

# FAIR USE IN THE 21ST CENTURY: *BILL GRAHAM AND BLANCH V. KOONS*

By Jeannine M. Marques

“You’ve got to ask yourself one question: ‘Do I feel lucky?’ Well, do ya, punk?”<sup>1</sup> In an era in which ninety-two million Americans use the internet daily<sup>2</sup> and in which YouTube is one of the top ten most highly viewed websites internationally,<sup>3</sup> both amateur and professional creators must increasingly wade through the fair use thicket—an arena that countless creators and lawyers alike have characterized as an enigma, a mystery, a fairy tale.<sup>4</sup> YouTube, MySpace, Blogspot, and countless other websites offer amateur creators (and even professional content companies like CBS) the opportunity to produce innovative content and to post it immediately and freely to a worldwide audience. Many of these creators incorporate copyrighted works such as songs, videos, and trademarked clothing into their art. Commentators agree that this type of artwork plays a vital role in today’s cultural commentary.<sup>5</sup> Traditionally, however, courts do not sanction this type of wholesale reproduction of copyrighted works unless the subsequent work constitutes a fair use.

Courts developed the fair use doctrine to balance copyright’s competing goals.<sup>6</sup> On the one hand, copyright encourages the creation of artistic works through a limited monopoly that ensures that creators can profit from their labors. On the other hand, a strict monopoly discourages the production of new art that builds from these existing copyrighted works.<sup>7</sup>

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1. *DIRTY HARRY* (Warner Brothers 1971).

2. Pew Internet & Am. Life Project, Internet Activities, [http://www.pewinternet.org/trends/Internet\\_Activities\\_7.19.06.htm](http://www.pewinternet.org/trends/Internet_Activities_7.19.06.htm) (last visited Mar. 23, 2007).

3. Alexa, a website that collects web traffic information and maintains a daily-updated list of top 500 websites, reports that YouTube is ranked in the top ten among internet users internationally, and that site traffic increases daily. Alexa, Top Sites, [http://www.alexa.com/site/ds/top\\_500](http://www.alexa.com/site/ds/top_500) (last visited Mar. 17, 2007).

4. David Nimmer, *The Fairest of Them All*, 66 LAW & CONTEMP. PROBS. 263, 263 (Winter/Spring 2003).

5. See, e.g., Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1540 (2005); Richard Koman, *Remixing Culture: An Interview with Lawrence Lessig*, *O’Reilly Network*, Feb. 24, 2005, <http://www.oreillynet.com/pub/a/policy/2005/02/24/lessig.html>.

6. See generally *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (establishing what will come to be known as the fair use test).

7. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1479 (1993) (“Numerous contemporary artists appropriate

Thus, fair use operates as the fulcrum that balances an author's economic rights against a secondary use that surpasses the original piece by contributing to society's wealth of knowledge in a way in which the original does not. The problem lies in judicial interpretation of this balance because since its inception, judges have failed to use a uniform scale to accomplish this fair use balancing. Thus, disparate rulings leave secondary users wondering, "What is enough for fair use?" or even worse, "Will I be lucky enough to get away with a fair use defense?"<sup>8</sup>

Despite its seemingly standardless application, fair use can be described as falling into three categories—classical, personal, and personal-productive.<sup>9</sup> Classical fair use encompasses a "professional" artist's unauthorized, yet productive, use of copyrighted content. Along with book reviews or film critiques, classical fair use encompasses both historical accounts and "appropriation art." The more traditional, historical works use copyrighted works in historical accounts such as documentary films or biographies.<sup>10</sup> Conversely, appropriation art is a type of post-modern art that incorporates the copyrighted work into a larger object of social, political, or cultural critique. Appropriation artists, such as Andy Warhol, do not create "art about Art" in the modernist sense, but create art about the images found in our daily lives.<sup>11</sup> Thus, appropriation art is valuable in its own right because it forces the viewer to perceive a familiar image differently.<sup>12</sup>

The second general category of fair use, personal fair use, includes home uses such as recording television shows on VCR or TiVo.<sup>13</sup>

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existing images as source material. Their works encompass a wide variety of methods, ranging from the incorporation of a single element into a much larger work through collage to the reproduction of an image without physical alteration, but reattributed to the appropriating artist.").

8. A recent study by Peter Jaszi and Patricia Aufderheide surveyed hundreds of documentary filmmakers on fair use and the issues surrounding it, and the filmmakers tended to agree that they used fair use as a last resort partly because of its instability as a defense. For example, one filmmaker noted, "fair use is a crap shoot because it really depends on [attitude]." PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (Nov. 2004), [http://www.centerforsocialmedia.org/files/pdf/UNTOLD\\_STORIES\\_Report.pdf](http://www.centerforsocialmedia.org/files/pdf/UNTOLD_STORIES_Report.pdf).

9. Michael Madison, *Rewriting Fair Use & the Future of Copyright Reform*, 23 *CARDOZO ARTS & ENT. L.J.* 391, 393-94 (2005).

10. *See id.*

11. Ames, *supra* note 7, at 1477-80.

12. *Id.* at 1482.

13. Madison, *supra* note 9, at 393-94 (pointing to the example of time-shifting of television shows in *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417 (1984)).

Finally, personal productive use combines the categories of classical and personal uses into a new category of home users (i.e. “non-professionals”) who exercise creative and editorial discretion in classical fair use areas, such as a blog entry that includes an image of the writer’s favorite movie.<sup>14</sup> This category also encompasses amateur appropriation artists.

In the realm of classical fair use, courts have been reluctant to expand fair use beyond works that are specifically enumerated in the preamble to § 107 (criticism, comment, news reporting, teaching—including multiple copies for classroom use, scholarship, or research) or works that are akin to these enumerated examples.<sup>15</sup> Additionally, courts have tended to favor copyright holders in disputes over appropriation art, especially if the secondary user’s work is commercial.<sup>16</sup> Two recent Second Circuit opinions, however, seem to diverge from this traditionally conservative approach: *Bill Graham Archives v. Dorling-Kindersley Ltd.* and *Blanch v. Koons*.<sup>17</sup> In *Bill Graham*, a historical account case, the Second Circuit upheld the use of seven graphic images of the Grateful Dead in a coffee table book that narrates a detailed history of the band.<sup>18</sup> Likewise, in *Blanch*, an appropriation art case, the Second Circuit upheld the use of a photograph in a painted collage.<sup>19</sup>

This Note explores how these recent developments seem to crack open the door to classical fair use jurisprudence, bringing into its purview a broader definition of transformative use and consequently an increased acceptance of secondary uses as fair despite the impact on a copyright holder’s potential market. While these developments likely will increase the production of creative works, especially in the digital realm, the transformative test is limited and still leaves room for continued judicial discretion to grant fair use only to the truly “lucky.”

