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## Can Newspapers Be Saved? How Copyright Law Can Save Newspapers from the Challenges of New Media

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### Cover Page Footnote

I would like to thank the editors and staff members of the IPLJ for all of their hard work and insightful comments. I would also like to thank Professor Hugh Hansen for his guidance and Sandra Sherman for reading every draft. Finally, thank you to my family and friends for their endless support throughout the entire process.

# Can Newspapers Be Saved? How Copyright Law Can Save Newspapers from the Challenges of New Media

Keiyana Fordham\*

INTRODUCTION .....	940
I. CURRENT TRENDS IN THE NEWSPAPER INDUSTRY, THE IMPACT OF DIGITAL MEDIA, AND FAIR USE .....	942
A. <i>Selling the News</i> .....	942
B. <i>Digital Media's Influence on News Delivery</i> .....	945
1. Automatic News Aggregators .....	947
2. News Aggregation Websites .....	948
C. <i>Fair Use</i> .....	951
D. <i>Fair Use Factors</i> .....	953
E. <i>Systematic Takings in News Reporting</i> .....	958
1. <i>Wainwright Securities, Inc. v. Wall Street Transcript Corp.</i> .....	959
2. <i>Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.</i> .....	961
3. <i>Los Angeles Times v. Free Republic</i> .....	962
F. <i>Fair Use on the Internet</i> .....	964
1. <i>Music File-Sharing and Fair Use</i> .....	965
2. <i>Search Engines and Fair Use</i> .....	967
a) <i>Kelly v. Arriba Soft Corp.</i> .....	967

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940	<i>FORDHAM INTELL. PROP. MEDIA &amp; ENT. L.J.</i> [Vol. 20:939	
	b) Field v. Google, Inc. ....	969
	c) Perfect 10, Inc. v. Amazon.com, Inc.....	971
	3. The Google Book Search Project Litigation.....	973
II.	THE CONFLICT BETWEEN COPYRIGHT OWNERS AND TECHNOLOGY DEVELOPERS .....	976
	A. <i>The Newspaper Industry's Arguments</i> .....	978
	B. <i>News Aggregators' Arguments</i> .....	980
III.	THE NEWSPAPER INDUSTRY'S FAIR USE ARGUMENT AND LICENSING POTENTIAL .....	982
	A. <i>The Newspaper Industry's Proposed Anti-Fair Use Arguments</i> .....	983
	1. The Purpose and Character of the Use.....	983
	2. The Nature of the Copyrighted Work .....	985
	3. The Amount and Substantiality of the Portion Used .....	986
	4. The Effect of the Use on the Potential Market ....	987
	B. <i>Licensing Opportunities</i> .....	987
	CONCLUSION.....	989

## INTRODUCTION

A newsworthy event can become headline news in a matter of minutes and be disseminated worldwide to millions of readers online. This facet of digital communication explains why print and ink newspapers are on the verge of extinction. The latest headline news is that many United States cities are in danger of losing their local newspapers.<sup>1</sup> Since December 2008, five leading media companies that acquired newspaper publishers have filed for Chapter 11 bankruptcy protection.<sup>2</sup> As a result, local and national

<sup>1</sup> Richard Pérez-Peña, *As Cities Go from Two Newspapers to One, Some Talk of Zero*, N.Y. TIMES, Mar. 12, 2009, at A1; Michael Sokolove, *What's a Big City Without a Newspaper?*, N.Y. TIMES, Aug. 9, 2009, at MM.

<sup>2</sup> In December 2008, Tribune Co., a media company that owns *The Los Angeles Times*, *Chicago Tribune*, *Baltimore Sun*, *Orlando Sentinel*, *Hartford Courant*, and other city dailies, was the first to seek bankruptcy protection. Michael O'Neal & Phil Rosenthal, *Tribune Co. Files for Chapter 11; Media Giant to Focus on Restructuring Massive Debt*, CHI. TRIB., Dec. 9, 2008, at C1. Facing substantial accumulated debt, four

newspapers have made dramatic cuts to their newsrooms,<sup>3</sup> reduced or eliminated print publications,<sup>4</sup> and, at worst, permanently shut down.<sup>5</sup> There are a number of factors that contributed to this decline, such as the newspaper industry's detrimental reliance on its traditional business model,<sup>6</sup> but there are also certain factors that are beyond the newspaper industry's control, one of which is the rise of digital media.<sup>7</sup> Digital media platforms have greatly expanded the news industry so that traditional newspapers are competing with online news aggregators<sup>8</sup> for news articles, readers, and advertising revenue.<sup>9</sup> News aggregators gain their competitive advantage against traditional newspapers, in part, by

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newspaper publishers were forced to make the same decision in early 2009 and file for Chapter 11 protection: Star Tribune Holdings Corp. in January 2009, Journal Register and Philadelphia LLC in February 2009, and the Sun Times Media Group Inc. in March 2009. Richard Pérez-Peña, *Publisher of the Chicago Sun-Times Files for Bankruptcy*, N.Y. TIMES, Apr. 1, 2009, at B7; *see also* Douglas A. McIntyre, *The Ten Major Newspapers That Will Fold or Go Digital Next*, 24/7 WALL ST., Mar. 9, 2009, <http://247wallst.com/2009/03/09/the-ten-major-newspapers-that-will-fold-or-go-digital-next/>.

<sup>3</sup> *See, e.g.*, Richard Pérez-Peña, *New York Times News Service to Cut Jobs and Relocate*, N.Y. TIMES, Nov. 19, 2009, at B2; David Phelps, *Star Tribune, Newsroom Union Reach Deal on Cuts; Newsroom Employees Take a Haircut in a Tentative Wage Agreement in an Effort to Save the Star Tribune*, STAR TRIB. (Minneapolis), Apr. 25, 2009, at 2D; Phil Rosenthal, *Tribune Cuts News Staff by 53 in Restructuring*, CHI. TRIB., Apr. 23, 2009, at C19.

<sup>4</sup> *See, e.g.*, John Gallagher, *Dawn of the Next News Era; Industry Watches to See If New Formula Catches on*, DETROIT FREE PRESS, Mar. 29, 2009, at E1.

<sup>5</sup> *See, e.g.*, Howard Kurtz, *Final Edition: Rocky Mountain News to Shut Down Today*, WASH. POST, Feb. 27, 2009, at D03; *N.H. Newspaper Closes, Laying Off 95 Employees*, BOSTON GLOBE, July 11, 2009, at 5.

<sup>6</sup> *See* Paul Farhi, *Don't Blame the Journalism: The Economic and Technological Forces Behind the Collapse of Newspapers*, 30 AM. JOURNALISM REV. 14, 14 (2008), available at <http://www.ajr.org/Article.asp?id=4623> [hereinafter Farhi, *Don't Blame the Journalism*] ("The gravest threats include the flight of classified advertisers, the deterioration of retail advertising and the indebtedness of newspaper owners."); *The Newspaper Industry: More Media, Less News*, ECONOMIST, Aug. 26, 2006, at 62 [hereinafter *More Media, Less News*] (describing how the newspaper industry was already in decline in 2005 from relying on its traditional business model and failing to acknowledge the changes within the industry towards a digital media platform); *see also The Future of Newspaper: Who Killed the Newspaper?*, ECONOMIST, Aug. 26, 2006, at 51 [hereinafter *Who Killed the Newspaper?*].

<sup>7</sup> *See* NAT'L RES. COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1-6* (2000) [hereinafter *DIGITAL DILEMMA*].

<sup>8</sup> For the definition of "news aggregator," *see infra* note 38.

<sup>9</sup> *See* discussion *infra* Part I.A.

using newspapers' copyrighted content.<sup>10</sup> If the newspaper industry is to effectively compete in the digital marketplace with news aggregators, it is imperative that it use copyright law to protect its commercially valuable news content.

This Note will explore how copyright law can legally protect newspaper publishers' copyrighted content from unauthorized copying and distribution by digital technologies like news aggregators. Specifically, it will demonstrate how newspapers may prevail against a fair use defense to prevent news aggregators from using newspapers' copyrighted content without authorization or a license. Part I will describe the current trends in the newspaper industry and the digital media landscape. Part I will also introduce the fair use doctrine and how it has been applied in cases involving systematic takings of news content prior to the digital era. Part I will finally examine cases where the fair use defense was invoked to justify digital uses of copyrighted works. These cases will highlight the current trend of fair use on the Internet and how this trend may affect the newspaper industry's arguments. Part II will examine the conflict between technology developers, such as news aggregators, and copyright owners, such as newspaper publishers, and how copyright law aims to balance their competing interests. Part III will argue that the newspaper industry has plausible legal arguments to defeat a news aggregator's fair use defense; in addition, it will examine potential licensing opportunities with news aggregators.

## I. CURRENT TRENDS IN THE NEWSPAPER INDUSTRY, THE IMPACT OF DIGITAL MEDIA, AND FAIR USE

### A. *Selling the News*

Newspaper publishers are in the business of distributing news to readers and giving advertisers access to those readers through print advertising.<sup>11</sup> For decades, the newspaper industry

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<sup>10</sup> See discussion *infra* Part I.A.

<sup>11</sup> *Who Killed the Newspaper?*, *supra* note 6, at 51; see also Philip Meyer, *Learning to Love Lower Profits*, 17 AM. JOURNALISM REV. 40, 40 (1995), available at <http://www.ajr.org/article.asp?id=1461> [hereinafter Meyer, *Lower Profits*]. Philip Meyer is the author of

maintained a monopoly position in the marketplace for providing news to the public and connecting buyers and sellers.<sup>12</sup> As a monopoly, newspaper publishers could raise prices for readers and advertisers despite declining circulation—a newspaper’s subscriber base—and still enjoy high profit margins from 20% to 40%.<sup>13</sup> Print advertising, especially classified advertisements, was a newspaper’s primary source of revenue.<sup>14</sup>

However, revenue from print advertising is rapidly decreasing as advertising has greatly migrated towards the Internet.<sup>15</sup> In 2008, classified advertising declined 29.7% from 2007, which was a loss of \$4.2 billion for the newspaper industry.<sup>16</sup> Print advertising also suffered with an overall decline of 17.7% from 2007 to 2008, which was a loss of \$7.5 billion for the newspaper industry.<sup>17</sup> In 2008, even online advertising declined 1.8%, a \$3.1 billion decrease from 2007.<sup>18</sup> As of 2008, online advertising only accounts for approximately 10% of the newspaper industry’s total advertising revenue.<sup>19</sup> These statistics reveal the newspaper industry’s financial troubles and show that the future of the newspaper industry will depend on the growth of its online market. To survive, newspapers will have to change their strategy.

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*The Vanishing Newspaper: Saving Journalism in the Information Age*, where he conducted an economic analysis on how the traditional newspaper is dying out and how the industry can best transform itself in the digital era. Meyer, *Lower Profits*, *supra*, at 40; see Paul Farhi, *Salvation?*, 29 AM. JOURNALISM REV. 18, 18 (2007), available at <http://www.ajr.org/Article.asp?id=4427> [hereinafter Farhi, *Salvation?*].

<sup>12</sup> See Farhi, *Don’t Blame the Journalism*, *supra* note 6, at 14.

<sup>13</sup> Meyer, *Lower Profits*, *supra* note 11, at 40.

<sup>14</sup> ROBERT G. PICARD & JEFFREY H. BRODY, *THE NEWSPAPER PUBLISHING INDUSTRY 5* (1997) (noting that “advertising material is critical because it provides the primary source of revenue for newspapers”). Classified advertising allows both companies and private individuals to publicize sales for real estate, automotive, and employment listings in newspapers for a fee. *Id.* at 82–83.

<sup>15</sup> Print advertising refers to the advertising contained in a newspaper’s print edition. Farhi, *Don’t Blame the Journalism*, *supra* note 6, at 14; Farhi, *Salvation?*, *supra* note 11, at 18.

<sup>16</sup> Newspaper Association of America, Advertising Expenditures, <http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx> (last visited Feb. 27, 2010).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Farhi, *Salvation?*, *supra* note 11, at 18.

Before the rise of the Internet, technological advances and market forces challenged the newspaper industry's monopoly advantage in news delivery and advertising. The introduction of radio broadcasts in the 1920s and broadcast television in the 1950s caused the newspaper industry to face declines in circulation as consumers had access to alternate sources for news and advertisers started buying air time, rather than print advertising, to reach more consumers.<sup>20</sup> Although radio and television diversified the media landscape, the newspaper industry was able to adapt to these changes and maintain its strong market position.<sup>21</sup>

In comparison to radio and television, the Internet has disrupted the newspaper industry's traditional business model in three important ways.<sup>22</sup> First, the Internet is capable of freely distributing news and information at a zero variable cost unlike newspaper publishers that have to pay for print and distribution costs.<sup>23</sup> Second, the Internet has greatly expanded the field of competition in news delivery due to low entry costs, as anyone with a computer and an Internet connection can distribute news.<sup>24</sup> Third, the Internet has changed consumer habits so that individual buyers and sellers can directly connect on the Internet using free classified sites like Craigslist and Monster or low-cost sites like eBay.<sup>25</sup> For the remaining advertisers, traditional newspapers now have to compete with new media entrants for advertising dollars to sustain their business.<sup>26</sup> Thus, the Internet has caused a dramatic shift in the way news is delivered and supported by advertising. As a result, the newspaper industry will need to make significant changes to its traditional business model as market demand has moved away from print to online news consumption.

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<sup>20</sup> See SHANNON E. MARTIN & DAVID A. COPELAND, *THE FUNCTION OF NEWSPAPERS IN SOCIETY: A GLOBAL PERSPECTIVE* 145 (2003).

<sup>21</sup> *Id.*

<sup>22</sup> Philip Meyer, *The Elite Newspaper of the Future*, 30 *AM. JOURNALISM REV.* 32, 32 (2008), available at <http://www.ajr.org/Article.asp?id=4605> [hereinafter Meyer, *Elite Newspaper*].

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

<sup>24</sup> *Id.*

<sup>25</sup> See *id.*; see also Sam Diaz, *On the Internet, A Tangled Web of Classified Ads*, *WASH. POST*, Aug. 31, 2007, at D1 (describing the newspaper's decline in classified advertising and the rise of online classified sites).

<sup>26</sup> See Meyer, *Elite Newspaper*, *supra* note 22, at 32.



