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Courts React: Popularity of YouTube's Reaction Video Genre Sparks New Discussion on Fair Use Defense

Gretchen L. Casey
geliljeb@my.loyno.edu

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COURTS REACT: POPULARITY OF YOUTUBE’S REACTION VIDEO GENRE SPARKS NEW DISCUSSION ON FAIR USE DEFENSE

By: Gretchen Liljeberg Casey †

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I. INTRODUCTION

Over the past few years, the rise in popularity of a genre of YouTube videos known as “reaction videos” has resulted in controversy for various reasons. The United States District Court in *Hosseinzadeh v. Klein*, a landmark case for the genre, described the “reaction videos” as “a large genre of YouTube videos . . . [that] vary widely in terms of purpose, structure, and the extent to which they rely on potentially copyrighted material.”¹ According to the *Hosseinzadeh* opinion, “[s]ome reaction videos. . .intersperse short segments of another’s work with criticism and commentary, while others are more akin to a group viewing session without commentary.”² Essentially, reaction videos are exactly what the name suggests: a video showing a person or group of people reacting to the work of another, which by nature

† Gretchen Liljeberg Casey is a J.D. Candidate at Loyola College of Law in New Orleans. She would like to express her gratitude to Texas A&M for presenting this opportunity for publication. She would also like to thank her father, Judge Hans Liljeberg, for convincing her to go to law school, and her husband, Chris Casey, for his encouragement and support.

1. *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 40 n.1 (S.D.N.Y. 2017).

2. *Id.*

requires the incorporation of the work being reacted to for the viewer's reference.

The first time that controversy arose out of the “reaction” genre was in 2015 when the Fine Brothers, the creators of a popular YouTube channel known for its “Kids React” series along with several other “reaction video” series, applied to trademark the term “react.”³ The brothers did so with the intention to create a program called “React World,” through which they would license out the “reaction video” format to other video creators.⁴ This endeavor came not long after the Fine Brothers criticized Ellen DeGeneres for allegedly using their “reaction” format in a segment on her television show, suggesting the brothers’ belief that they were the sole owners of what is, in reality, a widely-used format.⁵ As a result, YouTube viewers became distrustful of the Fine Brothers’ intentions in trademarking the format, and viewers criticized them to the point that they issued a public apology in February of 2016 in which they announced their decision to “[r]escind all. . . ‘React’ trademarks and applications” and “[d]iscontinue the React World program.”⁶

Later in 2016, reaction videos would again become the subject of controversy when Ethan and Hila Klein, the husband-and-wife creators of the popular YouTube comedy channel H3H3 Productions, were sued by Matt Hosseinzadeh of the decidedly less popular YouTube channel, Matt Hoss Zone, for copyright infringement.⁷ Hosseinzadeh alleged copyright infringement for the use of segments of his video, “Bold Guy vs. Parkour Girl,” in a humorous reaction video made by the Kleins.⁸ What resulted was the aforementioned *Hosseinzadeh v. Klein* opinion, which set a precedent that will hopefully allow future reaction video creators to produce and share content without their creativity being stifled by the looming risk of copyright infringement lawsuits.

Hosseinzadeh alleged that a video, which was part of a series of videos, starring himself as “Bold Guy,” “in which the Bold Guy flirts with a woman and chases her through various sequences” was infringement.⁹ Hosseinzadeh alleged that the Kleins’ video entitled “The Big, The BOLD, The Beautiful,” infringed upon “Bold Guy vs.

3. Chris Foxx, *Fine Brothers Spark Fury with YouTube Trademark Attempt*, BBC (Feb. 1, 2016), <https://www.bbc.com/news/technology-35459805> [<https://perma.cc/N656-7F7A>].

4. *Id.*

5. *Id.*

6. Benny Fine & Rafi Fine, *A Message from the Fine Brothers*, MEDIUM (Feb. 1, 2016), <https://medium.com/@FineBrothersEnt/a-message-from-the-fine-brothers-a18ef9b31777> [<https://perma.cc/38MY-UWTR>].

