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How Much is too Much? *Campbell* and the *Third* Fair Use Factor

R. Anthony Reese

UC Irvine School of Law, treese@law.uci.edu

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HOW MUCH IS TOO MUCH?: *CAMPBELL* AND THE THIRD FAIR USE FACTOR

R. Anthony Reese*

Abstract: The Supreme Court’s decision in *Campbell v. Acuff-Rose Music, Inc.* is probably best known for articulating the importance of transformativeness in analyzing fair use claims. The opinion gave less-noticed but important guidance on the third statutory fair use factor, which looks at the amount and substantiality of the portion of the plaintiff’s copyrighted work that the defendant used. *Campbell* explained that courts should evaluate this factor by inquiring whether the amount the defendant used was reasonable in light of her purpose. This Article examines the appellate fair use decisions since *Campbell* to investigate whether and how lower courts have used *Campbell*’s reasonableness approach. The Article pays particular attention to cases in which the defendant claiming fair use has used the plaintiff’s entire work, including in ways only recently made possible by new technologies.

| | |
|--|-----|
| INTRODUCTION | 756 |
| I. FACTOR THREE IN THE SUPREME COURT | 757 |
| A. Fair Use Cases Before <i>Campbell</i> | 757 |
| 1. <i>Sony</i> | 758 |
| 2. <i>Harper & Row</i> | 760 |
| 3. <i>Stewart v. Abend</i> | 762 |
| 4. Factor Three on the Eve of <i>Campbell</i> | 762 |
| B. <i>Campbell</i> ’s Factor Three Analysis | 763 |
| II. FAIR USE IN THE CIRCUIT COURTS AFTER <i>CAMPBELL</i> .. | 766 |
| A. Methodology | 766 |
| B. Distribution Among Circuit Courts | 766 |
| C. Distribution Over Time | 767 |
| D. Procedural Posture of the District Court Decisions Reviewed..... | 768 |
| E. Appellate Disposition of the District Court Decisions | 769 |
| F. Fair Use Outcomes on Appeal..... | 771 |
| III. FACTOR THREE IN THE CIRCUIT COURTS AFTER <i>CAMPBELL</i> | 773 |
| A. How to Weight Factor Three | 773 |
| B. Analyzing the Reasonableness of the Portion Copied in Light of the Purpose for the Copying | 778 |
| C. Illegitimate Purposes | 782 |

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| | |
|---|-----|
| D. What Is “the Copyrighted Work”? | 784 |
| E. Summary | 788 |
| IV. FACTOR THREE AND “ENTIRE WORK” CASES | 788 |
| A. Weighting Factor Three in Entire Work Cases | 789 |
| B. Analyzing Defendant’s Use of the Plaintiff’s Entire Work..... | 791 |
| 1. Quotation or Citation of <i>Campbell</i> | 792 |
| 2. Types of Work Used | 794 |
| a. Still Images..... | 794 |
| b. Literary Works..... | 798 |
| c. Other Types of Works | 801 |
| 3. Reasonableness and Use of Entire Visual Work..... | 802 |
| C. Factor Three and New Technological Uses of Entire Works | 804 |
| CONCLUSION | 812 |

INTRODUCTION

Fair use limits the rights of copyright owners. Someone who uses a copyrighted work without permission in a way that would ordinarily come within one of the copyright owner’s exclusive rights nevertheless does not infringe if the use qualifies as fair use. Fair use originated as a judge-made doctrine, and was only codified in the statute with the passage of the 1976 Copyright Act, which took effect on January 1, 1978. Section 107 of the Act sets out a nonexhaustive list of four factors that courts are to consider in determining whether any particular use qualifies as a fair use.¹

The Supreme Court’s most recent and sustained attention to copyright’s fair use doctrine came in 1994 in *Campbell v. Acuff-Rose Music, Inc.*,² a case in which the owner of the copyright in the musical work “Pretty Woman” (made famous in Roy Orbison’s recording) sued 2 Live Crew for creating a rap version of the song. Academics and

¹ “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.”

17 U.S.C. § 107 (2012).

2. 510 U.S. 569 (1994).

courts have paid substantial attention to the way the Supreme Court in *Campbell* developed the analysis of the first of the four statutory fair use factors and gave a prominent role to the question of whether a defendant's allegedly infringing use was "transformative."³

This Article explores an aspect of the *Campbell* decision that has attracted less attention—the Court's articulation of how courts should analyze the *third* fair use factor. That factor calls for considering "the amount and substantiality of the portion used [by the defendant] in relation to the [plaintiff's] copyrighted work as a whole."⁴ In other words, how much of the plaintiff's copyrighted work did the defendant use? And how substantial was the portion that the defendant used when compared to the plaintiff's entire copyrighted work.

Part I traces the relatively short history of fair use in the Supreme Court. Before *Campbell*, the Supreme Court had provided little guidance on how to apply factor three in the fair use analysis. *Campbell* filled that gap by announcing that the third factor calls for considering whether the defendant used a *reasonable* amount of the plaintiff's copyrighted work. The remainder of the Article looks at how this reasonableness analysis has fared in the circuit courts in the two decades since *Campbell* was decided. It studies the sixty-one post-*Campbell* appellate decisions that have engaged in fair use analysis. Part II details the methodology of the study and describes a number of general characteristics of appellate fair use decisions since *Campbell*. Part III looks specifically at the treatment of the third factor in the opinions in the study—both at how appellate courts weight that factor, and to what extent those courts expressly articulate *Campbell*'s reasonableness approach in their analysis. Finally, Part IV focuses on the relatively large portion of the appellate fair use decisions that involve a defendant's use of the plaintiff's entire work. In particular, this Part argues that courts have used *Campbell*'s reasonableness approach in finding fair use when a defendant's use of entire copyrighted works involves a relatively new technological use.

I. FACTOR THREE IN THE SUPREME COURT

A. *Fair Use Cases Before Campbell*

Before the *Campbell* decision, only three Supreme Court opinions addressed the application of Section 107's factors to a fair use claim. In

3. *Id.* at 578–81.

4. 17 U.S.C. § 107(3).

Sony Corp. of America v. Universal City Studios, Inc.,⁵ owners of copyrights in movies and television shows charged the makers and distributors of videocassette recorders (VCRs) with liability for copyright infringement allegedly committed when the defendants' customers used their VCRs to record television programming broadcast over the air. In deciding the case, the Court considered whether VCR users were engaged in noninfringing fair use.⁶ In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,⁷ the Court considered fair use in the context of a claim that the magazine *The Nation* infringed when, shortly before the publication of former President Gerald R. Ford's memoir, the magazine published an article that quoted passages from the memoir without permission.⁸ And in *Stewart v. Abend*,⁹ the Court considered whether the continued showing of Alfred Hitchcock's movie *Rear Window* infringed on the copyrighted short story on which the movie was based once the license to use the short story expired. The "amount and substantiality" of the guidance that each of those opinions provided on the application of the third factor was relatively modest.

I. Sony

The first of the three pre-*Campbell* opinions only briefly addressed how to consider the "amount . . . of the portion used" by the defendant in comparison to the plaintiff's entire work.¹⁰ The 1984 decision in *Sony Corp. of America v. Universal City Studios, Inc.*,¹¹ the Supreme Court's first interpretation of Section 107, considered whether "time shifting" a television program using a VCR was fair use. The Court defined time shifting as recording a television show when it was broadcast by an over-the-air television station and then later watching the recorded program and erasing it.¹² The Court concluded that a VCR user's time-shifting constituted fair use.¹³

The *Sony* majority opinion offered little analysis of the third factor. Indeed, the majority analyzed both the second and third factors together

5. 464 U.S. 417 (1984).

6. *Id.* at 447–56.

7. 471 U.S. 539 (1985).

8. *Id.* at 542–43.

9. 495 U.S. 207 (1990).

10. 17 U.S.C. § 107(3) (2012).

11. 464 U.S. 417.

12. *Id.* at 421.

13. *Id.* at 455–56.

in a single sentence:

Moreover, when one considers the nature of a televised copyrighted audiovisual work, see 17 U.S.C. § 107(2) (1982 ed.), and that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced, see § 107(3), does not have its ordinary effect of militating against a finding of fair use.¹⁴

This brief discussion did, nonetheless, offer some guidance on how to apply the third factor, particularly with respect to the “amount” (or quantity) of the plaintiff’s copyrighted work that the defendant had used. The Court announced, perhaps not surprisingly, that *ordinarily*, if a defendant copied the plaintiff’s entire work, then the third factor would weigh against the defendant’s claim of fair use.¹⁵ The Court also made clear, though, that Section 107(3) did not establish an invariable rule that whenever the defendant copied the whole work, the third factor would count against the defendant’s fair use claim.¹⁶ Instead, the Court, in deciding that time-shifting constituted fair use, demonstrated that courts evaluating factor three should recognize that in some situations a defendant could even use a plaintiff’s entire work and still qualify for fair use.¹⁷

We can think of factor three as asking, in part, “Has the defendant used ‘too much’ of the plaintiff’s work?” The *Sony* Court made clear that when the defendant has used all of the plaintiff’s work, the answer to the question will *ordinarily* be “yes,” but nevertheless will *sometimes* be “no.”¹⁸ Unfortunately, the *Sony* opinion offered little guidance, beyond the particular facts of that case, on how to decide *when* the use of the entire work had its ordinary effect of weighing against fair use, and when use of the entire work was nevertheless consistent with finding the defendant’s use fair. Using the entire work was clearly okay if the defendant was engaged in time-shifting, but nothing in the *Sony* opinion helps much in deciding in what other circumstances a defendant’s use of the whole copyrighted work might be acceptable under factor three.

14. *Id.* at 449–50.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

2. Harper & Row

A year after *Sony*, the Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*¹⁹ again considered how to apply Section 107's factors to a fair use claim. *The Nation* had published an article about former President Gerald R. Ford's forthcoming memoir, *A Time to Heal*, shortly before the book was published.²⁰ The Court's discussion of factor three gave little help in understanding how courts should answer that factor's quantitative question of whether the defendant used "too much."²¹ *The Nation* took only 300 to 400 words of the 200,000-word book manuscript.²² The Second Circuit, whose decision the Court was reviewing, had concluded that the defendants "took a meager, indeed an infinitesimal amount of Ford's original language."²³ The Court itself observed that "[i]n absolute terms, the words actually quoted were an insubstantial portion" of Ford's work.²⁴ On the facts, the Court implied that, on a quantitative reckoning, factor three would generally favor, or at least not weigh against, fair use.

The Court, however, immediately approvingly quoted the district court's conclusion that the defendants "took what was essentially the heart of the book."²⁵ The Court thus made clear that in evaluating factor three, courts must consider "the portion used" by the defendant both quantitatively and qualitatively.²⁶ This seems consistent with the statutory directive to consider both the "amount" and "substantiality" of what the defendant used.²⁷ Even if a defendant took only a small quantitative amount from the plaintiff's work, factor three might still weigh against fair use if the portion that the defendant used was qualitatively substantial, particularly if it was the "heart" of the work.²⁸

The Court had more to say about quantitative analysis, too. Even though *The Nation* copied a portion of Ford's memoir that was quantitatively insignificant in relation to Ford's entire *memoir*, the Court

19. 471 U.S. 539 (1985).

20. *Id.* at 542.

21. *Id.* at 564–66.

22. *Id.* at 539, 565 & n.8.

23. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 209 (2d Cir. 1983).

24. *Harper & Row*, 471 U.S. at 564.

25. *Id.* at 564–65 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (S.D.N.Y. 1983)).

26. *Id.* at 564–65.

27. See 17 U.S.C. § 107(3) (2012).

28. *Harper & Row*, 471 U.S. at 564–66.

also considered how much of *the magazine's article* was made up of material copied from Ford.²⁹ The language of Section 107(3) requires looking at the “amount” . . . of the portion used” by the defendant “*in relation to the copyrighted work as a whole*,”³⁰ and the entire context of Section 107 makes clear that the term “the copyrighted work” refers to the plaintiff’s copyrighted work which the defendant has allegedly infringed. The *Harper & Row* Court went beyond the statutory language to consider “the portion used” by the defendant in relation to the *defendant's own allegedly infringing work* as a whole.³¹ The Court asserted that “the fact that a substantial portion of the *infringing work* was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist.”³² Thus, the Court decided that looking at what proportion (how much) of the defendant’s own accused work she had copied from the plaintiff’s work could help determine whether what the defendant took from the copyrighted work was a *qualitatively* substantial portion of the plaintiff’s entire copyrighted work.

In *Harper & Row*, according to the Court, the defendant’s “direct takings from the unpublished [Ford] manuscript constitute at least 13% of the infringing article” in *The Nation*, and the article was “structured around the quoted excerpts which serve as its dramatic focal points.”³³ The Court concluded that the portions of the Ford memoirs that *The Nation* copied played a “key role” in its article.³⁴ Given the qualitative importance of the portions of the plaintiff’s work that the defendants copied, the Court appears to have concluded that the third factor weighed against a finding of fair use.

Harper & Row thus established that in evaluating factor three, quality matters as well as quantity. It also showed that a defendant who uses

29. *Id.* at 565.

30. 17 U.S.C. § 107(3) (emphasis added).

31. 471 U.S. at 565–66. The Court observed that “the statutory language indicates” that “a taking may not be excused merely because it is insubstantial with respect to the *infringing work*.” *Id.* at 565. Presumably the Court means that even if the portion copied by the defendant is insubstantial as a portion of the defendant’s own work, factor three could still weigh against fair use if the portion the defendant used is significant as a portion of the *plaintiff's* copyrighted work, since the language of factor three focuses attention on the portion used in relation to “the copyrighted work as a whole.” 17 U.S.C. § 107(3). That statutory language itself, however, does not necessarily imply the converse that the Court drew in *Harper & Row*, that if the portion the defendant used is a relatively significant portion of the *defendant's* infringing work, then the portion used is of qualitative value.

32. *Harper & Row*, 471 U.S. at 565 (emphasis added).

33. *Id.* at 565–66.

34. *Id.* at 566.

even a quantitatively insignificant portion of a copyrighted work may find this factor ranged against her if that portion is qualitatively important. And it made clear that in determining the qualitative value of the portion the defendant copied, a court could look, at least in part, at what proportion of the defendant's own accused work is made up of material copied from the plaintiff's work.³⁵

3. Stewart v. Abend

The Court's final fair use case before *Campbell, Stewart v. Abend*,³⁶ added little to the Court's factor three jurisprudence. Without much analysis, the Court affirmed the Ninth Circuit's conclusion that the plaintiff's copyrighted short story "It Had to Be Murder" was a "substantial portion" of defendant's movie *Rear Window*, because the movie "expressly uses the story's unique setting, characters, plot, and sequence of events."³⁷ The Court apparently viewed this as at least a qualitatively substantial portion, as it compared it to the taking of the "heart" of the work in *Harper & Row*.³⁸ The Court also dismissed the defendants' argument that the plaintiff's "story constituted only 20% of the motion picture's story line," noting that "that does not mean that a substantial portion of the *story* was not used in the motion picture."³⁹

4. Factor Three on the Eve of Campbell

When the Court took up the *Campbell* case, it had said relatively little about how to evaluate factor three. If the defendant copied the plaintiff's entire work, then the factor would generally, but not always, weigh against fair use. If the defendant copied a quantitatively insignificant portion of the plaintiff's work, the factor could still weigh against fair use if the portion the defendant copied was *qualitatively* significant. And if what the defendant copied was a significant part of the *defendant's own work* (and apparently thirteen percent amounted to a significant part), that might indicate that the copied portion was, indeed, a *qualitatively* important part of the plaintiff's copyrighted work, so that factor three would weigh against fair use.

Interestingly, the Court's first two cases applying Section 107

35. *Id.* at 569 ("[I]n finding the taking 'infinitesimal,' the Court of Appeals accorded too little weight to the qualitative importance of the quoted passages of original expression.").

36. 495 U.S. 207 (1990).

37. *Id.* at 238.

38. *Id.*

39. *Id.* (emphasis added).

plumbed the quantitative extremes of how much of the plaintiff's work the defendant had used. In *Sony*, the time-shifting viewer used the entirety of the plaintiff's copyrighted television program, while in *Harper & Row* the magazine used about 0.2% of the plaintiff's memoir. In each case, the Court suggested the ordinary effect of such extremes: copying the whole work would ordinarily militate against fair use, while copying only an insubstantial fraction of the work would not. But the Court also demonstrated clearly that even at the extremes, the weight of factor three was not determined by a simple quantitative calculation. Under certain circumstances, copying the entire work would not weigh against fair use (as it didn't in *Sony*), and copying only a tiny quantitative portion could weigh against fair use (as it did in *Harper & Row*) if the portion was qualitatively significant.

