The Applicability of the Fair Use Defense To Commercial Advertising: Eliminating Unfounded Limitations

Manal Z. Khalil
NOTE

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MANAL Z. KHALIL

INTRODUCTION

As a way of fostering the development of new ideas and means of expression, the fair use provision¹ of the Copyright Act of 1976² limits the scope of a copyright owner's exclusive rights.³ Section 107 of the Copyright Act codified the fair use doctrine as it existed at common law.⁴ Although an admittedly elusive concept, one definition has referred to the doctrine as a “privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner.”⁵ This doctrine acknowledges the social desirability of permitting others to build upon

   [T]he fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
   (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
   (2) the nature of the copyrighted work;
   (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
   (4) the effect of the use upon the potential market for or value of the copyrighted work.
   Id.

2. Id. §§ 101-810.


4. “The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107.” Id. at 65, reprinted in 1976 U.S.C.C.A.N 5659, 5678.

The creation of the doctrine in the United States dates back to Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), where Justice Story first enunciated the factors assessed in determining fair use. Justice Story stated that the question involved the nature of the two works, the extent of the copying and the economic effect of the use on the copyrighted work. See id. at 344, 348.

5. Horace G. Ball, The Law of Copyright and Literary Property 260 (1944). In keeping with the Constitutional mandate to Congress to “promote the Progress of Science and useful Arts . . .,” U.S. Const. art. I, § 8, cl. 8, the fair use doctrine recognizes the need to except certain uses of a copyright owner's work. See Jay Dratler, Jr., Distilling the Witches' Brew of Fair Use in Copyright Law, 43 U. Miami L. Rev. 233, 235 (1988).
Traditionally, the fair use doctrine has been viewed as a means of maintaining flexibility in copyright law. Its flexibility permits courts to adjust in accordance with the circumstances that may arise. The doctrine allows courts to exonerate uses of a copyrighted work that technically constitute copyright infringement.

The fair use doctrine further serves as a vehicle for the First Amendment. By exempting from liability certain uses of a copyrighted work, fair use enables the dissemination of new ideas and forms of expression to the public. The fair use doctrine, therefore, serves the crucial role of maintaining a proper balance between the copyright goal of rewarding creators (by granting them exclusive rights over their works) and the First Amendment goal of protecting freedom of expression.

This common law doctrine, however, has been acknowledged to be "the most troublesome in the whole law of copyright." Moreover, congressional failure to clarify the doctrine's ambiguities upon codification in the Copyright Act has aggravated the problem. Although Congress...
intended to maintain flexibility in the fair use doctrine, its failure to provide more definitive guidelines has presented problems for the courts, particularly in the area of commercial advertising.\textsuperscript{15}

The problems with respect to commercial advertising arise primarily from section 107(1)'s mention of the commercial nature of a use in determining its "purpose and character."\textsuperscript{16} The statute offers little guidance as to the weight this factor should be given.\textsuperscript{17} Specific reference to a commercial use in the statute has led courts hastily to conclude that Congress intended to single out this type of a use for special treatment, disregarding the explicit admonition not to consider this factor conclusive.\textsuperscript{18}

In addition, based on the specific statutory reference to the use's nature, the Supreme Court has created a presumption of "unfairness" where a use is commercial,\textsuperscript{19} and consequently has compounded the problem. This presumption has resulted in a great deal of confusion and incoherence in determining fair use for commercial advertisements.\textsuperscript{20} Some courts have interpreted the presumption as a per se rule of no fair use for commercial advertising,\textsuperscript{21} while other courts have viewed it merely as a rebuttable presumption.\textsuperscript{22} Moreover, this presumption raises serious First Amendment questions. The Court's presumption runs afoul of the commercial free speech doctrine by making it nearly impossible for a commercial advertisement to qualify for fair use.\textsuperscript{23} This threatens to destroy the delicate balance within copyright law between First Amendment concerns and the copyright goal of rewarding creators' endeavors.\textsuperscript{24}

The existing inconsistencies in the application of the fair use doctrine to commercial advertising has rendered this area of the law unpredictable.\textsuperscript{25} The importance of commercial advertising to consumers and to the economy in general mandates the development of clear standards and more consistent applications.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{15} See infra notes 31-67 and accompanying text.
\item \textsuperscript{16} Section 107(1) states that one of the factors to consider in determining fair use is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1) (1988 & Supp. II 1990). Use of a copyrighted work in a commercial advertisement is regarded as a "purely" commercial use because its sole purpose is to promote the sale of goods and services for profit. See Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938); see also Ellen S. Aho, Note, Fair Use and the First Amendment Protect Commercial Advertising: Consumers Union of United States, Inc. v. General Signal Corp., 17 Conn. L. Rev. 835, 842 (1985).
\item \textsuperscript{17} See Nimmer & Nimmer, supra note 13, at 13-90.
\item \textsuperscript{18} See infra notes 62, 64 and accompanying text.
\item \textsuperscript{20} See infra notes 41-55 and accompanying text.
\item \textsuperscript{21} See infra notes 61-63 and accompanying text.
\item \textsuperscript{22} See infra notes 64-67 and accompanying text.
\item \textsuperscript{23} See infra notes 88-99 and accompanying text.
\item \textsuperscript{24} See infra notes 101-04 and accompanying text.
\item \textsuperscript{25} See Dratler, supra note 5, at 341. As the law in this area currently stands, it would be very difficult for commercial advertisers to predict whether their use is fair. See id.
\item \textsuperscript{26} The Supreme Court's decisions in the commercial speech area have repeatedly
This Note discusses the applicability of the fair use doctrine to commercial advertising. It analyzes the disparate and inconsistent results that have taken and continue to take place in the courts, and proposes a more coherent standard for determining "the purpose and character" of commercial advertisements in evaluating a fair use defense.

