

## LITIGATING FAIR USE

Dale M. Cendali\*

This Article's topic is "Litigating Fair Use." What follows is a discussion of techniques a litigator can use to win a case and in so doing, help shape the development of fair use law.

Fair use is well-recognized as one of the "most troublesome" doctrines in all of copyright.<sup>1</sup> There are many famous cases where the district court wrote a compelling opinion holding that something was or was not fair use, and then was reversed by a court of appeals in an equally certain-sounding and compelling opinion holding the opposite.<sup>2</sup> Sometimes we have seen the Supreme Court take yet another view, or

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\* Dale M. Cendali, P.C. is a nationally recognized leader in the field of intellectual property litigation, having successfully litigated and tried numerous high-profile cases, and having argued and won before the U.S. Supreme Court. Dale heads the Copyright, Trademark, Internet and Advertising ("CTIA") Practice Group at Kirkland and Ellis, LLP and is an adjunct professor at Harvard Law School, teaching copyright and trademark litigation. She originally delivered this Article, in modified form, as the 36th Annual Horace S. Manges Lecture at Columbia University School of Law's Kernochan Center for Law, Media, and the Arts on March 25, 2024. She gives her sincere thanks to the amazing Kernochan Center, and in particular to Professor Jane Ginsburg and Executive Director Philippa Loengard, for selecting her to deliver the Manges Lecture. She also would like to thank Josh Berlowitz, Columbia Law School '23 and a former associate at Kirkland & Ellis LLP and current judicial law clerk at the United States Court of Appeals for the Second Circuit, for his help in preparing the lecture and this Article.

1. *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam)); see also Gary Myers, *Muddy Waters: Fair Use Implications of Google LLC v. Oracle Am., Inc.*, 19 NW. J. TECH. & INTELL. PROP. 155, 179 (2022) ("The best evidence of how unpredictable fair use determinations can be *ex ante* is the deeply divided judiciary in each of the four modern fair use [Supreme Court] cases."); cf. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 20 (2021) (fair use's judicial origins, "as well as modern courts' use of the doctrine, makes clear that the concept is flexible, that courts must apply it in light of the sometimes conflicting aims of copyright law, and that its application may well vary depending upon context.").

2. *E.g.*, *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 331 (S.D.N.Y. 2019) (granting summary judgment on fair use), *rev'd*, 11 F.4th 26, 32 (2d Cir. 2021) (no fair use as a matter of law), *aff'd*, 598 U.S. 508, 551 (2023); *Cariou v. Prince*, 784 F. Supp. 2d 337, 354 (S.D.N.Y. 2011) (granting summary judgment that use of 35 images was not fair use), *rev'd in part and vacated in part*, 714 F.3d 694, 712 (2d Cir. 2013) (fair use of 30 out of 35 images; material factual disputes as to other five precluding determination of fair use); see also Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 n.9 & n.10 (1990) (collecting cases on "reversals and divided courts"). Judge Leval's observation, nearly

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multiple views, where there is a dissent and perhaps a concurrence as well.<sup>3</sup> Court after court has noted that fair use requires “case-by-case analysis” that carefully balances the four statutory fair use factors<sup>4</sup>—plus sometimes other considerations as well<sup>5</sup>—rather than rigid application of “bright-line rules.”<sup>6</sup> The overall intent is to help judges reach a result that furthers the bedrock constitutional principle that copyright laws “promote the progress of science and useful arts.”<sup>7</sup> The flexible nature of fair use provides an opportunity—and perhaps a challenge—for a copyright litigator to not only figure out how best to apply *existing* precedent to create a persuasive argument, but also how to invite the creation of *new* precedent.

Copyright law, and fair use specifically, starts from Congress’s statutory text, is informed by the Copyright Office’s guidance, is interpreted by the courts, and is analyzed by law professors. But litigators are not passive in this process; rather, they play an important role as well. In fact, the modern litigator often is in a uniquely good position to affect the development of fair use. These days, litigators practice all around the country, with admissions in many courts and *pro hac vice* appearances before others. This cross-country practice creates the opportunity—and in fact the necessity—to keep abreast of trends and splits across the various circuits, to figure out what best to argue in a given case, and thereby to hope to advance the law and their clients’ interests. Simply put, if the law of fair use is developed by case precedent, then the people whose arguments impact cases—that is, litigators—can help shape the law.

How do litigators do it? In this Article, I will discuss three of the primary tools in the litigator’s proverbial tool kit: law, facts, and persuasion. At the end of the day, these three things determine every fair use outcome. The art of litigating fair use is found in the gaps between precedent, when a litigator’s cutting-edge case is one about which reasonable minds may disagree. It is in those gaps where the litigator shines, because

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thirty-five years ago, that “[j]udges do not share a consensus on the meaning of fair use” remains as valid today as it was then. *Id.* at 1106.

3. *E.g.*, Oracle Am., Inc. v. Google Inc., No. 10-cv-3561, 2016 WL 3181206 (N.D. Cal. June 8, 2016) (denying Rule 50 motions to overturn jury verdict on fair use), *rev’d*, 886 F.3d 1179, 1210 (Fed. Cir. 2018) (no fair use as a matter of law), *rev’d*, 593 U.S. 1, 40 (2021) (fair use as a matter of law).

4. *Warhol*, 598 U.S. at 527 (internal citation and quotation marks omitted) (quoting *Google*, 593 U.S. at 20) (“Fair use is a flexible concept, and its application may well vary depending on context.”); *Google*, 593 U.S. at 23 (“fair use depends on the context”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”).

5. *Google*, 593 U.S. at 19 (“[W]e, like other courts, have understood that the provision’s list of factors is not exhaustive (note the words ‘include’ and ‘including’).”); *see also* Joshua Berlowitz, Note, *The Five-Factor Framework: A New Approach To Analyzing Public Benefits in Fair Use Cases*, 46 COLUM. J.L. & ARTS 61, 65 (2022) (pre-codification, courts historically weighed a “fluctuating host of other considerations, including the challenged use’s public benefits” as part of the fair use analysis); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1152 (1990) (“[U]nless one disregards the plain language of the statute, the statutory factors are not exclusive.”); *see generally* 4 NIMMER ON COPYRIGHT § 13F.09 (discussing “a range of alternative and supplementary frameworks to fill the analytical gap” left by the statutory factors).

6. *Campbell*, 510 U.S. at 577.

7. *See id.* at 599 (Kennedy, J., concurring) (“[U]nderprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create.”); *see also* U.S. CONST., art. 1, § 8, cl. 8.

the law there is at its most malleable and the ability to persuade is most important. And with fair use, there are a *lot* of those gaps.

In this Article, I will explore the litigator's arsenal, moving from law to facts to persuasion, using some of my own cases to illustrate each part. Finally, I will conclude with what I see as some of the next big issues in fair use from my position in the trenches and some thoughts on how litigators may help resolve them.

Without further ado, I turn to the litigator's first weapon: understanding the law of fair use, and especially its malleability. I will discuss a small slice of legal history that I hope will show how litigators not only understand the law, but have an opportunity to affect its development.

## I. LITIGATING THE LAW OF FAIR USE.

To make sure we are all on the same page, let us start with the statute. Section 107 of the Copyright Act is the fair use provision.<sup>8</sup> It begins by describing the types of uses that may be fair use, and then lays out four non-exclusive factors that a court "shall" consider in addressing fair use.

I think it is fair to say, however, that perhaps the most significant development in fair use law over the past thirty years came not from Congress but from the courts, in the form of the transformative use doctrine. First proposed by Judge Leval in a seminal *Harvard Law Review* article,<sup>9</sup> transformative use was adopted by the Supreme Court in 1994 in *Campbell v. Acuff-Rose Music, Inc.*<sup>10</sup> There, the Court held that the first fair use factor—which considers the "purpose and character of the use"—asks whether a use is transformative.<sup>11</sup> As the Supreme Court explained, that means the first fair use factor looks for "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."<sup>12</sup>

Litigators and courts ever since have grappled with what this means in practice. Some courts took a broad view of transformativeness and essentially found that any

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8. 17 U.S.C. § 107 ("Notwithstanding the provisions of sections 106 and 106A, 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. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(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. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors").

9. Leval, *supra* note 2, at 1111.

10. *Campbell*, 510 U.S. at 569.

11. *Id.* at 579 (quoting Leval, *supra* note 2, at 1111).

12. *Id.* (alterations, internal quotation, and citation omitted).

work that added any new expression was transformative.<sup>13</sup> In these cases, such a finding often had a domino effect on the other factors.<sup>14</sup> This “litmus test” approach to fair use led to an overall conclusion of fair use whenever transformative use was found.<sup>15</sup> Other courts, however, were less keen to find a use transformative,<sup>16</sup> or were less likely to let it alone dictate the other factors.<sup>17</sup>

The problem with the all-or-nothing approach, leaving aside the reduction of the importance of the other factors, is that it runs headlong into the question of where the derivative works right ends and where transformative use begins. Section 106 of the Copyright Act grants to the copyright owner the exclusive right to prepare derivative works<sup>18</sup>—that is, to prepare works “based on” the original in “any other form in which a work may be . . . transformed . . .”<sup>19</sup> How *transformed* derivative works differ from *transformative* fair uses, *Campbell* doesn’t say. Courts began noting this tension in various ways over the years, and it became increasingly a subject of discussion, especially after *Cariou*, which in finding Prince’s fair use, rejected claims that it was

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13. *E.g.*, *Cariou v. Prince*, 714 F.3d 694, 707–08 (2d Cir. 2013) (finding transformativeness where Prince’s works “have a different character, give Cariou’s photographs a new expression, and employ new aesthetics with creative and communicative results distinct from Cariou’s.”); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177 (9th Cir. 2013) (“[A]n allegedly infringing work is typically viewed as transformative as long as new expressive content or message is apparent.”).