But beyond the extremes, the pre-*Campbell* decisions offered little guidance on how to analyze the statutory question about the *quantity* of what the defendant had copied from the plaintiff's copyrighted work in relation to the plaintiff's work as a whole. In other words, the opinions give no real guidance on how to answer the question, "Did the defendant take 'too much'?" This is particularly true in those cases where the defendant took less than the entire work, but more than a miniscule fraction of it—cases one might expect would make up a significant portion of instances in which fair use claims must be assessed.

B. Campbell's Factor Three Analysis

Campbell elaborated on the statutory language to offer courts a method of grappling with the basic quantitative question underlying the third factor—did the defendant take "too much"?

At the very opening of *Campbell*'s discussion of the third factor, the Court framed the inquiry differently than it had in the previous cases. The statute simply states that "[i]n determining whether the use made of a work in any particular case" is fair, the "factors to be considered shall include . . . the amount and substantiality of the portion used in relation to the copyrighted work as a whole."⁴⁰ But Justice Souter offered a subtly different version of the inquiry. He wrote: "The third factor asks whether 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole,' § 107(3) . . . are reasonable in relation to the purpose of the copying."⁴¹ By adding these last ten words, Justice Souter provided a yardstick to use in evaluating the portion of the

40. 17 U.S.C. § 107 (2012).

41. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (emphasis added).

plaintiff's work used by the defendant.

The statutory factor itself just directs attention to the question of "how much" the defendant took and how valuable was the portion taken. Measuring the quantitative amount taken is generally a relatively straightforward proposition. In some instances, as in *Sony*, the answer is one hundred percent. In other instances, as in *Harper & Row*, the answer is 0.2%. And presumably in most instances the percentage will be somewhere in between those extremes. But the statutory articulation of the third factor does not direct a court what to do once it has calculated what proportion of the work the defendant used.

The *Campbell* opinion's approach picks up where the statute leaves off. In one short stroke, the Court made clear that analyzing the third factor did not involve drawing some absolute, or even proportionate, line of how much a defendant could and could not take from a copyrighted work. Rather, analysis of this factor called for a reasonableness inquiry, related to the purpose of the defendant's use. Once a court has *measured* the quantitative and qualitative portion of the plaintiff's work that the defendant has used, it can then proceed to *evaluate* whether the amount and substantiality of the defendant's use counsel in favor of or against fair use. And that evaluation is made with reference to the purpose of the defendant's copying. *Campbell* thus expressly links analysis of the third factor to the first factor (which looks to the "purpose and character" of the defendant's use). This approach explains why copying the entire work did not weigh against fair use in *Sony* and why copying a very tiny fraction of the work did not weigh in favor of fair use in *Harper & Row*: "the extent of permissible copying varies with the purpose and character of the use."⁴² What impact the portion of the copyrighted work that the defendant took has on the fair use claim is to be evaluated, the *Campbell* Court explained, by asking whether what the defendant copied was *reasonable* in light of the purpose for the copying.⁴³

In applying this understanding of factor three to the case before it, the Court showed that inquiring into the reasonableness of the defendant's use informed analysis of both the quantity *and* quality of what the defendant copied. The Court explained that when the defendant uses the plaintiff's work for purposes of parody, the defendant "must be able to 'conjure up' at least *enough* of [the plaintiff's work] to make the object of [the parody's] critical wit recognizable."⁴⁴ In speaking of "enough,"

42. *Id.* at 586–87.

43. *Id.* at 586.

44. *Id.* at 588 (emphasis added).

the Court clearly is measuring the *quantity* of the defendant's taking. The Court also observed, though, that "the heart [of the plaintiff's work] is . . . what most readily conjures up the [work] for parody, and it is the heart at which parody takes aim," so "[c]opying *does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart.*"⁴⁵ In the dispute before it, the Court decided that the defendants copied, "no more [of the lyrics] . . . than necessary" and thus their copying could not be "excessive in relation to its parodic purpose even if the portion taken is the original's 'heart.'"⁴⁶ Thus, even when a defendant copies the "heart" of the plaintiff's work—that is, a *qualitatively* substantial portion of the plaintiff's work—the copying may still be "reasonable in relation to the purpose of the copying" and thus may not weigh against fair use.⁴⁷

The Court's approach in *Campbell* helps make sense of the Court's fair use decision in *Sony*—the Court's only case to affirm a finding of fair use. As a matter of simple quantitative measurement, the *Sony* case would seem to be a prime candidate for factor three to weigh against fair use, because the defendant used the plaintiff's entire work. While the *Sony* Court ruled that a time-shifter's recording of the entire work did not "have its ordinary effect of militating against a finding of fair use,"⁴⁸ its reason for that conclusion was fairly cryptic. The opinion merely noted "the nature of a televised copyrighted audiovisual work" and "that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge."⁴⁹ The *Campbell* approach, by contrast, makes it easier to see why recording the entire work did not weigh against fair use: factor three isn't concerned only with the quantitative measurement that the defendant used the entire work, but instead requires also considering the amount used in light of the VCR user's time-shifting purpose. As the *Sony* Court described time-shifting, the user's purpose in recording a broadcast television program that "he cannot view as it is being televised" is "to watch it once at a later time."⁵⁰ The user would not be able to achieve that purpose without recording the entire program. Recording only the first or last twenty percent of the show, or recording every fifth minute, would be ineffective to accomplish the time-shifting goal. So recording the entire

45. *Id.* (emphasis added).

46. *Id.* at 589 (internal citations omitted).

47. *Id.* at 586.

48. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984).

49. *Id.* at 449.

50. *Id.* at 421.

program was reasonable in relation to the purpose of the user's copying.

II. FAIR USE IN THE CIRCUIT COURTS AFTER *CAMPBELL*

The approach to the third-factor inquiry that the Court announced in *Campbell* marked a substantial elaboration on its previous discussions of that factor. To see what effect, if any, this new approach has had in the lower courts, I studied the appellate caselaw on fair use in the years since *Campbell* was decided.⁵¹ This Part discusses the study methodology and the general characteristics of circuit court fair use opinions from 1994 to 2014.⁵² Parts III and IV then look more closely at how the appellate opinions have treated the third factor since *Campbell*.

A. *Methodology*

Searching on Westlaw for published circuit court opinions between 1994 and 2014, inclusive, identified all those opinions that cited the statutory fair use provision, 17 U.S.C. § 107.⁵³ I reviewed those opinions and eliminated those in which the court did not actually discuss the application of the statutory factors as well as those opinions which were superseded by amended opinions or vacated upon a grant of rehearing en banc. This resulted in a total of sixty-one circuit cases that discuss the application of Section 107's factors to a claim of fair use.

B. *Distribution Among Circuit Courts*

These sixty-one fair use cases are not evenly divided among the circuit courts, as Table 1 shows:

51. This study takes a similar approach to that taken in my previous work. R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467 (2008). It also follows on more extensive work studying fair use cases done by Barton Beebe, Neil Netanel, and Mat Sag. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012).

52. None of the cases in the study were reviewed by the Supreme Court, which has not reviewed a fair use claim since *Campbell*.

53. I searched federal appellate decisions in Westlaw using the search string “((17 +5 107) “section 107”) & copyright & DA (aft 03-01-1994)” to identify cases decided after *Campbell* that contain the word “copyright” and that include a citation to the statute’s fair use provision, either in full form (17 U.S.C. § 107) or in shortened form (“§ 107” or “section 107”).

Table 1

| Circuit | Number of Opinions |
|------------------|---------------------------|
| Ninth Circuit | 20 |
| Second Circuit | 15 |
| Fourth Circuit | 5 |
| Seventh Circuit | 5 |
| Sixth Circuit | 4 |
| Eleventh Circuit | 4 |
| First Circuit | 2 |
| Third Circuit | 2 |
| Fifth Circuit | 1 |
| Eighth Circuit | 1 |
| Tenth Circuit | 1 |
| Federal Circuit | 1 |
| D.C. Circuit | 0 |

Over half of the opinions come from the Ninth and Second Circuits combined, the only two circuits with more than five fair use opinions during the twenty years since *Campbell* was decided. More than half of the circuit courts decided two or fewer fair use cases during this period. To the extent that these numbers generally reflect the number of cases involving fair use claims brought in the district courts of these circuits, the appellate caselaw in the Ninth and Second Circuits will likely influence the largest number of fair use decisions.

C. Distribution Over Time

The rate of circuit court fair use decisions issued by circuit courts has remained relatively steady since the Court decided *Campbell* on March 7, 1994. In each full five-year period since then, appeals courts decided between 11 and 17 cases applying the Section 107 factors to a fair use claim, as shown in Table 2:

Table 2

| Period | Cases Decided |
|-----------|---------------|
| 1994–1999 | 13 |
| 1999–2004 | 17 |
| 2004–2009 | 11 |
| 2009–2014 | 16 |
| 2014 | 4 |
| Total | 61 |

So far, during the fifth five-year period after *Campbell* (starting in March 2014), four appellate fair use opinions have been issued.

D. Procedural Posture of the District Court Decisions Reviewed

The district court decisions on appeal in the cases in the study came at all stages of litigation, but most appeals were from grants of summary judgment. Four cases involved decisions at the pleading stage, including one granting a motion to strike a defendant’s affirmative defense of fair use⁵⁴ and three dismissing complaints for failure to state a claim.⁵⁵ Another fourteen cases reviewed grants or denials of motions for a preliminary injunction.⁵⁶ More than half of the appeals—thirty-three out of sixty-one cases—reviewed district court decisions made at the summary judgment stage.⁵⁷ And ten cases involved appeals after trial,

54. *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003).

55. *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012); *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522 (9th Cir. 2008).

56. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014); *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191 (3d Cir. 2003); *Merkos L’Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Sony Computer Entm’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022 (9th Cir. 2000); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000); *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330 (9th Cir. 1995).

57. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932 (4th Cir. 2014); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013); *SOFA Entm’t, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273 (9th Cir. 2013); *Monge v. Maya Magazines, Inc.*, 688

including seven bench trials⁵⁸ and three jury trials.⁵⁹

E. Appellate Disposition of the District Court Decisions

In most cases in the study (forty-one out of sixty-one), the court affirmed the decision below. In twenty cases, the appeals court affirmed a district court's decision concluding that the defendant's use was (or uses were) fair,⁶⁰ while in twenty-one cases, the appeals court affirmed a decision below that the defendant's use was not fair.⁶¹ Thirteen cases in

F.3d 1164 (9th Cir. 2012); *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3d Cir. 2011); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287 (11th Cir. 2008); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769 (9th Cir. 2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005); *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849 (8th Cir. 2004); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002); *Davis v. Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001); *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267 (11th Cir. 2001); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); *L.A. News Serv. v. Reuters TV Int'l, Ltd.*, 149 F.3d 987 (9th Cir. 1998); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998); *Ringgold v. Black Entm't TV, Inc.*, 126 F.3d 70 (2d Cir. 1997); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381 (6th Cir. 1996).

58. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010); *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 106 (2d Cir. 1998); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194 (4th Cir. 1998); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

59. *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403 (5th Cir. 2004).

60. *Bouchat*, 737 F.3d 932; *HathiTrust*, 755 F.3d 87; *Fox Broad. Co.*, 747 F.3d 1060; *Kienitz*, 766 F.3d 756; *Swatch Grp. Mgmt. Servs. Ltd.*, 756 F.3d 73; *Seltzer*, 725 F.3d 1170; *SOFA Entm't, Inc.*, 709 F.3d 1273; *iParadigms*, 562 F.3d 630; *Blanch*, 467 F.3d 244; *Bill Graham Archives*, 448 F.3d 605; *Brownmark Films*, 682 F.3d 687; *Compaq Computer Corp.*, 387 F.3d 403; *NXIVM Corp.*, 364 F.3d 471; *Mattel Inc.*, 353 F.3d 792; *Kelly*, 336 F.3d 811; *Bond*, 317 F.3d 385; *L.A. News Serv.*, 305 F.3d 924; *Núñez*, 235 F.3d 18; *Sundeman*, 142 F.3d 194; *Leibovitz*, 137 F.3d 109.

61. *Balsley*, 691 F.3d 747; *Gregory*, 689 F.3d 29; *Salinger*, 607 F.3d 68; *Bridgeport Music, Inc.*, 585 F.3d 267; *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522 (9th Cir. 2008); *Zomba Enters., Inc.*, 491 F.3d 574; *Wall Data Inc.*, 447 F.3d 769; *BMG Music*, 430 F.3d 888; *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003); *Elvis Presley Enters.*, 349 F.3d 622; *Video Pipeline, Inc.*, 342 F.3d 191; *Merkos L'Inyonei Chinuch, Inc.*, 312 F.3d 94; *A&M Records, Inc.*, 239 F.3d 1004; *Nihon Keizai Shimbun, Inc.*, 166 F.3d 65; *Micro Star*, 154 F.3d 1107; *L.A. News Serv.*, 149 F.3d 987; *Castle Rock Entm't*, 150 F.3d 132; *Dr. Seuss Enters.*, 109 F.3d 1394; *Princeton Univ.*

the study resulted in reversals or remands of the district court's decision. In eight of these cases, the appeals court reversed a district court's decision that the defendant's use was (or uses were) fair;⁶² in five other cases, the appeals court reversed, reversed and remanded, or vacated and remanded a district court's decision that the defendant's use was not fair.⁶³ And in one case, the appeals court vacated and remanded all of the district court's decisions that some of the defendant's uses were fair and some were not.⁶⁴ Two cases involved mixed outcomes on appeal: the appeals court affirmed the district court's finding that one use was fair, but either reversed, or vacated and remanded, the finding below that a second use was fair.⁶⁵ And in the last four cases, the district court had not ruled on fair use but the appeals court did reach the issue. In three of those cases, the appeals court concluded that the defendant's use was not fair,⁶⁶ while in one case the appeals court concluded that the defendant's use was fair.⁶⁷

Table 3 summarizes these statistics:

Press, 99 F.3d 1381; *Triad Sys. Corp.*, 64 F.3d 1330; *Am. Geophysical Union*, 60 F.3d 913.

62. *Monge*, 688 F.3d 1164; *Murphy*, 650 F.3d 295; *Gaylord*, 595 F.3d 1364; *Mulcahy*, 386 F.3d 849; *Worldwide Church of God*, 227 F.3d 1110; *Infinity Broad. Corp.*, 150 F.3d 104; *Ringgold*, 126 F.3d 70; *L.A. News Serv.*, 108 F.3d 1119.

63. *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (reversing district court and finding twenty-five uses fair; vacating and remanding as to five other uses); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000).

64. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

65. *Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010) (reversing determination of fair use as to highlight films); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287 (11th Cir. 2008) (vacating and remanding determination of fair use as to one count of infringement in complaint).

66. *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013); *Davis v. Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001); *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267 (11th Cir. 2001).

67. *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1029 (9th Cir. 2000).

