



PROGRAM MATERIALS

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A (Star) Trek Through Copyright Fair Use After Prince & Oracle Have Spoken

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A (Star) Trek Through Copyright Fair Use After Prince & Oracle Have Spoken

James P. Flynn

May 27, 2021

Presented by



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Fair is foul, and foul is fair *MacBeth*, Act I, Scene i

- Appearance can be deceiving
- Things are not always what they appear to be
- What seemed ok today
- Is suddenly not ok tomorrow

What is fair use generally?

“the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”
17 U.S.C. § 107

What is fair use generally? (cont.)

The four non-exclusive factors in considering fair use are:

- 1.the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;**
- 2.the nature of the copyrighted work;**
- 3.the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and**
- 4. the effect of the use upon the potential market for or value of the copyrighted work.**

[*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); see also 17 U.S.C. § 107].

What are fair use categories, statutory and beyond?

- Expressly Noted List Of Examples:
 - Criticism
 - Comment
 - News reporting
 - Teaching (including multiple copies for classroom use),
 - scholarship, or
 - Research
- Court Created Additions
 - Parody
 - Mash-ups
 - Transformative Works

Parody v. Pastiche/Homage v. Mash-Up

- *Paramount Pictures Corp. v. Axanar Productions, Inc. et al.*, 2017 WL 83506, 2017 Copr. L. Dec. ¶131,029 (CD Cal. 2017), and *Dr. Seuss Enterprises LP v. Comicmix LLC, et al.*, 300 F. Supp.3d 1073 (S.D. Cal. 2017), and 256 F.Supp.3d 1099 (S.D. Cal. 2017)
- A parody “may loosely target an original” by “commenting on the original or criticizing it.” and by juxtaposing works “in such a way that it creates ‘comic effect or ridicule.’” *Dr. Seuss Enterprises v. ComicMix*, 256 F.Supp.3d 1099, 1106 (S.D. Cal. 2017).
- “Unlike parody, pastiche celebrates, rather than mocks, the work it imitates.” Hoestery, Ingeborg, *Pastiche: Cultural Memory in Art, Film, Literature* (2001)
- Mash-ups are “are crossover works that integrate pre-existing characters or imagery from another entertainment franchise, such as *Star Trek*, with those of Dr. Seuss.” *Seuss*, 300 F. Supp.3d at 1082.
- Jury instruction that “an homage or tribute” is “not necessarily” fair use is “an accurate statement of the law.” *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F. 3d 267, 278 (6th Cir. 2009)

Parody v. Pastiche/Homage v. Mash-Up

- Criticism and ridicule elements of the legal parody test, at least as articulated in some places, are disjunctive alternatives, not indispensable individual factors.
- Often about a derivative market that a copyright owner “would in general develop or license others to develop.” *Castle Rock Entertainment v. Carol Publishing Group*, 150 F. 3d 132, 145 (2d Cir. 1998)

How Much Is Fair?—Amount of Copying

[N]o easy rule of thumb can be stated as to the quantum of fragmented literal similarity permitted without crossing the line of substantial similarity. The question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff's work—not whether such material constitutes a substantial portion of defendant's work.

[Nimmer at § 13.03[A][2][a]].

How Much Is Fair?—Amount of Copying

- **Various names/approaches**
 - Comprehensive non-literal similarity test
 - Fragmented literal similarity test
 - Transformative use test
 - The ordinary observer or audience test
- **Comes down to whether there is substantial similarity**

Comprehensive non-literal similarity test

infringement occurs when the non-copyright holder's work is such that “the fundamental essence or structure of one [copyrighted] work is duplicated in another.” *Castle Rock Entertainment v. Carol Publishing Group*, 150 F.3d 132, 140 (2d Cir. 1998)

Fragmented literal similarity test

“fragmented literal similarity” test, is one covering situations “in which small bits of specific expression are copied but the overall structure is not,” Adam Steele, *CIRCUIT SPLIT: THE RESURRECTION OF THE DE MINIMIS EXCEPTION TO ACTIONABLE COPYRIGHT INFRINGEMENT FOR COPYRIGHTED SOUND RECORDINGS*, 11 *Ohio State Business Law Journal* 41, 44 (2017).

The ordinary observer or audience test

“fair use presents a holistic context-sensitive inquiry ‘not to be simplified with bright-line rules’” — *The Warhol Foundation v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021)

Courts have generally applied “the ordinary observer or audience test” to determine issue of “substantial similarity.” *Nimmer On Copyright* at §13.03[E][1] at 13-78

The ordinary observer or audience test (cont.)

test necessarily involves “line drawing” and that line be drawn “somewhere between the one extreme of no similarity and the other of complete and literal similarity” thereby “marking off the boundaries of ‘substantial similarity’” *Nimmer On Copyright*

whether an ordinary reasonable person would understand them to convey the same “total concept and feel.” *Sid & Marty Kroft TV Productions v. McDonald’s Corp.*, 562 F.2d 1157, 1161-1164 (9th Cir. 1977)

Transformative Use

a “derivative work” is defined under Section 101 of Title 17 as “a work based upon one or more preexisting works, such as an abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”

Transformative Use (Cont.)

Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work.

Nature of the copyrighted work: This factor analyzes the degree to which the work that was used relates to copyright's purpose of encouraging creative expression. Thus, using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item). In addition, use of an unpublished work is less likely to be considered fair.

[More Information on Fair Use, U.S. COPYRIGHT OFFICE (MAY 2021)]

Transformative Use—Something We Hope To Explain



Figure 6: Modifications made to the Garcia Obama Photo in the process of creating the Hope Poster.

[William W. Fisher III, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart & Marita Sturken, REFLECTIONS ON THE HOPE POSTER CASE, 25 Harv. J. L. & Tech. 243, 330 (2012).] ²

Transformative Use--*The Andy Warhol Foundation v. Goldsmith, 992 F.3d 99 (2d Cir. 2021)*



Transformative Use -- *The Andy Warhol Foundation v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021)

[W]hether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic — or for that matter, a judge — draws from the work. Were it otherwise, the law may well “recognize[e] any alteration as transformative.”

