

PAST HITS REMIXED: FAIR USE AS BASED ON MISAPPROPRIATION OF CREATIVE VALUE

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INTRODUCTION

Imagine that your client asks your advice on incorporating third party material into the client's own work. Lots of hypothetical permutations on this theme are possible. For example, maybe your client believes that people are (very) secretly yearning for a comeback of the phonebook, and your client wants to serve this demand by copying the contents of the white pages of an existing phonebook into the client's own phonebook. Maybe you have a different client who wishes to paint a modern recreation of Samuel Morse's famous *Gallery of the Louvre* canvas, an 1833 work depicting numerous other paintings hanging on an over-full

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wall of the Louvre. Maybe your client is a software programmer who wants to incorporate 500 lines of open source code into her own software. Maybe your client is hip-hop artist Will.i.am, and he is interested in sampling yet another hit 80's song in his newest track. But this time, instead of the Jackson 5 or the Ruggles, he wants to use Thomas Dolby's "She Blinded Me With Science" for a slightly edgy commentary song called, "They Blinded Me With Violence."¹ Or taken a few steps further, maybe your client is Girl Talk, a one-man DJ-cum-electronic artist who puts on concerts by splicing together hundreds of short, recognizable samples of other performers' popular songs.

From the perspective of copyright law, intellectual property lawyers have numerous tools at their disposal when assessing whether, and how, their client might use a third party work in scenarios like these. The first question an attorney should ask is whether copyright law imposes *any* restrictions on the client's proposed use of third party materials. If the third party work to be used is in the public domain, for instance, the client may make the proposed use without restriction imposed by copyright law. Such a conclusion would attach to the client who would like to remake the Morse painting, which, due to its age, no longer enjoys copyright protection. Also worth consideration is whether a work qualifies for copyright protection at all. Under the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, telephone directories are not protectable by copyright to the extent of the alphabetical arrangement of names in the white pages.² Therefore, the client who seeks to use that information from a third party phonebook would be able to do so because such information is not protected by copyright.

Unfortunately, these options are regularly unavailing. In order to fall into the public domain, the work must answer to at least one of three conditions. First, a sufficient amount of time must have elapsed to effect the expiration of the third party's copyright.³ Under the present Copyright Act, that length of time

¹ It sounds more promising than "My Humps," another song by Will.i.am.

² 499 U.S. 340, 363-64 (1991).

³ 17 U.S.C. § 302(a) (2006). More complicated rules apply to older works, but are not worth a detailed analysis here.

is the life of the work's author plus an additional seventy years.⁴ Under a second scenario, a work created before January 1, 1978 could have entered the public domain if it was published without copyright protection.⁵ Under a third scenario, a work would fall into the public domain if the work's author has abandoned copyright in the work.⁶ Abandonment of copyright, however, "must be manifested by some overt act indicative of a purpose to surrender the rights and allow the public to copy."⁷ Each of these conditions for public domain status suffers limits in its reach; accordingly, most works created in the past half-century have not forfeited copyright protection in favor of public domain status. So while the client interested in recreating the Morse painting would be permitted to make the proposed use, many other hypothetical clients, including the computer programmer,⁸ Will.i.am, and Girl Talk examples, would not be able to rely on a public domain work.

The threshold for a work to achieve copyrightability is similarly weighted against use of third party material, and by extension, in favor of copyright protection in the original work. As the *Feist* decision again clarifies, copyright protection is available to any work fixed in a tangible medium of expression⁹ that satisfies two additional conditions: 1) originality, in the sense that the work is original to, or independently created by, its author,

⁴ *Id.*

⁵ *Societe Civile Succession Guino v. Renoir*, 549 F.3d 1182, 1186 (9th Cir. 2008) ("Under the 1909 Copyright Act, a work enters the public domain when it is published in the United States without copyright protection.").

⁶ *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960).

⁷ *Id.*

⁸ The computer programmer might avail herself of the public domain option if the program she was using was sufficiently old. In this respect, it's worth noting that the first computer program is sometimes credited to Ada Lovelace, a daughter of the poet Lord Byron, whose work in the early 1840's described an implementation of an algorithm for use on a proposed, but never completed, computing device. See John Fuegi & Jo Francis, *Lovelace & Babbage and the Creation of the 1843 "Notes"*, 25 *IEEE ANNALS OF THE HISTORY OF COMPUTING* 16-26 (Oct.-Dec. 2003). The modern Ada programming language now bears her name in recognition of this accomplishment.

⁹ See 17 U.S.C. § 102(a) (2006) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

and 2) creativity.¹⁰ As to the latter requirement, the “requisite level of creativity is extremely low; even a slight amount will suffice.”¹¹ Even a chart capturing nine standard baseball pitching stats has been held sufficiently creative to merit copyright protection.¹² While the cherry-picked example involving the use of white pages is permissible for lack of protectability, most uses of a third party’s work, like the computer programmer’s, Will.i.am’s, and Girl Talk’s, will involve reliance on creative, original expression accordingly protected by copyright.

If a third party work is subject to copyright protection to the extent it is to be used, the proposed user of the third party work should next consider if any licensing terms authorize the proposed use. As rights in intellectual property are distinct from rights in the goods in which the intellectual property is embodied—a book or DVD, for example—users of intellectual property often rely on a license from the intellectual property owner to carry out their use. In some cases, licensing comes hardwired into a work. Such would likely be the case for the hypothetical computer programmer, whose intended use can be assessed in tandem with the licensing terms that accompany the third party open source software. Perhaps such terms are permissive,¹³ in that, subject to few conditions, they allow distribution and modification of the software as part of the hypothetical programmer’s product. In such a case, the programmer will likely be empowered to incorporate the third party code in her software, and distribute

¹⁰ Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

¹¹ *Id.*

¹² Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991).

¹³ “Permissive” usually refers to licenses like the MIT or BSD open source licenses. For the terms of these, and other, standard open source software licenses see *Licenses by Name*, OPEN SOURCE INITIATIVE (June 29, 2007), <http://www.opensource.org/licenses/alphabetical> (last visited Feb. 20, 2013). Alternatively, the hypothetical use of third party software could involve open source licensed under terms less favorable to commercial exploitation, like those of the General Public License. See *GNU General Public License*, OPEN SOURCE INITIATIVE, <http://www.opensource.org/licenses/GPL-3.0>. Under that scenario, the use of the software would have to be assessed in light of the more significant restrictions, such as pass-through of source code, under that license. As software licensing is used only for general illustrative purposes here, and is not the main topic of this article, greater detail into this topic should be sought elsewhere.

that combination. In other cases, a proposed use will not be addressed by standard licensing terms, or any licensing terms at all. If Will.i.am legally buys a copy of “She Blinded Me With Science”, that digital file or compact disc will lack licensing terms, let alone licensing terms favorable to a commercial sampling of the song in a larger work. Due to his renown and resources, however, Will.i.am could reasonably attempt to negotiate licensing terms for his proposed sampling with the original song’s rightsholders.¹⁴ And failing his first idea, he could generate other ideas—like a party song based on “Message in a Bottle” by the Police—and negotiate until he finds more amenable rightsholders. But such negotiating leverage is also a fairly unlikely proposition for many clients.

In the event that all of the foregoing possibilities—from use of unprotected or public domain material to use of third party material under license—are unavailing, the user of a third party’s protectable material will likely need to rely on the affirmative defense of fair use.¹⁵ As the name suggests, fair use precludes a finding of infringement for the use of a third party’s copyright-protected material under certain circumstances deemed “fair.”¹⁶

¹⁴ Such licensing arrangements are not always reached. Take, for example, the hip-hop group 2 Live Crew’s sampling of Roy Orbison’s hit song “Oh, Pretty Woman” for their own parody version. Likely because the 2 Live Crew song was a parody, no licensing for the sampling was reached. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

¹⁵ This introduction is slightly oversimplified in its proposed walk-through of steps an intellectual property lawyer should take to assess whether a client’s use of a third party’s material is acceptable. I neglected to discuss the possibility of non-exclusive implied licensing, for one. On this topic, *Effects Assocs., Inc. v. Cohen*, 817 F.2d 72 (9th Cir. 1987), provides a good introduction. There also are numerous very specific cases where use of a third party’s material is permitted by statute. For example, despite copyright protection in architectural works, one may take and distribute photographs of a building without need for licensing from the architect. 17 U.S.C. § 120(a) (2006). As another example, reproduction of a third party’s musical work may be acceptable if the reproduction is made in a specialized format that enables disabled individuals to enjoy the work. 17 U.S.C. § 121(a) (2006). As examples like these only tend to apply in limited circumstances, however, the general gist of this introduction will have merit under many other scenarios.

¹⁶ As the Second Circuit has noted, the fair use doctrine “tempers the protection of copyright by allowing the use of a limited amount of copyrighted material under some circumstances.” *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 916 (2d Cir. 1994)

The fair use doctrine exists in recognition of the cumulative nature of human learning and advancement. As new works regularly build on previous works, such new works will often need to use aspects of those earlier works to comment, educate, or criticize (among other legitimate pursuits). At the same time, however, the doctrine is an exception to infringement that must not swallow copyright protection by, for instance, authorizing acts of piracy directed at an earlier protected work.¹⁷

The doctrine accordingly must strike a balance between the interests of rightsholders on one hand and the interests of users and the public on the other. It purports to accomplish this through a factors test that weighs the factual background for a given use of third party material. In *Folsom v. Marsh*, an early articulation of this test, Justice Story advised a court faced with the use of third party copyrightable material to consider “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.”¹⁸ For more than a century following Story’s decision, fair use doctrine developed as a matter of common law on a case-by-case basis. Congress eventually codified the fair use doctrine as a factors test within section 107 of the 1976 Copyright Act, as follows:

[T]he 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—

(quoting *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1373 (2d Cir. 1993) (internal brackets and ellipsis omitted)).

¹⁷ See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966) (“The fair use privilege is based on the concept of reasonableness and extensive verbatim copying or paraphrasing of material set down by another cannot satisfy that standard.”).

¹⁸ 9 Fed. Cas. 342, 348, No. 4901 (C.C.D. Mass. 1841).

- (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.¹⁹

While the statutory restatement of the fair use doctrine is somewhat more prolix than Story's original articulation, "Congress meant § 107 'to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the common-law tradition of fair use adjudication."²⁰ In fact, the court, in *Maxtone-Graham v. Burtchaell*, marveled at the "remarkable" overlap between Story's test and its much younger statutory cognate.²¹

In practice, the statutory factors test will lend itself to a finding of fair use of third party material under certain circumstances. As to the first factor, a non-commercial or educational user is more likely to be a fair user. Courts will also consider whether the purported fair use transforms the purpose of the original work. Take, for example, a novel, which on its own may entertain, tell a story, or elicit certain emotional responses. A scholarly review of that same novel may legitimately sample excerpts of that novel, because the novel excerpts, in this new context, serve a very different purpose, as fodder for criticism, than they served in their original setting. A similar line of reasoning would favor parody under the first fair use factor. Where a work to be parodied may serve a specific form of entertainment, an effective parody of that work will necessarily use the original in the service of mockery of, or commentary on, the substance of the original. Transformative uses like the

¹⁹ 17 U.S.C. § 107 (2006).

²⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citing H.R. REP. No. 94-1476, at 66 (1976); S. REP. No. 94-473, at 62 (1975)).

²¹ 803 F.2d 1253, 1260 (2d Cir. 1986).

scholarly review and parody examples are more likely to meet with a finding of fair use. As to the second factor, the original work relied on by the purported fair user is scrutinized from the perspective of its inherently functional or creative content. Copyrightable works that are more functional and less creative in nature, like the dry recitation of facts in an encyclopedia or the lines of code that make up a software program, are more likely to contain elements that other authors will need to use in their subsequent works. If a software developer wishes to code software that interfaces with an operating system, that developer will likely need to use some elements of that operating system to implement the interface. A biographer similarly may need to use the facts compiled in an encyclopedia entry for the biography's subject. Use of functional works like these will tend to support a finding of fair use. By contrast, more creative works—like songs or poems—incorporated in a later work are less likely to constitute necessary or justifiable elements of the later work, and will accordingly shift the balance away from fair use. The third fair use factor considers the amount of the original work borrowed by a later user. The greater the absolute amount of an original work borrowed, the less likely the use is fair. But the third factor has a qualitative dimension, in addition to a strictly quantitative dimension, whereby the fair use is less likely if the material used constitutes the “core” or “heart” of the original work. The catchy hook of a song or the most memorable passage in a work might qualify as such core material, and accordingly be less susceptible to a finding of fair use when used in a later work. The final fair use factor reviews the effect that the subsequent work has on the market of the original. If the market for the user's work overlaps significantly with the market for the original, the user's work could be seen to usurp the original's market, a finding generally inconsistent with fair use. If the works serve different markets, on the other hand, the use is more likely to be found fair. Equally likely to be deemed a fair use are works that merely suppress demand in the original work without an overlap in market between the works. As an example of this, a parody may erode consumer demand in the original by mocking it, but the parody itself answers to a different market than the original work.

These simplified examples sketch certain fundamentals of fair use, but belie the inherent complexity of the fair use factors test. As the name of the doctrine itself suggests, courts charged with determining the presence of fair use are making an equitable decision as to what is “fair.”²² Equitable considerations as to fairness will necessarily involve a degree of unpredictability in application, both in a given case, and as a more long-term matter as notions of fairness evolve and change. Further, fair use serves as a primary means of negotiating a critical legal tension “in the need simultaneously to protect copyrighted material and to allow others to build upon it.”²³ Navigating such a tension involves difficult questions and occasionally unpredictable results. As an additional element of complexity in the fair use doctrine, suggested perhaps by the word “likely” peppering the paragraph above, the four fair use factors do not individually lend themselves to dispositive conclusions. Or, as the Supreme Court has cautioned, the four factors are not to be “treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”²⁴ Although courts seem fond of lining up all four factors in favor of one litigating party (to avoid the appearance of a difficult decision), many cases will present factors that militate in favor of both parties. Perhaps, for example, very little of a creative work is borrowed, but the borrowing can be shown to have a significant effect on the market of the original work. In cases like that, courts have to make difficult decisions in determining the weight to be afforded individual factors. And, as if the four factors alone did not sufficiently complicate the fair use quantum, the statute allows courts to consider additional factors in a given fair use case. While

²² See, e.g., *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 62 (2d Cir. 1980) (referring to the fair use doctrine as “entirely equitable”).

²³ *Acuff-Rose*, 510 U.S. at 575. See also *Blanch v. Koons*, 467 F.3d 244, 250 (2d Cir. 2006) (“Copyright law . . . must address the inevitable tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists, and the rest of us to express them—or ourselves by reference to the works of others, which must be protected up to a point. The fair-use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control.”).

²⁴ *Acuff-Rose*, 510 U.S. at 578.

consideration of such additional factors is fairly uncommon, the possibility of such factors creates something of a wild card in an already turbid decision-making environment. In view of all of these challenges, it should come as no surprise that fair use is often said to elude bright-line rules.

This unpredictability inherent to fair use cases contributes to divergent opinions on the scope of fair use. On one hand, certain users of copyrighted material are willing to hide behind fair use as a shield for almost any appropriation. Take, for example, Gawker,²⁵ a web site recently enjoined from publishing more than twenty pages of a then-unpublished Sarah Palin memoir.²⁶ Prior to the litigation, when HarperCollins, the publisher of the memoir, contacted Gawker to request that the memoir excerpt be taken down, a Gawker representative replied that HarperCollins should consult an attorney about fair use.²⁷ With the eventual issuance of an injunction against Gawker, the Gawker representative's statement ultimately proved presumptuous, but the mere fact that the statement was made may be reflective of how unpredictability in fair use can foster a range of views as to its scope. At the other end of the spectrum, undoubtedly, some uses of copyrightable material that would otherwise be fair are chilled by rightsholders that overstate or overleverage the scope of their copyrights. This seemed to be precisely the court's conclusion in dismissing with prejudice the copyright suit of Brownmark Films, the makers of a viral video, against Comedy Central for a parody of that video presented on the show *South Park*.²⁸ That the court would use words such as "easily" and "rightfully" in describing how it reached its fair use finding²⁹ only serves as a marker that this case represented (at least in the court's opinion) an attempt by a rightsholder to overreach in enforcing its copyright.

