# THE *SUB ROSA* RULES OF COPYRIGHT FAIR USE

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*Codified in 17 U.S.C. § 107, copyright's "fair use" is one of the best-known and most widely discussed doctrines in intellectual property. Commentators have noted that the § 107 balancing test is a legal "standard" but have never woven that observation into the rich "rules versus standards" literature.*

*After exploring fair use in relation to the insights of that literature, this Article builds on scholarship that classifies fair use jurisprudence into "clusters" and proposes that not only is § 107 a legal standard, but it is a statutory standard used by courts to generate specific, rule-like exceptions. Such discrete de facto exceptions include one for parody following the Supreme Court's* Campbell *decision and one for intermediate copying of software in the wake of appellate court rulings in* Sega *and* Connectix*. Following Karl Llewelyn's observations about legal rules, this Article reasons that these de facto exceptions may be as specific as rules in other areas of law and what we call "fair use" is actually both the overall § 107 balancing test and these specific de facto rules, causing the Jekyll-and-Hyde descriptions of copyright fair use as "vague" yet "predictable," "ad hoc" but "stable."*

*This Article then turns to "transformative use" doctrine and reasons that transformative use doctrine has already spun off one stable rule-like exception: comprehensive reproduction of works to prepare searchable databases that do not provide market substitution for the works copied. This is evidence that regardless of whether transformative use analysis dominates § 107 inquiries going forward, the fair use balancing test will continue to generate specific, rule-like exceptions in response to new social and economic developments.*

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## INTRODUCTION

> The common-law method instated by the fair use provision of the copyright statute presumes that rules will emerge from the course of decisions.
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> -Justice Kennedy, concurring in *Campbell v. Acuff-Rose Music, Inc.* (1981)

Legal norms may come in different shapes and sizes, but they are commonly understood to come in two broad forms, about which there is a vast literature: "rules" and "standards." A "rule" establishes *ex ante* what behavior is permitted versus what behavior attracts liability—and it does so with reasonable precision. A "standard" is more vague and gives the adjudicator the responsibility to determine both the relevant factual issues and "specification of what conduct is

permissible,"[1] often using reasonableness, practicality, or fairness. As the law develops, standards can be converted to rules; rules can be converted (or reverted) to standards; and the whole process is both iterative and bidirectional. For example, in some areas of law—e.g., criminal procedure and voting rights—the Supreme Court has tended to announce rules as a means of implementing legal norms that are expressed more generally in statutes or the Constitution. In other areas—e.g., tort law and patent law—courts have sometimes reversed course, first announcing judge-made rules, then reverting to legal standards.

Copyright law includes many rules: rules for calculating the term of protection, for determining when a performance is "public," for compulsory licenses for satellite transmissions, for copyright registration, etc. But copyright's machinery also runs on more vague legal norms—i.e., norms for determining originality, distinguishing ideas from protectable expression, establishing substantial similarity, etc. Most of these legal standards are thought to be inherently vague—as in Learned Hand's observation that "[t]he test for infringement of a copyright is of necessity vague" and "[d]ecisions must therefore inevitably be *ad hoc*."[2]

To many, nowhere is copyright more inherently vague than with the fair-use doctrine, codified at 17 U.S.C. § 107. In 1990, the most distinguished living jurist on fair use told us: "[j]udges do not share a consensus on the meaning of fair use. Earlier decisions provide little basis for predicting later ones."[3] In the years since, things have not gotten any better. Fair use "is one of the most unsettled areas of the law . . . [,] 'so flexible as virtually to defy definition;'"[4] the doctrine is consistently criticized as "unpredictable,"[5] an "ad hoc" approach "dependent on a shadowy weighing of vague factors,"[6] just plain "vague,"[7] and so unpredictable as to threaten the status of copyright as a form of property.[8] And yet with fair use, there is also a Jekyll-and-Hyde game afoot. One can find plenty of comments that fair use is "both more coherent and more predictable than many commentators have

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1. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) ("A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator.").

2. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

3. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106 (1990).

4. Princeton Univ. Press v. Mich. Doc. Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (quoting Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968)).

5. Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 871 (2015).

6. William Patry, *Barton Beebe's Fair Use Study*, PATRY COPYRIGHT BLOG (May 11, 2007), http://williampatry.blogspot.com/2007/05/barton-beebes-fair-use-study.html [https://perma.cc/7JG2-CNTU].

7. Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROBS. 185, 185 (2007).

8. Joseph P. Liu, *Fair Use, Notice Failure, and the Limits of Copyright as Property*, 96 B.U. L. REV. 833 (2016) (reasoning that the failure of fair use to provide predictability to less sophisticated parties is grounds to stop treating copyright as a property right in relation to certain classes of users).

perceived;"[9] that it is "stable, predictable, [and] coherent;"[10] and that there is "greater consistency and determinacy in fair use doctrine than many previously believed."[11]

How can we reconcile these competing visions of fair use? Recognizing § 107 fair use as a legal standard is a first step, but we need to go further. This Article proposes that instead of the near-universal understanding of 17 U.S.C. § 107 as *one* copyright exception in the form of a legal standard, it is better to see § 107 as a legal standard which often serves as a *mechanism* to establish distinct, judge-made rules for different types of copyright exceptions. Section 107 does this in the same way that the Fourth and Fifth Amendments have been used to generate specific rules of criminal procedure while remaining free-standing legal standards on which other cases can be decided and from which even further rules may be elaborated. Fair use works in the same way that § 1 of the Sherman Act allows courts to generate per se illegal rules for some economic conduct while § 1 itself remains a legal standard to judge other business activities.

When commentators talk about fair use being "stable [and] predictable," they are thinking of the fact patterns that are now handled under de facto rules already generated from § 107; in those cases, the prior decisions are actually more important than the statutory § 107 fair use factors. When commentators speak of fair use being an unpredictable crapshoot, they are thinking of fact patterns that have not yet been subsumed under a de facto rule and thereby require direct application of fair use as a legal standard.

There is nothing new in the observation that § 107 is a legal standard. The additional claim here is that § 107 is a legal standard *that generates rules or rule-like legal norms*, and the only reason the rule-like norms spun off from § 107 are not clearer is that, by its own terms, § 107 bars judges from announcing formal rule exceptions to copyright liability. The rules of fair use must remain *sub rosa.* Perhaps the only jurist to be frank about all this was Justice Anthony Kennedy. In the very Supreme Court opinion in which the majority announced that fair use determinations are "not to be simplified with bright-line rules,"[12] Justice Kennedy more candidly recognized that "[t]he common-law method instated by the fair use provision of the copyright statute . . . presumes that *rules* will emerge from the course of decisions."[13] Indeed, they have.

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9. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009).

10. BRANDON BUTLER, MICHAEL CARROLL & PETER JASZI, IN RE: DOCKET NO. 2012–12, ORPHAN WORKS AND MASS DIGITIZATION 1–2 (2014), http://copyright.gov/orphan/comments/Docket2012_12/Butler-Brandon-Carroll-Michael-Jaszi-Peter.pdf [https://perma.cc/6LTW-YJQQ] (footnotes omitted).

11. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 719, 740–41 (2011).

12. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (stating that a § 107 fair use determination "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis").

13. *Id.* at 596 (Kennedy, J., concurring) (emphasis added).

Part I of this Article discusses the "rules versus standards" literature and describes how 17 U.S.C. § 107 is a legal *standard*. Part II proposes that the § 107 caselaw not only produces the "clusters" of fair use decisions identified by other commentators but also distinct de facto exceptions that function as *judge-created rules*, similar to judge-created rules in criminal procedure, tort law, antitrust, and voting rights.[14] Part III continues this discussion by connecting this argument to Karl Llewellyn's theory of rules.

Part IV then uses this rule-generative understanding of § 107 fair use to offer a different perspective on the debate about the transformative use doctrine in fair use analysis. The "transformative use" question came to dominate fair use inquiries shortly after the Supreme Court's 1994 *Campbell v. Acuff-Rose Music, Inc.* decision.[15] While seemingly past the zenith of its sway over lower courts, the transformative use doctrine still played an important role in the Supreme Court's 2021 *Google LLC v. Oracle America, Inc.* decision.[16] This Article concludes that transformative use does not jeopardize § 107 as a rule-generating framework. In fact, one stable rule has already emerged from transformative use analysis: the "searchable database exception" that began with thumbnail internet images and crystallized in the *Google Books* litigation.[17] Transformative use may also be giving us other rule-like norms in the fair use ecosystem, such as that commercially repurposing copyrighted photographs without alteration is generally *not* "transformative" and not fair use.

## I. FAIR USE AS A LEGAL STANDARD AMIDST RULES FOR COPYRIGHT EXCEPTIONS

While the distinction between "rules" and "standards" is familiar, it is worthwhile to review these two archetypes as well as the reasons a legal system might use one or the other in different circumstances. We will then turn to § 107 fair use as a legal standard in comparison to the other exceptions and limitations in American copyright law.

### *A. Rules and Standards*

The conceptual dichotomy between "rules" and "standards" traces back at least to Jeremy Bentham[18] and is one that has generated a vast literature from legal

14. For other observations in this area, see Justin Hughes, *Fair Use and Its Politics—At Home and Abroad*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 234 (Ruth Okediji ed., 2017) (exploring how, from an international perspective, § 107's rule-generating nature affects analysis of § 107 under the "three test step" of the Berne Convention and the TRIPS Agreement); Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 165 (2017) (arguing that "Congress' articulation of fair use as a standard in the 1976 Copyright Act was deliberately meant to preserve the rulemaking power of the judiciary").

15. 510 U.S. at 579.

16. 141 S. Ct. 1183, 1202–04 (2021).

17. Authors Guild v. Google, Inc., 804 F.3d 202, 217 (2d Cir. 2015).

18. Bentham captured the idea in different ways, i.e., as the difference between "a more precise rule" and a "loose and general rule," as well as between "particular injunctions" and "general rules." JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT ch. I, ¶ 41; ch. V, ¶

scholars.[19] A "rule" establishes *ex ante* what kinds of behavior are permitted versus what kinds of behavior attract liability—doing this with reasonable precision.[20] A rule achieves its precision by giving a specific, independent (but incomplete) form to a policy objective. A legal norm is "rule-like" when "it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts."[21] Conceptually, rules have "formal realizability," meaning that for any particular case a rule should be able to be applied "deductively" or "analytically."[22]

In contrast, a "standard" gives the adjudicator the responsibility to determine both the relevant factual issues and "specification of what conduct is permissible."[23] The decision-maker applying a standard can consider most or all relevant factors in, at the extreme, a "totality of the circumstances" accounting. In this sense, a standard "tends to collapse decisionmaking [sic] back into the direct

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10 (1774), https://constitution.org/2-Authors/jb/frag_gov.htm [https://perma.cc/RZ3R-V9YH]. Bentham reasoned: "[S]ince it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, therefore the state establishes general rules for the perpetual information and direction of all persons, in all points, whether of positive or negative duty." *Id.* at ch. V, ¶ 2.

19. For a sample of what has been written about rules and standards, see, for example, Russell D. Covey, *Rules, Standards, Sentencing and the Nature of Law*, 104 CAL. L. REV. 447 (2016); Erik J. Girvan, *Wise Restraints? Learning Legal Rules, Not Standards, Reduces the Effects of Stereotypes in Legal Decision-Making*, 22 PSYCH. PUB. POL'Y & L. 31 (2016); Vincy Fon & Francesco Parisi, *On the Optimal Specificity of Legal Rules*, 3 J. INSTITUTIONAL ECON. 147 (2007); Kaplow, *supra* note 1; Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (exploring rules and standards in property law); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

20. *See, e.g.*, Hans-Bernd Schäfer, *Rules Versus Standards in Rich and Poor Countries: Precise Legal Norms as Substitutes for Human Capital in Low-Income Countries*, 14 SUP. CT. ECON. REV. 113, 116 (2006) ("Rules are legal commands that differentiate legal from illegal behavior in a comprehensive and clear manner. Standards are general legal criteria that are unclear and fuzzy and require complicated judicial interpretation."); Kaplow, *supra* note 1, at 559–60 ("[A] rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator.").

21. Sullivan, *supra* note 19, at 58 ("A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. . . . A rule captures the background principle or policy in a form that from then on operates independently. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness.").

22. Or in the extreme case, "mechanically." Radin, *supra* note 19, at 793, 795; *see also* Kennedy, *supra* note 19, at 1687–89 (discussing the virtues and costs of formal realizability).

23. Kaplow, *supra* note 1, at 560.

application of the background principle or policy to a fact situation."[24] Optimistically, this means standards may promote more reflection and consideration, both by private actors and courts.[25]

The classic example of the difference between rules and standards is the regulation of highway speeds with either a rule ("Maximum 70 MPH") or a standard ("drive at a reasonable and proper speed"[26]). This example makes clear that one way to recognize a legal norm as a standard instead of a rule is that a standard, as Frederick Schauer says, has "pervasive vagueness" such that "*all* applications" of the norm require an exercise of judicial discretion.[27]

For private actors, the first virtue of rules is that they provide bright-line guidance—as Kathleen Sullivan notes, "rules afford certainty and predictability to private actors, enabling them to order their affairs productively."[28] That predictability and certainty is generally thought to enhance efficiency[29] and can contribute to a sense of justice. But even when we think we can sufficiently

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24. Sullivan, *supra* note 19, at 58–59 ("A legal directive is 'standard'-like when it tends to collapse decisionmaking [sic] back into the direct application of the background principle or policy to a fact situation. . . . Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances.").

25. Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1374 (2013) ("Standards promote useful moral reflection and deter socially destructive behavior. Fuzziness at the edges of rules often prompts better decision making, both by market actors and by judges.").

26. From 1995 to 1998, this was the standard for excessive driving speed in Montana. Section 61-8-303(1) of the Montana Code Annotated (MCA) provided the following:

> A person operating or driving a vehicle of any character on a public highway of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to the view ahead.

This multi-factor test was ruled unconstitutionally vague, at least as to criminal prosecution, by the Montana Supreme Court in *State v. Stanko*, 1998 MT 321, 974 P.2d 1132 (Mont. 1998).

27. Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1125 (2008) (emphasis added). Describing the classic Hart–Fuller debate of the late 1950s, Schauer distinguishes between "statutes with a clear core and a vague penumbra" and "legal rules [that] resemble penumbra all the way through," *id.* at 1124, a distinction that—with different terminology—speaks to rules (the "clear core") versus standards (a legal norm that is "penumbra all the way through").

28. Sullivan, *supra* note 19, at 62; Kennedy, *supra* note 19, at 1688 ("[T]he two great social virtues of formally realizable rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty."); Kaplow, *supra* note 1, at 607–08 (stating rules "will tend to provide clearer notice than standards to individuals at the time they decide how to act").

29. Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 257 (1995) ("A standard supposition in the law and economic literature . . . is that private bargaining . . . is most likely to be efficient if the entitlement is clearly defined and assigned ex ante according to a rule . . . ."). But Johnston shows how under certain conditions the uncertainty of a standard might be efficient for bargaining.

anticipate the particulars to set out a rule, the legal categories required by rules often will not map cleanly onto reality as it develops; this produces situations where something like the rule should apply but the rule as written clearly does not (under-inclusiveness) as well as situations where the rule as written applies but should not (over-inclusiveness).[30] In contrast, standards give more vague direction to citizens (and lower courts); a standard is "fuzzy" because of the flexibility it gives to the decision-maker to withhold or impose liability.[31] As Vincy Fon and Francesco Parisi put it, "standards allow *ad hoc* custom-tailoring of the law to the circumstances of the case at bar, reducing problems of over-inclusion and under-inclusion."[32]

Of course, rules and standards are just points on a spectrum of precision in legal norms.[33] The notion of a standard may be itself a midpoint on the spectrum of specificity in principles for decision-making. The development of a *standard* assumes *some* commonalities between the fact patterns coming before a decision-maker. If every dispute was a truly sui generis set of facts, the decision-maker would have to rely on the most abstract organizing principle(s) of society to render decisions; there would be no need for either rules or standards. Making this point in relation to a society founded on utilitarianism, John Rawls noted that "[i]f similar cases didn't recur, one would be required to apply the utilitarian principle directly, case by case, and rules reporting past decisions would be of no use."[34]

Both standards and rules develop when (a) we recognize similar fact patterns emerging that require regulation or adjudication,[35] and (b) decision-makers (private actors and adjudicators) are more likely to make "mistakes" applying society's organizing principles than applying more precise norms that embody acceptable applications of the organizing principles to recurring situations.[36]

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30. *See, e.g.*, Brian Z. Tamanaha, *The History and Elements of the Rule of Law*, SINGAPORE J. LEGAL STUD. 232, 241 (2012) ("[A]ll rules suffer from the problem of *over-inclusiveness* and *under-inclusiveness*.").

