

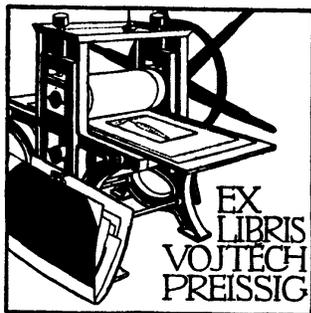
From the University Presses — Is “Functional” Use “Transformative” and Hence “Fair”? A Copyright Conundrum

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The decision from the Fourth Circuit **Court of Appeals** on April 16, 2009, in the case of *A.V. v. iParadigms, LLC* is the latest in a string of judicial rulings about “fair use” that employs the concept of “transformative” use to cover “functional” uses different from the original in a manner that is troubling both intellectually and practically.

Intellectually, these rulings stretch the natural meaning of “transformative” well beyond the bounds of common sense — and beyond, I contend, the meaning intended by the jurist whose writing gave rise to the development of this trend in copyright interpretation in the first place. Practically, they open a Pandora’s box out of which all sorts of legal mischief may ensue — and may further contribute to the public’s already severe lack of confidence in the unpredictability of “fair use” decisions in the courts.

In what is undoubtedly one of the most influential articles ever published in a law review by a sitting judge, “Toward a Fair Use Standard” (*Harvard Law Review*, March 1990), **Pierre N. Leval** begins by admitting that the reversal on appeal of two of his decisions as a district court judge (in *Salinger v. Random House, Inc.* [1987] and *New Era Publications Int’l v. Henry Holt & Co.* [1988]) had led him to ponder the need for “a cogent set of governing principles” that could get judges like him from simply deciding cases “upon ad hoc perceptions of justice without a permanent framework” to help guide their interpretations. His effort to develop “a fair use standard” takes off from his understanding of “the objectives of copyright law” in the United States as being basically “utilitarian” in nature, viz., viewing copyright ownership not as a natural right of the author but as “designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.” The temporary monopoly that copyright law invests in authors is aimed at motivating them to create new works, but if exercised in too sweeping a fashion, that monopoly can undermine the creativity of others that builds on the original authors’ works, and hence “fair use” provides a kind of safety valve preventing copyright from becoming counterproductive in carrying out the Constitutional mandate “to promote the Progress of Science and useful Arts.” As such, fair use “is a necessary part of the overall design” of copyright law, not just a “bizarre, occasionally tolerated departure” from it.



In **Leval’s** view, the key to keeping copyright interpretation in line with the Constitutional mandate lies in placing the concept of “transformative use” front and center. As he defines it, “the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.” **Leval** gives pride of place to this concept as he sees it embodied in the first of the four factors set forth in Section 107’s articulation of the considerations that courts must bear in mind when reaching a decision about whether any particular use is fair. This factor, “the purpose and character of the secondary use,” he calls at one point “the soul of fair use.” According to **Leval**, “one must assess each of the issues that arise in considering a fair use defense in the light of the governing purpose of copyright law,” which is manifested most straightforwardly in this idea of “transformative use.” Although no one factor alone is determinative in a fair use analysis, that a use is transformative in this sense creates a strong presumption that it is fair, and the other three factors would need to weigh heavily against a use being fair to override this presumption. The use’s transformative character “lies at the heart of the fair user’s case.”

What did **Leval** himself mean by “transformative”? The way he lays out his argument, in reflecting on its application to the **Salinger** and **New Era** cases (which involved quotations from authors **J.D. Salinger** and **L. Ron Hubbard** in biographies written about them), and the examples he gives of transformative uses, both lead naturally to the conclusion that such uses must themselves involve acts of creation that go beyond the original. “If...the secondary use adds value to the original — if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” Other examples **Leval** gives include “criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it,” and he also cites “parody, symbolism, and aesthetic declarations” as involving transformative use. All of these may be understood as “transformative” in a perfectly straightforward sense of that word.