While no bright-line rule can determine when a use is "fair," a clearer understanding as to when a given use is fair could instill

²⁵ GAWKER, <http://www.gawker.com> (last visited Feb. 20, 2013).

²⁶ HarperCollins Publishers, L.L.C. v. Gawker Media, L.L.C., 721 F. Supp. 2d 303, 305 (S.D.N.Y. 2010).

²⁷ *Id.*

²⁸ Brownmark Films, L.L.C. v. Comedy Partners, 800 F. Supp. 2d 991 (E.D. Wis. 2011).

²⁹ *Id.* at 1001-02.

greater predictability in the doctrine, and perhaps, by extension, less overreaching at both ends of the spectrum. Promoting just such an understanding is the goal of this Article. In this regard, this Article proposes that the primary goal of fair use is the promotion of “value,” and most typically, “creative value.” When a work comes before a court on the grounds that it constitutes a fair use, the four factors in the fair use test primarily assist the court in assessing the sources of creative value contributing to the final work. The court may then weigh these sources of creative value against each other to get a sense of the extent to which the creative value of the final work is the result of its author’s creative input, the original work’s creative input, or yet other sources, such as public domain materials like facts or ideas.

That the four factors are tailored to a balancing of the sources of creative value in a work can be shown in brief here. For example, if a work has transformed the purpose of the borrowed material, it is more likely both to have added significant independent creative value and to have borrowed less than all of the creative value of the original. If a work borrows very little of an original, or its non-core portions, the original likely does not serve as a primary source of creative value in the final work. The same result follows if the original work is more functional in nature, in which case the material taken is less likely to be particularly creative. Finally, to the extent a would-be fair user’s work avoids the market of the original which it uses, it probably avoids those aspects of the work that make it creative. At the same time, if the final work merely appropriates the original with little or no modification, the overwhelming source of creative value of the final product will owe its authorship to the original work, and the use will not be fair.

This Article selects “creative” value as the proper lens for fair use analysis, because “creativity” most closely mirrors what copyright protection aims to promote. Indeed, copyright does provide certain economic incentives as part of its protection, but those incentives prove more elastic when applied to more creative works. In other words, this Article proposes that the “economic value” of a work does not serve as the best fit in predicting whether a subsequent use of that work will be deemed fair. Arguments based on “economic value” may align with the outcome

in a given case, but such alignment can be shown to be fortuitous. Creative value, instead, more consistently tracks the outcome of fair use cases.

An understanding of fair use based on a balancing of the sources of creative value in a work is by no means a panacea or a perfect predictor for a given fair use case. If nothing else, in aiming to clarify the fair use doctrine by resorting to sources of creative value, this thesis simultaneously highlights the limits in clarity that can be achieved. Creativity may map to the weighing most regularly used by courts in fair use cases, but it is admittedly an ephemeral concept to be weighed in a variety of equally ephemeral incarnations. This confusion is only complicated by the periodic case that requires consideration of a one-off social or policy value. This seems to be the case in *Kelly v. Arriba Soft Corp.*, discussed further below,³⁰ where a judicial desire to protect socially valuable web image searching permitted a potentially otherwise non-fair use.³¹ Further to this opacity, Patry and Perlmutter have noted the sheer breadth of factors periodically considered by courts but not explicitly enumerated in section 107, including “the user’s bad faith, distortion of the copyright owner’s work, and the user’s interest in responding to a personal attack.”³² They go on to note that “[t]his list is not exclusive; in appropriate circumstances, courts may [also] examine the public interest, the First Amendment, privacy concerns, or additional equitable factors.”³³ In view of the many variables and complexities inherent to any fair use inquiry, the result that this Article seeks is not to illuminate fair use in all cases—an impossible task—but to provide some bearings in the twilight that necessarily surrounds fair use cases.

For better or worse, this twilight is inhabited by the hypothetical client, the DJ Girl Talk. He has even acknowledged

³⁰ See *infra* notes 122-28 and accompanying text.

³¹ 336 F.3d 811, 819-20 (9th Cir. 2003). See also *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 920 (2d Cir. 1995) (“[C]ustom and common usage [are] integral to the fair use analysis.”).

³² William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 685 (1992).

³³ *Id.*

as much.³⁴ That Girl Talk must rely on fair use flows from the type of music that he creates, which is heavily reliant on sampling from a very wide variety of sources. He could never conveniently negotiate licensing arrangements with the rightsholders for each of these songs to enable use of every snippet that he samples. So, Girl Talk must hold to an argument that his use of the songs is fair. So far, so good for him, as he has yet to be sued.

This Article suggests a framework by which Girl Talk's use, and the use of other would-be fair users, may be analyzed. In addition to suggesting that the fair use doctrine merely prescribes a series of questions tailored to determining the different sources of creative value in a would-be fair user's work, the Article also focuses on a second element, whether the creative value of the original work has been misappropriated. This analysis depends on a weighing of the sources of creative value in a work, as between the earlier author's material, the would-be fair user's contribution, and other public domain sources of value. With this weighing in mind, a court may then consider whether the balancing amounts to a misappropriation, or wrongful taking, of the earlier author's material. If so, fair use will not be found. The Article begins, in Part I, with a brief discussion as to why "creative value"—and not "economic value" or "economic efficiency"—is the proper focus of the fair use doctrine. The Article then devotes the subsequent four sections to a serial consideration of each of the four statutory fair use factors, with an eye to how each factor contributes to the overall hypothesis of the Article. The Article then concludes with a review of its contents, and a renewed consideration of the merits of Girl Talk's fair use case.

I. WHY FAIR USE IS ABOUT CREATIVE VALUE AND NOT ECONOMIC VALUE OR EFFICIENCY

This Section describes why the thesis of this Article revolves around "creativity" or "creative value," as opposed to "economic value" or "economic efficiency." The latter of these economic concepts has enjoyed particular currency in the academic world for

³⁴ See Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug. 7, 2008, at E1.

quite some time. On closer review, though, economic concepts prove an imperfect fit to model the mechanics of copyright at large, let alone within the more limited field of fair use. Fair use, instead, is better modeled with an eye towards the concept at the heart of copyright law's incentives—creativity. This Section is not particularly long, as the objective of this Article is not to swing a pillow at a cross-section of academia. Instead, the Article aims to describe a theory on its own independent merits, as applied to the statutory and common law structure of the fair use doctrine. That said, a few words as to why that theory is oriented as proposed, and not consistent with popular competing theories, are in order.

The mandate for copyright protection, set out in Article I, Section 8 of the Constitution, enables Congress to create a system that promotes the arts and sciences by permitting limited protection of artistic and scientific works.³⁵ The current embodiment of that system offers protection in a work for the life of the work's author plus seventy years.³⁶ In order to qualify for such protection, the work must primarily satisfy the two requirements of the *Feist* decision laid out in the Introduction—the work must be original to the author and it must evidence a “modicum of creativity.”³⁷ Once these prerequisites are satisfied, the author of the work enjoys limited rights to control a variety of activities involving the work, including reproduction, distribution, display, performance, and the creation of derivatives, of the work.³⁸ The author, or other holder of these rights in a work, may then economically exploit these rights by commanding license fees (or in a similar sense, prices) of third parties that wish to use the work in a manner that falls under one of the protected rights. This quid pro quo offering economic incentives to authors in exchange for the publication of their creative works is referred to as the utilitarian theory of copyright.

³⁵ To be more exact, the clause permits Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

³⁶ 17 U.S.C. § 302(a) (2006).

³⁷ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

³⁸ 17 U.S.C. § 106 (2006).

The protection of copyright is available to a fulsome variety of works—from novels, poems, movies, and musical compositions, to encyclopedias, maps, pantomimes, and computer software.³⁹ Once each of these items satisfies the minimal requirements of *Feist*, they enjoy the full range of economically exploitable rights offered by the Copyright Act. That said, the scope of these rights is dependent on the creativity evidenced in the work, and not the economic value of the work. Works evidencing no creativity, like the phonebook discussed in the Introduction, will not merit copyright at all. From there, more fact-based works like an encyclopedia or a map will generally enjoy limited protection covering little more than the specific combination of words, shapes, and colors on the applicable page.⁴⁰ Software, due to constraints inherent in programming languages, might also be included in the set of works eligible only for a more limited scope of copyright protection. Novels, musical compositions, and movies, on the other hand, may enjoy a broader scope of protection due to their higher degree of creativity. That protection will often extend beyond the words on the page or the specific images on the screen to include protection for more abstract aspects of the work, like plot, setting, and characters.⁴¹

The scope of copyright protection is, in this way, proportional to the creativity⁴² in a work.⁴³ At the same time, that scope of

³⁹ 17 U.S.C. § 102(a) (2006) contains a broad list of works eligible for copyright protection.

⁴⁰ *Feist* discusses just such a concept of thin copyright protection as applied to factual compilations. See *Feist*, 499 U.S. at 349 (“This inevitably means that the copyright in a factual compilation is thin.”).

⁴¹ *Nichols v. Universal Pictures, Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), contains Learned Hand’s famous statement regarding these abstractions on the work itself. The scope of copyrightability has been found to include such abstractions in cases like *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960) (finding infringement for non-literal copying of fabric designs) and *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (protecting Disney characters).

⁴² It is probably worthwhile to note what “creativity” is in terms of copyright law. See *Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991). In practice, it typically means the exercise of selection of one of many alternative expressions to an idea. For instance, if one wishes to pen an epic poem about Ulysses’ travels, one would enjoy any number of alternative ways of recounting those events. And, the end result, if produced independently of anything but the basic facts, would not necessarily look like Tennyson’s or Homer’s view of various points of the story.

protection has nothing to do with the absolute economic value of a work. Plenty of works with great economic value enjoy lesser copyright protection. In *Lotus Development Corp. v. Borland International, Inc.*, for example, the court found no copyright protection in one of the most valuable aspects of Lotus 1-2-3, a market-leading software package.⁴⁴ The same could be said for a popular encyclopedia, like the *Encyclopedia Britannica*, in that the work's copyright does not cover much more than the exact words on the page⁴⁵ despite the work's (at least quondam) economic value. On the other hand, highly fanciful works may have no economic value whatsoever. A conceptual novel recounting the most creative story ever, but written a third in Greek, a third in Sanskrit, and a third in Gullah, would enjoy the maximum of copyright's protection. But literally no one would be able to read it, so it probably would not fly off shelves. It is clear, then, that the scope of copyright protection has limited, if any, relation to the economic value of a copyrightable work.

Economic intellectual property theorists more normally propose that copyright law exists to promote economic efficiency.⁴⁶ In the context of fair use, this economic efficiency theory normally

In *Tying up Feist's Loose Ends: A Probability Theory of Copyrightable Creativity*, 7 WAKE FOREST INTELL. PROP. L.J. 45 (2007), I suggested my own view of copyrightable creativity through the lens of probability. This view elaborated on the standard conception of copyrightable creativity by focusing on the probability of the various alternatives available to an author. Low probability alternatives merit (for the most part) the greatest scope of copyright protection. *Id.* at 65. Yet even where many alternatives are available to the author, some may be highly probable to appear in the final work. *See id.* at 68-70. *Scenes à faire*, or the stock elements of stories, are one good example of high probability alternatives among many other, lower probability alternatives. *Id.*

⁴³ Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79, 81 (1991) ("Courts have traditionally viewed copyright as an instrument for encouraging creative activity."). The article goes on to explain that decisions in copyright cases are tailored to promote the greatest overall amount of creative material. *Id.* at 82.

⁴⁴ 49 F.3d 807 (1st Cir. 1995). I would contend that this case was thoroughly misguided. It uses a sledgehammer—the very eligibility of the Lotus 1-2-3 commands for copyright—where a scalpel like fair use would have been more precise. In any event, the District Court opinion in that case was far better reasoned.

⁴⁵ Particularly in view of the factual nature of the work. Facts, as discussed below, do not qualify for copyright protection. *See infra* notes 131-69 and accompanying text.

⁴⁶ Yen, *supra* note 47, at 79-80, n.3.

argues that fair use exists to address market failures.⁴⁷ Such market failures occur, when among other conditions, a would-be fair user “could not appropriately purchase the desired use through the market.”⁴⁸ This condition fits relatively well in the common fair use case of parody, where the user is likely not in a position to reach out to the author of the work to be parodied and request a license to mock that work.⁴⁹ The problem with this assertion, though, is that it does not fit well in every case where fair use ought to be found. There are legion examples where licensing would likely be available, but where the user should not be compelled to obtain such a license in order to use the potential licensor’s work. A positive review of a movie or a book including reasonable quotation or description of the movie or book would rely on the copyrightable creativity of those underlying works. And, as the review is positive in nature, the makers of the movie would surely license use of any quotations or descriptions (without giving the whole book or movie away, of course). But the reviewer should not be compelled to seek such a license because the use is fair, regardless of the availability of such licensing. The same result would follow where a historian wishes to quote from the work of earlier historians on the same subject matter. A license could very well be available for the use, but reasonable reliance on such work may be fair use regardless of the potential for such a license.⁵⁰ Examples like these show why even courts that value the possibility of licensing in the fair use quantum still note that

⁴⁷ See, e.g., Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

⁴⁸ *Id.* at 1601. Because of the increasing availability of licensing in the modern economy, at least one author has proposed that fair use will become less and less necessary under the market failure premise. Taking its place would be so-called “fared use.” Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright’s Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998).

⁴⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1991) (“[T]he unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”).

⁵⁰ Had the work at issue in *Maxtone-Graham* been more consistent politically with the original work from which it borrowed, the case could have tracked this use case.

such availability is not fatal to claims of fair use.⁵¹ Fair use is a right that exists on its own, in some cases without any regard to the possibility of licensing. The premise that market failure should be a condition of fair use accordingly seems under-inclusive. It is fair, then, to parrot the criticism lofted by Patry and Perlmutter: “The central flaw in . . . economic models [of fair use] is that the ultimate goal of copyright is to reward creativity, not efficiency. The two may not and need not lead to the same results.”⁵² As creativity is the most narrowly tailored target of copyright protection, fair use should operate in a manner consistent with the protection and promotion of creativity. This occurs—at least as proposed here—where the creative value of earlier works can be used in the genesis of further creative works, but only where that earlier creative value is not misappropriated by the later user.

With this proposal that the misappropriation of “creative value” represents the lens by which fair use is most appropriately viewed, we can now see how this thesis plays out through the four statutory fair use factors. Those factors will be addressed in the order in which they appear in the statute, beginning with the “purpose and character of the use.”

II. THE PURPOSE AND CHARACTER OF THE USE

The first fair use factor, which looks at the purpose and character of the use of a third party’s copyrightable material, typically breaks down into two discrete sub-inquiries. The primary sub-inquiry under this factor investigates how the copyrightable material is used, from the perspective of whether the new use “transforms” the original copyrightable material. Such “transformation” may occur through commentary on or criticism of

⁵¹ See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1995) (“[I]t is sensible that a particular unauthorized use should be considered ‘more fair’ when there is no ready market or means to pay for the use, while such an unauthorized use should be considered ‘less fair’ when there is a ready market or means to pay for the use. The vice of circular reasoning arises only if the availability of payment is conclusive against fair use.”).

⁵² Patry & Perlmutter, *supra* note 33, at 690 n.104.

the original work.⁵³ It may occur through a recasting of the original work in a new light—for example, as one small part of a larger mosaic—that adds significant value to the original through larger meaning or message.⁵⁴ Where such transformation occurs, a use is significantly more likely to be fair. Where, by contrast, the user reproduces the original work in an unmodified form, or uses it to the same end as the original work, the use is very unlikely to be deemed fair. This portion of the first factor is considered in the first subsection below.

