

Practitioners' Summary of Results Reported in An Empirical Study of U.S. Fair Use Opinions, 1978-2005

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In what follows, I briefly summarize the results of an empirical study of U.S. copyright fair use opinions reported in my larger article *An Empirical Study of U.S. Fair Use Opinions, 1978-2005*, 156 Pa. L. Rev. 549 (2008). That article evaluates in greater detail a data set consisting of all 306 reported federal court opinions that made substantial use of the section 107 four-factor test from the January 1, 1978 effective date of the Copyright Act of 1976 through 2005. Readers with questions about particular inferences drawn or findings reported below should consult the article, freely available at <http://www.pennumbra.com> or <http://www.bartonbeebe.com>.

I. Background

A. The Section 107 Four-Factor Test

Section 107 of the Copyright Act provides:

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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

B. Courts' Tendency Mechanically to Apply the Four-Factor Test

In 59.5% of the 306 opinions studied, courts explicitly stated which party each factor favored. In 32.7% of the opinions, courts concluded their analysis with a summary of the factors explicitly stating the valence of each factor. As Figure 1 suggests, Justice Brennan's dissent in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), itself highly mechanical in form, may have influenced courts to engage in this

practice—Justice O’Connor’s opinion for the majority in *Harper & Row* was not mechanical in nature.

II. Summary Statistics

A. Reversal, Dissent, and Appeal Rates

Notwithstanding conventional wisdom to the contrary, reversal, dissent, and appeal rates in U.S. fair use case law are not exceptionally high. Of the 306 opinions studied, 88 were circuit court opinions, of which 4 were concurrences and 13 were dissents. Of the 71 circuit court majority opinions, 24 reversed the district court’s fair use holding (for an unexceptional reversal rate of 33.8%) and 10 met with dissents (for an unexceptional dissent rate of 14.1%). Of the 211 district court opinions studied, 53 were appealed (for an appeal rate of 25.1%, again unexceptional), with 35 of the 211 (or 16.6%) affirmed and 18 (or 8.5%) reversed.

B. Fair Use Win Rates

Tables 1 and 2 set forth, by circuit and posture, the fair use win rates in the district court and circuit court opinions studied. At the district court level, 30.4% of the opinions addressing preliminary injunction motions found fair use, while 24.1% of the opinions issuing from a bench trial did so. At the circuit court level, the preliminary injunction win rate was 40.0%, while the bench trial win rate was 38.5%.

III. Interfactor Analysis

A. Correlation Analysis

Table 3 reports, for the 297 dispositive opinions studied, the pairwise correlation coefficients for the relations (1) between an overall finding of fair use and each of the four factor outcomes, and (2) among the four factor outcomes. As experienced practitioners might expect, the correlation between the outcome of factor four, addressing market harm, and the overall outcome of the fair use test was very strong. The correlation between the outcome of factor one, addressing the purpose and character of the defendant’s use, and the overall outcome of the fair use test was also strong. By comparison, the outcome of factor two, addressing the nature of the copyrighted work, correlated weakly, if at all, with the overall outcome of the fair use test.

B. Stampeding

To what extent did courts “stampede” the factor outcomes to conform with the overall test outcome? Notwithstanding conventional wisdom, the data show that courts rarely engaged in the practice of stampeding the factor outcomes. Instead, courts appear largely to have called the factor outcomes as they saw them, even when those outcomes did not support the overall test outcome. See Figure 2 and Table 4.

IV. Intrafactor Analysis

An empirical analysis of how courts analyzed various subfactor issues under each of the four factors reveals a number of interesting trends in the fair use case law. For example, lower courts appeared to be prone to invert Supreme Court precedent. That is, in situations where the Supreme Court might have said that a finding of “x” favors fair use (but said nothing about a finding of “not x”), lower courts tended to apply this precedent primarily to find that a finding of “not x” disfavored fair use. Further, due to the Supreme Court’s unwillingness explicitly and clearly to correct its past mistakes in its fair use opinions, lower courts tended to apply a wide array of often obsolete doctrine to the fair use issues before them.

