

KIENTITZ 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, use of a copyrighted work is not an infringement on a copyright if, after consideration of four factors, a court considers the use to be fair.¹ 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.² A circuit split exists between the Second and Seventh Circuit Courts of Appeals regarding the proper focus and application of the fair use factors in the context of copyright litigation.³ The purpose of this comment is to explain why it is improper to focus solely on “transformativeness,” and why courts must also consider market effect(s) when determining whether a secondary work is fair use of a copyrighted work. For purposes of this comment, the reader should associate transformativeness with the first fair use factor, and associate market effect(s) with the fourth fair use factor.

Part II of this comment discusses the origin of the circuit split between the Second and Seventh Circuits. Part III explains how the transformativeness analysis and market effect(s) analysis are implicitly connected, which is one reason it is not appropriate to focus solely on transformativeness. Part IV explains how market effect(s) analysis is able to maintain a balanced framework. Finally, Part V proposes that a market effect(s) focus in the fair use context limits

¹ 17 U.S.C. § 107.

² *Id.*

³ Compare *Kienitz v. Scornie 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).

frivolous copyright infringement claims and promotes the progress of science and useful technology.

II. HOW THE CIRCUIT SPLIT WAS CREATED: *CAMPBELL*,⁴ *CARIOU*,⁵ AND *KIENITZ*⁶

In 1994, the United States Supreme Court issued the *Campbell v. Acuff-Rose Music, Inc.* decision, which was the last time the Supreme Court provided its insight regarding fair use in copyright law.⁷ In *Campbell*, the Court had to determine 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. § 107.⁸ 2 Live Crew's manager contacted the copyright holder of the song, "Oh, Pretty Woman," and expressed a willingness to pay a fee for the band's use of the song.⁹ The copyright holder refused permission.¹⁰ 2 Live Crew eventually released records of "Pretty Woman" in a collection of songs, but still identified the authors of "Pretty Woman" as Orbison (and its publisher Acuff-Rose).¹¹

Although the use in *Campbell* was commercial, the Court found it to be a fair use through parody.¹² The Court determined it was improper to hold the commercial nature of 2 Live Crew's Parody of "Oh, Pretty Woman" as being presumptively unfair.¹³ It explained, "[n]o such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as

⁴ *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

⁵ *Cariou v. Prince*, 714 F.3d 694 (2nd. Cir. 2013).

⁶ *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014).

⁷ 510 U.S. 569 (1994).

⁸ *Id.* at 571-72.

⁹ *Id.* at 573.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 574.

¹³ *Id.* at 594.

parody, is a fair one.”¹⁴ The Court clearly kept the statutory fair use factors separate from the notion of “transformative use,” but after the *Campbell* decision was rendered, the Second Circuit Court of Appeals improperly began treating transformativeness as the focus of the inquiry into fair use.¹⁵

As evidenced in *Cariou v. Prince*, the Second Circuit has essentially read transformativeness into the list of four fair use factors.¹⁶ In *Cariou*, the court determined certain appropriation artwork to be considered fair use.¹⁷ An artist appropriated thirty copyrighted photographs,¹⁸ and the court determined twenty-five of the appropriated photographs to be fair use while the other five photographs were remanded for determination consistent with the opinion.¹⁹ In reaching this puzzling decision, the court really just imposed its own artistic evaluation to determine whether the appropriated photographs were fair use of the original photographs.²⁰ 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.²¹ Nonetheless, the court’s decision certainly centered on the

¹⁴ *Id.*

¹⁵ See *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2nd Cir. 1994); *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70 (2nd Cir. 1997); *Liebovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2nd Cir. 1998); *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132 (2nd Cir. 1998); *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002); *Salinger v. Colting*, 607 F.3d 68 (2nd Cir. 2010).

¹⁶ See *Cariou*, 714 F.3d at 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).

¹⁷ *Id.* at 712-13.

¹⁸ *Id.* at 699-700.

¹⁹ *Id.* at 712.

²⁰ *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).

