

## Is That All There Is? Reflections on the Nature of the Second Fair Use Factor

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### INTRODUCTION

Since Justice Story articulated the fair use inquiry in the seminal decision of *Folsom v. Marsh*, courts have struggled with understanding the proper role of the fair use factors within the overall fair use inquiry.<sup>1</sup> The codification of the four factors in section 107 of the 1976 Copyright Act did little to clarify the overall analysis, and the four Supreme Court fair use decisions since the 1976 Act have, in many ways, created more confusion than enlightenment.<sup>2</sup> The inconsistency in the application of the factors has led one scholar to note that Congress might have generated a comparable level of predictability by requiring the use of a dart board for the resolution of fair use questions.<sup>3</sup>

One factor tends to fare much better in its consistency of application – the second factor: the nature of the copyrighted work. Despite the confusion surrounding its sister factors, courts address this factor with remarkable efficiency and frugality, often distilling its unique perspective into a concentrated sentence or two. After a brief period of prominence following the Court's decision in *Harper & Row*, the second factor has once again returned to its prior state of Spartan focus in fair use analysis.<sup>4</sup>

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1. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

2. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Stewart v. Abend*, 495 U.S. 207 (1990); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Interestingly, as David Nimmer pointed out, the only two times before 1976 that the Supreme Court had a 4-4 split in a copyright dispute were both fair use cases. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975); *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958).

3. David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 279 (2003).

4. *Harper & Row*, 471 U.S. at 539.

While this clarity of purpose is an oasis in the endless desert of conundrums surrounding the other factors, the satisfaction gained from this narrow lens often leaves one less than fulfilled. At times, one thirsts for something more and can't help feeling that there's something missing. It's not clear what that something is, but nonetheless, it leaves one asking, "Is that all there is?"<sup>5</sup>

This Article suggests that there is something missing in the analysis of the second factor – rigorous thought and analysis. Despite its legacy of marginal significance, this factor offers a key to unlocking some of the most perplexing questions that plague the fair use analysis. The untapped value of the second factor can yield information that resonates throughout the fair use analysis and integrates what has for too long been viewed as separate and distinct inquiries. In particular, the second factor provides a means of assessing how copyright provided the author of the original work with the incentive to create the work.

Part I will describe some of the fundamental problems with the fair use analysis and suggest some of the likely reasons why the second factor has been of such limited assistance in resolving them. This section will include a discussion of the perceived genesis of the second factor in *Folsom v. Marsh*, the attempts to improve the factor, and the stagnation of the factor in court decisions. Part II will place the fair use analysis in the context of the purpose of copyright law and discuss how the second factor can assist in fulfilling that fundamental purpose. Part III will explore the parameters of a more robust and vigorous second factor analysis. This section will suggest new considerations beyond the traditional creative/factual and published/unpublished dichotomies, and explain how these new inquiries could assist the overall fair use analysis. Part IV will then illustrate how an improved second factor analysis can work in a hypothetical factual situation.

## I. THE NATURE OF THE PROBLEM

### A. DISCOVERING THE PURPOSE OF FAIR USE

The Copyright Act of 1976 codified the judicial doctrine of fair use. Section 107 states that the fair use of a copyrighted work is not an infringement of copyright. But in determining whether the use made in any particular case is a fair use, Congress requires the consideration of the four factors delineated in the statute. Applying these four factors so as to fulfill the underlying purpose of the doctrine has been challenging. The difficulty is owed in part to the fact that there is no clear articulation of the underlying purpose of the fair use doctrine. Despite the doctrine's central place within copyright law as the broadest limitation upon copyright owners' exclusive rights, scholars have continually sought to articulate a distinct and unifying purpose of the fair use doctrine in harmony with the goals of copyright law so as to provide a guiding light for navigating the four-factor inquiry.

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5. This, of course, is also the title of a song written by Mike Stoller & Jerry Leiber and made famous by Peggy Lee. The lyrics of the song were based on a story entitled "Disillusionment" by Thomas Mann.

Some believe that examining the factors without such a normative principle dooms the inquiry to *ad hoc* determinations of subjective fairness. Indeed, the application of the fair use analysis has reflected this subjectivity, with the result dependent on the values of the decision-maker. All too often, judges reach conclusions after hearing the facts but before ever analyzing the factors.<sup>6</sup> The factors thus become a means of rationalizing a predetermined outcome. This subjective fairness approach is not assisted by the factors; in fact, the factors can even become obstacles in the path of the decision-maker's chosen destination. Because the factors are malleable, courts have little difficulty stressing the importance of those factors supportive of their positions and downplaying the factors that are less favorable. In those cases where courts are not satisfied with partial support from the factors, they occasionally choose to organize the facts in such a way as to align all of the factors to bolster their determinations.<sup>7</sup>

This *ad hoc* approach to subjective fairness is part of the problem of the inconsistent outcomes in fair use cases. Of course, it is not the sole source of the problem. Courts often look to the statute or to precedent for guidance in trying to apply the factors in an objective manner. But the statute provides little assistance to judges seeking guidance. There is little about how much information to seek from the factors and no guidance whatsoever about how to assess the overall information obtained from the analysis. In fact, the codification of this judicial doctrine has, in many ways, constricted the analysis and alienated courts from this doctrine of their making.

Turning to precedent, lower courts find a confusing array of information. In large part, the precedential guidance is largely driven by the most recent Supreme Court fair use decisions. The last three fair use decisions by the Supreme Court each provide guidance to the lower courts, but the instructions from the Court are far from consistent.<sup>8</sup> In some respects, these precedents have done as much to mislead lower courts as they have to instruct.

The quest to improve the functionality and predictability of the fair use analysis is an admirable undertaking given the importance of the doctrine in fulfilling copyright's purpose. But the views on how to improve the analysis have been varied.<sup>9</sup> The search for guiding principles to improve the inquiry has led some

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6. This may be due to the posture of fair use, viewed as an affirmative defense, within the context of a copyright infringement trial. By the time the court considers fair use, all of the court's time has been spent substantiating the infringement claim (for, of course, if infringement is not established, the court would not need to reach the fair use defense). This problem could be resolved if fair use was incorporated into the infringement analysis, but this argument is not considered in this Article.

7. Professor Beebe has called this process of aligning the factors "stampeding." Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 588-93 (2008). This phenomenon is discussed further *infra* text accompanying notes 68-84.

8. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Stewart v. Abend*, 495 U.S. 207 (1990); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

9. See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) [hereinafter Leval, *Toward a Fair Use Standard*]; Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19 (1994) [hereinafter Leval, *Justice Souter's Rescue of Fair Use*]; Pierre N. Leval, *Fair Use Rescued*, 44 UCLA L. REV. 1449 (1997) [hereinafter Leval, *Fair Use Rescued*]; Dianne Leenheer Zimmerman, *The More Things Change the*

scholars to conclude that the statute should be amended to reflect particular normative principles.<sup>10</sup> If, however, the function of the fair use doctrine is to further the constitutional purpose of copyright – to promote the progress of science – imposing guiding principles may fail to address reasonable uses that fall outside the normative principle identified. How do we achieve greater clarity and certainty without sacrificing the flexibility that is the doctrine’s greatest asset?

Perhaps ascertaining the fair use doctrine’s purpose is the wrong inquiry. As L. Ray Patterson wrote: “Most discussions of fair use of copyrighted works provide answers without ever asking the right question. That question is not “what is fair use?” but “what is copyright?”<sup>11</sup> There is reason to believe that understanding fair use as an integral means of fulfilling copyright’s purpose is the proper approach.<sup>12</sup> Perhaps if the existing factors are thoughtfully examined in this context, we can achieve greater clarity and consistency in the results of the fair use analysis.

## B. THE ORIGIN OF PROBLEMS WITH THE SECOND FACTOR

Traditionally, the second fair use factor has contributed little to the fair use analysis. This is not surprising, since the roots of the doctrine appear devoid of this independent consideration. Although aspects of the copyrighted work are often considered in fair use decisions, these characteristics of the copyright work are raised only through the narrow lens of other factors.<sup>13</sup> This indicates that while courts find considerations about the copyrighted work to be important to the fair use analysis, their failure to conduct a separate inquiry obscures the full meaning of the facts and allows courts to overlook potentially important distinctions. This defect is evident in the roots of the fair use analysis.

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*Less They Seem “Transformed”*: Some Reflections on Fair Use, 46 J. COPYRIGHT SOC’Y U.S.A. 251, (1998); Michael J. Madison, *A Pattern Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990); Jon O. Newman, *Not the End of History*, 37 J. COPYRIGHT SOC’Y U.S.A. 12 (1990); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and Copying Serves It*, 114 YALE L.J. 535 (2004).

10. See, e.g., Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391 (2005); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11 (2006); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087 (2007).

11. L. Ray Patterson, *Understanding Fair Use*, 55 L. & CONTEMP. PROBS. 249, 249 (1992).

12. Leval, *Toward a Fair Use Standard*, *supra* note 9, at 1107 (“Fair use should be perceived not as a disorderly basket of exceptions to the rules of copyright, nor as a departure from the principles governing that body of law, but rather as a rational integral part of copyright, whose observance is necessary to achieve the objectives of that law.”).

13. At the symposium, Judge Leval queried whether considerations of the nature of the copyrighted work are addressed in other parts of the analysis even if they are not addressed in the context of the second factor. While the nature of the work is certainly often considered elsewhere in the analysis, removal of these considerations from the second factor itself deprives courts of understanding the other ways in which these facts are important. Specifically, this mode of analysis subordinates salient facts to the perspective of the factor in which they are perceived rather than allowing these facts to have independent significance. As a result, the precedential value of these facts is largely lost to courts that follow.

The genesis of the fair use doctrine in the United States – Justice Story’s decision in *Folsom v. Marsh* – involved the copying of letters that had never been “published”<sup>14</sup> by their author, George Washington.<sup>15</sup> Jared Sparks created a twelve-volume, seven-thousand-page set of books on the life and writings of George Washington. The first volume of the set was a biography of Washington, written by Sparks, entitled *The Life of Washington*. The other eleven volumes contained George Washington’s writings, including state papers and private and official letters. Washington’s papers had been left to his nephew, U.S. Supreme Court Justice Bushrod Washington. At first, Justice Washington refused to give Sparks the right to publish George Washington’s papers, because Justice Bushrod Washington and Chief Justice Marshall had plans to publish the papers themselves. Ultimately, however, Sparks was granted the right to publish the work and, in turn, Sparks granted the right to publish the biographical series to Folsom, Wells & Thurston.<sup>16</sup>

The defendant, Reverend Charles W. Upham, was a supporter of public elementary education and created his two-volume biography of George Washington that “extracted material from George Washington’s journals, speeches and letters, allowing Washington, as far as possible, to ‘relate his own history . . . from his own lips,’ with Upham providing the narrative connecting the various extracts.”<sup>17</sup> Upham had initially declined to create this work because Sparks was on the Board of Education and, Upham believed, Sparks should be entitled to create the abridged work based on Sparks’ earlier work. But when the Board informed Upham that Sparks had declined the offer to write the new book, Upham eventually agreed and used the Board’s publishers, Marsh, Capen & Lyon to publish two volumes.<sup>18</sup> After publication of Upham’s works, Folsom sued Marsh for copyright infringement.

Justice Story’s analysis in *Folsom v. Marsh* went to great lengths to show that

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14. “Publication” is a term of art within copyright law that was defined in the 1976 Act as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not in itself constitute publication.” 17 U.S.C. § 101 (2000).

15. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

16. I am indebted to Professor Tony Reese for much of this background information. For a fascinating and more complete account of the story and personalities involved in *Folsom v. Marsh*, including the financial relationships between the parties, see Anthony Reese, *The Story of Folsom v. Marsh: Distinguishing Between Infringing and Legitimate Uses*, in *INTELLECTUAL PROPERTY STORIES*, 259, 262-66 (Jane C. Ginsburg and Rochelle Cooper Dreyfuss, eds., 2006). The discussion in the article makes it clear that the case, now regarded as the touchstone for a doctrine that limits the rights of copyright owners, actually expanded the rights of copyright owners by limiting the previously established concept of “fair abridgment.” As Professor Reese notes, the Court’s departure from the fair abridgment limitation was accomplished by concluding that the abridgment doctrine simply did not apply because “the defendants’ work cannot properly be treated as an abridgment” with “little explanation and no citation to authority.” *Id.* at 281.

17. *Id.* at 269.

18. The fact that the plaintiff had no interest in derivative markets might have been a consideration under the fourth factor, as would the fact that elementary schools were unlikely to be within the intended market for the twelve volume set created by Sparks.