*B. Digital Media's Influence on News Delivery*

The newspaper industry is a traditional, content-driven business.<sup>27</sup> Traditional content providers, like the music, film, television, book, and newspaper industries, derive their profits from the production and sale of their content.<sup>28</sup> These industries rely on copyright law to protect their exclusive rights to copy and distribute their content.<sup>29</sup> In the analog age,<sup>30</sup> content industries were able to maintain control over their copyrighted content due to technological limitations which acted as deterrents to unauthorized copying and distribution.<sup>31</sup> For example, reproducing a newspaper or any printed work would require the copyist to invest in analog technology like a Xerox machine that uses a mechanical process to create copies that are inferior in quality to the original;<sup>32</sup> also, large volume copies were more expensive than traditional printing methods employed by newspaper publishers.<sup>33</sup> Therefore, it was easy to detect commercial distribution of unauthorized copies.<sup>34</sup> Today, digital technology's superior copying and distributing capabilities have the potential to significantly diminish the market for traditional content providers.<sup>35</sup> As content providers expand their businesses to online markets, courts will have to decide how copyright law will be able to protect traditional content industries without hindering technological innovation.

The transition to digital media has changed the information landscape by introducing modernized news distributors like news

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<sup>27</sup> Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 98 (2002); *see also* DIGITAL DILEMMA, *supra* note 7, at 5.

<sup>28</sup> *See* Menell, *supra* note 27, at 105; *see also* DIGITAL DILEMMA, *supra* note 7, at 5.

<sup>29</sup> *See, e.g.*, 17 U.S.C. § 106 (2006).

<sup>30</sup> The term "analog age" refers to technologies that use a human or mechanical means to deform a physical object to convey images or sounds as distinguished from digital technologies that use computer source code language of zeros and ones to convey images or sounds. Analog technologies have been used to fix and reproduce copyrighted works, for example, phonographs, photographs, film, and photocopies. Menell, *supra* note 27, at 104–05.

<sup>31</sup> *Id.* at 105.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 118–19.

aggregators.<sup>36</sup> A “news aggregator” is a website that contains headlines and news articles collected from other news sources and can guide Internet audiences to the original story.<sup>37</sup> This Note will focus on two types of news aggregators: automatic news aggregators, and news aggregation websites. Both types of news aggregators offer the same service, but they acquire news content in different ways. At times, they each have distinct legal considerations in their uses of copyrighted content to provide their services. The emergence of digital media outlets, like news aggregators,<sup>38</sup> has changed the way people read and acquire news.<sup>39</sup> The PEW Research Center’s Biennial News Consumption Survey has tracked this change in consumer preference and found that 37% of Americans access their news online at least three days a week in 2008, and this trend has been increasing yearly since 1993.<sup>40</sup>

A problem arises because advances in digital technology enable digital media’s vast copying and distribution capabilities to supplant traditional content markets.<sup>41</sup> Specifically, digital media outlets, like news aggregators, have detached news articles from their original source and dispersed them across the Internet.<sup>42</sup> Consumers can now access individual news articles using various sources instead of reading a single newspaper in its entirety.<sup>43</sup> This new trend in information dissemination has reduced the newspaper industry’s ability to control the digital distribution of its commercially valuable content.<sup>44</sup> Consequently, news aggregators have been able to function as news reporting businesses by repurposing news articles and publishing them as their own or

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<sup>36</sup> See DIGITAL DILEMMA, *supra* note 7, at 3–5.

<sup>37</sup> See ROUTLEDGE HANDBOOK OF INTERNET POLITICS 205 (Andrew Chadwick & Philip N. Howard eds., 2008) [hereinafter INTERNET POLITICS].

<sup>38</sup> News aggregators are sites that “do not produce their own unique content but instead allow audiences to access material from news agencies and other news outlets.” *Id.*

<sup>39</sup> See PEW RES. CTR. FOR THE PEOPLE & THE PRESS, BIENNIAL NEWS CONSUMPTION SURVEY 3–4, 21 (2008), <http://people-press.org/reports/pdf/444.pdf>.

<sup>40</sup> *Id.* at 21.

<sup>41</sup> Menell, *supra* note 27, at 118–19.

<sup>42</sup> See *id.* at 119.

<sup>43</sup> See *More Media, Less News*, *supra* note 6, at 62.

<sup>44</sup> See Menell, *supra* note 27, at 119.

displaying headlines and links to news articles.<sup>45</sup> This unauthorized use of newspaper content has, in part, contributed to the newspaper industry's difficulties in the online marketplace.

### 1. Automatic News Aggregators

An automatic news aggregator is operated by a search engine and uses an algorithm to automatically index the Internet to copy news articles.<sup>46</sup> The search results are used to create a website containing a list of headlines and excerpts taken from newspapers and newswires that are separated by category, ranked according to date and significance, and linked to the originating source.<sup>47</sup> Copyright owners have previously challenged search engines' practices of copying website content when indexing, caching, and linking on the Internet.<sup>48</sup> Search engines continue to present novel issues in copyright law as technological innovations lead to new uses of copyrighted content from thumbnail-sized images to searchable digital libraries.<sup>49</sup>

Newspaper publishers argue that automatic news aggregators, like Google News and Yahoo! News,<sup>50</sup> illegally copy and distribute their news articles, headlines, and bylines.<sup>51</sup> Operators

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<sup>45</sup> See Arnon Mishkin, *The Fallacy of the Link Economy*, PAIDCONTENT, Aug. 13, 2009, <http://paidcontent.org/article/419-the-fallacy-of-the-link-economy/> ("Now all the value gets captured by the aggregator that scrapes the copy and creates a front page that a set of readers choose to scan."); Erick Schonfeld, *The Media Bundles Is Dead, Long Live the News Aggregators*, TECHCRUNCH, Aug. 16, 2009, <http://techcrunch.com/2009/08/16/the-media-bundle-is-dead-long-live-the-news-aggregators/> ("But the days of the media bundle when readers got all of the day's news from one site are long gone. . . . Newspapers had better get used to a world where links exist and can whisk readers away as quickly as they bring them.").

<sup>46</sup> See INTERNET POLITICS, *supra* note 37, at 205.

<sup>47</sup> See MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD 243 (2007).

<sup>48</sup> See discussion *infra* Part III.

<sup>49</sup> See discussion *infra* Part III.

<sup>50</sup> Google News, <http://news.google.com/> (last visited Dec. 7, 2009); Yahoo! News, <http://news.yahoo.com/> (last visited Dec. 7, 2009).

<sup>51</sup> See Richard Pérez-Peña, *A.P. Seeks to Block Unpaid Use of Content*, N.Y. TIMES, July 24, 2009, at B3 [hereinafter Pérez-Peña, *A.P. Blocks Unpaid Use*]; *A New Age for Newspapers: Diversity of Voices, Competition, and the Internet: Hearing Before the Subcomm. on Courts and Competition of the H. Comm. on the Judiciary*, 111th Cong. 15 (2009) (statement of Brian Tierney, Chief Executive Officer, Philadelphia Media Holdings).

of search engines argue that these sites are intended to make news more accessible to readers and also to direct traffic to newspapers' websites.<sup>52</sup> Nielsen Online's Top 30 News Websites found that in November 2009, Yahoo! News had 38.7 million unique visitors, making it the leader in online news sites, and Google News acquired 15.9 million unique visitors.<sup>53</sup> The newspaper industry expresses concern that readers use automatic news aggregators as a comprehensive resource, possibly eliminating the need to read an entire article located on a newspaper's own website.<sup>54</sup> In addition, a study by Attributor reveals that online audiences are 1.5 times more likely to view a publisher's original content on a third party website instead of the publisher's website.<sup>55</sup> These results indicate that the newspaper industry is unable to capture a large segment of online readers in comparison to automatic news aggregators.

## 2. News Aggregation Websites

The second type of news aggregator is a website that primarily consists of headlines and news articles taken from other sources along with commentary and original reporting.<sup>56</sup> The purpose of a news aggregation website can be described as "curating the news: finding the good stuff from other sources and artfully exhibiting it for the enrichment of the more educated, liberal news consumer."<sup>57</sup> Unlike an automatic news aggregator, a news aggregation website

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<sup>52</sup> See *The Future of Journalism: Hearing Before the Communications, Technology and the Internet Subcomm. of the S. Commerce, Science, and Transportation Comm.*, 111th Cong. (2009) (statement of Marissa Mayer, Vice President, Search Products and User Experience, Google, Inc.) [hereinafter *Senate Hearing*]; Miguel Helft, *Google Insists It's a Friend to Newspapers, Not Foe*, N.Y. TIMES, Apr. 8, 2009, at B6.

<sup>53</sup> Jennifer Saba, *Top 30 Global News Sites in November—Yahoo Tops CNN, MSNBC, AOL, NYT*, EDITOR & PUBLISHER, Dec. 21, 2009, [http://www.editorandpublisher.com/eandp/search/article\\_display.jsp?vnu\\_content\\_id=1004054719&src=bchallenge](http://www.editorandpublisher.com/eandp/search/article_display.jsp?vnu_content_id=1004054719&src=bchallenge) (noting that *Editor & Publisher* updates this list monthly).

<sup>54</sup> See Posting of Emma Heald to [editorsweblog.org](http://editorsweblog.org), *Google News and Newspaper Publishers: Allies or Enemies?*, [http://www.editorsweblog.org/analysis/2009/03/google\\_news\\_and\\_newspaper\\_publishers\\_all.php](http://www.editorsweblog.org/analysis/2009/03/google_news_and_newspaper_publishers_all.php) (Mar. 11, 2009).

<sup>55</sup> ATTRIBUTOR TRUEAUDIENCE™ FINDINGS 1 (2008), <http://www.attributor.com/docs/TrueAudience.pdf>.

<sup>56</sup> See Belinda Luscombe, *Arianna Huffington: The Web's New Oracle*, TIME, Mar. 19, 2009, at 44, available at <http://www.time.com/time/business/article/0,8599,1886214,00.html>.

<sup>57</sup> *Id.*

uses a human editor to gather and select news articles.<sup>58</sup> News aggregation websites avoid the expense of newsgathering by taking news content from other sources, and there are minimal costs associated with distributing news online.<sup>59</sup> This low cost method of news reporting also fulfills consumer demand for continuously updated news.

News aggregation websites have influenced the way news is delivered and provides an interactive forum for readers to share, comment, and debate news stories of interest.<sup>60</sup> News aggregation websites have often started as weblogs and have grown into highly developed, news aggregation sites to offer a compendium of updated news articles daily.<sup>61</sup> Matt Drudge pioneered this contemporary form of news reporting when he launched the Drudge Report in 1995.<sup>62</sup> The Drudge Report received national acclaim when it was the first news outlet to break the Monica Lewinsky and President Bill Clinton scandal to the public in 1998.<sup>63</sup> In 2005, the Huffington Post was created as a liberal alternative to the Drudge Report that would aggregate political news and entertainment.<sup>64</sup> The Huffington Post received recognition and credibility for challenging the *New York Times*' coverage of the Iraq War during the summer and fall of 2005.<sup>65</sup> While newspapers have often discredited this new form of news reporting,<sup>66</sup> both the Drudge Report and the Huffington Post have achieved journalistic merit by breaking news stories to the public in advance of mainstream media.<sup>67</sup> Where newspapers have

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<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See* Eric Alterman, *Out of Print; the Death and Life of the American Newspaper*, NEW YORKER, Mar. 31, 2008, at 48, available at [http://www.newyorker.com/reporting/2008/03/31/080331fa\\_fact\\_alterman](http://www.newyorker.com/reporting/2008/03/31/080331fa_fact_alterman) (citing Rupert Murdoch, Speech to the American Society of News Editors (Apr. 2005)).

<sup>61</sup> *See* Joel Sappell, *Hot Links Served Up Daily*, L.A. TIMES, Aug. 4, 2007, at A1.

<sup>62</sup> *See id.*

<sup>63</sup> *Id.*

<sup>64</sup> Alterman, *supra* note 60, at 48.

<sup>65</sup> *Id.*

<sup>66</sup> *See, e.g.*, Jon Fine, *All the News That's Fit to Dis*, BUS. WK., Oct. 10, 2005, [http://www.businessweek.com/bwdaily/dnflash/oct2005/nf20051010\\_7117\\_db042.htm](http://www.businessweek.com/bwdaily/dnflash/oct2005/nf20051010_7117_db042.htm) (quoting a *New York Times* editor who stated that what bloggers do cannot be compared to what mainstream media does).

<sup>67</sup> *See* Luscombe, *supra* note 56; Sappell, *supra* note 61.

traditionally held government institutions accountable to the public, news aggregation websites have gained popularity and credibility by challenging mainstream media's dialogue with the public.<sup>68</sup>

While news aggregation websites have become popular and valuable news outlets, the way in which the news is acquired has often been at the expense of traditional newspapers. A recent *Washington Post* article that was rewritten and posted by Gawker, a popular news aggregation website, is an example of the problematic way these sites acquire news.<sup>69</sup> The writer of the *Washington Post* article calculated that it took over three hours to research and one day to write his 1,500 word article that was later posted on Gawker.<sup>70</sup> For a separate article detailing how Gawker rewrote his story, the *Washington Post* staff writer contacted the Gawker staff writer who admitted that he rewrote the article in approximately thirty minutes to an hour.<sup>71</sup> Despite providing a link to the original *Washington Post* article, Gawker attracts considerably more online readers and will be able to earn advertising revenue from the use of the *Washington Post*'s content.<sup>72</sup> This story is emblematic of the larger phenomenon of

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<sup>68</sup> MARTIN & COPELAND, *supra* note 20, at 114–16 (describing how newspapers serve a “watchdog function” to expose government corruption and abuses to the public). The idea of newspapers serving an important democratic function by informing the public dates back to early American history when President Thomas Jefferson famously stated,

The basis of our governments being the opinion of people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter.

FREE PRESS, CHANGING MEDIA: PUBLIC INTEREST POLICIES FOR THE DIGITAL AGE 2 (2009) (citing ADRIENNE KOCH & WILLIAM PEDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 411–12 (1944) (quoting Thomas Jefferson's letter to Edward Carrington, Jan. 16, 1787)).

<sup>69</sup> Ian Shapira, *The Death of Journalism (Gawker Edition)*, WASH. POST, Aug. 2, 2009, at B1.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *See id.* Online advertising is sold according to traffic volume to a website during a given period. *L.A. Times v. Free Republic*, No. CV 98-7840, 2000 U.S. Dist. LEXIS 5669, at \*4 (C.D. Cal. Mar. 31, 2000).

the type of news reporting that news aggregation websites are practicing on a daily basis.