31. Fon & Parisi, *supra* note 19, at 149; s*ee also* Sullivan, *supra* note 19, at 57–59. *See generally* VINCY FON & FRANCESCO PARISI, THE ECONOMICS OF LAWMAKING (2009).

32. Fon & Parisi, *supra* note 19, at 149; s*ee also* Sullivan, *supra* note 19, at 58–59. *See generally* FON & PARISI, *supra* note 31.

33. Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 828–32 (1991) (noting that rules and standards are theoretical endpoints on a "continuum" of specificity rather than sharply distinct categories); Kaplow, *supra* note 1, at 561 (explaining that we speak of rules and standards "as if one were comparing pure types, even though legal commands mix the two in varying degrees").

34. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 22 (1955). Obviously, in this passage Rawls used "rules" in a way that would encompass any specific norms regulating conduct.

35. *Id.* ("We are pictured as recognizing particular cases prior to there being a rule which covers them, for it is only if we meet with a number of cases of a certain sort that we formulate a rule.").

36. In his *Two Concepts of Rules* paper, Rawls did not draw the distinction we are considering here between standards and rules. Instead, Rawls speaks of "general rules." He writes:

> One is pictured as estimating on what percentage of the cases likely to arise a given rule may be relied upon to express the correct decision,

Finally, to complicate all this, we cannot expect courts to use the labels "rule" and "standard" with the same precision as academics distinguishing the two types of legal norms. For example, in its 2020 *Allen v. Cooper* decision, the Supreme Court described the "congruence and proportionality test" it had established for abrogation of state sovereign immunity—clearly a legal standard—and then told us, "going forward, Congress will know those rules."[37]

*1. How does one decide whether to regulate conduct with a rule or a standard?*

Commentators have noted a variety of considerations that go into the choice between using a rule or a standard to express a legal norm. First, it may be impossible or completely impractical to express some legal norms as rules that private parties or governmental officials can apply *ex ante*. Louis Kaplow gives the example of zoning codes that impose architectural or aesthetic consistency on towns or neighborhoods.[38] In the 1996 case *Ornelas v. United States*,[39] the Supreme Court said that this was also true of "reasonable suspicion" and "probable cause" in criminal law; the Court called these "commonsense, non-technical conceptions" and that "[a]s such, the standards are 'not readily, or even usefully, reduced to a neat set of legal rules.'"[40]

Once we are in the realm where an effective legal norm can be expressed as either a standard or a rule, several considerations should go into the choice between the two. One factor is the frequency with which a specific fact pattern comes before judicial authorities: the more frequent the enforcement of law against very similar fact patterns, *ceteris paribus*, the better off we will be with a rule. If drivers accused of driving at excessive speeds are frequently brought before the justice system, it is more efficient to have a fixed rule—say, 70 miles per hour—

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> that is, the decision that would be arrived at if one were to correctly apply the utilitarian principle case by case. If one estimates that by and large the rule will give the correct decision, or if one estimates that the likelihood of making a mistake by applying the utilitarian principle directly on one's own is greater than the likelihood of making a mistake by following the rule, and if these considerations held of persons generally, then one would be justified in urging its adoption as a general rule.

*Id.* at 23. Of course, standards can and do emerge in societies (presumably our own) where people can agree on intermediary principles but do not agree on the most fundamental principles. For an exploration of this in relation to intellectual property, see ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 139–59 (2011).

37. 140 S. Ct. 994, 1007 (2020).

38. Kaplow, *supra* note 1, at 599–600 ("It would appear that some legal commands cannot plausibly be formulated as rules. For example, it may not be possible to specify in a zoning ordinance which building designs are aesthetically inappropriate, but we may know them when we see them.").

39. 517 U.S. 690 (1996).

40. *Id.* at 695–96 (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)). The Court viewed these legal concepts as especially fuzzy standards; it "cautioned" that reasonable suspicion and probable cause "are not 'finely-tuned standards,' comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence." *Id.* at 696.

than a standard like "a reasonable and proper" speed.[41] In contrast, if the law is intended to shape behavior of a wide range of heterogeneous fact patterns, many of which will be infrequent, a standard is likely to be preferable.[42] Louis Kaplow provided the classic economic analysis of this point: because rules "involve advance determinations of the law's content,"[43] they are typically more costly to promulgate than standards. And that investment makes sense only if the law in question will be applied frequently. Conversely, the more frequently a legal standard is applied, the costlier it becomes for parties, legal advisors, law enforcement, and courts.

Because rules versus standards is a choice "whether to cast legal directives in more or less discretionary form,"[44] another factor in the choice will be confidence in the adjudicators; the level of confidence will reflect the diffusion of sophisticated legal knowledge as well as concerns about corruption, bias, or simply institutional inability to consider all relevant factors for proper application of a standard.[45] Simply put, rules are a better "restraint of official arbitrariness" than standards.[46] Thus, a jurisdiction that has sophisticated policymakers and judges in the capital but a substantial drop-off in sophistication and experience in the provincial court system[47] might *disfavor* standards and prefer clearer rules.[48] In contrast, a jurisdiction with a nationally homogenous, experienced, and sophisticated judiciary should be more comfortable with greater use of standards to govern behavior.

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41. Kaplow, *supra* note 1, at 577 ("In summary, the greater the frequency with which a legal command will apply, the more desirable rules tend to be relative to standards.").

42. *Id.* at 564 ("In contrast, some laws govern more heterogeneous behavior, in which each relevant type of act may be rare. For example, the law of negligence applies to a wide array of complex accident scenarios, many of which are materially different from each other and, when considered in isolation, are unlikely to occur.").

43. *Id.* at 562–63 ("Rules are more costly to promulgate than standards because rules involve advance determinations of the law's content, whereas standards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law's content.").

44. Sullivan, *supra* note 19, at 26.

45. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 149–55 (1991).

46. Kennedy, *supra* note 19, at 1688; *see also* SCHAUER, *supra* note 45, at 231–32 ("[T]he essence of rule-based decision-making lies in the concept of jurisdiction, for rules, which narrow the range of factors to be considered by particular decision-makers, establish and constrain the jurisdiction of those decision-makers."); Sullivan, *supra* note 19, at 64 ("Rules embody a distrust for the decisionmaker they seek to constrain.").

47. To some degree, early twenty-first-century China is an example because of the destruction of the legal system that occurred in late twentieth-century China, specifically Mao's Cultural Revolution (1966–1975). *See, e.g.*, YU HUA, CHINA IN TEN WORDS 91 (Allan H. Barr trans., 2011) ("There were no courts in China during the Cultural Revolution, nor any appeals after sentencing, and we had never in our lives heard of such a thing as the legal profession. After the penalty was announced, there was no chance of lodging an appeal. Prisoners were taken directly to the execution grounds and shot."). The rebuilding of China's legal infrastructure has understandably proceeded from the capital and largest cities outward.

48. Ruth Okediji has made a similar point on the question whether all countries should adopt American-style fair use. Ruth L. Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75, 154 (2000) (noting "that their local judicial institutions may not be developed enough to exercise a balanced application of the doctrine").

Yet another factor in the choice between rules and standards is how quickly the nonlegal reality changes: detailed rules "are more prone to obsolescence"[49] as technology, business models, and social practices change; in other words, the optimal level of specificity in the applicable legal norm depends on the anticipated rate of change in the nonlegal environment.[50] In that context, there is nothing new in observing that the increasing speed of technological change (in information technologies) and the concomitant need for "more responsive and flexible mechanisms" might tilt norm-making away from (typically legislative) rulemaking and toward (typically administrative or judicial) application of standards.[51] This is just an instantiation of an earlier point: rapid technological change means the same fact pattern arises less frequently.

*2. Both legislatures and courts make the choice between rules and standards.*

In the example of a highway speed limit, the relevant legislature decides whether to regulate driving speeds through a rule or a standard (almost always choosing a rule). But rules are often established by courts. In particular, a court may say, in effect, "enough is enough" in its application of a fuzzy standard and lay down a more precise rule. Indeed, some of the most important twentieth-century Supreme Court decisions announced new "rules"—as in the required *Miranda* warnings[52] and the trimester partition in *Roe v. Wade*.[53] Some Justices have favored the use of standards, while others have favored rules—and, over time, this seems to happen without any definite correlation to ideology.[54]

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49. Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 400 (2005) [hereinafter Sag, *New Structural Analysis*] ("In theory, laws that are more specific have a lower cost of administration, but that same specificity makes them more likely to produce undesirable or paradoxical results in response to unforeseen situations. In other words, specific laws are prone to obsolescence.").

50. Fon & Parisi, *supra* note 19, at 150 ("The fact that more specific rules become obsolete at a faster rate should imply that the optimal level of specificity of legal rules should depend on the expected rate of change of the external environment."); Schäfer, *supra* note 20, at 119–20 ("Rapid change makes precise rules obsolete after a short period of time, after only a small number of cases have been decided.").

51. *See, e.g.*, Shira Perlmutter, *Convergence and the Future of Copyright*, 24 COLUM.-VLA J.L. & ARTS 163, 165 (2001) (observing that given the "speed of technological development . . . it seems plausible that the mix of legislative versus administrative and judicial law making, and the mix of government regulation versus private sector agreements and standards, will shift toward a greater preponderance of the latter").

52. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

53. 410 U.S. 113, 163–65 (1973).

54. In her classic examination of Supreme Court precedent in the 1991 Term, Kathleen Sullivan observed that Justice Scalia favored rules while Justices Souter, Kennedy, and O'Connor moderated the Court's position by advocating standards. Sullivan, *supra* note 19. In other periods, it was liberals who favored rules; for example, Sullivan identified the Warren Court as using "rule-like or categorical approaches" to advance liberal positions in criminal procedure and privacy cases. *Id.* at 98. Sullivan concludes that "rules and standards simply do not map in any strong or necessary way onto competing political ideologies, or, in the setting of constitutional adjudication, onto the side of rightholders or the state." *Id.* at 96;

The choice between using a rule or a standard is not a one-time event, whether for legislatures, courts, or the two branches interacting. Over time, precise rules can be generated off of standards (as fact patterns become standardized) or rules can be made fuzzier (as difficult fact patterns emerge). Indeed, it is not hard to see that over time, as Frederick Schauer notes, "the rulification of standards is as common a phenomenon as is the standardization of rules."[55]

In the 1920s, Justices Holmes and Cardozo went back and forth this way in tort jurisprudence. In *Baltimore & Ohio Railroad v. Goodman Administratrix*,[56] Justice Holmes recognized that contributory negligence and "the question of due care very generally is left to the jury," but then concluded that in the case of what a driver should do at a railway crossing, a rule (although he called it a "standard") was warranted: "the standard is clear [and] it should be laid down once for all by the Courts."[57] One might have expected this particular judge-created rule to be stable because by the time of Holmes's opinion, railway technology was old-hat, automobile technology had become commonplace,[58] and the expected rate of technological change in that environment (cars and trains interacting) was low. But just a few years later, the rule was found unworkable in *Pokora v. Wabash Railway Co.*[59] against circumstances involving multiple tracks, a line of waiting vehicles, and a blocked view because of a "string of box cars standing on the switch."[60] Under those circumstances, Justice Cardozo found it was better to revert to a standard that

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*see also* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014) (observing, from the Supreme Court's perspective, "[w]ith rules, the Court can buy itself uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes. With standards, it can buy itself nuance, flexibility, and case-specific deliberation, at the expense of uncertainty, variability, and high decision costs"). Other judges have been identified or have self-identified as favoring rules or favoring standards. *See, e.g.*, Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 10–11, 19–21 (1984) (proposing that rules cause judges to view fact patterns from *ex ante* situations with less emphasis on (uncertain) determinations of fairness); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (favoring rules); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 605 (1986) (describing how Justice O'Connor "often rejects bright-line rules and occasionally makes explicit her preference for contextual determinations").

55. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 806 (2005).

56. 275 U.S. 66 (1927).

57. *Id.* at 70. The rule could be: "[I]t seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk." *Id.*

58. *See, e.g.*, *46a. The Age of the Automobile*, U.S. HIST., http://www.ushistory.org/us/46a.asp [https://perma.cc/32XV-5S4P] (last visited Jan. 6, 2021) ("By 1920, there were over 8 million registrations. The 1920s saw tremendous growth in automobile ownership, with the number of registered drivers almost tripling to 23 million by the end of the decade.").

59. 292 U.S. 98 (1934).

60. *Id.* at 100 ("A string of box cars standing on the switch, about five to ten feet from the north line of Edwards Street, cut off his view of the tracks beyond him to the north.").

judged what happened against "the conduct reasonably to be expected of reasonable men."[61] The same type of back and forth occurred decades later in North Carolina tort law in relation to nighttime driving.[62] One arguably sees the same back and forth in the Supreme Court's "one person, one vote" districting cases,[63] as well as the Court's handling of some areas of foreign affairs law.[64]

In intellectual property law, the struggle between rules and standards became an abiding theme of early-twenty-first-century patent law as rule-like norms laid down by the Federal Circuit were repeatedly rejected by the Supreme Court in favor of legal standards.[65] In 2006, the Court replaced the Federal Circuit's "general

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61. *Id.* at 102. Justice Cardozo also recommended "the need for caution in framing standards of behavior that amount to rules of law," reasoning that "[e]xtraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal." *Id.* at 105–06.

62. In *Weston v. S. Ry. Co.*, 194 N.C. 210, 238 (1950) (quoting Spencer v. Taylor, 188 N.W. 461 (Mich. 1922)), the North Carolina Supreme Court established as a rule that "it is negligence as a matter of law to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within the distance that objects can be seen ahead of it." Just a year later—in a case involving blindingly bright headlights from an oncoming car—the court reverted to a standard based on what "a reasonably prudent person [would] have done under the circumstances as they presented themselves." Chaffin v. Brame, 64 S.E.2d 276, 279 (N.C. 1951). My thanks to Paul Hayden for this example.

63. The Supreme Court first established a principle or standard of equal population for legislative districts. Reynolds v. Sims, 377 U.S. 533 (1964) (state legislatures); Wesberry v. Sanders, 376 U.S. 1 (1964) (Congress). The Court then established rule-like norms to implement the standard. Brown v. Thomson, 462 U.S. 835 (1983) (establishing a presumptive 10% threshold for prima facie unlawfulness in districting for state legislatures); Karcher v. Daggett, 462 U.S. 725 (1983) (establishing an apparent zero-tolerance rule for congressional districts). The Court later relaxed the rule for congressional districts back toward a standard. Tennant v. Jefferson Cnty. Comm'n, 567 U.S. 758 (2012). Arguably, the Court has also employed standards and rules in its different efforts to give effect to the Voting Rights Act. *See generally* Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573 (2016).

64. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 716 (2000) (noting "the Supreme Court has moved away from a standards-based approach" in the federal common law of foreign relations); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1424–29 (1999) (noting a shift from a standards-based approach to a rule-oriented approach in American foreign affairs law).

65. There has been a rich scholarly discourse on this. *See generally* Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035 (2003); John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771 (2003); Timothy R. Holbrook, *The Supreme Court's Complicity in Federal Circuit Formalism*, 20 SANTA CLARA COMPUT. & HIGH TECH. L.J. 1 (2003); John F. Duffy, *Rules and Standards on the Forefront of Patentability*, 51 WM. & MARY L. REV. 609 (2009); David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Rules and Standards*, 46 CONN. L. REV. 415 (2013). As of 2013, David Taylor calculated that "over the Federal Circuit's entire existence, . . . the Supreme Court has rejected a standard-like test adopted by the Federal Circuit in a patent case and replaced it with a more rule-like test only twice, while it has done the opposite eight times." *Id.* at 464.

rule that courts will issue permanent injunctions against patent infringement"[66] with a four-factor standard.[67] In the 2007 *KSR International Co. v. Teleflex Inc.* decision, the Federal Circuit's "teaching-motivation-suggestion" test for obviousness was criticized by the Supreme Court as falling in the genre of "[r]igid preventative rules that deny factfinders recourse to common sense."[68] In 2010, the Court replaced the Federal Circuit's rule-like "machine-or-transformation" test for patentability[69] with a more general standard (that *permits* use of that test, but not as a rule).[70] In 2014, the Court struck again in favor of standards, overruling a Federal Circuit interpretation that there were only two factual circumstances constituting "exceptional cases" meriting award of attorney's fees under the patent statute.[71] The Supreme Court found the Federal Circuit's rule-like framework to be "unduly rigid"[72] and essentially reinstated the standard that district court judges could award attorneys' fees whenever they found "exceptional" circumstances.[73] In the words of one Federal Circuit judge, the Supreme Court has been engaged in "condemnation of patent-specific, bright-line rules in favor of flexible mainstream dogma."[74] One jurist's dogma is another's legal standard.