George Washington had not given his letters to the public, but rather had deemed them valuable private property which Washington later bequeathed to his nephew, Bushrod.<sup>19</sup> Despite the fact that the letters were primarily factual in nature (as opposed to fictional prose) and were of great national interest, Justice Story believed that the “value” of these works needed to be preserved for the eventual owner of the copyright, or otherwise no one would undertake the time and expense to compile and publish such unpublished material. Justice Story reasoned that if previously unpublished material could be republished immediately after the “owner” of the copyright published these unpublished works, the public would lose the benefit of unpublished works being published in the first place.<sup>20</sup> Thus, Justice Story not only denied the application of the fair use defense to unpublished works, but he also denied the application of fair use to unpublished, factual works that had already been published.

Although Justice Story’s decision implicitly considered an aspect of the nature of the copyright owner’s works – the publication of previously unpublished letters – he did not distinguish between the interests of copyright authors and copyright owners, but instead presented a confusing discussion on the relevant attributes of the original copyrighted work. He focused on the property rights of the original author and the subsequent owner of the copyright but did not consider whether copyright played a role in the creation of the letters.<sup>21</sup> He focused on the “great expense and labor” of Sparks in compiling the letters but not on the incentives that led to the creation of the letters themselves.<sup>22</sup> He highlighted the “value” of the letters by pointing out that Congress purchased the letters at great expense but downplayed the fact that this “value” to the government was in the tangible “copies” of the letters purchased, rather than the copyright interest in the “works.”<sup>23</sup> Justice Story afforded a broad scope of protection to the owner of the copyright works and limited excused uses to the narrowest of circumstances. The opinion largely ignored the nature of the salient copyright works – the letters – and the incentives of the author that created them. By failing to fully examine the contours and unique characteristics of the particular copyrighted works at issue and any incentives that led to the creation of those works, Justice Story failed to consider what would later become the second fair use factor.

The entire opinion possesses a clear bias that favors broad property interests for copyright owners. It appears to afford protection to the “sweat of the brow,”<sup>24</sup> the

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19. *Folsom*, 9 F. Cas. at 345.

20. This logic would appear to apply equally to unpublished public domain material – if public domain material could be copied, the incentive of the owner to publish such works would be reduced. Yet so far, we have not found the need to provide the publishers of public domain works with a private property interest to encourage publication. This is really an argument about access rather than creation. A similar argument was made in regard to public figures in *Harper & Row*.

21. *Folsom*, 9 F. Cas. at 345-346.

22. *Id.* at 345.

23. *Id.* at 347.

24. The “sweat of the brow” was a term used for the effort and expense of creators. It was abandoned as a factor used in determining the copyrightability of a work in *Feist*. *Feist Publ’ns, Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340 (1991).

broad control of historically important documents by the owners of those works, and the extension of the copyright owner's scope of protection over what might have previously been exempt as a "fair abridgment." The opinion minimizes the fact that these originally unpublished letters were published by the plaintiff in addition to the factual and historically important information contained in the letters. Not only does Justice Story fail to investigate what incentives led to the creation of the Washington's letters, but in doing so he elevates the value of the owner's incentive to compile them and the publisher's incentive to publish them above all other considerations. Despite these failings, however, this seminal case served as the basis from which future courts navigated and explored the fair use analysis. Based on the emphasis in the decision, the effect on the value for the owner's property interest was more important than discovering what markets or value was important to the act of creation for the critical works at issue.

The Supreme Court, judges, and scholars have claimed to find the basis for the four statutory factors, including the second factor, in Justice Story's opinion. Although this allegation is now taken for granted in legal writings, a close examination of the opinion fails to support this claim. The oft-quoted passage from *Folsom* is:

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.<sup>25</sup>

In *Campbell*, Justice Souter attributed the genesis of the second factor to the phrase "value of the materials used," yet he provided no exegesis of the relationship.<sup>26</sup> On closer inspection of the *Folsom* opinion itself, it appears that Justice Souter's attribution was misplaced. In context, "value" was used by Justice Story in relation to the word "quantity." The "quantity and value" was of the "materials used," not the nature or value of the copyrighted work in itself. The "value" that Justice Story was addressing was intended to encompass the consideration of qualitative, as well as quantitative, takings, *i.e.*, determining whether the small quantitative taking appropriated the "heart of the book."<sup>27</sup> In the two sentences immediately preceding this passage in *Folsom*, Justice Story's quotation of Lord Cottenham reveals his intended meaning: "One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to."<sup>28</sup> Thus, the *Campbell* decision not only minimized the value of the second factor (at least in the context of parody), but also mischaracterized and limited its focus.<sup>29</sup>

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25. *Folsom*, 9 F. Cas. at 348.

26. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994).

27. *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565 (1985).

28. *Folsom*, 9 F. Cas. at 348, *quoting* *Bramwell v. Halcomb*, 3 Mylne & C. 737, 738 *and* *Saunders v. Smith*, 3 Mylne & C. 711, 736-737.

29. The Supreme Court's minimization of the value of the second factor in relation to parody cases had the effect of establishing a precedent of its relative ineffectual nature. While the Court explicitly limited its comments on the second factor to the context of parody determinations, the Court

The “value” that Justice Souter cited from *Folsom* is more appropriately placed within the statutory context of the third factor, which in turn affects the analysis of facts related to the fourth factor.

Later in the opinion, Justice Story repeats: “Much must, in such cases, depend upon the nature of the new work, the value and extent of the copies, and the degree in which the *original authors* may be injured thereby.”<sup>30</sup> Once again, Justice Story tied “value” to the quantitative concept of “extent,” but interestingly, specifically related the concept of injury to the “original authors.” Who was the “original author” in *Folsom*? It would appear that this should refer to Washington rather than Sparks, but read in context, Justice Story may have meant that phrase to refer to Sparks in contrast to Upham. Nevertheless, the lack of discussion about this “authorship” distinction is important. The original author of the works used in *Folsom* was George Washington.<sup>31</sup> The plaintiff, Mr. Sparks, was a compilation author whose own “authorship” was not at issue in the case.<sup>32</sup> Rather, it was the copyright interest that Sparks acquired in Washington’s authorship that was the sole focus of Justice Story’s fair use analysis. Was the “original author” injured by the use of Upham? Is there the slightest chance that Washington would not have created his letters had he anticipated this uncompensated use? Did the post-publication licensing market in any way encourage Washington to write these letters? Is the purpose of copyright (distinguished from other socially desirable purposes, such as the sweat of the brow) injured or advanced by Upham’s use? Even Justice Story wrote:

I have come to this conclusion [of infringement], not without some regret, that it may interfere, in some measure, with the very meritorious labors of the defendants, in their great undertaking of a series of works adapted to school libraries. But a judge is entitled in this case, as in others, only to know and to act upon his duty. I hope, however, that some means may be found, to produce an amicable settlement of this

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flippantly did harm to this factor’s potential. At a minimum, the Court missed an opportunity to clarify that in some factual situations, this factor may provide value to the analysis.

30. *Folsom*, 9 F. Cas at 349 (emphasis added).

31. *Id.* at 345. (“The gravamen is, that [Mr. Upham] has used the letters of Washington, and inserted, verbatim, copies thereof from the collection of Mr. Sparks.”) Although most of the letters consisted of Washington’s private letters, approximately one-fifth of the letters used by Upham were official letters and documents. Justice Story made no effort to differentiate between the treatment of the two. Today, not only might the fair use analysis be different, but consideration of section 105 as to the letters would be appropriate, and the “sweat of the brow” by Sparks would be understood as a laudable but uncopyrightable concern.

32. This point is not absolutely clear. The master’s report introduced in the case found that 353 pages out of Upham’s 866 page book are “corresponding and identical” to passages in Sparks’ work (and notes that this is more than one third of Upham’s work. There is no indication in the opinion of the percentage this represents in relation to Sparks’ work – the relevant percentage in the current third factor. Based on the page numbers cited by the court, Upham used approximately twenty percent of Sparks’ book.) Justice Story then states that of these 353 pages, 319 consisted of letters of Washington that hadn’t been published. Of those pages, 64 pages were official letters and documents, and 255 were private letters of Washington. That leaves 34 pages that were apparently used by Upham, but were not characterized by the court. *Id.*

unhappy controversy.<sup>33</sup>

We must keep in mind that the originator of a doctrine is just as susceptible to inadequate analysis as those that follow.<sup>34</sup> Justice Story may not have considered all of the relevant facts to achieve the optimal balance in light of the purpose of copyright. Or, as L. Ray Patterson might say, perhaps he simply asked the wrong question.<sup>35</sup> One thing that is clear from the opinion is that the decision-maker's view of the purpose or goal of copyright law pervades the analysis of the fair use determination. It also appears that the ultimate decision entails a conclusion about which work should be deemed more valuable to society. The pronouncement of relative importance sometimes fails to consider that both works can coexist without unduly affecting the expected markets of each.

Regardless of the view of the outcome, there is no indication that Justice Story considered the statutory equivalent of the present second factor, except to the extent of the published/unpublished dichotomy.<sup>36</sup> We must also keep in mind that until 1978, unpublished works were protected by state law rather than federal law unless they had been registered. Nevertheless, Justice Story did not fully address the distinction that Washington's unpublished letters had, in fact, been published prior to the use by Upham. At another point in the decision, Justice Story stated that "[m]uch must, in such cases, depend on the nature of the new work, the value and extent of the copies, and the degree to which the original authors may be injured thereby."<sup>37</sup>

Interpreted in context, this passage articulates three of the current four factors and omits what is now the second factor.<sup>38</sup> One can read considerations of the

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33. *Id.* at 349.

34. Justice Story's goal in the mere act of naming the factors "was in itself an attack on the abridgment doctrine." Patterson, *supra* note 11, at 256-57. While the abridgment doctrine was not eradicated by Story, Patterson makes the argument that the ultimate application of fair use to all users (and not just competitors) had the net result of allowing copyright owners to extend their scope of protection.

35. *Id.* at 249.

36. *Accord*, ALAN LATMAN, COPYRIGHT OFFICE, STUDY NO. 14: FAIR USE OF COPYRIGHTED WORKS 14 (1958) ("Judge Yankwich found that Story's criteria have been the basis of American case law. He restates the decisive elements as follows: (1) the quantity and importance of the portion taken; (2) their relation to the work of which they are a part; (3) the result of their use upon the demand for the copyrighted publication.").

37. *Folsom*, 9 F. Cas. at 349.

38. *But see id.* at 344 ("... in other cases, the identity of the two works in substance, and the question of piracy, often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent and value of the materials thus used; the objects of each work . . .") Arguably, this passage comes closest to the articulation of the present four factors. The reference to the "comparative use made in one of the materials of the other" and "the objects of each work" appear to address the first and the fourth factors in a general sense. The "nature, extent and value of the materials thus used" may encompass the second and third factor, but this is unclear. The "extent and value" in other parts of the opinion clearly address the quantitative and qualitative amount of the taking. Viewing the "nature . . . of the materials thus used" comes fairly close to our understanding of the second factor, although it appears to consider the nature of the original work only to the extent of the portion used by defendant. Given Justice Story's analysis, it is difficult to say that the nature of the original work was not considered, but Justice Story did not repeat this factor in other statements of the factors in the opinion and appeared to use the unpublished status as a means to reach a desired end.

second factor into parts of Justice Story's analysis and into his discussion of the last factor, but at best, the analysis of the second factor, even under the current limited inquiry of that factor, is incomplete. The opinion set the stage for minimizing the importance of scrutinizing the work used and obtaining facts relevant to the second factor only through the lens of the other three factors. The decision also set the stage for continuing confusion and misplaced emphasis, particularly in regard to the published/unpublished distinction. Justice O'Connor's opinion in the *Harper & Row* case only served to further the misunderstanding in the lower courts by over-emphasizing the absolute nature of the right of first publication without explaining its limits.

### C. JUDGE LEVAL'S EFFORT TO IMPROVE THE SECOND FACTOR ANALYSIS<sup>39</sup>

In 1990, Judge Pierre Leval, then a district court judge for the United States District Court for the Southern District of New York, published a seminal article on ways in which the fair use analysis could be improved. The most influential point in this article was his view of the critical importance of a transformative use of a work for a claim of fair use. This point was adopted several years later by the Supreme Court in the *Campbell* decision, and has altered the course of fair use analysis in the courts ever since. The attention paid to this particular argument, however, obscures many other valuable observations addressed by Judge Leval in this landmark article.

