

New York City Bar Association Copyright Law Committee
April 14, 2015

Prof. Barton Beebe
NYU School of Law
.pdf of presentation posted at www.bartonbeebe.com
Outline

I. Background
II. The Data Set
III. Findings
   A. Summary Statistics
   B. Interfactor Analysis
   C. Factor-Specific Analysis
IV. Conclusion
I. Background
   A. Section 107

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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.
I. Background

B. Research Questions

• Test-Wide Questions
  – Which factor outcomes drive the outcome of the overall test?
  – How do the factor outcomes interact?
  – To what extent do the factor outcomes stampede in the same direction?
  – How often does the FU defense succeed and is there significant intercircuit variation?

• Factor-Specific Questions
  – How does the subfactor doctrine operate in practice (e.g., transformativeness, commercial use, “heart” of the work)?

• Judge-specific questions:
  – Is there any relation between the ideology, age, gender, or tenure of the judge and the outcome of the test or of specific factors?

• What does the Section 107 test as applied tell us about legal multifactor reasoning in general?
I. Background
B. Research Questions

• More generally, what can a quantitative method tell us that a qualitative method cannot?
  – “Systematic content analysis” of court opinions

<table>
<thead>
<tr>
<th>Table 1: Trends over Time in Content Analysis of Judicial Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>Total Projects Coded</td>
</tr>
<tr>
<td>Projects Published per year</td>
</tr>
<tr>
<td>First Author Based in Law (%)</td>
</tr>
<tr>
<td>Any Author with Ph.D. (%)</td>
</tr>
<tr>
<td>Citation to Social Science</td>
</tr>
<tr>
<td>Methodology (%)</td>
</tr>
<tr>
<td>Median (maximum) Cases per Project</td>
</tr>
</tbody>
</table>
Supreme Court Fair Use Cases


• Stewart v. Abend, 495 U.S. 207 (1990), aff’g 863 F.2d 1465 (9th Cir. 1988)


I. Background
   C. Limitations of the Opinion-Counting Approach

   - SCA studies only opinions reported in Westlaw and Lexis
     - What about cases that settled before an opinion? Cease and desist practice? Jury trials? Transcript opinions?
   - SCA assumes that what judges write in their opinions expresses judges’ actual reasoning processes and views
     - One view: Factors are irrelevant. Judges eyeball facts, choose winner, and then tell clerk to draft the opinion to conform the FU factor analysis to judges’ decision.
   - SCA includes insignificant opinions
   - SCA can’t adequately test for circularity
     - Do judges find the use to be transformative and therefore find it to be a fair use, or do they find it to be a fair use and therefore find it to be transformative?
I. Background

D. Literature Review


<table>
<thead>
<tr>
<th>CASE</th>
<th>CITATION</th>
<th>FACTORs</th>
<th>1. PRODUCTIVE</th>
<th>2. PUBLISHED AND FACTUAL</th>
<th>3. WHOLESALE</th>
<th>CAUSING LOSS OF REVENUE</th>
<th>FAIR USE</th>
</tr>
</thead>
<tbody>
<tr>
<td>27.</td>
<td>Infinity Broad. Corp. v. Kirkwood, 155 F.3d 104 (2d Cir. 1998)</td>
<td>Service allowing subscribers “to listen over the telephone to contemporary radio broadcasts in remote cities”</td>
<td>UNFAIR</td>
<td>UNFAIR</td>
<td>UNFAIR</td>
<td>FAIR</td>
<td>UNFAIR</td>
</tr>
<tr>
<td>30.</td>
<td>Leibowitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998)</td>
<td>Staging and photo of pregnant Leslie Nielsen in place of Demi Moore, to advertise <em>Naked Gun</em>, a film “due this March”</td>
<td>FAIR</td>
<td>UNFAIR</td>
<td>UNFAIR</td>
<td>FAIR</td>
<td>FAIR</td>
</tr>
</tbody>
</table>
I. Background
D. Literature Review


280

the chart to discern correlations. Of the twenty-four cases upholding fair use, and the thirty-six cases denying its existence, the findings are as follows:

1. The first factor corresponds to the conclusion of fair use fifty-five percent of the time;\(^{55}\)
2. The second factor corresponds to the conclusion of fair use forty-two percent of the time;
3. The third factor corresponds to the conclusion of fair use fifty-seven percent of the time;\(^{56}\)
4. The fourth factor corresponds to the conclusion of fair use fifty percent of the time;\(^{57}\)
5. The cumulative correspondence for all four factors is slightly under fifty-one percent.\(^{58}\)

Beyond elevating the first and third factors slightly, while denigrating the second, the numbers hardly tell a compelling story. The last figure is the most revealing. Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.
I. Background
   D. Literature Review


   This conclusion is not to say that judges enter findings as to the four factors in support of their ultimate fair use determination only half the time. Perusal of fair use cases would reveal that the figure actually approaches ninety percent. In other words, judges who uphold fair use almost always find that three, if not four, of the factors incline in its favor; judges who deny the fair use defense almost always find that three, if not four, of the factors incline against it. The difference between the chart’s figure, showing virtually a dead heat, and the actual figure pushing ninety percent, stems from the malleability of the fair use factors.
I. Background
   D. Literature Review

I. Background
   E. Theoretical Approaches to Multifactor Decisionmaking

  – Defines coherence-based reasoning as reasoning in which the “decision-making process progresses bidirectionally: premises and facts both determine conclusions and are affected by them in return. A natural result of this cognitive process is a skewing of the premises and facts toward inflated support for the chosen decision.”
II. The Data Set
II. The Data Set
   A. Collecting the Opinions

   • LEXIS Federal Court Cases, Combined database:

