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Unbundling Fair Uses

Pamela Samuelson

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Cover Page Footnote

Richard M. Sherman Distinguished Professor of Law, Berkeley Law School. I wish to thank Fordham Law School for the opportunity to give the Levine Lecture, which presented the ideas developed in this Article, especially Benjamin Zipursky for his helpful comments. I also wish to thank for their comments Barton Beebe, Bob Berring, Ann Brick, Paul Geller, Mark Gergen, Daniel Gervais, Neil Netanel, David Nimmer, Aaron Perzanowski, Matthew Sag, Jason Schultz, and Fred von Lohmann, as well as my colleagues in the Copyright Principles Project who have helped me refine my ideas, and Jesse James and Tom Kearney for heroic research assistance.

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UNBUNDLING FAIR USES

*Pamela Samuelson**

The copyright fair use caselaw is more coherent and more predictable than many commentators seem to believe. Fair use cases tend to fall into common patterns, or what this Article calls policy-relevant clusters. The policies underlying modern fair use law include promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and the privacy and autonomy interests of users. If one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair. Policy-relevant clustering is not a substitute for appropriate consideration of the statutory fair use factors, but it provides another dimension to fair use analysis that complements the four-factor analysis and sharpens awareness about how the statutory factors, sometimes supplemented by other factors, should be analyzed in particular contexts.

Parts I through V mainly provide a positive account of how fair use has been adjudicated in a variety of contexts and suggestions about factors that should be given greater or lesser weight in certain fair use policy clusters. Its articulation of the policy-relevant clusters into which the fair use cases typically fall should not, however, be understood as attempting to limn the outer bounds of fair use or to foreclose the development of new policy-relevant clusters. This Article concludes by offering a more normative account of fair use as an integral and essential part of U.S. copyright law that can, in fact, encompass the wide range of fair uses discussed, by recapping the key lessons from this Article's qualitative assessment of the fair use caselaw, and by pointing to some encouraging trends in recent cases.

* Richard M. Sherman Distinguished Professor of Law, Berkeley Law School. I wish to thank Fordham Law School for the opportunity to give the Levine Lecture, which presented the ideas developed in this Article, especially Benjamin Zipursky for his helpful comments. I also wish to thank for their comments Barton Beebe, Bob Berring, Ann Brick, Paul Geller, Mark Gergen, Daniel Gervais, Neil Netanel, David Nimmer, Aaron Perzanowski, Matthew Sag, Jason Schultz, and Fred von Lohmann, as well as my colleagues in the Copyright Principles Project who have helped me refine my ideas, and Jesse James and Tom Kearney for heroic research assistance.

TABLE OF CONTENTS

INTRODUCTION 2539
I. FREE SPEECH AND EXPRESSION FAIR USES 2546
A. *Transformative Uses* 2548
1. Parodies 2549
2. Other Transformative Critiques 2551
3. Transformative Adaptations 2553
B. *Productive Uses in Critical Commentary* 2555
C. *Iterative Copying for Orthogonal Speech-Related Purposes* . 2557
D. *Uses for News Reporting Purposes* 2558
1. Systematically Taking Too Much 2559
2. Interfering with a Core Licensing Market 2560
3. Wrongful Acts 2563
E. *Weighing Factors in the Free Speech/Expression Fair Use Cases* 2565
II. AUTHORSHIP-PROMOTING FAIR USES 2568
A. *Productive Uses* 2570
1. Uses in Social or Cultural Commentary 2571
2. Uses to Support an Argument or Prove a Point 2571
3. Uses to Ground One's Commentary 2572
4. Uses to Set Historical Context 2573
5. Reference Works 2574
6. Incidental Uses 2575
B. *Other Customary Authorial Uses* 2576
C. *Weighing Factors in Authorial Fair Use Cases* 2578
III. USES THAT PROMOTE LEARNING 2580
IV. FORESEEABLE USES OF COPYRIGHTED WORKS BEYOND THE SIX STATUTORILY FAVORED PURPOSES 2587
A. *Personal Uses* 2588
B. *Uses in Litigation and for Other Government Purposes* 2592
1. Evidentiary Uses of Materials Not Prepared for Litigation 2593
2. Uses of Works Specially Prepared for Litigation 2594
3. Weighing Fair Use Factors in Litigation and Investigation Cases 2595
C. *Uses in Advertising* 2597
1. Comparative Advertising 2597
2. Truthful Advertising 2599
3. Market Research 2600
4. Product Labels 2600
5. Weighing Factors in Advertising Fair Use Cases 2601
V. UNFORESEEN USES 2602

A. *Innovative Technologies that Facilitate Personal Uses* 2602
B. *Competition- and Innovation-Promoting Uses in the Software Industry* 2605
C. *Access to Information-Promoting Fair Uses* 2610
CONCLUSION 2615

INTRODUCTION

Fair use has been invoked as a defense to claims of copyright infringement in a wide array of cases over the past thirty years,[1] including when someone has drawn expression from an earlier work in order to parody it,[2] quoted from an earlier work in preparing a new work on the same subject,[3] published a photograph as part of a news story,[4] made a time-shifted copy of television programming,[5] photocopied a document for submission as evidence in a litigation,[6] reverse engineered a computer program to get access to interface information,[7] cached websites to facilitate faster access to them,[8] or provided links to images available on the Internet,[9] just to name a few.[10]

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1. Fair use originated through judicial interpretation. *See, e.g.*, WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (2d ed. 1995) (discussing the origins of fair use). Fair use was first codified in the Copyright Act of 1976. *See* Pub. L. No. 94-553, § 107, 90 Stat 2541, 2546 (codified as amended at 17 U.S.C. § 107 (2006)). Section 107 has three main components: (1) a statement that the fair use of a copyrighted work is not an infringement; (2) a list of six illustrative purposes that may qualify as fair uses (criticism, comment, news reporting, teaching, scholarship, and research); and (3) a set of four factors that courts should take into account when considering whether use of a protected work is fair: (a) the purpose of the defendant's use (including whether it is for commercial or noncommercial purposes), (b) the nature of the copyrighted work, (c) the substantiality of the taking, and (d) the potential for harm to the market for the work. 17 U.S.C. § 107. Section 107 also makes clear that other factors can be taken into account and that the unpublished status of a work does not preclude finding a use to be fair. *Id.*

The commentary on fair use is vast, and, while this Article cites many articles, it is not possible to give credit in this paper to all the thoughtful contributions that have been made by my colleagues, so I apologize in advance if I have neglected to cite all significant writings on this subject.

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

3. *See, e.g.*, New Era Publ'ns Int'l v. Carol Publ'g Group, 904 F.2d 152 (2d Cir. 1990).

4. *See, e.g.*, Núñez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000).

5. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

6. *See, e.g.*, Sturgis v. Hurst, 86 U.S.P.Q.2d (BNA) 1444 (E.D. Mich. 2007).

7. *See, e.g.*, Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992), *amended by* 1993 U.S. App. LEXIS 78 (9th Cir. Jan. 6, 1993).

8. *See, e.g.*, Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006).

9. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007).

10. My colleague Peter Menell has pointed out that there are at least three different realms in which fair use operates. One is fair use caselaw on which this Article mainly concentrates; a second is the ordinary activities of the public, whose frequent unauthorized uses of copyrighted materials are not routinely challenged by copyright owners; a third is intra- or inter-copyright-industry licensing practices. Fair use arguably has the broadest scope in the second realm and the narrowest scope in the third realm, but the scope of fair

A well-recognized strength of the fair use doctrine is the considerable flexibility it provides in balancing the interests of copyright owners in controlling exploitations of their works and the interests of subsequent authors in drawing from earlier works when expressing themselves, as well as the interests of the public in having access to new works and making reasonable uses of them.[11]

Fair use is, however, often decried for the unpredictability said to attend the fact-intensive, case-by-case nature of fair use analysis and/or to result from the lack of judicial consensus on the fundamental principles that underlie fair use.[12] Some commentators have proposed to "fix" fair use by establishing a low-cost administrative tribunal so that putative fair users could explain uses they wished to make of another author's work and get feedback from the tribunal about whether the use is fair.[13] Another has suggested that the U.S. Copyright Office be given more rule-making authority to develop fair use guidelines or create new exceptions.[14] Still others have recommended bright-line, quantitative safe harbors for common kinds of appropriations (e.g., so many seconds of a song, so many words from a text).[15] A fourth approach has been to articulate "best practices" guidelines for groups of creators who typically reuse parts of previous works in developing new ones (e.g., documentary filmmakers).[16] Many commentators have also urged that courts take into account some factors not set forth in § 107, the fair use provision of the Copyright Act of 1976 (1976 Act),[17] including the likelihood of market failure,[18] the plaintiff's

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use in the caselaw realm is nonetheless significant—both in itself and in the role it plays in informing the zone of fairness in the second and third realms.

11. *See, e.g.*, Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 977 (2002) (discussing the two competing public interests).

12. *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004) (characterizing fair use as "the right to hire a lawyer"); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090 (2007); Pierre N. Leval, Comment, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106 (1990); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 263, 280 (noting the "malleability" of fair use factors); *see also* NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 66 (2008) ("Given the doctrine's open-ended, case-specific cast and inconsistent application, it is exceedingly difficult to predict whether a given use in a given case will qualify.").

13. *See, e.g.*, Carroll, *supra* note 12, at 1090–91; David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11 (2006).

14. *See, e.g.*, Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004).

15. *See, e.g.*, Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1489, 1511–18 (2007).

16. *See, e.g.*, CTR. FOR SOC. MEDIA, DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), *available at* http://www.centerforsocialmedia.org/resources/publications/statement_of_best_practices_in_fair_use.

17. Most other countries do not have a general fair use defense to copyright infringement, although they tend to set forth with some specificity exceptions and limitations on copyright for particular kinds of uses. *See, e.g.*, Council Directive 2001/29/EC, art. 5, On the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 (setting forth permissible exceptions and limitations to copyright in the EU). An advantage that lists of exceptions have over fair use is that they are

rationale for insisting that the use must be licensed,[19] chilling effects on free speech,[20] chilling effects on innovation,[21] the impact of network effects,[22] whether the defendant's use was reasonable and customary in her field of endeavor,[23] how "old" the work is,[24] distributive values,[25] and even the fairness of the use.[26]

This Article argues that fair use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns, or what this Article will call policy-relevant clusters.[27] The policies underlying modern fair use

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more specific and predictable; however, fair use has an advantage over exceptions lists in that it is more flexible and adaptable over time.

18. *See, e.g.*, Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 to Avoid the "Fared Use" Fallacy*, 2007 UTAH L. REV. 619, 622–23, 628–31 (discussing the proper role of market failure).

19. *See, e.g.*, James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007) (arguing that fair users frequently request licenses simply to avoid litigation, which in turn increases the scope of the right expected by copyright holders).

20. *See, e.g.*, Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 451 (2007) ("[P]rotecting free speech interests requires us not to be content with the mere existence of [free speech] safeguards, but to think seriously about mechanisms for reducing the chilling effect of uncertainty . . . .").

21. *See, e.g.*, Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 863 (2008).

22. *See, e.g.*, Frank Pasquale, *Breaking the Vicious Circularity:* Sony*'s Contribution to Fair Use Doctrine*, 55 CASE W. RES. L. REV. 777, 802–05 (2005).

23. *See, e.g.*, Michael Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 409–10 (2006).

24. *See, e.g.*, Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003) (arguing that the scope of fair use should increase as a copyrighted work ages).

25. *See, e.g.*, Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005) (discussing distributive concerns).

26. *See, e.g.*, Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990) (arguing that the doctrine of fair use should be "an exemption from copyright infringement for uses that are fair").

27. I am not the first person to suggest that fair uses tend to fall into clusters. Alan Latman's 1958 study of fair use set forth eight clusters of fair uses: (1) incidental uses; (2) review and criticism; (3) parody and burlesque; (4) scholarly works and compilations; (5) personal and private uses; (6) news; (7) use in litigation; and (8) use for nonprofit or government purposes. ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 3, 8–14 (Comm. Print 1960). Latman noted that there were no cases on uses 2, 5, and 7, yet he believed that it was well-accepted that such uses would often be fair. *Id.* William Patry's treatise clusters fair uses by having chapters on fair use cases involving biographies and historical works; public figures and public information; criticism, parody, and fictional characters; reprographic duplications; and off-the-air taping. *See* PATRY, *supra* note 1, chs. 4–8. More recently, Michael Madison proposed eight categories of fair uses: (1) journalism and news reporting; (2) parody and satire; (3) criticism and comment; (4) scholarship and research; (5) reverse engineering; (6) legal and political argument; (7) storytelling; and (8) comparative advertising, information merchants, and personal use. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1645–65 (2004); *see also* Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433, 439–41 (2008) (suggesting that fair use cases tend to fall into clusters, but not attempting a systematic study of fair use clusters).

law include promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth telling or truth seeking, competition, technological innovation, and privacy and autonomy interests of users. If one analyzes putative fair uses in light of cases previously decided in the same policy cluster, it is generally possible to predict whether a use is likely to be fair or unfair.[28] Policy-relevant clustering is not a substitute for appropriate consideration of the statutory fair use factors, but it provides another dimension to fair use analysis that complements the four-factor analysis and sharpens awareness about how the statutory factors, sometimes supplemented by other factors, should be analyzed in particular contexts.

This Article builds on Barton Beebe's recent empirical study of fair use decisions under the 1976 Act.[29] Its qualitative assessment of the fair use

28. The only clusters of fair use cases in which it is quite difficult to predict whether uses are likely to be fair is in the educational and research use clusters where judges have tended to take starkly different perspectives on fair use defenses in these settings, as Part III explains. I recognize that the risk of a wrong guess on fair use is worrisome because litigation can be very costly and courts have broad discretion to award substantial damages if a use is ruled unfair. If a copyright owner has registered its work within three months of the work's first publication, an unsuccessful defendant may have to pay not only its own attorney's fees and a monetary award to the plaintiff, but also the plaintiff's attorney's fees. *See* 17 U.S.C. §§ 412, 504–505 (2006).

29. *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008). The principal "leading cases" to which Barton Beebe refers are the U.S. Supreme Court's decisions in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), and *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). Beebe was kind enough to provide me with a spreadsheet of the cases he studied. I proceeded to read all of these cases in the order in which they had been decided, as well as collecting fair use decisions issued since then and rereading some pre–1976 Act cases with which I had been familiar. As I read the cases, I took notes on different kinds of uses I found. Because I had been studying fair use cases for many years, I expected to find cases that clustered around free speech and free expression uses of copyrighted materials; productive uses of parts of previous works in nonfiction works, such as biographies and documentaries; reverse engineering to achieve interoperability; comparative advertising; and personal use facilitations. But I tried to keep an open mind about uses that I had not previously noticed. There were some surprises—especially in the litigation use cases discussed in Part IV.B. Roughly fifteen percent of the 300-some opinions studied were not "real" fair use cases, most often because they involved ordinary infringement claims as to which a fair use defense was implausible, but sometimes because the main issue in the case was something other than fair use. For examples of the former, see *Palmer v. Garner*, No. 05-95-PA, 2006 U.S. Dist. LEXIS 13044, at *4 (D. Or. Mar. 3, 2006) (not fair use to construct homes designed by plaintiff); *Lindal Cedar Homes, Inc. v. Ireland*, No. 03-6102-TC, 2004 U.S. Dist. LEXIS 18878, at *14–18 (D. Or. Sept. 14, 2004) (not fair use to construct custom homes from plans); *Antioch Co. v. Scrapbook Borders, Inc.*, 291 F. Supp. 2d 980 (D. Minn. 2003) (not fair use to copy stickers of everyday objects in competing book); *Dahlen v. Michigan Licensed Beverage Ass'n*, 132 F. Supp. 2d 574 (E.D. Mich. 2001) (not fair use to copy layout and text of poster on driver rights); *Broadcast Music, Inc. v. Blueberry Hill Family Restaurants, Inc.*, 899 F. Supp. 474 (D. Nev. 1995) (not fair use to perform music in family restaurant); and *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 886 F. Supp. 1120 (S.D.N.Y. 1995) (not fair use to copy verbatim many articles from Russian newspapers). An example of the latter is *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001), in which fair use was raised as a defense, but the main issue—whether a digital product was a privileged "revision"—concerned a different issue. This is consistent with Beebe's conclusion that "if we exclude

caselaw provides support for Beebe's key conclusion that "much of our conventional wisdom about [U.S.] fair use case law, deduced as it has been from the leading cases, is wrong."[30] Courts do not, for instance, routinely "stampede" to conclusions in favor of or against fair use, as some commentators have suggested;[31] the commerciality of a use "ha[s] no significant influence on the outcome;"[32] copying an entire work is "far from dispositive;"[33] reversal rates in fair use cases are not abnormally high;[34] and win rates for fair use defenses in most policy-relevant clusters are generally quite high.[35] This Article also concurs in Beebe's conclusion that "the mass of nonleading cases has shown itself to be altogether worthy of being followed."[36]

Unbundling fair uses into policy-relevant clusters will not cure all of fair use's ills,[37] but unbundling will provide courts with a more useful and nuanced tool kit for dealing with the plethora of plausible fair uses than can be achieved merely by focusing on the four factors set forth in the statute. These are the purpose of the defendant's use, the nature of the copyrighted work, the substantiality of the taking, and the potential for harm to the work's market.[38]

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the 42 opinions that devoted less than 10% of the opinion to the fair use issue . . . , we quickly come to a very respectable [fair use] win rate in the remaining opinions of 45.5%." Beebe, *supra*, at 581. I have omitted the ordinary infringement or other issue-dominant cases from the policy cluster analysis in this Article and have focused instead on cases in which the fair use defense was at least somewhat plausible, even if it ultimately failed to persuade the court.

30. Beebe, *supra* note 29, at 554. Beebe characterizes the leading cases' approach as anecdotal, likens it to the "great men" approach to history, and concludes that it is "fundamentally flawed—both as a descriptive and as a prescriptive enterprise." *Id.* at 553 (citation omitted); *see also id.* at 621. Contrary to the leading cases' conventional wisdom, Beebe found that, for instance, "a finding that the plaintiff's work was [for a noncommercial purpose] appeared strongly to influence a court to find fair use," whereas "the data suggest that a finding that the defendant's use was for a commercial (rather than noncommercial) purpose had no significant influence on the outcome of the [four-factor] test." *Id.* at 554–56. This Article's qualitative analysis of the fair use caselaw agrees with Beebe's conclusions as well.

31. *See id.* at 555; *see, e.g.*, Nimmer, *supra* note 12, at 281 ("Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can.").

32. Beebe, *supra* note 29, at 556.

33. *Id.*

34. *Id.* at 574–75.

35. *Id.* at 609–10 (noting a 62% win rate for critical fair uses and a 78% win rate for news reporting fair uses, although lower win rates for educational and research uses).

36. *Id.* at 622.

37. Particularly in close fair use cases, judges are likely to differ in their predisposition to err in favor or against fair use defenses; some inconsistency in fair use caselaw is inevitable. But that does not mean we should not try to find some consistency where it is there to be found.

38. 17 U.S.C. § 107 (2006). Unbundling fair uses into policy-relevant clusters may also be useful if some nation eventually challenges the consistency of the fair use doctrine with U.S. obligations under the Agreement on Trade-Related Intellectual Property Rights (TRIPs). *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 9, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex

An obvious starting point for any effort to cluster fair uses lies in the preamble to § 107, which sets forth six favored uses: criticism, comment, news reporting, teaching, scholarship, and research. Given the considerable overlap among these uses (e.g., criticism and comment, scholarship and research), it makes little sense to organize the fair use caselaw around each of these six uses. Three main policies underlie the six preambular uses: promoting free speech and expression interests of subsequent authors and the public, the ongoing progress of authorship, and learning.

Part I discusses the fair use caselaw that implicates First Amendment freedom of speech and freedom of expression interests of subsequent authors and the public.[39] Three of the statutorily favored uses—criticism, commentary, and news reporting—tend to be evident in these cases. This part distinguishes among transformative uses, productive uses, and orthogonal uses.[40] Many of the free speech/expression cases involve

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1C, Legal Instruments—Results of the Uruguay Round, 108 Stat. 4809, 1869 U.N.T.S. 299 [hereinafter TRIPs], *available at* http://www.wto.org/english/docs_e/legal_e/27-trips.pdf. Article 13 of TRIPs requires nations to confine its exceptions and limitations to copyright to "certain special cases" that do not undermine a normal exploitation of the work or otherwise interfere with the legitimate interests of rights holders. U.S. commentators have disagreed about how vulnerable the U.S. fair use defense might be to a charge of violating Article 13. *Cf.* Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 COLUM. J. TRANSNAT'L L. 75 (2000) (suggesting the U.S. fair use defense may not be compatible with TRIPs obligations); The Patry Copyright Blog, http://williampatry.blogspot.com/2008/04/fair-use-three-step-test-and-european.html (Apr. 2, 2008, 14:44 EST) (arguing that U.S. fair use is consistent with TRIPs Article 13). In particular, unbundling fair uses makes it easier to argue that fair use accommodates a number of "certain special cases" and that the four factors ensure that this exception does not interfere with a normal exploitation of the work or with other legitimate interests of rights holders.

39. I recognize that "freedom of speech" and "freedom of expression" are sometimes used interchangeably, and, in many instances, an author may be exercising both freedoms at the same time. However, they are sometimes distinct. *Nordstrom, Inc. v. PARAN*, No. 92-1349, 1992 U.S. Dist. LEXIS 9162 (D.D.C. June 26, 1992), which ruled that a protest group's use of the store's ads to illustrate its reason for believing the store was racist, is, in my view, a free speech fair use case. *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001), which ruled that the retelling of the plot of *Gone with the Wind* from a slave's viewpoint was fair use, implicates Alice Randall's right to freedom of expression. The First Amendment protects both speech and expression interests of authors. *See, e.g.*, NETANEL, *supra* note 12, at 32–33.

40. As Part I explains, the Supreme Court's decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994), defined the word "transformative" broadly to encompass uses that truly transform expression from one work in making a new work, as well as iterative copying from a preexisting work in a new work that productively uses that expression, and iterative copying for a different or orthogonal purpose from the original. Transformative, productive, and orthogonal uses, while they overlap in some instances, are nevertheless useful to distinguish in fair use caselaw. The rap parody in *Campbell* exemplifies a truly transformative use. Quoting from writings of L. Ron Hubbard in a critical biography about him in *New Era Publications International v. Carol Publishing Group*, 904 F.2d 152 (2d Cir. 1990), exemplifies a productive use. Copying fifty-one pages from a book in connection with litigation on the fitness of the author to be a parent, as in *Sturgis v. Hurst*, 86 U.S.P.Q.2d (BNA) 1444 (E.D. Mich. 2007), is an example of an orthogonal use. Distinguishing among these types of uses should avoid confusion about what "transformative" really means and how important it should be in fair use cases. *See, e.g.*, Goldstein, *supra* note 27, at 442 (complaining about how blind application of "catch

transformative parodies or satires. Many others involve productive uses, as when a second author quotes from an earlier work in order to criticize it or challenge its author's ideas. Even orthogonal uses (that is, uses for a different purpose than the original) are sometimes fair when motivated by free speech/expression considerations. Most uses in the free speech/expression cluster are fair unless the second author has taken too much, undermined a core licensing market, or engaged in wrongful acts that undermined the claim of fair use.

Part II discusses a wide variety of uses that authors typically make of existing works, including uses for three of the six statutorily favored uses—research, scholarship, and commentary—that copyright law welcomes in order to promote the ongoing creation and dissemination of new knowledge, thereby fulfilling the constitutional purpose of copyright law. Part II discusses how fair use typically balances interests at stake when authors make productive uses of earlier works for purposes such as setting historical context, illustrating some phenomenon being discussed, or proving an assertion. Part II goes on to identify many other types of uses that authors typically make of other authors' works and suggests that authors should have considerable breathing room to make iterative copies of their own and others' works for reasonable and customary purposes. As in the free speech/expression cluster of cases, most authorial uses have been ruled fair unless the putative fair user took more than was reasonable given her purpose or supplanted demand for the first author's work.

Part III recognizes that research, scholarship, and teaching uses are often undertaken to promote learning by persons who are neither scholars nor would-be authors. The legislative history of the 1976 Act indicates that Congress sought to provide some latitude for learning-related fair uses, although legislators were aware that fair uses for teaching and research could, if too broadly construed, undermine incentives to invest in creation and dissemination of teaching and research materials. Sharply divergent views on fair use exist in the educational and research use caselaw, and it is in this cluster that fair uses are least predictable.

Part IV considers three kinds of uses beyond the six purposes set forth in the preamble to § 107 that were nonetheless in contemplation as possible fair uses when Congress adopted the 1976 Act. Congress seems, for instance, to have anticipated that some private or personal uses of copyrighted works would be fair, even if not done for one of the preambular purposes. Although the personal use caselaw is somewhat sparse, it and commentary about it provide some guidance for predicting when personal uses are likely to be fair. In the personal use context, fair use may promote privacy and autonomy interests of users. Uses in litigation or for advertising purposes are also not among the statutorily favored uses. Yet,

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phrases" like "transformative use" reflect the "triumph of mindless sound bite over principled analysis"); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537 (2004).

they too seem to have been in contemplation as possible fair uses, and fair use defenses have often succeeded in such cases. In litigation use contexts, fair use fosters truth seeking and truth telling. In advertising use cases, fair use fosters effective competition and access to truthful information.

Part V considers the role that fair use has played in adapting copyright law to uses that Congress did not and could not have anticipated when enacting the 1976 Act. Sony's Betamax videotape machines, which allowed purchasers to make private use copies of television programs, were just being introduced into the market as Congress was finishing up the copyright revision process. It was also too early in the history of the computer software industry for Congress in 1976 to have foreseen that developers of noninfringing programs would sometimes need to reverse engineer another firm's program in order to make their programs interoperate with the other firm's program. And the Internet and search engine technologies had yet to be invented in 1976. Fair use has proven quite useful in adapting copyright law in response to these and other new technologies so as to promote competition, technological innovation, and greater public access to information and ability to make use of content.[41]

Parts I through V mainly provide a positive account of how fair use has been adjudicated in a variety of contexts and suggestions about factors that should be given greater or lesser weight in certain fair use policy clusters.[42] Its articulation of the policy-relevant clusters into which the fair use cases typically fall should not, however, be understood as attempting to limn the outer bounds of fair use or to foreclose the development of new policy-relevant clusters.[43]

Part VI offers a more normative account of fair use as an integral and essential part of U.S. copyright law that can, in fact, encompass the wide range of fair uses discussed in the Article. It also recaps the key lessons from this Article's qualitative assessment of the fair use caselaw and points to some encouraging trends in recent cases.

I. FREE SPEECH AND EXPRESSION FAIR USES

The U.S. Supreme Court has characterized fair use as a "built-in" safeguard in copyright law for mediating tensions between interests of copyright owners in controlling exploitations of their works and free speech and expression interests of subsequent authors and members of the public.[44]

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41. *See generally* Pamela Samuelson, *Fair Use For Computer Programs and Other Copyrightable Works in Digital Form: The Implications of* Sony, Galoob *and* Sega, 1 J. INTELL. PROP. L. 49 (1993) (emphasizing flexibility of fair use in adapting copyright law as to new technological uses of copyrighted works). Part V of this Article discusses the role of fair use in adapting copyright law to unforeseen uses.

42. For the most part, this Article refrains from speculating about how fair use might apply in situations that have not been adjudicated.

43. *See, e.g.*, Goldstein, *supra* note 27, at 441 (recognizing the danger of fair use category ossification).

44. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

Many commentators believe that fair use is essential to maintaining compatibility of copyright law and the First Amendment,[45] although they are sometimes skeptical about whether fair use is doing as good a job at this task as the Supreme Court seems to believe.[46]

It is sometimes obvious that copyright is being asserted to suppress free speech or expression.[47] In *Nordstrom, Inc. v. PARAN*,[48] for example, a department store claimed that a protest group infringed copyright because it distributed leaflets featuring one of the store's ads next to text explaining why the group thought the store was racist. The court characterized PARAN's use of the ad as "political speech [that] is protected by the First Amendment."[49] When the National Rifle Association (NRA) sued the Handgun Control Federation (HCF) for copying a list of names and addresses of state legislators compiled by the NRA that HCF distributed to its members to urge them to lobby in support of the same gun control legislation that the NRA opposed,[50] the U.S. Court of Appeals for the Sixth Circuit found fair use because the list "was used primarily in exercising HCF's First Amendment speech rights to comment on public issues and to

45. *See, e.g.*, Carroll, *supra* note 12, at 1093 (*Eldred* recognized "the constitutional substrate undergirding the fair use doctrine"); Liu, *supra* note 20, at 432 ("The language in *Eldred* indicates that if . . . Congress abolished the fair use defense, this would be constitutionally problematic."); Stephen M. McJohn, Eldred*'s Aftermath: Tradition, the Copyright Clause, and the Constitutionalization of Fair Use*, 10 MICH. TELECOMM. & TECH. L. REV. 95 (2003); Tushnet, *supra* note 40, at 548.

46. *See, e.g.*, NETANEL, *supra* note 12, at 63 (characterizing fair use as "an exceedingly feeble, inconstant check on copyright holders' proprietary control").