Judge Leval thoughtfully considered all of the factors in this article, as well as the appropriate use of remedies that foreshadowed more recent Supreme Court decisions.<sup>40</sup> He spent a great deal of time considering the second factor, particularly as it related to the distinction between published and unpublished works. Of the second factor, Judge Leval stated that it "has been only superficially discussed and little understood. Like the third and fourth factors, it concerns itself with protecting the incentives of authorship."<sup>41</sup> In relation to congressional guidance, he stated that the statute "gives no clues at all regarding the significance of "the nature of" the copyrighted work."<sup>42</sup> In addressing the unpublished nature of works, Judge Leval recognized the need for a limiting principle.<sup>43</sup> He observed that the unpublished nature of a work has different meanings in different contexts.

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39. It must be said as a preface to my critique of his view that Judge Leval's broader analysis of the fair use doctrine was extraordinarily influential and for good cause. Judge Leval's many wonderful and insightful observations in his article, *Toward a Fair Use Standard*, were perhaps some of the most profound thoughts on the fair use analysis to date. Despite his influence on this author and, more importantly, the Supreme Court, it appears that his cure has caused almost as much distortion of the analysis as the original problem. The degree to which "transformative" use has become a necessity in a fair use claim has created almost a *per se* rule or something akin to the commercial/noncommercial presumption in *Sony* or the unpublished presumption in *Harper & Row*. Despite being the main source of what could be considered the latest fair use problem, Judge Leval has been a profound contributor to our current understanding of fair use.

40. See, e.g., *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

41. Leval, *Toward a Fair Use Standard*, *supra* note 9, at 1116.

42. *Id.* at 1106.

43. *Id.* at 1116-19.

He realized that some unpublished works, such as private documents, memos, letters, shopping lists, emails and extortion notes, were not created with the intention of publication. Those works that were created without such an intention of publication, Judge Leval wrote, “are, at best, incidental beneficiaries” of copyright.<sup>44</sup> He wisely argued for a more subtle and nuanced approach to the unpublished nature of a work that took into account additional considerations beyond the mere status as unpublished.

Judge Leval found a key to opening the door to a meaningful second factor analysis. He recognized the need to distinguish between the authors of works for whom copyright provided an incentive to create and those authors who were incidental beneficiaries of copyright. In a limited context, he saw that not all uses affect the purpose of copyright, and that distinctions should be made based on characteristics of the particular work. He might also have realized that not all markets encourage works to be created, but that some markets are incidental beneficiaries of copyright. This could have created distinctions between those markets for a particular work that served to encourage an author to create a work from unexpected windfalls to the author and markets that solely benefited subsequent owners of the copyrighted work. But instead of appreciating the value of what he had discovered, he limited his distinction to unpublished works and went on searching for the meaning of the second factor elsewhere.

Unfortunately, Judge Leval, like Justice Souter after him, took Justice Story’s phrase from *Folsom* out of context.<sup>45</sup> He stated that the “value of the materials used” was a better formulation of the second factor than the formulation in the statutory text, since it “suggests that some protected matter is more ‘valued’ under copyright law than others.”<sup>46</sup> He went on to state that the “[i]nquiry into the ‘nature’ or ‘value’ of the copyrighted work therefore determines whether the work is the type of material that copyright was designed to stimulate, and whether the secondary use proposed would interfere significantly with the original author’s entitlements.”<sup>47</sup> This sentence is susceptible to varying interpretations, but Judge Leval appears to be emphasizing the valuation of the social benefit of the copyrighted work. After the assessment of the social importance of the work, it would then seem to be necessary to determine whether the use is interfering with the author’s market expectations.<sup>48</sup> The market expectations could be very relevant

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44. *Id.* at 1117.

45. Justice Story used the term “value” as a qualitative assessment of the portion used, rather than an inquiry into the value of the copyrighted work in itself. *See supra* text accompanying notes 26-28. This miscommunication is ironic, since it was Judge Leval who likened the development of the fair use doctrine in the courts to a legal version of the child’s game of telephone, in which “each whispered repetition of the message caused it to be further mangled.” Leval, *Fair Use Rescued*, *supra* note 9, at 1450.

46. Leval, *Toward a Fair Use Standard*, *supra* note 9, at 1106.

47. *Id.* at 1119 (emphasis added).

48. *Id.* (“Inquiry into the ‘nature’ or ‘value’ of the copyrighted work therefore determines whether the work is the type of material that copyright was designed to stimulate . . . .”) While Judge Leval’s interpretation may lead to exactly the kind of judging of aesthetic merit that Justice Holmes warned against in *Bleistein*, it appears that Judge Leval is attempting to make a more objective distinction between extortion notes and shopping lists on the one hand and any “authorship” in the

to the second factor analysis, whereas merely assessing the “value” of the work in order to determine whether it is of the “type of material that copyright was designed to stimulate” is a turn down the wrong path. The question is not whether the material is of the “type” that copyright sought to stimulate, but rather whether copyright might have reasonably encouraged or provided an incentive for an author to create the work. This is accomplished by exploring all of the characteristics of the work itself (*e.g.*, scope, category, etc.). Once we understand the work and the reasonable and customary expectations of authors for that type of material, we can better understand how various uses might affect the incentive to create such works. While it may be true that copyright was not intended to encourage some incidental beneficiaries such as extortion notes, we reach this conclusion more objectively by examining the incentives for the creation of that work by its author. Shopping lists have “value” to their authors; but quite clearly, copyright does not serve as the impetus for their creation, and they would continue to be created without the existence of copyright.

The fourth factor looks at the effect of the use on the potential value that an author might rightfully claim as a reasonably anticipated expectation interest. But the fourth factor typically provides virtually no information about what entitlements stimulated the author’s creativity or what the author reasonably anticipated prior to or during the creation of a work. The purpose of copyright is to promote the progress of science and to encourage the creativity of “authors.” Part of the problem with the conflation of the second and fourth factors is that it conflates the interests of the author and the eventual copyright owner.<sup>49</sup> Those interests are often claimed to be one and the same, but in reality, there is no necessary correlation. Thus, to the extent that “value” is an issue in the second factor, it must be gauged by what value was reasonably anticipated by the *author* – what value encouraged the act of creation of the particular category or class of copyrighted work as distinguished from the value attributable to other interests unrelated to the act of creation.<sup>50</sup> Different types of works may involve different expectations.<sup>51</sup> Customs, norms, and traditional forms of exploitation drive the creative process. It is quite probable that windfalls play a part in many author’s dreams, and we should not dismiss the incentive that such a jackpot introduces into

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copyright sense on the other. While a ransom note could reach the level of sufficient original authorship to merit copyright protection, as Judge Leval notes, such works are obviously not works that the law is trying to encourage. Despite the usefulness of the distinction, it would appear that “value” is the wrong word for the distinction. Examining a work’s “nature” could elicit the same information.

49. While James Madison, in the Federalist Papers, viewed the interests of authors and the public as congruent, the interests of the author and the subsequent owner of a copyright are not always the same. While copyright seeks to encourage not only creativity, but also public distribution and access, owners sometimes seek profit over the widest dissemination of a work. In at least some cases, dissemination of the content is more important to authors than economic reward, *e.g.*, scholarly and scientific works.

50. The creation of markets that were not expected might have an effect on encouraging subsequent works to be created, and therefore are relevant to the inquiry. But there is benefit in distinguishing between those that were likely to have a past or present effect and those that provide a future incentive.

51. This point is illustrated further *infra* Parts III and IV.

our copyright system. Nevertheless, unanticipated windfalls and ancillary benefits falling outside the core expectations, which serve as an incentives to encourage creativity, are ancillary to the primary goals of copyright. At a minimum, such expectations of ancillary benefits must be balanced with the “value” of the new authorship created by the defendant. The determination of what value was relevant to the author of a particular type of work is central to the fair use analysis in order to establish what constitutes “traditional, reasonable, or likely to be developed markets.”<sup>52</sup> What interests did the *author* reasonably expect?<sup>53</sup> The expectations of non-author copyright *owners* are relevant only to the extent that they coalesce with the expectations of the author.<sup>54</sup>

There is also a danger in Judge Leval’s statement that the “[i]nquiry into the ‘nature’ or ‘value’ of the copyrighted work therefore determines whether the work is the type of material that copyright was designed to stimulate . . . .”<sup>55</sup> Care must be taken in the valuation of copyrighted works. Copyright was not designed to determine the “type” of work to be created. Unquestionably, there are works which society cares about more than others, but copyright protection does not so discriminate. What is important is not whether the type of work created is valued, but what motivations lie behind the act of creation. While it is tempting to distinguish between the value of emails and great novels, Justice Holmes long ago revealed the danger in such valuations of artistic merit in relation to extending copyright protection.<sup>56</sup> Nevertheless, there may be some reason to consider the social value of the copyrighted work when the question is not copyrightability, but rather an inquiry into whether a particular use of a work is a fair use, and objective criteria are used to establish relative social value.

What is important under the second factor is not only the motivation behind the creation of “works” in general, but specifically the motivation behind the creation of particular types of works, the reasonable and customary expectations for such a specific work, and the scope of protection for the particular type of subject matter. Fictional or creative works are not inherently more socially desirable than factual works, and in fact the contrary may be true. But the scope of protection varies and the expectations of the authors are different, or at least the structure of copyright law demands different expectations in relation to the scope of protection. Similarly, unpublished works might be entitled to heightened protection if the user interferes with the author’s expectation of publication; yet if there was no intent to publish or the use did not significantly affect the work’s market, the unpublished nature of the work might not adversely affect the motivation to create or the

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52. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1994) (holding that not all potential markets are relevant to the fourth factor analysis).

53. “At times, custom or public policy defines what is reasonable.” LATMAN, *supra* note 36, at 14.

54. To the extent that value in a work created by an owner may be susceptible to a reversionary interest of the author through termination, it is necessary to consider these interests.

55. Leval, *Toward a Fair Use Standard*, *supra* note 9, at 1119.

56. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits”).

monetary expectations of the author.<sup>57</sup>

The need to examine the expectations of the author of the copyrighted work becomes more obvious when the use is claimed to affect a derivative or licensing market of a work. In cases where a use is made of a particular copyrighted work itself, the prominence of the first and fourth factors may be apparent. Judge Leval stated:

The [*Campbell*] opinion teaches us further that every fair use factor is to be understood as a subset of that overall goal. They are not separate factors. Each is part of a multifaceted assessment of the question: Where should the author's exclusivity stop in order to best serve these familiar overall objectives of the copyright law?

The opinion stresses this dynamic interrelationship. Of cardinal importance is the close interdependence of the first and the fourth factors. The fourth factor looks at the harm which the secondary work may do to the copyright market of the original by offering itself as a substitute (for either the original or its derivatives). The first factor looks primarily at whether the use made of the original seeks to transform the taken material into a new purpose of message, distinct from purposes of the original. It follows logically that the more the appropriator is using the material for new transformed purposes, the less likely it is that appropriative use will be a substitute for the original, and therefore the less impact it is likely to have on the protected market opportunities of the original.<sup>58</sup>

Although the interrelationship between the first and fourth factors can illuminate when a use supersedes or substitutes for the original work itself, these factors alone are far less enlightening to the examination of derivative and licensing markets.<sup>59</sup> A licensing market may be much broader than the market for the original work. Any use of a work may be licensed. Yet, we have been told that only "traditional, reasonable, or likely to be developed markets" are to be considered. How do we

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57. Judge Leval emphasized this distinction and observed that there may be other non-copyright legal interests at stake in some of the potential scenarios, such as privacy interests, but these are not relevant to the question of the fair use of copyrighted works. See Leval, *Toward a Fair Use Standard*, *supra* note 9, at 1126-30. Fairness is sometimes viewed too broadly to include interests that are beyond the contours of copyright's domain. There are other bodies of law and causes of action to deal with these interests.

58. Leval, *Justice Souter's Rescue of Fair Use*, *supra* note 9, at 22.

59. Despite Judge Leval's argument for nuanced balancing, he arguably over-emphasized the importance of the first factor. In doing so, his thoughtful analysis has fallen victim to the very same evil that he seemed to be trying to draw the courts away from – the determinative nature of any one factor. At present, fair use has become largely dependent on the ability to characterize a use as transformative. For an excellent discussion of this problem, see generally Zimmerman, *supra* note 9; Matthew D. Bunker, *Eroding Fair Use: The "Transformative" Use Doctrine After Campbell*, 7 COMM. L. & POL'Y 1 (2002); Jeremy Kudon, Note, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579 (2000). Some scholars have taken the position that a transformative use must transform the work itself and that changing the context of the use is not transformative. See, e.g., Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 17 (2000); Justin Hughes, *Market Regulation and Innovation: Size Matters (Or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 619 (2006); Paul Goldstein, *Copyright's Commons*, 29 COLUM. J.L. & ARTS 1 (2005). Other scholars have argued that the allowance of non-transformative uses can be important for First Amendment considerations. See, e.g., Tushnet, *supra* note 9.

determine what is a traditional or reasonable market?<sup>60</sup> Where is the line between derivative works and transformative works? Is there a normative principle that can assist in establishing this line? The answer appears to be to look to the second factor in order to understand the traditional markets inherent *in the particular type of copyrighted work at issue*. At the same time, the second factor may assist in examining whether the market was relevant to the goal of copyright – did it encourage the author to create, or was there an expectation by the author that the market would be exploited?