     *copyright and "fair use" and 107 and date(geq(1/1/1978) and leq (12/31/2014))*

     Yields total of 932 opinions (on 4/6/2015)
   • Filtered down to 460 opinions that made “substantial use” of the four-factor test or that were concurrences or dissents to appellate opinions that did so
     - “Substantial use” defined as analyzing at least two factors from the test
     - Examples of excluded opinions:
       • Ty, Inc. v. Publications International, Ltd., 292 F.3d 512 (7th Cir. 2002) (declining to apply factors on ground that the “statutory definition” of fair use, “though extensive[,] is not illuminating”) (Posner, J.)
II. The Data Set
   A. Collecting the Opinions

   - Examples of excluded opinions (cont.):
     
     • Pacific and Southern Company, Inc. v. Duncan, 572 F. Supp. 1186, 1195 (N.D. Ga. 1983) ("[I]t becomes readily apparent that Ms. Duncan's use is not for a purpose such as ‘criticism, comment, news reporting, teaching, scholarship, or research.’ That being the case, analysis of the four factors listed under § 107 is unnecessary."), aff’d in part and rev’d in part on other grounds, 744 F.2d 1490 (11th Cir. 1984)
     
II. The Data Set
   B. Coding the Opinions

   • 74 variables
   • Coding of factor outcomes example:
     0 = Not addressed
     1 = Found to favor plaintiff
     2 = Found to favor defendant
     3 = Found to be neutral
     4 = Found to be a fact issue
     5 = Found to be not relevant
     6 = Unclear
   • Software: Atlas.ti, Excel, Stata
(1) the nature of the copyrighted work;

(2) the substantiality of the portion used in relation to the copyrighted work as a whole; and

(3) the effect on the potential market for or the value of the copyrighted work.


The Court, therefore, will examine each of the four statutory factors as they apply to the facts of this case.

1. THE PURPOSE AND CHARACTER OF THE USE

The evidence of record in this case establishes that the TV program, "Stop the Violence II," and the video of that program in which "Under the Gun" was used, was produced for the purpose of teaching teenagers conflict resolution and the dangers of illegal drugs. "Stop the Violence II," thus, was made for educational purposes. The video of the program was not mass marketed; rather, the distribution of the video program was limited to educational institutions. Information on ordering the videotape was set forth at the end of the TV program and is set forth at the end of the videotape copy in the catalog. Thus, the two uses for which the videotape was purchased are "for educational use only." [See Affidavit of Dan Hambly, Senior Program Director, Program Acquisitions Learning Media of Public TV] Broadcasting Service, P. 11.]

n5 The Court notes that nowhere in the excerpts of the PBS Video catalogues submitted by Plaintiff does "Stop the Violence II" appear or does any other episode of Club Connect. The fact that other videos, including videos of commercial motion pictures, may be purchased through the PBS Video catalogue is irrelevant for purposes of determining whether "Stop the Violence II," in which Plaintiff's song is played, was made for educational purposes.

Defendants admit that 41 "Stop the Violence II" videos were sold. (Hambly Affidavit P 18) From these sales, PBS grossed $2,159.73, of which WTVS received $552.90. Id. According to Dan Hambly, although generally PBS makes a 6% profit on each video sold at the normal $39.95 price, in the case of [*703] "Stop the Violence II," because of discounts and the extremely low volume of sales, PBS made no profit whatever from the sales of the video in this case. [Hambly Affidavit, P 21] The money, however, earned on the sale of PBS videos [*10] goes to fund other educational programs at PBS. Id. at P 23. The fact that a charge is made for a work, or that a profit is anticipated, however, does not convert the use into a commercial one. Wright v. Warner Bros. Inc., 953 F.2d 731, 736-737 (2d Cir. 1991), Saltzberg v. Random House, Inc., 811 F.2d 90, 94 (2d Cir. 1987), cert. denied, 484 U.S. 859, 99 L. Ed. 2d 177, 108 S. Ct. 213 (1987).

n6 The Court notes that of the 41 sales of "Stop the Violence II," only 19 were at the $39.95 price. The rest were sold at discounted prices, the discount ranging from $6.96 to $36.95.

As the court observed in Martone-Graham v. Burtchell, 803 F.2d 1253 (2d Cir. 1986), cert. denied, 481 U.S. 1659, 93 L. Ed. 2d 856, 107 S. Ct. 2204 (1987):

It is undisputed that Burtchell was paid for his efforts and that his publisher were not motivated by purely charitable intentions. The money does not and there. We do not read Section 107 as requiring us to make a cut-and-chase choice.
II. The Data Set
C. Amenability to Coding

- 64% of opinions explicitly stated valence of factors; 36% explicitly balanced the factors at the conclusion of their analysis
- 20-Opinion Moving Average of the Proportion of Opinions Stating and Reviewing the Valences of Each Factor
III. Findings
III. Findings
   A. Summary Statistics

   • 328 district court opinions; 125 circuit court opinions (102 majority opinions, 7 concurrences, 16 dissents); 7 Supreme Court opinions (4 majority opinions; 1 concurrence; 2 dissents)

   • Distribution by year
III. Findings

A. Summary Statistics

• Distribution by court
  – Of the 328 district court opinions, 86 (26.2%) came from the SDNY, 30 (9.2%) from the C.D. Cal., and 22 (6.7%) from the N.D. Cal.
  – Of the 125 circuit court opinions, 44 (35.2%) came from the 2d Circuit and 32 (25.6%) from the 9th Circuit.
  – The Supreme Court, 2d Circuit, 9th Circuit, and SDNY dominate our fair use case law.
III. Findings
   A. Summary Statistics