14. *See* Dale Cendali & Abbey Quigley, *The Death of the Litmus Test*, 23 CHI.-KENT J. INTELL. PROP. 139, 141–42 (2023).

15. *See id.* at 139; *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014) (“The Second Circuit has . . . concluded that ‘transformative use’ is enough to bring a modified copy within the scope of § 107.”); 4 NIMMER ON COPYRIGHT § 13.05[I][4][d] (discussing “stampeding” in *Google v. Oracle*); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 584 (2008) (fair use factors are correlated with one another); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 46, 84 (conducting an empirical analysis of the fair use doctrine and concluding “transformative use by the defendant is a robust predictor of a finding of fair use”).

16. *E.g.*, *Gaylord v. United States*, 595 U.S. F.3d 1364, 1373–74 (Fed. Cir. 2010) (“We conclude that the stamp does not transform the character of The Column. Although the stamp altered the appearance of The Column by adding snow and muting the color, these alterations do not impart a different character to the work.”); *Castle Rock Ent., Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 142 (2d Cir. 1998) (“Any transformative purpose possessed by *The SAT* is slight to non-existent.”); *Dr. Seuss Enters., LP v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997) (finding “there is no effort to create a transformative work with ‘new expression, meaning, or message’ where ‘the substance and content of’ the original work was not ‘conjured up’ by the alleged parodic use at issue”).

17. *E.g.*, *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 548–49 (S.D.N.Y. 2008) (“In this case, . . . the Lexicon’s purpose is only slightly transformative of the companion books’ original purpose. As a result, the amount and substantiality of the portion copied from the companion books weighs more heavily against a finding of fair use.”); *see also* Cendali & Quigley, *supra* note 14, at 144–45 (discussing the court’s decision not to apply a litmus test in *Warner Bros.*).

18. 17 U.S.C. § 106(2).

19. 17 U.S.C. § 101 (emphasis added).

derivative work.<sup>20</sup> But this tension was not noted just by judges. It was also written about in law reviews<sup>21</sup> and discussed by bar associations.<sup>22</sup>

Turning to the role of litigators specifically in this ongoing conversation, litigators contributed in several ways. Most directly, litigators contribute to the development of fair use law by making arguments in their own cases, whether in briefs or in oral argument, leading to the judicial opinions we all love to discuss. As I noted above, this involves closely keeping abreast of precedent and figuring how to tease out language and nuances that might be persuasive to win the case for their clients.

But the United States also provides an opportunity for even people not directly involved in a case to provide their views, and this is a particularly useful tool in fair use cases. Here I speak of amicus briefs.<sup>23</sup> Litigators must consider when to solicit amici in cases where their client is a party, when doing so would add something useful to the discussion. Moreover, as a practical matter, parties may not have space in their briefs to fully explore every helpful dimension. And while we perhaps think of amicus briefs most prominently at the Supreme Court, there can be a role for amici at all stages in a case, including district court proceedings, where they can assist the litigators in shaping the issues from early on.<sup>24</sup>

Note, however, that different procedures apply to amicus briefs at different levels. At the district court, for example, you need leave of court to submit one. For example, as I will discuss more later, *Fox News Network, LLC v. TVEyes, Inc.* was a single-plaintiff fair use case that we litigated on behalf of Fox.<sup>25</sup> It involved the reproduction of television news content that TVEyes argued assisted with media monitoring.<sup>26</sup> As the case raised important issues to other news organizations as well, we encouraged them to share their views with the court by seeking leave to file an amicus brief at the time of summary judgment briefing at the district court.<sup>27</sup> Judge Hellerstein granted leave, and the resulting briefing helped frame the effect on the market issues.<sup>28</sup>

In addition, when your client isn't a party to a case, they can still have their voice heard as an amicus. As an example of this, let us turn to *Cariou v. Prince* and how amicus briefs played a role. *Cariou* asked whether it was fair use for appropriation artist Richard

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20. See *TCA Television Corp. v. McCollum*, 839 F.3d 168, 181 (2d Cir. 2016); *Kienitz*, 766 F.3d at 758.

21. E.g., Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs*, 16 VAND. J. ENT. & TECH. L. 785, 842–43 (2013) (criticizing approaches that “tend[] to conflate derivation and fair use.”); R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 485 (2008).

22. E.g., Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use? The 1999 Donald C. Brace Memorial Lecture*, 46 J. COPYRIGHT SOC’Y U.S.A. 513, 515 (1999) (“[W]hen it comes to derivative works, fair-use doctrine is a red herring and we should just dump it.”).

23. See FED. R. APP. P. 29.

24. See, e.g., *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282, 287–88 (S.D.N.Y. 2013), *aff’d*, 804 F.3d 202 (2d Cir. 2015).

25. 43 F. Supp. 3d 379 (S.D.N.Y. 2014), *aff’d in part, rev’d in part*, 883 F.3d 169 (2d Cir. 2018).

26. *Id.* at 383–84.

27. See Brief of Amici Curiae Bright House Networks et al. in Support of Plaintiff’s Renewed Motion for Summary Judgment, *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (No. 13-cv-5315).

28. *TVEyes*, 43 F. Supp. 3d at 395–97.

Prince and the gallery that exhibited his works to use photographer Patrick Cariou's photographs of Rastafarians as part of a series of paintings and collages.<sup>29</sup> On behalf of our clients, the American Society of Media Photographers and the Picture Archive Council of America, we filed an amicus brief arguing that an overbroad conception of transformative use would destroy the original author's exclusive rights, including the right to prepare derivative works.<sup>30</sup> We wrote that:

[I]t is clear as a matter of statutory construction that merely because a work is "transformed" in a second author's work does not make that second work a fair use. To hold otherwise would put Section 107 in conflict with, and potentially nullify, the Copyright Act's express grant to copyright owners of the exclusive right to prepare derivative works, which *by definition* involve transformation.<sup>31</sup>

But the role of an amicus is not just to point out problems; rather, it is better to offer *solutions*. Thus, we argued that the tension between derivative works and transformative use tension could be resolved by ensuring the use in some way *related back* to the original work. Specifically, we wrote: "It is th[e] necessary relationship between the original work and the new work that can justify the taking of the original without permission or compensation."<sup>32</sup>

Counsel for Prince and his co-defendants in their reply brief specifically cited both counsel for Cariou's argument on this score as well as our amicus brief to challenge this "relation-back" idea.<sup>33</sup> In finding that twenty-five of the thirty Prince works at issue were fair use as a matter of law, the Second Circuit agreed with the defendants, rejected this relation-back principle, and adopted a broad view of transformative use.<sup>34</sup>

*Cariou*, however, was not the end of the debate between the derivative works right and transformative use. Famously, just a year later in *Kienitz v. Snornie Nation, LLC*, Judge Easterbrook, writing for the Seventh Circuit, expressly criticized *Cariou*, and in particular its overreliance on transformativeness at the expense of the statutory factors.<sup>35</sup> The court stated that, in the Seventh Circuit's view, "*Cariou* and its predecessors in the Second Circuit do no[t] explain how every 'transformative use' can be 'fair use' without extinguishing the author's [derivative works right]."<sup>36</sup>

By the time *Andy Warhol Found. for the Visual Arts v. Goldsmith* reached the Supreme Court last year on the meaning of transformativeness under factor one,<sup>37</sup> this issue had been debated in the bar, in law reviews, and before the courts. A deluge of amicus briefs

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

30. Brief of Amici Curiae Am. Soc'y of Media Photographers, Inc. and Picture Archive Council of Am., Inc. in Support of Plaintiff-Appellee and Affirmance, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (No. 11-cv-1197).

31. *Id.* at 10–11 (discussing §§ 101, 106).

32. *Id.* at 12.

33. Joint Reply Brief for Defendants-Appellants at 7, n.5, *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (No. 11-cv-1197).

34. *Cariou*, 714 F.3d at 706.

35. 766 F.3d 756, 758 (7th Cir. 2014).

36. *Id.*

37. 598 U.S. 508, 525 (2023).

from a wide assortment of stakeholders were submitted to the Supreme Court on the derivative works issue alone, including one that our team filed on behalf of the Association of American Publishers.<sup>38</sup>

At issue in *Warhol* was the Andy Warhol Foundation's commercial licensing of a silkscreen portrait that the acclaimed artist Andy Warhol had made based on a photograph by another acclaimed artist, photographer Lynn Goldsmith.<sup>39</sup> In a majority opinion by Justice Sotomayor, the Supreme Court held that transformativeness is a matter of *degree* that requires the proponent of fair use to *justify* the copying.<sup>40</sup>

Important to this discussion, the Court emphasized the need to protect the derivative works right, and that "an overbroad concept of transformative use . . . that includes any further purpose" would narrow the copyright owner's exclusive right to create derivative works.<sup>41</sup> Thus, the Court held that "the degree of transformation required to make 'transformative' use of an original must go beyond that required to qualify as a derivative"<sup>42</sup> and that simply "to convey a new meaning or message . . . does not suffice."<sup>43</sup> After finding the use at issue *not* transformative, the Court affirmed the Second Circuit's finding of no fair use.<sup>44</sup>

This little bit of legal history is just one example to show how litigators, as well as their clients, can shed light on issues, contribute to a larger debate, and incrementally shape the law, which in this case resulted in the Supreme Court addressing the very issue we—and many others—had highlighted so long ago. While sometimes the law can change instantly, very often it is more of a marathon than a sprint, with many constituencies helping to advance the debate, including litigators and their clients.

