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Tarantino v. Gawker: The News, Hyperlinking, and Contributory Infringement Liability

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Cover Page Footnote

Senior Writing & Research Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXV; J.D. Candidate, Fordham University School of Law, May 2015; B.S., University of Maryland, College Park, 2010. I would like to thank Professor Hansen and Nick Bartelt for their advice and care; Stephen Dixon & Kate Patton for their hard work and patience during the editorial process; and most of all, my family. To my parents, Alyce & William.

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Victoria Geronimo*

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INTRODUCTION

In early 2014 Quentin Tarantino publicly stated that his unproduced script *The Hateful Eight* was leaked and he would no longer be making the movie.¹ On January 22, 2014, Gawker Media (“Gawker”), an Internet media outlet specializing in pop culture news, published a post reporting the leak’s occurrence and Tarantino’s subsequent reaction on its Defamer blog.² At the end of the post, Gawker solicited readers for access to the script.³ The next day, Gawker posted a follow-up titled, “Here Is the Leaked Quentin Tarantino *Hateful Eight* Script,” with several hyperlinks, three of which directed readers to one of two websites hosting anonymously posted, unauthorized copies of Tarantino’s leaked script.⁴ Gawker encouraged readers to click on the hyperlinks in order to read the script but did not otherwise ask its readers to copy or distribute the leaked scripts.⁵

On January 27, 2014, Tarantino filed a complaint against Gawker in the Western Division of the United States District Court for the Central District of California, alleging that Gawker contributorily infringed Tarantino’s copyright.⁶ The complaint alleged that Tarantino’s camp filed two Digital Millennium Copy-

¹ Mike Fleming Jr., *Quentin Tarantino Shelves ‘The Hateful Eight’ After Betrayal Results in Script Leak*, DEADLINE (Jan. 21, 2014, 5:40 PM), <http://deadline.com/2014/01/quentin-tarantino-hateful-eight-leak-novel-669066/>. At the time of the interview, the leak was presumably not publicly posted to the Internet. See also Eriq Gardner, *Quentin Tarantino Suing Gawker Over Leaked ‘Hateful Eight’ Script (Exclusive)*, THE HOLLYWOOD REPORTER (Jan. 27, 2014, 8:03 AM), <http://www.hollywoodreporter.com/thr-esq/quentin-tarantino-suing-gawker-leaked-674424>.

² Lacey Donohue, *Quentin Tarantino Throws Temper Tantrum After Script Leak*, DEFAMER (Jan. 22, 2014, 10:37 AM), <http://defamer.gawker.com/quentin-tarantino-throws-temper-tantrum-after-script-le-1506541036>.

³ *Id.*

⁴ Lacey Donohue, *Here Is the Leaked Quentin Tarantino Hateful Eight Script*, DEFAMER (Jan. 23, 2014, 4:50 PM), <http://defamer.gawker.com/here-are-plot-details-from-quentin-tarantinos-leaked-1507675261>. The web pages hosting the leak script that the hyperlinks led to have since been disabled.

⁵ *Id.*; Tarantino v. Gawker Media, LLC, No. CV 14-603-JFW FFMX, 2014 WL 2434647, at *2 (C.D. Cal. Apr. 22, 2014) (order granting motion to dismiss).

⁶ Complaint, *Tarantino*, No. 2:14CV00603 (C.D. Cal. Jan. 27, 2014), 2014 WL 279854. In the same suit, Tarantino also sued AnonFiles.com, the website hosting the unauthorized copy, and nine other anonymous defendants for direct infringement. Tarantino did not know the identities of any of these parties. See *id.* at 1-10 (naming ten “DOE” defendants).

right Act (“DMCA”) takedown notices of infringement to Gawker, requesting removal of the hyperlinks.⁷ The media site refused to comply with the takedown notice and did not remove the hyperlinks.⁸

Gawker moved to dismiss the case, arguing that Tarantino’s complaint did not allege that a third party had directly infringed Tarantino’s copyright, a crucial element for proving contributory copyright infringement.⁹ Gawker continued that, even if he did prove a third party’s direct infringement, their hyperlinks were part of a news report constituting fair use under the Copyright Act of 1976 (“Copyright Act”).¹⁰ The judge agreed, granting Gawker’s motion to dismiss but allowing Tarantino to file an amended complaint alleging contributory infringement.¹¹ The judge declined to evaluate Gawker’s fair use defense because it felt the argument was “premature,” but hinted that it would ultimately prevail.¹²

Tarantino filed an amended lawsuit, this time claiming Gawker both contributorily and directly infringed his copyright by posting hyperlinks to unauthorized copies of his script.¹³ Tarantino also made sure to specifically allege that at least one anonymous person downloaded the script after clicking Gawker’s hyperlink, but did

⁷ *Id.* at 11–12.

⁸ *Id.*

⁹ Motion to Dismiss at 1, *Tarantino*, No. 2:14-cv-00603-JFW-FFM (C.D. Cal. Mar. 10, 2014), 2014 WL 1356498; *see* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1173 (9th Cir. 2007). *See also* *Tarantino*, No. CV 14-603-JFW FFMX, 2014 WL 2434647, at *4 (C.D. Cal. Apr. 22, 2014) (order granting motion to dismiss) (“However, nowhere in . . . the Complaint does [Tarantino] allege a single act of direct infringement committed by any member of the general public that would support [Tarantino]’s claim for contributory copyright infringement. Instead, [Tarantino] merely speculates that some direct infringement must have taken place.”).

¹⁰ Motion to Dismiss at 1–2, *Tarantino*, No. 2:14-cv-00603-JFW-FFM (C.D. Cal. Mar. 10, 2014), 2014 WL 1356498; Copyright Act of 1976, 17 U.S.C. § 107 (2012).

¹¹ *See* *Tarantino*, No. CV 14-603-JFW FFMX, 2014 WL 2434647, at *5–6 (C.D. Cal. Apr. 22, 2014) (order granting motion to dismiss) (“[T]he Court concludes that the fair use arguments, albeit persuasive and potentially dispositive, are premature . . .”).

¹² *Id.* at *5 (“However, the Court concludes that the fair use arguments, albeit persuasive and potentially dispositive, are premature . . .”).

¹³ First Amended Complaint at 10, *Tarantino*, No. 2:14-cv-00603-JFW-FFM (C.D. Cal. May 1, 2014), 2014 WL 2526689. Tarantino also dropped AnonFiles.com and the other anonymous defendants from the suit. *See id.*

not offer any concrete factual support.¹⁴ Before Gawker could respond to the amended complaint, Tarantino filed a notice for voluntary dismissal without prejudice.¹⁵ The notice reserves Tarantino's right to re-file an action against Gawker for contributory infringement "after further investigations to ascertain and plead the identities of additional infringers resulting from Gawker Media's contributory copyright infringement."¹⁶

Though *Tarantino v. Gawker* will likely never see the light of day, the question of whether Gawker, as a news website, would be held contributorily liable for knowingly posting hyperlinks to a copyright-infringing website, is an interesting one. This issue is particularly thorny because both hyperlinks as they pertain to copyright law and contributory copyright infringement are amorphous areas of law.¹⁷ It also raises issues of fair use, both in the hyperlinking context and in the news story context.

Part I of this Note provides background for hyperlinking, copyright law, fair use, and contributory infringement. Part II of this Note discusses pertinent hyperlinking, copyright infringement, and fair use cases. Part III of this Note argues that Gawker should be held liable in the instant case if Meghan Carpenter's and Stephen Hetcher's proposition that the fixation requirement's "transitory duration" prong should be shed from the inquiry altogether. It also argues that Gawker's use of the hyperlinks in this case should not constitute fair use.

¹⁴ See *id.* at 8 (naming "Doe-Downloader(s) 3 through 6" and stating that each "download[ed] a copy" of the script).

