

STRICTLY SPEAKING: TRANSFORMING FAIR USERS FROM DEFENDANTS TO COPYRIGHT HOLDERS

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I. INTRODUCTION

Under federal U.S. copyright law, when an original work¹ is created, its owner is vested with valuable and exclusive copyrights.² That owner can protect those rights in court by bringing an infringement action against “anyone who violates any of the exclusive rights of the copyright owner.”³ A defendant in an infringement action can raise a codified limitation on exclusive rights,⁴ and if successful, will not be liable. Section 107 of the Copyright Act is the “fair use” limitation on exclusive copyrights.⁵ When a court analyzes whether the defendant’s second-in-time work is transformative⁶ and determines that an alleged copyright infringement is a fair use,⁷ the consequences for the new work’s owner beyond escaping liability have not been established. This Note proposes that if a second-in-time work meets the very strict application of the transformation doctrine first articulated by Judge Pierre N. Leval in 1990⁸ and adopted in part by the Supreme Court in 1994,⁹ the owner of that second-in-time work is entitled to the exclusive rights held by an owner of original work under the U.S. Copyright Act.¹⁰

1. 17 U.S.C. § 102 (2018).
2. 17 U.S.C. § 106 (2018).
3. 17 U.S.C. § 501 (2018).
4. 17 U.S.C. §§ 107-112, 117, 121, 121A (2018).
5. 17 U.S.C. § 107 (2018).
6. *See infra* Part III.
7. 17 U.S.C. § 107 (2018) (Fair use is one of six codified “[l]imitations on exclusive rights” in U.S. copyright law.).
8. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).
9. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
10. 17 U.S.C. § 106 (2018).

Called “the most troublesome in the whole law of copyright,”¹¹ fair use is a concept that courts struggle to apply with consistent results.¹² Whether an assertion of fair use is a defense or affirmative defense to an allegation of infringement¹³ adds to the confusion, though the language of the 1976 U.S. Copyright Act plainly states that “the fair use of a copyrighted work . . . is not an infringement.”¹⁴ In 2016, the Ninth Circuit held that this phrase is unambiguous, concluding that “[f]air use is not just excused by the law, it is wholly authorized by the law.”¹⁵ However, this understanding has not had precedential force in the circuit nor has it been embraced by the Court.¹⁶

The distinction between excuse and authorization is crucial on many levels. It is crucial because when fair use is understood to be authorized by law, not an excused admission of wrongdoing, allowing a fair user to assert their own valuable copyrights is a reasonable and logical extension of a strict application of the transformation doctrine. It is crucial because a determination of transformative fair use must be less centered on the perceptions of trial court judges and consider the subjective intent of the second-in-time work’s creator, particularly in expressive work like fine art. It is also crucial because until the court takes up a classic fair use case, the application of the transformation doctrine is a mixed question of law and fact. As Justice Holmes noted, “[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”¹⁷

In this Note, Part II explores the differences between a defense and an affirmative defense beyond refuting liability, lays out the statutory language of the U.S. Copyright Act, and delves into the transformation doctrine. Part III distinguishes derivative works from fair use and examines two divergent decisions determining whether artist-defendants’ use of existing work is fair, both courts purportedly applying Leval’s transformation doctrine. These decisions illustrate the limitations of the bench’s subjective evaluation of fine art. Part III also examines a parodist’s successful assertion of infringement, shoring up the thesis that fair users hold exclusive copyrights. In Part IV,

11. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

12. For a history of the development in Anglo-American law of fair use and courts’ shifting approaches, see John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005).

13. See generally Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685 (2015).

14. 17 U.S.C. § 107 (2018).

15. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016).

16. See *infra* note 26.

17. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

this Note applies the force of Leval's transformational fair use doctrine to the realm of modern art, specifically a Robert Rauschenberg Combine,¹⁸ to illustrate the transformation doctrine and propose full federal copyright protection of works that qualify as fair use under the doctrine. Finally, Part V concludes that the logical consequence of determining that a work is fair use under Leval's doctrine is that the owner of the work holds exclusive rights in the copyrighted work listed in the 1976 Copyright Act.

