

FAIR USE MISCONSTRUED: PROFIT, PRESUMPTIONS, AND PARODY

WILLIAM F. PATRY* AND SHIRA PERLMUTTER**

I. INTRODUCTION

In the first fair use case decided in the United States, *Folsom v. Marsh*,¹ Justice Joseph Story began his opinion by expressing a healthy respect for the difficulties such cases pose:

This is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases.²

A century later, a panel of the Second Circuit that included both Judges Hand described fair use as “the most troublesome [issue] in the whole law of copyright.”³ The Supreme Court’s experience with the doctrine bears out this assessment. The Court’s first two encounters with fair use resulted in affirmances by an equally divided vote.⁴ The Court’s third attempt, in *Sony Corporation of America v. Universal City Studios*,⁵ resulted in a 5-4 decision handed down only after the case had been reargued.

The thorniness of fair use is not due to any failure on the part of the legislature or the judiciary. To the contrary, it is inherent in the common law nature of the doctrine as a mul-

* Counsel, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Intellectual Property and Judicial Administration.

** Assistant Professor, The Catholic University of America, Columbus School of Law. The authors acknowledge their debt to United States District Judge Pierre N. Leval, whose speech to the Washington Chapter of the Copyright Society of the U.S.A. on April 13, 1993, inspired some of the ideas in this article. We also thank Paul Riley, Class of 1994 at the Columbus School of Law, for his research assistance.

¹ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). Two years before *Folsom*, Justice Story decided *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728), which raised many of the same issues. While *Folsom* owed much to earlier English cases, Justice Story synthesized and articulated the doctrine so well that later English courts cited to his formulation. See, e.g., *Scott v. Stanford*, L.R. 3 Eq. 718, 722 (1867). See generally WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 6-17 (reviewing early English cases), and 19-25 (reviewing *Folsom v. Marsh*) (1985) (“THE FAIR USE PRIVILEGE”). The fair use provision of the current U.S. copyright statute is substantially derived from *Folsom*. See *id.* at 24-25.

² 9 F. Cas. at 344.

³ *Dellar v. Samuel Goldwyn Inc.*, 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

⁴ *Columbia Broadcasting System, Inc. v. Loew’s, Inc.*, 356 U.S. 43 (1958); *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975).

⁵ 464 U.S. 417 (1984).

tifaceted process by which courts can finely calibrate not only the equities between the parties in a given case, but also the fundamental public policies at stake in drawing the line between private property and free use. Fair use is one of the principal mechanisms by which the constitutional goal to “promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings”⁶ is achieved. As the Supreme Court has explained, fair use is “an ‘equitable rule of reason,’ which ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’ ”⁷ In brief, fair use is a critical safety valve of copyright.⁸ Flexibility and sensitivity in application are essential to its successful functioning.⁹

The origins of fair use date back to judicial opinions of the nineteenth century.¹⁰ As developed by the courts, it was a privilege granted to one author to make unauthorized use of the copyrighted material of another for purposes such as criticism and comment. Entitlement to the privilege was based on a case-

⁶ U.S. CONST. art. I, § 8, cl. 8.

⁷ *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984), and *Iowa State University Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60 (2d Cir. 1980)). In the words of Justice Blackmun in his dissent in *Sony*, 464 U.S. at 477-78: “[T]he fair use doctrine plays a crucial role in the law of copyright. . . . There are situations . . . in which strict enforcement of [the copyright] monopoly would inhibit the very ‘Progress of Science and useful Arts’ that copyright is intended to promote. . . . In such a case, the fair use doctrine acts as a form of subsidy—albeit at the first author’s expense—to permit the second author to make limited use of the first author’s work for the public good.” See also Horace G. Ball, *LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944), quoted in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 549 (1985):

[T]he author’s consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained.

⁸ Other safety valves incorporated in the copyright law include the prohibition of copyright protection for ideas, facts, systems, etc., 17 U.S.C. § 102(b) (1978), and the rule that infringement may be found only when the defendant has appropriated a substantial amount of expressive material, thereby permitting the unauthorized appropriation of *de minimis* amounts of expression. See, e.g., *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821 (11th Cir. 1982).

