

What Is Transformative?
*An Explanatory Synthesis of the Convergence of Transformation and
Predominant Purpose in Copyright Fair Use Law*

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This article analyzes the entire body of United States Courts of Appeals' case law applying the transformative test in copyright fair uses cases to present two points: first, that the transformative test modifies the first sentence of 17 U.S.C. § 107—in particular, the terms, “the fair use of a copyrighted work”—rather than simply factor one of the four factor test. Second, the implementation of the transformative test by the courts indicates that the courts are to consider transformations in the content, context, and the predominant purpose of the original work and whether the alleged fair use changes the content, context, or purpose in a manner that furthers the public policies reflected in the first sentence of section 107. These points indicate a convergence in transformation and predominant purpose in the evaluation of fair use in copyright law.

This article will perform an explanatory synthesis of each United States Court of Appeals case applying the transformative test in copyright fair use disputes to demonstrate how the term “transformative” works as revealed in the record of what courts actually declare to be transformative and not transformative. My goal is not to highlight disparities between cases and holdings, but to engage in synthesis—specifically, explanatory synthesis in contemporary legal rhetoric—to create meaning and induce comprehension of the term “transformation” and to inspire the rhetorical imagination of how to advocate for particular determinations of transformative fair use using the available data set of appellate cases that have made concrete determinations of transformative fair use in many fact patterns and copyright narratives.

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