Transformative Manners of Use: *The Unofficial Bridgerton Musical* and a Call for Reform in Transformative Use Analysis

Brice Kimble[*]

ABSTRACT

Modern cases of copyright infringement largely deal with an analysis of 'transformative use,' a judicial creation that is seen as an outgrowth of fair use as codified in the Copyright Act of 1976. Since 1976, the application of 'transformative use' has been different across courts and jurisdictions, where some courts emphasize purpose of use, and others look to method of delivery. These differences can be outcome determinative, depending on the facts of each individual case. As the world grows to favor sequels, retellings, and reimaginations of familiar favorites in consuming entertainment, a new method of transformative use analysis is necessary to clear ambiguities when applying transformative use analyses, especially when a derivative work is of a different media categorization than the original.

TABLE OF CONTENTS

[*] J.D., 2024, The George Washington University Law School; B.M., 2021, The University of Arizona. I extend sincere gratitude to the staff of *The George Washington Law Review* for their detailed guidance on this Note, especially to Brian Smith and Allie Schiele, whose advice was invaluable. I want to give a special thank you to Dr. John Milbauer, for encouraging me to combine the great interests of my life, and to my mother, for unconditionally supporting me through my journey in doing so.

INTRODUCTION

The Unofficial Bridgerton Musical has caused the hole in modern copyright analysis to grow. Although based on a Netflix television show—and containing dialogue from the show lifted to create its lyrics—*The Unofficial Bridgerton Musical* is a wholly original musical composition with unique melodies and instrumentation.[1] The music can also be adapted for the stage, with a live orchestra and several actors singing the composition for a public audience.[2] Netflix sued the musical's creators after it was performed live for the first time, and though *The Unofficial Bridgerton Musical* was only performed for a live audience once,[3] the studio recording of the

[1] *See generally* Complaint, Netflix Worldwide Ent., LLC v. Barlow, No. 1:22-cv-02247 (D.D.C. July 29, 2022).

[2] *Id.* at 2.

[3] The *Unofficial Bridgerton Musical* was performed for the first and only time for a live audience at the Kennedy Center in Washington, D.C., in the summer of 2022. *Id.* at 1–2.

composition, released prior to the live performance, won a Grammy[4] and yielded a considerable amount of listeners on music streaming services.[5] Though the copyright claim between Netflix and the musical's creators settled out of court,[6] the tension between the two parties reveals a unique problem—that the current transformative use doctrine is inadequate when dealing with two works with the same central idea and two different modes of presentation.

Modern copyright law is often centered around whether a work is adequately "transformative" to be deemed a permissible use of an otherwise copyrighted work. In short, if a derivative work adequately "transforms" the original, it is permissible.[7] Broadly, a work that adequately employs "transformative use" is taken to mean that the work "alter[s] the first with new expression, meaning, or message."[8] For decades, courts have relied on "transformative use" to resolve copyright disputes that fall under the doctrine of fair use.[9] Unlike fair use, however, transformative use is not codified, meaning its creation is entirely judicial.[10] Although not a problem in itself, courts' interpretation of what constitutes a transformative use has failed to accommodate the rapidly evolving and massively expanding world, a world where some new works find creativity in the mode of presentation itself, not necessarily in the ideas being presented.[11]

A lack of originality does not necessarily imply a lack of creativity. It is well known that many of the most beloved stories of the modern era originate from centuries' old ideas. Notable examples include *The Lion King* deriving major plot points from Shakespeare's *Hamlet*[12] or the several dozen *Pride*

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4 Deanna Schwartz, *The Netflix v. 'Unofficial Bridgerton Musical' lawsuit, explained*, NPR (Aug. 4, 2022, 12:42 PM), https://www.npr.org/2022/08/04/1115212455/netflix-bridgerton-musical-lawsuit [https://perma.cc/H74Q-PXSR].

5 *See* Complaint, *supra* note 1, at 13.

6 Zoe Guy, *Netflix Officially Settles* The Unofficial Bridgerton Musical *Lawsuit*, VULTURE (Sept. 26, 2022), https://www.vulture.com/2022/09/netflix-bridgerton-lawsuit-settled.html [https://perma.cc/3WY9-6B54].

7 *See* Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163, 166 (2019).

8 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

9 Liu, *supra* note 7, at 174.

10 David E. Shipley, *A Transformative Use Taxonomy: Making Sense of the Transformative Use Standard*, 63 WAYNE L. REV. 267, 268 (2018).

11 *See infra*, Part II.

12 Austin Tichenor, *Can you feel the Shakespeare love tonight*, FOLGER SHAKESPEARE LIBR. (July 26, 2019), https://www.folger.edu/blogs/shakespeare-and-beyond/lion-king-shakespeare-hamlet-hal-falstaff-henry-iv [https://perma.cc/U5B3-Y2ZJ].

and Prejudice retellings.[13] These modern works are arguably unique when compared to the original, largely due to distinguishing elements that are inherent in the later work's mode of presentation. As retellings continue to grow in popularity, a question begs to be answered: is it not true that by its very nature, a nonoriginal idea expressed through a completely original mode of expression is transformative? *The Unofficial Bridgerton Musical*—a stage musical that is nominally and substantively "transformed" from the original television show—is perhaps the most recent example of this inherent transformation.[14]

To resolve the numerous questions about courts' application of "transformative use" in fair use copyright analysis, Congress should amend current copyright law to include a new standard of transformative use analysis when analyzing derivative works of a different media categorization from the original. This Note proposes a revised legal framework for determining transformative use when analyzing two different works of two different media categorizations under fair use. Part I examines the origins, goals, and history of copyright and fair use in relevant American cases and legislation. Part II analyzes current fair use doctrine as applied in two ways. First, it analyzes fair use for two works of the same media categorization and second, for two works of different media categorizations. Part III proposes and applies a novel transformative use framework to examples of two works of different media categorizations and illustrates the proposed legislation's potential to resolve current ambiguities in transformative use analysis.

I. ORIGINS OF COPYRIGHT AND TRANSFORMATIVE USE

a. The Origin of American Copyright Law

To locate the purpose of copyright law, one needs to trace American copyright to its inception: the Copyright Act of 1790.[15] This Act was modeled after a British law—The Statute of Anne[16]—enacted in 1710, and both the British and American laws granted exclusive rights to authors of published works.[17] Specifically, the Copyright Act of 1790 granted authors

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13 Anne E. Bromley, *It's a Good Time to Binge on 'Pride and Prejudice' Adaptations*, UVATODAY (Nov. 13, 2020), https://news.virginia.edu/content/its-good-time-binge-pride-and-prejudice-adaptations [https://perma.cc/HB53-2GTW].

14 Complaint, *supra* note 1, at 1–2.

15 Copyright Act of 1790, ch. 15, 1 Stat. 124; *see also Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBRS., https://www.arl.org/copyright-timeline [https://perma.cc/P8MH-AVDA].

16 The Statute of Anne, 8 Ann. c. 19 (1710).

17 ASS'N OF RSCH. LIBRS., *supra* note 15; Jeremy M. Norman, *The Statute of Anne: The First Copyright Statute*, HISTORY OF INFO.,

the exclusive rights to print, reprint, or otherwise publish their work for fourteen years, with an option to renew that right for another fourteen years.[18] The purpose of this act was to foster an "encouragement of learning,"[19] where authors felt safe to spread their ideas and share their creations with the broader public.[20] Indeed, it appears that copyright was created as a way of encouraging the creation of new works, incentivizing creators to continue publishing new ideas by virtue that the idea itself is protected.[21] This is evidenced by the sentiment surrounding the drafting of the original Copyright Act of 1790. It was drafted as a way to incentivize authors to create by protecting their works, while also limiting those protections so others could build upon it as the arts and technology developed further.[22]

After a revision in 1831,[23] the Copyright Act was notably revised again in 1870.[24] A major factor to the 1870 revision was Harriet Beecher Stowe's novel, *Uncle Tom's Cabin*, which had been translated into German without her authorization.[25] Stowe argued that she possessed the sole copyright for all reprintings of her book—even when translated into German. But, when Stowe tried to claim copyright over the translation in *Stowe v. Thomas*,[26] the court held that the translated copy was not an infringement of her copyright.[27] The court held that the German translation was not a copy of her exact work in English, even while conceding that the German translation was still a "copy of [Stowe's] thoughts or conceptions."[28] In essence, the court held that Stowe's creation could be imitated in countless translations and recreations because she only possessed the copyright to publish the book in English.[29] In light of this controversial decision, the Copyright Act's revision

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https://www.historyofinformation.com/detail.php?entryid=3389 [https://perma.cc/FGG7-U6GB].