The ascension of transformative use to its current prominence in fair use jurisprudence no doubt is attributable to the huge influence that the case of *Campbell v. Acuff-Rose Music, Inc.* (1994) has had on subsequent court decisions in this arena. Probably no single case has been cited more frequently in cases following it where fair use is at issue. (The opinion in this **Supreme Court** case was written by **Justice David Souter**, soon to retire from the bench.) This case, concerning whether **2 Live Crew’s** parody of **Roy Orbison’s** song “Pretty Woman” could be considered fair, turned crucially on “whether the new work [in this instance, **2 Live Crew’s** rap rendition of the song] merely ‘supersede[s] 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; it asks, in other words, whether and to what extent the new work is ‘transformative.’” This quotation is immediately followed by a reference to **Leval’s** article. It is one of seven times that article is cited in the text of the decision, and another six citations occur in the footnotes. No other single secondary source is cited more frequently. The impact of **Leval’s** reasoning on this case is obvious to anyone reading the decision who is familiar with **Leval’s** article. The interpretation of the parody as a justifiable “transformative” use of the original song is the linchpin of the decision, sufficiently powerful to overcome the facts that the parody itself was done for “commercial” purposes and that the work used was “expressive” in nature — factors that usually count against a use’s being seen as fair.

In the Second Circuit, where **Leval** now serves on the **Court of Appeals**, another case was decided in 2006 along the same lines. *Bill Graham Archives v. Dorling Kindersley Ltd.* pitted the owner of posters of **The Grateful Dead** advertising their concerts against the publisher of a coffee-table book titled *The Grateful Dead: The Illustrated Trip* where the posters, in reduced size, were reproduced as part of a cultural history of the rock group. The very first paragraph of the four-factor analysis cites **Judge Leval’s** article and quotes the sentence from the *Campbell* case that appears above. (It should be noted that **Leval** was not one of the three judges hearing this appeal, so he was not citing himself). Here, against the plaintiff’s claim that “merely placing poster images along a timeline is not a transformative use,” the court argued that **DK’s** use of the images “as historical artifacts to document and represent the actual occurrence of **Grateful Dead** concert events featured on *Illustrated Trip’s* timeline” was “transforma-

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tively different” from the “original artistic and promotional purpose” and did involve creative design to produce a “collage effect” using both images and text in such a way as to “enrich the presentation of the cultural history of *The Grateful Dead*.” Thus, be it noted, the secondary use was itself a creative act that in its very creativity had transformed the original posters to use them for a different purpose, historical reconstruction rather than promotion or artistic expression for its own sake. This case conforms perfectly well to **Leval’s** line of reasoning and uses “transformative” in its natural sense. Here, again, although **DK’s** book was published for “commercial” gain, the images reproduced the posters in their entirety (albeit in reduced size), and the posters qualified as “expressive” works — all three factors usually counting against fair use — the “transformative” nature of the use trumped other valid considerations.

The issue of transformative use has come up in cases in circuits other than the Second, for instance, in *Video Pipeline v. Buena Vista* decided on appeal in the Third Circuit in 2003. *Video Pipeline* was in the business of supplying clips from movies as trailers for home video stores; after a license to use trailers created by **Disney** had lapsed, *Video Pipeline* made short clips of its own directly from the movies and argued that these were protected as fair use, in part because they were “transformative,” serving “only to provide information about the movies to Internet users or as advertisements for the company’s retail Website clients” rather than fulfilling the “aesthetic and entertainment purpose” of the original movies. Besides pointing out that the clips had no purpose different from the trailers that **Buena Vista** itself supplied, and that they therefore interfered with the market for the latter, the court also noted “the absence of creative ingenuity in the creation of the clips” in finding no “transformative use” involved here to weigh against the patently “commercial” purpose of *Video Pipeline’s* clips. This lack of creativity in the secondary use aligns this case also with **Judge Leval’s** reasoning about what “transformation” means in copyright law.