47. Copyright can, of course, chill free speech and free expression even when copyright owners do not sue, for a claim of copyright infringement has especially strong chilling effects on individuals and groups with modest financial resources. *See, e.g.*, MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL: A PUBLIC POLICY REPORT 37 (2005); Lawrence Lessig, *Copyright and Politics Don't Mix*, N.Y. TIMES, Oct. 21, 2008, at A29 (giving examples of speech-suppressing copyright claims asserted as to political ads in recent campaigns).

48. No. 92-1349, 1992 U.S. Dist. LEXIS 9162 (D.D.C. June 26, 1992).

49. *Id.* at *1. The court did not go through a full fair use analysis because the free speech interests at stake so clearly overrode the copyright interests in the case. *See id.* at *2. A fuller analysis is easy to imagine: the purpose of reproducing the ad was noncommercial and an integral part of critical commentary on the store's policies; ads are not as much at the core of copyright as other works; the whole of the ad was copied. On the other hand, it was implausible that the limited reproduction of the ad for purposes of political protest would harm any actual or potential market for the copyrighted work. Moreover, it is unlikely that Nordstrom would have been willing to license this use, even if PARAN had asked to do so, as the ad presumably made the group's critical commentary more powerful.

50. Nat'l Rifle Ass'n v. Handgun Control Fed'n, 15 F.3d 559 (6th Cir. 1994). The three-page list was published as part of two short National Rifle Association (NRA) newsletters aimed at persuading members to oppose gun control measures then pending before the Ohio legislature. *See id.* at 560. The Handgun Control Federation distributed the list to about 200 of its members urging them to support the same bill as the NRA urged its members to oppose. *See id.* The U.S. Court of Appeals for the Sixth Circuit did not address the lower court's alternative holding, namely, that there was insufficient originality in the list to support a claim of copyright. *See id.* at 562 (failing to address the lower court's alternative holding in *National Rifle Ass'n v. Handgun Control Federation*, 844 F. Supp. 1178, 1180–81 (N.D. Ohio 1992)).

petition the government regarding legislation."[51] Free speech considerations were also present in *Belmore v. City Pages, Inc.*,[52] which ruled that a newspaper's publication of a fable that revealed a police officer's racist attitudes was fair use. Similarly, in *Online Policy Group v. Diebold, Inc.*,[53] Online Policy Group asserted that its posting of an email archive about security problems with electronic voting software was fair use. The court observed,

> The email archive was posted or hyperlinked to for the purpose of informing the public about the problems associated with Diebold's electronic voting machines. It is hard to imagine a subject the discussion of which could be more in the public interest. If Diebold's machines in fact do tabulate voters' preferences incorrectly, the very legitimacy of elections would be suspect.[54]

In these and other cases,[55] copyright claims seemed to be pretexts for suppressing free speech.[56]

In other free speech/expression fair use cases, however, copyright claims have been more plausible, and the copyright and the First Amendment interests at stake were more in equipoise. Part I.A discusses the transformative use cases. Part I.B focuses on productive uses for purposes of critical commentary. Part I.C recognizes that some iterative copying for speech-related purposes may also be fair. Part I.D considers the news reporting cases. Fair use defenses have often prevailed when a second author's use implicated free speech and free expression interests. Part I.E offers suggestions about how courts should weigh certain factors when free speech and free expression interests are at stake in fair use cases.

A. *Transformative Uses*

Authors often draw upon preexisting works and transform expression from them in creating new works that criticize, comment upon, or offer new

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51. *NRA*, 15 F.3d at 562. The court concluded that all factors favored fair use in this case. *See id.*

52. 880 F. Supp. 673 (D. Minn. 1995).

53. 337 F. Supp. 2d 1195 (N.D. Cal. 2004).

54. *Id.* at 1203. Indeed, Diebold's copyright claim was so implausible that the court ruled that Diebold had violated the Digital Millennium Copyright Act (DMCA) by giving notice of infringement when it knew or should have known that its copyright claim was unsound. *See id.* at 1204.

55. *See, e.g.*, Payne v. Courier-Journal, 193 F. App'x 397 (6th Cir. 2006) (fair use for a newspaper to quote from an unpublished children's book written by a convicted rapist); Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966) (fair use to publish a critical Howard Hughes biography that drew upon an article of which a Hughes enterprise had purchased the copyright to sue the biography publisher for infringement); Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A., 553 F. Supp. 2d 680 (N.D. Tex. 2008) (fair use to post images on the Internet in connection with Super Future Equities' critical commentary on the bank's business practices); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D.N.H. 1978) (fair use to take fifteen seconds of the other candidate's song as part of political debate).

56. For an array of other examples, see HEINS & BECKLES, *supra* note 47.

insights about those works and the social significance of others' expressions.[57] Parodies are a classic example.

1. Parodies

The Supreme Court did not explicitly invoke the First Amendment, nor free speech or expression values, in its most recent fair use precedent, *Campbell v. Acuff-Rose Music, Inc.*[58] Such concerns nonetheless seem to underlie the Court's ruling that a rap parody version of Roy Orbison's song "Pretty Woman" could qualify as a fair use of that song. The Court repeatedly emphasized that parodies are a form of critical commentary on a first author's work that fair use could protect.[59] Criticism and comment are very much at the heart of speech that is protected by the First Amendment.[60]

Specifically as to "Big Hairy Woman," the Court noted,

> 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true [in the original song], with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.[61]

The Court also noted "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions" as a reason to be skeptical about "the very notion of a potential licensing market"[62] when assessing the harm factor. Biting criticism may suppress demand for the work being criticized, but, unless it usurps demand for the original, it does not harm the market for the first author's work in a copyright-significant way.[63]

Campbell endorsed a sensitive case-by-case analysis in parody cases, in which all fair use factors had to be considered and weighed in conjunction with one another and in which the transformative character of a second

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57. Transformativeness is not only important in fair use analysis, but also in analysis of the derivative work right. *See* R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 467 (2008) (concluding that courts treat transformativeness differently in each context).

58. 510 U.S. 569 (1994).

59. *Id.* at 579–80.

60. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (recognizing that "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

61. *Campbell*, 510 U.S. at 583.

62. *Id.* at 592.

63. *Id.* The Court quoted from *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986), regarding the distinction between criticism that suppresses demand and other uses that usurp demand. *Campbell*, 510 U.S. at 592. "[W]hen a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act." *Id.* at 591–92.

comer's use mattered.[64] The accused work would be considered "transformative" if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[65] Parody "has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[66] The Court emphasized that transformativeness is important not only in assessing the purpose of the defendant's use, but also the nature of the work (parodies, for example, inevitably borrow from well-known expressive works),[67] the amount of the taking (parodies must take a core part of the first work to conjure it up),[68] and the harm to the market (transformative uses are less likely to usurp the market for the first work).[69]

Notwithstanding the Court's unwillingness in *Campbell* to presume that parodies are fair,[70] every subsequent parody case has been adjudged a fair use.[71] Several cases have been more explicit than *Campbell* about the link

64. *See id.* at 577–78. Prior to *Campbell*, there was reason to worry that parodies might not qualify as fair uses because they are often commercial, they draw upon popular works, they aim at "the heart" of those works, and *Sony* and *Harper & Row* had instructed courts to presume harm from commercial uses. The Sixth Circuit's decision in *Campbell* bears witness that this fear was well-founded.

65. *Id.* at 579.

66. *Id.*

67. *Id.* at 586.

68. *Id.* at 586–88.

69. *Id.* at 590–91.

70. The *Campbell* Court cited approvingly several prior parody cases in which fair use defenses had succeeded. *See id.* at 579–80 (citing Fisher v. Dees, 794 F.2d 432 (9th Cir. 1986) ("When Sunny Sniffs Glue" made fair use of "When Sonny Gets Blue"); Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741 (S.D.N.Y.), *aff'd*, 623 F.2d 252 (2d Cir. 1980) ("I Love Sodom" television parody skit made fair use of "I Love New York")); *see also* H.R. REP. NO. 94-1476, at 65 (1976); S. REP. NO. 94-473, at 61 (1975) (recognizing that parodies may be fair uses). But the *Campbell* Court also cited *MCA, Inc., v. Wilson*, 677 F.2d 180 (2d Cir. 1981), in which a parody defense was rejected because the reworking of the plaintiff's song was a broader commentary on 1940s-era society, not a critical commentary on the plaintiff's work. *Campbell*, 510 U.S. at 580. It did not, however, cite *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), which rejected the fair use defense as to a comic book making fun of Walt Disney characters by depicting them as dope-smoking hippies. It is far from clear after *Campbell* that the *Air Pirates* case would be decided the same way today as it was in 1978.

71. *See, e.g.*, Lyons P'ship v. Giannoulas, 179 F.3d 384 (5th Cir. 1999) (parody of Barney the dinosaur assaulted by chicken at sporting event); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998) (poster parodying famous photo of nude actress held fair use); Burnett v. Twentieth Century Fox Film Corp., 491 F. Supp. 2d 962 (C.D. Cal. 2007) (parody of an actress's portrayal of a janitor in animated picture was fair use); Mastercard Int'l, Inc. v. Nader 2000 Primary Comm., Inc., 70 U.S.P.Q.2d (BNA) 1046 (S.D.N.Y. 2004) (Ralph Nader political ad was fair use parody of a MasterCard "priceless" ad); Kane v. Comedy Partners, 68 U.S.P.Q.2d (BNA) 1748 (S.D.N.Y. 2003), *aff'd*, 98 F. App'x 73 (2d Cir. 2004) (brief clip from public access TV show in satirical skit was fair use); Abilene Music, Inc. v. Sony Music Entm't, Inc., 320 F. Supp. 2d 84 (S.D.N.Y. 2003) (granting summary judgment to Sony for parodic song using three lines from a song); World Wrestling Fed'n Entm't, Inc. v. Big Dog Holdings, Inc., 280 F. Supp. 2d 413 (W.D. Pa. 2003) (parody of WWF wrestlers looking like dogs was fair use); Lucasfilm Ltd. v. Media Mkt. Group, Ltd., 182 F. Supp. 2d 897 (N.D. Cal. 2002) (Starballz movie, a pornographic parody, was

between parodic fair uses and First Amendment free speech and free expression values.[72] *Campbell* seemingly viewed satires as less worthy of fair use deference because satires target society at large or some segment of it, rather than the work being drawn from.[73] Yet, satiric uses have sometimes also been ruled fair.[74] In part because the line between parody and satire does not shimmer with clarity and because satires too involve the creative exercise of a second author's imagination, some commentators have questioned whether the parody/satire distinction is consistent with the First Amendment values that fair use is supposed to embody.[75]

2. Other Transformative Critiques

Parody is not the only type of transformative criticism of an existing work that may be a fair use. Two artists relied on fair use to fend off infringement claims arising from their critical transformations of Barbie dolls, an iconic symbol of a certain form of feminine beauty.[76] *Suntrust Bank v. Houghton Mifflin Co.*[77] is, however, the best example of a

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fair use of Star Wars); Williams v. Columbia Broad. Sys., Inc., 57 F. Supp. 2d 961 (C.D. Cal. 1999) (use of clay figure in an Army skit making fun of Navy personnel on TV during a sporting event was fair use); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 868 F. Supp. 1266 (N.D. Okla. 1994), *aff'd*, 95 F.3d 959 (10th Cir. 1996) (fair use protected parody baseball cards).

72. *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1264–65 (11th Cir. 2001) (noting that "copyright does not immunize a work from comment and criticism" because fair use embodies First Amendment values (emphasis omitted)); Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997) ("Parody is regarded as a form of social and literary criticism, having a socially significant value as free speech under the First Amendment."); *Cardtoons*, 95 F.3d at 972 ("[P]arody . . . is a vital commodity in the marketplace of ideas."); Nordstrom, Inc. v. PARAN, No. 92-1349, 1992 U.S. Dist. LEXIS 9162 (D.D.C. June 26, 1992) (protestors were expressing First Amendment free speech rights when distributing leaflets charging the store with racism, so use of ad in leaflet was fair use).

73. *Campbell*, 510 U.S. at 581.

74. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 254–55 (2d Cir. 2006) (satirical use of portion of photo in collage qualified as fair use); *Williams*, 57 F. Supp. 2d at 970–71 (satirical use of clay figure in skit during sporting event was fair use); *cf. Dr. Seuss*, 109 F.3d at 1403 (illustrated book with rhymes on the O. J. Simpson murder case in the style of Dr. Seuss's "Cat in the Hat" book held to be unfair use); Columbia Pictures Indus., Inc. v. Miramax Films Corp., 11 F. Supp. 2d 1179 (C.D. Cal. 1998) (poster and trailer for Michael Moore movie that was substantially similar to "Men in Black" poster and trailer was not fair use as a parody or satire).

75. *See, e.g.*, Liu, *supra* note 20, at 446–47.

76. *See* Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 796 (9th Cir. 2003) (fair use to photograph nude Barbie dolls in sexually suggestive poses seemingly imperiled by kitchen appliances); Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 (S.D.N.Y. 2002) (denying Mattel's motion for summary judgment because customized Barbie dolls in sadomasochistic costumes may be fair use).

77. 268 F.3d 1257. The U.S. Court of Appeals for the Eleventh Circuit struggled over whether *Suntrust* involved a parody within the meaning of *Campbell*. *See id.* at 1268–69. Under a narrow interpretation of this term, a second work would not be a parody unless it was humorous or held the first work up to ridicule. *Id.* at 1268. This conception of parody (which *Campbell*, 510 U.S. at 580, arguably endorsed) would have jeopardized Randall's defense, for there is nothing remotely funny about *The Wind Done Gone* (*TWDG*). *See*

nonparodic transformative critique of an earlier author's work that should qualify as fair use under *Campbell*.

Suntrust sued Alice Randall and Houghton Mifflin, her publisher, for copyright infringement because Randall retold the core story of *Gone With the Wind* (*GWTW*) from the slaves' point of view in her book *The Wind Done Gone* (*TWDG*). *TWDG* appropriated characters, plot sequences, and major scenes, including some verbatim dialogue, from *GWTW*; the defendants claimed fair use.[78]

The court in *Suntrust* began its analysis of Randall's fair use defense by observing that *TWDG* is "a specific criticism of and rejoinder to the depiction of slavery and the relationships between blacks and whites in *GWTW*."[79] Randall's decision to "convey her criticisms of *GWTW* through a work of fiction" was understandable given that she believed that fiction would be "a more powerful vehicle for her message than a scholarly article."[80] *TWDG* was, the court concluded, highly transformative of *GWTW* in recasting numerous scenes and characters and retelling the story from a radically different perspective.[81] To Suntrust's argument that Randall took far more than was necessary to conjure up *GWTW*, the court responded that "*Campbell* did not require that parodists take the bare minimum amount of copyright material necessary to conjure up the original work."[82] While the amount taken from *GWTW* was considerable, it should only be judged excessive if it harmed the market for the work. Randall's book was unlikely to usurp the market for *GWTW*, for the two books were aimed at different audiences.[83] Suntrust had, moreover, failed to show that

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Suntrust, 268 F.3d at 1269 n.23 (noting that Michiko Kakutani's review of *TWDG* characterized it as "decidedly unfunny"). Under a broader conception of parody, however, critical transformations such as *TWDG* could be regarded as parodies, and the Eleventh Circuit found this second interpretation persuasive. *Id.* at 1268–69. It is understandable, though perhaps regrettable, that the Eleventh Circuit felt compelled to shoehorn the *Suntrust* dispute into the parody category. Parody is only one of a number of ways that authors can engage in critical commentary. The court should instead have generalized the *Campbell* fair use framework so that it applies to all works that critically transform previous works by recasting aspects of the first work, remixing expression from it with the second author's expression, thereby shedding new light on the original and contributing to new perspectives on its meaning.

78. *Suntrust*, 268 F.3d at 1259, 1267. Randall and Houghton Mifflin argued that the two works were not substantially similar, but the Eleventh Circuit disagreed. *Id.* at 1267.

79. *Id.* at 1269.

80. *Id.*

81. *Id.* at 1269–70. Judge Stanley Marcus's concurrence further observed that Randall's style was "a marked departure from Mitchell's. *The Wind Done Gone* takes diary form; its chronology is disjunctive and its language often earthy. It is told from an introspective first-person point of view. Mitchell's story, by comparison, is a linear third-person narrative, epic in scope and staid in tone." *Id.* at 1279.

82. *Id.* at 1273.

83. *Id.* at 1275–76.

TWDG or other works like it would significantly harm the market for authorized derivatives.[84]

A thoughtful concurring opinion observed that Suntrust had in the past refused to authorize derivative works of *GWTW* unless the prospective licensee agreed to not discuss miscegenation or homosexuality,[85] both which were key parts of Randall's story. Suntrust was obviously free to preserve *GWTW*'s reputation from such "taint" though its licensing policy, but "it may not use copyright to shield [*GWTW*] from unwelcome comment, a policy that would extend intellectual property protection into the precincts of censorship."[86] Copyright law should not "afford [Suntrust] windfall damages for the publication of the sorts of works that they themselves would never publish, or worse, grant them a power of indirect censorship."[87] This opinion recognized Randall's freedom of expression interests in depicting miscegenation and homosexuality as plausible parts of the story.

3. Transformative Adaptations

Sometimes authors transformatively adapt expression from existing works even when not doing so to criticize the earlier work, as in *Campbell* and *Suntrust*, but rather as an expression of artistic imagination.[88] *Blanch v. Koons*[89] exemplifies fair use caselaw involving transformative recasting of expression. In the course of fulfilling a commission for a large painting, Jeff Koons, a well-known visual artist, selected several photos of women's legs from popular magazines, including one taken by Andrea Blanch.[90] Koons scanned the photos, loaded them into his computer, manipulated and edited them, and then digitally superimposed the edited images onto a

84. *Id.* The court viewed Randall as having made out a prima facie fair use defense, which it thought Suntrust then had to counter with evidence to show its insufficiency. *Id.* at 1275 n.31.

85. *Id.* at 1282 (Marcus, J., concurring).

86. *Id.* at 1283 (internal quotation marks omitted).

87. *Id.*

88. Several commentators think that courts should be much more deferential to borrowing from earlier works as an expression of artistic imagination in copyright cases than they have been thus far. *See, e.g.*, LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008); Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, *in* THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 121, 121–66 (P. Bernt Hugenholtz & Lucie Guibault eds., 2006); David Lange, *Reimagining the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 463, 474; Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 4 (2002). Professor Julie Cohen, in particular, has argued that artists and authors need to be able to draw upon the cultural landscape in which they work in the process of creating new works. Cohen does not think it is necessary to call upon fair use when second comers transformatively recast expression from earlier works. *See* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 362–67 (2005) [hereinafter Cohen, *Place of User*].

89. 467 F.3d 244 (2d Cir. 2006).

90. *Id.* at 246.

background featuring food and pastoral landscapes.[91] Koons then printed the resulting collages so that assistants could render them in paint on large canvasses.[92] Two of the eight legs featured in the final painting derived from Blanch's photo.[93] After seeing the resulting painting, Blanch sued Koons for infringement.[94]

The U.S. Court of Appeals for the Second Circuit ruled that Koons's use was fair.[95] Blanch's photo was "fodder for his commentary on social and aesthetic consequences of mass media," for which "the use of an existing image advanced his artistic purposes."[96] Although Blanch's photo was a creative work, the court gave this factor limited weight in view of its transformativeness, as Koons "comment[ed] on her image's social and aesthetic meaning rather than . . . exploit[ing] its creative virtues."[97] The amount taken was "reasonable . . . in light of [Koons's] purpose, to convey the 'fact' of the photograph to viewers of the painting."[98] Importantly, Blanch admitted she had suffered no harm from Koons's use of the photo.[99] The court also noted that "the public exhibition of art is widely and we think properly considered to 'have value that benefits the broader public interest.'"[100] Because Koons had produced a work of art for public display at major art galleries, this too favored fair use.

The court in *Blanch* did not directly consider the freedom of expression interests of Koons and other neo-pop artists in being able to express themselves by drawing upon images from popular culture. Yet, it was quite sympathetic to the artist's explanation for his decision to reuse expression from the earlier work. This bodes well for fair use as applied to transformative remixes and mashups created by amateurs, such as "Brokeback to the Future," which uses music from the movie "Brokeback Mountain" and clips from "Back to the Future" movies to suggest that the

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91. *Id.* at 247.
92. *Id.*
93. *Id.*
94. *Id.* at 249.
95. *Id.* at 258.
96. *Id.* at 253, 255. The court noted that the test for transformative use "almost perfectly" describes Jeff Koons's work:

> [T]he use of a fashion photograph created for publication in a glossy American 'lifestyles' magazine—with changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, the objects' details, and crucially, their entirely different purpose and meaning—as part of a massive painting commissioned for exhibition in a German art-gallery space. We therefore conclude that the use in question was transformative.

Id. at 253.
97. *Id.* at 257.
98. *Id.* He copied "only that portion of the image necessary to evoke a certain style of mass communication." *Id.* at 258 (citation omitted) (internal quotation marks omitted).
99. *Id.*
100. *Id.* at 254 (quoting Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994)). The court worked consideration of this factor into its analysis of the first fair use factor. *Id.* at 256.

two male lead characters are in love.[101] Remixes and mashups recontextualize parts of existing works, thereby shedding new light on and contributing new insights about the original.[102] Less transformative commercial appropriations are, however, much riskier for artists such as Koons.[103]

B. *Productive Uses in Critical Commentary*

More common than transformative critiques and adaptations have been fair use cases in which second comers have iteratively copied some portion—and occasionally the whole—of another's copyrighted work in preparing a new work critical of the first author's work. Productive uses of this sort have often, though not always, been deemed fair uses.[104] Although

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101. *See, e.g.*, CTR. FOR SOC. MEDIA, CODE OF BEST PRACTICES IN FAIR USE FOR ONLINE VIDEO 8–9 (2008), *available at* http://www.centerforsocialmedia.org/files/pdf/online_best_practices_in_fair_use.pdf (offering guidance for ordinary users who want to make fair use by remixing or mashing up elements of existing works to make new works); *see also* Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497 (2008) (discussing practices of creative communities as relevant to fair use).

102. *See, e.g.*, Tushnet, *supra* note 101, at 504–06. Distributive values may also favor fair uses when amateur creators make noncommercial remixes and mashups. *See, e.g.*, Van Houweling, *supra* note 25. Many studios would, moreover, be unable to give amateurs permission to engage in remixes and mashups of their content because permitting reuses of this sort would implicate a web of contractual obligations to stars and other creative contributors to these works. Transaction costs would overwhelm the ability to clear rights efficiently.

103. The fair use claim in *Blanch v. Koons* contrasted sharply, in the court's view, with Koons's fair use defense in *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992). Art Rogers sued Koons for infringement for making a sculpture based upon Rogers's photograph of a couple sitting with a brood of puppies for a series of artistic works depicting the banality of modern culture. The U.S. Court of Appeals for the Second Circuit ruled that Koons had not made fair use of the photo, in part because Koons had, in its view, slavishly copied the Rogers photo and because Rogers had licensed some reuses of his photograph. *See id.* at 312; *see also* Campbell v. Koons, No. 91 Civ. 6055, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. Mar. 30, 1993) (sculpture made unfair use of a photograph); United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370 (S.D.N.Y. 1993) (sculpture made unfair use of a cartoon character). These decisions predated *Campbell*, and the latest *Koons* decision is far more receptive to fair use claims as to appropriation art than the earlier *Koons* cases were. An excellent recent critique of the earlier *Koons* decisions can be found in Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 465 (2008) ("The value of a Jeff Koons sculpture results from the viewer's desire to be part of the discursive community surrounding the sculpture, not from that viewer's membership (if it exists) in the community around Art Rogers' photograph.").

104. *See, e.g.*, NXIVM Corp. v. Ross Inst., 364 F.3d 471 (2d Cir. 2004) (posting parts of NXIVM's proprietary training seminar materials as part of critical commentary by Ross was probably fair use); Baraban v. Time Warner, Inc., 54 U.S.P.Q.2d (BNA) 1759 (S.D.N.Y. 2000) (fair use to reproduce a photo first used in an ad for nuclear power in a book criticizing efforts to portray nuclear energy in positive light); Rotbart v. J. R. O'Dwyer Co., 34 U.S.P.Q.2d (BNA) 1085 (S.D.N.Y. 1995) (fair use for an editor to publish an article critical of the plaintiff's presentation, quoting liberally from it); Maxtone-Graham v. Burtchaell, 631 F. Supp. 1432 (S.D.N.Y. 1986), *aff'd*, 803 F.2d 1253 (2d Cir. 1986) (antiabortion book reproducing excerpts from proabortion book deemed fair use); Diamond v. Am-Law Publ'g Corp., No. 82 Civ. 6273, 1984 U.S. Dist. LEXIS 20787 (S.D.N.Y. Jan. 4, 1984), *aff'd*, 745 F.2d 142 (2d Cir. 1984) (fair use for a legal magazine to publish a lawyer's

Campbell's capacious definition of "transformativeness" can encompass productive uses, it is appropriate to distinguish transformative critiques, such as parodies, from productive uses for critical commentary. Doing so raises awareness that some iterative copying in a second work may qualify as fair use; it also averts overloading the word "transformative" with too many meanings.

Typical of the productive criticism fair use caselaw is *New Era Publications International v. Carol Publishing Group.*[105] New Era owned copyrights in many works authored by L. Ron Hubbard, the controversial founder of the Church of Scientology. After a former member of this church wrote a highly critical biography of Hubbard that included 121 passages from 48 of the latter's works, New Era sued the author and his publisher for infringement and the defendants claimed fair use.[106]

The purpose of the use in *New Era* was critical commentary. The works from which the critical biographer had drawn were largely factual and informational, which favored fair use. Of the 48 works alleged to be infringed, the court concluded that only miniscule uses had been made of 25; 23 others were short works; and less than 10% of each had been copied.[107] The author had, moreover, filed an affidavit explaining in detail his reasons for each quote in the book, such as "illustrating the alleged gap between the official version of Hubbard's life and accomplishments, and what the author contend[ed] [were] the true facts."[108] Quoting from Hubbard's work was said to be necessary to conjure up the original.[109]

The Second Circuit characterized as "unthinkable" the claim that the critical biography of Hubbard would undercut the market for an authorized favorable biography quoting from the same works.[110] Indeed, a critical biography might well stimulate interest in an authorized biography.[111] Even if a "devastating critique" of Hubbard's life might dampen interest in a New Era-authorized book, copyright law does not redress such harm.[112] The court did not directly invoke the First Amendment, but *New Era* raises free speech and free expression concerns that favored a finding of fair use and cautions against generalized claims of harm to the market in critical commentary cases.

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letter to the editors, even though lawyer tried to restrict permission to publish on condition that whole letter be published if any part was). *But see* Lish v. Harper's Magazine Found., 807 F. Supp. 1090 (S.D.N.Y. 1992) (unfair to publish 1206 words from an author/professor's letter to prospective students, which represented 52% of the text of this letter, even though done for the purpose of criticism).

105. 904 F.2d 152 (2d Cir. 1990).
106. *See id.* at 154.
107. *See id.* at 158.
108. *Id.* at 159.
109. *See id.*
110. *Id.* at 159–60.
111. *Id.* at 160.
112. *Id.*

C. *Iterative Copying for Orthogonal Speech-Related Purposes*

It is sometimes necessary, in order to make an effective critical commentary, to make or publish iterative copies of the whole or significant parts of a copyrighted work for a very different (i.e., orthogonal) speech-related purpose than the original. Although *Campbell* defines "transformative" in a way that encompasses uses for different purposes, copyright law will be more comprehensible and coherent if iterative copying for orthogonal purposes is distinguished from truly transformative uses of prior works.

One recent example is *Savage v. Council on American-Islamic Relations, Inc.*,[113] which ruled that the Council on American-Islamic Relations (CAIR) had made fair use of a conservative talk show host's radio programs when it posted on its website copies of anti-Islamic statements made by Michael Savage on his programs as well as a four-minute audio segment from the programs. CAIR posted the excerpts and audio to criticize Savage's views, to organize a boycott of the program, and to raise money to support its pro-Islamic activities. The court observed that "it was not unreasonable for defendants to provide the actual audio excerpts, since they reaffirmed the authenticity of the criticized statements and provided the audience with the tone and manner in which plaintiff made the statements."[114] *Savage* relied upon *Hustler Magazine, Inc. v. Moral Majority, Inc.*,[115] an earlier orthogonal use for speech-related purposes case.

The dispute in *Hustler* arose because Jerry Falwell and the Moral Majority organization he led became very upset when *Hustler* magazine published a mock Campari ad that depicted Jerry Falwell as recalling his first drunken sexual encounter with his mother in an outhouse.[116] Words were inadequate to illustrate how outrageous the ad was, so the Moral Majority mailed copies of the mock ad to its membership urging them to contribute to a fund to support Falwell's lawsuit against *Hustler* for libel and intentional infliction of emotional distress.[117] *Hustler* sued them for copyright infringement; they claimed their use was fair.[118]

Because the Moral Majority raised almost $1 million from this campaign, the U.S. Court of Appeals for the Ninth Circuit initially regarded the copying as presumptively unfair,[119] but the presumption was overcome in part because the Moral Majority's purpose in mailing copies of the *Hustler* mock ad to its supporters was to help Falwell "defend himself against . . .

