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“I Have a [Fair Use] Dream”: Historic Copyrighted Works and the Recognition of Meaningful Rights for the Public

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Abstract

Dr. Martin Luther King wrote and delivered his famous “I Have a Dream” speech more than fifty years ago. When he obtained copyright protection on the speech in 1963, Dr. King (and later his estate) would have expected the copyright to last a maximum of fifty-six years. That fifty-six-year copyright has become a ninety-five-year copyright, thanks to lengthy duration extensions enacted by Congress in the mid-1970s and late 1990s. As a result, the copyright on the “I Have a Dream” speech will not expire until the end of 2058. Because the Estate of Martin Luther King, Jr., Inc. and its affiliates have closely guarded the speech in a copyright enforcement and licensing sense, the public seldom sees more than snippets of one of the most highly regarded speeches in history. Greater public exposure to the full speech would serve important purposes of the sort recognized by Congress in the fair use section of the Copyright Act. However, those interested in borrowing from or otherwise using the speech have tended to drop their plans or have obtained a costly license from the King Estate or one of the affiliated entities—even when the users may have had a plausible right under the fair use doctrine to borrow from or use the speech without obtaining a license. With the copyright on the speech not expiring until the end of 2058, there is a danger that the snippets-only nature of the public’s exposure to the speech will remain the status quo for more than another four decades. Infringement cases that have not been settled by the parties have yielded judicial rulings on whether the “I Have a Dream” speech was properly copyrighted, but no case has been litigated extensively enough to permit a court to address the defendant’s fair use defense. This Article proposes a fair use analysis appropriate for use by courts in the event that a user of the “I Have a Dream” speech departs from the usual tendency to obtain a license in order to avoid litigation and, instead, rests its fate on the fair use doctrine. The proposed analysis gives a suitably expansive scope to the fair use doctrine for cases dealing with uses of the speech or similarly historic works, given the important public purposes that could be served by many such uses. The Article also develops a test for use in determining whether a work is sufficiently historic, for purposes of the fair use analysis proposed here.

KEYWORDS: Fair Use, Copyright

*The author acknowledges the helpful research assistance provided by Paul Lewellyn and Daniel Schiff.

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INTRODUCTION

More than fifty years have passed since Dr. Martin Luther King, Jr.'s "I Have a Dream" speech entered the national consciousness. On August 28, 1963, a crowd estimated at 200,000 saw and heard Dr. King deliver the speech in our nation's capital as part of the civil rights movement's March on Washington events.¹ Millions more watched television broadcasts of the speech or listened to radio transmissions of it.² Widely regarded as one of the greatest orations in modern times,³ "I Have a Dream"⁴ offered not

¹ Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1213 (11th Cir. 1999). At an event in Detroit two months earlier, Dr. King delivered a much shorter speech that contained some of the same words and ideas set forth in his later and considerably more well-known Washington, D.C. speech. The Detroit speech, which was untitled, included the "I have a dream" line. *Martin Luther King, Jr. v. Mister Maestro, Inc.*, 224 F. Supp. 101, 103 (S.D.N.Y. 1963).

² *CBS*, 194 F.3d at 1213.

³ See, e.g., Michiko Kakutani, *The Lasting Power of Dr. King's Dream Speech*, N.Y. TIMES, Aug. 27, 2013, <http://www.nytimes.com/2013/08/28/us/the-lasting-power-of-dr-kings-dream-speech.html>; Valerie Strauss, *'I Have a Dream' speech still private property*, WASH. POST, (Aug. 27, 2013), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/08/27/i-have-a-dream-speech-still-private-property>. See also *About Dr. King*, THE KING CENTER, <http://www.thekingcenter.org/about-dr-king> (last visited Apr. 19, 2015) (describing the reputation and impact of "I Have a Dream" speech in biographical section of Martin Luther King, Jr. Center for Nonviolent Social Change website).

⁴ This Article frequently uses the "I Have a Dream" phrase or title to identify the copyrighted work consisting of Dr. King's famous 1963 speech. Because the Article focuses on possible uses regarding the copyrighted speech, it makes no attempt to determine whether the King Estate should have *trademark* rights over the "I Have a Dream" phrase if the phrase is used in connection with something other than the famous speech itself. Although possible trademark issues are beyond the scope of the Article, it may be noted that the King Estate at one time had a federal trademark registration on the "I Have a Dream" phrase, for use in connection with a variety of products including such items as watches, ornamental pins, and t-shirts. Records of the US Patent and Trademark Office indicate that the trademark registration was abandoned in 1999. See U.S. Patent No. 75019950 (filed Nov. 8, 1995), *I Have a Dream* (abandonment date: June 29, 1999), <http://tmssearch.uspto.gov/bin/showfield?f=doc&state=4808:8le9vr.2.1>

only inspiration but also powerful insights that continue to resonate today.

Given the historic importance of “I Have a Dream” and of Dr. King himself, the speech might seem to belong to the ages. In a legal sense, however, it does not. Dr. King acquired copyright protection on the text of the speech in 1963.⁵ The copyright passed to his estate upon his assassination in 1968.⁶ Because the law in effect in 1963 contemplated a maximum of fifty-six years of copyright protection,⁷ the “I Have a Dream” copyright would have been set to expire at the end of 2019 if Congress had not changed the law. But Congress changed the law twice, enacting significant copyright duration extensions during the mid-1970s and late 1990s.⁸ As a result, the speech will remain under copyright protection through 2058.⁹ The eventual expiration of the copyright will cause the speech to pass into the public domain and become available for whatever use anyone wishes to make of it.¹⁰ However, until that

⁵ *Mister Maestro*, 224 F. Supp. at 104–08.

⁶ 17 U.S.C. § 304 (2012).

⁷ The then-applicable Copyright Act of 1909 called for a twenty-eight-year basic term plus a renewal term of twenty-eight years if the copyright owner took the necessary action to exercise the renewal right. Copyright Act of 1901, ch. 320, § 24, 35 Stat. 1075, 1080–81, *amended by* Copyright Act of 1976 (current version at 17 U.S.C. § 304 (2012)).

⁸ These extensions converted the renewal term that had been twenty-eight years into a sixty-seven-year renewal term. For explanation and discussion of the duration extensions, see *infra* Part I.C.

⁹ As the fiftieth anniversary of Dr. King’s delivery of the “I Have a Dream” speech drew near, various news accounts and short commentaries pointed out that, to the possible surprise of the public, the speech was under copyright and would remain so for a significant number of years. See, e.g., Strauss, *supra* note 3; Josh Schiller, *Why you won’t see or hear the “I have a dream” speech*, WASH. POST, (Aug. 27, 2013), http://www.washingtonpost.com/opinions/why-you-wont-see-or-hear-the-i-have-a-dream-speech/2013/08/27/09d2a07a-0e66-11e3-bdf6-e4fc677d94a1_story.html; Lauren Williams, *I Have a Copyright: The Problem With MLK’s Speech*, MOTHER JONES, Aug. 23, 2013, <http://www.motherjones.com/politics/2013/08/mlk-intellectual-property-problems>; Dustin Volz, *Why MLK’s “Dream” Is So Hard to Find Online*, NATIONAL JOURNAL, Aug. 19, 2013, <http://www.nationaljournal.com/daily/why-mlk-s-dream-is-so-hard-to-find-online-20130819>; Alex Pasternack, *Copyright King: Why the “I Have a Dream” Speech Still Isn’t Free*, MOTHERBOARD, (Jan. 17, 2012), <http://motherboard.vice.com/blog/copyright-king-why-the-i-have-a-dream-speech-still-isn-t-free>. The articles tended to recite the supposed fact that the copyright on the speech will run through 2038. See, e.g., Williams, *supra*; Volz, *supra*. However, as later explanation will reveal, that supposed time of expiration understates the actual time by twenty years. See *infra* Part I.C.

¹⁰ E.g., *Dastar v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003).

public domain date finally arrives more than four decades from now, Dr. King's estate can continue to exert control over the speech despite its considerable historical significance.

Copyright owners' rights, of course, are not of a monopoly nature.¹¹ Despite the general rule that infringement occurs when someone borrows a copyrighted work's expression without the copyright owner's permission, the fair use doctrine contemplates that those who engaged in unlicensed borrowing may sometimes avoid infringement liability.¹² However, the case-by-case nature of the fair use doctrine leads to uncertainty about when it will or will not apply.¹³ Relying on fair use as a supposed justification for borrowing from a copyrighted work can be an expensive proposition regardless of the case's outcome, thanks to the time-consuming factor-based analysis in which the parties and the court must engage when the fair use defense is invoked.¹⁴ Moreover, copyright owners often tend to be aggressive in enforcing their rights and inclined to ascribe a narrow scope to what they would consider fair use. The uncertainty associated with the fair use defense, coupled with a desire to avoid being sued, may cause would-be users of copyrighted works to back off from borrowings that would be plausible candidates for fair use protection. Alternatively, such considerations may influence users to borrow only small bits when more might have been justified, or to pay the copyright owner for a license when the application of fair use principles could have obviated the need for the license.¹⁵

¹¹ The statutory provision setting forth the rights of a copyright owner, 17 U.S.C. § 106 (2012), provides that the rights are subject to various limitations set forth in §§ 107 through 122.

¹² *Id.* §§ 107, 501.

¹³ *See, e.g.,* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560–61 (1985).

¹⁴ *See, e.g.,* *Campbell*, 510 U.S. at 578–94; *Harper & Row*, 471 U.S. at 561–69.

¹⁵ *See Campbell*, 510 U.S. at 585 n.18. *See also* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990) (observing that “[c]onfusion [about fair use] has not been confined to judges” and that “[w]riters, historians, publishers and their legal advisers can only guess and pray as to how courts will resolve [fair use issues] in copyright disputes”). Judge Leval's article has been influential in the development of fair use analysis—*see infra* note 239—but the case-by-case nature of the fair use doctrine continues to make outcomes in individual cases hard to predict.

Aggressive copyright enforcement practices appear to have had a chilling effect on possible uses of “I Have a Dream.” The King Estate’s enforcement stance features a general insistence on the need for a license if portions of the speech are to be used.¹⁶ Although it has not been involved in much actual litigation regarding uses of the speech, the King Estate has demonstrated a clear willingness to sue if need be.¹⁷ Those interested in using the speech have tended to opt for a license in order to avoid litigation even though their particular uses might have been both desirable and justified under the fair use doctrine.¹⁸ As a result, when we see the speech quoted or video of portions of it aired, we see snippets. They may be memorable, but they are snippets nonetheless.¹⁹ The bits and pieces we do get to read, see, or hear would be even more educational and enlightening in the context of the full speech.²⁰

When courts have decided copyright infringement cases dealing with unlicensed uses of “I Have a Dream,” the focus has been on a threshold question: whether the speech was validly copyrighted or whether it had entered the public domain under certain copyright-disqualifying principles that were part of US copyright law at the time the speech was delivered. One court has concluded

¹⁶ See *supra* note 9.

¹⁷ For discussion of the King Estate’s infringement lawsuits regarding the speech, see *infra* Part I.A. For discussion of other litigation dealing with the King Estate’s claims regarding other copyrighted works, items of personal property, or Dr. King’s public identity, see *infra* Part I.B.

¹⁸ See Volz, *supra* note 9; Andrew Beaujon, *MSNBC Licensed “I Have a Dream” Speech From King Family*, POYNTER INST., (Aug. 29, 2013 9:07 AM), <http://www.poynter.org/latest-news/mediawire/222446/msnbc-will-pay-king-family-to-air-i-have-a-dream-speech-today/>; Valerie Strauss, *King’s Fiery Speech Rarely Heard*, WASH. POST, Jan. 15, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/14/AR2006011400980.html>; see also Schiller, *supra* note 9 (asserting in newspaper op-ed that fair use protection should apply to certain unlicensed uses of Dr. King’s speech). Others potentially interested in using portions of Dr. King’s copyrighted works simply have given up on the idea. The producers of the recent movie *Selma* serve as an example. See *infra* text accompanying notes 122–24.

¹⁹ Strauss, *supra* note 3; Strauss, *King’s Fiery Speech Rarely Heard*, *supra* note 18.

²⁰ See Williams, *supra* note 9; Volz, *supra* note 9; Strauss, *King’s Fiery Speech Rarely Heard*, *supra* note 18; see also Beaujon, *supra* note 18 (noting that MSNBC planned to show the entire speech but had paid a licensing fee to the King Estate); Derek Khanna, *Guarding Against Abuse: The Costs of Excessively Long Copyright Terms*, 23 *COMMLAW CONSPICUUS* 52, 76 (2014) (citing lengthy copyright duration as a reason why entire speech is seldom seen).

that copyright protection attached to the speech,²¹ and another court has at least strongly suggested that conclusion.²² Neither court, however, addressed possible fair use arguments that the defendants might have had.²³

Hence, we do not know how courts would resolve the fair use question if users of significant portions of "I Have a Dream" departed from the usual tendency to be cautious about provoking litigation, refused to obtain a license from the King Estate, and invoked the fair use defense in the infringement lawsuit that would surely follow. We do know that in a roughly thirty-year-old decision, *Harper & Row, Publishers, Inc. v. Nation Enterprises*,²⁴ the Supreme Court stated that copyright law does not contemplate lesser rights for copyright owners whose works are of the "greatest importance to the public."²⁵ As will be seen, however, *Harper & Row* differs significantly in a contextual sense from cases that might arise over the use of "I Have a Dream." When *Harper & Row* is read in light of its context and with regard to later pronouncements by the Supreme Court, *Harper & Row* should not bar taking a work's historic character into account as part of the factor-based fair use analysis.²⁶

²¹ *Martin Luther King, Jr. v. Mister Maestro, Inc.*, 224 F. Supp. 101, 108 (S.D.N.Y. 1963). Discussion of the decision appears in Part I.A., *infra*.

²² *See Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1220 (11th Cir. 1999). In overturning a lower court's grant of summary judgment to the defendant, the Eleventh Circuit determined that it could not conclude as a matter of law what the defendant wanted it to conclude: that copyright protection did not attach to the speech under the then-applicable legal rules. *See id.* The Eleventh Circuit did not grant summary judgment in favor of the plaintiff copyright owner, however—meaning that the court stopped short of ruling as a matter of law that copyright protection did attach. *See id.* Even so, the decision suggests that had the case proceeded to trial, there would likely have been a determination in favor of the plaintiff on the question of whether a valid copyright existed. *See id.* at 1214–20. For further discussion of the *CBS* decision and the legal rules governing whether the 1963 speech was validly copyrighted, see *infra* text accompanying notes 61–79.

²³ *See infra* note 60; *infra* text accompanying note 78.

²⁴ 471 U.S. 539 (1985).

²⁵ *Id.* at 559.

²⁶ *See infra* text accompanying notes 286–93, 317–19.

Court decisions concerning the fair use defense are necessarily highly fact-specific.²⁷ Even so, this Article asserts that under a proper fair use analysis, some users of “I Have a Dream” could be well-positioned to invoke the fair use defense successfully if they overcome the usual tendency to obtain a license in order to avoid litigation. In offering such an analysis, the Article emphasizes the public benefit associated with an expansive approach to fair use when historic works such as “I Have a Dream” are at issue.²⁸ Due consideration of the public interest becomes especially important, as will be seen, because copyrights on such works now have a far longer duration than their owners expected to have under the law applicable when copyright protection arose.²⁹

Part I of the Article will deal with background concerning the “I Have a Dream” speech, the early litigation regarding unlicensed uses of it, the King Estate’s enforcement tendencies regarding the speech and other works of Dr. King, and the lengthy remaining duration of the copyright on the speech. Part II will provide an overview of copyright law’s fair use doctrine and leading cases in which courts have decided whether the doctrine applies. Particular attention will be paid to the previously noted *Harper & Row* decision and to *Campbell v. Acuff-Rose Music, Inc.*,³⁰ probably the most significant of the Supreme Court’s fair use decisions.

Building on the foundation laid in Parts I and II, Part III will furnish a detailed fair use analysis consistent with the above introductory remarks regarding potential uses of the “I Have a Dream” speech. In addition, Part III will consider other works of historic significance to which the proposed analysis should apply.

²⁷ *E.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006).

²⁸ *See infra* text accompanying notes 278–357.

²⁹ *See infra* text accompanying notes 126–51, 338–49.

³⁰ 510 U.S. 569 (1994).

I. THE SPEECH: COPYRIGHT PROTECTION, ENFORCEMENT, AND DURATION

A. *Cases Deciding Whether the Speech Was Validly Copyrighted*

As would be expected, given the nature and purposes of the March on Washington, Dr. King and the organizers of the event hoped to attract considerable public attention to his August 28, 1963 speech. They sought press coverage and received extensive amounts of it from print and broadcast outlets.³¹ Newspaper accounts of the speech and televised footage of it enabled readers and viewers to get a sense of what the huge live crowd experienced: a major historical figure's dynamic delivery of a profound, inspiring speech at a pivotal event in American history.³²

The significance of the "I Have a Dream" speech was not lost on entities that made prompt efforts to disseminate the speech widely despite having no affiliation with Dr. King or the March on Washington's organizers.³³ These efforts likely stemmed from a mixture of motives: a desire to inform and educate the public; a related interest in drawing attention to the cause of civil rights; and a recognition that it could be financially profitable to strike while the iron was hot.³⁴ The *New York Post*, for instance, went beyond reporting on the speech and sold reprints of it after printing its entire text in a regular issue of the newspaper.³⁵ Twentieth Century Fox Record Corporation ("Fox") made video and audio recordings of Dr. King's speech and other March on Washington speeches and used those recordings for a newsreel that was shown in movie theaters. Fox also produced and sold a phonograph record of the speech.³⁶ So did Mister Maestro, Inc., a media production and distribution company. These actions by Fox and Mister Maestro oc-

³¹ Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1213 (11th Cir. 1999); Martin Luther King, Jr. v. Mister Maestro, Inc., 224 F. Supp. 101, 103-04. (S.D.N.Y. 1963).

³² See CBS, 194 F.3d at 1213; *Mister Maestro*, 224 F. Supp. at 103-04.

