²⁴⁸ This clarification is crucial to copyright law and its fundamental purposes, due to the rapidly evolving and growing

²⁴¹ Reese, *supra* note 216, at 491.

²⁴² Williams, *supra* note 231, at 331.

²⁴³ *Id.* at 332.

²⁴⁴ Leval, *supra* note 13, at 1107.

²⁴⁵ See *Monge v. Maya Magazines, Inc.* 688 F.3d 1164, 1174 (9th Cir. 2012); *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010).

²⁴⁶ See *Monge*, 688 F.3d 1164; *Gaylord*, 595 F.3d 1364.

²⁴⁷ See *Perfect 10 Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2002); *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

²⁴⁸ Houston, *supra* note 144, at 150.

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technology available today, and the unique business models and content sharing of websites that have developed as a result.²⁴⁹

*Jennifer Yeh**

²⁴⁹ “This is where the artists of tomorrow are at play, and the playground is more boisterous than ever before.” *Id.* at 162.

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