

**An Empirical Study of the U.S. Copyright Fair Use Cases, 1978-2005**  
Barton Beebe

A Report of Initial Findings for Boalt Intellectual Property  
Scholarship Seminar, October 19, 2006

This project examines a data set of 271 reported federal court opinions (from 206 federal court cases) which made substantial use of the Section 107 four-factor test for copyright fair use from the January 1, 1978 effective date of the 1976 Copyright Act through 2005.<sup>1</sup> The project applies a variety of forms of statistical analysis to the data set to investigate how the four-factor test operates in practice. Specifically, it seeks to show which factors drive the outcome of the test, how the factors interact, how courts inflect certain individual factors, and the extent to which courts “stampede” the factors to conform to the outcome of the test. The project also seeks to develop quantitative data about the characteristics of the reported fair use cases, including their venue and posture, the nature of the copyrighted expression at issue, and any significant variance among the circuits and districts in the proportion of opinions that found fair use.

What follows here is a brief and somewhat informal precis of the project’s findings to date. I first address the nature of the data set, the manner in which the data was coded, and some problems with this project’s method. I then set out certain highlights so far from the findings.<sup>2</sup>

---

<sup>1</sup> Section 107 of the Copyright Act states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107.

<sup>2</sup> What is missing from this quick report is any attention to social-science theories of decision making, which I discuss elsewhere. See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 95 CAL. L. REV. \_\_ (2006) (forthcoming). In the article version of this project, I will likely suggest that this study’s findings strongly support the “coherence-based reasoning model” proposed by Dan Simon and others. See, e.g., Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511 (2004). See also, Beebe, *supra*.

## **I. The Data Set**

### **A. The Assembly and Coding of the Data Set**

To collect relevant opinions, I ran the following Lexis search in the allfeds database: copyright and "fair use" and 107 and date geq(1-1-1978). This yielded 572 opinions. A research assistant then skimmed through each of these opinions to exclude those which did not involve in any way an issue of copyright fair use. This left 327 opinions. I then read each of these opinions and excluded an additional 20 opinions as irrelevant or only marginally relevant<sup>3</sup> to copyright fair use. I coded each of the remaining 307 opinions according to the attached coding instrument (see Appendix). I went through the set of opinions twice. Of these 307 opinions, 271 made substantial use of the four-factor test, which I defined as any use of the test that made reference, however briefly, to at least two test factors.

The coding instrument lists 72 variables, the values of which I entered directly into an excel spreadsheet. I sought to record (1) general data about the opinion (e.g., caption, citation, judge, venue, posture, etc. ), (2) copyright-specific data about the opinion (e.g., the extent of the court's treatment of the fair use defense, the disposition of the defense, whether the facts involved software, the reverse engineering of software, and/or the internet, whether the opinion addressed the First Amendment or parody, etc.), (3) factor-specific information about the opinion (e.g., which party the factor was found by the court to favor, how the court treated certain subfactor doctrine such as transformativeness or commerciality, etc.), and (4) various miscellaneous data about the opinion (e.g., whether the court cited Nimmer, Leval, or any law review article, whether it cited legislative history, whether it relied on industry practice, etc.).<sup>4</sup> I then conducted all statistical analysis with Stata.

In a third round of coding, currently ongoing, I am using the qualitative data analysis program Atlas.ti to code the use of specific language and reasoning in each opinion sampled. Atlas.ti is traditionally used by social science researchers to code written or transcribed responses to questionnaires. In this project, the program facilitates, among other things, an analysis of judges' citation practices, the apparent influence of certain dicta or reasoning from appellate opinions, and, through word counts, the proportion of an opinion's fair use analysis devoted to each factor and to certain subfactor doctrine within each factor.

---

<sup>3</sup> For example, an opinion may have made an analogy to copyright fair use doctrine in the context of facts relating to trademark fair use or antitrust violations.

<sup>4</sup> I coded the opinions directly into an Excel spreadsheet and then used Stata 9.0 to conduct the statistical analysis.

## B. The Amenability of the Section 107 Fair Use Analysis to Empirical Study

As an initial matter, it is worth pointing out that the Section 107 four-factor test is applied by the courts in a manner that makes the test especially amenable to statistical analysis. Courts often rehearse the platitude that the test is not to be applied “mechanically,”<sup>5</sup> but the data suggest that over time, the test has indeed become more and more mechanical in application. Figure 1 shows the proportion of opinions by year in which the court adopted the rhetorical practice of explicitly stating that “this factor favors/disfavors a finding of fair use.”<sup>6</sup> Overall, of the 271 opinions sampled, 65% engaged in this practice. Thirty-four percent also engaged in the practice of concluding their Section 107 analysis with an explicit summing up in which they reviewed the valence of each factor.<sup>7</sup> As Figure 1 shows, the shift towards a more formal application of the Section 107 test first began in 1987. *Harper & Row* was handed down in 1985, yet Justice O’Connor’s opinion for the majority, though deliberate in its application of Section 107, did not engage in the kind of mechanical rhetoric that we see in most fair use opinions from 1987 to the present. Justice Brennan’s dissent, however, was highly mechanical in form.<sup>8</sup> It both explicitly stated the valences of each factor and explicitly summed up those valences in its conclusion. It may be that the Brennan dissent set American courts on a course towards at least a rhetorically more formal treatment of the Section 107 inquiry. In any event, this rhetorical practice greatly facilitated coding. With four factors per opinion, the 271 opinions called for 1084 assessments of how the court viewed the tilt of a given factor. Only 5% of these assessments were coded as unclear.

Courts also often state that the Section 107 list of factors is not exhaustive and that other factors may be considered.<sup>9</sup> Of the 271 opinions sampled, however, only 40 (14%) considered factors other than those listed in Section 107,

---

<sup>5</sup> See, e.g., *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) (Posner, J.) (“[T]he four factors that Congress listed when it wrote a fair use defense (a judicial creation) into the Copyright Act in 1976 are not exhaustive and do not constitute an algorithm that enables decisions to be ground out mechanically.”). See also *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 588 (Brennan, J., dissenting) (insisting that the four factors set forth in section 107 “do not mechanistically resolve fair use issues”).

<sup>6</sup> I have not come up with a better way quantitatively to measure, however weakly, the degree of an opinion’s formalism, and am open to suggestions.

<sup>7</sup> See, e.g., *College Entrance Examination Bd. v. Cuomo*, 788 F. Supp. 134, 143 (D.N.Y. 1992) (“In conclusion, given the fact that factor one favors the State, factor two favors GMAC, and factors three and four favor neither party, the court holds that GMAC has not demonstrated a likelihood of success on the merits of its copyright infringement claim.”).

<sup>8</sup> See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 619 (1985) (Brennan, J., dissenting).

<sup>9</sup> See, e.g., *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 868 F. Supp. 1266, 1271 (N.D. Okl. 1994) (“[T]he factors contained in Section 107 are merely by way of example, and are not necessarily an exhaustive enumeration. This means that factors other than those enumerated may prove to have a bearing upon the determination of fair use.” (quoting NIMMER)).

and about half of these opinions (19) rejected the additional factor or factors as irrelevant or unpersuasive.<sup>10</sup>

Of the 41 opinions (out of 271) that considered other factors, eleven treated bad faith as the other factor.

### C. Some Problems with This Project's Method

The empirical study of judicial reasoning is admittedly quite problematic. In writing their opinions, judges (or their clerks) may deliberately engage in strategic behavior or simply fail, for lack of time or effort, fully to explain the true basis for their holdings.<sup>11</sup> On this view, the judicial opinion is not so much a balanced and candid account of the judge's reasoning process as it is a partisan defense of the judge's ultimate determination. To the extent that they prescribe multidimensional analyses of a problem, multifactor tests may be especially susceptible to manipulation. Judge Easterbrook for one has made clear his "reluctan[ce] to accept an approach that calls on the district judge to throw a heap of factors on a table and then slice and dice to taste."<sup>12</sup> Thus, an empirical study of judicial reasoning, particularly when that reasoning takes the form of multifactor tests, may ultimately provide evidence not so much of what judges are actually doing as of what judges simply say that they are doing.

Furthermore, a project of this nature may suffer from severe selection bias. Data from the Administrative Office of the U.S. Courts (the "AO") suggests that from 1978 to 2002, the last year for which reliable data is currently available, approximately 50,000 copyright complaints were filed in the federal courts, with an average of about 2000 filings per year (see Figure 2). This project samples opinions from only 206 cases.

There are a number of responses to these reservations, none of them particularly satisfying and all of them more or less along the lines of not letting the perfect be the enemy of the good. The main defense of this project is that some empirical knowledge, however limited and so long as we acknowledge its limits, is better than none. Our empirical knowledge of the U.S. patent case law is relatively well-developed. By comparison, the only data we currently have on

---

<sup>10</sup> Cf. Lloyd L. Weinrib, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1152 (1990) ("Although courts and commentators have for the most part not agreed explicitly with Judge Leval's conclusion that the statutory factors are all that count, they usually come out very nearly the same way as a practical matter. They recite the four factors, indicate in which direction each 'weighs,' add up the respective weights, and reach a conclusion on that basis. Often there is nothing else to consider."). Weinrib goes on to propose "fairness" as an additional factor. I discuss bad faith below.