18 ASS'N OF RSCH. LIBRS., *supra* note 15.

19 Copyright Act of 1790, ch. 15, § 3, 1 Stat. 124, 125.

20 *See* ASS'N OF RSCH. LIBRS., *supra* note 15.

21 *See id.*

22 *Id.*

23 The Copyright Act revision of 1831 extended the initial time of protection from fourteen years to twenty-eight, with an option to renew for another fourteen. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; ASS'N OF RSCH. LIBRS., *supra* note 15.

For the purposes of this Note, a notable case was decided between 1831 and 1870 that serves as the model for what is known today as fair use. *See generally* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841); *see infra*, Section I.b.i.

24 ASS'N OF RSCH. LIBRS., *supra* note 15.

25 *See id.*

26 23 F. Cas. 201 (1896).

27 *Id.* at 208.

28 *Id.*

29 *Id.*

in 1870 expanded what a copyright holder owns, to include translations of their work, and dramatizations of their work.[30] The revision was in large part spurred by Stowe's struggle. In the wake of *Stowe v. Thomas*, hundreds of artists and authors signed five petitions that were submitted to Congress in 1869, urging the legislature to expand copyright protections.[31] In the year after these petitions were submitted, the Copyright Act of 1870 was adopted with language that was largely influenced by the petitions themselves.[32]

The next revision to the Copyright Act occurred in 1909.[33] Among the developments that spurred the 1909 revision is *White-Smith Publishing Co. v. Apollo Co*.[34] This case dealt with the advent of the player piano, which allowed for the placement of a perforated roll into a piano. The piano could then independently play whatever the roll read without anyone actively pressing its keys.[35] Several composers alleged that the perforated rolls infringed upon their copyright as creators of the music.[36] In response, manufacturers argued that the piano roll was inherently different from the music itself because, on its own, a perforated roll cannot be read as music.[37] As to whether music on the perforated roll infringed on the copyright of the original composer, the Supreme Court decided that the music notated on the perforated rolls was not a copy of the original composition, because they are pieces of a machine and not compositions themselves.[38] Thus, notating a copyrighted piece of music onto a perforated roll of music was not a copy of the original.[39] In the aftermath of *White-Smith Publishing*, Congress responded with the 1909 revision to the Copyright Act by conferring the right to mechanical reproductions of nondramatic musical works to the composition's original copyright holder.[40] In addition, the 1909 revision

30 *See* Act of July 8, 1870*,* ch. 230, § 86, 16 Stat. 198, 212.

31 *See* Robert Brauneis, *Understanding Copyright's Encounter with the Fine Arts: A Look at the Legislative History of the Copyright Act of 1870,* 71 CASE W. L. REV. 585, 588, 591–92 (2020).

32 *See id.* at 594.

33 *See* Pub. L. No. 60-349, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. §§ 101–1401 (2018)); *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RSCH. LIBRS., https://www.arl.org/copyright-timeline [https://perma.cc/6CKJ-ZWDQ].

34 209 U.S. 1, 9–11 (1907).

35 *Id.*

36 *See id.* at 11.

37 *See id.* at 18.

38 *See id.*

39 *See id.*

40 *Music Licensing Reform: Statement of Marybeth Peters The Register of Copyrights before the Subcomm. on Courts, the Internet, and Intell. Prop., Comm. on the Judiciary*, 109th Cong. (2005) (statement of Marybeth Peters, The Register of Copyrights), https://www.copyright.gov/docs/regstat062105.html [https://perma.cc/V4DX-T59N]; U.S. Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075.

categories of copyright protection were further extended to "include all the writings of an author."[41]

The rapid development of technology would continue to influence changes made to the Copyright Act. After the 1909 revision to the Copyright Act, the entertainment world grew rapidly and exponentially with the increasing popularity of television, motion pictures, and sound recordings, all of which were in the early stages of development in 1909.[42] These industries created "new methods for the reproduction and dissemination of copyrighted works,"[43] and it became clear that further revisions were needed to keep up with the developing world.[44] The most recent revision to the Copyright Act came in 1976.[45]

b. The Copyright Act of 1976

The law that governs copyright today is The Copyright Act of 1976.[46] The Act was inspired by two social developments: (1) technological innovations that could change how works are developed, published, and distributed; and (2) the 1971 Berne Convention,[47] an international agreement on copyright protections.[48] The 1976 revisions were an attempt to further align American copyright law with international copyright law. This was achieved by extending the amount of time of copyright protection, allowing for the protection of unpublished works, and strikingly, codifying fair use for the first time,[49] where fair use allows for the unauthorized use of a copyrighted work without infringing upon its copyright protections.[50]

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41 U.S. Copyright Act of 1909, ch. 320, § 4, 35 Stat. 1075, 1076. The 1909 revision also extended the time of copyright protection, with an initial protection of twenty-eight years and an option to renew for another twenty-eight. *See id.* § 23.

42 *See* H.R. REP. NO. 94-1476, at 47 (1976).

43 *Id.*

44 *Id.*

45 *See* ASS'N OF RSCH. LIBRS., *supra* note 15.

46 *See* 17 U.S.C. §§ 101–1332.

47 The 1971 Berne Convention provided an international blueprint for copyright protections. *See* ASS'N OF RSCH. LIBRS., *supra* note 15. The Convention yielded a multilateral treaty, the 1971 Paris Act, which required signatories to protect artistic creations under copyright for a uniform amount of time. *A Brief History of Copyright in the United States: 1950-1997*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-1997.html [https://perma.cc/6YL4-NWRF]. The United States became a signatory to this treaty, and the resulting Copyright Act of 1976 is an extension of the 1971 Paris Act's minimum requirements. *See id.*; ASS'N OF RSCH. LIBRS., *supra* note 15.

48 *See* ASS'N OF RSCH. LIBRS., *supra* note 15.

49 *See id.*

50 *See* David E. Shipley, *A Transformative Use Taxonomy: Making Sense of the Transformative Use Standard*, 63 WAYNE L. REV. 267, 270–271 (2017).

i. The Fair Use Doctrine

Though fair use was not codified until the Copyright Act of 1976, the language of the statute was largely modeled after an 1841 Massachusetts case,[51] *Folsom v. Marsh*.[52] There, the court discussed what was called "justifiable use," or a "use of original [copyrighted] materials, such as the law recognizes as no infringement of the copyright of the plaintiffs."[53] A comparison of the copyrighted work and the new work was conducted.[54] In large part, a copyright infringement occurs when so much is taken from an original work to create a new one, to the point that the value or thought put into the original's creation is diminished.[55]

This sentiment is, of course, limited, where infringement is "affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work."[56] In essence, the court emphasized the quality of the lifted material over the quantity of it, thus giving birth to the four factors that are used for copyright determinations today.[57]

The four factors of a justifiable use of a copyrighted work, as stated by Justice Story in *Folsom*, are:

> [A] . . . balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.[58]

Today, fair use[59] is understood as a limitation on copyright law's formal protections.[60] Indeed, the Copyright Act defines fair use when it reads, "the fair use of a copyrighted work . . . is not an infringement of copyright."[61] Within the statute itself, several categories of a material's usage are carved out as safe from copyright litigation, including "use by reproduction in copies or phonorecords or by any other means specified by that section, for

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51 *See* ASS'N OF RSCH. LIBRS., *supra* note 15.