Part I provides a brief evolution of fair use jurisprudence, with an emphasis on the transformative test. Part II presents an overview of the

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14. *Id.* (describing another example of personal productive use as the cleansing of a film’s violent or sexually explicit content).

15. 17 U.S.C. § 107 (2006); *see, e.g.*, *Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d 132, 143 (2d Cir. 1998) (holding that a trivia quiz book fails to meet the transformative test because its purpose is not one enumerated in § 107).

16. *See Stewart v. Abend*, 495 U.S. 207, 238 (1990) (“‘This case presents a classic example of an unfair use: a commercial use of a [creative work] that adversely affects the [artist’s market].’” (quoting *Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 (9th Cir. 1988))).

17. *Bill Graham Archives v. Dorling-Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

18. *Bill Graham*, 448 F.3d at 608.

19. *Blanch*, 467 F.3d at 32.

*Blanch* and *Bill Graham* cases, which are particularly important because of the Second Circuit's precedent setting role in fair use jurisprudence. Part III explores how these opinions have broadened the transformative test to perhaps set the stage for increased activity in the realm of personal productive use. Finally, Part IV explains that despite these opinions, the fair use doctrine is still limited in both its doctrinal and institutional reach, and as a result leaves enough flexibility to allow continued disparate rulings in the realm of fair use.

## I. THE EVOLUTION OF FAIR USE

At its core, fair use balances the inherent tension in copyright law between establishing an economic incentive for new works and fueling the production of works that build on these older creations.<sup>20</sup> Courts employ fair use as an equitable rule of reason to allow an otherwise infringing use when honoring the copyright would stifle the very creativity that the law strives to foster.<sup>21</sup> Courts also apply fair use as a kind of implied license when an unauthorized use does not injure the value associated with the copyright.<sup>22</sup> Thus, as Michael Madison writes:

Fair use marks the precious and elusive line between the future and the present, and between the good of the many and the good of the one, that exists for reasons of justice, fairness, utility, or otherwise. The world is a better place in some small measure because fair use enables it to be so.<sup>23</sup>

Part A of this section outlines the historical development of fair use. Parts B and C then provide an in-depth analysis of the two biggest fair use considerations: the transformative test and economic effects on plaintiff's market, respectively.

### A. Background

Fair use has matured from a vague common law doctrine into a statutory rule that embodies copyright's competing principles. After Justice Story initially proclaimed the doctrine of fair use,<sup>24</sup> courts did not use it as a defense, but as a way to establish the rights included in the copyright monopoly.<sup>25</sup> In 1976, Congress finally codified this broad doctrine in 17

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20. *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 429 (1984).

21. *Stewart*, 495 U.S. at 236.

22. Madison, *supra* note 9, at 398.

23. *Id.* at 392.

24. *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

25. PAUL GOLDSTEIN, COPYRIGHT 188-89 n.5 (Little, Brown & Co. 1989).

U.S.C. § 107.<sup>26</sup> The preamble of § 107 enumerates several examples of fair use including criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.<sup>27</sup> The statute then lists the fair use factors as follows: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) effect of the use on the potential market for or value of the copyrighted work.<sup>28</sup> Congress intended this rule to act as a broad guideline—applicable on an ad hoc basis and flexible enough to handle rapid technological changes.<sup>29</sup>

In the wake of § 107, the courts defined fair use as a kind of implied license for a defendant's reasonable or customary uses.<sup>30</sup> Today, most courts apply fair use as an affirmative defense to copyright infringement.<sup>31</sup> Fair use is a mixed question of law and fact that can be determined at summary judgment if no genuine issue of material fact exists.<sup>32</sup> In analyzing the fair use of an original creator's work, courts do not treat the statutory factors as a bright line rule, nor do they consider the factors in isolation; rather, courts weigh the factors together in light of the goals of copyright.<sup>33</sup> Hence, a use is usually fair if it can serve the dual purposes of stimulating the public's wealth of knowledge without diminishing incentives for creativity.<sup>34</sup>

This balancing test has led to a general disagreement over which factor should weigh more heavily in the fair use analysis—the transformative or productive nature of the secondary use or the economic effects on a copyright holder. Courts use the transformative test to determine if a defendant's work differs enough from a copyright holder's work that it makes its own independent contribution to society's knowledge but does not significantly impact the copyright holder's market. However, no bright line rule has emerged to determine the amount of transformation needed or a sufficient level of economic harm, which in turn has led courts to formulate disparate and wide-ranging rationales and outcomes in fair use cas-

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26. 17 U.S.C. § 107 (2006).

27. *Id.*

28. *Id.*

29. H.R. REP. NO. 94-1476 (1976).

30. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549-51 (1985).

31. 4-13 NIMMER ON COPYRIGHT § 13.05 (2006).

32. *Harper & Row*, 471 U.S. at 560.

33. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

34. Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

es.<sup>35</sup> Thus, this debate has left copyright owners and potential secondary users alike wondering what counts as fair use.

## **B. Transformative Test: Promoting Progress in the Arts**

Courts use the transformative test as a tool to calculate the amount a secondary use contributes to society in its own right and therefore advances copyright's goal of promoting progress in the arts. The transformative tests asks "whether the new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>36</sup> Judge Pierre Leval of the Southern District of New York first developed this test in his influential article, *Toward a Fair Use Standard*.<sup>37</sup> The Supreme Court, in turn, then adopted the formulation in *Campbell v. Acuff-Rose*, one of its landmark fair use cases.

Transformative works tip in favor of fair use because they further copyright's goal of promoting the arts.<sup>38</sup> Courts usually analyze the transformative test under the first fair use factor, the purpose and character of defendant's use, but the analysis also informs the other fair use factors.<sup>39</sup> Although the courts have not yet formulated a clear standard for transformative, they have considered two key factors of a secondary work: (1) actual transformation and (2) different functional purpose of the secondary work. Under actual transformation, the courts highlight the actual, aesthetic differences between the original and the secondary works.<sup>40</sup> For example, transformative works have included smaller, lower resolution thumbnail

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35. For example, in *Campbell*, the Supreme Court stated that transformative works lay at the heart of the fair use doctrine, and that the more transformative a new work is, the less significant the other fair use factors, including commercialism become. 510 U.S. at 579. However, recent opinions still cite *Harper & Row* for the idea that the defendant's effect on plaintiff's commercial market is the most important fair use factor. *Harper & Row*, 471 U.S. at 566-67; *Stewart*, 495 U.S. at 238; see, e.g., *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 275 F. Supp. 2d 543, 565 (D.N.J. 2003).