II. FAIR USE UNDER THE 1976 COPYRIGHT ACT AND THE TRANSFORMATION DOCTRINE

The U.S. Copyright Act of 1976 ("the Act") limits the exclusive rights of copyright-protected work in Section 107, which describes the fair use of copyrighted work.¹⁹ To be copyright-protected, a work must be original and fixed in a tangible medium.²⁰ The owner of copyrighted work is entitled to enumerated exclusive rights, including the right to reproduce the work and to create derivative works.²¹ A violation of those exclusive rights constitutes actionable infringement.²² The fair use of a senior, first-in-time work²³ is but one of nine codified limitations on exclusive copyrights.²⁴

Despite the unambiguous statutory language that the fair use of a copyrighted work "is *not* an infringement,"²⁵ the Supreme Court has referred to fair use as an *affirmative* defense to the alleged infringement,²⁶ not a defense. From a litigation-based perspective, the distinction between the two

18. *See infra* Figure 7.

19. 17 U.S.C. § 107 (2018).

20. 17 U.S.C. § 102 (2018).

21. 17 U.S.C. § 106 (2018).

22. 17 U.S.C. § 501 (2018).

23. 17 U.S.C. § 107 (2018).

24. *See* 17 U.S.C. §§ 107-112, 117, 121, 121A (2018).

25. 17 U.S.C. § 107 (2018) (emphasis added).

26. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) ("[F]air use is an affirmative defense . . ."); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) ("The drafters . . . structured the [fair use] provision as an affirmative defense . . .").

may seem arbitrary at first glance, but it determines which party bears the burden of proof²⁷ and colors whether fair use is seen as a right or a privilege.²⁸

An affirmative defense is a concession to an allegation which is then excused.²⁹ It evolved from the common law plea of confession and avoidance, “in which a defendant admits allegations but pleads additional facts that deprive the admitted facts of an adverse legal effect.”³⁰ Were fair use an affirmative defense, its assertion would amount to a concession of infringement that is discharged from civil liability. However, the language of the code plainly states that fair use “is not an infringement.”³¹

In contrast, a defense to an allegation is an absolute denial of an allegation.³² When fair use is asserted as a defense, the defendant is not conceding to infringement, but rather denying an allegation of infringement *ab initio*.³³ This crucial distinction between an affirmative defense and a defense denying an allegation outright is reflected in the factors delineated in the Act that are weighed when determining whether a work is a fair use.³⁴

The Act lists four factors to be considered in guiding courts’ determination of whether a junior work qualifies for a fair use defense to infringement.³⁵ The first factor, “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,”³⁶ has been described as “the soul of fair use.”³⁷ Also listed are “the nature of the copyrighted work,” “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and lastly, “the effect of the use upon the potential market for or

27. *Compare Affirmative Defense*, BLACK’S LAW DICTIONARY 528 (11th ed. 2019) (“A defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense. Examples of affirmative defenses are duress (in a civil case) and insanity and self-defense (in a criminal case).” (emphasis added)), *with Defense*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A defendant’s stated reason why the plaintiff or prosecutor has no valid case; esp., a defendant’s answer, denial, or plea <her defense was that she was 25 miles from the building at the time of the robbery>.”)

28. See Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE W. RESV. L. REV. 135, 149-50 (2011) (describing fair use as a right and copyright as a privilege).

29. *Affirmative Defense*, BLACK’S LAW DICTIONARY, (11th ed. 2019).

30. *Confession and Avoidance*, BLACK’S LAW DICTIONARY (11th ed. 2019).

31. 17 U.S.C. § 107 (2018).

32. *Defense*, BLACK’S LAW DICTIONARY, (11th ed. 2019).

33. See *id.*

34. 17 U.S.C. § 107 (2018).

35. *Id.*

36. *Id.*

37. Leval, *supra* note 8, at 1116.

value of the copyrighted work.”³⁸ These factors are not the exclusive means that courts must rely on when determining fair use.³⁹ Nevertheless, it is noteworthy that factors one, three, and four examine the relationship between the new work and the copyright-protected original work.⁴⁰

