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Transforming “Transformative Use”: The Growing Misinterpretation of the Fair Use Doctrine

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Transforming “Transformative Use”: The Growing Misinterpretation of the Fair Use Doctrine

Abstract

Starting in late 2012, and continuing into late 2013, the United States District Court for the Southern District of New York wreaked havoc on the traditional interpretation of the copyright infringement defense known as “fair use.” Two cases stemming from the advent of the Google Books Project are *Author’s Guild, Inc. v. HathiTrust* and *Author’s Guild, Inc. v. Google, Inc.* These cases adopted a controversial interpretation of the fair use defense, codified in 17 U.S.C. § 107, when each case determined that the mass digitization of thousands of books constituted fair use merely because the digitization was what is known as “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 will explain why the current legal state of the fair use defense, as propagated by the District Court for the Southern District of New York and the United States Courts Appeals for the Ninth Circuit, is inconsistent with traditional statutory construction principles.

Proposed recommendations to solve legal inconsistencies in Section 107 can come from clarification either from Congress by way of an amendment to this Section, or by a decision from the United States Supreme Court.

Keywords

fair use, copyright, transformative use, Google books, HathiTrust, digitization

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Essay

**Transforming “Transformative Use”:
The Growing Misinterpretation of the Fair Use Doctrine**

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I. INTRODUCTION

On October 10, 2012, Judge Baer handed down a decision that fueled dramatic change to the fair use doctrine of U.S. copyright law. 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.¹ 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. § 107.²

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. 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.³

These holdings are a radical change from precedent leading up to the codification of the fair use defense.⁴ Only the Ninth Circuit applies the fair use defense as the New York courts did, using a contested interpretation of transformative use, which was a major basis for both *Author's Guild* decisions.⁵ Each Southern District of New York judge focused on the way that defendants, *Google* and *HathiTrust*, transformed the copyrighted works in new and socially valuable ways that varied greatly from the uses of the original books and articles.⁶ Traditionally, the fair use judicial interpretation balanced rewarding authors and creators with intellectually enriching the public; the dramatic shift in the Southern

¹ *Authors 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 digitization of copyrighted books contained within the universities libraries' was protected by the fair use doctrine).

² *Id.* at 456-58.

³ *Author's Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (holding that the fair use defense was available to Google, a commercial Internet search engine, for the systematic digitization of copyrighted books from partner libraries).

⁴ 17 U.S.C. § 107 (2010); *see generally* *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (enumerating the fair 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).

⁵ *See 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); *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.* Sanford 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>.

⁶ *See generally Google*, 954 F. Supp. 2d 282 (explaining that Google's scanning of the copyrighted books into a keyword searchable online database was transformative from the original use of the books); *see generally HathiTrust*, 902 F. Supp. 2d 445 (finding that the works in the HathiTrust Digital Library transformative because they serve a different purpose, i.e. search capability, than the original copyrighted works).

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District of New York and Ninth Circuit courts now allows mass digitization of copyrighted works to continue without the permission of copyright holders.⁷

This Comment will argue that the growing theory of transformative use as propagated by the Ninth Circuit, and adopted by New York's Southern District, is a judicial interpretation that is not consistent with statutory construction principles. The decisions in *HathiTrust* and *Google*, extending the Ninth Circuit broad view of transformative use, stray too far from the traditional analysis of the fair use doctrine. 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. This exploration will focus on relevant case law that developed the fair use doctrine until its codification in 17 U.S.C. § 107 and the general application following codification. Part Two also describes the broad Ninth Circuit interpretation of the fair use doctrine, particularly the theory of transformative use. Additionally, this part details the *Author's Guild, Inc. v. HathiTrust* and *Author's Guild, Inc. v. Google, Inc.* decisions. Finally, this subsection explains the basics of a statutory construction analysis.

Part Three analyzes why the transformative use interpretation is inconsistent with traditional statutory construction principles by looking to 17 U.S.C. § 107 and its legislative history in order to conduct a statutory construction analysis of the statutes. Part Three also 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 the issue of interpreting the fair use doctrine, and more specifically, how the transformative use theory factors in to the overall analysis.

Finally, Part Five concludes by reiterating that the current fair use defense, as it exists 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

In what is known as the Copyright Clause, the United States Constitution gives Congress the power “[t]o promote the Progress of Science and useful Arts, by

⁷ 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* note 24).

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securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁸ This clause 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 with access to the work.⁹ The fair use defense plays a significant role 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.¹⁰

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: 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 subtle [sic] and refined, and, sometimes, almost evanescent.”¹¹ Justice Story means it is often difficult in copyright cases to come to fitting conclusions or create principles that can be generally applied to all copyright cases.¹² 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.¹³

The fair use defense is no different in that judges need to examine and analyze the argument on 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.¹⁴ In *Folsom v. Marsh*, the plaintiff had created a work on the life of President George Washington, which included personal letters written by

⁸ U.S. CONST. art. I, § 8, cl. 8.

