

2014

# The Expansion of Fair Use in Response to Copyright's Growing Protection

John Burke

Follow this and additional works at: [http://scholarship.shu.edu/student\\_scholarship](http://scholarship.shu.edu/student_scholarship)



Part of the [Law Commons](#)

---

## Recommended Citation

Burke, John, "The Expansion of Fair Use in Response to Copyright's Growing Protection" (2014). *Law School Student Scholarship*. Paper 631.

[http://scholarship.shu.edu/student\\_scholarship/631](http://scholarship.shu.edu/student_scholarship/631)

# THE EXPANSION OF FAIR USE IN RESPONSE TO COPYRIGHT'S GROWING PROTECTION

John Burke\*

## I. INTRODUCTION

The purpose of copyright is to balance the interests of authors and society as a whole in order to reward authors while making their work available to society.<sup>1</sup> The law must carefully balance these interests since, “while the benefits of broad copyright protection are concentrated in relatively few individuals and industries, the costs of that protection are spread among all potential users of copyrighted works, which includes nearly the entire population.”<sup>2</sup> Copyright scholarship has lamented a protectionist bias in the law.<sup>3</sup> In response to this perceived bias, some courts are increasingly using fair use as a way to decrease protectionism.

Copyright protection is available to original works of authorship fixed in a tangible medium of expression.<sup>4</sup> Copyright owners are entitled to a number of exclusive rights, including reproduction, creation of derivative works, distribution, and performance.<sup>5</sup> Violating any of these exclusive rights, including importing copies of the

---

\* J.D. Candidate, 2014, Seton Hall University School of Law; B.A., 2011, Saint Joseph's University.

<sup>1</sup> Deborah Kemp, *Copyright on Steroids: In Search of an End to Overprotection*, 41 MCGEORGE L. REV. 795, 797 (2010) (“The law gives monopoly protection to the creator to inspire him or her to produce and to make the creations available to society, thereby contributing to the constitutional goal of social progress through promotion of science and the useful arts.”).

<sup>2</sup> Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. LJ 567, 582 (2006).

<sup>3</sup> See Robert P. Merges, *One Hundred Years of Solitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2190–91 (2000) (recent Copyright Act amendments create “more specific, highly elaborated property rights,” which “reveal[] an excessively protectionist bias”).

<sup>4</sup> 17 U.S.C. § 102 (a) (1976).

<sup>5</sup> 17 U.S.C. § 106 (1976).

protected work, constitutes infringement.<sup>6</sup> The copyright act provides an exception known as fair use for uses that otherwise might be considered infringement.<sup>7</sup>

The copyright act's fair use provision provides for fair use for purposes such as criticism, comment, news reporting, teaching, scholarship, or research.<sup>8</sup> The statute also provides four non-exhaustive factors to determine whether a particular use is a fair use.<sup>9</sup> The first factor to be considered is the character of the use, such as a commercial, educational, or nonprofit use.<sup>10</sup> Next, the nature of the underlying copyrighted work itself should be considered.<sup>11</sup> The statute then requires a comparison of the "amount and substantiality" of the underlying work that is used in relation to the underlying work as a whole.<sup>12</sup> Finally, the use's effect on the underlying work's value and potential market for the work should be considered.<sup>13</sup>

Recent caselaw has shown that courts have begun to apply these factors more liberally, and, as a result, courts have found uses fair rather than infringing. This trend is a positive step in balancing society's interests against an increasingly robust author's monopoly interest. In fact, while it initially seems like the public's benefit comes at a cost to copyright holders, a liberal view of fair use could even benefit copyright holders themselves indirectly. Part II discusses the background and beginnings of fair use. Part III examines the recent liberal view of fair use adopted by the Second Circuit and spread to the Ninth Circuit. Part IV analyzes two existing arguments for a liberal view of

---

<sup>6</sup> 17 U.S.C. § 501 (a) (2012).

<sup>7</sup> 17 U.S.C. § 107 (2012).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 17 U.S.C. § 107 (2012).

fair use and analyzes how the recent decisions in *Cariou v. Prince* and *Seltzer v. Green Day, Inc.* support them. Part V concludes.

## PART II. BACKGROUND OF FAIR USE

This part discusses the beginnings of fair use, the initial fair use framework used by the Second Circuit, and the Supreme Court’s treatment of fair use. This background shows the initial, more protective approach that courts took that discouraged findings of fair use.

### *A. Judicial Beginnings of Fair Use*

The fair use doctrine can be traced back to some of the earliest infringement cases; in *Folsom v. Marsh*, the defendant published letters written by George Washington in a biography and was sued in 1841 for infringement by the copyright holder.<sup>14</sup> In his decision, Judge Story touches on several factors that have since been used by courts to determine whether a use is fair. Particularly, Judge Story notes some of the factors that should be used to analyze the content of the use:

the question of piracy, often depend[s] upon a nice balance of the comparative use made in one of the materials of the other the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.<sup>15</sup>

The potential economic impact of infringement has been a factor since the beginnings of fair use, as Justice Story noted that the court must “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the

---

<sup>14</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 345 (CCD Mass. 1841).

<sup>15</sup> *Id.* at 344 (quotation marks omitted).

objects, of the original work.”<sup>16</sup> Even in this early case in 1841 the court is concerned with balancing factors including the nature of the use, the nature of the works in question, and the possibility of the use superseding the original in the marketplace.

*B. Initial Treatment of Fair Use by The Second Circuit*

Initially, the Second Circuit adopted a very strong view of copyright and held strict requirements for fair use in *Rogers v. Koons*. In 1992, Jeff Koons purchased a postcard that featured Rogers’s print “Puppies,” depicting a couple holding puppies.<sup>17</sup> He took the postcard, tore off the copyright notice and gave it to one of his artisans and asked them to copy it.<sup>18</sup> Koons’s own written instructions include explicit directions to copy Rogers’ print faithfully and accurately.<sup>19</sup> The district court held that Koons use was not fair and granted an injunction.<sup>20</sup> After Koons failed to comply with the injunction and turn over all infringing copies, the district court held him in contempt.<sup>21</sup> Koons argued that his use constituted a fair use, but the trial court found no genuine issues of material fact and granted summary judgment.<sup>22</sup>

On appeal, the Second Circuit agreed with the district court that Koons’s copying of original elements of creative expression in Rogers’ work was so blatantly apparent as to not require a trial.<sup>23</sup> The appellate court noted that direct evidence of Koons’s copying was sufficient to uphold the district court’s summary judgment, but the court also noted that Koons’s access to the work along with the substantial similarity of the two pieces

---

<sup>16</sup> *Id.* at 348.

