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Hearing on "Fair Use"
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Statement of

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Thank you, Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, and members of the Committee. Good afternoon, ladies and gentlemen. My name is June Besek. I am the Executive Director of the Kernochan Center for Law, Media and the Arts at Columbia Law School and a Lecturer-in-Law at Columbia, where I teach seminars on advanced copyright and legal issues concerning individual creators – authors, artists and performers. I have practiced in the field of copyright since 1985, roughly half of that time in private practice and the other half in academia.

I'm here today to discuss fair use, and to emphasize its rapid expansion.

The Importance of Fair Use

Fair use is an exception to the exclusive rights the Copyright Act vests in authors. It excuses exploitations of a work that would otherwise be infringing. Fair use is an essential part of U.S. copyright law. It promotes cultural exchange and the creation of new works by facilitating activities such as education and scholarship, news, criticism and parody. Fair use is a critical means by which the copyright law fosters creative expression.

The fair use doctrine is contained in section 107 of the Copyright Act:

> **Limitations on exclusive rights: Fair use**
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> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

In broad brush, the fair use factors look to the purpose for which the copyrighted work was used; the type of work it is; how much was taken; and how the new use could affect the actual or potential market for the copyrighted work.

Fair Use: Extraordinarily Expanding

In early 2008 Columbia Law School sponsored a day-long symposium titled *Fair Use: "Incredibly Shrinking" or Extraordinarily Expanding?* What was apparent six years ago is even more obvious now: Fair use is extraordinarily expanding.

Until recently, the courts held that "[t]hough not an absolute rule, 'generally, it may not constitute a fair use if the entire work is reproduced.'"[1] From the point where copying *an* entire work generally defeats fair use, now copying the full contents of *millions* of works can qualify as fair use, regardless of whether it's done for commercial or noncommercial purposes.[2]

If fair use provides the important benefits described earlier, why might this expansion spark concern? Fair use is not a carte blanche to make unlimited use of others' work, even for a socially beneficial cause. The rights of creators and the interests of users must be balanced. As the Supreme Court stated in *Harper & Row v. Nation Enterprises*, reversing the Second Circuit's holding that *Nation* magazine was protected by fair use when it used pre-publication excerpts of President Ford's memoirs without authorization:

> [C]opyright is intended to increase and not to impede the harvest of knowledge. But we believe the Second Circuit gave insufficient deference to the scheme established by the Copyright Act for fostering the original works that provide the seed and substance of this harvest. The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.[3]

The Court went on to warn that

> It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike. . . . [A]s one commentator has noted: "If every volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading."[4]

The Rise of Transformative Use

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[1] Infinity Broadcasting Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998), quoting Nimmer on Copyright §13.05[A][3] at 13-178 (1997).

[2] *See* Authors Guild, Inc. v. Hathitrust, 902 F.Supp. 2d 445, 457 (S.D.N.Y. 2012), *appeal pending* (2d Cir.); Author's Guild, Inc. v. Google, Inc., 2013 U.S. Dist. Lexis 162198, 2013 WL 6017130, *appeal pending* (2d Cir.).

[3] Harper & Row, Publrs. v. Nation Enters., 471 U.S.539, 545-46 (1985) (citation omitted).

[4] *Id.* at 555 (citation omitted).

How did the law move so far so quickly? The principal reason for this expansion has been the increasing significance of "transformative use" in evaluating a fair use defense. The term "transformative use" is nowhere found in the fair use statute. It is not an entirely new concept, however: "productive use" – in the sense of producing new and independent creative works – has long been part of the fair use determination. In *Campbell v. Acuff-Rose*,[5] the Supreme Court embraced "transformative use" as a highly influential (though not determinative) factor in assessing fair use.

Campbell v. Acuff-Rose involved a parody by 2 Live Crew of Roy Orbison's song, "Pretty Woman." Campbell asserted a fair use defense.[6] The district court found in Campbell's favor, but the Sixth Circuit Court of Appeals reversed and held that fair use did not apply. Relying on the Supreme Court's statement in *Sony v. Universal City Studios* that "commercial use is presumptively an unfair exploitation" of the copyright owner's rights,[7] the Sixth Circuit resolved the first factor – the purpose and character of the use – in plaintiff's favor, because 2 Live Crew's parody was commercial.[8] On the fourth factor, often said to be the most important, the court stated that because 2 Live Crew's parody was entirely commercial, it "presume[d] that a likelihood of future harm to Acuff-Rose exists."[9] The Sixth Circuit's decision was typical of many post-*Sony* courts, which had made commercial use virtually dispositive of factors one and four. As a result, it had become very difficult to make a commercial fair use, so the Supreme Court intervened.