7. Cecilia D’Anastasio, *H3H3 Productions Wins Lawsuit Filed By YouTuber They Made Fun Of*, KOTAKU (Aug. 24, 2017), <https://kotaku.com/h3h3-productions-win-lawsuit-against-youtuber-they-paro-1798386207> [<https://perma.cc/3A8Y-HPQ5>].

8. *Id.*

9. *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 40 (S.D.N.Y. 2017).

Parkour Girl,” as it featured the couple “comment[ing] on and criticiz[ing] [his] video, playing portions of it in the process.”¹⁰ Accepting the Kleins’ motion for summary judgment, which pleaded the fair use defense, the court held that its “review of the. . . videos makes it clear that [the claim] in which plaintiff alleges that defendants infringed plaintiff’s copyrights, must be decided in defendants’ favor.”¹¹

II. FAIR USE EXPLAINED

A. *Origin of the Fair Use Doctrine*

The use of copyrighted works to create new works is far from a novel concept. For example, many of Beethoven’s early symphonies copied the works of Mozart.¹² It naturally follows that the fair use doctrine was recognized in jurisprudence long before achieving federal statutory recognition.¹³ As the Supreme Court stated in *Campbell v. Acuff-Rose Music, Inc.*, “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts.’”¹⁴ America’s history of recognizing the fair use doctrine echoes that of the early English courts, which decided whether the use of a work was fair based on the question of “whether [defendant’s work] is a legitimate use of the plaintiff’s publication, in the fair exercise of a mental operation, deserving the character of an original work.”¹⁵ Among the first of such works English law recognized as legitimate were unauthorized abridgments, as English courts believed these works could be used “for the promotion of science, and the benefit of the public.”¹⁶

The United States Supreme Court opinion established the jurisprudence upon which the fair use statute was based arose from *Folsom v. Marsh*. In that opinion, Justice Story suggested that to determine fair use, courts must “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”¹⁷ Justice Story’s summary of fair use “remained exclusively judge-made doctrine until the passage

10. *Id.*

11. *Id.* at 45.

12. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:1.60 (2018) [hereinafter PATRY].

13. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994). (“[A]lthough the First Congress enacted our initial copyright statute. . . without any explicit reference to ‘fair use,’ as it later came to be known, the doctrine was recognized by the American courts nonetheless”).

14. *Id.* at 575 (quoting U.S. Const., Art. I, § 8, cl.8).

15. PATRY, *supra* note 12, § 10:1.60.

16. *Id.* (quoting 4 Esp. 168, 170 (1803)).

17. *Campbell*, 114 S.Ct. at 1170 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (No. 4,901) (CCD Mass. 1841)).

of the 1976 Copyright Act,” and Section 107 clearly derives from the *Folsom* opinion.¹⁸ Congress intended for this statute to “restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”¹⁹

B. *Purpose of Fair Use Doctrine*

As suggested by the remarks of the English Common-law courts, the purpose of the fair use doctrine, and specifically Section 107 of the 1976 Copyright Act, is to “[permit] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”²⁰ Accordingly, in each case where a court must decide whether the use of a copyrighted work is permissible, “the assessment is driven by whether the claimed fair use furthers the goals of copyright.”²¹ Without the fair use doctrine, copyright law would prohibit the quoting of books in book reviews; the use of photographs and film clips in news stories; and, as attempted by the plaintiff in *Hosseinzadeh*, the creation of parodies and satires.²² It could even be argued that if the law did not allow some amount of use of copyrighted work, there could be no creation of new works at all. In his article *Toward a Fair Use Standard*, Hon. Pierre N. Leval described fair use as “a necessary part of the overall design” of the copyright monopoly and gave the following two reasons for allowing fair use:

First, all intellectual creative activity is in part derivative. There is no such thing as a wholly original thought or invention. Each advance stand on building blocks fashioned by prior thinkers. Second, important areas of intellectual activity are explicitly referential. Philosophy, criticism, history, and even the natural sciences require continuous reexamination of yesterday’s theses.²³

Thus, the purpose of the fair use doctrine is to facilitate the very purpose of copyright law: to foster creation. As the Kleins implied in their video response to *Hosseinzadeh*’s lawsuit, if courts fail to recognize certain fair uses of copyrighted works (in their case in the form of “reaction videos”), it would not only end their careers, but the careers of many others who contribute to our culture today by posting creative videos online.²⁴ It was for this reason that the Kleins later asserted the *Hosseinzadeh* court’s ruling in their favor made it a

18. *Id.*

19. *Id.* (quoting H.R. Rep. No. 94-1476 p. 66 (1976)).