• Intercircuit influence
  – Circuit and district court citation practices to other circuits
    • Opinions outside of the 2d Circuit cited on average to 1.51 2d Circuit opinions in their fair use analyses
    • Comparable numbers for opinions outside of:
      – Outside 9th Circuit: .81 citations to 9th Circuit opinions
      – Outside 5th Circuit: .10 citations to 5th Circuit opinions
      – Other circuits: negligible
      – Outside 2d Cir: .57 citations to SDNY opinions
III. Findings
   A. Summary Statistics

   • Reversal, Dissent, and Appeal Rates
     – Of the 102 circuit court majority opinions, 35 failed to affirm the district court’s fair use ruling (34.3% reversal rate) and 16 met with dissents (15.7% dissent rate).
     – Of the 328 district court opinions, 73 were appealed (22.3% appeal rate) with 47 (14.3%) affirmed and 26 (7.9%) not affirmed.
     – NB: This includes opinions from 2014, appeals of which may not yet be recorded
III. Findings

A. Summary Statistics – FU Win Rates

Distribution and Disposition of Unreversed District Court Opinions by Circuit and Posture (for leading postures)

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Distribution by Circuit</th>
<th>Preliminary Injunction</th>
<th>Bench Trial</th>
<th>SJ Plaintiff</th>
<th>SJ Defendant</th>
<th>SJ Cross</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>FU</td>
<td>N</td>
<td>FU</td>
</tr>
<tr>
<td>1</td>
<td>16</td>
<td>5.7</td>
<td>2</td>
<td>.500</td>
<td>3</td>
<td>.667</td>
</tr>
<tr>
<td>2</td>
<td>82</td>
<td>29.4</td>
<td>16</td>
<td>.500</td>
<td>10</td>
<td>.000</td>
</tr>
<tr>
<td>3</td>
<td>14</td>
<td>5.0</td>
<td>4</td>
<td>.000</td>
<td>2</td>
<td>.000</td>
</tr>
<tr>
<td>4</td>
<td>17</td>
<td>6.1</td>
<td>2</td>
<td>1.000</td>
<td>1</td>
<td>1.000</td>
</tr>
<tr>
<td>5</td>
<td>12</td>
<td>4.3</td>
<td>1</td>
<td>1.000</td>
<td>5</td>
<td>.200</td>
</tr>
<tr>
<td>6</td>
<td>15</td>
<td>5.4</td>
<td>1</td>
<td>.000</td>
<td>1</td>
<td>.000</td>
</tr>
<tr>
<td>7</td>
<td>14</td>
<td>5.0</td>
<td>4</td>
<td>.000</td>
<td>1</td>
<td>.000</td>
</tr>
<tr>
<td>8</td>
<td>13</td>
<td>4.7</td>
<td>2</td>
<td>.000</td>
<td>1</td>
<td>.000</td>
</tr>
<tr>
<td>9</td>
<td>63</td>
<td>22.6</td>
<td>12</td>
<td>.167</td>
<td>4</td>
<td>.500</td>
</tr>
<tr>
<td>10</td>
<td>9</td>
<td>3.2</td>
<td>3</td>
<td>.667</td>
<td>1</td>
<td>.000</td>
</tr>
<tr>
<td>11</td>
<td>18</td>
<td>6.5</td>
<td>4</td>
<td>.250</td>
<td>1</td>
<td>1.000</td>
</tr>
<tr>
<td>D.C.</td>
<td>6</td>
<td>2.2</td>
<td>1</td>
<td>.000</td>
<td>1</td>
<td>.000</td>
</tr>
<tr>
<td>Total</td>
<td>279</td>
<td></td>
<td>52</td>
<td></td>
<td>31</td>
<td></td>
</tr>
</tbody>
</table>

Circuit-Wide: 0.327 0.226 0.833 0.746 0.451 0.451

*Twenty-three district court opinions are not represented in this table: 18 addressed motions to dismiss and four addressed other miscellaneous postures. Of the 18 MTDs, 8 found fair use.
Distribution and Disposition of Unreversed District Court Opinions by Circuit and Posture (for leading postures)

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Distribution by Circuit</th>
<th>Preliminary Injunction</th>
<th>Bench Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
</tr>
<tr>
<td>1</td>
<td>16</td>
<td>5.7</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>82</td>
<td>29.4</td>
<td>16</td>
</tr>
<tr>
<td>3</td>
<td>14</td>
<td>5.0</td>
<td>4</td>
</tr>
<tr>
<td>4</td>
<td>17</td>
<td>6.1</td>
<td>2</td>
</tr>
<tr>
<td>5</td>
<td>12</td>
<td>4.3</td>
<td>1</td>
</tr>
<tr>
<td>6</td>
<td>15</td>
<td>5.4</td>
<td>1</td>
</tr>
<tr>
<td>7</td>
<td>14</td>
<td>5.0</td>
<td>4</td>
</tr>
<tr>
<td>8</td>
<td>13</td>
<td>4.7</td>
<td>2</td>
</tr>
<tr>
<td>9</td>
<td>63</td>
<td>22.6</td>
<td>12</td>
</tr>
<tr>
<td>10</td>
<td>9</td>
<td>3.2</td>
<td>3</td>
</tr>
<tr>
<td>11</td>
<td>18</td>
<td>6.5</td>
<td>4</td>
</tr>
<tr>
<td>D.C</td>
<td>6</td>
<td>2.2</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>279</td>
<td></td>
<td>52</td>
</tr>
<tr>
<td>Circuit-Wide:</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### III. Findings

A. Summary Statistics – FU Win Rates

Distribution and Disposition of Unreversed Circuit Court Majority Opinions (for leading postures)