Table 3

| | App Ct: Affirmed | App Ct: Reversed | App Ct: Mixed | App. Ct: First Decision | Totals |
|------------------------------|---------------------|---------------------|------------------|-------------------------------|--------|
| District Ct: Fair Use | 20 | 8 | 2 | | 30 |
| District Ct: Not Fair Use | 21 | 5 | | | 26 |
| District Ct: Mixed | | 1 | | | 1 |
| District Ct: Didn't Reach | | | | 3: Not Fair 1: Fair Use | 4 |
| Totals | 41 | 14 | 2 | 4 | 61 |

F. *Fair Use Outcomes on Appeal*

In terms of ultimate outcome on the question of fair use, in about half the cases—thirty in all—the appellate court concluded that the defendant's use was (or uses were) not fair.⁶⁸ In a little over a third of the cases (twenty four), the circuit court found the defendant's use or uses to be fair.⁶⁹ In three cases, the appellate court reached differing

68. *Diversey*, 738 F.3d 1196; *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012); *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3d Cir. 2011); *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010); *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522 (9th Cir. 2008); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007); *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769 (9th Cir. 2006); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005); *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003); *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002); *Davis*, 246 F.3d 152; *Greenberg*, 244 F.3d 1267; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999); *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998); *L.A. News Serv. v. Reuters TV Int'l, Ltd.*, 149 F.3d 987 (9th Cir. 1998); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381 (6th Cir. 1996); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330 (9th Cir. 1995); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

69. *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932 (4th Cir. 2014); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th

decisions as to whether different uses by the defendants were fair.⁷⁰ And in four cases the appeals court did not reach a decision on the merits of the fair use claim.⁷¹

Table 4 summarizes the appellate fair use determinations, organized by procedural posture of the district court's decision:

Table 4

| | Fair Use on Appeal | Not Fair Use on Appeal | Mixed Outcome on Appeal | Remanded on Appeal | Totals |
|------------------------|--------------------|------------------------|-------------------------|--------------------|--------|
| Pleading | 1 | 3 | | | 4 |
| Preliminary Injunction | 6 | 8 | | | 14 |
| Summary Judgment | 15 | 13 | 2 | 3 | 33 |
| Bench Trial | 1 | 4 | 1 | 1 | 7 |
| Jury Trial | 1 | 2 | | | 3 |
| Totals | 24 | 30 | 3 | 4 | 61 |

Cir. 2014); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013); *SOFA Entm't, Inc. v. Dodger Prods., Inc.* 709 F.3d 1273 (9th Cir. 2013); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403 (5th Cir. 2004); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000); *Sony Computer Entm't Am.*, 214 F.3d 1022; *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194 (4th Cir. 1998); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

70. *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013) (reversing district court and finding twenty-five uses fair; vacating and remanding as to five other uses); *Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010) (reversing determination of fair use as to highlight films); *Peter Letterese & Assocs., Inc.*, 533 F.3d 1287 (vacating and remanding determination of fair use as to one count of infringement in complaint).

71. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849 (8th Cir. 2004); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002); *Ringgold v. Black Entm't TV, Inc.*, 126 F.3d 70 (2d Cir. 1997).

III. FACTOR THREE IN THE CIRCUIT COURTS AFTER *CAMPBELL*

Identifying the sixty-one circuit court opinions since 1994 that have engaged in analyzing the Section 107 factors allows an examination of how the *Campbell* Court’s reasonableness approach to factor three has been applied in subsequent fair use cases. This Part examines how courts in the two decades after *Campbell* weight the third factor in the overall fair use determination, analyze the reasonableness of the defendant’s use of the plaintiff’s work in light of her purpose, and decide what constitutes the plaintiff’s “work.”

A. *How to Weight Factor Three*

The *Campbell* Court framed the third-factor inquiry as requiring consideration of whether the portion of the plaintiff’s work that the defendant used was reasonable in light of the purpose for the defendant’s use. The Court did not expressly state, though, how a court should weight factor three after evaluating the portion against the purpose. The Court certainly implied that if the defendant has not used more than is reasonable for its purposes (at least for its legitimate purposes), this factor should not pose an obstacle to finding the defendant’s use to be fair. The Court did not say, though, whether in such instances factor three should weigh in favor of fair use. The circuit court opinions in the study display a general reluctance to weight this factor in favor of fair use, even when the court concludes that the amount used by the defendant was reasonable.

Determining how circuit courts weight factor three is complicated by a tendency in the opinions not to state expressly how the court is weighting this factor. The sixty-one opinions in the study include sixty-four different conclusive analyses of factor three.⁷² More than a quarter of the analyses—nineteen out of sixty-four—do not expressly state how the court weighted that factor in the overall fair use analysis.⁷³ In five of

72. In one opinion, the court expressly did not reach a result on the third factor given the preliminary state of the record before it. *Suntrust*, 268 F.3d 1257, leaving sixty remaining opinions. In four of those opinions, the court conducted two separate fair use analyses of different challenged uses. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Bouchat*, 737 F.3d 932; *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013); *Bouchat*, 619 F.3d 301. This results in sixty-four separate analyses.

73. *Cambridge Univ. Press*, 769 F.3d 1232; *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014); *HathiTrust*, 755 F.3d 87 (full-image uses); *Cariou*, 714 F.3d 694 (finding fair use as to twenty-five uses); *SOFA Entm’t, Inc.*, 709 F.3d 1273; *Brownmark Films, LLC*, 682 F.3d 687; *Salinger*, 607 F.3d 68; *Bridgeport Music, Inc.*, 585 F.3d 267; *iParadigms*, 562 F.3d 630; *BMG*

those cases the courts found the defendant's use fair,⁷⁴ while in ten cases the court found the use was not fair,⁷⁵ and in four cases, the court vacated and remanded for further proceedings.⁷⁶

Of the forty-five analyses that do expressly state some conclusion about the weight, nearly half—twenty-one—expressly found that the factor weighed against fair use.⁷⁷ Most of the time, the court's weighting of the factor in these cases was consonant with the ultimate conclusion as to fair use: in nineteen of those twenty-one analyses, the court ruled against the fair use claim. In one case the court found the use to be fair even though factor three weighed against fair use,⁷⁸ and in one case it vacated and remanded the issue for further proceedings.⁷⁹

Music, 430 F.3d 888; *Mulcahy*, 386 F.3d 849; *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003); *Ty, Inc.*, 292 F.3d 512; *Greenberg*, 244 F.3d 1267; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Micro Star*, 154 F.3d 1107; *Dr. Seuss Enters.*, 109 F.3d 1394; *Princeton Univ. Press*, 99 F.3d 1381; *Triad Sys. Corp.*, 64 F.3d 1330. An absence of any express weighting of all of the fair use factors might reflect the admonition in *Campbell*: "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." 510 U.S. at 578. However, in several of these cases, including *Cambridge University Press*, *SOFA Entertainment*, *iParadigms*, *Napster*, *Dr. Seuss*, and *Princeton University Press*, the court *does* expressly weight at least one of the other factors.

74. *Kienitz*, 766 F.3d 756; *HathiTrust*, 755 F.3d 87 (full-image uses); *SOFA Entm't, Inc.*, 709 F.3d 1273; *Brownmark Films, LLC*, 682 F.3d 687; *iParadigms*, 562 F.3d 630.

75. *Salinger*, 607 F.3d 68; *Bridgeport Music, Inc.*, 585 F.3d 267; *BMG Music*, 430 F.3d 888; *Chi. Bd. of Educ.*, 354 F.3d 624; *Greenberg*, 244 F.3d 1267; *A&M Records, Inc.*, 239 F.3d 1004; *Micro Star*, 154 F.3d 1107; *Dr. Seuss Enters.*, 109 F.3d 1394; *Princeton Univ. Press*, 99 F.3d 1381; *Triad Sys. Corp.*, 64 F.3d 1330.

76. *Cambridge Univ. Press*, 769 F.3d 1232; *Cariou*, 714 F.3d 694 (vacating and remanding as to five uses); *Mulcahy*, 386 F.3d 849; *Ty, Inc.*, 292 F.3d 512.

77. *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013); *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012); *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3d Cir. 2011); *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010); *Bouchat*, 619 F.3d 301 (analyzing use in highlight films); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522 (9th Cir. 2008); *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287 (11th Cir. 2008); *Zomba Enters., Inc. v. Panoramas Records, Inc.*, 491 F.3d 574 (6th Cir. 2007); *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769 (9th Cir. 2006); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003); *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999); *L.A. News Serv. v. Reuters TV Int'l, Ltd.*, 149 F.3d 987 (9th Cir. 1998); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

78. *Sony Computer Entm't, Inc.*, 203 F.3d 596.

79. *Peter Letterese & Assocs., Inc.*, 533 F.3d 1287.

Far fewer analyses—only nine—expressly stated that factor three weighed in favor of fair use.⁸⁰ Again, the weighting of the third factor was generally consonant with the fair use outcome: of those nine analyses, all but two concluded that the use was fair.⁸¹

Table 5 summarizes these statistics, with the figures in bold indicating the cases in which the court’s weighting of the third factor was consonant with its ultimate conclusion on fair use:

Table 5

| | Use Found Fair | Use Found Not Fair | Remand | Totals |
|-----------------|----------------|--------------------|--------|--------|
| 3 Favors FU | 7 | 1 | 1 | 9 |
| 3 Against FU | 1 | 19 | 1 | 21 |

Fifteen more analyses weighted factor three as favoring neither party. Ten of these expressly stated that the factor was neutral (or “of little consequence” or “little weight” in the overall analysis), or did not weigh against fair use,⁸² and in all of those cases the court found the defendant’s use was fair. Five analyses did not expressly weight the factor as neutral, but stated that the factor did not benefit one party, without stating that the factor *did* benefit the other party, thus indicating that the court viewed the factor as not favoring either party. One of these five opinions expressly stated that the defendant couldn’t benefit from factor three and concluded that the use was not fair,⁸³ while four of the five opinions expressly stated that the factor didn’t favor or benefit the

80. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) (full-text searching); *Cariou*, 714 F.3d 694 (factor expressly favors fair use for twenty-five challenged uses); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403 (5th Cir. 2004); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003); *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191 (3d Cir. 2003); *Sony Computer Entm’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022 (9th Cir. 2000); *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194 (4th Cir. 1998); *Ringgold v. Black Entm’t TV, Inc.*, 126 F.3d 70 (2d Cir. 1997).

81. The court found that the use was not fair in *Video Pipeline*, 342 F.3d 191. The court remanded the fair use question in *Ringgold*, 126 F.3d. 70.

82. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014); *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932 (4th Cir. 2014); *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013); *Bouchat*, 619 F.3d 301 (lobby displays); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002); *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000).

83. *Davis v. Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001).

copyright owner (or was “little benefit” to the copyright owner),⁸⁴ and all four of those cases resulted in a determination of fair use. Thus, determining that factor three was neutral was almost always consonant with an ultimate conclusion of fair use: in fourteen of the fifteen instances where the court viewed the factor as neutral, it ultimately found the defendant’s use fair.

Overall, then, how consistent is a court’s weighting of the third factor with its ultimate ruling on fair use? That is, how likely is an appellate court to find fair use when the third factor weighs in favor of fair use, or against fair use when the third factor weighs against? In the thirty opinions in which the court expressly states how it is weighting the third factor and weights the factor in favor of one party or the other (rather than as neutral), the court’s conclusion as to which party that factor favors generally mirrors the outcome of the overall fair use analysis. In twenty-six instances, the third factor favored the party that prevailed on the fair use issue,⁸⁵ while in only two instances⁸⁶ did the court weight the third factor in favor of the party who ultimately lost on fair use.⁸⁷ (In two

84. *Bouchat*, 737 F.3d 932 (historical exhibitions); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004); *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

85. In nineteen cases, factor three weighed against fair use and the use was ruled not to be fair. *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013); *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012); *Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3d Cir. 2011); *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010); *Bouchat*, 619 F.3d 301 (analyzing use in highlight films); *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522 (9th Cir. 2008); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007); *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769 (9th Cir. 2006); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003); *Merkos L’Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999); *L.A. News Serv. v. Reuters TV Int’l, Ltd.*, 149 F.3d 987 (9th Cir. 1998); *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994). In seven cases, factor three weighed in favor of fair use and the court ruled that the use was fair. *HathiTrust*, 755 F.3d 87 (full-text searching); *Cariou*, 714 F.3d 694 (factor expressly favors fair use for twenty-five challenged uses); *Blanch*, 467 F.3d 244; *Compaq Computer Corp.*, 387 F.3d 403; *Mattel Inc.*, 353 F.3d 792; *Sony Computer Entm’t Am., Inc.*, 214 F.3d 1022; *Sundeman*, 142 F.3d 194.

86. *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000) (but of very little weight); *Video Pipeline*, 342 F.3d 191.

87. In fifteen other cases, the court expressly weighted the third factor, but did so as neutral and not favoring either party. See text accompanying notes 82–84, *supra*. If a neutral finding on factor three is viewed as consistent with an ultimate determination that the use is fair, then the determination on factor three and the determination on fair use overall align in forty out of forty-five analyses (cases cited in notes 82, 84, and 85, *supra*), with the outcome on factor three and fair

analyses, the court remanded without a definitive ruling on fair use in the appellate opinion.⁸⁸)

How did *Campbell's* reasonableness approach interact with courts' weighting of the third factor and ultimate determination of fair use? In approximately two-thirds (seventeen) of the twenty-four⁸⁹ analyses in which the court found that factor three favored fair use or was neutral, the court's analysis of factor three included some discussion of the reasonableness of what the defendant used from the plaintiff's work in light of the purpose of the defendant's use.⁹⁰ In all seventeen of those instances, the court found the defendant's use fair. Of course, in four other instances, the court found that factor three favored fair use or was neutral, and concluded that the defendant's use was fair, without evaluating the reasonableness of the portion of the plaintiff's work the defendant used in light of the defendant's purpose.⁹¹ In the twenty-one analyses in which the court expressly weighted the third factor against fair use, the court's analysis drew on *Campbell's* reasonableness approach in only nine of those analyses.⁹² A court's use of *Campbell's*

use diverging in only three of them (cases cited in notes 83 and 86, *supra*). (In two cases, cited in note 88, *infra*, the court did not reach the merits of the fair use claim.)

88. Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l, 533 F.3d 1287 (11th Cir. 2008); Ringgold v. Black Entm't TV, Inc., 126 F.3d 70, 80 (2d Cir. 1997).

89. See notes 80 and 82–84, *supra*.

90. Of the cases finding factor three favored fair use, the court discussed the reasonableness in light of the purpose in five of them. *HathiTrust*, 755 F.3d 87 (full text); *Cariou*, 714 F.3d 694; *Blanch*, 467 F.3d 244; *Mattel Inc.*, 353 F.3d 792; *Sundeman*, 142 F.3d 194. Of cases finding factor three neutral, that reasonableness was discussed in twelve analyses in those cases. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014); *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932 (4th Cir. 2014) (discussing reasonableness in analyzing use both in highlight films and historical displays); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013); *Bouchat*, 619 F.3d 301 (lobby displays); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004); *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

91. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014) (factor doesn't weigh against fair use); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403 (5th Cir. 2004) (jury could reasonably conclude that factor favored fair use); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) (does not help copyright owner); *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022 (9th Cir. 2000). In addition, in *Video Pipeline* and *Davis*, the court found factor three favored fair use or was neutral without discussing the reasonableness of the defendant's taking, but nonetheless found that the use was not fair. In *Ringgold*, the court affirmed the district court's conclusion that the third factor favored the defendants, but reversed and remanded the case for reconsideration of the fair use claim. *Ringgold*, 126 F.3d 70.

92. The twenty-one analyses expressly weighting the third factor against fair use are cited in note 77, *supra*. The court's analysis drew on *Campbell's* reasonableness approach in only nine of those analyses. *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir.

reasonableness approach is thus more strongly correlated with the court weighing of factor three in a way that favors fair use, or at least does not weigh against fair use.

B. Analyzing the Reasonableness of the Portion Copied in Light of the Purpose for the Copying

Just over half of the appellate opinions in the study actually state *Campbell*'s principle that the third factor should be analyzed by looking at the reasonableness of the defendant's copying in light of her purpose. Of the sixty-one opinions, thirty-two⁹³ of them quote or cite *Campbell* for this principle, or quote another circuit court opinion that quotes or paraphrases *Campbell* on this point.⁹⁴ The remaining twenty-nine

2012); *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010); *Bouchat*, 619 F.3d 301 (analyzing use in highlight films); *Peter Letterese & Assocs., Inc.*, 533 F.3d 1287; *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769 (9th Cir. 2006); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994). The other twelve analyses did not discuss reasonableness.

93. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Swatch Grp. Mgmt. Servs.*, 756 F.3d 73; *HathiTrust*, 755 F.3d 87; *Bouchat*, 737 F.3d 932; *Seltzer*, 725 F.3d 1170; *Cariou*, 714 F.3d 694; *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273 (9th Cir. 2013); *Gregory*, 689 F.3d 29; *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012); *Bouchat*, 619 F.3d 301; *Gaylord*, 595 F.3d 1364; *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009); *Peter Letterese & Assocs., Inc.*, 533 F.3d 1287; *Perfect 10, Inc.*, 508 F.3d 1146; *Blanch*, 467 F.3d 244; *Wall Data Inc.*, 447 F.3d 769; *Bill Graham Archives*, 448 F.3d 605; *NXIVM Corp.*, 364 F.3d 471; *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003); *Mattel Inc.*, 353 F.3d 792; *Elvis Presley Enters.*, 349 F.3d 622 (9th Cir. 2003); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Bond*, 317 F.3d 385; *L.A. News Serv.*, 305 F.3d 924; *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Núñez*, 235 F.3d 18; *Worldwide Church of God*, 227 F.3d 1110; *Castle Rock Entm't, Inc.*, 150 F.3d 132; *Sundeman*, 142 F.3d 194; *Leibovitz*, 137 F.3d 109; *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997); *Am. Geophysical Union*, 60 F.3d 913.