¹⁵ Notice of Voluntary Dismissal at 2, *Tarantino*, No. 2:14-cv-00603-JFW-FFM (C.D. Cal. May 7, 2014), available at <http://www.shadesofgraylaw.com/media/Tarantino-v-Gawker-Notice-of-Vol-Withdrawal.pdf>; see also Gardner, *supra* note 1. Tarantino decided to continue with filming *The Hateful Eight* soon after his voluntary withdrawal. See Roger Friedman, *Exclusive: Tarantino Move 'Hateful Eight' Has a November Start Date*, SHOWBIZ411 (May 24, 2014, 10:26 AM), <http://www.showbiz411.com/2014/05/24/exclusive-tarantino-movie-hateful-eight-has-november-start-date>.

¹⁶ Notice of Voluntary Dismissal at 2, *Tarantino*, No. 2:14-cv-00603-JFW-FFM (C.D. Cal. May 7, 2014), available at <http://www.shadesofgraylaw.com/media/Tarantino-v-Gawker-Notice-of-Vol-Withdrawal.pdf>.

¹⁷ RICHARD RAYSMAN, ET AL., EMERGING TECHNOLOGIES AND THE LAW: FORMS AND ANALYSIS § 5.25 (2014).

I. BACKGROUND ON HYPERLINKING, CONTRIBUTORY INFRINGEMENT, AND FAIR USE

Emerging technologies tend to throw a wrench into prevailing theories underlying copyright protections.¹⁸ The advent of the digital and Internet age is no exception to this trend.¹⁹ The Internet's greatness derives from its unparalleled ability to swiftly, cheaply, and simultaneously connect people across the globe via information exchange, provided those people have access to the necessary technological means.²⁰ These treasured benefits present a sort of Jekyll and Hyde complex for copyright holders.²¹ On one hand, cheap and direct dissemination of works to a substantially wider audience at a substantially lower cost aids in boosting recognition and profitability, which should theoretically incentivize copyright holders to create more works.²² Furthermore, increased dissemination and access to works inspires a new crop of artists.²³ To see this in action, one needs to only spend a few minutes browsing the millions of Tumblr accounts, iTunes podcasts, and YouTube videos, which host a rich environment of original and derivative works.

On the other hand, those same features significantly reduce the cost and increase the ease of piracy, which incentivizes more people to commit copyright infringement.²⁴ These effects are so acute that they compound; theoretically there are so many people

¹⁸ See Brian D. Johnston, *Rethinking Copyright's Treatment of New Technology: Strategic Obsolescence as a Catalyst for Interest Group Compromise*, 64 N.Y.U. ANN. SURV. AM. L. 165, 166 (2008) (“Each time a major technological innovation has emerged, the law of copyright has had to address the new types of reproduction and dissemination that innovation facilitates.”); see also JESSICA LITMAN, DIGITAL COPYRIGHT 22 (2006) (“Copyright laws become obsolete when technology renders the assumptions on which they were based outmoded.”).

¹⁹ See Johnston, *supra* note 18, at 167.

²⁰ See DanThu Thi Phan, Note, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 187–89 (1998).

²¹ See *id.* at 169.

²² See Sacha Wunsch-Vincent, *The Economics of Copyright and the Internet: Moving to an Empirical Assessment Relevant in the Digital Age* (World Intellectual Prop. Org. Econ. Research Working Paper Series, Paper No. 9, 2013), available at http://www.wipo.int/econ_stat/en/economics/pdf/wp9.pdf.

²³ See PEW RESEARCH CENTER, PEW INTERNET & AMERICAN LIFE PROJECT: ARTS ORGANIZATIONS AND DIGITAL TECHNOLOGIES (Jan. 4, 2013), http://www.pewinternet.org/~media//Files/Reports/2013/PIP_ArtsandTechnology_PDF.pdf.

²⁴ Wunsch-Vincent, *supra* note 22.

who will now pirate works that it becomes too costly to effectively police, thus further reducing costs of committing infringement.²⁵

A. What is Hyperlinking?

It is important to understand the technical background for how links work. Many courts have utilized the nitty-gritty details to fuel a doctrinal vehicle in order to reach policy goals.²⁶ Interestingly, although some courts focus on the technical aspects of linking to distinguish cases and reach a doctrinal conclusion, all types of links themselves are fundamentally the same.²⁷

The Internet is an electronic network comprised of computing devices, or “servers.”²⁸ Its central purposes are to facilitate communication and the exchange of information across the globe.²⁹ The World Wide Web is an application for the Internet that allows users to achieve that goal.³⁰ Users view the content on the World Wide Web via web pages, each of which has its own Uniform Resource Locator (“URL”).³¹ URLs are similar to addresses in that a URL tells the application exactly where the web page is.³² A web page is stored on a website, which in turn is stored on the servers.³³ One analogy for the relationship between a website and a web page is that the former is a book and the latter is an individual page within that book. A homepage, which is a type of web page, is the book cover.

²⁵ See *id.*

²⁶ See, e.g., Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); Ticketmaster Corp. v. Tickets.com, Inc., No. CV 99-7654 HLH (BQRx), 2000 WL 525390 (C.D. Cal. Mar. 27, 2000).

²⁷ World Wide Web Consortium, “Deep Linking” in the World Wide Web: TAG Finding 11 Sep 2003, <http://www.w3.org/2001/tag/doc/deeplinking-20030911> (Sept. 11, 2003) (“Thus, from the point of view of the underlying technology, all links are deep links.”).

²⁸ Kai Burmeister, *Jurisdiction, Choice of Law, Copyright, and the Internet: Protection Against Framing in an International Setting*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 625, 629 (1999).

²⁹ See *id.*

³⁰ See Tim Berners-Lee et al., *The World-Wide Web*, 37 COMM. ACM 76, 76 (1994).

³¹ See *id.* A URL is alternatively known as a Universal Resource Identifier (“URI”). See *id.*

³² See *id.*

³³ Resonate Inc. v. Alteon Websystems, Inc., 338. F.3d 1360, 1361–62 (Fed. Cir. 2003).

A hyperlink—or “link”—is a “connection from one [World Wide] Web resource to another.”³⁴ In more visual terms, a link is a “cross-reference (in a distinctive font or color) appearing on one web page that, when activated by the point-and-click of a mouse, brings onto the computer screen another web page.”³⁵ Hyperlinks are an essential tool for navigating the Internet, allowing users to move fluidly between web pages and maximizing the Internet’s vast information-sharing potential. Simply put, the Internet could not be what it is today without hyperlinks.³⁶

There are several different types of links.³⁷ This Note concerns only links that, when clicked on, open up new third-party web pages hosting infringing content.³⁸ This includes links taking you directly to the homepage of another website and deep links, where the link directs you to any page other than a website’s homepage.³⁹ It used to be considered poor Internet etiquette to deep link to another website because it would cause users to bypass vital information and advertising on the homepage. However, this distinction’s significance has dwindled since most website owners have adapted to the pervasive practice of deep linking and design web pages accordingly.

B. The Copyright Act of 1976

The Copyright Clause of the United States Constitution granted Congress the authority to pass legislation that would “promote the Progress of Science and useful Arts, by securing for

³⁴ World Wide Web Consortium, *HTML 4.01 Specification: W3C Recommendation 24 December 1999, Links*, <http://www.w3.org/TR/REC-html40/struct/links.html> (Dec. 24, 1999) [hereinafter *Links*].

³⁵ Universal City Studios, Inc. v. Corley, 273 F.3d 429, 455 (2d Cir. 2001).

³⁶ See generally *Links*, *supra* note 34.

³⁷ See Mark Deffner, Note, *Unlawful Linking: First Amendment Doctrinal Difficulties in Cyberspace*, 3 MINN. INTELL. PROP. REV. 111, 116–17 (2002) (discussing basic links, a linking called framing, deep linking, and inlining).

³⁸ As opposed to, for example, in-line links, which display content from a third-party website within the web page the user is already on. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2002) (“In-line linking allows one to import a graphic from a source website and incorporate it in one’s own website . . .”).