In addition to considering whether a use is transformative, the first statutory factor also explicitly recommends consideration of the commercial nature of the use. At least in theory, where a use is more commercial in nature, it is less likely to be fair. Commercial users, the logic goes, are more directly exploitive of the work underlying their own. After the sub-section on transformative use, however, this Article will address this facet of the fair use inquiry with a particularly skeptical eye as to its importance in the overall quantum.

A. *Transformative Uses*

Whether a use is transformative is probably the single most important factor in the fair use analysis. Judge Pierre Leval even went so far as to label it “the soul of fair use.”⁵⁵ This conclusion seems well-grounded—after all, the “transformative use” query is the only element of the larger four-factor fair use test to review the purported fair user’s work. The other three factors frame the fair use question almost exclusively from the perspective of the original work—by reviewing the nature of the original, the amount of the original taken by the user, and the original’s market. While these later queries also assume importance in teasing out the creative or non-creative elements that the original contributes to the user’s work, the first factor’s transformative use

⁵³ See generally *infra* notes 202-44 and accompanying text for *Acuff-Rose* and the discussion of parody cases.

⁵⁴ See *infra* notes 67-80 and accompanying text for the discussion of *Blanch v. Koons*.

⁵⁵ Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1116 (1990).

query places the creative contributions of the original in the context of other sources of creative value, whether they originate in the purported fair user, the public domain, or some other source.

As the word “transformative” suggests, the transformative use query investigates how a later work modifies or supplements the original that it employs. Such transformation may occur in the context of scholarly criticism on the original work, a parody that borrows elements of the original to lampoon it, the literal transformation of a work through the use of figurative scissors or red pen, or the recasting of a work in a different context. Or, as Judge Leval has noted, to qualify as transformative, “[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original.”⁵⁶

By affording courts a view into the nature of the purported fair user’s actual use, the “transformative use” query helps ensure that the fair use doctrine, as a whole, strikes an appropriate balance within the larger utilitarian copyright scheme. As the Supreme Court has noted, “[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”⁵⁷ The promotion of arts and sciences is particularly well served in this way, as transformative works accommodate the often gradual way in which human learning evolves—by “standing on the shoulders of giants,” in the oft-repeated phrase. Further, fair use’s encouragement of transformative works does not harm such “giants,” as it were. In this respect, the Second Circuit, in *Maxtone-Graham v. Burtchaell*, noted, “From the earliest days of the [fair use] doctrine, courts have recognized that when a second author uses another’s protected expression in a creative and inventive way, the result may be the advancement of learning rather than the exploitation of the first writer.”⁵⁸ By acknowledging the possible “exploitation of the first writer,” the Second Circuit underscores how transformative works are also

⁵⁶ *Id.* at 1111.

⁵⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1991).

⁵⁸ *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1259 (2d Cir. 1986).

unlikely to erode the incentive for authors at large to create new, unrelated works.⁵⁹ Indeed, while individual authors might shy away from creating lest a later transformative commentary or send-up legitimately cast ridicule on their work,⁶⁰ such authors need not fear judicial approval of the wholesale misappropriation of their work by another. “Transformative” works simply do not work such a misappropriation. The “transformative use” query in fair use accordingly advances learning in the science and arts in both the microscopic case of a specific transformative work, and at a more macroscopic level, by protecting the incentives that promote creative output generally. Society as a whole stands as the ultimate beneficiary of the well-incentivized, interactive marketplace of original authorship born of a transformative-work-centered fair use inquiry.

Works that do not qualify as “transformative,” by contrast, are far less consistent with the utilitarian theory’s incentives. As the *Texaco* court noted in assessing the practice of making photocopies of journal articles, “Mechanical ‘copying’ of an entire document, made readily feasible and economical by the advent of xerography is obviously an activity entirely different from creating a work of authorship. Whatever social utility copying of this sort achieves, it is not concerned with creative authorship.”⁶¹ Creative authorship, of course, is the intended product of the economic incentives of the utilitarian theory; and in the absence of such authorship, a non-transformative work falls entirely outside the scope of activities that a utilitarian copyright law should approve. If anything, non-transformative uses run entirely counter to the aims of the utilitarian theory. When the *Texaco* court commented that “photocopying merely supersedes the objects of the original creation,”⁶² it indirectly addressed the dangers posed by non-transformative works. Where the object of an original work may

⁵⁹ *Id.*

⁶⁰ See *Acuff-Rose*, 510 U.S. at 592 (“Because parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically, the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.” (citations omitted) (internal quotation marks omitted)).

⁶¹ *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 917 (2d Cir. 1994).

⁶² *Id.* at 919-20 (internal quotations and brackets omitted).

be superseded without consequence, the economic incentives to create such works disintegrate. It is accordingly critical that fair use be largely limited to works that qualify as “transformative” in nature.

Such a transformative nature is not a binary proposition, however. Rather, different works embody degrees of transformation along a spectrum. Even within a single case, two different uses of the same material may be found to represent differing degrees of transformation. Such was the case in *Los Angeles News Service v. CBS Broadcasting, Inc.*,⁶³ a case brought by the film team that captured the Reginald Denny beating at the hands of Los Angeles rioters on tape.⁶⁴ That film team then adopted a practice of suing various organizations that used the footage without a license. In the *CBS* case, two separate uses of the Denny beating footage by the network Court TV were at issue: one use to promote the network’s news coverage of the trial of the man who threw a brick at Denny’s head, and another short use in the background of a more graphically rich opening montage.⁶⁵ The court viewed the former use as wholly non-transformative due to its reliance on the clip for its original purpose, newsworthiness, while the court validated the latter use as embodying a somewhat greater degree of transformation in the montage.⁶⁶ In other words, neither use was found to be particularly transformative, but the court’s two conclusions point to slightly different points on the spectrum of “transformation.”⁶⁷

⁶³ 305 F.3d 924 (9th Cir. 2002).

⁶⁴ *Id.* at 929.

⁶⁵ *Id.*

⁶⁶ *Id.* at 939 (“Here, simply extracting the clip of the Denny beating and juxtaposing it with a clip from Denny’s testimony updates, but does not change, the purpose of depicting the attack on Denny—its newsworthiness However, the inclusion of the clip in the video montage that introduced the Prime Time Justice program, following editing for dramatic effect, has a better claim to be within the scope of ‘transformation.’ The development of the montage at least plausibly incorporates the element of creativity beyond mere republication, and it serves some purpose beyond newsworthiness.”).

⁶⁷ The court ultimately found both uses to be fair. *Id.* at 942. This conclusion does not seem well-supported, particularly in the case of the non-transformative use. It is very likely, however, that the court had tired of hearing the many infringement cases brought by Los Angeles News Service over the Denny footage (and other news footage) and wanted to discourage further litigious conduct.

As the *CBS* case illustrates, the “transformative use” query is equal to the sensitivity needed to make such fairly granular determinations. This is reflected in the substance of the transformative use query, requiring courts to engage in a critical review of the sources of a work’s creative value. The *Texaco* court offered a good explanation as to how this balancing works in practice:

The ‘transformative use’ concept is pertinent to a court’s investigation under the first factor because it assesses the value generated by the secondary use and the means by which such value is generated. To the extent that the secondary use involves merely an untransformed duplication, the value generated by the secondary use is little or nothing more than the value that inheres in the original. Rather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the same intrinsic purpose as the original, thereby providing limited justification for a finding of fair use.⁶⁸

In other words, the “transformative use” query allows courts to balance the sources of value in the would-be fair user’s work with an eye towards the degree to which a work might, on one hand, misappropriate the value of the original work or might, on the other, contribute new value to the original. If the uses of the word “value” were prepended with the modifier “creative,” the court’s description would align with the thesis proposed here—notably, that the sources of “creative value” represent the most critical reference points in this most critical part of the fair use analysis.

In view of this high-level outline as to how courts structure the transformative use query, the topic is now ripe for a more detailed review of certain critical permutations in practice. This discussion begins with an explanation of how a use typically “transforms” an original work—by diminishing the quantity of creative value that the original contributes in its new context when compared to the creative value that the original material

⁶⁸ *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 923 (2d Cir. 1994).

imparted in its original setting. The section then draws parallels between this type of modulation and certain tendencies of trademark law, before mentioning exceptional cases involving transformative, but also socially desirable, uses. Finally, the section considers the potential that public domain sources of value might contribute to a fair user's resulting work.

An original work's creative value is not fixed regardless of time or context. Rather, later uses of an original work may, by transforming the content or setting of an original, modulate the original work's creative value, at least insofar as that value contributes to the later work. One example of this phenomenon occurred in *Blanch v. Koons*,⁶⁹ a case pitting a fashion photographer against an artist who made subsequent use of one of her photographs. The defendant artist, Jeff Koons, creates visual works characteristic of the "appropriation" or "neo-Pop" art school, and consistent with the tenets of these schools, draws heavily on the protected materials of third parties.⁷⁰ This case revolved around a Koons piece, *Niagara*, consisting of several images of women's lower legs juxtaposed with images of food, and set against a larger backdrop of Niagara Falls.⁷¹ The work included an excerpt of one of the plaintiff's fashion photographs, *Silk Sandals*, depicting a woman's feet resting on a man's lap in a first class airplane cabin.⁷² The work originally appeared in a magazine for a nominal sum, and plaintiff never sought to re-license it.⁷³ The defendant did not, however, seek permission to use the work within *Niagara*⁷⁴ and was accordingly compelled to defend his use on the basis of fair use.

The case reached the Second Circuit on appeal from the district court's finding in favor of the defendant at the summary judgment stage.⁷⁵ The circuit court ultimately agreed with the district court's fair use finding, largely due to the very different function that the *Silk Sandals* excerpt served in the context of the

⁶⁹ 467 F.3d 244 (2d Cir. 2006).

⁷⁰ *Id.* at 246.

⁷¹ *Id.* at 247.

⁷² *Id.* at 247-48.

⁷³ *Id.* at 249.

⁷⁴ *Id.* at 248.

⁷⁵ *Id.* at 249.

larger *Niagara* work, as compared to the photograph's original magazine setting.⁷⁶ Perhaps unsurprisingly, this commentary appeared most notably in connection with the court's discussion of the transformative purpose of the defendant's use: "When, as here, the copyrighted work is used as 'raw material,' in the furtherance of distinct creative or communicative objectives, the use is transformative."⁷⁷ While the photo's contribution was perhaps less than the sum of its original parts, Koons articulated ample justification for why he selected the photograph (rather than taking his own)—it allowed him to tap into a larger current of mass media advertisement that bombards consumers daily.⁷⁸

The court's conclusion that the use was transformative pervaded the discussion of the remaining three factors. In connection with its discussion of the nature of the original work, the court commented, "[T]he second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose."⁷⁹ It went on to opine that "[i]t seems to us that Koons' copying of 'Silk Sandals' was indeed reasonable when measured in light of his purpose, to convey the 'fact' of the photograph to viewers of the painting."⁸⁰ In light of the balance between the overarching expressive content of *Niagara*, coupled with the limited value particularly attributable to the excerpt of the plaintiff's photograph, the court ultimately concluded that the defendant's use of *Silk Sandals* was fair.⁸¹

The court's description of *Silk Sandals* as a source of "raw material" is of critical importance in an assessment of the creative value imparted to *Niagara* by the photograph excerpt.⁸² Where *Silk Sandals*, authored by an acclaimed fashion photographer, likely represented a very creative photographic work in its original setting, its cropped placement in the larger collage of *Niagara* diminished that creativity greatly. Instead of serving as a focal point in the final work, *Silk Sandals* was a mere fungible

⁷⁶ *Id.* at 259.

⁷⁷ *Id.* at 253.

⁷⁸ *Id.* at 255.

⁷⁹ *Id.* at 257.

⁸⁰ *Id.*

⁸¹ *Id.* at 259.

⁸² *Id.* at 253.

part of the whole, an image from a fashion advertisement like any other image from a fashion advertisement.⁸³ In other words, the original *Silk Sandals* made no greater contribution to *Niagara* than a screw or steel I-beam makes to the overall architectural design of a building. This conclusion is only echoed by the court's comment that *Silk Sandals* was merely used "to convey the 'fact' of the photograph."⁸⁴ The "fact" of the photograph speaks only to the photograph's most abstract contents—a pair of legs and feet—and not the specific artistic choices made by the photographer in terms of lighting, her subjects' poses, or setting. In *Niagara*, the originally creative *Silk Sandals* was nothing more than generic, and in this respect, limited in its contribution of creative value to the overall work. In view of Koons's substantial input to *Niagara* beyond his use of a genericized *Silk Sandals*, the ultimate finding of fair use makes sense.

Blanch v. Koons does not represent the only example as to how a later work may use an original in a way that modulates the original's creative value to render the original more generic. Cases involving legitimate parody operate on essentially the same principle. As the Supreme Court has noted, because a parody must inherently comment on or mock an original work, it "needs to mimic [the] original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination."⁸⁵ The case of *SunTrust Bank v. Houghton Mifflin Co.*⁸⁶ provides one illustration of this premise. There, the Eleventh Circuit found in favor of the publisher of *The Wind Done Gone*, a parody of the famous novel *Gone with the Wind*. While *The Wind Done Gone* relied heavily on the characters and setting of its parodic target, it also built on *Gone with the Wind* substantially to "flip[] traditional race roles, portray[] powerful whites as stupid or

⁸³ Judge Leval has echoed the importance of this point, in noting whether a would-be fair user's work "adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." Leval, *supra* note 56, at 1111.

⁸⁴ *Blanch*, 467 F.3d at 257.

⁸⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

⁸⁶ 268 F.3d 1257 (11th Cir. 2001).

feckless, and strip [*Gone with the Wind*'s] romanticism.”⁸⁷ *The Wind Done Gone* accordingly qualified for fair use protection.⁸⁸ The Supreme Court seemed similarly convinced of the presence of legitimate parody in 2 Live Crew’s hip-hop send-up of Roy Orbison’s rock classic “Oh, Pretty Woman”:

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew’s song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.⁸⁹

The same approval of a parody as fair use followed when radio personality Rick Dees put together “When Sonny Sniffs Glue,” a send-up of Johnny Mathis’ version of the song “When Sonny Gets Blue.”⁹⁰

The thread common to these cases is the parodist’s need to use elements of the work to be parodied in order to comment on that original. As the Supreme Court noted, parody simply does not function as such without some, and in some cases, substantial, evocation of the work to be parodied.⁹¹ Use of a third party’s intellectual property in this manner does not exactly treat that intellectual property as “generic” in the same way that *Blanch v. Koons* did with regard to the *Silk Sandals* photograph. But, it represents a step in that direction. Where *Silk Sandals* could be fairly compared to a fungible screw or I-beam to support the broader creative effort of *Niagara* in *Blanch v. Koons*, elements of *Gone with the Wind* or “Oh, Pretty Woman” are more like a corridor or stairwell that must be included, perhaps for building code purposes, as part of the overall architecture of a building

⁸⁷ *Id.* at 1270.

⁸⁸ *Id.* at 1276.

⁸⁹ *Acuff-Rose*, 510 U.S. at 583. The Court ultimately did not reach a final conclusion on fair use, however, as it instead felt it necessary to remand for further evidentiary findings on the market harm threatened by the 2 Live Crew parody. *Id.* at 593-94.

⁹⁰ *See generally* Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986).

⁹¹ *Acuff-Rose*, 510 U.S. at 580-81.

containing many other dependently and independently creative aspects. In some ways, this use of the work to be parodied treats that work as a “generic” for a species of one—itself. It is probably more accurate, however, to say that use of the work to be parodied is, to a certain extent, “specifically necessary” to the overall parody. In this way, the resulting parody reflects two sources of creative value—the parodist’s commentary, in symbiosis with the other source of creative value, the original work whose creativity is necessary, but slightly modulated in the direction of the generic by virtue of the symbiosis.