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Distribution by Circuit</th>
<th>Preliminary Injunction</th>
<th>Bench Trial</th>
<th>SJ Plaintiff</th>
<th>SJ Defendant</th>
<th>SJ Cross</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>FU</td>
<td>N</td>
<td>FU</td>
</tr>
<tr>
<td>1</td>
<td>2</td>
<td>2.2</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>2</td>
<td>31</td>
<td>34.4</td>
<td>6</td>
<td>.333</td>
<td>7</td>
<td>.143</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>2.2</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>4</td>
<td>7</td>
<td>7.8</td>
<td>---</td>
<td>---</td>
<td>2</td>
<td>.500</td>
</tr>
<tr>
<td>5</td>
<td>2</td>
<td>2.2</td>
<td>---</td>
<td>---</td>
<td>1</td>
<td>1.000</td>
</tr>
<tr>
<td>6</td>
<td>4</td>
<td>4.4</td>
<td>---</td>
<td>---</td>
<td>1</td>
<td>1.000</td>
</tr>
<tr>
<td>7</td>
<td>4</td>
<td>4.4</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>8</td>
<td>2</td>
<td>2.2</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>9</td>
<td>27</td>
<td>30.0</td>
<td>10</td>
<td>.500</td>
<td>2</td>
<td>.500</td>
</tr>
<tr>
<td>10</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>11</td>
<td>7</td>
<td>7.8</td>
<td>1</td>
<td>1.000</td>
<td>2</td>
<td>.000</td>
</tr>
<tr>
<td>Fed.Circ.</td>
<td>2</td>
<td>2.2</td>
<td>1</td>
<td>.000</td>
<td>1</td>
<td>---</td>
</tr>
<tr>
<td>Total</td>
<td>90</td>
<td></td>
<td>18</td>
<td>.444</td>
<td>16</td>
<td>.310</td>
</tr>
</tbody>
</table>

*Circuit-Wide:*

\[
\begin{align*}
\text{Distribution of FU:} & \quad 0.444 \\
\text{Distribution of No FU:} & \quad 0.310 \\
\text{Distribution of FU:} & \quad 0.750 \\
\end{align*}
\]

*nine unreversed circuit court opinions, from other miscellaneous postures, are not represented in this table. See, e.g., Mulcahy v. Cheeta Learning LLC, 386 F.3d 849 (8th Cir. 2004) (finding certain uses at issue fair and others unfair); Ty, Inc. v. Publ’ns Int'l, 292 F.3d 512 (7th Cir. 2002) (same); Ringgold v. Black Entertainment TV, 126 F.3d 70 (2d Cir. 1997) (remanding on fair use issue for further finding of facts).*
**Distribution and Disposition of 90 Unreversed Circuit Court Majority Opinions, 1978-2014**

(“FU” denotes the proportion of opinions which found fair use; “No FU” denotes the proportion of opinions which found no fair use)

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Distribution by Circuit</th>
<th>Preliminary Injunction</th>
<th>Bench Trial</th>
<th>SJ Plaintiff</th>
<th>SJ Defendant</th>
<th>SJ Cross</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>FU</td>
<td>N</td>
<td>FU</td>
</tr>
<tr>
<td>1</td>
<td>2</td>
<td>2.2</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>2</td>
<td>31</td>
<td>34.4</td>
<td>6</td>
<td>.333</td>
<td>7</td>
<td>.143</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>2.2</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>4</td>
<td>7</td>
<td>7.8</td>
<td>---</td>
<td>---</td>
<td>2</td>
<td>.500</td>
</tr>
<tr>
<td>5</td>
<td>2</td>
<td>2.2</td>
<td>---</td>
<td>---</td>
<td>1</td>
<td>1.000</td>
</tr>
<tr>
<td>6</td>
<td>4</td>
<td>4.4</td>
<td>---</td>
<td>---</td>
<td>1</td>
<td>1.000</td>
</tr>
<tr>
<td>7</td>
<td>4</td>
<td>4.4</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>8</td>
<td>2</td>
<td>2.2</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>9</td>
<td>27</td>
<td>30.0</td>
<td>10</td>
<td>.500</td>
<td>2</td>
<td>.500</td>
</tr>
<tr>
<td>10</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>11</td>
<td>7</td>
<td>7.8</td>
<td>1</td>
<td>1.000</td>
<td>2</td>
<td>.500</td>
</tr>
<tr>
<td>Fed Circ.</td>
<td>2</td>
<td>2.2</td>
<td>1</td>
<td>.000</td>
<td>1</td>
<td>---</td>
</tr>
<tr>
<td>Total</td>
<td>90</td>
<td>18</td>
<td>16</td>
<td>8</td>
<td>13</td>
<td>34</td>
</tr>
</tbody>
</table>

*Nine unreversed circuit court opinions, from other miscellaneous postures, are not represented in this table. See, e.g., Mulcahy v. Cheetah Learning LLC, 386 F.3d 849 (8th Cir. 2004) (finding certain uses at issue fair and others unfair); Ty, Inc. v. Publ'ns Int'l, 292 F.3d 512 (7th Cir. 2002) (same); Ringgold v. Black Entertainment TV, 126 F.3d 70 (2d Cir. 1997) (remanding on the fair use issue for further finding of facts).
III. Findings
A. Summary Statistics – FU Win Rates