³³ See *Mister Maestro*, 224 F. Supp. at 104, 105, 108.

³⁴ See *id.*

³⁵ *Id.* at 104.

³⁶ *Id.*

curred without Dr. King's consent, as did the *Post*'s sale of reprints of the speech's text.³⁷

Some of the above-described actions prompted Dr. King to institute copyright infringement litigation, and before 1963 ended, a federal court had ruled in his favor. In *King v. Mister Maestro, Inc.*,³⁸ the court issued a preliminary injunction barring Mister Maestro and Fox from further distribution of their recordings of the "I Have a Dream" speech.³⁹ The critical issue in the case was whether Dr. King held a valid copyright on his speech.⁴⁰

If today's copyright law had applied to the speech, the "Was there a valid copyright?" question would have been easy to answer because copyright protection would have arisen automatically under federal law once the speech was created and fixed in a tangible medium of expression.⁴¹ As of 1963, however, determining whether copyright protection had been acquired was a very different inquiry that depended heavily on whether the work was published or unpublished.⁴² The law in effect at that time contemplated the existence of a common-law copyright in favor of the work's creator if the work remained unpublished.⁴³ Under the then-applicable Copyright Act of 1909, a statutory copyright was available if, prior to publication of the work, the creator complied with statutory requirements to furnish a copy to the US Copyright Office and obtained a certificate of registration.⁴⁴ If a general publication of the

³⁷ *Id.*

³⁸ 224 F. Supp. 101 (S.D.N.Y. 1963).

³⁹ *Id.* at 108. Dr. King did not sue the *New York Post* despite its sale of reprints of the speech. *See id.* at 104-05.

⁴⁰ *See id.* at 104-07.

⁴¹ 17 U.S.C. §§ 102, 201, 302 (2012).

⁴² *See Mister Maestro*, 224 F. Supp. at 105.

⁴³ *See Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214 (11th Cir. 1999); *Mister Maestro*, 224 F. Supp. at 105.

⁴⁴ *See* Copyright Act of 1909, 17 U.S.C. §§ 10-13 (superseded sections applicable to pre-1978 works); *see also CBS*, 194 F.3d at 1214 (discussing statutory requirements for securing copyright on pre-1978 works); *Mister Maestro*, 224 F. Supp. at 105 (to same effect). Alternatively, the Copyright Act of 1909 provided that a statutory copyright regarding a performed work was available if any published copies of the work bore a proper copyright notice and the creator promptly furnished copies to the Copyright Office. *See* 17 U.S.C. §§ 10-13 (superseded sections applicable to pre-1978 works); *see also CBS*, 194 F.3d at 1222 (Cook, Senior District Judge, sitting by designation, concurring in

work occurred without satisfaction of the statutory requirements, the work would enter the public domain because the common law copyright would have expired and no statutory copyright would have arisen.⁴⁵

A month and two days after he delivered the speech, Dr. King sent the US Copyright Office a copy of the "I Have a Dream" text and applied for a certificate of registration.⁴⁶ He premised his claim to copyright protection on the notion that the speech was an unpublished work in the Class C category of "lectures, sermons, [or] addresses (prepared for oral delivery)."⁴⁷ The Copyright Office soon issued the requested certificate.⁴⁸ When Dr. King sought a preliminary injunction, the *Mister Maestro* defendants argued that in light of the circumstances surrounding its delivery, the speech was a published work as of August 28, 1963.⁴⁹ Accordingly, the defendants maintained, the speech entered the public domain that day—making it available for all to use for whatever purpose—because Dr. King had not complied with the statutory requirements for securing copyright protection on published works.⁵⁰

In arguing that "I Have a Dream" became a published work the day Dr. King gave the speech, the *Mister Maestro* defendants focused on the following reasons: the active efforts by Dr. King and

part and dissenting in part) (discussing alternative route to satisfaction of statutory requirements for securing copyright on pre-1978 works).

⁴⁵ *CBS*, 194 F.3d at 1214–15; *Mister Maestro*, 224 F. Supp. at 105–06. To lessen the potential harshness of the rule that copyright protection would be lost if publication of the work occurred without satisfaction of the requirements for a statutory copyright, courts developed a distinction between a general publication and a limited publication. Only a general publication could cause a loss of copyright protection if the formalities for a statutory copyright had not been satisfied. *CBS*, 194 F.3d at 1214; *Mister Maestro*, 224 F. Supp. at 106.

⁴⁶ *Mister Maestro*, 224 F. Supp. at 104.

⁴⁷ *Id.*

⁴⁸ *Id.* at 104–05. After the issuance of this certificate of registration, Dr. King authorized the publication of "I Have a Dream" in books or similar printed materials that bore a copyright notice. He then sent copies of the published materials to the Copyright Office and obtained a copyright registration in a category reserved for published books. *Id.* at 105.

⁴⁹ *See Mister Maestro*, 224 F. Supp. at 106.

⁵⁰ *Id.* at 106–07. The defendants, therefore, were asserting that Dr. King's late-September efforts to obtain a statutory copyright—*see id.* at 104–05—were too late and should not have been given any legal effect. *See id.* at 106.

the organizers of the March on Washington to obtain extensive press coverage (efforts that clearly bore fruit); the furnishing of mimeographed copies of the speech to the press tent shortly before he delivered the speech (copies that presumably had no copyright notice on them); and the fact that the speech, by design, was delivered to a huge audience consisting of members of the public.⁵¹ The court rejected the defendants' argument, however.⁵² In doing so, the court pointed out that the copies furnished to the press tent were for the limited purpose of helping reporters follow the speech in their media coverage efforts.⁵³ The court also noted that Dr. King authorized the release of copies only to the press, not to the general public. Thus, the court reasoned, there was no general publication in the necessary sense of dedicating the work to the public.⁵⁴

Neither did a general publication result, according to the court, from the delivery of the speech to a vast public audience.⁵⁵ The court cited statutory authority and supporting cases indicating that the oral delivery of an address and the public performance of similar works—even when there was a large audience—did not constitute a general publication of the work for purposes of the then-applicable rules concerning copyright maintenance or acquisition.⁵⁶ Hence, the court concluded, “I Have a Dream” was an unpublished work on August 28, 1963 and remained so as of the time Dr. King took the necessary steps to obtain a statutory copyright in late September of that same year.⁵⁷

After determining that Dr. King possessed a valid copyright on the speech, the court briefly considered whether the defendants' actions would likely cause irreparable harm. The court noted that Dr. King “has made, or is making, arrangements to market phono-

⁵¹ *Id.* at 106–07.

⁵² *Id.* at 106–08.

⁵³ *Id.* at 103.

⁵⁴ *Id.* at 107–08.

⁵⁵ *Id.* at 106–07.

⁵⁶ *Id.* However, even if Dr. King's delivery of the speech did not constitute a general publication under the former rules on copyright maintenance or acquisition, the circumstances surrounding the speech remain highly relevant for purposes of the fair use analysis offered later in this Article. See *infra* text accompanying notes 284–87.

⁵⁷ *Mister Maestro*, 224 F. Supp. at 104–05, 106–08.

graph records of his speech through an organization of his own choosing, the profits from which ... are intended to be used ... in whole or in part to aid the causes with which he is identified."⁵⁸ The records produced and sold by the defendants would be "[c]ompetition" and would "seem clearly to show danger of an irreparable injury."⁵⁹ The court therefore issued the preliminary injunction.⁶⁰ The ruling effectively ended the case, with the lack of other reported proceedings suggesting that the defendants chose not to contest the plaintiff's claim any further.

After the *Mister Maestro* court ruled that "I Have a Dream" was validly copyrighted, parties subsequently wishing to make uses of the speech tended to accept the notion that a license from the copyright owner would be necessary.⁶¹ However, the CBS television network viewed the matter differently when it made preparations to produce and air a documentary series roughly thirty years after Dr. King's delivery of the historic speech. One segment in the series titled "The 20th Century with Mike Wallace" was devoted to Dr. King and the March on Washington.⁶² In that segment, CBS used considerable footage that the network had filmed during the March on Washington as well as footage that the network had filmed of Dr. King's delivery of "I Have a Dream."⁶³ Although the latter footage included approximately sixty percent of the content

⁵⁸ *Id.* at 108.

⁵⁹ *Id.*

⁶⁰ *Id.* The *Mister Maestro* court did not devote analytical attention to whether the defendants might have had a fair use defense, probably because of the procedural posture of the case and the defendants' emphasis on the whether the speech was even entitled to copyright protection. *See id.* at 106–07. Had the case gone to trial, it seems likely that the defendants would have tried to argue fair use. In its brief attention to the irreparable harm issue, the *Mister Maestro* court did refer to the defendants' actions as "unfair." *Id.* at 108. However, the court attached the "unfair" label almost in passing, without conducting the painstaking factor-based analysis in which courts must engage when the fair use defense is involved. *See id.* For discussion of the fair use factors and the nature of fair use analysis, see *infra* Part II.A. Importantly, too, even if a full fair use analysis would have resulted in a conclusion that the defendants' sale of recordings of the speech was not protected by the fair use doctrine, such an outcome would not mean that other users of the "I Have a Dream" speech would necessarily be barred from successfully invoking the fair use defense. For this Article's proposals regarding a fair use analysis, see *infra* Part III.

⁶¹ *See* Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1213 (11th Cir. 1999).

⁶² *See id.*

⁶³ *Id.*

of the speech, CBS neither sought a license from the King Estate nor offered to pay royalties to it.⁶⁴ The Estate responded by suing CBS for copyright infringement.⁶⁵

Disagreeing with the conclusion reached approximately thirty-five years earlier in *Mister Maestro*, a federal district court held that no valid copyright existed with regard to Dr. King's speech and that CBS therefore was entitled to summary judgment.⁶⁶ The district court concluded that Dr. King's "performance [of the speech] coupled with such wide and unlimited reproduction and dissemination as occurred concomitant to Dr. King's speech during the March on Washington can be seen only as a general publication which thrust the speech into the public domain."⁶⁷ However, in *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*,⁶⁸ the US Court of Appeals for the Eleventh Circuit reversed the grant of summary judgment to CBS and remanded the case to the district court.⁶⁹ The parties then settled the case,⁷⁰ and no further proceedings occurred.

The Eleventh Circuit emphasized that in reaching its decision, it considered only the undisputed facts in the case.⁷¹ Those facts concerned Dr. King's delivery of the speech in front of a huge audience, the furnishing of copies of the speech to the press tent, and the efforts of Dr. King and the March on Washington organizers to

⁶⁴ *Id.*

⁶⁵ *Id.* The material filmed by CBS and used in the documentary may well have been a copyrighted work in its own right, with CBS owning the copyright on the footage even though the words of Dr. King's speech belonged to the Estate as a copyright matter. At the very least, the footage was potentially copyrightable under the then-existing statutory requirements for securing copyright protection. *See supra* text accompanying notes 43-45. In addition, CBS's filming of Dr. King's speech was an action of the sort that Dr. King and the March on Washington organizers welcomed and invited as part of their attempts to have the speech made available beyond those persons actually in attendance. *See CBS*, 194 F.3d at 1224; *Mister Maestro*, 224 F. Supp. at 103-04, 106.

⁶⁶ *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 13 F. Supp. 2d 1347, 1354 (N.D. Ga. 1998), *rev'd*, 194 F.3d 1211 (11th Cir. 1999); *see also Mister Maestro*, 224 F. Supp. at 108. The relevant rules regarding acquisition and maintenance of copyright as of 1963 are set forth at *supra* text accompanying notes 43-45.

⁶⁷ *CBS*, 13 F. Supp. 2d at 1351, 1354.

⁶⁸ 194 F.3d 1211 (11th Cir. 1999).

⁶⁹ *Id.* at 1220.

⁷⁰ Volz, *supra* note 9.

⁷¹ *See Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1217 n.4.

obtain extensive press coverage (including live broadcasts) of the speech.⁷² The court viewed the undisputed facts in light of common-law authority indicating that a general publication does not result from the furnishing of copies of the work on only a limited basis or from performance of the work, regardless of the size of the audience.⁷³ Therefore, the court reasoned, it could not conclude that a copyright-disqualifying publication of the speech occurred as a matter of law on August 28, 1963.⁷⁴ This meant that the grant of summary judgment to CBS could not stand.⁷⁵

Although it was not considering disputed matters of supposed fact in its review of the grant of summary judgment, the Eleventh Circuit noted certain disputed matters that might lead the lower court to conclude that a general publication occurred if the court, on remand, resolved those fact questions in CBS's favor.⁷⁶ The disputed matters were: whether the speech's full text appeared in a widely circulated newsletter of the Southern Christian Leadership Council around the time of the speech, and, if so, whether Dr. King had authorized that action; and whether the copies of the speech furnished to the press tent had also been made freely available to members of the public with Dr. King's authorization.⁷⁷

It is important to note a further set of issues that the Eleventh Circuit did not address in its *CBS* decision because they were beyond the scope of the motion for summary judgment. The appellate court stated that it "would be inappropriate for us to address CBS's other arguments, e.g., *fair use* and the First Amendment, because the district court did not address them, and because the

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *Id.* at 1214–17, 1220. Of course, the Eleventh Circuit was ruling on the publication issue against the backdrop of the copyright acquisition and maintenance rules that applied as of 1963. *See id.* at 1214, 1226–27 (Cook, Senior District Judge, sitting by designation, concurring in part and dissenting in part) (concurring in the result); *see also supra* text accompanying notes 43–45 (summarizing those rules).

⁷⁵ *CBS*, 194 F.3d at 1216–17, 1220. The court's decision did not establish, however, that the King Estate was entitled to summary judgment. The Eleventh Circuit was not holding as a matter of law that a general publication *did not* occur. Rather, the court held only that the undisputed facts did not warrant a conclusion that a general publication took place. *Id.* at 1216–17, 1219–20.

⁷⁶ *See id.* 1219–20.

⁷⁷ *Id.* at 1217; *see also id.* at 1219–20.

relevant facts may not yet be fully developed.”⁷⁸ This Article, of course, will later take up the fair use issues the Eleventh Circuit did not have occasion to address in *CBS* and will offer a fair use analysis of relevance to a range of possible unlicensed uses of the “I Have a Dream” speech.⁷⁹

B. The King Estate’s Licensing Practices Regarding “I Have a Dream” and Other Works

Three entities established after Dr. King’s death play key roles in copyright enforcement and licensing regarding the “I Have a Dream” speech. One is the Estate of Martin Luther King, Jr., Inc., the plaintiff in the *CBS* case.⁸⁰ Dr. and Mrs. King’s three children play key roles in leading this corporate entity.⁸¹ In addition, the King family established Intellectual Properties Management, Inc., a firm that handles a range of licensing matters regarding the “I Have a Dream” speech, other copyrighted works of Dr. King, and

⁷⁸ *Id.* at 1220 (emphasis added). The court also pointed out that it was “express[ing] no opinion on the eventual merits of this litigation.” *Id.*

⁷⁹ *See infra* Part III. Of course, if unlicensed uses of the sort to be discussed later in the Article caused the King Estate to file infringement lawsuits, the defendants would not be restricted to offering fair use arguments. They could also make the same sorts of arguments made by the defendants in *CBS* and *Mister Maestro* regarding a supposed general publication of the speech on Aug. 28, 1963 and a resulting entry of the speech into the public domain as of that date. Neither *CBS* nor *Mister Maestro* would be a completely unassailable precedent blocking the defendants, given the respective postures of those cases (appeal of a summary judgment for the defendant in *CBS*, and motion for a preliminary injunction in *Mister Maestro*). *See supra* text accompanying notes 51–54, 61–70. Nevertheless, the odds would seem to be against a defendant’s renewed argument that a copyright-disqualifying general publication of the speech occurred on the day Dr. King delivered it more than fifty years ago. This Article, therefore, assumes without further argument that the copyright on the “I Have a Dream” speech is not vulnerable to an attack on its validity. The Article will focus instead on the development of a sensible fair use analysis for use in cases involving unlicensed uses of the copyrighted speech or similar historic works. *See infra* Part III.

⁸⁰ *CBS*, 194 F.3d at 1211.

⁸¹ A recent report indicated that Dexter King, one of the three children of Dr. and Mrs. King, is the president and chief executive officer of the estate and that his brother, Martin Luther King III, is chairman of the board. The Associated Press, *Georgia: Dr. King’s Children End One Suit Over Legacy*, N.Y. TIMES, Jan. 23, 2015, at A5. Both brothers and presumably their sister, Bernice King, are board members. David Beasley, *Martin Luther King’s Sons Dismiss Licensing Lawsuit Against King Center*, HUFFINGTON POST, (Jan. 23, 2015), http://www.huffingtonpost.com/2015/01/23/mlk-children-lawsuit-drop_n_6533690.html.

Dr. King's right of publicity.⁸² A family member also heads up this firm.⁸³ The Martin Luther King, Jr. Center for Nonviolent Social Change (the "King Center") is the third entity. The King family established this not-for-profit organization, whose museum commemorates Dr. King's life and accomplishments and whose programs are meant to heighten public awareness and understanding of causes with which he was associated.⁸⁴ Through its archives, the King Center permits access to some works of Dr. King, but makes clear that further uses of copyrighted material will require a license. As the King Center website indicates, Intellectual Properties Management handles licensing matters for the Center.⁸⁵

Access to the "I Have a Dream" speech is not available through the King Center's archives, though the Center does sell DVDs of the speech for approximately twenty dollars each.⁸⁶ However, copyright law contemplates that the purchaser of a DVD acquires only the object itself and the right to view what is on the DVD.⁸⁷ The purchaser acquires no right to use the DVD's copy-

⁸² Williams, *supra* note 9. For instance, in response to an inquiry about possible licensing arrangements for use of portions of the "I Have a Dream" speech in a hypothetical documentary, Intellectual Properties Management responded with an email that attached a five-page "Intellectual Property Request Form" prior to any licensing decision. The signature block indicated that the reply email was sent by a "Licensing Coordinator, Intellectual Properties Management (IPM), Licensing Manager of the Estate of Dr. Martin Luther King, Jr." Email from Paul Lewellyn to Intellectual Properties Management, Jan. 14, 2015; email from Sandra Butler to Paul Lewellyn, Jan. 15, 2015, with attachment (emails and attachment on file with author).