Part I gives some background on the major sources of the inconsistencies in application of the fair use doctrine to commercial advertising. This Part identifies three sources for the confusion—the common law, the Copyright Act, and the Supreme Court's two fair use decisions. The first section of Part I examines the doctrine as it existed at common law, when commercial uses first acquired a disfavored status. The second section analyzes the fair use doctrine under the Copyright Act. Part I then discusses the confusion generated by the Supreme Court's creation of a presumption of unfairness for a commercial use, both generally and as it applies to commercial advertising. Part II examines the First Amendment implications of the Supreme Court's presumption of unfairness for commercial uses and analyzes the role that the commercial free speech doctrine should play in formulating a standard for determining fair use. This Part argues that, aside from the confusion resulting in the lower courts, the Supreme Court's presumption is inappropriate because it threatens to destroy the delicate balance in the copyright law between a copyright owner's exclusive rights and the First Amendment interest in dissemination. Part III offers a solution to this problem in commercial advertising. The first section gives a general survey of other approaches to determining fair use for commercial uses that are more attuned to the basic goals of Copyright Law and the First Amendment. The second section proposes the productive use test as the most coherent standard. Under the productive use test, the advertiser claiming fair use must employ the copyrighted work for a different purpose than that for which it was originally used. The last section of Part III suggests the proper procedure that should be followed in applying the productive use test to commercial advertisements in conjunction with the other three factors of section 107. Finally, this Note concludes that the fair use doctrine should apply to commercial advertising in the same way it applies to other types of uses—without the burden of a presumption of unfairness.


27. See infra notes 31-67 and accompanying text.


29. An examination of the common law is necessary in understanding the current fair use doctrine since the Copyright Act is merely a codification of the common law. See House Report, supra note 3, at 66, reprinted in 1976 U.S.C.C.A.N. 5659, 5680; see also Nimmer & Nimmer, supra note 13, at 13-87 ("[I]n determining the scope and limits of fair use, reference must be made to pre- as well as post-1978 cases.").

30. For the full text of § 107(2), (3), and (4), see supra note 1.
The Supreme Court's unwarranted presumption of unfairness where a use is commercial should be discarded and replaced with a section 107 balancing test that looks to the actual substance of the use.

I. EXISTING INCONSISTENCIES IN THE APPLICATION OF THE FAIR USE DOCTRINE TO COMMERCIAL ADVERTISING

A. Fair Use for Commercial Advertising Under the Common Law

Prior to the passage of the Copyright Act, courts limited findings of fair use to non-commercial uses, reasoning that commercial uses did not advance society's interest in access to useful information. A commercial use generally was dismissed as "illegitimate." Interpreting fair use to apply only to works that advance science and the arts, these courts viewed use of a copyrighted work in an advertisement as per se unfair, and refused even to consider a fair use defense.

A competing doctrine applied to determine fair use was the "mere copying" rationale. Courts applying this approach determined whether the defendant's work provided new information to the public or whether the defendant "merely copied" information that already existed in the plaintiff's work. Although slightly more tolerant of commercial uses than the per se approach, this doctrine similarly disfavored commercial

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31. See, e.g., Wainwright Secs., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 94 (2d Cir. 1977) (fair use doctrine applicable only to works affecting the public's interest in dissemination of information involving areas of universal concern, such as art, science and industry); Amana Refrigeration, Inc. v. Consumers Union of United States, Inc., 431 F. Supp. 324, 326-27 (N.D. Iowa 1977) (advertising use is particular form of commercial use that is least likely to justify a fair use defense); Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (advertising is "purely" commercial and, therefore, not deserving of fair use protection).

32. See, e.g., Tennessee Fabricating Co. v. Moultrie Mfg., 421 F.2d 279, 284 (5th Cir. 1970) (defendant's use of photographs of plaintiff's copyrighted decorative screen in catalog not a "legitimate" purpose and, therefore not fair use); Associated Music Publishers, Inc., v. Debs Memorial Radio Fund, Inc., 141 F.2d 852, 855 (2d Cir. 1944) (defendant's use not within definition of fairness because use was for commercial purposes).

33. See, e.g., Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1354 (Cl. Ct. 1973) (fair use permitted only where copying is for scientific purposes); Telex Corp. v. IBM Corp., 367 F. Supp. 258, 362 (N.D. Okla. 1973) (fair use doctrine permits limited use of copyrighted material for such purposes as book reviews, newspaper articles, or scientific research, not profit-making); Henry Holt, 23 F. Supp. at 304 (defendant's use of three lines from plaintiff's book in commercial advertising not fair use since the fair use defense does not apply to commercial uses).


35. In Conde Nast, the plaintiff brought suit to enjoin the defendant from using the term "vogue" or past issues of Vogue magazine in the defendant's advertising. See Conde Nast, 105 F. Supp. 325. In considering the defendant's fair use defense, the Conde Nast court noted that the defendant copied the plaintiff's copyrighted work not to benefit the public but to make an unearned profit. See id. at 333.

Similarly in Robertson, the court held that defendant brewery's use of parts of plaintiff's song in its advertisement was not fair but mere copying of valuable parts of plaintiff's work. See Robertson, 146 F. Supp. at 798.
advertising. In applying the "mere copying" approach to commercial advertising, courts were more likely than not to deny fair use without examining the other elements of the fair use doctrine. Thus, although the per se approach—which deemed any commercial use unfair—and the "mere copying" rationale—which emphasized the commercial motive in determining fair use—may differ doctrinally, in application, both reveal the same bias against commercial advertising.

B. The Copyright Act of 1976: A Change in Form, Not in Substance

Congress codified the fair use doctrine in section 107 of the Copyright Act of 1976. Congress did not intend to change the doctrine but merely to restate it as it existed at common law. In adopting the common law unchanged, however, Congress sent a mixed message to the courts. By stating that the statute merely codifies fair use as it existed, Congress implicitly ratified the courts' treatment of commercial advertising under the per se and the "mere copying" approaches. Congress, however, also indicated that the commercial nature of a use is not dispositive since only one of the four factors set forth as a guide for determining fair use addressed the use's commercial nature. Given the conflicting messages embodied in the statute and its legislative history, the courts were left with no clear guidance.