94. I have counted in this number any opinion that quotes or paraphrases *Campbell*'s statement that the third factor asks whether the defendant's copying is "reasonable in relation to the purpose of the copying," 510 U.S. at 586, or its statement that "the extent of permissible copying varies with the purpose and character of the use," *id.* at 586–87. I have also counted in this number any opinion that, while not directly quoting *Campbell*, quotes a lower court opinion that itself quotes or paraphrases language from *Campbell* about analyzing the portion the defendant used in light of her purpose. For example, a number of opinions, while not directly quoting *Campbell*, quote or paraphrase portions of Second Circuit opinions in *Texaco*, *Castle Rock*, *Bill Graham Archives*, or *Blanch* that refer to this aspect of the *Campbell* decision. *See, e.g., Cariou*, 714 F.3d 694 (quoting *Bill Graham Archives, Blanch*); *Núñez*, 235 F.3d 18 (quoting *Castle Rock*); *Soc'y of the Holy Transfiguration Monastery, Inc.*, 689 F.3d 29 (quoting *Castle Rock*); *NXIVM Corp.*, 364 F.3d 471 (quoting *Texaco*); *see also Bouchat*, 737 F.3d 932 (quoting *Sundeman*); *Bouchat*, 619 F.3d 301 (quoting *Sundeman*); *L.A. News Serv., Inc.*, 305 F.3d 924, 941 ("If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her.")

opinions do not quote or cite, either directly or indirectly, *Campbell's* command to analyze factor three by looking to the purpose of the defendant's.

The rate at which the appellate courts have cited or quoted *Campbell* (directly or indirectly) for this proposition has not changed much over time, as breaking the opinions down by five-year periods since the decision in *Campbell* shows. For the thirteen opinions issued in the five years between the date *Campbell* was decided (March 7, 1994) through March 7, 1999, five⁹⁵ state the principle and eight⁹⁶ don't. Of the seventeen opinions issued from March 1999 to March 2004, nine⁹⁷ state the principle and eight⁹⁸ don't. From March 2004 to March 2009, there are eleven opinions in the study, and six⁹⁹ state the principle while five¹⁰⁰ don't. And of sixteen opinions between March 2009 and March

(quoting *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 942 (9th Cir. 2002), *superseded by* 336 F.3d 811 (9th Cir. 2003)) (emphasis added)). Finally, I have also included in this number the opinion in *Chicago Board of Education*, in which Judge Posner never quotes or cites *Campbell* either directly or indirectly for this point, but which simply states that "the fair use copier must copy no more than is reasonably necessary . . . to enable him to pursue an aim that the law recognizes as proper, in this case the aim of criticizing the copyrighted work effectively." 354 F.3d at 629.

95. *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998); *Sundeman*, 142 F.3d 194; *Leibovitz*, 137 F.3d 109; *Dr. Seuss Enters.*, 109 F.3d 1394; *Am. Geophysical Union*, 60 F.3d 913.

96. *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65 (2d Cir. 1999); *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998); *L.A. News Serv. v. Reuters TV Int'l, Ltd.*, 149 F.3d 987 (9th Cir. 1998); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998); *Ringgold*, 126 F.3d 70; *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381 (6th Cir. 1996); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330 (9th Cir. 1995).

97. *Chi. Bd. of Educ.*, 354 F.3d 624; *Mattel Inc.*, 353 F.3d 792; *Elvis Presley Enters.*, 349 F.3d 622; *Kelly*, 336 F.3d 811; *Bond*, 317 F.3d 385; *L.A. News Serv.*, 305 F.3d 924; *Suntrust*, 268 F.3d 1257; *Núñez*, 235 F.3d 18; *Worldwide Church of God*, 227 F.3d 1110.

98. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003); *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002); *Davis v. Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001); *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267 (11th Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022 (9th Cir. 2000); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000).

99. *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287 (11th Cir. 2008); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769 (9th Cir. 2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *NXIVM Corp.*, 364 F.3d 471.

100. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522 (9th Cir. 2008); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005); *Mulcahy v. Cheetah Learning LLC*, 386 F.3d 849 (8th Cir. 2004); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403 (5th Cir. 2004).

2014, nine¹⁰¹ state the principle, and seven¹⁰² don't. (Four opinions were issued after March 2014, the beginning of the fifth five-year period since *Campbell* was decided; three¹⁰³ state the principle and one¹⁰⁴ doesn't.)

The following table summarizes these statistics. The figures in parentheses show the portion of the total cases in that five-year period represented by the absolute number.

Table 6

| | State Principle | Don't State Principle | Totals |
|-----------|-----------------|-----------------------|--------|
| 1994–1999 | 5 (38.5%) | 8 (61.5%) | 13 |
| 1999–2004 | 9 (53%) | 8 (47%) | 17 |
| 2004–2009 | 6 (54.5%) | 5 (45.5%) | 11 |
| 2009–2014 | 9 (56%) | 7 (44%) | 16 |
| 2014 | 3 | 1 | 4 |
| Totals | 32 (52.5%) | 29 (47.5%) | 61 |

Opinions concluding that a defendant's use is fair are more likely to include an express discussion of the reasonableness inquiry established in *Campbell*. In twenty-eight of the sixty-one cases in the study, the appeals court either determined that some or all of the defendant's uses were fair, or that the district court had erred in concluding that some or all of those uses were not fair.¹⁰⁵ In twenty-two¹⁰⁶ of these twenty-eight

101. *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932 (4th Cir. 2014); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013); *Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013); *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273 (9th Cir. 2013); *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012); *Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010); *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010); *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

102. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014); *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013); *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3d Cir. 2011); *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267 (6th Cir. 2009).

103. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

104. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014).

105. In twenty cases, the appeals court affirmed a district court's decision concluding that the defendant's use was (or uses were) fair. *See* note 60, *supra*. In five cases, the appeals court reversed, reversed and remanded, or vacated and remanded a district court's decision that the defendant's use was not fair. *See* note 63, *supra*. In two cases with mixed outcomes on appeal, the appeals court affirmed the district court's finding that one use was fair, but either reversed, or vacated and

cases, the court discussed the reasonableness of the portion used in light of the defendant's purpose. (In three¹⁰⁷ of these twenty-two cases, the court discussed the amount and substantiality of the defendant's taking in the context of *Campbell's* discussion of parody, which arguably provided a more specific test for analyzing the reasonableness of the defendant's taking in that context.) Only six¹⁰⁸ of these twenty-eight opinions did not expressly discuss that issue.

By contrast, the opinions concluding that a defendant's use was not fair were far less likely to analyze the portion of the work that the defendant used in light of the defendant's purpose. In thirty-three of the sixty-one cases in the study, the appeals court either determined that some or all of the defendant's uses were not fair, or that the district court had erred in concluding that some or all of those uses were fair.¹⁰⁹ Only ten¹¹⁰ of these thirty-three opinions include some discussion of whether

remanded, the finding below that a second use was fair. *See* note 65, *supra*. And in one case, although the district court had apparently not ruled on fair use, the appeals court reached the issue and concluded that the defendant's use was fair, or was likely fair. *See* note 67, *supra*.

106. *Swatch Grp. Mgmt. Servs.*, 756 F.3d 73; *HathiTrust*, 755 F.3d 87; *Bouchat*, 737 F.3d 932; *Seltzer*, 725 F.3d 1170; *Cariou*, 714 F.3d 694; *SOFA Entm't, Inc.*, 709 F.3d 1273; *Brownmark Films, LLC*, 682 F.3d 687; *Bouchat*, 619 F.3d 301; *iParadigms*, 562 F.3d 630; *Peter Letterese & Assocs., Inc. v. World Inst. of Scientology Enters., Int'l*, 533 F.3d 1287 (11th Cir. 2008); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2d Cir. 2004); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194 (4th Cir. 1998); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

107. *Brownmark Films, LLC*, 682 F.3d 687; *Suntrust*, 268 F.3d 1257; *Leibovitz*, 137 F.3d 109.

108. *Kienitz*, 766 F.3d 756; *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014); *Compaq Computer Corp. v. Ergonome Inc.*, 387 F.3d 403 (5th Cir. 2004); *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000); *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022 (9th Cir. 2000).

109. In twenty-one cases, the appeals court affirmed a decision below that the defendant's use was not fair. *See* note 61, *supra*. In eight cases, the appeals court reversed a district court's decision that the defendant's use was (or uses were) fair. *See* note 62, *supra*. In three cases, while the district court had not ruled on fair use, the appeals court did reach the issue and concluded that the defendant's use was not fair. *See* note 66, *supra*. And in one case, the appeals court vacated and remanded all of the district court's decisions that some of the defendant's uses were fair and some were not. *See* note 64, *supra*.

110. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012); *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010); *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769 (9th Cir. 2006); *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003); *Worldwide Church of God v. Phila. Church of God*,

the defendant used a reasonable portion of the copyrighted work in light of the defendant's purpose, while the other twenty-three of these opinions include no real discussion of *Campbell's* reasonableness inquiry.

This correlation obviously does not directly reveal anything about causation. Perhaps analyzing a defendant's use in light of her purpose makes it more likely for a court to conclude that the defendant's use is fair. Or perhaps a court that concludes that a defendant's use is fair is more likely to justify that conclusion in part by analyzing the reasonableness of the defendant's use in light of her purpose. In whichever direction the causation runs, appellate opinions concluding that a defendant's use is fair are more likely to discuss the third factor under *Campbell's* reasonableness rubric than are opinions concluding that a defendant's use was not fair.

C. *Illegitimate Purposes*

One question raised by the *Campbell* approach is how the analysis should proceed if the amount the defendant used is reasonable in light of the defendant's purpose but that purpose is itself not one that favors treating the defendant's use as fair. To take the extreme example, if the defendant's purpose is merely to outcompete the plaintiff in sales of verbatim copies of the plaintiff's work by selling copies more cheaply, the defendant can't effectively achieve that purpose without copying the plaintiff's entire work. But it hardly seems that the third factor should weigh in favor of fair use (or even be neutral) just because the defendant took no more than necessary to achieve her *illegitimate* purpose.

While the issue has (perhaps not surprisingly) not arisen quite that starkly in the reported appellate decisions in the study, at least some opinions have expressly grappled with how to treat the third factor when the defendant's purpose is not one that favors fair use. *Society of the Holy Transfiguration Monastery, Inc. v. Gregory*¹¹¹ involved a defendant who had posted on his website excerpts from the plaintiff's

Inc., 227 F.3d 1110 (9th Cir. 2000); *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132 (2d Cir. 1998); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994). The opinions in *Gregory*, *Gaylord*, *Castle Rock*, and *Dr. Seuss* all quote or cite *Campbell* (directly or indirectly) on reasonableness, but the court in each case offers no real analysis of the reasonableness of the defendant's use in light of her purpose. Indeed, in *Gregory*, *Castle Rock*, and *Dr. Seuss*, the court seems to weigh factor three against the defendant because the court had concluded that the defendant's purpose did not weigh in favor of fair use. *Gregory*, 689 F.3d at 63; *Castle Rock*, 150 F.3d at 144; *Dr. Seuss Enters.*, 109 F.3d at 1402-03.

111. *Gregory*, 689 F.3d 29.

translations of ancient religious texts. The First Circuit, in considering the first fair use factor, determined that “the [defendant’s] translations hold the same purpose and benefit as the [plaintiff’s] Works, *i.e.*, to further religious practice and education.”¹¹² The court concurred with the view of other courts that “where a copy’s ‘use is for the same intrinsic purpose [as the copyright holder’s] . . . such use seriously weakens a claimed fair use,’”¹¹³ and ultimately concluded that the first factor weighed against fair use.¹¹⁴ In considering the third factor, the court noted the need “to determine whether copying is ‘consistent with or more than necessary to further ‘the purpose and character of the use.’”¹¹⁵ In making that evaluation, the court concluded that “[b]ecause the [defendant’s] use here was ‘for the same intrinsic purpose for which [the Monastery] intended it to be used,’ this third factor weighs against his contention of fair use.”¹¹⁶

The Ninth Circuit has taken a similar approach to the third factor. In *Wall Data*, where the defendant had installed the plaintiff’s software on substantially more computers than its license from the plaintiff allowed, the court, in analyzing the third factor, concluded that “although ‘entire verbatim reproductions are justifiable where the purpose of the work differs from the original,’ [the defendant] put its copies to the exact purpose for which the original software licenses were purchased.”¹¹⁷ In *Worldwide Church of God*,¹¹⁸ where the defendant made and distributed complete copies of the defendant’s entire 380-page religious text, the court considered the third factor in light of *Campbell*’s admonition that “[t]he extent of permissible copying varies with the purpose and character of the use.”¹¹⁹ But the majority (like the First Circuit in *Gregory*) concluded that “the purpose for which [the defendant] uses the [plaintiff’s work] is the same as [the plaintiff’s]”¹²⁰ and that therefore the

112. *Id.* at 60. The court noted that the defendant’s works, in *Campbell*’s words, “merely supersede[] the object[] of the original creation.” *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

113. *Id.* (quoting *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989)).

114. *Id.* at 61 (“[W]e conclude that as to the first factor, the scales tip in the Monastery’s favor.”).

115. *Id.* at 63 (quoting *Castle Rock Entm’t, Inc.*, 150 F.3d 132 quoting *Campbell*, 510 U.S. at 586–87).

116. *Id.* at 63 (quoting *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983)).

117. *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769 (9th Cir. 2006) (quoting *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003)).

118. 227 F.3d 1110 (9th Cir. 2000).

119. *Id.* at 1118 (quoting *Campbell*).

120. *Id.*

third factor weighed against fair use.¹²¹

Similarly, the Fourth Circuit has indicated that despite *Campbell's* principle that “the extent of permissible copying varies with the purpose and character of the use[,] [u]nless the use is transformative, the use of a copyrighted work in its entirety will normally weigh against a finding of fair use.”¹²² In a later opinion, the Fourth Circuit summarized the third-factor inquiry in a way that again stressed that the defendant’s purpose must not be illegitimate. “If the [defendant] reproduces only the amount necessary to achieve a *valid* end, this factor will favor neither party.”¹²³ And the Eleventh Circuit has made clear that while the inquiry into whether the portion of the work that the defendant used is “reasonable in relation to the purpose of the copying” [is] not limited to the context of transformative uses,”¹²⁴ nevertheless “the wholesale reproduction of an entire work will not generally be considered fair use unless the use is highly transformative.”¹²⁵

These statements all indicate that in evaluating the reasonableness of the defendant’s copying in light of her purpose, a court should consider (as it presumably did when evaluating the first factor) the legitimacy of that purpose, including whether the defendant’s purpose is simply the same as the plaintiff’s. Of course, a defendant’s use for a purpose that is illegitimate for fair use—such as making wholesale verbatim copies of the plaintiff’s work to sell or give away in competition with plaintiff—is unlikely to qualify as transformative or otherwise to weigh in favor of fair use under factor one. As a result, even if the defendant has copied no more than necessary to achieve that illegitimate purpose, that does not mean that the court should or would treat factor three as favoring fair use, or even as neutral in the overall fair use determination.

D. What Is “the Copyrighted Work”?

The evaluation of the third fair use factor may depend in part on how the court identifies “the copyrighted work” against which to compare the portion that the defendant used. Professor Paul Goldstein offers the example of a defendant who copies one episode of the popular television series *24*, and asks whether each episode is a relevant “work,” or

121. *Id.*

122. *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301, 311 (4th Cir. 2010) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586–87 (1994)).

123. *Bouchat v. Balt. Ravens Ltd. P’ship*, 737 F.3d 932, 949 (4th Cir. 2014) (emphasis added).

124. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1272 (11th Cir. 2014).