Judge Leval considered the importance of the author’s incentives within the fair use analysis. He recognized the essential utilitarian concept underlying the American copyright system and that not every taking is obnoxious. Yet he accepted the Supreme Court’s view that the fourth factor was the appropriate place to recognize this inquiry into incentives, even though he thought the Court overstated the fourth factor’s importance. Judge Leval saw that the requirement of justification for the use under the first factor was an important limit on the importance of the fourth factor’s market inquiry. What his analysis overlooked, however, is that the markets for copyrighted works are not monolithic. The authors of different types of works have different incentives. Different types of works are marketed in different ways. Instead of analyzing markets solely under the fourth factor, if the second factor were utilized to discover the full panoply of characteristics about the particular work being used, including markets, this information could provide critical distinctions for the analysis of the markets under the fourth factor. Such a searching second factor analysis might also reveal that a non-transformative use is also capable of promoting the purpose of copyright if it does not affect a market that provides an incentive to the author of a particular type of work. Such a non-interfering use does not supersede the author’s reasonable expectations and simply encourages more works to be created for the public. The second factor provides the optimal forum for work-specific examination in order to explore general characteristics outside the influences of the other factors’ unique perspectives.<sup>61</sup>

Only by accepting the value of all of the factors will the promise of the multifaceted approach espoused by Judge Leval (and Justice Souter in *Campbell*) become a reality. No factor is superior, nor is any interrelationship of the factors dominant. All of the factors are perspectives of the whole picture, and the whole picture can only be understood by mining all of the information that is available

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60. *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (1994) (“However, not every effect on potential licensing revenues enters the analysis under the fourth factor. Specifically, courts have recognized limits on the concept of ‘potential licensing revenues’ by considering only traditional, reasonable, or likely to be developed markets when examining and assessing a secondary user’s ‘effect upon the potential market for or value of the copyrighted work’”). *See also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994) (“The market for potential derivative uses includes only those that *creators* of original works would in general develop or license others to develop”) (emphasis added).

61. The utilization of the second factor for developing distinctions between types of works may also benefit the work being done on “best practices” for fair use in various areas, most notably, documentary filmmakers. The identification of customs and practices for different types of works would provide useful information for the markets that particular types of works depend on.

from the unique perspective of each factor. The factors are guides to intensive fact gathering. None of the factors weigh in favor or against fair use. Rather, their cumulative information provides the basis for the analysis as a whole. The fair use analysis is not a tally sheet, but an examination of the interrelationships of the facts and the factors, while keeping in mind the primary purpose of copyright. A robust second factor is essential to the integrity of the picture as a whole.

#### D. THE SECOND FAIR USE FACTOR IN COURT DECISIONS

To a great extent, courts limit their inquiries under the second factor to the creative/factual dichotomy. They inquire whether the copyrighted work is mostly creative and thus within the core of copyright protection or, in a binary fashion, ask whether the work is primarily factual in nature. Rarely is this discussion more than a short paragraph; often, it is limited to a brief sentence of two.<sup>62</sup> As might be expected from such a limited inquiry, the value of the assessment is often minimal, and courts tend to state that the factor weighs in favor of one party or the other. In many cases, since many works fall somewhere in between these two extremes, courts find the value of the factor inconclusive.

Following the decision in *Harper & Row, Publishers Inc. v. Nation Enterprises*, courts began to conscientiously inquire about the published or unpublished nature of the work.<sup>63</sup> Depending on the work's published/unpublished status, courts also placed this intra-factor consideration in favor of one party or the other. Whereas the published nature of a work typically carried little weight, the fact that a work was unpublished tended to heavily weight this factor against fair use.<sup>64</sup>

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62. There are exceptions to this general rule, but these exceptions tend to be cases in which either the creative/factual dichotomy (which often blurs into the idea/expression dichotomy) or the published/unpublished dichotomy is involved. *See, e.g.,* *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992) (providing an in-depth discussion of "computer programs" in the context of the second factor); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (providing an in-depth discussion of the protection for unpublished works in the second factor analysis). For a unique emphasis on the second factor, *see* *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 603 (9th Cir. 2000) (beginning the fair use analysis with a detailed consideration of the nature of the computer program at issue).

63. In *Harper & Row*, the Supreme Court considered whether *The Nation's* use of excerpts from the unpublished autobiography of President Gerald Ford was a fair use. The magazine obtained a "purloined" copy of the unpublished manuscript and published excerpts of the manuscript surrounding President Ford's pardon of President Nixon. *The Nation's* publication of this material resulted in *Time* magazine canceling a contract it had with Harper & Row for pre-publication serialization rights to publish excerpts. In assessing the fair use claim, the Court found that while the use constituted news reporting, *The Nation's* use was commercial, and noted that several times that the copy of the unpublished manuscript was "purloined." Continuing the presumptive effect of the commercial/noncommercial dichotomy established in *Sony*, the Court found that a commercial use "is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Harper & Row*, 471 U.S. at 562 (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)). The Court further identified the unpublished nature of the work as "a critical element of its "nature." *Id.* at 564. The Court went on to say that the right of first publication provides an author with "not only the choice of whether to publish at all, but also the choices of when, where, and in what form first to publish a work." *Id.*

64. This finding was often determinative of the entire fair use analysis until Congress amended

In order to attempt to better understand how federal courts use the factors in deciding fair use cases, a few scholars have attempted to discover whether the factors drive the outcome of the fair use analysis and, if they do, which factors are most important.

Professor David Nimmer sought to find information from a “nonscientific” statistical analysis of sixty reported fair use decisions between 1994 and 2003.<sup>65</sup> He attempted “to determine if a mechanistic view of the four factors reveals the secret of how fair use cases get resolved.”<sup>66</sup> Using his findings for my own purposes, of those sixty decisions, he found that the second factor corresponds to the conclusion of fair use 42% of the time, the lowest percentage of any of the four factors. Nimmer concludes:

Beyond elevating the first and third factors slightly, while denigrating the second, the numbers hardly tell a compelling story. The last figure [the cumulative percentage] is the most revealing. Basically, had Congress legislated a dartboard rather than the particular fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.<sup>67</sup>

In other words, the notion that courts rely on the four factors to resolve fair use questions is nothing but a fairy tale.

Professor Barton Beebe has undertaken an extremely thorough statistical analysis of all of the fair use decisions that made substantial use of section 107's four-factor analysis from January 1, 1978 (the effective date of the 1976 Act) through 2005.<sup>68</sup> The analysis included 306 reported federal court opinions.<sup>69</sup> He sought to show which factors drive the outcome of the fair use analysis, how the factors interact, how courts inflect certain individual factors, and the extent to which courts “stampede” the factors to conform to the outcome of the fair use analysis.<sup>70</sup> Interestingly, in almost 18 % of the reported opinions, courts did not even mention the second factor.<sup>71</sup> Surely, 25% of the required fair use inquiry deserves at least lip service.

Beebe notes that two considerations had emerged from the second factor analysis: whether the plaintiff's work was creative or factual, and whether the work

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section 107 to clarify the effect of a works unpublished status. *See* Fair Use of Unpublished Works, Pub. L. No. 102-492 (1992) (amending section 107 to include the final sentence: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”). *See also* Fair Use and Unpublished Works: Joint Hearing on S. 2370 & H.R. 4263 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary and the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary, 101st Cong. 102 (1990) (statement of Judge Leval in support of an amendment of the statute).

65. Nimmer, *supra* note 3, at 279.

66. *Id.*

67. *Id.* at 280.

68. Beebe, *supra* note 7. I am indebted to Professor Beebe for his kind assistance and support.

69. *Id.* at 554.

70. *Id.* at 550.

71. *Id.* at 610. An additional 6.5% of cases mentioned factor two, only to dismiss it as irrelevant. *Id.*

was published or unpublished.<sup>72</sup> Of the 306 opinions considered, 126 (41.1%) explicitly found the plaintiff's work to be creative; in these cases, the plaintiff successfully overcame the fair use defense nearly 66% of the time.<sup>73</sup> Meanwhile, 50 opinions (16.3%) explicitly found the plaintiff's work to be factual in nature; of these, the plaintiff prevailed 46% of the time.<sup>74</sup> On the one hand, these figures suggest that the creative/factual inquiry of the second factor has played a significant role in the ultimate fair use outcome – specifically, a finding that the work is creative correlates with a finding of no fair use.<sup>75</sup> Yet at the same time, as Beebe notes, opinions that explicitly made a finding on the creative or factual nature of the work also engaged in a “good deal of stampeding” – wherein all four factors either favored or disfavored fair use.<sup>76</sup> Thus, it raises the question of whether the factor two inquiry plays a determinative role or, instead, merely serves to confirm the court's fair use determination based on the other factors.

The published/unpublished dichotomy reveals a similar pattern: if the plaintiff's work was published, it had a significant effect on the fair use finding, but no effect is discernible if the work was unpublished. 42 opinions explicitly found the plaintiff's work to be published, and courts found fair use in 69.1% of those cases.<sup>77</sup> 37 opinions explicitly found the plaintiff's work was unpublished; 29 of these opinions asserted that this fact disfavored a fair use finding.<sup>78</sup> However, courts still found fair use in 18 (48.6%) of these cases.<sup>79</sup>

Despite these trends, Professor Beebe ultimately concludes that the first and fourth factors, often working together, tend to be dispositive of the fair use analysis.<sup>80</sup> Whereas the outcomes of factors one and four coincided with the ultimate fair use outcome in over 80% of the opinions, the outcome of factor two coincided with the overall test outcome only 50.2% of the time.<sup>81</sup>

Both of these analyses reveal that key intra-factor inquiries fail to provide clear predictability of the outcome a fair use consideration. For instance, although the statistics related to the published nature of a work could be viewed as driving a finding of fair use, this causal connection holds little weight when examined in the inverse. Almost half of the cases in which the court found that the copyrighted work was unpublished resulted in an ultimate finding of fair use.<sup>82</sup> When such intra-factor inquiries are related to the overall fair use analysis and the inter-factor relationships in that analysis, the weight of any one consideration is even less clear.

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72. *Id.* at 610.

73. *Id.* at 611.

74. *Id.*

75. *Id.* (“Though courts and commentators have belittled the significance of the creative/factual work inquiry along with the rest of factor two, the data suggest that in the opinions studied, there is in fact a significant inverse relation between the creativity of the plaintiff's work and the likelihood of its fair use.”).

76. *Id.*

77. *Id.* at 614.

78. *Id.*

79. *Id.*

80. *Id.* at 584.

81. *Id.*

82. *Id.* at 614.

These analyses also generally reveal that the second factor has played a less significant role in fair use analysis than has the first or the fourth factor. This finding is not surprising and is unlikely to change. What these statistical analyses fail to reveal is: what other facts or considerations have been, or should be, considered?<sup>83</sup> The mechanical application of the factors and intra-factor inquiries are highlighted by this research. But we also see that courts don't necessarily find the fair use inquiry is an exercise that is subject to precedent.<sup>84</sup> Fair use requires a case-by-case approach, and although the prescriptive force of higher court precedent has an effect on the lower courts, ultimately lower courts decide cases on the unique facts at hand.

What is less susceptible to statistical analysis is, perhaps, the most important aspect of fair use – the depth of the intra-factor inquiry and the subsequent inter-factor analysis of the unique information obtained from the factors. The lack of predictability from the individual factors reveals that the individual factors examined in a vacuum do not adequately represent the fair use analysis. Yes, certain factors tend to dominate, but in different ways and for different reasons. The fair use analysis, when well-analyzed, is a fluid inter-factor assessment based on the unique facts of each case. Each of the factors are a part of the whole inquiry and there is no good reason to grant prescriptive force to any one factor.

It appears that fair use is a fundamentally different sort of factor analysis than, for instance, trademark law's *Polaroid* factors for a likelihood of confusion.<sup>85</sup> In a likelihood of confusion analysis, the result of exploration of the relevant factors tends to be binary, objectively supporting one side or the other. The ultimate question to be resolved is whether one party's trademark identifies the source of products or services to the public and whether the public is likely to be confused by the mark.<sup>86</sup> While courts often treat the fair use factors in the same binary manner, in contrast, the fair use factors are less susceptible to such a tally-sheet approach. A thorough investigation of the factors will yield a bountiful amount of factual information, some of which is relevant, some of which may not be in the immediate context; but none of which has real value until assembled and weighed in the aggregate. The fair use factors themselves are weightless; it is the facts obtained from the factors that are weighed and balanced in their totality. Meaningless information viewed inside the vacuum of one factor may be enormously important

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83. Professor Beebe's thoughtful approach has, however, created an excellent opportunity for more detailed statistical investigation into such inquiries to begin.