A major source of confusion has been the statute's and legislative history's failure to indicate how the four factors of section 107 should be balanced. Congress nowhere delineates how much weight should be given to each factor or whether they are all of equal weight. Although this omission was intentional, the result in the courts appears to have

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36. See Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4901). For a list of the elements of the common law fair use defense, see supra note 4. Neither the Conde Nast court nor the Robertson court attempted to look at the other fair use factors. If the primary motive was commercial gain, defendant's use was automatically deemed unfair.


38. The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute . . . . Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.

Id.

39. See supra notes 31-36 and accompanying text.


41. See Nimmer & Nimmer, supra note 13, § 13.05[A], at 13-90.

42. See id.

43. Congress intentionally left the criteria vague so as to permit "each case raising the
been an ad hoc determination, based on each judge's subjective perception of what deserves fair use protection—a result Congress clearly did not intend.

The Act's confusion was also the impetus for the Supreme Court's creation of contradictory precedent in the fair use area. Although the Court has not ruled directly on the applicability of the fair use defense in the context of commercial advertising, it has addressed commercial use in other areas. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Court held that private "non-commercial" home taping of television programs for "time-shifting" purposes constituted fair use. Focusing on Congress' directive to consider the commercial nature of the use, the Court stated in dictum that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." This statement seems to imply that the first factor listed in section 107—purpose and character of the use—should be given great weight.

The Supreme Court has also stated, however, that the fourth factor listed in section 107—the effect of the use upon the potential market for or the value of the copyrighted work—is "undoubtedly the single most important element of fair use." Nevertheless, some courts seem to have ignored this statement. Although the fourth factor is regarded generally as the most important, several courts have seized upon the Supreme Court's clear disfavor for commercial uses to categorically deny advertisements fair use protection.

The Copyright Act's failure to clarify the common law doctrine's ambiguities, although intended to maintain flexibility, has generated a great deal of uncertainty. The Act essentially has left determinations of fair use entirely in the hands of the courts. This absence of clear guidance has rendered a once equitable doctrine a tool of judicial fancy.

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44. See Dratler, supra note 5, at 255-56 ("[D]ecisions based on balancing often turn on the personal value systems of judges."); see also supra notes 63-67 and accompanying text (for cases revealing the subjectivity involved in fair use decisions in the commercial use area).


46. See Harper & Row, 471 U.S. at 561; *Sony*, 464 U.S. at 448-51.


48. See id. at 456.

49. *Id.* at 451 (emphasis added).


51. See infra note 63.

52. See Nimmer & Nimmer, supra note 13, § 13.05[A], at 13-102.4.

53. The Court's disfavor is manifested in its creation of a presumption of unfairness for all commercial uses. See supra note 49 and accompanying text.

54. See infra notes 61-63 and accompanying text. These courts essentially ignore the Court's statement in *Harper & Row*.

55. See Abramson, supra note 10, at 154.
2. Courts’ Continued Adherence to Traditional Notions: Perpetuating the Common Law’s Inconsistencies

Although a complete reading of the Copyright Act suggests that the commercial nature of a use is but one factor to consider,\(^5\) the ambiguity of Congress’ actions has enabled several courts to adhere to the traditional view that commercial advertising cannot qualify for fair use.\(^6\) In contrast, other courts, relying on legislative history to clarify the statute, have adopted the view that the commercial nature of a use is only one factor in a four-prong balancing test.\(^7\)

These two conflicting views are particularly noticeable in the courts’ treatment of commercial advertisements that are parodies.\(^8\) The Second Circuit has consistently found that “an author is entitled to more extensive use of another’s copyrighted work in creating a parody than in creating other fictional or dramatic works.”\(^9\) This presumption of fair use for works that parody does not, however, apply in the context of commercial advertising.\(^10\)

When confronted with a commercial use, courts have resorted to the Supreme Court’s stated disfavor for such uses.\(^11\) They have treated the first factor of section 107—purpose and character of the use—not merely as a rebuttable presumption but as dispositive on the issue.\(^12\)

\(6\) See infra notes 61-63 and accompanying text.
\(7\) See infra notes 64-67 and accompanying text.
\(11\) See supra note 49 and accompanying text.
\(12\) In Tin Pan Apple, 737 F. Supp. 826, the District Court for the Southern District of New York held that a Miller beer advertisement that allegedly copied parts of the Fat Boys rap group’s sound recordings, did not constitute fair use. The court found that “appropriation of copyrighted material solely for personal profit, unrelieved by any creative purpose, cannot constitute parody as a matter of law.” Id. at 831. Ironically, however, the court never bothered to examine whether the advertisement in fact was relieved by a creative purpose. Instead, upon identifying profit as the primary motive, the Tin Pan Apple court ended its analysis.

Similarly, in DC Comics, 205 U.S.P.Q. at 1178, Judge Leval held that an advertisement
A competing interpretation of section 107 accepts commercial advertisements as a valid form of fair use.\textsuperscript{64} Courts adopting this view rely on congressional intent, as gleaned from the statutory language and legislative history, to clarify the ambiguities of the statute,\textsuperscript{65} and conclude that the commercial nature of the use is not dispositive but merely one of four factors to consider.\textsuperscript{66} Under this approach, the pivotal issue is not the purpose and character of the use but the market effect on the copyrighted work.\textsuperscript{67} Accordingly, where the use is commercial in nature but does not affect the value of the copyrighted work, a fair use claim is accepted.

\section*{C. The Supreme Court's Unfounded Presumption of Unfairness for Commercial Uses}

\subsection*{1. Lack of Statutory Support}

Based on Congress' explicit reference to a "commercial" use, juxtaposed as the opposite of a "nonprofit educational" use,\textsuperscript{68} the Supreme Court of the United States has repeatedly held that commercial advertisements are not fair use. However, the Court has also noted that the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, should be considered.\textsuperscript{69} Therefore, the Court has not established a blanket presumption of unfairness for commercial uses.


\textsuperscript{65} See supra notes 37, 38 and accompanying text.