By contrast, where a work lacks such symbiosis, a self-styled “parody” will not necessarily qualify for fair use protection. In *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., The Cat NOT in the Hat!*, a book claiming to parody Dr. Seuss’s *The Cat in the Hat* series of children’s books, fell short of the fair use bar.⁹² This result followed from the complete lack of critical connection between the *The Cat NOT in the Hat!* and the work that it allegedly parodied. For though the alleged parody borrowed Seuss’s characteristic, sing-song rhyme scheme and several well-known images from Seuss’s work, like the Cat’s crumpled stovepipe hat, it only used those aspects of Seuss’ work as a vehicle to describe the events surrounding football legend O.J. Simpson’s murder trial, and not as fodder for any commentary on Seuss’s work itself.⁹³ On this point, the Ninth Circuit noted that:

⁹² 109 F.3d 1349, 1397 (9th Cir. 1997) (quoting promotional literature referring to *The Cat NOT in the Hat!* as “one parody that really packs a punch!” The full title of the work, furthermore, included the words, “A Parody by Dr. Juice.”) *Id.* at 1396.

⁹³ *Id.* at 1401. By way of background, O.J. Simpson, nicknamed the “Juice,” was a noted running back at both the college and NFL levels. See *O.J. Simpson Biography*, BIO. TRUE STORY, <http://www.biography.com/people/oj-simpson-9484729> (last visited Mar. 18, 2013). He won college football’s highest honor, the Heisman trophy, before launching an eleven-year pro career for the Buffalo Bills and San Francisco 49ers. *Id.* Over the course of that career, he compiled over 11,000 rushing yards, currently good for 18th in NFL history. *Id.* He was subsequently inducted into the NFL Hall of Fame in 1985. *Id.* Accomplishments on the field aside, Simpson’s career arguably reached its zenith in the 1988 film *The Naked Gun: From the Files of Police Squad!*, in which he portrayed “Nordberg,” a perpetually unlucky detective subject to unremitting Three Stooges-esque physical mishaps. *The Naked Gun: From The Files of Police Squad!*, IMDB, <http://www.imdb.com/title/tt0095705/> (last visited Mar. 18, 2013).

The Cat NOT in the Hat! . . . does not hold [Seuss's] style up to ridicule. The stanzas have no critical bearing on the substance or style of *The Cat in the Hat*. [The authors] merely use the Cat's stove-pipe hat, the narrator (Dr. Juice), and the title (*The Cat NOT in the Hat!*) to get attention or maybe even to avoid the drudgery in working up something fresh.⁹⁴

The use of Seuss's copyright-protected content was accordingly deemed non-transformative for lack of "new expression, meaning, or message."⁹⁵ Because Dr. Seuss's original work was creative in nature,⁹⁶ the alleged parody appropriated the core of the original work. Since the defendants failed to proffer evidence to show the absence of harm to the original work,⁹⁷ the Ninth Circuit agreed with the District Court's injunction on the publication of *The Cat NOT in the Hat!*⁹⁸

The result in the *Dr. Seuss* case may come across as a bit harsh for the defendants. After all, the defendants did proffer a seemingly reasonable justification as to why they chose to re-package Seuss's work as a narrative of the Nicole Brown Simpson-Ronald Goldman double murder and subsequent arrest, trial, and acquittal of O.J. Simpson for that same double-murder.⁹⁹ The defendants were attempting to juxtapose the juvenile, care-free style of Seuss's original against the more morally murky backdrop of the Simpson affair.¹⁰⁰ Further, the defendant-authors clearly invested their own selection and judgment in fitting the narrative of the Simpson story to Seuss-ian verse. Take, for example, their description of the assembly of the various lawyers—on one side, the prosecution, and the other, Simpson's so-called "Dream Team":

A plea went out to Rob Shapiro / Can you save the fallen hero? / And Marcia Clark, hooray, hooray / Was called in with a justice play. / A man this famous / Never hires / Lawyers

⁹⁴ *Dr. Seuss*, 109 F.3d at 1401 (quoting *Acuff-Rose*, 510 U.S. at 580 (internal quotations omitted)).

⁹⁵ *Id.* (internal citations omitted).

⁹⁶ *Id.* at 1402.

⁹⁷ *Id.* at 1403.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1402.

¹⁰⁰ *Id.*

like / Jacoby-Meyers. / When you're accused of a killing
scheme / You need to build a real Dream Team. / Cochran!
Cochran! / Doodle-doo / Johnnie, won't you join the crew? /
Cochran! Cochran! / Deedle-dee / The Dream Team needs a
victory.¹⁰¹

While copyright law does not look to the aesthetics of a work as a rule,¹⁰² some would certainly find this retelling of a critical aspect of the Simpson trial whimsical, entertaining, or humorous. Copyright does look to a work's creativity, however, and even that short passage evidences a significant degree of it.

That the Ninth Circuit could nonetheless characterize the fair use defense in *Dr. Seuss* as "pure schtick"¹⁰³ and "completely unconvincing"¹⁰⁴ speaks to the defendant's uneasy position in its use of third party intellectual property rights as compared to both *Blanch v. Koons* and parody cases like those involving the *Wind Done Gone* and "Oh, Pretty Woman." This is because *Blanch v. Koons* on one hand, and the parody cases, on another, map to two subsets of third party intellectual property use that the law has traditionally proven willing to authorize. *Dr. Seuss*, by contrast, falls into a third subset of third party intellectual property use where judicial imprimatur is less forthcoming, or at least, more unpredictable.

Blanch v. Koons, as described above,¹⁰⁵ represents a "genericized" use of another's intellectual property. The concept of permissible use of a "generic" is not only present in the copyright area of fair use, it also regularly pops up under similar circumstances in trademark law. There, a word may serve as a trademark—or a means of associating commercial goods or services with a source—in some contexts, while it serves a strictly generic end in others. For example, "Tide" may properly serve as a trademark when attached to a brand of laundry detergent, but it

¹⁰¹ *Id.* at 1401.

¹⁰² The most famous citation to this effect comes courtesy of Justice Holmes in *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239, 251 (1903), stating, "It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations."

¹⁰³ *Dr. Seuss*, 109 F.3d at 1403.

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* notes 70-86 and accompanying text.

also may be used generically to describe a behavior of the ocean compelled by the moon's gravitational pull. The fact that Procter & Gamble may own trademark rights in "Tide" when applied to detergent does not grant the company any ability to prevent use of the word "tide" when applied to the ocean or any other body of water.

Even words that may once have functioned as trademarks may cease to indicate a source of goods, and become a term for a class of goods. To name a couple of examples, words like "Thermos" and "Shredded Wheat" once served to distinguish the source of certain vacuum bottles and cereal, respectively. In time, however, those words have come to refer to any vacuum bottle or pillow-shaped cereal, regardless of who produced it. Under this concept, called "genericide" or "genericism," the one-time trademark becomes, in the words of the Supreme Court in the Shredded Wheat case,¹⁰⁶ "the generic term of the article, which describes it with a fair degree of accuracy."¹⁰⁷

Generic words or genericized trademarks represent trademark law's answer to *Blanch v. Koons*. Just as "Tide" may be properly subject to trademark protection for laundry detergent, so too would Blanch's *Silk Sandals* photograph be subject to protection against infringing reproduction in certain settings—for instance, where a magazine advertisement reused the original photo in its entirety. But this does not hold true in the context of *Niagara*, where the photo merely serves as generic fodder for a more encompassing commentary, basically a use equivalent to an application of the word "tide" to marine topics. Trademarks that fall victim to genericide equally offer similarities to the use of *Silk Sandals* in *Niagara*. In the case of genericide, however, the change in trademark protection is time-dependent, not context-dependent.

Just as the use of *Silk Sandals* mapped to a permissive set of third party intellectual property uses present in both copyright

¹⁰⁶ *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111 (1938).

¹⁰⁷ *Id.* at 112-13. In the Shredded Wheat case, the Court could accordingly conclude, "[T]he term by which the biscuit in pillow-shaped form is generally known by the public. Since the term is generic, the original maker of the product acquired no exclusive right to use it." *Id.* at 113.

and trademark law, so too do parodies share critical similarities with a separate set of permissive trademark uses. More particularly, as a parody's use of elements of its target represent "specifically necessary" uses of another's intellectual property, certain species of descriptive or "nominative fair uses" in trademark law beget cases where use of another's trademark is "specifically necessary," and accordingly legally permissible.¹⁰⁸ In describing its prior holding in *Volkswagenwerk Aktiengesellschaft v. Church*,¹⁰⁹ the Ninth Circuit noted how a garage that services Volkswagen automobiles needs to use the Volkswagen trademark in a descriptive fashion to explain its services:

Volkswagen could not prevent an automobile repair shop from using its mark. We recognized that in 'advertising [the repair of Volkswagens, it] would be difficult, if not impossible, for [defendant] to avoid altogether the use of the word 'Volkswagen' or its abbreviation 'VW,' which are the normal terms which, to the public at large, signify appellant's cars.¹¹⁰

The court, in granting its blessing to descriptive uses of the band name New Kids On The Block and those of its individual members within a newspaper survey,¹¹¹ outlined a framework by which the presence of such so-called "nominative fair use" could be determined:

First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.¹¹²

¹⁰⁸ See *infra* note 113 and accompanying text.

¹⁰⁹ 411 F.2d 350 (9th Cir. 1969).

¹¹⁰ *New Kids On The Block v. New Am. Pub., Inc.*, 971 F.2d 302, 307 (9th Cir. 1992) (quoting *Volkswagenwerk Aktiengesellschaft v. Church*, 411 F.2d 350 (9th Cir. 1969) (internal quotations omitted)).

¹¹¹ *Id.* at 309.

¹¹² *Id.* at 308.

The critical takeaway here is the first two factors in the nominative fair use test, whose general thrust is underscored by the court's use of the word "necessary." Each of these factors speaks to a degree of necessity in certain uses of another's trademark. Under the first factor, the use is necessary insofar as the product or service cannot be designated without a mention of the mark. Under the second, the use of a third party mark is restricted to an extent "reasonably necessary." The combination of these two factors allows for use of third party trademarks where "specifically necessary." Under this rationale, it was specifically necessary for both the garage owner to use "Volkswagen" to identify the garage's services and the newspaper to use the names of the members of New Kids On The Block to identify that group. Such specifically necessary use of another's trademarked words or names are trademark law's answer to a parodist's specifically necessary use of elements of the parody's target. In this respect, there is a wide-spread recognition in intellectual property law that uses of another's intellectual property, where specifically necessary, must be permissible.

The *Dr. Seuss* case does not fit within either the generic or specifically necessary subsets of third party intellectual property use embodied by *Blanch v. Koons* and the parody cases, respectively. Instead, it falls in a class that tends to map to infringement in either trademark or copyright regimes. In trademark, such infringement is found where there is a likelihood of confusion of sponsorship or affiliation between the user of the trademark and the trademark owner.¹¹³ In copyright, this happens when a work using previous material evidences "substantial similarity" with that earlier material. In each case, the applicable intellectual property law is attempting to protect against wrongful use of the core protected material—in trademarks, commercial goodwill associated with the mark,¹¹⁴ and

¹¹³ See 15 U.S.C. § 1125(a)(1) (2006).

¹¹⁴ *Liebowitz v. Elsevier Sci. Ltd.*, 927 F. Supp. 688, 695-96 (S.D.N.Y. 1996) ("A trademark is, essentially, a designation of origin. It serves to inform the public of the source of the goods. As the public comes to know a trademark, it relies on the trademark as a sign that the goods sold under that trademark are of the same quality as goods that it has purchased from that source before. This public association between goods of a certain quality and a trademark benefits the owner of the trademark by

in copyright, the creativity of the original work.¹¹⁵ In cases where these matters are at issue, the user of the third party intellectual property cannot be said to “need” to use the material.¹¹⁶ In the absence of such a need (or the use of a genericized version of the intellectual property), the creativity or business goodwill relied on by the intellectual property user will not always be eligible for such use.¹¹⁷

Of course, certain such “unnecessary” uses of third party copyrightable material will qualify as fair use. Becoming eligible for the fair use exemption in such cases, though, undoubtedly requires the use of a smaller amount, both quantitatively and qualitatively, of the original rightsholder’s work and a greater

making it easy for consumers to find its product and it benefits consumers by allowing them more easily to find goods of a particular producer that have given them satisfaction in the past. These functions of trademarks have led the law to treat trademarks differently from other species of property. Because the value of a trademark arises from its association with goods of a particular quality and source, a trademark comes into existence only once it is affixed to goods in commerce. Likewise, a trademark cannot be transferred except in connection with a business. Otherwise, the mark would cease to signify the source and quality of the goods to which it once related and the public could be confused or misled by continued use of the trademark. For the same reasons, although a trademark can be licensed, the licensor must retain some degree of control over the quality of the goods marketed under the trademark by the licensee.” (internal citations omitted).

¹¹⁵ *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (“The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” (internal citations omitted)).

¹¹⁶ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557 (1985). “Nor do respondents assert any actual necessity for circumventing the copyright scheme with respect to the types of works and users at issue here.” *Id.* The court also stated:

[Respondent] possessed an unfettered right to use any factual information revealed in [the memoirs] for the purpose of enlightening its audience, but it can claim no need to ‘bodily appropriate’ [Mr. Ford’s] ‘expression’ of that information by utilizing portions of the actual [manuscript]. The public interest in the free flow of information is assured by the law’s refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.

Id. at 557-58 (quoting *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 61 (2nd Cir. 1980) (citations omitted)).

¹¹⁷ *Liebowitz*, 927 F. Supp. at 695-96.

input of creativity from the user, than in the case of specifically necessary or generic uses. For where the latter types of use magnify the creative contribution of the user while simultaneously diminishing the analogous contribution of the original rightsholder, the unnecessary or non-transformative use flips this polarity entirely, making the unnecessary user's task a doubly difficult one, and, in many cases like the *Dr. Seuss* case, an insurmountable one. At best, results in this subset of unnecessary uses are less predictable as a matter of balancing the use's sources of value.

The three sub-sets sketched above, however, do not tell the whole story as to transformative uses. In some cases, the transformative use factor can act as an exception for socially desirable practices.¹¹⁸ The *Arriba Soft* case is arguably one example of this.¹¹⁹ That case involved a suit by Leslie Kelly, a photographer, against a search engine web site that reproduced his images in miniaturized (or thumbnail) form within its search results.¹²⁰ The Ninth Circuit concluded that Arriba's reproduction of Kelly's photographs was transformative.¹²¹ This conclusion was based on the difference between the aesthetic purpose that Kelly's photographs served in their normal context, and the more information-driven use embodied by the search engine's retrieval

¹¹⁸ Socially desirable practices are not necessarily promoted only in the first factor. Fair use, at large, serves this end. See also William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1669 (1988) (noting that the objectives of fair use are: "(a) advancing social utility by increasing the supply of intellectual products and facilitating their distribution; (b) enforcing an author's natural right to a reasonable portion of the fruits of his labor; (c) protecting an author's interest in controlling the way in which his creations are presented to the world; and (d) aligning the law with custom and popular conceptions of decent behavior"). This article argues, however, that such cases of socially useful conduct should be treated as unpredictable exceptions and not an overarching rule.

¹¹⁹ 336 F.3d 811 (9th Cir. 2003).

¹²⁰ *Kelly*, 336 F.3d at 815. The Digital Millennium Copyright Act addressed many of these cases by carving out a safe harbor for online "service providers"—a class that includes search engines—to act as a passive conduit for intellectual property, whether infringed or not. If the search engine is aware of specific instances of infringement, however, it does not enjoy this safe harbor protection in passing through the infringing content. 17 U.S.C. § 512 (2006).