Focusing on factor one, the “purpose and character” of the secondary use, Judge Pierre N. Leval first articulated the transformative fair use doctrine in a 1990 law review article.⁴¹ He posited that “[t]he first fair use factor calls for a careful evaluation whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another’s creations.”⁴² Further, “if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”⁴³ “Raw material, transformed” is clearly distinguishable from “a work *based upon* one or more preexisting works,”⁴⁴ the Copyright Act’s definition of a derivative work. When a second-in-time work truly transforms and creates something new from the first-in-time work, it is transformative. When a junior, “free riding” work only adds to, translates, or adapts a senior work,⁴⁵ necessarily referencing the substance of the senior work, the junior work’s owner only holds copyrights in the elements that they have added, and the owner of the first-in-time work retains copyrights in the elements of the second-in-time work that were preexisting.⁴⁶ At their core, works that meet Leval’s transformation doctrine are the antithesis of “free riding” work because they do not build upon another’s creation, but use that creation as a raw material, devoid of its original substance.

38. 17 U.S.C. § 107 (2018).

39. *See id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The text employs the terms “including” and “such as” in the preamble paragraph to indicate the “illustrative and not limitative” function of the examples given.”).

40. *See* 17 U.S.C. § 107 (2018).

41. Leval, *supra* note 8, at 1111.

42. *Id.* at 1116.

43. *Id.* at 1111.

44. 17 U.S.C. § 101 (2018) (emphasis added) (definition of derivative work).

45. *Id.* (listing the many variants of derivative works) (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, 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.’”).

46. 17 U.S.C. § 103(b) (2018).

The Supreme Court incorporated Leval's thesis into its analysis in its 1994 decision in *Campbell v. Acuff-Rose Music, Inc.*⁴⁷ The Court held that a rap group's parodic use of a Roy Orbison song is entitled to examination under the "purpose and character" fair use factor, regardless of the commercial nature of the parody.⁴⁸ The Court further aligned its reasoning with Leval when it found that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."⁴⁹ Applying Leval's doctrine, it stated that "parody has an obvious claim to transformative value Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."⁵⁰ Based on this transformative newness, the Court held that parodies may assert fair use.⁵¹ By adopting Leval's transformation doctrine in its opinion, the Court gave it a jurisprudential significance surpassing the scope of a Harvard Law Review article.

However, the Court did not adopt Leval's thesis *in toto*. Leval refers to fair use as a "defense" nine times in the text of his article,⁵² yet the *Acuff-Rose* Court explicitly stated that "fair use is an affirmative defense."⁵³ Again, a litigation-based inquiry renders the distinction negligible through a lens of liability, because if fair use is successfully raised, the remedy sought by a plaintiff will not be granted.⁵⁴ If instead a successful fair use assertion under Leval's transformation doctrine is taken to its logical end, the result transcends refuting liability, and the innate newness and originality of the junior work affords its owner exclusive copyrights.

III. THE TRANSFORMATIVE FAIR USE DOCTRINE AND MODERN APPLICATIONS

When a second-in-time work's use of a senior copyrighted work is a fair use under a strict application of the transformation doctrine, that new work should be entitled to the full protection of U.S. copyright because it is an

47. 510 U.S. 569, 579 (1994).

48. *Id.* at 571, 578-84.

49. *Id.* at 579.

50. *Id.*

51. *Id.*

52. Leval, *supra* note 8, at 1110, 1111, 1116, 1121, 26, 1126, 1130, 1133, 1134.

53. 510 U.S. at 590 (providing no clear rationale for the Court's rejection of this part of Leval's proposal).

54. *See Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Affirmative Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

original work of authorship fixed in a tangible medium, satisfying the requirements of copyrightability.⁵⁵

An intrinsic part of a transformative fair use assertion is newness and originality. The Court has held that “originality requires independent creation plus a modicum of creativity” under both the Constitution and the statute.⁵⁶ *Nimmer on Copyright*, the definitive treatise on U.S. copyright law, states that “[a]ny ‘distinguishable variation’ of a prior work constitutes sufficient originality to support copyright if that variation is the product of the author’s independent efforts and is more than merely trivial.”⁵⁷ More than “distinguishable,” when a fair use is transformative, it is the sheer newness in the use of the senior work that renders its use fair. In a transformative work, the senior work “is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings.”⁵⁸ It’s that newness, that complete change in perspective without reference to the senior work, that lends itself to the characterization of “originality.”