\textsuperscript{66} In Consumers Union, 724 F.2d 1044, the Second Circuit held that the fair use defense permitted a manufacturer to quote from a copyrighted Consumer Reports article in a television advertisement for its product. Judge Timbers pointed out that although the purpose of defendant's use was undoubtedly commercial, "this fact alone does not defeat a fair use defense." \textit{Id.} at 1049. The court found that although motivated by purely commercial concerns, advertisements also serve the purpose of informing the public. \textit{See id.}

Although Consumers Union ordinarily would serve as decisive precedent for the other Second Circuit courts, this has not been the case. \textit{See supra} notes 61-63 and accompanying text. It appears that in the copyright area in general, precedent has little value. \textit{See Abramson, supra} note 10, at 165. Abramson suggests that the wide discretion given the courts by Congress in \textsection{107} renders judges less bound by prior decisions than they might otherwise be. \textit{See id.} Judge Haight, in his \textit{Tin Pan Apple} decision, did not even mention Consumers Union. The reasons for this odd phenomena in the copyright area is beyond the scope of this Note.

In Eveready Battery Co., 765 F. Supp. 440, the Northern District of Illinois held that Coors' advertisement parodying the Energizer Bunny commercial was fair use. The court noted that the commercial objective of the Coors advertisement was only one factor to consider and disapproved of the analysis in \textit{Tin Pan Apple}. \textit{See id.; see also supra} note 63 and accompanying text (more detailed analysis of the \textit{Tin Pan Apple} decision).

\textsuperscript{67} In Triangle Publications, 626 F.2d 1171, the Fifth Circuit held that defendant's reproduction of a \textit{T.V. Guide} cover in its comparative advertisement was fair use. Stressing the fourth factor of \textsection{107}—the effect on the commercial value of the copyrighted work—the court found no injury. \textit{See id.} at 1177.

\textsuperscript{68} Section 107(1) directs the courts to consider whether "the purpose and character of the use, \textit{including} whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. \textsection{107}(1) (1988 & Supp. II 1990) (emphasis added) (text of
Court, in *Sony Corporation of America v. Universal City Studios, Inc.*, created a presumption of unfairness for all commercial uses. This presumption, however, is overbroad and is inconsistent with a complete reading of the statute and its legislative history. Section 107(1) mentions the commercial or nonprofit nature of a use but nowhere indicates that any sort of presumption should apply. The legislative history states that the commercial or nonprofit nature of a use is not conclusive but merely one factor to be weighed. Indeed, elsewhere in the statute, Congress explicitly states its aversion to bright-line distinctions between nonprofit and commercial use.

Ironically, the Supreme Court in *Sony* disapproved of the circuit court's attempt to create oversimplified distinctions. In rejecting the Ninth Circuit's presumption against non-productive fair use, Justice Stevens admonished that "the question is not simply two-dimensional" and that "Congress has plainly instructed [the courts] that fair use analysis calls for a sensitive balancing of interests." Although the Court appeared to recognize the legislative mandate to balance the four fair use factors, it inexplicably created a sweeping presumption against commercial fair use.

By offering these two opposite types of uses as examples of characteristics to consider, Congress appears to be saying that one is favored (the nonprofit educational use) and the other is disfavored (the commercial use).

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70. See id. at 451.
72. See 17 U.S.C. § 107(1) (1988 & Supp. II 1990) (text of statute at *supra* note 1). In fact, Congress' use of the word "including" in § 107(1) indicates that reference to the commercial nature of a use is meant merely as an example of the types of characteristics that should be examined and not as an indication of a disfavored status. 17 U.S.C. § 101 (1988 & Supp. II 1990) defines "including" as "illustrative and not limiting." 73. "This amendment is... an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions." House Report, *supra* note 3, at 66, reprinted in 1976 U.S.C.C.A.N. 5659, 5680 (emphasis added).
74. In discussing the exclusive rights of copyright holders under § 106, Congress stated: The line between commercial and "non-profit" organizations is increasingly difficult to draw. Many "non-profit" organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write. *Id.* at 62-63, reprinted in 1976 U.S.C.C.A.N 5659, 5676. Although this excerpt focuses on Congress' reason for abandoning a "for-profit" limitation on exclusive performance rights, its logic is equally applicable to fair use.
76. For a discussion of the concept of productivity in fair use, see *infra* notes 113-21, 142-53 and accompanying text.
77. *Sony*, 464 U.S. at 455 n.40.
78. See *id.* at 451.
2. Court's Presumption is Unworkable

In addition to the Court's contradictory actions and the lack of a statutory basis for its presumption against commercial fair use claims, there are two major problems in adopting this presumption to distinguish fair from unfair uses. First, there is the problem of "double counting." The *Sony* Court indicated that the presumption shifts the burden of proof from the copyright holder to the alleged infringer. The copyright holder, upon showing that the use was intended for commercial gain, satisfies the burden of showing "some meaningful likelihood of future harm"—the fourth factor of section 107. Examining the use's commercial nature, therefore, becomes another way of determining whether the fourth factor has been met. In effect, the copyright owner is getting double protection in that she is able simultaneously to satisfy two prongs of the test with one piece of evidence. This is double counting because each factor subsequently is tallied separately before it is balanced against the other factors.

The second problem involves the ambiguity of the term "commercial." In *Sony* and *Harper & Row Publishers, Inc. v. Nation Enterprises,* the term was used in two markedly different ways. In the majority opinion in *Sony,* Justice Stevens equated "commercial" with money-making when he used the term as the opposite of nonprofit. Justice O'Connor, attempting to clarify Justice Stevens' definition, stated that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." Because of this ambiguous Supreme Court guidance, the user would find it difficult to tailor his activities so as to avoid infringement.

Moreover, the Court's definition is overinclusive. Application of either definition to any use of a copyrighted work potentially results in a presumption of unfairness in most instances. Very few "works of authorship" are undertaken with no intention of ever making money.