<sup>17</sup> *Rogers v. Koons*, 960 F.2d 301, 304–05 (1992).

<sup>18</sup> *Id.* at 305.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 306.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 309.

<sup>23</sup> *Rogers*, 960 F.2d. at 307.

would also be sufficient.<sup>24</sup> The appellate court concluded that summary judgment was granted properly.<sup>25</sup>

To determine whether Koons's use was fair, the Second Circuit went through four factors: the purpose and character of the use, the nature of the underlying copyrighted work, the amount and substantiality of the work used, and the effect of the use on the market value of the original. In examining the first factor, the purpose and character of the use, the appellate court noted that copies made for commercial or profit-making purposes are presumptively unfair.<sup>26</sup> The appellate court also noted that Koons's conduct, namely tearing off the copyright notice, suggested bad faith and militated against finding fair use.<sup>27</sup> The appellate court noted that Koons's commercial purpose and exploitative use weighed heavily against fair use, but that it was not controlling.<sup>28</sup>

In response, Koons argued that the primary purpose of his use of Rogers's work was for social commentary and is a parody of society at large.<sup>29</sup> The appellate court defined a parody as "one artist, for comic effect or social commentary, closely imitat[ing] the style of another artist and in so doing creat[ing] a new art work that makes ridiculous the style and expression of the original."<sup>30</sup> The appellate court also noted that parodies are allowed more leeway for more extensive use of the underlying work than the normal substantial similarity test.<sup>31</sup> The Second Circuit noted that the Circuit adopted a requirement that, while the work may satirize society at large, the underlying work itself

---

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Rogers*, 960 F.2d at 309 (citing *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 449 (1984)).

<sup>27</sup> *Rogers*, 960 F.2d at 309.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Rogers*, 960 F.2d at 310 (citing *Elsmere Muse, Inc. v. National Broad. Co.*, 623 F.2d 252, 253 (2d Cir. 1980)).

must be at least part of the object of the parody.<sup>32</sup> The appellate court stressed that this rule is necessary to keep boundaries on the fair use defense.<sup>33</sup> “If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer’s claim to a higher or different artistic use—without insuring public awareness of the original work—there would be no practicable boundary to the fair use defense.”<sup>34</sup> Ultimately, the appellate court found that the first factor weighed against Koons’s fair use, and that there was no discernable parody of the underlying work itself.<sup>35</sup>

The appellate court noted that the second factor, the nature of the underlying copyrighted work, includes consideration of whether the work is factual or fictional and the creative, financial, or time investment put into the work.<sup>36</sup> The appellate court found that the second factor also weighed against a finding of fair use since Rogers’s work was creative and imaginative and he stands to gain financially from it.<sup>37</sup>

The appellate court noted that the third factor, amount and substantiality of the work used, requires emphasis on the expression in the original work rather than the underlying facts.<sup>38</sup> Additionally, the court noted that the quality of the copying is more important than the quantity; copying that goes to the essence of the original, underlying work weighs against fair use.<sup>39</sup> While parody normally affords a defendant greater flexibility for copying, the court noted that Koons could not benefit since he did not meet the requirements for parody.<sup>40</sup> The court held that no reasonable jury could find Koons

---

<sup>32</sup> *Rogers*, 960 F.2d at 310.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 311.

<sup>38</sup> *Rogers*, 960 F.2d at 311.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

did not exceed a reasonable level of copying since he copied the very expression of Rogers's work.<sup>41</sup>

For the fourth factor, effect of the use on the market value of the original, the court explained that the goal is to strike a balance between the benefit gained by the copyright owner if the use is held unfair and the benefit gained by the public if the use is held fair.<sup>42</sup> The goal is to encourage the copyright owners' incentive to produce copyrightable works.<sup>43</sup> Therefore, non-commercial uses are less likely to harm the owner than commercial uses, where likelihood of future harm is presumed.<sup>44</sup> The court noted that despite Koons developing a work in a different medium, Rogers needed only to demonstrate that if the unauthorized use is widespread it could harm the potential market for his original work.<sup>45</sup> The court also considered that, in addition to the market for Rogers's work itself, Koons's work could harm the market for derivative works of Rogers's print.<sup>46</sup> The appellate court found that the evidence supported only the view that Koons created the work for a high-priced art piece and that the fourth factor weighed against fair use.<sup>47</sup>

Ultimately, the appellate court affirmed the lower court's finding that Koons infringed and his use was not fair.<sup>48</sup>

### *C. The Supreme Court's Treatment of Fair Use*

In *Campbell v. Acuff-Rose*, the Supreme Court addressed the issue of fair use, affirming the use of the four factored analysis from *Rogers v. Koons*. *Acuff-Rose* filed

---

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 312.

<sup>44</sup> *Rogers*, 960 F.2d at 312.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 314.



an infringement suit against 2 Live Crew for their song “Pretty Woman.”<sup>49</sup> The district court granted summary judgment, but the appellate court reversed and held that there was not a fair use since the song was commercial and borrowed too much from Roy Orbison’s “Oh, Pretty Woman.”<sup>50</sup> The Supreme Court granted certiorari and held that commercial character is not dispositive, but only a factor to be considered in the fair use elements.<sup>51</sup>

Additionally, the Supreme Court emphasized the additional freedom for copying afforded to parodies in a fair use analysis.<sup>52</sup> In his opinion, Justice Souter stressed the goal of copyright law “to promote the Progress of Science and useful Arts.”<sup>53</sup> As a result, Justice Souter emphasized the importance of avoiding rigid applications of the Copyright Act in fair use analysis; the four factors should be weighed together with the purposes of copyright in mind.<sup>54</sup>

In analyzing the first factor, Justice Souter explained that the analysis should focus on whether the new work “supercedes the objects” of the underlying work or alters it with new character or expression.<sup>55</sup> According to Justice Souter, the first factor analysis should center on whether the new work’s use of the original underlying work is transformative.<sup>56</sup> Transformative works further the goals of copyright to promote science and arts, and the more transformative a work, the more likely a finding of fair use against the other factors.<sup>57</sup> A parody is one such transformative use, and a parody’s ability to use existing works and expression rests on the fact that the new work at least partially

---

<sup>49</sup> *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 572 (1994)

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Campbell*, 510 U.S. at 575 (citing U.S. CONST. ART. I, §8, cl. 8).

<sup>54</sup> *Id.* at 577.