<sup>11</sup> See, e.g., R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1125-1130 (2004) (discussing and responding to "oft-cited concerns and limitations about using judicial opinions for systematic study" such as unobserved reasoning, selection bias, and strategic behavior).

<sup>12</sup> *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1279-83 (1990) (Easterbrook, J., concurring).

U.S. copyright case law consists of the AO data, which reports little more of interest than the district court in which the complaint was filed, the case's filing and termination dates, and the outcome of the case. The AO data is also widely believed to be so unreliable, particularly in its recording of the outcome of the case, as to be useless. This project is thus worthwhile if only to the extent that it gets us started on the task of developing an empirical profile of U.S. copyright case law.

As for the problem of judges' strategic behavior and unobserved reasoning, judges' written opinions are the only good resource we have and our task should be to make the best of this resource. If our goal is to understand how judges actually use the four-factor fair use test, then this project's method is arguably superior to the current scholarly method of seeking to do so, which consists of little more than citing to the leading cases or simply to those that support the scholar's point. Furthermore, one focus of this project, particularly with respect to judges' "stampeding" of the factors discussed below, is judges' strategic behavior itself. Finally, though I know of no empirical way of defending the proposition, it is likely that judges (and their clerks) do in fact make a good faith effort to explain their reasoning and record the bases for their holdings.

## **II. Initial Results**

### **A. Summary Statistics**

#### **1. Venue and Posture of the Opinions**

The sample consisted of seven Supreme Court opinions, of which one was a concurrence and two were dissents, 77 appellate court opinions, of which one was a concurrence and nine were dissents, and 187 district court opinions, of which 10% were reversed and 16% affirmed.<sup>13</sup> The courts of the Second Circuit dominated the sample, accounting for 36% of the appellate courts opinions and 40% of the district court opinions (See Table 1). By comparison, the courts of the Ninth Circuit were responsible for 31% of the appellate court opinions and 17% of its district court opinions. Percentages for all other circuits, even the Seventh, were in the single digits. At the district court level, the S.D.N.Y. alone accounted for 35% of the district court opinions, with the N.D. Cal. next at 8%. Thirteen of the 32 bench trial opinions came out of the S.D.N.Y., as did nine of the 41 preliminary injunction opinions.

---

<sup>13</sup> Of the eighteen district court opinions that were reversed, nine had found fair use and nine had found no fair use. It may be noted in passing that 10% does not seem to be an especially high reversal rate, nor does the rate of nine dissents from 66 total cases. These data run counter to the conventional wisdom that, as Judge Leval has written, "reversals and divided courts are commonplace" in fair use cases. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990). See also Lloyd L. Weinrib, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1137 (1990) ("The field is littered with the corpses of overturned opinions.").

Table 2 shows the distribution of postures in the district court opinions. Figure 3 shows the distribution of the 187 district court opinions by year.

## **2. Subject Matter of the Opinions**

Nearly half (49%) of the opinions addressed disputes involving at least one party engaged in the print medium. Twenty-one percent of the opinions addressed disputes arising out of the motion picture or television industry. Twelve percent of the opinions sampled from 1990 to 2005 (24 out of 203) involved computer software, and twelve percent (24) involved the internet. Only four opinions were coded as involving both software and the internet. Overall, from 1990 to 2005, one in five opinions involved software and/or the internet.

Twenty-three percent of the opinions addressed in some way the First Amendment. (This variable was coded very inclusively to include even brief allusions to the First Amendment.) As might be expected, the proportion of opinions addressing the First Amendment increased with the authority of the court. Eighteen percent of the district court opinions addressed in some way the First Amendment, while 31% of the circuit court opinions and 57% of the Supreme Court opinions did so.

As for parody, 16 of the 187 district court opinions addressed in some way the issue of parody. Thirteen of these opinions found parody, though five of these labeled as parody what we would arguably call “satire” according to the *Campbell* parody/satire distinction. Of the eight true parody decisions, all but one (the *Wind Done Gone* district court opinion) found in favor of the defendant. Of the five false parody district court opinions, all but one (*MasterCard Int'l Inc. v. Nader 2000 Primary Comm., Inc. (S.D.N.Y. 2004)*)<sup>14</sup> ruled in favor of the plaintiff.

Eleven percent of the district court opinions (21) addressed a claim by defendant that it was engaged in “news reporting.” The court ruled in favor of the defendant in 7 of these 21 opinions.

## **3. Fair Use Win Rates Across the Circuits**

Table 3 shows the proportion of district court opinions, grouped by posture and circuit, that either found fair use or, in the case of summary judgment motions by the plaintiff, found no fair use. Overall, 29% of the 41 preliminary injunction opinions sampled found fair use, while 31% of the bench trial opinions did so.<sup>15</sup> Of the 23 opinions that addressed a summary judgment motion brought only by the plaintiff (i.e., no cross-motion was brought), 83% found no fair use. Of 34 opinions that addressed a summary judgment motion brought only by the

---

<sup>14</sup> *MasterCard Int'l Inc. v. Nader 2000 Primary Comm., Inc.*, 2004 U.S. Dist. LEXIS 3644 (SDNY 2004).

<sup>15</sup> The difference between these proportions is not statistically significant ( $p=.084$ ).

defendant, 77% found fair use. As courts have suggested,<sup>16</sup> summary adjudication of fair use appears to be quite common—at least among published opinions. There is no statistically significant variance in fair use win rates across the circuits.<sup>17</sup> It is notable, however, that the district courts of the Seventh Circuit failed to find fair use in any of the opinions sampled.

It is unclear (at least to me) whether the fair use win rates reported in Table 3 should be considered disappointingly low or reasonably high. In any event, the rates may be skewed by defendants who argue fair use even when the defense is frivolous in light of the facts. The high proportion of opinions which granted a unique summary judgment motion (one which was not met by a cross motion for summary judgment) is not surprising, and is consistent with similar results from a study of the multifactor test for consumer confusion in U.S. trademark cases.<sup>18</sup> Parties are not likely to file a motion for summary judgment unless the motion has some merit and judges are more likely to write opinions when they grant motions for summary judgment.

## **B. Interfactor Analysis**

### **1. Correlations**

Table 4 shows correlations between the test outcome and factor outcomes and among the factor outcomes for the 187 district court opinions sampled.<sup>19</sup> As the reader may have expected, the outcome of factor four correlates very strongly with the outcome of the test, and the outcomes of factors one and three also correlate strongly with the outcome of the test. Also as probably expected,<sup>20</sup> factor two correlates very weakly with the outcome of the test. Note that the sum of the absolute values of the two correlation coefficients shown for each factor does not equal zero because the court could also have found the factor to be neutral, not relevant, a fact issue, or the court's finding was unclear.<sup>21</sup>

---

<sup>16</sup> See, e.g., *Castle Rock Entertainment, Inc., v. Carol Publishing Group, Inc.*, 150 F.3d 132, 136 (2d.Cir.1998) (“Though recognizing that fair use is a mixed question of law and fact, courts regularly resolve fair use issues at the summary judgment stage where there are no genuine issues of material fact.” (citation omitted)).

<sup>17</sup> Even when comparing the district courts of the Second Circuit to those of the rest of the circuits, there are no statistically significant differences.

<sup>18</sup> See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 95 CAL. L. REV. \_\_\_ (2006) (forthcoming).

<sup>19</sup> For most of the analysis of district court opinions that follows, I have not excluded the 18 district court opinions that were reversed. I will very likely do so in the final report of the study's findings. In general, the results are not meaningfully different whether the reversed opinions are included or excluded.

<sup>20</sup> *But see Compaq Computer Corp. v. Procom Technology*, 908 F. Supp. 1409, 1421 (N.D. Tex. 1995) (“The third factor, the amount and substantiality of the copying, is generally considered the least important factor of the fair use analysis. E.g. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 449-50, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984).”).

<sup>21</sup> For this correlation analysis, each factor outcome is represented with two binary variables: favors a finding of fair use (1=yes, 0=no) and disfavors a finding of fair use/confusion (1=yes, 0=no). Thus, if the first variable is coded as one, then the second variable will be coded as zero,

As for interfactor correlations, the correlations between the outcomes of factor four and factor one are fairly strong. This supports the common intuition that market substitution and transformativeness are the closely-related considerations that drive the outcome of the test. Outcomes under factor two correlate very weakly with outcomes under the other factors, which lends further support to the common assumption that, in practice, factor two plays a largely peripheral role in the fair use analysis.

## 2. Stampeding

As the interfactor correlation coefficients in Table 4 suggest, courts tend to find that the first, third, and fourth factors, if not also the second, point in the same direction. Nimmer has made the fairly strong empirical claim that “judges who uphold fair use almost always find that three, if not four, of the factors incline in its favor; judges who deny the fair use defense almost always find that three, if not four, of the factors incline against it.”<sup>22</sup> He further asserts—and I suspect that many readers would agree—that “it is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases.”<sup>23</sup> Instead, as he write in his treatise, the factors “tend to degenerate into post-hoc rationales for antecedent conclusions, rather than serving as tools for analysis.”<sup>24</sup> This raises the question of stampeding. Do what extent do the factors tend to stampede in the same direction?