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80. See *Sony,* 464 U.S. at 451.
81. *Id.* (emphasis omitted).
82. See Fisher, supra note 79, at 1673.
83. See *Id.*
85. See Fisher, supra note 79, at 1673.
89. "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." *Mazer v. Stein,* 347 U.S. 201, 219 (1954);
Whether it be the cancer researcher working for a university for a salary or the commercial advertiser attempting to sell his product, both have the same incentive—remuneration. Admittedly, the fact that the researcher’s money-making incentive may be secondary or tertiary as opposed to the advertiser’s, whose profit incentive is primary, is a valid consideration. This aspect of the commercial nature of the use, however, was not factored into Justice Stevens’ definition in the majority opinion in *Sony.* Thus, it appears that Justice Stevens’ definition derives from a subjective desire to afford the cancer researcher more protection than the commercial advertiser, not from an impartial examination of the term commercial. Granting more protection to a cancer researcher may, in fact, be preferable. Achieving this by manipulating the meaning of the statute in contravention of the legislative history, however, creates confusion and decreases the authoritative value of the Court’s decisions in the fair use area.

Justice O’Connor’s definition in *Harper & Row* is equally inadequate. According to her definition, the fact that the alleged infringer’s sole motive is money-making is inconclusive. Justice O’Connor defined commercial as a form of exploitation where the user profits without paying the customary price. Rather than clarifying Justice Stevens’ interpretation, however, this definition creates further confusion. First, the whole purpose of the fair use doctrine is to allow the use of others’ works without requiring that a fee be paid. Including a failure to pay the “customary price” as part of the definition of commercial is therefore circular. Second, Justice O’Connor’s definition of commercial has the same shortcoming as Justice Stevens’ definition—very few activities in the area of copyright are undertaken with no intention of earning a profit. The copyright law was enacted to give people the incentive to create, and a

*see also* *Harper & Row,* 471 U.S. at 592 (Brennan, J., dissenting) (emphasis omitted) ("Many uses § 107 lists as paradigmatic examples of fair use, including criticism, comment, and news reporting, are generally conducted for profit in this country, a fact which Congress was obviously aware when it enacted § 107."); Abramson, *supra* note 10, at 155 ("To disfavor uses for profit may be to disfavor virtually all uses of copyrighted material.").


91. *See,* *e.g.,* Dratler, *supra* note 5, at 341 ("Failure to adhere to Congress’ plan—so well illustrated by the Supreme Court’s *Sony* and *Nation Enterprises* ‘presumptions’—will only sow confusion and uncertainty in the lower courts."). This effect is evident also in the lower courts’ refusal to abide strictly by the Court’s presumption of unfairness for all commercial uses. *See supra* notes 64-67.


93. *See* id.; *see also supra* text accompanying note 87.

94. *See* *Harper & Row,* 471 U.S. at 562.

95. Fair use “is the class of uses for which copyright owners must license their material whether they choose to or not and receive nothing for such licensing.” *T. Brennan, Harper & Row v. The Nation: Copyrightability and Fair Use,* U.S. Dep’t of Justice, Antitrust Division, Economic Policy Office Discussion Paper, 12-18 (1984).

96. *See supra* note 89 and accompanying text.
large part of that incentive is monetary. Thus, in application, the “profit” and “customary price” components of Justice O’Connor’s test are ineffective in defining a commercial use.

Moreover, a literal application of this presumption to commercial advertising could result in a categorical exclusion of commercial advertisement from fair use protection. Given that a partially commercial use is presumptively unfair, as Sony and Harper & Row indicated, commercial advertisements, which are purely commercial in nature, should expect no protection. It would hardly be a leap in logic for lower courts to conclude that such uses are per se unfair. This result clearly would be antithetical to congressional intent.

II. THE ROLE OF THE FIRST AMENDMENT IN FORMULATING A PROPER STANDARD

A. Fair Use: The Compromise Between the Copyright Law and the First Amendment

The formidable barrier that the Supreme Court has erected for commercial advertisements seeking fair use protection undermines the purpose of the fair use doctrine. The fair use doctrine traditionally has been considered a means of resolving the tension in copyright law between the desire to reward creators and the need to disseminate information and ideas to the public. By excepting certain uses from the owner’s exclusive control, the fair use doctrine permits greater dissemination, thus resolving First Amendment concerns.

The Court’s presumption of unfairness for commercial uses threatens to destroy this delicate balance in the copyright law. Although the Court has not held that purely commercial uses can never be fair use, its presumption of unfairness in effect accomplishes the same result. The Court’s presumption places an undue burden upon the user to show that her work in fact does not affect the potential market for or the value of the copyrighted work.

The difficulty of proving this negative is both unjust and unnecessary in light of the Supreme Court’s commercial free

97. See supra note 89.
98. See Fisher, supra note 79, at 1673.
99. Use of a copyrighted work in a commercial advertisement is regarded as a “purely” commercial use because its sole purpose is to promote the sale of goods and services for profit. See, e.g., Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (pamphlet intended to promote sale of defendant’s product advanced a purely commercial purpose); Aho, supra note 16, at 842 (advertising purely commercial).
100. See supra notes 71-74 and accompanying text.
102. See supra notes 10-12 and accompanying text.
speech jurisprudence.\textsuperscript{104}

B. Supreme Court's Presumption Ignores the Commercial Free Speech Doctrine

In \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.},\textsuperscript{105} the Supreme Court held that a state cannot prohibit pharmacists from advertising their prices and thereby established the modern commercial free speech doctrine.\textsuperscript{106} The Court found that the free flow of commercial information is necessary to enable the public to make knowledgeable decisions in a free market economy.\textsuperscript{107} The Supreme Court's commercial free speech doctrine demonstrates that commercial advertising can serve as important a role in disseminating information as any non-commercial activity.\textsuperscript{108}

By making it difficult for commercial advertisements to qualify for fair use, the Court ignores its own doctrine of commercial free speech.\textsuperscript{109} Because the very purpose of the fair use doctrine is to promote greater dissemination of information to the public and because commercial advertisements further this goal, advertisements\textsuperscript{110} claiming fair use should not be saddled with a nearly unrebuttable presumption.\textsuperscript{111}


\textsuperscript{105} 425 U.S. 748 (1976).