<sup>55</sup> *Id.* at 579 (citing *Folsom v. Marsh*, 9 F. Cas. 342, 348 (CCD Mass. 1842)).

<sup>56</sup> *Id.* at 579.

<sup>57</sup> *Id.*

comments on the original, underlying work.<sup>58</sup> Alleged parodies that fail to comment on the original will have a difficult time surviving a fair use analysis: “If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.”<sup>59</sup> Justice Souter rejected 2 Live Crew’s argument that any parody is presumptively fair use since there is no workable presumption that could deal with each and every parody on a case-by-case basis.<sup>60</sup> He also noted that a commercial work does not lead to a presumption of unfair use and a non-commercial or educational work does not lead to a presumption of fair use.<sup>61</sup> Overall, in examining the first factor, Justice Souter stressed the importance of a careful analysis rather than a bright-line rule.<sup>62</sup>

For the second factor, Justice Souter noted that it primarily functions to focus on works closer to the goals of copyright, namely creative works for public consumption, and to afford less protection to factual works.<sup>63</sup> Justice Souter also noted, however, that this factor often would not be helpful for analyzing parodies since most focus on popular, public creative works.<sup>64</sup>

For the third factor, Justice Souter explained that the extent of the copying in relation to the purpose of the copying must be balanced along with the amount copied in

---

<sup>58</sup> *Id.* at 580.

<sup>59</sup> *Campbell*, 510 U.S. at 580.

<sup>60</sup> *Id.* at 581.

<sup>61</sup> *Id.* at 584.

<sup>62</sup> *Campbell*, 510 U.S. at 584.

<sup>63</sup> *Id.* at 586.

<sup>64</sup> *Id.*

relation to the whole underlying work.<sup>65</sup> Justice Souter agreed with the appellate court's arguments that the quality and significance of the copying is just as, if not more, important as the quantity of the copying.<sup>66</sup> The appellate court was also correct in arguing that whether copying was done substantially and verbatim is relevant since it can also touch on the transformative nature of the first factor and the likelihood of market harm of the fourth factor.<sup>67</sup> For parodies particularly, however, Justice Souter noted that a parody must be able to borrow enough from the original underlying work to be recognizable as the object of the parody.<sup>68</sup> While parodies by nature require more copying, once enough characteristic features have been borrowed to conjure up the underlying work, the amount of additional borrowing that is reasonable will depend on the first and fourth factors.<sup>69</sup>

For the fourth factor, Justice Souter rejected the appellate court's application of a presumption that commercial works lead to a likelihood of future harm.<sup>70</sup> Instead, his opinion stresses considering not only the potential market harm to the original from this copying but also the effect widespread copying of this sort would have and the harm to the market for derivative works.<sup>71</sup> Justice Souter stressed the importance of considering parodies carefully, since many parodies may have the goal of destroying the original work's market and causing financial harm without actually supplanting it and creating a cognizable infringement claim.<sup>72</sup> Therefore, the court must be mindful of its role "to

---

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 587.

<sup>67</sup> *Id.*

<sup>68</sup> *Campbell*, 510 U.S. at 588.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 591.

<sup>71</sup> *Id.* at 590.

<sup>72</sup> *Id.* at 591-92.

distinguish between biting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.”<sup>73</sup>

Finally, Justice Souter emphasized that the Court of Appeals erred by adopting a presumption against commercial uses as unfair.<sup>74</sup> Such a presumption should not be applied to any part of the fair use analysis.<sup>75</sup> The Supreme Court’s decision in *Campbell* emphasized a flexible approach to fair use that used the four-factor framework with the goals of copyright in mind. Justice Souter stressed that the four factors should not be rigidly applied and was careful to correct the Court of Appeals’ presumption against commercial uses. The Court even declined to adopt a rule requiring that parodies comment on the underlying work, instead only going as far as making it a single factor in the overall analysis. The *Campbell* decision was carefully balanced and can be seen as a step toward a less-protective, broader view of fair use.

### PART III. THE SECOND AND NINTH CIRCUITS ADOPT A LIBERAL VIEW OF FAIR USE

The Second Circuit has developed and further expanded on the more liberal fair use standard; and the Ninth Circuit has since adopted the same approach. The decisions of both courts of appeals represent important guideposts for the ways in which the new standard should be framed in the lower courts.

#### A. *Koons Returns to the Second Circuit for a Different Result*

Artist Jeff Koons created a series of paintings entitled “Easyfun-Ethereal” for Deutsche Bank and Guggenheim in 2000 and again faced litigation.<sup>76</sup> In creating the paintings, Koons used a number of images taken from advertisements and his own

---

<sup>73</sup> *Campbell*, 510 U.S. at 592 (citing *Fisher v. Dees*, 794 F.2d 432, 438 (1986)).

<sup>74</sup> *Id.* at 594.

<sup>75</sup> *Id.*

<sup>76</sup> *Blanch v. Koons*, 467 F.3d 244, 247 (2nd Cir. 2006).

photographs.<sup>77</sup> One of the pieces, “Niagara,” used a photograph from an issue on Allure magazine taken by Andrea Blanch, an accomplished fashion photographer.<sup>78</sup> Koons used only the woman’s legs and feet from Blanch’s photograph and pasted them vertically instead of slanting upward as in Blanch’s photograph.<sup>79</sup> After seeing Koons’s “Niagara” on display in the Guggenheim Museum in New York, Blanch filed a lawsuit for copyright infringement; she later amended her complaint and added Deutsche Bank and Guggenheim.<sup>80</sup>

The district court granted summary judgment for the defendants, concluding that Koons’s use was fair.<sup>81</sup> For the first factor, the district court decided that Koons’s use was transformative and favored fair use.<sup>82</sup> For the second factor, the district court determined that Blanch’s copyrighted photograph was not creative, favoring fair use.<sup>83</sup> For the third factor, the district court determined that since the focus of Blanch’s work was used by Koons, but the focus was not very original, the factor was neutral.<sup>84</sup> For the fourth factor, the court determined that the market for Koons’s work was not served by Blanch’s photograph.<sup>85</sup> After analyzing each of the four factors, the district court granted summary judgment for fair use since each factor was either neutral or favored fair use.<sup>86</sup>

On appeal, the Second Circuit noted that the goal of copyright law is to further creativity by rewarding it for benefiting the public.<sup>87</sup> The court also noted, however, that

---

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 248.

<sup>80</sup> *Id.* at 249.