³⁹ A homepage is “the page typically encountered first on a Web site that usually contains links to the other pages of the site.” *Home Page Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/home%20page> (last visited Oct. 20, 2014).

limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴⁰ Congress passed its first copyright law in 1790, which has since undergone major revisions, including two overhauls in 1909 and 1976, and multiple amendments.⁴¹ The 1790 Act only protected “maps, charts, and books.”⁴² The 1909 Act expanded this protection to “all the writings of an author” and added a formal publication requirement on works in order to receive protection.⁴³ The contemporary copyright statute, the Copyright Act of 1976, eliminated the publication requirement and expanded protection again to protect eight categories of works, which are to be broadly interpreted.⁴⁴

The Copyright Act grants copyright owners the exclusive rights on reproduction, distribution, creation of derivative works, public performance, and, for sound recordings, public display over “digital audio transmission.”⁴⁵ Copyright law is only designed to protect the original expression of ideas, but not the ideas themselves.⁴⁶ Thus, facts are not protectable under copyright.⁴⁷

⁴⁰ U.S. CONST. art. I, § 8, cl. 8; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

⁴¹ Many of these revisions expanded the scope of U.S. copyright law to accommodate new technology and protect works not previously contemplated by the law. See 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* Overview (1993) [hereinafter NIMMER ON COPYRIGHT]; Timothy D. Howell, *Intellectual Property Pirates: Congress Raises the Stakes in the Modern Battle to Protect Copyrights and Safeguard the United States Economy*, 27 ST. MARY’S L.J. 613, 627–28 (1996).

⁴² See Howell, *supra* note 41, at 627.

⁴³ See Copyright Act of 1909, ch. 320, Pub. L. No. 60-349, 35 Stat. 1075, 1076.

⁴⁴ The eighth category was added by amendment in 1990. See 17 U.S.C. § 102(a) (“Works of authorship include . . . (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”); Howell, *supra* note 41, at 628 n.45 (“The categories of copyrightable subject matter listed in 102 are not all-inclusive and Congress clearly intended for them to be read broadly.”).

⁴⁵ 17 U.S.C. § 106 (2006).

⁴⁶ See, e.g., 17 U.S.C. § 102(b) (2006) (“In no case does copyright protection for an original work of authorship extend to any idea . . .”); *Mazer v. Stein*, 347 U.S. 201, 217 (1954) (stating that copyright “protection is given only to the expression of the idea—not the idea itself.”); *Baker v. Selden*, 101 U.S. 99 (1879).

⁴⁷ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991) (“That there can be no valid copyright in facts is universally understood.”); Harper & Row Publishers,

One is liable for direct copyright infringement when one “violates any of the exclusive rights of the copyright owner.”⁴⁸ An alleged infringer need not copy the entire work verbatim to be liable for direct infringement; liability partially turns on whether the allegedly infringing work is substantially similar to the original work.⁴⁹

In *Feist Publications v. Rural Telephone Service Co.*, the Supreme Court held that the heart of copyright law is essentially the plain language of the Copyright Clause and not to compensate authors for their hard work.⁵⁰ However, the Copyright Clause itself provides a limited touchstone for predicting future copyright doctrine, primarily because there is no precise, authoritative definition of what “promotes” advancement of these fields.⁵¹ Moreover, even though rewarding authors’ labors is not the end goal of copyright law, Congress may still declare it to be an effective policy to achieve that goal.⁵²

The Copyright Act of 1976 protects creative “works of authorship” that are “fixed in any tangible medium of expression.”⁵³ Thus, a work must satisfy two elements to be eligible for copyright protection: originality and fixation. The originality element is a

Inc. v. Nation Enters., 471 U.S. 539, 556 (1985) (“No author may copyright his ideas or the facts he narrates.”).

⁴⁸ 17 U.S.C. § 501(a) (2006).

⁴⁹ See 4 NIMMER ON COPYRIGHT, *supra* note 41, § 13.03. Thus, it is possible to copy a work and not be held liable for copyright infringement. See *Feist*, 499 U.S. at 361 (“Not all copying, however, is copyright infringement.”).

⁵⁰ See *Feist* 499 U.S. at 349 (1991) (“The primary objective of copyright is not to reward the labors of authors.”).

⁵¹ See generally Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001) (arguing for a need of a precise definition of “progress” since Congress, the Supreme Court, and academic literature have not provided one).

⁵² See *Eldred v. Ashcroft*, 537 U.S. 186, 212–13 (2003) (“[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”); *Harper & Row*, 471 U.S. at 558 (1985) (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”); *Mazer v. Stein*, 347 U.S. 201, 209 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.”).

⁵³ 17 U.S.C. § 102 (2006).

constitutional requirement and “the *sine qua non* of copyright.”⁵⁴ The threshold for originality is resolutely minimal; all that is required is independent creation and a modicum of creativity.⁵⁵ Originality under copyright law does not even require novelty.⁵⁶ This Note does not concern issues of originality, as it assumes the web page is infringing an author’s legitimate copyright.

Under the Copyright Act, a work satisfies the fixation requirement “when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration.”⁵⁷ Courts have held fixation to be a constitutional requirement, deriving fixation implicitly from “[w]ritings” in the Copyright Clause.⁵⁸ Fixation was only “de facto, if not incidental” part of copyright law until it was codified in the Copyright Act of 1976.⁵⁹ Prior to 1976 and the invention of electronic media, nearly all authored works were written down and thus immediately fixed, obviating the need for a formal fixation requirement.⁶⁰ Indeed, before the fixation requirement was codified, Congress considered eliminating the de facto fixation requirement in the interest of protecting authors’ works.⁶¹ Ultimately, Congress decided to remove the publication requirement in favor of protection upon creation, provided the originality and fixation requirements are met, because it provided a convenient way for them to expand copyright protection to new technologies.⁶²

The fixation requirement is more difficult to apply to contemporary technology and art, which do not always fit the “transitory duration” prong of fixation. Meghan Carpenter and Stephen Hetcher argue that, in light of emerging technologies, the transito-

⁵⁴ *Feist*, 499 U.S. at 346, 348.

⁵⁵ *Id.* at 345.

⁵⁶ *Id.* at 345–46 (“To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”).

⁵⁷ 17 U.S.C. § 101 (2006).

⁵⁸ See Megan Carpenter & Steven Hetcher, *Function Over Form: Bringing the Fixation Requirement into the Modern Era*, 82 FORDHAM L. REV. 2221, 2236 (2014).

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.* at 2237.

⁶² See *id.* at 2237–38.

ry duration prong is not necessary to service the purposes of the fixation requirement.⁶³ The fixation requirement is vital to properly serve the goals of the Copyright Clause because it limits the originality requirement's "capaciousness," thus balancing copyright holders' rights with the public's interest in creative works.⁶⁴ However, they assert that the transitory duration prong is a misguided attempt in applying the purpose of the fixation requirement.⁶⁵ The Copyright Act defines copies as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device . . ."⁶⁶ As Carpenter and Hetcher assert, "[i]f the transitory duration exclusion is removed, the parameters of a work would be defined according to its 'embodiment,'" which is "sufficiently permanent" under the definition of "copies" under the Copyright Act and consistent with early fixation case law.⁶⁷ Carpenter and Hetcher also argue that the transitory duration prong cannot be satisfactorily applied to digital technology, as evidenced by the confusion in recent case law.⁶⁸ Opinions are becoming more flexible in accepting what is fixed for the purposes of copyright law, but the evident confusion is starting to cast doubt on the necessity of the transitory prong.⁶⁹

C. The Digital Millennium Copyright Act

The Digital Millennium Copyright Act ("DMCA") amended the Copyright Act in 1998 in an effort to bring copyright law up to speed with the digital age.⁷⁰ As personal computers and the Internet became widely available, more copyrighted material was up-

⁶³ See *id.* at 2226.

⁶⁴ See *id.* at 2238–41.

⁶⁵ See *id.*

⁶⁶ See 17 U.S.C. § 101 (2012).

