

# **KIENITZ V. SCONNIE NATION, LLC: THE SEVENTH CIRCUIT'S NECESSARY RESISTANCE TO DEFINING THE FAIR USE DOCTRINE SOLELY IN TERMS OF TRANSFORMATIVENESS**

## **I. INTRODUCTION**

Under the Fair Use Doctrine, the use of a copyrighted work is not an infringement on a copyright if, after consideration of four factors, the use of the work is considered by the court to be fair.<sup>1</sup> The four factors courts are required to consider are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount of the portion used in relation to the copyrighted work as a whole; and (4) the effect the use has on the potential market for, or value of, the original copyrighted work.<sup>2</sup> There currently exists a circuit split involving the Second and Seventh Circuit Courts of Appeals regarding how courts should properly assess whether a secondary work is a fair use of copyrighted work.<sup>3</sup> On March 23, 2015, the United States Supreme Court denied a petition to resolve the existing circuit split regarding the proper way to assess the aforementioned fair use factors.<sup>4</sup> The purpose of this comment is to explain why utilizing the market-effect approach used by the Seventh Circuit Court of Appeals in *Kienitz v. Sconnie Nation LLC*, which focuses on the fourth fair use factor,<sup>5</sup> is the ideal approach for courts to use when resolving fair use disputes.<sup>6</sup>

Part II of this comment will discuss the three primary cases involved in developing the circuit split. Part III will explain the transformative approach and market-effect approach, and

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<sup>1</sup> 17 U.S.C. § 107.

<sup>2</sup> *Id.*

<sup>3</sup> Compare *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758-59 (7th Cir. 2014) (taking a more economic approach to determine fair use of copyrighted material) with *Cariou v. Prince*, 714 F.3d 694 (2nd. Cir. 2013) (focusing the fair use determination on whether a work is “transformative” of the original copyrighted work).

<sup>4</sup> Andrea W. Jeffries, *High Court Will Need To Resolve Circuit Split In Fair Use*, Law360, Apr. 30, 2015, at 4 (discussing the need for the United States Supreme Court to resolve the circuit split on this issue and determine the appropriate assessment to evaluate the four statutory fair use factors).

<sup>5</sup> The “fourth fair use factor” is “the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.

<sup>6</sup> 766 F.3d at 758-59.

will ultimately illustrate that the transformative approach is implicitly part of the market-effect approach. Part IV will then cover the most recent line of United States Supreme Court decisions that have discussed the fair use doctrine, and how these cases illustrate an adoption of the market-effect approach. Part V proposes that the market-effect framework promotes a balanced approach to the fair use doctrine, which is important in order to keep up with a technological world that is constantly developing.

#### *A. How the Market-Effect Approach Maintains Balance*

The market-effect approach is nothing new in the fair use realm, and has been utilized by the Supreme Court on at least three different occasions.<sup>7</sup> By engaging in a more economic analysis, fair use evaluations can properly maintain the balance between incentives to initial creators and access and subsequent creation by the public and later creators.<sup>8</sup> The market-effect approach maintains the balance for two reasons. First, economic considerations allow courts to avoid too strict an application of the copyright statute, which was cautioned against by the Supreme Court in *Campbell* because a strict application would stymie creativity and originality.<sup>9</sup> Second, relying heavily upon economic considerations in resolving fair use dilemmas can afford a reasonable level of breathing room from copyright law in an age of constantly developing technology.<sup>10</sup> Therefore, to ensure that people are incentivized to be creative and to allow fair

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<sup>7</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (explaining that a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create), *Harper & Row, Publishers, Inc v Nation Enterprises*, 471 U.S. 539, (1985) (indicating that if the challenged use is fair if it will not become widespread, which would adversely affect the potential market for the copyrighted work) and *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 591 (1994) (discussing the market effect of mere duplication for commercial purposes).

<sup>8</sup> See Jeanne C. Fromer, *Market Effects Bearing On Fair Use*, 90 Wash. L. Rev. 615, 649 (2015) (stating that by utilizing the market-effects approach, "fair use evaluations can help copyright law strike a proper balance between incentives to initial creators and access and subsequent creation by the public and later creators").

<sup>9</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 577.

<sup>10</sup> See Zahr K. Said, *Foreword: Fair Use In The Digital Age, And Campbell v. Acuff-Rose At 21*, 90 Wash. L. Rev. 579, 584-86 (2015) (discussing the growth of digital technologies the effect the growth has had on copyright owners).

use law to keep pace with the digital world, the fair use circuit split should be resolved in favor of the market-effect approach illustrated in *Kienitz*.