<sup>81</sup> *Id.*

<sup>82</sup> *Blanch*, 467 F.3d at 249.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 250.

fair use must strike a balance between the protection of original works and the interests of other artists and the public in expression through referencing copyrighted works.<sup>88</sup>

For the first factor, the Second Circuit first looked at transformative uses, noting that merely working in a different medium or context was not a transformative use: “[w]e have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work.”<sup>89</sup> Koons’s use of Blanch’s work was not merely repackaging her expression.<sup>90</sup> “When, as here, the copyrighted work is used as ‘raw material’ in the furtherance of distinct creative or communicative objectives, the use is transformative.”<sup>91</sup> The Second Circuit decided that Koons’s use was transformative and perfectly fit the Supreme Court’s test for the first factor in *Campbell*: whether the use adds some new expression to the original or merely takes its place.<sup>92</sup>

Continuing under the first factor, the court also addressed the commercial nature of Koons’s work; having found his use transformative, the court gave little weight to his commercialism.<sup>93</sup> The court also noted that, while Koons was paid for his work to be displayed in the museum, the public also benefited greatly through the display of the art.<sup>94</sup> The court also analyzed Koons’s work under the parody/satire lens; ultimately deciding that his use was a justified satirical one.<sup>95</sup> The court cited Koons’s own affidavit to support his use of Blanch’s work for artistic reasons.<sup>96</sup> The court also performed a bad

---

<sup>88</sup> *Blanch*, 467 F.3d at 250.

<sup>89</sup> *Id.* at 252.

<sup>90</sup> *Id.* at 253.

<sup>91</sup> *Blanch*, 467 F.3d at 253 (citing *Castle Rock Entm’t*, 150 F.3d at 142).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 254.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 255.

<sup>96</sup> *Id.*

faith analysis for Koons's use, ultimately deciding that the only action he took close to bad faith was using the photograph without asking for permission first.<sup>97</sup> Citing the Supreme Court, the Second Circuit decided that Koons's failure to ask or receive permission is not bad faith so long as the use is otherwise fair.<sup>98</sup> After going through the transformative use, commercial, parody/satire, and bad faith sub-factors, the Second Circuit held that the first fair use factor weighed strongly for Koons's use as fair.<sup>99</sup>

For the second factor, the Second Circuit applied two primary considerations: whether the underlying, copyrighted work is expressive or creative and whether the underlying copyrighted work was published.<sup>100</sup> The court determined that the fact that Blanch published her photograph weighed in favor of Koons's use.<sup>101</sup> Analyzing the nature of Blanch's work, however, the Second Circuit disagreed with the district court's conclusion that her work was "banal rather than creative."<sup>102</sup> Instead, the Second Circuit found that Blanch's work was creative, but that Koons's transformative use commented on her work's meaning rather than borrowing its creativity.<sup>103</sup> Koons's use was transformative; therefore, the Second Circuit believed that the second factor had less weight even if Blanch's work was creative.<sup>104</sup>

For the third factor, the Second Circuit questioned whether Koons's copying was excessive given his purpose to incorporate existing images to comment on the world.<sup>105</sup> Since Koons copied only the woman's legs and feet rather than the whole image, the

---

<sup>97</sup> *Blanch*, 467 F.3d at 256.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 257.

<sup>103</sup> *Blanch*, 467 F.3d at 257.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

Second Circuit believed that Koons copied a reasonable amount given his purpose.<sup>106</sup> Here again, however, the Second Circuit disagreed with the district court, who believed the third factor was neutral, and found that the third factor favored Koons.<sup>107</sup>

For the fourth factor, the Second Circuit noted that the market effect analysis must focus on whether the use takes the place of the original work in its market rather than whether it alters the market.<sup>108</sup> Additionally, the Second Circuit pointed out that the market for derivative works is only examined for the types that would generally be created or licensed by the copyright owner.<sup>109</sup> Ultimately, the Second Circuit found the fourth factor favored Koons, since Blanch admitted she never licensed her work and Koons's use had no effect on her career or the value of her work.<sup>110</sup>

The Second Circuit in *Blanch* upheld the district court's finding of fair use for Koons's work, but they analyzed some of the factors differently to come to the same result.<sup>111</sup> The Second Circuit was careful to frame the factors differently than the district court in order to stress the transformative nature of Koons's use. While the district court was inclined to view Koons as slavishly copying Blanch's work without her permission, the Second Circuit stressed the creativity in Koons's work along with the fact that Blanch would never have licensed her work or expected any revenue for this kind of use.

#### *B. The Second Circuit Reinforces its Position on Fair Use*

In *Cariou v. Prince*, the Second Circuit continued the trend toward a broader view of fair use away from a broader view of the monopoly for copyright holders. In that

---

<sup>106</sup> *Id.* at 258.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Blanch*, 467 F.3d at 258.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 259.



case, Patrick Cariou, a professional photographer, published a book of landscapes and portraits he took while spending time with Rastafarians in Jamaica over the course of six years, titled “Yes, Rasta.”<sup>112</sup> Richard Prince, a famous appropriation artist, created a group of collages, “Canal Zone,” using thirty-five photographs torn out of “Yes, Rasta.”<sup>113</sup> Prince eventually created a series of twenty-nine paintings, twenty-eight of which included images taken from “Yes, Rasta.”<sup>114</sup> Prince took the images and enlarged, tinted, painted over, collaged, or cropped them.<sup>115</sup> Prince also had a gallery exhibition in Manhattan, and the gallery published a catalogue including the works.<sup>116</sup> Cariou never sold or licensed any of his photographs from “Yes, Rasta,” except for private sales. Cariou testified, however, that he was negotiating with another Manhattan gallery, owned by Christiane Celle, before Prince’s show.<sup>117</sup> Prior to Prince’s exhibition, Celle planned to give Cariou a large show, sell multiple prints, and reprint “Yes, Rasta” for a book signing.<sup>118</sup> After Prince’s show, however, Celle cancelled Cariou’s exhibition and testified that she did not want to be seen as unoriginal or riding Prince’s coattails.<sup>119</sup>

Before applying the fair use factors, the district court emphasized the goals of copyright and the balance between protection and public interest.<sup>120</sup> For the first fair use factor, the district court examined the purpose and character of Prince’s use under a three-pronged analysis: transformative use, commerciality, and bad faith.<sup>121</sup> First, the court emphasized and explained the purpose of transformative analysis. The goal is to

---

<sup>112</sup> *Cariou v. Prince*, 784 F. Supp. 2d 337, 343 (2d Cir. 2011).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 344.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Cariou*, 784 F. Supp. 2d at 344.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 347.