52 9 F. Cas. 342 (C.C.D. Mass. 1841).

53 *Id.* at 348.

54 *Id.* at 344.

55 *Id.* at 348.

56 *Id.*

57 As codified in 17 U.S.C. § 107. *See id.*; ASS'N OF RSCH. LIBRS., *supra* note 15.

58 *Folsom*, 9 F. Cas. at 344.

59 17 U.S.C. § 107.

60 *See* ASS'N OF RSCH. LIBRS., *supra* note 15.

61 17 U.S.C. § 107.

purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[62]

Justice Story's categories in *Folsom*[63] form the basis of considerations for the statutory definition of fair use, as the four factors to determine fair use are: "(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."[64]

The language that determines fair use is intentionally broad. The legislative history of the section states that "no generally applicable definition is possible" where each case of fair use must be determined based on the individual facts.[65] The fair use doctrine is applied to decide a number of different copyright disputes,[66] but the focus of this Note is how the Copyright Act has been used to determine instances of transformative use. Transformative use, however, is not a concept created by Congress,[67] nor does the word "transformative" appear anywhere in the legislation,[68] which has led to significant problems in its application.[69]

c. Transformative Use and the Application of the 1976 Copyright Act

Today, much of copyright law is centered around whether or not a work is adequately "transformative" to be deemed fair use.[70] The Supreme Court has determined that transformative use is a concept that falls under the first category of the fair use elements: "[T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[71] Transformative use is a relatively new concept,[72] though its roots can be traced to *Folsom*.[73] Indeed, when transformative use

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62 *Id.*

63 *Folsom*, 9. F. Cas. at 344.

64 17 U.S.C. § 107.

65 H.R. REP. NO. 94-1476, at 65 (1976).

66 *See* Liu, *supra* note 7, at 173–74, 176.

67 *See* Shipley, *supra* note 10, at 267.

68 *See* 17 U.S.C. § 107.

69 *See* Shipley, *supra* note 10, at 268.

70 *See* Liu, *supra* note 7, at 166.

71 17 U.S.C. § 107; *see also* Campbell v. Acuff-Rose Music, 510 U.S. 569, 578–79 (1994).

72 It was first applied in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994). For full elaboration of this case, see *infra* Section II.a.i.

73 *See* Liu, *supra* note 7, at 221. The *Folsom* court does not use the term "transformative" to define this concept but instead refers to the idea as "justifiable use." Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

was employed for the first time, the Supreme Court used *Folsom* as a guiding principle, stating that

> The central purpose of this investigation is to see, in Justice Story's words [in *Folsom*], whether the new work 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."[74]

Here, "transformative" is taken to mean a work that "alter[s] the original with new expression, meaning, or message."[75]

Transformative use is a judicial creation, not a legislative one.[76] This allows the transformative standard to be arbitrarily applied because there are no universally clear rules that ensure an equal application in every case.[77] This leads to a landscape in copyright law where individuals are not incentivized to create new works but are instead stifled, wondering if their works are original enough.[78] Indeed, as echoed by the Supreme Court when transformative use was used for the first time, "in literature, in science and in art, there are, and can be, few, if any, things . . . [that] are strictly new and original throughout."[79] Inherent to its nature, a work that transgresses the media categorization of the original—put simply, a "new mode" of expression when compared to the original[80]—is arguably already transformative because it belongs to a different medium than the original does. To fill this gap in legal reasoning, derivative works of a different media categorization from the original need to be held to a new legislative standard of transformative use: one that encourages the creation of new works and is applied uniformly.

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

75 *Id.* at 569.

76 *See* Shipley, *supra* note 10, at 267.

77 *See* Liu, *supra* note 7, at 169.

78 *See* Glyn Moody, *Widespread Copyright Anxiety, Leading to Copyright Chill, Means Something is Deeply Wrong*, WALLED CULTURE (Oct. 5, 2021), https://walledculture.org/widespread-copyright-anxiety-leading-to-copyright-chill-means-something-is-deeply-wrong [https://perma.cc/4RTX-98Q9]; Amanda Wakaruk, Céline Gareau-Brennan & Matthew Pietrosanu, *Introducing the Copyright Anxiety Scale*, 5 J. COPYRIGHT IN EDUC. & LIBRARIANSHIP 1, 2 (2021).

79 *Campbell*, 510 U.S. at 575 (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845)).

80 An example includes a book based on a television show, which was the case in *Castle Rock Ent., Inc. v. Carol Publ'g Grp.,* 150 F.3d 132, 143 (2d Cir. 1998), discussed in Section II.b.i.

II. RELEVANT COPYRIGHT CASES

To better understand how the transformative use framework is arbitrarily applied, this section will detail the application of transformative use in two scenarios: (1) when the two works are within the same media categorization—for example, a song being compared to another song, or a book compared to another piece of writing—and, (2) when the two works are within different media categorizations—for example, a television show being compared to a staged musical, or a book.

a. Copyright Claims of Two Works Within the Same Media Categorizations

i. *Campbell v. Acuff-Rose Music*

"Transformative use" was first used by the Supreme Court in 1994,[81] in *Campbell v. Acuff-Rose Music*.[82] The Court attached transformative use to the first element of traditional fair use analysis as a way of determining "the purpose and character of the use, including whether such use of a commercial nature or is for nonprofit educational purposes."[83] The Court held that the more transformative something is, the less likely its commercial nature needs to be considered when determining fair use.[84]

In the case, Acuff-Rose Music owned the copyright to the song, "Oh, Pretty Woman," and alleged a copyright infringement against the record company Campbell, who distributed a song with a similar musical bass motif, opening line, and title: called "Pretty Woman."[85] The Court defined its application of transformative works as one that "alter[s] the [original work] with new expression, meaning, or message,"[86] while still conceding that the definition "does not . . . tell either a parodist or judge much about where to draw the line" between a transformative work, and nontransformative work.[87]

The Sixth Circuit found that the bass motif—lifted from the original song to the new—was the "heart" of "Oh, Pretty Woman," and that its use in "Pretty Woman" was unlawful.[88] The Supreme Court, however, found that

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81 Michael D. Murray, *What is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law*, 11 CHI.-KENT J. INTELL. PROP. 260, 262 (2012).

82 510 U.S. 569 (1994).

83 17 U.S.C. § 107.

84 *See Campbell*, 510 U.S. at 585.

85 *See id.* at 572–73, 588.

86 *Id.* at 579.

87 *Id.* at 581.

88 *Id.* at 574–75.

although the motif is the heart of the original song, the later song is adequately transformative because it "could be perceived as commenting on the original or criticizing it," through "a comment on the naiveté of the original."[89] The case thereby opened the door for derivative parodies—of which "Pretty Woman" is, in relation to "Oh, Pretty Woman"—to be free of copyright infringement so long as it imbues a new meaning, even with using the heart of an original work.[90] *Campbell* sets the standard for what transformative use is by requiring a transformative work to be different from the original in terms of the meaning that is conveyed.[91]

ii. *Authors Guild v. Google, Inc.*

The transformative use analysis set in *Campbell* continues to determine copyright disputes, even alongside rapidly changing technologies, such as the advent of the internet.[92] In *Authors Guild v. Google, Inc.*,[93] Google's digitization of books—for the purpose of ease of user searching—was challenged.[94] Snippets of the searched text can be displayed on Google, and Authors Guild alleged that this was a violation of the copyright of the authors whose works were now digitalized and searched.[95] The Second Circuit held that the search itself is what made this practice transformative, in that searching for a sampling of the text is not a "substantial substitute" for the book because it provides information about the book being searched, not the entire book itself.[96] In addition, a snippet provided by Google is transformative because it provides context for the searched term without revealing the entire contents of the book.[97] Transformative use was thus found on two independent grounds based on a notably different use from the original: users could search for specific words, and the snippet function did not reveal the entire copyrighted work.[98] In making this determination, the *Authors Guild* court relied on the precedents of the Fourth and Ninth Circuits[99] for finding fair use when the digital copy "served a different

89 *See id.* at 583.