• Intercircuit and interdistrict variation in FU win rates
  – Circuit courts: No significant intercircuit variation
    • National FU win rate in unreversed dispositive majority opinions: 41 (50.6%) of 81 unreversed dispositive majority opinions found FU
      – 2d Circuit: 55.6% of 27 2d Circuit such opinions found FU; 48.2% of 54 non-2d Circuit such opinions found FU. \(X^2(1)=.40, N=81, p=.53\).
      – 9th Circuit: 53.9% of 26 9th Circuit such opinions found FU; 49.1% of 55 non-9th Circuit such opinions found FU. \(X^2(1)=.16, N=81, p=.69\).
  – District courts: Perhaps SDNY is distinctive
    • National FU win rate in unreversed dispositive opinions: 45.3% of 247 opinions found FU
      – SDNY: 54.7% of 64 SDNY such opinions found FU; 42.1% of 183 non-SDNY dispositive district court opinion found FU. \(X^2(1)=3.0, N=247, p=.08\).
      – C.D. Cal.: 41.7% of 24 C.D. Cal. such opinions found FU; 45.7% of 223 non-C.D. Cal. such opinions found FU. \(X^2(1)=.15, N=247, p=.70\).
III. Findings

A. Summary Statistics – FU Win Rates Over Time

Proportion of Non-Dissent/Non-Concurrence Opinions Per Year Finding Fair Use (All Courts)
III. Findings
   A. Summary Statistics – FU Win Rates Over Time

   Proportion of Unreversed Dispositive Non-Dissent/Non-Concurrence Opinions Per Year Finding Fair Use (All Courts)
III. Findings

A. Summary Statistics – Win Rates Over Time

Proportion of **Unreversed Dispositive** Non-Dissent/Non-Concurrence Opinions Per Year Finding Fair Use (2d Circuit Appellate and District Courts)
III. Findings

A. Summary Statistics – Win Rates Over Time

Proportion of **Unreversed Dispositive** Non-Dissent/Non-Concurrence Opinions Per Year Finding Fair Use (9th Circuit Appellate and District Courts)
III. Findings
A. Summary Statistics – Win Rates Over Time

Fair Use Win Rates before and after *Acuff-Rose*?

```
  tab postar winfubinflip if disp_un==1, chi r nokey

<table>
<thead>
<tr>
<th></th>
<th>FU found,</th>
<th>FU not</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>missing</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>64</td>
<td>43</td>
<td>107</td>
</tr>
<tr>
<td></td>
<td>59.81</td>
<td>40.19</td>
<td>100.00</td>
</tr>
<tr>
<td>1</td>
<td>113</td>
<td>111</td>
<td>224</td>
</tr>
<tr>
<td></td>
<td>50.45</td>
<td>49.55</td>
<td>100.00</td>
</tr>
<tr>
<td>Total</td>
<td>177</td>
<td>154</td>
<td>331</td>
</tr>
<tr>
<td></td>
<td>53.47</td>
<td>46.53</td>
<td>100.00</td>
</tr>
</tbody>
</table>

Pearson chi2(1) = 2.5535 Pr = 0.110
```
### III. Findings

**B. Interfactor Analysis – Pairwise Correlations**

**Correlations Between a Finding of Fair Use and the Factor Outcomes and Among the Factor Outcomes in 332 Dispositive Unreversed Non-Concurrence/Non-Dissent Opinions, 1978-2014**

<table>
<thead>
<tr>
<th></th>
<th>FU Found / SJ-P Denied</th>
<th>Factor One</th>
<th>Factor Two</th>
<th>Factor Three</th>
<th>Factor Four</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Favors</td>
<td>Disfavors</td>
<td>Favors</td>
<td>Disfavors</td>
</tr>
<tr>
<td>FU Found / SJ-P Denied</td>
<td>1.000</td>
<td>1.000</td>
<td>1.000</td>
<td>1.000</td>
<td>1.000</td>
</tr>
<tr>
<td>Factor One</td>
<td></td>
<td>.795*</td>
<td>1.000</td>
<td>-.822*</td>
<td>-.886*</td>
</tr>
<tr>
<td></td>
<td>Favors</td>
<td>.290*</td>
<td>.254*</td>
<td>-.204*</td>
<td>.212*</td>
</tr>
<tr>
<td></td>
<td>Disfavors</td>
<td>-.280*</td>
<td>-.144</td>
<td>.692*</td>
<td>-.671*</td>
</tr>
<tr>
<td>Factor Two</td>
<td></td>
<td>.631*</td>
<td>.532*</td>
<td>-.542*</td>
<td>.270*</td>
</tr>
<tr>
<td></td>
<td>Favors</td>
<td>-.656*</td>
<td>-.528*</td>
<td>.569*</td>
<td>-.168*</td>
</tr>
<tr>
<td></td>
<td>Disfavors</td>
<td>.831*</td>
<td>.683*</td>
<td>-.679*</td>
<td>.327*</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-.799*</td>
<td>-.622*</td>
<td>.651*</td>
<td>-.243*</td>
</tr>
</tbody>
</table>

“FU Found / SJ-P Denied” denotes that the court found fair use or otherwise denied the plaintiff’s motion for summary judgment on the issue. “Favors” denotes outcomes in which the factor was found to favor fair use. “Disfavors” denotes outcomes in which the factor was found to disfavor fair use. * denotes that the coefficient is statistically significant at the .05 level.
### III. Findings