The Supreme Court reversed the Sixth Circuit's decision. It criticized the appellate court for letting the commercial nature of the use so heavily influence its fair use determination. The Court explained that commercial use is not dispositive of fair use, and commercial uses can be fair. But commerciality is only one aspect of factor one; whether a use is "transformative" is a very important consideration.[10] To determine whether a use is transformative, one looks at whether "the allegedly infringing work "merely supersede[s]" the original work "or instead add[s] something new, with a further purpose or a different character, altering the first with new expression, meaning or message."[11] As Judge Pierre Leval explained in an article on which *Campbell* relied, "[i]f . . . the secondary use adds value to the original – if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new

[5] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").
[6] Campbell was 2 Live Crew's lead vocalist and the first named defendant.
[7] Sony Corp. of America v Universal City Studios, 464 U.S. 417, 451 (1984).
[8] Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1436-37 (6th Cir. 1992) *rev'd*, 510 U.S. 569 (1994) (*citing* Rogers v. Koons, 960 F.2d 301, 312 (2d Cir. 1992)).
[9] *Id.* at 1438-39.
[10] Transformative use is not essential to fair use; as the *Campbell* court observed, making complete copies, such as multiple copies for classroom use, can be fair use. 510 U.S. 569, 579 n. 11 and § 107.
[11] *Campbell*, 510 US at 579 (citing Leval, Towards a Fair Use Standard, 103 HARVARD L. REV. 1105, 1111 (1990)).

insights and understandings – this is the very type of activity that the fair use doctrine tends to protect for the enrichment of society."[12]

The Supreme Court also emphasized that all four fair use factors must be analyzed independently – there are no shortcuts. Still, it observed that "the more transformative the *new work*, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[13] As this quotation illustrates, it bears emphasis that the Supreme Court embraced the inquiry into "transformative use" in the context of a second author's creation of a "new work."

"Functional Transformation" and Making Complete Copies.

Prior to *Campbell*, fair use cases involving transformative (or productive) use were premised on changes made to the subject work itself: annotating a work, analyzing or critiquing it, creating a parody, and so on. *Campbell* itself involved a parody of "Pretty Woman," achieved through changes to both lyrics and music. Moreover, even where a second author transforms the copied material, the amount of the copying remains an important consideration. In *Campbell*, the Supreme Court, although it stressed the "transformativeness" of the 2 Live Crew parody, ultimately remanded to the Sixth Circuit to determine whether the resulting work copied too much – that is, more than was needed to achieve its parodistic purpose.

As explained above, the Supreme Court defined transformative use as use of a copyrighted work for "a further purpose or different character, altering the first with new expression, meaning or message."[14] Post-*Campbell* cases began to interpret "transformative" in two significantly expansive ways. First, to encompass not only changes to the substance of a work, but also changes to how the work is used, referring to this repurposing in a new work as "functional transformation." Second, and more radically, courts began to apply the "transformative" and "functional transformation" labels not only to new works incorporating unaltered copies of preexisting works, but also to new uses that exploited the prior work without creating a new work. "Transformative" thus became uprooted from its original context of "new *works*" to become applied to a much broader context of "new *purposes.*"

This expansive view of what it means to be transformative has opened the door to claims that making complete copies of multiple works, even for commercial purposes, and even without creating a new work, can be a fair use. This is a substantial departure from the long-prevailing view that copying an entire work is generally not a fair use.[15] It also implies an important

[12] Leval, *supra* note 11 at 1111.
[13] *Campbell*, 510 U.S. at 579 (emphasis supplied).
[14] *Id.*
[15] The Supreme Court's decision in *Sony v. Universal City Studios* – the "Betamax case" – was a notable exception. There the Court concluded that in-home copying of free broadcast programming for timeshifting purposes was a fair use, because it was noncommercial and merely allowed consumers to watch at a different time programs they were

constriction of the author's rights respecting "*potential* market[s]" for her work, because, once a court has found a "transformative purpose" to a new exploitation, it tends increasingly to find that the new use exploits a "transformative market" that does not compete with the author's markets. In other words, contrary both to statutory text and to the Supreme Court's cautious reminder in *Campbell*, a finding that a use is "transformative" now tends to sweep all before it, reducing the statutory multifactor assessment to a single inquiry.

