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

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

Prof. James Gibson, University of Richmond School of Law

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In [my last IP Viewpoints entry](#), I discussed the origin of “transformation” as a major factor in copyright’s fair use doctrine. In particular, I focused on “expressive” transformation, in which the user changes the actual content of the copyrighted work. Taking old works and turning them into something new is the way that culture usually evolves, so it is no surprise that copyright law would sometimes allow users to engage in such conduct without needing to pay for the privilege.

Yet there is also a second kind of transformation, one that does *not* involve the alteration of the underlying material. Indeed, this kind of transformation often involves wholesale, verbatim reproduction of all the expression in a copyrighted work. How could such uses be considered transformative, let alone fair?

The answer lies in the repurposing of the works. For example, consider the case of [Bill Graham Archives v. Dorling Kindersley Publishing](#). Dorling Kindersley used several images of vintage Grateful Dead concert posters in its coffee table book, without securing a license. There was expressive transformation here, because the images in the book were a fraction of the size of the originals. But the court also pointed out that the use “is transformatively different from the original expressive purpose.” The original use of the images was “artistic expression and promotion,” whereas the new use repurposed them as historical artifacts.

This “purpose” transformation is itself valuable, in that it creates something new. It adds value. It makes the pie bigger. The same is true of expressive transformation, of course, but in a different way. (This may be why the [fair use statute](#) asks about not only the “character” of the use, but also its “purpose.”)

Indeed, in some instances this added value depends on the repurposing of *multiple* works, in their entirety. Take Google’s Internet search engine. In order to enable such searching, Google makes copies of Internet content (much of which is copyrighted), indexes it, and then makes it available in its search results as snippets – or, in the case of images, thumbnails. This process involves little or no transformation of the underlying expression. But the ability to search the Internet is obviously of great value to society, and would simply not be possible in a world in which licensing was required.

Thus cases like [Perfect 10 v. Amazon.com](#) and [Field v. Google](#) have found these sorts of uses to be fair. No one is going to use the thumbnails available through Google Search as a substitute for the full-size images. In this way, therefore, they transform the purpose of the work, creating a new thing rather than merely “superseding the objects of the original” (to borrow a phrase from Supreme Court Justice Joseph Story’s opinion in [one of the foundational fair use cases](#)). And the fact that Google does this to thousands of copyrighted works actually bolsters the case for fair use, because the added value derives directly from the scale of the enterprise – the aggregation of Internet content.

The same is true of other search engines, like the anti-plagiarism program at issue in [A.V. v. iParadigms](#). For the program to work, schools had to upload students’ papers en masse to a central database. Some students objected, citing their copyrights in the papers. When iParadigms claimed fair use, the students responded that “iParadigms’ use of their works cannot

be transformative because the archiving process does not add anything to the work.” The court found that argument to be “clearly misguided,” noting that “[t]he use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.”

The latest battle over purpose transformation – and the battle that may decide the legitimacy of purpose transformation once and for all – involves the Authors Guild suit over [Google Books](#), which presents a very direct example of how making copyrighted works searchable involves wholesale copying of their content. (I have [explained the case before](#), so I will not do so again here.) That case is now before a panel of the Second Circuit, which heard oral argument last month.

Will purpose transformation carry the day for Google Books? No one knows for sure. But the presiding judge at the Second Circuit hearing was none other than Pierre Leval, whom [you will recall](#) is the one who first articulated transformation as a fair use centerpiece. The smart money is on Google.

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