113. 87 U.S.P.Q.2d (BNA) 1730 (N.D. Cal. 2008).
114. *Id.* at 1736.
115. 796 F.2d 1148 (9th Cir. 1986) (cited in *Savage*, 87 U.S.P.Q.2d (BNA) at 1733).
116. *Id.* at 1150.
117. *Id.*
118. *Id.*
119. *Id.* at 1152. Presumptions of harm are as inappropriate in orthogonal use cases, such as *Hustler Magazine, Inc. v. Moral Majority, Inc.*, as they are in truly transformative use cases. *See, e.g.*, Núñez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000) (court did not invoke the commercial harm presumption even though the copying was iterative, but orthogonal to the photographer's intended market).

derogatory personal attacks."[120] They had only used what was "reasonably necessary to make an understandable comment" about the *Hustler* mock ad.[121] The Moral Majority was not selling copies of the *Hustler* parody, nor were they using the mock ad in a manner that *Hustler* was likely to license.[122] Hence, there was no harm to the market of concern to copyright law in this case.

D. *Uses for News Reporting Purposes*

News reporting is among the highly valued uses in First Amendment law,[123] as well as among the six favored preambular uses. Although putative fair users for news reporting purposes typically make productive uses of others' works, news reporting cases warrant separate treatment from other productive use cases for three reasons. First, there is often a strong public interest in access to newsworthy information, and sometimes the first author's expression is, in fact, the news. Second, licensing markets tend to be more common among purveyors of news than in other productive use settings, and this affects harm analysis in news reporting cases. Third, publishers of news typically want to scoop other news entities' reporting on the same story, which may affect the first publication interests of the news utterer.

Although news reporting fair use defenses sometimes succeed,[124] they have sometimes foundered when (1) the news entity systematically took more than was necessary to cover the news; (2) the news entity's use undermined the plaintiff's core licensing market; or (3) the news entity engaged in wrongful conduct.[125] Studying the cases aids understanding as

120. *Hustler*, 796 F.2d at 1153.

121. *Id.*

122. *Id.* at 1155–56.

123. *See, e.g.*, N.Y. Times v. United States, 403 U.S. 713 (1971) (news reporting about study concerning Vietnam War policy protected by the First Amendment); Near v. Minnesota, 283 U.S. 697 (1931) (striking down statute that suppressed free speech rights of newspapers).

124. *See, e.g.*, Núñez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000) (fair use to publish a photo of Miss Puerto Rico as part of coverage about whether the photo was pornographic); Diamond v. Am-Law Publ'g Corp., 745 F.2d 142 (2d Cir. 1984) (fair use to publish excerpts of a letter, even though the author had conditioned permission to publish on publication of the whole letter); Nat'l Ass'n of Gov't Employees v. Buci Television, Inc., 118 F. Supp. 2d 126 (D. Mass. 2000) (fair use to broadcast excerpts of a video in critical commentary); Michaels v. Internet Entm't Group, Inc., 48 U.S.P.Q.2d (BNA) 1891 (C.D. Cal. 1998) (broadcast of excerpts from a video of a celebrity couple having intercourse held fair use because of newsworthiness); Rotbart v. J. R. O'Dwyer Co., 34 U.S.P.Q.2d (BNA) 1085 (S.D.N.Y. 1995) (fair use to quote liberally from a presentation in an article criticizing the presentation).

125. Defendants in two of the news-related cases raised First Amendment defenses on top of their fair use defenses. In *Harper & Row, Inc. v. Nation Enterprises*, 471 U.S. 539, 559–60 (1985), the Court cast doubt on whether the First Amendment could ever be asserted as a defense to copyright claims if the use was deemed unfair as a matter of copyright law. *See also* L.A. Times v. Free Republic, 54 U.S.P.Q.2d (BNA) 1453, 1472–73 (C.D. Cal. 2000) (rejecting a First Amendment defense to infringement for posting "biased" news articles on a website and encouraging readers to offer critical comment on them).

to why news-related fair use defenses are riskier than other free speech/expression-related uses.

1. Systematically Taking Too Much

Wainwright Securities, Inc. v. Wall Street Transcript Corp.[126] is typical of the cases in which the systematic appropriation of arguably small quanta of copyrighted research or news material has been ruled unfair. Wainwright prepared in-depth analytical reports evaluating markets and firms in various industries and made predictions about whether investments in those firms would be sound.[127] Wall Street Transcript (WST), a weekly financial newsletter, obtained copies of Wainwright reports and regularly quoted from their penultimate paragraphs.[128] WST claimed this was fair use because its purpose was news reporting, the reports were informational, only small parts were taken, and WST believed Wainwright's clients would still be willing to pay for the in-depth research that underlay its conclusions.[129] The Second Circuit found for Wainwright because the newsletter was systematically taking qualitatively substantial portions of its reports and because Wainwright asserted that its clients would be less willing to pay for the reports if they could get the penultimate paragraphs from the WST, dressed up as news.[130]

Wainwright was influential in another systematic appropriation of news case, *Los Angeles Times, Inc. v. Free Republic*.[131] Free Republic operated an online bulletin board established to allow its conservative Republican members to illustrate and object to liberal bias of leading newspapers.[132] To show this bias, members posted the full text of news articles that had recently appeared in the *Los Angeles Times* and *Washington Post* and invited commentary about the bias.[133]

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126. 558 F.2d 91 (2d Cir. 1977). For related cases, see *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65 (2d Cir. 1999) (commercial service held as an infringer for multiple appropriations from Japanese news stories, from which the service claimed to have only abstracted and copied facts, but which were substantially similar in expression to the Japanese stories); *Chicago School Reform Board of Trustees v. Substance, Inc.*, 79 F. Supp. 2d 919 (N.D. Ill. 2000) (not fair use for a newspaper to reproduce substantial portions of standardized exam questions in articles questioning the test's validity); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 886 F. Supp. 1120 (S.D.N.Y. 1995) (not fair use to republish Russian news articles in a U.S.-based newspaper); *Radji v. Khakbaz*, 607 F. Supp. 1296 (D.D.C. 1985) (not fair use to serialize portions of a former Iranian ambassador's book in a newspaper).

127. *Wainwright*, 558 F.2d at 93.

128. *Id.*

129. *Id.* at 94.

130. *Id.*

131. 54 U.S.P.Q.2d (BNA) 1453 (C.D. Cal. 2000). Free Republic appealed to the U.S. Court of Appeals for the Ninth Circuit, but the parties settled while the case was pending on appeal. *See* Arthur Bright, *LA Times v. Free Republic*, CITIZEN MEDIA LAW PROJECT, June 10, 2008, http://www.citmedialaw.org/threats/la-times-v-free-republic#description.

132. *See Free Republic*, 54 U.S.P.Q.2d (BNA) at 1455–56.

133. *Id.* at 1456.

Free Republic's fair use argument initially seemed quite strong: its purpose was to spur critical commentary; news is intrinsically factual and there is a public interest in broad fair uses as to it; only particular articles, not the whole of the newspapers, were copied, and these were selected because of perceived bias.[134] It was, moreover, unlikely that the newspapers would license such uses, and besides, these papers had already posted the stories online for anyone to see without charge.[135]

Free Republic had, however, promoted the site as a place to read news stories of current interest,[136] not just stories that demonstrated liberal bias. Members frequently posted these articles with little or no commentary, and hence, Free Republic's use was not or only minimally transformative.[137] The systematic nature of the postings of the whole texts of news articles from other sites disfavored fair use.[138] Free Republic did not have to post whole articles in order for its members to engage in critical commentary.[139] Summaries, excerpts, and links to online versions of the articles on host sites were alternative ways to achieve their objectives.[140] The *Times* and the *Post* argued that Free Republic's postings were interfering with their efforts to monetize online versions of their newspapers by advertising and charging fees for access to stories no longer on the papers' sites, as well as with licensing markets with other sites (Why would anyone pay for reposts of the articles if he/she could follow Free Republic's example and get them for free?).[141]

2. Interfering with a Core Licensing Market

The Los Angeles News Service (LANS) won several infringement cases against other news broadcasters because the unlicensed users had interfered with its core licensing market.[142] LANS sued Reuters for making tapes of

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134. *Id.* at 1459.

135. *See, e.g.*, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 357 (1999) (criticizing the *L.A. Times v. Free Republic* decision).

136. *Free Republic*, 54 U.S.P.Q.2d (BNA) at 1461.

137. *Id.* at 1460.

138. *Id.*

139. *Id.* at 1462–63.

140. The *L.A. Times* lawsuit was settled with Free Republic's agreement to link and excerpt stories, rather than posting whole articles. *See* Stipulation for Entry of Amended Final Judgment, *Free Republic*, 54 U.S.P.Q.2d (BNA) 1453 (No. 98-7840), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2002-06-11-Stipulation%20for%20Entry%20of%20Amended%20Final%20Judgment%20Against%20Free%20Republic.pdf.

141. *Free Republic*, 54 U.S.P.Q.2d (BNA) at 1464–66.

142. *See* L.A. News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987 (9th Cir. 1998); L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997) (reversing grant of summary judgment to defendants for unauthorized broadcast of videotapes of Reginald Denny beating); L.A. News Serv. v. Tullo, 973 F.2d 791 (9th Cir. 1992) (television clipping service did not make fair use of news); *see also* Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57 (2d Cir. 1980) (unfair to broadcast portions of a university's video about an athlete in the sports program because such videos are typically licensed); Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 189 (D. Mass. 2007) ("CBS's use of the

portions of its video footage of the beating of Reginald Denny during the 1992 race riots in Los Angeles.[143] Although the beating video was unquestionably newsworthy and Reuters was transmitting it for purposes of news reporting, the Ninth Circuit had very little sympathy for Reuters's fair use defense, emphasizing instead Reuters's commercial purpose and the nontransformative nature of Reuters's use of the tapes. [144] Although Reuters showed only a small portion of the video, the part shown was qualitatively substantial.[145] The court noted that Reuters and LANS were both in the business of licensing audiovisual materials to reporting organizations, and "[w]hen such an organization buys footage from Reuters, it does not need to purchase it from LANS."[146] Hence, Reuters's fair use defense failed.

Yet, LANS did not win every challenge to unauthorized broadcasts of the Denny beating. Several years later, a court found fair use when Court TV broadcast a few seconds of the Denny beating video in connection with its news coverage of the trial of Denny's assailants.[147] Recognizing that images of the Denny beating had been seared into the public's collective memory of the L.A. riots,[148] the court perceived Court TV's use of images from the tape to be more transformative than Reuters's use had been. Court TV was more selective in what it broadcast, some images were part of a montage, and the story was about the trial of those who beat Denny, not about the beating itself.[149] The court pointed out that LANS's argument that the few seconds shown on Court TV were "the heart" of the video was inconsistent with its previous stance that forty-five seconds of the nine-minute video were the heart of the work.[150] The court doubted that Court TV's use had harmed the market for or value of the LANS footage.[151]

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photographs is paradigmatic of the only market the photographs could reasonably have"); McClatchey v. Associated Press, 82 U.S.P.Q.2d (BNA) 1190 (W.D. Pa. 2007) (unfair use because AP distributed photo to firms most likely to be potential customers); New Boston Television, Inc. v. Entm't Sports Programming Network, Inc., 215 U.S.P.Q. (BNA) 755 (D. Mass. 1981) (not fair use to excerpt highlights of sports programming and distribute them via cable network).

143. *Reuters*, 149 F.3d at 990.

144. *Id.* at 993–94.

145. *Id.* at 994.

146. *Id.*

147. L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924 (9th Cir.), *amended and superseded on other grounds*, L.A. News Serv. v. CBS Broad., Inc. 313 F.3d 1093 (9th Cir. 2002).

148. *Id.* at 929.

149. *Id.* at 938–40.

150. *Id.* at 940–42 (internal quotation marks omitted).

151. *Id.* at 942. "Court TV was not competing with LANS to show riot coverage, or even breaking news of the same general type . . . . Moreover, this incident presented no apparent effort to evade licensing outright." *Id.* By the time of this trial, the "hot news" nature of the LANS' video—the period in which its commercial value would have been at its peak—had, moreover, died down considerably. *Id.*

An orthogonal news use of a photograph was ruled fair in *Núñez v. Caribbean International News Corp.*[152] Sixto Núñez, a professional photographer, had taken several pictures of a young woman for her modeling portfolio.[153] After she was named Miss Puerto Rico, some of Núñez's photographs came to light and generated controversy because she was undressed in them.[154] To cover the controversy about whether the pictures were or were not pornographic, *El Vocero* published some of them, and Núñez sued for copyright infringement.[155]

El Vocero was, of course, a commercial enterprise, and in putting Núñez's photos on the front page, it was seeking to maximize revenues. Although there is no newsworthiness exception to copyright infringement,[156] "the pictures [in this case] were the story," and "[i]t would have been much more difficult to explain the controversy without reproducing the photographs."[157] The paper also conducted interviews about the photographs and commented on the controversy, so it was not just using the photos for sensational purposes.[158] Núñez had also shot the photos for a purpose orthogonal to *El Vocero*'s, and this difference in purpose persuaded the court to consider the newspaper's use of the photos as transformative.[159] Anything less than reproducing the whole photo "would have made the picture useless to the story,"[160] and the court concluded that news use of the photos was unlikely to harm Núñez's market.[161] The photographer had, after all, taken the pictures with the expectation that they would be given out for free, and low-resolution reproductions in the newspaper were, moreover, unlikely to satisfy demand for the original photographs, and might, in fact, stimulate it.[162]

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152. 235 F.3d 18 (1st Cir. 2000). For related cases, see *National Ass'n of Government Employees v. BUCI Television, Inc.*, 118 F. Supp. 2d 126 (D. Mass. 2000) (newspaper made fair use of a portion of a television program in covering a controversy), and *Michaels v. Internet Entertainment Group, Inc.*, 48 U.S.P.Q.2d (BNA) 1891 (C.D. Cal. 1998) (broadcaster made fair use of clips from a video of a celebrity having sex in course of news coverage about it).

153. *Núñez*, 235 F.3d at 21.

154. *Id.*

155. *Id.*

156. *Id.* at 22. Courts have sometimes been reluctant to recognize a news reporting exception to copyright claims because this might encourage newspapers to manufacture news in order to justify what would otherwise be infringement, and because journalists and news photographers have to be able to make a living, and a news exception from copyright protection would undermine this goal. *Id.*

157. *Id.* (internal quotation marks omitted).

158. *Id.*

159. *Id.* at 23. The pictures in the newspaper were iterative copies of the original. *Núñez v. Caribbean International News Corp.* is better understood as an orthogonal use case, not as a transformative use case.

160. *Id.* at 24.

161. *Id.*

162. *Id.* at 24–25.

3. Wrongful Acts

A news reporting purpose has sometimes been outweighed by "bad acts," such as obtaining wrongful access to a text and scooping its author's right of first publication, as in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.[163] In this case, an editor of a weekly news magazine, *The Nation*, obtained unauthorized access to a prepublication copy of the memoirs of Gerald Ford that Harper & Row was about to publish.[164] He quickly read through the memoirs, found parts that discussed Ford's decision to pardon Richard Nixon, selected 300 words to quote, and paraphrased other passages in a 2250 word article for *The Nation*, which it defended as fair use.[165]

When the case came to the Supreme Court, the Justices all agreed that *The Nation*'s purpose was news reporting and that fair use was a doctrine that mediated tensions between copyright and the First Amendment.[166] But in almost every other respect, the majority and dissenting opinions disagreed about *The Nation*'s fair use defense.

The majority opinion emphasized the commercial nature of *The Nation*'s appropriation and elevated a dictum from an earlier case—that commercial uses of copyrighted materials should be presumed unfair—to a seemingly hard and fast (un)fair use rule.[167] It disparaged *The Nation*'s intent to "scoop" other news magazines by quoting from the memoirs before their publication.[168] Further polluting the fair defense was that the editor had "knowingly exploited a purloined manuscript."[169] These subfactors outweighed the news reporting purpose. The unpublished nature of the memoirs also weighed heavily against fair use.[170] Although Victor Navasky had quoted only 300 words from a 200,000 word manuscript, the

163. 471 U.S. 539 (1985). *Harper & Row* is not the only case that involved claims of improper conduct by the defendant or unauthorized use of unpublished materials. *See, e.g.*, Nat'l Ass'n of Gov't Employees v. BUCI Television, Inc., 118 F. Supp. 2d 126 (D. Mass. 2000) (defendant's conduct ultimately found fair); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) (unauthorized use of unpublished materials ultimately found unfair).

164. *Harper & Row*, 471 U.S. at 543.

165. *Id.*

166. *Id.* at 561, 590 (news reporting purpose); *id.* at 559–60, 580–83 (discussing fair use and exclusion of ideas and facts).

167. *Id.* at 562 (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)). The endorsement of this presumption set in motion an unfortunate trend in the caselaw that culminated in the *Campbell* decision's repudiation of the presumption, at least in cases in which the second comer's use was transformative. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584–85 (1994).

168. *Harper & Row*, 471 U.S. at 562. The majority also perceived *The Nation* to have manufactured a news event rather than simply covering it.

169. *Id.* at 563.

170. *Id.* at 595 (Brennan, J., dissenting). Subsequent caselaw, took this second presumption against fair use to heart. *See e.g.*, Salinger v. Random House, Inc., 811 F.2d 90, 95 (2d Cir. 1987). Heeding concerns expressed by historians, biographers, and other authors of nonfiction works, Congress was ultimately persuaded to amend 17 U.S.C. § 107 to provide, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

quotes were qualitatively substantial because *The Nation* published "the most powerful passages" from the book.[171] *Time* magazine's cancellation of its plans to publish excerpts from the Ford memoirs was "clear-cut evidence of actual damage."[172] And if such uses became widespread, they would have an adverse effect on the potential market for works such as Ford's memoirs.[173]

The dissenting opinion expressed grave concern about the impact of the majority's ruling on "the broad dissemination of ideas and information copyright is intended to nurture."[174] The editor had not copied the structure of the memoirs nor, with the exception of a few telling quotes, Ford's literary style.[175] At most, the magazine had "paraphrased disparate isolated sentences"[176] and quoted some statements made by others or in government documents in which Ford could claim no copyright.[177] Most of the article reported previously unpublished facts in which Ford also had no copyright interest.[178]

The dissent pointed out that § 107 specifically mentions news reporting as a paradigmatic fair use.[179] *The Nation* had not plagiarized the memoirs nor tried to disguise plagiarism as news, but had rather made a productive use of the memoirs in preparing the article about them.[180] The dissent thought it was a mistake to weigh *The Nation*'s commercial purpose so heavily, given that virtually all news reporting is done for profit,[181] and objected to the majority's characterization of *The Nation* as a thief, for "the most that can be said is that *The Nation* made use of the contents of the manuscript knowing the copyright owner would not sanction the use."[182] Journalists constantly try to scoop one another,[183] so this intent was not malignant.

Taking 300 words from a 200,000 word manuscript was, moreover, a quantitatively small appropriation, especially given that "the quotes are drawn from isolated passages in disparate sections of the work."[184] Qualitatively, Navasky's quoting was also modest, as "[m]uch of the quoted material was Mr. Ford's matter-of-fact representation of the words of others

171. *Harper & Row*, 471 U.S. at 565.
172. *Id.* at 567.
173. *Id.* at 568 (quoting Sony Corp. of Am. v. Universal City Studios, Inc, 464 U.S. 417, 451 (1984)).
174. *Id.* at 579 (Brennan, J., dissenting); *see also id.* at 605 (pointing to risk that the Court's ruling would stifle "robust debate of public issues that is the 'essence of self-government'" (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964))).
175. *Id.* at 584–87.
176. *Id.* at 586.
177. *Id.* at 585 n.9.
178. *Id.* at 583.
179. *Id.* at 591.
180. *Id.* at 591 & n.15, 592.
181. *Id.* at 592.
182. *Id.* at 593.
183. *Id.*
184. *Id.* at 598.

in conversations with him; such quotations are 'arguably necessary adequately to convey the facts.'"[185] Only six of the quotes were "rich in expressive content," but quoting these sentences was not excessive or inappropriate, given the news reporting purpose.[186]

The dissenters gave little weight to *Time*'s cancellation of the contract to publish excerpts, pointing to the Second Circuit's conclusion that *Time* had cancelled the deal for another reason.[187] They were also skeptical of the majority's prediction that ruling in *The Nation*'s favor would be harmful to Ford and his publisher or would set a precedent that would undermine the ability of copyright owners to benefit from popular interest in a public figure's works.[188]

Subsequent developments suggest that the Court in *Harper & Row* may have overreacted to *The Nation*'s misdeeds. In *Campbell*, for instance, the Court repudiated *Harper & Row*'s general endorsement of a presumption of harm as to commercial uses.[189] Congress also repudiated the *Harper & Row* presumption of unfairness for use of unpublished works.[190] Subsequent decisions have also taken a more sympathetic view toward First Amendment concerns in news reporting fair use cases than *Harper & Row* did.[191] Yet, this decision continues to cast a pall over efforts to raise First Amendment concerns in news-related fair use cases.[192]

E. *Weighing Factors in the Free Speech/Expression Fair Use Cases*

In the free speech/expression cases, fair use should not be disfavored when the defendant is a commercial actor, as the overwhelming majority of fair use cases in which free speech and expression values were apparent have involved commercial defendants. Commercial actors are as entitled as noncommercial actors to engage in free speech and expression.

Although some fair use cases mention the First Amendment, free speech and expression values, and the public interest in airing divergent points of

185. *Id.* (quoting from the majority opinion).

186. *Id.* at 598–600. "Had these quotations been used in the context of a critical book review of the Ford work, there is little question that such a use would be fair . . . ." *Id.* at 601.

187. *Id.* at 602–03 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 723 F.2d 195, 208 (2d Cir. 1983)).

188. *Id.* at 602–04; *see also id.* at 597 n.21. *The Nation*'s receipts from newsstand sales of the issue in question were $418. *Harper & Row*, 723 F.2d at 198. *Time*'s readership was unlikely to have been unwilling to buy the issue in which the Gerald Ford excerpts appeared simply because *The Nation* had published its article on the book. People who buy *Time* or subscribe to it do not typically read the left-wing *Nation* magazine (and vice versa); *Time* was, in fact, willing to publish the excerpts even after *The Nation* published its article, although *Time* wanted to push up the publication date. *Id.* at 199.

189. *See supra* note 167 and accompanying text.

190. In 1992, Congress amended § 107 of the Copyright Act to make clear that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." *See* Pub. L. No. 102-492, 106 Stat. 3145 (1992) (codified as amended at 17 U.S.C. § 107 (2006)); *see also supra* note 170.

191. *See supra* notes 55, 124.

192. The most obvious example is *Los Angeles Times v. Free Republic*, 54 U.S.P.Q.2d (BNA) 1453, 1472–73 (C.D. Cal. 2000).

view,[193] courts in future cases should be bolder and more explicit in their willingness to consider these concerns in weighing fair use claims within this cluster. Courts should also be on the lookout for assertions of copyright that are motivated by a desire to censor points of view with which the rights holder disagrees or to achieve noncopyright goals such as protecting the rights holder's privacy or reputation.[194] Courts should further pay attention to whether a ruling in a copyright owner's favor will have a chilling effect on free speech and free expression activities by other authors, speakers, and publishers.[195] Courts should also recognize the freedom of expression interests of those who artistically recast iconic figures, as in the *Mattel* cases.[196] Such transformative uses shed new light on existing works and allow culture to evolve.

While it is often necessary to copy a prior work's expression to parody it, parody is not the only kind of transformative or productive use as to which reproducing qualitatively significant parts may be necessary to engage in criticism, commentary, or news reporting. Sometimes a second comer needs to reuse parts of earlier works to prove a point to an audience, as in *Hustler*,[197] to offer a different perspective on the earlier work, as in *Suntrust*,[198] or to demonstrate that a work's author is unworthy of respect, as in *New Era*.[199]

Courts should give greater weight to the public's interest in access to the information the defendant's use would make available. *Harper & Row* cast some doubt on how much weight should be given to the public interest in fair use cases,[200] but that decision should not be understood as saying that the public interest in access to the defendant's work is irrelevant, but only

193. *See, e.g.*, Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1263–65 (11th Cir. 2001).

194. *See, e.g., id.* at 1282–83 (trustee's interests in avoiding the depiction of miscegenation and homosexuality in subsequent works not a reason to deny fair use); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 116 n.7 (2d Cir. 1998) (reputational interests of a photographer as to her celebrity clients not cognizable as copyright harms); Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 309, 311–12 (2d Cir. 1966) (Howard Hughes's interests in maintaining privacy not a sound reason to deny fair use for borrowing by a biographer).

195. *See, e.g.*, Liu, *supra* note 20, at 435–38 (pointing out that courts in defamation cases take this factor into account when assessing liability for speech acts).

196. *See* Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 806 (9th Cir. 2003); Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315 (S.D.N.Y. 2002).

197. *See supra* notes 117–22 and accompanying text.

198. *Suntrust*, 268 F.3d at 1265.

199. New Era Publ'ns Int'l v. Carol Publ'g Group, 904 F.2d 152, 154 (2d Cir. 1990).

200. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) ("It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. . . . [T]o propose that fair use be imposed whenever the social value [of dissemination] . . . outweighs any detriment to the artist[] would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it." (second, third, and fourth alterations in original) (quoting 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, 1615 (1982)) (internal quotation marks omitted)).

that it should not override all other considerations, as the Court's later *Campbell* decision makes clear.[201] Particularly in cases involving free speech and free expression values, courts can and should give more consideration to the public interest in access to the defendants' expression.[202]

Consistent with First Amendment values, courts should also heed market failure-based arguments that licensing markets are unlikely to develop to authorize critical commentary or unwelcome transformations.[203] Courts should consider whether a copyright owner's unreasonable withholding of a license for critical commentary or news purposes or its insistence on unreasonable terms might, in conjunction with other factors, weigh in favor of fair use. Effective critical commentary may have a debilitating effect on the market for the criticized work, but this is not the kind of market harm that courts should consider as disfavoring fair use. Yet, when critical commentary or news reporting stimulates demand for the original, courts should consider this as favoring fair use. *Campbell* rightly recognized that a putative fair user's request for a license may be motivated by a desire to avoid litigation, rather than being a concession that the use should have been licensed.[204]

Because fair use is the main mechanism in copyright law for balancing free speech/expression interests of second comers and the public against the commercial interests of authors and commercial exploiters,[205] it would be consistent with the Court's First Amendment jurisprudence for courts to require plaintiffs to show actual harm to their markets or at least a meaningful likelihood of harm if the defendants were permitted to make specific uses when free speech/expression interests are clearly present.[206]

Although *Harper & Row* has had a greater dampening effect on fair use defenses in news-related cases than is desirable,[207] courts should continue

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201. However, *Campbell* endorsed considering the public interest in access to the defendant's work as a factor that should be considered in fair use cases. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994) (quoting Leval, *supra* note 12, at 1132). Other fair use decisions have done so. *See supra* note 100 and accompanying text.

202. The public interest should not, of course, override all other considerations. Public interest defenses were unsuccessfully raised in some cases involving test materials. *See, e.g.*, Chi. Sch. Reform Bd. of Trs. v. Substance, Inc., 79 F. Supp. 2d 919 (N.D. Ill. 2000) (not fair use to publish a school board's tests to generate debate over the tests' validity); Coll. Entrance Examination Bd. v. Pataki, 889 F. Supp. 554 (N.D.N.Y. 1995) (not fair use for state to mandate that standardized tests be made publicly available).

203. *Campbell*, 510 U.S. at 592 ("[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.").

204. *Id.* at 585 n.18; *see also* Gibson, *supra* note 19, at 890–901.

205. The idea/expression distinction is, of course, another copyright doctrine that mediates tensions between the First Amendment and copyright values. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003). However, authors rarely claim that the copying of ideas or information constitutes infringement; in practice, fair use is the most important mechanism in U.S. copyright law for balancing First Amendment and copyright interests.

206. *See, e.g.*, Liu, *supra* note 20, at 448.

207. *See supra* notes 167–70 and accompanying text.

to consider whether systematic appropriations of key parts of others' publications pose risks of market-destructive consequences, as in *Wainwright*;[208] whether a defendant's uses are interfering with core licensing markets for the plaintiffs' works, as in some of the *L.A. News* cases;[209] and whether wrongful acts have allowed an unfair "scooping" of the author's first publication, as in *Harper & Row*.[210] Without protection against these kinds of uses, there may well be too little incentive to invest in creation of newsworthy content.

Even if a free speech/expression use is ultimately deemed infringing, perhaps the defendants should only have to pay actual damages (e.g., a reasonable license fee),[211] rather than being subject to a large award of statutory damages.[212] This option would be more consistent with First Amendment-tailored rules in other bodies of law that regulate speech.[213]

II. AUTHORSHIP-PROMOTING FAIR USES

Some overlap inevitably exists between putative fair uses that implicate free speech/expression values and uses that this part regards as authorship-promoting.[214] Free speech/expression values are most obvious in fair use cases involving parodies and other critical commentary; this is in part because rights holders may be asserting copyright to suppress the critique. Free speech and free expression values are also implicated when later authors reuse parts of existing works in a neutral way or to praise them. It should not, however, be necessary to justify every authorial use of earlier authors' works as First Amendment-protected before the use can be adjudged fair.[215] The First Amendment is not the only, and perhaps not

208. *See supra* notes 126–30 and accompanying text.

209. *See supra* notes 142–51 and accompanying text.

210. *See supra* notes 163–88 and accompanying text.

211. *Campbell* endorsed the idea of awarding compensatory damages in lieu of injunctive relief in close, but ultimately unsuccessful, fair use cases. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994).