**B. Interfactor Analysis – Pairwise Correlations**

<table>
<thead>
<tr>
<th></th>
<th>FU Found / SJ-P Denied</th>
<th>Factor One</th>
<th>Factor Two</th>
<th>Factor Three</th>
<th>Factor Four</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Favors</td>
<td>Disfavors</td>
<td>Favors</td>
<td>Disfavors</td>
</tr>
<tr>
<td>FU Found / SJ-P Denied</td>
<td>1.000</td>
<td>1.000</td>
<td>-.822*</td>
<td>-.886*</td>
<td>1.000</td>
</tr>
<tr>
<td>Factor One</td>
<td>.795*</td>
<td>1.000</td>
<td>-.280*</td>
<td>-.671*</td>
<td>1.000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-.254*</td>
<td>.212*</td>
<td>-.671*</td>
<td>1.000</td>
</tr>
<tr>
<td>Factor Two</td>
<td>.290*</td>
<td>.254*</td>
<td>.212*</td>
<td>.270*</td>
<td>.773*</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-.144</td>
<td>.671*</td>
<td>.306*</td>
<td>1.000</td>
</tr>
<tr>
<td>Factor Three</td>
<td>.631*</td>
<td>-.528*</td>
<td>-.168*</td>
<td>.564*</td>
<td>.876*</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-.542*</td>
<td>.306*</td>
<td>-.554*</td>
<td>1.000</td>
</tr>
<tr>
<td>Factor Four</td>
<td>.831*</td>
<td>.683*</td>
<td>.327*</td>
<td>.564*</td>
<td>.635*</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-.679*</td>
<td>-.278*</td>
<td>-.554*</td>
<td>.876*</td>
</tr>
</tbody>
</table>

“FU Found / SJ-P Denied” denotes that the court found fair use or otherwise denied the plaintiff’s motion for summary judgment on the issue. “Favors” denotes outcomes in which the factor was found to favor fair use. “Disfavors” denotes outcomes in which the factor was found to disfavor fair use. * denotes that the coefficient is statistically significant at the .05 level.
### III. Findings

#### B. Interfactor Analysis – Pairwise Correlations

<table>
<thead>
<tr>
<th></th>
<th>FU Found / SJ-P Denied</th>
<th>Factor One</th>
<th>Factor Two</th>
<th>Factor Three</th>
<th>Factor Four</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Favors</td>
<td>Disfavors</td>
<td>Favors</td>
<td>Disfavors</td>
</tr>
<tr>
<td>FU Found / SJ-P Denied</td>
<td>1.000</td>
<td>1.000</td>
<td>-0.822*</td>
<td>-0.886*</td>
<td>1.000</td>
</tr>
<tr>
<td>Factor One</td>
<td></td>
<td>.795*</td>
<td>1.000</td>
<td>-0.204*</td>
<td>1.000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-0.822*</td>
<td>-0.886*</td>
<td>1.000</td>
<td></td>
</tr>
<tr>
<td>Factor Two</td>
<td></td>
<td>.290*</td>
<td>.254*</td>
<td>-0.204*</td>
<td>1.000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-0.280*</td>
<td>-0.144</td>
<td>0.212*</td>
<td>-0.671*</td>
</tr>
<tr>
<td>Factor Three</td>
<td></td>
<td>.631*</td>
<td>.532*</td>
<td>-0.542*</td>
<td>1.000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-0.656*</td>
<td>-0.528*</td>
<td>0.569*</td>
<td>-0.773*</td>
</tr>
<tr>
<td>Factor Four</td>
<td></td>
<td>.831*</td>
<td>.683*</td>
<td>-0.679*</td>
<td>1.000</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-0.799*</td>
<td>-0.622*</td>
<td>0.651*</td>
<td></td>
</tr>
</tbody>
</table>

“FU Found / SJ-P Denied” denotes that the court found fair use or otherwise denied the plaintiff’s motion for summary judgment on the issue. “Favors” denotes outcomes in which the factor was found to favor fair use. “Disfavors” denotes outcomes in which the factor was found to disfavor fair use. * denotes that the coefficient is statistically significant at the .05 level.
III. Findings
B. Interfactor Analysis

Twenty-Opinion Moving Average of the Proportion of the Opinion’s Fair Use Analysis Devoted to Each Factor, 1978-2014
III. Findings

B. Interfactor Analysis

```
. ttest flcountprop, by(postar)

Two-sample t test with equal variances

<table>
<thead>
<tr>
<th>Group</th>
<th>Obs</th>
<th>Mean</th>
<th>Std. Err.</th>
<th>Std. Dev.</th>
<th>[95% Conf. Interval]</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>140</td>
<td>.1839405</td>
<td>.0120719</td>
<td>.1428366</td>
<td>.1600722 - .2078087</td>
</tr>
<tr>
<td>1</td>
<td>316</td>
<td>.2861844</td>
<td>.0091592</td>
<td>.1628174</td>
<td>.2681635 - .3042053</td>
</tr>
<tr>
<td>combined</td>
<td>456</td>
<td>.2547937</td>
<td>.0076684</td>
<td>.1637515</td>
<td>.2397239 - .2698635</td>
</tr>
</tbody>
</table>

diff         | -.102244 | .0159365 | -.1335624 | -.0709255 |

diff = mean(0) - mean(1)
t = -6.4157
degrees of freedom = 454

Ho: diff = 0
Ha: diff < 0
Pr(T < t) = 0.0000
Ha: diff != 0
Pr(|T| > |t|) = 0.0000
Ha: diff > 0
Pr(T > t) = 1.0000
```
III. Findings  
B. Interfactor Analysis

Stampeding?

