

The Rise of Transformative Use *

W. Gregory Lultschik

Over the past decade, digital technologies have expanded the number of ways in which people and institutions acquire, share, and utilize copyrighted material. More importantly, perhaps, our social perception of acceptable uses of copyrighted material has evolved alongside these access-facilitating technologies. The concept of "the classroom" has also become amorphous. Instructional content that previously had to be distributed in a physical classroom can be accessed at a student's convenience, and from any location with an internet connection. The advent of widely available high-speed internet access made streaming video technology a viable mass-distribution system, and its flexibility made it appealing to libraries and institutions. These systems may have earned their place in the modern educational institution's teaching toolbox, but the ease of access to information through new technologies are increasingly coming into conflict with old legal doctrines. Perhaps the most well known copyright doctrine impacted by these changes is fair use. The calculus for determining whether a particular use is legally fair under U.S. copyright law has changed over the last 5 years; and while the market impact has historically been dispositive in fair use case law, courts are now trending toward the first-factor transformative use test as a determinative factor.

The doctrine of fair use has been, and will continue to be, one of the primary tools for educational institutions to secure access to the copyrighted works they need to function. A court analyzing a claim of fair use must balance four factors: the purpose and character of the use, the nature of the copyrighted work, the amount used, and the effect of the use on the market for the copyrighted work. Because the courts must apply this balancing test on a case-by-cases basis, predicting the outcome of individual cases relying on fair use has often been frustratingly difficult. The heavy influence of the market impact factor following the ruling in *Harper & Row*

Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985), exacerbated this issue by entrenching hyper-conservative attitudes toward asserting fair use rights. That influence has declined markedly over the last several years, accelerated by the emergence of the increasingly dominant first factor test known as transformative use. Several cases over the last few years, including *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), *Bill Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605 (2nd Cir. 2006), and *A.V. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009), have illustrated the enormous influence that transformative use has gained within the fair use framework. In certain cases, it would not be an exaggeration to say that the fight to win transformative use now has the potential to decide the entire battle.

Two of the most straightforward examples of transformative use come from *Perfect 10 v. Amazon.com*, and *A.V. Vanderhye v. iParadigms*. In *Perfect 10*, a publisher claimed that Google infringed its distribution and display rights by providing users with thumbnail images of its photographs in image search results. *Perfect 10* at 1159. Google's search engine generated these thumbnails from images taken without permission from Perfect 10's website by third-parties. The Court of Appeals for the Ninth Circuit called Google's use of the images "highly transformative," because it changed the images into "pointer[s] directing a user to a source of information." *Id.* at 1165. The significant social value delivered through Google's image search service also weighed heavily in the Court's analysis. *See Id.* at 1168. One of the most significant aspects of the case was the court's treatment of market impact. The Court dismissed Perfect 10's argument that Google's images significantly impaired its market for selling thumbnail images to cell phone users. *Id.* at 1168. For the Court to declare that "the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses" was a radical shift from prior attitudes. *Id.* at 1166.

In *iParadigms*, the defendant company stored student-submitted essays in a database for use with its "Turnitin Plagiarism Detection Service". The system checked each newly submitted work against prior entries in the database for similarities, a use that the Court of Appeals for the Fourth Circuit also determined to be "highly transformative." *See iParadigms* at 638. Interestingly, the Court dismissed the argument that the use could not be transformative because nothing was added to the works as part of the archiving process as "clearly misguided." *Id.* at 639. Relying on the prior decision in *Perfect 10*, the Court stated explicitly that "[t]he use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work." *Id.* at 639. When it addressed the market impact question, the Court restricted its analysis to whether the use "*usurps the market of the original work*," not simply whether it infringed on it. Taking that argument even further, the Court said that "[a]n adverse market effect, in and of itself, does not preclude application of the fair use defense." *Id.* at 643. Even though the Court acknowledged that the Supreme Court held market impact to be the most important factor, its language here again suggests a marked departure from that philosophy.