⁹ See U.S. CONST. art. I, § 8, cl. 8.

¹⁰ 17 U.S.C. § 107 (allowing those defendants who meet the criteria an affirmative defense for infringement when it is used for purposes such as teaching, reporting, or researching following an analysis of four factors).

¹¹ *Folsom*, 9 F. Cas. at 344.

¹² *Id.*

¹³ *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 be decided on its own facts); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984) (allowing a Court to use section 107 to apply an equitable rule of reason analysis to claims based on their particular facts); H.R. REP. NO. 94-1476, at 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 (“Indeed, since the [fair use] doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case 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.”).

¹⁴ *Folsom*, 9 F. Cas. 342.

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Washington along with his biography.¹⁵ The plaintiff edited a twelve-volume work on the life of President George Washington, the first volume containing a biography and the following eleven volumes containing verbatim copies of President Washington's personal and private letters, messages and other public acts, with some explanatory notes from the editor.¹⁶ Justice Story found that the defendant used some of the letters from the plaintiff's work in creating his own, shorter biography of Washington in two volumes, copying 353 pages identically, with 319 of these pages containing the contested verbatim copies of the Washington's letters.¹⁷

In 1841, the Circuit Court of Massachusetts was confronted with the questions of whether such copying was considered piracy, and if there were any affirmative defenses to such copying.¹⁸ Justice Story laid out 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.¹⁹ This case is the common law foundation of the analysis of the current fair use defense in U.S. Copyright law.²⁰

Most courts have adopted these factors to help determine if a fair use defense was applicable in any given case.²¹ They were so prevalent in fact, that they were codified as the factors for judicial consideration in the 1976 Copyright Act.²² These factors include "the purpose and character of the use," which includes consideration of whether the use is 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."²³ The fair use section says that fair use of a copyrighted work for the purposes of criticism, comment, news reporting, teaching, scholarship, or research is not considered an infringement of copyright.²⁴ The section then lists 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.²⁵

¹⁵ *Folsom*, 9 F. Cas. at 345.

¹⁶ *Id.*

¹⁷ *Id.* at 345-46.

¹⁸ *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).

¹⁹ *Id.* at 348 ("Look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.").

²⁰ *Folsom*, 9 F. Cas. at 348; see 17 U.S.C. § 107 (West 1992).

²¹ See *Campbell*, 510 U.S. at 576-80; Pierre N. Leval, *Toward 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).

²² See 17 U.S.C. § 107.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

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The Congressional notes accompanying the statute show that it is difficult to distinguish between fair use and copyright infringement.²⁶ Although the courts have analyzed and ruled on the fair use defense numerous times, its codification is the first unified attempt at defining it.²⁷ Even with the codification, there is no general definition to apply since fair use must be decided on a case-by-case basis.²⁸ The legislative notes show that the purpose 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.²⁹ It is meant to be open to further judicial interpretation and be a starting point for a judge's analysis.³⁰

In the years following its codification, Section 107's open-ended application provided too little guidance for judges on how to recognize fair use and what extent of copying is acceptable.³¹ In 1990, Judge Pierre Leval of the Second Circuit published a law review article advocating for a fair use defense concept that is consistent with the principles of copyright.³² These principles include the utilitarian goal of stimulating progress of the arts for the intellectual improvement of the public rather than giving the absolute ownership of a work to an author.³³ 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 whether a finding of fair use would affect the objectives of copyright.³⁴

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 the secondary and allegedly infringing use.³⁵ In order to determine this first factor, the secondary use must be analyzed to see if it is justified, and this justification hinges on whether the challenged secondary use is transformative or not.³⁶ According to Judge Leval the 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.³⁷ Consideration of the purpose and character of use raises the question of whether the use is justified under the objectives of

²⁶ H.R. REP. NO. 94-1476, at 65-66 (1976); S. REP. NO. 94-473, at 62 (1975).

²⁷ H.R. REP. NO. 94-1476, at 65-66 (1976); S. REP. NO. 94-473, at 62 (1975) (suggesting that judges have attempted to apply this defense with the factors for consideration that have emerged within each respective jurisdiction, with no previous statutory basis).

²⁸ *Id.*

²⁹ H.R. REP. NO. 94-1476, at 65-66; S. REP. NO. 94-473, at 62.

³⁰ *Id.*

³¹ Leval, *supra* note. 21 at 1105-07.

³² *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").

³³ *Id.*

³⁴ *Id.* at 1110-11.

³⁵ *Id.* at 1111-12.

³⁶ *Id.* (defining a transformative use as one that is "productive and ... employ[s] the quoted matter in a different manner or for a different purpose from the original").

³⁷ Leval, *supra* note. 21 at 1116.