Some commentators have concluded that the Federal Circuit's preference for bright-line rules stems from its role as an expert court trying to establish predictability and certainty in one area of law.[75] Other commentators see the court's preference as a practical reaction of an expert court overseeing nonexpert district courts, i.e., an oversight body wanting to reduce the burden on (and errors from) non-technologist judges handling complex technological issues.[76] That observation is close to one made before about rules and standards generally: the Federal Circuit

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66. MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1339 (Fed. Cir. 2005), *vacated*, 547 U.S. 388 (2006); *see also* W.L. Gore & Assocs. v. Garlock, Inc., 842 F.2d 1275, 1281 (Fed. Cir. 1988) ("This court has indicated that an injunction should issue once infringement has been established unless there is a sufficient reason for denying it.").

67. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (holding the four-factor test for determination of permanent injunctions includes: "(1) that [the plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction").

68. 550 U.S. 398, 421 (2007).

69. In re Bilski, 545 F.3d 943 (Fed. Cir. 2008) (en banc), *aff'd on other grounds sub. nom*, Bilski v. Kappos, 561 U.S. 593 (2010).

70. Bilski v. Kappos, 561 U.S. 593, 602–04 (2010).

71. Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. 545, 554 (2014).

72. *Id.* at 553.

73. *Id.* at 553–54 (explaining that the word "exceptional" should be applied according to its "ordinary meaning," i.e., a case that "stands out from others with respect to the substantive strength of a party's litigating position . . . or the unreasonable manner in which the case was litigated").

74. Richard Linn, *Changing Times: Changing Demands*, 15 SMU SCI. & TECH. L. REV. 1, 6 (2011).

75. Taylor, *supra* note 65, at 468 n.377.

76. Rai, *supra* note 65, at 1037 (reasoning that the Federal Circuit's adoption of bright-line rules reduces the need for federal district judges, most without a technical background, to wade into technologically complex matters before them).

finds itself in a situation where there is substantial difference in expertise between the sophisticated patent policymakers and judges in the capital and the legal expertise in the broader, national court system. Such circumstances counsel toward promulgation of rules. Meanwhile, the Supreme Court's "preference for holistic standards relates to its status as a generalist court,"[77] but also its limited and self-selected docket means that it does not have to deal with "the difficulties of applying [the standards it announces] in myriad technological contexts."[78]

### *B. Section 107 Fair Use as a Standard Amidst a Herd of Rules*

Returning to copyright law, it is clear that the menu of exceptions and limitations in Title 17 is principally a set of rules. Sections 108 (exceptions for libraries and archives), 120 (exceptions for architectural works), and 121/121A (exceptions for the blind) are precise rules with little gray zone for their application. Some copyright exceptions are *extremely* complex rules that are opaque to outsiders—for example, § 108 runs to over 1,400 words—but are well understood by the constituencies to which the exceptions apply.

Other than § 107 fair use, each of the exceptions codified in §§ 108 to 122 apply in a specific situation. Each deals with *either* specific kinds of works (as defined in §§ 101 and 102) or specific kinds of uses or users. For example, §§ 111 and 119 create a compulsory licensing system for audiovisual work for specific uses: cable and satellite retransmission, respectively. Similarly, § 115 applies to one kind of work—musical compositions—for one kind of use, i.e., making and distributing new sound recordings after the musical composition has already been used for a publicly available sound recording. Section 120 creates particular limits on copyright rights in relation to architectural works, while §§ 121 and 121A create exceptions that apply to literary and musical works for one group of users (the blind and other persons with print disabilities).

In contrast to these detailed, often byzantine rules with narrow application, § 107 fair use applies across the entirety of the copyright world with a structure, history, and operation that clearly establishes it as a legal standard. A conclusion about legal liability under § 107 formally requires consideration of the plaintiff's work and the defendant's activity against four nonexclusive factors, some with further sub-components. Section 107 is not just a legal standard; it is what Louis Kaplow would call a "complex" legal standard. Analysis under § 107 is consistently

77. Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1425 (2016).

78. Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 63 (2010).

described as a question of "balance," or "balancing"[79] that is "flexible"[80] and "equitable."[81]

Section 107 fair use also comports with other scholarly observations about legal standards. For example, it fits one of Louis Kaplow's descriptions of a standard: "a standard promulgated decades ago can be applied to conduct in the recent past using present understandings rather than those from an earlier era."[82] And the fair use inquiry—especially in high profile cases with extensive amici briefing—fulfills Frank Michelman's praise for standards as "resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving."[83] Indeed, the complaint about fair use being nothing more than "the right to hire a lawyer"[84] is no different than complaints made about other legal standards, i.e., that standards are full employment acts for lawyers.[85] Finally, the realm of copyrighted works—particularly from 1995 onwards—has provided what commentators would have described as the perfect environment in which to deploy a general standard to exculpate behavior: (a) a rapidly changing nonlegal reality contributing to (b) significantly varied fact patterns quickly coming before (c)

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79. *See, e.g.*, NXIVM Corp. v. Ross Inst., 364 F.3d 471, 475 (2d Cir. 2004) ("balancing of the statutory fair use factors"); Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003) (stating courts "must balance [the statutory fair use] factors in light of the objectives of copyright law, rather than view them as definitive or determinative tests"); Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1151 (9th Cir. 1986) ("The doctrine is a means of balancing the need to provide individuals with sufficient incentives to create public works with the public's interest in the dissemination of information."); Lamb v. Starks, 949 F. Supp. 753, 757 (N. D. Cal. 1996) ("[C]ourts must balance the statutory factors . . . .").

80. *See, e.g.*, Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1258–59 (11th Cir. 2014) ("[T]he fair use inquiry is a flexible one."); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 800 (9th Cir. 2003) (stating that courts "engage in a case-by-case analysis and a flexible balancing of relevant factors"); Calkins v. Playboy Enters. Int'l, Inc., 561 F. Supp. 2d 1136, 1140 (E.D. Cal. 2008) ("In determining whether a use is fair, courts engage in a case-by-case analysis and a flexible balancing.").

81. *See, e.g.*, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1200 (2021) ("As far as contemporary fair use is concerned, we have described the doctrine as an 'equitable,' not a 'legal,' doctrine."); Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986) ("the equitable balance of a fair use determination"); Real v. Matteo, No. 17-01288, 2018 WL 493596, at *2 n.4 (W.D. La. Jan. 3, 2018) ("Fair use requires an equitable balancing of multiple factors, including four factors set out in the text of 17 U.S.C. § 107 (2000)."); Tuteur v. Crosley-Corcoran, 961 F. Supp. 2d 333, 343 (D. Mass. 2013) ("[F]air use requires an equitable balancing of multiple factors . . . .").

82. Kaplow, *supra* note 1, at 616.

83. Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4, 34–35 (1986).

84. LAWRENCE LESSIG, FREE CULTURE 187 (2004) ("[F]air use in America simply means the right to hire a lawyer to defend your right to create.").

85. *See, e.g.*, Tamar Lewin, *Long Battles over Abortion Are Seen*, N.Y. TIMES, June 30, 1992, at A18 (describing the standard for permissible abortions enunciated in the Supreme Court's *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), decision as meaning nothing more than "full employment for lawyers"); Sullivan, *supra* note 19, at 118 (describing that, in contrast to rules, one might view standards as "suspiciously as the self-interested tools of the lawyering class: the one thing they guarantee is full employment for lawyers").

sophisticated decision-makers (copyright cases being the exclusive purview of federal judges).

## II. HOW FAIR USE IS A MECHANISM TO GENERATE DISTINCT, RULE-LIKE EXCEPTIONS FROM COPYRIGHT LIABILITY

The principal thesis here is that § 107 is a legal standard that is often a mechanism to generate rule-like exceptions shielding certain conduct from copyright liability. In other words, § 107 fair use is not just a complex balancing test legal standard. Instead, § 107 fair use is a legal standard by which courts often generate de facto, "rule-like" exceptions that are as clear as some of the rule-like exceptions in the rest of Title 17 (and in other national copyright laws).

This generative process explains the Jekyll-and-Hyde persona of fair use. On the one hand, American fair use is criticized as "notoriously difficult" to predict,[86] the source of "significant *ex ante* uncertainty,"[87] and that any practical advice on § 107 "depends as much on the amount of risk the user is willing to undertake as it does on the evaluation of the substantive law."[88] One treatise on American copyright law says that "no copyright doctrine is less determinate than fair use,"[89] while the author of another leading treatise has likened judicial application of the four-factor fair use framework to a fairy tale.[90] Professor Jessica Litman has called the fair use factors "billowing white goo,"[91] a vivid phrase that at least one appellate judge seems to enjoy citing.[92] Judicial opinions candidly describe fair use as "a sort of rough justice,"[93] and "so flexible as virtually to defy

86. Joseph P. Liu, *Two-Factor Fair Use?*, 31 COLUM. J.L. & ARTS 571, 574–78 (2008) (stating that fair use's multifactor test makes it "notoriously difficult" to predict the outcomes of a case); Tushnet, *supra* note 5, at 871 ("unpredictable").

87. Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1095 (2007).

88. June M. Besek, Jane C. Ginsburg & Philippa S. Loengard, Comments on ALRC Discussion Paper 79, Copyright and the Digital Economy 3 (July 31, 2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2344338 [https://perma.cc/KA3G-T4UK] ("[The flexibility of fair use] in many instances comes at the cost of certainty and predictability . . . . [F]air use decisions are often complicated, and advice frequently depends as much on the amount of risk the user is willing to undertake as it does on the evaluation of the substantive law.").

89. 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.1, at 12:3 (3d ed. 2005).

90. David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 287 (2003) (concluding that the four factors in § 107 are so malleable that "[i]n the end, reliance on the . . . factors to reach fair use decisions often seems naught but a fairy tale").

91. Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008).

92. VHT, Inc. v. Zillow Grp., Inc., 918 F.3d 723, 739 (9th Cir. 2019) ("[C]ommentators have criticized the factors as 'billowing white goo.'"), *cert. denied*, 140 S. Ct. 122 (2019); Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1171 (9th Cir. 2012) ("Some commentators have criticized the factors, labeling them 'billowing white goo.'"). Both opinions are by Judge M. Margaret McKeown.

93. Henley v. DeVore, 733 F. Supp. 2d 1144, 1163 (C.D. Cal. 2010); Northland Fam. Plan. Clinic, Inc. v. Ctr. for Bio-Ethical Reform, 868 F. Supp. 2d 962, 982 (C.D. Cal. 2012).

definition."[94] Indeed, in the high profile *Oracle America, Inc. v. Google Inc.* litigation, the agreed-upon jury instructions informed the lay members of the jury that "[s]ince the doctrine of fair use is an equitable rule of reason, *no generally accepted definition is possible*."[95]

On the other hand, a number of commentators have recognized over the years that fair-use decisions fit into groups, categories, or clusters.[96] In 1958, Alan Latman offered what was perhaps the first taxonomy of fair-use decisions,[97] proposing eight categories of (then uncodified) fair uses. In the 1990s, William Patry offered his own classificatory framework, breaking fair use into five broad categories and, within those, 17 types of fair uses.[98] In 2004, Michael Madison again proposed dividing fair use caselaw into eight groups.[99] Pamela Samuelson offered her own taxonomy in a 2009 review of fair use caselaw, clustered around policy goals with the six articulated uses in the § 107 chapeau having overlapping policy objectives and then additional policy-based clusters (such as personal use).[100]

When commentators have developed these taxonomies of fair use, it has often been for the purpose of showing that fair use cases have some predictability.[101] In his empirical study of fair use caselaw, Barton Beebe observed that what he called "critical purpose" use cases had a 62% fair use win rate, while news-reporting cases had a 78% fair use win rate.[102] Pamela Samuelson also believes that once caselaw is properly classified into clusters, "it is generally possible to predict whether a use is likely to be fair or not."[103]

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94. Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (quoting Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968)).

95. Penultimate Jury Instruction on Fair Use at 2, Oracle Am., Inc. v. Google, Inc., Case 3:10-cv-03561-WHA (N.D. Cal. May 3, 2016) (emphasis added).

96. *See, e.g.*, Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 439–41 (2008) (suggesting that fair use cases tend to fall into distinct classes, but not attempting a systematic taxonomy).

97. Alan Latman, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 3, 8–14 (Comm. Print 1960).

98. *See generally* WILLIAM PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2d ed. 1995).

99. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1645–65 (2004). Madison's eight categories: (1) journalism and news reporting; (2) parody and satire; (3) criticism and comment; (4) scholarship and research; (5) reverse engineering; (6) legal and political argument; (7) storytelling; and (8) comparative advertising, information merchants, and personal use.

100. Samuelson, *supra* note 9, at 2540–42.

101. Netanel, *supra* note 11, at 718 (arguing that there are "patterns in fair use case law that give the doctrine some measure of coherence, direction, and predictability"); Samuelson, *supra* note 9, at 2541–42.

102. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 609–10 (2008).

103. Samuelson, *supra* note 9, at 2540–42; *see also* Annette Kur, *Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the*

***A. Like some other legal standards, Section 107 is a mechanism to generate distinct, rule-like legal norms.***

It seems evident that when a judge describes fair use as "a sort of rough justice" or "so flexible as virtually to defy definition," she is confronting a fact pattern for which—to paraphrase Justice Kennedy—"rules" have not yet "emerge[d] from the course of decisions."[104] It also seems that the scholarly "clustering" analysis has been a polite, if unconsciously so, effort to camouflage what we are really doing in the § 107 ecosystem. Instead of viewing the fair use doctrine as a *single* exception that generates *clusters* of results, it is better to understand § 107 as a legal standard that is a *mechanism* for throwing off discrete rule-like *exceptions* (plural). To better understand this, we need to return to the rules-and-standards literature and look at some other areas of law where it is largely agreed that rules emerge from the jurisprudence.

There is no question that courts generate rules and often generate those rules *from* standards. As Louis Kaplow notes, "courts create rules through precedents,"[105] and the efficiency loss in the legislative choice of a standard can be addressed by judicial development of rules through precedent. Describing circumstances "in which the first enforcement proceeding essentially transforms the standard into a rule,"[106] Louis Kaplow noted: "in subsequent enforcement proceedings, courts simply apply the precedent rather than engaging in an inquiry concerning appropriate legal treatment—and access to this precedent costs no more than if the law had been promulgated as a rule in the first place."[107] This is an apt description of what happens when a fair-use claim coming before a court falls squarely within a well-defined "cluster" of fair-use precedent.

But here is where we need to distinguish two different types of rule–standard relationships. Louis Kaplow's account can be read as one in which a standard is *transformed into a rule*. But what happens with fair use is more akin to what happens with the Fourth and Fifth Amendments: the standard *generates a particular rule* for particular circumstances while remaining a legal standard that can be used to generate additional rules for different circumstances.

There is a rough comparison here in how courts have developed the jurisprudence of § 1 of the Sherman Act that declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[108] What could be read as an absolute rule has been interpreted—and made workable—by the courts as a standard, with fact patterns analyzed under a rule of reason. But in tandem with that rule-of-reason standard, rules of per se illegality have been developed for certain kinds of contracts, combinations, and concerted activities—such as "agreements

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*Three-Step Test*, 8 RICH. J. GLOB. L. & BUS. 287, 297 (2009) (noting that U.S. fair use caselaw "offer[s] a relatively stable basis for parties to plead their case and structure their arguments").

104. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 596 (1994) (Kennedy, J., concurring).

105. Kaplow, *supra* note 1, at 611.

106. *Id.* at 577.

107. *Id.*

108. 15 U.S.C. § 1.

among competitors to fix prices on their individual goods or services"[109] or concerted refusals to deal.[110] In copyright jurisprudence, there may be multiple appellate decisions before we can say that rule-like exceptions have been generated off the fair-use standard. Just as in antitrust law, "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations."[111]

As in per se antitrust violations under 15 U.S.C. § 1, even after a rule-like exception has emerged under 17 U.S.C. § 107, the rule may need to be tweaked and refined.[112] For example, the Supreme Court's determination in *Sony Corp. of America v. Universal City Studios, Inc.* surely established a "rule" that there is no copyright liability for private copying for later enjoyment when the copyright owner made the work available to the consumer, and no copy is ultimately retained by the consumer.[113] You could also reasonably believe that the "Betamax" decision established a broader rule, i.e., that private copying *for any purpose* is exempt from copyright liability or that private copying *for most purposes* is exempt from copyright liability. As Karl Llewellyn noted in his own study of court-generated rules, "[a]ny rule of law which has not been given verbal form (as a statute has) can always be treated and stated on a level of broad abstraction or on a level of narrow near-concreteness."[114] The initial Betamax rule has been given greater "concreteness" by subsequent court decisions, i.e., establishing that the rule does not extend to acts of *distribution*[115] and does not reach situations where the copies were made from unauthorized sources.