⁸³ Dexter King is the family member, according to a report. Charles E. Cobb, *The Shakedown at the King Monument*, THE ROOT, (Sept. 6, 2011), <http://www.theroot.com/views/shakedown-king-monument>.

⁸⁴ *About the King Center*, THE KING CENTER, <http://www.thekingcenter.org/about-king-center> (last visited Apr. 19, 2015). Martin Luther King III has served as president of the Center. Pasternack, *supra* note 9. Bernice is the Center's CEO. Beasley, *supra* note 81.

⁸⁵ *About the King Center*, *supra* note 84; see also *Archives Terms & Conditions*, THE KING CENTER, <http://www.thekingcenter.org/archive-terms-conditions> (last visited Apr. 15, 2015).

⁸⁶ Schiller, *supra* note 9; Strauss, *supra* note 3. Although the text of the speech is not available through the King Center's archives, one may find a copy in the collection of the National Archives at www.archives.gov/press/exhibits/dream-speech.pdf.

⁸⁷ See 17 U.S.C. § 202 (2012) ("Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object . . ."); see also *id.* § 109 ("[T]he owner of a

righted content in any way that would be considered a public performance and no right to make any other use of the copyrighted speech—unless, of course, Intellectual Properties Management or the King Estate licenses that specific use or the fair use doctrine would permit it.⁸⁸

Other entities affiliated only contractually with the King Estate are also involved in enforcing copyrights on Dr. King's works and in deciding whether to grant licenses for uses of them. Under a 2011 agreement with the King Estate, EMI—the British music publishing and recording conglomerate—took on copyright enforcement and licensing responsibilities regarding some of Dr. King's works.⁸⁹ In addition, literary agency Writers House plays a role in the issuance or non-issuance of licenses for uses of certain King works.⁹⁰

The lines between the respective roles of the King Estate, Intellectual Properties Management, the King Center, EMI, and Writers House in copyright enforcement and licensing are less than clear, but clear delineation of those respective roles is not necessary for the purposes of this Article. Rather, the key consideration here is a more general point: that copyright enforcement and licensing regarding Dr. King's works is a well-established, structured operation in which a number of licensing entities and agents participate. Given the relationships between and among the various entities referred to above, this Article's further discussion and analysis of enforcement and licensing decisions and actions regarding Dr.

particular copy or phonorecord lawfully made under this title ... is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”).

⁸⁸ See *id.* § 106. Similarly, one who finds the speech in the collection of the National Archives, see *supra* note 74, is entitled to read the speech but is not free to make other uses of the speech's content unless the copyright owner grants a license or the fair use doctrine applies. See 17 U.S.C. §§ 106, 107. This Article will propose a relevant fair use analysis. See *infra* Part III.

⁸⁹ Williams, *supra* note 9; Pasternack, *supra* note 9. The arrangement may include a partial ownership interest on the part of EMI with regard to the copyright on the “I Have a Dream” speech. *Id.*; Strauss, *supra* note 3.

⁹⁰ See *Estate Representation*, WRITERS HOUSE, <http://www.writershouse.com/content/independent/asp> (last visited May 14, 2015). The Writers House website states that the firm “handles permissions and licenses for the literary estate of Dr. Martin Luther King, Jr.” *Id.*

King's works will normally refer to the King Estate as making those decisions or taking those actions. Such references will be made for convenience purposes, regardless of whether the Estate itself, Intellectual Properties Management, the King Center, EMI, or Writers House made the decision or took the action in question.

Although the previously discussed *Mister Maestro* and *CBS cases*⁹¹ are the only reported judicial opinions concerning alleged infringement of the copyright on the "I Have a Dream" speech, the King Estate has been involved in other disputes regarding unlicensed uses of the speech. For instance, the Estate alleged that *USA Today* committed infringement when, without a license, it printed the text of the speech in an edition of the newspaper around the time of an anniversary of Dr. King's delivery of "I Have a Dream."⁹² The dispute was settled by the parties under terms that involved payment by *USA Today*.⁹³ Similarly, the Estate insisted on payment from CNN for the right to air the speech.⁹⁴

Eyes on the Prize, a widely praised documentary on the civil rights movement, triggered objections by the King Estate to an unlicensed inclusion of portions of the "I Have a Dream" speech. A dispute over whether a licensing fee was owed and the apparent inability of the Estate and the documentary's producers to reach a settlement led to a stalemate in which the documentary was effectively out of circulation for a number of years.⁹⁵ Eventually, the Public Broadcasting Service stepped in and facilitated an arrangement under which the documentary could again be aired and distributed.⁹⁶

Although the King Estate has drawn criticism for taking enforcement action regarding certain unlicensed uses of part or all of

⁹¹ For discussion of those cases, see *supra* Part I.A.

⁹² Pasternack, *supra* note 9.

⁹³ *Id.*

⁹⁴ See Richard Fausset, *An Unsettled Chapter in Martin Luther King's Legacy*, N.Y. TIMES, Jan. 12, 2015, available at <http://www.nytimes.com/2015/01/13/us/fate-of-martin-luther-kings-bible-may-be-clearer-after-ruling-.html?emc=etal>; Jason Linkins, *Here's Why You Don't See MLK's 'I Have a Dream' Speech All the Time*, HUFFINGTON POST, (Aug. 28, 2013), http://www.huffingtonpost.com/2013/08/28/i-have-a-dream-copyright_n_3829901.html.

⁹⁵ Williams, *supra* note 9; Pasternack, *supra* note 9.

⁹⁶ Williams, *supra* note 9.

“I Have a Dream,”⁹⁷ the Estate has responded by stating that it has permitted various unlicensed uses for educational purposes—presumably in school settings for the most part.⁹⁸ However, uses that have a significant educational character are not necessarily confined to the school setting. As the *Eyes on the Prize* dispute suggests, the King Estate may be inclined to take a dim view of certain unlicensed uses even when they have a significant educational (or similarly important) purpose underlying them.⁹⁹

Representatives of the King family have noted that Dr. King’s vocation and leadership in advancing important social causes did not lead to significant income during his lifetime.¹⁰⁰ The King family faced financial challenges after his death.¹⁰¹ Copyright enforcement thus provided a source of income for the surviving family members.¹⁰² Importantly, too, licensing revenue has not simply gone to the family but has also been used for the advancement of causes with which Dr. King was identified.¹⁰³

Of course, it is not unusual for copyright owners to be aggressive in seeking to enforce the rights federal law grants them and to adopt a less-than-expansive view of what the fair use doctrine might permit.¹⁰⁴ In those respects, the King Estate may be a typical copyright owner. But even if the Estate is a typical copyright owner

⁹⁷ *Id.*; Pasternack, *supra* note 9; Schiller, *supra* note 9; Strauss, *supra* note 3. The Estate has also drawn criticism for certain decisions to grant licenses instead of saying “no.” See Pasternack, *supra* note 9 (noting civil rights leader Julian Bond’s negative reaction to seeing an Alcatel television commercial that used portions of the speech under a license granted by the Estate).

⁹⁸ Strauss, *supra* note 3; see Strauss, *King’s Fiery Speech Rarely Heard*, *supra* note 18. Of course, many such uses could go undetected by the Estate. See *id.* The case for fair use treatment in the school setting, moreover, is very strong. See *infra* Part III.A.3. In addition, some uses in the school context could be justified under the separate statutory privilege that permits instructors to “[perform] or display” a copyrighted work “in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.” 17 U.S.C. § 110 (2012).

⁹⁹ See Pasternack, *supra* note 9; Williams, *supra* note 9.

¹⁰⁰ See Williams, *supra* note 9.

¹⁰¹ Strauss, *King’s Fiery Speech Rarely Heard*, *supra* note 18.

¹⁰² *Id.*; see also Pasternack, *supra* note 9; Williams, *supra* note 9.

¹⁰³ Pasternack, *supra* note 9.

¹⁰⁴ The point is illustrated by the large number of copyright infringement cases in which the defendant argues for fair use protection but the plaintiff, obviously, regards the doctrine as inapplicable to the defendant’s use.

in terms of its licensing and enforcement efforts, the copyrighted work serving as the main object of those efforts is anything but typical.¹⁰⁵

Although the “I Have a Dream” speech’s legacy would seem to give it the highest profile of any of Dr. King’s copyrighted works, the King Estate maintains an active licensing and enforcement policy regarding his other works.¹⁰⁶ The Estate has also initiated litigation in which it contested ownership claims made by others regarding personal property items that Dr. King supposedly had given to them. For example, the Estate unsuccessfully sued Boston University in an effort to obtain the return of papers that Dr. King had deposited with the school beginning in 1964.¹⁰⁷ In a similar but more recent case, the Estate failed to obtain the return of documents and other items that, the defendant contended, had been gifts from Dr. King.¹⁰⁸ Even more recently, the Estate became

¹⁰⁵ See *infra* Part III.A.3 (discussing the unique importance of “I Have a Dream”).

¹⁰⁶ See *supra* Part I.A.

¹⁰⁷ King v. Trustees of Boston Univ., 647 N.E.2d 1196, 1198 (Mass. 1995). The Estate contended that it owned the papers and that the university committed conversion by refusing to return the papers and maintaining them in a collection at the university library. *Id.* at 1198–99. This was a case about rights over the objects (the papers), not a case of alleged infringement of any copyright that may have existed in the expressive content of the papers. See *id.* A key piece of evidence was a 1964 letter in which Dr. King outlined a plan to provide the university (where he received his doctorate) with documents that would become the university’s property. *Id.* Responding to questions in a special verdict form, the jury determined that Dr. King had made a charitable pledge on which Boston University relied, that Dr. King had delivered documents contemplated by the pledge, and that the university therefore owned the documents. *Id.* at 1199–1200. On appeal, the Supreme Judicial Court of Massachusetts upheld the jury’s verdict in favor of the university. *Id.* at 1200–04.

¹⁰⁸ Estate of Martin Luther King, Jr., Inc. v. Ballou, 544 Fed. App’x 280, 284 (5th Cir. 2013). The defendant was the son of Dr. King’s former secretary, who also had been a friend of Dr. and Mrs. King. When she ceased working for Dr. King in 1960, the defendant’s mother retained possession of documents and other items that she regarded as gifts from Dr. King. *Id.* The personal property at issue later came into the possession of her son, who became the defendant in a conversion and replevin case filed by the King Estate roughly forty years after his mother left Dr. King’s employ. *Id.* at 281. A federal district court granted the defendant summary judgment on two alternative grounds. *Id.* at 282. First, the court concluded that if conversion occurred, it would have occurred in 1960, when the defendant’s mother left her job with Dr. King and retained possession of the documents and other items. *Id.* This meant that the statute of limitations had expired many years before the King Estate filed suit. See *id.* Second, the court concluded that rather than establishing conversion, the evidence indicated that Dr. King made a

involved in a personal-property dispute with famous singer Harry Belafonte, who had been a close friend of Dr. King and had worked with him in the civil rights movement.¹⁰⁹ Belafonte maintained that certain items in his possession for many years had been gifts from Dr. and Mrs. King, but the Estate contested his claim of ownership.¹¹⁰ The parties later settled the case on terms that were largely confidential, but with Belafonte retaining possession—and presumably ownership—of the items.¹¹¹

Besides pursuing claims for copyright infringement and supposed conversion of personal property items, the King Estate and the King Center have sought to enforce Dr. King's right of publicity.¹¹² In *Martin Luther King, Jr. Center for Social Change, Inc. v.*

completed gift to the defendant's mother and that the defendant owned the property at issue through a gift from his mother. *Id.* at 281–82. The US Court of Appeals for the Fifth Circuit affirmed on the basis of the statute-of-limitations ground and therefore found it unnecessary to address the alternative ground of a completed gift. *Id.* at 282–84 n.3.

¹⁰⁹ James C. McKinley, Jr., *Belafonte Sues Heirs of Martin Luther King, Jr.*, N.Y. TIMES, Oct. 15, 2013, <http://www.nytimes.com/2013/10/16/arts/belafonte-sues-the-king-family.html>. During the 1960s, Dr. King frequently stayed in Belafonte's New York apartment and held meetings there with advisers. *Id.*

¹¹⁰ *Id.* The items included an outline for a later-drafted 1967 speech by Dr. King on the Vietnam War and a letter of condolence from President Johnson to Mrs. King after Dr. King's assassination. *Id.* Belafonte also had another item that had been the subject of a bequest to him in the will of one of Dr. King's longtime aides: an envelope that was in Dr. King's pocket on the day he was assassinated. Notes for a speech Dr. King was to deliver in Memphis appeared on the envelope. *Id.* Belafonte had planned to sell these items in an auction and devote the proceeds to a charitable organization that works with street gangs. However, the King Estate intervened, alleging that it owned the items and that Belafonte had wrongfully acquired them. As a result, Sotheby's (the auction house that was to handle the sale) held on to the items pending a resolution of the parties' competing claims of ownership. Belafonte then instituted a declaratory judgment action against the Estate. *Id.* Sotheby's was the firm the King family and the King Center intended to use several years ago for the sale of some 10,000 of Dr. King's speeches, sermons, letters, and other documents. *Id.* The auction did not occur, however, because the City of Atlanta stepped in and purchased the collection for approximately \$32 million. *Id.*

¹¹¹ Dareh Gregorian, *Harry Belafonte and Estate of Martin Luther King, Jr. Reach Deal Declaring Singer Rightful Owner of King's Documents*, N.Y. DAILY NEWS, April 11, 2014, <http://www.nydailynews.com/news/national/harry-belafonte-estate-martin-luther-king-jr-reach-deal-docs-article-1.1753604>.

¹¹² The right of publicity entitles a celebrity (or, in many states, the estate of a deceased celebrity) to seek damage awards and injunctive relief against defendants who made a commercial use of the celebrity's name, likeness, or identity without the consent of the celebrity or his estate. See Tara E. Langvardt, *Reinforcing the Commercial–Noncommercial*

American Heritage Products, Inc.,¹¹³ the Supreme Court of Georgia answered a federal court's certified questions concerning a case in which the King Center and the King Estate sought remedies against a defendant that was producing and selling plastic busts of Dr. King.¹¹⁴ The Georgia court stated that Georgia law recognizes the right of publicity in favor of public figures such as Dr. King and that such a right survives the public figure's death.¹¹⁵ The court also noted that a for-profit use of the sort present in the case appeared sufficiently commercial to support a right of publicity claim, but suggested that not all unlicensed uses of the celebrity's name, likeness, or identity would justify a claim.¹¹⁶

Dr. King's supposed right of publicity and a concern about use of words and phrases from some of his writings or speeches apparently motivated Intellectual Properties Management, Inc. (the previously noted licensing agent for the King Estate and King Center¹¹⁷) to seek a licensing fee from the builder of the memorial to Dr. King that now appears on the National Mall in Washington, D.C. Intellectual Properties Management negotiated the builder's payment of a licensing fee that reportedly exceeded \$700,000.¹¹⁸ The fee ostensibly was meant to make up for possible donations that the King Center might lose, on the theory that those who donated for purposes of the memorial would not then donate to the King Center.¹¹⁹

Considering the King Estate's and King Center's active copyright enforcement and licensing operation,¹²⁰ their history of filing

Distinction: A Framework for Accommodating First Amendment Interests in the Right of Publicity, 13 VA. SPORTS & ENT. L.J. 167, 169 (2014).

¹¹³ 296 S.E.2d 697 (Ga. 1982).

¹¹⁴ *Id.* at 698–99.

¹¹⁵ *Id.* at 700–05.

¹¹⁶ *See id.* at 702, 705; *see also id.* at 708–09 (Weltner, J., concurring specially) (suggesting that not all uses that involve financial gain are sufficiently commercial to give rise to right of publicity claim).

¹¹⁷ *See supra* text accompanying note 82.

¹¹⁸ Cobb, *supra* note 83.

¹¹⁹ *Id.*

¹²⁰ Disagreements among King family members and some of the previously noted King-related entities have also led to litigation. Fausset, *supra* note 94. The King Estate, on whose board Dexter King and Martin Luther King III form a majority, sued the King Center, which is headed up by Bernice King. *Id.* The lawsuit pertained to control of Dr.

of copyright infringement, conversion of personal property, and right of publicity lawsuits, and the prospect of such litigation if a party were to make an unlicensed use of supposedly protected material, it is not surprising that would-be users of the “I Have a Dream” speech have tended to obtain a license or not make the use at all.¹²¹ The recent movie *Selma* furnishes an example of not making the use at all. One might assume that in a movie about the 1965 march Dr. King led from Selma, Alabama to the state capital in Montgomery, Dr. King’s words—whether from the 1963 “I Have a Dream” speech or from other addresses or works by Dr. King—would be included. No portions of copyrighted works by Dr. King were used in *Selma*, however.¹²² Several years prior to the making of *Selma*, the King Estate had issued DreamWorks and Warner Brothers what apparently was an exclusive movie-rights license regarding certain copyrighted works of Dr. King, for possible use in a movie that Steven Spielberg would produce. That production has not occurred.¹²³ *Selma*’s producers unsuccessfully sought to acquire the rights from DreamWorks and Warner Brothers and decided not to pursue direct negotiations with the King Estate. Evidently not willing to employ Dr. King’s actual words and risk legal action, the producers opted for dialogue and lines written especially for their movie.¹²⁴

As a result of the tendency to obtain a license or abandon plans to make the use, courts have not had occasion to rule on the fair use doctrine’s possible application to uses of the “I Have a

King’s name, image, and intellectual property, certain actions or inactions by Ms. King in managing the Center, and Center board member Andrew Young’s supposed commercial uses of intellectual property associated with Dr. King. *Id.* Young, the former Mayor of Atlanta and a United Nations ambassador, had been an associate of Dr. King’s during the 1960s. *Id.* The parties later settled the case. Beasley, *supra* note 81. Still pending is a lawsuit in which Bernice King, a King Estate board member along with her brothers, seeks to stop the sale of Dr. King’s bible and Nobel Prize—a sale her brothers favor. Fausset, *supra* note 94; *Martin Luther King, Jr.’s Children Working to Settle Dispute Over Bible, Nobel Peace Prize*, HUFFINGTON POST (Jan. 29, 2015), http://www.huffingtonpost.com/2015/01/29/martin-luther-king-jr-children-legal-dispute_n_65771610.html.