90 *Id.* at 588–89.

91 *See id.*

92 *See* Liu, *supra* note 7, at 166.

93 804 F.3d 202 (2d Cir. 2015).

94 *Id.* at 207.

95 *Id.*

96 *Id.* at 207, 217.

97 *Id.* at 218.

98 *Id.* at 229.

99 *See id.* at 217. Specifically, the court cites *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009), *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), and *Kelly v. Arriba Soft Corp.* 336 F.3d 811 (9th Cir. 2003). All three cases concern

function from the original."[100] In other words, the different manners of use between the original and derivative work can be a notable factor in determining transformative use.[101] The same is true for cases where alterations are made to the original work through commentary, as in *Cariou v. Prince*.[102]

iii. *Cariou v. Prince*

In *Cariou v. Prince*, original photographs were altered to such an extent that the new creation was deemed transformative.[103] Prince had taken Cariou's photograph portraits and overlayed them with different facial expressions, added content, and new colors.[104] Cariou argued that his photographs were incorporated into the new work without his permission, infringing upon his copyright,[105] while Prince argued that his new works were transformative.[106] The Second Circuit held that this aesthetic altering of the original photograph, changing its original "presentation, scale, color palette, and media"[107] changed the expression and composition of the original because they transformed the original's character and aesthetic.[108]

Cariou, in addition to *Campbell*[109] and *Author's Guild*,[110] emphasizes that the courts' application of transformative use is logical when analyzing works of the same media categorization, the application of transformative use is muddied when a new media categorization is added to the analysis. To this point, the discussion of transformative use has been limited to an original song and a derivative song, an original book and a digital version of the book, and two pieces of visual art.[111] When analyzing a derivative work that is of a different form of media from the original, however, the traditional application of transformative use is more complicated because the new way

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the digitization of copyright works, and all three were held that the digital copies were transformative because they are different from the original in terms of function.

100 *Authors Guild*, 804 F.3d at 217 (quoting *Authors Guild v. HathiTrust*, 755 F.3d 87, 97 (2d Cir. 2014)).

101 *See Authors Guild*, 804 F.3d at 217.

102 714 F.3d 694 (2d Cir. 2013).

103 *See Cariou*, 714 F.3d at 710.

104 *See id*. at 706.

105 *See id*. at 698.

106 *Id*.

107 *Id*. at 706.

108 *Id*. at 708.

109 For a full discussion of this case, see *supra* Section II.a.i.

110 For a full discussion of this case, see *supra* Section II.a.ii.

111 *See supra* Sections II.a.i–iii.

the derivative work is used. An illustrative case to demonstrate this phenomenon is *TCA Television Corp. v. McCollum.*[112]

iv. *TCA Television Corp. v. McCollum*

TCA Television Corp. illustrates the added challenge to transformative use analysis when the latter work is of a different mode of delivery than that of the original.[113] The case deals with the use of the "Who's on First?" comedy routine, developed and initially performed by the comedic duo of Abbott and Costello in the mid-twentieth century.[114] The routine was recited—nearly verbatim[115]—by a character in a theatrical production called *Hand of God*, which premiered in 2015.[116] The estate of Abbott and Costello argued that the use of the comedy routine was a violation of the comedians' copyright. The play's representatives argued that the use of the routine was adequately transformative and therefore the routine could be used under fair use.[117] The Second Circuit disagreed and found that the use of the "Who's on First" routine was not transformative enough to be deemed fair use.[118]

In their argument, the play's representatives asserted that the use of the comedy routine was transformative because it was used to convey the demeanor and personality of a certain character, and was thus a different purpose from the original purpose of the comedians'.[119] The court noted, however, that the focus of their inquiry into transformative use would not solely be focused on purpose of the use, but would place emphasis on whether the new work adds "any new expression, meaning, or message."[120] The key in this holding is the court's emphasis on mode of expression, stating that "there is 'nothing transformative' about using an original work 'in the manner it was made to be' used."[121] It would seem that because the play merely reiterated the comedy routine in the same way it was initially performed—on stage, for an audience—its use was not transformative.

This rationale is quite the addition to the transformative use jurisprudence established by *Campbell*, *Authors Guild*, and *Cariou*, whose determinations of transformative use rested on purpose and meaning.[122] In

112 839 F.3d 168 (2d Cir. 2016).
113 *See id.* at 182–83.
114 *Id.* at 172.
115 *Id.* at 176.
116 *Id.* at 175.
117 *See id.* at 172, 177.
118 *See id.* at 184–85.
119 *See id.* at 179.
120 *Id.* at 183.
121 *Id.* at 182–183 (quoting *On Davis v. Gap, Inc*., 246 F.3d 152, 174 (2d Cir. 2001)).
122 *See supra* Sections II.a.i–iii.

contrast, *TCA Television Corp.* recognizes that expression of the copyrighted material can be a factor worth consideration in determining transformative use.[123] This, in turn, has created a number of questions when analyzing transformative use, especially in circumstances where the original copyrighted work is used to create a work of an entirely different medium or mode of expression.

b. Copyright Claims of Two Works Within Different Media Categorizations

Two notable decisions in copyright jurisprudence where the second work's delivery of the copyrighted material was different from that of the original include *Castle Rock Entertainment Inc. v. Carol Publishing Group, Inc.*,[124] and *Twin Peaks Productions, Inc. v. Publications International, LTD.*[125] These two cases illustrate the current problem in interpreting fair use between works of different media categorizations, namely because they interpret "transformative" to refer to the later work's purpose and function, respectively.[126]

i. *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*

Castle Rock Entertainment Inc. is the copyright owner of the popular television show, *Seinfeld.*[127] While the show was still on the air, Carol Publishing Group, Inc. published a *Seinfeld* trivia book, which tested the show's fans about episode content,[128] arguing that the trivia book was transformative when compared to the television show.[129] However, rather than argue that the trivia book was transformative because it is a book, and not a television show, Carol Publishing Group argued that the content of the book added commentary to the show because (a) knowledge of *Seinfeld* is common knowledge; and (b) that the trivia book had "critically restructure[d]" discourse about *Seinfeld* by critiquing and commenting on the show's content.[130] The Second Circuit rejected both of these arguments, stating that the trivia book "minimally alters *Seinfeld*'s original

123 *See TCA Television Corp.*, 839 F.3d at 183.

124 150 F.3d 132 (2d Cir. 1998).

125 996 F.2d 1366 (2d Cir. 1993).

126 *See Castle Rock*, 150 F.3d at 143; *Twin Peaks Prods., Inc.*, 996 F.2d at 1376.

127 *Castle Rock*, 150 F.3d at 135.

128 Of the eighty-six episodes of *Seinfeld* that had aired, characteristics about eighty-four of them were included within the trivia book. *Id.*

129 *Castle Rock*, 150 F.3d at 142.