## II. LITIGATING THE FACTS OF FAIR USE.

Let us turn to the next tool of a litigator—marshalling the facts. I have been teaching a class on Copyright and Trademark Litigation at Harvard Law School for about fifteen years, and on the first day of every semester I tell the class, "*The facts are not a given.*" By that I mean that while facts in judicial opinions *look* comprehensive and compelling, they only get to the courts' attention if the lawyers find them and try to get them in the record.

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38. See Brief for Amicus Curiae Ass'n of Am. Publishers in Support of Respondents at 2, *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508 (2023) (No. 21-cv-869).

39. *Warhol*, 598 U.S. at 526 ("Here, the specific use of Goldsmith's photograph alleged to infringe her copyright is AWF's licensing of Orange Prince to Condé Nast.").

40. *Id.* at 531–33 ("[T]he question of justification is one of degree." (citing *Leval*, *supra* note 2, at 1111)).

41. *Id.* at 529; see also *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 11 F.4th 26, 41 (2d Cir. 2021) ("A common thread running through these cases is that, where a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a higher or different artistic use is insufficient to render a work transformative." (internal quotation omitted)).

42. *Warhol*, 598 U.S. at 529.

43. *Id.* at 547.

44. *Id.* at 551.

Developing the factual record is a unique contribution of litigators to a case. Lawyers need to figure out which facts *might* be relevant to the case and then use appropriate discovery methods to ferret them out. Traditional tools such as requests for production of documents, requests for admission, interrogatories, and depositions<sup>45</sup> should of course be used, but a litigator sometimes has to be more creative, too, about how to find facts.

For example, when we were doing discovery on the copyright part of *Twentieth Century Fox Film Corp. v. Dastar Corp.*,<sup>46</sup> we needed to establish what Eisenhower's state of mind was in 1948 as to whether the book *Crusade in Europe* was written as a work for hire at the instance and expense of the publisher Doubleday.<sup>47</sup> It was challenging, as all the percipient witnesses were dead. We thus had to scour the archives of universities across the country, including those at Columbia, to collect the memoirs and related documents of everyone involved.<sup>48</sup> We pieced all this together to recreate what happened at the fateful meeting between Eisenhower and Doubleday, where they shook hands on a deal and Eisenhower agreed to write the book.<sup>49</sup> In fact, in my closing, I acted out the various roles using the dialogue contained in the various memoirs. We won summary judgment on ownership and infringement, a bench trial regarding remedies, a permanent injunction, and attorney's fees, and the Ninth Circuit affirmed.<sup>50</sup>

In creating your discovery plan, remember that *context* can be vital. Pretend for a minute that you are litigating a car accident case where your client ran a red light and crashed into a parked car. At first glance, the facts seem unfavorable to your client's case. But if you discovered that the only reason why your client ran the light was to avoid a kindergarten class that had darted into the street, it is easy to see that this might be helpful to your defense!

The importance of context is particularly true in fair use cases, where the facts can be so essential.<sup>51</sup> The first and fourth fair use factors are particularly fact-rich, as we

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45. See FED. R. CIV. P. 34 (production of documents); FED. R. CIV. P. 36 (admissions); FED. R. CIV. P. 33 (interrogatories); FED. R. CIV. P. 30 (depositions by oral examination); FED. R. CIV. P. 31 (depositions by written questions).

46. See *Twentieth Century Fox Film Corp. v. Dastar Corp.*, No. 98-cv-7189, 2000 WL 35503105 (C.D. Cal. Jan. 4, 2000) (summary judgment re: ownership and infringement) and 2000 WL 35503106 (C.D. Cal. Aug. 29, 2000) (bench trial re: remedies), *aff'd in part, rev'd in part, vacated in part sub nom.* *Twentieth Century Fox Film Corp. v. Ent. Distrib.*, 34 F. App'x 312 (9th Cir. 2002), *rev'd sub nom.* *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), *on remand to* 2003 WL 22669587 (C.D. Cal. Oct. 14, 2003), *aff'd sub nom.* *Twentieth Century Fox Film Corp. v. Ent. Distrib.*, 429 F.3d 869 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 2932 (2006).

47. See *Dastar*, 2000 WL 35503015, at \*9 ("The ownership of the copyright in this case turns on whether Eisenhower wrote the Book as a 'work for hire' for Doubleday.").

48. Although in this case we did the factual research ourselves, a litigator may also want to employ private investigators in certain cases. See 2 NIMMER ON COPYRIGHT § 8.11[D][5][a] ("An anomaly of non-public infringement is that plaintiffs may know of its existence at the 'wholesale' level, but to gain sufficient evidence of a 'retail' violation in order to craft a viable complaint, plaintiff may need to send in an investigator to engage in a sample transaction.").

49. See *Ent. Distrib.*, 429 F.3d at 873 (discussing handshake meeting).

50. *Id.* at 882-83 (affirming findings of ownership and infringement and award of attorneys' fees).

51. See *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 23 (2021) ("[O]ur case law instructs that fair use depends on the context.").



need to assess the claimed justification for the use,<sup>52</sup> consider whether and to what degree it is substitutive,<sup>53</sup> whether there is harm an existing or potential market for the use.<sup>54</sup> While the parties themselves may have much of this information and the relevant documents, a litigator must also think about *non-party* sources of information, which can be especially probative as to whether a market exists and whether there is harm to it. Narrowly tailored third-party subpoenas can help obtain that sort of data.<sup>55</sup>

In addition, fair use cases lend themselves to the creative use of experts, who can place the use in a broader context. For example, when we litigated the *TVEyes* case, we contended that TVEyes usurped a growing digital market for video clips of news segments.<sup>56</sup> Although our client had a lot of the information we needed to prove our point, we also retained a former TV producer who had become a journalism professor to position the use within a wider industry lens.<sup>57</sup> She wrote a detailed report about the economic pressures facing journalism and the need to protect the ability to monetize and support journalism in new ways, like through video clips that could be licensed to third-parties and/or shown with pre-roll ads on websites.<sup>58</sup> As I will discuss more later, we won this case on summary judgment, then won affirmance at the Second Circuit.<sup>59</sup>

Of course, in any given case, there may be one or more bad facts from your client's perspective. A creative lawyer, however, can sometimes change the facts *prospectively* (or at least shed light on their context) and not treat them as forever static. When I talk to my team about this, I cite the key precedent of *Kobayashi Maru*. No, this is not some Supreme Court case, but something from *Star Trek*.

First introduced in the movie *The Wrath of Khan*,<sup>60</sup> the *Kobayashi Maru* was a simulation test for Starfleet Academy cadets that was programmed to always result in failure: it was impossible for cadets to rescue the *Kobayashi Maru* without destroying their own ship.<sup>61</sup> Young Captain Kirk, however, rejected the idea of a no-win scenario. He reprogrammed the simulation to provide an opportunity to win, and for the first time in Starfleet Academy history, the ship was saved. I think this is a helpful mindset for litigators, as although you cannot change the past—and I am certainly not advocating hacking into computer programs—you *can* possibly do things to improve

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52. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 531 (2023) (“[T]he first factor also relates to the justification for the use.”).

53. *Id.* at 528 (“[T]he first factor relates to the problem of substitution—copyright’s *bête noire*”).

54. *Google*, 593 U.S. at 36 (discussing “harm” to “actual or potential markets”).

55. *See* FED. R. CIV. P. 45 (subpoena).

56. *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 180 (2d Cir. 2018).

57. *See* Declaration of Beth Knobel, Ph.D., in Support of Plaintiff Fox News Network, LLC’s Renewed Motion for Summary Judgment, *Fox News Network, LLC v. TVEyes, Inc.*, No. 13-cv-5315, 2015 WL 11661842 (S.D.N.Y. May 21, 2015).

58. *See id.* ¶ 10.

59. *Fox News Network, LLC v. TVEyes, Inc.*, 124 F. Supp. 3d 325 (S.D.N.Y. 2015), *aff’d in part, rev’d in part*, 883 F.3d 169 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 595 (2018).

60. *STAR TREK II: THE WRATH OF KHAN* (Paramount Pictures 1982).

61. *See* Mark Donaldson, *Every Kobayashi Maru in Star Trek (& Who Beat It)*, SCREEN RANT (Oct. 26, 2022), <https://screenrant.com/star-trek-every-kobayashi-maru-test> [<https://perma.cc/SJ6J-E44P>] [<https://web.archive.org/web/20240921132119/https://screenrant.com/star-trek-every-kobayashi-maru-test/>].

your client's position going forward. This can involve many things depending on the case, including prospectively changing a website's terms of use, taking down allegedly infringing content and thereby potentially minimizing damages, adding a disclaimer, finding a new source for a product, and/or redesigning a product where feasible so that the case's impact is limited to the past, not the future.

Again, you can only change future conduct. Sadly, however, sometimes people try to change the past, and you need to be alert to that possibility. In other words, it is important to take a critical eye and not to accept everything produced in discovery at face value, especially in this digital age where fabrication is incredibly easy.

As an illustration of this concern, consider the Obama Hope poster fair use case. There, we represented the Associated Press news organization against artist Shepard Fairey and argued that Mr. Fairey had engaged in copyright infringement by using without a license an AP photograph made by its photographer, Mannie Garcia, as the basis for his Obama Hope poster.<sup>62</sup> The poster became a fixture of President Obama's first presidential campaign and various merchandise.<sup>63</sup> The AP sent a cease-and-desist letter protesting the use of the photograph without a license, and noted that if a license could not be negotiated, it would commence a lawsuit in the Southern District of New York the following week.<sup>64</sup> The day before that deadline, Mr. Fairey elected to file suit in that same court for a declaratory judgment of non-infringement.<sup>65</sup>

In his declaratory judgment complaint, Mr. Fairey alleged that contrary to the AP's claim that he had used a particular portrait photograph by Mr. Garcia of then-Senator Obama, he instead had used a *different* photograph from the same news conference on the crisis in Darfur, also made by Mr. Garcia, but which included both Senator Obama and actor George Clooney.<sup>66</sup>

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62. See generally Associated Press's First Amended Answer, Affirmative Defenses and Counterclaims [hereinafter, AP Amended Answer], *Fairey v. Associated Press*, No. 9-cv-1123 (S.D.N.Y. Nov. 12, 2009), ECF No. 54.

63. See, e.g., *id.* ¶ 115.

64. *Id.* ¶ 156.

65. *Id.* ¶ 157.

66. Associated Press's Memorandum of Law in Opposition to the Motion for Substitution of Counsel [hereinafter, AP Mem. Opp. Substitution of Counsel] at 2, *Fairey v. Associated Press*, No. 9-cv-1123 (S.D.N.Y. Nov. 9, 2009), ECF No. 49.



**Figure 1: Garcia Photo (left); Hope Poster (center); Clooney Photo (right)**<sup>67</sup>

Discovery ensued, including about which photo was used.<sup>68</sup> Mr. Fairey produced in discovery a digitized image file allegedly showing how Mr. Fairey had modified the Clooney photograph to make the poster.<sup>69</sup>

All of this struck us as odd. It just did not seem credible that someone would have contorted a photograph to get the image that became the poster, when another photograph appeared to be a perfect match without any complicated digital editing. It also seemed a little bit convenient from a fair use perspective, because if the Clooney photograph had been the one used, perhaps Mr. Fairey would say he had transformed it more under factor one to make the poster and that he used less of it under factor three.<sup>70</sup>

One thing copyright litigators often do, especially in photography cases like this one, is to overlay images to show how they compare. This is exactly what we did here.<sup>71</sup> The Obama image in the Clooney photo did not line-up with the poster. By contrast, the Garcia portrait photo that the AP claimed had been used lined up perfectly.

We thus studied the digital metadata for the poster and the photograph and discovered that the metadata file paths did not support Mr. Fairey's story about how he had created the poster.<sup>72</sup> The metadata also indicated, for example, that there were more responsive documents on Mr. Fairey's computer than Mr. Fairey had produced.<sup>73</sup>

We confronted Mr. Fairey's lawyers with this evidence, and they admitted in a memorable Friday night letter that the correct photograph was indeed the Mannie

67. AP Amended Answer, *supra* note 62, ¶ 158.

68. *Id.* ("The AP sent Fairey an e-mail on October 1st identifying the specific file paths for these documents on Fairey's computers and asked Fairey's counsel whether those file paths had yet been searched.")

69. Associated Press's Rule 56.1 Statement of Undisputed Facts in Support of Its Motion for Summary Judgment Against Obey Clothing [hereinafter, AP SUF], ¶¶ 129–30, *Fairey v. Associated Press*, No. 9-cv-1123 (S.D.N.Y. Jan. 7, 2011), ECF No. 153.

70. AP Amended Answer, *supra* note 62, ¶ 160 ("Fairey's misidentification of the Clooney Photo as the source for the Infringing Works can only be understood as a deliberate attempt to obscure the Obama Photo as the true source material for the Infringing Works and to minimize the nature and extent of Fairey's unauthorized copying of the Obama Photo.")

71. *Id.* ¶ 159.

72. AP Mem. Opp. Substitution of Counsel, *supra* note 66, at 2.

73. AP Amended Answer, *supra* note 62, ¶ 168.

Garcia portrait photo that the AP asserted all along.<sup>74</sup> They also admitted that the image Mr. Fairey had provided in discovery had been fabricated, and that other evidence had been deleted by Mr. Fairey rather than produced.<sup>75</sup> Finally, they said that they were planning to withdraw from the case.<sup>76</sup> Ultimately, Mr. Fairey was indicted by the U.S. Attorney's Office on obstruction of justice, a charge to which he plead guilty, and he later settled the civil suit with the AP.<sup>77</sup> The civil suit against Mr. Fairey's apparel company and declaratory judgment co-plaintiff Obey Clothing, continued, however. The AP ultimately won summary judgment striking the fair use defense,<sup>78</sup> and then the case ultimately settled as well.<sup>79</sup>

I wish I could say that this case was the only one we have had where fabricated evidence was at issue, but unfortunately it was not. In fact, possible fabrication was on our minds in *Fairey* because we encountered a similar issue a few years earlier in *Scholastic, Inc. v. Stouffer*.<sup>80</sup>

There, we filed a suit for a declaratory judgment that J.K. Rowling's acclaimed *Harry Potter* books did not infringe Stouffer's alleged trademarks and copyrights, including in the term "muggles" and in the books *Larry Potter and His Best Friend Lilly* and *The Legend of Rah and the Muggles*.<sup>81</sup> Stouffer claimed the books had been printed in the 1980s.<sup>82</sup> They looked new to us, however, and trusting our instincts, we hired a typeface expert who conclusively determined that at least part of the text could not have been printed in the 1980s, as the typeface technology didn't exist until the 1990s.<sup>83</sup> This led to a wholesale review of other documents produced in discovery, including sending a paralegal to the archives of a magazine so we could compare ads as they had been produced in discovery to how they actually ran. We discovered some had been altered by adding the phrase "Muggle's TM."<sup>84</sup> We successfully moved for sanctions with respect to seven types of fabricated evidence<sup>85</sup> and summary judgment on the merits.<sup>86</sup> With today's AI tools, vigilance as to what's been produced is more important than ever.

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74. *Id.* ¶¶ 169–70.

75. *Id.*

76. *Id.* ¶ 177.

77. See Mary Huber, *Shepard Fairey Sentenced for Destroying Documents*, ART NEWS (Sept. 7, 2012), <https://www.artnews.com/art-in-america/features/shepard-fairey-fined-59021/> [https://perma.cc/QJJ6-ZQM4] [<https://web.archive.org/web/20240927172856/https://www.artnews.com/art-in-america/features/shepard-fairey-fined-59021/>].

78. See Summary Order, *Fairey v. The Associated Press*, No. 09-cv-01123 (S.D.N.Y. Feb. 17, 2011), ECF 199.

79. See Summary Order, *Fairey*, No. 9-cv-01123 (Mar. 16, 2011), ECF 243.

80. *Scholastic, Inc. v. Stouffer*, 221 F. Supp. 2d 425 (S.D.N.Y. 2002).

81. *Id.* at 428–30.

82. *Id.* at 429–30.

83. See *id.* at 429, 431.

84. *Id.* at 429.

85. See *id.* at 439–45.

86. *Id.* at 445.

In sum, it is the litigator's job to determine what facts are needed to tell the client's story of fair or unfair use, and then to develop the record using both fact and expert discovery.

### III. LITIGATING IS PERSUADING.

We have discussed the litigator's role in helping to shape the law and in discovering the relevant facts in each case, so let's now discuss how a litigator brings law and facts together to persuade the court and jury. This is where the magic happens. Litigation is the art of persuasion, and as a former theatre person, I can tell you that litigating is a lot like putting on a show, especially at trial.

It is vital for a litigator to synthesize the facts and law to develop an easy-to-understand and convincing *theme*. Fair use may be a complex doctrine, but if you start your presentation with "this is complicated," you are likely to lose. Rather, you need to *simplify* and *persuade*, whether in a brief, at oral argument, or at trial.

Consider our *TVEyes* case. In its briefing and at oral argument, TVEyes relied heavily on the *Google Books* case,<sup>87</sup> in which the Second Circuit had held that it was fair use for Google to copy entire books and reproduce snippets of them in response to user queries.<sup>88</sup> Central to the holding in that case, however, was that Google Books was designed to reproduce only *snippets* of the copied books.<sup>89</sup> As Judge Chin wrote on summary judgment at the district court, "Google Books provides a new and efficient way for readers and researchers to *find* books."<sup>90</sup> On appeal at the Second Circuit, Judge Leval noted that even if someone set out to do multiple searches of a particular book, the resulting aggregation of snippets would be "incomplete," which made substitution unlikely.<sup>91</sup> The Second Circuit also noted that the Google Books service was designed to prevent someone from getting a complete book by "blacklisting" "one snippet on each page and one complete page out of every ten."<sup>92</sup> Key to the *Google Books* holding, therefore, was that you could not get the whole text of any of the copied works.

By contrast, we argued, TVEyes *was* substitutive because it made all television news content available to users, in as many ten-minute segments as they wished, without any of the blacklisting design elements of Google Books.<sup>93</sup> TVEyes even advertised that subscribers could further download and save the clips, and further distribute the clips

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87. See, e.g., Redacted Page Proof Brief for Defendant-Appellant-Cross-Appellee at 24–26, *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018) (No. 15-cv-03885).

88. *Authors Guild v. Google, Inc.* ("*Google Books*"), 804 F.3d 202, 229 (2d Cir. 2015).

89. *Id.* at 207.

90. *Authors Guild v. Google Inc.*, 954 F. Supp. 2d 282, 287 (S.D.N.Y. 2013) (emphasis added).

91. *Google Books*, 804 F.3d at 224–25.

92. *Id.* at 209–10.

93. See Final Brief for Plaintiff-Appellee-Cross Appellant Fox News Network, LLC [Redacted] [hereinafter, Final Pl. Brief] at 1–2, *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018) (No. 15-cv-03885).

by email and use them on social media.<sup>94</sup> All of this, we contended, posed an existential threat to the market for television journalism.

To make all this clear, I came up with a theme that distinguished *Google Books* head-on. We argued that whereas *Google Books* was a program designed to *find* content, *TVEyes* *delivered* content.<sup>95</sup> This “*finding versus delivering*” theme guided us through our discovery efforts, our briefing, and our oral arguments. For example, at oral argument before the Second Circuit, after appellant’s counsel argued that *TVEyes* was simply *Google Books* for television, I argued that *TVEyes* “can be decided by recognizing the fundamental difference between services that *find* copyrighted works and those that *deliver* copies of such works. While this Court has held in other contexts that search can be a quintessential transformative use, well, so too should delivery of content be quintessential infringement.”<sup>96</sup>

The Second Circuit agreed, recognizing that we were not challenging search but rather redistribution of the audiovisual content.<sup>97</sup> In an opinion by Judge Jacobs, the Second Circuit thus affirmed that *TVEyes*’ service was *not* a fair use, and was more akin to *Infinity Broadcasting Corp. v. Kirkwood* and other retransmission cases than *Google Books*, because the content was redistributed.<sup>98</sup> Notably, a different Second Circuit panel in *Capitol Records LLC v. ReDigi, Inc.* later that same year discussed *TVEyes* expressly.<sup>99</sup> *ReDigi* asked whether a service to allow users to resell their digital music files was unauthorized distribution or a fair use.<sup>100</sup> In an opinion written by Judge Lval, the Second Circuit endorsed the fair use decision in *TVEyes*, writing that *TVEyes* was a “substantial precedent” for the Second Circuit’s finding of no fair use in *ReDigi*, noting that the modest transformative purpose in *TVEyes* was “easily outweighed” by the harm to the rightsholder’s market.<sup>101</sup>

Another point about oral argument in particular, is that part of the persuasion process is respectfully attempting to teach a court to see the case from your point of view. This epiphany was brought home to me by the foreword written by Justice Ruth

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94. *TVEyes*, 883 F.3d at 175; see also Bill Donahue, *TVEyes Downloads Aren’t Fair Use, Judge Says*, LAW360 (Aug. 25, 2015), <https://www.law360.com/articles/695389/tveyes-downloads-aren-t-fair-use-judge-says> [<https://perma.cc/3ZY9-TSVU>] [<https://web.archive.org/web/20160123090142/http://www.law360.com/articles/695389/tveyes-downloads-aren-t-fair-use-judge-says>].

95. See Final Pl. Brief, *supra* note 93, at 1 (“*TVEyes*’ service is nothing like *Google Books*. It goes beyond **finding** authorized copies of television content, and instead **delivers** unlimited, unauthorized, lengthy, seriatim, high-definition video clips to its paying subscribers.” (emphasis in original)).

96. Transcript of Oral Argument at 57:10–17, *TVEyes*, 883 F.3d 169 (No. 15-cv-03885) (emphasis added).

97. *TVEyes*, 883 F.3d at 174.

98. See *id.* at 177–78, 180 (citing *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998); see also *id.* at 186–188 (Kaplan, J., concurring) (“I regard *Infinity Broadcast Corp. v. Kirkwood* as having settled the question whether a use is transformative simply because it is more efficient or convenient than what preceded it.”).

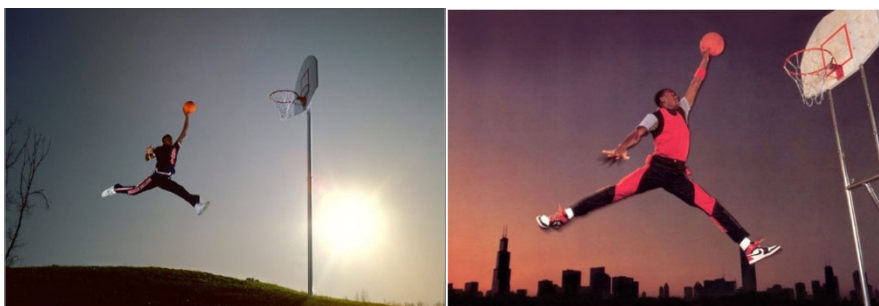
99. 910 F.3d 649 (2d Cir. 2018).

100. *Id.* at 657.

101. *Id.* at 663 (quoting *TVEyes*, 883 F.3d at 180).

Bader Ginsburg to a book on Supreme Court arguments,<sup>102</sup> which I eagerly read before I argued the *Dastar* case before the Court.<sup>103</sup> In addition to making a lot of helpful points about oral argument in general, Justice Ginsburg likened arguing in court to her experience as a teacher. As she reflected on her first Supreme Court argument, Justice Ginsburg wrote that “a teacher by trade, I relished the opportunity to persuade them that my cause was just, my legal argument sound.”<sup>104</sup> She saw oral argument as an opportunity to *teach*, not an ordeal to “resent.”<sup>105</sup> I found this idea of teaching and opportunity to be a helpful way of approaching oral argument.

To illustrate the point about using oral argument to teach and convey your theme, I think it is useful to consider briefly *Rentmeester v. Nike, Inc.*<sup>106</sup> There, a photographer alleged that Nike had infringed his copyright in a photograph of Michael Jordan leaping when Nike made its own iconic photograph of Mr. Jordan, which it used to create its “Jumpman” logo.<sup>107</sup>



**Figure 2: Rentmeester (left); Nike (right)<sup>108</sup>**

When I teach this case in my law school class, I start by polling my students, many of whom have never taken a copyright class before, to see who thinks the two images are substantially similar.<sup>109</sup> At first, many hands go up. Then I teach the idea/expression dichotomy and ask again.<sup>110</sup> This time, fewer hands. Finally, I start pointing out all the

102. Ruth Bader Ginsburg, *Foreword* to DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY*, at v–vii (1st ed. 2002).

103. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

104. Ginsburg, *supra* note 102, at v.

105. *Id.* at vi.

106. No. 15-cv-00113, 2015 WL 3766546 (D. Or. June 15, 2015), *aff'd*, 883 F.3d 1111 (9th Cir. 2018).

107. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116 (9th Cir. 2018).

108. *Id.* app. at 1126.

109. *Cf. id.* at 1117 (“To prove unlawful appropriation . . . the similarities between the two works must be ‘substantial’ and they must involve protected elements of the plaintiff’s work.”).

110. *Cf. Bikram’s Yoga College of India, L.P. v. Evolution Yoga, LLC*, 803 F.3d 1032, 1037 (9th Cir. 2015) (“Section 102(b) codifies the ‘idea/expression dichotomy,’ under which ‘every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication’” (first citing 17 U.S.C. § 102(b), then quoting *Golan v. Holder*, 565 U.S. 302, 328 (2012)).

differences in expression—the color, the proximity to the hoop, the bend of the arms, and the difference between a more traditional *grand jeté*, scissor-style split and a straddle-style jump. When I ask again if the images are substantially similar, few hands go up. And then when I tell them that I represented Nike—no hands go up!

My actual oral argument in that case on our motion to dismiss for lack of substantial similarity used the same principles. *First*, I used the theme that no one can own the idea of Michael Jordan jumping in a pose inspired by a *grand jeté*. *Second*, I emphasized the various expressive differences. I even acted out as best I could the difference between the scissor-style horizontal split as in the Rentmeester photo and the vertical straddle-style jump in the Nike photo. The Ninth Circuit then affirmed the district court's grant of our motion to dismiss.<sup>111</sup> The lesson here is that persuasion is closely tied to teaching.

Let us now turn from oral argument to trials, which may be the ultimate theatre for a fair use litigator. Having a theme at trial is absolutely critical. Not only will the theme help you to persuade the court or jury, but it also provides a compass for you to keep your presentation of evidence on track and help the factfinder see how disparate pieces of evidence and testimony fit together.

I know that Professor Ginsburg has always appreciated the theme we used in the *Harry Potter Lexicon* case, so I think it makes sense for me to turn to it now. The *Harry Potter Lexicon* case concerned whether a so-called *Harry Potter* encyclopedia was fair use.<sup>112</sup> Well before the case was ever filed, there had been a free, fan-made website called the *Harry Potter Lexicon* that compiled and analyzed many aspects of the *Harry Potter* books for other fans.<sup>113</sup>

One part of that website contained an alphabetical list of the people, places, and things in the *Harry Potter* universe.<sup>114</sup> After Ms. Rowling announced her intention to write her own encyclopedia after she completed the last of the seven *Harry Potter* books,<sup>115</sup> publisher RDR Books contracted with the editor of the Lexicon website, Steven Vander Ark, to rush out a book of just the A-to-Z listings from the Lexicon website (that is, not the essays and other analyses) as an unofficial *Harry Potter* encyclopedia.<sup>116</sup>

After cease-and-desist efforts were unsuccessful, J.K. Rowling and the *Harry Potter* books' film studio, Warner Brothers, filed suit in the Southern District of New York and sought a TRO and preliminary injunction against the publication of the *Harry Potter Lexicon* book.<sup>117</sup> In our complaint and our subsequent motions, we contended that *unlike* a true encyclopedia, the *Lexicon* merely repackaged the *Harry Potter* series as well as the companion books to it, *Quidditch Through the Ages* and *Fantastic Beasts and Where*

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111. *Rentmeester*, 883 F.3d at 1125.

112. *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 518 (S.D.N.Y. 2008).

113. *Id.* at 520.

114. *Id.*

115. *Id.* at 519; see also Trial Tr. (Rowling) 51:16–25, *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (No. 7-cv-9667).

116. *Warner Bros.*, 575 F. Supp. 2d at 522.

117. *Id.* at 523–24.



to *Find Them*, with little or no analysis, research, or even quotation marks.<sup>118</sup> RDR's defense was fair use.<sup>119</sup>

Judge Patterson combined the preliminary injunction hearing with a bench trial on the merits,<sup>120</sup> and we were off to the races in a trial that created a media frenzy of cameras at the courthouse steps and so much public interest that after the courtroom filled up, the court staff set up an overflow courtroom for people to watch the trial unfold on closed-circuit television. It was clear that I needed to come up with a concise, convincing trial theme that would show how each of the fair use factors favored us. It needed to get to the heart of the argument that this was not a true encyclopedia and that the copying was overly extensive, in a way that would persuade the court. I did not think that merely saying, "the four fair use factors favor us" would be very persuasive or clear.

Rather, my theme was that the *Lexicon* "takes too much and does too little" to be fair use.<sup>121</sup> With that phrasing, I wanted to emphasize the wholesale copying and the little, if any, transformative value of the so-called encyclopedia. The point was that the *Lexicon* added little, if anything, beyond Ms. Rowling's own words—there was no commentary, no analysis.<sup>122</sup> It had only sporadic and sometimes inaccurate etymology, and none of the other things you would expect in an encyclopedia.<sup>123</sup> As the *Lexicon*'s first page even noted, "All the information in the Harry Potter Lexicon comes from J.K. Rowling. . . ." <sup>124</sup> This is exactly what we wanted to convey—that it was all Ms. Rowling's work.

But it is not enough to simply *have* a theme; you need to *use* it. The "takes too much and does too little" theme was therefore an important framework for presenting the evidence and bringing out key factual points. Starting from my opening argument and continuing to the summations, I returned again and again to the massive verbatim copying and lack of analysis or other creative additions,<sup>125</sup> as well as to the highly imaginative world of J.K. Rowling and the need to protect it.<sup>126</sup>

Part of the defendant's argument was that Ms. Rowling and Warner Brothers were engaging in copyright misuse, or the enforcement of copyright beyond the law's reasonable bounds.<sup>127</sup> In some ways, however, this gave us an opportunity to show that

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118. See, e.g., *id.* at 543.

119. *Id.* at 539.

120. See *id.* at 517–18 (citing FED. R. CIV. P. 65(a)(2)).

121. Trial Tr. (Cendali), *supra* note 115, at 5:8–9 (emphasis added).

122. *Id.* at 5:10–15 ("You will hear that the Lexicon takes much more of Ms. Rowling's fictional facts and copyrighted expression tha[n] is necessary to comment on and discuss the Harry Potter books, and you will hear the Lexicon provides virtually no analysis or commentary, as much as RDR strains to inflate the import of sporadic qualitatively meaningless phrases.")

123. See *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 526 (S.D.N.Y. 2008) ("sporadic etymological references"), 544 (etymology "occasionally inaccurate").

124. *Id.* at 525.

125. E.g., Trial Tr. (Cendali), *supra* note 115, at 5:8–9, 678:23–679:11, 679:17–19.

126. E.g., *id.* at 6:2–16, 679:14–19.

127. *Warner Bros.*, 575 F. Supp. 2d at 518; see also *id.* at 545 n.21 ("Nor does the Court find Defendant's allegations of Plaintiffs' copyright misuse and unclean hands to amount to more than aggressive protective

neither Ms. Rowling nor Warner Brothers objected to true reference works, that took less of Ms. Rowling’s expansive universe and did more with it. We showed that many books fit this theme—and thereby showed what made the *Lexicon* different.<sup>128</sup>

We did this in part through a demonstrative series of slides that I used in my opening. I explained that the evidence would show that there are books about “Harry Potter and religion.”

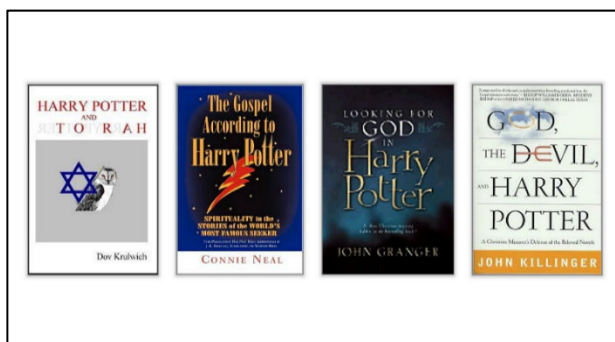


Figure 3: “Harry Potter and Religion.”<sup>129</sup>



Figure 4: “Kids and Harry Potter.”

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actions permitted by copyright law. Defendant apparently agreed, as it abandoned these defenses by the end of trial.”).

128. See Trial Tr. (Rowling), *supra* note 115, at 80:17–81:18.

129. These slides are recreations of those used at trial. See Trial Tr. (Cendali), *supra* note 115, at 24:4–13.



Figure 5: "Harry Potter and Literature."



Figure 6: "Science and Psychology and Harry Potter."

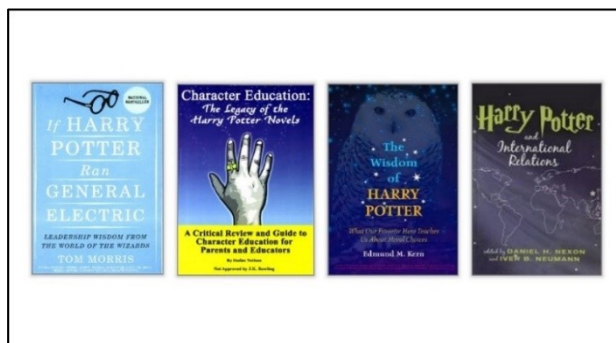


Figure 7: "What We Can Learn About Harry Potter."



Figure 8: "And Parodies of Harry Potter."



Figure 9: "Other Guidebooks to Harry Potter."

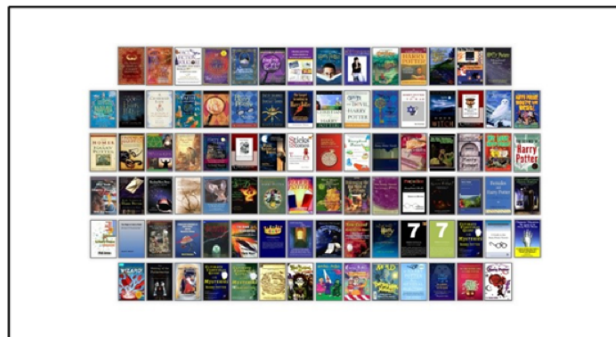


Figure 10: "Many Books About Harry Potter."

In fact, there were many books about Harry Potter. But as I told the court, these books took less and did more.<sup>130</sup>

Ms. Rowling also emphasized in her testimony how the *Lexicon* took too much. She testified that the *Lexicon* took “all the highlights of [her] work” or, as she analogized it, “all the plums in [her] cake.”<sup>131</sup> She also explained how the *Lexicon* didn’t add enough to justify the taking. Ms. Rowling testified that “if [Vander Ark] put quotation marks around everything he ha[d] lifted from [her] book, there would pretty much be quotation marks around the whole substance of the book, with a few little sides omitted.”<sup>132</sup> That is to say, that the *Lexicon* took too much, and did too little. And she used the theme in explaining market harm, noting that if it became legally acceptable to take an extreme amount of an author’s work and add little text to it, “the flood gates would open.”<sup>133</sup> Finally, she described the “devastating” injury to her as an author in having her words taken and resold under a different author’s name.<sup>134</sup>

Similarly, when I questioned Mr. Vander Ark, I tried to emphasize our “takes too much, does too little” theme. For example, I asked him what the Chudley Cannons were. As I expected, he gave a short answer, namely “This is a Quidditch team.”<sup>135</sup> I then juxtaposed that short answer with an exhibit from the text of the *Lexicon* showing that he included far more than that short response in the *Lexicon*.<sup>136</sup> Rather, he put in an extensive description—which was virtually identical to the text Ms. Rowling herself had written about the Chudley Cannons.

I then got him to admit that these were “fictitious facts,”<sup>137</sup> harkening back to the *Seinfeld Aptitude Test* case,<sup>138</sup> and that they were Ms. Rowling’s “creative output.”<sup>139</sup> Finally, I got him to confirm that he took everything. As he admitted, “it looks like we pretty much caught it all.”<sup>140</sup>

I will also add that when part of your point in arguing factor two is the creativity of your client’s work, it is important to bring that out. For example, my opponent made a big show of introducing his client as “the man without whom none of us would be here, Roger Rappaport of RDR Books.”<sup>141</sup> I felt that statement could not go unchallenged. Immediately after that, when I stood to begin my opening statement, I emphasized that “the person without whom none of us would be here is *J.K. Rowling*.”<sup>142</sup> I wanted to set the right tone from the beginning.

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130. Trial Tr. (Cendali), *supra* note 115, at 24:4–13.

131. Trial Tr. (Rowling), *supra* note 115, at 647:3–10.

132. *Id.* at 59:9–12.

133. *Id.* at 652:7–11.

134. *Id.* at 93:20–94:10.

135. Trial Tr. (Vander Ark), *supra* note 115, at 285:17–19.

136. *Id.* at 285:23–286:1.

137. *Id.* at 286:7–8.

138. See *Castle Rock Ent., Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 139 & n.5 (2d Cir. 1998) (“Whatever the line between historical fact and creative expression, however, *Seinfeld* is securely on the side of creative expression.”).

139. Trial Tr. (Vander Ark), *supra* note 115, at 286:9–11.

140. *Id.* at 288:15–22 (emphasis added).

141. Trial Tr. (Hammer), *supra* note 115, at 3:21–23.

142. *Id.* at 3:24–25.

Similarly, at the end of my opening, at the risk of perhaps being a little theatrical, I dove into the copyrighted work and used it to reemphasize our theme. I said, “In closing, it seems right to go back to Ms. Rowling’s words. At the end of *Harry Potter and the Goblet of Fire*, Professor Dumbledore, headmaster of Hogwarts, cautions the students that there may come a time when they must choose between what is right and what is easy. We submit, your Honor, that by *taking too much and doing too little*, RDR chose to do what was easy. But the evidence and controlling law of this circuit show that it was not right.”<sup>143</sup>

Ultimately, the court held that the *Lexicon* was infringing and was not fair use.<sup>144</sup> The court found that while it was “slightly” transformative, this was not enough to justify the wholesale copying without even quotation marks.<sup>145</sup> In other words, the court held that the *Lexicon* took too much, and did too little. Note that the court found no fair use even though it found the *Lexicon* was slightly transformative. This was also the situation in our *TVEyes* case, where the Second Circuit said that the service’s “modest” transformative character was not enough to justify its copying.<sup>146</sup>

It is interesting to me, reflecting back on these cases, that both the *Harry Potter Lexicon* and *TVEyes* courts found fair use despite findings that the uses were “slightly”<sup>147</sup> or “modest[ly]”<sup>148</sup> transformative. This seemed right to me, as I never understood why a finding of transformativeness should be an outcome-determinative litmus test, given the express direction in Section 107 that courts “shall” consider at least the four factors, none of which perfectly corresponds to transformativeness.<sup>149</sup> Thus, I appreciated that Justice Sotomayor’s majority opinion in *Andy Warhol Found. for the Visual Arts v. Goldsmith* repeatedly emphasized that transformativeness is a matter of “degree,” and that it must be considered along with the other factors.<sup>150</sup>

I was also heartened by *Warhol* in that in so many ways it seemed to be a validation of our Obama Hope poster case that had foreshadowed it, including by vindicating the idea that fair use cases often “involve[] not one, but two artists.”<sup>151</sup> Both cases involved photographs used as artists’ references to create new images.

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143. Trial Tr. (Cendali), *supra* note 115, at 28:6–17 (emphasis added).

144. *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 554 (S.D.N.Y. 2008).

145. *Id.* at 542 (use is “slightly transformative”).

146. *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 181 (2d Cir. 2018) (“[I]ts transformative character is modest at best.”).

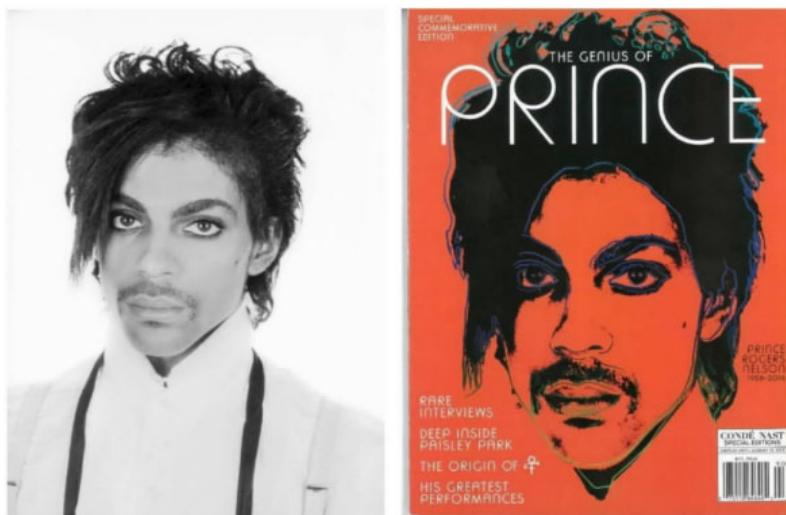
147. *Warner Bros.*, 575 F. Supp. 2d at 542.

148. *Fox News Network, LLC v. TVEyes*, 883 F.3d 169, 181 (2d Cir. 2018); *see also Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1183–84 (9th Cir. 2012) (finding no fair use “even if [the use were] credited as mildly transformative”).

149. 17 U.S.C. § 107; *see generally* Cendali & Quigley, *supra* note 14.

150. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 525, 528–29 (2023).

151. *Id.* at 514.



**Figure 11: Goldsmith (left); Warhol Foundation (right)<sup>152</sup>**

It also strikes me that in both cases, the side claiming fair use argued that the reference photo was not very original or entitled to much protection. In *Warhol*, the Foundation argued Goldsmith was attempting to “copyright Prince’s face.”<sup>153</sup> Opposing counsel made almost the identical argument in our case.<sup>154</sup>

But whereas the other side in the Hope Poster case tried to minimize Mr. Garcia’s artistry, we tried to elevate it. For example, we adopted the language photographers use to describe their work. Photographers don’t talk about “taking a picture;” they speak of “making” one, as that emphasizes their creative process as opposed to simply happening on an image and picking it up, as “taking” seems to denote. Part of our case, therefore, involved showing how Mr. Garcia *made* a patriotic portrait of the then junior senator from Illinois, Barack Obama.<sup>155</sup> For example, we included in our filings how Mr. Garcia

152. *Id.* at 517 fig. 1, 519 fig. 3.

153. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 46 (2d Cir. 2021).

154. *See* Memorandum of Law in Support of Counterclaim Defendant One 3 Two, Inc.’s Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment at 18, *Fairey v. The Associated Press* (S.D.N.Y. Jan. 10, 2011) (No. 9-cv-1123) (“[T]he conventional pose depicted in the Garcia Photo, and the elements associated with that pose (*i.e.*, President Obama’s thoughtful gaze out at the horizon and the angle of his body), all of which are part of the ‘conventions and ideals’ of political portraiture, are thus not protectible under the Copyright Act.”).

155. *See* Memorandum of Law in Support of the Associated Press’ Motion for Summary Judgment Against Defendant One 3 Two, Inc. d/b/a Obey Clothing at 16, 53–54, *Fairey v. The Associated Press* (S.D.N.Y. Jan. 7, 2011) (No. 9-cv-1123) ECF No. 152 (relying on artist’s deposition testimony to prove work’s creativity).

had liked the patriotic flag image behind Senator Obama, how he chose the right filter and moment to make the photograph, and how he even got on his knees to get the angle just right for making the portrait photograph he wanted.<sup>156</sup>

Moreover, in thinking about persuasion, lawyers need to be careful to make sure their arguments are consistent with the facts. While as noted above, the Fairey side tried to argue that there wasn't anything special about the Garcia headshot he used, that was not what Shepard Fairey had said both in a newspaper interview he gave prior to the lawsuit and in his deposition, where he said he selected the photo because of its special qualities.<sup>157</sup> As Mr. Fairey testified in his deposition, for example, "There are a lot of different historic photos of people like John F. Kennedy, [and] the famous Korda Che Guevara photo that have this feeling of the subject knowing what lies in the future, having some sort of wisdom, and it's a specific angle of the gaze, and that was really what struck me about the photo."<sup>158</sup>

We further tried to persuade the court on this issue by using some of the images that Mr. Fairey had downloaded and rejected as references to make the poster.



**Figure 12: Examples of Rejected Images**<sup>159</sup>

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156. AP Amended Answer, *supra* note 62, ¶ 99 (quoting Fresh Air, *Mannie Garcia: The Photo That Sparked Hope*, NAT'L PUB. RADIO (Feb. 26, 2009), <https://www.npr.org/transcripts/101184444> [<https://perma.cc/9JWN-LXM2>] [<https://web.archive.org/web/20241005043240/https://www.npr.org/2009/02/26/101184444/mannie-garcia-the-photo-that-sparked-hope>]).

157. See AP SUF, *supra* note 69, ¶ 94.

158. *Id.* ¶ 95 (internal citations omitted).

159. *Id.* ¶ 100.



As Fairey testified in his deposition, none of these were as good as the AP photo that was the subject of the lawsuit, as they made Senator Obama look “grumpy” or “unsure.”<sup>160</sup> This evidence helped to highlight the creativity of the AP’s photograph and to rebut the argument to the contrary.

The bottom line is that litigators are in a unique position. Sometimes incrementally, sometimes more dramatically, to impact the law and achieve results for their clients. Doing so effectively requires a suite of tools, starting with a command of the case law, the ability to identify and harness facts creatively, and ultimately the ability to persuade.

#### IV. LITIGATING THE FUTURE OF FAIR USE.

Let me now look to the future and ask, what does all this mean about the future of litigating fair use? I have discussed how *Warhol* fits into the story of fair use, but what about *Google LLC v. Oracle Am., Inc.*?<sup>161</sup> Where does the Supreme Court’s *other* recent fair use case fit into the past and future of fair use? We served as co-counsel to Oracle in the appeals before the Federal Circuit and at the Supreme Court, where the Court ended up upholding a jury verdict that Google’s use of Oracle’s Java code to develop the Android platform was fair use.<sup>162</sup>

I want to make a few brief points. *First*, I am concerned that courts may be viewing *Google* as *encouraging* jury trials to decide fair use, when I do not think that was the Supreme Court’s intent or indeed what the Court held, when it decided that Google’s use was a fair use “as a matter of law.”<sup>163</sup> This interpretation is buttressed by the Supreme Court’s affirmance of the Second Circuit’s holding of no fair use as a matter of law in *Warhol* in a summary judgment case.<sup>164</sup>

The *Google* case was an appeal from a jury trial on fair use,<sup>165</sup> yes, and that meant the Court had to grapple with the standard of review in that context where fair use is a mixed question of law and fact.<sup>166</sup> The Court did not, however, endorse the idea that fair use *always* must go to the jury. Rather, the Court endorsed the Federal Circuit’s conclusion that although fair use involves subsidiary historical facts that may be decided by a jury, “the ultimate question” of whether a use is fair is a *legal question* for courts to decide.<sup>167</sup> In his majority opinion, Justice Breyer acknowledged this interpretation and wrote that fair use primarily involves “legal work.”<sup>168</sup> So, although *Google* involved a jury verdict on fair use, I do not think it can be read as *requiring* a jury verdict on fair use. In

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160. *Id.* ¶ 101 (internal citations omitted).

161. *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1 (2021).

162. *Id.* at 40.

163. *Id.*

164. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 11 F.4th 26, 32 (2d Cir. 2021), *aff’d*, 598 U.S. 508, 551 (2023).

165. *Google*, 593 U.S. at 16.

166. *See id.* at 23–24; *see also id.* at 49–50 (Thomas, J., dissenting).

167. *Id.* at 25.

168. *Id.* at 24.

fact, as Oracle noted in its Supreme Court brief, the historical record of fair use trials is sparse. Rather, courts “most frequently’ resolve fair use as a matter of law ‘at summary judgment.”<sup>169</sup>

In light of this, it is interesting to me that, post-*Google*, it seems like there are more judges denying summary judgment and finding factual disputes that must go to the jury.<sup>170</sup> Often, of course, this is the right call; it is the jury’s role to decide *material* and *genuine* factual disputes given the important Seventh Amendment right to trial by jury.<sup>171</sup> But with fair use, many disputes are not really about the facts. Rather, they are about the *legal interpretation* of known facts. And even if there were a factual dispute about something, not all factual disputes might materially affect the Court’s ultimate balancing of the fair use factors. As I think you can tell, I like trying cases. But I also think that it is right to admit that jury trials can be expensive and burdensome for both the parties and the court.<sup>172</sup> Thus, I think this is an issue to watch.

*Second*, the *Google* Court’s decision to start with factor two, the nature of the work, and champion it as a key factor is deciding fair use in software cases is well known.<sup>173</sup> Another issue to watch is whether we will see other applications for factor two.

For example, we have litigated a series of cases that ask whether it is fair use to depict athletes realistically in a video game—with their tattoos—based on licenses from the athletes to use their likenesses, or whether permissions from the athletes’ tattooists are also needed to include the tattoos. We won the first of these cases, *Solid Oak Sketches, LLC v. 2K Games, Inc.*, on summary judgment in the Southern District of New York on three grounds—implied license, de minimis use, and fair use—in a decision by Judge Swain.<sup>174</sup>

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169. Brief for Respondent at 37–38, *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1 (2021) (No. 18-cv-956) (quoting *TCA Television Corp. v. McCollum*, 839 F.3d 168, 178 (2d Cir. 2016)).

170. *E.g.*, *Grant Heilman Photog., Inc. v. Tree Center, LLC*, No. 23-cv-3171, 2024 WL 2154011, at \*3 (D. Md. Apr. 22, 2024); *Sedlik v. Drachenberg*, No. 21-cv-1102, 2023 WL 6787447, at \*1 (C.D. Cal. Oct. 10, 2023) (granting motion for reconsideration but denying summary judgment).

171. *See Google LLC v. Oracle Am. Inc.*, 593 U.S. 1, 25 (2021); *see also* FED. R. CIV. P. 56 (“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

172. *Cf. Xavier Rodriguez, The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice as We Now Know It?*, 45 ST. MARY’S L.J. 333, 347 (2014) (“Abraham Lincoln wrote, ‘Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time.’” (quoting Abraham Lincoln, ‘Notes for a Law Lecture (July 1, 1850) in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 81 (1953)).

173. *Google*, 593 U.S. at 26.

174. 449 F. Supp. 3d 333 (S.D.N.Y. 2020). After this lecture was delivered, the Kirkland team won a jury trial in what is hopefully the last of these cases. There, the jury returned a verdict in under ninety minutes (including time for lunch), finding that the video game company’s use of the tattoos was covered by an implied license that the tattoo artist had given to the tattooed athlete. *See* Judgment Entry, *Hayden v. 2K Games, Inc.*, 2024 WL 3250749 (N.D. Ohio Apr. 19, 2024) (No. 17-cv-2635), ECF No. 339. Because of the way the verdict form was structured, the jury never reached the issue of fair use. *See* Redacted Special Interrogatories and Verdict Forms, *Hayden v. 2K Games, Inc.*, 2024 WL 3520751 (N.D. Ohio Apr. 19, 2024) (No. 17-cv-2635) (directing jury to “skip the remaining questions” after finding for Take-Two on its implied license defense).

The nature of the work is particularly interesting in this context. Tattoos are permanently inked on human beings who have their own rights and freedoms separate from those of the copyright holder.<sup>175</sup> Tattoos inked on a person's body seem inherently different in nature, therefore, from a painting on a canvas or a manuscript on a piece of paper, both of which are detached from the human body. You could not show people as they actually look without their tattoos. How should factor two's analysis apply in a context like this? Should the nature of the *work* be affected by the unique nature of a tattoo being fixed on a human being's body?

Other situations may also arise where the nature of the work may prove particularly significant. Gone, I think, are the days when factor two was reduced to whether the work was published, and whether it was factual or creative.<sup>176</sup>

*Third*, there is the question of how fair use will be applied to AI. Answering AI questions seems to have become the full-time employment of the copyright bar. I wish I could tell you which way the myriad courts considering this issue will decide the many cases currently being litigated, but I cannot. This is especially true if many cases are decided via jury trials, instead of through summary judgment decisions where it is sometimes easier to see what drove the conclusion. As we know, fair use requires a case-by-case analysis such that outcomes may differ based on the facts. Where the works involved, and the uses of them, differ, the fair use factors might produce different outcomes. In other words, we might not end up with a one-size-fits-all answer to the various questions on AI and fair use. As we work through these AI issues, the ability of all the actors in the copyright system to bring their expertise to the table is going to be very important.

I have one final thing to say about litigating fair use, and that is that you do not do it alone. One of the things about litigating cases is that you work as a team with your partners, associates, and clients, and often your colleagues in the bar as amici. Everyone is part of the process, and the result is the product of teamwork. I am proud that many Kirkland colleagues past and present, as well as many clients and friends in the bar were in the audience for this Manges Lecture, because this work was done with all of them. The bottom line is that we are all lucky to be part of the diverse and passionate copyright community, and it is exciting to think how each and every person who was in the room when this lecture was delivered, later watch this lecture online, or read through this Article will help further shape the law.

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175. See Second Amended Trial Brief at 21–22, *Hayden v. 2K Games, Inc.*, 2024 WL 3521721 (N.D. Ohio Feb. 29, 2024) (No. 17-cv-2635), ECF No. 268.

176. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).