20. PATRY, *supra* note 12, § 10:1.60.

21. *Id.*

22. *Id.*

23. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109–10 (1990).

24. *We’re Being Sued*, YOUTUBE, <https://www.youtube.com/watch?v=fEGVOysbC8w&t=683s> (last visited June 14, 2018).

“landmark case” by setting a precedent that would “strengthen fair use across YouTube.”²⁵

C. *The Fair Use Defense in Practice*

Frequently, the jury decides whether a fair use exists, although when appropriate “it may be decided on summary judgment.”²⁶ The statute phrases fair use as an affirmative defense, which has been confirmed by the Supreme Court in multiple cases.²⁷ The result of pleading the fair use defense is that the plaintiff is given a slight evidentiary burden.²⁸ The majority of courts assess the defense by evaluating the four factors enumerated in Section 107, taking any evidence brought into account, and then finally weighing the factors together.²⁹

III. STATUTORY RECOGNITION OF FAIR USE

The inclusion of the fair use doctrine in the 1967 Copyright Act is best referred to as a “statutory recognition” rather than a “codification” of the doctrine because “courts are not to regard Section 107 as defining, encapsulating, or limiting fair use, but only as referencing some factors to be examined using common-law methodology.”³⁰ The aforementioned Section 107, entitled “Limitations on exclusive rights: Fair use,” provides that the fair use of copyrighted works, including their reproductions by any other means, is not copyright infringement (unless Sections 106 or 106A apply. According to Section 107, this is the case, for any purposes such as criticism, commentary, journalism, education, scholarship, or research. Section 107 provides four factors to apply in any particular case to determine whether one’s use of a copyrighted work is fair use:

- (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.³¹

An unpublished work is not barred from fair use if such a finding is based on these four factors.³² The purpose of the statute’s preamble is

25. *We Won the Lawsuit!*, YouTube, <https://www.youtube.com/watch?v=9eN0CIyF2ok> (last visited June 14, 2018).

26. PATRY, *supra* note 12, § 10:3.

27. PATRY, *supra* note 12, § 10:2.

28. *Id.*

29. PATRY, *supra* note 12, § 10:157.

30. PATRY, *supra* note 12, § 10:8.

31. 17 U.S.C. § 107 (2012).

32. *Id.*

to “enumerat[e] illustrative methods of reproduction,” and purposes they could be applied to.³³ The six purposes enumerated in the preamble are examples of works that may be considered fair use; the list is not exclusive, but “conversely, uses that are enumerated within the preamble are not presumptively fair.”³⁴ The preamble as a whole is most closely related to the first fair use factor and is best understood in relation to that factor.³⁵

Its drafters intended Section 107’s four factors to be analyzed together and “in light of the purposes of copyright.”³⁶ In other words, the factors “do not represent a score card that promises victory to the winner of the majority.” Instead, they “direct courts to examine the issue from every pertinent corner and to ask in each case whether, and how powerfully, a finding of fair use would serve or disserve the objectives of the copyright.”³⁷ Though the majority of courts use the four factors listed in Section 107 as guidance in fair use inquiries, these factors “are not binding, need not be applied, and are not . . . discrete inquiries;” they are “merely an attempt to note the considerations previously taken into account by courts operating under prior statutes . . . that did not statutorily recognize fair use.”³⁸ Some courts instead employ a common law analysis,³⁹ but most engage in an “aggregate assessment” of the factors.⁴⁰ In doing so, courts must keep in mind that the fair use inquiry is “open-ended and context-sensitive” and therefore “calls for case-by-case analysis.”⁴¹

IV. THE FAIR USE FACTORS AND REACTION VIDEOS

A. Purpose and Character of the Use

The first factor derives from the *Folsom* Court’s reference to “the nature and objects of the selections made.”⁴² This factor “raises the question of justification”—not only “whether or not justification exists” for the use, but “how powerful, or persuasive, is the justification.”⁴³ Though not determinative, courts consider this as the most important factor, describing it as “the soul of fair use” and the “heart

33. PATRY, *supra* note 12, § 10:12.

34. *Id.* at 1–2.