84. Indeed, Beebe's analysis shows that a finding that the work was published favors fair use, even though the Supreme Court, in *Harper & Row*, sought to establish the inverse principle—that a finding of unpublished status disfavors fair use. *See id.* at 614-15.

85. *See Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961).

86. The judicial use of injunctive relief in trademark law as an effective remedy also presents a significant difference in the purposes of the factors. Within the realm of trademark law, courts have been more creative with injunctions as a means resolving disputes. In part, this may be due to the geographical nature of trademark law. But the increased reliance on injunctive relief may also be due to trademark's focus on consumers rather than the binary adjudication of competing users of marks. Copyright law could benefit from an analogous shift in the focus to the public benefit as a guiding light, as well as enhanced judicial use of creative and appropriate injunctive relief.

to the understanding of another factor. The purpose of the factors is to foster investigation into all of the relevant information. As the Supreme Court stated in *Campbell*, “[n]or may the four statutory factors be treated in isolation, one from the other. All are to be explored, and the results weighed together, in light of the purposes of copyright.”<sup>87</sup>

We have seen many cases in which the information obtained from the first factor has an effect on the analysis of the fourth. In many cases, the facts obtained from the first factor will affect information in the third factor relating to the amount appropriately used for a particular purpose. The second factor, too, has the capacity to affect the understanding of other factors, particularly the fourth. Specifically, the second factor can provide information about the normal, customary, and expected markets for a particular type of work, such that we can better understand whether any alleged harm to the market or value of a work is relevant to the purpose of copyright. It can offer information about whether the author expected reward from a particular market and thus obtained an incentive from that market, and to what degree. The doctrine of fair use not only reconciles the copyright law with the First Amendment, but it also reconciles the exclusive copyright rights with the Copyright Clause by limiting the exclusive rights when the reasonable interest of new authors outweighs the property interest of past authors.

Professor Beebe’s view that the descriptive and prescriptive effect of the leading cases is fundamentally flawed is an important point and is, on some level, consistent with David Nimmer’s view that judicial reliance on the factors is an illusion. What is implicit in both of these assessments is that facts drive the fair use analysis, not specific precedents. The fluid nature of the interplay between the factors in the fair use analysis that shifts the outcome as a consequence of nuanced differences in the facts reveals that fractiousness in the courts is not necessarily a negative result. Despite an overly-mechanistic application of the factors in many cases, some courts undertake a thoughtful application of the doctrine itself. However, it is important for courts to understand that this is not a binary choice. Courts need not choose between a mechanical application of the factors on the one hand and a general application of the doctrine on the other. The factors are inherently flexible and are compatible with nuanced investigation and subtle distinctions. The value of the second factor is not in its isolated effect on the outcome, but on the information that it may reveal that will inform the interpretation of the information from the other factors. Additional inquiries, beyond the published/unpublished and the creative/factual dichotomies, may provide useful distinctions.

## II. PROVIDING CONTEXT FOR FAIR USE AS A MEANS OF FULFILLING COPYRIGHT’S PURPOSE

The Supreme Court has repeatedly articulated the primary purpose of copyright:

- “The primary objective of copyright is not to reward the labor of *authors*,

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87. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

but 'to promote the Progress of Science and useful Arts.'"<sup>88</sup>

- "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law *is to secure a fair return* for an 'author's' creative labor. *But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. 'The sole interest of the United States and the primary object in conferring the monopoly,' this Court has said, 'lie in the general benefits derived by the public from the labors of authors.'* When technological change has rendered its literal terms ambiguous, *the Copyright Act must be construed in light of this basic purpose.*"<sup>89</sup>
- "By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."<sup>90</sup>
- "The sole interest of the United States and the primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the *labors of authors*. A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects.'"<sup>91</sup>
- "Lord Mansfield's statement of the problem almost 200 years ago in *Sayre v. Moore*, quoted in a footnote to *Cary v. Longman* . . . bears repeating: '[W]e must take care to guard against two extremes equally prejudicial; the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.'"<sup>92</sup>

All of these statements reveal that the limited property right bestowed by the public to authors must be balanced with the general interests of the public in fostering the creativity of new authors.<sup>93</sup> Copyright's purpose is to encourage

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88. *Feist Publ'n's, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (emphasis added).

89. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (emphases added) (internal citations omitted).

90. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

91. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-128 (1932) (citing *Kendall v. Winsor*, 21 How. 322, 327, 328 (1858)).

92. *Twentieth Century Music*, 422 U.S. at 156 n.6 (internal citations omitted).

93. For a fascinating discussion of the rhetoric of authorship and how that rhetoric has been selectively used by other interests as a rhetorical vehicle for expanding control, see Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 472 (1991) ("A stress on the interests of *past* "authors" could generate arguments for broad copyright protection, while

authors to create. Fair use furthers this goal by allowing new authors to create by building upon the expression of existing authors in a manner that will not impede the encouragement of authors to create. Only effects on the market that will hinder the monetary incentives that serve to encourage creative efforts and dissemination of works are germane to the fair use inquiry. Copyright does not seek to maximize an author's reward or a copyright owner's return; its purpose is only to ensure that authors create and disseminate their works.

Justice Souter stated that "[f]rom the infancy of copyright protection, some opportunity for fair use of copyright materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and the useful Arts.'"<sup>94</sup> He went on to say that the "fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'"<sup>95</sup>

So, as L. Ray Patterson stated, the question is not "what is fair use?" but "what is copyright?" The goals of fair use and copyright are congruent. Fair use is a means of fulfilling copyright's purpose. To paraphrase the Supreme Court, when its literal terms are ambiguous, the Copyright Act must be construed in light of copyright's basic purpose. And again, as the Court states in *Campbell*, "[n]or may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."<sup>96</sup> Where can the purpose of copyright be read into the fair use analysis? While it should be read into the analysis in the weighing and balancing of the totality of accumulated evidence, part of the answer lies in the second factor.

### III. POTENTIAL AVENUES OF INQUIRY UNDER THE SECOND FACTOR

Before investigating the possible inquiries that could increase the value of the second fair use factor, it is useful to consider the nature of the second factor itself. Congress instructs courts to examine "the nature of the copyrighted work." The word "nature" has many meanings, and a "copyrighted work" may take many different forms.

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an emphasis on the interests of *future* 'authors' could generate equally compelling arguments for strict limitations on the scope of copyright protection").

Here, I argue that the rhetoric of authorship, which leads to increased scope and duration in order to encourage creativity, applies equally to the fair use limitation on *past* authors' exclusive rights when those rights impinge on the creativity of *future* authors. The only limiting principle within fair use is rooted in whether the new author's use would affect the reward to the past "author" in a manner that would affect the incentive to create. In many cases, a copyright owner's market harm might be irrelevant to the analysis, particularly if the owner's harm was not directly related to the original author's incentive to create.

94. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

95. *Id.* at 577 (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

96. *Campbell*, 510 U.S. at 578.

### A. EXPLORING THE NATURE OF SOMETHING

The most likely meaning of the word “nature” in the context of the statute and the phrasing of the second factor is “the essential character of a thing; quality or qualities that make something what it is; essence.”<sup>97</sup> It is also defined as “the inherent character or basic constitution of a person or thing” or “a kind or class usually distinguished by fundamental or essential characteristics.”<sup>98</sup> “Nature” can also be defined as the “type or sort of thing.” The word is derived from the Latin word *natus* meaning “born” or “produced,” which in Latin is related to the word *genus* meaning “origin, species, or kind.” In this sense, to examine the “nature” of a thing would be to investigate its intrinsic attributes or its essence.

By investigating the intrinsic attributes of something, we are able to place it into classifications and categories. Not only does this establish commonality among things with like attributes, but it also allows us to distinguish the thing at issue from different things. An examination of the nature of a thing also allows us to look at different levels of classification or, to put it another way, different levels of abstraction. We may find the nature of a thing to be a rock as a basic classification, yet at an even lower level of abstraction, it can be classified as a solid, while at a higher level of abstraction we can look at the sub-classification as an igneous rock, or at an even higher level at the specific chemical and mineral composition.

There are other ways of dividing things into additional subclasses, *i.e.*, further distinctions that can be made. A rock can be classified by texture, shape, size, density, and color. These attributes may not be essential to the nature of rocks; but if the focus of the inquiry is on certain types of rock, they help distinguish differences and similarities between certain subgroups. In short, the inquiry into the nature of a thing can provide many levels of information. The value of this information, and the relevant levels of abstraction, will depend on the context of the inquiry.

When examining the nature of a thing, we must also recognize that things can fall into more than one classification. Some things might be a borderline-fit into a classification, and some things might be composite. In such specific cases, to understand the nature of the thing, it might be necessary to consider the nature of different elements in order to fully understand the thing.

### B. WHAT IS THE NATURE OF COPYRIGHTED WORKS?

Copyrighted works can be classified in many ways. As we have seen, courts have looked to a couple distinctions about the nature of copyrighted works, namely, the factual/creative dichotomy and the published/unpublished dichotomy. For the most part, courts have looked no further, and have even been reluctant to make further distinctions within these two classifications. In some cases, additional

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97. YOUR DICTIONARY, Nature – Definition, <http://www.yourdictionary.com/nature> (last visited May 9, 2008).

98. MERRIAM-WEBSTER ONLINE DICTIONARY, NATURE – DEFINITION (2008), <http://www.m-w.com/dictionary/nature> (last visited May 9, 2008).

information about the copyrighted work may be discussed in the opinion, or even specifically in the court's fair use analysis. But with something akin to pathological aversion, courts do not look at other information about the copyrighted work within the second factor.

There is an obvious starting point to the inquiry into the nature of the work – the eight statutory categories of copyrightable authorship.<sup>99</sup> Each category of authorship may be created, fixed, used, distributed, published, marketed, digitized, adapted, quoted, or licensed in different ways. Different categories of authorship receive different rights. Different limitations apply to different categories of works. Different categories of works have different practical limitations. Different categories also have different customs and practices, and are often situated in different industries or organizations. A great deal of information opens up to consideration if the court simply begins by examining the nature of the particular category of copyrightable authorship at issue.<sup>100</sup>

Moving from the general category into more specific distinctions about the copyrighted work, the next step to miring further information might be some narrower classification of the work involved. For purposes of this inquiry into the essential character or qualities of a copyrighted work, courts could explore many types of classification, including the factual/creative dichotomy or the published/unpublished distinction. Another manner of classification that may be useful, and which may be a better next step, is to differentiate between the types or sub-categories of copyrightable authorship. Within any section 102 category of copyrightable subject matter, there may be more specific classifications that are appropriate. For instance, identifying the work as a photograph would be a useful distinction from pictorial, graphic and sculptural works generally. Obviously, this is often done in copyright opinions, but not with the second factor in mind. Continually delving into the nature of the copyrighted work from the general toward greater specificity of the work's nature – through the levels of abstraction – uncovers potentially useful information that will assist in the ultimate analysis of the interrelationship between the factors.

By identifying the class of work with the particular category of copyrightable authorship, the court can learn more information about the scope of protection for that particular class of works, the customs and practices of that class of works, including the typical compensation and licensing mechanisms within that industry, the ways in which that work is typically disseminated in copies, and any other information about the class, including but not limited to how the work is created,

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99. See 17 U.S.C. § 102(a) (2000).

100. It is difficult to know what might be relevant in the fair use analysis in any particular case. Precedent may be misleading when different particular facts or new market developments change the subtle calculus of the equation. Questions that are irrelevant to copyrightability (*e.g.*, sweat of the brow, fortuitous creation, etc.) may be germane to the fair use analysis in certain cases. Similarly, the fact that courts looked to scope of protection and copyrightability in evaluating a *prima facie* case of infringement by the plaintiff should not eliminate those questions from the fair use analysis. As long as the inquiries of infringement and fair use are viewed a discreet and separate inquiries (as is the case when courts, arguably mistakenly, view fair use as an affirmative defense), courts must be willing to address these inquiries anew in the different contexts of the analysis.

fixed, used, distributed, published, marketed, digitized, adapted or quoted.<sup>101</sup> Again taking the example of a photograph, it might be relevant to consider the options that are available for use of that type of work. Was the work susceptible to different uses? Can a photograph be quoted, described sufficiently, or paraphrased? Can the use of a portion of the work, such as, the upper left quadrant of the work suffice for the purpose, or is a low resolution thumbnail image the only sufficient way in which to use less than the whole original work?<sup>102</sup> These questions may blend into other factors, such as the amount and substantiality of the portion used. But it is important to consider the inherent attributes of the work itself within the second factor in order to make sure that the analysis of the other factors does not overlook characteristics of the particular type of work at issue. The universe of copyrightable subject matter is extremely broad, so it does not make sense to proceed in the analysis as if all copyrighted works are identical. The second factor provides the capacity to recognize these differences and to see how these differences might affect the analysis.