130 *Id.*

expression,"[131] because despite being a "new mode of presentation . . . [the trivia book added] little, if any, transformative *purpose*."[132]

The court's reliance on purpose, as opposed to expression, is interesting when compared to the holding of *Campbell*, which set the standard for what constitutes transformative use.[133] Indeed, the *Campbell* Court states that a later work can be transformative when it has "a further purpose or different character, altering the first with new *expression*, meaning, or message."[134] Of course, this standard has proven difficult to analyze in practice.[135] The court's decision in *Castle Rock* is not incorrect, it simply chooses a different focal point for its analysis that is not heavily reliant on expression.[136] The *Castle Rock* court does not comment on what a transformative expression might be, thus leaving a large ambiguity unresolved for future decisions: When is mode of expression transformative?

ii. *Twin Peaks Productions, Inc., v. Publications International, LTD.*

The question of when a mode of expression is transformative was not clarified by the court in deciding *Twin Peaks*, either.[137] Similar to the case involving *Seinfeld*, this case dealt with the television show *Twin Peaks* and the publication of a book that summarized each episode's plot.[138] The Second Circuit held that the book was not transformative because it merely reprinted the plot of the original show without critique.[139] The Court emphasized that the function and purpose of the book was no different from that of the original show.[140] Again, the question of whether the mode of expression itself was transformative was left unresolved.

Both *Castle Rock* and *Twin Peaks* avoid addressing the mode of expression in analyzing cases of transformative use. This has presented considerable ambiguities, especially in the modern age when remakes, sequels, and retellings run rampant in the artistic and entertainment worlds.

c. The Problems of Applying Transformative Use to Two Works of

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131 *Id.* at 143.

132 *Id.* (emphasis added).

133 *See id.* at 142–43.

134 Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994) (emphasis added).

135 *See, e.g.*, Liu, *supra* note 7, at 171–73.

136 *See* Castle Rock Ent., Inc. v. Carol Publ'g Grp., 150 F.3d 132, 142–43 (2d Cir. 1998).

137 *See* Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1376 (2d Cir. 1993).

138 The book also included information about the show's creators, the location where the show was filmed, and a brief discussion on the show's impact on pop culture. However, the bulk of the book summarized the entirety of season one of the television show. *Id.* at 1370.

139 *Id.* at 1375–76.

140 *Id.* at 1376.

Different Media Categorizations

Up to this point, *TCA Television Corp.* has stood out among the transformative framework overview and analysis because of the rationale it used to define transformative use between works of different media categorizations,[141] notably diverging from other transformative use cases that include *Castle Rock* and *Twin Peaks*.[142]

Where *Castle Rock* and *Twin Peaks* took for granted the new mode of presentation of the derivative work,[143] *TCA Television Corp.* addressed it head on.[144] In *TCA Television Corp.*, the court found copyright infringement of the original work because "there is 'nothing transformative' about using an original work 'in the manner it was made to be' used."[145] Going forward, the expression of the material itself should be what is protected, not the ideas of the material itself.

This point is illustrated by comparing the rationale of *TCA Television Corp*. to that of *Castle Rock* and *Twin Peaks*. It is easiest to think of *TCA Television Corp.* as illustrating the cause of media consumption, focusing on the manner in which the material is delivered.[146] In contrast, both *Castle Rock* and *Twin Peaks* emphasize the effects of media consumption and focus on the purpose of the material.[147] These two different methods of analysis can create different outcomes when applied to each other.

i. Comparing the Rationale in *TCA Television Corp.* and *Castle Rock*

To further illustrate the method of analysis that favors original expression, firstly take the decision in *Castle Rock* as an example.[148] In addressing the facts, the court acknowledged that at most, only 3.6–5.6% of any single *Seinfeld* episode's content was used to create a trivia book.[149] Yet this was held as an infringement of copyright because the show's original purpose was supplanted and delivered in a different form, without addressing mode of expression at all.[150] However, inherently, a television show is nominally and functionally different than a trivia book. It is arguable that the

141 *See* TCA Television Corp. v. McCollum, 839 F.3d 168, 180 (2d Cir. 2016).

142 For a full analysis of these cases, see *supra* Sections II.b.i–ii.

143 *See* Castle Rock Ent., Inc. v. Carol Publ'g Grp., 150 F.3d 132, 143 (2d Cir. 1998); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1375 (2d Cir. 1993).

144 *See TCA Television Corp.*, 839 F.3d at 180.

145 *Id.* at 182–83 (quoting On Davis v. Gap, Inc., 246 F.3d 152, 174 (2d Cir. 2001)).

146 *See id.* at 183.

147 *See Castle Rock*, 150 F.3d at 143; *Twin Peaks Prods., Inc.*, 996 F.2d at 1376.

148 *Castle Rock*, 150 F.3d at 143.

149 *See id.* at 136.

150 *See id.* at 142.

purpose of the trivia book—to validate fans' knowledge of a favorite show—does not replace the experience of watching the show itself.[151] Instead, the trivia book adds to the experience of watching *Seinfeld* because knowledge of the show directly follows from watching it.[152] One cannot successfully use the trivia book without having watched the show first.[153] Using this framework, the trivia book in *Castle Rock* is arguably transformative because the mode of expression and delivery of material is different from the original television show's.[154] Thus, the choice of methodology applied in transformative use analysis has the potential to change the outcome of the case.

Less than twenty years after *Castle Rock*, a court applied a method of analysis that emphasizes method of delivery: *TCA Television Corp*.[155] It follows that adopting the rationale applied in *TCA Television Corp*. has the opportunity to change the outcome of *Castle Rock*, because the former is examining the expression and manner of delivery of the material, and the latter emphasizes the purpose of the material.[156] The tension of two different modes of transformative analysis creates considerable problems and ambiguities in analyzing other fair use cases, because the method of analysis has the power to be outcome determinative.

ii. Comparing the Rationale in *TCA Television Corp. and Twin Peaks*

An examination of the purpose between a derivative work and an original one was also the reason for a finding of copyright infringement in *Twin Peaks*.[157] In *Twin Peaks*, the court emphasized that the content between the original television show and the published book was the same, with little to no added material.[158] Thus, in *Twin Peaks*, the purpose of the book and the show are the same: to deliver a soap-operatic plot.[159] However, if a different rationale were to be applied in *Twin Peaks*, the outcome might be different. By its very nature, a book summarizing the plot of the television

151 *See id.* at 143 (acknowledging that the book "simply poses trivia questions").

152 *See id.* at 142–43 (acknowledging that a quiz of fan knowledge does not "qualify as 'criticism, comment, scholarship, or research'" (quoting Castle Rock Ent. v. Carol Publ'g Grp., Inc., 955 F. Supp. 260, 268 (S.D.N.Y. 1997))); Liu, *supra* note 7, at 209 (conceding that the court only looked at a general level of "entertainment purpose").

153 *See Castle Rock*, 150 F.3d at 135–36.

154 *See* Shipley, *supra* note 10, at 301.

155 TCA Television Corp. v. McCollum, 839 F.3d 168, 181–82 (2d Cir. 2016).

156 *See id.*; *Castle Rock*, 150 F.3d at 143.

157 Notably, *Twin Peaks* was decided prior to the Supreme Court's establishment of transformative use in 1994's *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). *See* Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1376 (2d Cir. 1993).

158 *See Twin Peaks*, 996 F.2d at 1376.

159 *See id.* at 1377.

show is different in method of the content's delivery, even if the content is the same.[160] After all, a book is read, and a television show is watched; thus, the manner of use of the book is different enough from the television show to be deemed transformative under a rationale that places emphasis on manner of use.[161]

This illustrates the different outcomes that can result depending on which rationale is applied in analyzing transformative use. By applying a method of analysis that favors manner of use[162] to *Twin Peaks* (as done above), one arguably finds transformative use, because a book is inherently different a television show. A different outcome in *Twin Peaks*, however, would feel wrong. This is because, conceivably, one could read the unoriginal book and fully receive the same delivery of plot that would be acquired through watching the original television show.[163]

The case of *Twin Peaks* illustrates a unique problem, as little original thought went into the creation of the book's contents with mere summaries of episode plots.[164] Indeed, perhaps the only notable unique trait about the book is the very fact that it is a book—not original content.[165] Arguably, this should mean that the *Twin Peaks* book, under any kind of analysis should be deemed as copyright infringement because it is merely an abridgment of the television show, with no added content.[166] But for the court to arrive here, they would have to pick one of two existing methods of analysis—either through manner of use,[167] or purpose of use[168]—without consideration of the other. This result is arbitrary and problematic because it leaves room for courts to choose a method of analysis to fit their subjective whims. It follows that a uniform standard of transformative use analysis is necessary to avoid this problematic result.

iii. *The Unofficial Bridgerton Musical* and Problems in Applying One of Two Available Methods of Analysis

Bridgerton is a popular show on Netflix, and two of its fans created an original musical based on the television show.[169] Though lines of dialogue

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160 *See id.* at 1375.