125. *Id.* at 1274.

whether “the relevant work [is] bounded by the single twenty-four-hour day that aggregates the interlocking episodes.”¹²⁶ He notes that “[f]air use . . . may come out differently if the copied episode of 24 is treated as the entire copyrighted work or as only one twenty-fourth of the copyrighted work.”¹²⁷

Professor Goldstein observes that on the general question of what constitutes a “work” (which has implications beyond the fair use analysis) “the statute is not instructive, and the cases reveal little analysis of the question and even less that is helpful.”¹²⁸ The fair use cases in the study add relatively little to our understanding of how to define the copyrighted “work.” Few of these cases resolve disputes between the parties over the proper characterization of what constitutes the plaintiff’s “copyrighted work” for purposes of measuring how much of that work the defendant has used. Most courts that have ruled on the issue have rejected arguments that, for purposes of analysis under factor three, the plaintiff’s work should be considered to be a larger whole, rather than smaller constituent parts.¹²⁹

*American Geophysical Union v. Texaco Inc.*¹³⁰ involved photocopying of individual articles from scientific journals. In analyzing factor three, the court considered whether the plaintiff’s work was properly understood as each individual article, or as each issue of the scientific journal (containing multiple articles). The court concluded that

each of the eight articles [copied] was separately authored and constitutes a discrete “original work[] of authorship.” [E]ach article enjoys independent copyright protection . . . , and what the publishers claim has been infringed is the copyright that subsists in each individual article—not the distinct copyright that may subsist in each journal issue or volume by virtue of the publishers’ original compilation of these articles.¹³¹

126. Paul Goldstein, *What Is a Copyrighted Work? Why Does It Matter?*, 58 UCLA L. REV. 1175, 1176 (2011).

127. *Id.*

128. *Id.* at 1177.

129. A similar issue was raised recently in *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), involving placing copies of academic literature on electronic reserve for university students to read. The copyright owners in that case argued that for edited academic volumes consisting of several chapters each written by a separate author, the “work” for purposes of factor three analysis should be each chapter, rather than the entire volume. The Eleventh Circuit did not reach the merits of the claim, however, because it concluded that the publishers had raised the issue too late in the proceedings below for it to be considered.

130. 60 F.3d 913 (2d Cir. 1994).

131. *Id.* at 926.

*Society of the Holy Transfiguration Monastery, Inc. v. Gregory*¹³² similarly involved a compilation of literary works—in that case translations of ancient religious texts. The defendant in that case argued that his copying of an entire homily of St. Isaac involved “only one of seventy-seven homilies in the St. Isaac work, which is only 3 pages in a work that [is] 568 pages or approximately a half percent of the entire work.”¹³³ The court rejected that argument and evaluated the defendant’s copying as “identical or near-verbatim copies of the [plaintiff’s] Works—themselves parts of greater texts, but which alone may be qualitatively significant.”¹³⁴

Similarly, in two cases in which defendants used photographs, appellate courts found that the defendant had used the plaintiff’s entire work and rejected the argument that the photo or photos used were a smaller part of a larger compilation. In *Balsley v. LFP, Inc.*,¹³⁵ the court rejected an argument that the defendant had used less than the entire work because the defendant had reprinted only one of several of the plaintiff’s copyrighted photographs that had appeared on a website.¹³⁶ Similarly, the majority in *Monge v. Maya Magazines, Inc.*¹³⁷ rejected an argument that the defendant had used only a small portion of the plaintiff’s work when it published six entire photographs of the plaintiff’s wedding from among 400 photographs stored on the memory card from which it acquired the photos.¹³⁸ The majority wrote that “[e]ach of the individual wedding photos is a separate work because each photo ‘can live [its] own copyright life’ and ‘has an independent economic value and is, in itself, viable.’”¹³⁹ The majority determined that the “random collection of unidentified, non-wedding related images” on the memory card did not qualify as a compilation, of which the copied photographs were merely a small portion, because there was no evidence that the 400 images had been selected, coordinated, or arranged in any way.¹⁴⁰

One case, however, rejected a plaintiff’s attempt to persuade the court

132. 689 F.3d 29 (1st Cir. 2012).

133. *Id.* at 62 (internal quotation marks omitted).

134. *Id.* at 63.

135. 691 F.3d 747 (6th Cir. 2012).

136. *Id.* at 760.

137. 688 F.3d 1164 (9th Cir. 2012).

138. *Id.* at 1179–80.

139. *Id.* at 1180 (quoting *Columbia Pictures TV, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1193 (9th Cir. 2001)).

140. *Id.* at 1179–80.

to consider smaller portions of a work as each constituting a separate work. *NXIVM Corp. v. Ross Institute*¹⁴¹ involved the plaintiffs' 265-page course manual for its training seminars; the defendants quoted from the manual in two reports criticizing the plaintiffs' seminars. With respect to factor three of the fair use analysis, the plaintiffs argued for "conceptualizing the single course manual as separate 'modules,' each of which they urge is a separate denominator" against which to calculate the amount of their work that the defendant used.¹⁴² "Applying this analysis, plaintiffs allege that defendants copied some entire works."¹⁴³

The court rejected this approach:

If plaintiffs' argument were accepted by courts—and, not surprisingly, plaintiffs cite no authority to support it—the third factor could depend ultimately on a plaintiff's cleverness in obtaining copyright protection for the smallest possible unit of what would otherwise be a series of such units intended as a unitary work. The proper analogy in this case is not to separate articles in a magazine, but instead to a book by a single author containing numerous chapters, which are not separately copyrightable. The "modules" in this case were written by the same author and they combine to produce one unitary work.¹⁴⁴

The court was unwilling to break down what it viewed as a single work by a single author into constituent parts for purposes of the factor three analysis, viewing as inapplicable the approach taken in *Texaco*, in which each article separately written by a different author was viewed as a different work, even though they appeared in a scientific journal issue containing multiple articles.¹⁴⁵

In *Chicago Board of Education v. Substance, Inc.*,¹⁴⁶ which involved wholesale copying of standardized tests, the parties do not appear to have actually disputed what constituted the plaintiff's work, but Judge Posner ventured his own opinion that part of the reason why copying an entire work is not per se unfair has to do with the potential manipulability of what constitutes "the work." He noted that the

141. 364 F.3d 471 (2d Cir. 2004).

142. *Id.* at 481.

143. *Id.*

144. *Id.* (citation omitted). The court cited its earlier opinion in *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 925–26 (2d Cir. 1994) for the proposition that treating individual articles in a scientific journal as the relevant "work" was appropriate when the author of each article is different.

145. *Texaco*, 60 F.3d at 925–26.

146. 354 F.3d 624 (7th Cir. 2003).

difficulties with a per se rule “would be obvious if the school board had copyrighted each question separately, as it might well have done, since it wants to reuse questions without necessarily reusing an entire test.”¹⁴⁷

Overall, then, courts appear to be alert to the potential for manipulation on both sides in identifying the plaintiff’s “work,” but they have dealt with the issue on a case-by-case basis without establishing general rules. In the few cases that have expressly considered what constitutes the plaintiff’s “copyrighted work” for purposes of the third fair use factor, courts have generally been disinclined to accept arguments that what the defendant copied should be viewed as only a small part of a larger work. But courts have also seemed suspicious of arguments by copyright owners that the court views as attempts to manipulate the definition of the “work” primarily for the purpose of affecting the analysis of the third fair use factor.

E. Summary

Examining post-*Campbell* appellate fair use opinions reveals several features of the third factor analysis. When courts expressly weight factor three, the weighting is generally consonant with the decision on the fair use claim. Only about half of the opinions expressly discuss the reasonableness of the defendant’s use in light of her purpose, but opinions finding the defendant’s use fair are more likely to discuss reasonableness than those that don’t. Where the court views the defendant’s purpose as not legitimate (or not favoring fair use), factor three will not favor fair use even if the defendant has used no more than reasonable for that purpose. And when disputes arise over what constitutes the plaintiff’s “work” against which the defendant’s portion used should be measured, courts tend to resist efforts to characterize the plaintiff’s work as a larger unit than what the defendant copied.

IV. FACTOR THREE AND “ENTIRE WORK” CASES

This Part looks more closely at cases in which the defendant used the plaintiff’s entire work. Some might be skeptical that use of the copyright owner’s entire work could ever be fair. Congress, though, when it enacted Section 107, expressly contemplated that in some circumstances the use of the entire work would qualify as fair use.¹⁴⁸ In the principal

147. *Id.* at 629.

148. See Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 840–43 (2015), elsewhere in this symposium.

committee report on the bill that became the 1976 Copyright Act, the drafters gave a number of examples of uses that they deemed to be fair under the bill's provisions and that involved copying an entire work.¹⁴⁹ These examples included duplicating feature films that existed only in physically deteriorating prints, as well as making copies in forms "such as copies in Braille and phonorecords of oral readings (talking books)" that are "needed for the use of blind persons."¹⁵⁰ *Campbell's* reasonableness approach seems likely to be particularly important in determining fair use where a defendant has used all, or essentially all, of a plaintiff's copyrighted work. Since use of the entire work ordinarily militates against finding fair use,¹⁵¹ *Campbell's* approach can help identify when such use does not have that ordinary effect.

A surprising number of cases in the study involved use of the plaintiff's entire work. While it can sometimes be difficult to be certain from the court opinions whether the defendant has used the entire work, it appears that more than half of the sixty-one cases in the study, thirty-four of them,¹⁵² involved claims that the defendant had used the plaintiff's entire copyrighted work. This Part looks more closely at the "entire work" cases. After considering how courts weight factor three in such cases, this Part looks at the fair use outcome in these cases and examines those outcomes in cases involving different types of copyrighted works. Finally, this Part concludes by looking at how *Campbell's* reasonableness analysis has generally led courts to find fair use when a defendant's use of a plaintiff's entire work is enabled by a new technology.

A. *Weighting Factor Three in Entire Work Cases*

As discussed in Part III.A, few courts have expressly weighted factor three in favor of fair use. When the defendant has used the plaintiff's entire work, courts seem particularly reluctant to weight factor three in favor of fair use, even where the court concludes that it was reasonable

149. H.R. REP. NO. 94-1476 at 65–74 (1976).

150. *Id.* at 73; *see also id.* at 71 (guidelines for educational uses of music suggesting that it would be fair use to copy entire work "to replace purchased copies which for any reason are not available for an imminent performance" and to record a performance by students for evaluation); *id.* at 68 (guidelines for classroom copying indicating that making multiple copies for classroom use of "a complete poem if less than 250 words" or of "a complete article, story or essay of less than 2,500 words" could be fair use, and indicating that a single copy for a teacher's use of an entire chapter, periodical article, or short story could be a fair use).

151. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984).

152. These cases are identified in notes 165–168, *infra*.

for the defendant to use the whole work. Indeed, in 2006 the Second Circuit wrote in the *Bill Graham Archives* case that

[n]either our court nor any of our sister circuits has ever ruled that the copying of an entire work *favors* fair use. At the same time, however, courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make fair use of an image.¹⁵³

The Second Circuit has repeated that assertion a number of times, most recently in May 2014.¹⁵⁴

The Second Circuit's statement seems to reflect the general approach in "entire work" cases, not just in its own cases, but also in the Ninth Circuit. In a case where an image search engine copied entire images posted online, that court determined that "although [the defendant] did copy each of [the plaintiff's] images as a whole, it was reasonable to do so in light of [the defendant's] use of the images."¹⁵⁵ But the court concluded that therefore "[t]his factor neither weighs for nor against either party."¹⁵⁶ More recently, the Ninth Circuit stated that "this court has acknowledged that this [third] factor *will not weigh against* an alleged infringer, even when he copies the whole work, if he takes no more than is necessary for his intended use."¹⁵⁷

The reluctance to weight factor three in favor of fair use when the defendant has used the entire work is not, however, as absolute as suggested by the court in *Bill Graham Archives*. Even before that case, at least one circuit court had in fact found that the third factor favored fair use even though the defendant had used the entire work. *Sundeman v. The Seajay Society, Inc.*¹⁵⁸ involved a claim of infringement in the unpublished first novel by author Marjorie Rawlings. The defendant, who possessed the unpublished manuscript, copied the entire novel for a scholar who used it to prepare a review of the book.¹⁵⁹ The Fourth

153. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

154. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014).

155. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (following *Kelley*).

156. *Kelly*, 336 F.3d at 821.

157. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013) (emphasis added) (citing *Kelly*, 336 F.3d at 820–21).

158. 142 F.3d 194 (4th Cir. 1998).

159. The defendant also made a copy of *nearly* the entire manuscript in order to have the manuscript's authenticity verified by the University of Florida. Other challenged uses by the defendant involved use of much smaller portions of the manuscript. *Id.* at 199.

Circuit concluded that the defendant copied no more of the manuscript than was necessary to allow the scholar to prepare her review without damaging the fragile original manuscript, and held that “the amount and substantiality of the portion copied by Seajay weigh *in favor of* finding the uses fair.”¹⁶⁰ While the court’s conclusion as to the third factor involved several different challenged uses, only one of which involved the entire work, the court nonetheless found the factor favored fair use.¹⁶¹

Most recently, in its June 2014 opinion in *Authors Guild, Inc. v. HathiTrust*,¹⁶² the Second Circuit itself seems to have departed from the approach announced in *Bill Graham Archives*. The defendant in *HathiTrust* copied entire works (primarily books) and did so on an enormous scale, ultimately scanning more than ten million items in the library collections of the many major research universities who are members of the defendant HathiTrust.¹⁶³ The defendant used the entire verbal content of all of these works to enable full-text searching to locate whether and where particular words appeared in any of the books in the libraries. The court concluded that the defendants had used no more of the plaintiffs’ works than necessary and at the end of its discussion of factor three stated that “this factor favors the Libraries.”¹⁶⁴

Overall, then, in cases where the defendant has used the entire work, the general approach appears to be that if the defendant used a reasonable amount in light of her purpose, the third factor will not weigh against fair use but will be viewed as neutral, although at least two cases appear to weigh reasonable use of entire works in favor of fair use.

B. *Analyzing Defendant’s Use of the Plaintiff’s Entire Work*

More than half of the sixty-one cases in the study, thirty-four of them,

160. *Id.* at 206.

161. In a later case, the Fourth Circuit found that the defendant’s use of the plaintiff’s entire work (in that case, a logo for a professional football team) was reasonable in light of the defendant’s transformative purpose. *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301, 315 (4th Cir. 2010). The court explained that “[h]owever, because the entire work is displayed [by the defendant], we decline to weigh the third factor in favor of fair use.” *Id.* Therefore, the court weighed this factor as “neutral.” *Id.* This approach is more in line with the Second Circuit’s approach in *Bill Graham Archives* than with the Fourth Circuit’s own approach in its earlier *Sundeman* case.

162. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

163. *Id.* at 90.

164. *Id.* at 99. The defendants also used the scanned *images* of the entire books to provide access to patrons with certified print disabilities; as to this use, the court concluded that the use was reasonable, but did not expressly state whether for that use the third factor favored fair use or was neutral. *Id.*

involved claims that the defendant had used the plaintiff's entire copyrighted work. In sixteen of these cases, the court concluded that the defendant's use was not fair,¹⁶⁵ in fourteen cases the court found the use was fair,¹⁶⁶ in two cases the court reached different conclusions as to different uses,¹⁶⁷ and in two cases the court did not reach a conclusion as to the fairness of the defendant's use.¹⁶⁸ (These statistics are summarized in Table 7, below.) This Section looks at these cases more closely, both in terms of the types of works involved and in terms of whether and how appeals courts in those cases consider the relationship of the amount used to the defendant's purpose.

1. *Quotation or Citation of Campbell*

Overall, opinions evaluating a defendant's use of the plaintiff's entire work do not appear to have used *Campbell's* reasonableness analysis more often than opinions evaluating use of less than an entire work. Of the thirty-four cases in which a defendant used an entire work, eighteen (or about half) of the opinions quoted or cited *Campbell*, directly or

165. *Diversey v. Schmidly*, 738 F.3d 1196, 1204 (10th Cir. 2013); *Balsley v. LFP, Inc.*, 691 F.3d 747, 761 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1192 (9th Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 309 (3d Cir. 2011); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 581 (6th Cir. 2007); *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 782 (9th Cir. 2006); *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005); *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 631 (7th Cir. 2003); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003) (use of photo in its entirety, though use of music and film and TV clips was often only part of the entire work); *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 98–99 (2d Cir. 2002); *Davis v. Gap, Inc.*, 246 F.3d 152, 176 (2d Cir. 2001); *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267, 1275 (11th Cir. 2001); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1120 (9th Cir. 2000); *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1337 (9th Cir. 1995); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 932 (2d Cir. 1994).