### C. Fair Use

When copyright owners seek to enforce their rights in court against infringers of their copyrighted works, the most commonly raised defense is fair use.<sup>73</sup> Copyright law grants authors certain exclusive rights in their works.<sup>74</sup> Unauthorized use of a copyrighted work violates an author's exclusive rights and constitutes infringement, unless there is a statutory exception.<sup>75</sup> The fair use doctrine is one statutory exception that allows unauthorized reproduction of a copyrighted work to be a non-infringing use.<sup>76</sup>

Fair use is a judicial construct, codified into law at section 107 of the 1976 Copyright Act,<sup>77</sup> which is used to maintain the utilitarian balance in copyright law.<sup>78</sup> The doctrine limits an author's monopoly by permitting public access and use of a copyrighted work for "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" as long as the use does not reduce the author's incentive for creativity.<sup>79</sup> Courts often decide fair use

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<sup>73</sup> See Cydney A. Tune, *Fair Use in the Digital World: Recent Cases*, 978 PLI/Pat 157, 163 (2009).

<sup>74</sup> 17 U.S.C. § 106 (2006).

<sup>75</sup> CHRISTOPHER ALAN JENNINGS, FAIR USE ON THE INTERNET 1 (Congressional Res. Serv. 2002).

<sup>76</sup> See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990).

<sup>77</sup> 17 U.S.C. § 107.

<sup>78</sup> Leval, *supra* note 76, at 1110; see also ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 390 (4th ed. rev. 2007) ("The predominant philosophical framework undergirding American copyright, however, is utilitarian."). "Utilitarian balance" refers to how copyright law grants an author a limited right as an incentive to create artistic works that are freely distributed for the public's benefit. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return to an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

<sup>79</sup> 17 U.S.C. § 107; Leval, *supra* note 76, at 1109–10; see also Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602 (1988) ("[O]ver time various copyright

according to policy and fairness<sup>80</sup> to promote the objectives of copyright law.<sup>81</sup> There is no bright line rule in the statute; the doctrine is designed to be flexible because neither the legislature nor the courts can anticipate how technological changes will affect the use of copyrighted works.<sup>82</sup> The Supreme Court has defined the doctrine as an “equitable rule of reason”<sup>83</sup> that “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.”<sup>84</sup>

Courts have yet to decide a case on whether a news aggregator’s use of a newspaper’s headlines, bylines, and news articles is a fair use. This determination would depend on the fair use doctrine’s four factor test that was first articulated by Justice Story in *Folsom v. Marsh*.<sup>85</sup> The following four factors were later included in the 1976 Copyright Act:

(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>86</sup>

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doctrines have evolved to guard against the possibility that the author’s right of control over his works could defeat rather than serve the public interest in dissemination.”).

<sup>80</sup> See Leval, *supra* note 76, at 1107.

<sup>81</sup> See *id.* at 1107 (stating that copyright law is designed to “stimulate activity and progress in the arts for the intellectual enrichment of the public”).

<sup>82</sup> DIGITAL DILEMMA, *supra* note 7, at 138; see *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 479–80 (1984) (Blackmun, J., dissenting) (“The inquiry is necessarily a flexible one, and the endless variety of situations that may arise precludes the formulation of exact rules.”).

<sup>83</sup> *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal quotations omitted).

<sup>84</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (citing *Stewart*, 495 U.S. at 236). The Supreme Court has quoted this language several times. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 n.5 (2008) [hereinafter NIMMER ON COPYRIGHT].

<sup>85</sup> 9 F. Cas. 342, 348 (C.C. Mass. 1841).

<sup>86</sup> 17 U.S.C. § 107 (2006).



The courts apply these factors on a case-by-case basis in light of all the evidence to determine if the secondary use of the copyrighted work is a fair use.<sup>87</sup>

#### D. Fair Use Factors

Court application of the fair use doctrine's four-factor test often involves an extensive analysis on how the secondary use affects the copyrighted work. This section will describe how courts analyze each factor. The first factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."<sup>88</sup> This factor requires courts to conduct a two-part analysis to establish if the secondary use has a commercial purpose and if the use is transformative.<sup>89</sup> Deciding whether a secondary use is commercial or whether it is non-profit in nature depends on the type of use, meaning if the copy is used for a commercial or non-commercial activity.<sup>90</sup> For example, a court could hold that it is not a fair use for a non-profit organization to make an unauthorized copy of a copyrighted work for a commercial purpose.<sup>91</sup> In *Sony Corp. of America v. Universal Studios, Inc.*,<sup>92</sup> the Supreme Court held that any commercial use of a copyrighted work was presumptively not a fair use.<sup>93</sup> The Supreme Court later rejected the presumption against commercial use in *Campbell v. Acuff-Rose Music, Inc.*<sup>94</sup> when the Court noted that there was "[n]o such evidentiary presumption . . . to address either the first factor, the character and purpose of the use, or the fourth, market harm."<sup>95</sup> Following *Campbell*, lower courts have placed less of an emphasis on commercialism.<sup>96</sup> Indeed, courts have found that commercialism

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<sup>87</sup> See NIMMER ON COPYRIGHT, *supra* note 84, § 13.05[A].

<sup>88</sup> 17 U.S.C. § 107.

<sup>89</sup> For a detailed description of the nature of transformative and commercial uses, see JENNINGS, *supra* note 75, at 2–3; WILLIAM F. PATRY, PATRY ON FAIR USE § 3.9 (2009).

<sup>90</sup> See generally PATRY, *supra* note 89, §§ 3.4, 3.7.

<sup>91</sup> See, e.g., *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117–18, 1121 (9th Cir. 2000).

<sup>92</sup> 464 U.S. 417 (1984).

<sup>93</sup> *Id.* at 451.

<sup>94</sup> 510 U.S. 569, 594 (1994).

<sup>95</sup> *Id.*

<sup>96</sup> PATRY, *supra* note 89, § 3.4.

is not an accurate indicator to identify the purpose of the use because most secondary uses are commercial or they are motivated by a desire for personal monetary gain.<sup>97</sup> The Supreme Court has now defined commercialism to mean when “the user stands to profit from the exploitation of the copyrighted material without paying the customary price.”<sup>98</sup> As the cases will show, this standard has been of varying importance involving digital uses of copyrighted works.<sup>99</sup>

Instead of analyzing commercialism, courts have used a transformative use analysis to determine the purpose and character of the secondary use.<sup>100</sup> In *Campbell*, the Supreme Court held that “the more transformative the new work, the less will be the significance of other factors, like commercialism.”<sup>101</sup> A use is transformative if the secondary use adds value to the original work to create something new without “merely ‘superse[ding]’” the original work.<sup>102</sup> The fair use doctrine is intended to protect such transformative uses as it furthers copyright law’s objectives of promoting new creative expressions that benefit the public.<sup>103</sup> Transformative use can be described as a concept that exists along a spectrum where at one extreme is a transformative use and the other extreme is a use that “repackages or republishes” the original.<sup>104</sup> In the few cases of fair use on the Internet, courts have found transformative use to be the most determinative aspect when analyzing the first factor.<sup>105</sup>

The second factor in a court’s fair use analysis is “the nature of the copyrighted work.”<sup>106</sup> The statutory language has remained

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<sup>97</sup> *See id.*

<sup>98</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *see also Campbell*, 510 U.S. at 584 (“[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fair use.”).

<sup>99</sup> *See discussion infra* Part III.

<sup>100</sup> *See* PATRY, *supra* note 89, § 3.9.

<sup>101</sup> *Campbell*, 510 U.S. at 579.

<sup>102</sup> *Leval*, *supra* note 76, at 1111 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C. Mass. 1841)).

<sup>103</sup> *Id.*

<sup>104</sup> PATRY, *supra* note 89, § 3.9 (quoting *Leval*, *supra* note 76, at 1111).

<sup>105</sup> *See discussion infra* Part III; *see also* PATRY, *supra* note 89, § 3.9.

<sup>106</sup> 17 U.S.C. § 107 (2006).

consistent with Justice Story's "value of the materials thus used" where the focus is on the qualities of the original work.<sup>107</sup> Since a copyright covers a diverse range of categories, this factor recognizes that there are various levels of copyright protection.<sup>108</sup> The relevant inquiries are whether the copyrighted work is published or unpublished and whether it is factual or fictional;<sup>109</sup> such inquiries then determine how much protection is given against a finding of fair use.<sup>110</sup> These qualities depend on the facts of each case and may not be relevant for every fair use analysis.<sup>111</sup> This second factor is often given the least weight within a fair use analysis.<sup>112</sup>

Typically, unpublished works are protected against a finding of fair use because the copyright owner has made the work unavailable to the public and maintains the right of first publication.<sup>113</sup> Once a work is published in any medium, the copyright holder has extinguished the first publication right.<sup>114</sup> This is not an issue for news articles as they are published daily. However, the Supreme Court created an exception for exclusive stories in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>115</sup> in which it held that the *Nation's* appropriation and publication of an excerpt of President Gerald Ford's memoirs before *Time's* exclusive publication was not a fair use.<sup>116</sup>

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<sup>107</sup> Leval, *supra* note 76, at 1117 (citing *Folsom*, 9 F. Cas. at 344).

<sup>108</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994); Leval, *supra* note 76, at 1116.

<sup>109</sup> See William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1674, 1682–83 (1988).

<sup>110</sup> See *id.* at 1682–83.

<sup>111</sup> NIMMER ON COPYRIGHT, *supra* note 84, § 13.05[A][5][c].

<sup>112</sup> *Id.* § 13.05[A][2][a] (quoting Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145); see also PATRY, *supra* note 89, § 4.1.

<sup>113</sup> NIMMER ON COPYRIGHT, *supra* note 84, § 13.05[A][2][b][ii]; see *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 540 (1985) (“[U]nder ordinary circumstances, the author’s right to control the first public appearance of his undissemated expression will outweigh a claim of fair use.”).

<sup>114</sup> See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167 (9th Cir. 2007) (citing *Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223, 1235 (9th Cir. 1998)).

<sup>115</sup> 471 U.S. 539 (1985).

<sup>116</sup> *Id.* at 569.

Courts have categorized copyrighted works as either fact or fiction.<sup>117</sup> Fictional works are considered creative and therefore given more copyright protection than factual works.<sup>118</sup> The courts' rationale for this distinction is to ensure that the public has access to facts<sup>119</sup> and the "greater need to disseminate factual works than works of fiction or fantasy."<sup>120</sup> This distinction also preserves the "incentives of authorship" for fictional works, which are the types of works that the Copyright Act seeks to promote.<sup>121</sup> News articles are primarily considered factual works that contain elements of protected expression and therefore are not at "the core of intended copyright protection."<sup>122</sup>

The third factor examines "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>123</sup> Courts have relied on a quantitative and qualitative analysis to determine how much of the original work was copied.<sup>124</sup> This dual approach is necessary as a purely quantitative analysis would overlook certain instances when a nominal amount of the work was taken, but involved a significant aspect of the work.<sup>125</sup> When the entire work, or a substantial portion, is reproduced, it tends to negate a finding of fair use unless a transformative use under the first factor justifies an extensive taking.<sup>126</sup> The analysis is whether the amount taken, both quantitatively and qualitatively, is needed to achieve the purpose and character of the secondary use under the first factor and if it will harm the market for the copyrighted work under the fourth factor.<sup>127</sup> In the context of news articles, courts must also consider whether the secondary use has copied

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<sup>117</sup> *Id.* at 546, 563.

<sup>118</sup> NIMMER ON COPYRIGHT, *supra* note 84, § 13.05[A][2][a].

<sup>119</sup> Robert Gorman identified five reasons for this distinction. *See* Robert Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC'Y 560, 562 (1982).

<sup>120</sup> *Harper & Row*, 471 U.S. at 563.

<sup>121</sup> Leval, *supra* note 76, at 1116–17.

<sup>122</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data Inc.*, 166 F.3d 65, 72 (2d Cir. 1999).

<sup>123</sup> 17 U.S.C. § 107 (2006).

<sup>124</sup> NIMMER ON COPYRIGHT, *supra* note 84, § 13.05[A][3].

<sup>125</sup> *See, e.g., Harper & Row*, 471 U.S. at 564, 565 (finding that the 300 to 400 words taken out of a 2250 word article constituted the heart of the plaintiff's work).

<sup>126</sup> *See* Leval, *supra* note 76, at 1123.

<sup>127</sup> *Id.*

protected expression or the factual elements that are not protected by copyright.<sup>128</sup>

Digital technology has created new legal concerns regarding the potential for widespread unauthorized copying and distribution of a copyrighted work.<sup>129</sup> Specifically, courts have already dealt with fair use involving digital copies of an entire copyrighted work used for search engine results.<sup>130</sup> Currently, the legality of Google's Library Project is at issue, specifically as to whether the search engine's display of excerpts from copyrighted works is a fair use.<sup>131</sup> This unresolved issue is related to how automatic news aggregators display excerpts of a newspaper's headlines and bylines and whether it should be considered a fair use.<sup>132</sup>

The fourth factor is concerned with the "effect of the use upon the potential market for or value of the copyrighted work."<sup>133</sup> The impact on the market for the copyrighted work recognizes that "[a] secondary use that interferes excessively with an author's incentives subverts the aim of copyright."<sup>134</sup> Case law demonstrates that if the secondary use significantly harms the market for the copyrighted work, then that weighs heavily against fair use.<sup>135</sup> In *Harper & Row*, the Supreme Court found the fourth factor to be "undoubtedly the single most important element of fair use."<sup>136</sup> The Supreme Court later abandoned this position in *Campbell v. Acuff-Rose Music, Inc.* and held that all of the factors are given equal consideration.<sup>137</sup>

To assess market harm, courts have looked at whether the secondary use can be substituted for the original work.<sup>138</sup> A work

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<sup>128</sup> See, e.g., *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 73 (2d Cir. 1999) ("Crucial facts are entitled to no more protection than ancillary ones.").

<sup>129</sup> See, e.g., *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

<sup>130</sup> See *id.* at 820–22.

<sup>131</sup> See discussion *infra* Part I.F.3.

<sup>132</sup> See *supra* notes 50–51 and accompanying text.

<sup>133</sup> 17 U.S.C. § 107 (2006).

<sup>134</sup> Leval, *supra* note 76, at 1124.