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copyright law.³⁸ 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 value to the original work, rather than repackaging or republishing quotations from the original material.⁴⁰ Since this factor is indispensable 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 Here, 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, the Court heavily relied on Judge Leval's idea of transformative use and how it lies at the heart of the fair use doctrine.⁴⁴ The Court held that this specific parody did not copy excessively from the original, and its criticism of an earlier era was transformative.⁴⁵ In adopting Judge Leval's take on the application of the four factors listed in Section 107, the Court expanded the transformative use concept to a new class of copyrighted works to include pictures, sculptures and music.⁴⁶

This Supreme Court decision acknowledges the importance of the first statutory factor in Section 107 to the fair use defense.⁴⁷ Following this decision, other courts began to expand this application without considering, as Judge Leval cautioned, the core objectives of copyright law.⁴⁸ This expansion began in the Ninth Circuit.⁴⁹

³⁸ Leval, *supra* note. 21 at 1116.

³⁹ *Id.* at 1111-12.

⁴⁰ *Id.* (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 *Campbell*, 510 U.S. at 578.

⁴³ *Id.* at 571-73 (defendant 2 Live Crew wrote a commercial parody of Roy Orbison's song "Oh, Pretty Woman" owned by plaintiff Acuff-Rose Music Inc. and the Court was to decide if it was either infringement or fair use under 17 U.S.C. § 107).

⁴⁴ *Id.* at 578-79 ("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 *Campbell*, 510 U.S. at 578-85.

⁴⁷ *Id.* at 578.

⁴⁸ *Kelly*, 336 F.3d at 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 at 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 *Kelly*, 336 F.3d at 818-19; *Perfect 10*, 508 F.3d at 1163-68.

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 illustrated through the Circuit's decisions in the *Kelly v. Arriba Soft Corp.* and *Perfect 10, Inc. v. Amazon.com Inc.* cases.⁵²

Arriba Soft is a search engine that displays results as small pictures, or 'thumbnails,' instead of displaying text; Kelly, a photographer, realized that his images displaying scenes of the American West were part of Arriba Soft's database, and sued for infringement.⁵³ 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.⁵⁴ 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. The court saw this transformation as a change in function from the original work to the 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.⁵⁵ After considering the other three factors of Section 107, the court concluded that since a majority of the factors favored Arriba Soft, the use of the thumbnails should be considered a fair use.⁵⁶

In 2007, the Ninth Circuit again considered a fair use claim with very similar facts to *Kelly*.⁵⁷ *Perfect 10, Inc. v. Amazon.com Inc.*, in which Google was a co-defendant, had facts and a fair use defense analysis that was very similar to *Kelly*.⁵⁸ 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.⁵⁹ Google was found to have improved access to information

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 upon by an online search engine).

⁵¹ See Leval, *supra* note 21, at 1107.

⁵² See *Kelly*, 336 F.3d 811; *Perfect 10*, 508 F.3d 1146.

⁵³ *Kelly*, 336 F.3d at 816-19.

⁵⁴ *Kelly*, 336 F.3d at 816-19.

⁵⁵ *Id.*

⁵⁶ *Id.* at 822.

⁵⁷ See generally *Perfect 10*, 508 F.3d 1146.

⁵⁸ *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 to pay to be part of the "member's area").

⁵⁹ *Id.* at 1163-68; See also *Kelly*, 336 F.3d at 819.

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on the Internet, a use that the court found to be new, different, and transformative from Perfect 10's original use for the photographs.⁶⁰

Changing the theory of transformative use to give so much deference to public enrichment over rewarding the authors goes beyond the guidance provided by the statute in Section 107.⁶¹ The Supreme Court advocated for this change, so 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.⁶² 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.⁶³ This shift puts more emphasis on the needs of the public over the need to incentivize new authors and creators to continue creating, unbalancing one of the core purposes of copyright.⁶⁴

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

The Ninth 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 recent cases out of the Southern District of New York in the Second Circuit have fully embraced this concept relating to the Google Books Project.⁶⁵

The Author's Guild, a professional organization and advocate for writers, brought suit against Google in late 2005 for its creation of the Google Books Project and litigation continued through November of 2013.⁶⁶ Google partnered with academic libraries to create a large electronic database in which both copyrighted books and books in the public domain are keyword-searchable and available in a digital format.⁶⁷ In *Author's Guild, Inc. v. Google, Inc.*, Judge Chin 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 more recent Ninth Circuit

⁶⁰ See *Perfect 10*, 508 F.3d at 1165 (going so far as to say that the search engine may have more transformative use than the parody considered by the Supreme Court in *Campbell*).

⁶¹ See 17 U.S.C. § 107; see generally *Kelly*, 336 F.3d 811; *Perfect 10*, 508 F.3d 1146.

⁶² See *Campbell*, 510 U.S. 569.

⁶³ See *Kelly*, 336 F.3d 811; *Perfect 10*, 508 F.3d 1146; see also Leval, *supra* note 24, at 1110-11, 1116-25.

⁶⁴ Leval, *supra* note 21, at 1106-07.