<sup>121</sup> *Id.* at 347–53.

determine whether the use adds new expression or merely takes the place of the original, and, while transformative use is not required, a finding of transformative use will weigh heavily in favor of fair use over the remaining factors.<sup>122</sup> The defendants argued that the use of copyrighted materials as raw materials for the creation of new appropriation works is a per se fair use, much like the §107 illustrative uses like criticism, comment, news reporting, teaching, scholarship, and research.<sup>123</sup> The district court, however, declined to adopt this position, and noted that the caselaw cited by the defendant required the use to comment on the underlying work.<sup>124</sup> Therefore, the court held that Prince’s works “are transformative only to the extent that they comment on the Photos; to the extent they merely recast, transform, or adapt the Photos, Prince’s Paintings are instead infringing derivative works.”<sup>125</sup> Though Prince intended to create new works, the court pointed to his testimony as evidence that he did not intend for his use to be transformative.<sup>126</sup> The court believed that Prince did not intend to comment on the underlying work, Cariou himself, or any cultural elements within the underlying work.<sup>127</sup> Ultimately, the court decided that, while some of his works are more transformative than others, the “transformative content of Prince’s paintings is minimal at best.”<sup>128</sup>

For the commerciality analysis under the first factor, the court began by noting that commerciality will weigh more heavily against works that are not transformative.<sup>129</sup> The gallery sold eight of Prince’s Canal Zone paintings for \$10,480,000, of which Prince

---

<sup>122</sup> *Id.* at 347–48.

<sup>123</sup> *Id.* at 348.

<sup>124</sup> *Cariou*, 784 F. Supp. 2d at 348.

<sup>125</sup> *Id.* at 349.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 350.

<sup>129</sup> *Id.*

received 60 percent.<sup>130</sup> Additionally, seven other paintings were exchanged for other art valued between \$6 and 8 million.<sup>131</sup> The court also noted that Prince did not publicly display the Canal Zone pieces anywhere else.<sup>132</sup> Ultimately, the court decided that Prince's use was substantially commercial and the transformative content was low; therefore, the commerciality prong weighed against fair use.<sup>133</sup>

Continuing under the first factor, for bad faith analysis, the court noted that, while relevant, it is not determinative.<sup>134</sup> The court placed weight on the fact that Prince does not approach using copyrighted and public domain source material differently.<sup>135</sup> Also, the court jumped on the fact that Cariou clearly owned the copyrighted material and Prince contacted him to purchase more copies of "Yes, Rasta" the book but never to license the work.<sup>136</sup> Additionally, the court found that the gallery acted in bad faith by exhibiting and profiting off Prince's work with knowledge of his likely infringing practices.<sup>137</sup> Having held that Prince's work was minimally transformative, highly commercial, and produced in bad faith, the court decided the first factor weighed against fair use.

For the second fair use factor, the nature of the copyrighted work, the court noted that the inquiry should focus on whether the work contained creative or factual elements rather than the artistic quality of the work.<sup>138</sup> The court held that the second factor

---

<sup>130</sup> *Cariou*, 784 F.Supp.2d at 350.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 351.

<sup>135</sup> *Id.*

<sup>136</sup> *Cariou*, 784 F.Supp.2d at 351.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 351–52.

weighed against fair use since Cariou's photographs were creative and original and fell within the core of copyright's protection.<sup>139</sup>

For the third fair use factor, the court emphasized that the analysis should focus on the amount of the underlying, copyrighted material that is used in relation to the purpose of the use.<sup>140</sup> If the used portion is the heart of the underlying work or nearly the entire underlying work, this will generally weigh against fair use.<sup>141</sup> Having determined that his work was minimally transformative, the court held Prince's use was far greater than necessary.<sup>142</sup> Prince took the central figures of Cariou's photographs, which were at the heart of "Yes, Rasta."<sup>143</sup> Therefore, the third factor weighed against fair use.<sup>144</sup>

For the fourth fair use factor, the defendants argued that Cariou had not aggressively marketed his work. The court found this argument highly unpersuasive and noted that the copyright owner's licensing or marketing efforts his or her decision and the owner has the right to change his or her mind.<sup>145</sup> The court found that Prince harmed the market for both Cariou's photographs and his ability to license them.<sup>146</sup> Cariou's lost museum exhibition is a clear, undisputed harm, and the court noted that unlicensed works destroy the market for licensed derivative works.<sup>147</sup> Prince harmed the actual and potential markets for Cariou's work, along with his ability to license derivative works; therefore, the court found the fourth factor weighed against fair use.<sup>148</sup> Having carefully

---

<sup>139</sup> *Id.* at 352.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Cariou*, 784 F. Supp. 2d at 352.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 353.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Cariou*, 784 F. Supp. 2d at 353.

gone through each of the fair use factors, the district court decided that the purposes of copyright are furthered by protecting Cariou's work and finding Prince's use unfair.<sup>149</sup>

On appeal, Prince argued that his use was transformative and fair and that the district court applied the incorrect standard by requiring Prince's use to comment on Cariou's underlying work.<sup>150</sup> The Second Circuit agreed with Prince, found incorrect the district court's requirement that he comment on the underlying work, and held that twenty-five of Prince's works fairly used Cariou's photographs.<sup>151</sup>

At the beginning of their analysis, the Second Circuit stressed that, while some uses like parody or satire comment on the underlying copyrighted work, there is no requirement that a use comment on the underlying, copyrighted work to be considered transformative.<sup>152</sup>

For the first factor, the Second Circuit noted that the Supreme Court has held that fair use requires only that a use alter the underlying work with "new expression, meaning, or message."<sup>153</sup> The Second Circuit was convinced that all but five of Prince's works were transformative.<sup>154</sup> The court noted the differences in artistic style, medium, composition, scale, and color between Prince and Cariou's works.<sup>155</sup> The district court heavily emphasized Prince's deposition testimony about his lack of a message and disinterest in Cariou's message or creating new meaning with his own work.<sup>156</sup> Cariou asked the Second Circuit to consider only Prince's own perception of his works except

---

<sup>149</sup> *Id.* at 353—54.

<sup>150</sup> *Cariou v. Prince*, 714 F.3d 694, 698 (2nd Cir. 2013).

<sup>151</sup> *Id.* at 698—99.

<sup>152</sup> *Id.* at 706.

<sup>153</sup> *Cariou*, 714 F.3d at 706 (quoting *Campbell v. Acuff-Rose Music*, 510 U.S. at 579).