212. *See generally* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 14.01–.04 (2008) (comparing remedies including actual damages, disgorgement of defendant's profits, and statutory damages).

213. *See, e.g.*, Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998) (discussing the relevance of First Amendment procedural rules for copyright).

214. Nor do I mean to suggest that all fair use cases must fall within only one of the categories I have identified. A second author may have made free expression uses of some parts of another author's work and productive uses of other parts. It will also sometimes be unclear whether a use is for free expression purposes or just a productive use; the fact that lines are sometimes difficult to draw does not mean one should not try to draw them, especially when, in many cases, this distinction will be relatively straightforward.

215. Other constitutional values may arise in some fair use cases. Iterative copies that authors make for private study purposes, for example, may implicate privacy rights. While it may be a stretch to say that private study copies are within the penumbra of constitutional privacy rights, privacy values may nonetheless be significant in some authorial fair use cases. *See, e.g.*, Cohen, *Place of User*, *supra* note 88, at 349–50.

even the most significant, constitutional provision that underlies fair use in copyright law.

Fair use promotes the constitutional purposes of copyright by allowing second authors to make productive uses of earlier works, drawing upon expression from them in a way that advances the "progress of Science and useful Arts."[216] Fair use "'permits . . . courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'"[217] Society benefits when scholars and other authors make fair uses, for, if "the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits."[218] It is thus unsurprising that five of the six favored uses in § 107—criticism, comment, news reporting, scholarship, and research—directly promote the ongoing progress of authorship and knowledge creation.[219]

This part discusses several types of uses that authors routinely make of copyrighted works that may qualify as fair. Part II.A discusses cases that analyze whether a second author's productive use of another author's works is fair. The overwhelming majority of the productive use cases turn on whether the subsequent author took too much from a first author's work or invaded a core licensing market. Part II.B discusses other types of uses that authors frequently make, and need to make, of preexisting works.[220] Among the many reasonable and customary fair uses of copyrighted works regularly undertaken by authors are taking detailed notes on an earlier author's work to analyze it, taking photographs of sculptures on which an author will be writing a commentary, and maintaining a portfolio of one's own work to show to new clients.

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216. U.S. CONST. art. I, § 8, cl. 8; *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (noting that the goal of copyright is to "promot[e] broad public availability of literature, music, and the other arts"). Copyright's goal overlaps with and complements the First Amendment's goal of fostering "the widest possible dissemination of information from diverse and antagonistic sources." *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

217. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)). It is well-recognized that "in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4436).

218. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 477–78 (1984) (Blackmun, J., dissenting). Justice Harry Blackmun thought that without this social benefit, fair use should not apply. *Id.*

219. *See* 17 U.S.C. § 107 (2006); *see also supra* note 1.

220. For example, 17 U.S.C. § 107 refers to research and classroom teaching as other purposes for which fair use may be available; such uses are likely to involve iterative copying. In other countries, private study and research copying is dealt with through personal use or fair dealing exceptions to copyright. *See* LATMAN, *supra* note 27, at 25 (discussing fair dealing and personal use exceptions in foreign countries).

Agents of authors may also need to rely on fair use as a shelter for authorship-promoting activities, such as when a research assistant makes photocopies of pages from a book for a scholar's research, a dean authorizes copying of a scholar's articles in support of a promotion case, or a gallery selling the author's work makes an illustrated brochure. Iterative copies such as these may not always be fair use—but often they will and should be, because they promote authorship, other interests of authors, and/or the ongoing advance of knowledge.

A. *Productive Uses*

Authors make many types of productive uses of other authors' works. Productive users typically use copyrighted materials to engage in social, political, or cultural commentary, to illustrate an argument or prove a point, to provide historical context, to prepare reference works, and/or as incidental byproducts of capturing some media content in the process of filming something else.[221] Productive uses of copyrighted materials may also include memorializing, preserving, or rescuing an experience, event, or cultural phenomenon.[222] As long as productive users are careful about how much they take from copyrighted works in relation to their purpose, productive uses are likely to be fair.[223] Of the productive use cases in which the uses have been deemed unfair, virtually all involved taking more than was justifiable in light of the purpose or supplanting a market that the first author was entitled to control.[224]

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221. CTR. FOR SOC. MEDIA, *supra* note 16.

222. CTR. FOR SOC. MEDIA, *supra* note 101, at 7–9. Noncommercial posting of content may also be important to launch discussion about it. *Id.*

223. *See, e.g.*, Norse v. Henry Holt & Co., 991 F.2d 563 (9th Cir. 1993), *remanded to* 847 F. Supp. 142 (N.D. Cal. 1994) (fair use to quote from letters in a biography); Wright v. Warner Books, Inc., 953 F.2d 731 (2d Cir. 1991) (biographer made fair use of a deceased author's writings); Narell v. Freeman, 872 F.2d 907 (9th Cir. 1989) (fair use to quote and paraphrase some portions of a historical work on Jews in San Francisco in a novel); Kramer v. Thomas, No. CV 05-8381 AG, 2006 U.S. Dist. LEXIS 96714 (C.D. Cal. Sept. 28, 2006) (use of part of video footage in a DVD on how to raise money for film projects held fair use); Williamson v. Pearson Educ. Inc., 60 U.S.P.Q.2d (BNA) 1723 (S.D.N.Y. 2001) (fair use to quote and paraphrase text from a General George S. Patton, Jr. biography in a corporate leadership book); Penelope v. Brown, 792 F. Supp. 132 (D. Mass. 1992) (fair use to quote and paraphrase scholarly work on syntax and diction in author's nonfiction work on writing); Rokeach v. Avco Embassy Pictures Corp., 197 U.S.P.Q. (BNA) 155 (S.D.N.Y. 1978) (movie made fair use of quotes from a research report on delusional statements made at a mental hospital).

224. *See, e.g.*, Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 629 (9th Cir. 2003) (excessive use of entertainment video footage in a documentary); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) (sculpture based on a photograph); Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (excessive quoting and paraphrasing in a reference work); Byrne v. British Broad. Corp., 132 F. Supp. 2d 229 (S.D.N.Y. 2001) (fifty-second use of a song in unrelated news story); Psihoyos v. Nat'l Exam'r, 49 U.S.P.Q.2d (BNA) 1766 (S.D.N.Y. 1998) (photo in magazine); Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351 (N.D. Ga. 1979) (stage version of a parody/satire of *Gone with the Wind*).

1. Uses in Social or Cultural Commentary

Documentary filmmakers often engage in social or cultural commentary, and, in so doing, they may "quote" from earlier works, whether they be texts, music, photographs, or video. The more substantial the use and the more prominently the prior work's expression is featured, the less likely a use is to be fair, but reusing short sequences can sometimes be a very important contribution to the work's message. In *Lennon v. Premise Media Corp.*,[225] for example, a documentarian used fifteen seconds of John Lennon's song "Imagine" in a film about the theory of intelligent design as an alternative to the Darwinian conception of evolution. The film is critical of scientists for having closed minds about—indeed, attempting to suppress serious discussion about—intelligent design as an explanation of the origin of life and the world in which it flourishes.[226] Ten words from the Lennon song—"Nothing to kill or die for / And no religion too"—were used in the film in conjunction with interviews of speakers who expressed negative views about religion and expressed hope that science will diminish the role of religion in society.[227] Lennon's widow sued the filmmaker for copyright infringement.[228] The court ruled the filmmaker's use of Lennon's song was fair because Premise was using part of an earlier work as fodder for social commentary, the use was reasonable in light of the filmmaker's purpose,[229] and the court was unconvinced the use would harm the market for more traditional licensing of the song.[230]

2. Uses to Support an Argument or Prove a Point

Authors sometimes need to use expression from earlier works to support an argument or prove a point. In such cases, the earlier expression becomes a "fact" that must be conjured up as evidence.[231] A classic instance is *Time, Inc. v. Bernard Geis Associates*.[232] Bernard Geis published a book by Josiah Thompson, *Six Seconds in Dallas*, that sought to prove Thompson's theory that Lee Harvey Oswald was not the lone gunman responsible for assassinating President John F. Kennedy.[233] After *Time* refused to license twenty frames from the Zapruder film for the book, Thompson and Geis

225. 556 F. Supp. 2d 310 (S.D.N.Y. 2008).
226. *Id.* at 317–18.
227. *Id.*
228. *Id.* at 316.
229. *Id.* at 326–27.
230. *Id.* at 327.
231. *See* Arica Inst., Inc. v. Palmer, 761 F. Supp. 1056 (S.D.N.Y. 1991), *aff'd*, 970 F.2d 1067 (2d Cir. 1992) (fair use for psychology professor to reproduce the nine-pointed star surrounded by a circle that Arica's founder had used to depict ego fixations of humans and how to cure them).
232. 293 F. Supp. 130 (S.D.N.Y. 1968).
233. *Id.* at 131–32.

arranged for sketches of the frames to be published in the book in order to prove Thompson's theory.[234]

The court concluded that the defendants had made fair use of the frames, in part because "[t]here is a public interest in having the fullest information available on the murder of President Kennedy."[235] It agreed with Thompson that the sketches made his theory about the assassination easier to understand.[236] People would buy Thompson's book to learn about his theory of the assassination, not to see sketches of the Zapruder frames.[237] *Time*'s refusal to license use of the frames on any terms cut in favor of fair use, especially after *Time* refused Geis's offer to surrender all profits from the book to pay for its use of the photos.[238]

3. Uses to Ground One's Commentary

Some uses of prior works are necessary to enable the reader or viewer to have a fuller understanding of the phenomenon on which a second author wants to comment. An example is *Haberman v. Hustler Magazine, Inc.*,[239] which involved the reproduction of two works of art in connection with a commentary on them. James Haberman, a professional artist and photographer, made and sold copies of these works as photographic works of art and as postcards.[240] *Hustler* published small-sized images of them along with a short positive comment on them.[241] The court's fair use analysis took into account that the "works in question are graphic and unusual . . . [and] could not be adequately described by words."[242] Also

234. *Id.* at 135, 137–38. A factor that cut against Josiah Thompson's fair use defense is that he had obtained copies of the Zapruder frames while working at *Life* magazine, knowing that making copies of the frames was contrary to his employment agreement. *See id.* at 135–36. Yet several *Life* editors knew of this copying and did not object. *Id.*

235. *Id.* at 146. While the court did not invoke the First Amendment in its analysis of the fair use defense, some commentators have viewed *Time, Inc. v. Bernard Geis Associates* as an example of fair use being used to vindicate First Amendment interests. *See, e.g.*, Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 300–01 (1979) ("It is hard to imagine a more compelling case for requiring free access to a copyrighted work. A President had been murdered. The official report on his death [had been met] with a rising tide of skepticism and suspicion. To have a meaningful public debate, it seemed crucial to test and illustrate opposing theories against the actual visual record of the events.").

236. *See Geis*, 293 F. Supp. at 146.

237. *Id.*

238. *Id.* *Time*'s refusal to license also undercut its harm to the market argument, as there was no market for these frames. *See id.*

239. 626 F. Supp. 201 (D. Mass. 1986). James Haberman also sued *Hustler* for defamation and invasion of privacy because he did not want his works to appear in *Hustler* and thought the unauthorized appearance of his works there would harm his reputation. These concerns also permeated his copyright claim, for the court went on at some length about why it should not take into account the merits or quality of *Hustler* magazine. *Id.* at 208–10.

240. *Id.* at 204–05; *see also id.* at 217–18 (reproducing the works as exhibits to the decision).

241. *Id.* at 205–06.

242. *Id.* at 212.

significant was that *Hustler* had attributed Haberman as the author and even provided his address for readers who might want to purchase copies of his works,[243] and indeed sales of the two works in question had risen substantially after *Hustler*'s publication of the images.[244] The court ruled that *Hustler*'s use had been fair.

4. Uses to Set Historical Context

Authors of nonfiction works may also use copyrighted materials as a way to set historical context. In *Bill Graham Archives v. Dorling Kindersley Ltd.*,[245] for instance, a book about the Grateful Dead featured a chronological time line with "a collage of images, text, and graphic art designed to simultaneously capture the eye and inform the reader."[246] It included seven small-scale images of Grateful Dead concert posters in which the Bill Graham Archives owned copyrights.[247] Dorling Kindersley initially sought to license rights to the images, but because it thought the Archives was asking an unreasonable price, Dorling Kindersley reproduced the images without permission.[248] The Archives then sued Dorling Kindersley for infringement, and Dorling Kindersley asserted fair use.[249]

The Second Circuit noted that biographical works and cultural histories, such as this one, were types of works that typically "require incorporation of original source material for optimum treatment of their subjects."[250] Dorling Kindersley used the images "as historical artifacts to document and represent the actual occurrence of Grateful Dead concert events featured on *Illustrated Trip*'s timeline."[251] This was transformative because it was "plainly different" from the original purpose for which the posters were created.[252] Dorling Kindersley also melded the images into a collage with commentary that enhanced the reader's understanding of the Grateful Dead chronology.[253] *Illustrated Trip* did not need to discuss the artistic merits of the posters to make its use productive.[254]

The Archives argued that other factors disfavored fair use because the posters were creatively expressive, seven entire works had been exactly copied, and it had lost licensing revenues.[255] The Second Circuit disagreed. The artistic character of the posters did weigh against fair use, but the court

243. *Id.* at 211.
244. *Id.* at 212–13. The court was not persuaded that *Hustler*'s use had interfered with any licensing market either. *Id.*
245. 448 F.3d 605 (2d Cir. 2006).
246. *Id.* at 607. The book was entitled *Grateful Dead: The Illustrated Trip*. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 609.
251. *Id.*
252. *Id.*
253. *Id.* at 609–10.
254. *Id.* at 611.
255. *Id.* at 612–14.

gave this less weight because Dorling Kindersley wasn't trying to exploit the poster images as artistic works, but rather to illustrate historical context.[256] The reduced size of the images neutralized the amount copied factor because "the visual impact of their artistic expression is significantly limited" by the reduced size; moreover, displaying small images was necessary to achieve the cultural history objectives of the *Illustrated Trip*.[257] Dorling Kindersley's use of the posters had no effect on the Archives' primary market, i.e., selling originals and copies of the posters.[258] The potential for harm to derivative markets had, of course, to be considered, but the Second Circuit emphasized that this principle should be applied cautiously.[259] Otherwise, every use that a plaintiff might want to license would establish harm to a market and fair use would be impossible to prove. Copyright owners cannot, the court concluded, preempt markets for productive uses of their works, such as Dorling Kindersley's use of the posters as part of its cultural history of this famous band.[260]

Documentary filmmakers have often made similar fair uses of preexisting materials to set historical context or illustrate a phenomenon on which their films are focused.[261] However, some fair use defenses have faltered when the filmmakers made too extensive use of earlier materials.[262]

5. Reference Works

Steven Vander Ark is a serious fan of *Harry Potter* books, so much so that he has devoted hundreds of hours to compiling an online information resource that he calls the *Harry Potter Lexicon*. J. K. Rowling, author of the *Harry Potter* books, has given Vander Ark an award for the *Lexicon* and admitted that she herself has used his lexicon to remind herself of some details from previous novels. When Vander Ark contracted with RDR Books to publish a print version of a substantial portion of this online resource, Rowling sued RDR and him for copyright infringement, and they asserted fair use as a defense.[263]

The trial court accepted that the *Lexicon* was a reference work that included entries for many types of information in the *Harry Potter* books, such as kinds of spells cast, magical devices, different types of creatures,

256. *Id.* at 612–13.
257. *Id.* at 613.
258. *Id.* at 614.
259. *See id.* at 614–15.
260. *Id.*
261. *See, e.g.*, Hofheinz v. Discovery Commc'ns, Inc., 60 U.S.P.Q.2d (BNA) 1845 (S.D.N.Y. 2001) (fair use to use excerpt from a horror film in a documentary about how such films depicted aliens); Hofheinz v. A & E Television Networks, 146 F. Supp. 2d 442 (S.D.N.Y. 2001) (fair use to include a short clip of a movie in a TV biography of a film star); Hofheinz v. AMC Prods., Inc., 147 F. Supp. 2d 127 (E.D.N.Y. 2001) (fair use to show clips of horror films in documentary about filmmaker and his studio).
262. *See, e.g.*, Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622 (9th Cir. 2003) (reuse of video clips of Elvis were too extensive to qualify for fair use).
263. *See* Warner Bros. Entm't v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

biographical details about characters, games played in the books, and the like.[264] "Each entry . . . gathers and synthesizes pieces of information relating to its subject that appear scattered across the *Harry Potter* novels," including "descriptions of the subject's attributes, role in the story, relationship to other characters or things, and events involving the subject."[265] For many entries, Vander Ark provided citations to the relevant passages in the *Harry Potter* books. The court was persuaded that Vander Ark's use of fictional facts from the books was transformative in that it served "the practical purpose of making information about the intricate world of *Harry Potter* readily accessible to readers in a reference guide."[266]

The main problem with Vander Ark's fair use defense was that the *Lexicon* had extensively quoted from or closely paraphrased expressive phrasings from the *Harry Potter* books and copied even more heavily from licensed companion books.[267] Although the court recognized that "[t]o fulfill its purpose as a reference guide to the *Harry Potter* works, it is reasonably necessary for the Lexicon to make considerable use of the original works,"[268] it ruled that the *Lexicon* had copied more than was reasonable, especially from the companion books. Because of their different purposes, the *Lexicon* would not supplant demand for the *Harry Potter* books. Publication of the *Lexicon* seemed likely, however, to harm the market for the companion books in view of the *Lexicon*'s wholesale appropriation from them.[269] The court did not accept Rowling's assertion that she was entitled to control the market for reference works on *Harry Potter* books.[270]

After Vander Ark removed some verbatim copying from the text of his lexicon and RDR withdrew its appeal to the Second Circuit, RDR announced its intent to publish a new version of the *Lexicon* that Rowling and Warner Brothers regard as acceptable.[271] Reference works such as the *Lexicon* improve public access to knowledge about the works they reference and thereby promote the progress of science, even when an author of the referenced works objects.

6. Incidental Uses

Photographers, filmmakers, and videographers sometimes incidentally capture copyrighted material in the course of preparing a new work. A

264. *Id.* at 540–44.
265. *Id.* at 525.
266. *Id.* at 541.
267. *Id.* at 546–48.
268. *Id.* at 546.
269. *Id.* at 550. The court also speculated that the *Lexicon*'s publication of songs and poems in the *Harry Potter* books might harm a derivative market for licensing publication of those works, even though there was no supporting testimony as to this market. *Id.* at 551.
270. *Id.* at 550.
271. *See* Posting of Anthony Falzone to The Center for Internet and Society, http://cyberlaw.stanford.edu/node/5960 (Dec. 6, 2008, 11:49 AM).

magazine might, for example, publish a photograph of someone's home that displays in the background a poster or stuffed animal.[272] A news cameraman might film a local festival for the evening news and incidentally capture part of a performance of a song.[273] A young mother might make a videotape to show her young child dancing and might post it on YouTube so that remotely located members of her family can see the video.[274] Incidental uses may sometimes be de minimis uses for which fair use analysis should be unnecessary,[275] but some incidental uses are suitable for fair use analysis. Yet, the more central to the second work's message or the more extensive the exposure of the copyrighted work in the second work, the less likely the use is to be fair.[276]

B. *Other Customary Authorial Uses*

Many customary uses of previous works that authors routinely make involve iterative copying, especially those connected to the preparation for, and execution of, projects that will eventually result in productive uses of parts of others' works. Many authors may take extensive notes, either by direct quotation or close paraphrases, from earlier authors' works,[277] photocopy articles or pages of books written by others on the same subject,[278] scan photographs to manipulate them, sketch the work of artists

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272. *See, e.g.*, Pro Arts, Inc. v. Hustler Magazine, Inc., Nos. 85-3022, 85-3041, 1986 U.S. App. LEXIS 19428, at *1 (6th Cir. Mar. 25, 1986) (incidental use of poster in a photo advertisement); Gordon v. Nextel Commc'ns, Inc., No. 00-73201, 2001 U.S. Dist. LEXIS 25048 (E.D. Mich. Aug. 13, 2001) (incidental use of a drawing of a dental procedure in an ad for telecomm services); Higgins v. Detroit Educ. Television Found., 4 F. Supp. 2d 701 (E.D. Mich. 1998) (incidental use of a song in an educational program); Jackson v. Warner Bros., Inc., 993 F. Supp. 585 (E.D. Mich. 1997) (incidental use of lithographs in a movie); Sandoval v. New Line Cinema Corp., 973 F. Supp. 409 (S.D.N.Y. 1997), *aff'd*, 147 F.3d 215 (2d Cir. 1998) (fleeting use of photos in a movie); Amsinck v. Columbia Pictures Indus., 862 F. Supp. 1044 (S.D.N.Y. 1994) (incidental teddy bear in a film).

273. *See, e.g.*, Italian Book Corp. v. Am. Broad. Cos., 458 F. Supp. 65 (S.D.N.Y. 1978).

274. *See, e.g.*, Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008). Materials about this case are available at Electronic Frontier Foundation, Lenz v. Universal, http://www.eff.org/cases/lenz-v-universal (last visited Mar. 24, 2009).

275. *See, e.g.*, *Sandoval*, 147 F.3d 215 (background use of photos in film was de minimis use); *see also* Andrew Inesi, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945 (2006).

276. *See, e.g.*, Ringgold v. Black Entm't Television, Inc., 126 F.3d 70 (2d Cir. 1997) (unfair to prominently feature poster of a quilt nine times during a television program).

277. Preparatory quoting or paraphrasing in the note-taking and other early stages of the creation process is likely to be much more extensive than quoting or paraphrasing in the final product, as the second author ingests the first author's work and develops ideas for what quotes should be put in final product. This kind of quoting has long been considered fair use. *See, e.g.*, Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1353 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

278. *See id.* at 1353–54 (fair use for governmental libraries to photocopy medical journal articles for research purposes); *see also* Duffy v. Penguin Books USA, Inc., 4 F. Supp. 2d 268, 274–75 (S.D.N.Y. 1998) (fair use for the author of a book to have photocopied pages from a book by a previous author as she was preparing a similar work). *But see* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913 (2d Cir. 1994) (unfair use for a commercial firm's research scientists to photocopy technical articles for archival purposes). *Williams &*

whose work inspires them, take clips from movies to study a cinematographer's manner of filming certain types of landscapes, record their own or others' performance of another author's song in order to understand it better, draw an architect's buildings to write an analysis of his style, photograph paintings to study an artist's techniques, or scan a large number of items on a particular subject to decide which of them should later be used to illustrate a point,[279] just to name a few.

If uses of these sorts are deemed unfair, fewer works of authorship will be created, and those that are would be less engaged and engaging because of the isolation that an overly strict copyright regime would impose. Hardest hit would be individual authors working in noninstitutional settings, for they would be unable to efficiently negotiate licenses with other authors and publishers to allow them to undertake ordinary acts of copying that are as essential to the life of authorship as breathing air is to all humans.

Even authors who have assigned copyrights in their works to others to enable commercial exploitations should be able to make some fair uses of their own works in pursuit of their professional and artistic futures. They should, for example, be able to make copies of their own work to build their portfolios,[280] to show their portfolios to prospective clients or others to demonstrate their creative output,[281] to provide copies of their work to others in connection with grant applications or assessments of the merits of their work,[282] and the like. Author-assignors should not, of course, be entitled to recreate and resell to others new instances of the work whose copyright they assigned or close approximations of it.[283]

There is very little caselaw on the copyright implications of making these kinds of iterative uses of other authors' works. Any society committed to promoting an abundance of authors and works of authorship must provide breathing room for iterative copying that is a necessary part of authorial work.[284]

Wilkins Co. v. United States and *American Geophysical Union v. Texaco, Inc.* are discussed *infra* Part III.

279. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 247–48 (2d Cir. 2006) (Koons digitally scanned many photographs of women's legs for artistic project).

280. *See, e.g.*, Fleming v. Miles, 181 F. Supp. 2d 1143, 1152–53 (D. Or. 2001) (fair use for artist to make copies of her work for her portfolio and to show the portfolio to prospective clients).

281. *Id.*

282. *Id.* at 1153 (entry of a work in a design contest was fair use).

283. *See, e.g.*, Pamela Samuelson, *Self-Plagiarism or Fair Use?*, COMM. ASS'N FOR COMPUTING MACHINERY, Aug. 1994, at 21 (discussing caselaw and principles).

284. I strongly agree with Rebecca Tushnet that iterative copying can and often does serve First Amendment as well as copyright values and that the caselaw that emphasizes "transformativeness" undervalues the expressive significance of some iterative copies. *See* Tushnet, *supra* note 40, at 558–67.

C. *Weighing Factors in Authorial Fair Use Cases*

In the authorial fair use cases, courts have generally weighed the statutory fair use factors in a careful manner. They have generally given relatively little weight to the commercial purpose of a second author's productive use of an earlier author's work, and considerable weight instead to commentary and other favored purposes. Courts should, however, be more willing to recognize that productive, as well as transformative, uses of preexisting works implicate freedom of expression interests of follow-on authors. Also welcome would be more explicit attention to the public interest in having access to works that productively use earlier works.

Except in cases involving digital sampling of sound recordings,[285] courts have become more receptive to "quoting" from songs, pictures, and videos,[286] although they do not always characterize the takings as quoting. Courts should, however, be more willing to consider whether a second author's use is reasonable and customary in the authorial community in which he or she creates. It was common to take custom into account in fair use cases prior to the 1976 Act;[287] there is nothing in the legislative history of this Act that repudiates custom as a factor. Its resurrection as part of purpose analysis would be a sound development since copyright law should accommodate practices that contribute to the availability of new works of authorship.[288]

A close study of the authorial fair use cases reveals that in order to comment on an earlier work, second authors sometimes need to conjure up the earlier work by reproducing all or part of it. Although the Supreme Court did justify conjuring up in the parody context, it failed to recognize that conjuring up is needed in other contexts as well. For example, to prove his theory of the Kennedy assassination, Thompson needed to reproduce frames from the Zapruder film in his book. Necessity should not always be

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285. Courts have been quite hostile to digital sampling of copyrighted music. *See, e.g.*, Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005). Most commentators have been critical of Bridgeport and other antisampling decisions. *See, e.g.*, Jeremy Beck, *Music Composition, Sound Recordings and Digital Sampling in the 21st Century: A Legislative and Legal Framework to Balance Competing Interests*, 13 UCLA ENT. L. REV. 1 (2005).

286. *See, e.g.*, Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605 (2d Cir. 2006) (fair use of graphic work in nonfiction book); Lennon v. Premise Media Corp., 87 U.S.P.Q.2d (BNA) 1489 (S.D.N.Y. 2008) (fair use of clip from sound recording in documentary); Hofheinz v. AMC Prods., Inc., 147 F. Supp. 2d 127 (E.D.N.Y. 2001) (fair use of clips from movies).

287. LATMAN, *supra* note 27, at 15 ("At times, custom or public policy defines what is reasonable.").

288. *See, e.g.*, Madison, *supra* note 27. I do not mean to suggest that just because a use is customary, it is necessarily fair; however, the more customary the use in authorial communities, the more likely it should be tolerated as necessary to promote ongoing authorship. I also recognize the dangers of reliance on custom, since an abundance of caution may cause some to license who should rely on fair use. *See, e.g.*, Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007). However, I agree with Madison that the fairness and reasonableness of an author's reuse of earlier works should be judged in part on authorial community standards.

necessary to justify conjuring up—several of the productive use cases focused on whether the second author's use was reasonable in light of her productive purpose, not on whether the use was absolutely necessary. Changes in size, scale, resolution, and context also seem to be important in authorial fair use cases in judging the substantiality of the taking. The defendant's willingness to attribute the contributions of the first author to the subsequent work has also sometimes favored fair use in authorial fair use cases.[289] Some commentators have suggested that fair use should be broader as to "older" works, particularly those whose authors may be difficult to track down, are out of print, or otherwise no longer commercially exploited.[290]

Judges in authorial fair use cases have usually been careful in analyzing the harm factor. Heeding *Campbell*,[291] they have generally been cautious about imputing harm when a second author has made transformative or productive uses of a first author's work. They seem to recognize the circularity problem that has given rise to the "risk aversion and rights accretion" phenomenon.[292] Courts in recent cases have sometimes taken into account how proximate or remote the second author's market is to the markets the first author is exploiting or is likely to exploit, as well as the foreseeability of a second author's use in a first author's calculations about her market.[293] An unreasonable refusal to license a use, as in *Geis*,[294] or to license the use on reasonable terms, as in *Bill Graham Archives*,[295] has sometimes favored fair use. Although courts have not generally analyzed this in market failure terms, some commentators have identified market failure as a basis for ruling in favor of fair use in such cases.[296]

This is not to say that all factors relevant to authorial fair use defenses cut only in favor of fair use. Drawing expression from unpublished or unfinished works is likely to cut against fair use.[297] Quoting or closely

289. *Cf.* Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 84 (2007) (arguing for attribution as a factor in fair use analyses). Failure to attribute may similarly cut against fair use, although not heavily so because U.S. copyright law does not protect attribution interests of authors (except as to certain works of visual art).

290. *See, e.g.*, Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002); William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of* Eldred, 92 CAL. L. REV. 1639 (2004).

291. *See supra* notes 58–69 and accompanying text.