⁶⁵ See generally *HathiTrust*, 902 F. Supp. 2d 445; *Google*, 954 F. Supp. 2d 282.

⁶⁶ See generally *Google*, 954 F. Supp. 2d 282 (The history of this case between 2005 and 2011 concerned the two parties negotiating a settlement, which was denied by the Southern District of New York. Following the denial, a new class-action suit was filed and recently decided in November 2013.).

⁶⁷ *Google*, 954 F. Supp. 2d at 282.

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precedent regarding fair use.⁶⁸ 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. The court held that Google changed "expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books" and did not supersede the text of the books.⁶⁹

When taking into account the other factors, Judge Chin found that there were 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.⁷⁰ When considered overall, Judge Chin concluded that Google Books benefits both the public and the authors and publishers. He therefore found a fair use defense in this case would be in line with the principles of copyright.⁷¹

In a separate case with similar facts, Author's Guild brought suit against HathiTrust in 2011, a partnership of major academic research libraries founded in 2008, an offshoot of the Google Books Project.⁷² The main difference between this case and the Google Books case is that HathiTrust is a group of libraries, and their use of the material is presumed to be for nonprofit purposes rather than commercial use.⁷³

Author's Guild, Inc. v. HathiTrust was decided in October 2012, a little earlier than the main Google Books case.⁷⁴ Relying on *Campbell* and the work of Judge Leval, Judge Baer found that the first factor of Section 107 was satisfied in its purpose for scholars and academic research, by protecting those works that still have valid copyrights from being read in full without purchase, and under transformative use, because the new purpose of the copied works was enhanced by search capabilities of the text.⁷⁵ After evaluating the other three factors and concluding that transformative use undermined any favorable factors to the Author's Guild without a transformative use, Judge Baer ruled that HathiTrust served the purposes of copyright to allow the fair use defense to apply in this case.⁷⁶

These two cases show the rapid adoption of the first factor of Section 107, and that if a transformative use is found, that use will determine whether or not a fair

⁶⁸ *Google*, 954 F. Supp. 2d at 291.

⁶⁹ *Id.*

⁷⁰ *Id.* at 291-92 (stating that all books were scanned and reproduced in their entirety, which would normally be concerning, but since Google needed full verbatim scans of the books in order to offer a full-text search of the books, Judge Chin found this to balance the harm of the taking).

⁷¹ *Id.* at 294.

⁷² *HathiTrust*, 902 F. Supp. 2d at 446.

⁷³ See generally *HathiTrust*, 902 F. Supp. 2d at 459; see 17 U.S.C. §107(1) ("factors to be considered shall include - within the purpose and character of the use, whether or not a use is commercial in nature or is for nonprofit educational purposes").

⁷⁴ *HathiTrust*, 902 F. Supp. 2d at 445.

⁷⁵ *Id.* at 459-61.

⁷⁶ *Id.* at 461-64.

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use defense applies in a given case.⁷⁷ Starting with Judge Leval and the adoption of his theory by the Supreme Court, then expanding from the Ninth Circuit into the Second 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 overlap when deciding how to draft new legislation or how to properly interpret codified language.⁷⁸ Central to these processes are the canons of statutory principles applied by judges when reading and interpreting a statute and considered by legislators when drafting new legislation.⁷⁹

These canons are extremely important to keep in mind when interpreting the meaning of any statute, especially in the case of the fair use defense.⁸⁰ 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.⁸¹

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.⁸² 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 deviates from the traditional statutory construction of the fair use defense.

⁷⁷ See *Google*, 954 F. Supp. 2d 282; *HathiTrust*, 902 F. Supp. 2d at 459-61; see also *Campbell*, 510 U.S. at 578 (adopting Judge Leval's view of emphasizing the first factor of section 107 more than the other three, if a 'transformative use' justification can be found).

⁷⁸ See generally Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, CRS REPORT FOR CONGRESS, <http://fas.org/sgp/crs/misc/97-589.pdf> (last updated Aug. 31, 2008); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision & the Rules or Canons About How Statutes Are to be Constructed*, 3 VAND. L. REV. 395 (1949).

⁷⁹ See Kim, *supra* note 78, at 1-2; Llewellyn, *supra* note 78, at 401-06.

⁸⁰ See Kim, *supra* note 78, at 1-2; Llewellyn, *supra* note 78, at 401-06.

⁸¹ See S. REP. NO. 94-473, at 62 (1975); H.R. REP. NO. 94-1476, at 65-66 (1976).

⁸² See *Google*, 954 F. Supp. 2d 282; *HathiTrust*, 902 F. Supp. 2d at 459-61.