35. *Id.* at 1, 3.

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

37. Leval, *supra* note 23, at 1110–11.

38. PATRY, *supra* note 12, § 10:8.

39. *See Ty Publ’ns, Inc. v. Publ’ns Int’l Ltd.*, 292 F.3d 512 (7th Cir. 2002) (Court examined the use based on purposes of copyright, dismissing statutory factors as unhelpful).

40. PATRY, *supra* note 12, § 10:8.5.

41. *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 41 (S.D.N.Y. 2017) (quoting *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)).

42. *See* PATRY, *supra* note 12, §10:5.

43. Leval, *supra* note 23, at 1111.

of the fair use inquiry.”⁴⁴ The “central purpose” in analyzing the first factor is to determine “whether and to what extent the new work is transformative.”⁴⁵

A transformative work does not attempt to supersede the original work, but instead “adds something new, with a further purpose or different character, altering the purpose with new expression, meaning, or message.”⁴⁶ In other words, a transformative use “does something more than repackage or republish the original copyrighted work.”⁴⁷ The now widely-used “transformative” metaphor was originally coined by Justice Leval in his *Authors Guild, Inc. v. Google, Inc.* opinion, as “a suggestive symbol for a complex thought, and does not mean that any and all changes made to an author’s original text will necessarily support a finding of fair use.”⁴⁸ Following this logic, the *Campbell* Court concluded that although “transformative use is not absolutely necessary for a finding of fair use . . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”⁴⁹ Moreover, *Campbell* set the precedent that a use can copy the original work verbatim and still be transformative if “defendant is communicating a different message or is using the original for a different purpose.”⁵⁰ Thus, a transformative work involves: “(1) an alteration of the authorial content; (2) no change in the form of the original, but a use that performs a valuable purpose; or (3) no change or alteration, but rather the presentation of the original intact in a new context or with new insights or a different message.”⁵¹

A court’s finding that a work is transformative weighs heavily in favor of an overall finding of fair use because the “more transformative the new work is, the less significant are other factors, like commercialism.”⁵² The reference to commercialism in the final clause of the first factor is often misinterpreted by courts to focus the factor “as an inquiry into commerciality or lack thereof,” or a “judgment by Congress that commercial uses. . . are to receive unfavorable treatment.”⁵³ In reality, according to the 1976 House Judiciary Committee report, the addition of the clause was merely “intended to illustrate

44. *Hosseinzadeh*, 276 F. Supp. 3d at 41, 45 (quoting *On Davis v. Gap, Inc.*, 246 F.3d 152, 171 (2d Cir. 2001)); PATRY, *supra* note 12, § 10:13.

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

46. *Id.*

47. *Hosseinzadeh*, 276 F. Supp. 3d at 42 (quoting *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014)).

48. PATRY, *supra* note 12, § 10:1.60 (quoting *Authors Guild, Inc. v. Google Inc.*, 804 F.3d 202, 214 (2d Cir. 2015)).

49. *Campbell*, 510 U.S. at 579 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 445, n. 40 (1984)).

50. PATRY, *supra* note 12, § 10:21.

51. *Id.*

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

53. PATRY, *supra* note 12, § 10:15.

types of uses that may, depending upon the facts, be taken into account in evaluating the actual thrust of the factor.”⁵⁴

1. Favor for Criticism and Comment

Although, the list of possible fair uses in the preamble to Section 107 is not exhaustive, works that fall into one or more of the six categories often possess a purpose or character indicative of fair use.⁵⁵ For this reason, in analyzing the first factor, courts may begin by looking to whether the use fits into any of those categories.⁵⁶ In particular, courts describe criticism and comment as “[a]mong the best recognized justifications for copying from another’s work.”⁵⁷