292. *See* Gibson, *supra* note 19 (arguing that risk aversion drives licensing, which in turn plays a role in defining the scope of the right, leading to a feedback loop that expands private rights and contracts public privileges).

293. *See, e.g.*, Ty, Inc. v. Publ'ns Int'l, Ltd., 292 F.3d 512 (7th Cir. 2002) (collectors guide in different market than beanie babies); Calkins v. Playboy Enters. Int'l, Inc., 561 F. Supp. 2d 1136 (E.D. Cal. 2008) (high school photographer had not anticipated market for Playboy's much later use of photo). *See generally* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. (forthcoming 2009).

294. *See supra* notes 232–38 and accompanying text.

295. *See supra* notes 245–60 and accompanying text.

296. *See, e.g.*, Gordon & Bahls, *supra* note 18, at 629–32.

297. *Harper & Row* established the unpublished status of works as a factor tending to negate fair use. *See supra* note 170 and accompanying text; *see also* Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987) (unpublished nature of letters from which biographer

paraphrasing many highly expressive passages also tends to weigh against fair use.[298] Preparing detailed plot summaries of popular entertainment programming tends to be unfair because the summaries heavily draw on expression from those programs and occupy a foreseeable proximate market.[299] Trivia games, such as the Seinfeld Aptitude Test, drawn from commercially successful television program dialogue and details, have similarly been regarded as unfair.[300] And of course, taking more expression than is necessary or reasonable in light of one's purpose and supplanting demand for the original is likely to doom a second author's fair use defense.[301]

III. USES THAT PROMOTE LEARNING

Teaching, scholarship, and research are three of the six favored uses in the preamble to § 107.[302] Congress thus considered learning as one of the societal purposes that fair use was intended to promote. The constitutional purpose of copyright is to promote the dissemination of knowledge, and courts have repeatedly said that promoting public access to knowledge is

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quoted weighed against fair use). While courts are generally unsympathetic to the use of copyright claims to protect noncopyright interests of authors, they are sometimes willing to do this as to works that were prepared for private use only. *See, e.g.*, Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998) (enjoining Internet distribution of video showing celebrity couple having intercourse which they filmed for personal use). Professor William Fisher has argued that publication of unfinished works should similarly negate fair use. *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1773–74 (1988). I agree that this should cut against fair use, although none of the studied fair use opinions involved unfinished works.

298. *See, e.g.*, Warner Bros. Entm't v. RDR Books, 575 F. Supp. 2d 513, 542 (S.D.N.Y. 2008); Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 629 (9th Cir. 2003). This too seems to be an aftermath of *Harper & Row*, for the Court in that case emphasized that Victor Navasky had quoted the most moving passages of the book. Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 564 (1985).

299. *See, e.g.*, Twin Peaks Prods. Inc. v. Publ'ns Int'l, Ltd., 996 F.2d 1366 (2d Cir. 1993) (detailed plot summaries of Twin Peaks television programs with extensively quoted dialogue); Toho Co. v. William Morrow & Co., 33 F. Supp. 2d 1206 (C.D. Cal. 1998) (plot summaries of Godzilla movies); Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d 329 (S.D.N.Y. 1998) (Star Trek plot summaries).

300. *See* Castle Rock Entm't v. Carol Publ'g Group, Inc., 150 F.3d 132 (2d Cir. 1998).

301. *See supra* notes 267–69.

302. The Senate report on the 1976 Act discusses at some length factors that would tip in favor of fair use or against in educational and research settings. *See* S. REP. NO. 94-473, at 63–67 (1975). This report also considered preservation as another learning-related use that may favor fair use. *See id.* at 66; *see also* Sundeman v. Seajay Soc'y, Inc., 142 F.3d 194 (4th Cir. 1998) (scholar working for nonprofit foundation made fair use of an unpublished manuscript written by well-known deceased author when she copied it in order to study its contents without damaging the original). Congress also contemplated that some iterative copying of protected works would be fair use if done to promote greater access to works by blind people, whether by preparing Braille editions or preparing talking books. *See* S. REP. NO. 94-473, at 66. These considerations were also endorsed in the House report. *See* H.R. REP. NO. 94-1476, at 66–73 (1976). The principal difference between the House and Senate reports as to fair use was that the House report incorporated two sets of negotiated guidelines for educational fair uses of copyrighted works. *Id.* at 68–71.

the primary goal of copyright,[303] so it is unsurprising that Congress would have considered that teaching, research, and scholarly uses, especially those conducted in noncommercial settings, often would be fair.[304]

Although research and scholarship sometimes directly lead to creation of new works of authorship that add to the store of knowledge, researchers, teachers, and scholars routinely make copies of preexisting materials, even when this is not directly connected to the creation of new works. A scholar-teacher may, for example, make a copy of a relevant article to prepare for an upcoming class or simply to learn more about a new development in her field. But nonscholarly teachers may also qualify for learning-related fair uses,[305] as may students who photocopy news articles, take pictures of images they like, or otherwise copy materials in preparing to write a term paper or the like.[306] Section 107 even offers some room for teachers and students to make multiple copies for classroom use.[307]

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303. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8 (Congress empowered to enact copyright legislation "[t]o promote the [p]rogress of Science"); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (promoting public access to knowledge as principal purpose of copyright); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); *see also* Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 607 (2001) ("The framers of the U.S. Constitution clearly intended that the law of copyright . . . would be tailored to serve the advancement of knowledge.").

304. A small number of cases decided prior to the 1976 Act involved copying for educational purposes. *See, e.g.*, Wihtol v. Crow, 309 F.2d 777, 778–80 (8th Cir. 1962) (not fair use for choral director to make 48 photocopies of new arrangement of copyrighted music for his students); Macmillan Co. v. King, 223 F. 862, 867 (D. Mass. 1914) (not fair use for tutor to prepare and distribute memoranda for students that reproduced parts of an assigned economics textbook). Library and educational use copying of copyrighted materials was the subject of one of the studies undertaken as part of the copyright revision process. *See* BORGE VARMER, PHOTODUPLICATION OF COPYRIGHTED MATERIALS BY LIBRARIES, STUDY NO. 15, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. (Comm. Print 1960). During the time that the copyright revision legislation was pending, educators and librarians sought a much broader and more specific exception to allow reproductions for teaching, scholarship, and research purposes. *See* PATRY, *supra* note 1, at 273–74. However, this proved to be unacceptable to author and publisher groups. *See id.* at 273–75. Congress left the debate over these issues to be worked out in the context of fair use. Yet, it also created exceptions for classroom performance of certain protected works, *see* 17 U.S.C. § 110(1) (2006), and for certain kinds of library uses, *see id.* § 108.

305. *See, e.g.*, *Sony*, 464 U.S. at 455 n.40 ("A teacher who copies to prepare a lecture is clearly productive. But so is a teacher who copies for the sake of broadening his personal understanding of his specialty."); H.R. REP. NO. 94-1476, at 68–69 (fair use for teacher to photocopy article from periodical, short story, chapter from book, etc to prepare for class).

306. *See, e.g.*, CONSORTIUM OF COLL. & UNIV. MEDIA CTRS., FAIR USE GUIDELINES FOR EDUCATIONAL MULTIMEDIA § 2.1 (1996), *available at* http://depts.washington.edu/uwcopy/Using_Copyright/Guidelines/Fair.php.

307. *See* 17 U.S.C. § 107 ("including multiple copies for classroom use"). Guidelines on making multiple copies for classroom use were negotiated in the mid-1970s between publishers and a coalition of educational and library organizations. Such uses are fair when they are relatively brief and spontaneous (e.g., a news article on a topic relevant to that day's class), do not exceed certain cumulative limits, and identify the copyright owner. *See, e.g.*, U.S. COPYRIGHT OFFICE, CIRCULAR 21, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS 7–8 (1995). These guidelines played an important role in the

There is relatively little caselaw on fair use in educational or research settings.[308] In the few litigated cases, however, fair use defenses have rarely succeeded.[309] One possible explanation for the paucity of such cases may be that copying for learning-related purposes is often done in private,

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settlement of a lawsuit brought by the Association of American Publishers (AAP) against New York University (NYU) and some of its professors for unlawful photocopying of copyrighted materials for classroom use. *See* Crews, *supra* note 303, at 639–41. As part of the settlement, NYU agreed to adopt the negotiated guidelines for educational uses as fair use guidelines to which it and its faculty were bound. *Id.* This was unfortunate because these guidelines had initially been intended to be a minimum statement of fair use in educational contexts, not a statement of the maximum scope. *Id.* After the NYU settlement, the AAP sent hundreds of cease and desist letters to other universities in an effort to persuade them, often successfully, to conform their photocopying practices to the negotiated guidelines. *See id.* In two other cases, *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1390–91 (6th Cir. 1996), and *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1535–37 (S.D.N.Y. 1991), courts gave the negotiated guidelines some weight in deciding that institutional coursepack copying was unfair. Kenneth Crews believes that the guidelines should be given relatively little weight in any litigated educational fair use case, as they are not rooted in the law of fair use, but are only a statement about uses that publishers are publicly willing to tolerate. Crews, *supra* note 303, at 692–96.

308. Most of the cases and law review commentary focus on learning-related fair uses in nonprofit educational contexts. *See, e.g.*, Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149 (1998); Crews, *supra* note 303; *infra* note 309. Occasionally, however, learning-related fair uses have occurred in corporate contexts. *See, e.g.*, Compaq Computer Corp. v. Ergonome, Inc., 387 F.3d 403 (5th Cir. 2004) (computer firm's use of four illustrations to show proper hand positions to avoid repetitive stress injury was fair use); Coates-Freeman Assocs., Inc. v. Polaroid Corp., 792 F. Supp. 879 (D. Mass. 1992) (fair use to reproduce chart depicting leadership styles for use within the firm).

309. *See, e.g.*, Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983) (not fair use for teacher to copy cake decorating instructions from plaintiff's pamphlet for use by her students); Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Ga., 86 U.S.P.Q.2d (BNA) 1683, 1703–04 (M.D. Ga. 2008) (not fair use to reproduce test questions to sell to others); Bosch v. Ball-Kell, 80 U.S.P.Q.2d (BNA) 1713 (C.D. Ill. 2006) (not fair use for substitute teacher to reproduce and teach from a fired teacher's notes); Educ. Testing Serv. v. Simon, 95 F. Supp. 2d 1081 (C.D. Cal. 1999) (not fair use to copy "hot" questions from standard test for preparatory course); Ass'n of Am. Med. Colls. v. Mikaelian, 571 F. Supp. 144 (E.D. Pa. 1983) (not fair use to copy questions from Medical College Admissions Test for a course designed to prepare students to take this exam); Encyclopedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243 (W.D.N.Y. 1978), *after trial on the merits*, 542 F. Supp. 1156 (W.D.N.Y. 1982) (not fair use for a nonprofit service to tape broadcast television programs of educational value for distribution to schools); *see also* Mulcahy v. Cheetah Learning LLC, 386 F.3d 849 (8th Cir. 2004) (denying summary judgment to the plaintiff on a fair use defense for a test preparation manual that incorporated material from the defendant copyright owner's handbook); Bridge Publ'ns, Inc. v. Vien, 827 F. Supp. 629 (S.D. Cal. 1993) (copying of L. Ron Hubbard lectures for commercial educational use not fair), *vacated*, 53 F.3d 344 (Fed. Cir. 1994); PATRY, *supra* note 1, at 210–12 (discussing settled publisher lawsuits against educational institutions for unauthorized photocopying). *But see* Newport-Mesa Unified Sch. Dist. v. State of Cal. Dept. of Educ, 371 F. Supp. 2d 1170 (C.D. Cal 2005) (fair use for state to authorize copying of test protocols for parents of special education students); Rubin v. Brooks/Cole Publ'g Co., 836 F. Supp. 909 (D. Mass. 1993) (use of "love scale" in social psychology was fair use as to past uses). *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975), discussed *supra* notes 277–78 and *infra* notes 315–19, 342 and accompanying text, is the most significant case in which a fair use defense for learning-related purposes succeeded.

noncommercial settings. This makes detection of infringement difficult. The costs of enforcement or of attempting to license many of these uses would be far greater than the economic returns likely to result.[310] Much of such copying, moreover, may be reasonable and customary uses that would pass muster as fair uses,[311] and publishers seem to have recognized and accepted this.

More controversial than individual student or teacher copying has been institutional copying on behalf of users in the name of education or research. Controversy over this type of fair use facilitation was well underway during the 1970s when copyright legislation was pending.[312] Indeed, enactment of copyright revision bills was held up for several years because of strong differences of opinion about the legitimacy of library photocopying for researchers and other uses of new technologies (e.g., whether inputting the text of a work into a computer would infringe copyright).[313] In 1974, Congress broke the legislative logjam by spinning out certain new technology issues to be addressed by the National Commission on New Technological Uses of Copyrighted Works (CONTU).[314]

Even before CONTU began its deliberations, a lawsuit testing the legality of library photocopying on behalf of researchers was winding its way through the courts. In *Williams & Wilkins Co. v. United States*,[315] a major publisher of medical research journals sued the United States government for copyright infringement, alleging that the library of the National Institutes of Health and the National Library of Medicine were systematically infringing copyrights by photocopying articles for medical researchers who requested copies.[316]

Williams & Wilkins won in the initial round of this lawsuit, but appellate review led to a 4-3 ruling in favor of the government's fair use defense.[317] The majority placed considerable weight on the benefits to the progress of

310. Market failure arising from high transaction costs may explain why certain educational uses should be fair. *See* Gordon, *supra* note 200, at 1620–21. *But see* Carol M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 S. CAL. L. REV. 617, 618 (2001) (expressing concern that courts will give too much emphasis to licensing as a solution to market failure in educational settings).

311. *See, e.g.*, Bartow, *supra* note 308, at 227–30; Carroll, *supra* note 12, at 1114–17.

312. *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 78–164 (1994) (discussing the heated copyright debate over private copying for research and educational purposes in the 1960s and 1970s).

313. *See, e.g.*, PATRY, *supra* note 1, at 203 ("Educational reprography was the single most contentious issue in attempts to codify the doctrine of fair use during the mid-1960s and 1970s."). For a thorough discussion of this controversy and the computer use controversy, see *id.* chs. 11–12.

314. *See* Act of Dec. 31, 1974, Pub. L. No. 93-573, § 201, 88 Stat. 1873, 1873–74.

315. 172 U.S.P.Q. (BNA) 670 (Ct. Cl. 1972), *rev'd*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

316. The evidence showed that the National Institutes of Health had made 930,000 photocopies of articles from scientific journals in 1970, and, in 1968, the National Library of Medicine had received 127,000 requests for interlibrary loans. *Id.* at 673–74.

317. *See Williams & Wilkins*, 487 F.2d at 1345–63.

science arising from the National Institutes of Health and the National Library of Medicine photocopying program and on limits that the libraries placed on copying on behalf of medical researchers.[318] Although the Supreme Court decided to hear this case, the Court split 4-4 on the merits in 1975,[319] thereby affirming the ruling on fair use copying by libraries of scientific articles for research patrons. When Congress passed the 1976 Act, it did not overturn this decision.[320] Although CONTU later offered some guidelines about library photocopying for interlibrary loans,[321] it did not attempt to resolve the broader controversy over photocopying for educational and research purposes.[322]

While teachers, students, scholars, and other researchers would for obvious reasons prefer liberal fair use rules as to educational and other learning-related uses,[323] publishers of educational materials have understandably worried that very liberal fair use rules would undermine sales of books, journals, and other materials and the development of new licensing markets that advances in technology have made possible.[324] If there is no limit, for example, on the ability of teachers or photocopy shops

318. *Id.* at 1356–57. "There is no doubt in our minds that medical science would be seriously hurt if such library photocopying were stopped." *Id.* at 1356. The libraries would, for instance, copy only one article from any particular journal per request and would not fill requests for articles from "widely available" journals. *Id.* at 1348–49. Crews asserts that these limits "greatly influenced the court's ruling." Crews, *supra* note 303, at 657.

319. *Williams & Wilkins*, 420 U.S. at 376. The Court was also deeply split about personal use copying of television programs for time-shifting purposes in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). *Williams & Wilkins* and *Sony* are similar in that copies were being made for consumptive, rather than directly productive, purposes; the whole of protected works were copied; many such copies were made; copyright owners were suing in order to establish new licensing markets; and the Court was deeply split over whether the uses were fair. The split judicial reactions in *Williams & Wilkins*, as well as in the *Texaco* and *Michigan Document* cases discussed *infra*, are akin to those of Justice John Paul Stevens's majority and Justice Blackmun's dissent in *Sony*, which I discuss at some length in Pamela Samuelson, *The Generativity of* Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831 (2006).

320. *See* U.S. COPYRIGHT OFFICE, *supra* note 307. The 1976 Act provided that nonprofit library and educational users who had a good faith belief that their copying was fair use would be treated as innocent infringers and gave courts discretion to reduce or remit damages in such cases. *See* Pub. L. No. 94-553, § 504(c), 90 Stat 2541, 2585 (1976) (codified as amended at 17 U.S.C. § 504(c) (2006)).

321. *See* NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT ch. 4 (1979) [hereinafter CONTU REPORT] (recommending guidelines for copying for purposes of making interlibrary loans). Crews notes that the National Commission on New Technological Uses of Copyrighted Works (CONTU) guidelines used principles from *Williams & Wilkins*. Crews, *supra* note 303, at 658.

322. However, CONTU resolved the inputting of copyrighted works into a computer issue in favor of the publishers. CONTU REPORT, *supra* note 321, ch. 3.

323. *See, e.g.*, Silberberg, *supra* note 310, at 617–19.

324. *See, e.g.*, PATRY, *supra* note 1, at 276 (quoting a letter by a publisher witness who made a similar proposal at a congressional hearing). A contemporary controversy is whether universities infringe by permitting or encouraging faculty to post assigned readings on password-protected websites for enrolled students. *See Publishers Sue Georgia State U. for Copyright Infringement*, CHRON. HIGHER EDUC., Apr. 16, 2008, http://chronicle.com/news/article/4319/publishers-sue-georgia-state-u-for-copyright-infringement. This issue has been debated since the mid-1990s. *See* Crews, *supra* note 303, at 627–29.

to make multiple copies of copyrighted materials for classroom purposes, teachers and their students will enjoy the benefits of access to these works without paying for them, and the photocopy-shop will make money from reproducing the materials with no payments to publishers.[325] Similarly, without some limitations on the ability of libraries and other research institutions to make copies of articles for patrons, publishers feel at risk of losing substantial revenues, including for new licensing schemes for these uses.[326]

Two cases decided in the 1990s, *American Geophysical Union v. Texaco, Inc.*[327] and *Princeton University Press v. Michigan Document Services, Inc.*,[328] tested the limits of systematic institutional research and educational use copying.[329] In *Texaco*, a divided Second Circuit ruled that the archival copying of scientific and technical articles by commercial research scientists was not fair use, in substantial part because the Copyright Clearance Center had been established to license for-profit subscribers, such as Texaco, whose researchers wanted to make copies of articles from the journals.[330] In the *Michigan Document* case, a divided Sixth Circuit held that a for-profit photocopy service infringed copyrights when it photocopied book chapters, articles, and other copyrighted materials in professor-assembled coursepacks.[331]

Texaco and *Michigan Document* have caused a good deal of agitation and anxiety in educational, library, and research communities,[332] because they contribute to fears that publishers are pushing for a rule that if a use can be licensed, it must be licensed,[333] which educators and librarians tend to think

325. *See, e.g.*, Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1531–36 (S.D.N.Y. 1991) (unfair for Kinko's to make photocopies of articles and excerpts from copyrighted books in compiled coursepacks for students).

326. *See, e.g.*, Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 929–31 (2d Cir. 1994) (the existence of a new licensing market for photocopying by a commercial firm's researchers given weight in ruling against fair use).

327. *Id.* The Second Circuit chose not to address whether copying by a researcher himself would be fair use. *Id.* at 916. The Second Circuit panel was split, however, on the issue of whether Texaco's photocopying of articles for researchers was fair use.

328. 99 F.3d 1381 (6th Cir. 1996).

329. Fair use defenses were also unsuccessful in two cases involving commercial news-clipping services, arguably another category of institutional personal use facilitation. *See, e.g.*, L.A. News Serv. v. Tullo, 973 F.2d 791 (9th Cir. 1992); Pac. & S. Co. v. Duncan, 744 F.2d 1490 (11th Cir. 1984).

330. *Texaco*, 60 F.3d at 929–31. It is worth noting that after a storm of criticism about the circularity of the harm analysis in *Texaco* (under which a use would be unfair if a publisher wanted to license it), the Second Circuit issued an amended opinion that tried to respond to this criticism. *Compare* Am. Geophysical Union v. Texaco, Inc., 37 F.3d 891 (2d Cir.), *amended and superseded by* 60 F.3d 913 (2d Cir. 1994), *with Texaco*, 60 F.3d 913.

331. *Michigan Document*, 99 F.3d at 1388–91. The finding of infringement was made easier in substantial part because the Copyright Clearance Center had established a licensing program for such uses. *Id.*

332. *See, e.g.*, Bartow, *supra* note 308, at 207–21.

333. The Clinton administration further contributed to this fear when its "white paper" on intellectual property questioned the need for fair use in the future because of the rise of new licensing models. *See* BRUCE LEHMAN, REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION

would spell the end of fair use.[334] Educators and librarians also worry that copyright owners' increased reliance upon licensing and extralegal technical protection measures are restricting access to and certain uses of copyrighted materials, especially those available in digital networked environments.[335]

Uncertainties about the scope of fair use for learning-related purposes have led to some efforts to develop fair use guidelines for common educational and research uses.[336] While guidelines negotiated between publishers and representatives of educational, library, and research communities have created a safe harbor for certain uses in educational and research settings,[337] negotiated guidelines have been much criticized.[338] The oft-stated danger is that what was intended to establish a safe harbor (or floor) for fair use activities may be misinterpreted as having established a ceiling on uses that are fair.[339] Guidelines also tend to be narrowly focused on certain common uses as to already known technologies; hence, they may become outmoded over time. Some educational institutions and organizations have promulgated "best practices" guidelines for educators, students, and staff that take a somewhat more expansive view of fair use in educational contexts than the negotiated guidelines.[340]

Because this Article principally aims to analyze clusters of decided fair use cases, there is relatively little it can say about how courts would apply fair use as to a wide array of educational and research uses that lie outside the negotiated guidelines.[341] There are simply too few decisions to analyze, and too much uncertainty about the implications of decisions such as *Williams & Wilkins*, *Texaco*, and *Michigan Document*—in all of which the judges were deeply split not only as to whether the uses in question were

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INFRASTRUCTURE 82 (1995) ("[I]t may be that technological means of tracking transactions and licensing will lead to reduced application and scope of the fair use doctrine.").

334. *See, e.g.*, Silberberg, *supra* note 310, at 618 (predicting that "current trends in fair use will eventually eliminate fair use for schools, colleges, and universities" and arguing against this outcome).

335. *Id.* at 645.

336. *See, e.g.*, Crews, *supra* note 303, at 614–32 (discussing various fair use guidelines).

337. *Id.* at 692–93.

338. *See, e.g.*, *id.* at 692–97; Silberberg, *supra* note 310, at 637–39.

339. *See, e.g.*, Bartow, *supra* note 308, at 160–63; *see also supra* note 307.

340. *See, e.g.*, The University of Texas System, Fair Use Rules of Thumb, http://www.utsystem.edu/ogc/intellectualproperty/copypol2.htm#rules (last visited Mar. 24, 2009).

341. The Google Book Search litigation would have been a major test case for library fair uses, had the case not settled, given that Google provided its university library partners with a database containing the full texts of the books the project copied from each library's collection. Google had a stronger fair use case as to the scanning of these texts for purposes of indexing them and making snippets available in response to user queries than it had for the copies it made and delivered to the libraries. The settlement allows libraries to continue to use the databases containing the texts of books in their collections and provides these and other libraries with the opportunity to license the broader database of scanned books now subject to the settlement agreement. *See* Google Book Search Settlement Agreement, *available at* http://books.google.com/googlebooks/agreement (last visited Feb. 12, 2009).

fair, but also as to the proper four-factor analysis—for a broader array of learning-related uses.[342]

It is, however, fair to observe that the small number of litigated educational/research cases contrasts sharply with the very high volume of everyday educational and research uses that arguably implicate copyright (e.g., photocopying articles, scanning pictures, inserting images into PowerPoint presentations, sending news articles to class listservs). Learning-related uses are certainly not fair across the board, but many are likely fair; still others have become so customary and so widely tolerated for so long as effectively to be outside copyright boundaries.[343] In future learning-related fair use cases, moreover, the widespread availability of many information resources on the open Internet or in open formats seems likely to affect the scope of fair use as to materials that are also available through licensing. If rights holders want to restrict access and control uses, technical protection measures now provide them a way to do this; failing to utilize these measures may also affect the fair use calculus.[344]

Proponents of broader fair use rules for learning-related uses suggest that courts should consider "the transformative nature of education, the extent to which instructors rely on fair use, and the reasonableness of the alleged available license" in making fair use determinations in educational and research use cases.[345] Perhaps courts should also presume educational and research uses are fair because they implicate three of the six favored statutory purposes, and require publishers to prove that the uses being challenged are supplanting demand for the original or otherwise will bring about a meaningful likelihood of harm to existing or foreseeable markets for the work.[346] A well-educated public is, after all, necessary not only to promote effective democracy, but also to create robust markets for copyrighted works.[347]

IV. FORESEEABLE USES OF COPYRIGHTED WORKS BEYOND THE SIX STATUTORILY FAVORED PURPOSES

Although the 1976 Act did not single them out for special consideration, Congress seems to have foreseen that fair uses might sometimes be made of

342. *See, e.g.*, Silberberg, *supra* note 310, at 646–51. She points out that instructors transform the content of the materials they copy to prepare for their lectures, and students further transform it in the learning process. For what it's worth, I think that both *Williams & Wilkins* and *Michigan Document* were rightly decided, but *Texaco* was not. Yet, even if *Texaco* was rightly decided (and I admit it was a close case), it should be construed narrowly such that copying by research scientists of commercial firms is unfair, while most copying done for research and educational purposes in nonprofit educational and research institutions (apart from coursepack compilations) is fair.

343. *See, e.g.*, Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 617–18 (2008).

344. *See, e.g.*, Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006) (copyright owner's failure to use robot.txt instructions to stop making copies of an Internet site and caching of those copies considered in favor of fair use).

345. Silberberg, *supra* note 310, at 619.

346. *See, e.g.*, Bartow, *supra* note 308, at 227–29.

347. *See, e.g.*, NETANEL, *supra* note 12, at 30–44.

copyrighted works for private, noncommercial purposes, for litigation and other legitimate government purposes, and for some commercial advertisements. This part considers the caselaw as to these foreseen fair uses.

A. *Personal Uses*

A study of fair use, prepared by Alan Latman in conjunction with the copyright revision effort, anticipated that fair use would play a role in the regulation of private and personal uses of copyrighted works.[348] Although there had been no litigated cases on the issue, Latman nevertheless opined that "the purpose and nature of a private use, and in some cases the small amount taken, might lead a court to apply the general principles of fair use in such a way as to deny liability."[349]

There is some evidence that Congress gave some consideration to the creation of a personal use exception during the revision process leading up to the 1976 Act.[350] It ultimately decided to define several exclusive rights narrowly so that many forms of private and personal uses of copyrighted works were left unregulated.[351] It created personal use privileges for certain personal uses.[352] Fair use was available to regulate personal use copying.[353]

There is very little caselaw on whether and to what extent personal use copying qualifies as fair use.[354] The issue has mainly been considered in

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348. LATMAN, *supra* note 27, at 12.

349. *Id.*

350. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 464–65 (1984) (Blackmun, J., dissenting). Some countries have personal use exceptions in their copyright laws, as noted in LATMAN, *supra* note 27, at 25. The study recommended fair use as the best option for regulating circumstances under which personal uses should be lawful. *Id.* at 33. The Register of Copyrights and the Congress seem to have adopted this recommendation.

351. Private performances and private displays of copyrighted works are not covered by copyright, nor are private distributions. *See* 17 U.S.C. §§ 106(3)–(5) (2006). Consumers are legally entitled to engage in these private activities. Jessica Litman has argued that the 1976 Act should be understood to leave many other personal uses, including personal use copying, unregulated. *See* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

352. *See* 17 U.S.C. § 109(a) (right to resell or otherwise dispose of one's copy of protected works); *id.* § 109(c) (right to display one's copy to the public), *id.* § 602(a) (right to import a copy of a work purchased outside the U.S. for personal use). Congress later added other specific personal use privileges to the statute. *See id.* § 110(11) (right to use software to bypass objectionable scenes in movies); *id.* § 117(a) (right to make a backup copy of purchased computer programs and adapt programs); *id.* § 120(a) (right to photograph or paint architectural work); *id.* § 120(b) (right to alter or destroy architectural work); *id.* § 1008 (right to make noncommercial copies of analog or digital audio sound recordings).

353. The House and Senate reports mention personal uses for education and research purposes as potentially fair. H.R. REP. NO. 94-1476, 74 (1976); S. REP. NO. 94-473, at 63–66 (1975). Some private and/or personal uses are likely to be de minimis uses or impliedly licensed. Fair use is thus not the only doctrine of copyright law that limits the reproduction right as to personal uses.