Some judges out west, however, either didn’t grasp the plain meaning of “transformative use” as **Leval** explicated it in his article or else decided to be “transformative” themselves by creating a new and quite different meaning for the term, which is neither a logical extension of **Leval’s** original nor a commonsensical interpretation of it. Enamored, as they seem to have been, by the vast public benefit they perceive the Internet to have brought society, and willing to excuse just about anything that **Google** does in pursuit of the overriding objective of preserving that benefit to its maximum extent, many judges in the Ninth Circuit have devised their own idiosyncratic interpretation of “transformative” as meaning anything that serves a different function from the original copyrighted work. Crucially, the different function need involve no creativity at all; it

can be the result of a purely mechanical process performed by a computer to search Websites and index their contents. If it took some genius to create the software that performs the function, the implementation of it nevertheless requires no human creativity whatsoever.

Hence, thanks to the Ninth Circuit’s prostration before the gods of cyberspace, we have the cases of *Kelly v. Arriba Soft* (2002) and *Perfect 10 v. Google* (2007), both of which cite **Campbell** frequently. The first of these cases involved a photographer suing a company that had used its Internet search engine to compile a database of images in the form of “thumbnails,” some of which came from the photographer’s own Website. Despite the admittedly “commercial” purpose of **Arriba Soft’s** database, the court ruled that the thumbnail images did not serve the same expressive purpose as **Kelly’s** original images but, instead, facilitated access to images on the Internet. “Because **Arriba’s** use is not superseding **Kelly’s** use but, rather, has created a different purpose for the images, **Arriba’s** use is transformative.” And, being transformative, this use outweighs not only the “commercial” purpose of the database but also the facts that the works copied are “expressive” in nature and were copied in their entirety (albeit at reduced size). The court took pains to emphasize the public benefit of **Arriba’s** activity as “enhancing information gathering techniques on the Internet.”

The facts in *Perfect 10 v. Google* were very similar, but not identical. Again, it was a company’s search engine locating images at Websites, storing them as thumbnails, and indexing them for the purpose of easy access. **Perfect 10** was in the business of supplying photographs of nude models to customers via the Internet and, as **Kelly** had earlier, sued for infringement. Unlike **Kelly**, however, **Perfect 10** did have a market for reduced-size images through another company that was authorized to license their use on cell phones. (It speaks to the lack of imagination of the **Arriba** judges that they could not envision any such market for thumbnails). One might think that this was indeed a significant difference. The court, however, decided that for lack of evidence that people had downloaded the thumbnail images from **Google** for use on their cell phones, “this potential harm to **Perfect 10’s** market remains hypothetical.” This is hardly in keeping with the way the fourth factor is normally interpreted and reeks of special pleading. The court was clearly intent on reaching the conclusion it wanted to reach, based on its view of what benefits the public generally, and nothing like this was going to deter it from that goal. Such was its hubris that, not merely content to use **Kelly** as precedent, the court went the extra mile and opined that “**Google’s** use of thumbnails is highly transformative” (emphasis added). How did it justify this hyperbole? Not only does a search engine provide “social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original

work”. What a breathtaking leap of logic! We are well beyond any commonsensical meaning of “transformative” here as one creator building upon the work of another creator, which is clearly what **Pierre Leval** had in mind when he tried to put this concept forward as “the soul of fair use.” Search engines do not create in any meaningful sense; they merely follow the instructions programmed into them and go about their business, in this instance of locating and indexing content on the Web. Yet the Ninth Circuit judges have somehow gotten it into their heads that a purely mechanical function can be “transformative.” They have been misled by the superficial analogies promoted by the slippery use of the term “purpose.” Had they focused on the “creative” element that **Leval** emphasized as crucial to the meaning of “transformative,” they could never have reached the conclusions they did.