Rather than using the senior work as its basis, a transformative work uses an element of the senior work in an entirely new fashion disconnected from both the meaning intended by its creator and its perception by the public.⁵⁹ In *Acuff-Rose*, when evaluating whether a junior work qualified as fair use, Justice Souter emphasized that “context is everything.”⁶⁰ In a transformative work, the senior work becomes like paint on a palette, void of the meaning its creator intended and entirely changed. Thus, the senior work is so removed from its original “context” that its original meaning is vanquished.

When the transformation doctrine is applied in determining whether a junior work is a fair use of a copyright-protected senior work, the senior work’s essence and the subjective intent of its creator are analyzed.⁶¹ Applying Leval’s transformation doctrine, the *Acuff-Rose* Court reasoned that “the question of fairness asks what else the parodist did besides go to the heart of the original.”⁶² Likewise, any strict application of the transformation doctrine must both identify the “heart” of the senior work and contrast it with the junior work.

55. 17 U.S.C. § 102 (2018).

56. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

57. 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.01 (2020).

58. Leval, *supra* note 8, at 1111.

59. *See id.*

60. 510 U.S. 569, 589 (1994).

61. *See id.*

62. *Id.*

A. *Warhol and the Impact of His Fifteen Minutes of Fame on the Bench*

Just as measuring similarity is an “of necessity vague”⁶³ and “arbitrary” test for copyright infringement,⁶⁴ the subjective task of identifying the “heart of the original” put upon courts when analyzing fair use leads to muddled results. In a recently reversed opinion and order, the District Court for the Southern District of New York granted the Andy Warhol Foundation for the Visual Arts’ motion for summary judgment on the basis of fair use of another artist’s photograph of Prince.⁶⁵ Warhol created sixteen works using Lynn Goldsmith’s Prince photograph as a “source,” and when initially published, it was attributed as such.⁶⁶ However, it was more than an inspiration. The photograph was most likely directly used to create a silkscreen print, as Warhol typically worked in this style when creating his well-known portraits.⁶⁷

63. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

64. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930) (“We have to decide how much, and while we are as aware as any one that the line, wherever [sic] it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases.”).

65. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 317 (S.D.N.Y. 2019), *rev’d and remanded*, 992 F.3d 99 (2d Cir. 2021) (petition for panel rehearing and rehearing en banc pending in light of the Court’s finding of fair use in *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021)).

66. *Id.* at 318-19 (“The article contained a copyright attribution credit for the portrait as follows: ‘source photograph © 1984 by Lynn Goldsmith/LGI.’”).

67. *Id.* at 319.

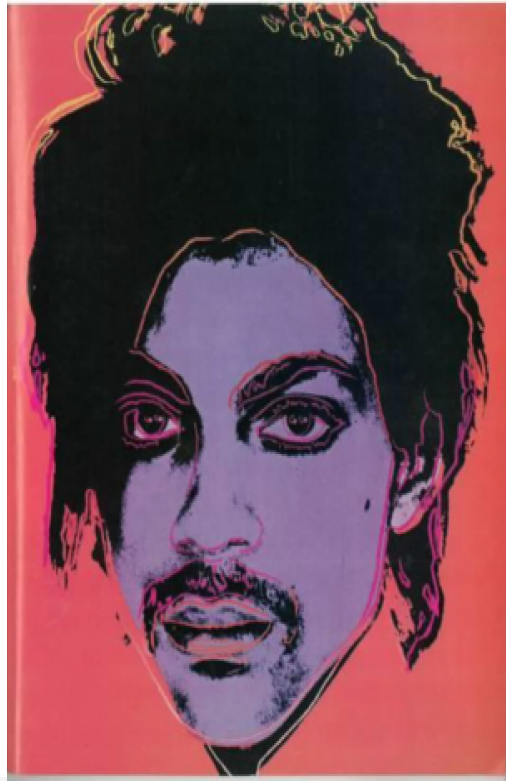


Fig. 1. Lynn Goldsmith's photograph (1981); Fig. 2. One of Warhol's Prince Series (1984).