166. *Kienitz v. Scionie Nation LLC*, 766 F.3d 756 (7th Cir. 2014); *HathiTrust*, 755 F.3d at 105; *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 92 (2d Cir. 2014); *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1069 (9th Cir. 2014); *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 949–50 (4th Cir. 2014); *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1181 (9th Cir. 2013); *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630, 645 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003); *Bond v. Blum*, 317 F.3d 385, 397 (4th Cir. 2003); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000); *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 207 (4th Cir. 1998).

167. *Cariou v. Prince*, 714 F.3d 695, 712 (2d Cir. 2013) (reversing district court and finding twenty-five uses fair; vacating and remanding as to five other uses); *Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010) (films not fair use, lobby displays fair use).

168. *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002); *Ringgold v. Black Entm't TV, Inc.*, 126 F.3d 70 (2d Cir. 1997).

indirectly, on reasonableness.¹⁶⁹ Similarly, of the twenty-six cases in which a defendant did not use an entire work, about half of the opinions (fourteen) quoted or cited *Campbell*, directly or indirectly, on reasonableness.¹⁷⁰

As discussed above, courts appear more likely to quote or cite *Campbell* on the reasonableness approach in decisions that find a use to be fair than in decisions finding the use unfair.¹⁷¹ That appears to be true in the “entire work” cases as well. Of the sixteen cases finding at least one of the defendant’s uses of an entire work to be fair,¹⁷² thirteen directly or indirectly quote or cite *Campbell* on reasonableness.¹⁷³ By contrast, in the sixteen cases finding the defendant’s uses of an entire work not to be fair,¹⁷⁴ only five of the opinions quote or cite *Campbell*, directly or indirectly, on reasonableness (or at least state the principle, though without citation).¹⁷⁵

169. Of the cases cited in notes 165 through 168, *supra*, *Campbell* is quoted or cited, directly or indirectly, for reasonableness in eighteen cases. *Swatch Grp. Mgmt. Servs.*, 756 F.3d at 89; *HathiTrust*, 755 F.3d at 96; *Bouchat*, 737 F.3d at 937; *Seltzer*, 725 F.3d 1170; *Cariou*, 714 F.3d at 710; *Bouchat*, 619 F.3d at 308; *iParadigms*, 562 F.3d at 639; *Perfect 10, Inc.*, 508 F.3d 1146; *Wall Data Inc.*, 447 F.3d at 780; *Bill Graham Archives*, 448 F.3d at 613; *Chi. Bd. of Educ.*, 354 F.3d at 629; *Elvis Presley Enters.*, 349 F.3d at 630; *Kelly*, 336 F.3d at 820; *Bond*, 317 F.3d at 396; *Núñez*, 235 F.3d at 24; *Worldwide Church of God*, 227 F.3d at 1118; *Sundeman*, 142 F.3d at 206; *Texaco*, 60 F.3d at 926. For an explanation of when an opinion is counted as citing *Campbell* on reasonableness, see note 94, *supra*.

170. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1271 (11th Cir. 2014); *SOFA Entm’t, Inc. v. Dodger Prods.*, 709 F.3d 1273, 1279 (9th Cir. 2013); *Soc’y of the Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 63 (1st Cir. 2012); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 693 (7th Cir. 2012); *Gaylord v. United States*, 595 F.3d 1364, 1375 (Fed. Cir. 2010); *Peter Letterese & Assoc., Inc. v. World Inst. of Scientology Enters., Int’l*, 533 F.3d 1287, 1314 (11th Cir. 2008); *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006); *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 480 (2d Cir. 2004); *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792, 803 (9th Cir. 2003); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 941 (9th Cir. 2002); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1274 (11th Cir. 2001); *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 144 (2d Cir. 1998); *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 (2d Cir. 1998); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997).

171. See text accompanying notes 105–110.

172. See notes 166 and 167, *supra*.

173. *Swatch Grp. Mgmt. Servs.*, 756 F.3d at 89; *HathiTrust*, 755 F.3d at 96; *Bouchat*, 737 F.3d at 937; *Seltzer*, 725 F.3d 1170; *Cariou*, 714 F.3d at 710; *Bouchat*, 619 F.3d at 208; *iParadigms*, 562 F.3d at 639; *Perfect 10, Inc.*, 508 F.3d at 1167; *Bill Graham Archives*, 448 F.3d at 613; *Kelly*, 336 F.3d at 820; *Bond*, 317 F.3d at 396; *Núñez*, 235 F.3d at 24; *Sundeman*, 142 F.3d at 206.

174. See note 165, *supra*.

175. *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769 (9th Cir. 2006); *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622 (9th Cir. 2003); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

2. *Types of Work Used*

One important dimension on which these cases can be analyzed is the type of copyrighted work that the defendant has used. A wide variety of types of works are involved—including motion pictures, computer software, sculptural works, musical compositions, and sound recordings. But in over two-thirds (twenty-four¹⁷⁶ out of thirty-four) of the “entire work” cases, the plaintiff’s work at issue is either a still image or a text.

a. *Still Images*

The largest share of the cases considering use of the entire work (fifteen of thirty-four) involved the use of still images. In ten cases, the works were photographs,¹⁷⁷ including some shot as artworks, some shot for magazine reporting, some shot for publicity purposes, some personal snapshots, and some classified as adult entertainment. In five cases, the works were graphic images, including the design for a football team logo,¹⁷⁸ posters and tickets for Grateful Dead concerts,¹⁷⁹ the design of a quilt,¹⁸⁰ and a poster showing a drawing of a screaming face.¹⁸¹

Seven of the decisions found the defendant’s use of the entire image fair,¹⁸² five found the defendant’s use not fair,¹⁸³ two found some of the defendant’s uses fair and others unfair (or not shown to be fair),¹⁸⁴ and one did not decide the merits of the fair use claim.¹⁸⁵

The differences in results do not seem to depend significantly on

176. See notes 177–181 and 212–217, *infra*.

177. *Kienitz v. Scion Nation LLC*, 766 F.3d 756 (7th Cir. 2014); *Cariou*, 714 F.3d 695, *Perfect 10, Inc.*, 508 F.3d 1146, *Kelly*, 336 F.3d 811, *Núñez*, 235 F.3d 18, *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012), *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164 (9th Cir. 2012), *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3d Cir. 2011), *Greenberg v. Nat’l Geographic Soc’y*, 244 F.3d 1267 (11th Cir. 2001), *Elvis Presley Enters.*, 349 F.3d 622.

178. *Bouchat*, 737 F.3d 932; *Bouchat*, 619 F.3d 301.

179. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

180. *Ringgold v. Black Entm’t TV, Inc.*, 126 F.3d 70 (2d Cir. 1997).

181. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013).

182. *Bouchat*, 737 F.3d at 949–50; *Kienitz*, 766 F.3d at 759–60; *Seltzer*, 725 F.3d at 1181; *Perfect 10, Inc.*, 508 F.3d at 1170; *Bill Graham Archives*, 448 F.3d at 615; *Kelly*, 336 F.3d at 822; *Núñez*, 235 F.3d at 25.

183. *Balsley v. LFP, Inc.*, 691 F.3d 747, 761 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1192 (9th Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 309 (3d Cir. 2011); *Greenberg v. Nat’l Geographic Soc’y*, 244 F.3d 1267 (11th Cir. 2001); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003).

184. *Cariou v. Prince*, 714 F.3d 695, 712 (2d Cir. 2013); *Bouchat v. Balt. Ravens Ltd. P’ship*, 619 F.3d 301, 317 (4th Cir. 2010).

185. *Ringgold*, 126 F.3d 70.

whether or how substantially the defendant altered the plaintiff's image. In only four of the fifteen cases are the defendants' uses described by the court as altering the plaintiffs' image beyond minor cropping or changes in resolution.¹⁸⁶ Some alterations were so substantial that the court found that little if any of the plaintiff's copyrighted expression was recognizable in the defendant's use.¹⁸⁷ Some alterations were substantial,¹⁸⁸ but the plaintiff's work was "nonetheless clearly identifiable" in the defendant's use.¹⁸⁹ One alteration involved animating a still photograph as part of an audiovisual work.¹⁹⁰ And in one case, some of the defendant's uses of the plaintiff's photographs involved substantial alterations while other challenged uses did not.¹⁹¹

Three of the four cases in which the defendant substantially altered the plaintiff's image found some or all of the defendant's uses to be

186. *Kienitz*, 766 F.3d at 759; *Seltzer*, 725 F.3d at 1174; *Cariou*, 714 F.3d at 710; *Greenberg*, 244 F.3d 1267. Other cases involve uses of the plaintiff's image in the defendant's work that may be fleeting, out-of-focus, or partial, but as these do not appear to involve intentional alteration of the plaintiff's image, I have not classified them as involving alteration. *Bouchat*, 737 F.3d 932; *Bouchat*, 619 F.3d 301; *Ringgold*, 126 F.3d 70.

187. *Kienitz*, 766 F.3d 756. The court concluded that the defendant altered the plaintiff's publicity portrait of the Madison, Wisconsin mayor's face of so substantially that "[w]hat is left [of the plaintiff's photo in the image on the defendant's t-shirt], besides a hint of [the mayor's] smile, is the outline of his face, which can't be copyrighted." *Id.* at 759. Given this analysis, it is not clear whether the defendant's use was even infringing; if not, no claim of fair use would be necessary.

188. *Seltzer*, 725 F.3d at 1174. The defendant's video footage featured a version of the plaintiff's poster *Scream Icon*. Staub, who created the accused video, "cut out the image of *Scream Icon* [from a photograph of it on street corner] and modified it by adding a large red "spray-painted" cross over the middle of the screaming face. He also changed the contrast and color and added black streaks running down the right side of the face. Staub's image further differs from *Scream Icon* because Staub's original photograph was of a weathered, slightly defaced, and torn poster." *Id.*

189. *Id.*

190. *Greenberg*, 244 F.3d at 1269. Plaintiff photographer Greenberg had taken a photo of a diver that appeared on the cover of *National Geographic* magazine in 1962, and that later appeared in the introductory sequence for *The Complete National Geographic* ("CNG"), a thirty CD-ROM set containing a digital image of every issue of the magazine from 1888 to 1996.

The [defendant's moving covers] Sequence is an animated clip that plays automatically when any disc from the CNG library is activated. The clip begins with the image of an actual cover of a past issue of the [National Geographic] Magazine. This image, through the use of computer animation, overlappingly fades ("morphs") into the image of another cover, pauses on that cover for approximately one second, and then morphs into another cover image, and so on, until 10 different covers have been displayed. One of the cover images used in the moving covers sequence is a picture of a diver that was taken by Greenberg in 1961. The entire sequence lasts for 25 seconds, and is accompanied by music and sound effects.

Id.

191. *Cariou*, 714 F.3d at 710 ("Many of Prince's works use Cariou's photographs . . . in whole or substantial part. In some works . . . Prince did not alter the source photograph very much at all. In others . . . the entire source photograph is used but is also heavily obscured and altered to the point that Cariou's original is barely recognizable.").

fair.¹⁹² Of the remaining ten cases in which the court reached the merits of the fair use claim involving the defendant's use of the plaintiff's entire image without alteration, five found the use fair,¹⁹³ four found the use not fair,¹⁹⁴ and one found some uses fair and some uses unfair.¹⁹⁵ Given the variety in the level of alterations made by defendants whose uses were found to be fair, and the fact that in most of the cases where a defendant's use of the plaintiff's entire image was found to be fair the defendant did not alter the image, the degree of the defendant's alteration of the plaintiff's photograph does not seem to be driving the decision as to whether the use is fair.

In any event, *Campbell's* reasonableness inquiry does not seem to have played a significant role in deciding how to evaluate the third factor when the defendant used an *altered* version of the plaintiff's entire image. None of the four cases involving substantial alterations by the defendant¹⁹⁶ expressly discusses whether the amount that the defendant used was reasonable in light of the purpose. One of those cases states that the defendant's use of the entire work was "necessary" to achieve the defendant's purpose without offering any explanation or analysis of *why* that was so.¹⁹⁷ A second case rejected the district court's view that the portion the defendant took "was substantially greater than necessary," but did so not based on any express inquiry into whether the amount taken was reasonable.¹⁹⁸

Campbell's reasonableness approach does seem to have played a significant role, however, in decisions finding that the use of an entire image without alteration was fair. Courts in many of those cases

192. *Kienitz*, 766 F.3d at 759; *Seltzer*, 725 F.3d at 1174; *Cariou*, 714 F.3d at 710. The use of the plaintiff's photo was found not to be fair in *Greenberg*, 244 F.3d 1267.

193. *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932, 949–50 (4th Cir. 2014); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000).

194. *Balsley v. LFP, Inc.*, 691 F.3d 747, 761 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1192 (9th Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 309 (3d Cir. 2011); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 631 (9th Cir. 2003).

195. *Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301, 317 (4th Cir. 2010).

196. See note 186, *supra*.

197. *Seltzer*, 725 F.3d at 1178–79.

198. *Cariou v. Prince*, 714 F.3d 695, 710 (2d Cir. 2013) (quoting *Cariou v. Prince*, 784 F. Supp. 2d 337, 352 (S.D.N.Y. 2011)). Instead, the court explained that the defendant was allowed "to 'conjure up' at least enough of the original to fulfill its transformative purpose" and that the defendant's use was in fact transformative. *Id.* (emphasis in original). The court may have concluded that the amount taken was reasonable to fulfill the transformative purpose, but at best it did so implicitly.

expressly related the third-factor inquiry to the defendant's purpose as *Campbell* directs. For example, in the *Bill Graham Archives* case, the defendant reproduced several of the plaintiff's copyrighted Grateful Dead concert posters in its 480-page illustrated history of the band.¹⁹⁹ In evaluating the first factor, the court concluded that the defendant's use of the images to illustrate its historical volume was use for a transformative purpose.²⁰⁰ When the court turned to the third factor, it "conclude[d] that such use by [the defendant] is tailored to further its transformative purpose because [the defendant's] reduced size reproductions of [plaintiff's] images in their entirety displayed the minimal image size and quality *necessary to ensure* the reader's recognition of the images as historical artifacts of Grateful Dead concert events."²⁰¹ Other courts found the amount of the defendant's use reasonable, and found the use to be fair, when the defendant was using the entire image for what the court viewed as transformative purposes, such as indexing images on the internet²⁰² and news reporting.²⁰³

The two decisions in *Bouchat v. Baltimore Ravens Limited Partnership*²⁰⁴ offer an instructive contrast that shows the relationship of the reasonableness analysis to the defendant's purpose. Both cases involved claims that the defendant football team infringed the copyright in the plaintiff's team logo by using the logo in highlight films and in historical exhibits at the defendant's stadium. The court found the use of the logo in historical exhibits to be fair use in both cases, but with respect to the highlight films, the earlier decision found that the defendant's use was not fair, while the later decision found the use fair. In all three instances when the court found the use of the entire logo to be fair, the court found that the third factor was "neutral,"²⁰⁵ of "very little weight,"²⁰⁶ "of no help to plaintiff,"²⁰⁷ and in each instance that conclusion was based on the fact that the defendant needed to use the

199. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006). The defendant also used an image of a Grateful Dead concert ticket. *Id.*

200. *Id.* at 609–11.

201. *Id.* at 613 (emphasis added).

202. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

203. *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

204. *Bouchat v. Balt. Ravens Ltd. P'ship*, 737 F.3d 932 (4th Cir. 2014); *Bouchat v. Balt. Ravens Ltd. P'ship*, 619 F.3d 301 (4th Cir. 2010).

205. *Bouchat*, 619 F.3d at 315.

206. *Bouchat*, 737 F.3d at 943.

207. *Id.* at 949.

entire logo to “fulfill” a “legitimate transformative purpose.”²⁰⁸ In the one instance in which the court did not find the defendant’s use fair, it weighted the third factor against fair use, and did so because it viewed the defendant’s use as not for a transformative purpose.²⁰⁹ Indeed, in most of the cases where the defendant’s use of an entire still image was found not to be fair, the court weighted the first fair use factor—the purpose of the use—against the defendant,²¹⁰ and in evaluating the third factor usually viewed the defendant as having used more than was reasonable in light of the defendant’s purpose.²¹¹

Campbell’s reasonableness approach thus seems to be important in the fair use determination in many of the cases involving the defendant’s use of the plaintiff’s entire still image.

b. *Literary Works*

The second largest share of the cases considering use of the entire work (nine out of thirty-four) involved the use of texts. Two-thirds of these cases involved relatively long literary works. Three involved published books (and one of those three, *HathiTrust*, involves millions of published books),²¹² two involved unpublished book-length manuscripts,²¹³ and one involved a doctoral dissertation.²¹⁴ Shorter but still substantial literary works, including scientific journal articles²¹⁵ and multiple-choice school examinations, featured in two other cases.²¹⁶ Only one case appears to involve relatively short literary works: papers

208. *Bouchat*, 619 F.3d at 315; *Bouchat*, 737 F.3d at 943, 949.