* * *

Although we do not hold that the primary work must be “barely recognizable” within the secondary work... the secondary work’s transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.

[*Warhol*, 992 F. 3d at 114 (quoting Nimmer, § 13.05(B)(6) at 26)]

Transformative Use--*Google v. Oracle*, 141 S. Ct. 1183 (2021)

“fair use” is an “equitable rule of reason” requiring “judicial balancing” of “the sometimes conflicting aims of copyright law” so that copyright does not “stifle the very creativity which the law was meant to foster.”
[*Google*, 141 S.Ct. at 1186]

“An artistic painting might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism.”
[*Google*, 141 S.Ct. at 1203]

Transformative Use—What's Next?

“The *Google* decision comprehensively refutes the panel’s reasoning.”
[Warhol Foundation Request For Reconsideration]

“Indeed, *Google* described — as a paradigm example of transformative use — a Warhol-like work of art that is materially indistinguishable from the works at issue here. A decision by this Court conflicting with the most recent authoritative decision of the Supreme Court cannot stand.”
[Warhol Foundation Request For Reconsideration]

Conclusion

Questions/Comments

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Fair is foul, and foul is fair: Navigating Copyright Claims After *Warhol* and *Google* Cases

A written piece to accompany the webinar entitled “A (Star) Trek Through Copyright Fair Use After Prince & Oracle Have Spoken”

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The first scene in Shakespeare famous Scottish play has mystic interpreters equating what is good with what is bad, and what is bad with what is good. The line *Fair is foul, and foul is fair* means that appearance can be deceiving and things are not always what they appear to be. That is true in copyright law, especially around what constitutes and what does not constitute fair use, which is an extremely important concept. That is because what is considered fair use absolves one from committing the foul of infringement, and one’s ability to guard against the foul of infringement demands that fair uses not be unduly curtailed. Though many practitioners had hoped that the recent Second Circuit decision in *The Andy Warhol Foundation v. Goldsmith*, 992 F.3d 99 (2d Cir. 2021) and Supreme Court’s recent decision in *Google v. Oracle*, 141 S. Ct. 1183 (2021) would make plainer what was foul and what was fair, it did not necessarily turn out that way. This paper, and related presentation, is about explaining where that leaves us.

A. *What is fair use generally?*

“Fair use” is a doctrine that courts use to determine when a second author/artists or creator can use older material in their work without the license or permission of the author/artist or creator of the original work. The fair use copyright defense, which addressed under the well-known four-factor test under the Supreme Court’s decision in *Campbell v. Acuff-Rose Music*. The four non-exclusive factors in considering fair use are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

[*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); see also 17 U.S.C. § 107].

B. *What are fair use categories, statutory and beyond*

The statute itself sets out additional language that states “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107.

As just noted, fair use is often addressed with reference to the statutory examples.

1. Parody/Criticism

For instance, one can quote large portions of a literary work, or the entirety of a photograph or painting when engaging in criticism or teaching, scholarship or research about a writer, artist, literary genre or school of art. But there seems to be a bias that criticism be critical and that education only take certain forms. This is perhaps best seen in the wide acceptance of satire or parody as an acceptable form of unlicensed fair use, but pastiche or homage are viewed much more skeptically by courts.

This is well illustrated in a number of the Star-Trek-related cases. For instance, in 2017, in *Paramount Pictures Corp. v. Axanar Productions, Inc. et al.*, 2017 WL 83506, 2017 Copr. L. Dec. ¶31,029 (CD Cal. 2017), a United States District Court held that Axanar could not rely on a fair use defense during the upcoming trial over whether Axanar infringed Paramount's copyright in the popular Star Trek television and motion picture franchise. Axanar had an existing twenty-one minute film Star Trek: Prelude to Axanar ("Prelude") and at least two trailers for a planned full-length feature film (the "Axanar Motion Picture," and, collectively with Prelude, the "Axanar Works"). Central to the Court's rejection of that defense was Axanar's inability to convince the Court that the Axanar Works had the characteristics of the sort of works, such as parodies, that are recognized as deserving of a fair use defense under 17 U.S.C. § 107, as further explained by the United States Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). While seemingly a solid analysis under the applicable U.S. copyrights laws and cases, one perhaps should ask whether a different result could be supported if one gave positive criticism and praising imitation that same weight as negative critique or sarcastic satire. Understanding more fully the Axanar case and the Axanar Works will help the parallels emerge.

Axanar set out to create a motion picture “prequel” to Star Trek The Original Series. Although the Axanar defendants wrote their own scripts for the Axanar Works, they used the copyrighted Star Trek source material “as a bible” in developing the script of Prelude and the final shooting script of the Axanar Motion Picture, each of which revolve around a human character known as Garth of Izar (“Garth,” played by Steve Ihnat). Garth appeared in one episode (“Whom Gods Destroy”) of The Original Series as a former starship captain famous among Starfleet officers for his exploits in the Battle of Axanar. Planet Axanar seems to be the namesake of Defendant Axanar Productions. The Axanar defendants intentionally used or referenced many elements similar to those in the Star Trek Copyrighted Works to stay true to Star Trek canon down to excruciating details. These defendants were “interested in creating alternative ways for fans to view Star Trek,” and “expressly set out to create an authentic and independent Star Trek film that [stayed] true to Star Trek canon,” especially in Axanar’s use of Klingon and Vulcan characters. As the Court noted, “Star Trek fans love Defendants’ faithfulness to the Star Trek canon” and the primary creator of the Axanar Works, Alec Peters, “considers himself ‘the keeper of faith with fans.’” Far from discerning any criticism of the Star Trek franchise in the Axanar Works, the Court found that the “Defendants set out to create films that stay faithful” to the Star Trek series and “appeal to Star Trek fans.” That finding became the death knell of any fair use defense under U.S. law.