⁶⁷ See Carpenter & Hetcher, *supra* note 58, at 2248–49.

⁶⁸ See *id.* at 2252–55.

⁶⁹ See *id.*

⁷⁰ The driving force behind congressional efforts to reform copyright law for the digital age was trying to comply with U.S. treaty obligations after it signed the 1996 WIPO Copyright Treaty. Diane M. Barker, *Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA*, 20 BERKELEY TECH. L.J. 47, 47–49 (2005).

loaded onto the web and a drastic increase in digital piracy followed soon after.⁷¹ Copyright holders and the Internet service providers (“ISPs”) pressured Washington to adopt new copyright laws in order to protect their interests in the unfamiliar terrain.⁷² Copyright holders wanted increased protections for their digitized content while ISPs fretted over the possibility of being held liable for every single infringement on the Internet by a third-party user.⁷³ This prompted the Clinton administration to zero in on researching and shaping a possible future for the Internet, particularly in relation to intellectual property and free speech concerns.⁷⁴ Addressing the concerns of copyright holders, a task force assembled in 1995 by the Clinton administration endorsed several major changes to the Copyright Act, but congressional attempts to codify those proposals failed.⁷⁵ Congress did not resurrect the issue until after the 1996 World Intellectual Property Organization (“WIPO”) conference and the entailing U.S. treaty obligations.⁷⁶ By 1997, the Clinton administration officially endorsed a governmental policy of limited liability for ISPs in order to promote growth, electronic trade, and innovation.⁷⁷ In 1998, President Clinton signed the DMCA into law.⁷⁸

Title II of the DMCA, the Online Copyright Infringement Liability Limitations Act (“OCILLA”), was drafted to “clarif[y] the liability faced by service providers who transmit potentially infringing material over their networks.”⁷⁹ Legislators were nervous about applying existing copyright doctrines to an unfamiliar arena where they wanted to promote innovation. Thus, “[r]ather than embarking upon a wholesale clarification” of various copyright doctrines,

⁷¹ *Id.* at 47–48.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 648 (2014).

⁷⁵ See Barker, *supra* note 70, at 49.

⁷⁶ *See id.*

⁷⁷ See WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (1997), available at <http://clinton4.nara.gov/WH/New/Commerce/read.html> (“Existing laws and regulations that may hinder electronic commerce should be reviewed and revised or eliminated to reflect the needs of the new electronic age.”).

⁷⁸ Barker, *supra* note 70, at 49.

⁷⁹ S. REP. NO. 105–90, at 2 (1998).

Congress elected “to leave current law in its evolving state and, instead, to create a series of ‘safe harbors,’ for certain common activities of service providers.”⁸⁰ These safe harbors, coded in § 512(a)-(d), limited the ability of ISPs to be held liable for copyright infringement. The theory is that, unless ISPs were generally protected from copyright infringement liability, the threat of litigation would discourage them from developing and providing beneficial online services. A case involving hyperlinking would normally be eligible for the § 512(d) safe harbor provision.⁸¹ However, this Note only considers media sites that knowingly hyperlink to an infringing website, jettisoning the safe harbor defense which requires that the defendant have no “actual knowledge” of the infringing content.⁸²

D. Fair Use Doctrine

The fair use doctrine is a statutory affirmative defense to allegations of copyright infringement, allowing an author to use copyrighted works without consent in order to create new works, as long as the use meets certain criteria.⁸³ Initially a judge-made rule, it was later adopted by Congress as Section 107 of the Copyright Act of 1976.⁸⁴ The policy goal behind this doctrine is to balance the twin aims of protecting copyright holders’ rights and developing “new ideas that build on earlier ones” so that Congress may ultimately “promote the Progress of Science and useful Arts”⁸⁵

⁸⁰ *Id.* at 19.

⁸¹ U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 12 (1998), available at <http://copyright.gov/legislation/dmca.pdf> (“Section 512(d) relates to hyperlinks, online directories, search engines and the like.”).

⁸² *Id.* at 12–13.

⁸³ Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1163 (9th Cir. 2007) (“The fair use defense permits the use of copyrighted works without the copyright owner’s consent under certain situations.”).

⁸⁴ 4 NIMMER ON COPYRIGHT, *supra* note 41, § 13.05. Congress’ adoption of fair use “was ‘intended to restate the present [*i.e.* pre-1978] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. Therefore, in determining the scope and limits of fair use, reference must be made to pre- as well as post-1978 cases.’” *Id.*

⁸⁵ *Amazon.com*, 508 F.3d at 1163; Campbell v. Acuff-Rose Music, 510 U.S. 569, 575 (1994).

It is meant to prevent courts from rigidly enforcing copyrights at the expense of growth and innovation.⁸⁶

Section 107 purposefully does not define “fair use,” instead providing four factors which courts are required to consider and balance on a case-by-case basis when a defendant invokes fair use.⁸⁷ The statute gives judges an incredible amount of discretion, as it does not even delineate which factors should be given more weight.⁸⁸ A substantial—and at times confusing—body of law has arisen around fair use, lending to the notion that outcomes are highly fact-specific and difficult to predict using precedent.⁸⁹ Conversely, some commentators assert that fair use is actually quite predictable when considered in light of certain “policy-relevant clusters,” rather than on the basis of the four factors.⁹⁰ Ultimately, the courts appear to effectively use policy to “weigh the strength of the defendant’s justification for its use as that justification has been developed under the first three factors, against the impact of that use on the incentives of the plaintiff.”⁹¹

⁸⁶ See *Amazon.com*, 508 F.3d at 1163.

⁸⁷ *Id.* The House Report states that Congress declined to define fair use and opted for the four-factor test because “the endless variety of situations . . . of circumstances that can rise” and possibility of “rapid technological change” indicate that “[b]eyond a very broad statutory explanation of what fair use is . . . the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.” H.R. REP. No. 94-1476, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680 (1976).

⁸⁸ See 17 U.S.C. § 107 (2006). It is debated whether the generous judicial discretion the fair use codification provides is beneficial. Compare Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (arguing that fair use should not be subject to judge’s “intuitive judgments,” but rather “utilitarian premises of the copyright scheme as a whole, to the exclusion of every other consideration”), with Lloyd Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138–39 (1990) (“Development of the doctrine of fair use ought to proceed, therefore, not by deduction from principle but by induction from concrete cases.”).

⁸⁹ The commentators who suggest this are considering the weight given to each factor relative to the particular case and its fair use finding. See Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2540 (2009).

⁹⁰ See, e.g., *id.* at 2541–42. The “policy-relevant clusters” proposed by each scholar supporting this view differ precisely from each other but are generally of the same character. The policy-relevant clusters that Samuelson observes are “promoting freedom of speech and of expression, the ongoing progress of authorship, learning, access to information, truth-telling or truth-seeking, competition, technological innovation, and privacy and autonomy interests of users.” See *id.*

⁹¹ See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 621 (2008).

The preamble to Section 107 enumerates six uses that are appropriate for a fair use defense: criticism, comment, teaching, scholarship, research, and news reporting.⁹² This list is neither exhaustive nor presumptive; it is merely supposed to provide guidance for applying the four factors.⁹³ Accordingly, if the disputed use is found to be one of the enumerated productive uses, then it is only one factor in the balancing test and not dispositive for finding fair use.⁹⁴

The first factor is the consideration of “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁹⁵ This factor considers how “transformative” the disputed use is; that is, it judges whether the disputed use “merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁹⁶ The Supreme Court has held that the transformative factor is the most important determination because it shares the closest relationship with the Copyright Clause.⁹⁷ Hence, while the transformative factor is not dispositive, “the more transformative the new work,” the less the factors disfavoring a finding of fair use will matter in the analysis.⁹⁸

The commercial vs. noncommercial consideration of the first factor may also weigh heavily in a court’s decision of finding fair use, depending on the finding.⁹⁹ In an empirical study of how courts apply the fair use doctrine, Barton Beebe found that generally, only a noncommercial use finding weighs heavily into the out-

⁹² 17 U.S.C. § 107 (2006).