While this sort of inquiry may seem like a large undertaking for a factor that typically takes up no more than a few sentences in a decision, over time courts will be able to build upon preexisting analyses of classes of works. Furthermore, the complexity of the analysis is no excuse for shortcuts, particularly if the investigation yields information that becomes relevant to the overall inquiry. Moreover, while the analysis may become more complex and the yield of potentially relevant information more bountiful, these nuanced distinctions may tend to limit the influence of decision-maker bias in reaching conclusions. When decision-makers are more informed of the pertinent facts, overly-simplistic preconceptions may yield to impartial consideration of the unique facts of the case at hand.

After identifying the class, it would be useful for the court to look at the particular work with even greater granularity. The factual/creative distinction is one useful area of pursuit. Yet, even within sub-factor inquiries, there is a need for courts to consider distinctions. For instance, there are levels of abstraction between pure fact and pure creativity. Most works fall somewhere in between the two

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101. "Class of works" is a phrase that is accumulating some meaning through the triennial rulemaking proceeding conducted by the U.S. Copyright Office. The legislative history of Title I of the Digital Millennium Copyright Act also contains some information about how Congress viewed that term as significant in terms of how different classes resulted in different markets. While there is no reason to restrict the term in the fair use analysis, these sources of information may provide some direction about where to begin the inquiry into consideration of classes. From there, courts could also consider classes of copies or phonorecords within a class, since the use of "nature of the copyrighted work" in the second factor is not exhaustive of the court's inquiry in the fair use analysis.

102. In *Kelly v. Arriba Soft*, 280 F.3d 934 (9th Cir. 2002), the Court of Appeals for the Ninth Circuit did take some of these considerations into account. In doing so, however, the court failed to see how the photographic nature of the work affected the third factor aside from the fact that the whole work needed to be used. The key characteristic of a thumbnail photograph was not its small size, but its compression and the removal of pixels that occurs in this process. Removing pixels was a means of taking less than the whole work and one of the few ways that a portion of this type of work could be used. Thus, the second factor could have more fully informed the court's understanding of the third factor.

extremes. Rather than simply identify whether a work is mostly factual in nature or more creative, it would be useful for courts to explore the placement on the continuum with more specificity, such as determining what in the work is factual and what in the work is expressive or creative. Identification of these distinctions may be valuable in considering how this distinction affects the amount used or the effect on the potential market or value. Some of these distinctions, although seemingly extraneous in a vacuum, may turn out to be instructive in the intra-factor or inter-factor analyses.

It is extremely important for courts to look at these sub-factor inquiries thoughtfully, and not be too quick to dismiss the relevance of the investigation. The factual/creative dichotomy could be relatively obvious in some literary works, but might appear less germane in other categories or classes of copyrightable authorship. This assumption of irrelevance should, however, be questioned.<sup>103</sup> For example, a photograph or pictorial work may be assumed to be purely creative. But some pictorial works are primarily factual. Consider a photograph of the Mai Lai massacre or the Sandinista 1979 uprising.<sup>104</sup> While there may certainly have been selection, coordination, and arrangement involved, the subject matter of these works is unquestionably factual. Such information may ultimately be useful to the analysis.<sup>105</sup> An impressionistic photograph of a factual event would be more creative, whereas a photographic manipulation of light and color might be viewed as purely creative. The analysis must be based on the facts; but it is important to understand that there is a spectrum between fact and creative expression for many types of works other than literary works, and potentially relevant distinctions should be made when analyzing the nature of the work.

The factual/creative dichotomy is only one intra-factor consideration of a

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103. The obviousness of such a finding, however, could also be superficial obviousness. Courts should remain vigilant to the subtleties of the particular analysis before them. A mere conclusion that a work is factual in nature should be explained and explored for additional information.

104. The example of the Mai Lai massacre was specifically chosen because of the important discussion of this example by Melville Nimmer in his seminal article on copyright and the First Amendment. Melville Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970). In that article, Professor Nimmer suggested that a distinct First Amendment exemption for news reporting may be warranted and that this First Amendment concern should not obscure the purpose of the more focused fair use analysis. *Id.* at 1197-99. With the utmost respect, I think that Professor Nimmer was wrong, and that the fair use analysis need not be as limited as he suggested.

The second example was chosen in light of a fascinating discussion that has arisen between two authors: Susan Meiselas, the photographer of a Sandinista fighter throwing a Molotov cocktail, and a subsequent depiction of the *Molotov* in a series of paintings by Joy Garnett, who created the *Riot* series of paintings based on a number of photographs. See Joy Garnett & Susan Meiselas, *On the Rights of Molotov Man: Appropriation Art and the Art of Context*, HARPER'S MAGAZINE, Feb. 2007, at 53, available at <http://silvacine.com/classreadings/molotov.pdf>. There is no conclusion to be drawn from the factual nature of a photograph in and of itself, but the information that the work is based on a factual event and may have captured the essence of that event could be important in the final intra- and inter-factor analysis.

105. I say "may" because some photographs may also be completely fortuitous. Although intent to create a work of authorship is not required for copyright protection, when viewed in the light of the purpose of copyright, the accidental nature of a particular work may be relevant to the ultimate fair use inquiry.

particular class of works that may be examined under the second factor. As we learned from the Supreme Court in *Harper & Row*, the published or unpublished nature can be a highly relevant consideration about the nature of the work as well. Yet, what many courts have ignored, despite the thoughtful suggestions of Judge Leval, is that this dichotomy also contains a spectrum of considerations that are capable of deeper distinctions. In fact, the failure to investigate more deeply the nature of an unpublished work may lead to erroneous assumptions. For instance, a work that was never intended for publication might be treated differently, and may be more susceptible to fair use, than a work that was scooped immediately preceding the expected first publication of the work. Similarly, a work that is technically “unpublished” may nevertheless be widely available to the world through its public performance or public display.<sup>106</sup> Such widespread availability of the work may diminish concern for the work’s unpublished status. The manner in which different types of works are published might also be relevant. The controversy surrounding the publication of sound recordings could be relevant, as could the difficulty establishing the publication concept for a work placed on the Internet.<sup>107</sup> Any deeper investigation into the published/unpublished dichotomy that might shed light on copyright’s function to encourage the creation of the work at issue might ultimately provide useful information to the ultimate inter-factor analysis.

Other forms of classification of the nature of works may be appropriate. The size of a work might be a relevant characteristic in some cases. The tangible form of a work – if it is distributed in copies or phonorecords, if there are limited copies or one copy that is primarily accessible only by display or performance, the types of copies or phonorecords available, the manner in which the copies or phonorecords can be used, the availability of copies or phonorecords, the price of copies, the licensing markets that are ancillary to or in lieu of copies – all may be relevant in the factual context of a particular cases. Quite simply, there is no limit to the ways in which a work’s nature may be categorized or classified into relevant inquiries. Any of these inquiries may shed light on the balancing of the use with the normal exploitation of the work in the context of the purpose of copyright – to what extent does fair use provide an incentive to create without superseding a market or potential market that provided an incentive for the original author to create the work used?

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106. The Copyright Act defines “publication” as “the distribution of copies of phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.” 17 U.S.C § 101 (2000) (defining “publication”).

107. See, e.g., *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950 (9th Cir. 1995); see also Michael B. Landau, “Publication,” *Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years*, 2 VAND. J. OF ENT. L. & PRAC. 29 (2000). Courts have not directly decided whether placing a work on the Internet amounts to publication of a work and the U.S. Copyright Office has not taken a general position on this issue.

### C. ADDITIONAL INQUIRIES

In addition to the considerations discussed, there are many other characteristics of the copyrighted work that might lead to information that would assist with understanding the other factors and the fair use analysis as a whole. The remainder of this section will offer some suggestions for possible avenues of inquiry. None of these distinctions are in themselves determinative of fair use, nor would any of them weigh for or against fair use. Many of the considerations do not relate to copyrightability, originality, the exclusive rights, or other limitations on those rights. They are factual distinctions related to the nature of specific works that may provide information useful to the overall fair use assessment. These are not a detailed taxonomy, but rather potential examples of inquiries that could yield useful information. Each case will involve its own unique circumstances, and courts must begin to investigate any and all salient facts that could inform the overall analysis. The examples below are provided as a means of opening the minds of courts to a flexible, searching and comprehensive analysis into the nature of the particular works at issue.

#### 1. Is the Interested Party the “Author” or “Owner”?

Looking at the purpose of copyright as articulated by the Supreme Court, the focus is on the encouragement of “authors” to create works of authorship. That focus on authors suggests that there may be a relevant distinction between “authors” and non-author “owners” of copyrighted works. The creation of works of authorship is limited to “authors,” and thus while subsequent owners of copyright can unquestionably play a vital role in the dissemination of a work to the public, the role of owners is different from that of authors in the copyright system. In certain circumstances, there may be reason to treat the interests of each differently.

Under U.S. law, authorship can arise in three different ways: individual authorship, joint authorship, and employer/commissioning authorship under the work made for hire doctrine. The second factor provides a vehicle by which to examine the creator of the work and the incentives of copyright in relation to the author of the copyrighted work at issue. What are the customary ways in which that work or class of works is commercially exploited? What do typical contracts for the transfer of rights include? Were there differences in this contract for which the author was compensated? What markets were reasonably anticipated by a typical copyright owner for this type of copyrighted work for which payment was made to the author? Unexpected markets could not have contributed to the incentive to create and are therefore outside the core purpose of copyright law. While these markets, by default, fall within the copyright owner’s rights, such a windfall should be considered for what it is when considering this market as relevant to the user’s purpose. The expectations of authors may change over time as the ways of distributing and exploiting works changes, but it is still reasonable to examine what the particular author anticipated at the time of the creation of his or

her work. This relevant expectation interest should be the principal concern for the original work when considering the fourth factor. Of course, the findings from the other factors will be equally relevant, and all of these facts must be balanced together.

## **2. Is the Author the Beneficiary of a Relevant Market?**

While markets have typically been viewed solely as a function of the fourth factor, we have seen that the optimal analyses of fair use have examined the factors in light of their relationships to each other. Thus, for example, the amount of the portion used under the third factor must be examined in relation to the purpose of the user – how much was reasonable in light of the use – and the effect of that amount used on the potential market for or value of the original copyrighted work under the fourth factor. The second factor can operate in a similar manner by providing relevant market information about a particular type of work.

A nuanced consideration of the markets anticipated by the authors of particular classes of works may address some of the problems encountered in relation to the first and fourth factors. The only way to differentiate between markets is to dig below the surface of their alleged values. By determining who the beneficiary of the market is and how important this alleged market was to the creation of the work, courts can better assess the relative value of the claimed market. This investigation is by no means determinative of the outcome, nor does it belittle the value of any particular market. However, this inquiry allows courts to differentiate between markets when weighing the relative importance of the markets in relation to the purpose of copyright. A number of further distinctions could be of value in particular cases.

### *a. The Primary User v. Ancillary Markets*

What primary markets does this class of works normally target? For example, the category of literary works provides little guidance in assessing this question, since it could include all books, periodicals, computer programs, etc. Narrowing the category to a particular sub-category narrows the focus; but since even the classification of books would lead to further information, additional focus is useful. If the work is determined to be a textbook, we gain further insight into the primary markets for this work – students. Further inquiry into the level and subject matter of the textbook would provide even more information about the markets critical to the incentive for this sub-class of works. A use outside the academic environment would have an attenuated effect relative to a use within the academic environment. Yet even this distinction may not be deep enough, since the use of a portion of the text at a different academic level or in a different field might be relevant. Thus, probing the primary intended market involves moving from the general to the specific in search of relevant information.

*b. What are the Typical Derivative Markets, Or is This an Unexpected/Ancillary/Novel Market?*

After discovering the primary markets for sale of the work, it may also be necessary to examine how works in this category, sub-category, class, or sub-class are adapted or licensed. Scrutinizing the traditional secondary markets for the work at issue offers the court an opportunity to differentiate between different secondary markets. Any use may be licensed, but we have been taught by courts that not every market is relevant.<sup>108</sup> It is important to determine whether licensing is a primary market or critical secondary market. The second factor offers courts an opportunity to explore the secondary markets traditionally associated with the specific work at issue.