354. One individual owner and user of Betamax machines was named as a defendant in Universal's lawsuit against Sony, but he was a client of the plaintiff's law firm and consented to become a defendant on the understanding that no damages claim would be

cases brought against developers of technologies or services designed to facilitate personal uses, which defendants argued were fair uses.[355] The principal case is *Sony Corp. of America v. Universal City Studios, Inc.*[356] Sony persuaded the Court that it was not indirectly liable for copyright infringement because its Betamax machines had and were capable of substantial noninfringing uses,[357] including fair use taping of broadcast television programs. In the course of its analysis as to whether time-shift copying of such programs was fair use, the Court in *Sony* made some influential pronouncements about personal use copying and the fair use doctrine.

A majority of the Court regarded the purpose of consumer uses of Betamax machines to be private and noncommercial.[358] This factor so cut in favor of fair use that the majority directed that such uses should be presumed fair, and this presumption should only be overcome if the copyright owner proved a meaningful likelihood of harm would flow from the use.[359] The Court gave little weight to the nature of the work factor, although it regarded Universal's decision to make its movies and programs available on broadcast television so that anyone could see the program for free as having some significance.[360] Whole programs were taped, which disfavored fair use, but because time-shifted copies were typically erased after later viewing, less weight should be given to the amount.[361] The presumption of fairness was not overcome because Universal had stipulated that it had suffered no harm as yet, even though time-shift copying of programs had become widespread, and it had offered, in the majority's view, only speculative evidence of harm in the future.[362] Consequently, the Court concluded that time-shift copying of television programs was fair use.

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made against him. Universal City Studios, Inc. v. Sony Corp., 480 F. Supp. 429, 437 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 417 (1984).

355. *See, e.g.*, *Sony*, 464 U.S. at 454–55 (private noncommercial time-shift copying of television programs held fair use); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072, 1079 (9th Cir. 1999) (characterizing place-shifting as "paradigmatic noncommercial personal use"); Lewis Galoob Toys, Inc. v. Nintendo of Am., 964 F.2d 965 (9th Cir. 1992) (relying on *Sony* as to private noncommercial use of Game Genie to change some aspects of the play of Nintendo games). *But see* Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994) (rejecting *Sony* private use defense by commercial bulletin board service held as indirect infringer for facilitating uploading and downloading of Sega games by its users); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (rejecting *Sony* private use defense by commercial bulletin board service held as infringer for facilitating uploading and downloading of Playboy bunny pictures by its users).

356. 464 U.S. 417.

357. For a discussion of this aspect of *Sony*, see *infra* Part V.A.

358. Justice Stevens's fair use analysis for the majority can be found in *Sony*, 464 U.S. at 447–56.

359. *Id.* at 449–51.

360. *Id.* at 451–53.

361. *Id.* at 453–54 & n.39, 458.

362. *Id.* at 454.

Justice Harry Blackmun's dissent in *Sony* offered a sharply contrasting conception of fair use as applied to personal use copying.[363] It perceived the purpose of the taping to be consumptive (i.e., consuming the work as if one had purchased a copy), not productive (i.e., there was no new work of authorship to justify the use as fair).[364] Consumptive copying, in his view, strongly disfavored fair use. The programs copied qualified as largely entertainments, as to which the scope of fair use is typically narrow.[365] Whole programs were copied, which also cut strongly against fair use.[366] The dissenters worried that the majority's ruling would undermine the development of new licensing markets to allow copyright owners to recoup their investments.[367]

Not until the recording industry began suing individual peer-to-peer (P2P) file sharers was there a direct infringement case that tested whether personal use copying qualified as fair use. In *BMG Music v. Gonzalez*,[368] the U.S. Court of Appeals for the Seventh Circuit ruled that Cecilia Gonzalez's use was unfair because she had downloaded many songs she had not paid for, whole works had been copied, and the widespread practice of file sharing was causing harm to the market for recorded music, thereby proving the meaningful likelihood of harm that had been missing in *Sony*.[369] Gonzalez downloaded the songs for her personal use, but the scale and scope of copying of commercial music through P2P networks distinguishes this case from ordinary personal uses that are far more likely to be fair.[370]

The *Gonzalez* case involved one type of consumptive personal use copying, but this term encompasses many types of acts. Consumptive uses also include such things as making time-shifted copies of television programs to watch them at a later time or loading the music from a purchased CD onto one's computer.[371] Productive personal uses include

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363. Justice Blackmun's fair use analysis can be found in *Sony*, 464 U.S. at 462–99 (Blackmun, J., dissenting).

364. *Id.* at 477–80.

365. *Id.* at 496–97.

366. *Id.* at 497.

367. *Id.* at 483–86.

368. 430 F.3d 888 (7th Cir. 2005); *see also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–15 (9th Cir. 2001) (peer-to-peer file sharing for personal use was not fair use). One Canadian court opined in *BMG Canada Inc. v. Doe*, however, that downloading music for personal use did not infringe copyright. *See* [2004] F.C. 488, 2004 Fed. Ct. Trial LEXIS 321, at *18–19 (Fed. Ct. Can.). An appellate court agreed with the lower court judge's ruling that the identities of file sharers did not have to be revealed, but he regarded its ruling on the downloading issue as premature. *See* BMG Canada Inc. v. Doe, [2005] 4 F.C.R. 81, 2005 F.C.R. LEXIS 232, at *44–48 (Ct. Ap. Can.).

369. *Gonzalez*, 430 F.3d at 889–90.

370. *See, e.g.*, John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 537–41 (giving examples of ordinary personal uses that are plausible prima facie infringements); Von Lohmann, *supra* note 21, at 830 (pointing out that personal use copying is more common than transformative or productive uses are).

371. *See, e.g.*, *Sony*, 464 U.S. at 454–55 (holding that time-shift copying was fair use). *See generally* Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 402–06 (2003) (distinguishing between active and passive consumers).

activities such as making a family video using commercial recorded music as the soundtrack.[372] Transformative uses include such things as remixing a song, making a mashup of clips from movies, or writing fan fiction about one's favorite characters.[373] Personal uses may also involve such things as backup copying of one's computer,[374] or sharing an occasional copy with family members or friends.[375]

There are several reasons why private and personal uses of copyrighted works should either be given a broad scope of fair use, or exempted from copyright control. For one thing, personal uses of copyrighted works, such as reading, viewing, listening, and otherwise enjoying them, generally do not interfere with commercial exploitations of protected works.[376] Second, personal uses are often within the sphere of reasonable and customary activities that copyright owners should expect from consumers, especially those who have purchased copies.[377] Third, members of the public often express themselves through personal uses of copyrighted works, and copyright law should accord some respect to user autonomy and self-expression interests.[378] Fourth, personal uses typically happen in the privacy of one's home, automobile, or other spaces as to which individuals have reasonable expectations of privacy. Copyright has traditionally not regulated the private sphere.[379] Fifth, even leaving aside privacy concerns, it is generally infeasible to regulate personal uses of copyrighted works because of the difficulties and costs likely to be encountered in efforts to enforce copyrights in spaces where personal uses so often take place.[380] Sixth, high transaction costs are likely to preclude the formation of viable markets for regulating most personal uses of most copyrighted works.[381] Finally, ordinary people do not think copyright restrictions apply to personal uses of copyrighted works and would not find acceptable a copyright law that regulated all uses they might make of copyrighted works.[382]

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372. *See, e.g.*, Deborah Tussey, *From Fan Sites to Filesharing: Personal Use in Cyberspace*, 35 GA. L. REV. 1129, 1134–38 (2001) (defining "personal use").

373. *Id.* at 1139–40.

374. *See, e.g.*, Litman, *supra* note 351, at 1896.

375. *Id.* at 1894.

376. *See, e.g.*, L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS 193 (1991).

377. *See, e.g.*, Litman, *supra* note 351, at 1897–99.

378. *See, e.g.*, Liu, *supra* note 371, at 406; Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 431 (2005).

379. *See, e.g.*, Gordon & Bahls, *supra* note 18, at 644–48 (discussing privacy as a factor justifying limits on a copyright owner's ability to regulate personal uses); *see also* Cohen, *Place of User*, *supra* note 88, at 349.

380. *See* NAT'L RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 134–35 (2000) (discussing the difficulties of enforcing copyrights in the personal sphere).

381. *See, e.g.*, Gordon, *supra* note 200, at 1601.

382. *See, e.g.*, JESSICA LITMAN, DIGITAL COPYRIGHT 194–95 (2001).

Copyright industry groups have, however, often expressed concern that creating a special exception for personal or private use copying or according a broad scope for personal fair uses is unjustified because of the potential harm it would cause to their markets.[383] They argue that, even if each individually made copy—whether made for oneself or for one's friends—looked at in isolation, might be commercially insignificant, the cumulative effect of widespread personal use copying is substantial and erodes opportunities for recouping investments in creating and disseminating new works.[384] Copyright owners can, however, counteract potentially harmful personal use copying by using technical protection measures (e.g., encryption or access control technologies) to prevent unauthorized access to or copying of their works by consumers and by directly licensing consumers to make personal uses of their works.[385]

Whatever the merits of a well-crafted statutory privilege for personal use copying,[386] fair use is the tool that the 1976 Act provides to balance consumer and copyright owner interests in regulating personal use copying. In my judgment, the Supreme Court got it right in *Sony*: private, noncommercial copies should be presumed fair, and that presumption should only be overcome if copyright owners bring forward proof that the defendants' use has, in fact, harmed the market for their work or at least poses a meaningful likelihood of such harm. Under this approach, ordinary personal uses, such as backup copying and platform-shifting, would be fair, but P2P file sharing would not be.

B. *Uses in Litigation and for Other Government Purposes*

The Latman study of fair use anticipated that some uses of copyrighted materials for litigation and other governmental purposes would likely be fair, although he found no cases on point.[387] Under the 1976 Act, a surprising number of fair use cases have involved uses of protected works in investigations or adjudications of legal disputes.[388] While the

383. *See, e.g.*, NAT'L RESEARCH COUNCIL, *supra* note 380, at 129–33 (2000).

384. *See, e.g.*, *id.* at 132–33.

385. *See, e.g.*, GOLDSTEIN, *supra* note 312, at 197–236. Some commentators consider this prospect with some trepidation. *See, e.g.*, J. H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 876–78 (1999).

386. I believe the merits are considerable.

387. LATMAN, *supra* note 27, at 13–14. The House and Senate reports also mention uses in judicial or legislative proceedings or reports as examples of fair uses. *See* H.R. REP. NO. 94-1476, at 65 (1976); S. REP. NO. 94-473, at 61–62 (1975).

388. *See, e.g.*, Moran v. deSignet Int'l, 557 F. Supp. 2d 378 (W.D.N.Y. 2008) (fair use for plaintiff to use software provided by defendant to review digital materials produced by defendants in discovery); Healthcare Advocates, Inc. v. Harding, Early, Follmer & Fraley, 497 F. Supp. 2d 627 (E.D. Pa. 2007) (fair use for lawyers to download images from a website in connection with an investigation of the merits of a lawsuit); Shell v. DeVries, No. 06-cv-00318, 2007 U.S. Dist. LEXIS 6967 (D. Colo. Jan. 30, 2007), *aff'd*, No. 07-1086, 2007 U.S. App. LEXIS 28317 (10th Cir. Dec. 6, 2007) (fair use for an attorney to use a timeline from the litigant's website as an exhibit to his motion for award of attorney fees);

investigation and litigation cases are interesting in their own right, they also plainly demonstrate that iterative copying of the whole or substantial parts of protected works for this kind of orthogonal use can be socially beneficial and qualify for fair use.

1. Evidentiary Uses of Materials Not Prepared for Litigation

The boldest of the litigation-related infringement claims was that made by William Bond in *Bond v. Blum*.[389] Bond was the author of an unpublished manuscript entitled *Self-Portrait of a Patricide: How I Got Away with Murder*, which Bond had written in the hope it would one day be commercially published.[390] Bond sued his wife's father, her ex-husband, an investigator hired to look into Bond's background, and the ex-husband's lawyers for copyright infringement because they made copies of his memoir and introduced it into evidence in a separate child custody lawsuit.[391]

Even though the defendants' copying was nontransformative, the court decided that the purpose favored fair use because they used the copy "for the evidentiary value of [the memoir's] content insofar as it contains admissions that Bond may have made against his interest when he bragged about his conduct in murdering his father, in taking advantage of the juvenile justice system, and in benefiting from his father's estate."[392] The unpublished status of Bond's manuscript and its stylized expression of his

Lucent Info. Mgmt., Inc. v. Lucent Techs., Inc., 5 F. Supp. 2d 238 (D. Del. 1998) (fair use for LT to send out letter similar to one previously sent by LIM to survey whether use of a similar name would be likely to cause confusion); *see also* Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 (9th Cir. 1992) (fair use for a lawyer to reproduce Scientology texts and distribute them to expert witness to prepare testimony in state court litigation); City Consumer Servs., Inc. v. Horne, 100 F.R.D. 740, 747–48 (D. Utah 1983) (fair use to make copies of litigation documents). Because the purpose of inputting student papers into a plagiarism detection database was investigatory in nature, *A.V. v. iParadigms, Ltd. Liability Co.*, 544 F. Supp. 2d 473 (E.D. Va. 2008), also seems to fit within this category of fair use cases. In *A.V.*, the court ruled that the database provider had made fair use of the student papers. *Id.* at 484.

389. 317 F.3d 385 (4th Cir. 2003). There were, however, some strong runners-up for the boldest litigation-related infringement claim. *See* Tavory v. NTP, Inc., 495 F. Supp. 2d 531 (E.D. Va. 2007) (fair use for lawyers to make copies of program code in conjunction with litigation about the code and a pertinent patent); Sturgis v. Hurst, 86 U.S.P.Q.2d (BNA) 1444 (E.D. Mich. 2007) (fair use for guardian ad litem to copy portions of the plaintiff's book for use in a proceeding to terminate parental rights to show the plaintiff's unfitness as a parent); Shell v. City of Radford, 351 F. Supp. 2d 510 (W.D. Va. 2005) (fair use for a police department to copy and publicly display photographs of a crime victim in the course of its investigation of a murder in which the photographer was a suspect); Kulik Photography v. Cochran, 975 F. Supp. 812 (E.D. Va. 1997) (fair use for a defense lawyer to use a copyrighted photo already admitted into evidence during the lawyer's closing arguments in a double murder trial where the closing arguments were televised on Court TV).

390. *Bond*, 317 F.3d at 390.

391. Shortly before William Bond's marriage, he brazenly sent his prospective wife's father a letter demanding "a dowry, a salary, establishment of an investment account, purchase of a studio apartment in addition to a house, and a severance package should Bond's marriage with [Blum] not work out." *Id.* at 391. Bond must have been quite a character.

392. *Id.* at 395.

feelings seemingly weighed against fair use,[393] as did the amount factor, for nearly all of the manuscript had been admitted into evidence.[394] But there was no evidence that the evidentiary use of the manuscript in the child custody case had adversely affected the marketability of the memoir.[395] Bond's concern that this use harmed his privacy interests was not cognizable in a copyright case.[396] Weighing the factors together, as *Campbell* required, the court concluded that the defendants' use of the Bond manuscript was fair, emphasizing that it "serve[d] the important societal interest in having evidence before the factfinder" that was unlikely to reduce incentives for investing in creative expression.[397]

Jartech, Inc. v. Clancy[398] was a more plausible infringement case than *Bond* in two respects. First, the allegedly infringed works were commercially distributed adult entertainment movies. Second, the investigator who made the copies had surreptitiously entered a theatre with a camcorder in order to take photographs every few seconds of the scenes and to record the soundtrack.[399] The photographs and scripts obtained through this process were introduced into evidence by a City of Santa Ana attorney charged with enforcing the city's nuisance abatement ordinance that declared cinematic depictions of certain sexual activities a nuisance.[400] As in *Bond*, litigation uses of these copyrighted works qualified for fair use.[401] The city had used the copies as evidence in a nuisance abatement case (that is, for an orthogonal purpose), not for the intrinsic purpose for which the movies had been made.[402]

2. Uses of Works Specially Prepared for Litigation

Fair use may be less likely as to works specially prepared for litigation, as in *Images Audio Visual Productions, Inc. v. Perini Building Co.*[403] Perini had been hired to construct a casino and resort complex.[404] It hired Images AV, a professional commercial photographer, to take a series of photographs, including aerial shots, of the firm's construction site, in case they were needed as evidence of construction progress if a dispute arose between Perini and its client.[405] Images AV and Perini agreed on a flat fee for photographing the site and a per-print charge for images chosen for

393. *Id.* at 395–96.
394. *Id.* at 396.
395. *Id.* at 396–97.
396. *Id.* at 395.
397. *Id.* at 396–97 (citing Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)).
398. 666 F.2d 403 (9th Cir. 1982).
399. *Id.* at 405.
400. *Id.*
401. *Id.* at 406–07.
402. *Id.* at 407.
403. 91 F. Supp. 2d 1075 (E.D. Mich. 2000).
404. *Id.* at 1077.
405. *Id.*

printing.[406] Images AV flew over the construction site 47 times in an eighteen-month time period.[407] Perini selected 305 photos to be printed.[408]

After Perini's client terminated the construction contract, Perini initiated an arbitration proceeding to seek compensation for work done under the contract.[409] It needed six copies of the selected photos so that the arbitrators, the attorneys representing the parties, and the witnesses could use them. Perini regarded the contract per-print price as excessive when photocopies would do, but Images AV insisted on getting the contractual per-print fee for each of these copies.[410] After an unsuccessful effort at a compromise, Perini made color photocopies for the arbitrators and lawyers.[411] Images AV then sued for infringement.[412] Relying on *Jartech* and other cases, Perini asserted fair use.[413]

Although Perini had not made commercial use of the photos in the ordinary sense of this word, the court regarded Perini's use to be nontransformative, for the photocopies were virtually identical to the prints.[414] Perini had, moreover, used the photos for the very purpose for which they had been taken, that is, as evidence of the construction site progress over time.[415] By photocopying the images, Perini had supplanted demand for extra prints from Images AV, which cut against fair use as to both the first and fourth factors.[416] Perini argued that the photos were evidence of historical facts, and so the scope of fair use should be broad, but the court regarded the pictures as being "worth a thousand words" and as creative works, so this factor also cut against fair use.[417] The court distinguished cases such as *Jartech* because the works in *Perini* had been created with the specific intent that they would be used in litigation.[418]

3. Weighing Fair Use Factors in Litigation and Investigation Cases

The main focus of fair use analysis in investigation and litigation cases has been and should be on the "salutary truth-seeking function" of the uses.[419] Iterative copying for purposes of investigating or adjudicating disputes are typically orthogonal to the purposes for which the works were

406. *Id.* The initial print charge was to be $18 with title block and $15 without title block. Images AV subsequently agreed to reduce the print price to $10.50. *Id.*
407. *Id.* at 1078.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.* at 1078–79.
412. *Id.*
413. *Id.* at 1078–79, 1081. For a discussion of *Jartech, Inc. v. Clancy*, see *supra* text accompanying notes 398–402.
414. *Perini*, 91 F. Supp. 2d at 1081–84.
415. *Id.* at 1081–82.
416. *Id.* at 1083–86.
417. *Id.* at 1085. The amount of photocopying also disfavored fair use because each photo was a separate copyrighted work. *Id.*
418. *Id.* at 1082.
419. *Id.* at 1083.

created or intended to be used. When copyrighted materials are used as evidence relevant to proof of some factual assertion, the nature of the work and amount of the taking factors should weigh less heavily than in other kinds of fair use cases, even when the work is unpublished.[420]

Investigatory and litigation uses are, moreover, generally unlikely to harm the market for a work. In view of this, courts should probably presume that investigation and litigation uses of works are fair. This presumption could perhaps be overcome in rare instances, such as *Perini*, where parties have contracted for specific prices for additional copies.[421] Courts should also be careful in litigation/investigation cases that copyright claims are not being asserted to advance noncopyright objectives, such as protecting privacy or thwarting efforts to determine the truth.

Although there is no caselaw involving judicial, legislative, executive, or administrative uses of copyrighted materials, these uses should similarly be accorded broad fair use privileges insofar as copyrighted materials are relevant inputs to legitimate governmental decision-making and other activities.[422] Consider, for example, fair use as a justification for court and West Publishing Co. reproductions of the texts of copyrighted works, such as the Supreme Court's recitation of the contested song lyrics in *Campbell* and the writings at issue in *Harper & Row*.[423] Those decisions are more informative and precise in their holdings because they reproduce the contested uses.[424]

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420. "[R]eproduction of a work in connection with a judicial proceeding, even where reproduction of the work is in its entirety, serves a qualitatively different function and does not satisfy the demand for the original." NIMMER & NIMMER, *supra* note 212, § 13.05[D][2]. The unpublished status of some works, such as the memoir in *Bond v. Blum*, and the creative and entertainment-oriented nature of other works, such as the movies in *Jartech*, should not count against fair use, even if they would in more typical copyright cases.

421. In my judgment, *Images Audio Visual Productions, Inc. v. Perini Building Co.* was a closer fair use case than the court perceived. Perini's purpose was noncommercial (in the copyright sense); the photocopies were made and distributed for their value as evidence as to historical facts, not for their artistry; and Images AV may have been unreasonable in not agreeing to a discount for photocopies in place of prints of the photos. Perini didn't need more prints to make its case, and photocopies were much cheaper and easier to produce. The authors of most works prepared for litigation should anticipate that copies will be made for lawyers, judges, arbitrators, and witnesses. *Perini* would thus have been more persuasive if it had focused on the contractual agreement to a certain price for extra copies, rather than on the fact that the photos had been specially made for litigation purposes.

422. Members of Congress, for example, sometimes read articles from the *New York Times* or *Washington Post* into the *Congressional Record*. Documentary filings with regulatory agencies may also include appendices containing copyrighted materials proffered as evidence in support of points made in the filing. Police and prosecutors may similarly need to make copies of photographs and the like in the course of investigations. *See* Shell v. City of Radford, 351 F. Supp. 2d 510 (W.D. Va. 2005) (fair use for police department to copy and publicly display photographs of crime victim in the course of its investigation of a murder in which the photographer was a suspect).

423. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 594–95 (1994) (reproducing disputed lyrics); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 570–79 (1985) (reproducing a disputed article and portions of Ford's memoirs).

424. A similar presumption should apply to copying of litigation documents such as complaints and briefs. This issue has not yet been litigated; it raises somewhat different

Governmental actors should not, of course, be completely immune from infringement claims for ordinary consumptive uses of copyrighted materials that harm the market for those works.[425] U.S. government actors cannot be enjoined from making infringing copies, but would be obliged to compensate copyright owners for ordinary infringements.[426]

C. *Uses in Advertising*

Although there is little direct evidence in the legislative history of the 1976 Act that Congress contemplated that commercial advertising uses would be fair, fair use had occasionally been asserted in cases involving commercial advertising under the 1909 Act,[427] and, given that the legislative history indicated that Congress did not mean to change fair use law by putting the doctrine in the statute, it is fair to assume that fair use might have some role in this already well-established and thriving enterprise. Under the 1976 Act, fair use became a significant defense in cases involving comparative advertising, truthful advertising, and market research.

1. Comparative Advertising

The first post–1976 Act comparative advertising case was *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*[428] Knight-Ridder reproduced copies of covers of past issues of TV Guide in advertisements

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issues than those in *Bond*, *Jartech*, and *Perini*. For a detailed discussion of these issues, see Davida H. Isaacs, *The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents*, 71 MO. L. REV. 391 (2006). As original works of authorship fixed in a tangible medium of expression, litigation documents are automatically copyrighted; yet, it is socially desirable for lawyers to be able to continue to borrow from preexisting works, as has been a long-standing custom in this field. The design of these documents may also be constrained by requirements of the law. They thus raise similar issues to those in the adjudication-related fair use cases.

425. Current interpretations of the Eleventh Amendment to the U.S. Constitution bar actions for damages against state government actors. *See, e.g.*, Chavez v. Arte Publico Press, 204 F.3d 601 (5th Cir. 2000) (dismissing an infringement claim against the University of Houston on sovereign immunity grounds). Courts can, however, enjoin specific government actors as to future infringements. *See, e.g.*, Salerno v. City Univ. of N.Y., 191 F. Supp. 2d 352 (S.D.N.Y. 2001) (enjoining the director of an institute from infringements). The U.S. government could, however, have been held liable for infringement damages in the *Williams & Wilkins* case under 28 U.S.C. § 1498(b).

426. *See* 28 U.S.C. § 1498(b) (2000).

427. Under the 1909 Act, fair use defenses as to commercial ads did not fare well. *See, e.g.*, Amana Refrigeration, Inc. v. Consumers Union of the U.S., Inc., 431 F. Supp. 324 (N.D. Iowa 1977) (reproducing excerpts of a favorable review of a product in an ad held unfair); Conde Nast Publ'ns, Inc. v. Vogue Sch. of Fashion Modelling, Inc., 105 F. Supp. 325 (S.D.N.Y. 1952) (using Vogue magazine covers in ads for a modeling school held unfair); Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938) (quoting three sentences from a book in a tobacco ad held unfair). *But see* Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D.N.H. 1978) (using a rival candidate's theme song in an ad held fair use).

428. 626 F.2d 1171 (5th Cir. 1980).

for its launch of a new competing television programming guide.[429] Triangle argued that Knight-Ridder's commercial purpose cut against its fair use defense and pointed to precedents that had rejected fair use defenses raised by advertisers.[430]

The U.S. Court of Appeals for the Fifth Circuit gave little weight to the commercial purpose in *Triangle* because it "occurred in the course of a truthful comparative advertisement,"[431] pointing to a Federal Trade Commission (FTC) report on public interests served by truthful comparative ads.[432] Knight-Ridder's use of TV Guide covers was, moreover, "done in a manner which is generally accepted in the advertising industry."[433] As the trial court had recognized, "[t]he comparative advertising at issue here was clearly undertaken to inform the public that they should purchase the Miami Herald TV supplement rather than buy TV Guide because it provides more value for the money."[434] If Knight-Ridder's ads had in fact drawn customers away from TV Guide, the court thought this was due to customers having been persuaded by the message in the ads, not because TV Guide covers were used in the ads.[435]

Comparative advertising was also challenged as infringement in *Sony Computer Entertainment America, Inc. v. Bleem, LLC*.[436] Bleem had developed a computer program that emulated the functioning of the Sony PlayStation.[437] To show that its product could be used to play games developed for the Sony platform, Bleem included a screen shot of a Sony game in its ads.[438] The court held that Bleem's use of the Sony screen shot was very similar to the use in *Triangle*, and hence it was fair.[439]

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429. *Id.* at 1172.

430. *Id.* at 1175 n.12.

431. *Id.* at 1176 n.13.

432. *Id.*

433. *Id.* at 1176. Knight-Ridder produced evidence that many magazines had reproduced covers of other magazines in the course of comparative ads. *Id.* at 1176 n.13.

434. Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc., 445 F. Supp. 875, 883 (S.D. Fla. 1978). The trial judge was not persuaded by Knight-Ridder's fair use defense because the comparative ad was not a critical commentary on TV Guide, nor was it a scientific or educational use such as those emphasized in the preamble of § 107. *Id.* at 880–83. However, the trial judge concluded that to enforce Triangle's copyright to block this comparative advertising would be inimical to the First Amendment and inconsistent with Supreme Court decisions such as *Bates v. Arizona*, 433 U.S. 350 (1977). *Triangle*, 445 F. Supp. at 882–85.

435. *Triangle*, 626 F.2d at 1177. The U.S. Court of Appeals for the Fifth Circuit briefly discussed the second and third statutory fair use factors but did not find either of them as potent as the first and fourth factors. *Id.* at 1176–77. The nature of the copyrighted work factor did not cut in favor or against fair use. *Id.* at 1176. Only the covers and none of the contents were copied, which the court did not regard as substantial. *Id.* at 1176–77.

436. 214 F.3d 1022 (9th Cir. 2000).

437. *Id.* at 1024.

438. *Id.*

439. *Id.* at 1027–30.

2. Truthful Advertising

One pre–1976 Act case held that quoting three sentences from a book about the risks of smoking in a commercial ad for cigarettes was an unfair use of the text because its author had not consented to this kind of use.[440] Under the 1976 Act, however, quoting from another author's work in truthful advertising has been viewed more favorably.

A case in point is *Consumers Union of United States, Inc. v. General Signal Corp.*[441] General Signal, the manufacturer of Regina vacuum cleaners, placed ads in magazines and other media that quoted from a positive assessment of its machines by Consumer Reports.[442] Consumers Union (CU) sued General Signal for infringement, in part because the firm had an explicit policy forbidding use of Consumer Reports's product assessments in subsequent advertising; CU was concerned that consumers would be misled into thinking that it was endorsing Regina cleaners.[443]

The Second Circuit viewed the purpose of the use to be reporting of factual information,[444] invoking General Signal's First Amendment commercial speech interests in making available factual information about its products.[445] Because Consumer Reports produced informational works, the court noted that the scope of fair use of these works should be broader to promote the free flow of information.[446] The company's use of Consumer Reports' assessment was "in the interest of accuracy, not piracy,"[447] and only a small number of words were reproduced in the ads. As the firm was not trying to supplant demand for Consumer Reports, the court regarded the harm factor as favoring fair use as well.[448]

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440. *See* Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 302, 304 (E.D. Pa. 1938).

441. 724 F.2d 1044, 1046–47 (2d Cir. 1983), *petition for reh'g denied*, 730 F.2d 47 (2d Cir. 1984).