¹²¹ See Volz, *supra* note 9; Williams, *supra* note 9; Schiller, *supra* note 9.

¹²² Tim Appelo & Stephen Galloway, *Oscars: How “Selma” Filmmakers Made a Movie About MLK Without Using His Words*, HOLLYWOOD REPORTER, Dec. 19, 2014, <http://www.hollywoodreporter.com/news/oscars-how-selma-filmmakers-made-755242>.

¹²³ *Id.*

¹²⁴ *Id.*

Dream” speech or other copyrighted works of Dr. King. This Article’s later proposals will provide guidance to courts in the event that a user of the speech spurns obtaining a license and hangs its hat on the fair use defense in the infringement case that will almost certainly be filed.¹²⁵ First, however, it is necessary to explain why the King Estate’s copyright on the speech is nowhere near expiring and will extend for even longer than has commonly been asserted.

C. Duration of the Copyright on the “I Have a Dream” Speech

Assuming that the courts in the previously discussed *Mister Maestro* and *CBS* cases were correct in concluding that the “I Have a Dream” speech was validly copyrighted in 1963,¹²⁶ it becomes important to determine how long the copyright will last. As previously noted, some news articles and short commentaries published near the fiftieth anniversary of Dr. King’s delivery of the speech stated, as a supposed fact, that the copyright on the speech will remain in force through 2038.¹²⁷ These articles and commentaries made the important point that the copyright on the speech is a long way from expiring, but 2038 is not the correct year of expiration. The copyright on the speech will actually last through 2058,¹²⁸ as the following overview of copyright duration principles will demonstrate.

The erroneous identification of 2038 as the last year of the copyright’s existence may have stemmed from an assumption that the copyright would exist for seventy years beyond Dr. King’s death in 1968. That assumption is incorrect, even though life-plus-seventy-years is a basic copyright duration rule that operates today. The life-plus-seventy-years rule for copyright duration applies only to works created in 1978 or later.¹²⁹ Because it is a pre-1978 work, the duration of the copyright on Dr. King’s speech is measured differently.¹³⁰ The rule governing the duration of copyrights on pre-1978 works employs a basic-term-plus-renewal-term approach,

¹²⁵ See *infra* Part III.

¹²⁶ For discussion of those cases, see *supra* Part I.A.

¹²⁷ See *supra* note 9.

¹²⁸ See 17 U.S.C. § 304 (2012).

¹²⁹ *Id.* § 303.

¹³⁰ See *id.* § 304.

with the renewal term having been lengthened and otherwise modified over the years.¹³¹ Therefore, tracing relevant history is necessary to an explanation of how long the copyright on the “I Have a Dream” speech will endure.

When copyright protection came into being on Dr. King’s speech in 1963, the then-applicable Copyright Act of 1909 called for a maximum copyright duration of fifty-six years. That maximum duration consisted of a twenty-eight-year basic term plus a twenty-eight-year renewal term, if a proper request for a renewal term was filed during the last year of the basic term.¹³² Failure to file for renewal meant that the copyright would expire, and the underlying work would enter the public domain, at the end of the twenty-eight-year basic term.¹³³ In 1963, therefore, Dr. King could have contemplated that if a proper renewal filing occurred near the end of the basic term, the copyright on the speech would then run through 2019 (a total of fifty-six years). During the early years following Dr. King’s death, his estate would have had the same duration expectation. The Copyright Act of 1976 changed that expectation, however, for the King Estate and for other holders of existing copyrights.

The Copyright Act of 1976 broke new ground on the duration front and set up 1978 as a critical dividing line. In that enactment, Congress established a new duration rule that would apply to copyrights on works created in 1978 or later: life of the creator plus fifty years.¹³⁴ As will be seen, a later congressional extension of copyright duration substituted seventy years for fifty years in the rule just noted.¹³⁵ The Copyright Act of 1976 also provided that the duration of copyrights on pre-1978 works would still be determined according to the basic-term-plus-renewal-term approach.¹³⁶ However, Congress tacked on nineteen years to the length of the renew-

¹³¹ *See id.*

¹³² Copyright Act of 1901, ch. 320, § 24, 35 Stat. 1075, 1080–81, *amended by* Copyright Act of 1976 (current version at 17 U.S.C. § 304 (2012)).

¹³³ *Id.*

¹³⁴ Copyright Act of 1976, 17 U.S.C. § 302, *amended by* Sonny Bono Copyright Term Extension Act of 1998 (current version at 17 U.S.C. § 302(a) (2012)).

¹³⁵ *See infra* text accompanying notes 139–43.

¹³⁶ Copyright Act of 1976, 17 U.S.C. § 304, *amended by* Sonny Bono Copyright Term Extension Act of 1998 (current version at 17 U.S.C. § 304 (2012)).

al term if the copyright on the relevant pre-1978 work still existed—either in its basic term or in its renewal term—as of January 1, 1978.¹³⁷ What had been a twenty-eight-year renewal term thus became a forty-seven-year renewal term instead.¹³⁸

Consider, then, the changing duration expectation of the King Estate and similarly situated copyright owners as a result of the Copyright Act of 1976. With the twenty-eight-year basic term of the “I Have a Dream” copyright having commenced in 1963, a 1991 renewal would trigger a renewal term of not merely twenty-eight years, but forty-seven years. In 1991, the Estate properly renewed the copyright¹³⁹ and received a renewal term that, as of then, would last through 2038. But the duration story does not end there, as Congress once again increased copyright duration in the Sonny Bono Copyright Term Extension Act of 1998 (“CTEA”).¹⁴⁰

In the CTEA, Congress modified each of the sets of rules identified above by adding twenty years to the respective durations contemplated by those rules.¹⁴¹ The duration rule for copyrights on works created in 1978 or later thus acquired its current content: life of the creator plus seventy years, rather than life plus fifty years.¹⁴² For pre-1978 works still under copyright protection as of 1998—whether in the basic term or the renewal term—the CTEA gave the renewal term that had already been lengthened from twenty-eight years to forty-seven years a further extension to sixty-seven years.¹⁴³

Therefore, the duration of a copyright on a pre-1978 work that remained under copyright protection as of 1998 is now a total of

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211, 1214 n.2 (11th Cir. 1999).

¹⁴⁰ See 17 U.S.C. § 304 (2012).

¹⁴¹ See *id.* §§ 302, 304. For more detailed examination of the duration extensions, the reasons they were enacted, and the problems resulting from them, see Arlen W. Langvardt and Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTELL. PROP. REV. 193, 193–206, 235–92 (2004); see also Khanna, *supra* note 20, at 70–119 (criticizing copyright duration extensions and outlining the cost increases and other damaging effects associated with long copyright durations).

¹⁴² 17 U.S.C. § 302.

¹⁴³ *Id.* § 304(a)–(b).

ninety-five years (the twenty-eight-year basic term plus the sixty-seven-year renewal term).¹⁴⁴ For a pre-1978 work to have been under copyright protection as of 1998, one of two things must have happened. One route to still-protected status as of 1998 was the copyright owner's filing of a proper renewal request near the end of the twenty-eight-year basic term.¹⁴⁵ Alternatively, the copyright could have been one that was subject to a 1992 enactment in which Congress made renewal automatic (in other words, without an actual renewal filing) for any copyright as to which a renewal filing would otherwise have been necessary in order to maintain copyright protection.¹⁴⁶ The statute's effects were to dispense with the renewal filing requirement for—and automatically grant a renewal term to—all copyrights that came into existence during the years 1964 through 1977.¹⁴⁷

Because the copyright on the “I Have a Dream” speech commenced in 1963, a renewal filing was necessary in 1991 if the copyright were to receive the renewal term.¹⁴⁸ (The automatic renewal statute was not enacted until 1992, so it could not have applied to the copyright on the speech.) When the King Estate took the necessary renewal action in 1991, it acquired a renewal term of forty-seven years.¹⁴⁹ This meant, of course, that the copyright was still in existence when 1998 arrived—a fact that then triggered an entitlement to the CTEA's duration extension. The renewal term that would have been forty-seven years under the law in effect at the time of the copyright renewal thus ripened into a sixty-seven-year

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* § 304(a).

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* Copyrights that came into being prior to 1964 did not benefit from the automatic renewal measure because their twenty-eight-year basic term would have ended—and the necessary time for a renewal filing would have arrived—before the 1992 enactment of the measure. *See id.* Works whose copyrights arose in 1978 or later were not affected by the automatic renewal provision because the duration of those copyrights is determined under rules that do not use the basic-term-plus-renewal approach. *See id.* § 302(a).

¹⁴⁸ *See supra* text accompanying notes 132–33.

¹⁴⁹ *See id.*

renewal term.¹⁵⁰ Accordingly, the King Estate's copyright on the "I Have a Dream" speech will run through 2058.¹⁵¹

II. THE FAIR USE DOCTRINE: THE RELEVANT FACTORS AND LEADING CASES

Unlicensed use of part or all of a copyrighted work's expression, as opposed to use of general ideas or facts set forth in the work,¹⁵² may constitute infringement because one or more of the copyright owner's rights could be implicated.¹⁵³ Not all such uses give rise to infringement liability, however. If the fair use doctrine applies, the user is not liable for infringement despite having borrowed the work's expression without the copyright owner's permission.¹⁵⁴ Reliance on the fair use doctrine entails risk, however, because the copyright owner probably will not agree with the user's position that fair use protection should apply. Infringement litigation then may be likely to result, with the court having to decide whether fair use principles should protect the defendant against liability.

This Part of the Article provides an overview of the fair use doctrine and the factor-based analysis in which courts must engage when they rule on fair use arguments. It also considers leading Supreme Court decisions that have provided guidance for application of the fair use factors. This discussion will help to support Part IV's proposed fair use analysis for cases involving unlicensed uses of the "I Have a Dream" speech and other historic copyrighted works.

¹⁵⁰ See *supra* text accompanying notes 137-38.

¹⁵¹ Copyrights run through the end of the relevant calendar year. 17 U.S.C. § 305 (2012). The conclusion that the "I Have a Dream" copyright will run through 2058 assumes, of course, that Congress does not enact another duration extension. For an objection to calls raised in recent years for yet another duration extension, see Arlen W. Langvardt, *The Beat Should Not Go On: Resisting Early Calls for Further Extensions of Copyright Duration*, 112 PENN. ST. L.J. 783 (2008).

¹⁵² See 17 U.S.C. § 102.

¹⁵³ *Id.* §§ 106, 501. In general, copyright owners have the exclusive rights to reproduce their work, prepare derivative works based on it, distribute copies of it, display it, and publicly perform it. *Id.* § 106. The display and performance rights apply only as to certain copyrighted works. See *id.*

¹⁵⁴ *Id.* § 107.

A. Fair Use Purposes, Candidates, and Factors

The fair use doctrine limits the copyright owner's rights by serving as a defense to an infringement claim¹⁵⁵ in order to "permit[] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."¹⁵⁶ Fair use was originally a judicial creation but is now recognized by statute.¹⁵⁷ In 17 U.S.C. § 107, Congress indicated that good candidates for fair use protection include uses that reflect "purposes such as criticism, comment, news reporting, [and] teaching . . . scholarship, or research."¹⁵⁸

There is no guarantee, however, that the fair use defense will apply in a given case even if the use reflects a purpose of the sort singled out in § 107. The statute lists four factors that courts must consider when deciding whether a particular use merits fair use protection.

Application of the factors, to be identified and discussed shortly, may result in a conclusion that the use was indeed fair use but may lead to the opposite conclusion.¹⁵⁹ Importantly, the factors enumerated in § 107 do not compose an exclusive set.¹⁶⁰ Courts may supplement the listed factors with other relevant considerations.¹⁶¹

¹⁵⁵ *Id.* For a listing of the copyright owner's exclusive rights, see 17 U.S.C. § 106.

¹⁵⁶ *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal quotation marks and citation omitted). When the fair use defense is invoked, the key question is "whether the copyright law's goal of promoting the 'Progress of Science and useful Arts' would be better served by allowing the use than by preventing it." *Castle Rock Entm't, Inc. v. Carol Publ'g Grp.*, 150 F.3d 132 (2d Cir. 1998) (internal quotation marks and citation omitted). See U.S. CONST. art. I, § 8, cl. 8 (granting power to Congress to enact copyright and patent laws in order to "promote the Progress of Science and useful Arts").

¹⁵⁷ 17 U.S.C. § 107 (2012). See *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 576-77 (1994) (noting the fair use defense's history).

¹⁵⁸ 17 U.S.C. § 107 (2012).

¹⁵⁹ See *id.*; *Campbell*, 510 U.S. at 577.

¹⁶⁰ Section 107 states that when a court is deciding whether fair use protection applies, the factors courts are to consider "shall include" the ones listed in the statute. 17 U.S.C. § 107. This language indicates that the statute's list of factors is not all-inclusive. See *id.*

¹⁶¹ See HOWARD B. ABRAMS, 2 THE LAW OF COPYRIGHT § 15:32 (2013). For instance, the public interest may sometimes be a relevant additional consideration. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2006). As will be seen, consideration of the public interest will play a role in this Article's later proposal of a fair

The fair use doctrine contemplates a case-by-case analysis that is, therefore, highly fact-specific.¹⁶² In applying the fair use factors and perhaps other relevant considerations, courts engage in a weighing-and-balancing approach in which no one factor is solely determinative.¹⁶³ As the following discussion will reveal, each § 107 factor adds a different point of emphasis to the fair use analysis.

The first factor listed in § 107 is “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”¹⁶⁴ This statutory language obviously calls for distinctions to be drawn between commercial and noncommercial uses, but those distinctions are only part of the inquiry. Factor number one also takes into account other considerations such as whether the use is transformative in nature¹⁶⁵ and whether the use reflects a generally favored purpose such as criticism or commentary, news reporting, or educational use.¹⁶⁶ A heavy commercial motivation may cut against fair use, especially if that motivation is not offset by some countervailing consideration.¹⁶⁷ Conversely, a lack of a profit motive may point toward fair use.¹⁶⁸ Because no single factor is solely determinative, however, it is possible that even a use with a significant commercial motivation could be classified as fair use once all of the statutory factors and other relevant considerations are taken into account.¹⁶⁹

use analysis for cases dealing with uses of historic works such as the “I Have a Dream” speech. *See infra* Part III.

¹⁶² *See e.g.*, *Campbell*, 510 U.S. at 577. As a result, it can be difficult to predict the outcome of a particular case; *see also* Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2540 (2009).

¹⁶³ *E.g.*, *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006).

¹⁶⁴ 17 U.S.C. § 107.

¹⁶⁵ *Campbell*, 510 U.S. at 579.

¹⁶⁶ Such purposes are the ones singled out in the fair use section of the Copyright Act. *See* 17 U.S.C. § 107 (2012).

¹⁶⁷ *See id.*; *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

¹⁶⁸ *See* 17 U.S.C. § 107 (2012).

¹⁶⁹ *See id.*; *Campbell*, 510 U.S. at 584–85. It is also possible that even a nonprofit use may be held not to be fair use once the fair use factors are applied. *Id.* at 584. Although the first factor is not solely determinative of whether a given use constituted fair use, courts frequently place significant emphasis on that factor. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Decisions*, 156 *U. PA. L. REV.* 549, 555, 571–72, 583, 587, 597.

Section 107 lists “the nature of the copyrighted work” as the second fair use factor.¹⁷⁰ Courts have frequently noted that this factor contemplates distinguishing between highly creative works and largely factual works designed for public consumption, with borrowings of expression from the former potentially being less likely to constitute fair use than borrowings of expression from the latter.¹⁷¹ As the Supreme Court has observed, however, drawing such a distinction sometimes tends not to be especially helpful in “separating the fair use sheep from the infringing goats”¹⁷² Accordingly, the distinction may carry less weight in the fair use analysis than courts’ recitation of it would seem to suggest.¹⁷³

The Supreme Court has identified another relevant question contemplated by the second fair use factor: whether the borrowed-from work was published or, instead, unpublished.¹⁷⁴ A defendant who borrows from an unpublished work usurps the copyright owner’s important right of first publication.¹⁷⁵ Such a borrowing tends to cut against fair use,¹⁷⁶ though § 107 provides a reminder that a borrowing from an unpublished work may still qualify for fair use protection if full consideration of the fair use factors so indicates.¹⁷⁷ A borrowing from a published work does not undermine the copyright owner’s right of first publication but does not entitle the borrower to any special credit in the fair use analysis. In the borrowing-from-published-work situation, the second fair use factor ends up having little significance.¹⁷⁸

Section 107 lists, as the third fair use factor, “the amount and substantiality of the portion used in relation to the copyrighted

Within the first factor, courts often inquire into whether the use was transformative. *Id.* at 583 587–88, 603–06. For further discussion of transformative uses, see *infra* Part III.A.

¹⁷⁰ 17 U.S.C. § 107 (2012).

¹⁷¹ *E.g.*, *Campbell*, 510 U.S. at 586; *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

¹⁷² *Campbell*, 510 U.S. at 586.

¹⁷³ *See id.*; *Bill Graham Archives*, 448 F.3d at 612.

¹⁷⁴ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563–64 (1985); *see id.* at 552–53.

¹⁷⁵ *Id.* at 550–53, 563–64.

¹⁷⁶ *Id.*

¹⁷⁷ 17 U.S.C. § 107 (2012).