²¹ 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”).

notion of “transformative use,” which the court mistakenly believed to be the primary takeaway from the Supreme Court’s decision in *Campbell*.²²

Within the year following the the *Cariou* decision, the Seventh Circuit Court of Appeals issued a decision in *Kienitz v. Sconnie Nation LLC*,²³ which brought attention to the problems posed by focusing the fair use analysis on “transformative use.”²⁴ In *Kienitz*, the court determined certain t-shirts, which displayed an appropriated version of a copyrighted photograph, as fair use of the copyrighted photograph.²⁵ Prior to reaching the court of appeals, the parties in *Kienitz* debated whether the t-shirts were a “transformative use” of certain copyrighted photos and, if so, just how “transformative” the use was required to be.²⁶ The court of appeals immediately pointed out that “transformative use” was not one of the statutory fair use factors even though the Supreme Court mentioned it in *Campbell*.²⁷ It further explained that the Second Circuit had run away with the Supreme Court’s suggestion and erroneously concluded that “transformative use” is enough to bring a modified copy of a copyrighted work within the scope of the fair use defense.²⁸

In particular, *Kienitz* expressed skepticism with the *Cariou* approach because exclusively asking whether something is “transformative” would replace the four statutory fair use factors,²⁹ and could also override the protection for derivative works that is afforded under 17 U.S.C. §106(2).³⁰ Ultimately, the *Kienitz* court found it best to stick with the statutory list of fair use

²² *Cariou v. Prince*, 714 F.3d at 706-07 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

²³ *Kienitz v. Sconnie Nation LLC*, 766 F.3d at 758-59.

²⁴ *Id.*

²⁵ *Id.* at 757.

²⁶ *Id.* at 758-59.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (explaining that by saying a new use ‘transforms’ a copyrighted work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2))

factors, of which the most important was deemed to be the fourth (market effect) factor.³¹

Regarding market effect, the court asked whether the secondary use of the copyrighted photographs was a complement (allowed) to the protected work rather than a substitute (prohibited) for it.³² It determined the t-shirts were no substitute for the original photograph because there was no evidence the t-shirts reduced the demand for the original photograph or any additional use of the photograph the copyright-owner contemplated.³³

The circuit split between the Second and Seventh Circuits needs to be resolved, and it is the perfect time for the United States Supreme Court to step in and clarify the appropriate assessment to evaluate the four statutory fair use factors.³⁴ Unfortunately, the Supreme Court denied a petition to resolve the circuit split on March 23, 2015.³⁵

III. ANALYSES OF THE FIRST AND FOURTH FAIR USE FACTORS ARE IMPLICITLY CONNECTED, SO IT IS NOT APPROPRIATE TO FOCUS SOLELY ON TRANSFORMATIVENESS

The market-effect analysis of the fair use factors implicitly resolves the transformative use analysis because, under the fair use statute,³⁶ the consideration of the fourth factor is 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.³⁷ 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

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ 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 the application of the fair use factors).

³⁵ *Id.*

³⁶ 17 U.S.C. § 107.

³⁷ 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.”)

use factor, which has meant that courts continue to offer varying analyses of the this fourth, market-effects, factor.³⁸ The *Cariou* decision further buries the importance of the market-effects factor by focusing too narrowly on the “transformative” language introduced in *Campbell*.³⁹ 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. § 107.⁴⁰

When the *Kienitz* decision was rendered, it received unmerited criticisms⁴¹ 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.”⁴² However, such belief is misplaced because the *Campbell* decision did not actually endorse the transformative use framework.⁴³ 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.⁴⁴ For instance, when a commercial use amounts to a mere 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.⁴⁵ 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

³⁸ *Id.*

³⁹ See *Cariou*, 714 F.3d at 705 (declaring the “transformative use” inquiry to be the heart of the fair use inquiry).

⁴⁰ 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).

⁴¹ 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.)

⁴² See Jeanne C. Fromer, *Market Effects Bearing On Fair Use*, 90 Wash. L. Rev. 615, 617 (2015); *supra* n. 41.

⁴³ 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).

⁴⁴ *Id.* at 591.