What looked to be a disease confined to the west coast’s Ninth Circuit has, like the swine flu, now begun to spread geographically eastward. The recent decision in the Fourth Circuit, which covers states from West Virginia to South Carolina, takes a page right out of the Ninth Circuit’s book. Its discussion of the first factor, which quotes **Leval’s** article and the **Campbell** case prominently, follows the lead of **Campbell’s Leval**-inspired dictum that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use,” and it hews to the Ninth Circuit’s open-ended construal of “different purpose” as encompassing noncreative functional difference. The defendant **iParadigm** owns and operates the **Turnitin Plagiarism Detection Service** used by many high schools and colleges that allows teachers to compare student essays against a large database of stored student papers and journal articles. Several students had brought suit against **iParadigm** for its use of papers they had written in high school. Among other points, their lawyers argued that **iParadigm’s** use of the papers could not be transformative “because the archiving process does not add anything to the work” (emphasis in original). The appeals court, however, rebutted this argument by calling it “clearly misguided. The use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without actually adding to the original work.” The court cites *Perfect 10 v. Google* as its authority for this position, quoting in particular the passage that urged the functional use in that case to be “highly transformative.” We can see here how far the courts have strayed from **Leval’s** own understanding of what is required for a use to be transformative. The court concluded its analysis of the first factor by saying that “**iParadigm’s** use of these works was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism.” As with the **Ninth Circuit** cases, the court here went on to interpret the other factors in light of its construal of the use as transformative. Thus the student papers’ being “expressive” in nature didn’t hold much weight because

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“iParadigm’s use of the works...[was] unrelated to any creative component,” its being merely a computer-facilitated comparison of the content of submitted student essays with the papers stored in the database. Nor did it matter that the entirety of the student papers were being used in this process because it was not their “expressive” content that was being exploited, only the “historical fact” of plagiarism that it was the aim of the process to detect. Urging that “the transformative nature of the use is relevant to the market effect factor,” the court dismissed the plaintiffs’ arguments for effect on potential markets as “theoretical and speculative,” just as the Ninth Circuit had done in the *Perfect 10* case. Clearly, the initial determination that the use was “transformative” colored the court’s construal of all the other factors, diminishing if not entirely negating their impact on the finding of fair use. And, just as clearly, the court was set on reaching this conclusion because of its favorable view of the public benefits afforded by the Turnitin system, supporting the district court’s opinion that it “provides a substantial public benefit through the network of educational institutions using Turnitin.”

This line of cases transforming the common meaning of “transformative” championed by Judge Leval into an all-purpose reading of “purpose” as anything that makes a functionally different use of the copyrighted work, however uncreative that use may be, offers a textbook example of Georgia Harper’s story about how judges approach fair use cases, by making up their minds first about what benefits the public most and then reasoning backward through the four-factor analysis to arrive at that predetermined conclusion. (See Harper’s “Google This!” at <http://www.utsystem.edu/ogc/intellectualproperty/googlethis.htm>). That this is indeed a fair charge to make against the Ninth Circuit is confirmed by one of its own members, Judge Alex Kozinski, who accused his fellow jurists in his dissent in *Perfect 10 v. Visa International*, an extension of the *Perfect 10 v. Google* case, of subscribing to this theory of what public policy requires: “(1) to promote the continued development of the Internet and other interactive media [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” Judge Kozinski also reminded his colleagues that it is the role of the legislature, not the judiciary, to decide what U.S. public policy should be.

Contrast the Ninth Circuit’s obeisance to functionality so long as it provides a perceived public benefit with the reasoning of Judge Jon Newman, Leval’s colleague on the Second Circuit Court of Appeals, who wrote about photocopying in the famous *American Geophysical Union v. Texaco, Inc.* (1994) case: “We would seriously question whether the fair use analysis that has developed with respect to works of authorship alleged to use portions of copyrighted material is precisely applicable to

copies produced by mechanical means. The traditional fair use analysis, now codified in section 107, developed in an effort to adjust the competing interests of the authors — the author of the original copyrighted work and the author of the secondary work that ‘copies’ a portion of the original work in the course of producing what is claimed to be a new work. Mechanical ‘copying’ of an entire document, made readily feasible by the advent of xerography..., is obviously an activity entirely different from creating a work of authorship. *Whatever social utility copying of this sort achieves, it is not concerned with creative authorship* (italics added).” This reasoning entirely comports with the argument of Judge Leval in his 1990 article. And it runs directly counter to the Ninth Circuit’s (and now the Fourth Circuit’s) intellectually obfuscating attempt to insert claims of social utility into the bowels of fair use analysis.