The *Perfect 10* and *iParadigms* cases are two of the clearest examples of transformative uses where the new use had an entirely different purpose and function from the original works. It would be dangerous to assume, however, that *any* difference in purpose or function will lead to a finding of transformative use. These cases do not make it clear that a court would consider making a video available to all students enrolled in a class as analogous to using an image to organize information on the internet.

Bill Graham Archives v. Dorling Kindersley Limited, 448 F.3d 605 (2nd Cir. 2006) offers more insight into how media could be altered to suit a transformative use defense. The Court of

Appeals for the Second Circuit deemed the use of reduced images of Grateful Dead concert posters arranged as part of a timeline to be transformative because it repurposed images created for artistic expression and promotion into historical artifacts that documented and represented actual concert events on a timeline. *See Id.* at 609. The core of the Court's characterization of the transformative use is identical to that in *Perfect 10* and *iParadigms*, that the images served "a purpose separate and distinct from the original artistic and promotional purpose for which [they] were created..." but here the Court also gives three factors that influenced its decision. *Id.* at 610-11. The first two, that the reproductions were much smaller than the originals, and that the Defendant integrated them into the timeline along with text and other artwork, warrant careful consideration. It is likely that the Court would not have considered large reproductions presented in isolation to be transformative. *See Id.* at 611. It is important to keep in mind that these decisions do not provide clear guidelines for judging whether a particular use is transformative. Except in certain situations, such as with internet search engines, this is an unsettled area of law, and no prior case offers a clear precedent as to whether streaming a video as part of a class is transformative.

The best metric for estimating the likely success of a transformative use claim is the original definition from *Campbell v. Acuff-Rose Music, Inc.*, "**whether the new work merely supersede[s] 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.**" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (*emphasis added*). The cases above strongly indicate that the more a defendant can show that its use added new information that changed the character of the work, and that altered the nature of the work to tie it strongly to the new purpose behind the use, the more likely that a court will consider it to be a

transformative use. Under that framework, it does not appear plausible that streaming a video adds "something new, with a further purpose or different character, altering the first with new expression, meaning, or message." A simple format conversion does not place the video in a new context that alters its purpose or message. The proximity of the video to the lesson content it enhances is extremely important, and students would most likely view the streaming video in relative isolation from other instructional material. One argument being raised is that by virtue of being viewed, analyzed, and critiqued within the context of a class, the students extract a new expression or message from the videos. Jonathan Band, Association of Research Libraries, *Educational Fair Use Today* 13 (2007) ("[i]f repurposing a work renders its use transformative, then arguably an educational use of a work created for a different market is also transformative"); See Jonathan Band et al., Library Copyright Alliance, *Streaming of Films for Educational Purposes* 2 (2010) ("[t]he courts nonetheless found these uses fair because the defendants repurposed and recontextualized the works."). However, this argument appears to misinterpret the rationale behind courts' use of "context" as part of a transformative use. A close reading of prior cases does not appear to support the theory that streaming unaltered video content to students is a transformative use simply because the streaming took place in an educational context. What a Court would be likely to pay attention to is whether an instructor makes a video available in isolation, or embeds it into a larger collage of material in a way that increases students' understanding of the entire volume of material. For example a video depicting a staged Roman gladiator fight could be used in conjunction with information on the gladiators' position in Roman society, the purpose of the festivals they were a key part of, and the impact of gladiators on Roman culture.

Transformative use has the potential to give educational institutions more leeway in how they make video content available to traditional students and distance education programs. However, there is very little evidence to suggest that it will completely absolve institutions of liability based on use in an educational context. Until a case directly addresses the issue of video streaming in education, educators should continue to weigh each use against the last three factors, and to follow the criteria of *Campbell* and *Bill Graham Archives* as closely as possible when streaming video content to students. Instructors should also seek the advice of general counsel at their institutions for further guidance on the application of the transformative factor in fair use analyses.

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W. Gregory Lultschik is a second-year student at the American University Washington College of Law and is pursuing a focus on intellectual property and international law. He holds a B.S. in Bioengineering from the University of Pittsburgh with research in neurosignaling and neural interfaces. After graduation Mr. Lultschik hopes to work in the biotechnology industry on patents and technology transfer. He completed a legal externship with the CIP during Summer 2010.