36. *Campbell*, 510 U.S. at 579.

37. Leval, *supra* note 34, at 1110.

38. *Campbell*, 510 U.S. at 579.

39. See *id.*; see, e.g., *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132, 132 (2d Cir. 1998) (concluding that under the first fair use factor, defendant's work is minimally transformative at best, which tips the balance to plaintiffs on the other fair use factors); *Ringgold v. Black Entm't Television*, 126 F.3d 70, 81-82 (2d Cir. 1997) (concluding that defendant's use supersedes plaintiff's original purpose and therefore does not meet the standard for transformativeness, which in turn tips the balance of the factors in favor of plaintiff).

40. *Elvis Presley Enters. v. Passport Video*, 357 F.3d 896, 896 (9th Cir. 2004) (stating that transformation must be a real, substantial condensation of materials and not merely a facile use).

images<sup>41</sup> and parodies.<sup>42</sup> The more the defendant adds or changes, the more likely the secondary work is transformative because the effect on plaintiff's market decreases and the secondary work comes closer to copyright's goals of spurring further creativity.<sup>43</sup>

Works that serve an entirely different functional purpose than the original are also transformative.<sup>44</sup> For example, in *Nunez v. Caribbean International News Corp.*, the court found fair use for a defendant who transformed a photograph from a promotional modeling purpose into a depiction of an important news story.<sup>45</sup> Thus the function of the secondary work, which was to inform, was transformatively different from the function of the original work, which served to illustrate the model's talent. Some courts also refer to the preamble of § 107 to define types of transformative purposes. In *Castle Rock Entertainment v. Carol Publishing Group*, for example, the Second Circuit denied fair use to defendant's creative trivia book based on the bizarre characters and comical situations of the hit television show *Seinfeld* not only because it superceded the entertainment purpose of *Seinfeld* but also because the trivia book did not have a transformative purpose as enumerated in the preamble of section 107.<sup>46</sup>

Historically, courts have been reluctant to extend the definition of transformation beyond aesthetic changes, a different functional purpose, and the preamble's examples. Consequently, this narrow reading of transformation translates into a conservative trend in fair use outcomes, leading courts oftentimes to find for a plaintiff even if the secondary work is transformative or takes very little of the copyrighted work.<sup>47</sup> In *Ringgold v. Black Entertainment Television, Inc.*, for example, the Second Circuit ruled against fair use because the defendants' purpose superceded the plaintiff's purpose.<sup>48</sup> In this case, the defendants depicted the plaintiff's work, an elaborate mosaic of paint, quilting, and text that illustrates the story of an African-American family, in a sitcom about an African-

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

42. *Campbell*, 510 U.S. at 579 (holding that a parody is transformative because it sheds light on the original work while creating a new work).

43. *Id.*

44. *Arriba Soft*, 336 F.3d at 818-19 (stating that if the secondary user uses plaintiff's work for the same intrinsic purpose, this weakens the claim for fair use).

45. *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).

46. *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132, 143 (2d Cir. 1998).

47. *See Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 457 (1984) (Blackmun, J. dissenting) (noting that the Court tends to evade difficult questions and punt to the legislature despite the legislative history of § 107, which states that fair use is flexible enough to encompass new technologies).

48. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).

American family.<sup>49</sup> The quilt appeared on screen for only 26.75 seconds and did not appear alone, but in a church scene filled with actors.<sup>50</sup>

The Second Circuit held that this use was enough to give rise to substantial similarity under the *de minimus* test.<sup>51</sup> After finding infringement, the court then marched through the fair use factors and deemed the use unfair because the defendant's purpose, using the painting as a set decoration, superceded the plaintiff's decorative purpose in creating the work.<sup>52</sup> The court commented that the plaintiff created the work with a significant decorative purpose even if she intended other purposes such as illuminating human understanding or inspiring others.<sup>53</sup> Furthermore, and perhaps more startling, the court did not require the plaintiff to demonstrate any harm to her current market; rather, the court held the use unfair because it affected a reasonable market that the plaintiff could develop, licensing her work as a set decoration.<sup>54</sup>

Although *Ringgold* seems to stand for the proposition that the transformative test clearly distinguishes between transformation and infringement, the test actually allows for much judicial discretion. For example, the test allows the court to determine whether aesthetic changes have been made between the secondary work and the original work. While an aesthetic change such as shrinking an image to thumbnail-size might be obvious in some circumstances, this type of change might not be so obvious in other ways, especially in the realm of appropriation artwork which re-contextualizes familiar images.<sup>55</sup> Additionally, the test permits the court to determine the purposes of both the original and secondary works. If the original work has multiple purposes, however, this inquiry is problematic. In these instances, a court will look to the work's primary purpose to determine if the secondary use transforms this primary purpose.<sup>56</sup> Both of these decisions, however, beg the question, "Is the court equipped to handle these types of determinations," especially in light of the fact that many fair use cases end at summary judgment?<sup>57</sup> Looking to the disparate fair

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49. *Id.* at 71-72.

50. *Id.* at 74-75.

51. *Id.* at 76 (stating that *de minimus* means either (1) a technical violation that is so trivial that the law will not impose legal consequences, or (2) copying that has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is a requirement for actionable copying).

52. *Id.* at 78.

53. *Id.* at 79 n.10.

54. *Id.* at 81.

55. See Ames, *supra* note 7, at 1479.

56. See *Ringgold*, 126 F.3d at 79 n.10.

57. See 4-13 NIMMER, *supra* note 31, §13.05 n.17.



use jurisprudence and confusion over fair use overall, the answer seems to be “no.”

### C. Economic Interest: Providing Sufficient Incentives for Creation

Further complicating the fair use analysis is the second copyright goal, providing sufficient incentives for creation. *Ringgold* exemplifies this tension between creation and economic incentives in trying to balance transformation with a secondary use’s economic effects on a copyright owner. As courts traditionally refrain from finding transformation, they simultaneously stress the importance of a copyright holder’s economic interests.<sup>58</sup>

As with the transformative test, courts consider economic harm within each of the fair use factors.<sup>59</sup> Under the first factor, purpose and character of the secondary use, courts consider the commercial nature of a secondary use. For commerciality to weigh heavily against fair use, the secondary use must involve more than a simple profit-making scheme.<sup>60</sup> In *Campbell*, the Supreme Court rejected the notion that the commercial nature of a defendant’s work leads to a presumption of market harm.<sup>61</sup> The Court held that a secondary use beyond duplication, in other words a transformative use, does not give rise to this presumption because profit motivates nearly all creators to produce, and thus this presumption would stifle creativity.<sup>62</sup>

Courts will not sustain a fair use defense when the secondary use is a form of commercial exploitation—that is—if the copier derives explicit financial rewards from the use of the copyrighted material.<sup>63</sup> For example, in *American Geophysical Union v. Texaco*, Judge Leval found against fair use for Texaco scientists who photocopied scientific journal articles merely to avoid buying more subscriptions or paying for the rights from the Copyright Clearance Center.<sup>64</sup>

Courts also consider the effect of defendant’s work on a plaintiff’s market in the fourth factor. The question is not merely whether the sec-

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58. Further complicating this tension is the notion that the desire for a certain outcome drives courts to weigh these factors differently depending on the fact patterns. Again, this leaves copyright holders and users without much guidance. See Nimmer, *Fairest of Them All*, *supra* note 4, at 280.