This is not to argue that references to the greater public good have no place in fair use analysis at all. Indeed, it was Leval’s explicit aim to find a principled way of interpreting fair use that would reflect the Constitutional objective of having copyright law serve the public good of promoting the progress of knowledge. But, unlike the Ninth and Fourth Circuits, the Second has made that attempt without distorting fundamental aspects of copyright or departing from the ordinary use of language. Still, it may be that Leval’s approach is itself not fully adequate to the full range of considerations that fair use analysis needs to take into account, and it may have created as much harm as benefit by suggesting that, as the “soul of fair use,” the “transformative” nature of a secondary use can be deployed to diminish the importance of the other three factors. In a comment on Leval’s article titled “Fair’s Fair” in the same issue of the *Harvard Law Review*, Lloyd Weinreb cogently argues that Leval errs in trying to force all fair use analysis into the Procrustean bed of “the utilitarian premises of the copyright scheme as a whole” and suggests instead that besides “the general purpose of copyright... , a number of other factors also have to be taken into account, among which customary practice and the prevailing understanding of what constitutes fair conduct in the circumstances are the most important.” Only with this more expansive approach to fair use, Weinreb urges, can one make sense of the decisions in two of the leading cases about fair use decided by the Supreme Court: *Sony Corp. of America v. Universal City Studios, Inc.* (1984) and *Harper & Row, Publishers, Inc. v. Nation Enterprises* (1985).

Straightforward comparison of *Sony* and *Harper & Row* according to the statutory factors has puzzling results. The “purpose and character” of the use in *Sony* was private; in *Harper & Row*, the use was news reporting, a public purpose with unusually strong constitutional protection. The copyrighted works in *Sony* included fictional works, presumably entitled to greater protection than factual works; *Harper & Row* involved an account of actual events. In *Sony*, the whole work was copied; in *Harper & Row*, fewer than four hundred words

from a manuscript of 200,000 words. Although the practice of time-shifting television programs was extremely widespread, the Court in *Sony* held that the plaintiffs had not met their burden of proving that “some meaningful likelihood of future harm exists.” In *Harper & Row*, the plaintiff’s loss was \$12,500 for a license to publish an excerpt from the copyrighted work. On the surface of things, *Harper & Row* looks like a much better candidate for a finding of fair use than *Sony*. Yet the results in the two cases, decided just sixteen months apart, are the reverse.

Needless to say, Leval’s approach does not work well for these two cases. The time-shifting at issue in the *Sony* case is not “transformative” at all in Leval’s sense (though might be seen as compatible with the Ninth Circuit’s functional construal). By contrast, the use of an excerpt from President Ford’s memoir in *The Nation*’s article is a classic example of “transformative” use, further blessed by having “news reporting” cited explicitly in the preamble of Section 107 as one of the “purposes” where fair use most comes into play as a limitation on the rights of the copyright owner. Key to the outcomes of the two cases were the other considerations that Weinreb alleges to be important also: “customary practice” in the case of *Sony* (because time-shifting for private viewing in the home was a commonly accepted practice) and “fair conduct” in the case of *Harper & Row* (where *The Nation* was charged with obtaining a copy of Ford’s unpublished manuscript by theft).