⁹ This point was brought home last year when Congress, concerned that the Second Circuit had adopted a *per se* rule barring fair use of unpublished works, amended the fair use provision of the Copyright Act. Act of October 24, 1992, Pub. L. No. 102-492, § 107, 106 Stat. 3145. The Act added the following sentence at the end of section 107: “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.” The amendment was designed to ensure that “[a]ll claims of fair use . . . be judged on the totality of the facts in the particular case by balancing all the factors.” See H.R. REP. NO. 102-836, 102d Cong., 2d Sess. 3 (1992).

¹⁰ See *THE FAIR USE PRIVILEGE*, *supra* note 1, at 6-64.

specific analysis of all the relevant circumstances, taking into account the entire complex of facts and equities presented.

The fair use doctrine remained entirely judge-made until enactment of the Copyright Act of 1976.¹¹ In replacing the 1909 Act with a new and comprehensive statute, Congress for the first time included fair use, in recognition of its role as an important limitation on the copyright owner's rights.¹² Although the precise wording of the provision went through a number of revisions, its purpose was clear: Congress intended the provision "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way,"¹³ and to entrust its future development to the courts.¹⁴

This intent was reflected in the drafting of the fair use provision, section 107. Unlike other sections of the statute that provide specific, detailed exemptions from or limitations on the copyright owner's exclusive rights, section 107 is open-ended and flexible. Its operative language states simply that "the fair use of a copyrighted work . . . is not an infringement of copyright." The statute does not define the term "fair use," but instead gives examples of types of use that might be considered fair,¹⁵ as well as four illustrative factors to be considered, each derived nearly verbatim from the language of prior judicial opinions.¹⁶

The decision to include fair use in the new statute was understandable. The form that the reference took, however, going beyond a bare-bones statement that "fair use is not infringement," and instead delineating this quintessential common law process in statutory terms, has led some courts to misinterpret Congressional intent.¹⁷ There is a natural tendency to treat stat-

¹¹ 17 U.S.C. §§ 101 *et seq.* (1978).

¹² See *infra* text at notes 24-33.

¹³ H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 66 (1976); S. REP. NO. 94-473, 94th Cong., 1st Sess. 62 (1975).

¹⁴ See *infra* text at notes 29-33.

¹⁵ The statute lists in the first sentence "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107.

¹⁶ See *infra* text at notes 50-51.

¹⁷ During the revision process that led to passage of the 1976 Act, some objected to any codification of fair use, fearing that it would lose its essential character as evolving, judge-made law. See COPYRIGHT LAW REVISION PART 2: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 88th Cong., 1st Sess. 25, 28, 261, 284, 315, 350 (House Comm. Print 1963), discussed in THE FAIR USE PRIVILEGE, *supra* note 1, at 218-21 (reporting opposition by NBC, music publishers, the Authors League of America, ASCAP, and the Motion Picture Association of America). A majority of those commenting on drafts of the bill, however, saw a benefit in affirming the existence of the doctrine in the new statute. COPYRIGHT

utory language as carved in stone, as rigid rules rather than broad guidelines. Despite Congress's desire that the courts continue to chart their own development of fair use, the very presence of the statutory provision has inhibited many from doing so. Rather than looking to the plain language of section 107 in its entirety in light of its purpose as a confirmation of judge-made law, courts have isolated and overemphasized individual words and phrases, taking as limitations on their power language intended as guidance.

This tendency has been exacerbated by the exoticism of fair use to most courts. Even in those jurisdictions with heavy diets of copyright, such as the Southern District of New York, most judges do not regularly try fair use claims, and thus do not have the opportunity to develop familiarity with the area. Given the open-endedness of the doctrine, and the frequency of disagreement by appellate courts, deciding fair use cases may be an intimidating experience.¹⁸ Accordingly, there is an understandable desire to find bright-line rules, whether in the language of the statute or in broad statements in prior opinions. With the illusion of certainty such rules provide, decision-making becomes easier.

Whatever the reasons, the result has been mechanistic, formulaic decisions—opinions that recite sonorous phrases drawn from statute and case law rather than engage in the sensitive balancing of factors that is the essence of fair use. The negative impact of such cases on the law may not be immediately obvious because their resolutions are frequently subject to reasonable debate. But the conceptual damage done to the fair use doctrine is real, and reflected dramatically in those cases that do go wrong.