Stampede Score = number of factors found to favor fair use minus the number of factors found to disfavor fair use
Stampede Score = number of factors found to favor fair use minus the number of factors found to disfavor fair use
III. Findings

C. Factor-Specific Analysis: Factor One

Twenty-Opinion Moving Average Showing the Proportion of Opinions Analyzing Transformativeness, Commerciality, and Applying the Sony Presumption
III. Findings

C. Factor-Specific Analysis: Factor One

- Transformativeness:
  - A finding of transformativeness is nearly sufficient but not necessary to trigger a finding of fair use.
  - Nearly sufficient:
    - Of the 332 dispositive unreversed non-concurrence/non-dissent opinions, 79 found a transformative use and 76 of these (96.2%) found fair use. The three outliers:
      - Castle Rock Entertainment v. Carol Publ. Group, 955 F. Supp. 260 (S.D.N.Y. 1997) (Seinfeld Aptitude Test found to be transformative; SJP granted)
    - Of the 460 opinions from 1978 through 2014, 104 opinions found a transformative use and 91 of these (87.5%) found fair use. The additional ten outliers:
III. Findings

C. Factor-Specific Analysis: Factor One

• The additional ten outliers in which court explicitly found D’s use to be transformative but did not find fair use:
  – Mattel, Inc. v. Pitt, 229 F.Supp.2d 315 (S.D.N.Y. 2002) (D’s parody of P’s Barbie doll found transformative; SJP denied)
  – Martha Reyes v. Wyeth Pharmaceuticals, Inc., 603 F. Supp. 2d 289 (D.P.R. 2009) (D’s use of P’s sculpture in advertisement found T; SJD denied)
  – Bridgeport Music, Inc. v. UMG Recordings, Inc., 585 F.3d 267 (6th Cir. 2009) (D’s sampling found to be transformative; JNOV denied)
  – Shepard v. Miler, 2010 U.S. Dist. Lexis. 136504 (E.D. Cal. 2010) (Declaratory P’s use of D’s contributions to book found to be transformative; MTD denied)
  – Righthaven, LLC v. Choudry, 2011 U.S. Dist. Lexis 48290 (D. Nev. 2011) (D’s use of photo owned by P copyright troll found to be T; SJD denied)
  – Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013) (D’s 30 uses of P’s photos found to be T, but 5 uses remanded as FI under FU; D’s CSJ denied in part)
  – Rosebud Entm’t, LLC v. Prof’l Laminating LLC, 958 F. Supp. 2d 600 (D. Md. 2013) (D’s display pieces incorporating covers and pages of P’s magazines found T; SJP denied)
  – Rivera v. Méndez & Compañía, 988 F. Supp. 2d 159 (D.P.R. 2013) (D’s use found to be T but no longer authorized; SJC found FI)
III. Findings

C. Factor-Specific Analysis: Factor One

• Transformativeness (cont.):
  – Not Necessary:
    • Of 224 dispositive unreversed opinions after Acuff-Rose, 111 found fair use. In 40 of these, the court did not find the defendant’s use to be transformative.
    • 6 of these explicitly found the use to be non-transformative:
      – L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924 (9th Cir. 2002) (D’s CSJ granted)
      – Swatch Group Mgmt. Servs. v. Bloomberg L.P., 742 F.3d 17 (2d Cir. 2014) (SJD granted)
Chronological ordering of all opinions finding fair use since *Campbell*
III. Findings
C. Factor-Specific Analysis: Factor One

• Parody
  – 31 of 460 opinions found defendant’s use to be parodic. 25 of these 31 found fair use. The 6 outliers, of which 2 reversed:
    • Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202 (N.D. Tex. 1981) (BT finds D’s parody of TV commercial not to be FU)
    • Acuff-Rose Music v. Campbell, 972 F.2d 1429 (6th Cir. 1992) (reversed)
    • Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 (S.D.N.Y. 2002) (D parodies P’s Barbie Doll; SJP denied)
III. Findings

C. Factor-Specific Analysis: Factor One

- Parody
  - 31 of 460 opinions found defendant’s use to be parodic. 25 of these 31 found fair use. The 6 outliers, of which 2 reversed:
    - Acuff-Rose Music v. Campbell, 972 F.2d 1429 (6th Cir. 1992) (reversed)
III. Findings
   C. Factor-Specific Analysis: Factor One

   • Commercial use
     – A finding that the defendant made a commercial use does not appear to affect the overall outcome of the fair use analysis.
     – The commercial use issue is interesting for what it shows of the indiscipline of the lower courts made possible by the S Court’s effort to maintain appearances.
III. Findings
   C. Factor-Specific Analysis: Factor One

• Supreme Court statements about commerciality in factor one:
  – Sony at 451: “If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair. The contrary presumption is appropriate here, however…”
  – Harper & Row at 562: “The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. ‘Every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.’ Sony Corp. of America v. Universal City Studios, Inc., 464 U.S., at 451.”
  – Stewart v. Abend at 237: “Every [unauthorized] commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” Sony Corp. of America v. Universal Studios, Inc., supra, 464 U.S. at 451
  – Acuff-Rose at 585: “[A]s we explained in Harper & Row, Sony stands for the proposition that the ‘fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”"
Twenty-Opinion Moving Average of the Proportion of Opinions Analyzing Transformativeness, Commerciality, and Applying the Sony Presumption
III. Findings
C. Factor-Specific Analysis: Factor One

- **Bad Faith**
  - 64 opinions explicitly found bad faith (17) or no bad faith (47). Of these, 54 (13/41) ruled on fair use in the direction of the bad faith finding.