⁴⁵ *Id.* (citing *Sony*, 464 U.S. at 451).

inferred.⁴⁶ Therefore, the *Campbell* opinion actually indicates that determining whether a use of copyrighted material is transformative requires consideration of market-effect.⁴⁷

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.⁴⁸ 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.⁴⁹ 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.⁵⁰ 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*.⁵¹ Furthermore, the *Cariou* court’s definition of “transformative” does not include the consideration of the market substitution effect that was discussed in *Campbell*.⁵² Importantly, the Supreme Court also stated that analyzing transformative use is not absolutely necessary for a finding of fair use,⁵³ which undermines the notion in *Cariou* that the transformative use inquiry is at the heart of the fair use inquiry.⁵⁴

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.⁵⁵ The court’s opinion declared that “transformative use” is not one of the statutory fair use factors, even

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See Cariou*, 714 F.3d at 705.

⁴⁹ *Kienitz*, 755 F.3d at 758.

⁵⁰ *Cariou*, 714 F.3d at 706 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

⁵¹ *See supra* at n. 46 and n. 47.

⁵² *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.)

⁵³ *Id.*

⁵⁴ *See Cariou*, 714 F.3d at 705.

⁵⁵ *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)).

though the Supreme Court mentioned it in *Campbell*.⁵⁶ 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.⁵⁷ 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.”⁵⁸

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.⁵⁹ 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.⁶⁰ Transformative use is merely an aid because, as stated previously, it is not absolutely necessary for a finding of fair use,⁶¹ and the transformative nature of a work or use is logically contingent upon the degree of harm caused to the copyright owner’s market.⁶² Therefore, adopting an analytic framework to the statutory fair use factors focused on transformative use would ignore Supreme Court precedent⁶³ and ignore the fact that the market-effects framework promulgated in *Kienitz* already includes considerations of “transformativeness.”⁶⁴

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.*

⁵⁹ *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)).

⁶⁰ *See id.* at 758-59 (rejecting the notion that “transformative use” is a required consideration in and of itself, but rather, it is merely an aid in the ultimate inquiry into market effects).

⁶¹ *See supra* n. 60.

⁶² *See supra* n. 48 and n. 49.

⁶³ *Campbell*, 510 U.S. at 590.

⁶⁴ *See supra* n. 51.

IV. FOCUSING ON MARKET EFFECT(S) ALLOWS A MORE OBJECTIVE METHOD TO ASSESS FAIR USE, WHICH WILL BALANCE OUT THE SUBJECTIVITY IMPOSED BY JUDGES THAT FOCUS SOLELY ON TRANSFORMATIVENESS

The Second Circuit’s discussion of “transformativeness” in *Cariou* illustrates the primary problem posed by focusing fair use analysis on transformativeness. As stated before, in *Cariou*, the court was tasked with determining whether the secondary use of 30 copyrighted photographs was fair use of the originals.⁶⁵ 25 appropriated photographs to be fair use of certain copyrighted photographs because the secondary works were transformative.⁶⁶ However, the court arbitrarily determined 5 appropriated photographs as not being transformative.⁶⁷ This odd decision was the result of the court’s arbitrary and subjective side-by-side comparison of each original photograph with each appropriated, secondary photograph.⁶⁸

The side-by-side method of analysis led the *Cariou* majority to determine that the secondary use of the copyrighted photographs was transformative and, thus, fair use.⁶⁹ In other words, the fair use analysis in *Cariou* was simply an imposition of the court’s own artistic judgment.⁷⁰ This should be no surprise, though, because in the context of copyright litigation, courts too frequently impose their own artistic interpretations when resolving fair use disputes.⁷¹ Allowing such an approach would result in inconsistent results for fair use disputes because the dispositive factor in the fair use analysis would be the subjective opinions of the judges.

⁶⁵ *Cariou*, 714 F.3d 699-704).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 707-08.

⁶⁹ *Id.*

⁷⁰ *Id.* at 717 (explaining the court’s subjective artistic judgment as its basis for finding the secondary works to be transformative of the original, copyrighted photographs) (Wallace, J., dissenting).

⁷¹ 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 based on the court’s subjective opinion); 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).