These rule-like exceptions within the ambit of § 107 will be specified by (a) the kind of plaintiff's work involved or (b) the defendant's use or characteristics. In other words, Justice Kennedy's "rules [that] emerge from the course of decisions" should have the same basic what-kind-of-work, used-by-whom, and for-what

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109. Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 8 (1979); *see also* United States v. McKesson & Robbins, Inc., 351 U.S. 305, 307–08 (1956) (involving a manufacturer that agreed with independent wholesalers on prices to be charged on products it manufactured); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 190 (1940) (involving firms controlling a substantial part of an industry that agreed to purchase "surplus" gasoline with the intent and necessary effect of increasing the price); United States v. Trenton Potteries Co., 273 U.S. 392, 394 (1927) (involving manufacturers and distributors of 82% of certain vitreous pottery fixtures that agreed to sell at uniform prices).

110. *See, e.g.*, Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 463 (1941); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 658 (1961).

111. United States v. Topco Assocs., Inc., 405 U.S. 596, 607–08 (1972).

112. In *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), the Court concluded that the per se rule against price fixing should not apply to ASCAP and BMI blanket licenses, although the rule, as formulated in prior caselaw, would literally apply to the blanket licenses. As the Court noted, "[l]iteralness is overly simplistic and often overbroad." *Id.* at 9.

113. 464 U.S. 417, 427 (1984); *see also* Elkin-Koren & Fischman-Afori, *supra* note 14, at 177–78 (describing how the *Sony* decision was a "rulification" of fair use).

114. KARL N. LLEWELLYN, THE THEORY OF RULES 141 (Frederick Schauer ed., 2011).

115. A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004, 1019 (9th Cir. 2001) (stating *Sony* precedent was "inapposite" because the time-shifting reproduction in that case "did not also simultaneously involve distribution of the copyrighted material to the general public").

activity structure as the rules embodied in copyright's statutory exceptions at §§ 108–122.

### *B. Four Rule-Like Exceptions*

Let us consider a few *exception rules* established via § 107 to better see the characteristics of a distinct exception within the fair-use environment. I believe these are properly viewed as distinct exception rules because the caselaw has produced "a *definite ex ante entitlement*" from application of the caselaw versus the "*contingent*, *ex post entitlement*"[116] that comes from application of the four-factor § 107 legal standard. This is *not* a claim that *all* fair-use decisions generate rules, contribute to the formation of rules, or fall under rules; many fair-use decisions remain ad hoc rulings of an equitable balancing test. The claim is only that through adjudication the § 107 legal regime has "transformed into a combination of standard and rule[s],"[117] even if the rules exist *sub rosa*.

#### *1. Fair-Use-Parody Exception*

Few copyright experts would dispute that the Supreme Court's 1994 *Campbell v. Acuff-Rose Music* decision[118] established a distinct framework for concluding that a parody does not infringe the work upon which it is based. But we can go further and say that *Campbell* and a handful of other key parody cases—including about a novel,[119] an artistic photograph,[120] and other songs[121]—give American copyright law a distinct exception for parodies in which critical commentary on an original work allows one to copy a *significant* amount of the original work on a *presumption* that there is not the kind of market harm that is relevant under the fourth factor.

Indeed, once one is "in" the parody category—which is a judgment under the first factor—each of the other three factors either morphs or falls away.[122] First,

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116. Johnston, *supra* note 29, at 256.

117. John Nockleby, The Dynamics of Rules and Standards 4 (2016) (unpublished essay) (on file with the author).

118. 510 U.S. 569 (1994).

119. SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1273–74 (11th Cir. 2001).

120. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115–16 (2d Cir. 1998).

121. Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741, 747 (S.D.N.Y. 1980), *aff'd sub. nom.* 632 F.2d 252 (2d Cir. 1980) (concluding that Saturday Night Live's "I Love Sodom" song took only two words and four notes from the "I Love New York" promotional jingle and did so without causing any cognizable market harm to the jingle); Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986) (finding fair use for a 29-second parody that used six bars of the song's music and one lyric line).

122. *Campbell*, 510 U.S. at 591 ("[A]s to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. This is so because the parody and the original usually serve different market functions.") (citations omitted). The Court bolstered this analysis as to substitutability from the consumers' perspective with a behavior analysis from the copyright holder's perspective, noting "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market." *Id.* at 592.

the objects of parody will usually be works at the core of copyright protection,[123] so the second factor that would normally favor the plaintiff has diminished importance. The Supreme Court has also told us that, qua parody, the fourth factor is effectively removed: qua parody the defendant's work cannot produce cognizable harm. (If there is any fourth-factor consideration—as there was in *Campbell*—it comes from considering the defendant's work differently.) Finally, the Court has told us that our judgments under the third factor must be made in a substantially more lenient framework.[124]

Because all this happens once we are in the parody category, much litigation energy focuses on whether the defendant's work is truly a parody.[125] On that count, courts have told us that parodies do not have to be humorous, but courts have also maintained the Supreme Court's boundary between a parody, which criticizes a *specific work*, and a satire (or burlesque), which critiques *society* or some social segment, custom, or practice. That is a defining element or sub-rule of the parody exception.[126]

Still, it might be complained that what I am calling the "fair use parody exception" is not specific enough to be a de facto rule. More generally, the critic of the argument here can say that caselaw does *not* produce rule-like exceptions unless courts actually announce "rules." But the legal framework for parody in American copyright law after *Campbell* (and a handful of appellate decisions) seems no less certain than the statutory rules of other national copyright laws that except parody

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123. A possible exception is a case involving film footage from a pro-choice group. Northland Fam. Plan. Clinic v. Ctr. for Bio-Ethical Reform, 868 F. Supp. 2d 962 (C.D. Cal. 2012).

124. *Campbell*, 510 U.S. at 588 ("Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. . . . [T]he parody must be able to 'conjure up' at least enough of that original to make the object of its critical wit recognizable."); *see also* Ty, Inc. v. Publ'ns Int'l Ltd., 292 F.3d 512, 518 (7th Cir. 2002) (stating a parody "must quote enough of that work to make the parody recognizable as such, and that amount of quotation is deemed fair use").

125. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1399 (9th Cir. 1997) (finding work mimicking the style of Dr. Seuss was a satire concerning the O.J. Simpson trial, not a parody of Dr. Seuss works). A pre-*Campbell* case to include here is *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987) (finding film promotional poster used parodic theme of plaintiff's work, but was not a parody of plaintiff's work).

126. In *Campbell*, Justice Kennedy expressly described it that way. 510 U.S. at 596–97 (Kennedy, J., concurring) ("I agree that certain general principles are now discernible to define the fair use exception for parody. One of these *rules*, as the Court observes, is that parody may qualify as fair use regardless of whether it is published or performed for profit. Another is that parody may qualify as fair use only if it draws upon the original composition to make humorous or ironic commentary about that same composition. It is not enough that the parody use the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).") (emphasis added) (citations omitted).

from copyright liability. Consider the copyright law in a couple of other jurisdictions:

> The right conferred in respect of a work by section 5 of this Act does not include the right to control . . . the doing of any of the aforesaid acts by way of parody, pastiche, or caricature.
>
> (Nigerian copyright law)[127]
>
> Paraphrases and parodies shall be free where they are not actual reproductions of the original work and are not in any way derogatory to it.
>
> (Brazilian copyright law)[128]

The Nigerian provision above is exemplary of jurisdictions that have an exception in national copyright law for parody without any further specification as to what constitutes a parody or caricature.[129] Do these express rules create exceptions that are any more rule-like for lawyers and their clients than the body of § 107 parody cases in the United States? Do these express rules make it any less necessary to exercise your "right to hire a lawyer?" To elaborate on the content of the Nigerian statute, two leading treatises on Nigerian copyright law cite to English and *American* parody cases, i.e., the American cases decided under § 107.[130] So it seems hard to deny that the fair use parody exception in American copyright law is at least as well defined as the Nigerian statutory exception. From the lay person's perspective, when they consult with Nigerian counsel or American counsel, they get roughly the same advice: "Yes, you can engage in parody, reasonably understood."

*2. Fair Use Print-Disabilities Exception*

At least two distinct de facto exceptions have been spun off the fair use framework based on § 107's legislative history, with the first concerning the blind. The House Report accompanying the 1976 Act expressly states that the § 107 codification of fair use was intended to include nonprofit production of accessible copies of works for the blind. The House Report notes that "the making of a single

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127. Copyright Act of Nigeria (1999) Cap. (68), Second Schedule (Nigeria), https://www.wipo.int/edocs/lexdocs/laws/en/ng/ng001en.pdf [https://perma.cc/42SK-BJCM].

128. Lei No. 9.610, de 19 de Fevereiro de 1998 [Law No. 9.610 of Feb. 19, 1998], DIÁRIO OFICIAL DA UNIÃO [D.O.U.], ch. IV, art. 47 (Braz.), http://www.wipo.int/wipolex/en/details.jsp?id=514 [https://perma.cc/KA5W-Z7WC].

129. *See, e.g.*, LAWS OF MALAYSIA, COPYRIGHT ACT OF 1987 art. 13(2)(b) (2012), https://www.cric.or.jp/db/link/doc/malaysiaCopyrightAct1987asat1-7-2012.pdf [https://perma.cc/A9JH-MMES] (exempting from liability "the doing of any of the acts referred to in subsection (1) by way of parody, pastiche, or caricature"); SENEGAL LAW NO. 2008-09 OF JANUARY 25, 2008 ON COPYRIGHT AND NEIGHBORING RIGHTS art. 43 (2008), https://wipolex.wipo.int/en/text/243176 [https://perma.cc/2ZYQ-R22K] (providing "[t]he author may not prohibit the reproduction or communication of the work in the form of a parody, where the rules of the genre are observed").

130. *See, e.g.*, JOHN O. ASEIN, NIGERIAN COPYRIGHT LAW AND PRACTICE 263–65 (2d ed. 2012) (discussing only American and English cases in relation to Nigerian parody provision); BANKOLE SODIPO, COPYRIGHT LAW: PRINCIPLES, PRACTICES & PROCEDURES § 11.15.2 at 213 (2d ed. 2017).

copy or phonorecord by an individual as a free service for a blind persons [sic] would properly be considered a fair use under section 107."[131] The House Report's reasoning appears based on the fourth fair use factor—i.e., that publishers do not usually make such copies for "commercial distribution,"[132] and, therefore, no market harm can occur.

In 1984, Supreme Court dicta noted the House Report's conclusion that the accessible format made "for the convenience of a blind person" would be a fair use, regardless of whether the copied work is "to entertain or to inform."[133] In the 2014 *Authors Guild, Inc. v. HathiTrust* decision, the Second Circuit had no problem finding that the same practice carried on by university libraries, instead of individuals, constituted a fair use.[134] The appellate panel did so *without* a detailed consideration of each of the four factors.[135] Indeed, a traditional analysis could put the third factor as *against* fair use, as well as perhaps the second factor (if the work was, for example, a novel). Under the first factor, while the activity would presumably not be "commercial," creating an accessible copy for the blind person's reading may not be "transformative."[136] Yet these points were barely discussed in the *HathiTrust* decision, supporting the argument that a distinct, rule-like norm had emerged.

One curious thing to note: use of § 107 for accessible copies for the blind coexists with an express statutory provision providing for special third parties (called "authorized entities") to create and distribute accessible format copies of copyrighted works to the blind and other people with print disabilities. That provision—17 U.S.C. § 121[137]—was added in the 1990s, well after the codification of fair use in 1976 and Supreme Court dicta in 1984 that identified fair use for the blind in light of § 107's legislative history. This timing *could* suggest that Congress believed that fair use for the blind was still uncertain. However, an alternative explanation is that to the degree Congress and Hill staff were aware of § 107's legislative history, they could have believed that the fair use exception for the blind was directed at "the making of a single copy or phonorecord by an individual as a free service for a blind person" and did not necessarily extend to organizations serving the blind systematically.[138] In other words, this accords with Karl Llewellyn's observation that a rule that has not been codified in a statute can "always be treated and stated on a level of broad abstraction or on a level of narrow near-

131. H.R. REP. NO. 94-1476, at 73 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5686.

132. *Id.* (noting that blind-accessible formats "are not usually made by the publishers for commercial distribution").

133. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984).

134. 755 F.3d 87, 102 (2d Cir. 2014).

135. *Id.*

136. *Id.*

137. 17 U.S.C. § 121, added as Pub. L. 104–197, title III, § 316(a) (1996).

138. The legislative history on 17 U.S.C. § 121 is scant at best. The sponsor of the Title 17 amendment which became § 121, Senator John Chaffee, discussed his proposal on the Senate floor twice—on July 29 and September 3, 1996. On neither occasion did he mention § 107.

concreteness."[139] In short, legislators and staff could have understood that there was a rule-like exception already existing in the fair use eco-system but construed it with "narrow near-concreteness."

*3. Fair Use Judicial-Proceedings Exception*

A second de facto specific exception spun off the fair use framework and based on § 107's legislative history could be called the "fair use judicial-proceedings exception," i.e., using an entire copy of a work in a litigation *unless the copied work was created for use in (that) litigation*.[140] The House Report accompanying the 1976 Copyright Act mentions the "reproduction of a work in . . . judicial proceedings" as an example of "the sort of activities the courts might regard as fair use under the circumstances."[141] District court and appellate decisions have given the exception substance and contours,[142] galvanizing the view that this fair use exception does not extend to copyrighted works created for use in litigation.[143]

Pamela Samuelson believes that this exception should extend to "legislative, executive, or administrative uses of copyrighted materials,"[144] a perspective shared by the U.S. Patent and Trademark Office in relation to patent applications.[145] But without caselaw on that point (or those points), this particular exception rule may or may not (yet) have those contours.

It warrants pointing out that the de facto exception *within fair use* for use of materials in judicial proceedings is the only way that American copyright law provides for what is otherwise a standard, widespread exception in sophisticated national copyright laws. The European Union's 2001 Information Society Directive provides that EU Member States may create an exception for "use for the purposes of public security or to ensure the proper performance or reporting of administrative,

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139. LLEWELLYN, *supra* note 114, at 141.

140. Samuelson, *supra* note 9, at 2592–95.

141. H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678–79.

142. *See* Jartech, Inc. v. Clancy, 666 F.2d 403 (9th Cir. 1982) (finding fair use to introduce unauthorized reproduction of a porn film to show that exhibition of film was public nuisance); Bond v. Blum, 317 F.3d 385 (4th Cir. 2003) (finding fair use to copy and introduce an unpublished manuscript by defendant to show defendant's unfitness in child custody battle).

143. Images Audio Visual Prods., Inc. v. Perini Bldg. Co., 91 F. Supp. 2d 1075 (E.D. Mich. 2000) (holding that photographs prepared for litigation not fairly photocopied by other party in the litigation).

144. Samuelson, *supra* note 9, at 2596.

145. Memorandum in Support of Motion to Intervene of the United States Patent & Trademark Office, Am. Inst. of Physics v. Winstead PC, No. 3:12-CV-1230-M, 2013 WL 6242843 (N.D. Tex. Dec. 3, 2013) (arguing that copying of scientific articles for prosecution of patent applications by either patent applicant and examiner is fair use); Memorandum from U.S. Patent & Trademark Office Gen. Counsel Bernard J. Knight on USPTO Position on Fair Use of Copies of NPL Made in Patent Examination (Jan. 19, 2012), https://patentdocs.typepad.com/files/memo-on-use-of-npl.pdf [https://perma.cc/6YEX-6THN]; *see also* Donald Zuhn, *USPTO Issues Memo on Use of Non-Patent Literature During Examination*, PATENTDOCS (Jan. 23, 2012), https://www.patentdocs.org/2012/01/uspto-issues-memo-on-use-of-non-patent-literature-during-examination.html [https://perma.cc/2P83-BLTT] (describing USPTO memo reaching the same conclusion).

parliamentary or judicial proceedings,"[146] while Australian law provides that "copyright in a literary, dramatic, musical or artistic work is not infringed by anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding."[147] Consider two of these national-law exceptions:

> It is permissible to reproduce a work if and to the extent that this is found to be necessary for judicial proceedings or for internal use by a legislative or administrative organ; provided, however, that this does not apply if reproducing a work would unreasonably prejudice the interests of the copyright owner in light of the nature and purpose of the work as well as the number of copies and the circumstances of its reproduction.
>
> (Japanese copyright law)[148]
>
> Use of a work in juridical or administrative procedures according to law, including reporting on such proceedings, is permitted to the extent that is justified taking into consideration the purpose of the aforesaid use.
>
> (Israeli copyright law)[149]

As with parody, are these statutory rules in other national copyright laws truly more rule-like norms than what relevant § 107 caselaw and practice provide to American lawyers and their clients? The lawyer using the copyrighted work without authorization still has to determine if it is for the "purpose" of judicial proceedings and, in jurisdictions like Japan and Israel, still needs to make a calculation of reasonableness.