59. See, e.g., *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000).

60. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

61. *Id.* at 590-91.

62. *Id.*

63. *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff’d*, 37 F.3d 881 (2d Cir. 1994).

64. *Id.*

ondary work affects the plaintiff's market overall; rather, the court asks whether the secondary use acts as a market substitute for a market that properly belongs to the copyright holder.<sup>65</sup> Thus, the fourth factor also accounts for the original work's potential market.<sup>66</sup> Potential market has been defined as one which is traditional, reasonable, or likely to develop.<sup>67</sup> This includes the market for derivative works<sup>68</sup> and the ability to license or further develop the original work.<sup>69</sup> This ability to license rights, however, does not mean a copyright owner can prevent fair uses: "Thus, by developing or licensing a market for parody, news reporting, educational, or other transformative uses of its own creative work, a copyright owner cannot prevent others from entering those fair use markets."<sup>70</sup>

This definition of potential market, however, raises a problem of circularity because it allows plaintiffs to define their own markets and hence claim an economic harm.<sup>71</sup> In an era of rapid digitalization and extended copyright terms,<sup>72</sup> copyright holders can increasingly close subsequent users out of the market. For example, in *Perfect 10 v. Google, Inc.*, the court held defendant Google's use of thumbnail images, while productive, was unfair because Perfect 10 had created a market for thumbnail images

65. *Nunez*, 235 F.3d at 24-25.

66. *Campbell*, 510 U.S. at 590.

67. *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132, 145 n.11 (2d Cir. 1998); *see, e.g., Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 81 (2d Cir. 1997) (holding that the fourth factor weighs in favor of the plaintiff if she can prove traditional, reasonable, or likely-to-be-developed market for licensing her art as set decorations).

68. A copyright owner has the right to exploit a derivative market. Section § 101 defines a "derivate work" as:

[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted....[or] a work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.

17 U.S.C. § 101 (2006). Derivative works, unlike transformative works, do not transform the purpose of the original work. *Castle Rock*, 150 F.3d at 143. However, derivative works can also complement or fulfill a different function than the original. *Blanch*, 467 F.3d at 252 n.4.

69. *Campbell*, 510 U.S. at 592; *see, e.g., Castle Rock*, 150 F.3d at 145 (holding that the SAT book was likely to fill gap in market that could likely have developed).

70. *Castle Rock*, 150 F.3d at 145 n.11.

71. *American Geophysical Union v. Texaco, Inc.*, 37 F.3d 881, 929 n.17 (2d Cir. 1994).

72. *See William F. Patry & Richard A. Posner, Fair Use and Statutory Reform in the Wake of Eldred*, 92 CALIF. L. REV. 1639, 1640-41 (2004).

for use on cell phones.<sup>73</sup> Thus, this ruling exemplifies the danger of favoring economic harm over transformation. As technology advances and copyright owners claim more potential markets, transformative uses will likely be stifled.

The Sixth Circuit's opinion in *Bridgeport Music v. Dimension Films* further illustrates this conflict between potential economic effects versus productive secondary uses.<sup>74</sup> Although the court did not employ the fair use test, its opinion strongly supports a copyright holder's economic right to his work despite the apparent transformation of the secondary work.<sup>75</sup> In this case, the defendants copied just two seconds of the plaintiff's guitar solo, looped the sound into 16 beats, and repeated the combination five times in a film soundtrack.<sup>76</sup> Although this use seems to be transformative, in an uncompromising opinion, the court held that digital sampling is nevertheless infringement: "Get a license or don't sample."<sup>77</sup> Even if the digital sample alters the original to the point where a lay observer can no longer recognize it,<sup>78</sup> sampling constitutes infringement because a copyright owner has the exclusive right to rearrange, remix, or license her actual sounds.<sup>79</sup> This ruling supporting a copyright holder's right to all potential markets departs from the Supreme Court's focus in *Campbell* on the transformativeness of a secondary use. Consequently, a strong emphasis on a copyright owner's market in some cases versus an emphasis on transformation in other cases, evinces the fundamental tension in fair use and leaves unlicensed users, regardless of their creativity, wondering what, if anything, is enough for fair use.

## II. THE SECOND CIRCUIT FAIR USE CASES

The Second Circuit has played a significant role in molding the fair use balancing test.<sup>80</sup> New York is home to numerous copyright holders,

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73. *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 848-49 (C.D. Cal. 2006).

74. *Bridgeport Music v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

75. *Id.* at 802.

76. *Id.* at 796.

77. *Id.* at 801.

78. This wording sounds like the court is trying to preempt the transformative inquiry, but the court explicitly states that its holding does not consider a fair use analysis. *Id.*

79. *Id.*

80. See Nimmer, *supra* note 4, at 263 (calling the Second Circuit justices the "copyright specialists"); see, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (adopting Judge Leval's transformative test); *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (adopting the Second Circuit's rule that denied fair use if a defendant's product unfairly competed with a copyright holder's work).

such as photographers, film companies, book publishers, advertising agencies, magazines, and newspapers. Accordingly, many fair use cases arise in the Second Circuit. Continuing this tradition of precedential rulings, the Second Circuit's two most recent fair use cases break from its traditionally conservative findings of fair use. This Part gives a brief overview of these two cases: *Bill Graham Archives v. Dorling-Kindersley Ltd.* and *Blanch v. Koons*. Part III explores how these opinions have departed from the transformative test's narrow definition of purpose and simultaneously deemphasized the economic harm factor. Finally, Part IV explains how these opinions are limited in both their doctrinal and institutional reach, leaving enough flexibility in the purpose definition to continue to foster conservative and disparate rulings in fair use jurisprudence.