## II. HOW THE CIRCUIT SPLIT WAS CREATED: *CAMPBELL*,<sup>11</sup> *CARIOU*,<sup>12</sup> AND *KIENITZ*<sup>13</sup>

The most recent Supreme Court decision regarding the fair use doctrine was in 1994 in the *Campbell v. Acuff-Rose Music, Inc.* case.<sup>14</sup> The *Campbell* case required the Court to decide whether 2 Live Crew's commercial parody of Roy Orbison's copyrighted song, "Oh, Pretty Woman," was a fair use within the meaning of the Copyright Act of 1976, 17 U.S.C. § 107.<sup>15</sup> 2 Live Crew's manager informed the copyright holder of the band's parody of "Oh, Pretty Woman," and expressed a willingness to pay a fee for the use the band wished to make of it.<sup>16</sup> The copyright holder refused permission.<sup>17</sup> Ultimately, though, 2 Live Crew released records of "Pretty Woman" in a collection of songs, and still identified the authors of "Pretty Woman" as Orbison (and its publisher Acuff-Rose).<sup>18</sup> Thus, the commercial nature of the use was put squarely at issue for the Court.<sup>19</sup>

Although the use in *Campbell* was commercial, the Court found it to be a fair use through parody.<sup>20</sup> The discussion leading to the holding primarily revolved around two factors: the first factor regarding "purpose and character of the use," and the fourth factor, which regards the "effect of the use upon the potential market for or value of the copyrighted work."<sup>21</sup> The Court's discussion regarding the first factor included the inquiry into whether the 2 Live Crew's parody

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<sup>11</sup> *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

<sup>12</sup> *Cariou v. Prince*, 714 F.3d 694 (2nd. Cir. 2013).

<sup>13</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014).

<sup>14</sup> 510 U.S. 569 (1994).

<sup>15</sup> *Id.* at 571-72.

<sup>16</sup> *Id.* at 573.

<sup>17</sup> *Id.*

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

<sup>19</sup> *Id.* at 573-74.

<sup>20</sup> *Id.* at 574.

<sup>21</sup> *Id.* at 578-86, 590-94.

of “Oh, Pretty Woman” was “transformative,” but this discussion was largely centered on the commercial use of the parody.<sup>22</sup> Although the Court’s discussion of the first factor regarding the “transformative” nature of 2 Live Crew’s parody was commercial in nature, this went unnoticed because of the attention drawn to the “transformative” language utilized by the Second Circuit Court of Appeals in *Cariou v. Prince*.<sup>23</sup>

In *Cariou*, the Second Circuit Court of Appeals determined certain appropriation artwork to be considered fair use.<sup>24</sup> An artist appropriated thirty photographs that were copyrighted photographs belonging to someone else,<sup>25</sup> and the court determined twenty-five of the appropriated works to be fair use while the other five works were remanded for determination regarding copyright infringement consistent with the opinion.<sup>26</sup> In reaching this odd decision, the court really just imposed its own artistic evaluation to determine whether the appropriated photographs were fair use of the original photographs.<sup>27</sup> This is no surprise, though, because in the context of copyright litigation, it is frequently alleged that the courts too frequently impose their own interpretations as evidence that cannot be reasonably doubted.<sup>28</sup> Nonetheless, the court’s decision was certainly centered on the notion of “transformative use,” which the court seemed to believe was the primary takeaway from the Supreme Court’s decision in *Campbell*.<sup>29</sup>

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<sup>22</sup> *Id.* at 584-85 (rejecting the notion that fair use analysis is confined to one relevant factor—the commercial nature of the use—and rejecting the presumption that every commercial use of copyrighted material was unfair)

<sup>23</sup> See 714 F.3d 694, 705-06 (stating that the first statutory factor to consider, which is the heart of the fair use inquiry, is whether and to what extent the new work is transformative).

<sup>24</sup> *Id.* at 712-13.

<sup>25</sup> *Id.* at 699-700.

<sup>26</sup> *Id.* at 712.

<sup>27</sup> *Id.* at 707-08 (providing artistic analysis by looking at the artworks and photographs side-by-side, and concluding that the appropriated art images, for the most part, had a different character, different expression, new aesthetics, among other things).