The court purportedly applied the transformation doctrine to determine that the Warhol works were a fair use of the photograph.⁶⁸ According to the photographer, the portrait conveyed its subject's vulnerability and discomfort.⁶⁹ The court ruled that "[t]he [Warhol] Prince Series works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure. The humanity Prince embodies in Goldsmith's photograph is gone."⁷⁰ But the court's perception seems to give great deference to the relative renown of Warhol, adding that "each Prince Series work is immediately recognizable as a 'Warhol' rather than as a photograph of Prince."⁷¹ Seemingly relying on the cultural impact of Warhol's work, the court stated that "[the Warhol Prince Series works] add something new to the world of art and the public would be deprived of this contribution if the works could not be distributed."⁷² Neither the statutory language of the Act nor Leval's transformation doctrine afford added deference to a junior work created by a well-known artist. If "reasonable perception" is the test for transformation, then comparing the two works leads to a conclusion that the Warhol works are derivative⁷³ of the Goldsmith photograph, as they are necessarily based on and referential of the senior work. As noted in the opinion reversing the District Court's grant of summary judgment, "the Goldsmith Photograph remains the recognizable foundation upon which the Prince Series is built."⁷⁴

B. *Cariou, Hubris*⁷⁵ *Restrained*

Further, differences in mood or tone between the senior and junior works that the court perceives do not rise to the level of the jurisprudence cited in

68. *Id.* at 325 (quoting *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006)) ("But the '[m]ost important' consideration under the first factor is the 'transformative' nature of the work at issue.").

69. *Id.* at 318.

70. *Id.* at 326.

71. *Id.*

72. *Id.*

73. *See* 17 U.S.C. § 101 (2018).

74. *Andy Warhol Found. for the Visual Arts, Inc.*, 992 F.3d at 115.

75. The use of "hubris" refers to Judge Wardlaw's recent remarks during oral argument in an infringement case. Oral Argument at 17:24, *Zindel v. Fox Searchlight Pictures*, No. 18-56087 (9th Cir. 2019), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000034822 ("I think it's kind of hubris for a district court judge to think they have enough knowledge and basis in film and theory

the *Warhol* opinion. In *Cariou v. Prince*, a photographer-plaintiff alleged infringement by the artist Richard Prince, who is well known and highly regarded for his painting and collage work that incorporates photographs and decontextualizes them, creating something entirely new.⁷⁶ According to Prince, he “‘completely tr[ies] to change [another artist’s work] into something that’s completely different.’”⁷⁷ His approach mirrors Leval’s doctrine because the senior work is used as “raw material, transformed,”⁷⁸ and “employ[s] the quoted matter in a different manner or for a different purpose from the original.”⁷⁹ In the twenty-five collages deemed to be a fair use of Cariou’s work, the senior work is obscured or mosaiced.⁸⁰ In strict adherence to the transformation doctrine, the court concluded, “Prince has not presented the same material as Cariou in a different manner, but instead has ‘add[ed] something new’ and presented images with a fundamentally different aesthetic.”⁸¹

– things people go to school for at USC, UCLA to learn all about– that they can decide this on just a dismissal stage except I think in rare cases where it’s just obviously so frivolous.”).

76. 714 F.3d 694, 699 (2d Cir. 2013) (“Prince’s work, going back to the mid-1970s, has involved taking photographs and other images that others have produced and incorporating them into paintings and collages that he then presents, in a different context, as his own.”).

77. *Id.* at 707.

78. Leval, *supra* note 8, at 1111.

79. *Id.*

80. *Cariou*, 714 F.3d at 700.

81. *Id.* at 708 (quoting *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998)).



Fig. 3. Patrick Cariou, Photographs from *Yes Rasta* 11, 59 (2000)



Fig. 4. Richard Prince, *James Brown Disco Ball* (2007).

Notably, the *Cariou* court distinguished transformative work from derivative work, stating that “[o]ur conclusion should not be taken to suggest, however, that any cosmetic changes to the photographs would necessarily

constitute fair use. A secondary work may modify the original without being transformative.”⁸² In contrast to Richard Price’s collages, the silkscreens Warhol used were most likely directly made from the cropped photograph,⁸³ and at their “heart,” both works are portraits of the musician Prince. Similarly, the *Cariou* court found that five of Prince’s works “do not sufficiently differ from the photographs of Cariou’s that they incorporate for us confidently to make a determination about their transformative nature as a matter of law.”⁸⁴

The alterations the *Warhol* court perceived to change the “mood” of the portraits from vulnerable to “larger-than-life icon”⁸⁵ are very much in line with, or even less than, the alterations the *Cariou* court found to potentially fall short of transformation.⁸⁶ Remanding the issue of whether five of the Prince works in question were infringements or fair use, the court described the change between the senior and junior work.