¹²¹ *Kelly*, 336 F.3d at 819.

of his images in thumbnail form.¹²² The court would go on to find the use of such thumbnails fair.¹²³

In some ways, the *Arriba Soft* court's conclusion that the thumbnail reproductions were transformative maps to the discussion of creative value above. After all, the thumbnails in the search engine context served as mere generic responses to a user's input query. That would support an argument that the search engine's use is fair, just as Koons's use of a genericized image was fair.¹²⁴ That said, the Ninth Circuit also seemed convinced of the social utility of image-based web searching's functionality when it noted how the use "improv[es] access to information on the internet."¹²⁵ And the court is, of course, correct in its assessment—search engines that retrieve images serve highly valuable purposes as a social matter. However, findings of fair use for socially useful practices like this represent a break with the overarching rule proposed here. As it is particularly hard to predict when a use is sufficiently socially valuable to merit fair use, such findings should accordingly be treated as rare exceptions to the general hypothesis proposed in this Article.¹²⁶

B. Public Domain Sources of Value

As the use of prior creative work in a transformative or non-transformative way introduces a weighing of sources of creative

¹²² *Id.* at 818.

¹²³ *Id.* at 822.

¹²⁴ *Id.* at 818.

¹²⁵ *Id.* at 819.

¹²⁶ *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1983) arguably stands as another example of a court finding a fair use in defense of a socially desirable practice. At issue in that famous case was the widespread use by consumers of Sony's Betamax video tape device to record their favorite shows, which at the time were probably *The Dukes of Hazzard* and *Magnum, P.I.* Universal, as the rightsholder of portions of the televised content recorded by consumers, sued Sony for these individual consumers' recordings. *Id.* The Court found Sony's provision of the Betamax a fair use, as "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. *Id.* Indeed, it need merely be capable of substantial noninfringing uses." *Id.* at 442. This language gave rise to the so-called *Sony* safe harbor. In any event, the case probably can be read as a nod to the social benefits of widely available consumer recording technology, even where that technology is sometimes employed in the service of infringing ends.

value, this represents an appropriate time to consider the possibility of public domain sources of value and their influence on the balance.¹²⁷ Each potential work for fair use contains such sub-elements that do not merit copyright protection individually. In fact, every work that merits copyright as a whole contains such elements. Individual words, for example, are not properly the subject of copyright because they represent necessary building blocks of creation. The stock elements in a story—like the standard plot arc of a Rocky movie, in which the boxer overcomes long odds to gain improbable triumph—are not protectable by copyright.¹²⁸ When considering the sources of value in a work, courts also must pay heed to the contribution of such public domain elements.

Historical facts represent yet another example of such public domain material, and one potentially critical source of value for certain classes of works, like biographies and newspaper articles.¹²⁹ The case of *Rosemont Enterprises, Inc. v. Random House, Inc.* offers a particularly instructive example as to how the fair use doctrine weighs the use of facts.¹³⁰ That case primarily involved famed aviator and Hollywood producer, Howard Hughes, a man whose remarkable success in such popular fields drew

¹²⁷ This aspect of the overall weighing could also have been introduced in later sections, of course.

¹²⁸ For the application of the doctrine to fictional stories set in the Antebellum South, see *Alexander v. Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978).

¹²⁹ See *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977). That court stated:

Ideas which may be of public interest are not subject to copyright; the specific form of expression of these ideas are. Thus, the political views of Dr. Martin Luther King may be widely disseminated. But the precise expression of these views in a speech may be protected. . . . Similarly, the facts about a historical figure are available to all to use. But if the expression of those facts in a biography is substantially copied infringement will be found.

Id. at 1170 (internal citations omitted). See also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (“As this Court long ago observed: [T]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day”) (quoting *Int'l News Serv. v. Associated Press*, 268 U.S. 215, 234 (1918)).

¹³⁰ 366 F.2d 303 (2d Cir. 1966).

significant public interest in his life.¹³¹ Yet flying and box office successes only told part of his story; Hughes also engaged in certain idiosyncratic behaviors possibly brought on by obsessive-compulsive disorder.¹³² In one notable episode, Hughes took up residence in one of his movie theaters, where he subsisted on chocolate and milk and watched reel upon reel of film in various states of undress.¹³³ Hughes was also known to have meticulously arranged peas on his plate by size,¹³⁴ vocally obsessed over a seam in the shirt of an actress in one of his films,¹³⁵ and insisted on a highly reclusive lifestyle.

Perhaps the very factors that prompted this behavior also contributed to Hughes's jealous desire to prevent publication of the details of his life, a desire that animated the litigation in *Rosemont Enterprises*.¹³⁶ There, Hughes, through one of his corporate entities, acquired rights in a series of magazine articles about his life originally published in *Look Magazine*.¹³⁷ He made this acquisition with the apparent intent of leveraging the copyright in the articles to enjoin subsequent publication of unauthorized biographies, an intent he acted on in suing Random House for infringement in its proposed publication of *Howard Hughes: a Biography* by John Keats.¹³⁸ While the Random House publication did attribute a few quotations and an eight-line paraphrase to the *Look Magazine* articles, the 304-page biography was significantly longer than the previous articles, and represented the result of the author's independent research.¹³⁹

¹³¹ *Id.* at 305.

¹³² PETER HARRY BROWN & PAT H. BROESKE, HOWARD HUGHES: THE UNTOLD STORY 184-85 (1996).

¹³³ *Id.* at 315-20.

¹³⁴ *Id.* at 89, 141, 312-14.

¹³⁵ *Id.* at 69, 244.

¹³⁶ The concurrence in *Rosemont Enterprises* explored this premise in detail. *Rosemont Enterprises*, 366 F.2d. at 311-313. The opinion offered a lengthy description as to how Hughes himself ran the Rosemont Enterprises entity to the illegitimate end of censoring the dissemination of his life's story.

¹³⁷ *Id.* at 305. The case discloses that Rosemont Enterprises was "organized in September 1965 by Hughes's attorney and two officers of his wholly-owned Hughes Tool Company." *Id.* at 304-05.

¹³⁸ *Id.*

¹³⁹ *Id.* at 306.

The district court, nonetheless, issued a preliminary injunction preventing the Random House biography's publication.¹⁴⁰

The Second Circuit overturned the injunction, finding that the Random House biography likely constituted a fair use of the previous material.¹⁴¹ In this respect, the court was skeptical that the relatively small amount of the original *Look Magazine* articles used in the later work qualified as a material and substantial portion of the original articles.¹⁴² The court also cautioned against an overemphasis of the commercial nature of the Random House biography.¹⁴³ Further, the court offered the critical comment that "Hughes has long been a newsworthy personality. Any biography of Hughes, of necessity, must recite the events of his life because biography in itself is largely a compilation of the past."¹⁴⁴ Such strictly historical facts, stripped of any expressive content owing to the *Look Magazine* articles, are not protectable in and of themselves, and could be used freely by Hughes biographers, whether authorized or not. In other words, "[W]hile the mode of expression employed by [the *Look Magazine* articles author] is entitled to copyright protection, he could not acquire by copyright a monopoly in the narration of historical events."¹⁴⁵ Such events could properly be retold in the context of the Random House biography.

This case is important in how clearly it demonstrates an important mechanism by which a copyrighted work embodies value. Where a particular work may derive its value in the form of its author's creativity and any third party materials used by that author, a work may also embody value in some measure due to strictly non-proprietary elements, such as the historical facts presented in the work. In this case, the *Look Magazine* articles contributed next to no expressive content to the 300-plus page Random House biography—the minimal use of such content was

¹⁴⁰ *Id.* at 304.

¹⁴¹ *Id.* at 311.

¹⁴² *Id.* at 306.

¹⁴³ *Id.* at 308. The court also got bogged down in occasionally irrelevant observations, including one about the degree to which the Random House biography was critical of Hughes. *Id.* at 309.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 306.

clearly fair.¹⁴⁶ Further, while the biography of Howard Hughes may have reflected highly creative writing by Keats, the most likely reason a reader would pick up this book is due to its subject matter, an account of the fascinating and sometimes peculiar life of Howard Hughes. Accordingly, the book's overwhelming source of value was very likely the incidents recounted in its pages. Yet, the bare facts that structure such an account are not protectable under copyright law, and cannot be subject to private control. This premise is particularly underscored in *Rosemont Enterprises*, where even the very person responsible for the notable acts or achievements—the one who produced the movies, flew the planes, and arranged the peas—cannot suppress the dissemination of reports or accounts of those historical acts or achievements for lack of proprietary rights.

The factual background underlying the *Rosemont Enterprises* decision takes an interesting twist in a more recent Ninth Circuit case, *Elvis Presley Enterprises, Inc. v. Passport Video*.¹⁴⁷ The case revolved around *The Definitive Elvis*, a videotape box set intended to chronicle the life of another notable historical figure, music legend Elvis Presley.¹⁴⁸ The box set, issued by defendant, Passport Video, culled audio and video footage from a wide variety of sources, including numerous clips and images owned by the plaintiffs to the suit. Plaintiffs' content, which comprised five to ten percent of the overall documentary,¹⁴⁹ included footage from several noteworthy appearances by Elvis on TV programs such as *The Steve Allen Show*, *The Ed Sullivan Show*, and *The 1968 Comeback Special*.¹⁵⁰ Such clips were presented in the documentary in a variety of ways—some were presented as fodder for narrative commentary; others were used as mere filler with no nexus to the audio track dubbed over the clip.¹⁵¹ In other instances, the documentary avoided narrative dubbing entirely, and presented the clip's original audio in conjunction with its

¹⁴⁶ *Id.*

¹⁴⁷ 349 F.3d 622 (9th Cir. 2003).

¹⁴⁸ *Id.* at 624-25.

¹⁴⁹ *Id.* at 625.

¹⁵⁰ *Id.* at 628.

¹⁵¹ *Id.* at 625.

visual content.¹⁵² The documentary most substantially reproduced the plaintiffs' material in the context of one clip that ran uninterrupted for roughly one minute.¹⁵³ Other clips owned by plaintiffs only consumed between ten and thirty seconds of the documentary, however.¹⁵⁴ In granting the plaintiffs' motion for a preliminary injunction, the district court concluded that *The Definitive Elvis*'s reliance on plaintiffs' materials did not constitute fair use.¹⁵⁵

The Ninth Circuit subsequently upheld the injunction.¹⁵⁶ On the merits of the defendant's claim of fair use, the court cited a tension inherent to chronicling historic figures in the age of television, in that "[i]t would be impossible to produce a biography of Elvis without showing some of his most famous television appearances for reference purposes."¹⁵⁷ In the court's judgment, however, the defendant took more of the plaintiffs' materials than was necessary for such reference purposes.¹⁵⁸ In so doing, the defendant used the plaintiffs' materials in a non-transformative way, for "the same intrinsic entertainment value" as the original works.¹⁵⁹ The remaining fair use factors also aligned in the plaintiffs' favor, as the materials used in *The Definitive Elvis* were creative in nature, the defendants took "key portions" of the materials, and defendant's failure to acquire licenses for the materials harmed the plaintiffs' economic interests.¹⁶⁰ The Ninth Circuit accordingly concluded that the district court had not abused its discretion in granting the injunction.¹⁶¹

In some respects, *Passport Video* mirrors *Rosemont Enterprises*. Just as the details of the unusual life of Howard Hughes made the biography in *Rosemont Enterprises* valuable, "[w]hat makes [the] copyrighted works [in *Passport Videos*]

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 626.

¹⁵⁶ *Id.* at 631.

¹⁵⁷ *Id.* at 629.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 630-31.

¹⁶¹ *Id.*

valuable is Elvis' appearance on the shows, in many cases singing the most familiar passages of his most popular songs."¹⁶² Viewed from this angle, the images, footage, and audio of Elvis Presley as he made memorable appearances on a variety of television programs are just some of the facts that make up Elvis' history. As the court acknowledged, any chronicle of Elvis' life would have to capture those events in some form,¹⁶³ much as any biography of Howard Hughes would necessarily have to detail Hughes' idiosyncrasies. Therefore, to some extent the materials used in *The Definitive Elvis* served as historical facts.

The clips in *Passport Videos* add a wrinkle beyond the mere facts that informed the *Rosemont Enterprises* biography, however. Unlike strictly unprotectable facts, the materials used in *The Definitive Elvis* were all embodiments of creative expression properly protected by copyright to the extent of their primary source of value: Elvis' voice, persona, and mannerisms. In other words, where the facts that Hughes attempted to monopolize through copyright protection were just that—facts—the plaintiffs' materials in *Passport Video* served a hybrid purpose, partly to inform in a factual capacity, but partly as protectable, and generally entertaining, expression. This hybrid purpose made the *Passport Video* case particularly challenging, as the two dimensions of that purpose pulled the court in diametrically opposed directions on the question of fair use. In all likelihood, the case ultimately came down to the standard of appellate review applicable to the injunction—an abuse of discretion. While the Ninth Circuit did not find an abuse of discretion, it did suggest that it may have decided the case differently if it had been afforded the opportunity to address the case as an initial matter.¹⁶⁴

The other odd wrinkle to consider with *Passport Video* is the slight dissonance between the holders of the intellectual property in the videos of Elvis and the contributor of the copyrightable value. The latter in each of the appearances was, of course, Elvis. His singing, accompanied by some formidable dance moves, gave

¹⁶² *Id.*

¹⁶³ *Id.* at 629.

¹⁶⁴ *Id.* at 631.

people reason to tune in, and embodied significant creativity. Ultimately, though, the owners of the camera, undoubtedly in some cases the television networks, would garner the copyright in the recordings of Elvis' performances. This seems odd, as holding a steady camera pointed in a specific direction seems a less than creative endeavor. It seems all the more uncreative when we consider one Elvis appearance, on *Ed Sullivan*, where the network did not allow the display of Elvis's hips (due to their provocative, scandalous gyrations).¹⁶⁵ Despite this inconsistency as between the owner of the intellectual property and the source of the work's creative value, copyright has long granted its protection to the steady hand holding the camera, and not the one gyrating in front of it.¹⁶⁶

In any event, what *Rosemont Enterprises* and *Passport Video* make clear is the need for courts to consider public domain sources of value evident in a potential fair user's work. Where those public domain sources of value are the only contributors beyond the potential fair user's work, the use is entirely acceptable without reaching fair use. Where, however, the sources of public domain value are tied up in intellectual property used in hybrid form, like the clips of Elvis, the overall balancing leads to a more muddled view of fair use. In those cases, public domain and properly owned contributions must both be considered in the fair use quantum, all against the backdrop of transformative use.

C. Commerciality of the Use

In addition to an inquiry into whether a given use is transformative, the first fair use factor also typically considers the "commerciality" of the use. The concept of commerciality is generally in line with the meaning of the word—that is, whether a purported fair user's work is offered for monetary profit, perhaps to consumers in exchange for a fee, without a return payment for

¹⁶⁵ See *Elvis Presley*, THE OFFICIAL ED SULLIVAN SITE, <http://www.edsullivan.com/artists/elvis-presley/> (last visited Mar. 18, 2013).

¹⁶⁶ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) granted a photographer copyright for an image of Oscar Wilde. Wilde's presence supplied much of the value for the work, notwithstanding the photographer's arrangement of lighting and cushions. *Id.*

the use of the copyrighted material.¹⁶⁷ As this subsection discusses, however, the term has been interpreted with enough malleability to cover other arrangements that result less directly in financial enrichment for the user, or perhaps, no financial gain at all. Due to this malleability, along with commerciality's close link with the transformative use query, commerciality is not a particularly important factor in the overall fair use quantum.