<sup>28</sup> See, e.g., *Wild v. NBC Universal, Inc.*, 788 F. Supp. 2d 1083 (C.D. Cal. 2011) (finding lack of similarity between contents of a television show and a three-book series); and *Davis v. American Broadcasting Companies, Inc.*, 2010 U.S. Dist. LEXIS 76145 (W.D. Mich. 2010) (granting motion to dismiss after taking judicial notice of the “generic elements of creative works”).

<sup>29</sup> *Cariou v. Prince*, 714 F.3d at 706-07 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

The focus on “transformative use” in *Cariou* was distinct for two reasons: first, unlike *Campbell*, “transformativeness” was contingent upon only the originality of content, rather than the originality of both content and purpose;<sup>30</sup> and second, it blurred the line between fair uses, which don’t require a copyright owner’s permission, and derivative works, which do require a copyright owner’s permission.<sup>31</sup> About a year after the *Cariou* decision, the *Kienitz* decision arose from the Seventh Circuit and brought attention to the problems posed by focusing the fair use analysis on “transformative use.”<sup>32</sup> If courts only look at transformative use when making fair use determinations, the market-effect considerations required by 17 U.S.C. § 107 would be read out of the statute.<sup>33</sup> Additionally, looking solely at content creates tension with derivative works under 17 U.S.C. § 106 because then a “transformative use” and “derivative use” would essentially be the same thing.<sup>34</sup> The *Kienitz* court expressly voiced its skepticism with the *Cariou* opinion from the Second Circuit because exclusively asking whether something is “transformative” would not only replace the four statutory fair use factors,<sup>35</sup> but also could override the protection for derivative works.<sup>36</sup>

### III. THE TRANSFORMATIVE APPROACH IN *CARIOU*<sup>37</sup> SHOULD NOT BE THE SOLE APPROACH BECAUSE THE FOCUS ON MARKET-EFFECT, AS ADVOCATED IN *KIENITZ*,<sup>38</sup> IMPLICITLY INVOLVES CONSIDERATIONS OF TRANSFORMATIVE USE

The market-effect analysis of the fair use factors implicitly resolves the transformative use analysis because, under the fair use statute,<sup>39</sup> the consideration of the fourth factor is

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<sup>30</sup> See *Copyright Law – Fair Use .. Second Circuit Holds That Appropriation Artwork Need Not Comment On The Original To Be Transformative – Cariou v. Prince*, 127 Harv. L. Rev. 1228, 1232-33 (2014).

<sup>31</sup> *Id.* at 1233 (citing 17 U.S.C. § 106(2)).

<sup>32</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d at 758-59.

<sup>33</sup> See 17 U.S.C. § 107.

<sup>34</sup> Compare 17 U.S.C. §107(1); with 17 U.S.C. § 106(2).

<sup>35</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d at 758.

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

<sup>37</sup> *Cariou v. Prince*, 714 F.3d 694 (2nd Cir. 2013).

<sup>38</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014).

<sup>39</sup> 17 U.S.C. § 107.

substantively connected to the consideration of the first factor. The *Campbell* decision, which is considered the seminal Supreme Court case regarding the fair use factors, should be seen as opening the door to the analytical framework regarding market effects on fair use.<sup>40</sup> However, as Jeanne C. Fromer articulates in *Market Effects Bearing on Fair Use*, the Court in *Campbell* obfuscated this [market-effects] framework by not underscoring the importance of the fourth fair use factor, which has meant that courts continue to offer varying analyses of the this fourth, market-effects, factor.<sup>41</sup> The *Cariou* decision further buries the importance of the market-effects factor by focusing too narrowly on the “transformative” language introduced in *Campbell*.<sup>42</sup> In other words, the *Cariou* court essentially just took *Campbell*’s instructive language and read it into the first factor of 17 U.S.C. § 107.<sup>43</sup>

When the *Kienitz* decision was rendered, it received unmerited criticisms<sup>44</sup> because of the misunderstandings surrounding the *Campbell* and *Cariou* decisions, which were believed to endorse the first factor analytic framework in its focus on “transformative use.”<sup>45</sup> However, such belief is misplaced because the *Campbell* decision did not actually endorse the transformative use framework.<sup>46</sup> Interestingly enough, the *Campbell* decision actually links the transformative nature of a use with the degree to which the market is affected, and it does so by discussing the notion of market substitution.<sup>47</sup> For instance, when a commercial use amounts to a mere

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<sup>40</sup> Jeanne C. Fromer, *Market Effects Bearing On Fair Use*, 90 Wash. L. Rev. 615, 617 (2015) (discussing how the *Campbell* decision “opened the door to a laudable analytical framework for the bearing of market effects on fair use.”)