That is because U.S. courts have protected parodies, but not imitations, as fair use under 17 U.S.C. § 107. Under the fair use test, parodies have been protected by first focusing on the “the purpose and character of the use” factor. That is because a true parody allows an affirmative response to the question of “whether and to what extent the new work is transformative,” in other words, whether the new work “adds something

new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Campbell*, 510 U.S. at 579. For the purposes of copyright law, however, parody must use some elements of a prior work to create a new work that criticizes the substance or style of the prior work. *Campbell*, 510 U.S. at 580 (emphasis added). “The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole.” *Id.* at 597 (Kennedy, J., concurring) (emphasis added). “The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.” *Id.* at 582. Because the Axanar Works were a faithful homage to the copyrighted Star Trek franchise, the parody and criticism argument failed.

Need the critic always pan the original to come within the fair use exception? Or can the critic sometimes provide a glowing tribute while remaining protected? U.S. law just does not seem to extend fair use protections to the homage:

Unlike parody, criticism, scholarship, news reporting, or other transformative uses, The SAT substitutes for a derivative market that a television program copyright owner *such* as Castle Rock “would in general develop or license others to develop.” [citation omitted] Because The SAT borrows exclusively from Seinfeld and not from any other television or entertainment programs, The SAT is likely to fill a market niche that Castle Rock would in general develop. Moreover, as noted by the district court, this “Seinfeld trivia game is not critical of the program, nor does it parody the program; if anything, SAT pays homage to Seinfeld.”

[*Castle Rock Entertainment v. Carol Publishing Group*, 150 F. 3d 132, 145 (2d Cir. 1998); accord *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F. 3d 267, 278 (6th Cir. 2009) (holding that jury instruction that “an homage or tribute” is not fair use is “an accurate statement of the law”)]

But it does not have to be that way because some other countries protect more and other kinds of fair use, and the US statute is exemplative, not exclusive. For example, Section 30A of the United Kingdom’s Copyright, Designs and Patents Act 1988 protects “Caricature, parody or pastiche” from infringement claims as “fair dealing,”

which is akin to fair use, but not identical. More importantly, one must consider the import of the term “pastiche,” which is not discussed as defense under U.S. copyright law. (In fact a Lexis search of federal cases shows only one decision that includes the word “pastiche” and the phrase “fair use,” *Disney Enters. v. Hotfile Corp.*, 2013 WL 6336286 (S.D. Fla. 2013), and “pastiche” refers there to an assortment of collected evidence, not a defense). So what is “pastiche”? Pastiche is actually a French cognate of the Italian noun *pasticcio*, which is a pâté or pie-filling mixed from diverse ingredients. In American English it is defined, in the first instance, as an artistic work in a style that imitates that of another work, artist, or period, and U.K. dictionaries note that includes a work made in a professed imitation of the style of another artist; importantly, it is a commonly understood aspect of the definition of the word “pastiche” that, “[u]nlike parody, pastiche celebrates, rather than mocks, the work it imitates.” Hoestery, Ingeborg (2001). *Pastiche: Cultural Memory in Art, Film, Literature*. Bloomington: Indiana University Press. p. 1. ISBN 978-0-253-33880-8. OCLC 44812124.

And therein lies the main difference between how the Axanar Works were analyzed by the U.S. federal district court in California applying American copyright law, and how it may have been looked at differently under a “pastiche-as-fair-dealing” test in the UK or elsewhere. (A number of other countries have adopted language similar to section 30A). Under a pastiche fair dealing test, Axanar’s faithfulness to the canon, detail work, and celebration would have been elements supporting its defense rather than complicating it. The Axanar Works clearly imitate the style of the so-called Star Trek canon, which itself is a Gene-Roddenberry-inspired potpourri mixing the art of numerous writers, directors, and actors from the Original Series through (i) additional

series and movies to (ii) the 2003 novel, titled *Garth of Izar* and copyrighted by Paramount (a book that the Axanar court described as further developing the character), to (iii) the *Four Years War at the Battle of Axanar* (which is also described in a Paramount-licensed game including a supplement titled *Four Years War*). Under the parody fair use test, the evidence of such reverential treatment of the multiply-sourced inspirational and referenced material and stories just distanced Axanar's creation from the parody cloak it sought to don as defense under U.S law. But parody was always an ill-fitting choice without much chance of working any longer than a jerry-rigged cloaking device stolen from Romulans in "The Enterprise Incident" episode and looking no more natural on the Axanar Works than did the pointy ears on Captain Kirk in the same episode.

A broadening of the parody fair use defense, or acceptance of a parallel fair-dealing-pastiche defense, would have challenged Paramount's control over that empire, as the ever faithful, creative and driven Trekkies would doubtless have created an even fuller genre of new Star Trek works with the *in terrorem* effect of infringement suits removed or diminished.

2. Mash-ups

Dr. Seuss Enterprises LP v. Comixmix LLC, et al., 300 F. Supp.3d 1073 (S.D. Cal. 2017), a case in the United States District Court for the Southern District of California, raised issues of trademark and copyright law, and that Court's 2017 decision denying defendants' motion to dismiss concentrated in the fair use implications of creating a new work borrowing characters from one one-existing work to be depicted in the style and genre of a separate pre-existing work—in other words, does the creator of a mash-up of pre-existing works require permission of the source creators. That motion sought

to dismiss claims that defendants' mashup of Dr. Seuss and Star Trek in a book to be entitled *Oh! The Places That You'll Boldly Go* infringed plaintiff's trademarks and copyrights. Given that we have written above about the intellectual property law issues arising in matters involving the Star Trek franchise, this case seemed a natural next step.

First, a little about this case. It involves claims of copyright (and trademark) infringement, including fair use/parody/transformation defenses on the copyright side. The Court's 2017 decision summarized the basic facts and claims thusly:

This lawsuit concerns two literary works, one of which is alleged to have infringed the other. Plaintiff Dr. Seuss Enterprises ("DSE") is ... owner of various copyright registrations for and alleged trademark rights in the works of ... "Dr. Seuss." One of Dr. Seuss's best-known books—and the one primarily at issue in this suit—is *Oh, the Places You'll Go!* ("Go!"). Defendants ... created a Kickstarter campaign in order to fund printing and distribution of an allegedly infringing work, *Oh, the Places You'll Boldly Go!* ("Boldly"). .. Boldly combines aspects of various Dr. Seuss works with "certain characters, imagery, and other elements from Star Trek, the well-known science fiction entertainment franchise created by Gene Roddenberry." Plaintiff alleges that Boldly "misappropriates key elements" of Go! and four other Dr. Seuss books. Defendants contest this point... Further, Boldly's copyright page both states that "[t]his is a work of parody, and is not associated with or endorsed by CBS Studios or Dr. Seuss Enterprises, L.P.[,]" and includes the following text: "Copyright Disclaimer under section 107 of the Copyright Act 1976, allowance is made for 'fair use' for purposes such as criticism, comment, news reporting, teaching, scholarship, education, research, and parody."