<sup>154</sup> *Cariou*, 714 F.3d at 706.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 707.

for a parody or satire analysis.<sup>157</sup> The Second Circuit declined to adopt any such rule and found Prince’s testimony not dispositive.<sup>158</sup> Instead, the Second Circuit focused on how the new work appears to a reasonable observer rather than the artist’s statements.<sup>159</sup> “Prince’s work could be transformative even without commenting on Cariou’s work or on culture, and even without Prince’s stated intention to do so.”<sup>160</sup> The Second Circuit found that the focus of fair use analysis should be on the works in question themselves.<sup>161</sup> Analyzing the works themselves, the Second Circuit found that Prince’s uses have new expression, new creative content, and new aesthetics.<sup>162</sup> The Second Circuit was careful to note that not all secondary uses are transformative simply because they modify the original, but found that twenty-five of Prince’s works added new creative expression.<sup>163</sup> The Second Circuit underlined the importance of avoiding presumptions against commerciality.<sup>164</sup> Having found that Prince’s works are highly transformative, the Second Circuit placed little weight on their commercial nature.<sup>165</sup>

For the second fair use factor, the Second Circuit agreed that Cariou’s work was clearly creative and published. While this factor weighed against fair use, the Second Circuit discounted it since Prince’s work was highly transformative.<sup>166</sup>

For the third fair use factor, the Second Circuit summarized the analysis as “consider[ing] the proportion of the original work used, and not how much of the

---

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Cariou*, 714 F.3d at 707.

<sup>161</sup> *Cariou*, 714 F.3d at 707 (citing *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012) (deciding fair use parody of “What What (In The Butt)” by South Park with the two videos in question as the only evidence.)).

<sup>162</sup> *Cariou*, 714 F.3d at 707–08.

<sup>163</sup> *Id.* at 708.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 710.

secondary work comprises the original.”<sup>167</sup> The Second Circuit noted that Prince took different amounts of recognizable material from Cariou’s work in different paintings.<sup>168</sup> The Second Circuit argued that using large portions of the original work is sometimes necessary and that there is no rule that fair uses cannot take any more source material than necessary.<sup>169</sup> While Prince used significant pieces of Cariou’s work, the Second Circuit still favored Prince’s use as fair since it is so transformative.<sup>170</sup>

For the fourth statutory fair use factor, the Second Circuit focused on the differences between Cariou and Prince’s works.<sup>171</sup> Relying on language in *Blanch* and *Campbell*, the Second Circuit narrowed the market effect analysis to “usurping” the market for the original work and those derivative uses the copyright owner would create or license.<sup>172</sup> The Second Circuit focused on the different markets in which Cariou and Prince present their work:<sup>173</sup>

Prince’s audience is very different from Cariou’s, and there is no evidence that Prince’s work ever touched—much less usurped—either the primary or derivative market for Cariou’s work. There is nothing in the record to suggest that Cariou would ever develop or license secondary uses of his work in the vein of Prince’s artworks.<sup>174</sup>

The Second Circuit seized on the fact that Cariou failed to market his works, having sold only four prints, and Prince trades in a drastically different artistic world, exhibiting to a variety of celebrities.<sup>175</sup> Finding nothing in the record to suggest that Prince’s use alters

---

<sup>167</sup> *Id.*

<sup>168</sup> *Cariou*, 714 F.3d at 710.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 708.

<sup>172</sup> *Id.* at 708–09.

<sup>173</sup> *Id.* at 709.

<sup>174</sup> *Cariou*, 714 F.3d at 709.

<sup>175</sup> *Id.*

the market for Cariou's work at all, the Second Circuit found the fourth factor weighed in favor of Prince's use as fair.<sup>176</sup>

Having analyzed each of the factors, the Second Circuit heavily favored Prince's use since it was transformative. For five of the works, the court remanded the issue of their transformative character to the district court.<sup>177</sup>

Judge Douglas A. Wallace authored a separate opinion, concurring in part and dissenting in part from the Second Circuit.<sup>178</sup> Lending his support to the changing standard for fair use, Judge Wallace agreed that the district court's requirement that the secondary use comment on the underlying work was incorrect.<sup>179</sup> Judge Wallace, however, would have remanded this case for the district court to consider the proper standard.<sup>180</sup> Additionally, Judge Wallace disagreed with the majority's disregard for Prince's own testimony in a transformative use analysis.<sup>181</sup>

### *C. The Ninth Circuit Adopts the Second Circuit Fair Use Standard*

More recently, since the Second Circuit's decision, the Ninth Circuit has continued the trend toward adopting a transformative standard for fair use that favors a broad view of acceptable fair uses. In *Seltzer v. Green Day*, Derek Seltzer brought claims against the band Green Day for their use of an image of a screaming face, titled "Scream Icon," that Seltzer posted as street art and used to identify himself in advertisements for his work and gallery shows.<sup>182</sup> Roger Staub created a video backdrop

---

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 711.

<sup>178</sup> *Id.* at 712.

<sup>179</sup> *Id.*

<sup>180</sup> *Cariou*, 714 F.3d at 712.

<sup>181</sup> *Id.* at 713.

<sup>182</sup> *Seltzer v. Green Day, Inc.*, 2013 U.S. App. LEXIS 16322 at \*3 (9th Cir. Aug 7, 2013).



for each of the band Green Day’s songs for their tour, one of which included a large version of “Scream Icon” with a red, spray-painted cross overlaid.<sup>183</sup>

For the first statutory fair use factor, the Ninth Circuit cited *Campbell* as the definitive standard for transformative use: whether the new work adds new creative expression or meaning.<sup>184</sup> The Ninth Circuit held that Green Day’s use was transformative.<sup>185</sup> While the “Scream Icon” is prominent, the video’s use is more than “simply a quotation or a republication.”<sup>186</sup> The Circuit noted that the message of the original “Scream Icon” was different from Green Day’s religious commentary; therefore, the use constituted new creative expression and content.<sup>187</sup> The Ninth Circuit summarized non-transformative uses as characteristically “mak[ing] no alteration to the expressive content or message of the original work.”<sup>188</sup> According to the Circuit Court, a transformative use, by contrast, has apparent new expressive content or a new message, regardless of whether any alterations were made to the underlying work.<sup>189</sup> The Ninth Circuit downplayed the commercial nature of Green Day’s use by finding it incidental, since it was never used to market anything.<sup>190</sup>

For the second factor, the Ninth Circuit held that “Scream Icon” is a creative work, deserving strong protection.<sup>191</sup> The Court found the fact that Seltzer had already

---

<sup>183</sup> *Id.* at \*5.

<sup>184</sup> *Id.* at \*10.

<sup>185</sup> *Id.* at \*11.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at \*12.