How did we get here? For example, in *Bill Graham Archives v. Dorling Kindersley Ltd*., the court found defendant's use of complete copies of Grateful Dead concert posters to be a fair use because the copies were used, in reduced size, as part of a historical timeline in a group biography of the Grateful Dead, rather than for their original purpose. The court stated that "[a] transformative use may be one that actually changes the original work. However, a transformative use can also be one that serves an entirely different purpose."[16] The Grateful Dead poster case, however, still concerned a new and independent work (indeed, of a kind that has traditionally come within the ambit of fair use): a biography.

The more radical shift came in *Perfect 10 v. Amazon.com.*[17] There, the Ninth Circuit Court of Appeals concluded that making complete copies of Perfect 10's copyrighted photos, and providing "thumbnail" reproductions to consumers in response to image search requests was a fair use. According to the court, "even making an exact copy of a work may be transformative so long as the copy serves a different function than the original work."[18] The court viewed defendants' use as "highly transformative" because their search engine served an "indexing" purpose which improved access to information on the Internet, entirely different from the photographs' aesthetic purpose, and because of the considerable public benefit the search engine conferred.[19]

Two recent "functional transformation" cases involve mass digitization of books from research libraries. *Authors Guild v. Google*[20] was a challenge to the mass digitization project initiated by Google, which contracted with research libraries to digitize their entire collections of published books. Google would provide each library with a full text digital version of the books in their

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invited to view without charge. *Sony v. Universal City Studios*, 464 U.S. 417. *Sony* also dubbed any commercial use "presumptively unfair" – a position from which the Supreme Court later retreated.

[16] Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 609 (2d Cir. 2006).

[17] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

[18] *Id*. at 1165 (citation omitted).

[19] *Id*. at 1165-66. Some of the distinctions that courts use to support "functional transformation" are simply untenable. For example, in *American Inst. of Physics v. Schwegman Lundberg & Woessner, P.A.*, 2013 U.S. Dist. Lexis 124578 (D. Minn. July 30, 2013), the court found defendant law firm's internal use of scientific articles (reading them to determine whether they represent "prior art" required to be supplied to the USPTO with a patent application) was intrinsically different from the plaintiff's purpose in publishing them (informing interested readers about developments in various scientific disciplines). In both cases the articles were read for information about scientific developments; there is no transformative purpose here.

[20] Author's Guild, Inc. v. Google, Inc., 2013 U.S. Dist. Lexis 162198, 2013 WL 6017130, *appeal pending* (2d Cir.).

collection. It would also retain copies of the full text database to enable it to allow customers to search Google's database to identify books of interest. A user's search would not retrieve a full-text version of a book unless it were in the public domain, but it would provide "snippets" of books in response to search requests, and information as to how one might get access to particular books. Google also uses its full text database to improve its translation capabilities and enhance its search capabilities, from which it derives revenue. Unlike the libraries, who purchased the books, Google did not pay the authors or publishers for its creation of full-text permanent retention copies.

The Authors Guild and publishers filed suit for copyright infringement against Google. Some time after the suit commenced, the parties entered into a class action settlement agreement, which the court declined to approve. The publishers subsequently entered into a separate settlement agreement with Google and dropped out of the suit.

In November 2013, the district court entered judgment in favor of Google on its fair use defense. The court found Google's use was "highly transformative" because Google had converted the books' text into digital form and created a valuable word index. It had also transformed the text into data that enabled new forms of research, like data-mining. Google's profit motive was accorded little weight in the decision, especially in light of the important educational purposes served by its project. The court found that Google's activities had little likely effect on the authors' actual or potential markets for their works. The court did not consider the market impact that could ensue were other for-profit enterprises to follow Google's lead in mass digitizing library collections. The Authors Guild has appealed the case.

Authors Guild v. Hathitrust[21] was the second case addressing massive databases of digitized books. Hathitrust is a nonprofit entity housed at the University of Michigan. It manages a large shared digital repository of millions of books that were scanned for Hathitrust's constituent libraries as part of Google's Library project. The repository is used for searches by library patrons (those search results yield information but no excerpts of text), preservation, and to provide full text of books in the libraries to persons who are visually impaired. In a suit brought by the Authors Guild against Hathitrust, the court concluded that Hathitrust's use was a fair use. It considered the use transformative since Hathitrust and the libraries were using the works for a different purpose than the originals – providing a searchable index that enabled locating books, data mining, and providing access for the print-disabled. The court found factor two "not dispositive" and concluded that the amount copied was reasonable in relation to the transformative purpose. The court decided that there was likely to be little impact on the market for plaintiffs' works since the plaintiffs were unlikely to set up a licensing system for this type of use. An appeal to the Second Circuit is pending.