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146. Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 17, art. 5(3)(e).

147. *Copyright Act 1968* (Cth) pt 3 div 3 s 43 para 1 (Austl.), https://www.legislation.gov.au/Details/C2017C00180 [https://perma.cc/B9HL-LWGH]. For other important jurisdictions, see, for example, Copyright Act, 1957 ch. XI, 52(d), No. 14 of 1957, Acts of Parliament, 1957 (India), http://copyright.gov.in/Copyright_Act_1957/chapter_xi.html (permitting "the reproduction of any work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding"); THE STATUTES OF THE REPUBLIC OF SINGAPORE, COPYRIGHT ACT ch. 63, art. 38 (2006), https://wipolex.wipo.int/en/text/485689 [https://perma.cc/2QFH-H97Q]. Singapore's law uses a similar formulation and expands the exception to unauthorized acts "for the purpose of seeking" or "of giving" professional advice from or by an advocate and solicitor. *Id.*; Copyright Act 98 of 1978 § 12(2) (S. Afr.), https://www.gov.za/sites/default/files/gcis_document/201504/act-98-1978.pdf ("The copyright in a literary or musical work shall not be infringed by using the work for the purposes of judicial proceedings or by reproducing it for the purposes of a report of judicial proceedings.").

148. Chosakukenhō [Copyright Act] Law No. 48 of May 6, 1970, as amended up to Act No. 72 of July 13, 2018, art. 42 sec. 1 (Japan), https://wipolex.wipo.int/en/text/504293 [https://perma.cc/E8C4-CYZ6].

149. COPYRIGHT ACT, 2007, § 20 (as amended on July 28, 2011) (Isr.), https://wipolex.wipo.int/en/text/255135 [https://perma.cc/L5H3-BSB2].

*4. Fair Use "Intermediate" Copying Exception for Software*

A pair of appellate decisions have established a clear exception for software developers that we can call an "intermediate-software-copying exception," a rule-like exception in fair use that might or might not have been expanded by the Supreme Court's 2021 *Google* decision—something considered below.

In the 1992 *Sega Enterprises, Ltd. v. Accolade, Inc.* case,[150] Accolade's engineers had made multiple copies of Sega's video-game programs while reverse engineering the software to understand Sega interfaces,[151] their goal being to develop video games that would interoperate successfully with the Sega Genesis game console.[152] In concluding that this was a fair use, the Ninth Circuit emphasized that the nature of the plaintiff's work (software) meant that, unlike with a novel or play, the only way to access unprotected elements of the work was to engage in prima facie infringement.[153] The defendants were also creating and marketing wholly new expressive works to be enjoyed on the Genesis console, and no elements of the plaintiff's expressive works were being redistributed, save for very-limited interface code.

The Ninth Circuit followed this 1992 decision with an opinion in 2000, *Sony Computer Entertainment, Inc. v. Connectix Corp.*,[154] that applied the same analysis to a defendant whose reverse engineering aimed to make a compatible *platform* that would play the plaintiff's video games. In both cases, the defendant had lawful access to software which was reproduced internally to learn the unprotected elements of that software in order to develop a compatible or complementary product (that has little or no infringing code). Factually similar disputes in which the fair use defense fails typically lack some characteristic of this description, e.g., the defendant only had *unlawful* access to the work.[155]

As with the Supreme Court's criminal-law jurisprudence, one way to understand the "rule" coming out of one or more fair use decisions is how subsequent courts summarize the prior holding(s). In the Court's 2021 *Google* decision, Justice Breyer characterized *Connectix* as "applying fair use to intermediate copying necessary to reverse engineer access to unprotected functional elements within a program"[156] and *Sega Enterprises* as "holding that wholesale copying of copyrighted code as a preliminary step to develop a competing product was a fair use."[157] While these characterizations of the two cases are quite different, they have the virtue of being a jurist's summation instead of an academic's broad

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150. 977 F.2d 1510 (9th Cir. 1992).
151. *Id.* at 1514–15.
152. *Id.*
153. *Id.* at 1524–28; *see also* Samuelson, *supra* note 9, at 2607–08.
154. Sony Comput. Entm't, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000).
155. *See* DSMC, Inc. v. Convera Corp., 479 F. Supp. 2d 68, 73, 83 (D.D.C. 2007) (finding no fair use where the defendant's access to the plaintiff's program was unlawful and the defendant had contractually agreed not to reverse engineer); Compaq Comput. Corp. v. Procom Tech., Inc., 908 F. Supp. 1409, 1421 (S.D. Tex. 1995) (finding no fair use when copying of software was in order to duplicate pre-failure warnings for hard drives).
156. 141 S. Ct. 1183, 1198 (2021).
157. *Id.* at 1199.

(and often overly expansive) reading. Combining Breyer's two summary descriptions, perhaps we can say that *Connectix* and *Sega Enterprises* give us a rule exception from copyright liability for the wholesale copying of copyrighted code as an intermediate step to reverse engineer unprotected functional elements and achieve interoperability for a new, competing product.

## III. ARE THESE REALLY STABLE RULES?

One objection might be that judges deciding fair use cases do not—with the exception of Justice Kennedy—betray the "consciousness" of rulemaking that one sees in some areas of the law. In criminal procedure, the Supreme Court has been quite conscious both that it announces "judicially crafted rule[s]"[158] and that it sometimes amends those rules, often to give them greater specificity. In its 1975 *Gerstein v. Pugh* decision,[159] the Court concluded that a person arrested without a warrant had to be brought before a magistrate to establish probable cause for continued detention. Later, the Court's 1991 *County of Riverside v. McLaughlin* decision further specified the rule, requiring that the arrestee be brought before a magistrate within 48 hours of their arrest.[160] In the Court's 1981 *Edwards v. Arizona* decision, the Court announced a rule that after a suspect in custody had initially requested the presence of counsel, any statement by the suspect while in custody resulting from renewed, police-initiated interrogation should be treated as involuntary.[161] In its 2010 *Maryland v. Shatzer* decision, the Court clarified the limits of the *Edwards* rule.[162] In this realm, the Supreme Court has stated that its specific metrics for safeguarding Fourth and Fifth Amendment rights are rules[163]

158. Maryland v. Shatzer, 559 U.S. 98, 106 (2010).

159. Gerstein v. Pugh, 420 U.S. 103, 123–26 (1975).

160. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 45 (1991). While *Gerstein* was announced as a requirement of the Fourth Amendment, the 48-hour rule in *County of Riverside* was couched more as a rule created from a constitutionally permissible balancing of interests by the Court. *Id.* at 56 ("Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds.").

161. 451 U.S. 477, 485 (1981) ("[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.").

162. *Shatzer*, 559 U.S. at 110 ("We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption . . . . It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.").

163. Although it arguably does so more often in hindsight, i.e., the Court does not say "this is the new rule" but subsequently refers to its prior decision as establishing a "rule." *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 719 (1979) (referring to "the rule in *Miranda*"); *id.* ("[T]he Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease."); *Shatzer*, 559 U.S. at 105 (stating that *Edwards v. Arizona* established a "rule"); *id.* ("We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis."); *id.* at 106 (discussing requirements for "a judicially crafted rule");

and has "repeatedly emphasized the virtues of a bright-line rule"[164] in matters of criminal procedure.

That sort of "rule announcement" (and the kind one sees in per-se-illegal caselaw under the Sherman Act) seems the opposite of fair use jurisprudence. In *Campbell*, the Court told us that a § 107 fair use determination "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[165] And that statement is repeated or paraphrased *over and over* in the caselaw.[166] Indeed, the Court's statement that fair-use determinations are "not to be simplified with bright-line rules" may have made some commentators shy away from the "R-word." For example, in praising the law-clarifying role of rigorous appellate review, Eugene Volokh and Brett McDonnell noted that "[f]ollowing *Sony Corp. v. Universal City Studios*, we know that certain sorts of private noncommercial copying of entire works are generally permissible. Following *Campbell v. Acuff-Rose Music*, we know that parodies commenting on the works from which they borrow are favored uses akin to commentary or news reporting."[167] Surely, when we "know" certain conduct is permissible *ex ante*, we have a rule. Similarly, Matthew Sag has observed that fair use is "the mechanism by which Congress transferred significant policymaking power to judges in order to allow copyright to adapt to ongoing social and technological change."[168] Policymaking frequently involves specifying new legal norms. It's only a tiny step further to agree that those new norms are specific rules.

If one's point of view is that a legal system does not have a rule until the legal norm is so labelled by the legislature or courts, then there are no rules within the § 107 ecosystem. But if one takes a more pragmatist view of rules, then rules—even if you want to call them implicit rules[169]—do seem to exist, orbiting around and anchored in the § 107 legal standard. That pragmatic view is simple and

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Michigan v. Jackson, 475 U.S. 625, 626 (1986), *overruled by* Montejo v. Louisiana, 556 U.S. 778 (2009) ("*Edwards* established a bright-line rule to safeguard pre-existing rights."); Solem v. Stumes, 465 U.S. 638, 646 (1984) ("*Edwards* established a bright-line rule to safeguard pre-existing rights . . . .").

164. Arizona v. Roberson, 486 U.S. 675, 681 (1988).

165. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

166. *See* Am. Socy. for Testing & Materials v. Public.Resource.Org, Inc., 896 F.3d 437, 451 (D.C. Cir. 2018); Authors Guild v. Google, Inc., 804 F.3d 202, 213 (2d Cir. 2015); Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1271–72 (11th Cir. 2014); Bouchat v. Balt. Ravens Ltd. Partn., 619 F.3d 301, 308 (4th Cir. 2010); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163 (9th Cir. 2007); Sarl Louis Feraud Int'l v. Viewfinder, Inc., 489 F.3d 474, 482 (2d Cir. 2007); L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924, 938 (9th Cir. 2002), *opinion amended on denial of reh'g*, 313 F.3d 1093 (9th Cir. 2002); Northland Fam. Plan. Clinic, Inc. v. Ctr. for Bio-Ethical Reform, 868 F. Supp. 2d 962, 982 (C.D. Cal. 2012) ("The case-by-case analysis resists bright-line determinations and the resulting decisions inevitably represent a sort of rough justice.").

167. Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2462 (1998).

168. Sag, *New Structural Analysis*, *supra* note 49, at 396.

169. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 249 (1976) ("The rules produced by the process of adjudication are distinctive in being implicit rather than explicit rules.").

straightforward: whether or not judges announce a rule, as Richard Posner observed, "an accumulation of precedents dealing with the same question may create a rule of law having the same force as an explicit statutory rule."[170]

### *A. Karl Llewellyn and Detecting When the Law Has a "Rule"*

Judge Posner's comment certainly aligns with the views of Karl Llewellyn. Among the Legal Realists, Llewellyn believed that "rules of law" were more than mere predictors of a judge's behavior[171] and that "our legal woods are full of rules that are not clear."[172] He also believed that such "rules of law" could defy verbal formulations—even to the point that rules expressed in statutes (what he called rules in "propositional form") were not the rules actually being applied by judges.[173] As Frederick Schauer observes about Llewellyn's idea of rules defying singular verbal formulation:

> [It] should come as no surprise. The rules of language and of etiquette do not have canonical formulations, but exist as rules nonetheless. And thus Llewellyn's belief that legal rules could exist in the same unwritten form should occasion little controversy. In fact, Llewellyn's immersion in common law ideology would make such a conclusion obvious to him, because most of what we think of as common law rules exist without there being a single authoritative canonical formulation.[174]

To Llewellyn, the clustering projects of fair-use commentators would just be inchoate quests to discover rules:

> Hence also American scholars who claim to be searching for accurate statements of what courts will do are not to be read as engaged in mere predictions of judicial behavior. They are engaged in a search for the rules of law which will prevail tomorrow, when cases come up, and therefore for purposes of guidance are the rules today, for layman, for official, and, if the scholar is persuasive, for the judge.[175]

For Llewellyn, rules might or might not have specific verbal formulations and "on the case-law side, they rarely have an accepted form of precise wording—what is 'the universally accepted rule' is an *idea,* not a phrasing."[176] The rule is a "rule" when it has a "core" of application where the results are predictable in advance, even if there are fuzzy boundaries where applicability of the rule is

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170. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 20.1, at 583 (7th ed. 2007).

171. *See* LLEWELLYN, *supra* note 114. Llewellyn's *The Theory of Rules* was a largely completed, unpublished manuscript started by Llewellyn in 1938.

172. *Id.* at 58.

173. Frederick Schauer, *Editor's Introduction* to KARL N. LLEWELLYN, THE THEORY OF RULES 21 (Frederick Schauer ed., 2011).

174. *Id.* at 23.

175. LLEWELLYN, *supra* note 114, at 58.

176. *Id.* at 75–76.

uncertain.[177] This is an apt description of what the fair use taxonomists are actually doing.

How then can we detect when a rule has formed within the ambit of § 107? As I proposed earlier, a judge-created rule should have the same basic what-kind-of-work, used-by-whom, and for-what-activity structure as the rules embodied in copyright's statutory exceptions at §§ 108–122. When the person falls squarely within that what-kind-of-work, used-by-whom, and for-what-activity structure such that a prudent lawyer can advise her client that "this is OK" or "this is almost certainly permissible," we have a rule. Contrast that with fact patterns in which the same prudent lawyer would have to say: "If we have to litigate this, we have a good chance of winning." In the former situation, the lawyer is explaining what is effectively a rule to her client; in the latter, she is speculating on how a court will address a new situation. The test, as Llewellyn would say, is whether people (or their counsel) can tell in advance what the court will determine is permissible—if that can be done with confidence, then one has a fact pattern that falls at the core of an unwritten rule.[178]

If the fair use doctrine is actually working as a process to establish de facto exception rules, then we might expect to see a few things. First, it should not only be that case outcomes become reasonably predictable—as scholars have discussed—*but that the caselaw winds down*, i.e., no one goes to court on that issue anymore. Because litigation involves "only those cases where uncertainty about the law, asymmetric stakes, divergent expectations, or other quirks of human behavior have prevented the parties from settling,"[179] when a rule-like exception is successfully spun out of the § 107 framework, litigation based on it should largely cease.

Indeed, the disappearance from the docket of some kinds of disputes does happen: one example is the judge-created exception for intermediate software copying discussed above. Pamela Samuelson wrote that the initial reverse-engineering fair use decision, the 1992 *Sega Enterprises* case, was "followed in a steady stream of cases involving reverse engineering of computer software,"[180] but that "stream" was never more than a trickle. And post-*Connectix*, it has, for all intents and purposes, dried up.[181] From 2005 to 2017, there were only six reported federal court decisions citing *Connectix* or *Sega Enterprises*, two of those decisions

177. Llewellyn thought that a rule's "content varies on its edges and in its direction and emphasis according to how one gets around to reducing it (or expand[ing] it) into words." *Id.* at 76. He also thought that "no clarity of core, however radiant, suffices to mark boundaries, in *close* cases, for *general* agreement," *id.* at 109, and "that a given current formulation of a rule of law can be wholly positive at the core, and yet un-positive at its edges . . . and a huge number of our current formulations are of that character," *id.* at 121.

178. *Id.* at 120 ("The test of whether the formulas of words we have and accept do give positive guidance, that test is whether the mass of officials subject to the court of resort can tell in advance what the court of last resort will, when called on, determine that the lower officials should, under the rule, have done.").

179. Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 83 (2012).