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

<sup>42</sup> See *Cariou*, 714 F.3d at 705 (declaring the “transformative use” inquiry to be the heart of the fair use inquiry).

<sup>43</sup> The first factor regards the purpose and character of a use, but does not include language regarding the transformative nature of that use. See 17 U.S.C. 107(1).

<sup>44</sup> See Andrea W. Jeffries, *High Court Will Need To Resolve Circuit Split In Fair Use*, Law360, Apr. 30, 2015, at 4 (alleging the Seventh Circuit Court of Appeals did not fully understand the nuances to fair use law, and found its criticism of the transformative use framework to be misplaced.)

<sup>45</sup> See Jeanne C. Fromer, *Market Effects Bearing On Fair Use*, 90 Wash. L. Rev. 615, 617 (2015); *supra* n. 41.

<sup>46</sup> See *Campbell v Acuff-Rose Music, Inc* , 510 U.S. at 579-85 (discussing, in its first factor analysis, commercial character of the use, and continuing such discussion in its fourth factor analysis, regarding market effects).

<sup>47</sup> *Id.* at 591.

duplication of the entirety of an original, it clearly supersedes the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur.<sup>48</sup>

Conversely, if the commercial use amounts to a transformative use of an original work, market substitution is less certain, and market harm under the fourth fair use factor may not be so readily inferred.<sup>49</sup> Therefore, the *Campbell* opinion actually indicates that determining whether a use of copyrighted material is transformative requires consideration of market-effect.<sup>50</sup>

The *Cariou* opinion from the Second Circuit largely ignored the substantive connection between the fourth and first fair use factors by making the “transformative use” inquiry the focus of its analysis.<sup>51</sup> In *Cariou*, the court essentially read the “transformative use” analytic framework into the list of factors in 17 U.S.C. § 107 by asking exclusively whether something is transformative.<sup>52</sup> Regarding the first factor, the court held that a use is transformative if a new work alters the original work with new expression, meaning, or message.<sup>53</sup> The court cited *Campbell* for this proposition, but as indicated previously, the *Campbell* court was not expressly endorsing the transformative analytic framework utilized in *Cariou*.<sup>54</sup> Furthermore, the *Cariou* court’s definition of “transformative” does not include the consideration of the market substitution effect that was discussed in *Campbell*.<sup>55</sup> Importantly, the Supreme Court also stated that analyzing transformative use is not absolutely necessary for a finding of fair use,<sup>56</sup> which

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<sup>48</sup> *Id.* (citing *Sony*, 464 U.S. at 451).

<sup>49</sup> *Id.*

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

<sup>51</sup> See *Cariou*, 714 F.3d at 705.

<sup>52</sup> *Kienitz*, 755 F.3d at 758.

<sup>53</sup> *Cariou*, 714 F.3d at 706 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>54</sup> See *supra* at n. 46 and n. 47.

<sup>55</sup> See *Campbell*, 510 U.S. at 578-79 (discussing whether a new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose of different character, thereby altering the first creation with new expression, meaning, or message.)

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

undermines the notion in *Cariou* that the transformative use inquiry is at the heart of the fair use inquiry.<sup>57</sup>

The *Kienitz* decision emerged from the Seventh Circuit in 2014, shortly after the *Cariou* opinion, and seemingly sought to get the fair use jurisprudence back on track.<sup>58</sup> The court's opinion declared that "transformative use" is not one of the statutory fair use factors, even though the Supreme Court mentioned it in *Campbell*.<sup>59</sup> Furthermore, the court made clear that it was sticking to the statutory list, of which the most important factor is the fourth factor, which concerns market-effects.<sup>60</sup> Essentially, then, the *Kienitz* court is saying "*Cariou* wrongly interpreted *Campbell* and we are going to stick to the central focus of the fair use factors: market-effect."<sup>61</sup>

The *Kienitz* court then followed *Campbell's* market-effect analysis and determined if there were any cognizable market-effects, which is best evidenced by determining whether a contested use is a complement to the protected work rather than a substitute for it.<sup>62</sup> The *Kienitz* opinion correctly understood the *Campbell* holding as indicating the transformative use inquiry as being an aid in resolving the ultimate, and most important inquiry in fair use disputes: whether the copyright owner's market or value will be affected by the secondary use.<sup>63</sup> Transformative use is merely an aid because, as stated previously, it is not absolutely necessary for a finding of

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<sup>57</sup> See *Cariou*, 714 F.3d at 705.