<sup>135</sup> *Id.*

<sup>136</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985).

<sup>137</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) ("Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.").

<sup>138</sup> NIMMER ON COPYRIGHT, *supra* note 84, § 13.05[A][4]; Leval, *supra* note 76, at 1125.

that is not transformative and is merely a substitute may supplant and adversely impact the market for the original work.<sup>139</sup> Courts must also look at whether the secondary use impairs the potential market in which the copyrighted work is to be exploited.<sup>140</sup> The law seeks to protect copyright owners from unrestricted use that would diminish the value of the work or impair the potential market.<sup>141</sup> This factor does not take into account a loss in revenue due to uncompensated fair use.<sup>142</sup> The fourth factor will be important in assessing how news aggregators' use of newspaper content is affecting the newspaper industry's market for online news distribution.

### *E. Systematic Takings in News Reporting*

News reporting is listed in the preamble of § 107 as one of six unauthorized uses that is most amenable to a finding of fair use.<sup>143</sup> These enumerated uses, however, are still subject to the fair use doctrine's four factor analysis.<sup>144</sup> There are cases in which courts have rejected a finding of fair use for news reporting when the secondary use has involved systematic takings<sup>145</sup> or market harm.<sup>146</sup> In the following cases of fair use for news reporting prior to the digital era, the factual underpinnings and the legal considerations are substantially similar to the current debate between newspapers and news aggregators.

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<sup>139</sup> See NIMMER ON COPYRIGHT, *supra* note 84, § 13.05[A][4]; Leval, *supra* note 76, at 1124–25.

<sup>140</sup> See NIMMER ON COPYRIGHT, *supra* note 84, § 13.05[A][4]; Leval, *supra* note 76, at 1125.

<sup>141</sup> See *Campbell*, 510 U.S. at 590 (citation omitted).

<sup>142</sup> Leval, *supra* note 76, at 1125.

<sup>143</sup> 17 U.S.C. § 107 (2006).

<sup>144</sup> See NIMMER ON COPYRIGHT, *supra* note 84, § 13.05[A][1][a].

<sup>145</sup> See, e.g., *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977); *L.A. Times v. Free Republic*, No. CV 98-7840, 2000 U.S. Dist. LEXIS 5669, at \*56–60 (C.D. Cal. Mar. 31, 2000).

<sup>146</sup> See, e.g., *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 993 (9th Cir. 1998).

1. *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*

In *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*,<sup>147</sup> the Second Circuit affirmed that a systematic, unauthorized use of the plaintiff's financial news reports was not a fair use.<sup>148</sup> *Wainwright Securities* ("Wainwright") was the copyright owner of in-depth, analytical financial reports on companies within certain industries.<sup>149</sup> Wainwright earned most of its profit from selling these reports to clients.<sup>150</sup> The *Wall Street Transcript* ("*Transcript*") published a weekly newspaper that featured economic, business, and financial news.<sup>151</sup> The *Transcript* would consistently publish abstracts of Wainwright's reports in its newspaper, and Wainwright sued for copyright infringement.<sup>152</sup> In response, the *Transcript* primarily argued that it engaged in fair use of Wainwright's reports for the purpose of news reporting.<sup>153</sup>

On a motion for preliminary injunction, the district court performed a concise fair use analysis and found that the secondary use was substantial in both quantity and quality for the third factor.<sup>154</sup> The rest of the district court's analysis focused on potential market harm.<sup>155</sup> The court found that the *Transcript's* use of Wainwright's reports to create and publish the abstracts could materially reduce the demand and value of the original copyrighted works.<sup>156</sup> In particular, the *Transcript* usurped Wainwright's potential market to publish abstracts or license others to publish its reports.<sup>157</sup> For these reasons, the court held that the *Transcript's* copying was not entitled to a finding of fair use.<sup>158</sup>

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<sup>147</sup> 558 F.2d 91 (2d Cir. 1977).

<sup>148</sup> *Id.* at 94.

<sup>149</sup> *Id.* at 93.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 94.

<sup>153</sup> *Id.* at 95.

<sup>154</sup> *See Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 418 F. Supp. 620, 625 (S.D.N.Y. 1976).

<sup>155</sup> *See id.* at 627.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

The Court of Appeals for the Second Circuit also implied that there was a theory of misappropriation that protected Wainwright's extensive research to create the reports.<sup>159</sup> The district court noted that the *Transcript* could have independently researched and prepared its own reports.<sup>160</sup> This finding uses the "sweat-of-the-brow" doctrine, where copyright protection is extended to factual information acquired through industrious efforts.<sup>161</sup> The Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>162</sup> later eliminated this doctrine.<sup>163</sup> As a result, the investment in time, labor, and expense that was required in news gathering would no longer be legally protected by the "sweat-of-the-brow" doctrine.<sup>164</sup> Alternatively, news has also been protected by the misappropriation doctrine.<sup>165</sup> However, this doctrine has been limited and narrowly defined by subsequent decisions.<sup>166</sup> Without

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<sup>159</sup> See *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 96 (2d Cir. 1977) ("[T]he Transcript appropriated almost verbatim the most creative and original aspects of the reports, the financial analyses and predictions, which represent a substantial investment of time, money and labor.").

<sup>160</sup> *Wainwright Sec.*, 418 F. Supp. at 627.

<sup>161</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 353 (1991).

<sup>162</sup> 499 U.S. 430 (1991).

<sup>163</sup> See *id.* at 359–60.

<sup>164</sup> See *id.*

<sup>165</sup> See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 242 (1918).

It is said that the elements of unfair competition are lacking because there is no attempt by defendant to palm off its goods as those of the complainant, characteristic of the most familiar, if not the most typical, cases of unfair competition. But we cannot concede that the right to equitable relief is confined to that class of cases. In the present case the fraud upon complainant's rights is more direct and obvious. Regarding news matter as the mere material from which these two competing parties are endeavoring to make money, and treating it, therefore, as quasi property for the purposes of their business because they are both selling it as such, defendant's conduct differs from the ordinary case of unfair competition in trade principally in this that, instead of selling its own goods as those of complainant, it substitutes misappropriation in the place of misrepresentation, and sells complainant's goods as its own.

*Id.* at 241–42.

<sup>166</sup> Misappropriation was a federal common law doctrine, but the Supreme Court invalidated federal general common law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938). The misappropriation doctrine still exists, but the Second Circuit has narrowly defined the test for misappropriation in *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997). For a recent application of the misappropriation



these doctrines, the newspaper industry will need to seek alternative legal remedies under copyright law to protect its news content from unauthorized uses.

2. *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*

Twenty years later, the Second Circuit revisited a case with similar facts to *Wainwright* in *Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*,<sup>167</sup> and again rejected a finding of fair use in news reporting.<sup>168</sup> *Nihon Keizai Shimbun* (“Nihon”), a Japanese newspaper publisher, filed a copyright infringement suit against *Comline Business Data* (“Comline”), a company that gathered news articles from a variety of sources and sold abstracts of the articles to its customers.<sup>169</sup> *Comline*’s principal defense was fair use for the purpose of news reporting.<sup>170</sup>

The Second Circuit agreed with the district court’s fair use assessment against a finding of fair use.<sup>171</sup> For the first factor, the court found that there was no transformative use in the creation of the abstracts.<sup>172</sup> The evidence supporting this result was that *Comline* roughly translated each of *Nihon*’s news articles into English and repurposed them into an abstract without adding any value.<sup>173</sup> This process took *Comline* approximately thirty-six minutes per article.<sup>174</sup> For the second factor, the court recognized that news articles are predominantly factual works that also contain expressive elements.<sup>175</sup> The court found that this factor favored neither party.<sup>176</sup> For the third factor, the court clarified that *Comline* copied a substantial portion of *Nihon*’s expressive

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doctrine, see *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009).

<sup>167</sup> 166 F.3d 65 (2d Cir. 1999).

<sup>168</sup> *Id.* at 72.

<sup>169</sup> *Id.* at 69.

<sup>170</sup> *See id.*

<sup>171</sup> *Id.* at 72.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 69. This restructuring is strikingly similar to how the new aggregation website, Gawker, refashioned the *Washington Post* story. See *supra* notes 69–71 and accompanying text.

<sup>175</sup> See *Nihon*, 166 F.3d at 72.

<sup>176</sup> *Id.* at 73.

elements as opposed to the facts, which are not protected by copyright.<sup>177</sup> Finally, when considering the fourth factor, the court found that there was market harm because Comline's abstracts acted as substitutes and therefore supplanted Nihon's market.<sup>178</sup> Since three out of four factors weighed against fair use, the court held that Comline's use was infringement.<sup>179</sup> Although Comline's defense of news reporting is a favored fair use purpose, the court still found against fair use on the grounds of fairness.<sup>180</sup>

### 3. Los Angeles Times v. Free Republic

*Los Angeles Times v. Free Republic*<sup>181</sup> was a later case involving systematic appropriation of news content that the court held was not a fair use.<sup>182</sup> This case is an early example of the capabilities of digital technology and the legal issues that can arise from the unauthorized use of copyrighted works on Internet bulletin boards,<sup>183</sup> which predated today's modern version of the worldwide web.<sup>184</sup> Here, *The Los Angeles Times* and *The Washington Post* both published print and online editions of their respective newspapers.<sup>185</sup> The online edition was free, but the archived articles were not.<sup>186</sup> Free Republic operated a website where registered members could post news articles and commentary.<sup>187</sup> *The Los Angeles Times* and *The Washington Post* sued Free Republic for copyright infringement upon discovering that unauthorized copies of their news articles were posted on Free

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *See id.* at 72–73.

<sup>181</sup> No. CV 98-7840, 2000 U.S. Dist. LEXIS 5669 (C.D. Cal. Mar. 31, 2000).

<sup>182</sup> *Id.* at \*3.

<sup>183</sup> For examples of cases on fair use involving Internet bulletin boards and webpages, see *Religious Technology Center v. Henson*, 20 F. App'x 620 (9th Cir. 2001); *Religious Technology Center v. Lerma*, 980 F. Supp. 1362 (E.D. Va. 1995); PATRY, *supra* note 89, § 3:50.

<sup>184</sup> ENCYCLOPEDIA OF NEW MEDIA: AN ESSENTIAL REFERENCE 45 (Steve Jones ed., 2003).

<sup>185</sup> *Free Republic*, 2000 U.S. Dist. LEXIS 5669, at \*4.

<sup>186</sup> *Id.*

<sup>187</sup> *See id.* at \*6.

Republic's site.<sup>188</sup> Free Republic asserted the fair use defense for the purpose of criticism.<sup>189</sup>

In a detailed analysis of the first factor, the court found that there was no transformative use in Free Republic's verbatim copying of the plaintiffs' news articles.<sup>190</sup> The court found that Free Republic promoted its site as a forum where members could post their own commentary about coverage of breaking news stories.<sup>191</sup> As there was little evidence of actual commentary on the nature of the media's coverage, Free Republic's verbatim copying did not justify its purpose.<sup>192</sup> Without commentary, Free Republic's use of the plaintiffs' news articles on a daily basis served the same purpose as the newspapers' websites and constituted an extensive, systematic taking.<sup>193</sup> While the court found that Free Republic's use of the articles was not for direct commercial gain, the systematic taking was still an overriding concern.<sup>194</sup> Because the court identified news articles as predominantly factual works, the second factor weighed in favor of fair use.<sup>195</sup> As for the third factor, the court found that copying news articles in their entirety or a substantial portion thereof does not weigh in favor of fair use as it was not essential to Free Republic's purpose of hosting a forum for commentary.<sup>196</sup>

The court also rejected Free Republic's fair use defense on the fourth factor because there was potential harm to the plaintiffs' market.<sup>197</sup> The plaintiffs demonstrated that Free Republic was attempting to exploit the market for distributing their news articles online, selling archived news articles, and licensing others to distribute their news articles.<sup>198</sup> The court found that Free Republic's use substituted the plaintiffs' market and undercut the

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<sup>188</sup> *Id.* at \*2.

<sup>189</sup> *See id.* at \*2–3.

<sup>190</sup> *See id.* at \*24–32.

<sup>191</sup> *Id.* at \*39.

<sup>192</sup> *Id.* at \*38–39.

<sup>193</sup> *Id.* at \*52–53.

<sup>194</sup> *See id.* at \*50–53.

<sup>195</sup> *Id.* at \*56.

<sup>196</sup> *See id.* at \*57, 59–60.

<sup>197</sup> *Id.* at \*74.

<sup>198</sup> *Id.* at \*70.

sale of archived copies and licensing opportunities.<sup>199</sup> The court relied on evidence of Free Republic's visitor volume and registered users' accessing the site to demonstrate that there was a likelihood of potential market harm.<sup>200</sup> The court also rejected Free Republic's "beneficial use" argument that its site increased demand for the plaintiffs' news articles.<sup>201</sup> The court held that this "beneficial use" argument has routinely failed in other cases and did not justify copying as a fair use.<sup>202</sup>

#### F. Fair Use on the Internet

The rise of digital media has forced courts to reexamine what types of digital uses of copyrighted works should be considered a fair use. In deciding what uses are fair, courts must adhere to the objectives of copyright law.<sup>203</sup> Specifically, courts will aim to uphold the public interest in having access to information as well as protect an author's exclusive rights in copyrighted works.<sup>204</sup> Courts have found against fair use when technology developers used the defense to justify distribution of commercially valuable content over the Internet without authorization from copyright owners.<sup>205</sup> Courts have also supported fair use defenses for technological developments that offer public benefits.<sup>206</sup> However, the law remains uncertain in this area as these issues have not been heavily litigated. Nevertheless, these decisions reveal how the courts are currently approaching fair use issues in the digital era and how new digital uses might be addressed in the future.

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<sup>199</sup> *Id.* at \*70.

<sup>200</sup> *See id.* at \*63, 71.

<sup>201</sup> *Id.* at \*72–73.

<sup>202</sup> *Id.* at \*73; *see, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 n.21 (1994) (noting that even if an unauthorized use of a previously unknown song "turns the song into a commercial success[,] the boon to the song does not make the film's . . . copying fair"); *D.C. Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) ("Since one of the benefits of ownership of copyrighted material is the right to license its use for a fee, even a speculated increase in DC's comic book sales as a consequence of RFI's infringement would not call the fair use defense into play as a matter of law.").

<sup>203</sup> *See* Leval, *supra* note 76, at 1107.