The data suggest that stampeding is indeed prevalent in the case law. Table 5, Panel A shows the distribution of four-factor stampede scores by test outcome for the 187 district court opinions sampled. An opinion’s “four-factor stampede score” is simply the number of the four factors that the opinion found to favor a finding of fair use minus the number of the four factors that it found to disfavor a finding of fair use. As Panel A shows, 70 of the 187 district court opinions sampled (37%) found that all four factors favored the outcome of the test. Stampeding was especially prevalent in opinions which found no fair use or otherwise denied a defendant’s motion for summary judgment. Of the 113 opinions which did so, 53 (47%) found that all four factors favored that outcome. Stampeding was less pronounced in opinions which found fair use or otherwise denied a plaintiff’s motion for summary judgment. Of the 79 opinions which did so, a plurality of 27 (34%) yielded a stampede score of -2. Interestingly, only four of the district court opinions sampled ruled contrary to the sum of the factors. In each of these opinions, the court ruled in favor of the defendant.<sup>25</sup>

---

and vice-versa. But if the court found the factor to be neutral, irrelevant, or not argued, then both variables were coded as zero.

<sup>22</sup> David Nimmer, *Fairest of Them All and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003)

<sup>23</sup> *Id.* at 282.

<sup>24</sup> 4 DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (2005).

<sup>25</sup> *Fournier v. McCann Erickson*, 242 F. Supp. 2d 318 (S.D.N.Y. 2003); *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (S.D.N.Y. 1997); *Basquiat v. Baghoomian*, 1991 U.S. Dist.



Table 5, Panel B shows the distribution of *three-factor* stampede scores by test outcome for the 187 district court opinions sampled. Here, factor two is excluded from consideration, so that an opinion's three-factor stampede score is the number of the factors other than the second that the opinion found to favor a finding of fair use minus the number of factors other than the second that the opinion found to disfavor a finding of fair use. As Panel B shows, the degree to which courts stampede the factors other than the second is remarkable. Courts in 122 of the 187 opinions (65%) found that the first, third, and fourth factors each favored the outcome of the test.

Finally, of the 206 federal court cases which produced the 271 written opinions sampled, 34 cases produced a district court opinion and a circuit court opinion reviewing the fair use reasoning of the district court opinion. For these 34 cases, Table 6 crosstabulates the stampede score of the district court opinion with the stampede score of the reviewing circuit court decision. In the 13 cases in which the appellate court reversed the district court, the shift in stampede score was typically quite profound.

While I know of no statistical way to show that courts are indeed putting the cart before the horse when they engage in a Section 107 analysis, the strong evidence of stampeding is at least consistent with Nimmer's description.<sup>26</sup>

### 3. Regressions Results

Logistic regression of both outcomes of the overall test on the outcomes of the four factors favoring that overall test outcome for the 187 district court opinions sampled (Table 7) tells us at this point very little that we don't already know. Furthermore, if judges do in fact tend to stampede the factors, then regression analysis is inappropriate. In any case, the regression results reemphasize that factor two has no significant effect on the outcome of the test. Interestingly, the regression results further suggest that factor four is far and away the most important factor in the fair use test and that when factor four is taken into account, factor one recedes in importance.

---

LEXIS 16647 (S.D.N.Y. 1991); *N.A.D.A. Services Corp. v. Business Data of Virginia, Inc.*, 651 F. Supp. 44 (E.D. Va. 1986). In two of these cases, *Sandoval* and *N.A.D.A.*, a finding that factor four favored the defendant outweighed findings under the other factors. In *Fournier*, the court denied the plaintiff's motion for summary judgment after finding outstanding issues of fact under factor three. In *Basquiat*, the court also denied the plaintiff's summary judgment motion after finding outstanding issues of fact under factor four.

<sup>26</sup> In a footnote in *Fairest of Them All*, *supra*, Nimmer suggests:

Alternatively, as courts work their way through the four factors, at some point they decide what the ultimate conclusion should be—which, in turn, molds the way that they reach resolution as to which direction each factor points.

See David Nimmer, *Fairest of Them All and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 281 n. 62 (2003). What Nimmer is talking about here is “coherence-based reasoning.” This is the model of decision making that I will likely propose in the final article.

## C. Factor-Specific Findings

### 1. Factor One: The Purpose and Character of the Use

Table 8 crosstabulates the distribution of courts' findings under factor one by the overall outcome of the test for the 187 district court opinions sampled. Thus, for example, 94 of the district court opinions found that factor one favored a finding of no fair use and in 90 of these (96%), the court found no fair use or otherwise denied a defendant's motion for summary judgment. Of the 73 district court opinions that found that factor one favored a finding of fair use, 63 (86%) ultimately found fair use or otherwise denied a plaintiff's motion for summary judgment. Thus also, of the 108 district court opinions which ultimately found in favor of the plaintiff, 90 of them (83%) found that factor one favored that outcome.

It is obvious from the crosstabulation, as it was from the correlation coefficients above, that factor one has a strong influence on (or at least strongly correlates with) the overall outcome of the fair use test. Nothing here is surprising. Perhaps more interesting are the data relating to the specific factor-one issues of transformativeness and commercial versus non-commercial use. Table 9, Panel A shows the distribution of district court opinions' findings with respect to transformativeness and, for each finding, the proportion of relevant opinions which found that factor one favored the defendant and, more generally, the proportion of those relevant opinions which found in favor of the defendant in the overall outcome of the fair use test. The data suggest that an explicit finding of transformativeness is dispositive of the outcome of factor one specifically and is nearly dispositive of the outcome of the fair use test overall.<sup>27</sup> Table 9, Panel B shows similar data for the question of whether the defendant's use is "of a commercial nature." Here, commerciality is shown to be not nearly as decisive. What of commercial uses that were found to be transformative? Eighteen district court opinions made this dual finding; 16 of these opinions found both that factor one favored the defendant and that the overall fair use test favored the defendant. Conversely, six opinions explicitly found a non-commercial use to be non-transformative; the court found that factor one favored fair use in three of these opinions and eventually found fair use in only two of them. This is reasonably good evidence in support of the proposition that transformativeness trumps commerciality both in the application of factor one and in the application of the Section 107 fair use test more generally.<sup>28</sup>

---

<sup>27</sup> Cf. 4 DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 n. 85.7a (2005) ("Those Second Circuit cases appear to label a use 'not transformative' as a shorthand for 'not fair,' and correlatively 'transformative' for 'fair.' Such a strategy empties the term of meaning—for the 'transformative' moniker to guide, rather than follow, the fair use analysis, it must amount to more than a conclusory label.").

See id. 85.7a.

<sup>28</sup> See *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 12-13 (S.D.N.Y. 1992) ("Thus courts have repeatedly found in favor of transformative secondary uses on the first factor, notwithstanding the presence of profit motivation. Thus, although courts ritualistically proclaim,

Section 107 volunteers in its “preamble” certain examples of fair use. Specifically, it provides that the defendant’s use of the plaintiff’s expression might be deemed fair if it is made “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” Thirty-six of the district court opinions sampled (19%) noted in their analysis of factor one that the defendant’s use fell within one of these categories. Eighteen opinions found a “research” purpose, and in eleven of these (61%), the court ruled in favor of the defendant. Eighteen opinions found that the defendant’s purpose related to “criticism,” and in thirteen of these (72%) the court ruled in favor of the defendant.<sup>29</sup> Interestingly, however, of the seventeen cases which found that the defendant was engaged in an “educational” purpose, only six (35%) ruled in favor of the defendant.<sup>30</sup>

Twelve opinions out of the total of 271 sampled considered the First Amendment in their factor one analysis. Seven of these ruled in favor of the defendant.

## **2. Factor Two: The Nature of the Copyrighted Work**

Table 10 crosstabulates the distribution of courts’ findings under factor two by the overall outcome of the test for the 187 district court opinions sampled. Notable here is the relatively large percentage of opinions that failed to consider factor two or found it to be not relevant.

As for the specific nature of the copyrighted work at issue, 49% of the district court opinions sampled found that the plaintiff’s work was creative in nature rather than factual, while 16% found that the work at issue was factual in nature rather than creative. Plaintiffs whose works were creative in nature were significantly more successful in overcoming the fair use defense than were plaintiffs whose works were factual in nature. The former prevailed in 66% of the relevant opinions while the latter prevailed in 41% of the relevant opinions ( $p=.017$ ).<sup>31</sup>

The data with respect to the published or unpublished status of the work suggests that this aspect of factor two doctrine appears to be quite malleable, or at least that the legacy of *Harper & Row* is a mixed one. Of the 60 district court opinions which made an explicit finding on the issue, 31 found that the plaintiff’s work was published while 29 found that it was unpublished. Defendants that made use of a published work were significantly more successful in their fair use

---

almost as a mantra, that every commercial use is ‘presumptively’ unfair, that presumption is easily overcome by a transformative, nonsuperseding use.” (citations omitted)).

<sup>29</sup> Of the six opinions which found both a research and a critical purpose, four ruled in favor of the defendant.