161 *See, e.g.*, TCA Television Corp. v. McCollum, 839 F.3d 168, 181–82 (2d Cir. 2016).

162 *See id*.

163 *See Twin Peaks Prods., Inc.*, 996 F.2d at 1377.

164 *Id.* at 1375.

165 *See id.* at 1373, 1375.

166 *See id.* at 1375.

167 *E.g.*, TCA Television Corp. v. McCollum, 839 F.3d 168, 183–84 (2d Cir. 2016).

168 *E.g.*, Castle Rock Ent., Inc. v. Carol Publ'g Grp., 150 F.3d 132, 143 (2d Cir. 1998); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1376 (2d Cir. 1993).

169 Complaint, *supra* note 1, at 4–5.

were lifted from the show to create the lyrics for the musical, the melodies and instrumentation were wholly original.[170] After the music was performed live for the first time, Netflix sued the musical's creators for copyright infringement.[171] Though it was settled out of court, *Bridgerton* is a point of interest because of the two possible paths it could have traversed if the composers had argued that their musical composition was transformative, and thus, protected under fair use.[172] Firstly, there is the path that favors Netflix, which would apply the *Castle Rock* and *Twin Peaks* purpose rationale[173] by only examining the material itself. Under this view, the dialogue and character mannerisms that were lifted from the original show and placed into a staged performance[174] would probably lead to a finding of copyright infringement, because the material itself and its use in any form is protected.[175] Under the method of analysis applied in *Castle Rock* and *Twin Peaks*, an unofficial musical of *Bridgerton* is a mere repackaging of the original show to entertain its original fans, without looking at its expressive mode of presentation: that of a musical.[176]

In contrast to this method of analysis, valuing purpose of use is the *TCA Television Corp.* rationale, which emphasizes manner of use.[177] To this end, the creators of *The Unofficial Bridgerton Musical* put considerable originality and creativity into their work by composing around thirty-seven minutes' worth of original music that are scored to *Bridgerton* dialogue,[178] distinguishing this musical from the book in *Twin Peaks*, which had no original material.[179] Under *TCA Television Corp.*'s application of transformative use, an examination of the manner in which the material is expressed could lead one to conclude there is not an infringement of copyright.[180] This is because while the content is lifted from a protected work—the *Bridgerton* television show—the manner under which it is expressed is original.[181] The original music may speak to some listeners who have not yet watched the original show, inviting a new and wholly original audience, and the *Bridgerton* content of the musical surely attracts the

170 *See id.* at 27.

171 *See id.* at 42.

172 Guy, *supra* note 6.

173 *See Castle Rock*, 150 F.3d at 143; *Twin Peaks Prods., Inc.*, 996 F.2d at 1376.

174 Complaint, *supra* note 1, at 10–11.

175 *See Castle Rock*, 150 F.3d at 143; *Twin Peaks Prods., Inc.*, 996 F.2d at 1376.

176 Complaint, *supra* note 1, at 9–13.

177 TCA Television Corp. v. McCollum, 839 F.3d 168, 181–82 (2d Cir. 2016).

178 Complaint, *supra* note 1, at 4; BARLOW & BEAR, THE UNOFFICIAL BRIDGERTON MUSICAL (2021).

179 *See Twin Peaks Prods., Inc.*, 996 F.2d at 1375.

180 *See TCA Television Corp.*, 839 F.3d at 181–82.

181 *See* Complaint, *supra* note 1, at 4.

show's ardent original fans. In essence, the musical itself does not supplant the purpose of the original show: the musical and the television show are two different and independent experiences. The staged production cannot wholly supplant the television show because it offers a unique musical expression; and the expression of the television show remains intact because it is a dramatic presentation of the plot, not a musical one.[182]

iv. A Need for a Uniform Method of Transformative Use Analysis

The existence of these two diverging modes of analysis poses significant problems for copyright jurisprudence going forward, specifically when examining transformative use, because it creates an ambiguity that can have a determinative effect on the outcome.[183] As they stand, the two diverging viewpoints both conform to the standard of *Campbell*, where transformative use was first conceived and where the goals of transformative use analysis are listed.[184] The two methods, however, achieve the goals of transformative use in different ways. *Campbell* requires that a transformative work must "alter[] the [original work] with new expression, meaning, or message."[185] The "purpose of use" analysis of *Castle Rock* and *Twin Peaks* applies this definition literally, where the added "expression, meaning, or message"[186] must be in substantive content, and must be so quantitatively great that the purpose of the derivative material is different from that of the original.[187]

In contrast, the *TCA Television Corp.* method of transformative analysis applies transformative use to mean the method of the material's delivery.[188] In essence, the *TCA Television Corp.* analysis examines the expressive nature of the derivative work and decides whether the original's method of delivery is supplanted—if the original method of delivery is not supplanted, the derivative work is transformative.[189]

The existence of at least two—for there are surely more ways to interpret *Campbell*'s language—different methods of analysis for transformative use pose a significant challenge to consistency and accuracy in copyright jurisprudence. This is especially problematic when analyzing derivative works of different media categorizations where the method of analysis for

182 *See id.*

183 *See supra* Sections II.c.i–iii.

184 *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).

185 *Id.*

186 *Id.*

187 The court in *Castle Rock* does not create a clear threshold but states that the new content must change the original in a way that is more than "minimally transformative." *See* Castle Rock Ent., Inc. v. Carol Publ'g Grp., 150 F.3d 132, 144 (2d Cir. 1998).

188 *See* TCA Television Corp. v. McCollum, 839 F.3d 168, 182–83 (2d Cir. 2016).

189 *See id.*

transformative use can be outcome determinative.[190] Because transformative use is a judicial creation, it makes sense that *Campbell*'s language is broad and vague; creation of an ironclad standard might be seen as a separation of powers issue where the Court is legislating.[191] The vague language of *Campbell*, however, makes it difficult for the standard to be uniformly applied across cases and jurisdictions.

The difficulty of applying the current methods of analyzing transformative use is self-evident, especially when the derivative work is of a different media categorization than the original.[192] By its nature, a derivative work of this kind is already transformative because it is in a separate category of media.[193] Courts have tended to uphold the copyright of the original in these cases by regarding the function of the derivate work.[194] To call this an analysis of transformative use is flawed because it bypasses one of the primary goals of transformative analysis set out in *Campbell*, where a factor of transformative use is whether the derivative work employs a "new expression"[195] of the original work. The courts in cases like *Castle Rock* and *Twin Peaks* supplant this by instead looking at the derivative work's purpose,[196] not the mode or method of its expression.[197]

Going forward, Congress should create a narrower transformative use framework that guides courts away from rationales like those in *Castle Rock* and *Twin Peaks* when determining copyright claims in cases of two different media categorizations. Such a framework would be closer to that of *TCA Television Corp.*, where the method of expression itself is the focus of the analysis,[198] not the mere use of the work; otherwise, arguably, most everything is an infringement of some form of a copyrighted original. A narrower transformative use framework will encourage the creation of new

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190 *See supra* Section II.C.iii (discussing the different outcomes in the case of *Bridgerton*, depending on which methodology is utilized).