#### A. *Bill Graham Archives v. Dorling-Kindersley Ltd.*

In *Bill Graham Archives v. Dorling-Kindersley Ltd.*, the Second Circuit found that the defendants' complete reproduction of seven of the plaintiff's graphic images in a biographical book constituted fair use.<sup>81</sup> Plaintiff, Bill Graham Archives ("BGA"), owned the copyright in seven graphic images depicting the famous rock band, the Grateful Dead.<sup>82</sup> Six of these images were large posters that featured concert information at various venues, and one image depicted a Grateful Dead concert ticket.<sup>83</sup> BGA originally used these huge poster-size pieces to generate public interest in the Grateful Dead and their forthcoming concerts.<sup>84</sup>

Defendant, Dorling-Kindersley ("DK"), published *Grateful Dead: The Illustrated Trip*, a 480-page coffee-table book that chronicles the history of the famous rock band.<sup>85</sup> The book follows the band's developments through a timeline that features text, graphics, and photographs, including the seven BGA images.<sup>86</sup> DK initially asked for permission to reprint the images, but after the parties failed to agree on a licensing fee, negotiations collapsed.<sup>87</sup> Nevertheless, DK proceeded to publish the art in full.<sup>88</sup> DK "significantly" reduced the image size, surrounded each image with expla-

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

82. *Id.* at 607.

83. *Id.* at 605.

84. *Id.* at 607 n.1.

85. *Id.* at 607.

86. *Id.*

87. *Id.*

88. *Id.*

natory text, and placed them on the Grateful Dead Timeline as a graphic representation of these historic moments.<sup>89</sup>

The Southern District of New York granted summary judgment to DK on the rationale that their use of the images constituted fair use.<sup>90</sup> The Second Circuit affirmed the grant of summary judgment also on fair use grounds.<sup>91</sup> The Second Circuit framed its analysis within the policy behind fair use, stating, "The ultimate test of fair use is whether the copyright law's goal of promoting the Progress of Science and the Useful Arts would be better served by allowing the use than by preventing it."<sup>92</sup> Then in the traditional march through the fair use factors, the court found that because DK's use constituted a transformative use, the fair use analysis tipped in its favor on each factor.<sup>93</sup> Under the first factor, purpose and character of the use, the court announced that the transformative test is the most important part of the fair use inquiry.<sup>94</sup>

The court then held that DK's use of all seven images was transformative.<sup>95</sup> The court reasoned the use of copyrighted material in biographies is generally permissible because these works are akin to § 107's enumerated examples of fair use such as criticism and comment.<sup>96</sup> The court extended this inquiry, however, to the expressive purpose of *Illustrated Trip* and the aesthetic transformation. DK used each image for a transformatively different "expressive purpose" than the original.<sup>97</sup> After their creation, BGA displayed the images to generate public interest and convey information to audiences about the band.<sup>98</sup> Conversely, DK exploited the images' historical value, displaying the images as artifacts to document actual events.<sup>99</sup> Thus, the images in *Illustrated Trip* enhanced the reader's understanding of the text, a transformatively different purpose than conveying information to a broad public.<sup>100</sup>

Moreover, the placement and context of the images in *Illustrated Trip* also constituted a visual transformation.<sup>101</sup> Drawing on the Ninth Circuit's

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 608 (citing U.S. CONST. art. I, § 8, cl. 8).

93. *Id.* at 615.

94. *Id.* at 608.

95. *Id.* at 609.

96. *Id.* at 608 (citing 17 U.S.C. § 107).

97. *Id.* at 609.

98. *Id.*

99. *Id.* at 610.

100. *Id.*

101. *Id.* at 611.

rationale in *Kelly v. Arriba Soft Corp.*,<sup>102</sup> in which it found a website's thumbnail images of plaintiff's photographs to be a transformative use, the Second Circuit found that the aesthetic changes to BGA's images constituted transformation.<sup>103</sup> DK both minimized the images until they could no longer capture the originals' expressive value and placed them within the larger collage of the book.<sup>104</sup> The court found that because of their reduced size, the images constitute an inconsequential portion of the book as a whole (one-fifth of one percent).<sup>105</sup> Thus, even though DK wholly reproduced BGA's images, the importance to the work overall counted in favor of fair use.

The court continued with the fair use analysis with a particular emphasis on transformation in each factor. Resuming its purpose and character inquiry, the court concluded that DK did not actively use the images to promote the sale of the book.<sup>106</sup> Instead, the use of the images was incidental to the commercial value of the book which aimed to describe the life of the Grateful Dead.<sup>107</sup> Under the second factor, the nature of the copyrighted work, the court concluded that although BGA's images constituted creative works, this factor only weighed slightly in their favor because of the transformative way in which DK exhibited the works.<sup>108</sup> Likewise, under the third factor, the amount and substantiality of the portion used, the Second Circuit cited to *Campbell* for the proposition that even though DK featured the entire images, the transformatively different purpose of *Illustrated Trip* necessitated including the entire images.<sup>109</sup> Thus, this factor played a neutral role in the fair use analysis.<sup>110</sup> Finally with respect to the market harm analysis of the fourth factor, the court concluded that because DK transformed the works, BGA did not suffer any market harm.<sup>111</sup> Notably, the court stated that the mere existence of a licensing market does not mean that a secondary user cannot use the work fairly.<sup>112</sup>

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

103. *Bill Graham*, 448 F.3d at 611.

104. *Id.*

105. *Id.*

106. *Id.* at 612.

107. *Id.*

108. *Id.*

109. *Id.* at 613.

110. *Id.* at 615.

111. *Id.*

112. *Id.* ("Moreover, a publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images.")

## B. *Blanch v. Koons*

In *Blanch v. Koons*, the Second Circuit again upheld a ruling of fair use, following a very similar rationale.<sup>113</sup> The plaintiff, Andrea Blanch, is a renowned portrait and fashion photographer.<sup>114</sup> In August of 2000, *Allure* magazine published Blanch's photo "Silk Sandals By Gucci" in a six-page spread on metallic make-up.<sup>115</sup> The photo depicted the lower half of a woman's bare legs (from below the knee to the feet) crossed at the ankles, resting on a man's knee and pointing diagonally upwards (from right to left at a 45-degree angle).<sup>116</sup> The minimal background, which appears to portray the floor, window, wall and seat of an airline cabin, tightly framed the woman's ornately jeweled shoes and sparkling metallic toenail polish.<sup>117</sup> In creating the image, Blanch carefully controlled the lighting, camera, film, and composition of the photo, with an emphasis on the scene's sexuality.<sup>118</sup>

Jeff Koons is a "visual artist" renown for dabbling in appropriation, art, and litigation.<sup>119</sup> In preparation for an art show at the Guggenheim Museum in New York,<sup>120</sup> Koons scanned several advertisement photographs, including "Silk Sandals" into his computer.<sup>121</sup> Koons then collected these fragments into various paintings with the goal of compelling the viewer to reconceptualize familiar media images.<sup>122</sup> Koons incorporated "Silk Sandals" into a painting entitled "Niagara," which featured three other pairs of women's legs displayed prominently in front of Niagara Falls and dangling above images of confections such as a colorful ice cream sundae and plates of donuts and pastries.<sup>123</sup> When "Niagara" was painted, "Silk Sandals" was altered—the background was discarded, the

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113. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

114. *Id.* at 247.