*c. Is the market typically expected by the author, or is the market one that serves as a means of profit maximization solely for the benefit of the subsequent owner of a work?*

Who is the beneficiary of the market, whether primary or secondary? Did the author receive compensation for this market? Did the market arise before or after the sale of the work to the subsequent copyright owner? If the market benefits the copyright owner rather than the author, was this benefit a traditional and expected part of the price paid to the author for the work? Are there non-monetary benefits that the author receives for which the owner should reasonably be compensated? All of these questions probe the importance of the market relative to the purpose of copyright. For instance, if an author receives non-monetary benefits from a subsequent copyright owner, such as a journal publisher who received the work from the author for free, what interests of the publisher must be protected in order to fulfill its role in providing an incentive to the author to create the work? The societal obligation to the subsequent owner is not the same as the duty to the creator. Similarly, if a market becomes available after the purchase of a work, such a windfall is ambiguous. The market probably did not contribute to the incentive of the author to create, and also may not have contributed to the price paid to the author by the subsequent owner. The copyright owner clearly has a default claim to the rights in *post hoc* emerging markets, but those rights are not unlimited, because copyright is a limited monopoly of exclusive rights subject to fair uses and other limitations. Such markets may be more susceptible to new uses than those traditional and expected markets that led to the creation of the work or the price paid for that work. Further, there is some reason to distinguish between even these two interests, since the primary purpose of copyright is to encourage the former rather than the latter interest. While a reliance interest by a purchaser of a copyright should be considered, it is subsidiary to the principal concern of encouraging creation of works.

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108. See, e.g., *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994). The Second Circuit stated that by limiting the fourth factor to traditional, reasonable and likely-to-be-exploited markets, the fourth factor avoids the problem of circularity.

### **3. Is the Work Freely Available or Available Subject to Protective Restrictions?**

Whether the copyrighted work is freely available, for instance, on the Internet, or whether the work is protected or restricted to particular types of copies might be another characteristic about a copyright work that a court should assess. This might be considered related to the inquiry of publication and provides information about how widely the author sought to disseminate a work. Although copyright rights apply equally to works that are widely or freely disseminated as those that are not and no additional forms of protection are necessary to claim protection, such as technological measures, free access to a work is at least a fact to consider in the fair use calculus. At a minimum, the characteristics of the dissemination of a work provide information about the author's amenability to dissemination.

### **4. Has the Work Been Exploited in Digital or Analog-Only form?**

Along these same lines, the exploitation of the work in digital form might also be considered as a relevant fact, particularly when assessing a digital use of a copyrighted work. Like the right of first publication, the decision to exploit the work in digital form might be considered a conscious choice that could be considered the prerogative of the author, given the heightened risks of infringement online. By giving the author the choice of when and if to place a work online, the author can choose how freely that work will be accessible.

### **5. Has the Work Been Disseminated to a Limited or a Broad Audience**

As with the right of first publication, the decision to disseminate to a small or select group, rather than to effect a general commercial exploitation, may be relevant. Traditionally, a limited distribution to a limited group of people for a limited purpose was not publication of a work, but was a limited publication (meaning not a publication). There are reasons consistent with the purpose of copyright to allow authors to choose to limit who can have access to a work for a particular purpose. Unlike the consideration for restricted or protected use mentioned above, however, the limited purpose inquiry is particularly important for distinguishing between traditional limited publication concerns and general publication. Simply limiting access to those willing to pay or to agree to licensing restrictions is not the type of limited purpose associated with limited publication. Limited publication typically precedes publication and is an opportunity for the author to gain feedback or to shop the work to different distributors before going forward with publication. The reasons to provide the author with an opportunity to improve a work or find the optimal deal for a work continue to promote the goal of copyright. However, leveraging limited publication as a means of gaining the benefits of copyright without the limitations does not promote the purpose of copyright.

## 6. What is the Length or Scope of the Work?

This characteristic of a work might be relevant in different ways. A short work's primary value could be harmed by the use of a small part. But alone, a work of small size or length does not lead to a presumption of harm, since the scope of protection for such a work may be very thin. In addition, there may be a limited number of ways to express a work of very short length. This applies only to literary works, but may be relevant to pictorial, musical, audiovisual, sound recordings and other works as well. Generally, this will be considered within the third factor, but the amount of copyrightable authorship and the type of expression might well be considered separately before simply looking at how much was used. The amount of authorship and possibly the amount of effort expended on creation might be relevant to fair use, notwithstanding the fact that it is not relevant to copyrightability. It might also be relevant to consider whether reference to the work is possible without using the work, *e.g.*, a photograph, in some way.

## 7. Was the Work Expensive to Create?

The expense and effort that went into the creation of a work is not a consideration for purposes of copyrightability, but these facts may be relevant to considering potentially fair uses of the resulting expression in the work. It is difficult to provide an incentive for the creation of highly expensive, labor-intensive, or time-consuming works. Compared to less expensive counterparts, such works may be more in need of subsidiary markets in order to encourage their continued creation. For instance, the incentive to create a feature-length motion picture is very different from the incentive to create a photograph. These considerations may be relevant to the inquiry, but they also set the stage for examining the distinctions that exist in relation to the particular work at issue. Some photographs involve more creativity, expense, effort, or expertise to create than those taken with a camera phone. Conversely, home movies are different than documentaries or feature-length motion pictures. The particular characteristics of the work used should be placed in relative perspective.

## 8. Was There an Intention to Create a Copyrighted Work?

As Judge Leval pointed out, some works are the "incidental beneficiaries of copyright" for which copyright's incentives may have played no role in the act of creation. Emails, letters, personal notes or even home movies may not have been encouraged by the protection of the copyright system. As incidental beneficiaries, they are protected by copyright; but in some circumstances, uses of that work might outweigh the need for monetary compensation. The Zapruder film could be seen as an example of such a situation. Zapruder never intended to capture the assassination of President Kennedy. Since intent is not necessary for copyrightability, there is no question that he created copyrightable subject matter. Nevertheless, certain socially beneficial uses of reasonable amounts of that work may be reasonable. No one factor controls, and the same result can be reached

without delving into the second factor; but the second factor can further the analysis.

### **9. What Were the Expected Uses of the Work?**

It may be beneficial to inquire into the expected uses of a work in order to better understand relevant markets. Was the work intended to be distributed in copies or phonorecords, or was the work intended for public performance or display? What are the ways in which users used the purchased copies or phonorecords? Were certain ancillary uses of the copies traditionally permitted or tolerated by creators or copyright owners? Did the owners of copies or phonorecords of the work typically involve subsidiary uses, such as quotation, time-shifting or linking to the work? Was the work intended to be consumable by the user, as is a workbook? The ways in which different classes of works may be used varies greatly and the characteristics of any use may be relevant to the overall inquiry.

### **10. What is the Cost of Purchasing Copies of the Work or Rights to Use the Work?**

The cost of copies or licenses for use of the work may affect the other factors. For instance, if a license for a portion of the work was the same as a license for the whole work, this fact may be relevant to the overall calculus. A readily available licensing mechanism at a reasonable price may also be pertinent. Different classes of works have vastly different pricing structures and distribution models. Any of these facts might enter into the fair use analysis.

### **11. Is the Work Time Sensitive, or Does it Have a Long-Lasting Market?**

The time-sensitive value of a work may be an important consideration. While works with a long life expectancy may be less affected by limited uses, those with a short period of value might be less susceptible to certain uses at a particular point in time.<sup>109</sup> Assessing the relative value of a work over time may be a useful consideration.

### **12. Is the Work Unusual or Highly Successful?**

Courts should also consider that exceptions to general rules exist. Even though the typical market for a particular class is established, it is important to consider the ways in which the particular work at issue deviates from the norm. A highly successful or famous work may deserve significant protection for the ancillary markets its success creates. Many authors hope that a work will achieve wide success and lead to many forms of revenue. The aspiration for a “hit” or critical acclaim may be a significant force, despite its elusiveness, in driving the utilitarian

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109. See, e.g., Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003); Joseph Liu, *Copyright and Time*, 101 MICH. L. REV. 409 (2002).

model of the U.S. copyright system. The role that copyright owners play in developing the success of a work is also a component of this system. The fact that initial payment to an author might not equate with the ultimate value of a work is addressed in the termination provisions of the Copyright Act, as well as the renewal system until the 1909 Act. The fact that a particular work is a commercial success and the reasons for that success may be relevant to the second factor analysis.

But it may also be important to consider the social value of such works. Some works are not only successful, but become “iconic symbols” in our culture.<sup>110</sup> There may be cases in which famous works are the ideal vehicles for satire and social commentary due to the cultural significance surrounding these works. A highly successful work becomes a part of our social and cultural vocabulary. Examples of such works are Barbie, *Gone With The Wind*, Mickey Mouse, and the *Cat in a Hat*. The need to reference these expressive cultural symbols is part and parcel to the success of the work. Thus, the benefits of success entail a corollary loss of some measure of control.

In many cases, famous works also receive other forms of intellectual property protection, such as trademark protection. It is critical to allow trademark law to protect trademark interests without allowing those interests to obscure copyright interests. Since trademark law is capable of preventing consumer confusion, dilution, and unfair competition, this fact should be recognized when dealing with copyright issues in such works. Moreover, the social significance of such works may be an appropriate fact to assess.

There are undoubtedly many other inquiries that could be relevant in a particular case. The purpose of this section was not to itemize the universe of relevant inquiries, but rather to posit examples of possible considerations. Courts should begin to demand more information about the characteristics of the copyrighted work used in order to inform the overall analysis. Different cases require or allow different inquiries, but courts should seek to go beyond the limited inquiries normally considered in the second factor and probe works for distinctions and nuances that might assist the court in the examination of the other factors. Importantly, this inquiry should be grounded in the harmonization of the analysis with the primary purpose of copyright – to encourage authors to create.

#### **D. CONGRESSIONAL VALIDATION OF THE NEED FOR AN EXPANDED SECOND FACTOR ANALYSIS**

Although Congress did not provide guidance in the statute for the scope of inquiry of the second factor, it did provide some significant instruction. In the legislative history preceding the passage of the 1976 Act, Congress devoted significant discussion to the second factor’s role in the fair use analysis.<sup>111</sup> This legislative history lists two general considerations. First, it lists the “Character of

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110. Jessica Litman deserves credit for this point, which she raised at the Symposium.

111. See H.R. REP. NO. 89-2237, at 58-66 (1966); an identical version in H.R. REP. NO. 90-83, at 29-37 (1967); and a similar discussion (but identical in relation to the second factor) in S. REP. NO. 93-983, at 115-120 (1974).

the work,” stating that:

The character and purpose of the work will have a lot to do with whether its reproduction for classroom purposes is fair use or infringement. For example, in determining whether a teacher could make one or more copies without permission, a news article from the daily press would be judged differently from a full orchestral score of a musical composition. In general terms it could be expected that the doctrine of fair use would be applied strictly to the classroom reproduction of entire works, such as musical compositions, dramas, and audiovisual works including motion pictures, which by their nature are intended for performance or public exhibition.

Similarly, where the copyrighted work is intended to be “consumable” in the course of classroom activities – workbooks, exercises, standardized tests, and answer sheets are examples – the privilege of fair use by teachers or pupils would have little if any application. Text books and other material prepared primarily for the school markets would be less susceptible to reproduction for classroom use than material prepared for general public distribution. With respect to material in newspapers and periodicals the doctrine of fair use should be liberally applied to allow copying of items of current interest to supplement and update the students’ textbooks, but this would not extend to copying from periodicals published primarily for student use.<sup>112</sup>

This discussion is extraordinary informative. With this instruction, we find that courts may want to inquire about the characteristics of the original work. What type of work is it? How is the work used? Which markets is the work targeted to reach? Is the work intended for consumption by the same market that is now claiming fair use? What category of work is it? In what sub-category or class is the work used? How is that particular class of works usually exploited? In what manner is the class of works usually exploited, *i.e.*, in copies, by public performance, or by license? We find that different classes of works may be generally used and marketed in different ways. These differences are relevant to the fair use inquiry.

Congress goes on to instruct us that something else may be relevant. The legislative history states that the “availability of the work” may be another consideration:

A key, though not necessarily determinative, factor in fair use is whether or not the work is available to the potential user. If the work is “out of print” and unavailable for purchase through normal channels, the user may have more justification for reproducing it than in the ordinary case, but the existence of organizations licensed to provide photocopies of out-of-print works at reasonable cost is a factor to be considered. The applicability of the fair use doctrine to unpublished works is narrowly limited since, although the work is unavailable, this is a result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances the copyright owner’s “right of first publication” would outweigh any needs of reproduction for classroom purposes.<sup>113</sup>

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112. S. REP. NO. 93-983, at 117-118.