A. Factor One: The Purpose and Character of the Defendant’s Use

As shown above in Table 3, the outcome of factor one correlated strongly with the outcome of the overall fair use test in the opinions studied. Specifically, 90.2% of the opinions that found that the factor favored fair use eventually found fair use, while 95.3% of the opinions that found that factor one disfavored fair use eventually found no fair use.

In the relatively small proportion of the opinions studied that referenced the issue of transformativeness (or “productive use”), a finding that the defendant’s use was transformative appears to have been sufficient—or nearly sufficient—to trigger an overall finding of fair use. Each of the 13 circuit court opinions and 27 of the 29 district court opinions that found transformativeness went on to find fair use. A finding of transformativeness is not necessary, however, to trigger a finding of fair use. Of the opinions studied, 68 were filed after the Supreme Court’s issuance of its opinion in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). Of these 68 opinions, 25 found fair use but made no reference to transformativeness while an additional four opinions explicitly found that the defendant’s use was not transformative but nevertheless went on to find fair use.

Figure 3 sets forth a twenty-year moving average of the proportion of opinions per year that addressed various issues under factor one. It appears that proportionally fewer courts per year are engaging in transformativeness analysis (or encountering facts that require transformativeness analysis).

B. Factor Two: The Nature of the Plaintiff’s Work

In general, factor two received little attention from the courts. Of the 306 opinions studied, 17.7% failed even to refer to the factor, while an additional 6.5% referred to it only to call it irrelevant. Nevertheless, and surprisingly, logistic regression analysis of the overall outcome of the fair use test on various factual findings made in the opinions studied suggests that certain subfactor considerations under factor two have a significant effect on the outcome of the overall test. This analysis, described in more detail in the full-length article, suggests that a defendant’s use of a work that is factual in nature or that is published is far more likely to be found to be a fair use.

C. Factor Three: The Amount and Substantiality of the Defendant's Use

Of the 99 opinions that found that the defendant took the entirety of the plaintiff's work, 27.3% found fair use. Of the 37 opinions that found that the defendant took the "essence" or the "heart" of the plaintiff's work, 35 found no fair use.

D. Factor Four: Effect on the Market

The data suggest that the fourth factor constitutes a metafactor under which courts integrate their analysis of the other three factors and, in doing so, arrive at the outcome not simply of factor four, but of the overall test. Of the 141 opinions that found that factor four disfavored fair use, 140 found no fair use. Of the 116 opinions that found that factor four favored fair use, all but six found fair use.

FIGURE 1
 20-OPINION MOVING AVERAGE OF THE PROPORTION OF OPINIONS EXPLICITLY STATING THE VALENCE OF THE FACTORS AND
 EXPLICITLY REVIEWING THE VALENCE OF THE FACTORS