A. *The Codification of Fair Use: Restating Common Law*

Section 107 was created intending to restate the judicial doctrine of the fair use defense at the time that the statute was adopted.⁸³ This codification includes a preamble generally explaining the defense, 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.⁸⁴ A traditional statutory construction analysis considers many of the canons and any judge interpreting the meaning of this statute, and how fair use applies to an individual case, should consider these canons as well.⁸⁵

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.⁸⁶ 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 guidance.⁸⁷ 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.⁸⁸

For Section 107, the language is unambiguous, even if the application is more difficult to understand.⁸⁹ It 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. These purposes include “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”⁹⁰ The statute then lists four guiding factors that shall be included in any analysis determining if an infringing use may be afforded a fair use defense, which include: 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 Finally, the statute ends with a caveat that just because a work is unpublished, that alone will not bar a finding of fair use if a finding can be made based on the four listed factors.⁹² To

⁸³ See S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

⁸⁴ 17 U.S.C. § 107.

⁸⁵ See Kim, *supra* note 78, at 1-2; Llewellyn, *supra* note 78, at 401-06.

⁸⁶ See Kim, *supra* note 78, at 2-3; Llewellyn, *supra* note 78, at 403.

⁸⁷ See Kim, *supra* note 78, at 2.

⁸⁸ See Kim *supra* note 78, at 2-4; See also Llewellyn, *supra* note 78, at 403 (giving the counter point to the plain and unambiguous canon that it should not be read as being plain and unambiguous “when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose”).

⁸⁹ See Leval, *supra* note 21, at 1105-06.

⁹⁰ 17 U.S.C. § 107.

⁹¹ *Id.* at § 107(1)-(4).

⁹² 17 U.S.C. § 107.

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summarize, a plain reading of the statute would say that fair use of a copyrighted work for specific purposes will not be infringement and that the four factors should be used in making that determination.⁹³

The language itself gives no indication as to which of the factors, if any, should weigh more in the analysis. This means all factors should be considered without deference to a specific one.⁹⁴ A plain reading would also support that due to the subjective nature of the factors, every case attempting to bring a fair use defense needs to be decided on its own particular fact pattern because there is no bright-line standard for deciding if something is considered a fair use.⁹⁵ There are some things that may be inferred based on specific words used within the statute.⁹⁶ One example is that because the words “shall include” are used prior to describing the factors for consideration, all four factors should be considered by judges in their analyses, but these are not the only factors that may be considered.⁹⁷ Another example is that because the words “such 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 that the list provided is non-exhaustive.⁹⁸

Considering that the language as interpreted above is unambiguous, 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.⁹⁹ However, because the guidance given in Section 107 is so difficult to apply, despite being plainly stated, a judge would want to look to legislative history for further guidance.¹⁰⁰ While this is always a valid option, the legislative history merely spells out what is obvious from a plain reading of this statute itself.¹⁰¹ The history shows that courts are free to

⁹³ 17 U.S.C. § 107.

⁹⁴ *Id.*

⁹⁵ *Id.*; Accord S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

⁹⁶ See Kim, *supra* note 78, 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* note 78, 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).

⁹⁷ See 17 U.S.C. § 107; see generally Kim, *supra* note 78; Llewellyn, *supra* note 78.

⁹⁸ See 17 U.S.C. § 107.

⁹⁹ See Kim, *supra* note 78, at 6-7; Llewellyn, *supra* note 78, at 403 (noting that the counterpoints to the traditional statutory construction canons of plain language and ordinary meaning do not really apply in a situation where those interpretation do not cause absurd results that fall outside the purposes of the statute).

¹⁰⁰ See Leval, *supra* note 78, at 1105-06; Llewellyn, *supra* note 78, at 403 (noting the counter point to having plainly stated text is to look to the legislative history for overall meaning of the statute). *Contra* Kim, *supra* note 78, 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).

¹⁰¹ See 17 U.S.C. § 107; S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

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adapt the doctrine on a case-by-case basis, and that Section 107 was intended to restate the judicial doctrine of fair use as it was developed prior to codification, rather than change, narrow, or enlarge the doctrine in any way.¹⁰² This is all consistent with a traditional statutory construction analysis.¹⁰³

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 context to further the overall purposes of the statute.¹⁰⁴ 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.¹⁰⁵ 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.”¹⁰⁶ 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 rights that go with the work, such as reproducing and distributing the work.¹⁰⁷ It is a balance between benefitting the public intellectually and rewarding the work and creativity of the authors.¹⁰⁸ Section 107 should be read with this general purpose in mind, which is often acknowledged in opinions where judges are considering the fair use defense.¹⁰⁹ 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.¹¹⁰ Two important canons of statutory construction that play off 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.¹¹¹ Statutes should not be construed to

¹⁰² S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

¹⁰³ See generally Kim, *supra* note 78; Llewellyn, *supra* note 78, at 401-06.

¹⁰⁴ See Kim, *supra* note 78, at 2-3 (“A statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.”); Llewellyn, *supra* note 78, at 302 (including the canon that statutes in *pari materia*, or on the same subject or matter, must be construed together).

¹⁰⁵ U.S. CONST. art. I, § 8, cl. 8.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; see Leval, *supra* note 21, at 1107-08; 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.).