113. *Id.*

Once again, this information provides enormous insight into the possibilities of the inquiry. The marketplace availability of a work is relevant to the second factor. Can copies be obtained? Can they be obtained for a reasonable price? Can they be licensed? Are they out-of-print or otherwise unavailable for a particular use? It would seem that issues related to orphan works might also be relevant, since authorization for use or the desire to license would be impossible if the user could not identify or locate the author or copyright owner of a work or a relevant right. This discussion also addresses many of the problems that arose after the *Harper & Row* decision by clarifying that unpublished works may not ordinary be justified, but that qualification is not absolute. Moreover, this legislative history uses the example of the use of an unpublished work in relation to reproduction for classroom purposes. It would appear that a different analysis would be called for if the unpublished work was used for purposes of parody, criticism, research, or scholarship.

Not only do we learn from the legislative history that the second factor is capable of a wide variety of considerations beyond the creative/factual dichotomy and the published/unpublished dichotomy, but we also know from other parts of the legislative history that the mandatory factors are not exhaustive; rather, they are non-exclusive inquiries.<sup>114</sup> Courts are free to consider additional factors if the factual context of the fair use inquiry calls for further investigation. If the factors are non-exclusive, it logically follows that courts have discretion and are free to consider any relevant and additional inquiry within a particular mandatory factor as long as the required statutory considerations are also taken into account. For example, as we have seen, Justice O'Connor considered not only the amount and substantiality of the portion used in relation to the copyrighted work as a whole, but also considered the amount and substantiality of the portion used in relation to the infringing work.<sup>115</sup> There appears to be no reason for the second factor to be limited to the narrow inquiries courts typically employ. Indeed, there are important reasons to consider a much broader inquiry under the second factor in order to garner additional useful information that could elucidate the information discovered under the other three factors. The legislative history provides support for an expanded and nuanced second factor inquiry.

#### IV. ILLUSTRATION OF THE ENHANCED SECOND FACTOR INQUIRY IN PRACTICE

In an effort to place this proposal for rehabilitation of the second factor into perspective, an exploration of the factor's potential role within a hypothetical scenario may provide some perspective. In order to explore how the analysis might be affected by the nature of the copyrighted work, an example involving the use

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114. H.R. REP. NO. 94-1476, at 66 (1976) ("Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way"); *see also, e.g.*, *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 918 (2d Cir. 1994) ("Section 107 of the Copyright Act identifies four non-exclusive factors that a court is to consider when making its fair use assessment").

115. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-65 (1985).

varying portions of works by a professor for students will serve as the basis for this hypothetical.

Consider a professor who wants to make a coursepack for the students registered for a law and politics course. The coursepack might consist of whole articles and excerpts from newspapers, online popular press, journals and monographs, all of which will be credited and all of the works in the collection of the educational institution's library. The professor has not decided whether to make hard copies available to students or to provide the course pack through a limited-access course site, but if hard copies are made, the cost will not exceed the actual cost of photocopying using the academic institution's in-house, non-profit reproduction service. There are two principal cases that have addressed academic coursepacks, but these cases involved intermediary, commercial copy shops that reproduced the works for professors and distributed the works to students as part of a commercial enterprise.<sup>116</sup> Such a commercial intermediary is not present in this hypothetical.

How could a comprehensive second factor inquiry develop from these facts? It would be useful to consider the most general characteristics of the copyrighted works at issue. Although there will be differences between the particular works used as we explore the distinctions in greater detail, at a high level of abstraction, these works all fall within the category of literary works. Literary works may take many different forms; therefore, before looking into different characteristics, incentives, distribution models and uses, it is helpful to assess further distinctions about the types or classes of literary works involved. Taking the class of journal articles as a focus, what are some of the relevant characteristics of this class of works? First, all of the articles were written by academics and are on the factual side of the spectrum. All of the works were published, and publication is generally a key goal of the authors of all of the journal articles – the authors want recognition for their theories and analysis, and also want their works to be as widely read as possible. While a traditional second factor analysis might find that the fact that the works are published and primarily factual in nature is all that the second factor is capable of introducing into the analysis, the following are considerations consistent with the proposal of this article that may provide additional salient information.

It may be useful to understand that none of the authors of the academic journals were specifically paid for their articles to appear in the journals. The incentive for the act of creation was therefore non-monetary. Most of the authors are interested in receiving attribution for their expression in the hope of securing notoriety in their field. The authors may have an interest in securing publication in recognized or respected journals, but it would be useful to look at the facts of the particular authors as well as the particular journals and articles. Did the authors transfer their copyright as a condition of publication? While this was often a condition of publication in the past, more recently, many journals permit the author to retain the copyright and require only some period of exclusivity in the realm of competing journal publication. Publishers bear the expense of publishing these works, and

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116. *Basic Books, Inc., v Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *Princeton Univ. Press v. Michigan Document Servs. Inc.*, 99 F.3d 1381 (6th Cir. 1996).

since the forum of publication is important to many academics, this expense must be considered as a form of payment to the authors.

The typical markets for journals are subscriptions to libraries and individuals, as well as rights to publish in other collections and online databases. Since the journals are in the collection of the institution's library, at least one copy of the journal has been paid for by the institution, and limitations on some reproduction and distribution would apply to that library's ability to make and distribute copies to patrons under section 108 where a request was made at the direction of a user and did not involve systematic copying.<sup>117</sup> The library may also be able to provide the journal as a reserve item and students would be likely to have the ability to photocopy the works for their own use under sections 107, 108 and 109 of the Act, to the extent that the library possessed a lawful copy and did not have reason to know that systematic copying would result from lending the publication. Reproduction by the individuals in an entire class could be considered systematic copying that would be outside the scope of section 108, but we also know from the Preamble of section 107 that making multiple copies for classroom use might be a fair use in certain circumstances. The authors of the journal articles might generally consent to the use of their works in this manner, but if the publisher is the copyright owner of one or all of the relevant rights, the publisher might believe that a license fee should be paid for the use in a coursepack. The respective interests of the author and the subsequent owner of an exclusive right in the work, as well as the interrelationship between the two, should be considered. We also know that an efficient market mechanism is available to administer the licensing of such works through the Copyright Clearance Center (CCC). However, before we can determine whether a license from the copyright owner or the CCC is necessary, we must determine whether such a reproduction and distribution license is a relevant market.

In addition to subscriptions of physical copies and licensing for reprints, what other ways are journal articles distributed? Journals are typically licensed to online databases. Many schools have blanket licenses to cover access and use by teachers and students within a school. For law schools, for instance, the law library generally pays a significant annual license fee to Lexis, Westlaw, and other online databases for access and use by students and faculty. Thus, all students may have lawful access to many or all of the works that would be incorporated into the coursepack. This would appear to allow a professor to create an online course pack by simply selecting and arranging links to the particular articles that are available through these subscription services that could then be accessed by each student. But what if the professor did not want the students to read the entire articles? A professor could simply provide page numbers, but for student convenience, and to have the works in more readable hard copy form, a printed coursepack that contains only the portions that the professor determined to be relevant to the purpose of the course might be preferable. It would appear to be significant to know that students have lawful access to the articles and that the copyright owner was being

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117. 17 U.S.C. § 108 (2000).

compensated in at least two ways (by the subscription for the hard copy and the subscription for the online service) when considering the question of fair use. Whether a third form of payment for a different version of the same work was reasonable to encourage the author to create or the publishers to disseminate the works could be affected by these facts. The availability of other forms of the same work might also be relevant. If the actual author of the article also posted the work on his or her website, on the Social Science Research Network (SSRN), or some other forum, that fact might also be relevant. The greater the free access to authorized copies of the works, the more likely it would be that a reasonable author would assent to an uncompensated productive use in a limited environment. In the case of selecting and arranging portions of the works, there would also be considerations relevant to the other factors, such as the percentage of the original work used, transformative use by the professor by the selection and arrangement of class-relevant portions, transformative comment and criticism in the classroom use environment, productive use for educational purposes, limited use to only the members of the class, noncommercial use, etc. The fact that the educational market may be the primary market for such works would have to be balanced with the important consideration about the work under the second factor relating to incentive and preexisting authority to use the work. Courts could then assess how many times a non-author copyright owner should be entitled to obtain compensation for a work for which it never paid the author in monetary compensation. Not only would such an analysis prove helpful to courts in assessing fair use, but it would also be instructive to users who sought to discover other ways in which the use of the works might be accomplished without resort to fair use at all. Users could also then weigh how important a particular form of use was in relation to the other uses of the work that might be possible under existing limitations or licenses.

Each other type of work intended to be included within the coursepack might proceed under its own facts. For newspaper articles, whether these articles were available through a licensed database from the academic institution could be relevant. Whether the works were available online from the author for free or from a subscription archive might also be relevant. The timeliness of the article in relation to the course could be considered. The likelihood that the author considered the academic market to be a core market for the creation of the work would also be germane. The analysis will vary from work to work. Providing a portion of a textbook to a class that constituted the primary market for the work would clearly raise important concerns, but the particular facts related to each work or type of work may yield important information.

Examples and specific inquiries, such as the possible considerations sketched out above, have the capacity to be misleading. The intrinsic value of the proposal of this Article lies in the inherent flexibility of the inquiry. Many of the considerations focused on in this inquiry will not be present in other factual contexts. Nevertheless, I hope that this example provides some basis for understanding how a more thorough analysis of the second factor could assist the overall fair use analysis.

### CONCLUSION

The second factor has the potential to introduce many subtle inquiries into the fair use analysis. This additional information could help formulate nuanced patterns in fair use decisions that could serve as more instructive precedent into the future. By probing the nature of the copyrighted work more rigorously, it is possible to distinguish between subtle differences in factual patterns that affect the overall analysis.

The second factor is not a panacea for the complexity of the fair use analysis, nor does it necessarily increase certainty. One of the primary obstacles to certainty is the overriding effect of bias on fair use decision-making. A decision-maker who views fair use through lens of strong property rights bias will undoubtedly find that uses which affect any potential market for a copyrighted are unfair. The only hope for increasing certainty in the outcome of fair use cases will be to agree on fair use's place within context of copyright law, and the purpose of copyright law itself. While American copyright law grants a property interest in original works of authorship, that property interest is limited, not just in duration, but also in scope. An essential limitation on the scope of the copyright owner's exclusive rights is the fair use of the work by others. Thus, while copyright provides limited property rights, the enforcement of these rights is a tort – the requirement of proving that the use of expression by another is wrongful. A fair use of another's expression is not wrongful when it does not impede an author's incentive to create. Notwithstanding the exclusive rights of the copyright owner, a fair use is not an infringement of those rights.<sup>118</sup>

The second factor provides a mechanism for introducing considerations about the original author's incentives. Many of these considerations are not novel in fair use analyses and often find their way into an analysis through other factors. However, they are not considered in a consistent manner. The analysis of these considerations often does not fully explore the importance of a nuanced understanding of the specific work being used, intrinsic attributes of that particular work, or the incentives that drove the creation of that work. Without such a conscious exploration of the work used, the predominant focus rests on scrutiny of the user's purpose and the subjective "value" of that purpose. Without a robust second factor, it is too easy to grant copyright owners control over any uses that affect the market for, or value of, the original work – no matter how remote those markets or value is to the reasons for the work's creation. If fair use really is the Golden Rule of copyright, and if we really are going to try to objectively evaluate this equitable rule of reason, we must be willing to put aside our bias in order to scrutinize the interests of both parties in an objective manner. I suggest that additional relevant information may be the optimal means of overcoming bias. The more information that is learned, the harder it may be to obfuscate, and the more likely it will be to reach a nuanced determination. With this additional information, it may be easier to understand that both new authors and past authors are within the

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118. 17 U.S.C. § 107 (2000).

purpose of copyright law. The goal is to find the proper balance.

Undertaking the exploration of the nature and characteristics of copyrighted works is never determinative. The information obtained will not lead to a particular result or foster either the expansion or constriction of fair use. Properly performed, the proposed analysis of the second factor will not “weigh” in either party’s favor, and hopefully courts will realize that factors have no weight in isolation. This analysis will lead to case-specific information that should be considered along with all of the other factual information revealed through the perspectives of the factors. The totality of the accumulated facts and circumstances can be viewed and weighed together at the conclusion of the inquiry in order to reach an equitable result in light of the purpose of copyright to encourage authors to create. Courts must scrutinize the work used to the same degree that they have been willing to scrutinize the new use of that work.