Courts routinely consider parody as a form of criticism and comment because “[t]he critical element of a parody is its comment.”⁵⁸ The courts should allow parody under the fair use doctrine for its social benefit of “shedding light on an earlier work, and, in the process, creating a new one.”⁵⁹ The Second Circuit has also commented that “in today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody.”⁶⁰

Depending on the facts, courts may treat reaction videos as parodies, but have generally found that using the copyrighted work is for the purpose of criticism and comment.⁶¹ Though the *Hosseinzadeh* court did not decide whether the reaction video format employed by the Kleins (and, perhaps most famously, by the Fine Brothers) constituted a work of parody, choosing to refer to the Klein video as “critical commentary on a creative video,” the court cited several parody cases to support its decision.⁶² Thus, finding the Klein video was a work of criticism, the *Hosseinzadeh* court held that the first factor weighed heavily in favor of fair use because “[w]here the defendants’ use is for the purposes of criticism [or] comment. . . factor one will

54. *Id.* at 2.

55. *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 42 (S.D.N.Y. 2017) (citing *TCA Television Corp. v. McCollum*, 839 F.3d 168, 179 (2d Cir. 2016)).

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

57. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214-15 (2d Cir. 2015).

58. *PATRY*, *supra* note 12, § 10:95.

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

60. *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 623 F.3d 252, 253 (2d Cir. 1980) (per curiam).

61. *See Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1104–1105 (C.D. Cal. 2015) (“It is difficult to say whether Equals Three’s episodes, which undisputedly use graphics and narration to tell jokes about the events depicted in the videos, criticize these videos – which were themselves made to serve the purpose of humor and entertainment – or simply point out their inherent humor. Nevertheless, even if Equals Three’s episodes are not parodies, the episodes comment upon or criticize Jukin’s videos.”); *See also Hosseinzadeh v. Klein*, 276 F. Supp. 3d at 45-46 (S.D. N.Y. 2017).

62. *Hosseinzadeh*, 276 F. Supp. 3d at 39–40.

normally tilt in the defendants' favor."⁶³ Indeed, it asserted, "courts have regularly found fair use after holding that the purpose or character of an allegedly infringing work was criticism [or] comment."⁶⁴

2. The Transformative Value of Reaction Videos

As asserted by the *Hosseinzadeh* court, not all reaction videos constitute fair use.⁶⁵ However, the court did imply that the format that is arguably the most popular—the one employed by both the Kleins and the Fine Brothers, which intersperses clips of another's work along with their own (or another person's) commentary (hereinafter the "critical reaction video")—may be considered as a parody, which "has an obvious claim to transformative value."⁶⁶ The *Campbell* Court was the first case in which the Supreme Court decided whether parody was fair use.⁶⁷ *Campbell* defined parody as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule," or "a composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous."⁶⁸ Thus, parody requires using another's work for its very existence.

The critical reaction video embodies parody by directly displaying clips of another's video, then transform them it into a new work with the added commentary. For example, these videos can change a work's context—without changing its content—and create comedy even though the original work was not intended to be humorous. This effectively changes the original work's purpose. For example, the *Hosseinzadeh* court held that "The Big, The BOLD, The Beautiful" is transformative because it "responds to and transforms [Hosseinzadeh's] video from a skit into fodder for caustic, moment-by-moment commentary and mockery."⁶⁹ Where "Bold Guy vs. Parkour Girl" was created to show off the creator's supposed athletic ability and sexual prowess, "The Big, The BOLD, The Beautiful" was created as a humorous response to the original's arrogance. Whether such commentary is tasteful is irrelevant, as the Supreme Court stated, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work],

63. *Id.* at 42 (quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004)).

64. *Id.*

65. *Id.* at 40, n.1.

66. *Id.* at 42 (citing *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 444–45 (S.D.N.Y. 2016)).

67. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (noting that prior to *Campbell* it was only considered once before in *Benny v. Loew's Inc.*, for which the court issued no opinion because of its equal division).

68. *Id.* at 580.