[21] Authors Guild, Inc. v. Hathitrust, 902 F.Supp. 2d 445, 457 (S.D.N.Y. 2012), *appeal pending* (2d Cir). *Hathitrust* was filed after *Authors Guild v. Google*, but it was decided first.

Potential Consequences of "Functional Transformation"

The ascendency of transformative use, and in particular, "functional transformation," gives rise to concern that the fair use pendulum has now swung too far away from its roots and purpose, now enabling new business models rather than new works of authorship, and potentially placing the U.S. in violation of international restrictions on the scope of copyright exceptions and limitations. Lower courts applying "transformative use" analysis appear at times to be ignoring the Supreme Court's warning to consider the impact on copyrighted works were the challenged use to become widespread. Similarly, their analyses of "transformative markets" that fall outside the author's exclusive rights risk inappropriately cabining the scope of the derivative works right. The sheer volume of the taking in some of these functional transformation cases has at times resulted in courts' failure to consider distinctions among subject works that should be analyzed, if not individually, then by categories of works with certain characteristics. A capacious concept of "transformative use" also seems to be swallowing up the more specific exceptions Congress has crafted for particular uses, overriding their limitations and thus disregarding the balance Congress set for those exceptions.

1. **Some Courts Fail to Give Due Consideration to the Effect of Defendant's Use on the Copyright Owner's Potential Market**

Some courts are giving short shrift to two important considerations under factor four: First, the effect on the market if the use should become widespread, and second, the appropriate scope of authors' potential markets.

The analysis of factor four requires a court to consider

> not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the original.[22]

Similarly, the Court in *Sony* stated that a plaintiff must show that defendant's use is harmful or that "if it should become widespread, it would adversely affect the potential market for the copyrighted work." The Court explained in more detail:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a

[22] *Campbell*, 510 U.S. at 590 (quoting Nimmer on Copyright, §13.05 [A][4], at 13-102.61).

> showing by a preponderance of the evidence that *some* meaningful likelihood of harm exists.[23]

Lower courts have in the past heeded this counsel. For example, in *A&M Records v. Napster*,[24] the Ninth Circuit found that Napster's activities in promoting and enabling consumers to engage in file-sharing of copyright-protected music CDs harmed the record companies' future markets. Although the record companies had not yet entered the market for digital downloads, they had "expended considerable funds and effort" to commence licensing digital downloads. The court found that the presence of unauthorized copies of plaintiffs' recordings on Napster's file-sharing network "necessarily harms" the record companies' potential market.[25]

In some of the more recent "transformative use" cases, however, the courts have taken an unduly narrow view of the "transformative" use's effect on potential markets. For example, in *Perfect 10,* the Ninth Circuit was unwilling to find market effect attributable to defendant's transformative use because Perfect 10 could not demonstrate *current* sales of thumbnails, even though Perfect 10 had just begun a program to offer thumbnail photos (specifically, cellphone downloads) in the market. In contrast to its decision six years earlier in *Napster*, the Ninth Circuit did not find plans to enter a market sufficient; it would recognize a market for thumbnails only if Perfect 10 could prove actual sales.

In *Authors Guild v. Google*, the court never considered the consequences "if the use should become widespread." Perhaps the court implicitly assumed that no one but a Google could (or might want to) create such a comprehensive and expensive database. But it could well be that smaller, more narrowly tailored databases (e.g., financial economics or travel guides) would be of value to specific entities or individuals for a variety of purposes). The cost of book-scanning is far less now than it was when Google began its digitization project, so the prospect of a "democratization" of mass digitization is hardly far-fetched, and may already be well in prospect. Or, another internet service provider may seek a database to enhance its searches and bring in more advertising revenue, just as Google has done. The court simply never addressed the possible adverse effects on plaintiffs of a multiplicity of such databases.

2. Confusion Between a Transformative Work and a Derivative Work.

Cases since *Campbell* have contributed to tension between the market for derivative works and exploitation of transformative works.