⁹³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

⁹⁴ *Id.*

⁹⁵ 17 U.S.C. § 107(1) (2006).

⁹⁶ *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994) (citing *Folsom v. March*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901); Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)).

⁹⁷ See *Campbell*, 510 U.S. at 579 (“[T]he goal of copyright, to promote the science and the arts, is generally furthered by the creation of transformative works.”).

⁹⁸ See *Campbell*, 510 U.S. at 579 (“Although such transformative use is not absolutely necessary for a finding of fair use . . . the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”).

⁹⁹ See Beebe, *supra* note 91, at 602–03.

come of the inquiry.¹⁰⁰ In other words, a noncommercial use finding usually significantly influenced an outcome of finding fair use, while a commercial use finding did not have a substantial impact on a particular finding one way or the other.¹⁰¹ Curiously, this empirical finding contrasts with Supreme Court precedent.¹⁰² In *Sony v. Universal Studios*, the Supreme Court held, *inter alia*, that using Sony's pioneering Betamax video recording technology to record an unauthorized copy of a copyrighted television broadcast for later viewing was fair use.¹⁰³ In finding this, the Court also held that a determination of commercial use was presumptive of a likelihood of market harm under the fourth factor.¹⁰⁴ In *Campbell v. Acuff-Rose Music*, where fair use was found for a 2 Live Crew parody of Roy Orbison's song, "Pretty Woman," the Court backtracked on its strong position in *Sony*, holding that a finding of commercial use only tends to weigh against a finding of fair use.¹⁰⁵ Thus, although precedent says the commercial use question is not a presumptive factor anymore, some courts still treat it as such when they find the use is noncommercial.¹⁰⁶

The second factor is the "nature of the copyrighted work," which places more importance on the protection of fictional works and soon-to-be-published works than factual works and published works.¹⁰⁷ Generally, this factor is considered the least important of the fair use factors, although there are a few cases in which it weighed heavily in a court's decision.¹⁰⁸ Interestingly, though

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

¹⁰² See *id.* at 598–603.

¹⁰³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

¹⁰⁴ *Id.*

¹⁰⁵ See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 585 (1994).

¹⁰⁶ See Beebe, *supra* note 91, at 602–03.

¹⁰⁷ 17 U.S.C. § 107(2) (2006); see *Campbell*, 510 U.S. at 586 ("This factor calls for the recognition that [fictional and soon-to-be-published] works are closer to the core of intended copyright protection than [factual and published works], with the consequence that fair use is more difficult to establish when the former works are copied.").

¹⁰⁸ See Beebe, *supra* note 91, at 611; see, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985) (saying the fact that a work is unpublished is a "critical element of its 'nature'" in "ordinary circumstances" but is not "determinative"); *Salinger v. Random House, Inc.*, 811 F.2d 90, 97, 100 (2d Cir. 1987), cert. denied, 484 U.S. 890 (1988) (finding that the inclusion of Salinger's private, unpublished letters in a biography were unlikely to constitute fair use).

prominent cases such as *Harper & Row Publishers v. Nation Enterprises* and *Salinger v. Random House* have held that the unpublished factor weighed heavily in finding no fair use, Beebe's empirical analysis found that in most lower court cases an unpublished factor mostly came with a finding of fair use.¹⁰⁹

The third factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."¹¹⁰ Courts must measure this factor both quantitatively and qualitatively.¹¹¹ Generally, the more quantitatively and qualitatively the unauthorized use takes from the original work, the less likely the chances a court will find fair use.¹¹² However, an unauthorized use that quantitatively copies most—or even all—of the original work will not necessarily result in a dismissal of the fair use defense if the unauthorized use is qualitatively different enough.¹¹³ As a result of his empirical analysis, Beebe posits that the third factor has a meaningful impact on the outcome of the fourth factor, which he argues is "a kind of metafactor under which courts synthesize their analyses of the first three factors."¹¹⁴

The fourth and final factor is "the effect of the use upon the potential market for or value of the copyrighted work."¹¹⁵ This factor is regarded as one of the most important of the fair use factors.¹¹⁶ Unlike the other three factors, no distinct subfactors have

¹⁰⁹ See Beebe, *supra* note 91, at 613. Beebe believes this empirical finding is a good thing, because it furthers the ultimate goal of the Copyright Clause to disseminate creative works, assuming the works were not soon-to-be-published works. *See id.* at 614.

¹¹⁰ 17 U.S.C. § 107(3) (2006).

¹¹¹ Beebe, *supra* note 91, at 615.

¹¹² *See* 4 NIMMER ON COPYRIGHT, *supra* note 41, § 13.05.

¹¹³ *See* Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003); 4 NIMMER ON COPYRIGHT, *supra* note 41, § 13.05.

¹¹⁴ See Beebe, *supra* note 91, at 616.

¹¹⁵ 17 U.S.C. § 107(4) (2012).

¹¹⁶ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) (dictum) ("[The fourth factor] is undoubtedly the single most important element of fair use."); *see* 4 NIMMER ON COPYRIGHT, *supra* note 41, § 13.05 ("If one looks to the fair use cases, if not always to their stated rationale, [the fourth factor] emerges as the most important, and indeed central fair use factor."); Beebe, *supra* note 91, at 616–17 (finding that, though the *Campbell* Court dicta may have tried to scale back the *Harper & Row* dictum in stating that the four fair use factors are to be considered and weighed together, empirically the fourth factor is the most influential factor. Beebe's empirical analysis supports this finding: "[O]f 141 of the opinions that found that factor four disfavored fair use, 140 found no fair

emerged under the fourth factor, which Beebe posits as evidence of its dispositive quality.¹¹⁷ The Court has tried to refine this factor somewhat.¹¹⁸ In *Sony* and *Campbell*, the Court said that it requires the consideration of “not only the extent of the market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market’ for the original.”¹¹⁹ However, Beebe’s findings suggest that while some of the lower courts may still cite this “slippery slope principle . . . there was no significant relation at any time between a court’s citing to the slippery slope principle and its finding of no fair use.”¹²⁰

E. Contributory Copyright Infringement & Inducement

Contributory copyright infringement is a branch of secondary liability as applied to copyright law—a common law concept born out of tort law and judicial interpretations of the Copyright Act.¹²¹ A contributory infringer is one “who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another.”¹²² In simpler terms, one may be liable for contributory infringement if one knowingly causes another to infringe.¹²³ The invocation of contributory infringement has increased with the emergence of new technologies, and as such,

use,” and “of the 116 opinions that found that factor four favored fair use, all but 6 found fair use.”). *But see* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 743–44 (2011) (arguing that based on empirical analysis of fair use cases from 2006–2010—cases decided after Beebe’s analysis—that an unequivocal transformative use finding influences a finding of market harm).

¹¹⁷ Beebe, *supra* note 91, at 618.

¹¹⁸ See *supra* notes 102–106 and accompanying text; *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 590 (1994).

¹¹⁹ *Campbell*, 510 U.S. at 590 (quoting 4 NIMMER ON COPYRIGHT, *supra* note 41, § 13.05).

¹²⁰ Beebe, *supra* note 91, at 620.

¹²¹ See Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941, 998 (2007); 3 NIMMER ON COPYRIGHT, *supra* note 841, § 12.04; *see also* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).

¹²² Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). *See also* *Grokster*, 545 U.S. at 930 (citation omitted); *see also* WILLIAM PATRY, PATRY ON COPYRIGHT § 21:47 (2007).