Upon learning of Boldly and the corresponding Kickstarter campaign, Plaintiff sent Defendants two letters over the span of approximately ten days asserting their exclusive rights in the relevant Dr. Seuss works. When Defendants did not respond to the first letter, Plaintiff on the same day sent a takedown notice to Kickstarter and a second letter to Plaintiff. Kickstarter disabled access to Defendants' campaign later that day.

Several weeks later Plaintiff's Counsel and Defendants' Counsel exchanged letters; Defendants argued their use of Dr. Seuss's intellectual property was fair, threatened suit, and advised Plaintiff that Defendants would send a counter-notice to Kickstarter to reinstate the Boldly campaign. Plaintiff commenced this suit shortly thereafter.

[*Seuss*, 300 F. Supp. 3d at 1077-1078]

The lawsuit was no surprise to defendants, one of whom is also the author of the classic Star Trek Original Series episode *Trouble with Tribbles*. As reflected in their own Kickstarter webpage’s statement that, defendants “firmly believe[d]” their work to be a parody protected by fair use, they knew that others might disagree but that defendants “may have to spend time and money proving” their views “to people in black robes.” *Seuss*, 300 F. Supp. 3d at 1078. Defendants moved to dismiss the original complaint, and that motion was granted in part and denied in part in a June 9, 2017 opinion. After that decision, the plaintiff amended its complaint, defendants again moved to dismiss, and the Court denied that motion in its December 7, 2017 opinion.

The central copyright issue the latter decision addresses is the fair use copyright defense, which it addressed under the well-known four-factor test under the Supreme Court’s decision in *Campbell v. Acuff Rose Music*. In applying *Campbell*, the Court concentrated on the fourth factor, the effect of the use upon the potential market for, or value of, the copyrighted work. The Court did so because it had already found in June 2017 that factor 1 favored defendants because Boldly was “transformative,” albeit not, in the Court’s mind, as a parody. *Dr. Seuss Enterprises v. ComicMix*, 256 F.Supp.3d 1099, 1106 (S.D. Cal. 2017). Indeed, the conclusion that Boldly, a “repurposed, Star-Trek-centric” work, was a “mash-up” rather than a parody (assuming it could not be both) turned on the Court’s conclusion in the June opinion that Boldly did not “target” the original for criticism or ridicule. *Id.* at 1106. This, however, overlooks the fact that the criticism and ridicule elements of the legal parody test, at least as articulated in some places, are disjunctive alternatives, not indispensable individual factors. *Id.* (a parody “may loosely target an original” by “commenting on the original or criticizing it” and by

juxtaposing works “in such a way that it creates ‘comic effect or ridicule’”) (emphasis added).

This, of course, highlights the limitations judges seem to find inherent in the United States intellectual property law’s pre-occupation with parody as a basis for fair use without express extension of such protections to pastiche and other, more laudatory uses under the broader criticism and commentary fair use rubric, which we have discussed at length previously. The same occurred in *Castle Rock Entertainment v. Carol Publishing Group*, 150 F. 3d 132, 145 (2d Cir. 1998), rejecting the fair use defense in, where the Court noted that “this ‘Seinfeld trivia game is not critical of the program, nor does it parody the program; if anything, SAT pays homage to Seinfeld.’” *Castle Rock*, 150 F. 3d at 145; accord *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F. 3d 267, 278 (6th Cir. 2009) (holding that jury instruction that “an homage or tribute” is “not necessarily” fair use is “an accurate statement of the law”) (emphasis added). This illustrates the judicial focus on a certain seemingly required ridicule element of a copyright parody test.

This was in fact further exemplified a September 2017 decision in another Seuss case, *Lombardo v. Dr. Seuss Enterprises, LP*, 279 F. Supp. 3d 497 (S.D.N.Y. 2017), the Southern District of New York case that we had discussed with regard to the cease and desist letter issues addressed in an earlier decision. In *Lombardo*, the Court’s later opinion framed the issue thus:

The key question I must therefore resolve, is whether the Play comments on Grinch by imitating and ridiculing its characteristic style for comic effect, or, as defendant contends, merely exploits the characters, style and themes of Grinch in order “to avoid the drudgery in working up something fresh.” Defendant argues that the Play “does not poke fun of the Seussian rhyming style,” but instead usurps that style in order to sell a commercial work. Nor, according to defendant, does the Play comment on or ridicule the characters and themes of Grinch; it

merely “uses Grinch, Cindy-Lou, the Grinch character, and the dog Max as building blocks for a sequential work, featuring those same characters in the Seuss-created settings of Mount Crumpit and Who-Ville.”

Defendant’s assessment misses the mark. The Play recontextualizes Grinch’s easily-recognizable plot and rhyming style by placing Cindy-Lou Who — a symbol of childhood innocence and naivete — in outlandish, profanity-laden, adult-themed scenarios involving topics such as poverty, teen-age pregnancy, drug and alcohol abuse, prison culture, and murder. In so doing, the Play subverts the expectations of the Seussian genre, and lampoons the Grinch by making Cindy-Lou’s naivete, Who-Ville’s endlessly-smiling, problem-free citizens, and Dr. Seuss’ rhyming innocence, all appear ridiculous. (emphasis added)

[*Lombardo*, 279 F. Supp. 3d at 507-508]

Thus, the focus on criticizing or ridiculing the original work as a necessary element of parody seems somehow deeply engrained despite the disjunctive language and broader approach seen in the tests noted above.