<sup>30</sup> There is nothing in this set of 17 cases to explain this result. That is, only four of the cases involved standardized testing.

<sup>31</sup> This difference is not statistically significant ( $p=.104$ ).

defense, prevailing 62% of the time, than defendants that made use of an unpublished work, who prevailed 38% of the time (p=.035).<sup>32</sup> Nevertheless, while 22 opinions recognized that the unpublished status of the plaintiff's work disfavored a finding of fair use, a greater number, 26, found the inverse, that the published status of the work *supported* a finding of fair use.<sup>33</sup> Meanwhile, five opinions found that the published status of the plaintiff's work disfavored a finding of fair use because the work could be bought on the open market. An additional three opinions found that the unpublished status of the plaintiff's work supported a finding of fair use because the work was not available otherwise.

### **3. Factor Three: The Amount and Substantiality of the Portion Used**

Table 11 crosstabulates the distribution of courts' findings under factor three by the overall outcome of the test for the district court opinions sampled. Notable here is the degree to which a finding that factor three favors the defendant is nearly dispositive. Of the 47 opinions which made this finding, all but two ruled in favor of the defendant.

As for the subdoctrine of factor three, it is commonly stated that, "generally, it may not constitute a fair use if the entire work is reproduced."<sup>34</sup> Seventy-two of the sampled district court opinions explicitly found that the defendant copied the entirety of the plaintiff's work. Fifty-three of these opinions (74%) ruled in favor of the plaintiff. Interestingly, four opinions found that the defendant copied the entirety of the plaintiff's work but nevertheless found that factor three favored the defendant. All of these opinions subsequently found fair use. Twenty-five district court opinions explicitly found that the defendant took the "heart" of the plaintiff's work. In each of these, the court ruled in favor of the plaintiff.

### **4. Factor Four: Effect on the Market**

Table 12 crosstabulates the distribution of courts' findings under factor four by the overall outcome of the test for the district court opinions sampled. The table suggests that when factor four favors the plaintiff, this finding is nearly dispositive of the outcome of the fair use test. Of the 96 opinions which found

---

<sup>32</sup> Cf. *Byrne v. BBC*, 132 F. Supp. 2d 229, 235 (S.D.N.Y. 2001) ("Unpublished works are the 'favorite sons' of the second fair use factor, and where a plaintiff proves unauthorized publication of an unpublished work, this factor weighs heavily against a finding of fair use. See *Wright v. Warner Books*, 953 F.2d 731, 737 (2d Cir. 1991).").

<sup>33</sup> See, e.g., *Rotbart v. J.R. O'Dwyer Co.*, 1995 U.S. Dist. LEXIS 1315 (S.D.N.Y. 1995) ("Thus, the fact that Rotbart had 'published' his work, in the sense that he made it available to the public in these several ways, makes his work subject to fair use by defendant. See *Harper & Row*, 471 U.S. at 563"); *Caratzas v. Time Life, Inc.*, 1992 U.S. Dist. LEXIS 16285 (S.D.N.Y. 1992) ("Factor two favors the defendant where the plaintiffs' works are published and available to the general public. Here, this factor favors the defendant." (citation omitted)).

<sup>34</sup> *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir 1998) (quoting NIMMER).

that factor four favored the plaintiff, all but one ultimately ruled in favor of the plaintiff.<sup>35</sup> A finding that factor four favored the defendant also apparently exerted a very strong influence on the outcome of the test. Of the 76 district court opinions which found that factor four favored the defendant, all but six ultimately ruled in favor of the defendant. Judge Leval has asserted that factor four can work “powerfully” in favor of the plaintiff but not in favor of the defendant.<sup>36</sup> The data suggest, however, that the factor is nearly decisive whether it tilts in favor of the plaintiff or the defendant—though, admittedly, slightly more so when it tilts in favor of the former.

As for courts’ recognition of the importance of factor four, 40% of the opinions sampled explicitly stated that factor four was the most important among the four factors. Of course, in its 1994 opinion in *Campbell*, the Supreme Court is understood to have downgraded factor four’s significance.<sup>37</sup> Nevertheless, 27% of the 141 sampled opinions which postdated *Campbell* explicitly stated that

---

<sup>35</sup> In the one outlier case, *Williamson v. Pearson Educ.*, 2001 U.S. Dist. LEXIS 17062 (SDNY 2001), the court granted the defendant’s motion for summary judgment after finding that all factors other than the fourth favored the defendant. In the case, the defendant published a book entitled *Patton on Leadership: Strategic Lessons for Corporate Warfare* which quoted from and allegedly copied other elements of the plaintiff’s book entitled *Patton's Principles: A Handbook for Managers Who Mean It!*. The court’s analysis of factor four is arguably flawed. On its reasoning, factor four would favor the plaintiff in any situation where the plaintiff’s and the defendant’s products are competitive goods:

Although there are significant differences between the plaintiff’s and defendants’ works (as discussed in Section II.B., supra), clearly they both target readers interested in learning about General Patton’s methods of leadership, and the publication of *Strategic Lessons* may very well have had a negative impact on sales of *Williamson’s* works.

See *id.* at \*19-20.

<sup>36</sup> See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990). Judge Leval states:

Although the market factor is significant, the Supreme Court has somewhat overstated its importance. When the secondary use does substantially interfere with the market for the copyrighted work, as was the case in *Nation*, this factor powerfully opposes a finding of fair use. But the inverse does not follow. The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified. Thus, notwithstanding the importance of the market factor, especially when the market is impaired by the secondary use, it should not overshadow the requirement of justification under the first factor, without which there can be no fair use.

See *id.* (footnotes omitted).

<sup>37</sup> See, e.g., *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 113 (2d Cir. 1998). Judge Newman wrote:

The Court’s emphasis on an aggregate weighing of all four fair use factors represented a modification of the Court’s earlier view that the fourth factor, effect on the potential market for, or value of, the original, was “the single most important element of fair use.” *Harper & Row*, 471 U.S. at 566, a characterization conspicuously absent from the *Campbell* opinion. See *American Geo-physical Union v. Texaco Inc.*, 60 F.3d 913, 926 (2d Cir. 1995). Rather than accord the fourth factor primacy, the Court explicitly noted that “the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.” *Campbell*, 510 U.S. at 590 n.21.

See *id.*

factor four remained the most important, while 5%, citing *Campbell*, explicitly stated that it was not.

## **5. Bad Faith**

Thirty-six out of the 271 opinions (13%) explicitly considered the defendant's good or bad faith in their analysis of the fair use defense. Twenty-four opinions considered bad faith as part of their factor one analysis while the remaining twelve considered bad faith as an additional factor. Of the eleven opinions which found that the defendant acted in bad faith, all but two found in favor of the plaintiff.

## **III. Conclusion**

Overall, the project has not apparently produced any findings that go against conventional wisdom or are otherwise strongly counterintuitive. Nevertheless, certain results, such as those relating to stampeding, are quite interesting. Obviously, much more work remains to be done on the data set. In particular, I haven't yet looked at the appellate data. Nor have I looked in any detail at smaller issues such as the citation practices of the opinions—for example, what kind of opinions cited Nimmer (overall, 44% of the sampled opinions did so) and what kind cited academic commentary (overall, 9% of the sampled opinions cited Leval's article, if that qualifies as "academic" commentary, and an additional 13% cited academic commentary other than Leval's article). I may also seek to document somehow the various ways that judges "bend" the factors to conform to the test outcome.