Weinreb’s argument thus allows for a broader range of factors to be taken into consideration in arriving at decisions about fair use, and his approach suggests that they just be straightforwardly put on the table, rather than smuggled in through the back door of Leval’s utilitarian principles. The error of the Ninth and Fourth Circuits, then, may be viewed as following Leval’s approach of stressing the primacy of “transformative” use but having to distort it in order to import these broader considerations of public benefit seen by these courts as deriving from computer technology, which could more simply have been brought forward as separate points to bear in mind. How could this be done? Both Leval and Weinreb offer suggestions for harmonizing copyright law and the public interest. Leval’s recommendation is to recognize the author’s entitlement to compensation for creative effort by awarding damages but to deny an injunction against the use if it is indeed “transformative” and strongly in the public interest. Weinreb agrees that this recommendation “has merit.” For a situation “when a practice as widespread as taping television programs is at stake, however, resort to a compulsory license — the consequence of withholding an injunction and awarding damages — is more appropriately a legislative task. Congress has provided for a compulsory license in similar circumstances.” *Nimmer on Copyright*, discussing the vexed issue of photocopying arising from *Williams & Wilkins Co. v. United States* (1975), offers

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another suggestion for balancing the interests of copyright owners and the public: “even in copyright actions against nongovernmental entities, where the remedy of permanent injunction is available, a court could withhold injunctive relief and provide instead for the mandatory payment of a royalty as a condition of further photocopying,” i.e., “a judicially created compulsory license.”

Nimmer on Copyright proposes a “functional test” as a means for deciding when certain uses are fair: “if, regardless of medium, the defendant’s work, although containing substantially similar material, performs a different function than that of the plaintiff’s, the defense of fair use may be invoked.” One example given is where “unauthorized reproduction of chorus lyrics of songs were held noninfringing fair use where such reproductions appeared in magazine articles” rather than in sheet music competing for the same market as the original. This “functional test” was inspired by a suggestion from **Judge Richard Posner**, who urged the recognition that “copying that is complementary to the copyrighted work...is fair use, but copying that is a substitute for the copyrighted work..., or for derivative works from the copyrighted work, is not fair use”. This approach, though it may seem superficially similar to the Ninth Circuit’s because of the reference to functionality, is in fact quite different. Rather than being tortured out of the notion of “transformative” use, this “functional test” is instead “viewed as an expansion of the fourth fair use factor...[and] vindicates the oft-cited assertion...that that factor emerges as the central fair use determinant, in result if not always in stated rationale.” *Nimmer*, like *Weinreb*, looks at some **Supreme Court** cases whose outcomes appear to be quite puzzling without being understood in terms of this “functional test.”

Consider the four **Supreme Court** cases decided under the fair use doctrine in the decade beginning in 1984. Each of the three initial fair use factors defies characterization that can consistently explain the court’s ultimate conclusion in those cases. The first factor reveals conflicting impulses, whether scrutinized as to commercial use or to transformative use, or according to the statutory preamble. On the commercial scale, *Nation* and *Abend* [*Stewart v. Abend*, 1990] both disallow fair use for commercial uses, whereas *Sony* allows it in a noncommercial context; but *Campbell* allows fair use for commercial exploitation. On the transformative scale, *Campbell* weighs in favor of fair use for a productive use, yet *Nation* and *Abend* rule against fair use for what is admittedly a productive use; even more strangely, *Sony* allows fair use for a nonproductive use. In terms of the presumptively fair activities enumerated in the preamble to Section 107, the activity in *Campbell* constituted “criticism, comment,”

and hence, inclines towards fair use, whereas the activity in *Abend* met none of the preamble specifications and was held unfair, both as expected, yet the activity in *Sony* fell into none of the preamble categories, and was nonetheless held fair; completely confounding expectations, *Nation* dealt with protected “news reporting,” but nonetheless held against fair use.

The second factor likewise produces disparate results. *Abend* unsurprisingly disallows fair use for a highly creative work, yet *Campbell* and *Sony* allow the use for similarly creative works; and *Nation* seems totally out of kilter, disallowing fair use for a factual work. The third factor is likewise mixed. *Campbell* allows fair use for less than total copying, but *Nation* and *Abend* both disallow fair use for less than total copying; by contrast, *Sony* allows fair use for total copying!