<sup>58</sup> See *Kienitz*, 766 F.3d at 758 (criticizing the Second Circuit's focus on "transformative use" while reaffirming the most important statutory factor under 17 U.S.C. § 107 to be the fourth factor concerning market effect(s)).

<sup>59</sup> *Id.*

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

<sup>61</sup> See *id.*

<sup>62</sup> *Id.* (asking whether the contested use is a complement for the protected work (allowed) rather than a substitute for it (prohibited)) (citing *Ty, Inc. v Publications International Ltd*, 292 F.3d 512 (7th Cir. 2002); and *Chicago Board of Education v Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003)).

<sup>63</sup> See *id.* at 758-59 (rejecting the notion that "transformative use" is a required consideration in and of itself, but rather, it is

fair use,<sup>64</sup> and the transformative nature of a work or use is logically contingent upon the degree of harm caused to the copyright owner's market.<sup>65</sup> Therefore, adopting an analytic framework to the statutory fair use factors focused on transformative use would ignore Supreme Court precedent<sup>66</sup> and ignore the fact that the market-effects framework promulgated in *Kienitz* already includes considerations of "transformativeness."<sup>67</sup>

#### IV. THE SUPREME COURT HAS ENDORSED THE MARKET-EFFECT FRAMEWORK IN THE FAIR USE CONTEXT IN TWO CASES PRIOR TO *CAMPBELL: SONY CORP. OF AMERICA V. UNIVERSAL CITY STUDIOS*<sup>68</sup> AND *HARPER & ROW PUBLISHERS, INC. V. NATION ENTERPRISES*<sup>69</sup>

Two Supreme Court decisions preceding *Campbell* openly embraced the market-effect framework in the fair use context.<sup>70</sup> In 1984, the Supreme Court's opinion in *Sony* indicated, "a challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."<sup>71</sup> In 1985, the Supreme Court commented on market-effects again in *Harper & Row*, essentially explaining the market-effects inquiry<sup>72</sup> as the most equitable framework for fair use analysis because if an allegedly infringing use adversely affects the value of any rights in the copyrighted work, then the use is not fair.<sup>73</sup> It is not required to evidence actual present harm because such a requirement would prejudice copyright holders and prevent protecting one's self from foreseeable damage.<sup>74</sup> Furthermore, it is also not required to show

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<sup>64</sup> See *supra* n. 60.

<sup>65</sup> See *supra* n. 48 and n. 49.

<sup>66</sup> *Campbell*, 510 U.S. at 590.

<sup>67</sup> See *supra* n. 51.

<sup>68</sup> 464 U.S. 417 (1984).

<sup>69</sup> 471 U.S. 539 (1985).

<sup>70</sup> See *Sony*, 464 U.S. at 450-51 (explaining that a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited to protect the author's incentive to create) and *Harper & Row*, 471 U.S. at 568 (explaining that to negate fair use it only needs to be shown that if the challenged use should become widespread, it would adversely affect the potential market for the copyrighted work).

<sup>71</sup> *Sony*, 464 U.S. at 451.

<sup>72</sup> *Harper & Row*, 471 U.S. at 568 (citing *Sony*, 464 U.S. at 451).

<sup>73</sup> *Id.*

<sup>74</sup> See *Sony*, 464 at 451.

with certainty that future harm will result.<sup>75</sup> Instead, it is necessary to show by a preponderance of the evidence that *some* meaningful likelihood of future harm exists.<sup>76</sup>

The two Supreme Court Cases preceding *Campbell* very plainly express the importance of the market-effects framework in determining whether a particular use of a copy righted work is a fair use.<sup>77</sup> As stated previously, the *Campbell* decision obfuscated the market-effects framework by failing to clearly underscore the importance of the fourth fair use factor, which requires courts to consider the effect of a use upon the potential market for or value of a copyrighted work.<sup>78</sup> This obfuscation is recognized by looking at the particular language the Supreme Court used in *Campbell* that stems from *Harper & Row*<sup>79</sup> and *Sony*.<sup>80</sup> Instead of plainly expressing its endorsement of the market-effects framework for fair use analysis, the *Campbell* court picked out language from *Harper & Row* and *Sony* that did not patently indicate the language's relevance in the market-effects context.<sup>81</sup> Although the discussion in *Campbell* may be more complex, it should be pretty clearly understood as focusing the fair use analytic framework on the fourth factor, market effects, which is especially true when it is viewed in line with *Sony* and *Harper & Row*.