209. *Bouchat*, 619 F.3d at 311–12.

210. *Balsley v. LFP, Inc.*, 691 F.3d 747, 758–59 (6th Cir. 2012); *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1173–77 (9th Cir. 2012); *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 306–08 (3d Cir. 2011); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 628–29 (9th Cir. 2003); *Greenberg v. Nat’l Geographic Soc’y*, 244 F.3d 1267, 1274–75 (11th Cir. 2001) (describing the use as “transformative” but indicating that the transformation “transcends a use that is fair within the context of § 107”).

211. *Monge*, 688 F.3d at 1179; *Elvis Presley Enters.*, 349 F.3d at 630. In at least one instance, the court weighted factor three against fair use without any analysis of the reasonableness of the amount the defendant used in light of the purpose. *Murphy*, 650 F.3d at 309.

212. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Merkos L’Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1112 (9th Cir. 2000) (380 pages).

213. *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003); *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194 (4th Cir. 1998).

214. *Diversey v. Schmidly*, 738 F.3d 1196 (10th Cir. 2013).

215. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

216. *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003).

written by students to satisfy school assignments.²¹⁷

Four of the decisions found the defendant's use of the entire text to be fair,²¹⁸ and five found the defendant's use not fair.²¹⁹ Interestingly, three of the four uses found fair involved use of entire books or entire unpublished book manuscripts, and only one involved use of relatively short works (students' school papers). A common feature of the four uses found fair, however, is that in each case, the defendant's use did not expose the plaintiff's work to the general public. In *HathiTrust*, the defendant's use in a search engine of the full text of published books it had scanned allowed the public only to identify on which pages of which books a search term appears.²²⁰ *Bond v. Blum*²²¹ involved the submission of a copy of the plaintiff's manuscript memoir (*Self-Portrait of a Patricide: How I Got Away with Murder*) into evidence in a court proceeding over child custody, where the manuscript would apparently only be available in the court file.²²² And in *Sundeman* an archive that possessed the fragile manuscript of a deceased author's unpublished first novel copied the manuscript for a scholar who was preparing a scholarly review of the novel, which was presented at a conference and not further disseminated.²²³ Even the shorter works at issue in *A.V. v. iParadigms, LLC*,²²⁴ the student papers, were stored by the defendant only so that papers submitted to the defendant's plagiarism detection service in the future could be compared against prior submissions; only if plagiarism were suspected would the plaintiffs' works be disseminated outside the defendant's company, and then only to the teacher to whom the potentially plagiarized paper was submitted.²²⁵

By contrast, in four of the five cases in which the defendant's use of an entire literary work was not found to be fair use, the defendant's use made the plaintiff's work more widely available. In two cases, both

217. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

218. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *iParadigms*, 562 F.3d 630; *Bond*, 317 F.3d 385; *Sundeman*, 142 F.3d 194.

219. *Diversey*, 738 F.3d 1196; *Chi. Bd. of Educ.*, 354 F.3d 624; *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

220. *HathiTrust*, 755 F.3d at 91. Access to the full text of the plaintiff's books was limited to the defendant libraries' patrons with certified print disabilities. *Id.*

221. 317 F.3d 385 (4th Cir. 2003).

222. *Id.* at 390.

223. *Sundeman*, 142 F.3d at 199.

224. 562 F.3d 630 (4th Cir. 2009).

225. *Id.* at 641.

involving religious texts, the defendant was selling copies of the defendant's entire book,²²⁶ while in one other case the defendant published the plaintiff's multiple-choice exams in the defendant's newspaper.²²⁷ And in a fourth case, the defendant made the plaintiff's unpublished doctoral dissertation available to the general public in its university library.²²⁸ Of the cases finding against fair use, only in the *Texaco* case, involving the defendant oil company's copying of articles in scientific journals for the internal use of its own research scientists, did the defendant's use not make the plaintiff's work more publicly available.²²⁹

The courts finding fair use of an entire literary text generally used *Campbell's* reasonableness inquiry in their analysis of factor three. In *HathiTrust* and *Sundeman*, as discussed above, the court expressly concluded that the defendant's use of the entire work was reasonable in light of the purpose for the defendant's use. The *HathiTrust* defendants needed to scan and index the books in their libraries in their entirety in order to make full-text searching available.²³⁰ In *Sundeman* the archive needed to make a complete copy of the fragile manuscript in order for the reviewer to create a critical review of the novel.²³¹ In *iParadigms*, the circuit court didn't itself address the reasonableness of the defendant's use of entire student papers, but it expressly approved of the analysis in the district court, which had concluded that the defendant "must" use the plaintiff's entire works in order to achieve its purpose of detecting suspected plagiarism.²³² Only the *Bond* opinion does not address the reasonableness of the defendants' use to achieve their purpose, but the court's factor three analysis in that case did look to the defendants' purpose, explaining that the "sole purpose and intent of introducing Bond's manuscript [into evidence in the child custody case]

226. *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002), *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000). In *Merkos*, the defendant's version of the prayerbook, which apparently included additional material beyond the translation copied from the plaintiff, was apparently sold in competition with the plaintiffs, while in *Worldwide Church of God* the defendant was distributing copies of a religious text that the plaintiff had removed from circulation.

227. *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624 (7th Cir. 2003).

228. *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013). It is unclear from the opinion whether the dissertation was available only to be read at the library, or whether it could be borrowed.

229. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

230. See text accompanying notes 269–274, *infra*.

231. *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194, 205–06 (4th Cir. 1998).

232. See text accompanying notes 279–280, *infra*.

was to obtain admissions of fact against [Bond's] interest in an effort to prove that his home would not be a suitable place for the custody of children," and concluding that use of the plaintiff's work for that purpose would not "undermine the protections of the [Copyright] Act."²³³

Overall, then, the *Campbell* approach has played a significant role in cases concluding that the use of an entire literary work is fair. The factor three analysis in these cases appears to focus less on simply *how much* of the plaintiff's work the defendant has copied, and more on how, and *how publicly*, the defendant is using the work. The less the purpose of the defendant's use requires disseminating the plaintiff's work publicly, the more likely it seems that the defendant's use of the entire work may be found reasonable in light of the defendant's purpose.

c. Other Types of Works

The remaining ten "entire work" cases involve a scattering of different types of works. One involved broadcast television programming, and the use at issue was treated as essentially the same as the time-shifting approved in *Sony*.²³⁴ Three involved computer software. One of these found a defendant who made intermediate copies of computer software in the course of reverse engineering it in order to write a noninfringing compatible computer program had engaged in fair use.²³⁵ In the other two software cases, fair use was not found where a defendant installed multiple copies of software beyond those it had licensed from the copyright owner²³⁶ and where a defendant made copies of software while providing computer maintenance and repair services to those who had licensed the software.²³⁷ Two involved "sculptural" works—stuffed Beanie Babies in one case,²³⁸ and "sculptured metallic ornamental wearable art" described by the court as "eye jewelry" in the other²³⁹—and both cases considered the defendants' uses to be photographs of the "entire" works (though it seems unclear whether a single photograph could capture the entirety of a three-dimensional sculptural work). Three cases involved music: two cases challenging

233. *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003).

234. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1070 (9th Cir. 2014).

235. *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 609 (9th Cir. 2000).

236. *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 778–82 (9th Cir. 2006).

237. *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1336 (9th Cir. 1995).

238. *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002).

239. *Davis v. Gap, Inc.*, 246 F.3d 152, 176 (2d Cir. 2001).

peer-to-peer file exchange were brought in one instance by owners of copyrights in both sound recordings and musical works²⁴⁰ and in the other by sound recording copyright owners alone,²⁴¹ and one case challenged the defendant karaoke recording supplier's use of the plaintiff's copyrighted musical works.²⁴² In all three cases, the court found the challenged uses were not fair. And one case involved a sound recording, not of music but of a company's conference call with investors regarding its quarterly earnings report, and the use of that entire recording by a subscription financial news service was found to be fair.²⁴³

Table 7 summarizes the outcomes of cases where the defendant used the plaintiff's entire work, broken down by the main categories of works used. The figure in parentheses in each cell indicates the number of opinions in which the court cited or quoted, directly or indirectly, the *Campbell* reasonableness approach.

Table 7

| | Fair Use | Mixed Outcome | Not Fair Use | Merits Not Decided | Totals |
|--------------|----------|---------------|--------------|--------------------|---------|
| Still Images | 7 (6) | 2 (2) | 5 (1) | 1 | 15 |
| Texts | 4 (4) | | 5 (3) | | 9 |
| Other | 3 (1) | | 6 (1) | 1 | 10 |
| Totals | 14 (11) | 2 (2) | 16 (5) | 2 | 34 (18) |

3. Reasonableness and Use of Entire Visual Work

Several opinions reviewing fair use claims by a defendant who used an entire visual work identify the copyrighted visual work as essentially indivisible, and expressly take this indivisibility into account in the factor three analysis analyzing whether the defendant used a reasonable amount.

The Ninth Circuit offered perhaps the most express statement of this position in *Seltzer v. Green Day*, in which the video backdrop for the defendant band's concerts featured a nearly complete (though somewhat altered) copy of the plaintiff's work *Scream Icon*, a drawing of a

240. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

241. *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

242. *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 581 (6th Cir. 2007).

243. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 78 (2d Cir. 2014).

screaming, contorted face.²⁴⁴

[U]nlike an episode of [a television show] or a book manuscript, [the plaintiff's drawing] *Scream Icon* is not meaningfully divisible. Given that fact, . . . this factor will not weigh against an alleged infringer, even when he copies the whole work, if he takes no more than is necessary for his intended use.²⁴⁵

Other appellate courts have at least suggested a similar approach for still photographs.²⁴⁶ And the Ninth Circuit offered an extended discussion of this issue in the context of sculptural works in *Mattel Inc. v. Walking Mountain Productions*.²⁴⁷ The plaintiff's copyrighted sculptural work in that case was the familiar Barbie doll, and the defendant was accused of infringing the copyright by producing a series of photographs called "Food Chain Barbie" that "depicted Barbie in various absurd and often sexualized positions," including "in danger of being attacked by vintage household appliances."²⁴⁸

Mattel's argument that [the defendant] could have taken a lesser portion of its work attempts to benefit from the somewhat unique nature of the copyrighted work in this case. Copyright infringement actions generally involve songs, video, or written works. Because parts of these works are naturally severable, the [defendant's] new work can easily choose portions of the

244. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013)

245. *Id.* at 1178.

246. In *Balsley v. LFP, Inc.*, 691 F.3d 747, 760 n.2 (6th Cir. 2012), the court noted that "[o]ther courts have suggested that [the third] factor may be of lesser import where the publication of a photograph is involved, because a photograph's value usually lies only in its full reproduction." The Sixth Circuit stated that "[e]ven if we were to agree with this point," it "merely diminishes the extent to which this factor weighs in Plaintiff's favor." *Id.*

247. *Mattel Inc. v. Walking Mt. Prods.*, 353 F.3d 792 (9th Cir. 2003). I have not categorized *Mattel* as an entire work case, because the Ninth Circuit rejected Mattel's argument that the defendant's photographs used the entire work: "A verbatim copy of Barbie would be an exact three dimensional reproduction of the doll. Forsythe did not display the entire Barbie head and body in his photographs. Parts of the Barbie figure are obscured or omitted depending on the angle at which the photos were taken and whether other objects obstructed a view of the Barbie figure." *Id.* at 803–04. This approach seems more nuanced than Judge Posner's view in *Ty, Inc. v. Publications International Ltd.*, 292 F.3d 512 (7th Cir. 2002). That case also involved photographs of sculptural works—Beanie Babies stuffed animals. The court stated that "[f]actor (3) is inapplicable to Beanie Babies, each one of which is copyrighted separately, so that there can be no partial copying as a matter of fact (no one, we imagine, wants a photograph of part of a Beanie Baby)." *Id.* at 522. Indeed, the one allegedly infringing photograph reproduced in the court's opinion, *id.* at 525, depicts a number of Beanie Baby toys, and, to paraphrase the *Mattel* opinion, parts of some of the stuffed animals are obscured or omitted because of the angle at which the photo was taken and because objects obstruct the view of some the stuffed animals. Because the *Ty* court treats the defendant as having used the entire work, I have counted the case as an entire work case.

248. *Mattel Inc.*, 353 F.3d at 796.

original work and add to it. Here because the copyrighted material is a doll design and the infringing work is a photograph containing that doll, [the defendant], short of severing the doll, must add to it by creating a context around it and capturing that context in a photograph.²⁴⁹

The court concluded that the defendant had indeed incorporated Barbie into new works “imbued with a different character.”²⁵⁰

While the indivisible nature of a visual work may well be relevant in analyzing the third fair use factor, the outcomes of the cases show that such indivisibility does not necessarily mean that the defendant’s use is fair. Seventeen of the thirty-four entire work cases involve use of the entirety of a visual work.²⁵¹ Seven of the decisions found the defendant’s use of the entire work fair,²⁵² six found the defendant’s use not fair,²⁵³ two found some of the defendant’s uses fair and others unfair (or not shown to be fair),²⁵⁴ and two did not decide the merits of the fair use claim.²⁵⁵ Thus, even if the defendant’s use of a plaintiff’s entire work has a stronger claim to reasonableness in relation to purpose because the work is an indivisible visual work, such a use will not necessarily be found to be fair.

C. *Factor Three and New Technological Uses of Entire Works*

Campbell’s approach appears to be particularly important in cases where a defendant is using others’ copyrighted works in ways enabled by new technologies, because in many of the cases challenging these uses, the defendant is using the entire copyrighted work.

In several cases, the defendants arguably used new technology in a manner similar to earlier uses of older technology, and the technological aspects of the defendant’s use do not seem to make much difference to the outcome of the case.²⁵⁶ For example, a defendant’s posting a text or

249. *Id.* at 804.

250. *Id.* The court concluded that the defendant’s use was fair.

251. *See* notes 177, 178–181, and 238–239 *supra*.

252. *See* note 182, *supra*.

253. *See* notes 183 and 239, *supra*.

254. *See* note 184, *supra*.

255. *See* notes 185 and 238, *supra*.

256. Unlike the cases discussed in the remainder of this section, in some of the cases identified in this paragraph the defendant used the plaintiff’s entire work—*i.e.*, *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295 (3d Cir. 2011); *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014)—and in others the defendant used only portions of the plaintiff’s work—*i.e.*, *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Soc’y of the Holy*

an image on her website does not seem particularly different from publishing that same text in printed form.²⁵⁷ Similarly, showing previews of movies available for rental at a movie rental store does not seem particularly different when those previews are shown on the rental store's website rather than on monitors in the physical store itself.²⁵⁸ Recording broadcast television programs for time-shifting purposes on a *digital* video recorder seems highly analogous to doing so on an *analog* videocassette recorder.²⁵⁹ And making copies of academic publications available on electronic reserves does not seem that different from putting physical copies on reserve in a university library, at least with respect to evaluating the amount and substantiality of the portion used by the defendant.²⁶⁰

Seven cases in the study, though, involve uses of new technologies that differ substantially from those that came before. Many of those cases raise novel questions of how to evaluate factor three not just because of the new technology, but because the defendants in those cases used the entirety of the plaintiffs' copyrighted works. These cases involved a variety of different uses of different kinds of works:

- In *HathiTrust*,²⁶¹ the defendants scanned the entire contents of the books held in several academic libraries and created an online repository. Users could search the full-text of the scanned volumes and determine the pages on which the search terms appear, though the search results did not include any of the text from the book. Certified print-disabled users could obtain access to the full text (or in some cases the scanned images) of books.

Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29 (1st Cir. 2012); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191 (3d Cir. 2003). I have also not treated as "new" technology cases during the 1994 to 2014 period karaoke devices (involved in *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 581 (6th Cir. 2007)) or reverse engineering of computer software (involved in *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596, 609 (9th Cir. 2000)).

257. See, e.g., *Gregory*, 689 F.3d 29 (defendant posted plaintiff's translation of religious text online); *Murphy*, 650 F.3d 295 (defendant posted plaintiff's photograph of radio disc jockeys on radio station's website). The outcomes in these cases do not seem substantially different from those in cases of similar use in old technologies. See, e.g., *Balsley v. LFP, Inc.*, 691 F.3d 747 (6th Cir. 2012) (defendant printed plaintiff's photograph of TV news reporter); *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94 (2d Cir. 2002) (defendant printed copies of plaintiff's translation of religious text).