¹⁷⁸ *See, e.g.*, *Bill Graham Archives*, 448 F.3d at 612.

work as a whole.”¹⁷⁹ Borrowing material that is quite substantial either quantitatively or qualitatively may often cut against fair use.¹⁸⁰ However, the extent of the defendant’s borrowing must be considered in light of the purposes underlying the defendant’s use of the copyrighted work.¹⁸¹ If the defendant used what was reasonably necessary to advance purposes that the fair use doctrine might favor, even substantial borrowing could still be fair use upon consideration of all of the factors.¹⁸² Conversely, borrowing to an extent clearly exceeding what was reasonably necessary may cause the third factor to cut against fair use, despite the existence of an otherwise favored purpose.¹⁸³

The fourth fair use factor identified in § 107 is “the effect of the use on the potential market for or value of the copyrighted work.”¹⁸⁴ If the defendant’s use adversely affects the copyright owner’s ability to exploit the work financially, this factor tends to cut against—sometimes strongly against—fair use.¹⁸⁵ In deciding whether such adverse effect is present, courts consider not only primary markets for the work itself but also reasonable markets for derivative uses of the work.¹⁸⁶

Two Supreme Court decisions merit special attention because they have played leading roles in shaping the fair use analysis and because they relate in different ways to this Article’s later proposal of a fair use analysis for cases involving uses of historic works such as the “I Have a Dream” speech. The following subsection discusses *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹⁸⁷ which

¹⁷⁹ 17 U.S.C. § 107 (2012).

¹⁸⁰ *Campbell*, 510 U.S. at 586; *Harper & Row*, 471 U.S. at 564–66; *Bill Graham Archives*, 448 F.3d at 613.

¹⁸¹ *See Campbell*, 510 U.S. at 586.

¹⁸² *See id.* at 586; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1167 (9th Cir. 2006).

¹⁸³ *See Harper & Row*, 471 U.S. at 564–66.

¹⁸⁴ 17 U.S.C. § 107.

¹⁸⁵ *Harper & Row*, 471 U.S. at 566–68.

¹⁸⁶ *Campbell*, 510 U.S. at 592–94. To be considered here, the market must be a reasonable, logical market of sort that the copyright owner would be inclined to pursue. For instance, if the defendant’s use was highly transformative, there probably was no impairment of a market the copyright owner would logically pursue. *See id.* at 591–92; *Bill Graham Archives*, 448 F.3d at 613–15.

¹⁸⁷ 471 U.S. 539 (1985).

might seem at first glance to run contrary to the Article's proposal but which, if properly understood and read in context, does not amount to a significant obstacle.¹⁸⁸ A later subsection will examine *Campbell v. Acuff-Rose Music, Inc.*,¹⁸⁹ which offers insights relevant to the Article's proposal even though the nature of the copyrighted work and the defendants' use in *Campbell* differed from the nature of the copyrighted works and types of uses with which this Article is concerned.¹⁹⁰

B. *The Harper & Row Decision*

In 1977, an editor at the political magazine *The Nation*, came into possession of a copy of the then-unpublished manuscript of former President Ford's memoirs.¹⁹¹ The editor then wrote an article that used quotations and paraphrased language from the manuscript.¹⁹² This occurred without permission from the Harper & Row publishing company, owner of the copyright on the manuscript.¹⁹³ The quotations borrowed from the copyrighted work constituted thirteen percent of the editor's article, totaled approximately 300 words, and pertained for the most part to President Ford's decision to pardon former President Nixon.¹⁹⁴

The publication of the article in *The Nation* compromised Harper & Row's publication plans, which had called for excerpts from the memoirs to appear in *Time* magazine under an existing licensing agreement.¹⁹⁵ The full memoirs would then appear in book form shortly thereafter. Before the excerpts could appear in *Time*, however, the article in *The Nation* was published. Having been scooped, *Time* exercised a contractual right to be released from the excerpts deal—meaning that Harper & Row lost the licensing op-

¹⁸⁸ See *infra* Part III.C.

¹⁸⁹ 510 U.S. 569 (1994).

¹⁹⁰ See *infra* Part II.C.

¹⁹¹ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 542 (1985).

¹⁹² *Id.*

¹⁹³ *Id.* at 542–43. The article also used facts from the Ford memoirs. *Id.* at 543. However, facts, unlike expression, may be freely borrowed from copyrighted works. See *id.* at 547, 548–49; 17 U.S.C. § 102 (2012).

¹⁹⁴ *Harper & Row*, 471 U.S. at 542–43, 548, 565.

¹⁹⁵ *Id.* at 542–43.

portunity and the payment called for the agreement.¹⁹⁶ Harper & Row then sued *The Nation's* publisher and affiliated defendants for copyright infringement, and won in federal district court.¹⁹⁷ After the US Court of Appeals for the Second Circuit reversed on fair use grounds, the Supreme Court granted certiorari.¹⁹⁸

The Supreme Court made clear in *Harper & Row* that the defendants' admitted use of quotations and closely paraphrased language from the copyrighted manuscript was a taking of protected expression that would subject the defendants to infringement liability unless the fair use defense came to their rescue.¹⁹⁹ Before engaging in detailed application of the fair use factors set forth in the Copyright Act, the Court commented unfavorably on the defendants' advocacy of an expansive version of the fair use doctrine and on their argument that the First Amendment should insulate them from liability.²⁰⁰ In the Court's view, it was unnecessary to consider free speech interests to any greater extent than customary fair use principles would, despite the identity of the copyrighted work's author (a former President) and the high level of public interest in the subject matter of the borrowed words (the pardoning of an ex-President).²⁰¹ A public figure exception to a copyright owner's rights would be unwarranted, the Court reasoned.²⁰² Adhering to the conventional view that the fair use doctrine operates as a built-

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 543.

¹⁹⁸ *Id.* at 542.

¹⁹⁹ *Id.* at 541-42, 547, 548-49.

²⁰⁰ *See id.* at 555-56.

²⁰¹ *See id.*

²⁰² *Id.* at 557, 559-60, 569. Writing for the majority, Justice O'Connor stated that the defendants' arguments "would expand fair use to effectively destroy any expectation of copyright protection in the work of a public figure." *Id.* at 557. Under the circumstances present in the case, the Court saw "no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." *Id.* at 560. These statements by the Court may seem to run contrary to the fair use proposal advanced later in this Article. However, as will be seen, the statements must be evaluated within the context of *Harper & Row*—a context quite different from that of cases involving uses of historic works such as the "I Have a Dream" speech. If properly evaluated and interpreted, the *Harper & Row* statements do not block the Article's proposal. *See infra* Part III.B.

in safeguard of First Amendment interests,²⁰³ the Court indicated that standard fair use analysis would be used to determine whether the defendants were liable.²⁰⁴

Seeming to suggest that the statute's mention of "commercial" in the first fair use factor²⁰⁵ called for consideration of whether any meaningful commercial motivation was present (as opposed to whether such a motivation predominated), the Court determined that *The Nation's* for-profit character significantly diminished the defendants' fair use chances.²⁰⁶ Justice O'Connor's majority opinion ascribed little significance to the defendants' argument that the article in *The Nation* involved news reporting or a similar effort to inform readers about matters of great public interest.²⁰⁷ Although Congress has identified such purposes as good candidates for fair use treatment,²⁰⁸ the Court's resolution of the first fair use factor against the defendants focused mainly on the profit motive underlying the defendants' magazine.²⁰⁹ The Court

²⁰³ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 218–21 (2003); see also *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264–65 (11th Cir. 2001) (recognizing this conventional view but noting that fair use analysis must be conducted with clear awareness of First Amendment interests). For analysis of the conventional view and its potential shortcomings, as well as proposals for making the fair use doctrine more sensitive to First Amendment interests, see Arlen W. Langvardt and Tara E. Langvardt, *Caught in the Copyright Rye: Freeing First Amendment Interests from the Constraints of the Traditional View*, 2 HARV. J. SPORTS & ENT. L. 99, 118–55 (2011).

²⁰⁴ *Harper & Row*, 471 U.S. at 556–60.

²⁰⁵ 17 U.S.C. § 107 (2012).

²⁰⁶ See *Harper & Row*, 471 U.S. at 562–63.

²⁰⁷ See *id.* at 542–43, 558, 561. The Court appeared not to recognize that the public interest may play a significant role in the fair use analysis and may call for a First Amendment-based privilege in certain copyright infringement cases. See Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283, 297 (1979).

²⁰⁸ See 17 U.S.C. § 107.

²⁰⁹ See *Harper & Row*, 471 U.S. at 561–63. Nearly all magazines and similar publications are for-profit in nature, however. *Castle Rock Entm't, Inc. v. Carol Publ'g Group*, 150 F.3d 132, 141 (2d Cir. 1998). The Court's analysis in *Harper & Row* differed sharply from what general First Amendment principles would have dictated if those principles had been applied. The article in *The Nation* constituted political speech, which receives full First Amendment protection. See e.g., *Citizens United v. FEC*, 558 U.S. 310, 329, 340 (2010); *Texas v. Johnson*, 491 U.S. 397, 406, 412 (1989). General First Amendment principles also indicate that the magazine would have been classified as noncommercial speech, notwithstanding the profit motive. See, e.g., *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). The magazine would not have been treated as

thus placed almost no weight on purposes and considerations that might have been regarded as offsetting the commercial motivation.²¹⁰ As will be seen, however, a later decision of the Court would adopt a far more measured approach to consideration of commercial motivation.²¹¹

Turning to the second fair use factor,²¹² the *Harper & Row* Court emphasized the unpublished nature of the copyrighted work and the fact that the defendants had deprived the copyright owner of the important right of first publication.²¹³ Therefore, the Court concluded, the second factor cut strongly against fair use.²¹⁴ In so ruling, the Court made the unpublished-versus-published issue a key component of the factor-two analysis and indicated that a de-

less-protected commercial speech, because the Supreme Court's commercial speech definition applies to advertising and little, if anything, more. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 770–72 (1976). The greater protection for speech contemplated by general First Amendment principles suggests flaws in the courts' conventional view—see *supra* text accompanying note 203—that the fair use doctrine sufficiently safeguards free speech interests and eliminates the need for a separate First Amendment defense in copyright infringement cases. See Langvardt & Langvardt, *supra* note 203, at 118–55; see also Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082, 1110 (2013) [hereinafter Netanel, *First Amendment Constraints*] (noting that fair use doctrine sometimes “falls glaringly short” in the First Amendment sense); Ned Snow, *The Forgotten Right of Fair Use*, 62 CASE WES. L. REV. 135, 138 (2011) (characterizing free speech and copyright as being “[a]t war,” despite existence of fair use doctrine).

²¹⁰ See *Harper & Row*, 471 U.S. at 558–61. *Harper & Row*'s seemingly hardline application of the first fair use factor appears to have been influenced by a concern that pertained mainly to the second factor but permeated the Court's opinion: the defendants' undermining of the important right of first publication that Harper & Row held with regard to the previously unpublished manuscript. See *id.* at 551–55, 562–64, 569. In addition, the Court's factor-one approach may have been influenced by concern about the mysterious circumstances under which the defendants acquired a copy of the unpublished Ford manuscript and about the magazine editor's apparent desire to “scoop” other publications. Justice O'Connor's majority opinion suggests that the Court may have regarded the defendants as having a special profit motive that exceeded the usual profit motive for issues of the magazine. See *id.* at 562–63. It does not appear, however, that the defendants acted unlawfully in obtaining access to a copy of the manuscript from an “undisclosed source.” *Id.* at 542; see also *id.* at 562–63. Moreover, use of undisclosed sources and wanting to scoop other publications seem to be common media practices.

²¹¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571, 579–80, 584–85 (1994). For discussion of *Campbell*, see *infra* Part II.C.

²¹² That factor is the nature of the copyrighted work. 17 U.S.C. § 107 (2012).

²¹³ *Harper & Row*, 471 U.S. at 551–53.

²¹⁴ *Id.* at 551–55, 563–64, 569.

defendant's having borrowed from an unpublished work would likely make succeeding with the fair use defense an uphill battle.²¹⁵

The defendants also fared poorly on the third factor,²¹⁶ with the Court concluding that the expression borrowed from the copyrighted manuscript was qualitatively substantial even if not quantitatively so.²¹⁷ The Court emphasized "the expressive value of the [borrowed] excerpts and their key role in the infringing work,"²¹⁸ and observed that the defendants used some of the "most powerful passages" in the Ford manuscript.²¹⁹ In the Court's view, the defendants had taken the "'heart'" of the copyrighted work.²²⁰ The Court concluded, therefore, that the third factor also cut against fair use.²²¹

The fourth fair use factor²²² likewise proved to be a major problem for the defendants, as the Court identified what it saw as a clear adverse effect on Harper & Row's ability to reap financial advantage in the marketplace.²²³ Noting that the fourth factor contemplates the harm to actual or potential markets for the original

²¹⁵ See *id.* at 550–51, 552–55, 563–64. Justice O'Connor's majority opinion repeatedly expressed disapproval of users' actions that compromise a copyright owner's right of first publication. See *id.* The Court's concerns along those lines not only shaped the factor-two analysis but may also have influenced the Court to take the previously noted hardline approach to the application of the first fair use factor. *Harper & Row* reflects little inclination on the part of the majority to weigh the defendants' factor-one purpose of informing the public about a political and historical matter of great importance against the factor-two consideration that the Ford memoirs constituted an unpublished work. See *id.*, at 561–63.

²¹⁶ 17 U.S.C. § 107.

²¹⁷ *Harper & Row*, 471 U.S. at 564–65.

²¹⁸ *Id.* at 566.

²¹⁹ *Id.* at 565.

²²⁰ *Id.* (quoting district court's opinion).

²²¹ *Id.* at 564–66, 569.

²²² 17 U.S.C. § 107.

²²³ 471 U.S. at 566–69. Justice O'Connor's majority opinion labeled the fourth factor as "the single most important" of the factors, presumably in a relative sense. See *id.* at 566–68. In a later decision, the Court backed away somewhat from that characterization of the fourth factor's importance by noting that "[m]arket harm is a matter of degree, and importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 n.21; see also Netanel, *First Amendment Constraints*, *supra* note 209, at 1111 (noting *Campbell*'s movement away from *Harper & Row* in regard to factor number four).

work and derivative works based upon it,²²⁴ the Court identified clear actual harm in the collapse of Harper & Row's licensing deal with *Time* and the loss of the payment the publishing company was to receive.²²⁵

Harper & Row's analysis reflected a less-than-expansive approach to the fair use doctrine and a possible weakening of the doctrine's effectiveness in protecting those who borrow from copyrighted works for public interest-related purposes.²²⁶ The major decision to be discussed in the following subsection, however, suggested a potentially broader scope for the fair use defense.

C. *The Campbell Decision*

*Campbell v. Acuff-Rose Music, Inc.*²²⁷ arose after Luther Campbell and fellow members of the musical group 2 Live Crew wrote and recorded a parody version of "Oh, Pretty Woman," a song co-written by Roy Orbison and William Dees and recorded by Orbison in hit-making fashion during the mid-1960s.²²⁸ Acuff-Rose Music, Inc., which owned the "Oh, Pretty Woman" copyright, had denied 2 Live Crew's request for permission to include the parody version on an album the group planned to release in 1989.²²⁹ 2 Live Crew proceeded with its plan anyway and sold approximately 250,000 copies of the album during the first year after its release.²³⁰ Acuff-Rose then sued the group members and their record label for copyright infringement.²³¹ A federal district court granted summary judgment for the defendants on fair use grounds, but the U.S.

²²⁴ *Harper & Row*, 471 U.S. at 566–68.

²²⁵ *Id.* at 567; *see id.* at 542–43. "Rarely will a case of copyright infringement present such clear-cut evidence of actual damage," Justice O'Connor observed. *Id.* at 567. The Court also suggested that the publication of the article in *The Nation* could adversely affect sales of the Ford memoirs, because readers of the article would already have been exposed to the supposed heart of the book. *See id.* at 564–66, 568–69.

²²⁶ *See* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 21–23 (2001).

²²⁷ 510 U.S. 569 (1994).

²²⁸ *Id.* at 572–73.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* Although the defendants' decision to proceed after being denied permission may have made Acuff-Rose particularly inclined to sue them, it did not deprive them of the ability to invoke the fair use defense. *Id.* at 585 n.18.

Court of Appeals for the Sixth Circuit reversed and remanded because, in its view, the commercial nature of the defendants' parody barred it from fair use protection.²³²

The Supreme Court granted certiorari in *Campbell* "to determine whether 2 Live Crew's commercial parody could be a fair use."²³³ Of course, the Court's answer to that question has shaped the analysis of fair use issues in cases involving parodies, but *Campbell*'s significance is not restricted to the parody setting. Principles and considerations articulated in *Campbell* have assumed great importance in the fair use analysis regardless of whether the use at issue was a parody.²³⁴

In *Campbell*, the Court quickly concluded that parody may qualify for fair use protection.²³⁵ Writing for a unanimous Court, Justice Souter noted that through the use of humor, the parodist "can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."²³⁶ As a form of criticism or commentary, parody was among the types of uses singled out by Congress as a candidate for fair use protection.²³⁷ The Court emphasized, however, that it was not creating any presumption that parody is fair use, because "parody, like any other use, has to work its way through the [four fair use] factors, and be judged case by case, in light of the ends of the copyright law."²³⁸

As part of its application of the first fair use factor, the Court stated that this factor's focus on the purpose and character of the

²³² *Id.* at 573-74.

²³³ *Id.* at 574.

²³⁴ *Campbell* has had an "immense" impact on fair use analysis. See ABRAMS, *supra* note 161, § 15:26. The decision constituted a "significant watershed" in that regard. *Id.*

²³⁵ *Campbell*, 510 U.S. at 579-80.

²³⁶ *Id.* at 579.

²³⁷ *Id.* at 578-79. See 17 U.S.C. § 107 (2012).