This was not always the case, however. The fact that a use was commercial was once effectively dispositive of the case in favor of the original author. Such was the thrust of the Supreme Court's decision in *Stewart v. Abend*, a case involving a Cornell Woolrich short story ultimately adapted into the Alfred Hitchcock film, *Rear Window*.¹⁶⁸ In finding that the adaptation did not qualify as a fair use, the Court's brief consideration of the first factor focused primarily on the fact that the use was commercial.¹⁶⁹ This conclusion is not surprising given the Court's earlier statement in *Sony Corp. of America v. Universal Studios, Inc.*, that "every commercial use" is "presumptively . . . unfair."¹⁷⁰

That statement was exceptionally misguided and counterproductive. It elevated a single factor to dispositive status in a test that normally requires the weighing of all factors. More importantly, though, the Court may have selected the *least* appropriate factor to elevate to dispositive status in the fair use balancing. On one hand, there are legion examples of commercial uses that are manifestly fair, including the many parodies and works of scholarly criticism offered in stores and through other commercial channels. And, to the extent that the court intended to communicate the obverse of its statement—viz., that non-profit uses are presumptively fair, it would be equally misguided. Plenty of reproductions and distributions conducted by non-profit organizations or otherwise for no economic gain would not qualify

¹⁶⁷ *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 562 (1985) ("The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

¹⁶⁸ 495 U.S. 207 (1990).

¹⁶⁹ *Id.* at 237. It also dismissed out of hand any claim to educational use of the original material. *Id.*

¹⁷⁰ 464 U.S. 417, 451 (1984).

as fair. To name one example, the wholesale piracy of another's work is not fair just because the copy is offered for free or by a non-profit. Fair use simply is not designed to serve as a general sword or shield depending solely on the commerciality or non-commerciality of a use.

The Supreme Court acknowledged as much in *Acuff-Rose*, a case that served to reestablish the fair use doctrine's equilibrium vis-à-vis the commerciality of a given use.¹⁷¹ Notably, the Court opined:

[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'¹⁷²

In the void left by commerciality-deemed-dispositive, the Court instead tethered this element of the fair use test to its first factor cohabitant, the transformative use query—where “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”¹⁷³

This latter comment has a dual effect. First, it refocuses commercialism and brings it in line with the overarching goal of fair use proposed here, the protection against misappropriation of creative value. Second, it renders the commerciality factor far less important in the overall fair use balancing. To the first point, the Court's updated view on commercialism introduces a sliding scale whereby the degree of transformation in a use is inversely

¹⁷¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994) (“No ‘presumption’ or inference of market harm that might find support in *Sony [Corp of America v. Universal Studios]* is applicable to a case involving something beyond mere duplication for commercial purposes.”)

¹⁷² *Id.* at 584.

¹⁷³ *Id.* at 579.

proportional to the importance of commercialism. Where a work adds significant transformative creative value to the original—like “Niagara” described above—commercialism effectively drops out of the fair use quantum.¹⁷⁴

To the second point above, that commerciality is now a far less important aspect of the fair use query than previously, it suffices to show the very limited set of cases where commercial use would still appear to matter. As noted above, the Supreme Court’s sliding scale discounts the value of commerciality of a use in cases where the work is transformative. In view of this, the commerciality of a use will only assume real significance in cases where the use is non-transformative. Even in such non-transformative cases, however, fair use would regularly not be found due in large part to the sheer fact that a use is non-transformative—in other words, regardless of whether the use happens to be commercial or non-commercial. This additional distillation step suggests the conclusion that the commercialism inquiry really matters in a very limited sub-set of non-transformative uses—specifically, where a use is non-transformative, but where its lack of commerciality serves to help overcome the lack of transformation in the use.

Further, to the enfeebling of commerciality in the overall fair use test, this sub-set would appear to represent a fairly limited class of non-transformative uses due to the relative malleability of the meaning of commerciality. Rather than limit the commerciality inquiry to materials offered to consumers in exchange for a fee, courts have shown willingness to expand the commercial concept to almost any form of benefit accruing to the would-be fair user. For example, in *Worldwide Church of God v. Philadelphia Church of God*, the Ninth Circuit commented that: “in weighing whether the purpose was for ‘profit,’ ‘[m]onetary gain is not the sole criterion . . . [p]articularly in [a] . . . setting [where] profit is ill-measured in dollars.”¹⁷⁵ The case revolved around the book *Mystery of Ages*, which had fallen out of favor with the Worldwide Church of God, the organization that owned the book’s

¹⁷⁴ Patry & Perlmutter, *supra* note 33, at 681.

¹⁷⁵ 227 F.3d 1110, 1117 (9th Cir. 2000) (alteration in original) (citation omitted).

copyright.¹⁷⁶ A church group that had splintered from the Worldwide Church of God, however, continued to make unlicensed use of *Mystery of Ages* as part of its core religious material.¹⁷⁷ While the splinter group, called the Philadelphia Church of God, did not charge its members for *Mystery of Ages*, the court still found the use commercial.¹⁷⁸ The court explained its rationale:

[*Mystery of Ages*'s] use unquestionably profits [Philadelphia Church of God] . . . by attracting through distribution of [*Mystery of Ages*] new members who tithe ten percent of their income to [Philadelphia Church of God], and by enabling the ministry's growth. During the time of [Philadelphia Church of God's] production and distribution of copies of [*Mystery of Ages*] its membership grew to some seven thousand members. It is beyond dispute that [Philadelphia Church of God] "profited" from copying [*Mystery of Ages*]*—*it gained an "advantage" or "benefit" from its distribution and use of [*Mystery of Ages*] without having to account to the copyright holder.¹⁷⁹

The court accordingly found the first factor to weigh against Philadelphia Church of God en route to a conclusion that the church's use of *Mystery of Ages* was not fair.¹⁸⁰

A similarly expansive view of commerciality cropped up in *Weissmann v. Freeman*.¹⁸¹ There, Dr. Freeman, an academic physician, claimed authorship of—and presented at a conference—a paper to which he had apparently contributed relatively little.¹⁸² The actual author of the paper was his former co-worker, Dr. Weissmann, who sued to vindicate her rights in the work.¹⁸³ While Freeman had not directly earned any income from sale of the paper or other fees, the court still found his use commercial in

¹⁷⁶ *Id.* at 1113.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1118.

¹⁷⁹ *Id.* (abbreviations omitted).

¹⁸⁰ *Id.* at 1118, 1121.

¹⁸¹ 868 F.2d 1313 (2d Cir. 1989).

¹⁸² *Id.* at 1316. The court concluded that the circumstances surrounding Freeman's contributions to the paper did not give rise to a finding that the article was a "joint work." *Id.* at 1317.

¹⁸³ *Id.* at 1316.

nature.¹⁸⁴ In support of this conclusion, the court explained that “Dr. Freeman stood to gain recognition among his peers in the profession and authorship credit with his attempted use of Weissmann’s article Particularly in an academic setting, profit is ill-measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure.”¹⁸⁵ Like Philadelphia Church of God’s use of *Mystery of Ages*, Dr. Freeman’s use of Dr. Weissmann’s paper was ultimately not deemed fair.¹⁸⁶

Both the *Weissmann* and *Worldwide Church of God* decisions stand for a conception of commerciality not limited to a direct payment in exchange for access or exposure to the copyrighted work used. In each case, any monetary gain was at least a step removed from the specific use of the work at issue. In *Worldwide Church of God*, the church stood to gain economically from the use by attracting new acolytes who would then tithe to the church.¹⁸⁷ In *Weissmann*, the presentation of the article would grant Freeman greater prestige, which in turn, would translate to more lucrative tenured jobs.¹⁸⁸ At this degree of remove, the courts’ shared conclusions appear relatively speculative. That Freeman presented one paper at a conference may not have contributed to his prestige at all. In fact, if the paper were particularly poor, it might have detracted from his standing in the community.¹⁸⁹ The *Worldwide Church of God* decision was similarly facile in concluding that *Mystery of Ages* contributed to the growth of the Philadelphia Church of God, as any number of other, completely unrelated factors may have accounted for the church’s increasing popularity. Most important in the courts’ conception of commerciality, though, is the apparent unimportance of monetary reward on any level, let alone an indirect level. Each of the decisions focused instead on the presence of a benefit in any form. As such, the mere increase in the Philadelphia Church of God’s

¹⁸⁴ *Id.* at 1324.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ 227 F.3d 1110, 1118 (9th Cir. 2000).

¹⁸⁸ *Weissmann*, 868 F.2d at 1324.

¹⁸⁹ Although, one might surmise, not as much as plagiarizing another academic’s article.

constituency or the possibility of improved professional standing for Freeman were in and of themselves sufficient to render the uses at issue commercial in nature. The breadth of benefits that qualify as commercial coupled with the relatively speculative nature of such benefits render commercialism quite broadly applicable.

As courts demonstrate such a willingness to define commerciality of a use to encompass a wide range of speculative, non-monetary benefits, many uses would hypothetically be swept within the factor's purview. Take, for example, a clip that an individual posts on YouTube whose visual portion consists of images of the city of Boston taken by the user. Such images are accordingly properly the property of the user. That user, however, chooses to set the slideshow to the popular song, "Shipping up to Boston," by Beantown favorites, the Dropkick Murphys. The individual user, of course, has not acquired rights to reproduce the song for this purpose. That said, this user, like other YouTube users that post clips of this ilk, does not receive any money from the video post. In fact, the user even goes so far as to affix a conclusory "non-commercial" label to the post to try to push a tenuous fair use case.

Under both the *Philadelphia Church of God* and *Weissmann* cases, this YouTube clip would likely qualify as a commercial use of the Dropkick Murphys' song. The reason for this is the fact that the audio portion of the YouTube clip will drive visitors to YouTube to view the clip. That number of views is tracked within YouTube, and a higher number of views for a clip imparts the posting user with greater respect and prestige within the YouTube community. This increase in views is analogous to the increase in acolytes in *Philadelphia Church of God* and the greater professional goodwill accruing to Freeman in *Weissmann*. Although a number of views on YouTube does not necessarily translate to commercial success for the YouTube user, that view total is a form of benefit just like those reaped in the *Philadelphia Church of God* and *Weissmann*. This conclusion would remain true even if the YouTube user's photographs of Boston drove a certain amount of traffic to the posted clip, as courts are willing to engage in speculation as to the root cause of the benefit, and could

easily conclude that the copyrighted song actually drove the user traffic.

Although the YouTube user's use was ultimately non-transformative, a finding of commercialism probably was not necessary to a finding that the use of the Dropkick Murphys' song was not fair. Instead, as proposed above, commercialism now probably most matters in cases where a use's non-commercial nature overcomes its non-transformative nature.¹⁹⁰ But as commerciality expands to cover uses like our YouTube user's, the factor effectively loses its teeth—the set of truly non-commercial uses becomes increasingly small. The logical conclusion to be drawn, then, is that commerciality of a use is not of great, absolute importance in the overall fair use quantum, and not nearly as important as transformative use.

III. NATURE OF THE ORIGINAL WORK

The second fair use factor reviews the nature of the original copyrighted work relied on by the would-be fair user. The factor primarily consists of a review of the level of creativity evidenced by the original work. Less creative works will militate in favor of a finding of fair use, and vice versa. Where applicable, the second factor might also consider the newsworthiness of the original work, as well as whether the work is published or not. Newsworthy, published works will also tend to favor the user's case. Use of unpublished works, by contrast, is viewed very dimly by courts, and will rarely meet with a finding of fair use. This section will consider each of these aspects of the second factor in order. Such consideration will remain brief, for as one court noted, “[T]his factor typically has not been terribly significant in the

¹⁹⁰ To this point, a good example of a non-commercial use overcoming non-transformative use is *Sundeman v. Seajay Soc'y, Inc.*, 142 F.3d 194 (4th Cir. 1998), which is discussed in slightly greater detail in the section covering uses of unpublished material. See *infra* note 214 and accompanying text. By way of foreshadowing, the case involved scholarly analysis and very limited preservative copying of an unpublished work. *Sundeman*, 142 F.3d 194. The work itself was never disseminated in its entirety, however. *Id.* So not only was the use non-commercial, it did not misappropriate any of the creative value of the original work. *Id.*

overall fair use balancing.”¹⁹¹ Importance of the factor aside, its queries are all consistent with the overarching thesis of this Article—namely, that the fair use analysis is directed at determining the sources of creative value in a work, and whether the creative value of a third party has been misappropriated.

The overall objective of the second fair use factor is to determine the proximity of the original work to the core of material meriting copyright protection. To this end, the Eleventh Circuit commented, in *Peter Letterese & Associates v. World Institute of Scientology Enterprises, International*, “Works that are ‘closer to the core of intended copyright protection,’ and thus merit greater protection, include original as opposed to derivative works; creative as opposed to factual works; and unpublished as opposed to published works.”¹⁹² The creativity of the original work is typically the primary query under the second factor. Works that are traditionally more creative in nature, such as poems, novels, and musical compositions, will have a greater claim to protection from third party use than dryer, more factual works, like encyclopedias or lists of facts.¹⁹³ This inquiry can be quite nuanced, measuring works along a spectrum of creativity. As the Supreme Court stated in *Harper & Row*:

[E]ven within the field of fact works, there are gradations as to the relative proportion of fact and fancy. One may move from sparsely embellished maps and directories to elegantly written biography. The extent to which one must permit expressive language to be copied, in order to assure dissemination of the underlying facts, will thus vary from case to case.¹⁹⁴

¹⁹¹ *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997).

¹⁹² 533 F.3d 1287, 1312 (11th Cir. 2008).

¹⁹³ *Cf. Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000) (“[T]he creativity, imagination and originality embodied in [*Mystery of Ages*] tilt the scale against fair use.”).

¹⁹⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (quoting Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y. 560, 563 (1982)).

As a corollary to the generally greater rights of use in factual or non-creative works, the second factor similarly affords greater freedom to use newsworthy works. In the various *Los Angeles New Service* cases,¹⁹⁵ which involved re-use of either the Reginald Denny beating tapes or film of the scenes of train and plane crashes,¹⁹⁶ the newsworthiness of the footage favored the user.¹⁹⁷ This makes sense in light of the discussion of *Rosemont Enterprises* and *Passport Videos*, as news footage constitutes, in large part, a capture of historical facts, and typically an uncreative capture at that. In this respect, the footage shares characteristics with the bare facts whose dissemination was sought to be squelched by Howard Hughes. While the news footage is not so factual as to undermine its copyright entirely, such copyright should remain thin, and to a certain extent, susceptible to later reuse.

That the second factor reviews whether an original work is more creative or factual in nature is thoroughly consistent with the premise that fair use is intended to protect against the misappropriation of creative value. Simply put, the more creative an original work, the more likely it is that the subsequent user has taken creative value. And the converse is equally true—more factual original works will more likely embody value in the form of the unprotectable facts themselves. In those cases, as with *Rosemont Enterprises*, fair use is a more appropriate finding in view of a more limited taking of creative value.

In addition to reviewing the creativeness of an original work, the second factor also considers whether that original work has been previously published.¹⁹⁸ Where a work has been published,

¹⁹⁵ In addition to the *CBS* decision discussed above, these cases include: *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997), *L.A. News Serv. v. Tullo*, 973 F.2d 791 (9th Cir. 1992), and *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987 (9th Cir. 1998).

¹⁹⁶ *See, e.g. Tullo*, 973 F. 2d at 791.

¹⁹⁷ *See, e.g., KCAL-TV*, 108 F.3d at 1122.

¹⁹⁸ Judge Leval's article on fair use presents, as a central thesis, the premise that unpublished works should be more protected from subsequent users if such works were created in response to copyright incentives. *See Leval, supra* note 56. Or, as he put it, "the second factor should favor the original creator more heavily in the case of a work (including superseded drafts) created for publication, than in the case of a document

that fact is treated as a makeweight, lending nothing to a fair use finding in either direction. Where, however, a work is unpublished, the use is far less likely to be fair.¹⁹⁹ The most notable case on this proposition is *Harper and Row Publishers v. Nation Enterprise*, where the Supreme Court addressed *The Nation's* use of a then-unpublished excerpt of Gerald Ford's memoir.²⁰⁰ In explaining copyright's more solicitous protection against use of unpublished material, the Court outlined an additional interest at play in such cases: "There is necessarily, and within suitably defined areas, a . . . freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect."²⁰¹ The Court further elaborated:

written for reasons having nothing to do with the objectives of copyright law." *Id.* at 1117.