¹²³ See 3 NIMMER ON COPYRIGHT, *supra* note 841, § 12.04.

outcomes tend to be highly fact-specific and difficult to apply neatly to subsequent conflicts.¹²⁴

In *Sony Corp. of America v. Universal City Studios*, which this Note discussed earlier in the context of fair use, the Supreme Court applied contributory liability to copyright law for the first time.¹²⁵ There, copyright owners of television programs sued Sony, the manufacturer of the Betamax, a video tape recording device (“VTR”), because consumers used the technology to record broadcasts.¹²⁶ Betamax was cutting-edge technology, and by the time the case reached the Supreme Court, VTRs had taken off and the videocassette industry was emerging as an extremely lucrative “content technology platform.”¹²⁷ Reversing the Ninth Circuit’s judgment, the Court absolved Sony of contributory infringement liability because, although the recording technology was being used to make unauthorized copies, the product was “capable of substantial noninfringing uses.”¹²⁸

In *A&M Records v. Napster*,¹²⁹ the Ninth Circuit held that Napster could be contributorily liable for its peer-to-peer (“P2P”) file sharing service because it had actual and constructive knowledge of infringement and provided the means for infringing.¹³⁰ It is important to note that the Ninth Circuit imputed actual knowledge to Napster on the basis of the company’s conduct and not the pro-

¹²⁴ See Flava Works, Inc. v. Gunter, 689 F.3d 754, 757 (7th Cir. 2012) (Posner, J.) (“A typical, and typically unhelpful, definition . . . [b]ut does ‘may be held liable’ mean that a person who fits the definition of ‘contributory infringer’ may nevertheless *not* be a contributory infringer after all? And what exactly does ‘materially contribute’ mean? And how does one materially contribute to something without causing or inducing it? And how does ‘cause’ differ from ‘induce’?”).

See also PATRY, *supra* note 122, § 21:55 (“The rapidly evolving nature of technology and the law in this important area militate against hard and fast rules and in favor of a cautious, case-by-base approach.”).

¹²⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 440–42 (1984).

¹²⁶ *See id.* at 417.

¹²⁷ Menell & Nimmer, *supra* note 121, at 954.

¹²⁸ *Id.* at 442. Only 9% of the home tapings were authorized copies. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 950–51 (2005) (Breyer, J., concurring).

¹²⁹ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). This was the first case to consider secondary liability for P2P file sharing services. *See id.*

¹³⁰ *See id.* at 1019–22.

gram's architecture.¹³¹ The finding of actual knowledge prevented Napster from falling within the *Sony* safe harbor for technologies that have substantial non-infringing uses.¹³² To arrive at its conclusion of actual knowledge, the Ninth Circuit examined the technical aspects of Napster's essential functions.¹³³ Registered users could share music with each other when they downloaded the program onto their computers and subsequently uploaded their files to the program's "user library."¹³⁴ An individual user's uploaded files resided on her computer and were only available to other users when she connected to Napster's servers by logging in.¹³⁵ Files were not stored on Napster's computers, but the program did rely on a centralized database tracking which users were logged in and connected users based on their search queries.¹³⁶

The court, invoking *Sony*, vowed that it would not hold Napster liable merely because its program was capable of infringing uses.¹³⁷ Nevertheless, the court found Napster liable partially because it accepted the district court's factual finding that Napster had actual knowledge of specific instances of infringement and that it had the capability to block the infringing suppliers and did not do so.¹³⁸ The Ninth Circuit affirmed the lower court's ruling that gave Napster the requisite knowledge of infringement, despite Napster's arguments that it could not screen for infringing works shared on its system.¹³⁹ Regarding the inducement factor, the Ninth Circuit agreed with the district court's conclusion that Napster clearly induced or caused third parties to directly infringe because "Napster users could not find and download the music they want with the ease of which defendant boasts."¹⁴⁰

¹³¹ See 3 NIMMER ON COPYRIGHT, *supra* note 41, § 12.04.

¹³² *Napster*, 239 F.3d. at 1020–22.

¹³³ *Id.*

¹³⁴ *Id.* at 1011–12.

¹³⁵ *Id.* at 1012.

¹³⁶ *Id.* at 1011–12.

¹³⁷ *Id.* at 1020–21.

¹³⁸ *Id.* at 1021–22. The court found actual knowledge because Napster had received notices of infringement from the Recording Industry Association of America. *Id.* at 1020 and n.5.

¹³⁹ *Id.* at 1022.

¹⁴⁰ *Id.* at 1022 (quoting A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 919–20 (N.D. Cal. 2000)).

Four years later, in *Metro-Goldwyn-Mayer Studios v. Grokster*, the Supreme Court declined to extend the *Sony* holding to a P2P file-sharing service shown to have a clear objective of promoting copyright infringement.¹⁴¹ The Court found Grokster liable under a distinct variant of contributory infringement: the intentional inducement of infringement, which focuses on the alleged infringer's conduct rather than the nature of the technology.¹⁴² So, even though the technology concededly was "capable of substantial or commercially significant noninfringing uses," Grokster's intent to use its technology to promote copyright invoked the liability under the inducement theory.¹⁴³

The Court also examined Grokster's technology and practices to find evidence of its intent to induce infringement.¹⁴⁴ Grokster's P2P service had the capability to run even if Grokster was shut down because it did not rely on a central database stored on its servers.¹⁴⁵ This was seen as an intentional move on Grokster's part in an attempt to avoid the *Napster* trap.¹⁴⁶ Grokster also "voiced an objective" to induce copyright infringement.¹⁴⁷ Seeing Grokster as a bad actor, the Court held that any product with a clear objective of "promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement," and going beyond mere distribution with knowledge of third-party action "is liable for the resulting acts of infringement by third parties."¹⁴⁸ Grokster's intent to induce also helped the Court explicitly sidestep *Sony* by asserting that *Sony* never maintained that a manufacturer of a product capable of substantially infringing uses will *never* be liable for contributory copyright infringement.¹⁴⁹

¹⁴¹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 941 (2005).

¹⁴² *See id.* at 936–37, 941.

¹⁴³ *Id.* at 933–36.

¹⁴⁴ *Id.* at 937–40.

¹⁴⁵ *Id.* at 919–20.

¹⁴⁶ *Id.* at 939.

¹⁴⁷ *See id.* at 923–24.

¹⁴⁸ *Id.* at 936–37.

¹⁴⁹ *Id.* at 933–34.

II. HYPERLINKING & NEWS STORIES IN COPYRIGHT CASE LAW

Not all of the cases relevant to this Note's central issue will deal squarely with a party knowingly linking to infringing content. It is imperative to also examine how courts treat linking in relation to direct copyright infringement because proving both a direct infringement and an inducement to direct infringement are necessary for proving contributory infringement. In Part II, this Note will discuss cases that face issues of hyperlinking intersecting with contributory infringement and direct infringement. It also discusses defenses that may have a chance to overcome a showing of infringement, which include the fair use defense as it pertains to hyperlinking and news stories.

A. Hyperlinking & Copyright Case Law

1. Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.

In this case, the United States District Court for the District of Utah granted a preliminary injunction upon finding defendant could be held liable for contributory infringement for posting web addresses to an unauthorized copy of a religious handbook.¹⁵⁰ The Utah Lighthouse Ministry operated a website criticizing The Church of Jesus Christ of Latter-Day Saints.¹⁵¹ To prove contributory copyright infringement, Intellectual Reserve had to prove that direct infringement occurred as a result of defendant's posting particular links.¹⁵² Ultimately, the court found that a user clicking on the link constitutes a direct infringement because a copy of this work is subsequently being displayed on the user's computer

¹⁵⁰ *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.* 75 F. Supp. 2d 1290, 1294–95 (D. Utah 1999). The court never indicates that defendants actually provided hyperlinks to an unauthorized copy of the Handbook, just that it posted the web addresses. Some commentators have taken this to mean hyperlinking. *See, e.g.*, Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copyright Ownership*, 42 WM. & MARY L. REV. 1245, 1264–65 (2001). Others maintain that the site did not contain a hyperlink, but that there is no legal distinction between providing a hyperlink and a web address, which this Note agrees with. *See* Mary Anne Bendotoff, *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.: Fair Use, the First Amendment, and the Freedom to Link*, 35 U.S.F. L. REV. 83, 84 n.11 (2000).

¹⁵¹ *Intellectual Reserve*, 75 F. Supp. 2d at 1291.