FIGURE 1  
PROPORTION OF OPINIONS BY YEAR EXPLICITLY STATING THE VALENCE OF THE FACTORS

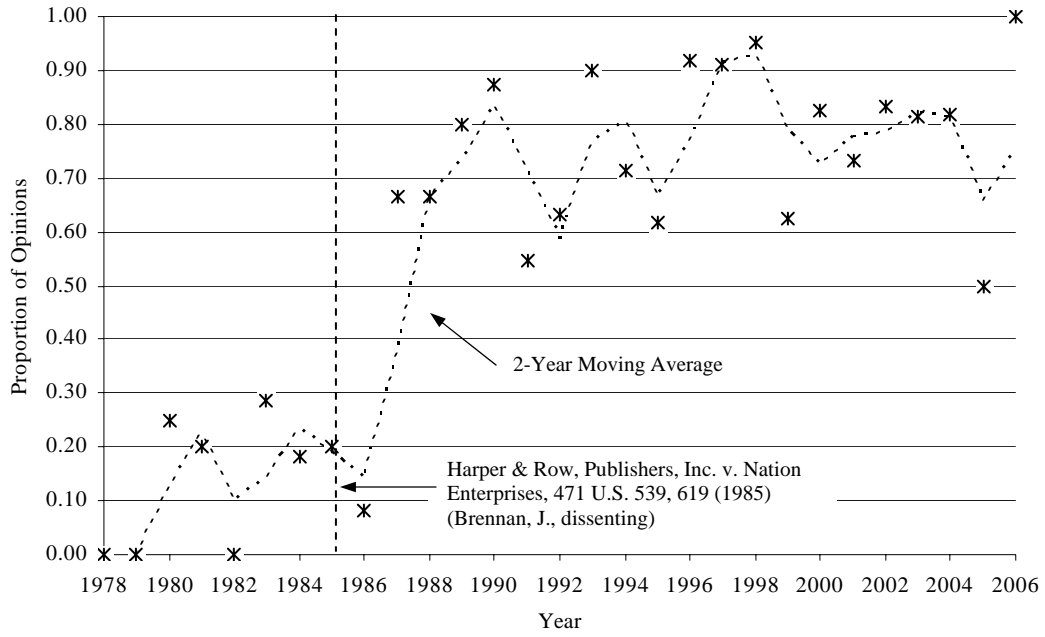


FIGURE 2  
COPYRIGHT FILINGS PER YEAR IN FEDERAL DISTRICT COURTS, 1978-2002

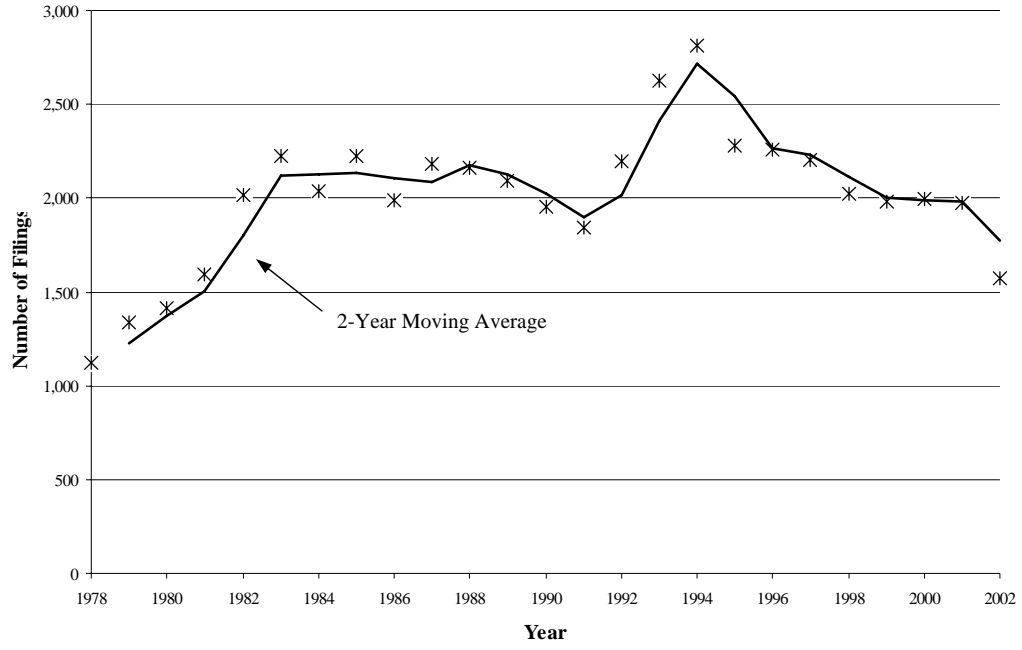




FIGURE 3  
NUMBER OF OPINIONS SAMPLED BY YEAR

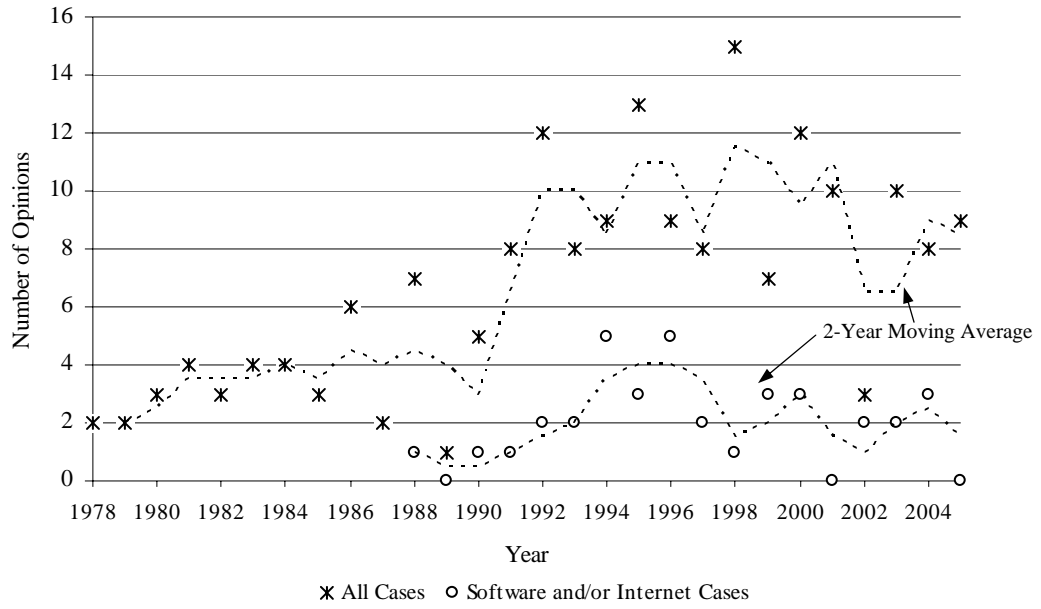


TABLE I  
DISTRIBUTION OF OPINIONS BY CIRCUIT AND DISTRICT  
("FU" denotes the proportion of opinions which found fair use  
or otherwise denied plaintiff's summary judgment motion)

Circuit	Appellate Court Opinions		District Court Opinions						
			By Circuit		By District				
	N	%	N	%	District	N	%	N Rev'd	FU
1	1	1.3	7	3.7	D. Mass.	6	3.2		.833
					D.N.H.	1	0.5		1.000
2	28	36.4	74	39.6	N.D.N.Y.	3	1.6	1	.333
					E.D.N.Y.	2	1.1		1.000
					S.D.N.Y.	66	35.3	8	.545
					W.D.N.Y.	3	1.6		.000
3	1	1.3	9	4.8	D.N.J.	2	1.1		.000
					E.D. Pa.	5	2.7		.000
					W.D. Pa.	1	0.5		1.000
					D. Del.	1	0.5		1.000
4	3	3.9	8	4.3	D. Md.	2	1.1		.000
					E.D. Va.	5	2.7		.600
					W.D. Va.	1	0.5		1.000
5	4	5.2	7	3.7	N.D. Tex.	2	1.1		.500
					E.D. Tex.	1	0.5	1	.000
					S.D. Tex.	3	1.6		.333
					W.D. Tex.	1	0.5		.000
6	7	9.1	12	6.4	E.D. Ky.	1	0.5	1	.000
					E. D. Mich.	6	3.2		.500
					W.D. Mich.	2	1.1		.000
					N.D. Ohio	1	0.5		1.000
					E. D. Tenn.	1	0.5		.000
					M.D. Tenn.	1	0.5	1	1.000
7	2	2.6	11	5.9	N.D. Ill.	10	5.4	1	.100
					S.D. Ill.	1	0.5		.000
8	2	2.6	8	4.3	D. Minn.	7	3.7	1	.286
					D. Neb.	1	0.5		.000
9	24	31.2	32	17.1	N.D. Cal.	15	8.0	2	.467
					C.D. Cal.	12	6.4	1	.417
					S.D. Cal.	2	1.1		.500
					D. Nev.	1	0.5		.000
					D. Ore.	2	1.1		.500
10	0	0	4	2.1	D. Colo.	1	0.5		1.000
					D. Kansas	2	1.1		.500
					N.D. Okla.	1	0.5		1.000
11	5	6.5	11	5.9	M.D. Fla.	2	1.1		.000
					S.D. Fla.	2	1.1		.000
					N.D. Ga.	7	3.7	1	.143
DC	0	0	4	2.1	D.D.C.	4	2.1		.000
Total	77		187			187		18	0.423

TABLE 2  
 DISTRIBUTION OF DISTRICT COURT OPINIONS BY POSTURE  
 ("P Found FU" denotes the proportion of opinions which found fair use; "P Found  
 No FU" denotes the proportion of opinions which found no fair use)

Posture	N	%	P Found FU	P Found No FU
Preliminary Injunction	41	21.9	.293	.707
SJ-Plaintiff	23	12.3	---	.826
SJ-Defendant	34	18.2	.765	---
Cross-SJs	55	29.4	.400	.491
Bench Trial	32	17.1	.313	.688
MTD	1	0.5	.000	1.000
JNOV Motion	1	0.5	.000	1.000
Total	187	100	.385	.562

TABLE 3  
 DISTRIBUTION AND DISPOSITION OF DISTRICT COURT OPINIONS BY CIRCUIT AND POSTURE  
 (“FU” denotes the proportion of opinions which found fair use; “No FU” denotes the proportion of opinions which found no fair use)

Circuit	Distribution by Circuit		Preliminary Injunction		Bench Trial		SJ Plaintiff		SJ Defendant		SJ Cross		
	N	%	N	FU	N	FU	N	No FU	N	FU	N	No FU	FU
1	7	3.7	1	1.000	3	.667	0	---	2	.000	1	.000	1.000
2	74	39.6	13	.538	15	.267	8	.625	17	.765	20	.400	.550
3	9	4.8	4	.000	2	.000	0	---	2	1.000	1	1.000	.000
4	8	4.3	1	1.000	1	1.000	0	---	3	.667	3	1.000	.000
5	7	3.7	1	1.000	4	.000	0	---	0	---	2	.500	.000
6	12	6.4	1	.000	1	.000	3	.667	2	1.000	5	.600	.400
7	11	5.9	4	.000	1	.000	1	1.000	0	---	4	.750	.000
8	8	4.3	2	.000	1	.000	1	1.000	1	1.000	3	.667	.333
9	32	17.1	10	.100	2	1.000	4	1.000	6	.500	10	.200	.600
10	4	2.1	1	1.000	0	---	1	1.000	1	1.000	1	.000	1.000
11	11	5.9	3	.000	1	1.000	4	1.000	0	---	3	1.000	.000
D.C	4	2.1	0	---	1	.000	1	1.000	0	---	2	1.000	.000
Total	185*		41		32		23		34		55		
	Circuit-Wide:			.293		.313		.826		.765		.510	.400

\*Two district court opinions are not represented in this table. One involved a motion for JNOV, the other a motion to dismiss. Neither found fair use.