The Supreme Court's three most recent fair use decisions resemble the childhood game known as "telephone," which is a game where a message is passed on, in a whisper, by each of a number of people, which typically results in distorted final versions of the message.<sup>82</sup> The

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

<sup>76</sup> *Id.* (emphasis in the original).

<sup>77</sup> See *supra* at 71.

<sup>78</sup> See *supra* at n. 42.

<sup>79</sup> *Campbell*, 510 U.S. at 579 (citing *Harper & Row*, 471 U.S. at 562 for the proposition that the goal of fair use analysis is to determine whether a secondary use "supplants" the original work).

<sup>80</sup> *Id.* (citing *Sony*, 464 U.S. at 455 for the proposition that transformative works lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright).

<sup>81</sup> See *supra* n. 79 and n. 80.

<sup>82</sup> *Telephone Game Definition*, THE FREE DICTIONARY, [\(last visited Jan 16, 2016\).](http://www.thefreedictionary.com/Telephone+(game))

progression from *Sony*, to *Harper & Row*, to *Campbell* resembles the telephone game because the decisions seem to be supporting the market-effect “message,” but the message also seems to be getting more distorted at the same time.<sup>83</sup> With the existing circuit split between the Seventh and Second Circuits, the Supreme Court should take the next chance it can to end the game and determine the proper analytic framework courts must use in determining fair use cases.<sup>84</sup>

Based on the Supreme Court’s evident reliance upon the fourth fair use factor, which considers market effects, the Seventh Circuit’s framework,<sup>85</sup> and not the Second Circuit’s framework,<sup>86</sup> is proper to analyze fair use of copyrighted work.<sup>87</sup> The *Kienitz* decision is more harmonious with the Supreme Court’s decisions in *Sony*, *Harper & Row*, and *Campbell* because it follows the market-effects framework set forth in that line of cases.<sup>88</sup> In contrast, the *Cariou* decision failed to properly understand *Campbell* and disrupts the balance between copyright owners, the public, and other creators because the transformative use framework is based almost entirely on subjective determinations regarding whether and to what extent a work is transformative.<sup>89</sup> Therefore, the market-effect analysis allows for a more reliable framework in analyzing fair use disputes because courts will be able to more objectively assess the fair use of

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<sup>83</sup> Compare *Sony*, 464 U.S. at 451 (holding a use of copyrighted work not to be fair use if it is proved that the particular use is harmful, or that if the use becomes widespread it would adversely affect the potential market for the copyrighted work); with *Harper & Row*, 471 U.S. at 568 (holding the use of copyrighted work that adversely affects the potential market for the work or the value of any of the rights in the copyrighted work to be unfair use); with *Campbell*, 510 U.S. at 579 (evidencing market-effect under the fourth factor by determining whether a work is transformative, which depends on whether the work in question substitutes or complements a copyrighted work).

<sup>84</sup> See Jeffries, *supra* note 4, at 649.

<sup>85</sup> *Kienitz*, 766 F.3d at 758-59.

<sup>86</sup> *Cariou*, 714 F.3d at 705 (focusing on determining whether and to what extent the new work is transformative).

<sup>87</sup> See Fromer, *supra* note 41, at 617.

<sup>88</sup> See *supra* at n. 83; and *Kienitz*, 766 F.3d at 758 (stating that “[w]e think it best to stick with the statutory list [of factors], of which the most important usually is the fourth (market effect))

<sup>89</sup> Compare *Campbell*, 510 U.S. at 578-79 (stating that a finding of fair use is not absolutely necessary for a finding of fair use); with *Cariou*, 714 F.3d at 705 (considering the first statutory fair use factor, which addresses transformative use, to be the heart of the fair use inquiry).

copyrighted works,<sup>90</sup> and this approach faithfully adheres with the Supreme Court decisions governing fair use disputes under 17 U.S.C. § 107.<sup>91</sup>