<sup>204</sup> *See, e.g.*, *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549–50 (1985).

<sup>205</sup> *See, e.g.*, *A & M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir. 2001).

<sup>206</sup> *See* discussion *infra* Part III.A.

### 1. Music File-Sharing and Fair Use

The sound recording industry was the first content industry to prevail against a finding of fair use to protect its commercially valuable content from being freely distributed over the Internet.<sup>207</sup> Digital compression technology made it possible for music files to be easily reproduced and distributed over the Internet using peer-to-peer file-sharing networks.<sup>208</sup> Napster was the first peer-to-peer application where consumers could access and exchange millions of copyrighted sound recordings for free.<sup>209</sup> This system was effective at distributing online content, but it was also a significant economic threat to the copyright owners of the sound recordings and underlying musical compositions.<sup>210</sup> The music publishers who represented the copyright owners filed suit against Napster for contributory and vicarious copyright infringement.<sup>211</sup>

Napster raised several defenses against the copyright infringement claims, one of them being fair use.<sup>212</sup> Ultimately, the district court found that all of the fair use factors weighed against Napster.<sup>213</sup> For the first factor, the district court found that Napster users were engaging in a commercial activity because they were distributing a vast number of music files for free instead of paying a customary price.<sup>214</sup> The court also found that the digital reproductions of copyrighted songs did not constitute a transformative use.<sup>215</sup> The district court also found that the second factor weighed in favor of the plaintiffs since musical compositions and sound recordings are creative works that deserve strong copyright protection.<sup>216</sup> As for the third factor, Napster reproduced the entire copyrighted work, which weighs against fair use if there is an adverse effect on the market.<sup>217</sup> The fourth factor

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<sup>207</sup> See Menell, *supra* note 27, at 99–100.

<sup>208</sup> *Id.*

<sup>209</sup> A & M Records, Inc. v. Napster, 114 F. Supp. 2d 896, 901–02 (N.D. Cal. 2000).

<sup>210</sup> MICHAEL A. EINHORN, MEDIA, TECHNOLOGY AND COPYRIGHT 84 (2004).

<sup>211</sup> *See id.*

<sup>212</sup> *Napster*, 114 F. Supp. 2d at 912.

<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *Id.*

<sup>216</sup> *See id.* at 913.

<sup>217</sup> *See id.*

was the most determinative as the plaintiffs presented evidence that Napster created market harm in two ways: it reduced CD sales among college students, the plaintiffs' primary consumer,<sup>218</sup> and it hindered the plaintiffs' entry into the potential market for digital music distribution.<sup>219</sup> The Ninth Circuit affirmed the district court's finding against fair use.<sup>220</sup>

After the sound recording industry aggressively litigated against file-sharing programs and users, copyright owners have been able to promote licensed uses of digital music.<sup>221</sup> Digital technology has enhanced the sound recording industry by changing the way songs are produced, recorded, marketed, and distributed at a significantly lower cost.<sup>222</sup> By creating a licensed use model for digital music files, technology and copyrighted works are able to have a mutually beneficial relationship.<sup>223</sup> This balance protects the copyright holder's interest and supports technological innovations.<sup>224</sup>

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See* A & M Records, Inc. v. Napster, 239 F.3d 1004, 1014–17 (9th Cir. 2001). The Ninth Circuit remanded, however, for a modification of the district court's preliminary injunction. *Id.* at 1029.

<sup>221</sup> *See* Jefferson Graham, *Rivals Mix Up Digital Music*, USA TODAY, Apr. 26, 2004, at 3B.

<sup>222</sup> Menell, *supra* note 27, at 101.

<sup>223</sup> *See, e.g.*, David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 373, 444 (2010) (“[A]s long as artists . . . are not contractually beholden to intermediaries that own the work they author or/and perform, and as long as they have access to the wherewithal to do a modicum of self-production, the legal status quo may satisfy their primary career goals as artists. At a theoretical level, they are in a position to enjoy the originally intended benefits of copyright law in fulfilling both their utilitarian and personality interests”). Legal scholars like Troutt, therefore, would support a licensed use model in some or all digital contexts. Troutt envisions, however, that the licensed use would be controlled by the creator herself. *See id.*; *see also* Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 44 (2004) (“One important goal of online music copyright reform, I would argue, should be to encourage music file sharing, as distinguished from merely tolerating it. To do that, it should incorporate some licensing mechanism . . . . So long as shareable is the legal default, we don't need to make sharing compulsory.”).

<sup>224</sup> *See* Troutt, *supra* note 223, at 444.

## 2. Search Engines and Fair Use

There are also fair use cases that examine how digital technologies, like search engines, copy information on the Internet. These decisions can be directly applied to how automatic news aggregators copy and link to thousands of newspapers to create a searchable news index.<sup>225</sup> Search engines perform three functions to produce search results: indexing the contents of the web, caching website content for faster access, and displaying textual excerpts taken directly from a website to describe its content.<sup>226</sup> The cases discussed in this section have centered on whether it is a fair use for search engines to perform functions that involve unauthorized copying and distribution of copyrighted works contained on websites.<sup>227</sup> So far, courts have held that a search engine's use of copyrighted works is a fair use due to its tremendous public benefit.

### a) Kelly v. Arriba Soft Corp.

In *Kelly v. Arriba Soft Corp.*,<sup>228</sup> the Ninth Circuit held that a search engine's use and display of a copyrighted work was a fair use.<sup>229</sup> Leslie Kelly, the copyright owner of photographs posted on his website, sued Arriba Soft, the operator of a search engine, for copyright infringement.<sup>230</sup> Arriba Soft used a web crawling software program to copy and store images from the Internet to a database that created thumbnail-sized images.<sup>231</sup> In response to a user's queries, the search engine displayed these thumbnail images as results and provided links to guide users to the originating website containing the full-sized images.<sup>232</sup> Arriba Soft argued that its use of Kelly's photographs to create thumbnail-sized images was a fair use.<sup>233</sup>

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<sup>225</sup> See *supra* notes 37–47 and accompanying text.

<sup>226</sup> PATRY, *supra* note 89, § 3.50.

<sup>227</sup> See *infra* Part I.F.2.a–c.

<sup>228</sup> 336 F.3d 811 (9th Cir. 2003).

<sup>229</sup> *Id.* at 822.

<sup>230</sup> See *id.* at 815.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 816.

The court applied the four factor analysis to determine if Arriba Soft's unauthorized reproduction of Kelly's copyrighted photographs was a fair use.<sup>234</sup> For the first factor, the court agreed with the district court's finding that Arriba Soft operated its search engine for commercial purposes and the use of Kelly's images was also commercial, but in comparison to music file-sharing, the use here was "incidental and less exploitative in nature than more traditional types of commercial use."<sup>235</sup> Since Arriba was not using Kelly's images to directly promote the search engine or profit from the sale of the images, the commercial nature of the use only slightly weighed against a finding of fair use.<sup>236</sup> The court also found that Arriba's thumbnails were a transformative use of Kelly's photographs.<sup>237</sup> The court concluded that Kelly's use was for illustrative or aesthetic purposes,<sup>238</sup> and Arriba Soft's use was to improve access to information over the Internet, which also benefits the public and advances the goals of copyright law.<sup>239</sup>

The copyright owner was not able to prevail on the remaining fair use factors.<sup>240</sup> The photographs were creative works, which are granted a higher level of copyright protection,<sup>241</sup> but they were also published so the second factor only weighed slightly in favor of Kelly.<sup>242</sup> The court found that the purpose of Arriba's use required copying Kelly's images in its entirety so the third factor favored neither party.<sup>243</sup> As for the fourth factor, the court found

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<sup>234</sup> *Id.* at 817.

<sup>235</sup> *Id.* at 818. *Compare id.*, with *A & M Records, Inc. v. Napster*, 239 F.3d 1004, 1015 (9th Cir. 2001) ("[C]ommerical use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies. Plaintiffs made such a showing before the district court." (citations omitted)).

<sup>236</sup> *Kelly*, 336 F.3d at 818.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *See id.* at 818–20.

<sup>240</sup> *See id.* at 820–22.

<sup>241</sup> *See id.* at 820; *see also supra* notes 118–22 and accompanying text.

<sup>242</sup> *Kelly*, 336 F.3d at 820; *see supra* notes 109–14 and accompanying text.

<sup>243</sup> *Kelly*, 336 F.3d at 820–21. *Compare id.*, with *A & M Records, Inc. v. Napster*, 239 F.3d 1004, 1016 (9th Cir. 2001) ("[U]nder certain circumstances, a court will conclude that a use is fair even when the protected work is copied in its entirety." (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984) (finding fair use even though the secondary use copied the protected work entirely))).



that the thumbnail images did not harm Kelly's market to sell full-sized images.<sup>244</sup> Since the thumbnails would significantly lose clarity when enlarged, Arriba's use "would guide users to Kelly's web site rather than away from it."<sup>245</sup>

In striking a balance between the copyright holder and the public interest, the court decided in *Kelly* that the public benefit in accessing information outweighed the copyright holder's right to control unauthorized copying.<sup>246</sup> As a result, the court found in favor of the search engine.<sup>247</sup>

b) *Field v. Google, Inc.*

In *Field v. Google, Inc.*,<sup>248</sup> another federal district court upheld the public benefit of search engines.<sup>249</sup> Blake Field posted his copyrighted works on his website in a deliberate attempt to manufacture a claim against Google.<sup>250</sup> Field sued Google for copyright infringement after Google's web crawling program reproduced the entire website to create cached links.<sup>251</sup> Google asserted a number of defenses, including fair use.<sup>252</sup> The court held that Google's use of Blake's copyrighted works to create cached links was a fair use.<sup>253</sup> The court based this finding largely on the transformative use under the first factor.<sup>254</sup> The court found that Field's copyrighted works have an artistic purpose while Google's cached links offer users efficient access to copyrighted works online.<sup>255</sup> The court specifically identified at length the public benefits of cached links,<sup>256</sup> and noted that a website owner can disable the caching function with a simple meta-tag instruction

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<sup>244</sup> *Kelly*, 336 F.3d at 821–22.

<sup>245</sup> *Id.* at 821.

<sup>246</sup> Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 72 (2002).

<sup>247</sup> *Kelly*, 336 F.3d at 822.

<sup>248</sup> 412 F. Supp. 2d 1106 (D. Nev. 2006).

<sup>249</sup> *See id.* at 1118–19.

<sup>250</sup> *Id.* at 1113–14.

<sup>251</sup> *Id.* at 1114.

<sup>252</sup> *See id.* at 1115, 1117.

<sup>253</sup> *Id.* at 1118.

<sup>254</sup> *See id.* at 1123.

<sup>255</sup> *See id.* at 1118–19.

<sup>256</sup> *See id.*

to the search engine.<sup>257</sup> Therefore, the court found that these public benefits associated with Google's transformative use outweighed its commercial nature.<sup>258</sup> The court did note that when a user accesses a cached link, it "displays no advertising to the user, and does not otherwise offer a commercial transaction to the user."<sup>259</sup> While a commercial transaction was not at issue in this case, it may be implied that the court considered advertising displayed next to search results to be a commercial use. This analysis is relevant to today's automatic news aggregators where advertising is displayed alongside search results.

The second and third factors were unable to overcome the court's finding that Google's use was transformative. The court found that the second factor slightly weighed in favor of Field.<sup>260</sup> The copyrighted works were creative, but they were also published on his website, "mak[ing] his works available to the widest possible audience for free."<sup>261</sup> In finding that the third factor was neutral, the court closely followed *Kelly* to justify copying of an entire work if there is a transformative use.<sup>262</sup> Since Field made his works available for free, there was no evidence of market harm under the fourth factor.<sup>263</sup> This case further illustrates how courts are willing to justify copying as fair use in cases in which technology facilitates greater access to information over the Internet. This case also demonstrates a new trend where copyright owners have to take affirmative steps to prevent digital copying by using meta-tag instructions; otherwise an implied license is granted for digital indexing and creating abridged displays of copyrighted works.<sup>264</sup>

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<sup>257</sup> See *id.* at 1112–13, 1119.

<sup>258</sup> See *id.* at 1119.

<sup>259</sup> *Id.* at 1120.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See *id.* at 1121.

<sup>263</sup> *Id.* at 1121–22.

<sup>264</sup> See *id.* at 1116. Critics argue that the opt-out approach is contrary to copyright principles because copyright protection and exclusive rights against infringement are granted to an author by operation of law without the author having to take affirmative steps. This debate has gained prominence in the Google Library Project litigation. Press Release, Ass'n of Am. Publishers, Google Library Project Raises Serious Questions for Publishers and Authors (Aug. 12, 2005), available at <http://www.publishers.org/main/>

## c) Perfect 10, Inc. v. Amazon.com, Inc.

Seven years later, the Ninth Circuit reaffirmed *Kelly* in *Perfect 10, Inc. v. Amazon.com, Inc.*,<sup>265</sup> by holding that Google's use of Perfect 10's images to create thumbnail-sized images was a fair use.<sup>266</sup> Perfect 10 markets and sells copyrighted photographs on a restricted access website and also licenses the photographs to third party websites.<sup>267</sup> Similar to *Kelly*, Google's search engine copied Perfect 10 photographs from unlicensed third party sites to create thumbnail-sized images.<sup>268</sup> Perfect 10 brought a copyright infringement claim against Google.<sup>269</sup> On a motion for preliminary injunction, the district court distinguished the case from *Kelly* and held that Google's use of the photographs likely was not a fair use.<sup>270</sup>

The district court's fair use ruling was based on commercial considerations under the first and fourth factors.<sup>271</sup> For the first factor, the court found that Google's AdSense program made the use of Perfect 10's images commercial since advertising was tied to search results.<sup>272</sup> Google generates revenue from its AdSense program in which Google uses its search engine technology to display targeted advertising on participating third party websites based on the website's geographic location and content.<sup>273</sup> When a user clicks on the advertising, both Google and the third party website share the revenue.<sup>274</sup> For the fourth factor, the court found that there would be harm to the market because Perfect 10 had a license agreement with a British cell phone company, FoneStarz

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PressCenter/Archives/2005\_Aug/Aug\_02.htm; see *infra* notes 294–303 and accompanying text.

<sup>265</sup> 508 F.3d 1146 (9th Cir. 2007).

<sup>266</sup> *Id.* at 1168.

<sup>267</sup> *Id.* at 1157.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 416 F. Supp. 2d 828, 831, 851 (C.D. Cal. 2006).