TABLE 4  
CORRELATION COEFFICIENTS AMONG THE FACTOR OUTCOMES AND A RULING FOR DEFENDANT IN 187 DISTRICT COURT OPINIONS  
("D Wins" denotes that the court found fair use or otherwise denied plaintiff's motion for summary judgment)

		D Wins	Factor One		Factor Two		Factor Three		Factor Four	
			Favors FU	Disfavors FU	Favors FU	Disfavors FU	Favors FU	Disfavors FU	Favors FU	Disfavors FU
	D Wins	1.000								
Factor One	Favors FU	.663**	1.000							
	Disfavors FU	-.744**	-.841**	1.000						
Factor Two	Favors FU	.212**	.241**	-.166*	1.000					
	Disfavors FU	-.267**	-.162*	.250**	-.649**	1.000				
Factor Three	Favors FU	.563**	.615**	-.548**	.235**	-.144*	1.000			
	Disfavors FU	-.696**	-.585**	.640**	-.144*	.256**	-.781**	1.000		
Factor Four	Favors Fu	.740**	.692**	-.684**	.266**	-.277**	.609**	-.591**	1.000	
	Disfavors FU	-.820**	-.662**	.722**	-.229**	.291**	-.537**	.635**	-.898**	1.000

\*\* significant at the .005 level of significance \* significant at .05 level of significance

TABLE 5  
DISTRIBUTION OF FOUR- AND THREE-FACTOR STAMPEDE SCORES BY  
OPINION OUTCOME IN 187 DISTRICT COURT OPINIONS  
(Stampede score is the number of factors favoring a finding of fair use minus  
the number of factors disfavoring a finding of fair use)

Panel A: Four-Factor Stampede Scores

Stampede Score	Prevailing Party						Total
	P	%	D	%	None	%	
4	0	0.0	17	23.0	0	0.0	17
3	0	0.0	13	17.6	0	0.0	13
2	0	0.0	27	36.5	1	20.0	28
1	0	0.0	6	8.1	1	20.0	7
0	6	5.6	7	9.5	2	40.0	15
-1	4	3.7	2	2.7	0	0.0	6
-2	19	17.6	1	1.4	1	20.0	21
-3	26	24.1	1	1.4	0	0.0	27
-4	53	49.1	0	0.0	0	0.0	53
Total	108		74		5		187

Panel B: Three-Factor Stampede Scores

Stampede Score	Prevailing Party						Total
	P	%	D	%	None	%	
3	0	0.0	43	58.1	0	0.0	43
2	0	0.0	8	10.8	0	0.0	8
1	3	2.8	17	23.0	3	60.0	23
0	2	1.9	3	4.1	1	20.0	6
-1	14	13.0	3	4.1	1	20.0	18
-2	10	9.3	0	0.0	0	0.0	10
-3	79	73.5	0	0.0	0	0.0	79
Total	108		74		5		187

TABLE 6  
 CROSTABULATION OF THE STAMPEDE SCORES OF APPEALED DISTRICT  
 COURT OPINIONS BY THE STAMPEDE SCORES OF THE REVIEWING CIRCUIT  
 COURT DECISIONS, IN 34 FAIR USE CASES  
 (Underlined numbers indicate reversals)

		Stampede Score of Reviewing Circuit Court Opinion								
		-4	-3	-2	-1	0	1	2	3	4
Stampede Score of Appealed District Court Opinion	-4	4	1		1			<u>1</u>		<u>1</u>
	-3			1			<u>1</u>	<u>1</u>		<u>1</u>
	-2	1		2	<u>1</u> <sup>*</sup>					
	-1			<u>1</u> <sup>†</sup>						
	0	<u>1</u>					1			
	1									
	2	<u>1</u>		<u>2</u>			2			
	3	<u>1</u>	<u>1</u>	<u>1</u>						
	4			<u>1</u>				1	1	2

<sup>\*</sup>In *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991), the Second Circuit reversed the district court's granting of summary judgment to the plaintiff in *Association of American Medical Colleges v. Carey*, 728 F. Supp. 873 (S.D.N.Y. 1990). <sup>†</sup>In *Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 241 F.3d 398 (5th Cir. 2001), the Fifth Circuit reversed the district court's granting of summary judgment to the defendant in *Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 49 F. Supp. 2d 885 (E.D. Tex. 1999).

TABLE 7  
 LOGISTIC REGRESSION OF THE PREVAILING PARTY ON THE OUTCOME OF  
 THE FOUR FACTORS, REPORTING ODDS RATIOS

Dependent Variable: D Prevails (1) / P Prevails (0)

N = 182  
 LR  $\chi^2$  = 192.51  
 p >  $\chi^2$  = .000  
 Pseudo R<sup>2</sup> = .783

Log Likelihood : -26.703

Factor	Odds Ratio	Std. Error	z	p> z
<i>Favors</i> FU				
Factor One	9.659	7.422	2.95	.003
Factor Two	1.094	.803	.12	.903
Factor Three	14.641	12.746	3.08	.002
Factor Four	99.344	94.403	4.84	.000

Correctly classified: 95.6%

N = 182  
 LR  $\chi^2$  = 202.81  
 p >  $\chi^2$  = .000  
 Pseudo R<sup>2</sup> = .732

Log Likelihood: -21.556

Factor	Odds Ratio	Std. Error	z	p> z
<i>Disfavors</i> FU				
Factor One	.116	.099	-2.53	.011
Factor Two	2.400	2.185	.96	.337
Factor Three	.011	.016	-3.05	.002
Factor Four	.004	.004	-4.91	.004

Correctly classified: 95.1%



TABLE 8  
 FACTOR ONE OUTCOME BY PREVAILING PARTY IN 187 DISTRICT  
 COURT OPINIONS

Factor Outcome	Prevailing Party			Total
	P	D	None	
Not Considered	4	1	0	5
Row %	80.0%	20.0%	0.0%	100.0%
Column %	3.7%	1.4%	0.0%	2.7%
Favors No FU	90	4	0	94
Row %	95.7%	4.3%	0.0%	100.0%
Column %	83.3%	5.4%	0.0%	50.3%
Favors FU	8	63	2	73
Row %	11.0%	86.3%	2.7%	100.0%
Column %	7.4%	85.1%	40.0%	39.0%
Neutral	1	0	0	1
Row %	100.0%	0.0%	0.0%	100.0%
Column %	0.9%	0.0%	0.0%	0.5%
Fact Issue	2	0	2	4
Row %	50.0%	0.0%	50.0%	100.0%
Column %	1.9%	0.0%	40.0%	2.1%
Not Relevant	0	0	0	0
Row %	0.0%	0.0%	0.0%	0.0%
Column %	0.0%	0.0%	0.0%	0.0%
Unclear	3	6	1	10
Row %	30.0%	60.0%	10.0%	100.0%
Column %	2.8%	8.1%	20.0%	5.4%
Total	108	74	5	187
Row %	57.8%	39.6%	2.7%	100.0%
Column %	100.0%	100.0%	100.0%	100.0%

TABLE 9  
DISTRICT COURT FINDINGS WITH RESPECT TO TRANSFORMATIVE USE AND THE  
“COMMERCIAL NATURE” OF THE DEFENDANT’S USE

Panel A: District Court Findings Under Factor One With Respect to Transformative Use

---

Court’s Finding as to Transformativeness	N	Proportion of N in Which Factor One Was Found to Favor FU	Proportion of N Which Found in Favor of D
Court Did Not Addressed Transformativeness	117	.368	.385
Court Found Transformative Use	27	1.000	.926
Court Found Non- Transformative Use	42	.100	.071
Court Addressed Transformativeness But Minimized the Importance of the Issue	1	1.000	1.000
	187	.390	.396

Panel B: District Court Findings Under Factor One With Respect to “Commercial Nature”

---

Court’s Finding as to “Commercial Nature”	N	Proportion of N in Which Factor One Was Found to Favor FU	Proportion of N Which Found in Favor of D
Commercial Nature Not Addressed	19	.579	.579
Commercial Nature Found	127	.284	.307
Non-Commercial Nature Found	30	.767	.700
Commercial Nature Issue Held to Be Neutral	1	.000	.000
Finding Unclear	10	.300	.300
	187	.390	.385