180. Samuelson, *supra* note 9, at 2608.

181. There were no reported decisions citing *Sega* for its fair use discussion in 2005, 2008–2011, 2013–2016, and 2018–2019. My thanks to Justin Thiele for help on this point.

involving the same high-stakes litigation (e.g., *Oracle v. Google*). Since 2000, only two reported cases have cited *Sega Enterprises* for its basic fair use proposition—one to say that the defendant qualified for the exception[182] and one to say that the defendant certainly did not.[183]

This is precisely what we would expect if we had an adjudicatory process that is establishing de facto new rules. After *HathiTrust*, the legislative history of § 107, and Supreme Court dicta in *Sony*, what lawyer would recommend that a plaintiff sue over any nonprofit production of accessible format copies for blind persons? When fair use disputes are litigated after the apparent emergence of a particularized rule, it is usually part and parcel of a larger struggle between the parties in which the copyright dispute is ancillary.[184]

### *B. Some Further Criticisms and Considerations*

Fair use may not be the only place where a comment by the Supreme Court is taken to forbid rules, but rules form nonetheless. Earlier we considered the Court's discussion of reasonable suspicion and probable cause in *Ornelas*. After saying that these commonsense concepts were legal standards "not readily, or even usefully, reduced to a neat set of legal rules,"[185] the Court proceeded to justify de novo review of both determinations of reasonable suspicion to stop individuals and determinations of probable cause to make a warrantless search. The Court's seemingly contradictory reasoning for de novo review was that repeated appellate review of decisions involving these fuzzy legal standards could nonetheless spin off rules that police could apply *ex ante* in many situations. The Court offered:

> Finally, de novo review tends to unify precedent and will come closer to providing law enforcement officers with a defined "set of rules which, in most instances, makes it possible to reach a

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182. *See* Nautical Sols. Mktg., Inc. v. Boats.com, No. 8:02-CV-760-T-23TGW, 2004 WL 783121, at *2 (M.D. Fla. Apr. 1, 2004) (using *Sega Enterprises* to support holding that "Boat Rover's momentary copying of Yachtworld's public web pages in order to extract from yacht listings facts unprotected by copyright law constitutes a fair use").

183. *See* Disney Enters., Inc. v. VidAngel, Inc., 869 F.3d 848, 862 n.12 (9th Cir. 2017) (saying, in reference to the defendant's use of *Sega Enterprises*, that "[t]he cases [defendant] cites are inapposite, because VidAngel does not copy the Studios' works to access unprotected functional elements it cannot otherwise access"). The case also cited *Connectix* in the same context. *Id.*

184. *See, e.g.*, Tavory v. NTP, Inc., 495 F. Supp. 2d 531 (E.D. Va. 2007) (finding of fair use to introduce unauthorized copies of program code in litigation concerning the code and a pertinent patent); Sturgis v. Hurst, 86 U.S.P.Q.2d (BNA) 1444 (E.D. Mich. 2007) (finding of fair use for guardian ad litem to copy and introduce portions of the plaintiff's book to show plaintiff's unfitness as a parent); Shell v. City of Radford, 351 F. Supp. 2d 510 (W.D. Va. 2005) (finding of fair use for a police department to reproduce and publicly display photographs of a crime victim in the course of murder investigation in which photographer was a suspect).

185. Ornelas v. United States, 517 U.S. 690, 695–96 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)). The Court viewed these legal concepts as especially fuzzy standards; it "cautioned" that reasonable suspicion and probable cause "are not 'finely-tuned standards,' comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence." *Id.* at 696.

> correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[186]

How could harmonized precedent "come closer to providing law enforcement officers with a defined 'set of rules'" if reasonable suspicion and probable cause are legal standards "not readily, or even usefully, reduced to a neat set of legal rules"?

The answer should be familiar by now: reasonable suspicion and probable cause cannot be *converted* (or "reduced," in the Court's wording) to a single rule or a "neat" set of rules, but they can be used to *generate* specific rules that govern specific situations, i.e., rules that can be known *ex ante* to govern *only those specific situations*. Section 107 can remain a legal standard to address new fact patterns while generating a "set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether" an unauthorized use of a copyrighted work will be permissible.

The discussion here would not be complete without considering some additional criticisms and observations. First, judge-made rules developed from legal standards are usually considered second-best when it comes to transparency. As one critique of fair use observed, "[c]ertainly, a law, even if badly drafted, is easier to decrypt for non-specialists than case law that is inevitably fluctuating."[187] When people criticize fair use as being opaque, it is not only a matter of hiring lawyers for the unsettled questions but getting lawyers or legal materials to explain even the settled fact patterns. The usual solution is to prescribe statutory exceptions. Of course, there is nothing stopping Congress from occasionally codifying a rule that has, through caselaw, spun off § 107, just as Congress codified § 107 itself. The negotiations among interested parties on how to word such a statutory exception would be intense—but not impossible.

Another observation is that there may be some categories of activity where, despite repeated tries, the fair use mechanism fails to produce enduring, rule-like exceptions. For example, Barton Beebe and Pamela Samuelson both conclude that fair use outcomes in educational- and research-use situations remain unpredictable.[188] In these areas, we also have to make sure that we are looking at the right level of generality or specificity in our efforts to detect a rule. And, of course, the failure of the § 107 mechanism to spin off rules in *all* areas does not impeach how successfully it has spun off exception rules in *some* areas.

Another criticism is that this understanding of fair use is an abandonment of democratic ideals because it expressly recognizes judges as crafting new rules for copyright exceptions. As even a proponent of fair use observed in 2004, "one may doubt whether it is suitable to delegate to the judge questions that are so delicate, and that imply principally political choices. Is it not in the first place the task of the

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186. *Id.* at 697–98 (quoting New York v. Belton, 453 U.S. 454, 458 (1981)).

187. Andre Lucas, *For a Reasonable Interpretation of the Three-Step Test*, 32 EUR. INT. PROP. REV. 277, 282 (2010).

188. Beebe, *supra* note 102, at 609–10; Samuelson, *supra* note 9, at 2545 ("Sharply divergent views on fair use exist in the educational and research use caselaw, and it is in this cluster that fair uses are least predictable.").

legislature to provide for a foreseeable framework for the users . . . ?"[189] Intellectual-property disputes certainly generate their fair share of policy arguments, from the 1980 *Diamond v. Chakrabarty* decision[190] in which the Supreme Court was faced with numerous amici arguing that patenting microorganisms would trigger a "parade of horribles," to the *Capitol Records, LLC v. ReDigi Inc.* litigation, with amici arguing for a counterintuitive interpretation of Title 17 to achieve "realization of an economically beneficial practice."[191] In response to such arguments, courts have on occasion pronounced themselves "poorly equipped to assess the inevitably multifarious economic consequences that would result from such [policy-driven] changes of law"[192] and that these are "matter[s] of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot."[193]

At least some of what happens in fair use adjudication arguably fits that description. For example, one could reasonably think that the Second Circuit's decision in *Google Books* was "a matter of high policy for resolution within the legislative process." As Judge Leval noted in the *ReDigi* case:

> The copyright statute is a patchwork, sometimes varying from clause to clause, as between provisions for which Congress has taken control, dictating both policy and the details of its execution, and provisions in which Congress approximatively summarized common law developments, implicitly leaving further such development to the courts. The paradigm of the latter category is § 107 on fair use.[194]

It is well accepted that in 1976 Congress only sought to provide a statutory restatement of judge-created fair use, not to normatively dictate the direction fair use jurisprudence would develop.[195] Or, as the Court said in *Google*, "[w]e here recognize that application of a copyright doctrine such as fair use has long proved a cooperative effort of Legislatures and courts, and that Congress, in our view, intended that it so continue."[196] In that framework, Justice Scalia's observation about judge-created rules seems well-founded: "[R]eduction of vague congressional commands into rules that are less than a perfect fit is not a frustration of legislative

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189. CHRISTOPHE GEIGER, DROIT D'AUTEUR ET DROIT DU PUBLIC À L'INFORMATION 420 (2004) (translated by the author of this article).

190. 447 U.S. 303 (1980).

191. 910 F.3d 649, 663 (2d Cir. 2018). The "economically beneficial practice" was the resale of iTunes digital copies of sound recordings. *Id.*

192. *Id.* at 664.

193. *Diamond*, 447 U.S. at 317.

194. *ReDigi*, 910 F.3d at 664.

195. *See* H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 (stating that § 107 was intended "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way"); *see also* Authors Guild v. Google Books, 804 F.3d 202, 213 (2d Cir. 2015) ("[I]n passing the statute, Congress had no intention of normatively dictating fair use policy.").

196. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1208 (2021).

intent because that is what courts have traditionally done, and hence what Congress anticipates when it legislates."[197]

And Congress remains free to override rules that emerge within § 107 jurisprudence. Following *Harper & Row Publishers, Inc. v. Nation Enterprises*, courts appeared to adopt a rule that there could be no fair use of unpublished works,[198] prompting Congress to tweak § 107 in order to restore that possibility,[199] i.e., to nullify what seemed to be an emerging bright-line or near bright-line rule within the fair use system.

Indeed, there is an odd footnote to all this: the Supreme Court's admonition that a fair use determination "is not to be simplified with bright-line rules" was inspired in part by the Court noting that in drafting § 107 the "Senate Committee similarly eschewed a rigid, bright line approach to fair use."[200] But Congress's decision was against *legislating* a bright-line rule or rules because the variety of situations and circumstances "preclude[d] the formulation of *exact rules in the statute*."[201] That does not mean Congress intended to prevent courts from formulating rules.

## IV. "TRANSFORMATIVE USE" AND GENERATION OF DE FACTO RULES

It would be odd to present fair use as a *rule-generating mechanism* that produces distinct de facto exceptions without discussing the ascendency of the "transformativeness" test from the 1994 *Campbell* decision,[202] Judge Pierre Leval's

197. Scalia, *supra* note 54, at 1183.

198. Elkin-Koren & Fischman-Afori, *supra* note 14, at 185. The decisions included *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991); *New Era Publications International v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989); and *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987).

199. Fair Use of Unpublished Works, Pub. L. No. 102-492, 106 Stat. 3145 (1992). The amendment added, after the four factors: "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." *Id.*

200. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 n.31 (1984).

201. H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 (emphasis added) ("The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute."); *see also* S. REP. NO. 94-473, at 62, § 107 (1975) ("However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute.").

202. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

seminal 1990 law-review article,[203] and, further back, Justice Blackmun's 1984 dissent in *Sony*.[204]

According to the *Campbell* court, a defendant's work will be transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[205] Formally, a determination of transformativeness tilts the first factor in favor of fair use.[206] In *Campbell*, there was a *new expression*: a substantially new musical composition and a completely new sound recording. But the *Campbell* formulation left us with multiple bases for finding a transformative use: an alteration of the plaintiff's work with "new expression," new "meaning," or a new "message" that gives the defendant's use a "further purpose" or "different character." Commentators have reduced these possibilities to a dichotomy between "transformative purpose" and "transformative content,"[207] with the former being what really counts. As Neil Netanel has noted, "[i]n case after case decided since *Campbell*, courts have made clear that what matters for determining whether a use is transformative is whether the use is for a different purpose than that for which the copyrighted work was created."[208]

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203. Leval, *supra* note 3, at 1111 (stating that if a copyrighted work 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").

204. *Sony Corp. of Am.*, 464 U.S. at 478 (Blackmun, J., dissenting) (drawing a distinction between a "productive use, resulting in some added benefit to the public beyond that produced by the first author's work" that should be protected by fair use as against "ordinary" consumptive uses); *see, e.g.*, Sag, *New Structural Analysis*, *supra* note 49, at 387 ("[T]he Supreme Court in *Campbell* substantially reintroduced the productivity requirement under another name—the key question now being whether the allegedly infringing use is 'transformative.'").

205. 510 U.S. at 579.

206. If I understand it, I do not share Niva Elkin-Koren and Orit Fischman-Afori's interpretation of *Campbell*, which suggests a looser use of rules; they write that *Campbell* established "a rule that stresses the supremacy of the transformativeness factor." Elkin-Koren & Fischman-Afori, *supra* note 14, at 180. I instead follow Louis Kaplow in viewing a rule or a rule-like legal norm as "entail[ing] an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator." Kaplow, *supra* note 1, at 560. A rule tells actors—*ex ante* and with reasonable precision—what behavior they can and cannot engage in. The *Campbell* transformative use analysis does not meet these criteria; transformative use is just a reformulation or elaboration of the fair use *standard*.

207. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 484–94 (2007) (laying out transformative content, transformative purpose, defendant activities that do both, and defendant activities that do neither); Tushnet, *supra* note 5, at 870 (referring to the distinction as "purpose-transformativeness and content-transformativeness").

208. Netanel, *supra* note 11, at 747. As a parallel observation, Netanel concludes that "[t]he vast majority of courts adhere to the rule that new expressive content, even a fundamental reworking of the original, is generally insufficient for the use to be transformative absent a different expressive purpose." *Id.* at 747–48; *see also* Reese, *supra* note 207, at 484–85 ("In assessing transformativeness, the courts generally emphasize the

As of roughly 2010, copyright scholars had come to the view that instead of merely being part of *one* factor, "the transformative use paradigm, as adopted in *Campbell v. Acuff-Rose*[,] overwhelmingly drives fair use analysis in the courts"[209] and that "transformative use may be eating the fair use world."[210] In 2017, the New York City Bar Association noted that transformative use "played an increasingly significant role in every substantive fair use decision issued by the Second Circuit since *Campbell*."[211] The apparent dominance of the transformative use analysis has been picked up by lay observers. For example, a 2018 commentary (mis)described fair use as "an exception to copyright law reserved for the original transformative use of copyrighted works (though courts weigh other factors in determining fair use as well)."[212]

How much the transformative use doctrine has at least momentarily overshadowed the other elements of the fair use analysis has been richly explored—with differing perspectives—by Clark Asay, Barton Beebe, Jiarui Liu, Neil Netanel, R. Anthony Reese, Matthew Sag, Pamela Samuelson, Rebecca Tushnet, and others.[213] Following criticism of the Second Circuit's *Prince v. Cariou* decision,

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transformativeness of the defendant's purpose in using the underlying work, rather than any transformation (or lack thereof) by the defendant of the content of the underlying work."); Tushnet, *supra* note 5, at 876 ("Specifically, exact copying plus transformative purpose has a stunningly good fair use record in recent cases.").

209. Netanel places 2005 as the year transformative use analysis became dominant. Netanel, *supra* note 11, at 734. Perhaps a more Pyrrhic view of the doctrine's success is that it has become a label to conclude the overall balancing analysis. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1][b] (2013) (stating that transformative has become a shorthand for fair, and not transformative has become a shorthand for not fair); Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701, 725 (2010) ("At the end of the day, characterizing a use as transformative may be nothing more than a conclusion based on some unconscious, inarticulable balancing of social costs and benefits."); Netanel, *supra* note 11, at 742 (stating the possibility that "transformative use" is simply the "favored moniker to characterize judicial balancing and justify the post hoc result"); Sag, *New Structural Analysis*, *supra* note 49, at 388.

210. Clark D. Asay et al., *Is Transformative Use Eating the World?*, 61 B.C. L. Rev. 905, 940 (2020). But Asay's study concludes that while transformative use is "playing a role in increasingly more fair use opinions," the data "do not suggest that when courts rely on the transformative use concept, the fair use outcome is favorably predetermined in any way." *Id.*

211. N.Y.C. BAR COUNCIL ON INTELLECTUAL PROPERTY, SECOND CIRCUIT FAIR USE SURVEY: ASSESSING THE IMPACT OF "TRANSFORMATIVE USE" THEORY, BY CASE (1982–2016) 3 (2017), https://www.herrick.com/content/uploads/2017/04/Second-Circuit-Fair-Use-Survey-2017.pdf [https://perma.cc/9Z74-TQ47].

212. Isaac Kaplan, *5 Lawsuits That Could Reshape the Art World in 2018*, ARTSY (Jan. 1, 2018, 8:00 AM), https://www.artsy.net/article/artsy-editorial-5-lawsuits-reshape-art-2018 [https://perma.cc/URB2-A8JT] (describing artist Richard Prince as "the king of copyright infringement cases" and saying he "often wins these cases by asserting fair use—that is, his use of artwork created by others falls under an exception to copyright law reserved for the original transformative use of copyrighted works (though courts weigh other factors in determining fair use as well)").

213. See footnotes *supra* and Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163 (2019).

emphasis on transformativeness in fair use analysis might be receding.[214] While the Court's fair use determination in *Google* relied on Google's transformative use of Oracle's software, it did so in a robust analysis in which all four § 107 factors favored the defendant.

Regardless of whether the transformative use doctrine is ascendant or receding, our question is whether the doctrine impacts the ability of § 107 to generate new de facto exception rules. The concern expressed in many quarters is that too many decisions relying on transformative use analysis lack rigor, that transformative use doctrine is "susceptible of incoherence and judicial manipulation as applied in practice,"[215] and that it "makes fair use even more indeterminate and unpredictable than before . . . because 'transformativeness' may be entirely in the eye of the judicial beholder."[216]

There is no question that the transformative use caselaw has had some troublingly inconsistent *reasoning*—whatever one thinks of the specific outcomes. In that vein, we should ask whether transformative use analysis makes the formation of new, stable exception rules that are "spun off" from § 107 easier or more difficult. Or maybe the transformativeness doctrine has no effect at all on the § 107 rule-generating process?