¹⁰⁸ Leval, *supra* note 21, at 1107-08.

¹⁰⁹ See *Campbell*, 510 U.S. at 575-78.

¹¹⁰ See *Campbell*, 510 U.S. at 575-78 (“Nor may the four 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* note 21, at 1110-11.

¹¹¹ See Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 404.

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render superfluous any of the language included.¹¹² 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.¹¹³ This prevents judges from undermining the 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 particular situation in a case.¹¹⁴

Section 107 should include 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.¹¹⁵ 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 always be considered or an additional consideration within a specific factor.¹¹⁶ To commit either one of these actions not only goes against traditional statutory construction principles, but also against the common law foundations of the fair use defense.¹¹⁷

Similarly, another traditional canon is that words and phrases that have received judicial construction before enactment should be understood according to that construction.¹¹⁸ The fair use defense is based off of judicial constructs beginning with those factors and concepts enumerated in *Folsom v. Marsh*.¹¹⁹ The statute and legislative history state that all factors should be considered on a case-by-case basis and provide a list of factors that would be most useful to the majority of analyses.¹²⁰ These basic concepts were used in the common law for decades before being codified. Therefore, in the case of Section 107, the codified construction is what judges should use in their analyses.¹²¹

There are many other canons of statutory construction that may be

¹¹² See Kim, *supra* note 78, at 12-13 (citing *Monclair v. Ramsdell*, 107 U.S. 147, 152 (1883)) ("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 legislature was ignorant of the meaning of the language it employed.');" Llewellyn, *supra* note 80, at 404.

¹¹³ See Kim, *supra* note 78, at 13.

¹¹⁴ See Llewellyn, *supra* note 78, at 404.

¹¹⁵ See 17 U.S.C. § 107; Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 404.

¹¹⁶ 17 U.S.C. § 107; see Kim, *supra* note 78, at 12-13.

¹¹⁷ 17 U.S.C. § 107; see Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 404; S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

¹¹⁸ See generally Kim, *supra* note 78, at 18 (explaining that if Congress wanted to depart from an established interpretation at common law, it would make it clear not only in the statute but also in its legislative history); see also Llewellyn, *supra* note 78, at 401.

¹¹⁹ 17 U.S.C. § 107. *Folsom*, 9 F. Cas. at 348.

¹²⁰ 17 U.S.C. § 107; S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

¹²¹ 17 U.S.C. § 107; S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

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observed and applied to Section 107, but do not add substantially more to what has already been discussed.¹²² 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.

IV. 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.¹²³ What is clear from the precedent set in the Ninth Circuit with *Kelly v. Arriba Soft Corp.* and *Perfect 10, Inc. v. Amazon.com, Inc.*, and the expansion of that precedent in New York's Southern District 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 construction of Section 107 by focusing heavily on transformative use.¹²⁴ By moving away from this construction, in essence, the Second and Ninth Circuits are moving away from decades of judicial construction of the fair use defense that Section 107 was meant to codify.¹²⁵ The Author's Guild cases use the crutches of increased technology and large public benefits to avoid applying the traditional statutory construction to achieve a particular result.¹²⁶ This comes at the cost of the individual authors and publishing companies retaining profits for their creativity and creates a lack of incentive, all while under the guise of being "in light of the purposes of copyright."¹²⁷ The following contains specific examples of how this focuses on the first factor listed in Section 107, and is based solely on whether an infringing use is transformative or not, that 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 as a whole with each section striving to achieve an overall purpose.¹²⁸

¹²² See Llewellyn, *supra* note 78, at 401-06.

¹²³ Llewellyn, *supra* note 78, at 403.

¹²⁴ See *Google*, 954 F. Supp. 2d at 290-92; Kim, *supra* note 78, at 2-3; *HathiTrust*, 902 F.Supp.2d at 459-60; *Kelly*, 336 F.3d at 818; *Perfect 10*, 508 F.3d at 1163.

¹²⁵ 17 U.S.C. § 107; see S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66; Leval, *supra* note. 24, at 1106-07, 1111-12; *Campbell*, 510 U.S. at 579.

¹²⁶ See *Google*, 954 F. Supp. 2d at 291-92; *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 complete copying of the books and articles a transformative use to a keyword-searchable book database).

¹²⁷ See *Campbell*, 510 U.S. at 578.

¹²⁸ See Kim, *supra* note 78, at 2-3; Llewellyn, *supra* note 78, at 402-03.