The damage to fair use extends to every aspect of the doctrine. The most serious problems, however, have been manifested in application of the first and fourth factors set out in section 107: “the purpose and character of the use” and “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁹ By misinterpreting the language of the

LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT BILL at 158 (1964). As to the form which this affirmation should take, a consensus emerged that “favor[ed] either no definition at all or else a very, very broad one—so broad that it would not, as some said, ‘freeze the doctrine as it stands today.’” *Id.*

¹⁸ United States District Judge Pierre Leval has colorfully described this experience: “It has been exhilarating to find myself present at the cutting edge of the law, even though in the role of the salami.” Pierre N. Leval, *Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture*, 36 J. COPR. SOC'Y 167, 168 (1989).

¹⁹ Much controversy was generated in the late 1980s by the Second Circuit's treat-

statute and reading too much into dicta from the two major Supreme Court opinions on fair use,²⁰ some courts have altered radically the traditional approach to the doctrine. Rather than examining all of the circumstances bearing on these two factors as well as the fair use inquiry as a whole, they have resorted to a simplistic judgment call turning on a characterization of the use as either commercial or not.²¹ In the process, they have adopted a series of presumptions and rules of thumb—a method of analysis antithetical to the very nature of fair use.

This year, the damage may be reversed. The Supreme Court has agreed to hear in the October 1993 term a copyright case involving a parody of a popular song, *Acuff-Rose Music, Inc. v. Campbell*.²² As an extreme example of a misreading of the statute and the Supreme Court fair use decisions, the Sixth Circuit's opinion in *Acuff-Rose* provides the Court with an excellent vehicle to clarify the meaning of its own statements on the issue of commercial use. The Court will also have the opportunity to address for the first time copyright parody, a type of use that presents some unique fair use issues.²³

ment of the second statutory factor, "the nature of the copyrighted work." Starting with the Supreme Court's decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), courts had treated the unpublished nature of a plaintiff's work as an important element weighing against fair use in applying section 107. In two opinions dealing with the use by biographers of unpublished letters and diaries of the subjects of the biographies, the Second Circuit arguably went further, making statements suggesting that it would be extremely difficult ever to establish fair use of unpublished works. See *New Era Publications Int'l, ApS v. Henry Holt and Co.*, 873 F.2d 576 (2d Cir.), *reh'g denied en banc*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). The resulting strong reaction from the publishing community ultimately led to the enactment in 1992 of legislation amending section 107. See *infra* note 25 and accompanying text. The legislation was intended to leave Justice O'Connor's comprehensive opinion in *Harper & Row* unaffected in any way. See H.R. REP. NO. 102-836, 102d Cong., 2d Sess. 9 (1992); 138 CONG. REC. H7991 (August 11, 1992) (remarks of Mr. Hughes).

The problems that have developed with the first and fourth factors have not been as noticeable, primarily because they do not impact any one particular industry. Nevertheless, they are considerably more pernicious, as they threaten to skew the analysis in every fair use case.

²⁰ *Harper & Row*, 471 U.S. 539; *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). The only other opinion by the Supreme Court addressing the topic of fair use is *Stewart v. Abend*, 495 U.S. 207 (1990), which discusses the doctrine briefly in the course of analyzing the impact of a reversion of renewal rights on the continued use of a derivative work prepared under a grant during the initial copyright term.

²¹ See *infra* text at notes 60-65.

²² 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1642 (1993).

²³ The Court once before granted *certiorari* in a copyright parody case, but has not yet provided any guidance on the subject. In 1957, a case involving a parody by the comedian Jack Benny of the movie "Gaslight," entitled "Autolight," was argued before the Court. In 1958, an equally divided Court affirmed the Ninth Circuit's opinion rejecting the parody defense. *Columbia Broadcasting System, Inc. v. Loew's, Inc.*, 356 U.S. 43 (1958), *aff'g* 239 F.2d 532 (9th Cir. 1956).