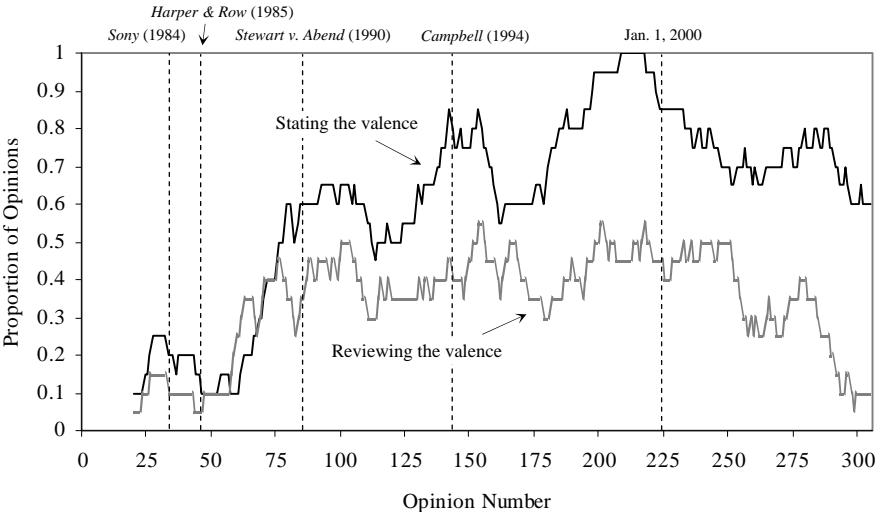
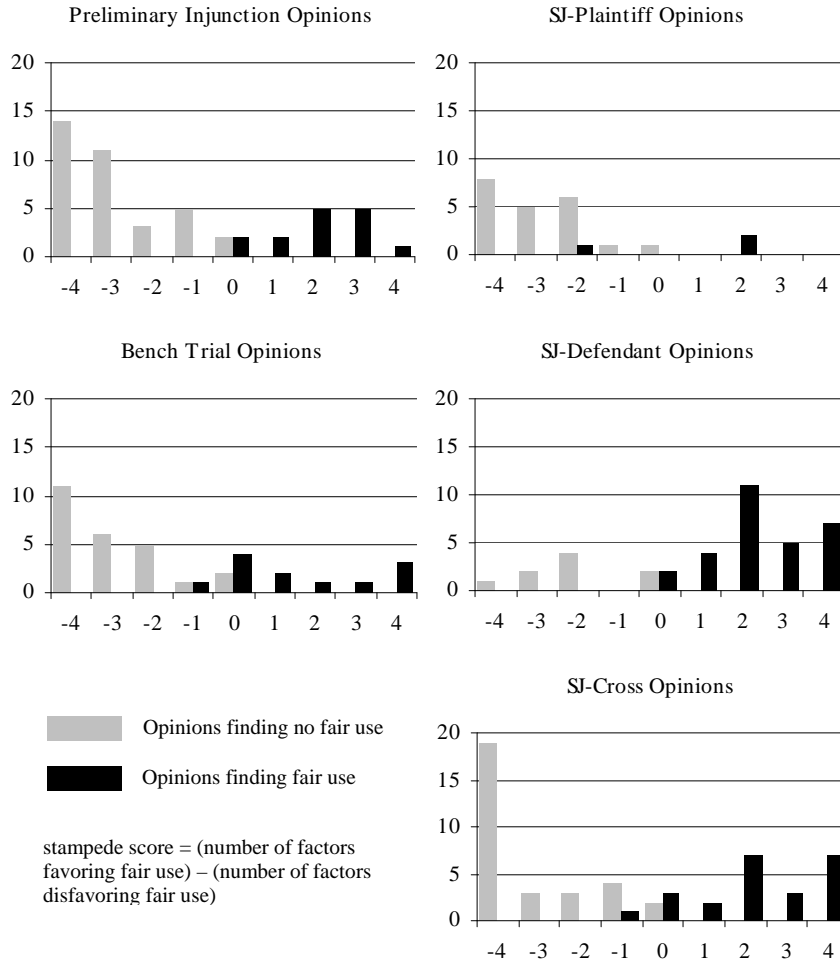


FIGURE 2
 DISTRIBUTION OF FOUR-FACTOR STAMPEDE SCORES BY OUTCOME AND POSTURE IN 208 DISTRICT COURT OPINIONS



Three district court opinions were excluded from the sample used to construct this figure. See *Chicago Sch. Reform Bd. of Trustees v. Substance, Inc.*, 79 F. Supp. 2d 919 (N.D. Ill. 2000) (denying motion to dismiss on a stampede score of -4); *Int-Elect Eng'g, Inc. v. Clinton Harley Corp.*, No. 92-20718, 1993 U.S. Dist. LEXIS 11510 (S.D. Cal. 1993) (denying motion to dismiss on a stampede score of -1); *Roy Export Co. Establishment etc. v. Columbia Broadcasting System, Inc.*, 503 F. Supp. 1137 (S.D.N.Y. 1980) (denying defendant's motion for judgment notwithstanding the verdict on a stampede score of -4).