- **Preambular Uses**


![Table showing distribution and fair use win rates of opinions explicitly addressing preambular purposes, 1978-2014]

<table>
<thead>
<tr>
<th>Preambular Purpose</th>
<th>N</th>
<th>% of 460</th>
<th>Found FU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Research purpose</td>
<td>34</td>
<td>7.4</td>
<td>.647</td>
</tr>
<tr>
<td>Critical purpose</td>
<td>46</td>
<td>10.0</td>
<td>.826</td>
</tr>
<tr>
<td>News reporting</td>
<td>34</td>
<td>7.4</td>
<td>.471</td>
</tr>
<tr>
<td>Educational purpose</td>
<td>38</td>
<td>8.3</td>
<td>.368</td>
</tr>
</tbody>
</table>
III. Findings
C. Factor-Specific Analysis: Factor Two

• Creative vs. factual works:
  – 202 opinions addressed facts where plaintiff’s work was held by the court to be creative. Of these, 36% found fair use.
  – 83 opinions addressed facts where plaintiff’s work was held by the court to be factual. Of these, 63% found fair use.
  – 130 opinions (28% of 460) did not address the creative/factual issue.

• Published vs. non-published works:
  – Opinions claiming unpublished supports no FU on privacy or economic grounds: 36
  – Opinions claiming unpublished supports FU because the work is not available otherwise: 5
  – Opinions claiming published supports no FU because work can be purchased: 6
  – Opinions claiming published supports FU because work is already available to the public: 64
  – Opinions not addressing publication status: 322 (70% of 460)
III. Findings

C. Factor-Specific Analysis: Factor Three

• Amount of the plaintiff’s work that defendant copied
  – 175 opinions found that the defendant copied the entirety of the plaintiff’s work. Of these 39% found fair use.

• Defendant took the “heart” of the plaintiff’s work
  – 50 opinions found that the defendant did so. 80% found no fair use.
### III. Findings

**C. Factor-Specific Analysis: Factor Four**

<table>
<thead>
<tr>
<th></th>
<th>FU Found / SJ-P Denied</th>
<th>Factor One</th>
<th>Factor Two</th>
<th>Factor Three</th>
<th>Factor Four</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FU Found / SJ-P Denied</strong></td>
<td>1.000</td>
<td>.795*</td>
<td>-822*</td>
<td>-.886*</td>
<td>1.000</td>
</tr>
<tr>
<td>Factor One</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Favors</td>
<td>.795*</td>
<td>1.000</td>
<td>.254*</td>
<td>-.204*</td>
<td>1.000</td>
</tr>
<tr>
<td>Disfavors</td>
<td>-.822*</td>
<td>-886*</td>
<td>.212*</td>
<td>-.671*</td>
<td>1.000</td>
</tr>
<tr>
<td>Factor Two</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Favors</td>
<td>.290*</td>
<td>.254*</td>
<td>1.000</td>
<td>-.671*</td>
<td>1.000</td>
</tr>
<tr>
<td>Disfavors</td>
<td>-.280*</td>
<td>-.144</td>
<td>.212*</td>
<td><em>.671</em></td>
<td>1.000</td>
</tr>
<tr>
<td>Factor Three</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Favors</td>
<td>.631*</td>
<td>.532*</td>
<td>-.542*</td>
<td>.270*</td>
<td>.564*</td>
</tr>
<tr>
<td>Disfavors</td>
<td>-.656*</td>
<td>-.528*</td>
<td>.569*</td>
<td>-.168*</td>
<td>-.514*</td>
</tr>
<tr>
<td>Factor Four</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Favors</td>
<td>.831*</td>
<td>.683*</td>
<td>-.679*</td>
<td>.327*</td>
<td>.564*</td>
</tr>
<tr>
<td>Disfavors</td>
<td>-.799*</td>
<td>-.622*</td>
<td>.651*</td>
<td>-.243*</td>
<td>-.514*</td>
</tr>
</tbody>
</table>

*“FU Found / SJ-P Denied” denotes that the court found fair use or otherwise denied the plaintiff’s motion for summary judgment on the issue. “Favors” denotes outcomes in which the factor was found to favor fair use. “Disfavors” denotes outcomes in which the factor was found to disfavor fair use. * denotes that the coefficient is statistically significant at the .05 level.*
III. Findings
C. Factor-Specific Analysis: Factor Four

• Correlation between outcome of factor four and outcome of overall test:
  – Of 332 dispositive opinions, 156 found that factor four disfavored fair use. 152 (97.4%) of these found no fair use. The 4 outliers:
    • Bouchat v. NFL Props. LLC, 910 F. Supp. 2d (D. Md. 2012) (D used P’s logo in historic displays and documentary; SJD granted)
  – Of 332 dispositive opinions, 147 found that factor four favored fair use. 138 (93.9%) of these found fair use. 9 outliers.
III. Findings
C. Factor-Specific Analysis: Factor Four


Most Important Factor

Sony Presumption

Campbell Presumption

Slippery Slope
III. Findings
D. Does Judicial Ideology Affect Fair Use Outcomes?


IV. Conclusions
IV. Conclusions

• Basic descriptive conclusions
  – FU shows unexceptional reversal and appeal rates
  – Possibly some difference in FU win rates among the courts
  – Possibly some difference in FU win rates over time
• The four-factor test
  – Judges take the factors seriously; no persuasive evidence of stampeding
  – Zombie precedent lives
  – The considerations at issue in factors one and four drive the test
  – Transformativeness
    • A finding of T is nearly sufficient to trigger a finding of FU
    • A finding of T is not necessary to trigger a finding of FU
  – Commerciality is unimportant
  – Factor four largely makes conceptual space for a balancing of factor one and factor three
• Legal futurism: “a mode of legal discourse that forecasts the future and law’s role in it”
• Scholarly predictions of the future of fair use have tended to be overtly pessimistic
  – Predictions of failure that are intended to be self-defeating
• Danger of predictions becoming self-fulfilling
Distribution of and FU Win Rate in Opinions by Proportion of Total Word Count Devoted to Fair Use Analysis, 1978-2011

Number of Opinions

Proportion of Opinion Devoted to Fair Use Analysis