<sup>271</sup> See *id.* at 846–47, 851.

<sup>272</sup> *Id.* at 846–47.

<sup>273</sup> Google AdSense, How AdSense Works, [http://www.google.com/services/adsense\\_tour/howitworks.html](http://www.google.com/services/adsense_tour/howitworks.html) (last visited Mar. 12, 2010).

<sup>274</sup> *Id.*

Media, to download thumbnail-sized images to cell phones.<sup>275</sup> The district court's analysis thus illustrates how commercial considerations, like sponsored advertising, can negate a finding of fair use.

The Ninth Circuit reversed the district court's decision and supported Google's fair use defense.<sup>276</sup> Following its emphasis on transformative use in *Kelly*, the court held that Google's use of the thumbnails was also "highly transformative."<sup>277</sup> As to the first factor, the court found that a search engine's use of an original work creates a new work, "namely, an electronic reference tool," which promotes the objectives of copyright law by serving the public interest.<sup>278</sup> The court disagreed with the district court and held that "the transformative nature of Google's use is more significant than any incidental superseding use or the minor commercial aspects of Google's search engine and website"<sup>279</sup> despite evidence that in 2005, Google's AdSense program generated \$630 million, 46% of Google's total revenue.<sup>280</sup>

The court relied on the same fair use analysis in *Kelly* for the second and third factors.<sup>281</sup> As to the fourth factor, Perfect 10 had a potential market for thumbnail-sized images, which was not an issue in *Kelly*.<sup>282</sup> The court found that the "potential harm to Perfect 10's market remains hypothetical"; there was no evidence of users downloading Google's thumbnail-sized images for cell phones so this factor favored neither party.<sup>283</sup> The court concluded that the district court's finding that Google's use was commercial and superseding was outweighed by the transformative nature of the search engine and its public benefits.<sup>284</sup> In sum, both *Kelly* and

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<sup>275</sup> *Perfect 10*, 416 F. Supp. 2d at 849.

<sup>276</sup> *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168, 1177 (9th Cir. 2007).

<sup>277</sup> *Id.* at 1165.

<sup>278</sup> *Id.* at 1165–66.

<sup>279</sup> *Id.* at 1167.

<sup>280</sup> *Perfect 10*, 416 F. Supp. 2d at 847.

<sup>281</sup> *See Perfect 10*, 508 F.3d at 1167–68; *see also supra* notes 243–45 and accompanying text.

<sup>282</sup> *Perfect 10*, 508 F.3d at 1168.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 1166.

*Perfect 10* established a legal precedent that digital indexing and creating abridged, thumbnail-sized displays of copyrighted works is a fair use.

These cases illustrate the importance that courts place on transformative use to decide if a digital use of a copyrighted work is a fair use. In the aforementioned cases, courts have granted search engines legal protection to encourage the investment in facilitating public access to information on the Internet. The problem is that transformative use is subject to a variety of interpretations.<sup>285</sup> Courts have often supported new technologies that “deployed the original work for a different commercial use” instead of creating a new work.<sup>286</sup> This interpretation is a departure from the original meaning that a secondary use should have “new insights and understandings” from the copyrighted work.<sup>287</sup> By this “creative” standard, a different commercial use is considered transformative to achieve a desired result that is socially beneficial to the public.<sup>288</sup> The shift away from creative transformation to public benefit has become an effective fair use justification for search engines.

### 3. The Google Book Search Project Litigation

The Google Book Search Project is another example of copyright infringement concerns that arose from the digital use of copyrighted works.<sup>289</sup> The litigation that resulted from this project raises similar concerns with regard to how news aggregators use newspapers’ content. In December 2004, Google launched two initiatives under the Google Book Search Project—the Partner Program and the Library Project—to “make the full text of all the

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<sup>285</sup> See Kathleen K. Olson, *Transforming Fair Use Online: The Ninth Circuit’s Productive-Use Analysis of Visual Search Engines*, 14 COMM. L. & POL’Y 153, 159–60 (2009). See generally Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 COMM. L. & POL’Y 1 (2002).

<sup>286</sup> Raymond T. Nimmer, *Content Protection and Copyright*, 984 PLI/Pat 81, 107 (2009) [hereinafter Nimmer, *Content Protection*].

<sup>287</sup> Leval, *supra* note 76, at 1111.

<sup>288</sup> Olson, *supra* note 285, at 175.

<sup>289</sup> See Complaint, *McGraw-Hill Cos., Inc. v. Google, Inc.*, No. 05 Civ. 8881 (S.D.N.Y. 2005).

world's books searchable by anyone.”<sup>290</sup> The Partner Program enables publishers and authors to expressly authorize Google to make digital copies of their copyrighted works.<sup>291</sup> To maintain copyright protection, users of Google Book Search are only given a limited preview of pages within the book in response to a user's search terms.<sup>292</sup> Since the Partner Program involves an express agreement between Google and copyright owners it has not provoked copyright infringement concerns from authors or publishers.<sup>293</sup>

The Library Project has involved the scanning of out-of-print books,<sup>294</sup> books that are within the public domain, and copyright protected books from participating libraries to create a searchable digital book collection.<sup>295</sup> The books that are within the public

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<sup>290</sup> Jonathan Band, *Google and Fair Use*, 3 J. BUS. & TECH. L. 1, 16 (2008); Posting of Adam M. Smith, Google Print Product Manager, to Official Google Blog, <http://googleblog.blogspot.com/2005/08/making-books-easier-to-find.html> (Aug. 12, 2005, 1:31 PST); see also Press Release, Google, Google Checks Out Library Books (Dec. 14, 2004), available at [http://www.google.com/press/pressrel/print\\_library.html](http://www.google.com/press/pressrel/print_library.html) [hereinafter Google Checks Out Library Books]; Google Books, The Future of Google Books, <http://books.google.com/googlebooks/agreement/#3> (last visited Mar. 12, 2010) [hereinafter The Future of Google Books].

<sup>291</sup> See Google Books Tour, Promote Your Books on Google—for Free, [http://books.google.com/googlebooks/book\\_search\\_tour/index.html](http://books.google.com/googlebooks/book_search_tour/index.html) (last visited Apr. 12, 2010) [hereinafter Promote Your Books on Google]; see also Band, *supra* note 290, at 16.

<sup>292</sup> Google Books Tour, Keep Your Content Protected, [http://books.google.com/intl/en-US/googlebooks/book\\_search\\_tour/books4.html](http://books.google.com/intl/en-US/googlebooks/book_search_tour/books4.html) (last visited Mar. 12, 2010).

<sup>293</sup> Band, *supra* note 290, at 17; Promote Your Books on Google, *supra* note 291.

<sup>294</sup> Many of the out-of-print books are still copyright protected, but the copyright owners of these books are unknown or cannot be found so they are considered to be “orphan works.” Orphan works have been a point of controversy for the Library Project as critics argue that Google should not have an exclusive right to commercially exploit orphan works. See generally Pamela Samuelson, *Legally Speaking: The Dead Souls of the Google Book Search Settlement*, COMM. ACM, July 1, 2009, at 28; Miguel Helft, *Some Raise Alarms as Google Resurrects Out-of-Print Books*, N.Y. TIMES, Apr. 4, 2009, at A1.

<sup>295</sup> Initially, the five participating libraries were Harvard University, Stanford University, University of Michigan, University of Oxford, and the New York Public Library. Google Checks Out Library Books, *supra* note 290. For an updated list of participating libraries, see Google Books, Library Partners, <http://books.google.com/googlebooks/partners.html> (last visited Mar. 12, 2010). See generally KATE M. MANUEL, CONGRESSIONAL RES. SERV., THE GOOGLE LIBRARY PROJECT: IS DIGITIZATION FOR PURPOSES OF ONLINE INDEXING FAIR USE UNDER COPYRIGHT LAW? 1 (2009), available at [graphics8.nytimes.com/packages/pdf/topics/googlelibcrs.pdf](http://graphics8.nytimes.com/packages/pdf/topics/googlelibcrs.pdf).

domain, and therefore without copyright protection, are available to users in full view and capable of being downloaded while the copyright protected books only offer a “snippet”<sup>296</sup> view where users are given limited access to the book.<sup>297</sup> However, the Library Project initiated copyright infringement concerns from authors and publishers because Google scanned the copyright protected books without their consent.<sup>298</sup> In 2005, Google halted the project to allow authors and publishers to “opt-out” if they did not want their books to be scanned.<sup>299</sup> The same year, the authors and publishers who owned the books’ copyrights filed a class action suit against Google for copyright infringement due to unauthorized copying and distribution of their protected works.<sup>300</sup> Google presented two counterarguments: the ability for copyright owners to “opt-out” of the project, and the fair use defense.<sup>301</sup>

While it is undisputed that the Library Project offers a wide range of benefits to the public as far as making information more accessible, the Library Project also raises concerns for copyright owners. The ability to “opt-out” of the Library Project is similar to a website owner’s ability to prevent search engines from copying and indexing its site.<sup>302</sup> The question is whether offering the ability to opt-out should protect unauthorized digital uses from infringement liability.<sup>303</sup> Another prominent issue is whether a search engine’s display of textual “snippets” of a copyrighted work online should be considered a fair use.<sup>304</sup> In October 2008, Google proposed a settlement agreement to pay \$125 million to resolve claims with copyright owners regarding prior and future use of

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<sup>296</sup> A “snippet” shows the user’s search terms located within the book and a few sentences surrounding the terms. Google Books, Google Books Library Project, <http://books.google.com/googlebooks/library.html> (last visited Feb. 9, 2010).

<sup>297</sup> The Future of Google Books, *supra* note 290.

<sup>298</sup> See MANUEL, *supra* note 295, at 2.

<sup>299</sup> Margaret Kane, *Google Pauses Library Project*, CNET NEWS, Aug. 12, 2005, [http://news.cnet.com/Google-pauses-library-project/2100-1025\\_3-5830035.html](http://news.cnet.com/Google-pauses-library-project/2100-1025_3-5830035.html).

<sup>300</sup> See Complaint, *supra* note 289; see also Band, *supra* note 290, at 18–19.

<sup>301</sup> See MANUEL, *supra* note 295, at 3–5.

<sup>302</sup> Compare *id.* (describing the “opt-out” scheme), with *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1114 (D. Nev. 2006) (describing website owners ability to remove their site from Google’s index).

<sup>303</sup> MANUEL, *supra* note 295, at 4.

<sup>304</sup> See generally discussion *supra* Part I.C.

their books.<sup>305</sup> In November 2009, the District Court for the Southern District of New York granted preliminary approval of the settlement agreement.<sup>306</sup> The settlement agreement recognizes that licensed uses create more favorable results in the ongoing conflict between copyright owners and technology developers. The copyright infringement concerns affecting this Project remain unresolved as the court is in the process of granting final approval of the settlement agreement.<sup>307</sup>

## II. THE CONFLICT BETWEEN COPYRIGHT OWNERS AND TECHNOLOGY DEVELOPERS

The rise of digital media has heightened the longstanding conflict between copyright owners and technology developers.<sup>308</sup> Copyright owners have often viewed technological advancements as a threat to their exclusive rights, existing business models, and market potential.<sup>309</sup> Specifically, publishers argued that public libraries<sup>310</sup> and later, the advent of photocopiers, would harm their market.<sup>311</sup> The music industry feared that radio would supplant its

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<sup>305</sup> See Google, Increasing Access to Books: The Google Books Settlement, <https://sites.google.com/a/pressatgoogle.com/googlebookssettlement/home> (last visited Feb. 7, 2010).

<sup>306</sup> See *id.*; see also Alex Pham, *Google's Book Scanning Deal Is Not Solid Yet*, L.A. TIMES, Nov. 28, 2009, at B1.

<sup>307</sup> A federal court must approve a class action settlement agreement by first granting a preliminary approval, holding a period for objections and conducting a fairness hearing before granting final approval. FED. R. CIV. P. 23(e); Pham, *supra* note 306. The District Court for the Southern District of New York held the fairness hearing on February 18, 2010, where supporters and objectors offered testimony on the settlement agreement. Chad Bray, *Google Defends Its Book Pact*, WALL ST. J., Feb. 18, 2010, at B2; Motoko Rich, *Judge Hears Arguments on Google Book Settlement*, N.Y. TIMES, Feb. 19, 2010, at B4.

<sup>308</sup> See EINHORN, *supra* note 210, *passim*.

<sup>309</sup> See 17 U.S.C. § 106 (2006) (enumerating rights of copyright owners); Nimmer, *Content Protection*, *supra* note 286, at 83.

<sup>310</sup> Menell, *supra* note 27, at 101 (citing CHARLES KNIGHT, *THE OLD PRINTER AND THE MODERN PRESS* 285 (1854)) (“[W]hen circulating libraries were first opened, the booksellers were much alarmed; and their rapid increase added to their fears, and led them to think that the sale of books would be diminished by such libraries. But experience has proved that the sale of books, so far from being diminished [by public libraries], has been greatly promoted . . .”).

<sup>311</sup> *Id.* at 102 (citing NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 1 (1979)). The “CONTU Report” studied the threat of



market,<sup>312</sup> and the film and television industries were concerned about video cassette recorders.<sup>313</sup> Nevertheless, the relationship between technology and copyright owners is often mutually beneficial.<sup>314</sup> Technology has accelerated the speed at which news is gathered and has modernized the way newspapers are printed and now digitally distributed.<sup>315</sup> Meanwhile, the success of a new technology that makes copyrighted content easily accessible to the public also depends on the constant production of new content.<sup>316</sup>

The Internet is considered the most significant technological development in modern communication.<sup>317</sup> It enables information to be transformed into a digital format and creates new market opportunities. Newspapers thus will have the ability to take advantage of “Web 2.0” such as providing weblogs, interactive discussions with readers, streaming video, and live commentary on breaking news events alongside traditional news articles.<sup>318</sup> Over the past ten years, the Internet has also fostered the growth of digital technologies that are capable of making copies of identical quality and distributing copyrighted works instantly and at no additional cost;<sup>319</sup> this has had the effect of restructuring the economics of information dissemination.<sup>320</sup> The digital use of copyrighted works has presented new issues for the courts to examine, such as file-sharing of music,<sup>321</sup> books,<sup>322</sup> and now

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photocopying and offered fair use recommendations to lessen harmful impact on copyrighted works. *Id.* at 102 n.132.

<sup>312</sup> *Id.* at 102.