II. DISCUSSION

A. *The 1976 Act's Recognition of Fair Use*

The proper place to begin, as indicated by the Court's statement of the question for review,²⁴ is with the statute. The fair use provision of the Copyright Act reads as follows:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

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.²⁵

The plain words of section 107 rule out application of bright line tests or conclusive presumptions. Rather than setting forth a test or definition for fair use,²⁶ the provision simply states the

²⁴ The Supreme Court phrased the question "Whether petitioners' commercial parody was a 'fair use' within the meaning of 17 U.S.C. Section 107." 113 S. Ct. at 1642. The Court substituted this single question for the four originally presented in the petition for *certiorari*.

²⁵ 17 U.S.C. § 107. Since the statute's enactment in 1976 (effective January 1, 1978), section 107 has been amended twice. In 1990, "and section 106A" was added to the opening phrase, in order to make subject to fair use the moral rights granted to visual artists by the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, title VI, 104 Stat. 5089, 5128, 5132 (effective June 1, 1991). In 1992, the final sentence was added, dealing with fair use of unpublished works. Act of October 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145.

²⁶ As explained in the legislative reports accompanying the 1976 Act:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

general principle of the doctrine and lists four factors to be considered. It does not ascribe relative weight to any individual factor,²⁷ and the factors are by definition made illustrative only.²⁸

As Justice Blackmun has remarked, section 107 constitutes “statutory recognition” of the fair use doctrine²⁹ in a form that incorporates a number of criteria previously developed by the courts.³⁰ This is explicitly stated in the legislative reports:

General intention behind the provision

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.³¹

1st Sess. 62 (1975). See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 476 (1984) (Blackmun, J., dissenting): “Nor did Congress provide definitive rules when it codified the fair use doctrine in the 1976 Act; it simply incorporated a list of factors ‘to be considered’”

²⁷ See *Sony*, 464 U.S. at 476 (1984) (Blackmun, J., dissenting) (“No particular weight . . . was assigned to any of th[e] [factors]”); *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965, 970 (9th Cir. 1992) (“Section 107 does not indicate how much weight should be ascribed to each [factor].”), *cert. denied*, 113 S. Ct. 1582 (1993).

²⁸ This is accomplished through the section’s repeated use of the terms “including” and “such as,” terms defined in the general definitional section of the Act. See 17 U.S.C. § 101 (1978) (“The terms ‘including’ and ‘such as’ are illustrative and not limitative.”). See also H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65 (1976) (the four factors are “in no case definitive or determinative, [but] provide some guage [sic] for balancing the equities”); H.R. REP. NO. 102-836, 102d Cong., 2d Sess. 9-10 (1992) (Use of the phrase “all the above factors” in the 1992 amendment to section 107 was intended to “encompass the terms ‘including’ and ‘such as’ embodied in the preamble to Section 107, terms that are defined in Section 101 of title 17 as being ‘illustrative and not limitative.’ Thus, for unpublished works as for all other copyrighted works, the courts must consider all four statutory factors, but they may, at their discretion, consider any other factors they deem relevant.”).

²⁹ *Sony*, 464 U.S. at 476 (Blackmun, J., dissenting).

³⁰ The first, third, and fourth factors were derived from Justice Story’s opinion in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). See THE FAIR USE PRIVILEGE, *supra* note 1, at 24-25.

³¹ H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 66 (1976); S. REP. NO. 94-473, 94th Cong., 1st Sess. 62 (1975). There is one respect, however, in which courts are more restricted than before enactment of section 107: the statute altered the process of decision-making to the extent that it directs courts to consider at least the four factors specified. See *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1495 n.7 (11th Cir. 1984),

Thus, section 107 is not a typical statutory provision representing Congress's creation of new law and establishment of rules for the courts to apply. It is instead a direction to the courts to continue to develop the common law.³² It is therefore misleading to characterize section 107 as a "codification" of the doctrine. Fair use would not have been embodied in statutory language at all but for Congress's omnibus revision in 1976 of the antiquated 1909 Act. Given the importance and frequency of fair use claims in copyright litigation, Congress believed it would be misleading not to mention the defense as part of the comprehensive new law.³³ The failure of some courts to recognize section 107's unique nature as statutory recognition of a judge-made rule of reason is responsible for much of the damage to the doctrine. We shall focus on two areas of particular concern: the adoption of presumptions for or against entire categories of uses, and the proper interpretation of the fourth statutory factor, the harm to the market for the copyrighted work.