69. *Hosseinzadeh*, 276 F. Supp. 3d at 47.

outside of the narrowest and most obvious limits.”⁷⁰ Of course, not all parody constitutes fair use; it must be discussed among all other relevant factors for a court to make the determination.⁷¹ Further, critical reaction videos do not require parody or a comedic purpose to transform an original work; critical commentary itself is transformative.⁷²

B. *The Nature of the Copyrighted Work*

The purpose of the second factor is to “[call] for recognition that some works are closer to the core of intended copyright protection than others,” and a work that “is in the nature of an artistic creation. . . falls close to that core.”⁷³ However, this second factor is “rarely determinative” in a fair use inquiry.⁷⁴ In general, a court’s determination that the original work allegedly infringed upon an artistic creation would weigh against a finding of fair use.⁷⁵ However, in nearly all fair use cases involving published works, “[this] factor typically receives little attention.”⁷⁶ When determining fair use in critical reaction videos, courts should continue deemphasizing the second factor because nearly all works that evoke criticism or commentary are creative; and like parodies, critical reaction videos “almost invariably copy publicly known, expressive works.”⁷⁷ The *Hosseinzadeh* court held that the second factor weighed against a finding a fair use because the original video “was a creative work in that it was entirely scripted and fictional,” and the court’s judgment in favor of the defendants emphasized that this factor is of little value when analyzing a critical reaction video.⁷⁸

C. *The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*

The third factor derives from the *Folsom* court’s “quantity and value of the materials used” analysis.⁷⁹ While “amount” obviously refers to the quantity of the copyrighted work used, “substantiality” refers to “how well tailored that use was to the allegedly infringing work’s proper purpose.”⁸⁰ All works of parody are required to “take recognizable material from the original in order to convey its mes-

70. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

71. *See Campbell*, 510 U.S. 579–80.

72. *Hosseinzadeh*, 276 F. Supp. 3d at 46 (citing *TCA Television Corp. v. McCollum*, 839 F.3d 168, 185 (2d Cir. 2016)).

73. *Hosseinzadeh*, 276 F. Supp. 3d at 42 (quoting *On Davis*, 246 F.3d at 174).

74. *Id.*

75. *Id.*

76. PATRY, *supra* note 12, § 10:138.

77. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 570 (1994).

78. *Hosseinzadeh*, 276 F. Supp. 3d at 46.

79. PATRY, *supra* note 12, § 10:138.

80. *Hosseinzadeh*, 276 F. Supp. 3d at 46.

sage.”⁸¹ For criticism and comment in general, “there is an inherent relationship between the amount copied and the amount of criticism or comment,” and therefore “[a] work consisting of considerable commentary with fragments from the original interspersed is likely to qualify” as fair use.⁸²

The nature of the critical reaction video calls for a substantial amount of copying of the original work to achieve its purpose of criticism and comment. For the Klein video in particular, the *Hosseinzadeh* court held that “[w]ithout using actual clips, the commentary and critique here would lose context and utility.”⁸³ Regardless, the court held that the third factor was neutral in this case, even though a large amount of the original work was copied, “such copying was plainly necessary to the commentary and critique.”⁸⁴ In doing so, the court failed to correctly apply the third factor of Section 107. When a substantial portion of the original work is copied verbatim, consideration should turn on the persuasiveness of the justification for the copying.⁸⁵ It would have been more appropriate for the court to uphold the Ninth Circuit’s suggestion that “the amount permitted to be taken should depend on various factors, among them ‘the degree of public recognition of the original work, the ease of conjuring up the original work in the chosen medium, and the focus of the [new work].’”⁸⁶ In the *Hosseinzadeh* case, the original work was not particularly popular with the public or with Kleins’ demographic. As stated before, the critical reaction video format uses short clips to “conjure up” the original work. The focus of this format is the criticism and comment of the original work. Had the *Hosseinzadeh* court correctly interpreted the third factor based on legislative intent, it would have held that the third factor weighed in favor of fair use.

D. *The Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work*

The fourth and final factor in the fair use analysis comes from *Folsom*’s “degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”⁸⁷ Courts heavily emphasize this factor because it plays an important role in ensuring the purpose of the fair use doctrine.⁸⁸ When copying another’s work interferes with the market for the original, there is no societal bene-

81. *Id.*

82. PATRY, *supra* note 12 § 10:61.

83. *Hosseinzadeh*, 276 F. Supp. 3d at 46.