## V. THE KENITZ MARKET-EFFECT FRAMEWORK BEST PROMOTES THE PROGRESS OF SCIENCE AND USEFUL TECHNOLOGY

The most important reason the market-effects approach should be the standard for resolving fair use disputes is because it upholds the purpose of copyright law, which is to promote the progress of science and useful arts.<sup>92</sup> As Justice Story once explained, “[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout.”<sup>93</sup> If this were true, it would be counterintuitive to adopt a standard that allows fair use disputes to be resolved by the unpredictable and subjective opinions of judges regarding whether something is new and original enough to be considered transformative, thereby making it a fair use of copyrighted work.<sup>94</sup> As the dissent in *Cariou* makes clear, by focusing solely on the “transformativeness” of a secondary use of copyrighted material, the court is truly making a determination based on its own artistic judgment.<sup>95</sup> The problem with this kind of subjective judgment is illustrated by looking at the way modern technology has blurred the line regarding the ways something may be transformed in the traditional sense.<sup>96</sup>

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<sup>90</sup> See *Sony*, 464 U.S. at 450 (requiring a showing by a preponderance of the evidence that some meaningful likelihood of future economic harm exists).

<sup>91</sup> See *supra* at n. 83.

<sup>92</sup> *Cariou*, 714 F.3d at 705 (citing U.S. Const., Art. I, § 8, cl. 8).

<sup>93</sup> *Campbell*, 510 U.S. at 575 (citing *Emerson v. Davies*, 8 F.Cas. 615, 619 (No. 4,436) (CCD Mass. 1845)).

<sup>94</sup> See *Cariou*, 714 F.3d at 712 (holding that 25 out of the 30 pieces of appropriated artworks were considered to be fair use) (Wallace, J., dissenting).

<sup>95</sup> See *id.* at 713

<sup>96</sup> Edward J. Black, *Better Understanding of Fair Use, Tech Missing From Copyright Hearing*, THE HUFFINGTON POST, ([http://www.huffingtonpost.com/edward-j-black/better-understanding-of-fair-use\\_b\\_4675624.html](http://www.huffingtonpost.com/edward-j-black/better-understanding-of-fair-use_b_4675624.html)) (March 30, 2014) (last visited March 26, 2016) (explaining how the fair use doctrine has proven to be the only way to keep up with developing technology in light of our nation’s outdated copyright law).

Economic consultants have urged that, “[i]n difficult economic times, we need to preserve and promote America’s engines of innovation . . . ,” which means avoiding a fair use standard that is “. . . likely to deter significant technological innovation at a time when technology innovators are leading the effort to add new, high-paying jobs to our economy.”<sup>97</sup> If courts follow the *Cariou* decision and focus on determining the extent to which the use of a copyrighted work is transformative, the economic benefits that are supposed to be permitted by the fair use doctrine will certainly be hindered.<sup>98</sup> The market-effects framework utilized in *Kienitz* is more effective than the transformative use framework because it limits the amount of trivial claims that can be brought under copyright law.<sup>99</sup> More importantly, the market-effects framework allows “fair use industries” to generate economic growth.<sup>100</sup>

Examples of “fair use industries” include manufacturers of consumer devices that allow individual copying of copyrighted programming; educational institutions; software developers; and Internet search and web hosting providers.<sup>101</sup> Fair use industries have grown dramatically within the past two decades, and the growth of these industries has had a profound impact on the U.S. economy.<sup>102</sup> The 2011 economic study prepared for the Computer & Communications Industry Association (CCIA) provides interesting data regarding the evidence showing the

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<sup>97</sup> See Thomas Rogers & Andrew Szamoszegi, FAIR USE IN THE U.S. ECONOMY: 2011 STUDY ON ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE, pp. 2-3 (<http://cdn.ccianet.org/wp-content/uploads/library/CCIA-FairUseintheUSEconomy-2011.pdf>) (last visited March 26, 2016).

<sup>98</sup> See *id.* at p. 5 (stating that “the fair use doctrine...[has] grown in importance with the rise of the digital economy, as fair use permits a range of activities that are critical to many high technology businesses and are an important foundation of the Internet economy”).

<sup>99</sup> See *supra* n. 96 (stating that “it should go without saying that a principle that prevents lawsuits over nine-word quotes, seven-second clips and fleeting glimpses of team logos should figure prominently in the conversation [about modernizing our nation’s copyright law], particularly when [the fair use doctrine] is also a cornerstone of modern Internet law”).

<sup>100</sup> See *supra* n. 98 (explaining that “[t]he ubiquity of the Internet means that the economic growth fostered by fair use is widespread and generates significant consumer benefits”).

<sup>101</sup> *Id.* at p. 6. (defining “fair use industries” as “industries...that depend upon fair use...exceptions”).