B. *The Preamble to Section 107*

The preamble to section 107 lists six illustrative types of purposes that may qualify for fair use consideration:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as *criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research*, is not an infringement of copyright.³⁴

One issue that has bedeviled the courts is the significance to be given to this list. Explicit in the language of the statute is the list's nonexclusivity;³⁵ the uses enumerated are only examples, and uses that are not mentioned may also qualify as fair.³⁶ There

cert. denied, 471 U.S. 1004 (1985). In contrast, earlier cases occasionally resolved the fair use defense based on only some of these factors. *See infra* text at notes 119-23.

³² *See Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (Section 107 "did not freeze the fair use doctrine in stone. Rather, Congress expressly sought to preserve the doctrine's common law character."); *Triangle Pub., Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980) ("Congress made clear that it in no way intended to depart from Court-created principles or to short-circuit further judicial development.").

³³ *See* REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong., 1st Sess. 25 (House Comm. Print 1961), *quoted in* THE FAIR USE PRIVILEGE, *supra* note 1, at 215.

³⁴ 17 U.S.C. § 107 (1978) (emphasis added).

³⁵ This nonexclusivity is communicated by the preamble's use of the defined terms "including" and "such as." *See supra* note 28.

³⁶ *See Weissmann v. Freeman*, 868 F.2d 1313, 1323 (2d Cir. 1989) ("Analysis begins

is a common thread to most of these examples: they represent productive uses—uses that produce some benefit to the public beyond the value of the copyrighted work.³⁷ The one exception is the reference to multiple copies for classroom use—more a substitute for purchasing the original work than the creation of new value. Yet, while the list suggests that productive uses may be worthy candidates for fair use treatment, its nonexclusive nature and the inclusion of classroom copying indicate that in appropriate cases the privilege may also be extended to nonproductive uses.³⁸

What status is then to be given to particular uses that fall within the statutory examples? Some decisions by the Second Circuit have held that where a use is for one of the enumerated purposes (*e.g.*, criticism), the first statutory factor—the purpose and character of the use—should be weighed in favor of the party asserting the fair use defense.³⁹ This approach pays too much respect to terms intended merely as examples,⁴⁰ and overlooks the language and structural purpose of the preamble. The preamble merely states the principle that fair use is not infringement; whether a particular use is fair will depend on evaluation of the four factors that follow. Adoption of the Second Circuit's ap-

not by elevating the statutory guides into inflexible rules, but with a review of the underlying equities.”).

³⁷ See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 478-80 (1984) (Blackmun, J., dissenting).

³⁸ Based on similar reasoning, the majority in *Sony* rejected the argument that a non-productive use could not qualify as fair. 464 U.S. at 455 n.40. The Court held that an unproductive use, video tape recorder time-shifting of over-the-air broadcasts of audiovisual works, constituted fair use, where the copyright owners had not demonstrated harm to their potential market. See also *THE FAIR USE PRIVILEGE*, *supra* note 1, at 362-64.

³⁹ See *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991) (“There is a strong presumption that factor one favors the defendant if the allegedly infringing work fits the description of uses described in § 107.”); *New Era Pub. Int'l, ApS v. Carol Pub. Group*, 904 F.2d 152, 156 (2d Cir.) (“If a book falls into one of these categories, assessment of the first fair use factor should be at an end.”), *cert. denied*, 498 U.S. 921 (1990). See also *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992); *New Era Pub. Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir.), *reh'g denied en banc*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987); *Lish v. Harper's Magazine Foundation*, 807 F. Supp. 1090, 1097-98 (S.D.N.Y. 1992). *But see Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, Nos. 92-7933, 92-7985, slip op. at 13 (2d Cir. June 7, 1993 *as amended* July 6, 1993) (seemingly adopting an approach more consistent with the statute by referring to preamble examples as “non-exclusive purposes for which a protected fair use may be made”).