FIGURE 3
20-OPINION MOVING AVERAGE OF THE PROPORTION OF OPINIONS MAKING THE COMMERCIALITY AND
TRANSFORMATIVENESS INQUIRIES AND CITING THE *SONY* COMMERCIAL USE PRESUMPTION

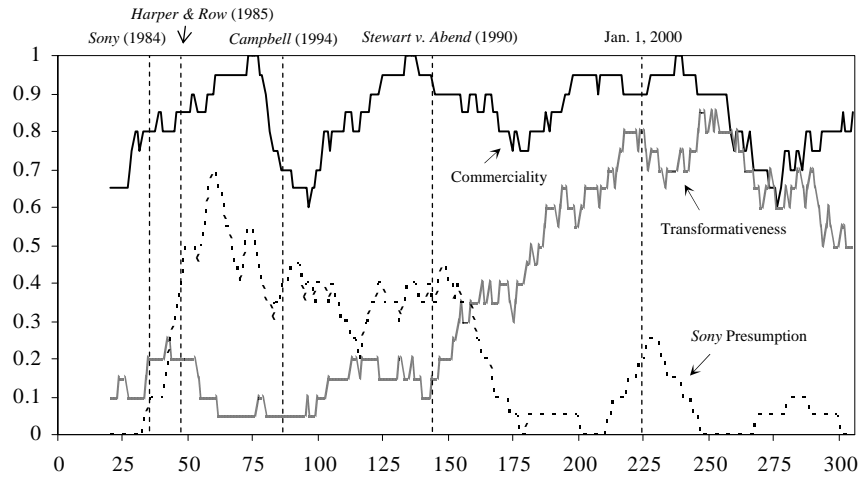


TABLE 1
DISPOSITION OF UNREVERSED DISTRICT COURT FAIR USE OPINIONS BY CIRCUIT AND POSTURE
 ("FU" denotes the proportion of opinions which found fair use; "No FU" denotes the proportion of opinions which found no fair use)

Circuit	Distribution by Circuit		Preliminary Injunction		Bench Trial		SJ Plaintiff		SJ Defendant		SJ Cross	
	N	%	N	FU	N	FU	N	No FU	N	FU	N	No FU
1	8	4.2	2	.500	3	.667	---	---	2	1.000	1	.000
2	64	33.7	12	.500	9	.000	6	.667	18	.778	19	.421
3	9	4.7	4	.000	2	.000	---	---	2	1.000	1	1.000
4	12	6.3	1	1.000	1	1.000	1	1.000	4	.750	5	.800
5	7	3.7	1	1.000	5	.200	---	---	---	---	1	.000
6	11	5.8	1	.000	1	.000	3	.667	1	1.000	5	.600
7	10	5.3	4	.000	1	.000	1	1.000	---	---	4	.750
8	9	4.7	2	.000	1	.000	1	1.000	2	.500	3	1.000
9	34	17.9	11	.181	2	1.000	4	1.000	6	.500	11	.273
10	7	3.7	3	.667	1	.000	1	1.000	1	1.000	1	.000
11	12	6.3	3	.000	2	.500	4	1.000	---	---	3	1.000
D.C.	7	3.7	2	.500	1	.000	1	1.000	1	1.000	2	1.000
Total	190*		46	.304	29	.241	22	.864	37	.757	56	.536
	Circuit-Wide:											.375

*Three unreversed district court opinions are not represented in this table. None of them found fair use. See Chicago Sch. Reform Bd. of Trustees v. Substance, Inc., 79 F. Supp. 2d 919 (N.D. Ill. 2000) (motion to dismiss); Int-Elect Eng'g, Inc. v. Clinton Harley Corp., 1993 U.S. Dist. LEXIS 11510 (S.D. Cal. 1993) (same); Roy Export Co. v. Columbia Broadcasting System, Inc., 503 F. Supp. 1137 (S.D.N.Y. 1980) (motion for JNOV).