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Both *HathiTrust* and *Google* ignore the plain language reading of Section 107 by giving almost all consideration to the first factor and relating back the other three to the fact that the first factor has been found.¹²⁹ In both *HathiTrust* and *Google*, Judges Baer and Chin, after finding that the infringing use was transformative and therefore satisfied the first factor of Section 107, referred back to the first factor and the transformative use when setting out their brief analyses of the other three factors in each case.¹³⁰ 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.¹³¹ While the judge determines the weight each factor should be given in the analysis, including those factors the judge wishes to consider not enumerated in the statute, it is logical to believe that each factor deserves its own careful contemplation.¹³²

Both cases also ignore the overall purpose of the Copyright Act.¹³³ While Judge Chin specifically mentions that he believes all parties benefit in some way from the Google Books database, he glosses over the harms suffered by the individual authors and publishing companies.¹³⁴ Google took thousands of books, digitized them, kept copies for itself, distributed them in snippets to the public, in full text back to the libraries, all without payment of any kind to the copyright holders.¹³⁵ While this enriches the intellect of the public, it woefully ignores the rights of the authors and publishers who suffered unauthorized copying and distributions of their copyrighted works.¹³⁶

Another canon of statutory construction that both cases disregard is that every word and clause of a statute must be given effect.¹³⁷ As discussed above, *Google* and *HathiTrust* put the most emphasis on finding the first factor, with a determination that a transformative use exists without the other three factors of Section 107.¹³⁸ This makes the other three factors, forged in the common law and then codified to reflect that judicial construction, mere surplusage.¹³⁹ It implies that Congress did not need to bother including the other three factors if courts today only feel the need to briefly run through them once determining there was a transformative use.¹⁴⁰

More specifically to *HathiTrust*, there is another section of the Copyright Act, 17 U.S.C. § 108, that deals with the exceptions to copyright infringement pertaining

¹²⁹ *Google*, 954 F. Supp. 2d at 6-11; *HathiTrust*, 902 F. Supp. 2d at 458-64.

¹³⁰ *Google*, 954 F. Supp. 2d at 6-11; *HathiTrust*, 902 F. Supp. 2d at 458-64.

¹³¹ 17 U.S.C. § 107; Kim, *supra* note 80 at 2-3; Llewellyn, *supra* note 80 at 403.

¹³² 17 U.S.C. § 107. See S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

¹³³ Kim, *supra* note 78, at 2-3; Llewellyn, *supra* note 78, at 402-03.

¹³⁴ *Google*, 954 F. Supp. 2d 293-94.

¹³⁵ *Google*, 954 F. Supp. 2d 293-94.

¹³⁶ See U.S. CONST., art. I, § 8, cl. 8.

¹³⁷ Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 404.

¹³⁸ 17 U.S.C. § 107; see *Google*, 954 F. Supp. 2d at 290-92; *HathiTrust*, 902 F. Supp. 2d at 458-64.

¹³⁹ Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 404.

¹⁴⁰ 17 U.S.C. § 107; Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 404.

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to libraries.¹⁴¹ As written, Section 108 gives leeway to fair use defenses if Section 107 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.¹⁴² If Section 108 never applies because 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 107.¹⁴³

More specifically to *Google*, Judge Chin disregards 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.¹⁴⁴ 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.¹⁴⁵ While it is a hard line to draw, Congress would not have specifically included a provision 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 overall analysis. Otherwise, those words would be surplusage.¹⁴⁶

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.¹⁴⁷ Both cases added the concept of the transformative use to the first factor in Section 107.¹⁴⁸ Congress amended the language from “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.”¹⁴⁹ There have also been amendments to Section 107 in 1990 and 1992, and further amendments to the Copyright Act in 1998.¹⁵⁰ 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; however, Congress chose to keep the language as it was.¹⁵¹ If Congress wanted transformative use to be the cornerstone of the fair use defense, Congress could

¹⁴¹ 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 copies within the libraries of copyrighted works, and in what situations that defense applies).

¹⁴² *HathiTrust*, 902 F. Supp. 2d at 456-58; see also 17 U.S.C. § 108(f)(4); Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 404.

¹⁴³ Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 404.

¹⁴⁴ *Google*, 954 F. Supp. 2d. at 291-92; see S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66 (explaining in both legislative histories that all factors need to be weighed somehow in a fair use analysis).

¹⁴⁵ *Google*, 954 F. Supp. 2d at 291-92.

¹⁴⁶ Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 404.

¹⁴⁷ Kim, *supra* note 78, at 12-13; Llewellyn, *supra* note 78, at 401.

¹⁴⁸ *HathiTrust*, 902 F. Supp. 2d at 459-61; *Google*, 954 F. Supp. 2d at 291-92.

¹⁴⁹ H.R. REP. NO. 94-1476, at 65-66.

¹⁵⁰ *Id.*

¹⁵¹ H.R. REP. NO. 94-1476, at 65-66.