TABLE 10  
 FACTOR TWO OUTCOME BY PREVAILING PARTY IN 187 DISTRICT  
 COURT OPINIONS

Factor Outcome	Prevailing Party			Total
	P	D	None	
Not Considered	11	7	0	18
Row %	61.1%	38.89%	0.0%	100.0%
Column %	10.2%	9.5%	0.0%	9.6%
Favors No FU	73	27	2	102
	71.6%	26.5%	2.0%	100.0%
	67.6%	36.5%	40.0%	54.6%
Favors FU	10	26	1	37
	27.0%	70.3%	2.7%	100.0%
	9.3%	35.1%	20.0%	19.8%
Neutral	8	2	0	10
	80.0%	20.0%	0.0%	100.0%
	7.4%	2.7%	0.0%	5.4%
Fact Issue	2	0	1	3
	66.7%	0.0%	33.3%	100.0%
	1.9%	0.0%	20.0%	1.6%
Not Relevant	0	2	1	3
	0.0%	66.7%	33.3%	100.0%
	0.0%	2.7%	20.0%	1.6%
Unclear	4	10	0.0	14
	28.6%	71.4%	0.0%	100.0%
	3.7%	39.6%	0.0%	7.5%
Total	108	74	5	187
	57.8%	39.6%	2.67%	100.0%
	100.0%	100.0%	100%	100.0%

TABLE 11  
 FACTOR THREE OUTCOME BY PREVAILING PARTY IN 187 DISTRICT  
 COURT OPINIONS

Factor Outcome	Prevailing Party			Total
	P	D	None	
Not Considered	3	5	1	9
Row %	33.3%	55.6%	11.1%	100.0%
Column %	2.8%	6.8%	20.0%	4.8%
Favors No FU	100	13	1	114
Row %	87.7%	11.4%	0.9%	100.0%
Column %	92.6%	17.6%	20.0%	61.0%
Favors FU	2	47	0	49
Row %	4.1%	95.9%	0.0%	100.0%
Column %	1.9%	63.5%	0.0%	26.2%
Neutral	0	3	0	3
Row %	0.0%	100.0%	0.0%	100.0%
Column %	0.0%	4.1%	0.0%	1.6%
Fact Issue	1	1	0	2
Row %	50.0%	50.0%	0.0%	100.0%
Column %	0.9%	1.4%	0.0%	1.1%
Not Relevant	0	0	0	0
Row %	0.0%	0.0%	0.0%	0.0%
Column %	0.0%	0.0%	0.0%	0.0%
Unclear	2	5	3	10
Row %	20.0%	50.0%	30.0%	100.0%
Column %	1.9%	6.8%	60.0%	5.4%
Total	108	74	5	187
Row %	57.8%	39.6%	2.7%	100.0%
Column %	100.0%	100.0%	100.0%	100.0%

TABLE 12  
 FACTOR FOUR OUTCOME BY PREVAILING PARTY IN 187 DISTRICT  
 COURT OPINIONS

Factor Outcome	Prevailing Party			Total
	P	D	None	
Not Considered	3	0	0	3
Row %	100.0%	0.0%	0.0%	100.0%
Column %	2.8%	0.0%	0.0%	1.6%
Favors No FU	95	1	0	96
Row %	99.0%	1.0%	0.0%	100.0%
Column %	87.0%	2.7%	0.0%	51.4%
Favors FU	5	70	1	76
Row %	6.6%	92.1%	1.3%	100.0%
Column %	4.6%	94.6%	20.0%	40.6%
Neutral	2	1	0	3
Row %	66.7%	33.3%	0.0%	100.0%
Column %	1.9%	1.4%	0.0%	1.6%
Fact Issue	1	1	4	6
Row %	16.7%	16.7%	66.7%	100.0%
Column %	0.9%	1.4%	80.0%	3.2%
Not Relevant	0	0	0	0
Row %	0.0%	0.0%	0.0%	0.0%
Column %	0.0%	0.0%	0.0%	0.0%
Unclear	3	0	0	3
Row %	100.0%	0.0%	0.0%	100.0%
Column %	2.8%	0.0%	0.0%	1.6%
Total	109	73	5	187
Row %	58.3%	39.0%	2.7%	100.0%
Column %	100.0%	100.0%	100.0%	100.0%

Appendix

Coding Form as of 6/19/06

**General Opinion Information**

<b>caption</b>	<b>Caption of the opinion</b>
<b>cite</b>	<b>Citation of the opinion</b>
<b>circ</b>	<b>Circuit of the appellate court or district court</b>
<b>pubbel</b>	<b>Published Below</b> (1=For appellate opinions, there exists a published D Ct analysis (in Westlaw or Lexis) of the FU claim; 0=else)
<b>publappel</b>	<b>Appellate case is (citable(1)/not citable(0))</b>
<b>dist</b>	<b>District Court</b>
<b>date</b>	<b>Date opinion was filed</b>
<b>lname</b>	<b>Last name of author of opinion</b>
<b>fname</b>	<b>First name and middle initial of author of opinion</b>
<b>posture</b>	<b>Posture of district court opinion addressing FU</b>  1 Preliminary injunction 2 TRO 3 SJ plaintiff 4 SJ defendant 5 SJ cross 6 BT 7 MTD 8 Motion for attorneys fees 87 JNOV 88 Jury trial 89 Unclear
<b>dj</b>	<b>Declaratory Judgment</b>  1 P seeks declaratory judgment of no FU (D then coded as P and vice-versa) 0 P does not seek declaratory judgment of no FU
<b>concdiss</b>	<b>Opinion is a concurrence (1), dissent (2), or neither (0)</b>

**Copyright Specific Opinion Information**

<b>extent</b>	<b>Extent of C's Treatment of the FU analysis</b>
---------------	---

- 0 Though FU is mentioned, there is little (one or two sentences) or no discussion *of the FU factors*
- 1 Full discussion of each factor
- 2 Brief discussion (one or two paragraphs) of the factors
- 3 Incomplete discussion of the factors (no more than two factors considered, though each fully)
- 4 Factors discussed in context of attorneys fees motion
- 5 Ct says 4-factor analysis not appropriate (b/c is satire)
- 6 Non-factor discussion
- 9 Extraneous discussion (e.g., in context of discovery motion)

**winfu**

**Disposition of FU defense**

- 1 Plaintiff wins
- 2 Defendant
- 3 Mixed
- 4 Issue of fact

**appeal**

**Fate of FU ruling on appeal** (if district court, then whether district court was affirmed, reversed, etc.; if appellate court, then whether appellate court affirmed, reversed etc.)

- 0 No appellate treatment of D Ct's FU ruling
- 1 Affirmed
- 2 Reversed
- 3 Other

**sct**

**Fate of Appellate Court's FU ruling on appeal to S Ct**

- 0 No record of cert sought
- 1 Cert denied
- 2 Affirmed
- 3 Reversed

**appealdif  
though outcome is the same**

**Appellate Ct's analysis of valence of FU factors differs from D Ct's,**

- 1 Yes
- 0 No

**facts**

**Facts** (Very brief narrative of the facts of the case)

**soft**

**Software case.** Facts of FU deal with computer software (1/0)

**interop**

**Interoperability case.** Facts of FU deal with interoperability (1/0)

**reveng  
(1/0)**

**Reverse engineering case.** Facts of FU deal with reverse engineering

**internet**

**Internet case.** Facts of case involve the internet (1/0)

**newsrep**

**News reporting case**

- 1 Court explicitly finds that the case is a "news reporting case"
- 2 D argues that the case is a "news reporting" case but C rejects this characterization
- 0 Not argued/mentioned

<b>firstam</b>	<b>First Amendment.</b> The C’s analysis of FU alludes in some way, however briefly, to the First Amendment (1/0)
<b>newtech</b>	<b>C explicitly labels the case as one involving “new technology”</b> (1/0)
<b>parody</b>	<b>The defense of parody is made out</b> (1/0)
<b>scient</b>	<b>Scientology case</b>
<b>intcop</b>	<b>Intermediate copying</b> (1/0)