258. *Video Pipeline, Inc.*, 342 F.3d 191.

259. *Fox Broad. Co.*, 747 F.3d at 1070.

260. *Cambridge Univ. Press*, 769 F.3d 1232. Handling reserves electronically might have differences from physical reserves that would be relevant to other fair use factors.

261. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

- In *Swatch Group Management Services Ltd. v. Bloomberg L.P.*,²⁶² the defendant financial news service posted online for its subscribers a complete sound recording (and written transcript) of a 132-minute conference call between Swatch executives and investment analysts in which the executives discussed Swatch's annual earnings report.²⁶³
- In *iParadigms*,²⁶⁴ the defendant plagiarism detection company reviewed electronic copies of written assignments by students to assess whether the assignment had been plagiarized. In many instances the defendant retained an electronic copy of the entire student paper it reviewed in order to compare those papers against future submissions to its plagiarism-checking service.
- In both *Perfect 10, Inc. v. Amazon.com, Inc.*²⁶⁵ and *Kelly v. Arriba Soft Corp.*,²⁶⁶ the defendant search engines made thumbnail copies of images posted on publicly available websites, and displayed those thumbnail copies in the search results shown to users of their image search engines when the images were relevant to a user's search terms.
- In both *BMG Music v. Gonzalez*²⁶⁷ and *A&M Records, Inc. v. Napster, Inc.*,²⁶⁸ the defendant (or, in Napster's case, the users of the defendant's system) used peer-to-peer software to download entire phonorecords of copyrighted musical recordings, and made those phonorecords available to other users of the software to download in their entirety.

All of these uses were challenged by copyright owners, and in all but two of the cases (the peer-to-peer cases), the reviewing courts concluded that the defendant's use was fair, even though the defendant was copying the entirety of the plaintiff's work. In all five cases in which the defendant prevailed, the appeals court concluded that the third factor did not weigh against fair use because the amount copied was reasonable in light of the use to which the defendant put the copy.

262. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 78 (2d Cir. 2014).

263. Neither telephone conference calls nor recordings of them involve new technologies, but it seems highly unlikely that a financial news service would have used the entirety of a two-hour-plus conference call in a radio or television report. Instead, the use of the entire recording seems facilitated entirely by availability of internet technology for dissemination of information by the financial news service.

264. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

265. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

266. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

267. *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

268. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

In the *HathiTrust* case, the Second Circuit expressly evaluated the third fair use factor along the lines discussed in *Campbell*. Although the defendants maintained complete digital copies of the works in their libraries, the court determined that “[b]ecause it was reasonably necessary for the [HathiTrust Digital Library (HDL)] to make use of the entirety of the works in order to enable the full-text search function, we do not believe the copying was excessive.”²⁶⁹ Indexing only *parts* of the books in the library collections would obviously frustrate the goal of allowing patrons to search the *full text* of those books. The copyright owners challenging HathiTrust’s use also argued that the amount of the defendants’ use should weigh against fair use because the defendants stored not only the full text of the copyrighted volumes, but also the images of each page scanned from the physical book.²⁷⁰ Again, the court looked to the purpose for maintaining copies of the image files. Doing so allowed HathiTrust to provide greater access to the books for those with print disabilities. Many books contain nontextual visual information (charts, illustrations, etc.) that many people with visual impairments could see using the image scans with substantial magnification or manipulation of contrast, and individuals who could see the images but could not hold physical books or turn their pages could use assistive devices to access the scanned images of the books.²⁷¹ This convinced the court that maintaining the image files was reasonable in light of the defendant’s purpose—providing access to individuals with print disabilities: “For those individuals, gaining access to the HDL’s image files—in addition to the text-only files—is necessary to perceive the books fully. Consequently, it is reasonable for the Libraries to retain both the text and image copies.”²⁷² The court expressly concluded that factor three favored a finding of fair use for the defendant’s full-text search use;²⁷³ the court did not expressly state its conclusion as to factor three for the print-disabled services, but its analysis indicates that it did not view that factor as weighing against fair use.²⁷⁴

269. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d Cir. 2014).

270. *Id.* at 102.

271. *Id.* at 102–03.

272. *Id.* at 103. The court also concluded, with respect to both the full-text and image copies of plaintiffs’ works, that the fact that the defendants’ maintained four copies of the repository’s contents (one at each of two online mirror sites available for use, and two in the form of encrypted backup tapes not connected to the Internet) did not tilt factor three against fair use. “We have no reason to think that these copies are excessive or unreasonable in relation to the purposes identified by the Libraries and permitted by the law of copyright.” *Id.* at 99; *see also id.* at 103 n.6.

273. *Id.* at 99.

274. *Id.* 102–03.

Similarly, in *Swatch Group* the Second Circuit evaluated the third factor using *Campbell's* reasonableness approach. In the court's view, "[t]he recording [of the earnings conference call] has independent informational value over and above the value of a written transcript or article."²⁷⁵ In particular, the court observed that "by disseminating a full, unadulterated recording of the earnings call, Bloomberg was able to convey valuable factual information that would have been impaired if Bloomberg had undertaken to alter the speech of the Swatch Group executives by interjecting its own interpretations."²⁷⁶ Using the actual recording, rather than a transcript or an article, allowed the defendant "to convey with precision not only the raw data of the Swatch Group executives' words, but also more subtle indications of meaning inferable from their hesitation, emphasis, tone of voice, and other such aspects of their delivery."²⁷⁷ Consequently, the court found that the defendant's "use of the entire recording was reasonable in light of its purpose of disseminating important financial information."²⁷⁸

The court in *iParadigms* also did not view the defendant's copying of the plaintiff students' entire written assignments as an impediment to finding fair use.²⁷⁹ Although the appeals court did not really discuss the relationship of the defendants' copying to the purpose for its use, it expressly affirmed the district court's analysis, which had considered that relationship and had observed that "[i]n order to be successful in its plagiarism detection services, [iParadigms] must [use the entirety of the plaintiffs' works]."²⁸⁰ And the district court noted that the copies that iParadigms made were used only for comparison purposes in checking future submissions for plagiarism, and could only be viewed (by a teacher) if a future submission indicated the possibility of plagiarism. Thus, the appellate court concluded, while the defendant used the plaintiffs' works in their entirety, that was necessary to achieve the purpose of plagiarism detection and the use was "limited in purpose and scope."²⁸¹ If the defendant had copied only *portions* of student papers

275. *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 90 (2d Cir. 2014).

276. *Id.* at 85. The court made this observation in its discussion of the first factor, but in discussing factor three the court expressly stated that its conclusion that the defendant's taking was reasonable was based on "the reasons already explained in our discussion of the first fair use factor." *Id.* at 90.

277. *Id.* at 84.

278. *Id.* at 90.

279. *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 642 (4th Cir. 2009).

280. *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473, 483 (E.D. Va. 2008).

281. *iParadigms*, 562 F.3d at 642. While the circuit court did not itself discuss the relationship between the defendant's copying and its purpose, it did reject the plaintiff's argument on appeal that

into its database, that of course would not prove especially useful in detecting whether *future* student papers had copied from any of the papers already in the database.

The image search engine cases also found that the defendants' copying of the plaintiffs' entire works did not militate against finding fair use. They did so by following *Campbell's* admonition to consider whether the amount of copying was reasonable given the purpose of the copying (operating an image search engine), which the court had already found was a purpose that favored fair use.²⁸² In *Kelly*, the court explained why the defendant Arriba's copying of the entirety of the plaintiff's images did not weigh against fair use:

[A]lthough Arriba did copy each of Kelly's images as a whole, it was reasonable to do so in light of Arriba's use of the images. It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site. If Arriba only copied part of the image, it would be more difficult to identify it, thereby reducing the usefulness of the visual search engine.²⁸³

The court ruled that factor three favored neither party, and concluded that the defendant's use was fair.²⁸⁴ Four years later, the same court concluded that "the same analysis [of the third factor] applies to Google's use of Perfect 10's image" in Google's visual search engine, and again found that copying entire images for use in a search engine was fair use.²⁸⁵

By contrast to all of these cases, in the two decisions concerning peer-to-peer dissemination of recorded music, the courts concluded that the exchange of complete copies of recorded songs over peer-to-peer networks was not fair use. Neither court offered much express discussion of the third factor in its fair use analysis, and neither expressly considered the amount used in light of the purpose.²⁸⁶ Judge

the district court had improperly considered the transformative nature of the defendant's use in evaluating the third factor: "Plaintiff's argument . . . fails to recognize the overlap that exists between the fair use factors. The first and third factors, for example, take into account to some degree the purpose of the disputed use." *Id.*

282. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–20 (9th Cir. 2003).

283. *Id.* at 821.

284. *Id.*

285. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007).

286. In *Gonzalez*, the court's identification of the defendant's purpose in discussing the first factor was limited to the statement that the defendant "was not engaged in a nonprofit use." *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005).

Easterbrook in *Gonzalez* simply observed that the defendant “downloaded (and kept) whole copyrighted songs (for which, as with poetry, copying of more than a couplet or two is deemed excessive).”²⁸⁷ After the court measured the amount used by the defendant—the whole work—it made no inquiry into the reasonableness of the use of that amount in light of the defendant’s purpose. The court in *Napster* also did not expressly evaluate the amount of the peer-to-peer user’s copying in light of her purpose (either in considering the general fair use analysis or in analyzing the specifically identified uses of sampling and space-shifting). The court merely observed that Napster users engaged in wholesale copying of the plaintiff’s works, which usually, but not always, weighs against fair use.²⁸⁸

This is not to suggest that either of the peer-to-peer cases would have been decided differently if the courts, in considering factor three, had asked whether the defendant used a reasonable amount in light of her purpose. Both courts found in evaluating factor one that the peer-to-peer copier’s purpose did not favor fair use.²⁸⁹ As a result, even if the court had concluded that the user did not copy more than “necessary” to achieve her purpose, it seems likely that factor three could still have weighed against fair use because her purpose was disfavored.²⁹⁰ And because copying the plaintiff’s entire work, as the user did in these cases, ordinarily militates against a finding of fair use, such copying would likely have that ordinary effect where the purpose for the copying was one that weighed against fair use.

All of these cases suggest that, in recent years at least, new digital technologies have often enabled new uses of copyrighted works that allow or require using the entire work. Machine-processed full-text searching or comparison of the kind at issue in *HathiTrust* and *iParadigms* is simply not possible, at least on any sizable scale, except for the fact that the texts are in digital form in their entirety. The existence of a search engine to locate images posted online obviously requires the existence a network like the Internet and the computer

287. *Id.* at 890. Of course, it is not at all clear that copying “more than a couplet or two” of a copyrighted song is necessarily deemed excessive; *Campbell* itself arguably found that a defendant’s copying of “more than a couplet or two” of the plaintiff’s copyrighted song lyrics in that case not only was not excessive but was reasonable. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587–89 (1994).

288. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001).

289. *Gonzalez*, 430 F.3d at 890 (stating as first factor analysis that defendant “was not engaged in a nonprofit use”); *Napster, Inc.*, 239 F.3d at 1015 (upholding district court’s conclusion that peer-to-peer user’s use was not transformative and was commercial).

290. See Part III.C, *supra*.

power and algorithms that enable indexing and searching, and the effectiveness of that search engine clearly depends on using the entire image in the results that the search engine returns. If courts were guided only by *Sony's* principle that copying an entire work ordinarily, but not always, militates against fair use, it might be more difficult in these cases to decide whether the third factor counsels for or against fair use when such uses are challenged. The *Campbell* approach can explain *when* a court should not weigh wholesale copying against fair use—when use of the entire work is reasonable to achieve the purpose for the use.

The possibility for courts to weigh the third statutory factor in favor of (or at least not against) fair use when a defendant copies an entire work may well have continuing importance in resolving infringement claims involving new technologies, given that digital technologies seem likely to continue to allow (or require) making entire copies of works in order to access the work.²⁹¹ For example, space-shifting uses, which appear to be becoming more and more common, involve making complete copies.²⁹² This happens when a user rips an MP3 file from a music track on a compact disc, or copies a legally downloaded MP3 file from the hard drive of the computer to which it was downloaded, in order to be able to listen to the song on a portable digital music player such as an iPod or a tablet or mobile phone.²⁹³ It also happens when a user uploads an MP3 file to a cloud storage service in order to access the song from any Internet-connected device.²⁹⁴ Similarly, a user who backs up computer files that legitimately reside on her hard drive makes complete copies of all of the copyrighted works contained in those backed up files, whether she backs up to an external hard drive or to a cloud backup service.²⁹⁵

291. For a discussion of whether Congress intended personal uses of entire copies of copyrighted works to be within the scope of copyright owners' exclusive rights, see generally Jessica Litman, *Campbell at 21/Sony at 31*, 90 WASH. L. REV. 651 (2015), elsewhere in this symposium.

292. Of course, the time-shifting uses considered in *Sony* involved making complete copies as well, and those copies were found to be noninfringing by application of the fair use doctrine.

293. See, e.g., *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999); see also R. Anthony Reese, *The Temporal Dynamics of "Capable of Substantial Noninfringing Uses,"* 12 MICH. TELECOMM. & TECH. L. REV. 197, 207 (2006) (discussing claims by copyright owners in litigation and rulemaking proceedings that consumer copying of music for personal use is lawful only because authorized by copyright owners).

294. See, e.g., *Am. Broad. Cos., Inc. v. Aereo, Inc.*, ___ U.S. ___, 134 S. Ct. 2498, 2510–11 (2014) (leaving undecided the question of whether a cloud storage service engages in public performance when it transmits to a customer a performance using a file stored on the service by that customer).

295. See, e.g., U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 150 (2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

Few cases involving these issues have been litigated to decision on fair use grounds. At least one court has strongly implied that space-shifting recorded music that one owns constitutes fair use,²⁹⁶ and academics have considered these issues and their implications.²⁹⁷ But if and when courts are squarely presented with the issue of whether such uses are fair, the *Campbell* Court's approach to the third factor should help the courts to think carefully, and less abstractly, about the issue of whether an accused infringer claiming fair use has or has not copied "too much" of the plaintiff's work.

CONCLUSION

The *Campbell* opinion has garnered substantial attention for articulating the importance of transformativeness in fair use analysis. *Campbell's* guidance on how to evaluate the third fair use factor has gotten less notice, but is an important part of the decision's legacy. The Court explained that the statutory question of whether the defendant has taken "too much" of the plaintiff's work should be answered not in the abstract but by judging whether the defendant used an amount that was reasonable in relation to the purpose of her use.

About half of the appellate fair use decisions since *Campbell* have expressly looked to *Campbell's* reasonableness approach in analyzing the third factor. Express consideration of whether the amount the defendant used was reasonable is correlated with the court weighting factor three as favoring fair use (or at least as neutral), and with the court finding the defendant's use fair, though this correlation does not permit any conclusions as to causation.

Campbell's approach has perhaps been most significant when the defendant has used the plaintiff's entire work. While the *Sony* decision made clear that using the entire work did not necessarily doom a fair use claim, it offered no real guidance as to when the use of the entire work should not have its ordinary effect of militating against fair use. *Campbell* indicates that using the entire work might not weigh against fair use if it is reasonable for the defendant to use the entire work in light of the purpose for her use. The importance of the reasonableness

296. *Recording Indus. Ass'n of Am.*, 180 F.3d 1072.

297. See, e.g., Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007); Rebecca Giblin & Jane Ginsburg, *We Still Need to Talk About Aereo*, 38 COLUM. J.L. & ARTS 109 (2015); Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889 (2011); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STANFORD L. REV. 1345 (2004).

approach can be seen in the fact that more than half of the appellate fair use decisions since *Campbell* involve use of the entire work, and nearly half of those “entire work” decisions find the defendant’s use fair.

And the approach to the third factor set forth in *Campbell* appears to have played a role in courts finding fair use where the defendant used the plaintiff’s entire work in a manner enabled by a new technology. In all five of the seven cases in which the court found such use fair, the court analyzed the third factor at least in part in terms of whether the use was reasonable in light of the purpose. If technological developments continue to enable uses that allow or demand the use of entire copyrighted works, *Campbell’s* reasonableness approach likely will remain important in resolving claims that such uses are fair.