\textsuperscript{106} See id. at 763.

\textsuperscript{107} See id.; see also \textit{Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York}, 447 U.S. 557 (1980) (holding that regulation that completely bans electric utility from advertising violates First Amendment).

\textsuperscript{108} The \textit{Virginia State Board} Court stated that the consumer's interest in the content of commercial advertising "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." \textit{Virginia State Bd.}, 425 U.S. at 763; see also \textit{Consumer Union of United States, Inc. v. General Signal Corp.}, 724 F.2d 1044, 1049 (2d Cir. 1983) (defendant's use of favorable copyrighted language from a \textit{Consumer Reports} article in its advertising fair use because served the important educational function of informing the public); \textit{Wolff v. Institute of Elec. and Elecs. Eng'rs}, 768 F. Supp. 66, 68 (S.D.N.Y. 1991) ("[T]he fair use doctrine will not apply absent a significant public interest justifying limits on the copyright holder's rights.") (quoting \textit{Strauss v. Hearst Corp.}, 8 U.S.P.Q. (BNA) 1832, 1835 (S.D.N.Y. 1988)).

\textsuperscript{109} Although the Court addressed the First Amendment in \textit{Harper & Row}, its discussion was with respect to using the First Amendment as fall-back defense where the use is found unfair. See \textit{Harper & Row, Publishers, Inc. v. Nation Enters.}, 471 U.S. 539, 556-60 (1985). The Court has never addressed the First Amendment problem that arises as a result of the creation of a presumption of unfairness for commercial uses.

\textsuperscript{110} This conclusion assumes that the advertisement claiming fair use meets all of the Supreme Court's commercial speech requirements, namely that it "is neither misleading nor related to unlawful activity." \textit{Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n}, 447 U.S. 557, 564 (1980).

\textsuperscript{111} The Court's stated reason for the presumption is that commercial uses usually involve injury to the copyrighted work's market. See \textit{Sony Corp. of Am. v. Universal City Studios, Inc.}, 464 U.S. 417, 451 (1984). This reasoning, however, confounds the first and the fourth factors of § 107 and, in effect, gives the copyright owner the benefit of meeting two of the § 107 factors simultaneously. As discussed earlier, this type of double-counting gives an unfair advantage to the original user. See \textit{supra} notes 79-82 and
Although the commercial free speech doctrine should not become a fifth factor in the fair use analysis or an alternative defense when a fair use claim fails, its concerns and underlying goals should be considered in analyzing the nature of the use.\(^\text{112}\)

III. TOWARDS A COHERENT FAIR USE STANDARD FOR COMMERCIAL ADVERTISING

A. Alternative Approaches to Assessing Fair Use for Commercial Advertising

In an effort to find a more workable standard, several commentators have posited various alternative tests to determine fair use. These proposals reflect the important values underlying the copyright law and merit discussion.

1. The Productive Use Test

The productive use test is based upon the fundamental premise of copyright—to encourage new creations for the benefit of society.\(^\text{113}\) Pursuant to this scheme, a use of a copyrighted work that is deemed “fair” would seek to encourage creativity.

According to Professor Seltzer, fair use should not be permitted for the “mere reproduction” of a work in order to use it for its intrinsic purpose—to make, what he calls, an “ordinary” use of it.\(^\text{114}\) Instead, fair use should be a “use that is necessary for the furtherance of knowledge, literature, and the arts AND does not deprive the creator of the work of an appropriately expected economic reward.”\(^\text{115}\)

Similarly, Judge Leval’s productive use approach focuses on the utilitarian goals of copyright law as a whole.\(^\text{116}\) His test requires that a use accompanying text. Whether a use injures the copyrighted work’s market must be decided and tallied separately as a preliminary step in the balancing process if the statutorily-mandated balancing test is to retain any validity.

112. Some commentators have argued against allowing the First Amendment to play a role in fair use analysis for fear it will usurp copyright law altogether. They contend that all commercial advertising can be said to inform the public, thus making it difficult to determine where the line should be drawn. See, e.g., Note, Fair Use and the First Amendment Protect Commercial Advertising: Consumers Union of the United States, Inc. v. General Signal Corp., 17 Conn. L. Rev. 835 (1985); Note, Consumer’s Union of United States, Inc. v. General Signal Corp.: Commercial Free Speech and the Fair Use Doctrine of Copyright, 16 Loy. U. Chi. L.J. 85 (1984). However, if First Amendment concerns are integrated into only the first factor, the other three factors will serve as a check. Thus, only those advertisements that inform, do not take more from the copyrighted work than is necessary, and do not injure the copyrighted work’s market in any meaningful way are deemed fair use. See infra notes 143-76 for a more developed presentation of this proposal.

113. See U.S. Const. art. I, § 8, cl. 8.


115. Id.

meet two basic criteria: it must "serve[ ] the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." 117

In analyzing the first factor of section 107—the purpose and character of the use—Judge Leval argues that for fair use to be a viable defense the purported use must be justifiable. 118 Upon determining that justification exists, the question still remains as to the strength of that justification. 119 According to Judge Leval, "[T]he answer to this question turns primarily on whether, and to what extent, the challenged use is transformative." 120 A use that merely takes the copyrighted work and "repackages" it cannot qualify as a transformative use. 121

2. The Market Factor Approach 122

The market approach parallels Judge Leval's but adds a third criteria. According to Professor Gordon, for a use to qualify as fair, three requirements must be met: "(1) defendant could not appropriately purchase the desired use through the market; (2) transferring control over the use to defendant would serve the public interest; and (3) the copyright owner's incentives would not be substantially impaired by allowing the user to proceed." 123 In Professor Gordon's view, the "productive" aspect of a use is merely a "secondary indicator" that the three primary requirements have been satisfied. 124