<sup>313</sup> *Id.*; see, e.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

<sup>314</sup> See Symposium, *The Death or Rebirth of the Copyright?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1095, 1121 (2008).

<sup>315</sup> See Nimmer, *Content Protection*, *supra* note 286, at 82–83.

<sup>316</sup> See *id.* at 83.

<sup>317</sup> YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 30 (2006).

<sup>318</sup> See DIGITAL DILEMMA, *supra* note 7, at 1–2; see also Mike Yamamoto, *Can Web 2.0 Save Newspapers?*, CNET NEWS, Aug. 31, 2006, [http://news.cnet.com/8301-10784\\_3-6111168-7.html](http://news.cnet.com/8301-10784_3-6111168-7.html).

<sup>319</sup> See DIGITAL DILEMMA, *supra* note 7, at 4.

<sup>320</sup> See *id.* at 3.

<sup>321</sup> See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). “Because digital sound recording files are widely available and relatively small (in comparison to

newspapers. Copyright law has always adapted to technological changes that affect the way copyrighted works are created, reproduced, and distributed.<sup>323</sup> However, digital technology may present the greatest challenge to copyright law as it allows for wide-scale, instantaneous copying and distribution of copyrighted works, leaving content providers vulnerable to unauthorized use and piracy.<sup>324</sup>

Copyright owners will argue that section 106 of the Copyright Act grants them exclusive rights to prevent others from copying and distributing their works.<sup>325</sup> As digital technology presents the risk of unauthorized copying and distribution on a wide scale, copyright owners will want to ensure that copyright law adequately protects their works.<sup>326</sup> When technologies create new uses of copyrighted content, copyright owners insist that copyright laws should be expanded to protect their works.<sup>327</sup>

#### A. *The Newspaper Industry's Arguments*

The newspaper industry's resounding chorus is that its business is in trouble and it wants to protect its news articles from unauthorized use by news aggregators as an effort to save the industry.<sup>328</sup> The industry's concern is that if news aggregators are systematically taking its news articles, this appropriation weakens the industry's ability to earn online advertising revenue from the distribution of its content to consumers.<sup>329</sup> Newspaper publishers commonly agree that news aggregators are negatively affecting their online market because "readers acquire news from

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film files), the sound recording industry has been the first content industry to be affected by the capabilities of the emerging digital platform." Menell, *supra* note 27, at 99.

<sup>322</sup> See, e.g., Complaint, *supra* note 289.

<sup>323</sup> Menell, *supra* note 27, at 104.

<sup>324</sup> See *id.* at 64, 66–67.

<sup>325</sup> See 17 U.S.C. § 106 (2006).

<sup>326</sup> See Karen S. Frank, *Fair Use: The Changing Balance*, 943 PLI/Pat 469, 473 (2008); Tune, *supra* note 73, at 163.

<sup>327</sup> See Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law?*, 157 U. PA. L. REV. 1831, 1834–35 (2009).

<sup>328</sup> See, e.g., *Senate Hearing*, *supra* note 52 (statements of David Simon, Author, Producer, and Former Newspaperman, and James Moroney, Publisher and CEO, *The Dallas Morning News*).

<sup>329</sup> See *supra* Part I.B.

aggregators and abandon its point of origin—namely the newspapers themselves. In short, the parasite is slowly killing the host.”<sup>330</sup>

Newspaper publishers have also challenged technology developers’ expression that “information wants to be free,”<sup>331</sup> which has been described as a “self serving adage” that exemplifies today’s digital age.<sup>332</sup> This ideology has influenced consumer habits as people have grown accustomed to using various websites as sources for news without having to pay a subscription fee.<sup>333</sup> This trend has also influenced the way newspapers have distributed their news content online, forcing the industry to abandon online subscriptions and promote free distribution of news articles.<sup>334</sup> The newspaper industry recognizes that “[c]onsumers are willing to spend millions of dollars on the Web when it comes to music services like iTunes and gaming sites like Xbox Live. But when it comes to online news, they are happy to read it but loath to pay for it.”<sup>335</sup> Newspaper publishers are now protesting this phenomenon by arguing that information cannot be free to support their expensive news-gathering operations.<sup>336</sup> News aggregators fully endorse the model of offering content for free while earning profits solely from advertising, but this strategy has so far proven to be unsuccessful for the newspaper industry.<sup>337</sup>

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<sup>330</sup> *Senate Hearing, supra* note 52 (statement of David Simon, Author, Producer, and Former Newspaperman).

<sup>331</sup> *See* Nimmer, *Content Protection, supra* note 286, at 82–85.

<sup>332</sup> Ginsburg, *supra* note 246, at 62.

<sup>333</sup> *See* Heald, *supra* note 54.

<sup>334</sup> *See* Farhi, *Salvation?, supra* note 11, at 18; Katharine Q. Seelye, *Can Papers End the Free Ride?; Publishers Face the Risky Economics of Charging Online*, N.Y. TIMES, Mar. 14, 2005, at C1, available at [http://www.nytimes.com/2005/03/14/business/media/14paper.html?\\_r=1](http://www.nytimes.com/2005/03/14/business/media/14paper.html?_r=1).

<sup>335</sup> Seelye, *supra* note 334.

<sup>336</sup> *See* *Senate Hearing, supra* note 52 (statement of James Moroney, Publisher and CEO, *The Dallas Morning News*). *The New York Times* recently announced that it will once again start charging an online subscription fee. Richard Pérez-Peña, *The Times to Set Fee for Some on Web Site*, N.Y. TIMES, Jan. 21, 2010, at B1.

<sup>337</sup> *See* *supra* note 72; *see also* Nimmer, *Content Protection, supra* note 286, at 82–83.

### B. News Aggregators' Arguments

News aggregators, as a whole, argue that newspapers are trying to adhere to traditional business models and fallen monopolies instead of embracing the new media landscape.<sup>338</sup> News aggregators believe that they represent the modern face of journalism and news delivery<sup>339</sup> that appeals to consumers' changed attitude towards the news.<sup>340</sup> To provide their brand of journalism, the common discourse among news aggregators, like Google News, is that excerpting headlines and bylines is considered a fair use.<sup>341</sup> Google News also notes that copyright owners have the ability to opt-out of their news aggregation service.<sup>342</sup> News aggregation websites also defend their practice of repurposing and linking to newspaper articles as a fair use for the purpose of news reporting.<sup>343</sup> The practice of excerpting,

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<sup>338</sup> See *Senate Hearing*, *supra* note 52 (statement of Arianna Huffington, Co-Founder and Editor-in-Chief, The Huffington Post); Merrill Brown, *Abandoning the News*, CARNEGIE REP., Spring 2005, at 2, 5, available at <http://carnegie.org/publications/carnegie-reporter/single/view/article/item/124/> (“By and large, the major news companies are still turning a blind eye to what is happening because it’s challenging and they need to consider radical change.” (quotation omitted)); see also Paul Farhi, *Build That Pay Wall High*, 31 AM. JOURNALISM REV. 22, 22 (2009), available at <http://www.ajr.org/Article.asp?id=4800> (describing the *Newport Daily News*, a family owned newspaper in Rhode Island, strategy of charging a \$345 online subscription fee as a disincentive to drive readers to the print edition of the paper).

<sup>339</sup> See *Senate Hearing*, *supra* note 52 (statement of Arianna Huffington, Co-Founder and Editor-in-Chief, The Huffington Post) (“[W]e are actually in the middle of the golden age for news consumers—who can surf the Net, use search engines, access the best stories from around the world, and be able to comment, interact, and form communities.”).

<sup>340</sup> See generally Brown, *supra* note 338 (describing the modern approach by individuals in seeking out the news on the Internet instead of waiting for it in print form, and encouraging news organizations to create new business approaches to reach their younger audiences).

<sup>341</sup> See Helft, *supra* note 52 (stating that Eric Schmidt, Chief Executive Officer, Google, Inc., noted that “the ultimate resolution of all is this will be determined by how you interpret fair use”).

<sup>342</sup> See *Senate Hearing*, *supra* note 52 (statement of Marissa Mayer, Vice President, Search Products and User Experience, Google, Inc.); Eric Schmidt, Opinion, *How Google Can Help Newspapers*, WALL ST. J., Dec. 1, 2009, at A23.

<sup>343</sup> See *Senate Hearing*, *supra* note 52 (statement of Arianna Huffington, Co-Founder and Editor-in-Chief, The Huffington Post) (arguing that it is necessary “to take a small part of the story to give a taste to the consumer of what the story is about, but in order to read the full story, they would have to go to the content creator”).

repurposing, and linking to newspaper articles has become an industry standard and will likely persist unless copyright law recognizes that these practices are not a fair use.

Throughout history, courts have been willing to limit the reach of copyright law to support technological development.<sup>344</sup> Specifically, technology developers rely on fair use to defend new technologies against potential copyright infringement claims.<sup>345</sup> In *Sony*, the Supreme Court held that it was a fair use for video cassette recorders to copy television shows.<sup>346</sup> This holding limited the scope of copyright law to encourage the development of new technology.<sup>347</sup> Similarly, the case law regarding fair use on the Internet demonstrates how the courts supported search engines' fair use defenses to encourage innovation.<sup>348</sup> In *Kelly*, *Field*, and *Perfect 10*, each search engine was able to prevail on its fair use defense because the courts found that the secondary use was not highly exploitative, meaning the search engine did not intend to profit from the direct sale of the copies.<sup>349</sup> Upon weighing all the fair use factors, the courts also held that search engines' fair use defenses were justified because it was necessary for the effective operation of the search engine.<sup>350</sup> A court has yet to decide if the fair use defense can be extended to a search engine's news aggregator service in copying headlines and bylines and news aggregation websites that copy newspaper articles.

Technology developers also rely on the "beneficial use" argument to justify unauthorized use of copyrighted content.<sup>351</sup>

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<sup>344</sup> See, e.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 456 (1984) (refusing to extend the Copyright Act to prohibit selling machines that would make copying of television programming for later viewing at home possible, in light of constitutional directives to promote the progress of science and the useful arts); *Religious Tech. Ctr. v. Netcom On-Line Comm'n Servs.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995) (noting that in an online context, evidence of actual knowledge of specific acts of infringement is required to hold a computer system operator liable for contributory copyright infringement); see also Depoorter, *supra* note 327, at 1836.

<sup>345</sup> See Band, *supra* note 300, at 2; Tune, *supra* note 73, at 163–64.

<sup>346</sup> *Sony Corp.*, 464 U.S. at 456.

<sup>347</sup> *Id.*

<sup>348</sup> See discussion *supra* Part I.F.

<sup>349</sup> See discussion *supra* Part I.F.

<sup>350</sup> See discussion *supra* Part I.F.

<sup>351</sup> Nimmer, *Content Protection*, *supra* note 286, at 109.

The “beneficial use” argument is that new technology will provide a public benefit that outweighs the negative impact of infringement upon the copyright owner.<sup>352</sup> In response to allegations that news aggregators are infringing newspapers’ copyright in news articles, technology developers like Google argue that “[t]ogether Google News and Google Search provide a valuable, free service to online newspapers; specifically, by sending interested readers to their sites at a rate of more than one billion clicks per month.”<sup>353</sup> The Supreme Court in *Campbell* acknowledged that a beneficial use is not a consideration when a court decides fair use.<sup>354</sup> Yet the current case law involving fair use on the Internet demonstrates a new trend towards supporting beneficial use.<sup>355</sup> Courts have found that the public benefit of search engines is persuasive in the balancing of the fair use factors in favor of technology developers.<sup>356</sup>

### III. THE NEWSPAPER INDUSTRY’S FAIR USE ARGUMENT AND LICENSING POTENTIAL

The outcome of an actual copyright infringement case involving a newspaper against a news aggregator cannot be entirely predicted since a court’s fair use analysis requires a subjective, fact-intensive inquiry. This section will examine the issues and legal precedent of systematic takings and fair use on the Internet that a court may consider in each of the four fair use factors. At times, a distinction will be made between automatic news aggregators and news aggregation websites when each of them would infringe on a newspaper’s exclusive rights in different

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<sup>352</sup> *Id.*

<sup>353</sup> *Senate Hearing, supra* note 52 (statement of Marissa Mayer, Vice President, Search Products and User Experience, Google, Inc.).

<sup>354</sup> *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 n.21 (1994) (noting that even if an unauthorized use of a previously unknown song “turns the song into a commercial success[,] the boon to the song does not make the film’s . . . copying fair”); *D.C. Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (“Since one of the benefits of ownership of copyrighted material is the right to license its use for a fee, even a speculated increase in DC’s comic book sales as a consequence of RFI’s infringement would not call the fair use defense into play as a matter of law.”).

<sup>355</sup> *See supra* Part I.F.2.

<sup>356</sup> *See supra* Part I.F.2.

ways. A court conducting a fair use analysis is likely to hold in favor of newspapers due to the commercialism and potential superseding use under the first factor and the substantial harm to the market under the fourth factor. Thus, this Note concludes that if news aggregators want to continue using newspaper content, then they should enter into licensing agreements with newspapers.

A. *The Newspaper Industry's Proposed Anti-Fair Use Arguments*

1. The Purpose and Character of the Use

In examining transformative use under the first factor, a court could find that a news aggregator's use of newspapers' content merely "repackages or republishes" the original, which is not a transformative use.<sup>357</sup> At the outset, the court would have to determine if news aggregators are creating a new work or simply offering a different commercial purpose.<sup>358</sup> An automatic news aggregator, like Yahoo! News, will argue that its use of a newspaper's headlines and bylines serves as an "electronic reference tool" to guide users to the originating news source.<sup>359</sup> While automatic news aggregators provide a different use than news reporting, they do not offer "new insights or understandings" when displaying excerpts, bylines, and headlines of new stories.<sup>360</sup> In fact, studies indicate that online readers may use this feature as a news source instead of a reference tool,<sup>361</sup> which would create a news reporting purpose. Similarly, a news aggregation website's use of newspaper content does not offer new insights when the story is refashioned and published as its own.

*Kelly, Field*, and *Perfect 10* all held that a search engine's use of a copyrighted work is transformative due to the public benefit of improving access to information on the Internet.<sup>362</sup> A court, however, should avoid placing too much of an emphasis on a technology's public benefits. The Supreme Court has

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<sup>357</sup> See *supra* note 104 and accompanying text.

<sup>358</sup> See *supra* notes 285–87 and accompanying text.