But there are two points to note, one illustrated by our earlier Star Trek Axanar blog post and another illustrated by this Seuss/Star Trek case.

As to the former, express statutory recognition of the homage-like pastiche already exists in some jurisdictions, albeit not in the United States, and such recognition is an expansion past parody, as already discussed above. Since the definition of “pastiche” includes “a musical, literary, or artistic composition made up of selections from different works,” as in “a potpourri” and it is a commonly that “pastiche,” “celebrates, rather than mocks, the work it imitates,” that phrase already seems quite analogous to the definition of “parody mash-up” used in reference to the Seuss/Star Trek or the notion of “satirical pastiche” found elsewhere.

But what the Seuss/Star Trek decision makes clear, upon a close reading, is that the seeds of expansion may already exist here in the United States without any need to insert “pastiche” into the statutory language. While Seuss Star Trek (and *SAT* and

Lombardo before it) focus on criticism/ridicule of the original work itself being some essential part of parody, the language of the cases on which they rely is actually broader, as noted above. *Seuss*, 256 F. Supp.3d at 1106 (a parody “may loosely target an original” by “commenting on the original or criticizing it” and by juxtaposing works “in such a way that it creates ‘comic effect or ridicule’”).

Even under US law, parody may involve criticism or ridicule, but it may not necessarily have to involve that, and could very well simply evoke commentary or humor. Indeed, *Lombardo* relied on *Abilene Music, Inc. v. Sony Music Entertainment, Inc.*, 320 F. Supp. 2d 84 (S.D.N.Y. 2003, but *Abilene* itself was much less categorical in its definition of parody, stating:

The heart of any parody is its evocation of the message or style of the original work in order to alter that message or style in a way that humorously expresses the author’s opinion of the original work. See, e.g., *Campbell*, 510 U.S. at 580, 114 S.Ct. 1164 (defining parody). ...Plaintiffs’ argument takes too narrow a view of parody and of the fair use factors. The fair use analysis as a whole avoids quantitative measurements, relying instead on a qualitative examination of the unique characteristics of the work at issue. It is therefore not necessary for a parody to devote a certain proportion of its length to the copied material, focus only on the subject work, or rely entirely on the subject work for its melody or form...Here, the overall message of *The Forest* is that the world is corrupted and ridden with crime and drugs. In the process of making that point, *The Forest* sets up a contrast between the assertedly delusional innocence of mainstream culture and the purportedly more realistic viewpoint of the rapper, both by using cartoon characters as subjects and by quoting from and parodying *Wonderful World*. While the message of *The Forest* goes beyond simply parodying *Wonderful World*, that parody is an integral part of the song’s take on the world because it highlights the contrast between the two worldviews, and expresses the rapper’s belief in the realism of his own perspective.

[*Abilene*, 320 F. Supp. 2d at 90-91]

Though the December 2017 *Seuss Star Trek* decision relies on *Abilene*, that December 2017 opinion does not seem to appreciate that *Abilene* suggests a broader approach than the *Suess Star Trek* court applied. Perhaps, this is a question for ongoing discussion later, even though we have raised it before.

Indeed, what is unexamined here also is the notion that *Boldly!* is a parody of Star Trek rather than, or along with, being a parody of Seuss. One must consider what the legal analysis would be if that were the case. There is, or could be, something jolting in placing the well-known Star Trek adventurers in a milieu in which, for example, a Starship captain and his cohorts known for overly emotive, even pretentious actions, philosophizing, and speechifying in supposedly dangerous, life- (and even human-existence) threatening situations. In the words of *Lombardo*, that could certainly be seen as a work that “subverts the expectations of” those devoted to the Trekkie “genre, “and lampoons” that franchise by transforming galactic explorers and combatants into those with Seussian “naivete, [akin to] Who-Ville’s endlessly-smiling, problem-free citizens, and Dr. Seuss’ rhyming innocence,” in such a way as to have the Star Trek characters and stories “all appear ridiculous,” or at least funny. Shouldn’t the artist, author, critic or parodist be allowed to use a work as the means of parody and not just as its end. Surely, a satirical take on Donald Trump called *Oh! The Great Places You’ll Go (All Have “Trump” Marquees)!* or critique of Al Gore’s campaigning style entitled *The Borax* would each be a satirical parody with plenty of First Amendment protections that even admittedly aggressive rights protectors like Dr. Seuss Enterprises should have a hard time overcoming. Where it is fair to use an original work for the purpose of parody or commentary, there seems little reason to restrict that use to parody of, or commentary on, that work alone. In the world where mash-ups exist, their parodic tendencies are not unilateral, but look in multiple directions Janus-like, and the law could accommodate that reality and those choices. That is because such new works do not merely “supersede[] the objects of the original creation,” but “instead add[] something new, with a further purpose or different character, altering the first with new

expression, meaning, or message.” *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 41 (S.D.N.Y. 2017) (quoting *Campbell*).

C. *How Much Is Fair?*

There is no set percentage or amount test for how much of a text or other copy of work can be copied before the use is unfair. In fact, there are two existing theories that test infringement even in contexts that lack literal word for word copying. There is the “comprehensive non-literal similarity test,” under which infringement occurs when the non-copyright holder’s work is such that “the fundamental essence or structure of one [copyrighted] work is duplicated in another.” *Castle Rock Entertainment v. Carol Publishing Group*, 150 F.3d 132, 140 (2d Cir. 1998) (quoting and citing 4 Nimmer On Copyright §13.03[A][1] at 13-29; §13.03[A][2] at 13-45 (hereafter “Nimmer”). Another test, the “fragmented literal similarity” test, is one covering situations “in which small bits of specific expression are copied but the overall structure is not,” as Adam Steele notes.¹ This test has “won wide scale judicial acceptance” along with the earlier noted test, as ways to articulate “sometimes alternative, sometimes complementary methods of demonstrating the existence of a probative and substantial similarity sufficient to establish infringement.” Nimmer, *supra*, at §13.03[A][3] at 13-51.