²³⁸ *Campbell*, 510 U.S. at 581. In addition, Justice Souter explained, a parody would be a plausible candidate for fair use treatment only if it reflected, to a meaningful extent, commentary on the copyrighted work being parodied, as opposed to merely using the work as a vehicle for commentary on other subjects. *Id.* at 580. The parody at issue in *Campbell* met that threshold requirement, the Court observed. *Id.* at 582-83. Justice Souter suggested that if the parody included commentary on other matters such as social issues, it could still be a candidate for fair use protection as long as it included commentary on the work from which the parody borrowed. See *id.* at 579-80, 581-82, 582-83.

defendant's use involves determining "whether the new work 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; it asks, in other words, whether and to what extent the new work is 'transformative.'"²³⁹ Although the Court went on to note that a transformative character was "not absolutely necessary for a finding of fair use," it stated that transformative uses "lie at the heart of the fair use doctrine's breathing space within the confines of copyright."²⁴⁰ *Campbell's* emphasis on transformative uses has had a profound effect on fair use analysis, as courts ever since have paid considerable attention to whether defendants seeking fair use protection can credibly claim that their borrowing from the copyrighted work featured a transformative character.²⁴¹

The Court also observed in *Campbell* that the more transformative the use, the less important will be other considerations, such as commercialism, that might otherwise cut against fair use.²⁴² This statement related directly to another key aspect of the Court's application of the first fair use factor: the role a defendant's profit motive should play in the fair use analysis. The Sixth Circuit had held in *Campbell* that the "'blatantly commercial purpose [of 2 Live Crew's parody] prevents [it] from being a fair use.'"²⁴³ In doing so, the Sixth Circuit had interpreted *Sony Corp. of America v. Universal City Studios, Inc.*,²⁴⁴ as setting up an essentially unassailable presumption against fair use for any use reflecting a meaningful commercial purpose.²⁴⁵ The Supreme Court, however, emphasized that the Sixth Circuit had erred in so interpreting *Sony* and in giving essentially conclusive effect to the fact that the defendants had profited financially.²⁴⁶

²³⁹ *Id.* at 579. In using the term "transformative," the Court was quoting Judge Leval's influential article. Leval, *supra* note 15, at 1111. The Court noted that parody will often have a strong claim to being transformative. *Campbell*, 510 U.S. at 579.

²⁴⁰ *Campbell*, 510 U.S. at 579.

²⁴¹ ABRAMS, *supra* note 161, § 15:42.30; *see* Samuelson, *supra* note 162, at 2549–55.

²⁴² *Campbell*, 510 U.S. at 579.

²⁴³ *Id.* at 575 (quoting *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1439 (6th Cir. 1992)).

²⁴⁴ 464 U.S. 417 (1984).

²⁴⁵ *Campbell*, 510 U.S. at 583–84.

²⁴⁶ *Id.* at 584–85.

Instead, Justice Souter stressed, the question of whether a use was commercial is only a part of the inquiry under the first fair use factor, which, in any event, contemplates that the significance of a defendant's profit-making motivation would vary with the context of the case.²⁴⁷ The Court referred to *Harper & Row, Publishers, Inc. v. Nation Enterprises*²⁴⁸ as having established that the commercial character of a use is merely a consideration that could weigh against fair use, not something that makes the use presumptively unfair.²⁴⁹ If uses with any meaningful commercial character were presumed not to be fair use, Justice Souter continued, "the presumption would swallow nearly all of the illustrative uses listed in [the fair use section of the Copyright Act], including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'"²⁵⁰ In the case at hand, then, the profit-making nature of 2 Live Crew's use of the copyrighted work did not render the fair use defense off-limits to the defendants.²⁵¹

Although Justice Souter cited *Harper & Row* as being consistent with the notion that the first fair use factor involves considering more than just whether the use had a commercial character,²⁵² *Campbell*'s treatment of the first factor differed significantly from *Harper & Row*'s application of it. *Harper & Row* emphasized the defendants' profit motive and devoted minimal attention to potentially offsetting considerations such as informing the public about important historical matters.²⁵³ In *Campbell*, however, the emphasis was reversed. There, the Court stressed the role of offsetting con-

²⁴⁷ *Campbell*, 510 U.S. at 584–85. To underscore this point, the Court stated that "the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial nature of a use bars a finding of fairness." *Id.* at 584. As an example of how the significance of a profit motive will vary with the context, the Court noted that the use of a copyrighted work "to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry than the sale of a parody for its own sake" *Id.* at 585.

²⁴⁸ 471 U.S. 539 (1985).

²⁴⁹ *Campbell*, 510 U.S. at 584–85.

²⁵⁰ *Id.* at 584 (quoting *Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting)); see also 17 U.S.C. § 107 (2012).

²⁵¹ See *Campbell*, 510 U.S. at 583–85.

²⁵² See *id.* at 583–84.

²⁵³ See *supra* text accompanying notes 205–11.

siderations such as transformative character and other favored types of purposes in reducing the attention a reviewing court should pay to a defendant's profit motive.²⁵⁴ *Campbell* thus contemplated a factor-one analysis that is potentially more favorable to defendants making fair use arguments than was the analysis in *Harper & Row*.²⁵⁵

After noting the second fair use factor²⁵⁶ but concluding that it would carry little weight in the case before the Court,²⁵⁷ Justice Souter turned to the third factor, the amount and substantiality of the portion borrowed by the defendant from the copyrighted work.²⁵⁸ The Court observed that this factor calls for consideration not only of the quantity of the portion used but also of the qualitative importance of what was borrowed.²⁵⁹ Citing the interplay between the third and fourth fair use factors,²⁶⁰ the Court stated that "a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original."²⁶¹

The Court nevertheless observed that the extent of the defendant's borrowing must be evaluated in light of the defendant's

²⁵⁴ See *Campbell*, 510 U.S. at 578–85. See also 17 U.S.C. § 107 (setting forth types of purposes that may be good candidates for fair use treatment).

²⁵⁵ See *Campbell*, 510 U.S. at 578–85. In citing Justice Brennan's dissent in *Harper & Row*, Justice Souter may have been implying in *Campbell* that the *Harper & Row* Court had paid too little attention to the defendants' news reporting purpose. See *Campbell*, 510 U.S. at 584; see also Samuelson, *supra* note 162, at 2565 (characterizing *Harper & Row* as an overreaction to the facts before the Court and *Campbell* as having a moderating effect on the *Harper & Row* analysis).

²⁵⁶ That factor is the nature of the copyrighted work. 17 U.S.C. § 107.

²⁵⁷ The Court noted the conventional view that borrowings from highly creative works may not seem to be as strong a candidate for fair use treatment as borrowings from largely factual works, but then proceeded to note that the conventional view in the end may not offer much useful insight. *Campbell*, 510 U.S. at 586. Justice Souter observed that the highly creative nature of copyrighted fictional works "is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works." *Id.* The Court's treatment of factor number two consisted of one paragraph. *Id.*

²⁵⁸ 17 U.S.C. § 107.

²⁵⁹ *Campbell*, 510 U.S. at 587.

²⁶⁰ See 17 U.S.C. § 107. For discussion of *Campbell's* application of the fourth factor, see *infra* text accompanying notes 269–76.

²⁶¹ *Id.* at 587–88.

purposes.²⁶² For instance, parodists who borrow from copyrighted works must have sufficient latitude to to “conjure up” the original work in the mind of the audience and thereby cause the audience to recognize the parody’s target. Otherwise, the humor and commentary in the parody will not be effective.²⁶³ In a given parody case, therefore, even the borrowing of the work’s recognizable or memorable “heart” may not cause the third factor to cut against fair use, if such borrowing was reasonably necessary to furtherance of the parodic purpose. Significantly greater borrowing than what was reasonably necessary, however, could cause the third factor—and perhaps the fourth as well—to work against the defendant’s fair use argument.²⁶⁴

Applying these principles to the parody before it in *Campbell*, the Court stated that in “cop[y]ing the characteristic opening bass riff (or musical phrase) of the original,” as well as some of its lyrics, the defendants borrowed what “may be [characterized as] the ‘heart’ of the original.”²⁶⁵ Justice Souter observed, however, that “the heart is also what most readily conjures up the [copyrighted work] for parody, and it is the heart at which parody takes aim.”²⁶⁶ He added: “Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original’s heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through.”²⁶⁷

²⁶² See *id.* at 586–87.

²⁶³ *Id.* at 588.

²⁶⁴ See *id.* at 588–89. Only on a case-by-case basis can it be determined whether the extent of the defendant’s borrowing fit generally within or, or significantly exceeded, what was reasonably necessary in light of the defendant’s purpose. See *id.* at 586–89.

²⁶⁵ *Id.* at 588.

²⁶⁶ *Id.* The Court also stressed that the defendants had not simply engaged in copying from “Oh, Pretty Woman.” They also added new considerable musical and lyrical expression. *Id.* at 589.

²⁶⁷ *Id.* at 588–89. The Court concluded that the borrowing of lyrics from the copyrighted song was not excessive under the circumstances. It expressed no view on whether the defendants’ repetitions of the song’s distinctive bass riff went too far, leaving that issue for consideration on remand in light of the principles articulated in *Campbell*. *Id.* at 589. The Court’s repeated references to the “heart” of a work seemed designed to distinguish the parody setting of *Campbell* from the non-parody context of *Harper & Row*. See *Campbell*, 510 U.S. at 587–89. In *Harper & Row*, the defendant’s borrowing of the supposed heart of President Ford’s unpublished memoirs was among the reasons why the

Much of *Campbell*'s discussion of the third fair use factor was tailored to parodies because the case involved a parody. But early in its third-factor discussion—before it began exploring specific parody-related issues—the Court plainly stated that the extent of the defendant's borrowing must be evaluated in light of the defendant's purpose.²⁶⁸ Because this general statement was not by its terms restricted to the parody setting, it should play an important role in the factor-three analysis even when the defendant seeks fair use protection for a use meant to further purposes other than parody.

The *Campbell* Court then turned to the fourth fair use factor, which calls for consideration of whether defendant's use had an actual or likely adverse effect on markets for the copyrighted work.²⁶⁹ The Court noted that the Sixth Circuit, which had erred in ruling that a use with a meaningful commercial character could not be fair use, committed a similar error in regard to factor number four by presuming market harm because of the commercial nature of the defendants' use of the copyrighted work.²⁷⁰ The Court concluded, instead, that when the defendant's use is transformative, market substitution by consumers is less likely and therefore cannot be presumed to have occurred.²⁷¹

In addition, the fourth factor requires consideration of whether the defendant's actions would be likely to harm logical markets for derivative works based on the copyrighted work.²⁷² The relevant derivative markets to be considered here include "only those [uses] that creators of original works would in general develop or license

Court denied fair use protection to the defendant. See *Harper & Row*, 471 U.S. at 564–66. For discussion of *Harper & Row*, see *supra* Part II.B.

²⁶⁸ See *Campbell*, 510 U.S. at 586–87.

²⁶⁹ See 17 U.S.C. § 107.

²⁷⁰ *Campbell*, 510 U.S. at 591; see also *id.* at 583–84.

²⁷¹ *Id.* at 591. The Court observed that given the "different market functions" served by the original copyrighted work and the parody version, it is "likely that the [parody] will not affect the market for the original in a way cognizable under [the fourth fair use] factor." *Id.* That was the situation in *Campbell*. See *id.* at 593. See also Netanel, *First Amendment Constraints*, *supra* note 209, at 1111 (characterizing *Campbell*'s approach to the fourth fair use factor as a repudiation of the market-centered approach in *Harper & Row*).

²⁷² *Campbell*, 510 U.S. at 590, 592–93.

others to develop.”²⁷³ Justice Souter stressed in *Campbell* that “there is no protectible derivative market for criticism [because] the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.”²⁷⁴ Accordingly, the defendants could not be treated as having harmed a potential market for “Oh, Pretty Woman” parodies, because a supposed market of that sort would not be a logical one.²⁷⁵ There was, however, a potential market that 2 Live Crew might have impaired: the market for rap versions of “Oh, Pretty Woman.” With the evidentiary record not providing a basis for determining whether such impairment had occurred or was likely, the Court remanded for further consideration of that question.²⁷⁶

The remand ordered by the Court meant that *Campbell* was not a flat-out win for the defendants, but Justice Souter’s opinion was a favorable one for parodists and for other defendants who seek the protection of the fair use doctrine. *Campbell*’s treatment of the fair use factors contemplated a far broader potential scope for the fair use defense than the Court had signaled nine years earlier in the *Harper & Row* decision.²⁷⁷ As will be seen, *Campbell*’s insights will play key roles in the fair use analysis proposed in this Article. The following section presents that analysis.

III. THE FAIR USE DREAM: A PROPOSED ANALYSIS

As previous discussion revealed, courts have not had occasion to determine whether particular unlicensed uses of the “I Have a Dream” speech may merit the fair use defense’s protection against copyright infringement liability. Courts that have ruled in infringement cases dealing with the speech have focused on whether the required actions for securing copyright were taken under the

²⁷³ *Id.* at 592.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 592–94.

²⁷⁷ Compare *id.* at 578–94 (viewing fair use factors in light potentially favorable to defendants) with *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561–69 (1985) (applying fair use factors in manner considerably more favorable to copyright owner). For further discussion of *Harper & Row*, see *supra* Part II.B.

law in effect in 1963, without reaching possible fair use questions.²⁷⁸ Other cases have been settled, leaving fair use arguments unresolved. Moreover, it seems reasonable to conclude that as a likely effect of the King Estate's approach to copyright enforcement, those who want to use portions of the speech and may have had strong fair use arguments for doing so have tended to seek and pay for a license in order to eliminate the threat of being sued.²⁷⁹

There are substantial fair use arguments to be made regarding many uses of the speech, but those arguments obviously will go nowhere unless a court is in position to rule on them. That will happen only if a user of part or all of "I Have a Dream" departs from the usual tendency to seek a license and refuses to yield in the face of infringement allegations. Perhaps the user would be a documentary filmmaker who includes much or all of the speech in the documentary and accompanies it with commentary, interviews, and historical footage. Perhaps the user would post full-text versions of the speech online, in an effort to inform and educate. The user might be a book publisher that prints the text of the speech and accompanies it with explanatory notes. Or the user could be one whose "I Still Have a Dream" speech borrows from the original but adds content in an effort to consider the assessment Dr. King might offer, if he were alive today, of what we still need to do to realize the vision he set forth in the original speech. Other justifiable uses can readily be envisioned.

Any of the possible uses identified above would be likely to trigger a lawsuit in which the fair use defense would be potentially applicable. Alternatively, a declaratory judgment action by the user could be a route to a fair use ruling by a court, given the likelihood that the use would prompt an objection and a threat of litigation from the King Estate (thus creating a genuine controversy suitable for judicial resolution). The following subsections assume the existence of a case or cases in which the user of part or all of the "I Have a Dream" speech argues for fair use protection against infringement liability. A court deciding such a case should approach

²⁷⁸ See *supra* Part II.A.

²⁷⁹ See *supra* text accompanying notes 16–18, 120–21. Sometimes would-be users have simply abandoned the idea, as indicated in the previous discussion of the movie *Selma*. See *supra* text accompanying notes 122–24.

the fair use determination in a manner consistent with the analysis to be offered below. The analysis proceeds on a factor-by-factor basis, with other relevant considerations added along the way.

A. *The First Factor*

In a case involving an unlicensed use of “I Have a Dream,” the court would analyze the fair use issues by working through the statutorily required factors, the first of which deals with the purpose and character of the defendant’s use.²⁸⁰ As a reason for the court to resolve the first factor against the defendant, the King Estate surely would seek to highlight the profit motive that would be present in many uses of the speech. Such a point of emphasis would be understandable, considering the statute’s reference to “commercial” use in the factor-one language and the approach adopted by the Supreme Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.²⁸¹ There, as previous discussion revealed, the Court honed in on the commercial motivation that *The Nation*, a for-profit magazine, would have had regarding its article that borrowed expression from the copyrighted, unpublished manuscript of President Ford’s memoirs. When it concluded that the first factor cut against fair use, the *Harper & Row* Court paid little attention to potentially offsetting purposes, such as news reporting, that also attended the publication of the article in *The Nation*.²⁸²

The King Estate, however, would succeed with the above argument—and the court would take a *Harper & Row*-like approach to the first fair use factor—only if the court pays insufficient attention to three key matters: the relevant statutory language; the context of *Harper & Row*; and the lessons the Supreme Court later provided in *Campbell v. Acuff-Rose Music, Inc.*²⁸³ The following subsections address those matters.

1. The Statutory Language and the *Harper & Row* Context

In setting forth the first fair use factor, Congress called for an inquiry into “the purpose and character of the use, *including*

²⁸⁰ 17 U.S.C. § 107 (2012).

²⁸¹ 471 U.S. 539 (1985).

²⁸² *Id.* at 561–63.

²⁸³ 510 U.S. 569 (1994).

whether such use is of a commercial nature” or, instead, is of a “nonprofit educational” nature.²⁸⁴ The use of the word “including” indicates that the commercial versus nonprofit educational question is only part of the factor-one inquiry. Other purposes may have an offsetting effect with regard to an underlying profit motive, and should also be taken into account under the first factor.²⁸⁵

In doing little more than wave at any purpose other than a commercial motivation that was also present regarding the article in *The Nation*, *Harper & Row* did not conduct the true weighing and balancing contemplated by the statute. Justice O’Connor’s majority opinion in *Harper & Row* suggests that the Court’s narrow approach to factor number one and its pro-copyright-owner application of the other fair use factors were influenced greatly by the concern that the defendant’s magazine article usurped Harper & Row’s critical right of first publication. That concern permeated the *Harper & Row* decision,²⁸⁶ whose factual context, therefore, is significantly different from the context of any case involving an unlicensed use of the “I Have a Dream” speech.

The right of first publication issue that preoccupied the Court in *Harper & Row* stemmed from the fact that the Ford manuscript was an unpublished work as of the time the defendants borrowed from it. The former President’s memoirs had been kept confidential until someone surreptitiously provided a copy to an editor of *The Nation*.²⁸⁷ If that action had not taken place, there would have been no article in *The Nation*, and Harper & Row’s excerpts-licensing plans would not have been disrupted.²⁸⁸

The “I Have a Dream” speech, however, cannot credibly be considered an unpublished work, at least not in the same sense the Ford manuscript was. According to the courts that decided the previously discussed cases dealing with whether the speech carried copyright protection under the law in effect in 1963, the speech was not a published work as of the date of its delivery (August 28, 1963) because copies distributed that day were made available only to the

²⁸⁴ 17 U.S.C. § 107 (2012) (emphasis added).

²⁸⁵ See *Campbell*, 510 U.S. at 578–85.