191 Congress declined to include the "formulation of exact rules in the statute" for fair use because of "the endless variety of situations and combinations of circumstances that can rise in particular cases," and had *Campbell* created an ironclad standard, such a standard could have been seen as the formulation of the type of "exact rule[]" Congress sought to avoid. *See* H.R. REP. NO. 94-1476, at 66 (1976).

192 Often, this different media categorization is through the original mode of the material's presentation, as it was in *The Unofficial Bridgerton Musical. See* Complaint, *supra* note 1; *see also supra* Section II.c.iii.

193 Especially when looking at the work's manner of use. *See supra* Section II.b.

194 For analyses of these instances, see *supra* Section II.b.

195 Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).

196 *See* Castle Rock Ent., Inc. v. Carol Publ'g Grp., 150 F.3d 132, 143 (2d Cir. 1998); Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1375–76 (2d Cir. 1993).

197 *See* TCA Television Corp. v. McCollum, 839 F.3d 168, 180–183 (2d Cir. 2016).

198 *Id.*

works by clearing excessive ambiguity and by providing clear guidelines to future courts in interpreting transformative use claims.

III. PROPOSED LEGISLATION

To resolve the ambiguities surrounding transformative use analysis when comparing works of two different media categorizations, Congress should amend current copyright law to include a new standard of transformative use analysis where method of expression is analyzed.

To evaluate claims of copyright infringement in which the derivative work's media categorization is different from that of the original work, the following framework shall apply when analyzing transformative use, where element (a) must be satisfied before analysis of element (b):

a. If the original work's expressive purpose is supplanted by the derivative work—meaning that the material of the original work is merely duplicated by the derivative work, where the derivative work can be seen as a total replacement of the original—then the derivative work is not transformative. If the original work's expressive purpose is not supplanted by the derivative work, evaluate the amount of original material of the later work under section (b) of this provision.
b. If the derivative work is expressed through a substantially original mode of expression, including but not limited to original music, commentary, and/or criticism, the derivative work is transformative.

a. Purpose and Legislative Aims of Proposed Legislation

The purpose of applying a new transformative use framework to derivative works that transcend the media categorization of the original is twofold: (1) it creates a broader opportunity for artistic development and creation of works, and (2) it ensures that ideas themselves are accessible by presenting them through a plethora of different modes of expression.

First, in a society whose media—including novels, television, film, and more—is full of remakes and sequels,[199] it is refreshing for new works to tell a familiar story in a different, artistically diverse way. Indeed, the basis of modern storytelling is far from original, as it is largely rooted in what was

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199 In 2017 alone, forty-three American films were released either as a sequel, reboot, or a remake, and collectively grossed several billions of dollars. *See* Knut Haanaes and Michael Sorell, *Déjà vu: Is the Film Industry's Sequel and Remake Addiction a Sign of the End?*, IMD, (June 2017), https://www.imd.org/research-knowledge/articles/deja-vu-is-the-film-industrys-sequel-and-remake-addiction-a-sign-of-the-end [https://perma.cc/9ZFF-8HNV].

conceived in Ancient Greece.[200] While U.S. copyright protection was not available to the Ancient Greeks, to call the many works that are inspired by Greek mythology and drama original is plainly wrong. These stories unite humanity in primitive ways and have endured through time because of it.[201]

The creation of a work that expresses an idea in a new way ensures that it is accessible for current audiences. For example, it is entirely plausible that an individual unfamiliar with the details of the television show *Seinfeld* could see their friends partake in a trivia competition using the book in *Castle Rock.*[202] Eager to participate, the uninformed friend may resolve to watch *Seinfeld* for himself, perhaps to participate with his friends in the trivia game, or perhaps because its answers have sparked his interest in the show. Either way, the *Seinfeld* trivia book's presentation of the show's material has opened the door for someone who is unfamiliar with its content to seek it out, something he might not have done were it not for the trivia book. In this instance, the presentation of *Seinfeld* in a different way from the original has made the show itself more accessible and has increased its appeal. It is essential that the new creation be held to a different standard, not only because it is a different creation in itself but because it increases the longevity of curiosity about the original.

An excellent example of both of these traits at play can be extracted from *The Unofficial Bridgerton Musical*.[203] Though based on a television show, the staged musical presentation of the material has yielded a considerable amount of creativity for the composers who wrote the music and lyrics, for the actors who sung the lyrics, for the musicians who performed the music,[204] where each could lay their own personal touches—whether it be through volume and dynamics, tone and intonation, dramatic pause, phrasing, and so on. This level of opportunity for creativity and expression is different—both in terms of expression itself, and who can express such artistry—from the television show. Additionally, *The Unofficial Bridgerton Musical* almost certainly expanded interest in the original television show by presenting it through a new medium.[205] Perhaps an actor, unfamiliar with their character, started watching the television show to gain insight to inform their performance; or perhaps a musician, enamored

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200 *See* Charlotte Higgins, *Fruits of the Loom: Why Greek Myths Are Relevant for All Time*, THE GUARDIAN (Sept. 3, 2021, 7:00 AM), https://www.theguardian.com/books/2021/sep/03/fruits-of-the-loom-why-greek-myths-are-relevant-for-all-time [https://perma.cc/38YJ-BTZX].

201 *See id.*

202 *See* Castle Rock Ent., Inc. v. Carol Publ'g Grp., 150 F.3d 132, 135 (2d Cir. 1998).

203 *See* Complaint, *supra* note 1.

204 *See id.* at 4.

205 *See id.* at 2.

with the story, wanted to explore the source material for themselves, thereby benefiting the original creator by creating new interest in their original creation.

It is thus a benefit to consider a derivative work that is of a different media categorization from the original through a broadly applied, more lenient lens for transformative use. The legal framework proposed above can better protect the original goal of copyright law: to encourage the spread of creative ideas by protecting original presentations, not their creators. The framework will also ensure that the original creation is remembered for years to come.

b. Application of Proposed Legislation to Copyright Claims of Different Media Categorizations

To apply this legislative framework to preexisting cases, namely *Castle Rock* and *Twin Peaks*, is to illustrate that a new framework can yield a different outcome when viewed through a more creative lens.

i. Application to *Castle Rock*

The *Castle Rock* decision rested upon the content of the trivia book, where the book provided no further comment or criticism on the original television show, *Seinfeld*, but was instead perceived as regurgitating the show's content in book form.[206] Under the proposed legislation, the original expression of the television of the show is maintained, even with the trivia book's publication. This is because the trivia book does not supplant the experience of watching the show itself; rather, the book is a supplement to the enjoyment of the show, where the book serves as a complement, rather than an expressive replacement. Thus, the trivia book satisfies element (a) of the proposed legislation, in which case one turns to element (b).

Element (b) of the proposed legislation requires an analysis of the amount of original material, regardless of derived material, input into the later work. As conceded by the *Castle Rock* court, the original material contained in the trivia book included the presentation of the show's material as a question, and a number of original multiple-choice answers that are incorrect,[207] yet related to the show's content. The amount of original thought given to the formation of the question, as well as the original material needed to conceive of incorrect answers to those questions, is a work of considerable originality and transformation. Therefore, through the proposed

206 *See Castle Rock*, 150 F.3d at 143.

207 *See id.* at 135–36.

analytical lens, a trivia book about *Seinfeld* is transformative when compared to the original television show.