¹⁵² *Id.* at 1292.

screen.¹⁵³ In arriving at this conclusion, the court reasoned that, “when a person browses a website, and by doing so displays the Handbook, a copy of the Handbook is made in the computer’s random access memory (RAM), to permit viewing of the material. And in making a copy, even a temporary one, the person who browsed infringes the copyright.”¹⁵⁴ This is an important case because the facts are closest to the issue at the heart of this Note: a website knowingly posted the URLs (i.e., for the purposes of this Note, hyperlinks) to infringing material.

2. *Ticketmaster Corp. v. Tickets.com, Inc.*

One of the first cases to comprehensively consider deep linking in the context of copyright law, *Ticketmaster Corp. v. Tickets.com*, posited that deep linking itself cannot violate the Copyright Act because no copying is involved.¹⁵⁵ Both parties in the case sold tickets on the Internet.¹⁵⁶ Ticketmaster’s business model relied on exclusive agreements with the events it sold tickets for. Tickets.com also sold tickets, but had an additional feature informing users “where and how tickets which it does not sell may be purchased.”¹⁵⁷ When Ticketmaster had the exclusive license for selling tickets for a particular event, Tickets.com would provide a link with the text, “Buy this ticket from another on-line ticketing company” and the user would be directed to an interior web page of Ticketmaster.¹⁵⁸ When it alleged copyright infringement, Ticketmaster argued that copying occurred “by transferring the event page to [Tickets.com’s] own computer to facilitate extraction of the facts.”¹⁵⁹

¹⁵³ *Id.* at 1294.

¹⁵⁴ *Id.* (quoting *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993)).

¹⁵⁵ See *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH (BQRx), 2000 WL 525390, at *2 (C.D. Cal. Mar. 27, 2000). The district court could not make a formal ruling on the copyright claim because there was ambiguity as to whether Ticketmaster’s event pages were covered in its copyright registration. *See id.*

¹⁵⁶ *Id.* at *1.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *2.

The United States District Court for the Central District of California rejected Ticketmaster's argument.¹⁶⁰ To support its argument, the court analogized clicking on hyperlinks to "using a library's card index to get reference to particular items, albeit faster and more efficiently."¹⁶¹ The court reasoned that Tickets.com made it clear that users were being directed to Ticketmaster's genuine website and that there was "no deception in what is happening."¹⁶² This case is relevant because it demonstrates that when there is no real bad actor and a website is generally perceived as providing a good service, courts are more likely to find that hyperlinks are not capable of infringement.

3. *Kelly v. Arriba Soft Corp.*

In *Kelly v. Arriba Soft Corp.*,¹⁶³ the Ninth Circuit held that Arriba was not liable for copyright infringement for its use of thumb-size versions of copyrighted images as hyperlinks to deep link to the photographer's web page through its search engine because it constituted fair use.¹⁶⁴

In its fair use analysis, the court found the purpose and character of use weighed in favor of Arriba because the images were being used to help users identify the images in the search engine, thus creating a new purpose for the works that would increase the public's access to them.¹⁶⁵ The nature of the copyrighted work was in Kelly's favor because a creative work favors a finding of infringement.¹⁶⁶ Consideration of the third factor turned was a draw.¹⁶⁷

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 820 ("The thumbnails do not stifle artistic creativity because they are not used for illustrative or artistic purposes and therefore do not supplant the need for originals. In addition, they benefit the public by enhancing information-gathering techniques on the internet.").

¹⁶⁶ *Id.* ("Works that are creative in nature are closer to the core of intended copyright protection than are more fact-based works. Photographs that are meant to be viewed by the public for informative and aesthetic purposes, such as Kelly's, are generally creative in nature." (quoting A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016 (9th Cir. 2001) (internal quotation marks omitted))).

One on hand, copying an entire work is a strike against you in the fair use analysis.¹⁶⁸ On the other hand, it is not dispositive, and this factor can be neutral if one only uses the amount necessary for the intended use.¹⁶⁹ Lastly, the fourth factor weighed in favor of Arriba because the thumbnails would bring more exposure to Kelly's site and spark interest in the full-size images.¹⁷⁰

4. *Perfect 10, Inc. v. Amazon.com, Inc.*

*Perfect 10*¹⁷¹ is a landmark case because the Ninth Circuit affirmed the lower court's adoption of the "Server Test," thus rejecting the test adopted by the court in *Intellectual Reserve*.¹⁷² Additionally, the court held that while the images could infringe Perfect 10's copyright, the hyperlinks themselves could not sustain a claim of contributory copyright infringement.¹⁷³ The primary reason for this was the Ninth Circuit's adoption of the Server Test.¹⁷⁴

Perfect 10, a company specializing in photographs of nude women, sued Google and Amazon.com for contributory copyright infringement for creating hyperlinks through thumbnail images that were originally from an infringing third-party source. According to an earlier case, *MAI Systems Corp. v. Peak Computer, Inc.*¹⁷⁵ a work

¹⁶⁷ *Id.* at 821 ("This factor neither weighs for nor against either party because, although Arriba did copy each of Kelly's images as a whole, it was reasonable to do so in light of Arriba's use of the images.").

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *Id.* at 822 ("There would be no way to view, create, or sell a clear, full-sized image without going to Kelly's web sites. Therefore, Arriba's creation and use of the thumbnails does not harm the market for or value of Kelly's images.").

¹⁷¹ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007)

¹⁷² *See id.* The Server Test says that a link constitutes a display for the purposes of copyright infringement if it serves content over the web by "physically sending ones and zeroes over the internet to the user's browser." *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 839 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom.* See also *Perfect 10*, 508 F.3d 1146.

¹⁷³ *See Perfect 10*, 508 F.3d at 1161–62.

¹⁷⁴ *See id.*

¹⁷⁵ *MAI v. Peak* considered whether or not the loading of a software program into a computer's RAM by a defendant computer technician constituted direct copyright infringement. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993). The narrow holding as it applied to computer technicians was legislatively overruled by the DMCA, which was amended after *MAI* to exempt third-party computer maintenance companies to run copyrighted software (thus loading the program on the computer's

is “fixed” for the purposes of copyright when a digital copy is stored in the RAM drive of the computer.¹⁷⁶ Because links direct you to the website, the Server Test asserts that users never actually download the website and instead store it in their RAM drive.¹⁷⁷ Thus, the user never downloaded a copy of an infringing work, so there is no basis for direct infringement.¹⁷⁸ And if there is no basis for direct infringement, there is no basis for contributory infringement either.¹⁷⁹

This ruling is directly at odds with *Intellectual Reserve*, where the court concluded that when a web page displays on a user’s computer, there is indeed a copy on the RAM and thus it is possible to create a copy through hyperlinking.¹⁸⁰

B. Fair Use & News Stories

News stories are one of the favored uses enumerated in Section 107’s preamble.¹⁸¹ When news stories are the subject of a copyright infringement suit, First Amendment values are also implicated.¹⁸² However, traditional First Amendment analysis usually is not directly applied in copyright cases because fair use is generally considered a “‘built-in’ safeguard in copyright law for mediating tensions between interests of copyright owners in controlling exploitations of their works and free speech.”¹⁸³ One policy underlying news stories as an enumerated favored use is the strong public interest in newsworthy information.¹⁸⁴ Despite this policy, news stories are not categorically considered fair use, particularly when

RAM) on a computer in order to perform its maintenance duties. 17 U.S.C. § 117(c) (2006); *see also* Liu, *supra* note 150, at 1261–62.

¹⁷⁶ *MAI Sys.*, 991 F.2d at 517–18.

¹⁷⁷ *See Perfect 10*, 508 F.3d at 1160–61.

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry*, 75 F. Supp. 2d 1290, 1293–95 (D. Utah 1999).

¹⁸¹ *See* 17 U.S.C. § 107 (2006).

¹⁸² *See* Samuelson, *supra* note 89.