By allowing the copyright owner to obtain as large a share of the profit as she can through negotiations with the proposed user, 125 the market approach recognizes the copyright owner's property interests. Thus, so long as the copyright owner is willing to transfer her rights through sale or licensing, the concerns of the fair use doctrine are not implicated. 126 If the owner, however, is not interested in profit and has an "anti-dissemination motive[ ]," 127 her refusal to license the use "out of a desire unrelated to the goals of copyright" constitutes a market failure, which strengthens the argument for a finding of fair use. 128

117. Id.
118. See id. at 1111.
119. See id.
120. Id. To be transformative a use must be productive and must employ the copyrighted work in a "different manner or for a different purpose" than the original. Id.
121. Id. (quoting Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901)).
123. Id. at 1601.
124. See id. at 1652-55.
125. See id.
126. See id. at 1615-17.
127. Id. at 1632.
128. See id. at 1632-34.
3. Working Within the Framework of Section 107

Professor Dratler's approach attempts to work within the framework of section 107. Emphasizing the dual copyright goals of "fostering creativity and encouraging wide dissemination and use of creative works," he argues that section 107 provides adequate guidance for achieving these goals. Professor Dratler contends that for the statutory scheme to work as intended, courts must respect congressional mandates. One such mandate is for the courts to consider all four specific factors and not choose amongst them as they please. To this end, Professor Dratler urges that courts keep the four factors analytically distinct and examine separately any additional considerations, such as bad faith.

Finally, Professor Dratler insists that a court must conduct a proper balancing of all four factors, along with any other factors that it finds relevant. This balancing, he argues, is crucial both to reach a reasoned conclusion in each case and to provide a consistent basis for comparing fair use decisions based on differing facts. Professor Dratler's proposal concludes by admonishing that the failure to adhere to Congress' plan—"so well illustrated by the Supreme Court's Sony and Nation Enterprises 'presumptions'"—will inevitably lead to confusion and incoherence.

4. The Utopian Notion

Unlike Professor Dratler, Professor Fisher sees no hope for the current statutory scheme or the Supreme Court's fair use decisions. Rejecting both as beyond redemption, Professor Fisher offers two reconstructions of the fair use doctrine: one that strives to attain economic efficiency and another that seeks "a vision of the good life," or more specifically, "a substantive conception of a just and attractive intellectual culture." Professor Fisher's second reconstruction is not confined to the utilitarian copyright considerations of other commentators. Instead, it goes beyond utilitarianism altogether and includes creativity as an element of personal fulfillment and recognition of entitlement and dessert.

130. Id. at 245-47.
131. See id. at 288-89.
132. See id. at 341.
133. See id.
134. See id.
135. See id.
136. Id. at 341.
137. See supra notes 113-36 and accompanying text.
138. See id.
139. Id. at 1744.
140. See supra notes 113-36 and accompanying text.
141. See Fisher, supra note 137, at 1744-62.
Recognizing that such an expansive overhaul of the statute is unlikely in the near future, Professor Fisher also proposes a more "modest" approach. Under this approach, he calls for the courts to weigh the extent to which a finding of fair use would decrease the incentive to create copyrighted works against the social good of the use.\footnote{See id. at 1780-83. Social good of a use would include the increased availability of creative works, greater public access to "information and debate on matters of public importance," and the availability of materials to teachers for their courses. Id. at 1782. Professor Fisher specifically excludes consideration of customary practice and the user's good or bad faith. See id. at 1783 n.533.}

B. The Productive Use Test as the Most Coherent Standard

That copyright law has been successful in accommodating First Amendment concerns is due mainly to the fact that both constitutional doctrines share similar goals and purposes.\footnote{See supra note 11 and accompanying text. A thorough discussion of the interplay between the First Amendment and copyright law is beyond the scope of this Note. For a comprehensive discussion of this issue, see generally David E. Shipley, Conflicts Between Copyright and the First Amendment After Harper & Row, Publishers v. Nation Enterprises, 1986 B.Y.U. L. Rev. 983, 991-95; Paul Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983 (1970); Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U.C.L.A. L. Rev. 1180 (1970); Celia Goldwag, Copyright Infringement and the First Amendment, 79 Colum. L. Rev. 320 (1979); Jeffrey Oakes, Note, Copyright and the First Amendment, 33 U. Miami L. Rev. 207 (1978); Leonard W. Wang, Note, The First Amendment Exception to Copyright: A Proposed Test, 1977 Wis. L. Rev. 1158.} One of the basic purposes of the Copyright Clause of the Constitution, and therefore the Copyright Act,\footnote{U.S. Const. art. I, § 8, cl. 8, provides the authority for Congress' enactment of the Copyright Act.} is to encourage creative endeavors in order to benefit the public.\footnote{"The monopoly privileges that Congress may authorize are ... intended to motivate the creative activity of authors and inventors." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); see also 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 for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").} This stimulates contributions to the "marketplace of ideas,"\footnote{Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (citation omitted).} thus furthering First Amendment concerns as well. Therefore, in order to maintain the harmony between copyright and the First Amendment, a proper fair use standard should look to the purposes of copyright as a basis.\footnote{The Supreme Court in Sony recognized the need to maintain this harmony when it concluded that an interpretation of the Copyright Act necessarily "involves a difficult balance between the interests of authors ... in the control and exploitation of their writings ... on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1985).} At the heart of the copyright law is the concept of productivity.\footnote{The Copyright Clause of the Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inven-
One salient example is the idea/expression dichotomy. By affording copyright protection only for expressions and not for ideas, the law seeks to encourage creators to build upon the ideas of others, thereby producing new works. Section 107's listed examples of fair use suggest a legislative intent to permit this privilege only for productive uses. Similarly, the incentive built into the copyright law rewards production of new works of authorship. Therefore, the focus of the "purpose and character" factor of section 107 should be whether the allegedly infringing use furthers the productive goals of the copyright law.

A "productive" use is one that intends to build upon and perform functions different from the copyrighted work. Such a use does not merely reproduce the original copyrighted work and use it for its "ordinary" purpose. In determining whether a work falls within a favored "productive" category, courts may consider the degree of originality and the value of the use to the public.