TABLE 2
DISTRIBUTION AND DISPOSITION OF UNREVERSED CIRCUIT COURT MAJORITY OPINIONS
("FU" denotes the proportion of opinions which found fair use; "No FU" denotes the proportion of opinions which found no fair use)

Circuit	Distribution by Circuit		Preliminary Injunction		Bench Trial		SJ Plaintiff		SJ Defendant		SJ Cross	
	N	%	N	FU	N	FU	N	No FU	N	FU	N	No FU
1	1	1.6	---	---	---	---	---	---	1	1.000	---	---
2	24	37.5	5	.400	7	.143	2	.500	4	.750	6	.167
3	1	1.6	---	---	---	---	---	---	---	---	1	1.000
4	3	4.7	---	---	1	1.000	---	---	1	1.000	1	1.000
5	2	3.1	---	---	1	1.000	---	---	---	---	1	1.000
6	3	4.7	---	---	1	1.000	---	---	---	---	2	.500
7	2	3.1	---	---	---	---	1	.000	1	.000	---	---
8	2	1.6	---	---	---	---	---	---	---	---	1	.000
9	21	32.8	8	.375	2	.500	1	1.000	3	.333	7	.286
10	---	---	---	---	---	---	---	---	---	---	---	---
11	5	7.8	1	1.000	1	.000	2	1.000	---	---	1	1.000
D.C.	1	1.6	1	.000	---	---	---	---	---	---	---	---
Total	64		15		13		6		10		20	
		Circuit-Wide:		.400		.385		.667		.600		.350
												.550

*Three unreversed circuit court opinions are not represented in this table. See *Mulcahy v. Cheeath 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).

TABLE 3
CORRELATIONS BETWEEN A FINDING OF FAIR USE AND THE FACTOR OUTCOMES AND AMONG
THE FACTOR OUTCOMES IN 297 DISPOSITIVE OPINIONS

		FU Found / SJ-P Denied	Factor One		Factor Two		Factor Three		Factor Four	
			Favors	Disfavors	Favors	Disfavors	Favors	Disfavors	Favors	Disfavors
FU Found / SJ-P Denied		1.000								
Factor One	Favors	.747*	1.000							
	Disfavors	-.780*	-.735*	1.000						
Factor Two	Favors	.321*	.310*	-.192*	1.000					
	Disfavors	-.281*	-.087	.267*	-.491*	1.000				
Factor Three	Favors	.646*	.559*	-.496*	.339*	-.190*	1.000			
	Disfavors	-.680*	-.471*	.631*	-.146*	.370*	-.630*	1.000		
Factor Four	Favors	.823*	.713*	-.616*	.364*	-.174*	.637*	-.504*	1.000	
	Disfavors	-.806*	-.557*	.673*	-.205*	.331*	-.474*	.688*	-.722*	1.000

“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.

TABLE 4
 CROSTABULATION OF THE STAMPEDE SCORES OF APPEALED DISTRICT
 COURT OPINIONS BY THE STAMPEDE SCORES OF THE REVIEWING CIRCUIT
 COURT DECISIONS, IN 32 FAIR USE CASES

		Stampede Score of Reviewing Circuit Court Opinion								
		-4	-3	-2	-1	0	1	2	3	4
Stampede Score of Appealed District Court Opinion	-4	4	1		1			<u>1</u>		<u>1</u>
	-3			1			<u>1</u>	<u>1</u>		<u>1</u>
	-2	1		2	<u>1</u> [*]					
	-1			<u>1</u> [†]						
	0	<u>1</u>					1			
	1									
	2	<u>1</u>		<u>2</u>			2			
	3	<u>1</u>	<u>1</u>	<u>1</u>						
	4			<u>1</u>				1	1	2

The number in each box of the crosstabulation indicates the number of cases producing a district court opinion and an appellate court majority opinion meeting the values of the x and y coordinates of the crosstabulation. For example, four cases produced district court and appellate court majority opinions that both yielded stampede scores of -4. Underlined numbers indicate the number of cases in which the appellate court reversed the district court. *In *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991), the Second Circuit reversed the district court's granting of summary judgment to the plaintiff in *Association of American Medical Colleges v. Carey*, 728 F. Supp. 873 (S.D.N.Y. 1990). †In *Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 241 F.3d 398 (5th Cir. 2001), the Fifth Circuit reversed the district court's granting of summary judgment to the defendant in *Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 49 F. Supp. 2d 885 (E.D. Tex. 1999).