The market effects framework discussed in *Kienitz* is more objective than the “transformative use” framework because it aims to objectively determine whether the secondary use of original copyrighted work operates as a substitute or a complement for the original.⁷² Under the market effect(s) framework discussed in *Kienitz*, the question of transformativeness is secondary to the question of market effect(s).⁷³ So, after determining if, how, and to what extent a copyrighted works’ market is affected, the court may then ask whether the secondary use is a transformative use.⁷⁴ This allows for a whole-bodied approach to fair use law, which will also afford more predictability in how the fair use doctrine is applied to these kinds of disputes.⁷⁵ Such an approach will not only promote a clearer and more predictable fair use doctrine, it will also promote the progress of science and useful technology.

V. THE *KIENITZ* MARKET-EFFECT FRAMEWORK BEST PROMOTES THE PROGRESS OF SCIENCE AND USEFUL TECHNOLOGY, WHICH IS IMPORTANT IN MODERN SOCIETY

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.⁷⁶ 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.”⁷⁷ 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

⁷² See *supra* at n. 59.

⁷³ See *supra* at n. 60.

⁷⁴ *Id.*

⁷⁵ 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) (asserting that the full-bodied approach to analyzing harm to the plaintiff’s market should be reintroduced to the fair use analysis).

⁷⁶ *Id.* at 705 (citing U.S. Const., Art. I, § 8, cl. 8).

⁷⁷ *Campbell*, 510 U.S. at 575 (citing *Emerson v. Davies*, 8 F.Cas. 615, 619 (No. 4,436) (CCD Mass. 1845)).

considered transformative, thereby making it a fair use of copyrighted work.⁷⁸ 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.⁷⁹ 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.⁸⁰

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.”⁸¹ 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.⁸² 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.⁸³ More importantly, the market-effects framework allows “fair use industries” to generate economic growth.⁸⁴

⁷⁸ 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).

⁷⁹ See *id.* at 713.

⁸⁰ 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) (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).

⁸¹ 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).

⁸² 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).

⁸³ See *supra* n. 80 (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

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.⁸⁵ 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.⁸⁶ The 2011 economic study prepared for the Computer & Communications Industry Association (CCIA) provides interesting data regarding the evidence showing the success of fair use industries in light of the economic recession during 2008 and 2009.⁸⁷ 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.⁸⁸ The CIIA 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.⁸⁹

In the modern digital age, people use, reinterpret, and remix copyrighted content to develop new technologies like Internet search engines and social network sites.⁹⁰ 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.⁹¹ 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

modernizing our nation’s copyright law], particularly when [the fair use doctrine] is also a cornerstone of modern Internet law”).

⁸⁴ See *supra* n. 78 (explaining that “[t]he ubiquity of the Internet means that the economic growth fostered by fair use is widespread and generates significant consumer benefits).

⁸⁵ *Id.* at p. 6. (defining “fair use industries” as “industries...that depend upon fair use...exceptions).

⁸⁶ *Id.*

⁸⁷ *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).

⁸⁸ *Id.* at pp. 6-7.

⁸⁹ *Id.* at p. 7.

⁹⁰ 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).

⁹¹ 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).

determine whether a contested use is a complement to, or a market substitute for a protected work.⁹² Focusing on this inquiry allows economic benefits and harms to be considered in determining whether a contested use is a fair use.⁹³ Considering both the economic benefits and harms allows for a balanced approach to fair use law, which is the proper approach for courts to utilize in the digital age⁹⁴ in light of the economic importance of fair use industries in the United States,⁹⁵ as well as the expanded role of the public user.⁹⁶

VI. CONCLUSION

The disagreement regarding the proper framework to utilize in assessing fair use of copyrighted work should be resolved in favor of a market effects analysis, with a transformativeness framework as a secondary inquiry into fair use. 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 a balanced, whole-bodied approach to resolving fair use disputes. Utilizing the transformative use framework from *Cariou* instead of the market effect(s) framework from *Kienitz* will only continue to allow courts to impose their own subjective artistic opinions regarding transformativeness and will continue to produce inconsistent and unpredictable fair use decisions. Third, as indicated in Part V, the market-effect framework best

⁹² 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).

⁹³ 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”).

⁹⁴ *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).

⁹⁵ See *supra* n. 97.

⁹⁶ See *supra* n. 107.

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. Accordingly, the proper framework for assessing fair use is to first assess market effect(s), if any, and then to assess transformativeness as a second measure.