It will come down often to how much of the earlier work is copied:

[N]o easy rule of thumb can be stated as to the quantum of fragmented literal similarity permitted without crossing the line of substantial similarity. The question in each case is whether the similarity relates to matter that constitutes a substantial portion of plaintiff’s work—not whether such material constitutes a substantial portion of defendant’s work.

[Nimmer at § 13.03[A][2][a]].

¹ Adam Steele, CIRCUIT SPLIT: THE RESURRECTION OF THE DE MINIMIS EXCEPTION TO ACTIONABLE COPYRIGHT INFRINGEMENT FOR COPYRIGHTED SOUND RECORDINGS, 11 *Ohio State Business Law Journal* 41, 44 (2017).

Still, some courts will take note of how much of the infringing work is made of matter from the earlier work. *See Craft v. Kobler*, 667 F. Supp. 120, 128 (S.D.N.Y. 1987) (Supreme Court precedent makes clear that mentioning in a non-exclusive list of factors an approach using the copyrighted work as the denominator “does not mean that [that] word count fraction. . .is the only relevant approach to the issue of the substantiality of the appropriation”); *see also Harper & Row v. Nation’s Enterprise*, 105 S.Ct. 2218, 2233-34 (1985) (finding infringement where 13% of the infringing work was compromised of quoted passage from copyrighted work).

Ultimately, it may come down to the common sense of the ordinary observer. Nimmer, at §13.03[E][1] at 13-78 (courts have generally applied “the ordinary observer or audience test” to determine issue of “substantial similarity”); *see also* Nimmer, at §13.03[A][1] at 13-29 (test necessarily involves “line drawing” and that line be drawn “somewhere between the one extreme of no similarity and the other of complete and literal similarity” thereby “marking off the boundaries of ‘substantial similarity’”). Hence, substantial similarity can be found in analysis, without reliance on expert testimony, of the intrinsic comparison of expressions used in light of whether an ordinary reasonable person would understand them to convey the same “total concept and feel.” *Sid & Marty Kroft TV Productions v. McDonald’s Corp.*, 562 F.2d 1157, 1161-1164 (9th Cir. 1977).

D. *Transformative Use*

As we have seen, not every such suit for such infringement is successful and the answer may depend on a variety of factors. One of those is whether the second work transforms the first work used by the second author or artist. Thus, the question

remains—does fair use allow for a derived transformational work free from copyright claims of the author of the original work? Traditionally, a “derivative work” is defined under Section 101 of Title 17 as “a work based upon one or more preexisting works, such as an abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” Such derivative works can be claimed by the creator of the original work in many cases, as the Copyright Office makes clear.

The question of whether a derivative work always infringes the original usually comes down to fair use, which either means a ratio/feel/structure analysis like that noted above, or a conclusion that the new work is transformative. According to the Copyright Office, “‘transformative’ uses are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work.” But the question of whether remaining within the original text, no matter how distilled, is sufficiently transformative to preclude infringement is likely limited to a case-by-case analysis. *See Warner Bros. Entertainment, Inc. v. RDR Books*, 575 F.Supp.2d 513 (S.D. N.Y. 2008) (Harry Potter encyclopedia found to be “slightly transformative” but this was not enough to justify a fair use defense in light of the extensive verbatim use of text from the Harry Potter books). In the end, the best one can likely do is suggest a fair use checklist, and explain how to use it.

Courts have addressed this form of so-called “appropriation art.” A number of traditional legal comment fact have gotten together to assess whether the so-called

Obama Hope poster was or was not a fair and transformative use of a photograph by an AP reporter:



Figure 6: Modifications made to the Garcia Obama Photo in the process of creating the Hope Poster.

[William W. Fisher III, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart & Marita Sturken, REFLECTIONS ON THE HOPE POSTER CASE, 25 Harv. J. L. & Tech. 243, 330 (2012).] ²

Though the entirety of the lengthy article is worth reading, the last thirteen pages by Professor Fisher lay out specific approaches that would support arguments and practical reforms as to “Why Copyright Law Should Not Proscribe Appropriation Art.” *Id.* at 313-326. Simply stated, Fisher suggests “giving artists more freedom to make creative uses of copyrighted materials,” and bases it in part on some shifts on how the law of “originality” and the concepts of *scènes à faire* should apply to found art and what is “necessary” to create “appropriation art” or something similarly inspired and differently named. *Id.* at 318-321. He also documents the evolving nature of

² According to the cited article, here are the modifications: “1. Rotation of the image by approximately five degrees in the clockwise direction. 2. Redrawing of Obama’s right shoulder line to make it appear straighter. 3. Straightening of Obama’s left collar and shoulder lines. 4. Addition of trapezoidal highlights in both eyes to give the effect of catching light in the eyes. 5. Redrawing the outlines of both ears to make them appear smooth and more perfectly shaped. 6. Adjusting the intersection of the hairline above both ears to reduce the protrusion of the ears. 7. Straightening the line of the nose. 8. Straightening the lines defining the chin and neck. 9. Extending the length of the torso below the lower boundary in the original photo. 10. Smoothing and stylizing the hairline.” REFLECTIONS ON THE HOPE POSTER CASE, 25 Harv. J. L. & Tech. at 330.

transformative use cases toward standards tying transformation toward protecting use of past works that is “socially beneficial” or has a “purpose ... different from that of the [earlier] work.” *Id.* at 322. Those are supported by the already existing case law he cites and practitioners, though he would push further toward what he considers a “more straightforward” approach of providing a “safe harbor” for any use that is “creative,” which he defines as anything that “either constitute[s] or facilitate[s] creative engagement with intellectual products.” *Id.* at 323.

Although there seems to be much merit in the Fisher philosophy of fair use, the United States Court of Appeals for the Second Circuit rejected an artistic intent or purpose test for fair use on March 26, 2021, in *The Andy Warhol Foundation v. Goldsmith*. In the recently-decided case, which the Warhol Foundation had won below, the appellate court rejected the claim that Warhol’s uses of certain photographs of Prince by Linda Goldsmith (with photographs and Warhol works depicted in 992 F. 3d at 106-107 were transformative, stating that:

[W]hether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic — or for that matter, a judge — draws from the work. Were it otherwise, the law may well “recognize[e] any alteration as transformative.”