115. *Id.* at 248.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 246. Koons is actually a repeat defendant in copyright infringement litigation and has been sued by several different artists/copyright holders for "using" their works in his art. See, e.g., *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992).

120. *Blanch*, 467 F.3d at 246. Co-defendants in this suit are Deutsche Bank AG, a German Company, and the Guggenheim Foundation in New York, both of which commissioned Koons' allegedly infringing work. *Id.*

121. *Id.* at 248.

122. *Id.*

123. *Id.* at 247.

legs were rotated to a vertical position, a heel was added to one of the sandals, and the color was modified.<sup>124</sup>

Parallel to their analysis in *Bill Graham*, the Second Circuit walked through the fair use factors with an eye towards transformation. The court first determined that, like the book in *Bill Graham*, Koons' use in "Niagara" was transformative. Under the first factor, even though Koons' work did not fall into § 107's examples, the work did have an entirely different expressive purpose.<sup>125</sup> In a laborious inquiry, the court carefully examined depositions from both Blanch and Koons to determine their respective purposes, and the court noted numerous times that Blanch failed to contest much of Koons' testimony.<sup>126</sup> With his painting, Koons wanted viewers to consider their own personal experiences with media objects and gain new insights into how those affect their lives.<sup>127</sup> Conversely, Blanch wanted to highlight the erotic sexuality of the moment.<sup>128</sup> Thus, the two works expressed an entirely different meaning to the viewer. In addition, as in *Bill Graham*, the court found that the aesthetic changes between the two images, notably the medium and the size of the image, were transformative.

With a finding of transformation in hand, the court proceeded through the other fair use factors, weighing each one in light of this transformative use. Under the commercial use inquiry, the court concluded that the transformative nature of Koons' work overshadowed its commercial nature.<sup>129</sup> In considering the nature of Blanch's work, the court cited to its decision in *Bill Graham*. It held that even though the work is creative, the second factor was of limited usefulness where the defendant used the art for a transformative purpose such as that evidenced in Koons' painting.<sup>130</sup> With respect to the amount and substantiality test of factor three, the court again cited *Campbell* for the notion that the copying must be reasonable in light

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124. *Id.* at 248. As William Patry notes, oftentimes Koons does not actually create his own artwork, and in this case it is not clear whether Koons himself actually painted "Niagara." Patry Copyright Blog, Koons Affirmed (Don't Blanch), <http://williampatry.blogspot.com/2006/10/koons-affirmed-dont-blanch.html> (Oct. 26, 2006, 19:07 EST). For example, Koons did not personally sculpt the sculpture at issue in *Rogers v. Koons*; rather he printed out an image of plaintiff's photograph and sent it to a factory for sculpting. *Rogers v. Koons*, 751 F. Supp. 474, 476 (S.D.N.Y. 1990).

125. *Blanch*, 467 F.3d at 251-52; see *Bill Graham Archives v. Dorling-Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006).

126. *Blanch*, 467 F.3d at 252.

127. *Id.* at 252-53.

128. *Id.*

129. *Id.* at 257.

130. *Id.*



of the transformative purpose.<sup>131</sup> The court went on to note that although Koons conveyed the facts of Blanch's photo, he stripped out the individual expressive elements, which Blanch had defined as the airline cabin backdrop and the exact positioning of the women's legs.<sup>132</sup> Finally under the market effect analysis, the court accepted Blanch's testimony that Koons' use did not affect her economically.<sup>133</sup> Blanch admitted that she had never licensed her works to other visual artists and that Koons' use did not harm her market, career, or the value of "Silk Sandals."<sup>134</sup> Thus, the court found that both the transformative nature and the absence of any current market effect tip the fair use calculus in favor of Koons.<sup>135</sup>

### III. DEVELOPMENTS IN THE TRANSFORMATIVE TEST

*Bill Graham* and *Blanch* seem to mark a shift in focus in fair use jurisprudence towards promoting and encouraging transformative works, regardless of economic effects, in areas in which classical fair use was all but closed to secondary users. Section A first outlines the changes in the meaning of transformative post *Bill Graham* and *Blanch*. Section B applies this meaning to the realm of classical fair uses. Finally, Section C extends these implications to the arena of personal productive uses in the post-modern, YouTube, age.

#### A. Transformation and its Reach Revisited

Both *Bill Graham* and *Blanch* strongly support the notion that the transformative inquiry dominates the fair use analysis. Moreover, the opinions go beyond paying lip service to this principle; they actually implement it through a fairly broad reading of transformative use. Specifically, the opinions expand the definition of transformative in four ways: (1) defining transformative purpose beyond the preamble's enumerated examples to include creative works, (2) considering a secondary work's expressive purpose not just its functional purpose, (3) considering minimal aesthetic changes as sufficient for transformation, and (4) deemphasizing any market harm once transformation is found.

From *Ringgold* to *Blanch*, the Second Circuit has broadened the meaning of both transformative purpose and aesthetic transformation. In both *Bill Graham* and *Blanch*, the court evidences a willingness to move

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131. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994)).

132. *Id.* at 257-58.

133. *Id.* at 258.

134. *Id.*

135. *Id.*

beyond § 107's enumerated examples in finding transformative purpose. Although the court noted that the biography in *Bill Graham* is like a criticism, biography is not enumerated in the preamble of § 107. Moreover, the list does not include any creative works akin to Koons' painting.

The Second Circuit stepped even further beyond the traditional purpose inquiry by determining expressive purpose of the secondary works. The *Ringgold* opinion turned on the functional purpose of both plaintiff's and defendant's uses as decorative works of art, explicitly ignoring any expressive purposes of either work such as "illuminating human understanding."<sup>136</sup> Conversely, in both *Bill Graham* and *Blanch*, the court identified the expressive purposes of plaintiffs' and defendants' works as relevant to the fair use inquiry.<sup>137</sup> Even though the secondary works in both cases served the same functional purpose as the underlying works, the determinative factor became expressive purpose. For example, in *Blanch* the purpose inquiry turned on the differences between the types of emotions each artist wanted to evoke even though both works endeavored to evoke emotion in the viewer. Likewise, in *Bill Graham* both works strove to convey information about the Grateful Dead to a large number of people, but each work accomplished this in a different context, and thus each work embodied a different expressive meaning.