⁴⁰ “[W]hether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors, including those mentioned in the second sentence.” S. REP. NO. 94-473, 94th Cong., 1st Sess. 62 (1975). See also H. REP. NO. 94-1476, 94th Cong., 2d Sess. 66 (1976) (emphasis added): “[The] reference to ‘multiple copies for classroom use’ is a recognition that, *under the proper circumstances of fairness*, the doctrine can be applied to reproductions of multiple copies for the members of a class.”

proach would come close to rendering the first factor superfluous.⁴¹

The Supreme Court has previously rejected an effort to ascribe undue weight to uses mentioned in the preamble. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court rejected a similar claim by *The Nation* magazine that its news reporting purpose automatically entitled it to have the first factor resolved in its favor. As the Court explained:

[T]he examples enumerated in § 107 . . . “give some idea of the sort of activities the courts might regard as fair use under the circumstances.” This listing was not intended to be exhaustive, or to single out any particular use as presumptively a ‘fair’ use. The drafters [of the 1976 Act] resisted pressures from special interest groups to create presumptive categories of fair use, but structured the provision as an affirmative defense requiring a case by case analysis. The fact that an article arguably is ‘news’ and therefore a productive use is simply one factor in a fair use analysis.⁴²

C. *The First Statutory Factor: The Purpose and Character of the Use*

1. General

As the first enumerated factor, the statute directs courts to consider “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”⁴³ This language is instructive in several respects. First, it focuses the court’s inquiry on the type of use being made, rather than the type of entity making the use. While not unrelated, they do not necessarily coincide. A profit-making company may on occasion engage in a noncommercial use; a nonprofit organization may use a work in a way that is blatantly commercial.⁴⁴

⁴¹ See *Astoria Federal Savings & Loan Assoc. v. Solimino*, 111 S. Ct. 2166, 2171-72 (1991) (Souter, J.) (“[O]f course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.”).

⁴² 471 U.S. 539, 561 (1985) (citations omitted).

⁴³ 17 U.S.C. § 107(1) (1978).

⁴⁴ See *Lish v. Harper’s Magazine Foundation*, 807 F. Supp. 1090, 1101 (S.D.N.Y. 1992) (“[T]he mere fact that Harper’s is a non-profit organization that operates at a loss does not preclude a finding of ‘commercial use’; non-profit organizations enjoy no special immunity from determinations of copyright violation. The question under factor one is the purpose and character of the use, not of the alleged infringer.”), *later op.*, COPR. L. REP. (CCH) ¶ 27,048 (S.D.N.Y. 1993).

The courts have also properly rejected attempts by for-profit users to stand in the shoes of their customers making non-profit or noncommercial uses. See *Educational Testing Service v. Katzman*, 793 F.2d 533, 543 (3d Cir. 1986); *Pacific & Southern Co. v.*

Second, the statutory language indicates that the commercial character of the use alone does not end the inquiry on the first factor. The use of the defined term "including" makes clear that the use's commercial or non-profit educational nature is not the only relevant consideration.⁴⁵ Unfortunately, some courts have forgotten the "fundamental principle of statutory construction (and indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."⁴⁶ The context of the "commercial nature" phrase as merely a subsidiary part of the first factor indicates that the commercial or nonprofit educational element of a given use is but one aspect of its more general purpose and character. Courts may therefore go beyond such categorization and examine other aspects of the purpose and character of the use⁴⁷—for example, whether the copyrighted material was used for purposes of criticism or comment.⁴⁸ While one aspect of the use's purpose may be the purpose of the defendant's work as a whole, the focus should be on the purpose of each specific use of the plaintiff's expression.⁴⁹

Finally, a reading of the text itself leads to the conclusion that it does not establish an either-or choice, with commercial uses banished to copyright purgatory and nonprofit educational uses admitted to the promised land of privilege. Not all uses can be classified as either "commercial" or "nonprofit educational"; some nonprofit uses, for example, are not educational. Perhaps for this reason, it has become common to substitute the contrast-

Duncan, 744 F.2d 1490, 1496 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); Basic Books, Inc. v. Kinko's Graphic Corp., 758 F. Supp. 1522, 1531-32 (S.D.N.Y. 1991); Association of American Medical Colleges v. Mikaelian, 571 F. Supp. 144, 152-53 (E.D. Pa. 1983), *aff'd per curiam*, 734 F.2d 3 (3d Cir. 1984).

⁴⁵ See *supra* text at note 28.

⁴⁶ Deal v. United States, No. 91-8199, 1993 U.S. LEXIS 3134, at *6-7 (1993). See also Smith v. United States, 61 U.S.L.W. 4503, 4505 (1993) (O'Connor, J.): "Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it."