84. *Id.*

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

86. PATRY, *supra* note 12, § 10:99 (quoting *Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986)).

87. PATRY, *supra* note 12, §10:7.

88. PATRY, *supra* note 12, §10:1.60.

fit.⁸⁹ However, it is very unlikely that a critical reaction video would substantially affect the market of the original work enough to preclude a finding of fair use. In assessing the fourth factor, courts are only concerned with uses that effectively usurp the market for original work by superseding or “offer[ing] a substitute for the original.”⁹⁰ It is not enough for the new work to merely harm the market for the original work.⁹¹ If this were the case, copyright law would censor any kind of negative reviews of another work, which must cite the original work to be effective because the ability to freely criticize or comment on the works of others would be threatened. With these considerations in mind, the *Campbell* Court noted, “[w]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”⁹² *Campbell* set the precedent for weighing the fourth factor in the case of a parody, declaring that “the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.”⁹³ Courts have held that even parody created for the very purpose of knocking the original book off the bestseller lists does not “necessarily harm to the market under the fourth factor if a genuine parody is involved.”⁹⁴ The Supreme Court also established in *Campbell* that when the parody is a “parody pure and simple,” meaning that it has “nothing but a critical aspect,” it is treated by courts in the same way as any work of criticism, for which the law does not recognize any derivative market.⁹⁵ Therefore, even if the purpose of a critical reaction video is to reduce the popularity or prestige of the original video, the fourth factor would not weigh against a finding of fair use. Original works and their parodies (or critical commentaries) serve different market functions and therefore exist in separate markets; it is highly unlikely that the creator of an original work would license a criticism or parody of their own work.⁹⁶

In *Hosseinzadeh*, the court held that the fourth factor weighed in favor of fair use because “the Klein video does not ‘offer a substitute for the original,’ it does not (and indeed, cannot) ‘usurp a market that properly belongs to the copyright-holder.’”⁹⁷ The *Hosseinzadeh* court’s holding found that a critical reaction video, like the one in that case, qualified as a work of criticism that did present a market issue.

89. *Id.*

90. *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 43 (S.D.N.Y. 2017).

91. *Id.*

92. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591–92 (1994).

93. *Id.* at 592 (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).

94. PATRY, *supra* note 12, § 10:100 (citing *CCA and B v. F + W Media*, 2011 WL 4583790 (N.D. Ga. Sept. 22, 2011)).

95. *Campbell*, 510 U.S. at 592.

96. *Id.* at 593.

97. *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 47 (S.D.N.Y. 2017).

V. CONCLUSION

Although the *Hosseinzadeh* court correctly ruled that reaction videos were not categorically fair use, the critical reaction video described herein is a format designed to use the work of another in a transformative way without infringing on the original creator's copyright.⁹⁸ Should similar cases arise in the future, courts should look to the *Hosseinzadeh* opinion for guidance in light of the purpose of copyright. Alleging copyright infringement to prevent the publication of a critical commentary of one's own work would set a dangerous precedent. The criticism of another's work, without some kind of incorporation of the original work, would likely be ineffective. The gradual censoring of such criticism using the threat of civil action would eradicate many important contributions to our culture. Even if the criticism is published wholly for comedic purposes, the therapeutic value of the work serves as a social benefit and supports the legislators' intention in establishing copyright law.⁹⁹ Though the critical reaction video format may not be universally loved or revered for its artistic value, it nonetheless contributes to society just as any other creative work would. Their publication does not deserve to be limited any more than the publication of a critical book review that uses quotes from the book for reference. In 2018, critical reaction videos remain a popular format for creators and viewers alike, and whether that changes should depend on the natural ebb and flow of popular culture—not on their creators' fear of copyright infringement lawsuits.

98. *Id.* at 40, n.1.

99. *Elsmere Music, Inc. v. Nat'l Broadcasting Co.*, 623 F.2d 252, 253 (2d Cir. 1980) (per curiam).