**Factor 1**

<b>f1</b>	<p><b>C finds that f1 favors:</b></p> <ul style="list-style-type: none"> <li>1 Plaintiff</li> <li>2 Defendant</li> <li>3 Neutral</li> <li>4 C finds fact issue</li> <li>5 C finds that factor is not relevant</li> <li>6 C’s finding is unclear</li> <li>0 Not addressed</li> </ul>
<b>flobjcomm</b>	<p><b>Is D's use objectively a for-profit use?</b></p> <ul style="list-style-type: none"> <li>1 Yes. D’s use is objectively a for-profit use.</li> <li>2 No. D’s use is objectively a not-for-profit use.</li> <li>3 Unclear</li> </ul>
<b>f1comm</b>	<p><b>C characterizes D’s use as:</b></p> <ul style="list-style-type: none"> <li>0 C does not address commerciality</li> <li>1 C characterizes D’s use as commercial</li> <li>2 C characterizes D’s use as non-commercial</li> <li>3 C’s characterization is unclear</li> <li>4 C characterizes commerciality as “neutral”</li> </ul>
<b>f1min</b>	<b>The C minimizes the importance of the commerciality inquiry</b> (1/0)
<b>f1pres uses are not FU</b>	<p><b>C acknowledges the <i>Harper &amp; Row</i> presumption that commercial</b></p> <ul style="list-style-type: none"> <li>0 No</li> <li>1 Yes</li> <li>2 C acknowledges the <i>Acuff-Rose</i> retreat from the <i>Harper &amp; Row</i> presumption</li> </ul>
<b>f1t work (or “productive”)</b>	<p><b>C explicitly finds that D’s use (is / is not) “transformative” of P’s</b></p> <ul style="list-style-type: none"> <li>0 C does not address</li> <li>1 C finds that D’s use is “transformative”</li> <li>2 C finds that D’s use is not “transformative”</li> <li>3 C minimizes the importance of the “transformative[ness]” inquiry</li> <li>4 C addresses, but analysis is unclear</li> </ul>



<b>f1s</b>	<b>C explicitly finds that D’s use (does “supersede” / does not “supersede”) P’s work</b>
	<ul style="list-style-type: none"> <li>0 C does not address</li> <li>1 C finds that D’s use does “supersede”</li> <li>2 C finds that D’s use does not “supersede”</li> <li>3 C minimizes the importance of the supercession inquiry</li> <li>4 C addresses, but analysis is unclear</li> </ul>
<b>f1par</b>	<b>C characterizes D’s use as:</b>
	<ul style="list-style-type: none"> <li>0 C does not address issue</li> <li>1 Parody</li> <li>2 Satire</li> <li>3 Not parody</li> <li>4 Neither</li> </ul>
<b>f1parmist</b>	<b>Does C mistakenly call D’s use “parody” when it is probably in fact satire?</b>
	<ul style="list-style-type: none"> <li>1 Yes</li> <li>0 No</li> </ul>
<b>f1educ</b>	<b>C characterizes D’s use as having an educational purpose (1/0)</b>
<b>f1res</b>	<b>C characterizes D’s use as having a research purpose (1/0)</b>
<b>f1crit</b>	<b>C characterizes D’s use as criticism or comment (1/0)</b>
<b>f1manner</b>	<b>Manner in which D obtained P’s work</b>
	<ul style="list-style-type: none"> <li>1 Supports P</li> <li>2 Supports D</li> <li>0 Not addressed</li> </ul>
<b>f1pream</b>	<b>C identifies D’s use as mentioned / not mentioned in the preamble</b>
	<ul style="list-style-type: none"> <li>0 C not address whether D’s use is mentioned in preamble</li> <li>1 C finds that D’s use is mentioned in preamble, supports FU</li> <li>2 C finds that D’s use is not mentioned in preamble, disfavors FU</li> </ul>
<b>f1firstam</b>	<b>The First Amendment is / is not referenced anywhere in the C’s analysis of F1 (1/0)</b>

**Factor 2**

<b>f2</b>	<b>C finds that F2 favors:</b>
	<ul style="list-style-type: none"> <li>0 Not addressed/not argued</li> <li>1 Favors plaintiff</li> <li>2 Favors defendant</li> <li>3 Neutral</li> <li>4 Fact issue</li> <li>5 Not relevant</li> <li>6 Unclear</li> </ul>

**f2nat**

**C finds that P's work is:**

- 0 Not addressed
- 1 Primarily creative
- 2 Primarily factual
- 3 Compilation
- 4 Unclear
- 5 Both creative and factual
- 6 A "computer program"

**f2pub**

**C finds that P's work is published / unpublished:**

- 0 Not addressed
- 1 P's work is unpublished and this supports a finding of no FU
- 2 P's work is published and this supports a finding of FU
- 3 P's work is published and this supports no FU (because can purchase)
- 4 P's work is unpublished and this supports FU (because not available otherwise)
- 5 Unclear
- 6 P's work is unpublished but this is not important to the FU analysis
- 7 P's work is published but this is not important to the FU analysis

**Factor 3**

**f3**

**C finds that F3 favors:**

- 0 Not addressed
- 1 Favors plaintiff
- 2 Favors defendant
- 3 Neutral
- 4 Fact issue
- 5 Not relevant
- 6 Unclear

**f3ref**

**Reference work for F3 analysis**

- 1 P's work
- 2 Both P and D's work
- 3 D's work
- 4 Unclear
- 0 Not addressed

**f3amount**

**C finds that D copied entirety of P's work?**

- 1 Yes, C finds that D copied "entire" work
- 0 C does not address / C finds that D did not copy "entire" work
- 3 Unclear

**f3heart**

**C finds that D copied the "heart" of P's work**

- 0 Not Addressed
- 1 Yes
- 2 No
- 3 Unclear

**f3work**

**C acknowledges ambiguity over scope of “work”**

- 1 Yes
- 0 No

**Factor 4**

**f4**

**C finds that f4 favors:**

- 0 Not addressed / not argued
- 1 Favors plaintiff
- 2 Favors defendant
- 3 Neutral
- 4 Fact issue
- 5 Not relevant
- 6 Unclear

**f4compres**

**C explicitly acknowledges the presumption that a commercial use will lead to market harm:**

- 1 C explicitly acknowledges presumption and finds that favors P
- 2 C ... but finds that nevertheless favors D
- 0 C does not acknowledge presumption
- 3 C explicitly rejects presumption

**f4tpresum**

**C explicitly acknowledges the presumption that a nontransformative use will lead to market harm:**

- 1 C explicitly acknowledges presumption
- 0 C does not acknowledge presumption

**f4slip**

**widespread...:**

**C explicitly relies on the doctrine that if D’s use should become**

- 1 Yes, supports P
- 0 C does not explicitly rely on this doctrine
- 2 Yes, supports D
- 3 Yes, unclear whom it supports

**f4sub**

**substitution (from F1):**

**C explicitly acknowledges the doctrine of supercession/market**

- 1 C acknowledges and finds that favors P
- 2 C acknowledges and finds that favors D
- 0 C does not acknowledge

**f4crit**

**criticism of the P’s work**

**C acknowledges the doctrine that there is no derivative right in**

- 1 C acknowledges
- 0 C does not acknowledge

**frimport**

**C’s explicit statement as to the importance of F4:**

- 0 Not addressed

- 1 States most important factor
- 2 States not most important
- 3 States that is not sure
- 4 C's treatment of the importance of F4 not clear

**Other Factors**

**fother**

**C explicitly considers other factors**

- 0 No
- 1 Yes, and the factor is considered relevant
- 2 Yes, but the factor is considered irrelevant
- 3 Yes, and one additional factor is accepted, another rejected

**General FU Analysis Information**

**leghist**

**Does C refer to the legislative history of the Copyright Act?**

- 1 Yes, C directly refers to the legislative history
- 0 No
- 2 C does not directly refer to the legislative history, but cites to a case which does, and the C notes parenthetically that the cited case is referring to the legislative history

**bfaith**

**Does the C address good/bad faith anywhere in the FU analysis?**

- 1 Yes, under F1
- 2 Yes, under F2
- 3 Yes, under F3
- 4 Yes, under F4
- 5 Yes, as a separate factor
- 0 No

**bfaiths**

**Good/bad faith supports:**

- 1 Supports P (no FU)
- 2 Supports D (FU)
- 3 FI
- 4 Not relevant

**pubint**

**The “public interest” is explicitly considered**

- 1 Yes – Supports P
- 2 Yes – Supports D
- 0 No

**equity**

**Does the court defer to “equity” in deciding the fair use issue?**

- 1 Yes – Supports P
- 2 Yes – Supports D
- 0 No

**indprac**

**Any reference to industry practice?**

- 1 Yes – Supports P

2 Yes – Supports D  
0 No

**moral**

**Any reference to moral rights?**

1 Yes  
0 No

**val**

**Does C tend explicitly to state “This factor favors...”:**

1 Yes  
0 No  
2 No, but valences are obvious

**rev**

**At the conclusion of its analysis, does the C review the valences of the factors, however briefly, in stating its overall finding? (1/0)**

**leval**

**Does C cite Leval’s article or opinions in its FU analysis?**

1 C explicitly cites Leval’s article  
2 C explicitly cites a Leval opinion and him as the author  
3 Both  
0 C does not explicitly cite Leval

**nimmer**

**Does C’s FU analysis cite the Nimmer treatise?**

1 C explicitly cites the Nimmer treatise  
0 C does not explicitly cite  
2 C indirectly cites Nimmer treatise in parenthetical to case cited by C

**gordon**

**Does C’s FU analysis cite Gordon?**

1 Yes, C’s FU analysis explicitly cites to Gordon  
0 No

**lawrev**

**Does C’s FU analysis cite any law review article?**

1 Yes  
0 No

**Coding Information**

**uniq**

**Unique Case Identifier** (each case, rather than opinion, is given a unique number to facilitate stringing together district court and appellate opinions from the same case)

**codeorder**

**Coding Order** (order in which the cases were initially coded)

**carlorder**  
emailed to author)

**RA’s Order** (order in which RA listed the cases in the spreadsheet he