* * *

Although we do not hold that the primary work must be “barely recognizable” within the secondary work... the secondary work’s transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.

[*Warhol*, 992 F. 3d at 114 (quoting *Nimmer*, § 13.05(B)(6) at 26)]

Because the appeal court concluded that “any reasonable viewer with access to a range of such photographs including the Goldsmith Photograph would have no difficulty identifying the latter as the source material for Warhol’s Prince Series,” the Second

Circuit rejected the claim of fair use. *Id.* at 124. In doing so, the Second Circuit rejected what seemed like a fairly persuasive amicus argument (illustrated with photos at pages 9-26) that “recognizable similarity in expression is not, in itself, substantial similarity,” that only limited aspects of the Goldsmith work was protectable, and differences in aesthetic have been determinative in previous cases.³

Understanding the decision requires an understanding of some basic facts and concepts. As the court noted, “Goldsmith is a professional photographer primarily focusing on celebrity photography, including portrait and concert photography of rock-and-roll musicians.” 992 F. 3d at 105. This eventually included taking a series of color and black/white photographs in 1981 of a “(then) up-and-coming musician Prince Rogers Nelson (known through most of his career simply as ‘Prince’).” *Id.* at 106. Eventually, Vanity Fair magazine got a license from Goldsmith to use a single black/white photograph from the collection:



³ This amicus brief is available at available at <https://clinic.cyber.harvard.edu/files/2020/03/192420cvAmicusLawProfs.pdf>.

“as an artist reference,” which in the industry meant that “an artist ‘would create a work of art based on [the] image reference.’” *Id.* at 106. As the Second Circuit noted:

Vanity Fair, in turn, commissioned [Andy] Warhol to create an image of Prince for its November 1984 issue. Warhol’s illustration, together with an attribution to Goldsmith, was published accompanying an article about Prince by Tristan Vox and appeared as follows:



In addition to the credit that ran alongside the image, a separate attribution to Goldsmith was included elsewhere in the issue, crediting her with the “source photograph” for the Warhol illustration.

[*Id.* at 107].

Understanding those facts now require some understanding of who Andy Warhol was.

According to Court, Warhol “was an artist recognized for his significant contributions to contemporary art in a variety of media. Warhol is particularly known for his silkscreen portraits of contemporary celebrities.” *Id.* at 105. After creating the item to run in Vanity Fair:

Warhol created 15 additional works based on the Goldsmith Photograph, known collectively, and together with the Vanity Fair image, as the “Prince Series.” The Prince Series comprises fourteen silkscreen prints (twelve on canvas, two on paper) and two pencil illustrations, and includes the following images:



Although the specific means that Warhol used to create the images is unknown (and, perhaps, at this point, unknowable), Neil Printz, the editor of the Andy Warhol Catalogue Raisonné, testified that it was Warhol's usual practice to reproduce a photograph as a high-contrast two-tone image on acetate that, after any alterations Warhol chose to make, would be used to create a silkscreen. For the canvas prints, Warhol's general practice was to paint the background and local colors prior to the silkscreen transfer of the image. Paper prints, meanwhile, were generally created entirely by the silkscreen process without any painted embellishments. Finally, Warhol's typical practice for pencil sketches was to project an image onto paper and create a contoured pencil drawing around the projected image.

[*Id.* at 107].

The question then is whether Warhol infringed, or simply made fair use of, the Goldsmith photo.

To answer that question, one needs to understand what constitutes “infringement” and what is “fair use.” Infringement is the unlicensed copying of a pre-existing work. Under copyright law, the original creator has a right to the first work and a presumptive right to the works derived from it. In fact the Copyright statute, “copyright protection extends both to the original creative work itself and to derivative works, which it defines as, in relevant part, ‘a work based upon one or more preexisting works, such as a[n] . . . art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted’ 17 U.S.C. § 101.” *Warhol*, 992 F. 3d at 109. “Fair use” is also statutorily protected, at 17 U.S.C. § 107, and grows out of the notion that much progress in art, literature, and science comes in building on the work of others. *Warhol*, 992 F. 3d at 109. Thus, determining whether one is in engaging in fair use of pre-existing works, and can proceed without license, depends on a balancing and weighing of the four statutory factors: (1) the purpose and character of the second artist's/author's use; (2) the nature of the earlier copyrighted work; (3) the amount and substantiality of the portion of the original work used in the second work;

(4) the effect of the use on the potential market for the first work. Because “fair use presents a holistic context-sensitive inquiry ‘not to be simplified with bright-line rules,’” it gets complicated. *Id.* at 109.

Frequently, as occurred in the *Warhol* case, the first factor becomes the battleground, and there was a trend in the law to see whether the second work had made a “transformative” use of the first, and therefore could be considered fair use. One makes such decision by determining “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* at 110 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). “Although the most straightforward cases of fair use thus involve a secondary work that comments on the original in some fashion, in *Cariou v. Prince*, we rejected the proposition that a secondary work *must* comment on the original in order to qualify as fair use. *See* 714 F.3d at 706.” *Warhol*, 992 F. 3d at 110 (emphasis in *Warhol*). *Cariou* was also a photograph case where the Court concluded that twenty-five of the thirty works at issue were transformative of the original photographs because they had been used “as raw material, transformed in the creation of new information, new aesthetics, new insights and understanding.” *Id.* at 110 (quoting *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013)).

In this *Warhol* case, however, the Second Circuit stepped back from *Cariou*, the “high-water mark of our court’s recognition of transformative works,” to reject the argument that the Warhol Prince Series was transformative, instead finding the series merely derivative. In doing so, the appellate court made clear that a transformative

purpose was a necessary, but alone insufficient element of establishing fair use, stating that:

[W]hether a work is transformative cannot turn merely on the stated or perceived intent of the artist or the meaning or impression that a critic—or for that matter, a judge—draws from the work. Were it otherwise, the law may well “recognize[e] any alteration as transformative.”

* * *

Although we do not hold that the primary work must be “barely recognizable” within the secondary work... the secondary work’s transformative purpose and character must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both recognizably deriving from, and retaining the essential elements of, its source material.