²⁸⁶ See *Harper & Row*, 471 U.S. at 550–57, 561–64, 567.

²⁸⁷ *Id.* at 542, 557.

²⁸⁸ *Id.* at 557, 567–69.

press and because precedent cases indicated that the performance of a work (there, Dr. King's delivery of the speech) did not constitute a general publication.²⁸⁹ Though not published for purposes of the then-existing rules on copyright protection, the speech was "published" on August 28, 1963 in a different sense more relevant here: the sense of making it widely available to the public through delivery to the 200,000 or more people present at the scene and through the television coverage the organizers of the March on Washington invited and encouraged.²⁹⁰ Thus, unlike the Ford memoirs, the speech was anything but a confidential work being held under wraps until the copyright owner could begin implementing licensing plans. From the beginning, the speech was designed for widespread public consumption and, of course, broad public enlightenment.

Moreover, as the above-mentioned cases reveal, the speech clearly became a published work in the conventional legal sense shortly after August 28, 1963, when Dr. King authorized the publication of the speech in certain books or other periodicals.²⁹¹ Decades of copyright enforcement, including receipt of licensing fees, by the King Estate further demonstrate the impossibility that a defendant's use of the speech somehow could undermine a right of first publication.²⁹² Accordingly, the right of first publication concern that so animated the Court in *Harper & Row* is simply not present with regard to Dr. King's speech. This strongly suggests that a court deciding a case regarding use of the speech should not ascribe a narrow, *Harper & Row*-influenced scope to the first fair use factor. The *Harper & Row* Court, in applying factor number one, paid special attention to the likelihood that the defendants made money as a result of their borrowing before the copyright owner could implement its plans to exploit the work in a financial

²⁸⁹ *King v. Mister Maestro, Inc.*, 224 F. Supp. 101, 106-08 (S.D.N.Y. 1963); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214-17, 1120 (11th Cir. 1999). Therefore, the courts ruled, Dr. King did not lose the common law copyright that the law then recognized regarding unpublished works. *Mister Maestro*, 224 F. Supp. at 104-05, 106-08; *CBS*, 194 F.3d at 1220. For discussion of the two decisions, see *supra* Part I.A.

²⁹⁰ *Mister Maestro*, 224 F. Supp. at 103-04, 106-08; *CBS*, 194 F.3d at 1213.

²⁹¹ *Mister Maestro*, 224 F. Supp. at 104-05, 106-08.

²⁹² See *supra* Part I.B.

sense.²⁹³ The very different facts surrounding an unlicensed use of “I Have a Dream” would not support similar special emphasis on the defendant’s profit motive as a reason to deny the defendant the protection of the fair use defense.

2. Lessons from *Campbell*

The lessons provided by *Campbell v. Acuff-Rose Music, Inc.*²⁹⁴ further support the foregoing analysis. One of these lessons, included in the Court’s explanation of the role of a defendant’s commercial motivation in the factor-one analysis, offered a reminder that many borrowings from copyrighted works are tied to a profit-seeking activity in some sense. The Court observed that “[i]f commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities ‘are generally conducted for profit in this country.’”²⁹⁵ The Court thus emphasized that a defendant’s profit motive, though relevant, is only one consideration in the factor-one analysis called for by § 107.²⁹⁶ Justice Souter also explained that the weight ascribed to the defendant’s commercial motivation in the fair use analysis will vary from case to case, depending upon other considerations that may be in play.²⁹⁷

Campbell thus made plain that when courts consider the purpose and character of the defendant’s use of the copyrighted work, a weighing and balancing is in order. If the use reflects purposes valued under the fair use doctrine, those purposes may, in appropriate instances, offset or even outweigh the defendant’s profit motive.²⁹⁸ *Campbell* also emphasized the highly valued status of transformative uses—uses that borrow from the copyrighted work but

²⁹³ See *Harper & Row*, 471 U.S. at 542, 564, 566–67.

²⁹⁴ 510 U.S. 569 (1994).

²⁹⁵ *Campbell*, 510 U.S. at 584 (quoting *Harper & Row*, 471 U.S. at 592 (Brennan, J. dissenting)); see also 17 U.S.C. § 107 (2012).

²⁹⁶ 510 U.S. at 583–85.

²⁹⁷ *Id.* at 585.

²⁹⁸ *Id.* at 584–85; see also *id.* at 578–79; 17 U.S.C. § 107 (2012); see also Samuelson, *supra* note 162, at 2549–87 (discussing numerous examples of cases dealing with purposes that may offset commercial motivation).

add something new in order to further a purpose beyond what the borrowed-from work possessed. The Court observed that the more transformative the use, the less concern there should be about the commercial aspects of the defendant's use.²⁹⁹ But even though *Campbell* indicated that transformative uses lie at the core of the fair use doctrine, Justice Souter noted that fair use protection may apply even when a transformative character is not present.³⁰⁰

3. Application to Uses of "I Have a Dream"

The weighing and balancing contemplated by the first fair use factor, as envisioned in *Campbell*, allows ample room for unlicensed users of the "I Have a Dream" speech to stress considerations that should cause the first fair use factor to point in their favor. Many uses of the speech would have a clear educational character. For instance, showing a film of the speech—even the entire speech—in a school setting should be a prime fair use candidate for purposes of factor number one, because the use would be for nonprofit educational purposes.³⁰¹ Some school-related uses of this sort presumably have occurred, but without threats of legal action because the King Estate did not know about them, chose not to object to them, or perhaps even licensed them.³⁰² But it seems reasonable to expect that cautious school administrators may not be inclined to make a use of the speech and then defend it on fair use grounds because they could perceive doing so as far riskier than it would actually be.³⁰³ Schools should have considerable borrowing and use latitude regarding "I Have a Dream."

Educational uses, moreover, may extend well beyond the formal school setting. Various other uses, such as the previously noted

²⁹⁹ *Campbell*, 510 U.S. at 579.

³⁰⁰ *Id.* Some uses that are not transformative may still benefit the public and should therefore be candidates for fair use protection despite being non-transformative. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537–38, 545, 556, 586 (2004).

³⁰¹ See 17 U.S.C. § 107 (2012). Separate statutory protection could also apply to some video showings in the classroom. See *supra* note 98.

³⁰² Strauss, *supra* note 3; see also Strauss, *King's Fiery Speech Rarely Heard*, *supra* note 18.

³⁰³ Although many school-related uses should be good candidates for fair use protection, the fact-specific, case-by-case nature of the fair use analysis does not provide the clarity a school administrator might like before making a decision on whether to use the speech.

uses in documentaries, books, and online forums, would have strong arguments that they are educational in nature.³⁰⁴ Just as in the school environment, such uses' educational character would be enhanced considerably if the "I Have a Dream" snippets we typically see or hear could be placed in the context of the full speech, or at least a good bit more of the speech than the public usually encounters. Of course, educational uses of the sort noted here probably would not be nonprofit in nature. The fact of a profit motive, however, clearly does not deprive a user of the ability to seek fair use protection. *Campbell* offered useful reminders that many, if not most, uses of copyrighted works have some sort of profit motive underlying them and that a use's commercial character may be offset or outweighed by other important purposes.³⁰⁵ Many uses' strong educational character should carry significant weight when considered alongside the profit motive the copyright owner would like to stress in the fair use analysis.

So should the commentary that would be part of certain uses of the "I Have a Dream" speech. For instance, a documentary filmmaker might accompany footage of most or all of the speech with interviews in which civil rights leaders or historians comment on the speech, its messages, and its implications. A book publisher might do a similar thing, printing the full text of the speech in a volume that includes analysis of, and commentary on, the speech. CBS produced such a documentary along those lines more than twenty-five years ago and was hit with one of the infringement lawsuits discussed earlier.³⁰⁶ The court ruled only on the copyright qualification issues surrounding the speech and did not reach CBS's fair use arguments in a case that the parties later settled.³⁰⁷ If the court had addressed the fair use issues and had adopted the approach urged here, CBS would have been treated favorably in the

³⁰⁴ See 17 U.S.C. § 107 (2012); see also Samuelson, *supra* note 162, at 2580–87 (discussing uses that promote learning).

³⁰⁵ See *Campbell*, 510 U.S. at 579, 584–85.

³⁰⁶ Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 194 F.3d 1211 (11th Cir. 1999). For discussion of the case, see *supra* text accompanying notes 57–66. See also *supra* text accompanying notes 95–96 (discussing the King Estate's dispute with the makers of the documentary *Eyes on the Prize*).

³⁰⁷ See Volz, *supra* note 9; see also text accompanying notes 69–70.

factor-one weighing and balancing process³⁰⁸ because its documentary contained commentary. Commentary is a potentially favored purpose singled out in the Copyright Act's fair use section, as is an educational purpose.³⁰⁹ When combined, commentary and an educational purpose should be especially effective in outweighing an underlying profit motive for purposes of factor number one.³¹⁰

The examples noted above could also be fairly characterized as transformative in nature. They clearly would use the speech or borrow portions of it, but would be adding content in furtherance of an educational purpose and related objectives. As *Campbell* noted, the transformative character could serve to lessen or perhaps override the factor-one concern over a use's commercial component.³¹¹ It

³⁰⁸ In a comment and note dealing with fair use issues in historical documentaries, Elizabeth High expresses the view that CBS would have had strong fair use arguments if the court had addressed them. Elizabeth High, Comment and Note, *Holding History Hostage: Fair Use in the Context of Historical Documentary*, 18 TEMP. POL. & CIV. RTS. L. REV. 753, 777-80 (2009). Her article offers useful analysis and suggestions regarding the use of voluntary guidelines that balance the rights of copyright owners and the interests of documentary makers who wish to borrow from copyrighted works for purposes of their documentaries. *See id.* at 773-76. *See also* Schiller, *supra* note 9 (asserting in op-ed that use of sort made by CBS should be protected under fair use doctrine).

³⁰⁹ *See* 17 U.S.C. § 107 (2012). Section 107's reference to "criticism or comment" should not be interpreted as indicating that commentary on a copyrighted work must be negative in nature in order to be a purpose that carries meaningful weight in the fair use analysis. Although it is possible that some commentary on the "I Have a Dream" speech could be negative in nature, the speech's wide acclaim as one of the greatest in modern times presumably would mean that commentary on it would nearly always be positive in nature. Much can be learned from commentary that addresses why the speech occupies such a rarified position or, say, explores the lessons the speech continues to offer more than five decades after its delivery.

³¹⁰ Of course, the Court in *Harper & Row* applied the first factor more narrowly than the application urged here when it concluded that the news reporting purpose stressed by *The Nation* was overwhelmed by the magazine's supposed commercial purpose. *See Harper & Row*, 471 U.S. at 562-63. However, as explained earlier, *Harper & Row*'s restrictive approach to factor number one and the other fair use factor appears to have been influenced by the Court's extreme concern over the defendants' undermining of the copyright owner's right of first publication. Such a concern would not be present with regard to uses of Dr. King's speech. Moreover, *Harper & Row*'s negative attitude toward users' profit motives appears to have been tempered by *Campbell* and its emphasis on purposes and considerations that, in the factor-one analysis, may outweigh profit motives. *See Campbell*, 510 U.S. at 579-85.

³¹¹ *Campbell*, 510 U.S. at 579. The Court also suggested in *Campbell* that when a parody of, or other commentary on, a copyrighted work is used in an effort to sell a product, it may receive less favorable treatment in the factor-one analysis than when the parody or

could be argued, of course, that uses of “I Have a Dream” may not be truly transformative if their purpose is to educate in some broad sense, because education, along with providing enlightenment and offering inspiration, was probably one of Dr. King’s underlying purposes in delivering the speech.³¹² Yet the education and enlightenment purposes of today’s uses of the speech would add a different dimension by exposing those born since 1963 to the speech in its full context, by viewing the speech through the lens of history, and by enabling an assessment of how far we have come over the past five decades and of how far we still have to go in achieving the vision Dr. King offered in the speech. That different dimension merits meaningful consideration under factor number one.

Some uses of the speech would not add content at all. Suppose, for instance, that a user prints and distributes full-text copies of the speech or that an organization publicly airs footage of the speech. Because neither use would add new content to the speech or the portions borrowed from it, such uses might not be regarded as transformative.³¹³ Even so, educational purposes and related objectives could still be present and furthered. Say that the public airing of the speech is then followed by a discussion session dealing with issues raised in the speech. Although a discussion session of that sort would not change the speech’s content in any way, important public interest considerations would be advanced through use of the speech. It is also important to remember *Campbell*’s statement that a transformative character is “not absolutely necessary” for

other commentary is itself being sold. *Id.* at 585. In uses of the sort being addressed here, users of the “I Have a Dream” speech would not be using the speech to sell a product such as a beverage, a sleep aid, or an automobile. Rather, the user’s profit motive would be tied to the communication of the speech’s content. According to the *Campbell* suggestion, then, such a profit motive should not necessarily be cause for concern under the first fair use factor. A similar distinction between speech used to sell a product and speech itself being sold operates in the First Amendment arena. The former, illustrated by an advertisement for motorcycles, is less-protected commercial speech, whereas the latter, illustrated by a movie or book, is fully protected noncommercial speech despite the underlying profit motives. *See supra* note 209.

³¹² The argument would be that, according to *Campbell*, a transformative use “adds something new, with a *further* purpose or *different* character.” *Id.* at 579 (emphasis added). Such an argument involves too restrictive a reading of the quoted language.

³¹³ *See id.*

fair use protection to be triggered.³¹⁴ Where important public interests are at stake, the lack of transformative character in a use should not doom fair use arguments to failure.

In evaluating the purpose and character of uses of “I Have a Dream,” courts should take account of the speech’s unique significance. As will be seen, this significance relates not only to the first fair use factor but also to the second. Not simply an interesting speech, “I Have a Dream” is widely regarded as a masterpiece of oratory.³¹⁵ Even more importantly for fair use purposes, it has special social and political resonance. The delivery of the speech was a critical component of the landmark March on Washington events and became a profoundly important event in the civil rights movement.³¹⁶ A student—whether still in school or in lifelong learning mode—cannot fully understand the civil rights movement and related US history without a suitable familiarity with the speech and the issues it raises. Acquisition of that familiarity would seem far more likely to be developed through exposure to the full speech than merely to the snippets usually made available. Exposure of the public to most or all of the speech can be guaranteed, however, only if a meaningfully expansive approach to fair use is recognized. Leaving such exposure purely up to the copyright owner means that it will occur only upon payment of a large licensing fee, if it is allowed to occur at all.

Similarly, the speech’s authorship and delivery by a giant in the civil rights arena and in US history more broadly give the speech a special significance. Dr. King won the Nobel Peace Prize. He is the only non-President recognized with a federal holiday. A monument commemorating his life and work appears on the National Mall in Washington, D.C. The need for meaningful public access to one of his most important works—and to what may be learned from it—would seem an especially important consideration in the fair use analysis.

The above emphasis on the special significance of the “I Have a Dream” speech and on Dr. King’s towering status in American

³¹⁴ *Id.*; see Tushnet, *supra* note 300, at 537–38, 545.

³¹⁵ See, e.g., Katukani, *supra* note 3; Strauss, *supra* note 3.

³¹⁶ See *supra* text accompanying notes 1–5, 31–32.

history would seem to run contrary to *Harper & Row*'s statement to the effect that public figures' copyrighted works should not receive less protection than other copyrighted works.³¹⁷ That *Harper & Row* statement, however, came in the context of a case in which the Court found highly troublesome the fact that the copyright owner was deprived of the especially important right of first publication.³¹⁸ It seems reasonable to conclude that regardless of whether the creator of a copyrighted work was a public figure or, instead a private figure, the same ability to exploit the right of first publication should be extended to the copyright owner. As previous discussion established, no compromising of the right of first publication occurred with regard to the "I Have a Dream" speech, and, obviously, the copyright owner has exercised publication rights for more than fifty years. When considered in light of *Harper & Row*'s context, the Court's statement about public figures' copyrighted works does not and should not bar the fair use analysis advocated here.

Moreover, this Article's proposed analysis does not feature a categorical approach to treatment of public figures' copyrighted works.³¹⁹ But neither does the proposed analysis ignore the special status and importance of Dr. King and his speech. Taking such considerations into account, as this Article's proposal does, is in keeping with the fact-specific, case-by-case nature of fair use analysis.

B. *The Second Factor*

In moving to the second factor, the nature of the copyrighted work,³²⁰ a further nod to *Campbell* is in order. Justice Souter noted there that in discussing the second factor, courts have tended to

³¹⁷ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557 (1985).

³¹⁸ See *supra* text accompanying notes 286–88.

³¹⁹ A categorical approach is taken in the law of defamation, for First Amendment reasons. In order to win a defamation case, a public official or public figure plaintiff must prove that the defendant made the false statement with actual malice (knowledge of falsity or reckless disregard for the truth). *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). A comparable public figure rule is not necessary in the copyright realm, though the public figure status of certain works' creators may bear directly on the public interest and on the historic significance of the work.

³²⁰ 17 U.S.C. § 107 (2012).

articulate a distinction between highly creative works and largely factual works whose content (not only facts but also expression) is designed for widespread public consumption.³²¹ Under this distinction, factor two may be less likely to cut in favor of fair use if the borrowed-from copyrighted work was in the highly creative category.³²² Seeming to acknowledge that this distinction ultimately carries little weight in the fair use analysis, the Court stated in *Campbell* that at least in cases involving parody, the distinction is not particularly helpful in distinguishing “the fair use sheep from the infringing goats.”³²³

The *Campbell* acknowledgment seems appropriate beyond the parody setting and, in particular, in the types of case with which this Article is concerned. The “I Have a Dream” speech was obviously a highly creative work with powerful, artistic, and inspiring expression, but its forward-looking vision was also grounded in past and present facts. Moreover, Dr. King and leaders of the March on Washington clearly meant for widespread public consumption of the speech to occur, given the huge throng in attendance on the date of its delivery and the extensive media coverage that was sought. Thus, as the Court observed in *Campbell*, the factor-two distinction courts traditionally voice offers essentially no help in determining whether a use of the “I Have a Dream” speech amounts to a fair use sheep or an infringing goat.³²⁴

After *Harper & Row*'s previously discussed emphasis on the potentially problematic nature of borrowing from an unpublished work and then compromising the copyright owner's right of first publication,³²⁵ the unpublished versus published distinction has become a component of the factor-two inquiry. If the defendant borrowed from an unpublished work, then the second factor is unlikely to favor a finding of fair use. If the borrowing was from a published work, the second factor tends to hold little significance in the

³²¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

³²² *E.g.*, *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

³²³ *Campbell*, 510 U.S. at 586.