Furthermore, the Second Circuit in both *Bill Graham* and *Blanch* emphasized the context and size alterations of the secondary works under the actual transformation prong of the transformative test in accord with the transformative nature of a website's thumbnail images in *Kelly*.<sup>138</sup> DK surrounded the shrunken Grateful Dead images with explanatory text while Koons enlarged the legs from "Silk Sandals" and surrounded them with other tantalizing images. Thus, unlike previous fair use cases which seemed to demand a high level of aesthetic transformation, such as a parody, these opinions seem to excuse a defendant's wholesale reproduction of a work if the defendant incorporates minimal additions into a copyright owner's work.<sup>139</sup>

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136. See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 79 n.10 (2d Cir. 1997).

137. See *Bill Graham*, 448 F.3d at 609.

138. *Id.* at 605 (citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-20 (9th Cir. 2003)).

139. *Contra* *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132 (2d Cir. 1998) (holding that a trivia book which cleverly incorporated the bizarre characters and comical situations of the hit show *Seinfeld* into a series of multiple-choice questions was not transformative enough).

Once the Second Circuit had determined that the secondary work was transformative, it deemphasized the effect of the secondary use on the owner's market. Previously, as evidenced in both *Ringgold* and *Bridgeport*, market harm and potential market harm greatly concerned the courts. But, in both *Bill Graham* and *Blanch*, the Second Circuit discounted each of the fair use factors, including market harm and commerciality, in light of the defendants' transformative use. More notably, unlike previous cases, the court seemed to limit its analysis of potential market under the fourth fair use factor. In *Blanch*, for example the court did not even consider Blanch's potential licensing market, an analysis it so willingly engaged in previously.<sup>140</sup> Moreover, in *Bill Graham* even though a licensing market actually existed for BGA's graphic poster images, the transformative nature of DK's book meant that DK did not usurp this market. Thus, in both cases, the transformative test seems to have shifted the focus of the fair use analysis from providing economic incentives for copyright owners to stimulating the production of new works.<sup>141</sup>

## B. Implications for Classical Fair Use

This seemingly broader transformative test appears to crack open the door to fair use for both classical fair use and, by implication, personal productive fair uses. Thus, these rulings give hope to creators that their sheer ingenuity in using a copyrighted work to craft a new work will allow them to win fair use on the merits.

Under this new formulation, the Second Circuit likely would have reached a different outcome in *Ringgold*, a paradigmatic classical fair use case. The *Ringgold* court noted that the defendants' television show did not fit the preamble's enumerated examples.<sup>142</sup> Under the new transformative formulation, this fact would not weigh against the defendants. Additionally, the transformative purpose inquiry in *Ringgold* turns on the functional purpose of both works. Under the new formulation, the court would determine the expressive purpose of each use. The court noted that aside from a functional, decorative purpose, the plaintiff could also have created the quilt for an expressive purpose, to provide information or provoke thought about that moment or event in history.<sup>143</sup> Likewise, the defendants could have used the work for a different expressive purpose. The scene

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140. See, e.g., *id.* at 145-46 (holding that even though Castle Rock did not develop a market for *Seinfeld* trivia books it was a reasonable market that they could develop).

141. See *Bill Graham*, 448 F.3d at 608 (couching the fair use analysis in copyright's goal of promoting further progress in the arts).

142. *Ringgold*, 126 F.3d at 78-79.

143. See *id.* at 79 n.10.

that features the quilt depicts a modern African American family at Church. Thus, the defendants could have used the quilt as an expressive commentary on the parallels between the lives of African Americans in the quilt and today.

Furthermore, even though the defendants used the entire quilt, just like DK reprinted the Grateful Dead graphics in their entirety, the defendants in *Ringgold* also placed the quilt in a different context and surrounded the quilt with singing and talking actors.<sup>144</sup> Additionally, like in *Bill Graham*, the defendants in *Ringgold* only used the quilt for 26.75 seconds, which the court could then conclude is only a de minimus portion of the television show as a whole.<sup>145</sup> Finally, like in *Blanch* because the plaintiff in *Ringgold* failed to show any market harm, this factor would weigh strongly in favor of defendants, and consequently tip the fair use calculus in their favor. Thus, armed with this broader definition of transformation, creators using copyrighted material to capture historically significant moments might be able to win under fair use.

Along with this impact on classical fair use in general, a broader transformative analysis may also affect historical compilations in particular because *Illustrated Trip* is an historical account. For example, this expanded formulation could greatly affect documentary films. The creative enterprise of documentary films depends on the use of copyrighted works because documentarians track real-life events and people. When filming is complete, documentarians face the daunting task of clearing rights for all of the copyrighted works captured in their films—anything from wall art like in *Ringgold* to background television clips to songs the subjects are singing. Sometimes these rights' clearance costs are so debilitating that it forces documentarians to delete scenes or change the scene, and thus alter reality, while trying to reflect it accurately.<sup>146</sup> In the end, the audience loses out on valuable bits of the story.<sup>147</sup>

Currently, documentarians rely on fair use sparingly, but these Second Circuit rulings could open the door for its use. Jan Krawitz, the producer of *Little People*, a documentary about dwarfs, notes, "There's no way you can argue fair use—'Oh it just happened to be in the back-

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144. See *id.* at 74-75.

145. See *Bill Graham*, 448 F.3d at 611.

146. Jaszi, *supra* note 8, at 17.

147. For example, Peter Gilbert, one of the makers of *Hoop Dreams* described a moving scene in which the main character's family sings "Happy Birthday" to the tune of \$15,000 dollars. Without a budget to clear this song, this pivotal scene would have been cut. *Id.* at 11.

ground.’ . . . That just doesn’t fly with the music publishers.”<sup>148</sup> Under the Second Circuit’s new ruling, however, documentarians might now feel more comfortable with this argument. Even though the preamble to § 107 does not explicitly mention documentaries, under the new formulation, a court will be more willing to view a documentary as having a productive purpose. The court might also consider the documentary film’s expressive purpose overall as different from any single copyrighted work featured in the film. For example, Jeffrey Tuchman, a filmmaker who produced a documentary about the history of medicine, cut a sequence about cloning that included short clips from *Jurassic Park* that illustrated modern cloning.<sup>149</sup> Under the new formulation of transformation, however, he could argue that the expressive purpose of the clip, to illustrate an example or to act as an historical artifact, is transformatively different from *Jurassic Park*’s entertainment purpose. The broader purpose inquiry should lead to the production of more works like documentary films and hence promote copyright’s goal of stimulating the creation of more works.