Where the proposed analysis differs from the one applied by the court in *Castle Rock* is in the analysis of expression as opposed to purpose.[208] While artistic purpose is certainly a notable point of analysis, the proposed legislation—and the judicial conception of transformative use—states that artistic expression and character of use are also worth consideration.[209] And, in the case of *Castle Rock*,[210] a trivia book is different in both expression and character from a television show because it is written and bound into a book––not shown on a television screen.

ii. Application to *Twin Peaks*

Interestingly, when applying the proposed legislation to *Twin Peaks*, the outcome is not different from that of the courts. In making a decision about the transformative use of a book derived from a television show, the *Twin Peaks* court did not emphasize the difference in the modes of expression, but instead focused on the overall function of the book, which was decidedly an abridgment of the original show's plot—without added criticism or comment.[211] Under element (a) of the proposed legislation—deciding if the expressive purpose of the original show is supplanted by the book—the book is not transformative enough to be deemed fair use. This is because the book itself can be substituted for the television show—albeit through a different mode of expression—but without any added originality,[212] meaning a reader of the book would have the same experience as one who watches the show does. Thus, because the book and the show are substitutes for the same experience, and because the book adds no original thoughts or creations of its own,[213] the book is not transformative under the proposed legislation.

The argument can be made that the book, simply because it is written, is different from something that airs on television and would therefore satisfy element (a) of the proposed legislation. What this argument fails to account for is the lack of originality in the writing of the book. While it is true that the words written by the author for a book about *Twin Peaks* are original creations, which summarize and condense the show's episodes, the ideas conveyed by the words are not original.[214] Perhaps if there were original

208 *See id.* at 143.

209 *See, e.g.*, Campbell v. Acuff-Rose Music, 510 U. S. 569, 579 (1994).

210 *See Castle Rock*, 150 F.3d at 135.

211 Twin Peaks Prods. v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1375–76 (2d Cir. 1993).

212 *Id.* at 1376.

213 *See id.*

214 *See id.*

ideas in the book—for example, a critical review of the episode, or a prediction for what the next unaired episodes might entail—the book would be original enough to be deemed transformative. The facts of *Twin Peaks*, however, make it clear that the book is merely an abridgement of the television show with nothing added.[215]

It might also be argued that the book in *Twin Peaks* was not wholly an abridgment of the show's plot because it also contained facts about the show's creators and the show's impact on popular culture.[216] But what this argument does not account for is the use of the plot itself, which had no commentary or added material within it.[217] Rather, the commentary is about the show as a whole, which had already been recounted in detail.[218] Perhaps if the recounting of the plot had an added original component to its expression—for example, if it were recounted through song, or visual art—the mode of expression would be both different enough and imbued with creative originality to be deemed transformative. This is not the case of the book in *Twin Peaks*, which admittedly does feature some commentary.[219] What the book does not include is an original expression of the show's plot or ideas, and thus, the use of the show is not transformative under the proposed legislation.[220]

It follows that because the book substantially lacks original material, the book also does not meet the standard for transformative use under element (b) of the proposed legislation, which requires that a substantial amount of original material be added to the newly expressed derivative work. Viewed through either element of the proposed legislation—where both elements must be satisfied for the derivative work to be deemed transformative—the book summarizing episodes of *Twin Peaks* is not an instance of transformative use.

iii. Application to *The Unofficial Bridgerton Musical*

It is impossible to know what the outcome would have been had Netflix's claim over *The Unofficial Bridgerton Musical* gone to court instead of settling.[221] But in applying the framework of the proposed legislation to the case of *The Unofficial Bridgerton Musical*, there is a finding of transformative use. Under element (a) of the proposed legislation, the

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215 *See id.*

216 *See id.* at 1370.

217 *Id.* at 1375–76.

218 *Id.* at 1376–77.

219 Albeit a very minimal amount. *See id.* at 1370.

220 *Id.* at 1376.

221 *See* Guy, *supra* note 6.

expressive purpose of the *Bridgerton* television series is compared to that of *The Unofficial Bridgerton Musical*, and arguably, the two are different. This is because the original television show delivers its plot through period-drama costumes and sets,[222] while the musical delivers a mere portion of the plot through a wholly different medium, that of musical melodies and lyrics.[223] Thus, because the original television show is not merely recreated by the musical—meaning that one can watch both and have two wholly unique experiences—element (a) of the proposed legislation is satisfied.

Under element (b), the musical's amount of original material is analyzed. *The Unofficial Bridgerton Musical* is substantially original because it employs an entirely unique musical setting of the show's dialogue,[224] thereby transforming the original show from its dramatic delivery to one of musical expression. This undoubtedly satisfies element (b) of the proposed legislation. Under the proposed legislation, *The Unofficial Bridgerton Musical* is, therefore, an instance of transformative use, because its expressive purpose and added original material substantially transform the original television show into something new.

c. Implications of an Expanded Transformative Use Analysis

This Note, in effect, advocates for a broader interpretation of transformative use to allow for the creation of new works where some might argue that protections afforded to original creators are diminished. The diminished protections argued for in this Note would allow copyrighted material to be used in a derivative work so long as the expressive purpose of the original is not supplanted, based on the latter work's expressive purpose and original material.[225]

Some would argue that it is against the purpose of copyright to broaden the number of works covered by transformative use because an author would not be incentivized to create something new if it can be replicated in another form of expression.[226] The true goal of copyright law, however, is not exclusive to serving the interests of current creators; it is equally important

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222 Complaint, *supra* note 1, at 3.

223 *Id.* at 2.

224 *See id.*

225 The proposed method ensures that expressive purpose is upheld but expands upon it by adopting a second element of analysis: manner of use. *See supra* Section III; *see also* TCA Television Corp. v. McCollum, 839 F.3d 168, 181–82 (2d Cir. 2016) (emphasizing manner of use).

226 *See* Liz Brown, *Remixing Transformative Use: A Three Part Proposal for Reform*, 4 NYU J. INTELL. PROP. & ENT. L. 139, 158 (2014) (arguing that certain works should be afforded greater copyright protections by being precluded from transformative use analysis altogether).

that copyright law not be so stringent that future artists are dissuaded from creating their own works.[227] A balanced solution is required that honors the interests of both current and future creators.

This Note attempts to reach a balanced solution. While this Note advocates for protections to be more liberally applied, its solution does not give free reign for someone to simply take an original creation and present it, as is, through a different medium.[228]

Others might argue that transformative use is too difficult to adequately define and that the harm itself should be addressed in copyright analysis, not the use of the works themselves.[229] Again, an approach like this is unbalanced because it does not account for the future creation of works. Further, modern copyright claims make it difficult for a uniform interpretation of cognizable harms. For example, the cognizable harm suffered by the copyright holders of *Bridgerton*[230] is far different from the cognizable harm suffered by the songwriters in *Campbell*.[231] It is perhaps difficult to define what a cognizable harm can be—especially in how it differs from a general harm,[232] thereby supplanting one form of ambiguity for another.

CONCLUSION

The proposed legislation attempts to clarify a well-known issue of copyright, to account for a legal ambiguity in copyright analysis, and it seeks to ensure the protection of both current and future artists, so that culture and the arts are preserved and enjoyed for years to come. As the world grows further away from consumption of original material in the realms of arts and culture—instead preferring reboots, sequels, and the reimagining of familiar favorites—a new kind of analysis for claims of transformative use needs to be adopted. The proposed framework will ensure that modern artists and creators can continue to imbue beloved works with a creative and original spin that distinguishes their creation from the prior work and ensures that the material is beloved for generations to come.

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227 *See* ASS'N OF RSCH. LIBRS., *supra* note 15.

228 *See supra* Section III.b (discussing the need for added original content in the case of the *Twin Peaks* trivia book).

229 Thomas F. Cotter, *Transformative Use and Cognizable Harm*, 12 VAND. J. ENT. & TECH. L. 701, 703–04 (2010) (advocating for a transformative use analysis that is focused on 'cognizable harm').

230 Complaint, *supra* note 1, at 19–20.

231 *See* Campbell v. Acuff-Rose Music, 510 U.S. 569, 591, 593 (1994).

232 *See* Cotter, *supra* note 229, at 736 (conceding that 'cognizable harm' is different from a general 'harm').