442. *Id.* at 1047.

443. *Id.* at 1046.

444. *Id.* at 1049.

445. *Id.* (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (recognized that commercial advertisements serve the public interest by informing the public about products)).

446. *Id.* at 1049–50.

447. *Id.* The court pointed out that copying the exact words from Consumer Reports may be "the only valid way [to] precisely . . . report the evaluation." *Id.* Judge James Lowell Oakes dissented from the denial of the petition for rehearing en banc, insisting that since the use was commercial, the first factor weighed against fair use, as did the harm factor. Consumers Union of U.S., Inc. v. Gen. Signal Corp., 730 F.2d at 48–50. Consumer Reports made substantial investments in its research, and it would undermine its incentives to make these investments if it could not control advertising uses of its assessments. *Id.* at 48–49.

448. For a similar case, see *Sony Computer Entertainment America, Inc. v. Bleem, LLC*, 214 F.3d 1022 (9th Cir. 2000), in which the maker of a video game platform was held to have made fair use when it reproduced screen shots of Sony video games in its advertisements to inform the public that its software could be used to play Sony video games.

3. Market Research

In many fields, it is customary to do market research about the efficacy of competitors' activities, including of advertising campaigns. Some copying of the competitors' materials may be necessary to do market research. Only rarely has copyright infringement been alleged to challenge such research.

One such challenge was *Bruzzone v. Miller Brewing Co.*[449] Donald Bruzzone's consultancy business assessed the efficacy of ads shown on broadcast television.[450] His firm regularly developed surveys that displayed some frames from ads shown on broadcast TV and posed questions about them. Bruzzone mailed the surveys to thousands of households and tabulated and assessed the responses to the surveys. Bruzzone then published a newsletter to report on the results of his surveys.[451] The producer of Miller beer objected to the use of its ads in the surveys. Bruzzone claimed his use of the ads was fair because it was for research purposes; he used the "minimum necessary to stimulate recognition" of the ad; and there was no evidence that Bruzzone's use had harmed the market for Miller ads.[452] The court noted that survey research of this sort was a customary and accepted practice in the advertising industry and that "reliable market research results have value for the public [and] assist in keeping the competitive marketplace free of distortion and confusion."[453]

A more systematic and ubiquitous transmission of Infinity Broadcasting's radio programs via telephone lines to customers of Kirkwood's DialUp service was challenged in *Infinity Broadcast, Corp. v. Kirkwood*,[454] even though Kirkwood sought to justify the service as an aid to market research and as a way for advertisers to monitor whether ads for which they had paid had, in fact, been aired on the station.

4. Product Labels

Producers of some uncopyrightable goods use images or texts on the labels of their products and assert that copying of those images (which are often also claimed as trademarks), even for purposes such as promoting sales of those goods, is infringement unless specifically authorized by the copyright owner. The caselaw on this kind of advertising-related use of copyrighted materials is sparse, but somewhat mixed. Two recent cases involving Internet advertisements for the resale of sun tanning products with copyrighted product labels reached inconsistent results.[455] Similar

449. 202 U.S.P.Q. (BNA) 809 (N.D. Cal. 1979).
450. *Id.* at 810–11.
451. *Id.*
452. *Id.*
453. *Id.* at 811.
454. 150 F.3d 104, 104, 106, 109 (2d Cir. 1998).
455. *Compare* S&L Vitamins, Inc. v. Australian Gold, Inc., 521 F. Supp. 2d 188 (E.D.N.Y. 2007) (fair use to reproduce copyrighted trademark in order to resell products), *with* Designer Skin, LLC v. S&L Vitamins, 560 F. Supp. 2d 811 (D. Ariz. 2008) (posting photograph of tanning product label by Internet reseller was unfair). These cases raise issues

inconsistencies have arisen in two cases involving Federal Drug Administration-approved labels explaining the effects of chemicals in the packaged products.[456]

5. Weighing Factors in Advertising Fair Use Cases

Commercial advertisements may infringe copyrights if their makers unfairly copy expression from an earlier work.[457] But courts should be careful about infringement claims in advertising-related fair use cases because ads play such an important role in promoting competition among goods and services. Courts should probably not presume that a use in an ad is unfair based on its commerciality because, generally speaking, ads are not marketed as copyrighted products in the same manner as books, photographs, and sound recordings. The goal of an ad is to persuade consumers to buy some other good or service, not to buy the ad itself. So harm from copying an ad is unlikely to affect the market for the ad. Courts should also be wary of cases in which claims of copyright infringement are being asserted in order to thwart effective competition.[458]

Under the 1976 Act, courts have been attentive to the public interest in access to truthful information about products and services. As the FTC report cited in *Triangle* recognized, "Comparative advertising, when truthful and nondeceptive, is a source of important information to

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similar to those in *Quality King Distributors, Inc. v. L'Anza Research International*, 523 U.S. 135 (1998) (not infringement to import lawfully acquired bottles of shampoo whose labels were copyrighted), and *Euro-Excellence Inc. v. Kraft Canada Inc.*, [2007] 3 S.C.R. 20, 2007 S.C.R. LEXIS 305 (Can.) (not copyright infringement to import lawfully acquired chocolate products whose labels were copyrighted).

456. *Compare* FMC Corp. v. Control Solutions, Inc., 369 F. Supp. 2d 539 (E.D. Pa. 2005) (unfair use for generic manufacturer to use federally approved text on product labels), *with* SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc., 211 F.3d 21 (2d Cir. 2000) (not copyright infringement to reproduce federally approved label as to generic product). SmithKline, in my view, had the better argument. The companies in both cases had competed in the sale of noncopyrighted goods, and the texts of labels for those goods to inform consumers about their proper usage were highly constrained by regulatory oversight.

457. *See, e.g.*, Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987) (movie poster infringed copyright in earlier pictorial work).

458. A good example of an erroneous fair use analysis in a comparative advertising case is *Southco, Inc. v. Kanebridge Corp.*, 53 U.S.P.Q.2d (BNA) 1490 (E.D. Pa. 2000), in which the trial court ruled that it was unfair for competitor to use the plaintiff's parts numbering system in comparison charts to enable prospective customers to discern which parts to order from it as substitutes for plaintiff's hardware products. The U.S. Court of Appeals for the Third Circuit later ruled that Southco's parts numbering system was unprotectable by copyright law under 17 U.S.C. § 102(b). Southco, Inc. v. Kanebridge Corp., 390 F.3d 276, 278 (3d Cir. 2004). The lower court's ruling against Kanebridge's fair use defense should, therefore, be ignored. This opinion shows how courts can be led astray in fair use cases when they don't pay attention to the value to society in making truthful information about uncopyrightable hardware products available to the public and give too much weight to commerciality as a purpose. Southco wasn't selling part numbers; it was selling noncopyrighted hardware. All Kanebridge was trying to do was compete effectively with Southco. The product labeling cases present similar risks of thwarting competition in secondary markets.

consumers and assists them in making rational purchase decisions. Comparative advertising encourages product improvement and innovation, and can lead to lower prices in the marketplace."[459] In cases like *Triangle*, where a new directly competitive entrant is comparing its product with that offered by an established player, courts should be especially attentive to potentially anticompetitive reasons for challenging advertisements "quoting" from the established product. First Amendment commercial speech interests should be weighed into the fair use balance as well, and courts should follow *Triangle*'s lead by citing to First Amendment caselaw when analyzing fair use cases involving advertising.

V. UNFORESEEN USES

One of the important functions of fair use is providing a balancing mechanism within copyright law to allow it to address questions posed by new technologies or other developments that the legislature could not or did not contemplate.[460] The legislative history of the 1976 Act states that Congress did not intend to freeze the law of fair use and expected it to continue to evolve,[461] as indeed it has done. This part demonstrates that fair use has been used to resolve numerous disputes arising from new uses of copyrighted works enabled by advances in technology, including time-shift copying of television programs with the aid of video tape recording machines, reverse engineering of computer programs, and Internet search engine web crawling. The policies underlying the uses in these cases include promoting competition and innovation in complementary technology industries, furthering privacy and autonomy of users of copyrighted works, and fostering enhanced public access to information.

A. *Innovative Technologies that Facilitate Personal Uses*

Although Congress expected that fair use would play some role in regulating personal uses of copyrighted works,[462] it did not anticipate that fair use would play a significant role in regulating the development of new technologies and services designed to facilitate personal uses of copyrighted works. Although Congress was aware that copyright owners had challenged research library copying on behalf of its patrons (one kind of personal use facilitation), it did not foresee that copyright owners would sue

459. Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, 626 F.2d 1171, 1176 n.13 (5th Cir. 1980) (quoting 16 C.F.R. § 14.15(c) (1980)).

460. *See, e.g.*, Samuelson, *supra* note 41, at 55–56 (discussing fair use as a doctrine that allows copyright to evolve in response to challenges posed by new technologies).

461. The House report noted,

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

H.R. REP. NO. 94-1476, at 66 (1976).

462. *See supra* Part IV.A.

developers of reprography technologies as infringement-facilitators or that fair use would play such a critical role in determining which technologies would survive such challenges and which would not.

The issue of technology developer liability for personal fair use facilitation was first addressed in *Sony Corp. of America v. Universal City Studios, Inc.*[463] Universal claimed that Sony was indirectly liable for copyright infringement because it had manufactured and distributed Betamax video tape recorders (VTRs) that materially contributed to widespread copying of television programs, including movies made by Universal, that Sony knew or had reason to know was infringement.[464]

The Court found no precedent in the copyright caselaw for imposing copyright liability on an equipment manufacturer based on unauthorized copying by its customers, and nothing in the 1976 Act or its legislative history to indicate that Congress intended to extend copyright liability to technology development.[465] It took note that Congress had, however, decided that technology developers should only be held liable for contributory patent infringement if the firms made and sold technologies lacking substantial noninfringing uses.[466] Firms that sell staple articles of commerce (that is, technologies suitable for substantial noninfringing uses) do not contributorily infringe patents, even if they, in fact, sell their products to someone who uses them for infringing purposes.[467] Congress balanced the interests of patent owners and the public and decided that the public had legitimate interests in access to such technologies for their noninfringing uses, and unlicensed developers should be free to make these technologies to fulfill consumer demand for them. The Court found the policies underlying this rule to be relevant to the question in *Sony*.[468]

The Court then addressed whether Sony's VTRs were suitable for substantial noninfringing uses. It concluded they were, relying partly on evidence that some copyright owners had authorized VTR taping of their programs.[469] But it went on to decide that the widespread use of Betamax

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463. 464 U.S. 417 (1984).

464. Sony ads encouraged prospective customers to copy their favorite programs. *Id.* at 489–90 (Blackmun, J., dissenting).

465. *Id.* at 435, 440. The Court further noted,

> One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.

Id. at 456.

466. *Id.* at 440–41 (citing 35 U.S.C. § 271 (1984), *invalidated by* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999)).

467. *See, e.g.*, DONALD S. CHISUM, CHISUM ON PATENTS ch. 17 (2005).

468. The Court noted,

> [T]he 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. Indeed, it need merely be capable of substantial noninfringing uses.

Sony, 464 U.S. at 442.

469. *Id.* at 442–47.

VTRs to make time-shifted copies of television programs to watch the programs at a later time was fair use. This was a private, noncommercial activity that had not harmed and was unlikely to harm the market for motion pictures.[470] Consumers accordingly had legitimate interests in access to VTRs to get better access to television programs through time-shifting, and companies such as Sony had a legitimate interest in being able to offer Betamax machines to customers for these uses.

Sony established a safe harbor for the development of technologies designed to facilitate personal fair uses.[471] This rule has sometimes benefited not only consumers and technology developers, but also copyright owners. Consumers may initially be drawn to new technologies, such as VTRs or iPods, because of the personal uses they facilitate (e.g., time-shifting TV programs or place-shifting music from their CD collections),[472] but the technologies often create opportunities for new complementary markets for copyrighted works, such as the video cassette and DVD markets for movies and the iTunes store for music.[473]

Early on, it may be "difficult, perhaps impossible, to predict whether and to what degree any *particular* technology will exhibit this complementary character."[474] The *Sony* safe harbor allows personal-use-facilitating technologies to enter the market so that there is time to see if complementary markets will emerge. "[F]air use, insofar as it represents legal tolerance for private copying, plays an important and underappreciated role in U.S. technology and innovation policy, particularly in that it draws investment to technologies that are complementary goods to copyrighted works."[475]

Sony does not always shield technologists from copyright liability. Copyright owners have successfully sued commercial bulletin board services that knowingly facilitated infringement by encouraging customers

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470. *Id.* at 450–55.

471. *See, e.g.*, Von Lohmann, *supra* note 21, at 833–38 (giving examples of such technologies). The *Sony* safe harbor has protected the development of many personal-use-facilitating technologies with substantial noninfringing uses. In subsequent cases, the *Sony* safe harbor shielded (1) the distribution of software that facilitated backup copying of software, *see* Vault Corp. v. Quaid Software Ltd., 847 F.2d 255 (5th Cir. 1988); (2) add-on software that enhanced consumer enjoyment of Nintendo video games, *see* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992); and (3) MP3 players that allowed users to listen to music from their CDs on a portable device, which the Ninth Circuit characterized as a paradigmatic fair use, *see* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1079 (9th Cir. 1999).

472. *See, e.g.*, Von Lohmann, *supra* note 21, at 837 ("[T]here would be no iPod if Apple could not count on copyright law to permit iPod buyers to copy their existing CD collections.").

473. *Id.* at 840–43.

474. *Id.* at 843. "[E]stablished, successful firms often suffer from a persistent inability to capitalize on certain kinds of innovation that may revolutionize the marketplace but do not have predictably high profit margins." *Id.* at 844–45; *see also id.* at 845–50 (further discussing the impediments that established firms experience in responding to disruptive innovations).

475. *Id.* at 831.

to upload and download copies of copyrighted software and photographs.[476] Developers of P2P file-sharing technologies were similarly held liable for knowingly contributing to or actively inducing their users to infringe.[477] MP3.com failed to justify as fair use making a database of recorded music ripped from thousands of purchased CDs in connection with its planned service to facilitate personal uses of music for customers who owned CDs of those recordings.[478] Congress has also chosen to regulate some specific technologies that threatened to undermine the ability to recoup rights holder investments in creative works.[479]

Personal use facilitation does not provide a complete defense to copyright challenges to new technologies and services, in part because not all personal uses are fair uses. But fair use has become the lynchpin in the technology-developer personal use facilitation cases.[480]

B. *Competition- and Innovation-Promoting Uses in the Software Industry*

The legislative history of the 1976 Act does not suggest that Congress expected that the fair use doctrine would play any role in promoting competition in the software industry, such as regulating when reverse engineering of software for purposes of extracting information to develop an interoperable program would or would not be lawful.[481] In numerous cases in the past three decades, however, fair use defenses have been successful when courts perceived copyright owners to be claiming

476. *See, e.g.*, Sega Enters. Ltd. v. MAPHIA, 857 F. Supp. 679 (N.D. Cal. 1994); Playboy Enters., Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993). MAPHIA and Frena had both argued that they were merely facilitating private noncommercial uses of these works under *Sony*, but these services posed the meaningful likelihood of harm to the market that Sony recognized should be considered as unfair. *Sega*, 857 F. Supp. at 689; *Playboy*, 839 F. Supp. at 1557–58.

477. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); *see also* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 914 (2005) (remanding but noting that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties").

478. *See* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350–52 (S.D.N.Y. 2000).

479. *See* Von Lohmann, *supra* note 21, at 856 n.114 (giving examples).

480. Some have argued that First Amendment values and precedents support allowing firms to make and distribute personal-use-facilitating technologies, such as peer-to-peer file-sharing technologies, insofar as they are speech-facilitating technologies akin to printing presses to which the public should have access unless the technologies lack noninfringing uses. *See* Brief for Professors Edward Lee, Peter Shane & Peter Swire as Amici Curiae Supporting Respondents, *Grokster*, 545 U.S. 913 (No. 04-480), *available at* http://www.copyright.gov/docs/mgm/law_profs-lee.pdf.

481. At a 1965 hearing on computer technology issues, one witness from the electronics industry raised the question of whether reverse engineering of programs should be lawful, but he did not suggest fair use as an option for making it so. *See* Letter from Graham W. McGowan, Gen. Counsel, Elecs. Indus. Ass'n, to Rep. Edwin E. Willis, Subcommittee No. 3, House Committee on the Judiciary (May 8, 1965), *reprinted in Copyright Law Revision: Hearings Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. app. at 1898–99 (1966).

infringement in order to exclude competitors from a market[482] or to block development and distribution of complementary noninfringing products.[483] Several of the competition-promoting fair use cases involved intermediate copying of protected works in the course of developing noninfringing products.[484]

When Congress was finalizing its revisions to U.S. copyright law, it was too early in the history of computer programming and in the evolution of copyright as a form of legal protection for programs for Congress to have considered whether reverse engineering of program code should be privileged under fair use.[485] Not until 1992, in *Sega Enterprises, Ltd. v. Accolade, Inc.*,[486] was this new technology issue seriously addressed. Sega sued Accolade for infringement because Accolade's engineers had made copies of Sega's video game programs in the course of reverse engineering them to extract information about Sega interfaces so that Accolade could make its video games interoperate successfully with the Sega Genesis console.[487] Accolade's principal defense was that it had made fair use of the Sega programs.[488]

Sega was initially successful in persuading a trial judge that Accolade's fair use defense was specious.[489] Sega invoked the *Sony* and *Harper & Row* presumptions against fair use based on the commerciality of Accolade's purpose and its intent to develop competing products that would adversely affect the market for Sega games.[490] Sega further argued that Accolade's attempt to get access to unpublished source code forms of its programs was unfair under *Harper & Row*.[491] Accolade had, moreover,

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482. See, for example, *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992), *amended by* 1993 U.S. App. LEXIS 78 (9th Cir. Jan. 6, 1993), discussed *infra* in notes 486–511 and accompanying text.

483. *See, e.g.*, Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992) (unsuccessful challenge to "Game Genie" program that allowed users to make fair uses by temporarily changing some aspects of the play of Nintendo games). *But see* Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006) (not fair use for firm to edit DVDs to block scenes or dialogue to omit sex or violence for customers who wanted to see "family-friendly" movies).

484. *See Sega*, 977 F.2d 1510; *see also infra* note 512 (citing relevant cases).

485. Although the CONTU report discussed copyright protection for computer programs in some detail, it did not consider reverse engineering at all, let alone opine whether doing so should be considered infringement. *See* CONTU REPORT, *supra* note 321, ch. 3.

486. 977 F.2d 1510.

487. *Id.* at 1514–16.

488. Accolade's other defenses were discussed by the Ninth Circuit. *Id.* at 1517–20.

489. Sega Enters. Ltd. v. Accolade, Inc., 785 F. Supp. 1392, 1398 (N.D. Cal.), *aff'd in part, rev'd in part*, 977 F.2d 1510.

490. *Sega*, 785 F. Supp. at 1398.

491. *Id.* In response to Accolade's argument that it was necessary to make copies for reverse engineering purposes, the trial court expressed the view that the public's need for access to Sega programs was "fully satisfied" by Sega's distribution of its games into the marketplace. *Id.* The court was also convinced that the legislative history of copyright law did not reveal congressional intent to privilege reverse engineering of software. *Id.* at 1398–99. The court drew a negative inference from the fact that there was an explicit reverse engineering privilege in the Semiconductor Chip Protection Act, but not in the copyright act. *Id.*; *see also* Semiconductor Chip Protection Act, 17 U.S.C. § 906(a) (2006).

copied the whole of Sega programs not just once, but multiple times.[492] In addition to lost sales of Sega games due to competition from the Accolade games, Sega pointed to lost revenues from the licensing program it had established for developers of games for the Sega platform, a program that Accolade had declined to join.[493]

The Ninth Circuit reversed with respect to copyright and trademark infringement, and held that intermediate copying of computer programs for a legitimate purpose such as achieving interoperability was a fair use.[494] While agreeing that Accolade had a commercial purpose in making copies of Sega games, the court thought that Sega's insistence that it must presume unfairness was "far too simple and ignores a number of important considerations."[495] A closer look at Accolade's purpose revealed that it had the legitimate and nonexploitative purpose of studying the functional requirements for achieving compatibility with the Genesis console.[496] The court was, moreover, "free to consider the public benefit resulting from a particular use," which in Sega had "led to an increase in the number of independently designed video game programs offered for use with the Genesis console,"[497] which was "precisely [the kind of] growth in creative expression . . . that the Copyright Act was intended to promote."[498]

Even if the availability of Accolade's Genesis-compatible games caused some minor economic loss to Sega, this was the result of ordinary competition among noninfringing works, not of Accolade's use of expression from the Sega programs. The court regarded Sega as having "attempt[ed] to monopolize the market by making it impossible for others to compete," a result that "runs counter to the statutory purpose of promoting creative expression."[499] This misuse of copyright seems to have undercut Sega's claim and strengthened Accolade's fair use defense.[500]

The *Sega* decision gave considerable attention to the nature of the work factor, in part because the scope of copyright protection for computer programs is quite thin since programs embody many functional design elements that copyright law does not protect, including information pertinent to achieving interoperability among programs.[501] The only way to get access to unprotected aspects of programs distributed in machine-executable forms was to decompile or disassemble them, which inevitably

492. The trial court did not emphasize the wholesale copying in its fair use analysis, although this is apparent from reading the whole decision. *See Sega*, 785 F. Supp. at 1398–99.

493. The trial court did not emphasize this latter source of lost revenues; the Ninth Circuit's decision mentions the Sega licensing program and Accolade's decision not to participate in it. *Sega*, 977 F.2d at 1514.

494. *Id.*

495. *Id.* at 1522.

496. *Id.*

497. *Id.* at 1523.

498. *Id.*

499. *Id.* at 1523–24.

500. *See id.*

501. *Id.* at 1524.

requires making intermediate copies.[502] Finally, the court recognized that "[i]f disassembly of copyrighted object code is *per se* an unfair use, the owner of the copyright gains a *de facto* monopoly over the functional aspects of his work—aspects that were expressly denied copyright protection by Congress" under 17 U.S.C. § 102(b).[503] To obtain exclusive rights over functional design elements of programs, "the creator of the work must satisfy the more stringent standards imposed by the patent laws."[504] Thus, the nature of the work factor also cut in favor of Accolade's fair use defense.

The one factor that weighed against Accolade's fair use defense was that it had copied entire programs.[505] But the Ninth Circuit invoked *Sony* for its ruling that copying an entire work did not preclude fair use.[506] Given the intermediate nature of the copies, the Ninth Circuit concluded that this factor should not be given much weight.[507]

The Ninth Circuit concluded its fair use analysis in *Sega* with several observations. First, the case had presented a novel question as to a subject matter with which courts had relatively little experience.[508] It invoked *Sony* as observing that "[w]hen technological change has rendered an aspect or application of the Copyright Act ambiguous," the law should be construed in light of its public policies, such as the exclusion of functional designs.[509] It also responded to Sega's argument that Accolade was free riding on Sega's substantial investment in the success of its video game system by pointing to *Feist Publications, Inc. v. Rural Telephone Service Co.*[510] Specifically, the *Feist* court rejected the sweat-of-the-brow basis for copyright claims and endorsed freedom to reuse unprotected elements in copyrighted works as consistent with the constitutional purpose of copyright law.[511]

Sega has been followed in a steady stream of cases involving reverse engineering of computer software.[512] Reverse engineering fair use defenses

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502. *Id.* at 1525–26.

503. *Id.* at 1526; *see also* 17 U.S.C. § 102(b) (2006) (denying protection to any "idea, procedure, process, system, method of operation, concept, principle, or discovery").

504. *Sega*, 977 F.2d at 1526 (citing Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 159–64 (1989)).

505. *Id.* at 1526.

506. *Id.*

507. *Id.* at 1526–27. For further discussion of the implications of *Sony* and *Sega* for other new technology uses of copyrighted works, see, for example, Samuelson, *supra* note 41; Samuelson, *supra* note 319.

508. *Sega*, 977 F.2d at 1527.

509. *Id.*

510. *Id.* (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991)).

511. *Id.* (discussing *Feist*).

512. *See, e.g.*, Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 599 (9th Cir. 2000) (copying of program code for purposes of discerning interface information to make a compatible platform was fair use under *Sega*); DSC Commc'ns Corp. v. DGI Techs., Inc., 81 F.3d 597, 601 (5th Cir. 1996); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1539 (11th Cir. 1996); *see also* Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832, 843–44 (Fed. Cir. 1992); Evolution, Inc. v. Suntrust Bank, 342 F. Supp. 2d 943, 955–56 (D. Kan.

have, however, sometimes been unsuccessful,[513] as when defendants obtained unlawful access to the software or copied expression from the software being reverse engineered.[514]

Fair use has also played a role in regulating the development of add-on software and of add-on activities of licensed users of copyrighted materials. In *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,[515] for instance, the Ninth Circuit ruled that users of Galoob's "Game Genie," which allowed them to make temporary changes to the play of some aspects of Nintendo games (e.g., extending the "life" of a particular character), had made fair use of those games.[516] Galoob was consequently not an infringer either.[517] Makers of computer software that bypassed scenes of DVD movies that involved violence, nudity, or foul language relied on *Galoob* in arguing that they too should not be held liable for infringement.[518] During the pendency

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2004) (intermediate copying for purposes of extracting information to develop noninfringing interoperable products held fair use). *Sega* has also had some significance in cases involving works other than computer software, which involved intermediate copying for purposes of developing noninfringing products. *See, e.g.*, Nautical Solutions Mktg., Inc. v. Boats.com, No. 8:02-cv-760-T-23TGW, 2004 U.S. Dist. LEXIS 6304 (M.D. Fla. Apr. 1, 2004) (intermediate copying to extract information about boats listed for sale); Ticketmaster Corp. v. Tickets.Com, Inc., No. CV99-7654-HLH, 2003 U.S. Dist. LEXIS 6483 (C.D. Cal. Mar. 7, 2003) (intermediate copying of website to extract information on tickets being sold); *see also* Bellsouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc., 999 F.2d 1436 (11th Cir. 1993) (en banc) (intermediate copying of information from yellow pages into database for purposes of preparing a competing yellow pages directory did not infringe copyright).

513. *See* DSC Commc'ns Corp. v. Pulse Commc'ns, Inc., 170 F.3d 1354, 1363 (Fed. Cir. 1999) (reverse engineering to demonstrate interchangeability of plaintiff's and defendant's cards not fair use); Compaq Computer Corp. v. Procom Tech., Inc., 908 F. Supp. 1409, 1421 (S.D. Tex. 1995) (copying of software for purposes of duplicating prefailure warnings on compatible hard drives held not fair use). I find *DSC Communications Corp. v. Pulse Communications, Inc.* and *Compaq Computer Corp. v. Procom Technology, Inc.* to be unpersuasive and incompatible with the core analysis in *Sega* and its progeny. I have elsewhere argued that decompilation or disassembly of computer program code for other legitimate purposes besides obtaining information necessary to achieve interoperability (e.g., to figure out how to fix malfunctioning code) is also fair use. *See* Pamela Samuelson, *Comparing U.S. and EC Copyright Protection for Computer Programs: Are They More Different than They Seem?*, 13 J.L. & COM. 279, 285–92 (1994).

514. *See, e.g.*, Bowers v. Baystate Techs., Inc., 320 F.3d 1317 (Fed. Cir. 2003); DSMC, Inc. v. Convera Corp., 479 F. Supp. 2d 68, 83 (D.D.C. 2007) (unfair use when the defendant gained unlawful access to the plaintiff's program to reverse engineer it). Another factor given weight in *Bowers v. Baystate Technologies, Inc.* was that a shrinkwrap license term forbade reverse engineering of the software at issue. 320 F.3d at 1323–24.

515. 964 F.2d 965 (9th Cir. 1992).

516. *Id.* at 972. In keeping with *Sony*, the Ninth Circuit presumed that this private, noncommercial use of Nintendo games was fair; because users had to own Nintendo games in order to use the Game Genie, there was no risk of supplanting demand for the games. *Id.* at 969–70.

517. Since there were no underlying acts of infringement, there was no basis for imposing secondary liability. *Id.* at 970. *But see* Micro Star v. Formgen Inc., 154 F.3d 1107, 1113 (9th Cir. 1998) (ruling that a third-party compiler of user-generated content that built on top of a copyrighted game made unfair use of MAP files in the underlying program).

518. *See, e.g.*, Ashley Kerns, Note, *Modified to Fit Your Screen: DVD Playback Technology, Copyright Infringement or Fair Use?*, 24 LOY. L.A. ENT. L. REV. 483, 484–85 (2004).

of a lawsuit concerning this software, Congress enacted legislation that specifically exempted this kind of software from infringement claims.[519] The availability of alternative means to make movies "family-friendly" was a significant factor in defeating a fair use claim made by a firm that altered actual DVD disks so that "harmful" content in the movies would not be rendered when the DVD played.[520]

Several lessons emerge from the competition- and innovation-promoting fair use cases. First, the commerciality of a second comer's use should be given relatively little weight in these cases, as competition-promoting uses will almost always be for commercial purposes. Second, the nature of the copyrighted work factor may be more significant in these kinds of fair use cases than in other types of fair use cases. In software reverse engineering cases, for example, there is no other way to get the information except by making copies. Third, attention should be given in these kinds of cases to the markets that the plaintiff and defendant are in, their respective market power, whether the defendant's use is supplanting the market for the plaintiff's work or is for legitimate competitive purposes, the impacts that the fair use determination will have on competitive entry and effective competition, and whether the defendant is engaged in fair follow-on activities or market-destructive free riding.