### C. Implications for Appropriation Art

This broadening of the transformative test in the area of classical fair use could also impact appropriation art especially in the digital context in light of the Second Circuit’s reliance on *Kelly v. ArribaSoft* in the *Bill Graham* case.<sup>150</sup> Both amateur and professional artists of the digital age increasingly use copyrighted works in the same manner as Jeff Koons.<sup>151</sup> These amateur creators, dabbling with cheap equipment and easily available, high-quality content incorporate copyrighted works into all sorts of new, expressive, appropriation works just like Koons did with “Silk Sandals.” Anyone with an internet connection can easily and cheaply create and distribute these types of appropriation art without the traditional barriers of rights clearances. For example, many of the most popular websites such as MySpace and Blogspot, allow internet users and bloggers to incorporate images and video and music clips into their blog entries.<sup>152</sup> Thus, a greater emphasis on transformation in fair use as opposed to the market effects of an appropriation work on a copyright owner’s market could spur the creation of even more appropriation work. Creators can

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148. *Id.* at 16.

149. *Id.* at 14.

150. See Madison, *supra* note 9, at 393-94 (explaining the different realms of fair use).

151. See generally Van Houweling, *supra* note 5, at 1540.

152. “A blog, short for web log, is a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” Merriam Webster Online, <http://www.m-w.com> (search “blog”) (last visited Mar. 22, 2007).

craft their works with more confidence in their own ingenuity and their capacity to invent a new expression and less concern for the rights of other copyright holders.

#### IV. LIMITATIONS OF THIS DEVELOPMENT IN THE TRANSFORMATIVE TEST

No matter which side of the fair use fence one falls, *Bill Graham* and *Blanch* neither establish a bright line rule of fair use nor blow the fair use door wide open. Both doctrinal constraints, such as the increased flexibility of the fair use test and the specific facts of these cases, and institutional constraints, such as insurance coverage and industry partnerships, limit this development and consequently limit any grand upsurge in the production of new works.

##### A. Doctrinal Constraints

The broader transformative test still permits enough leeway for courts to exercise discretion on how to focus the fair use analysis—on transformation or on economic harm to a plaintiff. Consequently, even though both *Bill Graham* and *Blanch* support the notion of discounting the fair use calculus if a work is transformative, the expressive purpose test allows courts to assess the expressive purpose, and consequently even the value and creativity, of both the copyrighted and secondary works.<sup>153</sup> The expressive purpose inquiry allows for even more judicial discretion than functional purpose, an inquiry that the courts already seemed ill-equipped to handle. Accordingly, the expressive purpose test could lead courts to calculate fair use on an outcome driven basis, providing little comfort to secondary users, especially in circuits, like the Sixth Circuit in *Bridgeport*, where copyrights are especially valued.<sup>154</sup> Without firmer footing on which to stand, creators such as documentarians will continue to rely on fair use cautiously if at all, thus limiting any increased production the test could have promised.

Another doctrinal constraint arises in that these cases' rulings may not actually extend much farther than their factual situations. As the Second Circuit noted in *Bill Graham*, works such as biographies require the use of

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153. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994) ("It would be a dangerous undertaking for persons trained only in the law to constitute the final judges of the worth of a work, outside of the narrowest and most obvious limits." (internal quotations omitted)).

154. See Nimmer, *supra* note 4, at 291.

copyrighted works in order to give a more complete historical picture.<sup>155</sup> While this argument benefits documentarians, it does little for post-modern artists who use copyrighted works in creative expressions. Additionally, in *Blanch*, the court permitted Koons' use of Blanch's photograph, yet historically unlike other creative works, photographs have usually received copyright protection from slavish copying only.<sup>156</sup> Thus, post-modern artists might be hard-pressed to extend the *Blanch* rationale to copying of other expressive works such as songs or movie posters. Again, these factors limit the possible increase of the production of new works in the wake of *Bill Graham* and *Blanch*.

## B. Institutional Constraints

In addition to doctrinal constraints, content providers who advocate stronger copyrights in the post-modern era still maintain institutional checks that prevent classical creators from invoking the fair use defense. Movie studios and other content distributors hesitate to use any copyrighted work without clearing the rights because of the enormous costs of litigation or even threatened litigation.<sup>157</sup> Moreover, insurance carriers and financier hesitate to support a film that has not cleared its rights. In the documentary film context, for example, before a traditional broadcaster like CBS will broadcast a film, the filmmaker must obtain errors and omissions insurance.<sup>158</sup> Insurers, in turn, will require filmmakers to clear all their rights because they do not want to risk litigation even if a viable fair use defense exists.<sup>159</sup> This problem reaches the internet realm because many of the traditional broadcasters now also distribute content on the internet through their own sites or sites such as YouTube. Thus, even if documentarians believe that they have a viable fair use defense, they face resistance from broadcasters and insurers against whom they do not have the resources to fight.<sup>160</sup>

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155. *Bill Graham Archives v. Dorling-Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006).

156. *See, e.g., Gentieu v. Tony Stone Images*, 255 F. Supp. 2d 838, 848 (D. Ill. 2003) (holding that even though plaintiff's photo meets the minimal standard for originality, she only received protection for wholesale copying because the subject matter itself, the babies and their natural movements, was not protected); *SHL Imaging v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000) (noting that the totality of plaintiff's creative choices on the photograph meet the originality requirement, but this originality prevents only wholesale copying because plaintiff cannot protect many of the photo's individual elements such as the subject, technique, or backgrounds from being used again).

157. Jaszi, *supra* note 8, at 24.

158. *Id.*

159. *Id.*

160. *Id.* at 25.

## V. CONCLUSION

Between ensuring economic incentives and encouraging further creation, the fair use doctrine has left judges striving to strike the perfect balance to fulfill copyright's constitutional mandate. Before *Blanch* and *Bill Graham*, the Second Circuit blazed the trail towards conservative findings of fair use with a focus on market harm. Both *Blanch* and *Bill Graham* seem to mark a shift away from this traditional conservatism. While these opinions are limited in their reach, they are significant in their meaning. They evince the Second Circuit's willingness to step beyond its narrow focus on economic harm to emphasize copyright's goal of promoting and furthering the arts. These cases may not change the behaviors of creators tied to the major content producers/distributors, especially in light of the continued flexibility for judges to recalibrate the fair use calculus. But, they just might give personal productive fair users, today's YouTube generation, even more of a reason to create their quirky, referential, and innovative works.