Generally speaking, Leval's premise seems flawed. For one thing, a lot of works are not created with copyright incentives in mind. Their authors may even be aware of the possibility of economic reward for their work, but they may not believe that their work stands a reasonable chance of garnering such reward. Such, unfortunately, may be the fate of the *auteur* in the age of *Twilight* and a constant barrage of superhero movies. That such *auteurs* do not believe in their work commercially does not mean that their unpublished work should not receive as much protection as the more economically-driven author of the latest vampire-centric schlock. If anything, such unpublished works are all sufficiently imbued with the creativity of their authors, and each should be treated with the same solicitude by the fair use doctrine. Moreover, Leval bases his premise on a variety of items like shopping lists and brief loan shark IOU notes. *Id.* at 1116-17. Not only would almost no one care to publish such works, but they are probably not even copyrightable in the first place. So fair use really does not enter the picture to support his argument. Again, what Leval seems to be missing is the type of work that an author produces to express him- or herself privately, to fulfill a desire to create, without an interest in economic incentive or potential publication. That work is produced with privacy in mind, but Leval would have the work afforded little leeway under his conception of fair use. In this way, Leval's premise would translate to the least respect for an author's privacy precisely where an author most rigorously seeks that privacy.

¹⁹⁹ *Harper & Row*, 471 U.S. at 564 ("Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works. While even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, see House Report, at 65, the author's right to control the first public appearance of his expression weighs against such use of the work before its release. The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work.")

²⁰⁰ *Id.* at 542-43.

²⁰¹ *Id.* at 559 (emphasis in original).

The author's control of first public distribution implicates not only his personal interest in creative control but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing. . . . Under ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use.²⁰²

In finding for the plaintiff-publishers of Ford's memoirs, *Harper & Row* was no exception to this rule.

The Court used the qualifier "under ordinary circumstances"²⁰³ for good reason though, as unpublished works may occasionally serve as candidates for fair use. Two cases support this proposition. One is *Sundeman v. Seajay Society Inc.*, where an unpublished novel by Pulitzer Prize winner Marjorie Rawlings passed inadvertently to a non-profit organization after Rawlings's passing.²⁰⁴ That organization then permitted the creation of two copies of the novel—one for review and commentary by a Rawlings expert and another for unpublished preservational purposes.²⁰⁵ Due to lack of permission, however, even the commentary by the expert was never presented or published.²⁰⁶ The Fourth Circuit did not treat the work's unpublished nature as dispositive under these circumstances,²⁰⁷ and found the making of the two copies a fair use.²⁰⁸ In a second case, *NXIVM Corp. v. Ross Institute*, the publisher of a web site critical of cults obtained a copy of an unpublished manuscript used by NXIVM to provide its acolytes instruction in a business technique called "Rational Inquiry."²⁰⁹ Because the web site publisher viewed NXIVM as tantamount to a cult, he published portions of the manuscript in the company of highly critical

²⁰² *Id.* at 555.

²⁰³ *Id.*

²⁰⁴ 142 F.3d 194, 199 (4th Cir. 1998).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 205.

²⁰⁸ *Id.* at 208.

²⁰⁹ 364 F.3d 471, 475 (2d Cir. 2004).

commentary.²¹⁰ Although the unpublished nature of the work weighed against the defendant's use, it was not fatal to the case.²¹¹ Instead, as the portions of the manuscript published on the site were quite small in relation to the overall work,²¹² the court was still able to conclude that the largely parodic use was fair.²¹³ In view of the *NXIVM* and *Sundeman* decisions, it is probably fairer to say that unpublished works may only be used in a way that does not misappropriate the original work. In *Sundeman*, such misappropriation could not occur because the work was never published in any form—rather, it was used and reproduced privately and strictly for preservational and limited academic purposes.²¹⁴ The same is effectively true of *NXIVM*, due to the very limited quotation of the original.²¹⁵ Had the web site operator published more significant portions, let alone all of the manuscript, his use likely would not have been deemed fair.

Protection for unpublished works represents a further means of safeguarding the creative value in an original work. Indeed, by publishing elements of a previously unpublished work, the user cannot help but entirely misappropriate the creativity in the original work, in whatever form that creativity may exist. Furthermore, an unpublished work's creativity is not as susceptible to the type of modulation evident in the *Koons* and parody cases. The *NXIVM* decision notwithstanding, an unpublished work is a weaker candidate for parody, as commenting on an unpublished original will fall flat for lack of public awareness of the whole original. Further, an unpublished work is ill-suited to use as a generic in a larger work, in the nature of *Silk Sandals* within *Niagara*. And even if an unpublished work would tenuously fit within one of these modulated classes of use, it would simultaneously have the effect of publishing portions of the work for the first time. That effect, in preempting the work's first publication, would undermine

²¹⁰ *Id.*

²¹¹ *Id.* at 480.

²¹² *Id.*

²¹³ *Id.* at 482.

²¹⁴ *Sundeman v. Seajay Society, Inc.*, 142 F.3d 194, 202-03 (4th Cir. 1998).

²¹⁵ *NXIVM Corp. v. Ross Institute*, 364 F.3d 471, 480 (2d Cir. 2004).

modulation of the original's creativity. In other words, where some viewers of the work relying on unpublished material might do so to appreciate the modulated creativity of the genericized or lampooned original, others would take in the parody or *Niagara*-like composition for precisely the same reason as they would have taken in the work on its initial publication—to appreciate it for its unmodulated creative value. The use, then, is not nearly as transformative as it would have been for the same work after its publication. Of course, as noted above, greater protection for unpublished works also serves a general interest in a right to privacy or a right not to speak; but it also promotes the protection of creativity.

Consistency with the thesis of this article notwithstanding, the second fair use factor is not particularly weighty in the overall balancing. Or put differently, while the factor is rarely or particularly important (outside of the use of unpublished works), it is sometimes lent no weight at all. Such was the case in *Acuff-Rose*, which involved the sampling of Roy Orbison's "Oh, Pretty Woman" by the hip-hop group 2 Live Crew.²¹⁶ In that case, the Supreme Court noted that the factor would traditionally weigh in favor of the rightsholders of the Orbison song, as the work is more creative in nature.²¹⁷ However, because parody requires use of "publicly known, expressive works," the Court deemed the factor unavailing to the plaintiffs.²¹⁸ Most telling, perhaps, was the fact that the Court devoted a mere paragraph to the discussion of the factor, a mere fraction of the ink spilled on each of the other three factors.²¹⁹ Such a limited treatment of the factor, both on an absolute level and in proportion to the discussion of other factors, is quite common.²²⁰

The weakness of the factor is only further underscored by cases where the overall finding on fair use is inconsistent with the

²¹⁶ 510 U.S. 569, 572-73 (1994).

²¹⁷ *Id.* at 586.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See, e.g., *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000) (involving an equally limited discussion of the second factor); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 994 (9th Cir. 1998) (dedicating a mere two sentences to the second factor).

tilt of the second factor. Take, for example, the *Texaco* case, where the court assessed the scientific journal articles photocopied by the defendants as follows: “Though a significant measure of creativity was undoubtedly used in the creation of the eight articles copied from *Catalysis* [a journal], even a glance at their content immediately reveals the predominantly factual nature of these works.”²²¹ Yet the court gave this factor little to no weight in its final conclusion that the photocopying of the *Catalysis* articles did not qualify as fair use.²²² The case of *Financial Information, Inc. v. Moody’s Investors Service, Inc.* takes this premise one step farther.²²³ There, the Second Circuit declined to find fair use where the materials used consisted of strictly factual compilations of stock prices and other market data.²²⁴ So ultimately, while this factor is in line with a review for the presence of misappropriated creative value, it rarely applies significant weight to the outcome of a given case.

IV. AMOUNT AND SUBSTANTIALITY

The third fair use factor measures the amount and substantiality of the original work incorporated into the subsequent work of the would-be fair user. The factor has two distinct dimensions, as it “calls for thought not only about the quantity of the materials used, but about their quality and importance, too.”²²⁵ If a user takes either a substantial amount of an earlier work, or takes the work’s core material, the factor will tend against a finding of fair use.

That quantitatively significant copying would run afoul of fair use under normal circumstances is fairly self-explanatory; but a brief explanation is in order as to how qualitative copying is defined. A fly-by of a few caselaw examples should help furnish such an explanation. In *KCAL-TV*, the Ninth Circuit noted that the portion of the Reginald Denny beating tapes depicting the

²²¹ *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 925 (2d Cir. 1994).

²²² *Id.* at 931.

²²³ 751 F.2d 501 (2d Cir. 1984).

²²⁴ *Id.* at 502. This was a pre-*Feist* case, so its baseline premise that the materials at issue were copyrightable could presently be called into question.

²²⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1991).

beating itself constituted the heart of the overall footage.²²⁶ In *Harper & Row*, the Supreme Court highlighted the fact that “[t]he Nation did not stop at isolated phrases and instead excerpted subjective descriptions and portraits of public figures whose power lies in the author’s individualized expression.”²²⁷ The Court later added, “In short, [*The Nation*] quoted the [excerpted] passages precisely because they qualitatively embodied [President] Ford’s distinctive expression.”²²⁸ Finally, in *Stewart v. Abend*, the film *Rear Window* took the heart of the Woolrich short story, as “[t]he motion picture expressly uses the story’s unique setting, characters, plot, and sequence of events.”²²⁹ In each of these cases, qualitative copying involves the taking of particularly valuable portions of a work, be they the highlight of the Denny film, Ford’s unique turns of phrase, or Woolrich’s plot, setting, and characters. In the latter two cases, the Court is highlighting the highest concentrations of creative value specifically imparted by the author. In *KCAL-TV*, the court focuses on the value imparted on the tape by the Denny beating, and not the camera operator. But again, consistent with the discussion of Elvis’ contributions to the *Passport Video* materials, this too is a form of creative value that the law allows to be appropriated, if not necessarily by the value’s true source. In other words, the “heart” of the work tends to lie where the work is most creative.

While more quantitatively or qualitatively significant copying will militate against a finding of fair use, the analysis under the third fair use factor does not lend itself to hard and fast rules.²³⁰ On one hand, some wholesale taking still qualifies as fair use. In *Kelly v. Arriba Soft Corp.*, the search engine reproduced the entirety of the indexed images, yet that reproduction was still

²²⁶ *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1122 (9th Cir. 1997).

²²⁷ *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 563 (1985).

²²⁸ *Id.* at 565.

²²⁹ *Stewart v. Abend*, 495 U.S. 207, 238 (1990).

²³⁰ See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986) (“There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use. In some instances, copying a work wholesale has been held to be fair use, while in other cases taking only a tiny portion of the original work has been held unfair. Questions of fair use may turn on qualitative assessments.”) (internal citations omitted).

deemed fair.²³¹ Hypothetically speaking, the show *Mystery Science Theater 3000* probably also had a claim to fair use despite its reuse of entire films.²³² For those not familiar with the show, it chronicled the life of a janitor marooned on a man-made satellite along with a handful of sarcastic, pop-culture-savvy robots that the janitor had constructed from parts on the ship.²³³ The parties responsible for marooning said janitor on the ship tortured him by compelling him to watch various ignoble contributions to film history, mostly in the B sci-fi genre.²³⁴ The janitor and his robots responded by turning the viewings into a tableau for constant wisecracks at the expense of the film.²³⁵ By its nature, then, *Mystery Science Theater 3000* required a showing of all or a substantial portion of films in order to provide their commentary with sufficient context. In this way, despite significant quantitative copying on an absolute scale, the show probably had a claim to fair use.²³⁶ But where *Kelly v. Arriba Soft Corp.* and *Mystery Science Theater* could legitimately take entire works, some very minimal taking may not be fair. This is certainly true in cases involving the taking of only the quantitatively minimal “core” of a work, as occurred in *KCAL-TV*. But it might hypothetically occur where non-core elements of an unpublished work are published without authorization.²³⁷ It is more reasonable, then, to note that the copying of qualitatively or quantitatively substantial portions of a work make a finding of fair use less *probable*, but such copying is not necessarily fatal to a claim of fair use—depending on the circumstances.

²³¹ 336 F.3d 811, 822 (9th Cir. 2003).

²³² *Mystery Science Theater 3000* (Best Brains, Inc. 1988-99).

²³³ See generally James Poniewozik, *All Time 100 TV Shows*, TIME (Sept. 6, 2007), <http://www.entertainment.time.com/2007/09/06/the-100-best-tv-shows-of-all-time/slide/mystery-science-theatre-3000/>.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ The show acquired licenses for the films that it used, however, so the fair use question here is strictly hypothetical. See *Frequently Asked Questions: The Basics*, MYSTERY SCI. THEATRE 3000, <http://www.mst3kinfo.com/mstfaq/basics.html> (last visited Mar. 18, 2013); *Mystery Science Theatre 3000 (1988-1999): Did You Know?*, IMDB, <http://www.imdb.com/title/tt0094517/trivia> (last visited Mar. 18, 2013).

²³⁷ The *NXIVM* case is not consistent with this; but had the use there not been parodic in nature, the case could have been decided differently.

Much of the potential inconsistency between, on one hand, a finding of fair use, and on the other, substantial quantitative or qualitative copying can be explained by resort to the presence of a transformative use.²³⁸ Parody cases, like *Acuff-Rose*, often require the use of a significant portion of the work to be parodied, and that portion often qualifies as the “heart” of the work in order to trigger enough public recognition of the humor. Yet the Supreme Court has assured in *Acuff-Rose* that this degree of copying is not fatal to a parodist’s fair use claim: “Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart.”²³⁹ Instead, “context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original.”²⁴⁰ The same result was obtained for the transformative use in *Blanch v. Koons*: “It seems to us that Koons’s copying of ‘Silk Sandals’ was indeed reasonable when measured in light of his purpose, to convey the ‘fact’ of the photograph to viewers of the painting.”²⁴¹ Thus, where uses are more transformative in nature, the fair use doctrine demonstrates a willingness to permit more significant degrees of copying, both as a matter of quality—like the recognizable riff and certain lyrics from “Oh, Pretty Woman” in *Acuff-Rose*—or as a matter of quantity, à la the more quantitative taking of *Silk Sandals* in *Blanch v. Koons*.

With a particular view to this background, the general aims of the third factor are fully in line with a fair use analysis intended to weed out the misappropriation of creative value. This is because the amount and substantiality taken from the original work tracks closely to the degree to which the original work serves as a source of creative value in the ultimate work. Where the use is non-transformative, a larger amount of copying quantitatively will lend itself to a higher probability that significant creative

²³⁸ See Leval, *supra* note 56, at 1123 (The third factor “has further significance in its bearing on two other factors. It plays a role in consideration of justification under the first factor (the purpose and character of the secondary use); and it can assist in the assessment of the likely impact on the market for the copyrighted work under the fourth factor (the effect on the market.”)).

²³⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

²⁴⁰ *Id.* at 589.

²⁴¹ *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006).

material has been copied. A similarly significant creative contribution follows when the qualitative query reveals that the core or heart of a work has been taken. Each of these findings develops a more accurate scale to balance the sources of creative value that inform a final work. And this is equally true where the work is transformative. There, as noted above, the transformation diminishes the creative value contributed by the original work, and the amount or substantiality of creative value taken from that work can be augmented (to an extent) accordingly. The scaling of this factor, in other words, is sufficiently sensitive to make a determination as to the amount and substantiality of creative value taken by the would-be fair user. This, in turn, clears up any inconsistency in the operation of the factor were the consideration actually only the raw amount—or raw quality—of material appropriated by the later work. The real consideration is the amount of material appropriated in light of the degree of transformation of the subsequent use.