<sup>188</sup> *Seltzer*, 2013 U.S. App. LEXIS 16322 at \*13.

<sup>189</sup> *Id.* at \*14.

<sup>190</sup> *Id.* at \*15.

<sup>191</sup> *Id.* at \*16.

widely disseminated his work favored fair use.<sup>192</sup> Overall, the court found that the second favored Seltzer slightly.<sup>193</sup>

For the third factor, the Ninth Circuit found Green Day qualitatively and quantitatively copied significant amounts of “Scream Icon.”<sup>194</sup> The court also found that Green Day used an amount of “Scream Icon” necessary given their new expressive purpose.<sup>195</sup> Therefore, the court found that the third factor did not weigh against Green Day.<sup>196</sup>

For the fourth factor, the Ninth Circuit noted that uses that serve a different function and do not substitute themselves for the original work, fair use is favored.<sup>197</sup> While the value of the “Scream Icon” was not altered by Green Day’s use, Seltzer testified that it was damaged for him personally.<sup>198</sup> Green Day argued that their use is significantly different than Seltzer’s use and not a substitute for it.<sup>199</sup> Additionally, there was little evidence that Seltzer’s ability to license the “Scream Icon” was at all affected by Green Day.<sup>200</sup> Therefore, the fourth factor weighed in favor of Green Day’s use as fair.<sup>201</sup>

The Ninth Circuit ultimately decided that Green Day’s use was fair, noting that the majority of the case law is concerned with the first and fourth factors, both of which weighed in favor of Green Day.<sup>202</sup> The Ninth Circuit ultimately decided to continue the

---

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Seltzer*, 2013 U.S. App. LEXIS 16322 at \*17.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at \*18.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Seltzer*, 2013 U.S. App. LEXIS 16322 at \*19.

<sup>201</sup> *Id.* at \*20.

<sup>202</sup> *Id.* at \*20.

trend championed in the Second Circuit toward a broad view of fair use. The Court found that Green Day took significant amounts of Seltzer’s “Scream Icon,” yet the Court also found a fair use because Green Day used it differently and with different meaning than Seltzer. Ultimately, this case shows how far fair use has come given that significant copying can be fair use if the use is seen as creatively transformative.

#### PART IV. ANALYSIS

This part discusses the goals of copyright law, two existing arguments for a liberal view of fair use, and the support for these arguments from the *Cariou* and *Seltzer* decisions.

##### *A. Increased Protection Does Not Further the Goals of Copyright*

The trend away from protectionism in copyright law, highlighted by the Second Circuit’s treatment of fair use in *Prince v. Cariou*, represents a positive trend toward allowing more creative use of material that might previously have been seen as infringement. The purpose of granting a monopoly through copyright law to an author is to “inspire him or her to produce and to make the creations available to society, thereby contributing to the constitutional goal of social progress through promotion of science and the useful arts.”<sup>203</sup> An overly protective view that gives robust rights to authors does not further this goal, and copyright scholarship has lamented a protectionist bias in the law.<sup>204</sup> While it is important to give rights to authors of creative works in order to both incentivize creation and support the authors, the other half of the balancing equation cannot be forgotten. The goal of copyright law must be ultimately to promote science

---

<sup>203</sup> Kemp, *supra* note 2.

<sup>204</sup> See Merges, *supra* note 4 (finding that recent Copyright Act amendments create “more specific, highly elaborated property rights,” which “reveal[] an excessively protectionist bias”).

and the useful arts, and a narrow view of fair use that favors the copyright holder does not do so.

*B. Existing Criticism of the Expansion of Copyright Protection*

In his article *Symposium on Law in the Twentieth Century: One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, Robert Merges expressed concerns about growing intellectual property legislation and pointed out two indicators for when private interests have applied excessive influence on legislation.<sup>205</sup> According to Merges, consumers are likely to be harmed when the legislation focuses benefits on a small, specific group and when costs are spread broadly over a long term and a large group.<sup>206</sup> For example, Merges believes that the Sonny Bono Copyright Term Extension Act of 1998 demonstrates these two indicators: the term extension disproportionately benefits those who already hold large or valuable copyright catalogues; and consumers as a whole will be forced to pay for the term extension.<sup>207</sup> Since the costs are spread so broadly, it is unlikely that anyone will lobby against the Act; therefore, the resulting legislation is not likely to reflect an appropriate balance of interests.<sup>208</sup> Since Congress has failed to adequately balance the public interests when enacting legislation, courts should consider whether industry groups were disproportionately represented when the statute was drafted.<sup>209</sup> Merges suggests that, while not determinative, a clear imbalance should tip the scales in close cases.<sup>210</sup> Merges believes that the judiciary should use the Intellectual Property Clause of the Constitution itself as a counterweight to the influence of special

---

<sup>205</sup> *Id.* at 2236.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 2236–37.

<sup>208</sup> *Id.* at 2237.

<sup>209</sup> *Id.* at 2238.

<sup>210</sup> Merges, *supra* note 4, at 2238.

interests over legislation.<sup>211</sup> Ultimately, Merges is concerned that the principle of competition has given way to the principle that property rights are derived from labor; courts are too eager to grant rights to any type of labor, stifling competition and increasing property at the expense of the public.<sup>212</sup>

In her article *Copyright on Steroids: In Search of an End to Overprotection*, Deborah Kemp argues that Copyright's balance between the public's benefit and the author's benefit currently weighs too heavily in favor of the author to the detriment of the public.<sup>213</sup> Kemp offers several reasons for the trend, including the impact of corporate copyright holders on legislation and a mistaken belief that increased protection will lead to increased incentive for innovation.<sup>214</sup> "Instead of promoting creativity, [Copyright] laws now promote marketing."<sup>215</sup> Kemp also points out that the constitutional framers did not view copyright as a property right as many do today; "[i]nstead, they considered it a monopoly, what they referred to as a necessary evil, granted in a very limited manner purely to provide incentive to the author to create."<sup>216</sup> Kemp believes that copyright's increasing protection results from this modern view that the value of a copyright is in its ability to exclude others, which is a departure from the original intent of copyright.<sup>217</sup> As a result of these mistaken rationales for copyright, Kemp believes that both courts and Congress have hindered scientific and artistic progress by expanding copyright in three

---

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 2239–40.

<sup>213</sup> Kemp, *supra* note 2 ("Modern copyright policy is so protective of the copyright owner that it reduces availability to those in society who would benefit from access and would make productive uses of the copyrighted work.").

<sup>214</sup> *Id.* at 805.

<sup>215</sup> *Id.* at 800.