Applying the productive use standard to commercial advertising best satisfies the aims of the copyright law. By requiring that an advertisement that takes from a copyrighted work add originality and serve a public interest, this standard comports with goals that underlie both the copyright law and the First Amendment. The basic rationale for the Supreme Court's commercial free speech doctrine is that commercial speech, in particular advertising, serves the important public service of informing consumers. For an advertisement that uses a copyrighted work to satisfy this standard it must offer new information—a central requirement of the productive use test.
C. Application of the Productive Use Test: Greater Consistency and Predictability

In determining fair use for commercial advertisements, the courts must weigh all four factors in section 107. A consistent procedure for application of the productive use test, in conjunction with the other factors of section 107, must be followed.

Under the Supreme Court's fair use analysis, the first factor to be examined is the "purpose and character" of the use. At this point, if the plaintiff shows that the defendant's use is commercial, his burden of production is satisfied. The burden then shifts to the defendant to rebut the presumption by demonstrating that the other three factors are in his favor.

This process, however, is counterproductive. As discussed earlier, the Supreme Court has stated that the fourth factor—the effect of the use upon the potential market for or the value of the copyrighted work—is dispositive. Hence, this factor should be the first examined since it is unnecessary to go through the other three factors if market injury can be shown under section 107(4). If analysis under section 107(4) reveals no likelihood of an effect on the value or the potential market for the copyrighted work, the court would then examine the other three factors. The court should next examine the purpose and character of the use. Applying the productive use test, the court should ascertain whether the defendant's advertisement performs a different function from that of the copyrighted work. If the advertisement does not pass the productive use test, there is, once again, no need for the court to proceed and consider the other factors. An advertisement that neither serves a different function nor adds to the copyrighted work in some way cannot be considered fair. Such an advertisement does not meet the ultimate goal of

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158. See Sony, 464 U.S. at 448-51 & nn.30, 32.
159. See id.
160. See supra note 49 and accompanying text.
162. See supra notes 113-21 and accompanying text.
163. See supra notes 113-21 and accompanying text.
informing the public because the information is already available.\footnote{164}

If the advertisement meets the productive use test, the court must evaluate the remaining two factors. The amount and substantiality of the portion used\footnote{165} should be the next factor considered. Section 107(3) assesses the amount and substantiality of the portion used in relation to the copyright work as a whole.\footnote{166} This factor should be used to further refine the findings under the first two factors discussed.\footnote{167} A use that takes a substantial amount from the original, whether qualitatively or quantitatively, would have difficulty showing sufficient originality.\footnote{168} Such a use, moreover, is likely to affect the value and potential market of the copyright holder's work. The concerns of this factor, therefore, are inevitably considered under the analysis of the purpose-and-character and market-effect factors.\footnote{169} Hence, an examination of the degree and substantiality of the portion used merely serves as a double-checking mechanism.

Finally, the court should consider the nature of the copyrighted work.\footnote{170} This factor takes into consideration the varying degrees of protection that is given to different types of works.\footnote{171} Analysis under this factor usually entails categorizing the copyrighted work "on the spectrum between fact to fancy."\footnote{172} If an advertisement borrows from a factual or informational work, fair use is more likely to be found.\footnote{173} If an advertisement borrows from a poem or a movie, however, the fair use hurdle will be more difficult to overcome.\footnote{174} In this case, the degree of originality is more closely scrutinized. The requisite level of creativity, therefore, will be higher.

The rationale for the differentiation between types of copyrighted

\footnote{164. See supra note 145 and accompanying text.}
\footnote{166. See id.}
\footnote{167. To summarize, the two factors discussed were the market effect factor under § 107(4) and the "purpose and character of the use" factor under § 107(1). See supra notes 160-64 and accompanying text.}
\footnote{168. To show sufficient originality, a use must be creative and imaginative. A use that takes the essence of another's work leaves little room for such originality. See Dratler, supra note 129, at 310-12.}
\footnote{170. Id. § 107(2).}
\footnote{171. In assessing the nature of the copyrighted work the court "may consider . . . whether the work was creative, imaginative, and original." MCA, Inc. v. Wilson, 677 F.2d 180, 182 (2d Cir. 1981).}
\footnote{172. Dratler, supra note 129, at 303-09.}
\footnote{173. See, e.g., Diamond v. Am-Law Publishing Corp., 745 F.2d 142, 148 (2d Cir. 1984) (creative works are entitled to more protection than those that are informational); Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) (finding plaintiff's magazine "primarily informational rather than creative" widens scope of permissible fair use). See generally Goldwag, supra note 143, at 326 n.42 ("[C]ourts have tended to be most receptive to unauthorized use of educational, scientific, and historical works.").}
\footnote{174. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984).}
works is, once again, the public interest.175 In the case of a factual work, the copyright owner merely compiles facts already in the public domain, albeit in fragmented form; whereas, with creative or expressive works, the author is contributing his own ideas and original thoughts to the "marketplace of ideas." This distinction has led courts to conclude that this type of "author" deserves more protection, with the ultimate reason being to encourage others to undertake the extra effort involved in the creation of such works.176

CONCLUSION

The proper standard for assessing the "purpose and character" of a commercial advertisement asserting the fair use defense must be based on the general policy underlying the copyright law. The productive use standard best meets this criterion by requiring that a use build upon the copyrighted work in a creative and informative manner, without causing any meaningful harm to the copyright work's market. Under this standard, the original copyright owner continues to reap the benefits of his creation while the user is rewarded for his added work. The ultimate beneficiary is the public, which now has two sources of information as opposed to one.

The productive use standard further satisfies First Amendment concerns by allowing commercial advertisements to qualify for fair use. This standard should displace the Supreme Court's presumption of unfairness where a commercial use is involved. Unlike the Court's presumption, the productive use standard incorporates the commercial free speech doctrine, and, therefore, maintains the delicate balance between the copyright goal of rewarding creators and the First Amendment objective of protecting freedom of expression.

175. See supra note 145 and accompanying text.
176. See supra note 173 and accompanying text.