V. MARKET FOR THE ORIGINAL WORK

Over the discussion of the first three factors, we have had ample opportunity to investigate the various sources of creative value that make up a candidate for fair use. The factors have also enabled consideration of the relative magnitude of creative value due to each of these sources. As the discussion shifts to the fourth factor, which reviews the effect of a potential fair use on the market of the original work, the analysis finally turns to whether the potential fair use marks a “misappropriation” of the creative value of the original. By “misappropriation,” it is meant the “wrongful taking” of the creative value of the earlier copyright holder. Taking alone is obviously not enough, as that would drain fair use of its meaning. Rather, the would-be fair user must wrongfully appropriate some aspect of the market of the original work by infringing on the original author’s ability to capitalize on the exclusive rights granted in section 106. This type of appropriation can happen in one of many ways described below. At all times, however, this analysis maintains a view of the results of the first three fair use factors, allowing that balancing of the sources of creative value to inform the assessment of market

overlap - for it is the market for the creative value of the original work that must be taken for fair use not to apply.

The most obvious case of market harm occurs when the user commercially exploits the work in a market that could have been, or already was, exploited by the original author. This is what happened in *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*²⁴² There, the ABC television network augmented its exclusive Olympics coverage with some film footage on the topic of American Olympian wrestler Dan Gable.²⁴³ The film was the creation of two college students, and ABC never received authorization to use it.²⁴⁴ As one of the students previously worked at ABC, the Olympics broadcast represented a market that the student, and more importantly the University of Iowa that owned the footage, could have tapped. The Second Circuit accordingly felt that:

ABC did foreclose a significant potential market to Iowa - sale of its film for use on television in connection with the Olympics. In fact, because of its exclusive right to televise the games, ABC monopolized that market. When ABC telecast [the wrestling footage] without purchasing the film, it usurped an extremely significant market.²⁴⁵

As a market that the University could have exploited, the market where the work was harmed was a true sub-set of potential legitimate markets for the film. This type of overlap does not lend itself to a finding of fair use, as it did not for ABC.

Market harm, however, is not limited to markets or to cases as flagrant as ABC's infringing use of the wrestling footage. A few other angles allow slightly broader protection against the non-fair user. For one thing, the fair use market factor analysis

requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a

²⁴² 621 F.2d 57 (2d Cir. 1980).

²⁴³ *Id.* at 58-59.

²⁴⁴ *Id.* at 59-60.

²⁴⁵ *Id.* at 62.

substantially adverse impact on the potential market' for the original.²⁴⁶

While ABC's use of the wrestling film, on its own, harmed the potential market for that film, this expansion of the penumbra of market harm also covers the smaller, less significant user whose use does not directly cause serious market harm but would if the use was widespread. The concept of "potential market" can be taken one step further, where even works that have not been exploited commercially still receive protection against exploitation by others. This premise was supported by *Peter Letterese & Associates v. World Institute Of Scientology Enterprises, International*, where the plaintiff

conceded that it ha[d] failed to develop a profitable market for [its book,] *Big League Sales* or derivative works, and w[ould] not do so in the future. Such a concession, however, falls short of establishing that the intrinsic value of the copyright is zero. "Even an author who ha[s] disavowed any intention to publish his work during his lifetime [is] entitled to protection of his copyright, first, because the relevant consideration [is] the `potential market' and, second, because he has the right to change his mind."²⁴⁷

Potential markets accordingly include even the speculative commercial exploitation not yet, and maybe never to be, undertaken by the rightsholder.

In addition to a recognition of harm threatened by speculative widespread use or within untapped markets, the fair use analysis "must take account not only of harm to the original but also of harm to the market for derivative works."²⁴⁸ In *Stewart v. Abend*, for example, the Supreme Court agreed that "re-release of the film [*Rear Window*] impinged on the ability to market new versions of the [Woolrich] story."²⁴⁹ The case, the Court noted,

²⁴⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

²⁴⁷ *Peter Letterese & Assoc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287, 1317 (11th Cir. 2008) (quoting *Worldwide Church of God v. Phila. Church of God*, 227 F.3d 1110, 1119 (9th Cir. 2000)).

²⁴⁸ *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 568 (1985).

²⁴⁹ *Stewart v. Abend*, 495 U.S. 205, 238 (1990).

“presents a classic example of an unfair use: a commercial use of a fictional story that adversely affects the story owner’s adaptation rights.”²⁵⁰ Most derivatives, even those not yet considered by the rightsholder (if *Letterese* is to be believed), significantly expand the market not to be overlapped by subsequent users under the fourth fair use factor.

Further, market harm is not just a matter of raw economic value. As the *Worldwide Church of God* and *Weissmann* cases stand for a broader view of commerciality of use, so too do those cases acknowledge a broader, less-dollars-and-cents-driven view of market harm. In *Worldwide Church of God*, the court acknowledged the difficulties attendant on a fight between nonprofits for a work that did not enjoy a traditional market.²⁵¹ The court did not, however, allow the lack of lost dollars to drain *Mystery of Ages* of the value of its copyright.²⁵² It instead noted, as a policy matter, “If evidence of actual or potential monetary loss were required, copyrights held by nonprofits would be essentially worthless. Religious, educational, and other public interest institutions would suffer if their publications invested with an institution’s reputation and goodwill could be freely appropriated by anyone.”²⁵³ The court redefined the relevant market much in the way that it had categorized the commerciality of the use:

[Philadelphia Church of God]’s distribution of its unauthorized version of [*Mystery of Ages*] thus harms [Worldwide Church of God]’s goodwill by diverting potential members and contributions from [Worldwide Church of God] . . . [*Mystery of Ages*]’s value is as a marketing device; that is how [Philadelphia Church of God] uses it and both [Philadelphia Church of God] and [Worldwide Church of God] are engaged in evangelizing in the Christian community.²⁵⁴

A similarly broad view of “market” aided Dr. Weissmann in the *Weissmann* court’s fourth factor analysis, where Dr.

²⁵⁰ *Id.* (quoting *Abend v. MCA, Inc.*, 863 F.2d 1465, 1482 (9th Cir. 1988)).

²⁵¹ *Worldwide Church of God*, 227 F.3d at 1119.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

Weissmann's article was not couched in terms of its absolute financial value, but in terms of its value in the market for "works of scientific research."²⁵⁵ In view of these comments, a "market" flexibly expands beyond financial transactions, and goes to any possible use from which the copyright holder might reasonably derive a benefit—be it an increase in religious followers or professional prestige. So market harm occurs when the user puts the original work to a use that appropriates the creativity of the original work by using the work in a way that would have been beneficial to the original author. This is particularly true when the use, if permitted, would undermine future incentives to create such work.

While markets may accordingly be defined with sufficient breadth to include non-financial rewards, markets generally do not include those that the original author would not normally develop or pursue.²⁵⁶ The best example of this is the market for parody, which would not be licensed by the usual rightsholder. On this count, the Supreme Court explained in *Acuff-Rose*, "Because 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically', the role of the courts is to distinguish between 'biting criticism that merely suppresses demand and copyright infringement, which usurps it.'"²⁵⁷ Ultimately, then, the question of market harm distills to

²⁵⁵ *Weissmann v. Freeman*, 868 F.2d 1313, 1326 (2d Cir. 1989).

The fact that Dr. Freeman's planned use of [the article at issue] was for the same intrinsic purpose as that intended by Dr. Weissmann not only undermines Dr. Weissmann's ability to enjoy the fruits of her labor, but also creates a distinct disincentive for her to continue to research and publish in the field of nuclear medicine. Hence, to rule that this was a fair use would tend to disrupt the market for works of scientific research without conferring a commensurate public benefit. The district court's error on this fourth factor was in focusing on sales or dollars received, rather than upon the realities of promotion and tenure in an academic setting.

Id.

²⁵⁶ *See* *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994) ("Only an impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets should be legally cognizable when evaluating a secondary use's 'effect upon the potential market for or value of the copyrighted work.'").

²⁵⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (internal brackets and citations omitted). The Court added, "[T]he unlikelihood that creators of

the usurpation of the original author's work in a market that the author could conceivably, and would legitimately, exploit.

Legitimate parody's immunity from causing market harms such harm back into the analysis of the sources of creative value in a work. Parody is one of the forms of transformative use under the first factor, and such transformative uses, in general, diminish the likelihood of cognizable market harm. The Court noted as much:

But when . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it.²⁵⁸

But the statement could equally apply to “genericized” transformative uses like the one at issue in *Blanch v. Koons*. In this way, only the use of the unmodulated creative value of the original work will remain eligible to cause market harm to that original work.

The tie-in between the market factor and the earlier analysis of the sources of a work's creative value has another important facet. As Patry and Perlmutter have noted, “[T]he [market] harm must be caused by the use of copyrightable expression from the plaintiff's work.”²⁵⁹ The *NXIVM* case echoed this thought in stating “the relevant market effect with which we are concerned is the market for plaintiffs' ‘expression,’ and thus it is the effect of defendants' use of that expression on plaintiffs' market that matters, not the effect of defendants' work as a whole.”²⁶⁰ This reasoning, coupled with the limited market harm threatened by transformative uses, links market harm closely to the creativity-driven conclusions of the first three factors, because it is only copyrightable expression that remains eligible for protection from

imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.” *Id.*

²⁵⁸ *Id.* at 591.

²⁵⁹ Patry & Perlmutter, *supra* note 33, at 692.

²⁶⁰ *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 482 (2d Cir. 2004).

subsequent use. And as that expression assumes greater creative value in the form of creativity at higher levels of abstraction, the work receives commensurately greater protection from subsequent use due to its greater creative value.

The link between market harm and creativity can be reconstructed in a slightly more circuitous manner. Specifically, the market harm factor only arises out of the violation of one of the rights granted under section 106 of the Copyright Act, such as the right to distribute the work, the right to display it, or, as noted above, the right to create derivatives of it.²⁶¹ These rights arise as a form of incentive within the utilitarian theory of copyright law. The market harm factor accordingly is animated by an interest in protecting the incentives offered by the copyright law.²⁶² And as a final logical step, such incentives only exist to promote creativity in the form of an optimum opportunity for authors to create new and different works.

The fourth fair use factor, then, assesses misappropriation through market harm in a manner entirely consistent with the balance of sources of creative value exposed over the first three factors. It basically reviews how such different sources of creative value translate to a benefit, either monetary or otherwise, and who should reap such a benefit. In making this assessment, the market factor should carefully consider whether a use is transformative, in which case the creative value in transformed form is not likely to represent the real value point in the market for the would-be fair user's work. As such, the user is not misappropriating the original expression in free-riding off of its creative value, but is reaping an earned reward by operating in a separate market made accessible by the user's own creative expression. Where, by contrast, the material is untransformed, its creative value likely remains unmodulated, and that value may contribute directly to a misappropriation in the market in favor of the subsequent user. The thesis explored in the first three factors

²⁶¹ See Patry & Perlmutter, *supra* note 33, at 687.

²⁶² See Leval, *supra* note 56, at 1124. See also *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1123 (9th Cir. 1997) (noting that unfettered use of LANS's news footage without required licensing would undermine LANS's incentives to conduct its business).

finds its culmination in the fourth factor's view of misappropriation.

CONCLUSION

Through its discussion of the four primary fair use factors, this Article has attempted to demonstrate how the fair use doctrine serves the purpose of detecting the misappropriation of creative value. It accomplishes this goal by weighing the various sources of creative value (or public domain value) contributing to the work of a would-be fair user. Each of the four fair use factors generally tracks an aspect of this weighing. The first factor poses the primary question of whether a use is transformative in nature. This, in turn, allows courts to understand the absolute weight to be given to third party or public domain contributions to the work at issue, measured against the user's contributions. Where a work is transformative, it will usually use such third party content in a way that decreases the absolute creative value of that content—either by genericizing the content or using it in a specifically necessary manner. This, in turn, acts as a sort of fractional coefficient by which the absolute amount of creativity provided by the original work is multiplied and diminished. In other words, it enables courts to afford less weight to the creative input of the third party content as compared to the creative value imparted by the user of that content. Where, by contrast, a use is not transformative, the creative input of the original work will not be modulated in its new setting, and may be weighed for its full contribution.

The remaining factors play off and with this first factor. The second factor, in assessing the type of work relied on by the user, provides another means of evaluating how creative the contribution of the original work is. The third factor scales the amount and substantiality of the original third party work, in the form of its creative input, incorporated in the final work. If the use is transformative, though, this amount may be treated as less important, even where the taking is quite substantial on an absolute level. Where the use is not transformative, the amount and substance of the taking may be reviewed for what they are, without any discount. In view of the first three factors, courts are able to determine in large measure the amount and weight of

creative value that owes its source to prior third party work, as compared to the creative value that owes its origin to the would-be fair user. The market factor then hammers home whether that weighing indicates a “misappropriation” of the third party’s creative value. Where the markets demonstrate close overlap between the original and new work, coupled with significant reliance on third party creative value, such creative value may be said to be misappropriated, and fair use will not be found. But again, where a use is more transformative in nature, the markets for the two works are likely to be disjoint, and the creative value of the original—already a lesser contributor to the overall quantum—can be said not to have been misappropriated. A finding of fair use would follow.

As a closing point, it is worthwhile to consider where this thesis leaves our DJ Girl Talk. A brief consideration of the four fair use factors, in light of the proposed purpose of fair use, should at least sketch the contours of the case. Girl Talk relies on short, recognizable samples of famous songs replayed and relayered to form a larger composition. That his work is cool is not much in doubt. But aesthetics have no place in copyright, Justice Holmes long ago noted,²⁶³ so the fair use question remains open.

The first factor is of critical importance to Girl Talk’s hypothetical case. Specifically, his overall success or failure will largely depend on how the different song snippets are characterized. The question boils down to whether such snippets can be likened to the genericized third party contributions that formed a large part of Koons’s *Niagara*, or whether the snippets still function as they did in their original context. In other words, can the creative value of Girl Talk’s contribution in the form of remixing be weighed favorably compared to the raw material embodied by the underlying snippets; or is Girl Talk’s contribution too insignificant in comparison to a conception of the snippets as highly creative works—where such creativity remains unmodulated? If the former, his use will be found transformative. The rest of the analysis would then slough off in his favor. The second factor would be given little weight despite the creativity of

²⁶³ See *supra* note 96.

the original songs. The third factor would note that the snippets were mere raw material in the larger composition, and accordingly discount the fact that he has used the heart of the original songs by relying on their most recognizable musical phrasings. And due to his transformative use, the market overlap between Girl Talk's work and the original works would be deemed fortuitous. No one, a court would conclude, would purchase Girl Talk's work instead of an original Jay-Z or Outkast song that he samples. And ultimately, Girl Talk's work is fair use.

If, on the other hand, the components of Girl Talk's compositions are found not to be transformed, because they still serve an entertainment purpose whose creative value is not modulated in their new setting, the case would follow less favorably for the DJ. The second factor would still be considered against him. The third factor would shift polarity to focus solely on the fact that Girl Talk borrows the core of the songs and accordingly be weighed against him. And, in view of the first three factors falling against him, the fourth would fall as an inevitable domino, where a court would likely conclude that Girl Talk music usurps either the market for the original songs, or for their derivatives in a techno-style recreation.

I would venture that the case falls on a razor's edge. It is hard to liken the snippets employed by Girl Talk precisely to *Silk Sandals* within the *Niagara* composition. *Silk Sandals* was a truly anonymous part of the larger commentary presented by *Niagara*, like, as noted, an I-beam or bolt in a house; the samples used by Girl Talk help construct an overall composition, but they are the opposite of anonymous—they are recognizable for what they are, parts of widely known pop songs. But those samples do serve as building blocks of a sort, and Girl Talk does contribute a fair measure of his own creative value to the overall composition. With this tension in mind, it is hard to conclude with any certainty that the case would fall one way or the other.

And therein lies the real difficulty of the fair use doctrine. Even if this Article captures a proper high-level view of fair use as a whole, it only represents a step towards understanding. It cannot predict every case with perfect accuracy, nor can it fill in every detail needed to make close decisions. All it provides is a framework, leaving within lots of room to maneuver. Others may

disagree with it, but alternatives are no more sure-fire in their predictions. Such, unfortunately, is the ethereal nature of fair use, a doctrine ill-suited to predictable margins or boundaries.