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[23] *Sony*, 464 U.S. 417, 451. The Supreme Court placed the burden of this showing on plaintiffs when the challenged use is noncommercial: since fair use is an affirmative defense, the burden respecting harm remains with defendants whose use is commercial.

[24] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[25] *Id*. at 1017.

Under the Copyright Act:

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a "derivative work".

A transformative work is one that adds "something new, with a different purpose or a different character, altering the first with new expression, meaning or message." [26]

This overlap in terms and concepts has led to confusion. When is a work "transformed" in such a way that it becomes a protectable (or infringing) derivative work? On the other hand, when is it transformed in such a way that the transformation significantly bolsters a fair use claim? This decision has important implications for authors' potential markets. If a court finds that defendants' use of an author's work is "transformative" because it reaches new markets or makes the work available to a new audience, that finding could risk usurping the author's derivative work rights. Ultimately, those rights could hinge on a "race to the market" for new and sometimes unanticipated uses. If the party allegedly making transformative use gets there first, that market may belong to him and be foreclosed to the author or copyright owner. Moreover, in some cases the copyright owner, who may have obligations to its licensors or others, may be unable to move as quickly as the putative "fair" user.

3. Fair Use is Swallowing Other Copyright Exceptions.

In some cases, expansive readings of fair use have virtually swallowed other exceptions to copyright. For example, the *Hathitrust* case's interpretation of fair use effectively reads section 108 (c) of the Copyright Act and portions of section 121 out of the statute.

Section 108(c) permits qualified libraries and archives under certain circumstances to make copies of published works in their collections. It provides:

> (c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if—

[26] *Campbell*, 510 U.S. at 579.

> (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and
> (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

The courts in both *Authors Guild v. Hathitrust* and *Authors Guild v. Google* apparently accepted that libraries are free to copy in digital form (or have copied for them) all published works in their collections, without qualification. The *Hathitrust* court finds no inconsistency between this comprehensive copying and section 108(c) quoted above, because section 108(f) provides that nothing in section 108 "in any way affects the right of fair use as provided by section 107. . . ."[27] But section 108(f) does not justify the court's conclusion. Under fundamental principles of statutory interpretation, statutes are to be interpreted in a manner that gives sense to the whole.[28] A statutory provision should not be interpreted in a manner that renders another provision superfluous or redundant.[29] Interpreting fair use to permit a library to copy every published work in its collections leaves section 108(c) with no remaining significance.

Similarly, the *Hathitrust* rationale effectively swallows section 121 as well. That section provides an exception from copyright for the blind and visually impaired. Section 121(a) states:

> (a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.

As it did in setting a balance in section 108, Congress carefully crafted section 121 to provide a balance between the interests of the visually impaired and those of authors. In *Hathitrust*, however, the court concluded that although defendants in its view "fit squarely within" section 121, they "may certainly rely on fair use . . . to justify copies made outside of these categories or in the event they are not authorized entities."[30]

The court's conclusion reads the essential conditions in section 121 out of the law.

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[27] § 108 (f)(4). The idea that fair use could make substantial portions of section 108 irrelevant was clearly not anticipated by Congress when the 1976 Act was passed. According to the House Report accompanying the 1976 Act, "[n]o provision of section 108 is intended to take away any rights existing under the fair use doctrine. To the contrary, section 108 authorizes certain photocopying practices which may not qualify as a fair use." H.R. Rep. No. 96-1476, 94th Cong. 2d sess. at 74 (1976).

[28] 2 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 46:5 (7th ed. 2013).

[29] Bilski v. Kappos, 130 Sup. Ct. 3218, 3228-29 (2010) (citation omitted); Kungys v. United States, 485 U.S. 759, 778 (1988).

[30] *Hathitrust*, 902 F. Supp. 2d at 465 (footnote omitted).

4. Evaluating Fair Use "In Gross."

The sheer volume of works involved in the mass digitization cases has led courts to eschew the case-by-case fact-based analysis fair use has traditionally required. Of course it is not possible to evaluate each work individually in these cases. But even significant differences among subgroups of works seem irrelevant in these cases, e.g., fiction versus nonfiction? Works no longer available on the market versus those recently released? It's as though courts are according some kind of "volume discount" for fair use, where a massive taking justifies a lower level of scrutiny in a fair use determination. It becomes increasingly difficult to explain to authors and public alike a copyright regime that rigorously examines the extent of a single scholar's partial copying,[31] while essentially according a free pass to a for-profit enterprise's massive takings. It also risks putting the U.S. at odds with international norms.

