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# Fair Use and the Faces of Transformation, Part I

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## Fair Use and the Faces of Transformation, Part I

Prof. James Gibson, University of Richmond School of Law

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The recent [\*Kienitz v. Sconnie Nation\*](#) case has been the focus of three recent posts in this Intellectual Property Issues series – from [me](#), [Doug Lichtman](#), and [Rod Smolla](#). In *Kienitz*, the defendant changed a photograph of the mayor of Madison, Wisconsin, into a stylized, high-contrast image, printed on t-shirts that mocked the mayor’s policies. The U.S. Court of Appeals for the Seventh Circuit held that the new image constituted a fair use and therefore did not infringe the photograph’s copyright. (The original photo and the stylized version on the t-shirt can be seen [here](#).) In doing so, however, the court took the opportunity to criticize a concept that many other courts have employed as a central part of the fair use analysis: whether the defendant’s use was “transformative.”

Given all this attention to *Kienitz*, I’ve decided to step back and talk about the role that transformation plays in fair use and in copyright more broadly. In this essay, I will trace the origin of transformation as a guiding principle, through what I’ll call “expressive” transformation cases. In my next post I will discuss how the principle has more recently been applied to encompass what I call “purpose” transformation.

The importance of transformation to the creative process cannot be overstated. One of the undeniable maxims in the world of innovation is that creativity derives from creativity; past innovation provides the raw material for future innovation. My favorite quote in this regard comes from Sir Isaac Newton. If anyone could have claimed that his genius sprang fully formed from his own head, without reliance on others, it was Newton – the father of modern mathematics, physics, and optics. But even Newton acknowledged the debt he owed to the likes of Galileo, Copernicus, and the natural philosophers of Greece; he famously stated, “If I have seen further, it is by standing on the shoulders of Giants.” Indeed, by uttering that particular turn of phrase, Newton proved his point, because his expression transformed an earlier sentiment by Bernard of Chartres, a 12th-century monk and scholar, who had observed that “[i]n comparison with the ancients we stand like dwarfs on the shoulders of giants.”

Of course, Newton was an innovator in the sciences, but the same is equally true of arts and literature. As Ecclesiastes tells us, there is nothing new under the sun. This saying is often mistakenly attributed to Shakespeare, perhaps because he opens Sonnet 59 with, “If there be nothing new, but that which is / Hath been before....” (The Bard shamelessly copied stories and themes from others, as the rest of literature has since done from him.)

So how does copyright deal with this dynamic? There’s a careful balance to be struck. If the law binds up existing works too tightly, we may deny future generations of authors and artists the raw materials they need and thus impede the very innovation the law is trying to encourage. But if the law allows too much copying from existing works, then the incentive to create those works in the first place may be insufficient.

Copyright uses the concept of transformation to strike this balance in at least two ways. On the one hand, the law prohibits not only unauthorized verbatim copying, but also unauthorized transformative copying – copying in which the copyist actually adds new creative expression to an existing, underlying work. Such transformative copying creates what copyright law calls a

“derivative work.” In fact, the Copyright Act explicitly defines “derivative work” as works that are “recast, transformed, or adapted,” and it assigns control of derivative works to the author of the underlying work.

If all innovation is derivative, however, then giving all control to the first author and none to the second would produce a suboptimal amount of innovation. After all, both parties are authors, creators of new expression – and the first author’s work was itself undoubtedly based on one or more preexisting works. Copyright law accordingly limits the first author’s control over derivative works in two ways: through the idea/expression dichotomy (which allows the next generation of authors to use the ideas in the underlying work without a license) and through the fair use doctrine.

The fair use doctrine is famously amorphous, but the Copyright Act (as well as longstanding case law) makes it clear that uses that transform the underlying work are good candidates for fair use. For example, a classic example of a favored fair use is criticism, which combines the underlying expression with new expression on the critic’s part, producing a new work of expression.

The criticism example dates back at least to Justice Story’s opinion in the 1841 case of [Folsom v. Marsh](#), and it was codified in the current Copyright Act’s fair use statute. But labeling this kind of use as essentially “transformative” is a more recent development. In 1990, Judge Pierre Leval of the Southern District of New York, frustrated after being reversed in several fair use cases, decided to try to articulate “a cogent set of governing principles” for the doctrine. The principle that emerged most starkly from his *Harvard Law Review* article on the subject was that fair use should value transformation. Leval reasoned that any fair use must be rooted in the justification for copyright itself (“the objective of copyright law to stimulate creativity for public illumination”) and argued that whether the defendant’s use transformed the underlying work was central to this inquiry:

*I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story’s words, it would merely “supersede the objects” of the original. If, on the other hand, the secondary use adds value to the original – if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.*

According to Leval, the principle of transformation united a number of categories of fair use – criticism, of course, but also “parody, symbolism, aesthetic declarations, and innumerable other uses.”

Four years later, the Supreme Court endorsed this principle in [Campbell v. Acuff-Rose](#), a case in which the rappers 2 Live Crew parodied Roy Orbison’s classic hit, “Oh, Pretty Woman.” In reversing a lower court ruling against the rap group, the Court echoed Leval’s views, showing explicit deference to “transformative” uses, as opposed to uses that merely “supersede the objects of the original.”

After *Campbell*, then, defendants arguing fair use increasingly argued that their works were transformative. Prominent examples include [\*Suntrust Bank v. Houghton Mifflin Co.\*](#) (involving a “highly transformative” retelling of *Gone With the Wind*, called *The Wind Done Gone* and written from a slave’s perspective) and [\*Leibovitz v. Paramount Pictures Corp.\*](#) (in which the makers of the *Naked Gun* films parodied Annie Leibovitz’s photo of a naked and pregnant Demi Moore, substituting Leslie Nielsen’s face for Demi’s). Of course, not all such defenses were successful. See, for example, [\*Dr. Seuss Enterprises v. Penguin Books\*](#) (involving a satire of *The Cat in the Hat*). And even when a use was held to be transformative, that was not the end of the inquiry; there were other factors to weigh as well. In fact, in *Campbell* itself the Supreme Court noted that transformation was only part of the fair use analysis – indeed, just part of the first of four factors – and it actually remanded the 2 Live Crew case for further proceedings rather than rule in the rappers’ favor outright.

When the defense was successful, however, what the defendant’s works usually had in common was that they transformed the *expression* in the underlying works. 2 Live Crew copied Roy Orbison’s song, but they also changed it; it was a different song when they were done with it. *The Wind Done Gone* replicated Margaret Mitchell’s expression, but simultaneously altered it. And the t-shirt in *Kienitz* used the photographer’s image, but made it into something new. In short, these are all examples of what one might call “expressive” transformation.

More recently, however, courts have found uses to be transformative even when the underlying expression is completely unchanged. Indeed, in several of these cases, the underlying expression is not only unaltered, but copied in its entirety, from start to finish. How could such uses be considered transformative, let alone fair? The answer lies in what I call “purpose” transformation, and it will be the subject of my next essay in this series. Stay tuned.

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