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have made it so, and for the courts to continue to disregard this and add to Section 107 goes against traditional statutory construction principles.¹⁵²

Finally, the fair use defense received considerable judicial construction before the codification of Section 107.¹⁵³ Understanding a statute in light of that common law construction is another canon of traditional statutory construction.¹⁵⁴ Beginning with *Folsom v. Marsh* and continuing through the years, Section 107 is meant to be simply a restatement of all case law that led up to the 1976 Copyright Act regarding the fair use defense.¹⁵⁵ Each application is to be considered on a case-by-case basis and to 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.¹⁵⁶ 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 Ninth Circuit, that transformative use has started to gain judicial popularity.¹⁵⁷ 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.¹⁵⁸

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 transforms how the fair use defense is applied.¹⁵⁹ 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.¹⁶⁰

V. LEGISLATIVE AND JUDICIAL EXPANSION: SOLUTIONS TO A FAIR USE FAUX PAS

The Southern District of New York's application of the fair use principle, especially its 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: either the Supreme Court or Congress.

¹⁵² See Llewellyn, *supra* note 78, at 401, 404.

¹⁵³ See generally *Folsom*, 9 F. Cas. at 342.

¹⁵⁴ Llewellyn, *supra* note 78, at 401.

¹⁵⁵ S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

¹⁵⁶ 17 U.S.C. § 107; S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

¹⁵⁷ Leval, *supra* note 21, at 1111-12; *Campbell*, 510 U.S. at 579; *Kelly*, 336 F.3d at 818; *Perfect 10*, 508 F.3d at 1163.

¹⁵⁸ Leval, *supra* note 21, at 1111-12; *Campbell*, 510 U.S. at 579; *Kelly*, 336 F.3d at 818; *Perfect 10*, 508 F.3d at 1163.

¹⁵⁹ See generally Llewellyn, *supra* note 78.

¹⁶⁰ *Id.* at 401-06.

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The first option would require a case attempting to interpret how the fair use defense applies and the role of the doctrine of transformative use, to be accepted on appeal to the Supreme Court. Both the *HathiTrust* and *Google* decisions are appealable and could possibly escalate to the Second Circuit, and further petitioned to the Supreme Court. It is possible that there is ample case law in other Circuits that could be appealed 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.¹⁶¹ The Ninth Circuit and Southern District of New York's decisions upset the balance that is inherent in the Copyright Clause of the Constitution and the Copyright Act, and that is struck between the needs of the public and the need to provide incentive to authors and creators by favoring the public benefit.¹⁶² A Supreme Court decision would provide a clear and uniform interpretation of the fair use defense to apply across the Circuits, limiting extensive future litigation costs and further confusion regarding Section 107.

The Supreme Court may also be able to combine sections in the Copyright Act. If the Court were to analyze and interpret the relationship between Section 107 and Section 108, then library exception cases such as the *Author's Guild* cases would be easier to decide.¹⁶³ 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.¹⁶⁴ This section was updated to include a defense for digitization of works, but only for purposes of preservation of, or ease of access to, the work.¹⁶⁵ However, the section carves out the fair use defense by stating "nothing in this section in any way affects the right of fair use as provided by Section 107."¹⁶⁶ In light of new technological advances showcased in the *Author's Guild* cases, in particular the *HathiTrust* decision, the most recent amendment to Section 108 is outdated technologically, shifts a court's analysis to section 107, and fails to utilize Section 108.¹⁶⁷ A Supreme Court decision consistent with technological advances that helps to clarify how the two defenses work together would be a good solution to the current problem.

¹⁶¹ U.S. CONST., art. I, § 8, cl. 8; 17 U.S.C. § 107; Llewellyn, *supra* note 80, at 401-06.

¹⁶² *Google*, 954 F. Supp. 2d 293-94; *HathiTrust*, 902 F. Supp. 2d at 459-60; *Kelly*, 336 F.3d at 818; *Perfect 10*, 508 F.3d at 1163.

¹⁶³ *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).

¹⁶⁴ 17 U.S.C. § 108.

¹⁶⁵ *Id.* § 108(b)(2), (c)(2).

¹⁶⁶ *Id.* § 108(f)(4).

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

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Another option would be one of several legislative 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, is more likely than consideration by the Supreme Court.

An amendment to Section 107 should consider the current language before and after the four factors enumerated for judicial consideration.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ This would address 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 properly used in conjunction with the fair use defense.¹⁷¹ An amendment to both sections would allow for cases like the *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 applied in situations with commercial entities in opposition to nonprofit libraries.

VI. CONCLUSION

It is unclear from the most recent opinions in *Author's Guild, Inc. v. HathiTrust* and *Author's Guild, Inc. v. Google, Inc.*, whether any issues will be appealed and whether the courts will consider this issue of transformative use within the scope of the fair use defense. The question remains whether these recent changes signify a permanent shift in the state of this area of copyright law 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. It is discomfoting that both the established case law and more recent developing precedent only 25 years after codification, can rapidly change without Congressional input as to the original intent of the Act. 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 10.

¹⁶⁸ 17 U.S.C. § 107.

¹⁶⁹ S. REP. NO. 94-473, at 62; H.R. REP. NO. 94-1476, at 65-66.

¹⁷⁰ 17 U.S.C. § 108(b)(2), (c)(2).

¹⁷¹ *HathiTrust*, 902 F. Supp. 2d at 456-58.