<sup>216</sup> *Id.* at 800.

<sup>217</sup> *Id.* at 805.

aspects: “length of protection, categories of works protected, and breadth of protection.”<sup>218</sup>

This antiquated proprietary view of copyright comes from viewing copyright as a traditional property synonymous with the right to exclude others.<sup>219</sup> Kemp believes that this view of copyright as private property, through traditional property theories like those of John Locke, is out of line with the way society and copyright owners often view art and science.<sup>220</sup> Unlike land or physical property, “knowledge, aesthetics, and entertainment are communications based and are meant to be shared, not exclusive to the owner.”<sup>221</sup> The Constitution grants a right to exclude in order to promote artistic and scientific progress, and Kemp argues that “[s]haring property is implicit in the purpose of the protection.” Kemp also argues that modern economic concepts, namely the view that sharing to benefit the group will ultimately benefit the individual, better reflect the realities facing copyright owners than an antiquated exclusionary property view.<sup>222</sup> Kemp gives the following example of sharing and the realities of copyright:

For example, when an artist shares his music without copyright protection, he is doing an immediate financial disservice to himself, . . . [b]ut the sharing behavior will increase the number of consumers who have heard of the artist, and they will attend the artist’s paid performances. The benefit in the future is worth the economic costs in terms of current return.<sup>223</sup>

Kemp also argues that the Internet has reversed the exclusionary property model, and that rather than deriving value through exclusion, like in land ownership, value is now derived

---

<sup>218</sup> *Id.* at 805.

<sup>219</sup> Kemp, *supra* note 2, at 828.

<sup>220</sup> *Id.* at 828.

<sup>221</sup> *Id.* at 829.

<sup>222</sup> *Id.* at 832.

<sup>223</sup> *Id.* at 831–32.

through “accessibility, or inclusivity.”<sup>224</sup> Ultimately, Kemp believes that copyright law must realign itself with this economic reality of sharing through legislation, judicial interpretation, education and the social sciences, and encourage productive uses and discourage litigation.<sup>225</sup>

*C. The Second and Ninth Circuit’s Liberal Treatment of Fair Use Bolsters Protectionist Criticism and Benefits the Public*

The liberal treatment of fair use in both *Cariou* and *Seltzer* furthers the objectives presented by Merges and Kemp of balancing the economic realities of the public’s interest with the individual copyright holder’s interest.

Merges is particularly concerned with the balance between the benefits and costs copyright bestows on the public and on copyright holders.<sup>226</sup> In *Seltzer*, the Ninth Circuit cites Judge Leval’s 1990 article in the Harvard Law Review, *Toward a Fair Use Standard*,<sup>227</sup> for his understanding of transformative use: “if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”<sup>228</sup> The court’s liberal treatment of the transformative use doctrine allows more fair uses of copyrighted material operates to restore the balance in Merges’s equation. A conservative, narrow view of transformative uses, favoring robust and protective copyright standards, benefits the few copyright holders at the expense of society as a whole.<sup>229</sup> Merges warned of the dangers of

---

<sup>224</sup> *Id.* at 833.

<sup>225</sup> Kemp, *supra* note 2, at 837–41.

<sup>226</sup> Merges, *supra* note 4, at 2236–37.

<sup>227</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

<sup>228</sup> *Seltzer*, 2013 U.S. App. LEXIS 16322 at \*11 (quoting Leval, *supra* note 229, at 1111)).

<sup>229</sup> Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. LJ 567, 582 (2006).

copyright law benefiting a select few copyright holders while the public bears the cost.<sup>230</sup> Under a liberal view of transformative use, however, the public benefits from both the availability of raw creative material for new creative uses and an increase in material created through these transformative uses while a select few copyright holders bear the cost of allowing others to transform their copyrighted material. In fact, the cost to the copyright holder of the underlying work is an explicit inquiry in the fourth fair use factor: the effect of the allegedly infringing use on the “potential market for or value of the copyrighted work.”<sup>231</sup> In *Seltzer*, the Ninth Circuit noted that, under the fourth factor, when uses serve a different function and do not substitute themselves for the original work, fair use is favored.<sup>232</sup> Under a fair use inquiry, then, courts are actively using the same balancing test as *Merges* and determining whether the cost to the individual copyright holder is so great that it outweighs the benefit fair use bestows on the public. Therefore, a liberal understanding of transformative uses can help counteract the imbalance *Merges* finds in copyright law.

Furthermore, if one considers Kemp’s economic argument that the long-term benefits of widespread sharing outweigh the short-term economic costs to copyright holders, transformative uses are likely to end up benefitting even the copyright holder of the underlying work in many cases.<sup>233</sup> The short-term costs of allowing a transformative use could possibly lead to a long-term benefit such as increased exposure or sales of the underlying work or its creator. The Second Circuit in *Cariou* makes it a point to state the differing markets for each work in their analysis of the fourth fair use factor: “Prince’s

---

<sup>230</sup> *Merges*, *supra* note 4, at 2236–37.

<sup>231</sup> 17 U.S.C. § 107(4) (2012).

<sup>232</sup> *Seltzer*, 2013 U.S. App. LEXIS 16322 at \*18.

<sup>233</sup> *Kemp*, *supra* note 2, at 831–32.



audience is very different from Cariou's, and there is no evidence that Prince's work ever touched—much less usurped—either the primary or derivative market for Cariou's work.” But what about the possibility of Prince's transformative use *expanding* the market for Cariou's work? It is certainly possible that Prince's audience could seek out Cariou's work after seeing it used by Prince. In the long run, the immediately perceived costs to Cariou could lead to greater long-term benefits than if Prince's transformative use was barred. Ultimately, a liberal treatment of fair use benefits society by promoting creativity and making more raw creative material available for transformative uses with little cost, if not some benefit, to a smaller group of copyright holders.

#### PART V. CONCLUSION

The evolution of fair use toward a broad, less-protective transformative use standard furthers the goals of the Copyright Act. The Supreme Court has noted Copyright ought to serve the interests of the public: “Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.”<sup>234</sup> The goal in awarding a limited monopoly through copyright is to benefit the public through the efforts of copyright holders.<sup>235</sup> “To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”<sup>236</sup> A liberal view of fair use promotes these goals of copyright law. The march toward a broad fair use standard balances the interests of the public and those of the copyright holder toward the goals of copyright law.

---

<sup>234</sup> Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

<sup>235</sup> Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

<sup>236</sup> Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991) (citing Harper & Row Publrs. v. Nation Enters., 471 U.S. 539 (1985)).