Also important may be the intermediate nature of any copying and its necessity, whether the plaintiff is trying to misuse or extend its copyright beyond its proper bounds, and whether the plaintiff is trying to exercise undue control over complementary or supplementary markets. There is a substantial public interest in getting access to new noninfringing products and services that should be weighed in the fair use balance. But defendants who gain unlawful access to protected works or breach contracts as to them should not expect that their uses will be fair, even when the uses promote competition.

C. *Access to Information-Promoting Fair Uses*

One significant cluster of unanticipated use cases has involved Internet search engine copying for the purpose of indexing or otherwise making information about protected works more publicly accessible.[521] Internet

519. Family Movie Act of 2005, Pub. L. No. 109-9, §§ 201–202, 119 Stat. 218, 223–24 (codified at 17 U.S.C. § 110(11) (2006)).

520. Clean Flicks of Colo., LLC v. Soderbergh, 433 F. Supp. 2d 1236, 1240 (D. Colo. 2006).

521. At least one fair use case predating the Internet involved access to information. In *New York Times, Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977), the defendants had prepared a personal names index to a set of *New York Times* indices. In assessing Roxbury's fair use defense to the *Times*' charge of infringement, the court observed,

> It seems likely that defendants' index will serve the public interest in the dissemination of information. Without defendants' index, an individual seeking to find articles which appeared in The New York Times on a certain person whose career spanned, say, forty years, would be compelled to search through forty

search engines use web crawling software to copy information posted on the Internet; they typically cache these copies to facilitate faster access to them, process them to index the contents and/or to create thumbnail images, and display links to websites where the content can be found.

The first major challenge to Internet search engine copying was *Kelly v. Arriba Soft Corp.*[522] Leslie Kelly, a commercial photographer, had posted his photographs of the American West on his website.[523] Arriba Soft used web crawling software to copy images on open sites on the Internet, including Kelly's. After inputting the copies to its database, Arriba Soft processed the data to produce thumbnail-size images.[524] Its search engine would then serve up thumbnails responsive to user queries (e.g., "show me photos of the Grand Canyon").[525] Users could decide which image best satisfied their queries and follow the link to the site where full-size images could be found.[526] Kelly claimed that the thumbnail-size images of his photos without a license constituted infringement.[527]

> volumes of the Times Index. Using defendants' index, the researcher would discover immediately the pages and volumes of the Times Index on which the name of his subject appears. Armed with this information, the researcher then can proceed to a few of the forty potentially relevant volumes of the Times Index, from which he will be directed to the pages and columns of The New York Times itself. On its face, defendants' index appears to have the potential to save researchers a considerable amount of time and, thus, facilitate the public interest in the dissemination of information.

Id. at 221. The purpose of the use factor thus favored fair use, as did the nature of the copyrighted work factor, for the *Times* indices were informational works that required more diligence than creativity to produce, and the information in these works was beyond the scope of copyright protection. *Id.* While Roxbury had taken a substantial amount of information from the *Times*' indices, this was counterbalanced by the fact that Roxbury could not prepare a personal name index without copying this information. *Id.* at 222. The Roxbury index, moreover, did not supplant the market for the *Times*' indices. *Id.* at 223. Its index "is not another version of plaintiffs' index, but a work with a different function and form." *Id.* at 225. The fact that the *Times* then asserted an interest in entering the market for creating such an index was not sufficient evidence of harm to the market to undermine Roxbury's fair use defense. *Id.* at 225–26. *Roxbury* was not relied upon in any of the Internet search engine cases.

Other post–1976 Act information-access fair use cases include *N.A.D.A. Services Corp. v. Business Data of Virginia, Inc.*, 651 F. Supp. 44, 49 (E.D. Va. 1986) (fair use to prepare computer tape of information from compilation purchased from plaintiff to facilitate access to the data), *Dow Jones & Co. v. Board of Trade*, 546 F. Supp. 113, 120 (S.D.N.Y. 1982) (fair use to reuse Dow Jones' averages), and *Kipling v. G. P. Putnam's Sons*, 120 F. 631, 635 (2d Cir. 1903) (preparing an index to the poets' works not infringement).

522. 336 F.3d 811 (9th Cir. 2003).

523. *Id.* at 815.

524. *Id.* After creating the thumbnail images, the larger images were deleted from the search engine database. *Id.*

525. *Id.*

526. *Id.* at 815–16. In the first half of 1999, the defendant's search engine created an in-line link to the larger images, which made it appear to the user that the full-sized image was being displayed on the search engine's site; thereafter, the results page provided links to take the user to the source page for the image. *Id.*

527. Leslie Kelly apparently did not claim that the copying done by the web crawling software or in the database prior to making thumbnail-sized images were infringements, perhaps because these intermediate copies were likely be fair uses under *Sega*. Web

The Ninth Circuit characterized Arriba Soft's thumbnails as "transformative" of Kelly's images.[528] Arriba Soft's thumbnails were, of course, smaller in size and of lower resolution than Kelly's full-sized images, but the thumbnails were demonstrably iterative copies of Kelly's photos.[529] The court may have felt compelled to characterize the thumbnails as transformative to avoid the presumption of harm to the market that *Campbell* endorsed when a second comer's use was both commercial and nontransformative.[530] But it would be more straightforward simply to say that Arriba Soft's thumbnail images "served an entirely different function than Kelly's original images,"[531] that is, they had an orthogonal purpose. Arriba Soft had created the thumbnails to "improve access to images on the internet," not to supplant the demand for the aesthetic experience that Kelly's photos might evoke.[532] The purpose factor thus favored Arriba Soft "due to the public benefit of the search engine and the minimal loss of integrity to Kelly's images."[533] These considerations should be recognized as sound bases for characterizing the thumbnails as fair in *Kelly*, even if they are not really transformative.

The nature of the work factor slightly favored Kelly because his works were quite creative; yet this was counterbalanced by Kelly's having published the photos on the open Internet.[534] The amount of the taking factor favored neither party, for "although Arriba [Soft] did copy each of Kelly's images as a whole, it . . . was necessary for Arriba [Soft] to copy the entire image to allow users to recognize the image and decide whether to pursue more information about the image or the originating web site."[535] Arriba Soft's search engine helped users find Kelly's photos so that they could buy them from him or his licensees,[536] which undercut the argument that Arriba Soft's use would harm the market for the photos.[537]

Like Arriba Soft, Google creates thumbnails of images so that its search engine can help users find relevant images on the Internet. In its lawsuit against Google, [538] Perfect 10 sought to distinguish *Kelly* on two grounds:

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crawling and cache copying of copyrighted works were unsuccessfully challenged as infringements in *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006), discussed *infra* notes 542–53 and accompanying text.

528. *Kelly*, 336 F.3d at 819.

529. *Id.* at 815.

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

531. *Kelly*, 336 F.3d at 818.

532. *Id.*

533. *Id.* at 820.

534. *Id.*

535. *Id.* at 821.

536. *Id.* The Ninth Circuit also considered that Arriba Soft's thumbnail images also lost clarity if someone tried to enlarge them, which is why they could not supplant demand for good resolution images, an especially important feature of photographic images. Moreover, Kelly did not license or sell thumbnails, so the Arriba Soft thumbnails were not displacing this market. *Id.*

537. *Id.* at 821–22.

538. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007). Google relied on *Kelly v. Arriba Soft Corp.* not only in *Perfect 10, Inc. v. Amazon.com, Inc.*, but also

first, because it had licensed thumbnail-sized images of its photos to a cell phone company, thereby showing the existence of a licensing market that Google's thumbnails might partly supplant; and second, because Google was making money through its AdSense program when it served up thumbnails in response to user queries.[539] The Ninth Circuit ruled that neither consideration altered the fair use calculus struck in *Kelly*,[540] and reversed a lower court's preliminary ruling that Google's thumbnails were unfair.[541]

Field v. Google Inc.[542] more directly addressed the question about whether web crawler and cache copies of Internet content may themselves qualify as fair use because they facilitate enhanced public access to information. Field registered his copyright in numerous writings that he posted on a website from which his texts could be downloaded for free.[543] As Field anticipated, Google's web crawling program visited his site, made copies of its contents, stored those copies in a cache on its servers, and in response to relevant queries, Google served up snippets of the site's contents as well as a link to the host site and to its cache of the relevant information.[544] Field charged Google with copyright infringement, alleging that the web crawler copying, the cache copying, and the snippet copying were copyright infringements, for which he sought $2.55 million in statutory damages ($50,000 per infringed work).[545] Google defended the lawsuit by claiming these acts were fair use.[546]

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in a lawsuit that the Authors Guild and some publishers brought to challenge its Book Search project, which scanned books from major research libraries for purposes of indexing them to make snippets available in response to user queries. *See* Posting of Michael K. Dunn to Intellectual Property Law Blog, http://www.intellectualpropertylawblog.com/archives/copyrights-the-google-book-digitization-settlement-the-fair-use-question-remains.html (Dec. 8, 2008) (discussing the Google Book Search lawsuit). Drawing upon the *Field* case discussed below, Google also made a market failure argument for fair use, arguing that transaction costs for clearing all of the rights in the books being scanned were prohibitively high. This lawsuit was recently settled. *See* Settlement Agreement, The Authors Guild, Inc. v. Google Inc., No. 05 CV 8136-JES (S.D.N.Y. Oct. 28, 2008), *available at* http://www.googlebooksettlement.com/r/view_settlement_agreement.

539. *See Perfect 10*, 508 F.3d at 1161–62; *see also* Timothy B. Lee, *Google v. Perfect 10: Appeals Court Affirms that Thumbnails Are Fair Use*, ARS TECHNICA, May 17, 2007, http://arstechnica.com/news.ars/post/20070517-google-v-perfect-10-appeals-court-affirms-that-thumbnails-are-fair-use.html.

540. There was no evidence of any downloading of Google thumbnails to mobile phones, and hence, no harm to Perfect 10's licensing market; moreover, evidence of a connection between the AdSense program and infringement was too speculative to change the fair use calculus. *Perfect 10*, 508 F.3d at 1165–68.

541. *Id.*

542. 412 F. Supp. 2d 1106 (D. Nev. 2006). See also *Parker v. Google, Inc.*, 422 F. Supp. 2d 492 (E.D. Pa. 2006), *aff'd*, 242 F. App'x 833 (3d Cir. 2007), where the Third Circuit affirmed dismissal of direct and indirect infringement claims for Google's web crawler's copying of writings freely available on the Internet.

543. *Field*, 412 F. Supp. 2d at 1114.

544. *Id.*

545. *Id.* at 1110.

546. *Id.* Google also argued that there was no direct infringement by virtue of automated copying by its web crawling and caching software and raised an implied license and an

The factor that weighed most heavily against Field's copyright claims was the court's perception that he had "manufacture[d]" his claims of infringement "in the hopes of making money from Google's standard practice."[547] But another important factor was the exceptionally high transaction costs that Google would have incurred if it had to seek and obtain permission for every copy its web crawlers made of Internet content.[548] There was, moreover, a simple technological fix available to Field if he didn't want his content to be web-crawled.[549]

The court considered at length the positive purposes served by Google's web crawling and caching activities, including its enablement of searches for access to content when the original page was inaccessible (for example, because the website's server was down), for detecting changes in website content over time, and for discerning why the search engine considered the site to be responsive to the search query term.[550] As in *Kelly*, the differences in function between the copies of Field's works on his website, on the one hand, and web crawling and cache copies, on the other, caused the court to conclude that Google's copying was transformative (notwithstanding the fact that the Google web crawler and cache copies were 100% identical, iterative copies of Field's content).[551] Also weighing in favor of fair use was Google's good faith in operating its system cache, as evidenced by its practice of taking down any cached content upon receipt of notice of objection from its owner.[552] The fact that Field had posted copies of his works on an open site on the Internet affected the court's judgment on the nature of the work factor, the substantiality of the taking factor, and the harm to the market factor.[553]

Among the factors highly relevant in information access cases are: (1) whether the putative fair user is, in fact, facilitating better access to publicly available copyrighted works; (2) whether the information-access tool is making searches more efficient and effective; (3) whether copying is necessary or reasonable in order to facilitate better access; (4) whether transaction costs for seeking and obtaining permission are such that a market cannot readily be formed; and (5) whether the information-access tool made by the defendant is superseding or supplanting the market for the plaintiff's work. When the defendant's information-access tool enhances

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estoppel defense. *Id.* at 1109. The court granted Google's summary judgment motion on all grounds. *Id.* at 1109.

547. *Id.* at 1113. Field had created all fifty-one allegedly infringed writings in a three-day period before posting them on his website. *Id.* at 1114.

548. *Id.* at 1122 (noting that "[t]here is compelling evidence that site owners would not demand payment for this use of their works").

549. *Id.* at 1113–14. Field knew that he could use a robots.txt file to signal that he did not want data on his site to be web-crawled and that he could ask Google not to supply cached links to his writings. *Id.* Indeed, he created a robots.txt file that signaled that bots were allowed to copy his data. *Id.* at 1114.

550. *Id.* at 1118–19.

551. *Id.*

552. *Id.* at 1122–23.

553. *Id.* at 1120–22.

the market and value of the copyrighted work, this should be counted as a positive factor for fair use, as it was in *Kelly*.[554] The good faith of the defendant in making the information-access tool available and its superior insight about the market opportunity for the information-access tool should also cut in favor of fair uses in these cases.

In Internet access cases, it should further be relevant whether the plaintiff made its work available on open sites on the Internet and/or declined an opportunity to opt out of the information-access tool. The commerciality of the defendant's purpose should be given little weight because developing useful information-access tools is sufficiently expensive that the defendant would most likely need to recoup its expenses. Similarly, the nature of the work—whether informational or creative—should generally be given less weight in information-access cases because improving access to the plaintiff's work is socially valuable regardless of its creative status. Even a plaintiff's willingness to license the new market for information access to its work should be given little weight, as the chance for enhancing the market for the work by better access is a more important consideration.

Lastly, courts should recognize that iterative copying is often required in order to make a useful information-access tool; this kind of iterative copying should be recognized as an orthogonal use, rather than being characterized as transformative.[555] The information-access cases support the argument that iterative copying sometimes serves copyright values.[556]

This is not to say that all information-access-promoting uses will be fair or should be presumed fair. Peer-to-peer file sharing, for example, promotes access to information (e.g., commercially distributed sound recordings and music). However, if owners of copyrights in such works have not made their works freely available on open sites on the Internet, the risk is substantial that shared copies will supplant demand for purchased copies. In view of this, such uses have been and should be ruled unfair.[557]

CONCLUSION

Given the wide array of fair use cases decided under the 1976 Act and the many policy-relevant clusters into which they fall, one might wonder whether it is possible to discern any fundamental principle underlying U.S. fair use law. Over the years, commentators have proffered numerous conceptions of the underlying principle, rationale, and/or justification for

554. Courts are generally skeptical of arguments that a second author (e.g., the producer of a movie) should escape liability for wrongdoing merely because it enhanced the market for the original work (e.g., a novel) because its unauthorized derivative work was successful in the marketplace. *See, e.g.*, Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prods., Inc., 479 F. Supp. 351 (N.D. Ga. 1979). However, information-access cases may enhance the market for the original work without superseding a foreseeable market for authorized derivatives.

555. Tushnet, *supra* note 40, at 555–56 (objecting to judicial insistence on transformativeness).

556. *Id.* at 590.

557. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

fair use. Some of these seem to have fallen out of use and no longer seem persuasive. Consider, for instance, the implied consent theory, articulated in the Latman study, which posits that by deciding to publish her work, an author impliedly consents to others quoting from it in a review or in some subsequent work on the same subject.[558] A similar reasonable author consent theory posits that fair use is a use that a reasonable author would consent to.[559] While Justice Sandra Day O'Connor mentioned this second conception of fair use in *Harper & Row*,[560] it has had very little purchase in fair use caselaw since then and is an infirm foundation for fair use because it is too narrow and amorphous. Also outmoded is the conception of fair use as a "subsidy" to next-generation authors or a "tax" imposed on first-generation authors that can only be justified if the second author has made productive uses of the first author's work by contributing new knowledge through follow-on works.[561]

More common today are justifications of fair use as an appropriate response to market failure,[562] as a doctrine internal to copyright that accommodates First Amendment free speech and free expression interests,[563] as a doctrine that promotes semiotic democracy,[564] and/or as a doctrine that prevents stifling the very creativity copyright law was designed to foster.[565] While fair use certainly serves these purposes, each of these conceptions of fair use encompasses only some important aspects of fair use, especially those discussed in Parts I and II, not the whole of fair use.

Reverse engineering of computer programs to get access to interface information is, for example, difficult to justify under these modern conceptions of fair use, as are litigation uses. Nor can these conceptions accommodate ordinary personal uses, such as copying music from a purchased CD and loading it onto an iPod. The First Amendment, semiotic democracy, and risks of stifling creativity justifications for fair use are not really relevant to whether this type of use is fair. Platform-shifting is a closer case; yet, it may not fit within the market failure conception insofar as the same songs may be available on iTunes for a relatively modest fee, which the copyright owner does not get when a person loads the songs from her CD to her iPod. Yet, even the recording industry accepts that this type of use is lawful.[566]

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558. LATMAN, *supra* note 27, at 2–3.

559. A third outmoded theory of fair use in the Latman study was the bargain theory, which posited that, in exchange for a grant of exclusive rights in their works, authors granted the public fair use privileges. *Id.* at 7.

560. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 549–50 (1985).

561. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 478 (1984).

562. *See, e.g.*, Gordon, *supra* note 200, at 1620–21.

563. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003); *Harper & Row*, 471 U.S. at 560.

564. Fisher, *supra* note 297, at 1744–54.

565. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

566. *See* Von Lohmann, *supra* note 21, at 833 n.13.

Is there any conception of fair use capable of encompassing the wide array of uses discussed in this Article? I believe there is, and it can be derived from viewing copyright as a limited monopoly,[567] the primary purpose of which is to promote the public good, or as the U.S. Constitution puts it, "promote the [p]rogress of Science and useful Arts."[568] Copyright law promotes the public good by protecting authors and other rights holders from uses of their works that unfairly appropriate the commercial value of their work. But copyright also promotes the public good when subsequent authors are able to draw upon existing works in making and preparing to make new works, when members of the public are able to use copyrighted materials in a way that allows them to make a range of reasonable uses that pose no meaningful likelihood of harm to the markets for protected works, and when developers of new technologies provide new opportunities for the public to make such reasonable uses.[569]

The limited monopoly conception of copyright would consider fair use as a defense to claims of infringement insofar as the defendant must raise the issue in its answer, but this does not mean necessarily that the defendant should bear the burden of proving that its use was fair. Section 107, on its face, does not require that defendants offer such proof, as it merely says that a fair use is not an infringement.[570] Nor does the Supreme Court's jurisprudence resolve the burden of proof issue.[571] Very few fair use decisions discuss burden of proof issues, for courts typically decide whether a use is fair without saying in whose favor the issue would tip if the evidence were perfectly in equipoise.

Courts should treat fair use as they would statute of limitations defenses, which a defendant must raise in answering a complaint, after which the burden shifts to the plaintiff to demonstrate that the acts complained of were recent enough to be within the limitations period. Given the important role that fair use plays in mediating tensions between copyright law and the First Amendment and other constitutional values, it would be appropriate for the burden of showing unfairness to be on the copyright owner.[572]

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567. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

568. U.S. CONST. art. I, § 8, cl. 8.

569. These uses may be commercial or noncommercial in nature, public or private, transformative, productive, or iterative, within the six favored uses in § 107 or for some other purpose, and foreseen by Congress or unforeseeable.

570. 17 U.S.C. § 107 (2006).

571. Although the Supreme Court's fair use jurisprudence in *Campbell* certainly spoke of fair use as an "affirmative defense," the Court did not really consider the burden of proof issue. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994). *Campbell*'s endorsement of a presumption that a use will harm the market when it is both commercial and nontransformative demonstrates that the Court has not fully thought through burdens of proof. *Id.* at 591. Such a presumption would seemingly doubly burden defendants by making them not only prove that their use was fair but also show that the presumption of market harm was unsound.

572. This approach is consistent with that set forth in Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1 (2005).

When deciding whether to challenge a use as infringement, rights holders often anticipate that fair use will be at issue in the case, and they are typically in a better position than defendants to offer proof on key issues pertinent to fair use, such as the likelihood of harm to the market. If copyright owners cannot show that a use is likely to cause harm to markets for their works, why shouldn't the use be allowed as fair? At the very least, copyright owners should bear the burden of proving unfairness in free speech/expression, personal use, and litigation use cases.

Fair use is an essential doctrine in U.S. copyright law that counterbalances what would otherwise be an unreasonably broad grant of rights to authors and an unduly narrow set of negotiated exceptions and limitations.[573] As Judge Pierre Leval once observed, "[f]air use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law."[574] As Professor Beebe has recently noted, fair use defines "the contours of the private and public domains of human expression and, in doing so, directly impact[s] our capability for human flourishing."[575] It is not just an economic doctrine that calls for a cost-benefit analysis; fair use "goes to the core of what constitutes a good society."[576] It is in this respect a "constitutive doctrine" of copyright law that "reduces to a nutshell the foundational assumptions of the law itself."[577] Although fair use began as a distinctively American copyright doctrine,[578] commentators throughout the world have come to realize that copyright law is incomplete when viewed only as a law of author's rights, for the public has important interests in zones of free uses; exceptions and limitations on author's rights, including fair use, which reflect those interests, are an integral part of all modern copyright systems.[579]

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573. *See, e.g.*, LITMAN, *supra* note 382, chs. 2–3 (discussing the political economy of copyright legislation as to the grant of broad exclusive rights and narrow limitations).

574. Leval, *supra* note 12, at 1107.

575. Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence from the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 522 (2008).

576. *Id.*

577. Goldstein, *supra* note 27, at 434.

578. Israel has recently adopted a fair use provision in its law. *See, e.g.*, Jonathan Band, Editorial, *Israel Now Has the Right Copyright Law*, JERUSALEM POST, Mar. 26, 2008, *available at* http://www.jpost.com/servlet/Satellite?cid=1206446110027&pagename=JPost%2FJPArticle%2FPrinter (discussing its fair use provision).

579. *See, e.g.*, P. BERNT HUGENHOLTZ & RUTH L. OKEDIJI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT, FINAL REPORT (2008), *available at* http://www.soros.org/initiatives/information/articles_publications/publications/copyright_20080506/copyright_20080506.pdf; Abraham Drassinower, *Taking Users Rights Seriously*, *in* IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 462 (Michael Geist ed., 2005), *available at* http://www.irwinlaw.com/PublicInterest/three_2_drassinower.htm; Daniel Gervais, Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations (Feb. 11, 2008) (unpublished manuscript, on file with the Fordham Law Review).

This Article's review of the past thirty years of fair use law should be encouraging to those who have been concerned about the (un)predictability of fair use. Fair use defenses are generally successful in transformative and productive use cases as long as the defendants are careful about how much they take in relation to their purpose for doing so. This pattern is especially evident in the free speech/expression and authorship-promoting policy clusters.

Even iterative copying of an earlier work has often qualified as fair use in various situations: when it is done for a purpose orthogonal to the purpose for which the work was originally created (e.g., to prove some point, as in *Geis*, or to compare two products, as in *Triangle*); when it is done as an intermediate step in the development of a new noninfringing product (e.g., to reverse engineer a computer program to get access to interface information); when it is done to enhance information access (e.g., to index or cache web content); or when it constitutes an ordinary personal use (e.g., time-shift copying of television programs). Iterative copying has, in fact, been found to be fair use in virtually all clusters of the fair use caselaw.

While most of the fair use caselaw involves one or more of the six favored preambular uses, courts have been receptive to fair use claims outside of those six. Congress expected fair use to evolve under the 1976 Act, and evolve it has, especially in response to challenges posed by new technologies. Especially notable is the role that fair use has taken on in regulating competition, promoting innovation in the technology industry, and facilitating access to information.

This study of the fair use caselaw also shows that parody is far from the only kind of commentary as to which copying of the whole or qualitatively substantial parts of prior works has been deemed necessary to "conjure up" the original. Conjuring up the original is also often necessary to prove a point, to ground one's commentary, or to illustrate some phenomenon. But neither is necessity really necessary. Courts are increasingly considering whether a particular use is reasonable in light of the defendant's purpose, not whether it is, strictly speaking, necessary. Even iterative copying of the whole of a protected work, while it generally cuts against fair use, does not doom the defense, as illustrated in some of the free speech cases, authorial productive use cases, learning and personal use cases, litigation use cases, and new technology cases.

There are relatively few clusters in which fair use defenses fail more often than they succeed or where there appears to be a deep divide in the caselaw. News reporting is one of the statutorily favored use categories; yet, many news-related fair use defenses have failed because judges believed the defendants took too much, interfered with core licensing markets, or engaged in wrongful conduct that tainted the fair use defense.[580] The scope of fair use for teaching, scholarship, and research, three others of the statutorily favored uses, remains quite unclear. This is in part because

580. *See supra* Part I.D.

the relevant caselaw is quite thin, and in part because publishers, educators, and researchers have fundamentally different perspectives about how fair use should be analyzed in respect of such copying. Educators and researchers regard their copying as fair insofar as their uses advance knowledge, while publishers regard this copying as unfair insofar as it impedes the development of new licensing markets. Neither Congress nor the courts have been able to definitively resolve the intense controversy over learning-related uses, even after more than forty years of debate.[581] Yet, educational and research uses of copyrighted materials, like personal uses more generally, have become so ubiquitous and widely tolerated that they may have, in effect, become fair uses after all.

After the *Texaco* and *Michigan Document* decisions ruled that photocopying of research and educational materials was unfair because of new licensing markets, proponents of fair use worried that courts would assume that any use that could be licensed must be licensed, which would cause harm analysis in fair use cases to become circular.[582] (That is, if a copyright owner challenged a use, there must be a market for licensing it, which the putative fair user is interfering with by not paying a license fee.) After *Campbell*, courts have generally avoided this circularity problem, especially in transformative and productive use cases. Two prominent appellate courts have opined that copyright owners are not entitled to preempt or monopolize markets for transformative or complementary uses of their works.[583] In recent years, courts have also been more demanding about evidence of market harm,[584] more willing to consider positive externalities of a defendant's use (e.g., the public interest in having access to the defendant's work),[585] and more cognizant that a variety of factors, including copyright owner unwillingness to license certain kinds of uses (e.g., criticism), may impede the successful formation of new licensing markets.[586]

It is curious, though, how reluctant courts have been to consider factors beyond those set forth in § 107 in the fair use caselaw. One of the goals of this Article is to embolden courts to consider additional factors, especially those of particular salience in certain policy clusters. Also curious is the

581. *See, e.g.*, PATRY, *supra* note 1, at 203–19 (discussing contentiousness about such copying since 1961).

582. *See, e.g.*, Jessica Litman, *Copyright Noncompliance (or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237 (1997); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997); Silberberg, *supra* note 310.

583. *See, e.g.*, Bill Graham Archives v. Dorling Kindersley, Ltd., 448 F.3d 605, 614–15 (2d Cir. 2006); Ty, Inc. v. Publ'ns Int'l, Ltd., 292 F.3d 512, 517–18 (7th Cir. 2002).

584. *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1168 (9th Cir. 2007) (expressing skepticism about a claim of harm to the thumbnail licensing market for cell phones).

585. *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 254 (2d Cir. 2006) (public interest considered).

586. *See, e.g.*, Field v. Google Inc., 412 F. Supp. 2d 1106, 1115–16 (D. Nev. 2006); *see also* Gordon & Bahls, *supra* note 18 (discussing various types of market failures).

unwillingness of courts to follow the dictum in *Campbell* that endorsed damage awards instead of injunctive relief in close fair use cases.[587] Courts have also continued to presume harm when plaintiffs seek preliminary injunctions in productive fair use cases, even though it seems difficult to square this presumption with First Amendment jurisprudence.[588]

This Article recommends that judges and commentators should stop wringing their hands about how troublesome fair use law is[589] and look instead for common patterns in the fair use caselaw upon which to build a more predictable body of fair use law. Analyzing fair uses in light of cases previously decided within the same policy cluster will make fair use more rule-like without a concomitant loss in its utility as a flexible standard for balancing a wide range of interests in a wide variety of situations.

587. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994). Only once did a judge propose that a documentary should be able to use video footage subject to compensating the rights holders, but this judge was a dissenter who could not persuade his colleagues to follow this dictum. *See* Elvis Presley Enters., Inc. v. Passport Video, 357 F.3d 896, 898–99 (9th Cir. 2004) (Noonan, J., dissenting).

588. *See, e.g.*, Lennon v. Premise Media Corp., 556 F. Supp. 2d 310 (S.D.N.Y. 2008); *see also* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 229–31 (1998) (arguing that preliminary injunctions in copyright cases are prior restraints on speech under the First Amendment).

589. *See, e.g.*, Liu, *supra* note 20, at 433 & n.19 (quoting Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (characterizing fair use as "the most troublesome [issue] in the whole law of copyright")); Nimmer, *supra* note 13, at 280–83 (complaining about the unpredictability of fair use caselaw).