[*Warhol*, 992 F. 3d at 113-114 (quoting *Nimmer*, § 13.05(B)(6) at 26)]

Because the appeals court concluded that “any reasonable viewer with access to a range of such photographs including the Goldsmith Photograph would have no difficulty identifying the latter as the source material for Warhol’s Prince Series,” the Second Circuit rejected the claim of fair use. 992 F. 3d at 124. In doing so, the Second Circuit rejected what seemed like a fairly persuasive amicus argument (illustrated with photos at pages 9-26 of the amicus brief) that “recognizable similarity in expression is not, in itself, substantial similarity,” that only limited aspects of the Goldsmith work was protectable, and differences in aesthetic have been determinative in previous cases. It also pulled far back from the limits promoted by a number of legal scholars who, pre-*Cariou*, had suggested, in REFLECTIONS ON THE HOPE POSTER CASE, 25 *Harv. J. L. & Tech.* 243 (2012), even that “giving artists more freedom to make creative uses of copyrighted materials” should occur because it is “socially beneficial” to provide a “safe harbor” for any use that is “creative,” which the article defined as anything that “either constitute[s] or facilitate[s] creative engagement with intellectual products.” *Id.* at 318-323.

One must understand that the appellate court here did more than simply look at the works side by side—an important element of the decision that use was not transformative comes from not seeing enough newness, for sure. Slip op at 25-26. The court deemed that true even though each allegedly infringing work is “immediately recognizable as a ‘Warhol.’ Entertaining that logic would inevitably create a celebrity-plagiarist privilege; the more established the artist and the more distinct that artist’s style, the greater leeway that artist would have to pilfer the creative labors of others. But the law draws no such distinctions.” *Warhol*, 992 F. 3d at 115. But it is also important that the Second Circuit address the “commercial” purposes of the alleged use as within the same statutory prong as the transformativeness analysis. “[J]ust as we cannot hold that the Prince Series is transformative as a matter of law, neither can we conclude that Warhol and AWF are entitled to monetize it without paying Goldsmith the ‘customary price’ for the rights to her work, even if that monetization is used for the benefit of the public,” 992 F. 3d at 117, a point the Court drives home further when assessing the fourth (effect on market) statutory prong later in the opinion. 992 F. 3d at 120-122. This focus on the commercial impact, which also is further emphasized in Judge Sullivan’s concurrence, illustrates that the “fair use” analysis may be more aptly described as a “fare to use” test, in the sense that a court is determining whether the second artist must pay for the privilege of relying on the earlier creations to reach a new intended artistic destination.

It is worth noting that, despite reaction to the *Warhol* decision as an important one, it was ignored less than a week later by the Second Circuit itself in *Marano v. Metropolitan Museum of Art*, decided April 2, 2021, and the Supreme Court in *Google v. Oracle*. Indeed this debate continued almost immediately, as both the United States

Supreme Court and the Second Circuit addressed fair use cases in recent days, and gave the second artist's creative "purpose" a much greater continuing role in determining transformativeness than *Warhol* would suggest was appropriate. First, the Second Circuit itself in *Marano v. Metropolitan Museum of Art*, 844 Fed. Appx. 436 (2d Cir. April 2, 2021), held in a case about a photograph of "Eddie Van Halen playing his 'Frankenstein' guitar" that "whether the use is 'transformative'...constitutes the 'heart of the fair use inquiry,'" and that the purpose the defendant sought to serve was a primary factor in determining fair use. 844 Fed. Appx. at 436 (allowing "the Met's 'copying the entirety of [the Photo]"). Then, April 5th the United States Supreme Court decided in *Google v. Oracle* that "fair use" is an "equitable rule of reason" requiring "judicial balancing" of "the sometimes conflicting aims of copyright law" so that copyright does not "stifle the very creativity which the law was meant to foster." *Google*, 141 S.Ct. at 1186. Neither *Marano* nor *Google* cite *Warhol*, though each address at some length, including in a Supreme Court dissent, the role "purpose" plays in assessing whether a use is "transformative." *See, e.g., Google*, 141 S. Ct. at 1204, 1206. *See also* 141 S. Ct. at 1218-1219 (Thomas, J., Dissenting). So the debate goes on and fair use inquiries remain "open-ended" and subject to "context-sensitive inquiry." Summary order at 5.

Since fair use potentially applies to many media and markets beyond the visual art/photography one illustrated in *Warhol*, creators and owners of intellectual property generally need access to counsel experienced in such matters. From the book to screenplay to film progression noted as an example in *Warhol*, 292 F. 3d at 111-112, 114, 116, 118, to newer (or newly popular) genres of poetry, to spoofs, pastiches and mash-ups, to video clips, to music, the question of "fair use" v. "fare to use" will continue to come up for artists building on earlier works.

E. Conclusion

Our reality is that, even though the United States Supreme Court just decided in *Google v. Oracle* its first significant fair use decision in a generation, the law of fair use is in flux. What *Warhol* and *Google* mean, and whether they can co-exist, is now before the Second Circuit, which has asked for briefs from the parties to address the question of whether the Supreme Court’s view of the transformative nature of Google’s operating system, as expressed in its April decision, suggests that the Second Circuit should reconsider its decision in *Warhol*. In fact, the Warhol Foundation affirmatively argued that “The *Google* decision comprehensively refutes the panel’s reasoning,” and “Indeed, *Google* described — as a paradigm example of transformative use — a Warhol-like work of art that is materially indistinguishable from the works at issue here. A decision by this Court conflicting with the most recent authoritative decision of the Supreme Court cannot stand.”⁴ So stayed tune

⁴ Cited, *Google*, 141 S.Ct. at 1203 (“An artistic painting might, for example, fall within the scope of fair use even though it precisely replicates a copyrighted advertising logo to make a comment about consumerism.”) (internal quotes removed). Google Brief requesting reconsideration and rehearing is available at <https://www.hollywoodreporter.com/business/business-news/does-andy-warhol-get-same-copyright-treatment-as-google-code-4171885/>.