### *A. Unruly Transformative Use Analysis OR an Emerging Rule on Photography?*

The Second Circuit's 2013 *Cariou v. Prince*[217] decision is perhaps the poster child for the unpredictability of the transformative use doctrine. The case concerned 30 photographs, taken by Cariou, that artist Richard Prince had used in his artwork. The appellate panel concluded that 25 of the uses were transformative as a matter of law and that, for the remaining five, the appellate panel could "not say with certainty at this point whether those artworks present a 'new expression, meaning, or message.'"[218] Unable to "divine the dividing line" between the two groups,[219] David Nimmer has presented elements of the case at different conferences, reporting:

> At numerous conferences of copyright lawyers and of federal judges interested in intellectual property, we have juxtaposed

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214. The Second Circuit itself considered *Prince* the "high-water mark of our court's recognition of transformative works," *TCA Television Corp. v. McCollum*, 839 F.3d 168, 181 (2d Cir. 2016), and went to great lengths to provide "some clarification" in a lengthy decision against a trial court finding of fair use. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99, 110 (2d Cir. 2021); *see also* Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014).

215. Netanel, *supra* note 11, at 750.

216. Jane C. Ginsburg, *Letter from the U.S.: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms — Part II (Fair Use)* 21 (Columbia Law Sch. Ctr. for Law & Econ., Working Paper No. 503, 2014), http://ssrn.com/abstract=2539178 [https://perma.cc/VS6Q-737P].

217. 714 F.3d 694 (2d Cir. 2013).

218. *Id.* at 711 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994)).

219. David Nimmer, *On Juries and the Development of Fair Use Standards*, 31 HARV. J.L. & TECH. 563, 580 (2018).

> various images—without revealing how the majority actually ruled—and asked the audience which deserve judgment as a matter of law versus which require remand. The results have been dismal—if our auditors had made random guesses, they would have been far closer to the court's actual result.[220]

If transformative-use analysis is producing near-random rulings on fair use, surely this will inhibit the development of identifiable clusters and, therefore, de facto rules spun off the fair use standard.

Different commentators will have their own candidates for worrisome transformative use analysis. Let us consider the indeterminacy of the transformative use analysis through four appellate cases, with three of the courts—all fact patterns involving photography—reversing district-court findings of fair use based on transformativeness.

In the 2013 *SOFA Entertainment v. Dodger Productions* decision,[221] the Ninth Circuit considered the Jersey Boys musical's use of a seven-second clip from the Ed Sullivan Show. The clip showed Mr. Sullivan introducing the Four Seasons. In the musical, the clip was projected onto a large screen behind the stage where the performers stood, then the lights came up on the stage, and the Jersey Boys performers recreated the Four Seasons' Ed Sullivan Show performance.[222] The court found this to be a transformative use, reasoning that Jersey Boys was "using [the clip] as a biographical anchor"[223] and that "using the clip for its biographical significance . . . has imbued it with new meaning."[224] The court rejected the plaintiff's argument "that the clip was used for its own entertainment value."[225]

There is no need to question the final outcome—one *could* have found in favor of the defendants on other fair use factors.[226] The issue is how the transformative test works. What was any one episode of the Ed Sullivan Show (and all its constituent parts)? Pretty clearly, it was for-profit entertainment. And what is any one performance of the musical Jersey Boys (and all its constituent parts)? Again, for-profit entertainment. To avoid this, the Ninth Circuit concluded that the clip had been used in the musical "as a biographical anchor," introducing another sequence in the Jersey Boys musical. But the court inadvertently admits that that is also *how* the seven seconds were used in the original work when it says "the clip

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220. *Id.*

221. SOFA Entm't, Inc. v. Dodger Prods., Inc., 709 F.3d 1273 (2d Cir. 2013).

222. *Id.* at 1276–78.

223. *Id.* at 1278.

224. *Id.* at 1276.

225. *Id.* at 1278.

226. The Ed Sullivan Show was a one-hour prime-time show. Assuming that there were also 18 minutes of commercials in 1966 prime-time hourly broadcasts, that means the Ed Sullivan episode was 2,520 seconds (42 minutes). A seven-second clip might even have been *de minimis*, without need to consider fair use. When Jersey Boys opened in 2005, this Ed Sullivan episode was already almost 40 years old; elsewhere, I have argued that the age of a work should be considered under the second or fourth fair-use factor. *See* Justin Hughes, *Fair Use Across Time*, 43 UCLA L. REV. 775 (2003); *see also* Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002).

conveys mainly factual information—who was about to perform,"[227] and "Sullivan simply identifies the group that is about to perform."[228] That makes it sound like the original purpose of that seven-second sequence of the Ed Sullivan Show was already used as a "biographical anchor" in a work of for-profit entertainment. It might have been just as convincing for the court to say that the original use was "biographical" and that the Jersey Boys' use was "entertainment."

In contrast, in a series of cases involving photographs, circuit courts have reversed trial court findings of transformative use.

In the 2011 decision *Murphy v. Millennium Radio Group*,[229] a photographer, Murphy, was hired by *New Jersey Monthly* ("*NJM*") to take a photo of two radio-show hosts for an article naming them "best shock jocks" in the "Best of New Jersey" issue. An employee of the radio station scanned the photo and used it on the radio station's website, referring to the hosts' "Best of New Jersey" award. The district court found that this use was transformative, but the Third Circuit disagreed:

> The Image was originally created to illustrate a [sic] *NJM* article informing the public about Carton and Rossi's "best of" award; the Station Defendants themselves state they "used [the Image] . . . to report to their viewers the newsworthy fact of [Carton and Rossi's] receipt of the magazine's award." Although they claim that the difference is significant, there is, in fact, no meaningful distinction between the purpose and character of *NJM*'s use of the Image and the Station Defendants' use on the WKXW website.[230]

The same kind of indeterminacy in the defendant's "purpose" was also present in the Ninth Circuit's 2012 *Monge v. Maya Magazines, Inc.* litigation,[231] where the plaintiffs were Noelia Lorenzo Monge, a Latina pop-music singer, and Jorge Reynoso, a well-known music producer. Although the couple had been married in a seemingly discrete ceremony in 2007, the ceremony was not discrete enough: several photos of their wedding were published by "TV NOTAS," a magazine covering Latino celebrities. The photos appeared in a story about the clandestine wedding with some text and each photo having a caption. When Monge and Reynoso sued for copyright infringement, the district court granted summary judgment to the defendant on the grounds of transformative fair use. As in *Murphy*, that conclusion was reversed on appeal.

Again, whether or not TV NOTAS should have succeeded in its fair-use defense is not the question here;[232] our interest is that federal judges facing the same

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227. 709 F.3d at 1279.

228. *Id.*

229. Murphy v. Millennium Radio Grp. LLC, 650 F.3d 295 (3d Cir. 2011).

230. *Id.* at 306.

231. Monge v. Maya Magazines, Inc., 96 U.S.P.Q.2d 1678, 2010 WL 3835053, at *2–3 (C.D. Cal. 2010), *rev'd*, 688 F.3d 1164 (9th. Cir. 2012).

232. For example, an outcome in favor of the defendant might have been based on this being § 107 "news reporting" without the market-destroying element of the defendant's actions in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

facts could have such different analyses on the transformative use question. As part of its analysis in favor of TV NOTAS, the district court had concluded:

> The first factor supports a finding of fair use because of the transformative nature of Defendant's publication. The photographs were used not in their original context as documentation of Plaintiff's wedding night but as confirmation of the accompanying text challenging Plaintiffs' repeated public denials of the marriage. . . .
>
> . . . .
>
> Because Defendants used the photograph[s] in a function that was distinct from their original purpose, the use did not supersede the objects of the original creation.[233]

On appeal, the Ninth Circuit concluded that the defendant "did not transform the photos into a new work, as in *Campbell*" and had "left the inherent character of the images unchanged."[234] But the court accepted that the "individual images were marginally transformed"[235] because of the magazine's photo montage arrangement and addition of text. Nonetheless, the majority seemed to conclude that while there had been *some* "further purpose,"[236] that change in purpose was insufficient to establish more than marginal transformation.[237]

Separate from the ultimate disposition of the case, it seems like mere wordplay to say that some photos have been transformed from "documentation of [a] . . . wedding night" to "confirmation of . . . text" stating that a couple got

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233. *Monge*, 96 U.S.P.Q.2d 1678, 2010 WL 3835053, at *2.

234. Monge v. Maya Magazines, Inc., 688 F.3d 1164, 1176 (9th Cir. 2012); *see id.* at 1174 ("Each of the individual images was reproduced essentially in its entirety; neither minor cropping nor the inclusion of headlines or captions transformed the copyrighted works."); *id.* at 1175 ("[T]here was no real transformation of the photos themselves.").

235. *Id.* at 1174.

236. *Id.* at 1174–75; *see also* Iantosca v. Elie Tahari, Ltd., No. 19-CV-04527, 2020 WL 5603538 (S.D.N.Y. Sept. 18, 2020) (fashion designer's commercial use in its social media of unaltered photograph was not transformative). In contrast, some district courts have found fair use where part of all of a photograph was reproduced with text with which the photo was initially published. *See* Walsh v. Townsquare Media, Inc., 464 F. Supp. 3d 570, 581–84 (S.D.N.Y. 2020), *reconsideration denied*, No. 19-CV-4958 (VSB), 2021 WL 4481602 (S.D.N.Y. Sept. 30, 2021) (republishing of tweet containing photo was transformative); Yang v. Mic Network, Inc., 405 F. Supp. 3d 537, 543–44 (S.D.N.Y. 2019) (screenshot of an article that included roughly the top half of plaintiff's photo was transformative use).

237. *Id.* (recognizing that the defendant's "purpose in publishing the photos was to expose the couple's secret wedding, which was at odds with the couple's purpose of documenting their private nuptials," *id.* at 1176, the majority felt that that "difference in purpose is not quite the same thing as transformation, and *Campbell* instructs that transformativeness is the critical inquiry under this factor"); *see also* Lucasfilm Ltd. v. Ren Ventures Ltd., No. 17-cv-07249-RS (N.D. Cal. June 29, 2018) (order granting in part and denying in part motion for partial summary judgement) (holding that defendant merely reposting *Star Wars* images and dialogue with "minor cropping [or] the inclusion of headlines or captions" did not transform the copyrighted works into something new).

married.[238] If the original purpose—as per the defendant's description—was to have "images of a wedding night," that is surely how the photos were used in TV NOTAS.

Last in this suite of appellate decisions is the 2019 *Brammer v. Violent Hues Productions, LLC* litigation concerning a photograph of a lively Washington, D.C. neighborhood: "Adams Morgan at Night."[239] Violent Hues lifted the photo from photographer Russell Brammer's Flickr account and used it—without attribution—on a website promoting a film and music festival. The district court granted summary judgment for Violent Hues on fair use, reasoning that the photographer's stated purpose "in capturing and publishing the [Photo] was promotional and expressive,"[240] while "Violent Hues' stated purpose 'in using the [Photo] was informational: to provide festival attendees with information regarding the local area.'"[241]

The Fourth Circuit disagreed. While recognizing that whole-cloth reproduction of a copyrighted work *can* sometimes be genuinely transformative, the court found that the unauthorized use of Brammer's photograph was not transformative:

> Violent Hues used the Photo expressly for its content—that is, to depict Adams Morgan . . . . Violent Hues' sole claim to transformation is that its secondary use of the Photo provided film festival attendees with "information" regarding Adams Morgan. But such a use does not necessarily create a new function or meaning that expands human thought; if this were so, virtually all illustrative uses of photography would qualify as transformative.[242]

The Fourth Circuit was correct in that "new meaning" or "new purpose" in transformative use analysis could be debilitating to copyright in photography. A person who takes photos for their beauty, the information they convey, or some combination thereof, will almost certainly have a different purpose than a downstream user who finds a photograph and uses that photograph as an illustration in a newspaper story, blog post, promotional brochure, tweet, etc. The same can be said for works, especially photographs, that the owner intends to keep unpublished:

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238. Calkins v. Playboy Enters. Int'l, Inc., 561 F. Supp. 2d 1136, 1141 (E.D. Cal. 2008) seems to be another case where the purpose of photos and their use was malleable. The district court found that the original purpose of a high school photo was for family and friends, but its later use by Playboy to show how a Playboy "Bunny" looked while growing up was "to inform and entertain" the magazine's readership. *Id.* at 1141. But as Netanel notes, "a court that wished to find that Playboy's use was not transformative could fairly and more broadly characterize the high school yearbook portrait as informational or biographical, while narrowly characterizing Playboy's choice to reproduce its model's high school portrait as serving an informational and biographical purpose within a glossy photographic spread otherwise designed for entertainment." Netanel, *supra* note 11, at 750–51.

239. Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 261 (4th Cir. 2019).

240. *Id.* at 263 n.3.

241. *Id.*

242. *Id.* at 264.

*any* unauthorized publication of such works would be a transformative purpose.[243] That cannot be sound reasoning under the first factor of § 107.

The danger from such gaming of the transformative use doctrine is real. If *Nicklen v. Sinclair Broadcasting Group, Inc.* is any indication,[244] some for-profit news agencies may have learned they can claim this variation of transformative use to provide their customers with independent photo and video journalism—without reimbursing the photographers and journalists. In *Nicklen*, various websites of the Sinclair Broadcasting group used the plaintiff's entire video of starving polar bears and—by making their captions about how much attention *the video* was getting online—claimed a transformative use that survived summary judgment.[245] The back and forth between trial and appellate courts in cases like *Murphy*, *Monge*, and *Brammer* make it reasonable to worry that an undisciplined transformative use doctrine can threaten the ability of § 107 to generate new rule-like exceptions. On the other hand, the cumulative *Murphy*, *Monge*, and *Brammer* appellate decisions[246] may provide a rule-like norm disfavoring manipulation of the transformative use doctrine in relation to commercial use of complete, unaltered photographs.

### *B. The New "Searchable Database" Rule*

More importantly, the transformative use doctrine in the form of "purpose transformation" has already achieved at least one new, distinct de facto exception in the form of large-scale copying to produce searchable databases. The cluster of court decisions building the new rule arguably started with the Ninth Circuit's 2007 *Perfect 10, Inc. v. Amazon.com, Inc.* decision concerning "thumbnail" copies of digital images for a search engine database of internet images[247] and culminated in

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243. In *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1176 (9th Cir. 2012), the married couple definitely intended to keep the photos as private, unpublished keepsakes of their wedding. In another case, *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012), a woman who had engaged too enthusiastically in a wet t-shirt contest while on vacation in Florida purchased the copyright to the photographic record of the contest. That didn't stop *Hustler* from publishing the photos and arguing transformative use—an argument rejected by both the jury and appellate panel.

244. Nicklen v. Sinclair Broad. Grp., Inc., 20-cv-10300-JSR (S.D.N.Y. July 30, 2021).

245. *Id.* at 12–14 (quoting Barcroft Media v. Coed Media, 297 F. Supp. 3d 339, 352 (S.D.N.Y. 2017)) (finding a possible transformative use because media conglomerate "did not use the Video to illustrate an independent story about polar bears or environmentalism; instead [the defendants] 'report[ed] news *about the Images themselves*'").