³²⁴ *See id.*; *Bill Graham Archives*, 448 F.3d at 612.

³²⁵ *See supra* text accompanying notes 286–88.

analysis.³²⁶ "I Have a Dream" has long been a published work, so any borrowing from or use of the speech would not trigger the concern expressed in *Harper & Row* and would not cause the second factor to cut against fair use.

For purposes of this Article's proposed fair use analysis, some of what was advocated above regarding the first fair use factor also applies to the second factor. When courts deciding cases involving uses of "I Have a Dream" consider the nature of the copyrighted work, they should not ignore the setting, fame, visibility, and importance of this speech by a legendary and highly influential leader. The speech's fame would seem to surpass otherwise noteworthy addresses by US Presidents, with perhaps only inaugural addresses by Franklin Delano Roosevelt and John F. Kennedy matching Dr. King's speech in terms of recognition of a key phrase. (Consider FDR's "The only thing we have to fear ..."; JFK's "Ask not what your country can do for you ..."; and MLK's "I have a dream") Presidential speeches, of course, would normally be classified as government-authored works and therefore ineligible for copyright protection,³²⁷ whereas Dr. King's speech was eligible and remains under that protection. Yet taking into account the speech's degree of fame seems especially apt in the fair use analysis, considering its case-by-case nature.³²⁸

Fame, however, does not necessarily translate into full understanding. The "I Have a Dream" speech may seem familiar because we have all seen brief clips containing the "I have a dream" line, but the public's familiarity with the speech may not go much deeper. Adopting a fair use analysis that gives meaningful opportunities for use of more than merely brief clips can lead to greater understanding on the part of the public about what the speech contained and what its content may mean for our society as the years and generations pass. This recognition also relates to the third fair use factor, to which the analysis now turns.

³²⁶ See *Bill Graham Archives*, 448 F.3d at 612.

³²⁷ 17 U.S.C. § 105 (2012).

³²⁸ *Campbell*, 510 U.S. at 577.

C. *The Third Factor*

Previous discussion revealed that the greater the degree of borrowing in either a quantitative or qualitative sense, the less likely it is that the third factor will point toward fair use. Conversely, lesser degrees of borrowing may enhance the defendant's factor-three argument.³²⁹ The statutory section dealing with fair use contemplates, however, that under appropriate circumstances, even the borrowing of an entire copyrighted work may still be protected by the fair use defense. Section 107 states, for instance, that distributing "multiple copies for classroom use" could be a fair use candidate.³³⁰

Campbell, moreover, provided a further message of importance here: The extent of the borrowing must be considered in light of the purposes furthered by the defendant's use.³³¹ Properly heeding the *Campbell* message and the content and thrust of the § 107 language requires careful consideration of the matchup between the purposes underlying defendants' uses of the "I Have a Dream" speech and the extent of the borrowing. Considering the previously noted educational, commentary, and public interest purposes reflected in many uses of the speech, borrowing significant portions of the speech or even all of it may be in line with those purposes. Snippets cannot provide the illuminating effect that the speech's further content can provide. Just as the parodist may sometimes need special latitude to borrow from the commented-on copyrighted work,³³² so, too, may the borrower from a work of great historical significance need special latitude in that regard in order to accomplish important educational and public interest objectives.

D. *The Fourth Factor*

This factor, of course, focuses on whether the defendant's use of the copyrighted work adversely affected markets for the work.³³³ The test here is not merely whether the copyright owner would like to collect a licensing fee, for if it were the test, there would invaria-

³²⁹ See *supra* text accompanying notes 179–83.

³³⁰ 17 U.S.C. § 107.

³³¹ See *Campbell*, 510 U.S. at 586.

³³² *Id.* at 588–89.

³³³ 17 U.S.C. § 107.

bly be an adverse effect on a market every time an unlicensed use was made. Instead, the factor-four inquiry considers only those logical markets that the copyright owner could reasonably pursue and expect to exploit.³³⁴

Cases indicate that if the defendant made a transformative use, there generally should be no assumption that impairment of a reasonable market occurred. The reasoning is that any market for transformative uses is not within the range of markets that logically do or should belong to the copyright owner.³³⁵ In a case of parody or critical commentary, it seems easier to conclude that the copyright owner would not be seeking to utilize a market for such uses and thus should not be able to create a factor-four market by simply asserting that the defendant's failure to pay a licensing fee constitutes impairment.³³⁶ Uses of the "I Have a Dream" speech, however, are unlikely to involve parody or other criticism of the speech. Instead, even some transformative uses of the speech, such as the previously noted example of use as part of a documentary, might be seen as arguably reasonable markets for the King Estate to pursue. And clearly the Estate has pursued such users, insisting on licensing fees and sometimes suing for infringement.³³⁷

Two questions therefore arise. First, should the rare parodist who would borrow from Dr. King's speech somehow have a greater chance of succeeding with the fair use defense than the user who is clearly not a parodist but seeks to educate and inform? The answer offered here is "no," with any evening-up of the chances being accomplished through increasing the latter user's chances of attaining fair use protection, not by diminishing the parodist's chances in that regard. The second question is whether the King Estate should have sweeping control regarding uses of this profoundly significant speech, considering the important purposes underlying uses of it and the additional decades that the copyright on the speech will last. This question leads to the following subsection's focus on public interest considerations in light of the lengthy duration of the copyright on the speech.

³³⁴ *Bill Graham Archives*, 448 F.3d at 613-15.

³³⁵ *Id.*; see *Campbell*, 510 U.S. at 591-92.

³³⁶ See *Campbell*, 510 U.S. at 591-92.

³³⁷ See *supra* Part I.B.

E. The Public Interest Consideration and the Copyright Duration Problem

The list of fair use factors enumerated in § 107 of the Copyright Act does not preclude a court from taking other considerations into account in conducting the case-by-case fair use analysis.³³⁸ The public interest is one such consideration,³³⁹ and one that should assume particular significance in the context of uses of historic copyrighted works such as the “I Have a Dream” speech.

Earlier portions of the analysis proposed here have made reference to public interest purposes because they have logical connections with educational purposes and related objectives taken into account under fair use factor number one.³⁴⁰ In recognizing the fair use defense, courts and Congress have concluded that giving the copyright owner exclusive control of all decisions on use of the relevant copyrighted work may sometimes lead to undesirable results. When the copyright owner’s exertion of control over the work would stifle creativity or would otherwise impede sufficiently important purposes that users of the work would seek to further, the fair use doctrine may come into play.³⁴¹ Consideration of the public interest can help inform courts’ decisions on whether the user’s purposes are sufficiently important to justify the fair use doctrine’s limitation on the copyright owner’s usual rights.³⁴² Explicit attention to the public interest in the fair use analysis thus would permit an inquiry into whether, despite the copyrighted nature of the relevant work, the public should effectively be a stakeholder in regard to decisions on certain uses of it.

Given the historic and enduring significance of the “I Have a Dream” speech, fair use determinations concerning uses of the speech should take into account what is, or is not, in the public in-

³³⁸ ABRAMS, *supra* note 161, § 15:32.

³³⁹ *E.g.*, *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2006); *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

³⁴⁰ *See supra* Part III.A.

³⁴¹ *Stewart v. Abend*, 495 U.S. 207, 236 (1990); *Campbell*, 510 U.S. at 577.

³⁴² *See Perfect 10*, 508 F.3d at 1168. There, the court took the public interest into account in deciding that Google should be protected under the fair use doctrine when, in reporting search results, it included thumbnail-sized images of the plaintiffs’ copyrighted photos. *Id.* Holding Google liable might have had the effect of limiting the effectiveness of search engines—a result that probably would not be in the public interest. *See id.*

terest. The importance of doing so becomes even more apparent when one considers the length of time copyrights last. As previous discussion has revealed, the copyright on the "I Have a Dream" speech qualified for the lengthy extensions of copyright duration that Congress enacted in the mid-1970s and late-1990s. The copyright concerning which Dr. King would have expected a maximum of fifty-six years of protection has become, therefore, a ninety-five-year bundle of rights.³⁴³ Under the law in effect in 1963 and until the mid-1970s, the copyright on the speech would have expired at the end of 2019, but will now continue to exist for almost forty years beyond that.³⁴⁴

Of course, the opportunity to obtain copyright rights can provide important incentives to engage in creative activity.³⁴⁵ The fact that Dr. King pursued copyright protection for the "I Have a Dream" speech indicates that securing copyright protection was important to him, but the social causes to which he devoted his life suggest strongly that incentives and influences other than those connected with copyright were far more important reasons why he wrote and delivered the speech.³⁴⁶ Even assuming, however, that the prospect of fifty-six years of copyright protection was a significant incentive for the writing of the speech, the decades of additional years of protection tacked on by Congress in its copyright duration extensions cannot have created an incentive to create a work that had already been created. Although the Supreme Court rejected such a lack-of-incentives argument in sustaining the 1998 Copyright Term Extension Act against constitutional attack in *Eldred v. Ashcroft*,³⁴⁷ nothing in *Eldred* prohibits courts from taking

³⁴³ See *supra* Part I.C.

³⁴⁴ See *id.*

³⁴⁵ Leval, *supra* note 15, at 1107-08; see Harper & Row, Publishers, Inc. v. Nation Enters. 471 U.S. 539, 546 (1985).

³⁴⁶ See Khanna, *supra* note 20, at 76; see generally Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945 (2006) (exploring other reasons—besides economic incentives—why artists engage in creative activity).

³⁴⁷ 537 U.S. 186 (2003). The Court held in *Eldred* that the duration extension did not violate Article I, § 8 of the Constitution. *Id.* at 208-19. For purposes of Article I, § 8's preamble language, it did not matter that the duration extension could not possibly furnish an incentive to create works that had already been created. It was sufficient that the copyright regime in general furnished incentives to create. *Id.* at 211-12. Neither did

into account the effects of duration extensions when evaluating fair use arguments. With regard to the “I Have a Dream” speech, a major effect is the handcuffing of would-be users of the speech through 2058, thirty-nine years beyond the period of copyright protection contemplated by the law in effect when copyright on the speech came into being.³⁴⁸ Worthwhile uses of the speech stand to be stifled for decades to come, with demands for licensing fees continuing unabated, unless courts faced with deciding fair use issues take meaningful stock of what is in the public interest.

Of course, a court cannot rule that a particular copyright is no longer entitled to the full statutory duration set by Congress. However, a fair use analysis that duly recognizes the public interest can appropriately limit copyright owners’ excesses and provide case-by-case reprieves from the unintended negative consequences of the congressional decisions to make copyrights longer and longer in duration. The duration extensions have created considerable private benefit for copyright owners and considerable harm to the public interest in the sense that dates when works would enter into the public domain are put off until much farther down the road.³⁴⁹ Even though courts cannot move up the date when works enter the public domain and become fully available for all to use, they can ameliorate the duration-extension-related harm by taking the public interest into account when making fair use determinations.

F. Application to Other Historic Works

This Article’s analysis has focused on uses of the “I Have a Dream” speech, but the fair use proposals offered here can apply readily to other works of a similarly historic nature. To be “similarly historic” for purposes of the Article’s proposals, the work must

the duration extension violate the First Amendment. *Id.* at 218–22. Although the Court upheld the duration extension, it suggested that its enactment may not have been wise public policy. *See id.* at 208. For extensive analysis of *Eldred* and examination of the problems created by the duration extension, see Arlen W. Langvardt and Kyle T. Langvardt, *supra* note 141, at 236–92. *See also* Khanna, *supra* note 20, at 70–104 (lamenting the harmful effects of copyright durations that have become overly long).

³⁴⁸ *See supra* Part I.C.; *see also* Khanna, *supra* note 20, at 76 (observing that because of very long copyright durations, “[g]enerations of . . . historical artifacts now lay fallow behind locked vaults of copyright”).

³⁴⁹ *See Eldred*, 537 U.S. at 247–55 (Breyer, J., dissenting).

not simply have been about important persons or matters in history. Rather, the work must have been created by a person of profound historical importance in a public policy sense or must consist predominantly of the words of such a person even if he or she did not create the work.³⁵⁰ The work must also be of a non-fiction nature, whether autobiographical or expressive of views on political, social, or cultural issues.³⁵¹ In addition to these requirements, the work must be a published work. These requirements suitably narrow the range of works subject to the potentially more expansive fair use analysis proposed here and avoid the right of first publication problem that dominated the *Harper & Row* decision.³⁵²

It may be helpful to provide examples of copyrighted works that would satisfy the test outlined above and, like the "I Have a Dream" speech, should trigger the type of fair use analysis proposed here when infringement litigation arises from third parties' unlicensed uses of those works. Of course, other major works of Dr. King could meet the test.³⁵³ Works authored by Presidents of the United States or other high-level government officials prior to or after their time in office would also satisfy the test. (Speeches, other addresses, and official statements they created—or whose creation they oversaw—while in office need not be considered here, because they would be classified as government-authored

³⁵⁰ Thus, a historian's biography of a famous person would not be subject to the more expansive fair use analysis proposed here. Though it is about a famous person, the biography would not consist predominantly of the famous person's words.

³⁵¹ The analysis proposed here does not amount to a public-figure exception to general copyright principles. The limitations just outlined would rule out many works authored by public figures, such as works of fiction or other creations by celebrities, however entertaining, interesting, or otherwise important they may be, if those creations do not reflect the type of content noted in the text. A categorical public-figure rule of the sort required in the defamation context—*see supra* note 319—would be unwarranted in the fair use setting, but the fact-specific, case-by-case nature of the fair use inquiry suggests that the public-figure status of a borrowed-from work's author will sometimes be quite relevant. The exclusion of fiction narrows the range of works to which the more expansive fair use analysis outlined here would apply. Even the well-known writer of fiction typically is not in the public limelight to the same extent as the high-profile persons contemplated here.

³⁵² *See supra* text accompanying notes 286–88.

³⁵³ Likely examples would include his "Letters from a Birmingham Jail," his speech in Memphis shortly before his assassination, and selected sermons, assuming that copyright protection had attached to those works under the legal requirements in effect at the relevant times.

works and therefore not subject to copyright protection.)³⁵⁴ President Obama's pre-presidential book *Dreams from My Father* and his Red State/Blue State address at the 2004 Democratic Convention would therefore qualify. So would the published memoirs of ex-Presidents³⁵⁵ and presumably former Supreme Court Justices, ex-Senate majority leaders, former Cabinet members, and the like. The same may be true of certain pre-election books of the sort that candidates for high-profile office tend to produce, seemingly on cue, as they launch their electoral campaigns.

Examples may come from the private sector as well, if the works at issue reflect significant connections with major social issues or matters of public policy. Depending upon the relevant facts, a book or op-ed article by, say, Warren Buffett, Bill Gates, or Oprah Winfrey might qualify. Moreover, as previously noted, the test could be met by works that consist largely of the words of the prominent speaker even if he or she did not create the work. Consider, for example, a televised interview such as Walter Cronkite's lengthy question-and-answer session with President Kennedy several weeks before the JFK assassination, or a magazine interview of the private-sector figures noted earlier in this paragraph. What about television networks' footage of the "I Have a Dream" speech? The footage may be the networks' property, but it consists largely of Dr. King's words. If, as is urged here, the public should have an expanded ability to borrow from or otherwise use the speech under the fair use doctrine, the same may be said regarding the footage of that speech.³⁵⁶

It is important to keep in mind what is not being asserted here. The Article's focus on the "I Have a Dream" speech and its outlining of the examples noted immediately above are not meant to suggest that courts should declare open season on works that qualify for the approach advocated here and effect a de facto extinguish-

³⁵⁴ See 17 U.S.C. § 305 (2012).

³⁵⁵ The Ford memoirs, unpublished as of the time *The Nation* magazine engaged in the borrowing that gave rise to *Harper & Row*, would now be the type of work contemplated here because the memoirs have long been published.

³⁵⁶ Other profoundly important historical footage displaying facts, such as the Zapruder film of the JFK assassination, could warrant an expansive fair use analysis similar to what is proposed here.

ing of the relevant copyrights by permitting any and all uses of those works. Rather, the analysis proposed here is designed to allow expanded room for consideration, within the copyright structure, of the public interest regarding use of such works. The fair use doctrine and its case-by-case nature are part of the copyright structure.³⁵⁷ If properly applied and interpreted, that structure can respect both the rights of the copyright owner and the legitimate rights and interests of the public.

CONCLUSION

The “I Have a Dream” speech is one of the most important in modern history, if not of all time. However, its copyrighted status and an active licensing and enforcement approach taken by its copyright owner have resulted in only snippets of the speech being available for use unless the user is inclined to pay a significant licensing fee. As a result, opportunities to further important educational and public policy-related purposes go largely unrealized. The problem has been exacerbated by two copyright duration extensions enacted by Congress. Those extensions, as applied to the speech, have transformed a copyright originally set to expire at the end of 2019 into a copyright that will exist until the end of 2058.

If it is given an appropriate scope by courts, the fair use doctrine affords the potential for greater public access to the speech and greater ability to use the speech in furtherance of important objectives associated with the public interest. Courts thus far have not had occasion to rule on fair use arguments in infringement cases involving unlicensed uses of the speech. The proposals offered above serve as a roadmap for courts to use in applying the fair use doctrine when such cases arise. The roadmap is applicable not only to uses of “I Have a Dream” but also to uses of other works that are similarly historic under the definition set forth herein (published non-fiction works authored by a person of considerable historical significance or consisting largely of the words of such a person). It respects the rights of copyright owners but envisions a fair

³⁵⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).

use doctrine that is expansive enough to recognize, in appropriate instances, meaningful rights on the part of the public.