5. Expansive Interpretations of "Transformative Use" Risk Putting the U.S. in Violation of its International Treaty Obligations.

The United States is a member of a number of international copyright treaties and agreements – e.g., TRIPs, the Berne Convention, and the WIPO Copyright Treaty – that require that member states' copyright exceptions (as applied to foreign works) meet the "Three Step Test." As set out in the TRIPS, that test provides:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.[32]

As the World Trade Organization's dispute resolution panel held in a case in which the U.S. was found to be in violation of this test,[33] under the first step, any limitations or exceptions must be clearly defined and limited in scope. "Normal exploitation" embraces all forms of exploitation that the author would normally seek to exploit now or in the future. In other words, an exception may not compromise a normal market for the work. The third and final step requires that authors be protected from unreasonable loss of income; in some cases a compulsory license or remuneration scheme is permissible if the author's rights are adequately protected.

An increasingly expansive fair use exception risks violating each of these three steps. Fair use is open-ended; its consistency with the first step depends on the scope of its application in particular cases. The broader the scope of the works affected, or the wider the uses the exception

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[31] *See, e.g.*, Craft v. Kobler, 667 F. Supp. 120 (S.D.N.Y. 1987) (Leval, J.) (holding that a biographer copied more than was needed for his critical examination of the letters of Igor Stravinsky).
[32] TRIPS, Annex 1C, art. 13.
[33] WT/DS160/R 15 June 2000 UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT Report of the Panel.

permits, the more likely that the exception will not be deemed limited to "certain special cases." By the same token, the breadth of the exception's application can affect types of exploitation that the author is now or likely will in the future be engaging in. Finally, fair use is an all-or-nothing proposition. If a use is "fair", authors receive no compensation for the use. The U.S. has no remuneration scheme in connection with fair use.

The Fair Use "Pendulum"

Fair use doctrine is not static. Over the years fair use case law has sometimes strayed too far in one direction, favoring right holders, or in the other direction, favoring users. For example, after the *Sony* case, many lower courts interpreted the Supreme Court's statement that "'commercial use is presumptively an unfair exploitation' of the copyright owner's rights" to drive both the first and fourth fair use factors, making commercial fair use difficult to achieve. In *Campbell*, the court stepped in to restore the balance.

Now, the pendulum has swung the other way. Now it is "transformative use" that drives these two factors, which together are generally determinative of fair use. It is important that the fair use "pendulum" once again be moved back toward center.

A Role for Congress?

Despite the concerns just voiced, fair use remains a rule whose application is best made by judges, as Congress recognized in codifying the doctrine in section 107.[34] As we have seen, the pendulum can swing in both directions. But if Congress had best continue to leave the general task of applying the section 107 factors to the courts, legislative intervention may be appropriate when that application proves too rigid or too expansive. Thus, after a series of decisions in which lower courts misapprehended the Supreme Court's interpretation of the second fair use factor as wholly insulating unpublished works from quotation, Congress added a final sentence to section 107 to emphasize that all the factors should be taken into account, and that the single feature of a work's publication status was not dispositive.[35]

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[34] *See, e.g.*, H.R. Rep. No. 96-1476 at 66: "Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow or enlarge it in any way."

[35] In *Harper & Row v. Nation Enters*., the unpublished nature of the Ford memoirs was a key consideration in the Court's decision that the Nation had not a made a fair use. *Harper & Row*, 471 U.S. 539, 561-62. After that decision, the high level of protection accorded unpublished works by some courts seemed largely to foreclose making fair use of unpublished material, posing serious obstacles to historians, biographers and others. *E,g*, Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). In 1992, Congress amended §107 to provide that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

Just as some judges overreacted to the Supreme Court's protection of the right of first publication by overly-constricting fair use, the current judicial expansion of fair use may reflect concern to preserve the benefits of mass digitization notwithstanding the tension between those activities and the Copyright Act's charge to secure the actual and potential markets for works of authorship. Without altering the text of section 107, Congress might separately address the problems of mass digitization, including whether authors should be compensated for publicly beneficial uses (compensation is not currently an option under section 107). Congress' attention to those issues might relieve the pressure that has risked turning the doctrine into a free pass for new business models, and thus restore fair use to its most appropriate role of fostering new authorship.

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Thank you for this opportunity to provide comments to the Committee.