246. See also *Schiffer Publishing, Ltd. v. Chronicle Books, LLC*, No. CV 03-4962 (E.D. Pa. Nov. 12, 2004), in which the plaintiff was a publisher of historical books and collectible fabric patterns, while the defendant distributed a book of design patterns called *1000 Patterns* that copied 118 photographs from the plaintiff's books. The defendant argued that their use was transformative "because while Plaintiffs' books concentrate on a class of collectible fabrics, *1000 Patterns* is an historical reference book of design patterns." *Id.* at 21. The court rejected this, recognizing that "[b]oth Plaintiffs' books and Defendant's *1000 Patterns* are aimed at designers, artists, and art enthusiasts, and both share a common purpose—to inform . . . audience[s] about patterns and fabrics." *Id.*

247. 508 F.3d 1146, 1154 (9th Cir. 2007).

the Second Circuit's 2015 *Google Books*[248] and 2018 *Fox News Network, LLC v. TVEyes, Inc.* decisions.[249] But other cases have contributed to this exception rule, including the Fourth Circuit's 2009 analysis of unauthorized reproduction of student papers for a plagiarism-detection database.[250] As the Second Circuit said in *HathiTrust*, one of the cases forming this rule:

> [T]he creation of a full-text searchable database is a quintessentially transformative use. . . . [T]he result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn. Indeed, we can discern little or no resemblance between the original text and the results of the [HathiTrust] full-text search.[251]

One searching for "principles" in these cases might say that these decisions broadly vindicate "exact copying plus transformative purpose."[252] There is nothing wrong with this; as Karl Llewellyn observed, one can formulate the rule at different levels of abstraction. But if our goal is to identify *a rule* with genuine *ex ante* predictability, it is better to understand these as cases establishing a rule-like exception in American copyright law that might be phrased this way: a defendant may engage in large-scale digital, exact reproduction of a category of works where the result is a widely available, searchable database that would not otherwise exist; the database provides a valuable information-searching capacity; and use of the database does not substitute for how the copyright holder distributes or may be expected to distribute the work(s). As I said earlier, one indication of when a rule has been spun off § 107 is that once the defendant fits the fact pattern of the rule, the four fair use factors no longer have the same application; in these searchable database fact patterns the second factor becomes irrelevant because of the wide variety of works in the database[253] and the third factor is irrelevant because the defendant has copied the entirety of the plaintiffs' works.

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248. Authors Guild v. Google, Inc., 804 F.3d 202, 207–08 (2d Cir. 2015). The *Google Books* decision built on the *HathiTrust* case the year before, where the searchable database did not provide snippets of prose, but "only the page numbers on which the search term is found within the work and the number of times the term appears on each page." Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 91 (2d Cir. 2014).

249. 883 F.3d 7 169, 173–74 (2d Cir. 2018).

250. A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 634–35 (4th Cir. 2009). The case includes a discussion that the most credible market harm would be if the students wanted to sell their papers to others *for plagiarism*, but "each plaintiff indicated that such transactions were dishonest and that he or she would not sell their original works for submission by other students." *Id.* at 643–44.

251. *HaithiTrust*, 755 F.3d at 97.

252. Tushnet, *supra* note 5, at 876.

253. The Google Books project included large numbers of both "factual works" and "works of fiction or fantasy," to use the difference drawn in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985). Even an image search engine captures paintings, drawings, and photographs that run a gamut of originality. *See* Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339 (2012). A plagiarism-detection database covers everything from science papers to "works of fiction and poetry." *iParadigms*, 562 F.3d at 641.

The limits of this new, rule-like exception came to the fore in the 2018 decision, *TVEyes, Inc.*[254] TVEyes was a "for-profit media company" providing an innovative service allowing its subscribers—at subscription rates of $500 per month—to search "vast quantities of television content in order to find clips that discuss items of interest to them."[255] With a TVEyes subscription, a consumer-products company could monitor for stories about its brands or a publicist for news about her clients.

To offer this service, TVEyes recorded more than 1,400 television channels 24/7, copying the close-caption text that accompanies the broadcasts and using the close-captioning to create a searchable-text database of all that is said in the broadcasts.[256] Based on that database, "[a] client inputs a search term and gets a list of video clips that mention the term."[257] A subscriber could then play, archive, or download as many of the clips as the search identified. TVEyes subscribers were also able to email video clips to others, including people who were not TVEyes subscribers. This meant that a public-relations firm could, for example, send a daily set of video clippings to a client.[258]

The case was litigated in the shadow of *Google Books*,[259] and the outcome boiled down to the panel concluding that TVEyes "ha[d] exceeded those bounds" such that the service could not be excused from liability.[260] The panel described TVEyes as having "two core offerings": a "Search function" that "allows clients to identify videos that contain keywords of interest" and a "Watch function" that "allows TVEyes clients to view up to ten-minute, unaltered video clips of copyrighted content."[261] It was the Watch function—along with TVEyes' other reproduction and distribution of Fox content—that the court found unprotected by fair use.[262]

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254. 883 F.3d 169 (2d Cir. 2018).

255. *Id.* at 174–75.

256. *Id.* at 175.

257. *Id.*

258. So, from one perspective, TVEyes was offering its subscribers a daily, customizable clipping service of the kind that another district court within the Second Circuit had found was not fair use. In *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013), the court reasoned that although "the copying of [a] full work can be transformative when done by an Internet search engine," *id.* at 555, the defendant was not such a search engine when it offered the plaintiff's works in an "Internet news clipping service," *id.* at 553. The court added that "use of an algorithm to crawl over and scrape content from the Internet is surely not enough to qualify as a search engine engaged in transformative work," *id.* at 555, because "the purpose of search engines is to allow users to sift through the deluge of data available . . . and to direct them to the original source," *id.* at 556.

259. *TVEyes, Inc.*, 883 F.3d at 177 ("Precedent is helpful. Both parties rely most heavily on *Google Books*, which provides the starting point for analysis.").

260. *Id.* at 174.

261. *Id.* at 176.

262. *Id.* ("[W]e determine that [the Watch function] renders TVEyes's package of services unprotected by the fair use doctrine. That conclusion subsumes and obviates consideration of certain functions that are subsidiary to the Watch function, such as archiving, downloading, and emailing the video clips.").

In a maturation of transformative use analysis, the panel concluded that vis-à-vis the "Watch function," TVEyes' innovative way of publicly performing and distributing the video clips *was* modestly transformative, but that conclusion remained only *part* of the first fair use factor. The commercial nature of TVEyes' activities still counted against the defendant under the first factor.[263] The panel also concluded that the third and fourth factors weighed heavily against the defendant,[264] meaning that the "transformative use" analysis no longer short-circuits the rest of § 107.

Isn't the Second Circuit's detailed discussion of these § 107 factors evidence *against* the idea that the court was applying a rule? No. Once the court determined that TVEyes' conduct went beyond the judicially created searchable-database exception rule, *then* the court was compelled to apply § 107 as a legal standard. This would be no different than if a defendant had claimed both a specific exception under §§ 108–22 and § 107 fair use, i.e., a defendant archives who argues that their archival activities are excused by § 108 and, if not, are nonetheless fair use.

What is telling on the question of rule formation is that on appeal, Fox did not challenge TVEyes' Search function at all[265]: Fox did "not challenge the creation of the text-searchable database but allege[d] that TVEyes infringed Fox's copyrights by re-distributing Fox's copied audiovisual content."[266] In other words, following *Google Books*, the *searchable-database exception* had already become sufficiently stabilized that the plaintiff realized it was better to accept the searchable-database exception and focus on the defendant's redistribution of large chunks of unaltered content. The Second Circuit remanded to the district court the job of revising the injunction against TVEyes but directed that the ultimate injunction "shall not bar TVEyes from offering a product that includes that [Search] function without making impermissible use of any protected audiovisual content."[267]

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263. *Id.* at 180–81 ("As to the first factor, TVEyes's Watch function is at least somewhat transformative in that it renders convenient and efficient access to a subset of content; however, because the function does little if anything to change the content itself or the purpose for which the content is used, its transformative character is modest at best. Accordingly—and because the service at issue is commercial—the first factor favors TVEyes only slightly."). In his concurrence, Judge Kaplan thought this point irrelevant. *Id.* at 182 (Kaplan, J., concurring) ("The 'somewhat transformative' characterization therefore is entirely immaterial to the resolution of this case—in a familiar phrase, it is *obiter dictum*. I would avoid any such characterization even if I agreed with it."). The rest of Kaplan's concurrence shows he did not agree with it, and he believed that a new technology for delivering the same content should not count as a transformative use.

264. *Id.* at 181 ("The third factor strongly favors Fox because the Watch function allows TVEyes's clients to see and hear virtually all of the Fox programming that they wish. And the fourth factor favors Fox as well because TVEyes has usurped a function for which Fox is entitled to demand compensation under a licensing agreement.").

265. *Id.* at 176 ("Fox's challenge is to the Watch function . . . .").

266. *Id.* at 173. Although the court added that it was crafting the injunction this way because the Search function had not been challenged on appeal and that the court was "neither upholding it nor rejecting it." *Id.* at 182 n.7.

267. *Id.* at 182.

In the future, the searchable-database exception might expand—or it could inspire another rule-like exception that we might anticipatorily call the "big-data-AI exception." In other words, if reproduction and storage of vast quantities of literary and photographic works are permissible in order to produce a new information service useful to *humans*, perhaps the same would hold true when the database is useful for "training" artificial-intelligence software through deep structured learning. Or perhaps not. A court sufficiently convinced of the "intelligence" of an AI system might conclude that to the degree the copyrighted materials were being "learned" by a machine, the machine would be using them for the same purpose as the works were intended. In other words, when we start to speak of machine intelligence, machine learning, and machine cognition, perhaps the AI system is just a new *consumer* of the works.

The emergence of the searchable-database exception shows that the transformative use doctrine does not change how the § 107 mechanism is working. There may be significant indeterminacy in whether *X* activity by the defendant is declared to be "transformative," but once we have the first such decision by an important court, that decision can become the foundation for—or at least the beginning of—a rule-like exception under § 107.

### *C. A New Widely Used User Interface Rule?*

In the early days following a Supreme Court decision, there often is considerable discussion about the scope and importance of the decision; that seems true of the 2021 *Google* decision, in which the Court held that Google's copying and reuse of approximately 11,500 lines of Java SE-application interface code was fair use under § 107.[268] On the one hand, *Google* reaffirmed the transformative use doctrine with the Court, concluding that because "Google's use of the Sun Java API seeks to create new products,"[269] it was transformative. On the other hand, the Court made very clear that transformative use is only part of the first § 107 factor, the opinion is structured in a way that emphasizes how each factor requires appropriate (if not equal) attention, and the Court devoted the most words to the fourth factor (market effects).[270]

Perhaps most importantly, after explaining that "some factors may prove more important in some contexts than in others,"[271] the Court *began* with the second § 107 factor—the nature of the plaintiff's work.[272] Under this factor, the Court identified the "work" as the "the Sun Java API" and conceptualized the work as a "user interface," not simply software. Viewed this way, the Court reasoned that the

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268. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1191 (2021) ("To build the platform, Google . . . copied roughly 11,500 lines of code from the Java SE program. The copied lines of code are part of a tool called an Application Programming Interface, or API.").

269. *Id.* at 1203. The Court emphasized: "To repeat, Google, through Android, provided a new collection of tasks operating in a distinct and different computing environment. Those tasks were carried out through the use of new implementing code (that Google wrote) designed to operate within that new environment." *Id.*

270. By word count, the Court devoted 1,193 words to the first factor, 1,073 words to the second factor, 715 words to the third factor, and 1,636 words to the fourth factor.

271. *Id.* at 1197.

272. The Court said that this was for "expository purposes." *Id.* at 1201.

plaintiff's work—or the part copied by Google—"differs . . . from many other kinds of copyrightable computer code" by being closer to unprotectable ideas, processes, and methods of operation.[273] The Court concluded that Oracle's "declaring code is, if copyrightable at all, further than are most computer programs (such as the implementing code) from the core of copyright."[274]

As always, advocates and academicians may argue for a broad reading of *Google*, but the Court expressly explained that it was not altering its existing fair use jurisprudence.[275] Instead, it was "look[ing] to the principles set forth in the fair use statute, § 107, and set forth in our earlier cases, and appl[ying] them to *this different kind of copyrighted work*."[276] So, if we are looking for a new exception rule arising from the decision, it might be expressed as something like: where a software-implemented user interface is popularly used, copying key elements of the user interface is permitted for the development of new products. Formulated this way, the outcome of *Google* is consistent with—and a refinement of—Judge Boudin's insightful concurrence in the First Circuit's 1995 *Lotus Development Corp. v. Borland International, Inc.* decision.[277]

## CONCLUSION

Whether or not the transformative use doctrine continues to dominate fair use analysis is not as important to § 107 being a rule-generating mechanism as is keeping fair use determinations "judge-centric,"[278] something the Court confirmed in *Google*. In *Google*, the Court held that de novo review of jury conclusions on fair use was appropriate because overall fair use determinations are "legal work" under the Court's *U.S. Bank National Association v. Village at Lakeridge, LLC*[279] framework: a fair use determination "involves developing auxiliary legal principles

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273. *Id.* ("The declaring code at issue here resembles other copyrighted works in that it is part of a computer program. Congress has specified that computer programs are subjects of copyright. It differs, however, from many other kinds of copyrightable computer code. It is inextricably bound together with a general system, the division of computing tasks, that no one claims is a proper subject of copyright. It is inextricably bound up with the idea of organizing tasks into what we have called cabinets, drawers, and files, an idea that is also not copyrightable. It is inextricably bound up with the use of specific commands known to programmers, known here as method calls . . . .").

274. *Id.* at 1202.

275. *Id.* at 1208 ("We do not overturn or modify our earlier cases involving fair use—cases, for example, that involve 'knockoff' products, journalistic writings, and parodies.").

276. *Id.* at 1208–09 (emphasis added).

277. In *Lotus Development Corp. v. Borland International, Inc.*, 49 F.3d 807, 818–19 (1st Cir. 1995), the court concluded that the Lotus 1-2-3 command tree (as experienced by humans) was an unprotectable "method of operation." In his concurrence, Judge Boudin could only offer the faint praise that this was a "defensible position," *id.* at 821 (Boudin, J., concurring), but gave an insightful analysis of why the popular Lotus 1-2-3 user interface needed to be available for use by developers of competing spreadsheet software. Justice Breyer was obviously influenced by Boudin's concurrence, citing it three times. *Google*, 141 S. Ct. at 1198, 1208 (twice).

278. *See, e.g.*, Justin Hughes, *The Respective Role of Judges and Juries in Copyright Fair Use*, 58 HOUS. L. REV. 327, 330 (2020).

279. *Google*, 141 S. Ct. at 1208–09.

for use in other cases,"[280] reasoning consistent with the idea that courts are often fashioning *rules* for future fact patterns.

While scholars writing about rules and standards have never focused on § 107 fair use, it readily meets Louis Kaplow's description for the refinement of a legislative standard into a judge-created rule; the principal difference is that the § 107 standard is used by courts to generate *multiple* rules for copyright exceptions, just as the Fourth Amendment, the Fifth Amendment, and § 1 of the Sherman Act all remain standards governing a wide area of human activity but are also used to generate discrete rules to forbid or permit particular conduct.

One valuable insight in the debate about fair use is Rebecca Tushnet's observation that "fair use has finally adapted to the relatively new, higher default level of copyright protection."[281] For Americans, that "new" default level has been the post-1988 Berne Convention world in which all original expression is protected without the self-selection filters that a registration system provides. On this count, it is worth noting that many of the "transformativeness" cases have been cases in which the market created by copyright was not a meaningful incentive for the creation of the plaintiff's work: an expert's resume;[282] blog posts;[283] posters promoting music concerts;[284] university-student papers;[285] litigation briefs;[286] and recordings of conference call proceedings.[287] These cases all concern original expressions that might never have been registered in a system where copyright protection depended on registration.

This "new, higher default level of copyright protection" applies to all or almost all of the world's jurisdictions. Different legal systems will find different ways to provide new exceptions and limitations to compensate for stronger, broader default copyright protection. For some jurisdictions, it will be more compulsory licenses, more extended collective licensing, and more frequent creation and

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280. *Id.* at 1200 (quoting U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC., 138 S. Ct. 960, 967 (2018)).

281. Tushnet, *supra* note 5, at 892; *see also* Jessica Litman, *Campbell at 21/Sony at 31*, 90 WASH. L. REV. 651 (2015).

282. Devil's Advocate LLC v. Zurich Am. Ins. Co., No. 1:13-CV-1246, 2014 WL 7238856, at *5 (E.D. Va. Dec. 16, 2014).

283. Denison v. Larkin, 64 F. Supp. 3d 1127, 1136 (N.D. Ill. 2014). But the exclusive rights provided by copyright could be important to bloggers who obtain some economic support from the blog's advertising revenue, if any.

284. Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006). Music concert posters are not directly incentivized by copyright, but again one can imagine that they have a place in the copyright eco-system, i.e., concert posters support concerts which increase the sales of recorded music.

285. A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 631–32 (4th Cir. 2009).

286. White v. W. Publ'g Corp., 29 F. Supp. 3d 396, 397 (S.D.N.Y. 2014).

287. Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 85 (2d Cir. 2014).

amendment of specific statutory exceptions.[288] For Americans, it may be the generation of more rule-like exceptions within the § 107 framework. American-style fair use is no more for everyone than is the Electoral College or barbecue-chicken pizza. But when it works properly, it often establishes reasonably transparent rule-like exceptions in American copyright law.

288. The European Union's 2019 Digital Single Market Directive did all these things. Directive (EU) 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC.