Transforming 'Transformative Use:' The Growing Misinterpretation of the Fair Use Doctrine

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Abstract:

Starting in late 2012, and continuing into late 2013, the U.S. District Court for the Southern District of New York wreaked havoc on the traditional interpretation of the fair use copyright infringement defense. Two cases stemming from the advent of the Google Books Project, Author's Guild, Inc. v. HathiTrust and Author's Guild, Inc. v. Google, Inc. adopted a controversial interpretation of the fair use defense, codified at 17 U.S.C. § 107, when each case determined that the mass digitization of thousands of books constituted a fair use merely because the digitization was a 'transformative use.'

This Comment will explore the background of the fair use defense, from its common law origins to its codification in the 1976 Copyright Act to its application in modern law. Keeping this background in mind it will explain why the current legal state of the fair use defense, as propagated by S.D.N.Y. and the 9th Circuit, is inconsistent with traditional statutory construction principles. This will be done by conducting such an analysis of section 107, then putting it in context of the Google and HathiTrust decisions to show the inconsistencies.

Proposed recommendations to solve this legal inconsistency can come from clarification either from Congress by an amendment to section 107, or by a decision from the Supreme Court.

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I. Introduction

On October 10, 2012, Judge Baer, writing for the United States District Court for the Southern District of New York handed down a decision that fueled dramatic change to the fair use doctrine of U.S. Copyright law.[1] In Author's Guild v. HathiTrust, Judge Baer upheld the actions of a group of academic libraries to digitize their collections by partnering with Google in the Google Books project.[2] The Court held that these actions did not fall under the Copyright Act's library exception, codified at 17 U.S.C. § 108, but instead would be afforded a fair use defense, found at 17 U.S.C. § 107.[3]

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[1] See generally Author's Guild, Inc. v. HathiTrust, 902 F.Supp.2d 445 (S.D.N.Y. 2012)(holding that the fair use defense was available to the universities and that the systematic digitalization of copyrighted books contained within the universities libraries' was protected by the fair use doctrine).

[2] See id. at 445, 448 (explaining the background of how the universities worked with Google to procure digital copies of works in their collections, including works both in the public domain and under copyright protection).

[3] See id. at 456-58 (deciding that the fair use exception would apply in this case instead of the library exception to the Copyright Act, which allows nonprofit libraries and academic

A little over a year later, on November 13, 2013, Judge Chin of the same court continued this dramatic change by ruling for a commercial entity with a fair use defense.[4] In Author's Guild, Inc. v. Google, Inc., Judge Chin upheld Google's fair use defense for the complete copying and digital reproduction of millions of copyrighted materials.[5]

These holdings were a radical change from the precedent set up to the codification of the fair use defense.[6] Only the 9th

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institutions several limited options for digitization and photocopying of copyrighted works).

[4] See generally Author's Guild, Inc. v. Google, Inc., 2013 WL 6017130 (S.D.N.Y. 2013)(holding that the fair use defense was available to Google, a commercial Internet search engine, for the systematic digitalization of copyrighted books from partner libraries).

[5] See id. at 1 (explaining that Google made agreements in 2004 with several research libraries to digitally copy the books from each library's collection and has since made digital copies to give back to the libraries in addition to a large electronic database of the books).

[6] See 17 U.S.C. § 107 (codifying previous fair use defense case law into a statutory affirmative defense); see generally Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841)(enumerating the fair

Circuit applies the fair use defense as the New York Courts did, using a contested interpretation of what is known as "transformative use," which was a major basis for both Author's Guild decisions.[7] The focus of each S.D.N.Y. judge was on the way that Google and HathiTrust transformed the copyrighted works in new and socially valuable ways that varied greatly from the

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use defense as it was usually applied at common law as well as the four factors generally associated with those codified in the current Copyright Act).

[7] See generally Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003)(holding that displaying a 'thumbnail' version of a copyrighted picture on an Internet search engine was a transformative use, and therefore protectable under the fair use doctrine); see Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)(holding that Google's use of 'thumbnail' images of copyrighted images was a transformative use and protectable under the fair use doctrine). But see, e.g. Sandford Gray Thatcher, One Publisher's Take on the Google Decision, **Likelihood of Confusion** (Nov. 14, 2013), http://www.likelihoodofconfusion.com/one-publishers-take-on-the-google-books-decision/ (last visited Mar. 2, 2014).

uses of the original books and articles.[8] This is a dramatic leap from traditional fair use judicial interpretation, which balances the traditional principles of copyright of rewarding authors and creators with intellectually enriching the public, to allow this mass digitization of copyrighted works to continue without the permission of the copyright holders.[9]

This Comment will argue that the growing theory of "transformative use" as propagated by the 9th Circuit, and now adopted by S.D.N.Y., is a judicial interpretation that is not consistent with statutory construction principles. The decisions in HathiTrust and Google, extending the 9th Circuit broad view of "transformative use," are veering too far away

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[8] See Google, 2013 WL at 7-9 (explaining that Google's use of scanning the copyrighted books into a keyword searchable online book database was transformative from the original use of the books); see HathiTrust, 902 F.Supp.2d at 459-60 (finding that the works in the HathiTrust Digital Library are transformative because they serve an entirely different purpose, i.e. search capability, than the original copyrighted works).

[9] See generally Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994)(adopting Judge Leval's view of 'transformative use' to help analyze the first factor of the four factor fair use doctrine test)(citing Leval, infra n. 23).

from the traditional analysis of the fair use doctrine. The Congressional intent is at odds with this broad interpretation, and the principles of the Copyright Act would be better served by returning to a more traditional interpretation. In lieu of returning to a more traditional judicial interpretation of the fair use doctrine, there are a few legislative-based alternatives that would allow for this kind of digitization to continue without straying from the traditional statutory construction of 17 U.S.C. § 107.

Part Two of this Comment explores the background of the fair use doctrine from its common law origins and codification through to its application in modern law. Subsection A gives some relevant case law that developed the fair use doctrine until its codification at 17 U.S.C. § 107, and the general application following codification. Subsection B describes the broad 9th Circuit interpretation of the fair use doctrine, and particularly the theory of 'transformative use.' Subsection C details the Author's Guild, Inc. v. HathiTrust and Author's Guild, Inc. v. Google, Inc. decisions. Subsection D explains the basics of a statutory construction analysis.

Part Three analyzes why the 'transformative use' interpretation is inconsistent with traditional statutory construction principles. Subsection A looks to 17 U.S.C. § 107 and its legislative history in order to conduct a statutory

construction analysis of the statutes. Subsection B explains why the decisions in Google and in HathiTrust specifically veer too far from the principles of statutory construction.

Part Four provides legislative and judicial solutions to this issue of interpreting the fair use doctrine, and more specifically how the 'transformative use theory' factors in to the overall analysis. Finally, Part Five will conclude by reiterating that the current fair use defense as it is used in modern copyright law is inconsistent with statutory construction principles.

II. From Common Law to Codified Law to Transformative Law: Tracing the History of the Fair Use Doctrine

The United States Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10] Commonly known as the Copyright Clause, this embodies the delicate balance struck between rewarding an author for time and effort put into creating a work and limiting the monopoly protection to a certain amount of time, providing the public

[10] **U.S. Const.** art. I, § 8, cl. 8.

with access to the work.[11] The fair use defense plays a significant part in this balance because it attempts to limit the protection given to the authors by giving members of the public who meet certain criteria an affirmative defense to their infringement of an author's copyrighted material.[12]

This Section discusses the origins of the fair use defense and its original application, the codification of fair use in the Copyright Act, and finally how it is applied in modern law.

A. Humble Beginnings: the History of Fair Use and Creation of 17 U.S.C. § 107

Justice Story once opined that "copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtile [sic] and

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[11] See **U.S. Const.** art. I, § 8, cl. 8 (giving authors and inventors the exclusive right to what they write and discover for a limited amount of time, which strikes a balance between public access to the intellectual creations and rewarding the creator).

[12] See 17 U.S.C. § 107 (limiting the exclusive rights granted to authors who have successfully copyrighted their works by allowing infringement for purposes such as teaching, reporting, or researching following a analysis of four factors).

refined, and, sometimes, almost evanescent[13]." What the Justice meant was that it is not often easy in copyright cases to come to fitting conclusions or create principles that can be generally applied to all copyright cases.[14] Copyright infringement cases, by nature, need to be examined and analyzed case-by-case as copying one line of a novel may be considered infringement whereas copying large chunks may not be found to infringe depending on other facts and circumstances.[15]

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[13] Folsom, 9 F. Cas. at 344 (C.C.D. Mass. 1841).

[14] See id. (explaining that in some cases it may be obvious when a person infringes on the copyright of another, but in others the line between infringing and not infringing is unclear and difficult to discern).

[15] See id. at 344-45. See also Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985)(stating that there is no generally applicable fair use definition that can be applied, so each case must decided on its own facts); Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984)(allowing a Court to use section 107 to apply an equitab;e rule of reason analysis to claims based on their particular facts); H.R. Rep. No. 94-1476, at 65-66 (1976)("Indeed, since the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case

The fair use defense is no different in that judges need to examine and analyze on it a case-by-case basis. Justice Story recognized this in the first case found to enumerate the factors we now know as part of the fair use defense, Folsom v. Marsh.[16] The plaintiff had created a work on the life of President George Washington, which included personal letters written by Washington along with his biography.[17] The defendant allegedly used some of the letters from the plaintiff's work in creating

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raising the question must be decided on its own facts."); S. Rep. No. 94-473, at 62 (1975)("Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.").

[16] Folsom, 9 F. Cas. 342.

[17] See id. at 345 (explaining that the plaintiff, Mr. Sparks, had edited a twelve-volume work on the life of President George Washington, the first volume containing a biography and the following eleven containing verbatim copies of President Washington's personal and private letters, messages and other public acts, with some explanatory notes from the editor).

his own, shorter biography of Washington.[18] In total, the Justice found 353 pages identically copied, with 319 of these pages containing the copies of the Washington's letters.[19]

In 1841, the then-Circuit Court of Massachusetts was confronted with the questions of whether such copying was considered 'piracy,' and if there were any affirmative defenses that applied.[20] Justice Story enumerated some factors that could be used to determine if a person had pirated another's copyrighted work, but would not be held liable for his or her piracy in coming to this decision.[21] This was the common law

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[18] See id. (countering the story of the plantiff with that of the defendant, Mr. Upham, who created another life of President Washington, contained in a two-volume work).

[19] See id. at 345-46 (explaining that the contested Mr. Upshaw created of Washington's life was not contested, but what was contested was his use of verbatim copies of Washington's letters from Mr. Sparks' original work).

[20] See id. at 345-49 (finding a 'piracy,' which is equated with modern day copyright infringement, and that the affirmative defense brought by the defendant fell short in this case, a defense later known as the fair use defense).

[21] See id. at 348 ("Look to the nature and objects of the selections made, the quantity and value of the materials used,

beginning of what we now know as the analysis of the fair use defense in U.S. Copyright law.[22]

These factors were adopted among most courts to help determine if a fair use defense was applicable in any given case.[23] They were so prevalent in fact, that they were codified as the factors for judicial consideration in the 1976 Copyright Act.[24] The fair use section says that fair use of a copyrighted work for the purposes of criticism, comment, news reporting,

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and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.").

[22] Id. at 348; see 17 U.S.C. § 107 (enumerating an updated version of the four factors from Folsom).

[23] See Campbell, 510 U.S. at 576-80 (explaining Folsom's enumeration of previous case law, and the fair use defense in current-law application); Leval, Towards a Fair Use Standard, 103 **Harv. L. Rev.** 1105, 1106-07, 1110-12 (1990)(explaining how judges have applied fair use despite the lack of guidance given by the codification in section 107, and how he believes Judge Story's four factors from Folsom should be applied).

[24] See 17 U.S.C. § 107 (listing the four factors derived from Judge Story's original factors listed for consideration in a fair use analysis in Folsom).

teaching, scholarship, or research is not considered an infringement of copyright.[25] The section then gives list of factors, reminiscent of those from Justice Story, which judges may take into consideration to determine if the facts of a case warrant a fair use defense.[26] These factors include "the purpose and character of the use," which includes consideration of the use if commercial or not, "the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work."[27]

What is clear from the Congressional notes accompanying the statute is that the distinction between what is fair use and what is considered copyright infringement is not always consistent or easy to define.[28] Despite the fact that courts have analyzed and ruled on the fair use defense many times over the years, the codification of the defense is the first unified

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[25] Id.

[26] Id.

[27] Id.

[28] H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976); S. Rep. No. 94-473, supra n. 15 at 62 (1975).

attempt at defining of the concept that has emerged.[29] Even with the codification, there is no way to have a general definition to apply since fair use raises questions for each case that must be decided on the facts.[30] What is also clear from the legislative notes is that the intention of the statute is to merely codify judicial interpretation of the defense up until that point, not modify or enlarge the concept in any way.[31] It is meant to be open to further judicial interpretation and be a starting point for a judge's analysis.[32]

Section 107's open-ended application was viewed in the years following its codification as providing too little guidance for judges.[33] In 1990, Judge Pierre Leval of the Second

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[29] See id. (suggesting that judges have attempted to apply this defense with the factors for consideration that have emerged withing each respective jurisdiction, with no previous statutory basis).

[30] Id.

[31] Id.

[32] Id.

[33] See Leval, supra n. 23 at 1105-07 (stating that the formulations in the statute give little guidance on how to recognize fair use, and which levels of copying are acceptable and which are excessive).

Circuit published a law review article advocating for changes in the way the fair use defense was viewed.[34] Judge Leval suggested moving back to a fair use defense concept that is consistent with the principles of copyright, which include the utilitarian goal of stimulating progress of the arts for the intellectual improvement of the public rather than give the absolute ownership of a work to an author.[35] A judge may do this by looking at the four statutory factors given and using them to analyze the facts of each case while considering if a finding of fair use from any individual factor would help or harm the objectives of copyright.[36]

Arguably the most important point from Judge Leval's article is his explanation of how a judge may analyze the first statutory factor, which considers the purpose and character of

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[34] See id. at 1107 (advocating that fair use should become a "rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law.").

[35] See id. at 1107 (writing that judges make their decisions regarding the fair use defense not by constant principles but instead by their reactions to the fact patterns of individual cases, finding their justifications in fairness and private property concerns).

[36] Id. at 1110-11.

the secondary and allegedly infringing use.[37] Judge Leval is of the belief that this first factor is the heart of the fair use defense, while the other factors focus on the entitlements of the copyright owner to be weighed against the first factor.[38] Considering the purpose and character of use raises the question of if the use is justified under the objectives of copyright law, and if justifiable it must be powerful enough to outweigh the rights of the copyright owner by transforming the original work.[39] This 'transformative use' must add some sort of value to the original work rather than repackaging or republishing

[37] See id. at 1111-12 (explaining that to find the first factor, you must analyze if the infringement was a justified use, and justification hinges on if the challenged infringing use is transformative or not).

[38] See id. at 1116 (explaining that if there is no transformative purpose found, that the fair use defense should be rejected without considering the other factors).

[39] See id. at 1111-12 (answering this question requires a use to be 'transformative,' which is found when a use is "productive and . . . employ[s] the quoted matter in a different manner or for a different purpose from the original.").

quotations from the original material.[40] According to Judge Leval, as this factor is indispensible to a fair use defense, if a justification through 'transformative use' is not found then fair use should be rejected without further analysis of the other factors.[41]

Judge Leval advocated successfully for this utilitarian 'transformative use' approach, as it was adopted by the Supreme Court of the United States in Campbell v. Acuff-Rose Music, Inc..[42] The defendants wrote a commercial parody of plaintiff's song and the Supreme Court was asked to rule on the alleged infringement.[43] In its consideration and analysis of the issue,

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[40] See id. at 1111-12 (noting that transformative uses when proven do not necessarily guarantee a successful fair use defense, especially if extensive taking from an original work imposes on the incentives for authors to create).

[41] Id. at 1116.

[42] See Campbell, 510 U.S. 578 (adopting Judge Leval's view of the first factor in section 107 being determinative, and it may be found by conducting a transformative use analysis).

[43] See id. at 571-73 (laying the background that defendant 2 Live Crew wrote a commercial parody of Roy Orbison's song "Oh, Pretty Woman" owned by plaintiff Acuff-Rose Music who sued for infringement, and the Court was taked with deciding if it was

the Court heavily referred to Judge Leval's idea of 'transformative use.'[44] The Court held that this specific parody did not copy excessively from the original, and the use's criticism of the naïveté of an earlier era was transformative.[45] The Court in adopting Judge Leval's take on the application of the four factors listed in section 107, expanded the use of the 'transformative use' concept to a class of copyright works that includes pictures, sculptures, and music.[46]

This important decision from the Supreme Court adopted idea of the importance of the first statutory factor in section 107

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infringement and if it was considered a fair use under 17 U.S.C. § 107).

[44] See id. at 578-79 (writing by Justice Souter opining that transformative works lie at the heart of the fair use doctrine, and that "the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use.").

[45] Id. at 578-85.

[46] See generally id. (holding that a commercial parody of Orbison's song "Oh, Pretty Woman" may be a fair use under section 107, applying the transformative use theory to a work falling under section 102(a)(2)).

to the fair use defense.[47] It was not long before other courts began to expand this application without considering, as Judge Leval cautioned, the core objectives of copyright law.[48] This expansion of 'transformative use' began with some key cases in the 9th Circuit.[49]

[47] Id. at 578.

[48] See generally Kelly, 336 F.3d 811 (applying the fair use defense to an Internet search engine considering the transformative use and public good, unbalancing the rights of the authors and creators at the core of copyright objectives); Perfect 10, 508 F.3d 1146 (applying the fair use defense to Google and Amazon again putting the transformative use that serves the public good over the rights of the copyright owners).

[49] See Kelly, 336 F.3d at 818-19 (finding use of thumbnails on an internet search engine to be transformative of the original photographs and therefore qualifying for the fair use defense); Perfect 10, 508 F.3d at 1163-68 (holding that the fair use defense applies to Google and Amazon using copyrighted photographs as thumbnails from a different website).

B. 'Transformations' Rewarding the Public Over Authors

The Ninth Circuit is well known for tackling issues of advancing technology in copyright contexts.[50] The results of considering these sorts of issues do not always retain the core concepts of copyright law, which is to advance public intellect for the exchange of return on investment by creative authors willing to share their works.[51] This is clearly illustrated through the Circuit's decisions in both the Kelly v. Arriba Soft Corp. and Perfect 10, Inc. v. Amazon.com Inc. cases.[52]

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[50] See generally Kelly, 336 F.3d 811; Perfect 10, 508 F.3d 1146 (applying the fair use defense to copyrighted photographs on the internet that were allegedly infringed by an online search engine).

[51] See **U.S. Const.** art. I, § 8, cl. 8 (investing in Congress the right to make laws regarding the limited protection of the writings of authors in exchange for enriching the general public knowledge); Leval, supra n. 23 at 1107 (explaining the utilitarian goals and purposes of copyright law generally, and the Copyright Act specifically).

[52] See Kelly, 336 F.3d 811 (looking more to a transformative use and the good of the public over the protections supposed to be afforded to copyright owners); Perfect 10, 508 F.3d 1146 (citing the usefulness of a search engine and the thumbnail image search

In 2006, the Court in Kelly v. Arriba Soft Corp. found that while the defendant's use of the plaintiff's photographs was commercial in nature, it was more incidental than exploitative.[53] The Court also found that changing the full-size photographs into smaller, lower-resolution images constituted a 'transformative use' from the originals by providing access to images on the Internet and their websites, as opposed to the aesthetic function of the original photographs.[54] After considering the other three factors of section 107, the Court

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that can be done ot the public as a transformative use, and finding that to be more persuasive than the the limited protections given to the owners of the copyrighted photographs).

[53] See Kelly, 336 F.3d 816-19 (giving the background that Arriba Soft Corp. is a search engine that displays results as small pictures, or 'thumbnails,' instead of displaying text and that Kelly was a photographer who realized that his images displaying scenes of the American West were part of Arriba Soft's database and sued for infringement).

[54] See id. at 818-19 (empasizing the function change from the original work to the allegedly infringing use, rather than the "retransmission of . . . images in a different medium," simply because this change served the purpose of improving access to information on the internet rather than artistic expression).

concluded that as a majority of the factors gave favor to Arriba Soft that use of the thumbnails was considered a fair use.[55]

A year later in 2007, the Ninth Circuit Court again considered a fair use claim with very similar facts to Kelly.[56] Perfect 10, Inc. v. Amazon.com Inc. had facts and a fair use defense analysis that was very similar to Kelly.[57] The Court found that Google's use of the thumbnails was highly transformative because they serve a different function than the original work's aesthetic or entertainment purpose.[58] Google was

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[55] Id. at 822.

[56] See generally Perfect 10, 508 F.3d 1146 (ruling on a case brought against Google and Amazon with a very similar fact pattern to Kelly regarding if thumbnail images on an internet search engine constituted fair use).

[57] See id. at 1155-57, 1163-68 (stating that Google was using thumbnail versions of full pictures from the Perfect 10 website, a site offering nude photos to those willing ito pay to be part of the "member's area").

[58] See id. at 1163-68 (analyzing the four factors set out in section 107 and finding that the thumbnails used by Google and Amazon.com were transformative uses of the Perfect 10 pictures). See also Kelly, 336 F.3d at 819 (finding Arriba Soft's use of

found to have improved access to information on the Internet, a use that the court found to be new, different, and transformative from Perfect 10's original use for the photographs.[59]

Moving the theory of 'transformative use' to give so much deference to public enrichment over rewarding the authors goes much further beyond the guidance provided by the statute in section 107.[60] The Supreme Court advocated for this change, so

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the thumbnail images for the search engine function to be transformative).

[59] See Perfect 10, 508 F.3d at 1165 (going so far as to say that the search engine may an even more transformative use than the parody considered by the Supreme Court in Campbell).

[60] See 17 U.S.C. § 107 (enumerating four factors to guide judges in applying the fair use defense to individual cases). See generally Kelly, 336 F.3d 811 (applying the transformative use theory to thumbnail images of copyrighted photographs to allow a fair use defense to protect the search engine from an infringment allegation); Perfect 10, 508 F.3d 1146 (applying the transformative use theory to thumbnail images of photographs that were copyrighted and used by another website to allow a fair use defense to protect the search engines from the infringement allegations).

long as it was done within the purposes of copyright, and also stated that lower courts may lessen the weight of consideration of the last three factors so long as the first factor is found through a transformative use.[61] The Ninth Circuit takes this one step further by looking to the great public service provided by these two similar cases in terms of search engine functionality and accessibility, and how transformative the use is without seeming to consider the other section 107 factors Judge Leval advised would protect the interests of the copyright owner.[62]

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[61] See Campbell, 510 U.S. 569 (adopting Judge Leval's theory of tranformative use and the importance of the first section 107 factor over the other three factors, and advocating that all analyses be done with the basic purposes of copyright in mind).

[62] See Kelly, 336 F.3d 811 (finding a transformative use of the pictures by the search engine, and how the search engine generally is a great public service); Perfect 10, 508 F.3d 1146 (finding that the search engine and its use of the thumbnail images was transformative and good for the public generally). See also Leval, supra n. 23 at 1110-11, 1116-25 (explaining that each factor directs courts to examine a fair use issue from every angle to ask if a finding of fair use would serve the purposes of copyright or not, and explaining the three other factors in depth).

This shift seems to put more emphasis on the needs of the public over incentivizing new authors and creators to continue creating, unbalancing one of the core purposes of copyright.[63]

C. 'Transforming' Fair Use to Serve the Public: Google and HathiTrust

The 9th Circuit is no longer one of the only circuits to apply the 'transformative use' concept to the fair use defense by favoring vast public enrichment over rights of authors. Two very recent cases out of the U.S. District Court for the Southern District of New York ("S.D.N.Y.") in the Second Circuit have fully embraced this concept relating to the Google Books Project.[64]

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[63] See **U.S. Const.** art. I, § 8, cl. 8 (explaining that authors are given limited protection for sharing their writings with the public); Leval, supra n. 23 at 1106-07 (explaining the importance of analyzing the fair use defense within the overall purposes of copyright).

[64] See generally HathiTrust, 902 F.Supp.2d 445 (applying the fair use defense to the libraries partnering with Google and digitizing their collections, citing public access and access to the print disabled as transformative of the original use of the books); Google, 2013 WL 6017130 (applying the fair use defense

The Author's Guild, a professional organization and advocate for writers, brought suit against Google initially in late 2005 for its creation of the Google Books project and litigation continued through November of 2013.[65] This project partnered Google with academic libraries to conduct a mass digitization of books.[66] In Author's Guild, Inc. v. Google, Inc., Judge Chin writing for S.D.N.Y. found that Google could exercise a fair use defense, relying heavily on Judge Leval's article, the ruling from the Supreme Court in Campbell, and the

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to Google for creating a searchable database of books, considered transformative from the original use).

[65] See Google, 2013 WL at 1-6 (procedurally, the history of this case from the origin of the suit in 2005 up until 2011 was mostly concerned with the two parties negotiating a settlement, which was brought before S.D.N.Y and subsequently rejected, from which sprang a fresh class-action suit was brought and recently decided on in November of 2013).

[66] See id. at 1 (copying the entire text of books in the public domain and books that still retained copyright protections given to Google by the libraries, digitizing the books and including a keyword search function and creating a massive electronic book database on Google's website).

more recent 9th Circuit precedent regarding fair use.[67] Judge Chin writes that while there was an abundance of evidence pointing to a prima facie case of copyright infringement by Google it did not matter because Google's use of the copyrighted works was highly transformative.[68]

When taking into account the other factors, Judge Chin found that there was not many convincing arguments made in favor of Author's Guild save for the factor that considers the amount of the original work that is copied.[69] When considered overall,

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[67] See id. at 6-11 (analyzing the fair use defense by laying out a standard of review relying on the decision in Campbell, Judge Leval's article, and the 9th Circuit Kelly and Perfect 10 decisions then applying it to the facts of this case finding transformative use and therefore a fair use defense).

[68] See id. at 6-8 (finding that Google changed "expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books" and did not supersede the books because Google Books was not meant to be a tool to read the books).

[69] See id. at 9 (stating that as the entirety of the books were scanned and reproduced, this would normally be concerning, but since Google needed full verbatim scans of the books in order to

Judge Chin believed that Google Books was a huge benefit not only to the general public, but also to the authors and publishers and found a fair use defense in this case would be in line with the principles of copyright.[70]

In a separate suit with very similar facts, The Author's Guild brought suit against HathiTrust in 2011, a partnership of major academic research libraries founded in 2008, as an offshoot of the Google Books project.[71] The main difference between this case and the case from which it stems is that HathiTrust is a group of libraries, and their use of the material is presumed to be for nonprofit purposes rather than commercial uses.[72]

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offer a full-text search of the books, Judge Chin found this to balance the harm of the taking).

[70] Id. at 10-11.

[71] HathiTrust, 902 F.Supp.2d at 446. See id. at 1 (explaining that this separate suit occurred after the settlement in the original Author's Guild, Inc. v. Google, Inc. case was rejected).

[72] See generally HathiTrust, 902 F.Supp.2d at 445 (eliminating a major consideration for a judge when analyzing the first factor from section 107, which takes into account the purpose and character of the allegedly infringing use including if the use

Author's Guild, Inc. v. HathiTrust was decided a little earlier than the main Google Books case, in October 2012.[73] Relying on Campbell and the work of Judge Leval, Judge Baer found that the first factor of section 107 was satisfied in purpose for scholars and academic research, in character by protecting those works that still have valid copyrights from being read in full without purchase, and in transformative use because the new purpose of the copied works was enhanced search capabilities of the text.[74] After evaluating the other three factors and concluding that transformative use undermined any factors that would have been favorable to the Author's Guild without a transformative use, Judge Baer ruled that it served the purposes of copyright to allow a fair use defense to apply in this case.[75]

The combination of these two cases shows the rapid adoption of the first factor of the section 107 as the one that garners

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is commercial or not.); see 17 U.S.C. § 107(1)(including within the purpose and character of the use whether or not a use is commercial in nature or is for nonprofit educational purposes).

[73] See HathiTrust, 902 F.Supp.2d at 445 (finding that HathiTrust was entitled to a fair use defense).

[74] Id. at 459-61.

[75] Id. at 461-64.

the most attention during analysis and the one that, if a transformative use is found, will determine whether or not a fair use defense applies in a given case.[76] Starting with Judge Leval and the adoption of his theory by the Supreme Court, now expanding from the 9th Circuit into the 2nd Circuit, this theory is likely to change how fair use is applied from pre-codification precedent and from how the statute suggests it should be applied.

D. Statutory Construction of Section 107: The Basics

The processes of legislative drafting and analysis of statutory language are intertwined in the sense that one often considers the other when deciding how to draft new legislation

[76] See Google, 2013 WL at 6-11 (finding a fair use defense to be applicable to the infringement by Google in digitizing thousands of copyrighted books based largely upon a finding of transformative use); id. at 459-61 (holding that a fair use defense was found mostly through a finding of transformative use by the libraries in the digitization of their collections). See also Campbell, 510 U.S. at 578 (adopting Judge Leval's view of emphasizing the the first factor of section 107 more thant the other three if a 'transformative use' justification can be found)(citing Leval, supra n. 23 at 1110-11).

or how to properly interpret codified language, respectively.[77] Center to both of these processes are the canons of statutory principles, seemingly common-sense idioms that judges apply when reading and interpreting a statute, and that legislators consider when drafting new legislation to be passed into law.[78]

These canons are extremely important to keep in mind finding the meaning of any statute, especially in the case of

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[77] See generally Kim, Statutory Interpretation: General Principles and Recent Trends, **Cong. Research Serv.** (2008), available at http://opencrs.com/document/97-589/ (last visited Mar. 2, 2014)(explaining the canons of statutory construction that the Supreme Court often uses when interpreting stautory language, and how Congress may write laws with those canons in mind); Llewellyn, Remarks on the Theory of Appellate Decision & the Rules or Cannons About How Statutes are to be Constructed, 5 **Green Bag 2d** 297 (listing out the canons of stautory construction and the counterarguments that can be made against each canon, and how each may be applied).

[78] See Kim, supra n. 77 at 1-2 (setting out the overview of the Supreme Court's reasoning behind statutory interpretation); Llewellyn, supra n. 77 at 302 (providing these idioms and explaining that they need to be applied to the situation of each case to take hold).

the fair use defense.[79] The codification in the 1976 Copyright Act of the defense was meant to condense decades of judicial consideration and countless different interpretations into one concept for judicial application across jurisdictions.[80]

III. Statutory 'Misconstruction': The Propagation of 'Transformative Use'

The current track of the fair use defense, especially following the decisions in Author's Guild, Inc. v. HathiTrust and Author's Guild, Inc. v. Google, Inc., is straying too far from the common statutory interpretation canons or principles.[81]

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[79] See Kim, supra n. 77 at 1-2 (explaining the importance of the canons and other rules of construction used by the Supreme Court in statutory interpretation); Llewellyn, supra n. 77 at 302 (listing 28 canons of traditional statutory construction and their counterpoints, which judges may use depending on the statute involved and the other facts of each case).

[80] See S. Rep. No. 94-473, supra n. 15 at 62; H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (adopting judicial construction of the fair use defense starting with Folsom up through codification in the 1976 Copyright Act).

[81] See Google, 2013 WL 6-11 (implementing a fair use defense after determining that there was a 'transformative use' in Google digitizing the books from the HathiTrust libraries and

This Section will analyze the traditional statutory construction of 17 U.S.C. § 107 and how Congress intended this defense to be applied based on the language itself and the legislative history of the section's drafting. This section will then apply this statutory construction to the Author's Guild cases and show how each decision's extension of the Ninth Circuit's interpretation of fair use strays too far from the traditional statutory construction of the fair use defense.

A. The Codification of Fair Use: Restating Common Law

17 U.S.C. § 107 was created with the intention to restate the judicial doctrine of the fair use defense at the time that the statute was adopted.[82] This codification includes a preamble

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making it keyword searchable in a database); HathiTrust, 902 F.Supp.2d at 459-61 (finding a fair use defense when the libraries took advantage of a partnerhsip with Google in the Google Books project by digitizing their collections to make them available on a digital databse and to print disabled individuals, all considered to be a 'transformative use').

[82] See S. Rep. No. 94-473, supra n. 15 at 62; H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (beginning with the factors enumerated in Folsom, Congress considered the fair use defense as it evolved in judicial consideration until a decision was made on statutory language for condification of the defense).

generally explaining the defense, gives four factors that judges are urged to consider among others when analyzing a case for fair use, and a caveat regarding the place of unpublished works within the defense.[83] A traditional statutory construction analysis considers many of the canons, and any judge trying to

[83] 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.").

interpret the meaning of this statute and how fair use applies to an individual case should consider many of these canons as well.[84]

Statutory construction based on the traditional canons emphasizes starting and ending any analysis with the plain language of the statute, especially if that language is unambiguous.[85] This means that if the language provided can plainly be discerned, then there is no need to turn to the legislative history or Congressional intent for further

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[84] See Kim, supra n. 77 at 1-2 (explaining that Supreme Court justices often consider these canons when deciding how to interpret the statutes involved with the cases brought before them); Llewellyn, supra n. 77 at 302 (showing the different canons that judges will employ when interpreting statutes).

[85] See Kim, supra n. 77 at 2-3 (stating that when the Supreme Court finds the language and meaning of a statute to be clear that there is no need to look to legislative history outside the statute); Llewellyn, supra n. 77 at 302 (stating one of the basic canons of statutory construction as "if language is plaing and unambiguous it must be given effect" with the counter argument that plain language should be disregarded when it leads to absurd results that bely the manifest purpose).

guidance.[86] However, if a statute is ambiguously written or a literal reading would create absurd results, it is common for courts to then look to the legislative history of a document to garner further information on how Congress intended the statute to be interpreted.[87]

For section 107, the language is very clear as to its meaning, even if the application may be more difficult.[88] It

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[86] See Kim, supra n. 77 at 2 (explaining that the Supreme Court has moved away from evaluating sources that are extrinsic to the text of the statute, such as legislative history and other related outside sources).

[87] See id. at 2-4 (talking about the plain meaning rule, and later explaining that this is often disregarded if results from applying this rule would be a disregard of congressional intent). See also Llewellyn, supra n. 77 at 302 (giving the couter point to the plain and unambiguous cannon that it should not be read as being plain and unambiguous "when literal interpretation would lead to absurd or mischevous consequences or thwart manifest purpose").

[88] See Leval, supra n. 23 at 1105-06 (discussing that while the Copyright Act of 1976 clearly adopted judicial doctrine and language of the fair use defense up until that point, there was no real guidance given for its application in the statute).

states that notwithstanding the provisions of sections of the Act that note the exclusive rights granted to copyright owners, fair use of a specific copyrighted work for the purposes enumerated is not considered to be an infringement of that copyright.[89] It goes on to list four guiding factors that shall be included in any analysis determining if an infringing use may be afforded a fair use defense.[90] It then adds the caveat that just because a work is unpublished, that alone will not bar a finding a fair use if a finding can be made based on the four listed factors.[91] To summarize, a plain reading would say that fair use of a copyrighted work for specific purposes will not be

[89] See 17 U.S.C. § 107 (listing these purposes to include "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research").

[90] See id. at §§ (1)-(4)(including the purpose and character of the use, the nature of the copyrighted work, the amount of the portion used in relation to the whole, and the effect of the use upon the potential market or value of the copyrighted work).

[91] See 17 U.S.C. § 107 (explaining after the enumeration of the four factors that an unpublished work will not automatically be barred from a finding of fair use).

infringement and that the four factors should be used in making that determination.[92]

The language itself gives no weight to which of the factors, if any, should be weighted more in the analysis.[93] A plain reading would also support that due to the subjective nature of the factors that every case attempting to bring a fair use defense needs to be decided on its own particular fact pattern and that there is no bright-line standard for deciding if something is considered a fair use or not.[94] There are some things that may be inferred based

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[92] See id. (looking at the full language of the statute will allow a reader to acertain the plain language meaning that as lon15g as, after an analysis of four factors, an allegedly infringing use being used for one of the listed purposes is found to outweigh the rights of the copyright owner, the affirmative fair use defense will be applied).

[93] See id. (stating that judges should consider all four of the enumerated factors in the statute without giving deference to one above any of the others).

[94] Id. Accord S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976)(adopting judicial doctrine up to the codification of fair use means analyzing the

on specific words used within the statute.[95] One example is that because the words "shall include" are used previous to describing the factors for consideration that all four should be considered by judges in their analyses, but these are by no means the only factors that may be brought in for consideration.[96] Another is that because the words "such

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defense on a case-by-case basis weighing at least the four factors mentioned if not more that apply to the specific case).

[95] See Kim, supra n. 77 at 6-7 (explaining that words that are not defined within the statute or are not terms of art are given their ordinary, dictionary definitions); Llewellyn, supra n. 77 at 302 (enumerating the canon of statutory construction that claims that words are to be taken in their ordinary meaning unless they are technical or terms of art, so in this statute, reading these terms as they are ordinarily defined).

[96] See 17 U.S.C. § 107 ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include [the four factors]."). See generally Kim, supra n. 77 (listing many of the canons and rules the Supreme Court justices take into consideration when conducting statutory construction interpretations); Llewellyn, supra n. 77 (giving 28 canons for statutory interpretation and their counter

as" are used before the list of acceptable purposes that may bring a successful fair use defense, it may be inferred that there are other possible acceptable purposes and the list provided is non-exhaustive.[97]

Considering the language as interpreted above is not ambiguous, and would not lead to absurd results due to its success in American common law for decades prior to codification, this would be a good reading of the language of the statute.[98] It could be argued that because the

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points that may be used by judges in analyzing statutory language).

[97] See 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 [the enumerated purposes to serve as examples] . . .").

[98] See Kim, supra n. 77 at 6-7 (Supreme Court justices often will interpret words that are not terms of art according to their ordinary meanings, usually found within a dictionary); Llewellyn, supra n. 77 at 302 (noting that the counterpoints to the traditional statutory construction canons of plain language and ordinary meaning do not really apply in a situation where

guidance given is so difficult to apply, despite being plainly stated, that a judge would want to look to legislative history anyways for further guidance.[99] While this is always a valid option, the legislative history merely spells out what is obvious from a plain reading of the statute itself.[100] The history explains that courts are

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those interpretation do not cause absurd results that fall outside the purposes of the statute).

[99] See Leval, supra n. 23 at 1105-06 (discussing the difficulties judges encounter applying the fair use defense analysis due to the lack of guidance in the statute itself); Llewellyn, supra n. 77 at 302 (providing the counterpoint for the canon explaining that "a statute cannot go beyond its text" that a statute may be implemented beyond its text to effect its overall purpose, which may be found in the case of this statute through the legistlative history). Contra Kim, supra n. 77 at 2-3 (explaining that the current trend of the Supreme Court is to begin and end analysis of statutes with their plain meaning if discernible, rather than resorting to legislative history).

[100] See 17 U.S.C. § 107; S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976)(showing that the codification of the statute is merely based on judicial doctrine up until 1976 on the fair use

meant to be free to adapt the doctrine on a case-by-case basis, and that section 107 is intended to restate judicial doctrine of fair use as it was developed up to the point of codification rather than change, narrow, or enlarge the doctrine in any way.[101] This is all in line with the information that could be garnered from a traditional statutory construction analysis.[102]

Another traditional statutory construction principle is that a statute should be read as a whole, where each section within is interpreted in a broader statutory

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defense, balancing at least the four factors enumerated in any analysis, which is discernible from the plain language of the statute).

[101] S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976).

[102] See generally Kim, supra n. 77 (laying out the typical cannons of statutory construction and the way that the Supreme Court at the time the article was written tended to use those canons in statutory interpretation); Llewellyn, supra n. 77 (providing the traditional canons of statutory construction and their counterpoints, and explaining the ways in which these canons and counterpoints are used in a typical statutory construction analysis).

context to further the overall purposes of the statute.[103] In the context of the Copyright Act, the statute itself fulfills the part of the United States Constitution that designates the right to Congress to create copyright laws.[104] The Constitution states that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[105] This means that all copyright laws should be written and interpreted with the broad purpose in mind that authors are rewarded for sharing their creativity with the public by having a limited monopoly over exclusive

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[103] See Kim, supra n. 77 at 2-3 ("A statute should be read as a harmonious whole, with its various parts being interpreted within their broader stautory context in a manner that furthers statutory purposes."); Llewellyn, supra n. 77 at 302 (including the canon that statutes in pari materia, or on the same subject or matter, must be construed together).

[104] See **U.S. Const.** art. I, § 8, cl. 8 (allowing for Congress to make laws concerning patents and copyrights, giving a limited monopoly to authors and inventors for sharing their writings and discoveries with the general public).

[105] Id.

rights that go with the work, like reproducing and distributing the work for example.[106] It is a delicate balance between the public intellectual benefit and rewarding the work and creativity of the authors.[107]

Section 107 should be read with this general purpose

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[106] Id. See Leval, supra n. 23 at 1107-08 (expanding on the Constitutional language explaining that it is designed to stimulate progress in the arts for the enrichment of the general public by rewarding authors for their creative efforts, with the overall goal to increase the harvest of knowledge). See also 17 U.S.C. § 106 (listing examples of exclusive rights granted to a copyright owner upon the granting of a copyright for a work, including right to make and distribute copies, right to public display, right to sound recordings, etc.).

[107] See **U.S. Const.** art. I, § 8, cl. 8 (giving authors the limited protection of their writings in exchange for sharing those writings with the public for the general intellectual good); Leval, supra n. 23 at 1107-08 (elaborating on the language in the Constitution and stating what he believes the ultimate purposes of copyright law are, and that is the utilitarian balance between the public and the authors and attempting to enrich the public while rewarding and incentivizing the authors).

in mind, which is often acknowledged in opinions where judges are considering the fair use defense.[108] It is important to analyze the defense and the four factors listed in section 107 in a context that satisfies the core principles of copyright, namely the balance mentioned above.[109]

Two important canons of statutory construction that play off of each other are the idea that every word and clause of a statute must be given effect, and that the courts should not add language that Congress has not included.[110] Statutes should not be construed to render

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[108] See Campbell, 510 U.S. at 575-78 (detailing the general purpose of copyright as detailed in early fair use case law, the intent in the legistlative history of section 107, and finally Judge Leval's opinion of these purposes).

[109] See id. at 575-78 ("Nor may th efour statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."); Leval, supra n. 23 at 1110-1111 (mentioning the balance between the public and the authors inherent in the Constitution regarding copyright law).

[110] See Kim, supra n. 77 at 12-13 (explaining that statutes should be interpreted so as not to presume that Congress was

superfluous any of the language that is included.[111] Similarly, Congress put time and effort into creating a statute and going further to amend it, so the courts should be wary of including and making crucial any new language to the statute.[112] This prevents judges from undermining the

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ignorant of the language it employs, so therefore every word and clause should be seen as important, and that the converse argument of this is that the courts should not presume to add language that Congress has not included); Llewellyn, supra n. 77 at 302 (stating the canon that "every word and cluase must be given effect").

[111] See Kim, supra n. 77 at 12-13 ("A basic principle of statutory interpretation is that courts should 'give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legistlature was ignorant of the meaning of the language it employed.')(citing Monclair v. Ramsdell, 107 U.S. 147, 152 (1883)); Llewellyn, supra n. 77 at 302 ("Every word and clause must be given effect.").

[112] See Kim, supra n. 77 at 13 ("A converse of the rule that courts should not read statutory language as surplusage is that courts should not add language that Congress has not included.").

authority of Congress and interpreting the laws as they were written, allowing for respect of the drafting process of Congress itself for choosing certain language. A counterargument to this may be that the general rule is contrary to a very prominent and evident meaning that judges feel should be applied, and that judges should be given the leeway to interpret as they see fit to the situation at hand in a case.[113]

Section 107 should be read as including all four factors, even if they are not to be weighed equally by a judge during his or her consideration of a case's individual fair use defense.[114] Also, a judge should not add language to what is already given, and in the case of section 107 that would mean an additional factor that must

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[113] See Llewellyn, supra n. 77 at 302 (providing the counter argument to the surplusage canon that if some language of the statute is repugnant to the rest of the statute that it should be rejected as surplusage).

[114] See 17 U.S.C. § 107 (listing the four factors to be included in judicial analysis); Kim, supra n. 77 at 12-13 (explaining that Supreme Court justices employ the rule that statutes should not be read for surplusage); Llewellyn, supra n. 77 at 302 (listing the canon and its counter point regarding surplusage).

always be considered or an additional consideration within a specific factor.[115] To commit either one of these actions not only goes against traditional statutory construction principles, but also it goes against the common law foundations of the fair use defense.[116]

Similarly, another traditional canon is that words and phrases that have received judicial construction before enactment should be understood according to that

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[115] 17 U.S.C. § 107. See Kim, supra n. 77 at 12-13 (explaining that Supreme Court justices often employ the converse of the surplusage rule that judges should not add language to statutes that Congress did not).

[116] 17 U.S.C. § 107. See Kim, supra n. 77 at 12-13 (these rules are listed as being among the canons, and are important enough to be often looked to first in a statutory construction analysis); Llewellyn, supra n. 77 at 302 (listing the 28 canons and their counterpoints that have come up the most over the years in judges' statutory construction analyses); S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976)(stating that the codification of the fair use defense in section 107 is reflective of judicial doctrine previous to the making of the statute, and that all factors are to be weighed differently on a case-by-case basis).

construction.[117] The entire idea of the fair use defense was based off of judicial constructs beginning with those factors and concepts enumerated in Folsom v. Marsh.[118] The statute itself and legislative history clearly stated that all factors should be considered on a case-by-case basis and gave a list of factors that would the most useful to most analyses.[119] These basic concepts were used in the common law for decades before being codified. Therefore, in the case of section 107, the construction that is codified is what judges should use in their analyses.[120]

There are many other canons of statutory construction that may be observed and applied to section 107, but do not

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[117] See Kim, supra n. 77 at 18 (explaining that if Congress wanted to depart from an established interpretation at common law, they would make that clear usually in the statute and almost certainly in the legistlative history); Llewellyn, supra n. 77 at 302 (enumerating the canon that judicial construction before enactment of a statute should trump any other meaning).

[118] 17 U.S.C. § 107; Folsom, 9 F. Cas. at 348.

[119] 17 U.S.C. § 107; S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976).

[120] 17 U.S.C. § 107; S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976).

add substantially more to what has already been discussed.[121] While this statutory construction is based on a hypothetical reading of the fair use defense it, like the defense itself, comes to life when applied to a case's fact pattern.

B. Google and HathiTrust Ignore Statutory Construction

Traditional statutory construction of 17 U.S.C. § 107 lends most credence to a plain reading of the statute supplemented by the legislative intent.[122] What is clear from the precedent being set in the 9th Circuit with Kelly v. Arriba Soft Corp. and Perfect 10, Inc. v. Amazon.com, Inc., and the expansion of that precedent in S.D.N.Y. through Author's Guild, Inc. v. HathiTrust and Author's Guild, Inc. v. Google Inc., is that the courts are beginning to move away from the traditional statutory

[121] Llewellyn, supra n. 77 at 302 (listing out 28 statutory construction canons with 28 counterpoint aligning with each canon).

[122] Id. (enumerating the canon of statutory construction that "if the language is plain and unambiguous it must be given effect"); Kim, supra n. 77 at 2-3 (discussing that Supreme Court justices begin and end their anlyses of statutes with a plain language reading).

construction of section 107.[123] By moving away from this construction, in essence the 2nd and 9th Circuits are moving away from the decades of judicial construction that made up the fair use defense as it is clear that section 107 was meant to codify existing judicial construction.[124] The Author's Guild cases and the judges who decided them are using the crutches of increased technology and large public benefits to avoid applying the traditional statutory construction to achieve a particular result.[125] This comes at the cost of the individual authors and

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[123] See Google, 2013 WL at 7-9; HathiTrust, 902 F.Supp.2d at 459-60; Kelly, 336 F.3d at 818; Perfect 10, 508 F.3d at 1163 (finding in all cases that transformative use and the first factor of section 107 to control a finding of the fair use defense more so than the other three factors).

[124] 17 U.S.C. § 107. See S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976); Leval, supra n. 23 at 1111-12; Campbell 510 U.S. at 579 (explaining in all cited sources that section 107 was meant to codify the years of judicial doctrine already in place regarding the fair use defense).

[125] See Google, 2013 WL 6-7; HathiTrust, 902 F.Supp.2d at 458-64 (finding in both cases that the benefit to the public in general, and the print-disabled public in particular, makes the

publishing companies retaining profits for their creativity, and chases away others wanting to create due to lack of incentive, all under the guise of being "in light of the purposes of copyright."[126] The following contains specific examples of how this line of focusing on the first factor listed in section 107, and basing that factor solely on if an infringing use is 'transformative' or not strays away from the traditional statutory construction of the section.

The most obvious canons that are violated here, and that can be considered an overarching theme for other statutory construction principles that are ignored, are that a statute must be analyzed by its plain language and that a statute must be read a whole, with each section striving to achieve an overall purpose.[127]

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complete copying of the books and articles a transformative use to a keyword-searchable book database).

[126] See Campbell, 510 U.S. at 578 (emphasizing the importance of analyzing each section 107 factor with the purposes of copyright in mind).

[127] See Kim, supra n. 77 at 2-3 (discussing that Supreme Court justices begin and end their anlyses of statutes with a plain language reading and look to the language of the staute as a whole); Llewellyn, supra n. 77 at 302 (enumerating the canons

Both HathiTrust and Google ignore the plain language reading of section 107 by giving almost all consideration to the first factor of the four enumerated, and relating back the other three to the fact that the first factor has been found.[128] In both HathiTrust and Google, Judges Baer and Chin, after finding that the allegedly infringing use was transformative and therefore satisfied the first factor of section 107, both referred back to the first factor and the transformative use when setting out their brief analyses of the other three factors in each case.[129] The plain reading of the statute infers that each factor should be considered fully and then considered overall to determine if a fair use defense exists.[130] While the weight each factor should be given in the analysis is left up to

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that the language must be read plainly and unambiguously, and that the language of the each section should be read within the purpose and meaning of the whole statute).

[128] Google, 2013 WL at 6-11; HathiTrust, 902 F.Supp.2d at 458-64.

[129] Google, 2013 WL at 6-11; HathiTrust, 902 F.Supp.2d at 458-64.

[130] 17 U.S.C. § 107; Kim, supra n. 77 at 2-3; Llewellyn, supra n. 77 at 302.

the judge, it is logical to believe that each factor deserves its own careful consideration.[131]

Both cases also ignore the canon of considering the overall purpose of the Copyright Act.[132] While Judge Chin specifically mentions that he believes that all parties benefit in some way from the Google Books database, he seems to gloss over the harms suffered by the individual authors and publishing companies.[133] Google took thousands of books and digitized them, kept copies for itself and distributed them in snippets to the public and as full text back to the libraries, all without payment of any kind to the copyright holders.[134] While this enriches the intellect of the public, it seems to woefully ignore the rights of the

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[131] 17 U.S.C. § 107. See S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976) (explaining in both that the weight given to each factor will depend on the case, each factor must be considered in the analysis along with any additional factors the judge sees fit to add).

[132] Kim, supra n. 77 at 2-3; Llewellyn, supra n. 77 at 302.

[133] Google, 2013 WL at 10-11.

[134] Id. at 2.

authors and publishers who suffered unauthorized copying and distributions of their copyrighted works.[135]

Another canon of statutory construction that both cases seem to disregard is that every word and clause of a statute must be given effect.[136] As discussed above, Google and HathiTrust put the most emphasis on finding the first factor, with a determination that a transformative use exists over the other three factors of section 107.[137] This makes the other three factors, forged in the common law and then codified to reflect that judicial construction, seem to be mere surplusage.[138] It implies that Congress did not need to bother including the other three factors if courts today only feel the

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[135] See **U.S. Constitution**, art. I, § 8, cl. 8 (explaining the purposes of copyright are to protect the work of authors for a limited time so long as the public may gain the intellectual benefit of those works).

[136] Kim, supra n. 77 at 12-13; Llewellyn, supra n. 77 at 302.

[137] 17 U.S.C. § 107. See Google at 6-11; HathiTrust at 458-64 (finding in both cases that Google and HathiTrust both transformed the copyrighted works from their original use to a new one in the form of a index searchable book database that is extremely beneficial to the public).

[138] Kim, supra n. 77 at 12-13; Llewellyn, supra n. 77 at 302.

need to briefly run through them once determining there was a transformative use.[139]

More specifically to HathiTrust, there is an entire other section of the Copyright Act, 17 U.S.C. § 108, that deals with the exceptions to copyright infringement pertaining to libraries.[140] As written, section 108 gives leeway to fair use defenses if section 108 is not found to apply, but the fact that Judge Baer completely waived off the argument that section 108 applied without considering it further almost renders section 108 as surplusage.[141] If section 108 never applies because

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[139] 17 U.S.C. § 107; Kim, supra n. 77 at 12-13; Llewellyn, supra n. 77 at 302.

[140] See 17 U.S.C. § 108(f)(4)(stating the affirmative defense that libraries may use when a suit for infringement of the exclusive rights of making and distributing copries within the libraries of copyrighted works, and in what situations that defense applies).

[141] HathiTrust, 902 F.Supp.2d at 456-58. See 17 U.S.C. § 108(f)(4)(stating that nothing within section 108 "in any way affects the right of fair use as provided by section 107"); Kim, supra n. 77 at 12-13 (explaining that the Supreme Court justices try to give deference to Congress and interpret statutes so that no part of the language of the statute can be considered

section 107 supersedes it, even when the allegedly infringing party is a library, no library will ever feel the need to use the protections afforded under section 108 if they may obtain a defense more easily from section 107.[142]

More specifically to Google, Judge Chin seems to disregard the commercial nature of Google, thus disregarding that an activity having a commercial character, while not dispositive, needs to be weighed with the other factors in the overall consideration.[143] Judge Chin dismisses the commercial purpose of the activity by saying that Google only indirectly profited from the Google Books project, and does not weigh that consideration with the others.[144] While it is a hard line to draw, Congress would not have specifically included that a judge should consider the commercial, not-for-profit, or educational character of the use if it was not meant to factor into the

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surplusage); Llewellyn, supra n. 77 at 302 (enumerating the canon that "every word and clause must be given effect").

[142] Kim, supra n. 77 at 12-13; Llewellyn, supra n. 77 at 302.

[143] Google, 2013 WL at 8. See S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976) (explaining in both legistlative histories that all factors need to be weighed some how in a fair use analysis).

[144] Google, 2013 WL at 8.

overall analysis. Otherwise, those words would be rendered as surplusage.[145]

The canon that is often considered with surplusage, that the courts should not add something where Congress has not, also applies to the analysis employed in both Author's Guild cases.[146] Both added the concept of the transformative use to the first factor in section 107.[147] Congress amended the language from just "the purpose and character of the use" to the language as it currently stands, explicitly adding "whether such use is of a commercial nature or is for non-profit educational purposes."[148] There have also been amendments to section 107 in 1990 and 1992, and further amendments to the Copyright Act in 1998.[149] There was ample time for Congress to consider the ruling of the Supreme Court in Campbell and its adoption of Judge Leval's 'transformative use,' in light of the rise of new technology but chose to keep the language as it was.[150] If Congress wanted transformative use to be the cornerstone of the fair use

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[145] Kim, supra n. 77 at 12-13; Llewellyn, supra n. 77 at 302.

[146] Kim, supra n. 77 at 12-13; Llewellyn, supra n. 77 at 302.

[147] HathiTrust, 902 F.Supp.2d at 459-61; Google, 2013 WL at 7-8.

[148] H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976).

[149] Id.

[150] Id.

defense, Congress could have made it so, and for the courts to continue to disregard this and add to section 107 flies against traditional statutory construction principles.[151]

Finally, the fair use defense received considerable judicial construction before the codification of section 107.[152] Understanding a statute in light of that common law construction is yet another canon of traditional statutory construction.[153] Beginning with Folsom v. Marsh and continuing on through the years, section 107 is meant to be nothing more than a restatement of all of the case law that led up to the 1976 Copyright Act regarding the fair use defense.[154] Each application was supposed to be considered on a case-by-case

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[151] See Llewellyn, supra n. 77 at 302 (enumerating the 28 traditional statutory construction principles and their counter points).

[152] See generally Folsom, 9 F. Cas. 342 (C.C.D. Mass. 1841)(writing out the fair use defense and the factors that it is now analyzed with by judges every where, which was taken into consideration in case law following this case and in the codification of the fair use defense in the 1976 Copyright Act).

[153] Llewellyn, supra n. 77 at 302.

[154] S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976).

basis and be analyzed with at least the four factors enumerated within section 107, because that was the judicial construction of the fair use defense prior to codification.[155] It was only in the last twenty or so years with Judge Leval and the Supreme Court's opinion in Campbell, as well as the rapid expansion of the concept by the 9th Circuit, that transformative use has started to gain judicial popularity.[156] Both Google and HathiTrust rely heavily on the post-codification construction of the fair use defense that involves transformative use, which is a far cry from the way judges traditionally interpreted the statute.[157]

Though these are not the only examples of traditional statutory construction principles that could be applied to these cases, it is clear from this analysis that the adoption of 'transformative use' truly does transform the way that the fair

[155] 17 U.S.C. § 107; S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976).

[156] Leval, supra n. 23 at 1111-12; Campbell, 510 U.S. at 579; Kelly, 336 F.3d at 818; Perfect 10, 508 F.3d at 1163.

[157] Leval, supra n. 23 at 1111-12; Campbell, 510 U.S. at 579; Kelly, 336 F.3d at 818; Perfect 10, 508 F.3d at 1163.

use defense is applied.[158] It is hard to tell if there will be future expansion of this post-codification construction of section 107, but what is certain is that it is now too far from the way it should be read by judges and others.[159]

IV. Legislative and Judicial Expansion: Solutions to a Fair Use Faux Pas

S.D.N.Y's application of the fair use doctrine, especially it's application of the 'transformative use' doctrine, is not something that is accepted across the board and may generate litigation in other jurisdictions over the same issues with varied results. It is clear from this that a clarification of the parts of the Copyright Act that deal directly with the fair use defense would provide the necessary guidance for correct application of the defense. This clarification may come from one of two sources: the Supreme Court or Congress.

The first option would require a case attempting to interpret how the fair use defense applies and the role of the

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[158] See generally Llewellyn, supra n. 77 (listing out the traditional canons, their cournter points, and the judicial origins of both).

[159] See id. at 302 (giving the traditional way that statutes should be interpreted based on the canons or their counter points).

doctrine of 'transformative use,' to be appealed up to and accepted by the Supreme Court. Both the HathiTrust and Google decisions are appealable and could possibly be appealed to the 2nd Circuit and further petitioned to the Supreme Court. It is possible that there is ample case law in other Circuits that could be appealed up as well. A recommendation would be for the Supreme Court to conduct a statutory construction analysis to determine how far the fair use defense, and other judicial constructs like 'transformative use,' may go in terms of favoring the public over the authors. A true reading of the statute based on the canons of statutory construction would give credence to an interpretation that current case law is going too far from the purpose of the fair use defense and the overall purpose of the Copyright Act.[160] The decisions that stem from the 9th Circuit and S.D.N.Y. upset the balance inherent in the Copyright Clause of the Constitution and the Copyright Act, struck between the needs of the public and the need to provide incentive to authors and creators to continue creating, by leaning too far towards the public benefit.[161] A Supreme Court

[160] **U.S. Const.**, art. I, § 8, cl. 8; 17 U.S.C. § 107; Llewellyn, supra n. 77 at 302.

[161] Google, 2013 WL at 7-9; HathiTrust, 902 F.Supp.2d at 459-60; Kelly, 336 F.3d at 818; Perfect 10, 508 F.3d at 1163.

decision would remedy this balance by providing a clear and uniform interpretation of the fair use defense to be applied across the Circuits, cutting on extensive future litigation costs and further confusion regarding section 107.

The Supreme Court may also be able to make a decision regarding a combination of sections in the Copyright Act. If the Court were able to analyze and interpret how section 107 works with 17 U.S.C. § 108, the library exception, that would make situations like those created in the Author's Guild cases much clearer to decide.[162] As it is currently written, section 108 provides an affirmative defense to copyright infringement on the exclusive right of reproduction so long as the infringer is a library or archive, and only a certain number of copies are reproduced for specific purposes.[163] This section was updated to even include a defense for digitization of works but only for purposes of preservation of or ease of access to the work.[164] However, the section leaves a carve-out for the fair use defense

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[162] HathiTrust, 902 F.Supp.2d at 458-61. See generally 17 U.S.C. §§ 107, 108 (stating that section 108 is not meant to interfere with any rights or defenses provided in section 107 as currently written).

[163] See generally 17 U.S.C. § 108.

[164] Id. at §§ (b)(2), (c)(2).

by stating "nothing in this section in any way affects the right of fair use as provided by section 107."[165] In light of new technological advances showcased in the Author's Guild cases, in particular the HathiTrust decision, even the most recent amendment to section 108 has been outdated technologically shifting a court's analysis to section 107 and eliminating the usefulness of section 108.[166] A decision by the Supreme Court with an opinion that helps to clarify how the two defenses work with one another and to keep up with the times technologically would be a good solution to the current problem.

The second option would one of several legislative-based solutions, which include amending the current Copyright Act and clarifying section 107, section 108, or both to allow for a clearer application of the fair use defense to internet-based works. This option, regardless of what sections are amended, would be the more likely course of action to provide a solution based on the very slight possibility that a case would be taken by the Supreme Court for consideration.

An amendment to section 107 would need to be directed at the current language before or after the four factors enumerated

[165] Id. at § 108(f)(4).

[166] 17 U.S.C. §§ 107, 108; HathiTrust, 902 F.Supp.2d at 458-61.

for judicial consideration.[167] Language that would be most effective in clarifying the present problems with the interpretation of the fair use defense would have to explain how much weight should be given to any one factor listed in the statute for consideration, and may even include an acceptable interpretation of 'transformative use.'[168] An amendment to section 108 would need to be directed at the amount of copies and the purposes for which a library may digitize copyrighted works within its collection.[169] This addresses cases like HathiTrust more directly, and if amended in a way that considers the advancement of technology where digitization is concerned section 108 could be the proper analysis rather than having to skip the section all together for the more favorable fair use defense.[170] An amendment to both sections would create a combination that would allow for cases like both Author's Guild decisions to be analyzed and ruled on with no doubt as to the Congressional intent behind the statute and how it should be

[167] 17 U.S.C. § 107.

[168] S. Rep. No. 94-473, supra n. 15 at 62 (1975); H.R. Rep. No. 94-1476, supra n. 15 at 65-66 (1976).

[169] 17 U.S.C. §§ 108(b)(2), (c)(2).

[170] HathiTrust, 902 F.Supp.2d at 456-58.

applied in situation with commercial entities versus non profit libraries.

V. Conclusion

It is unclear from the most recent opinions of Author's Guild, Inc. v. HathiTrust and Author's Guild, Inc. v. Google, Inc. what issues will be appealed, if any, to higher courts and what other Circuits, or even the Supreme Court, will consider this issue of transformative use within the scope of the fair use defense. The takeaway from these recent changes is that whether they are signifying a shift in the state of this area of copyright law for good or if they are merely a fluke that will be corrected by any or all of the recommendations listed above, this interpretation does not comply with traditional statutory construction principles.

The idea that precedent that was so long in the making before codification, and even for twenty-five years after codification, could be changed so rapidly without Congressional input on if the changes stay true to the original intent is discomforting. One can only hope that some sort of solution in the form of Congressional or Supreme Court intervention will arrive to clear up and refocus the appropriate construction for section 107.