<sup>359</sup> See *supra* note 278 and accompanying text.

<sup>360</sup> See *supra* note 287 and accompanying text.

<sup>361</sup> See INTERNET POLITICS, *supra* note 38, at 201; *supra* note 40 and accompanying text.

<sup>362</sup> See discussion *supra* Part I.F.2.

acknowledged that “not all effects of even beneficial technologies are socially desirable when counterbalanced by the negative impact they may have on the rights of other parties, including copyright owners.”<sup>363</sup> Thus, technological innovation should be encouraged, but not to the detriment of a copyright owner.

There are also commercial considerations associated with a news aggregator’s digital use of newspaper’s content. The Supreme Court defined commercialism to mean when “the user stands to profit from the exploitation of the copyrighted material without paying the customary price.”<sup>364</sup> In this context, the customary price is a license agreement for news content.<sup>365</sup> It is undisputed that news aggregation websites are operated for commercial profit.<sup>366</sup> By not having to investigate, research, and gather news, news aggregation websites are building their business models without having to incur the necessary expenses associated with being a news purveyor.<sup>367</sup> In addition, a news aggregation website is able to attract online advertising revenue due, in large

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<sup>363</sup> Nimmer, *Content Protection*, *supra* note 286, at 87 (citing *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 498 (2001)).

<sup>364</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (“[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”).

<sup>365</sup> *See Harper & Row*, 471 U.S. at 563; *see also* Nimmer, *Content Protection*, *supra* note 286, at 85 (stating that in the absence of protection under the fair use doctrine, licensing is a general defense to copyright infringement).

<sup>366</sup> *See* John C. Abell, *A.P. to Aggregators: We Will Sue You*, WIREd, Apr. 6, 2009, <http://www.wired.com/epicenter/2009/04/ap-to-aggregato/>.

<sup>367</sup> *See* Press Release, News Corp., Rupert Murdoch Before the Federal Trade Commission’s Workshop: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age? (Dec. 1, 2009), *available at* [http://www.newscorp.com/news/news\\_435.html](http://www.newscorp.com/news/news_435.html) (“Technology makes it cheap and easy to distribute news for anyone with Internet access. But producing journalism is expensive.”); *see also* *Senate Hearing*, *supra* note 52 (statement of James Moroney, Publisher and CEO, *The Dallas Morning News*) (“In most markets, newspapers have, far and away, the most expensive news-gathering resources of any local media.”); Mishkin, *supra* note 45 (“[B]ecause they can scrape essentially every content provider on the web, each aggregator gets to build a ‘front page’ to target and win over their chosen segment . . . . [T]hey can do that by leveraging all the resources of the global journalistic community without paying any part of its cost.”).



part, to its unlicensed use of copyrighted content from other sources.

The way in which news aggregators' use of newspapers' content is for a commercial purpose is through targeted advertising. While search engines have been able to prevail against a finding of commercialism, this should not be the case for news aggregators. In *Field*, the court specifically recognized that a cached link does not display advertising.<sup>368</sup> The district court in *Perfect 10* also recognized that advertising tied to search results is a commercial factor that weighed against fair use.<sup>369</sup> In the case of news aggregation, advertising is sold based on the surrounding content unlike in *Perfect 10* where the Ninth Circuit found that the possibility of earning advertising revenue was more distant.<sup>370</sup> These findings indicate the importance courts have placed on advertising as a commercial consideration under the first factor. Accordingly, a court should find that these types of commercial uses weigh against a finding of fair use.

## 2. The Nature of the Copyrighted Work

Courts have consistently found that the nature of news articles weigh in favor of fair use. News articles are predominantly factual works that also contain the author's expression when recounting facts from breaking news to investigative journalism.<sup>371</sup> While copyright law recognizes that there is a public interest in having access to news, news articles also have expressive elements that are entitled to copyright protection.<sup>372</sup> At best, a court may decide that the second factor is neutral, which was the case in *Nihon Keizai Shimbun*.<sup>373</sup> Since courts have considered this factor to be of lesser importance than the others, a finding of fair use on this

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<sup>368</sup> *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1120 (D. Nev. 2006).

<sup>369</sup> *See Perfect 10, Inc. v. Amazon.com, Inc.*, 416 F. Supp. 2d 828, 851 (C.D. Cal. 2006); *supra* text accompanying notes 270–72.

<sup>370</sup> *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166–67 (9th Cir. 2007).

<sup>371</sup> *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985).

<sup>372</sup> *See id.* at 547–48; *L.A. Times v. Free Republic*, No. CV 98-7840, 2000 U.S. Dist. LEXIS 5669, at \*56 (C.D. Cal. Mar. 31, 2000).

<sup>373</sup> *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 73 (2d Cir. 1999).

factor will not negatively affect the overall strength of the newspaper industry's argument.

### 3. The Amount and Substantiality of the Portion Used

The third factor would require courts to examine how much of a news article is taken by a news aggregator.<sup>374</sup> Since digital technologies enable anyone to make exact replicas of original, copyrighted content, this factor will be most relevant to determine how much copying is necessary for the purpose of the secondary use.<sup>375</sup> News aggregation websites can digitally copy and repurpose entire news articles found on a newspaper publisher's website.<sup>376</sup> A court must therefore decide if the copied material is protected expression or unprotected facts.<sup>377</sup>

The court in *Kelly* set a new precedent when it held that an entire reproduction of a copyrighted work is justified if there is a transformative use.<sup>378</sup> Using this precedent, an automatic news aggregator can argue that the amount of copying to display headlines and excerpts of news articles is minimal in comparison to a search engine's wholesale copying, which courts have held is a fair use.<sup>379</sup> However, Google's Library Project has raised the question of whether textual "snippets" can be considered a fair use of a copyrighted work.<sup>380</sup> Copyright owners should have the right to determine how their works are digitized and these "snippets" could possibly act as a substitute for purchasing the written work and therefore harm the market.<sup>381</sup> Similar "snippets" are used when automatic news aggregators take newspapers' headlines and bylines, which are important elements to any news article. Thus, such appropriation of "snippets" should not be considered a fair use simply because the copier alleges that the amount of copying is minimal.

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<sup>374</sup> See *supra* notes 123–28 and accompanying text.

<sup>375</sup> See *supra* notes 129–32 and accompanying text.

<sup>376</sup> See INTERNET POLITICS, *supra* note 38, at 205; Luscombe, *supra* note 56.

<sup>377</sup> See, e.g., *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

<sup>378</sup> See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818–20 (9th Cir. 2003); *supra* text accompanying notes 237–39.

<sup>379</sup> See discussion *supra* Part III.

<sup>380</sup> See MANUEL, *supra* note 295, at 9 & n.75.

<sup>381</sup> See *id.* at 9, 11.

#### 4. The Effect of the Use on the Potential Market

The fourth factor determines how a news aggregator's use of a newspaper's content is affecting the market for online news distribution. Prior case law shows that harm to a potential market for the copyrighted work can negate a finding of fair use.<sup>382</sup> In most of the cases previously discussed, the courts found that unauthorized secondary use impaired the market potential for copyright owners to license their works. This was especially true in the cases of systematic takings of news content and *Napster*.

The law recognizes that copyright owners have the right to control the market for the distribution of their works.<sup>383</sup> So far newspapers have been unable to monetize or "exploit" the distribution of their news articles online. Meanwhile news aggregators are attracting the online advertising dollars notably; in 2008, Google earned \$100 million in advertising revenue from its Google News service.<sup>384</sup> While this service offers a public benefit in making news accessible, Google is also profiting from the use of newspapers' content. News aggregators have consistently relied on the argument that their use of copyrighted content is beneficial to newspapers because it directs traffic to newspapers' websites. However, courts have held that offering a beneficial use to a copyrighted work does not excuse infringement.<sup>385</sup> A court should find fair use where technology promotes instead of supplants existing and potential markets for copyrighted works.

#### B. Licensing Opportunities

The issue of how copyrighted content should be distributed can also be resolved through license agreements. If newspapers were

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<sup>382</sup> See, e.g., *Wainwright Sec., Inc. v. Wall St. Transcript Corp.*, 418 F. Supp. 620, 625 (S.D.N.Y. 1976) (indicating that a claim of fair use was rejected because of the likelihood such use would have a negative effect on the potential market).

<sup>383</sup> *L.A. Times v. Free Republic*, No. CV 98-7840, 2000 U.S. Dist. LEXIS 5669, at \*67-68 (C.D. Cal. Mar. 31, 2000).

<sup>384</sup> See John Fortt, *What's Google News Worth? \$100 Million*, CNN MONEY, July 22, 2008, <http://brainstormtech.blogs.fortune.cnn.com/2008/07/22/whats-google-news-worth-100-million/>.

<sup>385</sup> See, e.g., *Free Republic*, 2000 U.S. Dist. LEXIS 5669, at \*73 ("Courts have routinely rejected the argument that a use is fair because it increases demand for the plaintiff's copyrighted work.").

to license news articles to news aggregators, it would provide an alternative revenue stream to support their online market instead of solely relying on advertising.<sup>386</sup> The Associated Press, a non-profit membership organization that is partly owned by newspaper publishers, has been aggressive in preventing unauthorized use of its news articles by digital media outlets through threatened legal action.<sup>387</sup> Since the emergence of digital media, the Associated Press has licensed news content to news aggregators like Google News and Yahoo News.<sup>388</sup> Through license agreements, the Associated Press has established a ubiquitous online presence and successfully monetized its news content.<sup>389</sup> Meanwhile, individual newspapers have been distributing their news content for free and begrudgingly supporting news aggregation.<sup>390</sup>

At the same time, however, license agreements between newspapers and news aggregators are not a comprehensive solution to save the newspaper industry. This is because their widespread use would necessarily depend on a court finding against a news aggregator's fair use defense. Otherwise, news aggregators would have no incentive to pay for news content when they currently have unregulated access. Nonetheless, *USA Today*, a national newspaper, has entered into a partnership with a news aggregator to license its content.<sup>391</sup> Also, Rupert Murdoch, the owner of *The Wall Street Journal*, is deciding whether to opt-out of

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<sup>386</sup> See Paul Farhi, *A Costly Mistake?*, 31 AM. JOURNALISM REV. 36, 36 (2009), available at <http://www.ajr.org/Article.asp?id=4730> [hereinafter Farhi, *A Costly Mistake?*] (noting that the AP President and Chief Executive Officer stated, "[i]t was a dumb idea to think that you could pay the rent on the Internet with advertising alone").

<sup>387</sup> See, e.g., *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454 (S.D.N.Y. 2009); Abell, *supra* note 366; Saul Hansell, *The Associated Press to Set Guidelines for Using Its Articles*, N.Y. TIMES, June 16, 2008, at C7; Pérez-Peña, *A.P. Blocks Unpaid Use*, *supra* note 51; Richard Pérez-Peña, *A.P. Seeks to Rein in Sites Using Its Content*, N.Y. TIMES, Apr. 7, 2009, at B1.

<sup>388</sup> Farhi, *A Costly Mistake?*, *supra* note 386, at 36.

<sup>389</sup> *Id.*

<sup>390</sup> See *id.* (noting that Roger Plothow, Editor and Publisher of *The Post Register* in Idaho Falls, Idaho, lamented that "[newspaper publishers] put our news online for free, we let every Web spider on the planet take that same content, aggregate it on a global scale and leach our revenues, one story at a time").

<sup>391</sup> Michelle Kessler, *USA TODAY Partners with Fark on News-Packed Tech Site*, USA TODAY, Nov. 24, 2009, <http://blogs.usatoday.com/technologylive/2009/11/editors-note-usa-today-partners-with-fark-on-newspacked-tech-site.html>.

Google News, ending Murdoch's relentless battle against Google.<sup>392</sup> Instead, Murdoch may enter into an exclusive licensing deal to allow Microsoft's Bing to aggregate news from *The Wall Street Journal*.<sup>393</sup> Depending on the success of these partnerships, other newspaper publishers may want to follow this approach.

#### CONCLUSION

As the digital era threatens the traditional newspaper industry, the newspaper industry must avail itself of the viable legal remedy described in this Note. Specifically, the newspaper industry should challenge news aggregators' unauthorized use of its content using fair use law or enter into beneficial licensing agreements with news aggregators. Copyright law, and the judicial determination of fair use principles, has been an effective remedy against systematic takings of copyrighted news content prior to the introduction of digital media. Copyright has also been a tool in preventing the exploitation of digital uses of copyrighted content in the music file-sharing cases.<sup>394</sup>

Copyright law is currently adapting to encourage the growth of digital technology and innovative uses of copyrighted content. Within this general trend, courts have favored search engines' fair use defenses to promote the public interest in having access to information.<sup>395</sup> However, case law also demonstrates that courts have made a distinction between protecting the growth of digital technology for the public interest and recognizing the impermissibility of systematic takings and unauthorized uses of copyrighted content by digital technologies. For example, the courts protected the music industry's commercially valuable content from being freely distributed over peer-to-peer

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<sup>392</sup> See Weston Kosova, *Rupert Murdoch Is Quitting Google, Leaving Readers with Only Millions of Other Web Sites to Choose from*, NEWSWEEK, Nov. 24, 2009, <http://blog.newsweek.com/blogs/techtonicshifts/archive/2009/11/24/rupert-murdoch-is-quitting-google-leaving-readers-with-only-millions-of-other-web-sites-to-choose-from.aspx>.

<sup>393</sup> See *id.*

<sup>394</sup> See discussion *supra* Part I.F.1.

<sup>395</sup> See discussion *supra* Part I.F.2.

990 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 20:939

networks.<sup>396</sup> The newspaper industry should adopt a similar approach and be more proactive in using copyright law to protect its content from news aggregators.

The best way to encourage a beneficial relationship between copyright owners and technology developers is through a licensed use. News aggregators will not be willing to negotiate licensed uses of news content unless courts hold that their unauthorized uses of news articles are not fair uses. There are currently a few examples of licensed uses of online news content, but in order for this to become an industry standard, the newspaper industry's legal rights must be protected through copyright law. The Associated Press has been aggressive in licensing its content before it is freely distributed online, but individual newspaper publishers' have been unable to do the same.<sup>397</sup> If newspapers are to learn how to effectively compete in the digital environment, they should use copyright law to prevent news aggregators from undermining their market potential.

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<sup>396</sup> See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>397</sup> See Farhi, *A Costly Mistake?*, *supra* note 386, at 36; Hansell, *supra* note 387.