Nimmer goes on to consider how the “functional test” fares better as an explanation for the outcomes of these four cases and concludes: “then the fourth factor, as expanded by the functional test, is currently the most reliable touchstone for performing fair use analysis.” One wonders why the appeals courts in the Ninth and Fourth Circuits did not follow *Nimmer*’s lead, or the suggestions of both *Leval* and *Weinreb* about injunctions and compulsory licenses, rather than stretch the applicability of “transformative use” beyond its ordinary-language limits. That would have been an intellectually more honest and satisfactory way of reaching the conclusions they wanted to reach about the public interest and saved them from sometimes very contorted reasoning that betrays the special pleading in which they were manifestly engaged.

Why should anyone care about how these courts reached their decisions? There are, in fact, very good reasons for university presses, indeed all publishers, to be concerned. If the **Google Settlement** comes undone, perhaps under pressure from the **Justice Department** about its anti-trust implications (which seems more possible than ever in light of recently announced changes in that Department’s strategy for dealing with anti-trust issues, where its potential impact on **Google** was mentioned in news stories reporting the change), the suit against **Google** will presumably resume in the Second Circuit. For publishers’ sake, we may hope that the Second Circuit stays true to **Judge Leval**’s concept of “transformative use” and does not depart down the dangerous path that the Ninth Circuit has taken. If it does, **Google** may yet lose its battle in court over fair use. But the risk remains that the west coast disease, having now spread eastward to the Fourth Circuit, will begin infecting judges in the Second Circuit as well. (Some signs of the disease having already begun to spread further may indeed be found in both the *Bill Graham Archives* and *Video Pipeline* cases, which cite *Kelly* approvingly). If that happens, all bets are off.

But this is not the only suit that stands in jeopardy from this spreading disease. The Fifth Circuit now has under consideration the

suit brought by two university presses, joined by a commercial academic publisher, against **Georgia State University** for its alleged infringing activities in providing unauthorized copies of publications to students through its course-management, e-reserve, and other educational systems. But can coursepack copying really be construed as fair? Copyright expert **Jonathan Band**, in the white paper titled “Educational Fair Use Today” (December 2007) prepared for the **ARL**, believes that it can indeed be construed as fair if interpreted under the rubric of “transformative use,” as that was explicated especially in the Ninth Circuit’s decision in *Perfect 10*. According to **Band**, “an educational use of an entertainment product is transformative because the work is being repurposed...[and], when a teacher reproduces a poem, a sound recording, or a photograph so that his students can study the work, his use is transformative” — as though, magically, merely making copies available to students somehow adds value to them because of the new context of their use. He further suggests that “tools like **Blackboard** permit an instructor to create an online anthology for a class, including copyrighted works, commentary, lecture notes, and student reactions” and “this recontextualization appears to provide a stronger fair use defense than would a library-run e-reserves containing just the plain text of works.” This theory would also presumably sanction publishing such an anthology online through the library or an institutional repository, eliminating the need for any permissioning of the copyrighted contents. **Band** does admit that “the repurposing argument provides less protection with respect to works that target the education market,” but he goes on to distinguish in this respect textbooks from journal articles and academic books. Journal articles, he asserts, have scholars as their primary audience and “because undergraduates are not the target audience of journal articles, inclusion of such articles in e-reserves or a course Website might well be treated as a form of repurposing.” Academic books, he believes, fall in a middle ground, “but even if the book is aimed to some extent at the student market, a course Website could recontextualize the book.” (For my full critique of **Band**’s position, see my article titled “What Is Educational Fair Use?” in *Against the Grain*, April 2008). If judges in the Fifth Circuit catch the Ninth Circuit disease, then the outcome of this suit may well not favor publishers’ interests. On the other hand, *Nimmer*’s “functional test,” emphasizing the key role of the fourth factor, would likely result in an outcome favorable to publishers, and even the suggestions forwarded by *Leval* and *Weinreb* with regard to compulsory licensing, while not an ideal solution from a publisher’s point of view, would respect the copyright ownership of the authors and their publishers by recognizing their legitimate interests in a return on their investment.

To conclude, my modest proposal is that judges in all of the other nine circuits outside the Ninth and Fourth don the metaphorical equivalent of surgical masks to reduce the risk of their exposure to the west coast disease. 🦋