Lozenges painted over the subject’s eyes and mouth . . . make the subject appear anonymous, rather than as the strong individual who appears in the original. Along with the enlarged hands and electric guitar that Prince pasted onto his canvas, those alterations create the impression that the subject is not quite human. Cariou’s photograph, on the other hand, presents a human being in his natural habitat, looking intently ahead.⁸⁷

82. *Id.*

83. *Andy Warhol Found. for the Visual Arts*, 382 F. Supp. 3d at 318.

84. 714 F.3d at 710-11.

85. 382 F. Supp. 3d at 329.

86. 714 F.3d at 711.

87. *Id.*; see figures 5, 6.



Fig. 5. Patrick Cariou, Photograph from *Yes Rasta* 118 (2000); Fig. 6. Richard Prince, *Graduation* (2007).

This hesitation to find these alterations in mood or subjective impression fair uses by the *Cariou* court is not acknowledged in the *Warhol* decision. More strikingly, the context of Warhol's works in relation to the original photograph escapes examination, though that abrogation of original context is a basis of transformation under Leval's doctrine, *Acuff-Rose*, and *Cariou*.⁸⁸

C. *Pushing Transformation Forward*

Once a junior work is determined to be a fair use, the consequences of that classification have rarely been explored beyond the realm of infringement liability. The inquiry cannot stop there, and it need not under Leval's doctrine. For a court to find fair use under the transformation doctrine, a Venn diagram of shift in context and innate newness is essential. It is the "fundamentally different aesthetic"⁸⁹ that the *Cariou* court found to be determinative. The logical conclusion, particularly under Leval's transformation doctrine, is that the junior work is an "original work[] of authorship fixed in any tangible medium" and as such is entitled to the full

88. See *supra* Part II; Sections III.A, III.B.

89. *Cariou*, 714 F.3d at 708.

protection of the U.S. Copyright Act, with its creator having the ability to assert infringement when necessary.⁹⁰

Additionally, when fair use is seen as an absolute defense and denial of infringement, granting copyrights to a transformative fair user squares with concepts of equity and Congress' constitutional power to "promote the Progress of Science and Useful Arts"⁹¹ through the Act. Explaining the goals of the U.S. copyright system, the Court noted:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.⁹²

Granting such powerful rights in "fair return" cannot be reasonably justified if a fair use assertion is merely an excused liability. Recognizing that fair use is not an infringement as a threshold matter allows a transformative fair user to fit the bill of the "author" who is incentivized to create artistic work for the general public good.

Judicial inroads have been made towards establishing rights held by a fair user. The creator of a stage play parodying the movie *Point Break* has been successful in asserting infringement against her former producer in the Second Circuit, which held that "an unauthorized but lawful fair use employing preexisting copyrighted material may itself merit copyright protection."⁹³ The court cited the legislative report on the "compilations and derivative works" section of the Act⁹⁴ for support, highlighting that "the unauthorized reproduction of a work might be 'lawful' under the doctrine of fair use or an applicable foreign law, and if so the work incorporating it could be copyrighted."⁹⁵ But, as was the case in *Acuff-Rose*, parodies seem to lend themselves to successful analysis under the transformation doctrine in a way that other categories of fair use have yet to meet. The Act's language does not ascribe to any such hierarchy,⁹⁶ so there is no reasonable basis for an assertion of transformative fair use to be more successful when applied to

90. 17 U.S.C. § 102 (2018).

91. U.S. CONST. art. I, § 8, cl. 8.

92. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

93. *Keeling v. Hars*, 809 F.3d 43, 49 (2d Cir. 2015).

94. 17 U.S.C. § 103 (2018).

95. *Keeling*, 809 F.3d at 50 (quoting H.R. Rep. No. 94-1476, at 58 (1976)).

96. *See* 17 U.S.C. § 107 (2018).

parodies than other junior works, and no legal basis to deny the exclusive copyrights to transformative fair users.

IV. TRANSFORMATIVE FAIR USE AND ITS IMPLICATIONS:
RAUSCHENBERG'S *DYLABY*

A functional example of a junior work's transformative fair use of a senior work is helpful to illustrate the thesis that the junior work is entitled to copyright protection.