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

success of fair use industries in light of the economic recession during 2008 and 2009.<sup>103</sup> During the recession, fair use industries had economic growth in five areas: national revenue; contribution to the national GDP; national employment rates; employee productivity; and national exports of goods and services.<sup>104</sup> The CIAA study also indicates that the growth rate of fair use industries has outpaced overall economic growth in recent years, fueled productivity gains, and supported millions of jobs.<sup>105</sup>

In the modern digital age, people use, reinterpret, and remix copyrighted content to develop new technologies like Internet search engines and social network sites.<sup>106</sup> The role of the public user has expanded in the digital age, and there is access to free-flowing information at all times via the Internet.<sup>107</sup> In light of how the Internet and other technology has developed in recent decades, it makes sense to utilize the market-effect approach promulgated in *Kienitz* and determine whether a contested use is a complement to, or a market substitute for a protected work.<sup>108</sup> Focusing on this inquiry allows economic benefits and harms to be considered in determining whether a contested use is a fair use.<sup>109</sup> Considering both the economic benefits and harms allows for a full-bodied approach to fair use law, which is the proper approach for courts

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<sup>103</sup> *Id.* at p. 4 (pointing out that, “notwithstanding [the] recessionary [economic] environment, the fair use economy remained steady when measured by value added, while the remainder of the U.S. economy contracted”).

<sup>104</sup> *Id.* at pp. 6-7.

<sup>105</sup> *Id.* at p. 7.

<sup>106</sup> Matthew Sag, *Predicting Fair Use*, 73 Ohio St. L.J. 47, 50 (2012) (discussing how the fair use doctrine plays a pivotal role in allowing technological progress).

<sup>107</sup> Cynthia M. Cimino, *Fair Use In The Digital Age Are We Playing Fair?*, 4 Tul. J. Tech. & Intell. Prop. 203, 220-21 (2002) (discussing how judicial decisions have shifted the fair use inquiry from its traditional focus on whether or not a substantial amount of the protected work was taken, to no focusing on a market-driven analysis).

<sup>108</sup> See *Kienitz*, 766 F.3d at 758-59 (explaining that, under the market-effect theory, a complementary use is permissible fair use, but a use that is a market substitute for the protected work is not allowed).

<sup>109</sup> See Zahr K. Said, *Foreward Fair Use in the Digital Age, and Campbell v Acuff-Rose at 21*, 90 Wash. L. Rev. 579, 591-92 (2015) (citing Professor Jeanne C. Fromer for the proposition that “*Campbell* can be read to require consideration of all of the market effects on a plaintiff’s work, not just the negative ones”).

to utilize in the digital age in<sup>110</sup> light of the economic importance of fair use industries in the United States,<sup>111</sup> as well as the expanded role of the public user.<sup>112</sup>

## VI. CONCLUSION

The disagreement regarding the proper framework to utilize in assessing fair use of copyrighted work should be resolved in favor of the market-effects approach. First, as indicated in Part III, the market-effect approach implicitly involves considerations of transformative use because the market-effect approach requires courts to determine whether a use of copyrighted work operates as a market complement or market substitute. So, concerns of ignoring the extent to which a use of copyrighted work is transformative are unfounded. Second, as indicated in Part IV, the market-effect framework is in line with the Supreme Court's decisions in *Campbell*, *Sony Corp.*, and *Harper & Row Publishers*. Utilizing the transformative use framework from *Cariou* instead of the market-effect approach from *Kienitz* would be improper because it would depart from precedent. Third, as indicated in Part V, the market-effect framework best promotes the progress of science and useful technology by acknowledging the reality that the modern digital age has changed the way business is conducted and the amount of access the public has to copyrighted works.

In light of these foregoing reasons, it should be clear that the fair use doctrine is an economic doctrine more than anything else. In reality, the fair use doctrine is tethered to the Internet and modern technology, because without the fair use doctrine, some of our most important technological advancements may not have ever occurred. The Internet and modern technology is tethered to the modern marketplace. It logically follows, then, that the fair use

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<sup>110</sup> *Id.* (providing the argument that the full-bodied approach to analyzing harm to the plaintiff's market should be reintroduced to the fair use analysis).

<sup>111</sup> See *supra* n. 97.

<sup>112</sup> See *supra* n. 107.

doctrine is tethered to the modern marketplace. Understanding this connection leads to the conclusion that it is most appropriate to utilize a market-based approach in assessing fair use disputes. When the Supreme Court gets another opportunity to assess the proper fair use framework, it should clearly establish the market-effects framework as the appropriate method to adjudicate fair use disputes.