¹⁸³ *See id.* at 2546. Some commentators do not agree that the fair use doctrine appropriately addresses First Amendment concerns. *See id.*

¹⁸⁴ *See id.* at 2558–59.

news stories take too much of the original work and when the news organization “engaged in wrongful conduct.”¹⁸⁵

In *Harper & Row Publishers v. Nation Enterprises*, the Supreme Court found that a news article quoting approximately 300 words from an unpublished manuscript was not fair use.¹⁸⁶ After the conclusion of his term, President Gerald R. Ford contracted with Harper & Row and Reader’s Digest to publish a book of his memoirs, including the exclusive right to license prepublication excerpts.¹⁸⁷ The publishers then licensed the prepublication excerpts to *Time* magazine, which scheduled an article covering the memoirs and some of its excerpts for publication.¹⁸⁸ Before the article was published, the editor of *The Nation* magazine obtained what he knew to be an unauthorized copy of the manuscript and “hastily put together . . . ‘a real hot news story’” comprised of quotes, paraphrases, and facts drawn exclusively from the manuscript.¹⁸⁹ In finding no fair use, the Court was particularly moved by *The Nation*’s bad intent to “scoop” rival publication *Time*, especially in light of the fact that the editor knew he obtained an unauthorized copy.¹⁹⁰ The Court found that the third fair use factor weighed in favor of the defendant because, despite being qualitatively insubstantial, *The Nation*’s use was qualitatively substantial.¹⁹¹

III. FINDING FOR TARANTINO

Case law reflects the tenuous balance between protecting copyright holder’s property interests and protecting highly useful Internet innovations, like search engines.¹⁹² Court opinions are highly fact-specific rulings heavily influenced by a policy of favoring In-

¹⁸⁵ See *id.*

¹⁸⁶ See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 544–45, 569 (1985).

¹⁸⁷ *Id.* at 542.

¹⁸⁸ See *id.* at 543.

¹⁸⁹ See *id.*

¹⁹⁰ See *id.* at 562.

¹⁹¹ See *id.* at 564–65 (“In absolute terms, the words actually quoted were an insubstantial portion of ‘A Time to Heal’ . . . [but] the portions actually quoted were selected by [The Nation’s editor] as among the most powerful passages in those chapters.”).

¹⁹² See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

ternet-based services. On one hand, Internet users and providers need heightened protections in order to promote growth and innovation, so the Internet can realize its full potential. On the other hand, the law must adequately protect copyright holders' constitutional and statutory rights.

The touchstone for copyright law—" [t]o promote the Progress of Science and useful Arts"—is only so helpful when applied to copyright issues arising from the Internet. What exactly *will* fulfill that purpose? Surely giving certain Internet actors heightened protections fulfills copyright's overarching purpose. After all, the relaxed rules have allowed enormously beneficial Internet-related technologies to come to life. However, there is still a necessity to incentivize creators. This Part argues that Gawker should be held liable for inducement to infringe under the contributory copyright liability strand of cases. This means that Gawker's fair use defense should not prevail.

As seen in *Grokster* and *Harper & Row*, the Supreme Court does not like bad actors in the context of copyright infringement, directly using their unsavory purposes as a way to find liability. In light of these decisions, Gawker is conceivably a bad actor in this scenario because it solicited readers for a link to an unauthorized copy of the script. The original story was that Tarantino's script had been leaked to the industry, not that it was leaked for the larger public to view on the Internet. If this were the case, Gawker surely would not have needed to solicit readers for a link to the site, it could have just Googled the script. It then posted links to the web pages hosting the infringing copies, inviting its users to click on the links and view the unauthorized copies.

A showing of inducement to infringe still requires a showing that the direct infringement was a result of defendant's inducement.¹⁹³ Even though the fact that Gawker could not produce a link to a script until after it had solicited its readers for the script raises an eyebrow, it seems unlikely that Tarantino would be able to actually prove Gawker posted the script or that an anonymous user posted the script as a result of Gawker's solicitation. Thus, Tarantino would have to prove that clicking on hyperlink which then

¹⁹³ See *supra* notes 141–48 and accompanying text.

takes the user to a web page hosting infringing content constitutes direct copyright infringement.¹⁹⁴ In turn, to prove this, Tarantino would have to prove that clicking on the hyperlink creates a copy.

As Carpenter and Hetcher argue, the “transitory duration” prong of the fixation requirement is ill-suited to the digital age.¹⁹⁵ Courts are literally nitpicking over seconds and technological nuances to reach a finding over whether or not the display on a computer is fixed enough for the purposes of copyright.¹⁹⁶ The diversity in outcomes evidences that courts sense such displays should constitute copies, but they are unable to find solid footing in order to appease the transitory duration prong. This Note agrees with Carpenter and Hetcher that the transitory duration prong should not be a part of the fixation requirement and, under this assertion, argues that image on a computer screen is a fixed display for the purposes of copyright law.

The concern that arises out of such an argument is that nearly everyone would effectively be committing copyright infringement every day and it would be impossible to police. However, the legislature could effectively cabin liability under such copying to intentional secondary liability claims that cannot prevail on a fair use defense. Cabining liability would also maintain the basic structure of the World Wide Web, which depends on linking.

Gawker’s provision of links should not qualify as fair use merely because those links are housed in a news story. In the instant case, besides the favored fair use of Gawker’s news story, all four factors should lean toward Tarantino. As Beebe’s data suggested, the fair use analysis seems to come down to a “two-sided balancing test in which [courts] weigh the strength of the defendant’s justification for its use, as that justification has been developed in the first three factors, against the impact of that use on the incentives of the plaintiff[s],” with the fourth factor being the most determinative of the outcome.¹⁹⁷ Although Tarantino changed his mind and decided to go ahead with filming, suggesting there was not much market harm to him, this was uncertain at the time of the case.

¹⁹⁴ See *supra* note 9 and accompanying text.

¹⁹⁵ See *supra* notes 58–69 and accompanying text.

¹⁹⁶ See Carpenter & Hetcher, *supra* note 58, at 2253–55.

¹⁹⁷ Beebe, *supra* note 91, at 621.

Gawker might be able to successfully argue that Tarantino is actually better off as a result of the leak due to the free publicity and his fervent fan base. However, not all screenwriters will be so lucky, and it would be a dangerous game for courts to instill precedent of predicting the likelihood of market harm based on the perceived popularity of a given screenwriter. Furthermore, allowing Gawker's actions, while in the short term supporting copyright law's goal of disseminating works to the public, may ultimately inhibit this goal as screenwriters or studios refuse to produce movies because of an increase in this practice.

Additionally, as seen in *Harper & Row*, courts generally are not fond of bad actors, and in the instant case, Gawker actively solicited readers to produce a copy of the script that the site could link to. Again, it seems unlikely that Gawker would solicit readers unless there was no public copy online to begin with. Assuming this, Gawker seemed to actually *create* the news story of the leak on the Internet. That is, Gawker should not prevail on the claim that hyperlinking to the news story was an essential part in validating its news story because the original news story was presumably not an Internet leak. Moreover, even if a court did find that linking to a case was not a bad act because it helped Gawker validate its story, publishing the whole script pushes back. Under fair use, Gawker is fully entitled to publish excerpts of *The Hateful Eight* so long as those excerpts are qualitatively substantial—a difficult task when it is a Tarantino screenplay. Posting links to the entire screenplay is unnecessary for its purpose as a news story.

CONCLUSION

Gawker should be held liable for knowingly linking to a web page hosting unauthorized copies of Tarantino's *Hateful Eight* screenplay. This argument rests primarily on the suggestion that the transitory duration prong of the fixation requirement should be relegated to a footnote in copyright's history. Accordingly, displaying a web page on a computer should be considered a copy for the purposes of copyright liability, although liability for infringement should only be annexed to actors that knowingly induce others to view the infringing material. Furthermore, Gawker should not pre-

vail on a fair use defense, because of the harm to the potential market, it's bad intent, and the fact that it unnecessarily linked to a full copy of the work when it at most needed to publish excerpts.