Robert Rauschenberg's Combines are both paintings and sculptures at once,⁹⁷ and they tend to incorporate senior copyright-protected works. John Cage coined the term "multiplicity" to describe Combines, analogizing the form to three radios simultaneously blaring, destroying the intended message from each radio and creating something apart.⁹⁸ In a book accompanying a comprehensive Rauschenberg exhibition, Combines are explained as "the result of bringing into the zone of art all kinds of objects and images that were originated outside the painting by other people for different purposes than the artist's use."⁹⁹ These characterizations of Rauschenberg's work parallel Leval's understanding of transformative use in that absolute contextual newness is created when incorporating senior works.¹⁰⁰

97. Yve-Alain Bois, *Eye To the Ground*, ARTFORUM, Mar. 2006, <https://www.artforum.com/print/200603/yve-alain-bois-10489> ("[T]he standard acceptance of 'Combine' [is] something between painting and sculpture.").

98. JOHN CAGE, *On Robert Rauschenberg, Artist, and His Work*, in SILENCE 98, 101-02 (1961).

99. SMITHSONIAN INSTITUTION, ROBERT RAUSCHENBERG 5 (1976).

100. See *supra* Part II.



Fig. 7. Robert Rauschenberg, *Dylaby* (1962).

Dylaby,¹⁰¹ Rauschenberg's 1962 contribution to the "dynamic labyrinth" exhibition by the New Realists at the Stedelijk Museum in 1962,¹⁰² illustrates

101. ROBERT RAUSCHENBERG, *DYLABY* (1962); *see supra* Fig. 5.

102. SMITHSONIAN INSTITUTION, *supra* 99, at 38.

the transformation both Judge Leval and John Cage described. The Combine incorporates a tin Coca-Cola sign, its ornate script logo theoretically eligible for copyright protection as a graphic work.¹⁰³ As Cage described, the transformation of senior works in Combines “bec[o]me as much of a subject as the paint . . . causing changes of focus: A third palette.”¹⁰⁴ In *Dylaby*, the sign itself becomes a post-modern addition to the known colors previously limiting the fine artists’ range. New York art historian and museum director Alan R. Solomon explained that the senior works incorporated into Rauschenberg’s Combines “function as components of an enriched visual vocabulary which enlarges the range of pictorial opportunities open to the artist to a significant degree.”¹⁰⁵ Instead of limiting his palette to the vocabulary of color, in *Dylaby*, Rauschenberg paints with things by transforming them completely into a new essence, irrelevant of and separate from their original purpose or meaning. The senior work is “used as raw material,” as Leval described.¹⁰⁶

Rauschenberg’s use of the tin sign is a fair use under a strictly applied transformation doctrine, in line with the Richard Prince collages in *Cariou*.¹⁰⁷ It follows that *Dylaby* is, of itself, an original work of authorship, fixed in a tangible medium, regardless of its incorporation of the senior work. As such, the owner of its copyright should be entitled to the same exclusive rights¹⁰⁸ as any other similarly situated copyright holder, including the right to protect the work against infringement of those rights.

V. CONCLUSION

When the use of a senior work is found to be fair under a strict application of the transformation doctrine, the author of the junior work has not only successfully avoided liability but holds exclusive rights under the U.S. Copyright Act. A plain-language reading of the Act, Leval’s transformation doctrine, and the High Court’s ruling in *Acuff-Rose* supports this conclusion. First, courts must adhere to the unambiguous statutory language of the U.S. Copyright Act and treat fair use as a defense, not an excused infringement. Second, Leval’s transformation doctrine must be

103. See 17 U.S.C. § 102(a)(5) (2018) (listing graphic work as a work of authorship protected by copyright law).

104. CAGE, *supra* note 98, at 99.

105. ALAN R. SOLOMON, ROBERT RAUSCHENBERG 3 (1963).

106. Leval, *supra* note 8, at 1111.

107. See *supra* Part III.

108. 17 U.S.C. § 106 (2018).

strictly applied if applied at all when the court analyzes whether the use of a senior work is fair, or else the line between fair uses and derivative works disappears. And third, when the use of a senior work is found to be a fair use under the transformation doctrine, the new work is innately original. If that work is also fixed in a tangible medium, its owner is entitled to all the exclusive rights of federal copyright and protection under the law.