⁴⁷ See Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) ("The distinction between 'commercial nature' and 'nonprofit educational purposes' is merely illustrative of what is included in assessing the core of the criterion, which is the purpose of and character of the use."), *reh'g denied en banc*, 730 F.2d 47 (2d Cir.) (Oakes, J., dissenting), *cert. denied sub nom.* Consumers Union of United States, Inc. v. New Regina Corp., 469 U.S. 823 (1984), *on remand*, 664 F. Supp. 753 (S.D.N.Y. 1987).

⁴⁸ See *infra* text at notes 81-89.

⁴⁹ See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1112-13 (1990): "Courts must consider the question of fair use for each challenged passage and not merely for the secondary work overall. . . . Simply to appraise the overall character of the challenged work tells little about whether the various quotations of the original author's writings have a fair use purpose or merely supersede."

ing “commercial or noncommercial” formulation for the statutory “commercial or nonprofit educational.”

The import of the statutory language is underlined by the history of the first factor, which can be traced back to Justice Story’s opinion in *Folsom v. Marsh*.⁵⁰ Justice Story phrased his version of the factor as “the nature and objects of the selections made.”⁵¹ In 1963, early in the revision process leading up to the 1976 Act, the Copyright Office circulated a preliminary draft bill which described the first factor as “the purpose and character of the use,” without referring to commerciality or indicating any particular aspect of purpose and character as relevant.⁵² Subsequent drafts of the bill either omitted any mention of specific factors⁵³ or retained the Copyright Office’s language unchanged.

It was not until September 1976, one month before passage of the revision bill, that the phrase “including whether such use is of a commercial nature or is for nonprofit educational purposes” was added by the House Judiciary Committee, in order to mollify educators who had lobbied unsuccessfully for an across-the-board exemption for nonprofit educational uses.⁵⁴ The Judiciary Committee Report explained:

This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.⁵⁵

In other words, this final phrase of the first factor was intended not to affect the substance of fair use but to serve as a sop to an

⁵⁰ 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

⁵¹ *Id.* at 348. The full quote reads: “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.” Some of the same factors were identified as relevant by Justice Story two years earlier in *Gray v. Russell*, 10 F. Cas. 1035, 1038-39 (C.C.D. Mass. 1839) (No. 5,728).

⁵² See COPYRIGHT LAW REVISION PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT at 6, § 6 (September 1964). The full statutory evolution of section 107 is described in THE FAIR USE PRIVILEGE, *supra* note 1, at 482-85. Sections from the various legislative reports discussing fair use are reproduced *id.* at 486-513.

⁵³ Identical bills introduced in the House and the Senate in 1965 contained a minimalist fair use provision reading in its entirety as follows: “Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright.” H.R. 4347 and S. 1006, 89th Cong., 1st Sess. (1965).

⁵⁴ See THE FAIR USE PRIVILEGE, *supra* note 1, at 296-304.

⁵⁵ H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 67 (1976).

unhappy interest group, by recognizing in the statute itself that their type of use was one that might be fair in appropriate circumstances.

It should also be noted in this connection that one of the major distinctions between the 1909 and 1976 Acts is the new Act's rejection of the prior across-the-board nonprofit exemptions. This rejection is implemented in a number of ways. To begin with, it is reflected in the very structure of the 1976 Act: a broad grant of exclusive rights in section 106, limited only by the privileges, exemptions, and compulsory licenses contained in sections 107 to 120.⁵⁶ In contrast, the 1909 Act placed the restrictions on the copyright owner's rights within the grant of rights.⁵⁷ In 1976, Congress expressly rejected the continuation of the former nonprofit exemptions based on concerns that the "line between commercial and 'nonprofit' organizations is increasingly difficult" to draw, and that a broad nonprofit exemption might result in supplanting the market for many works.⁵⁸ This fundamental change was also reflected in Congress's refusal to accede to educators' request for blanket statutory fair use privileges.⁵⁹

2. The Meaning of "Commercial"

In the overall context of an equitable rule of reason, it may not make sense to classify any particular use as either commercial or noncommercial. Few uses will qualify as purely one or the other; most involve some degree of monetary gain, whether direct or indirect. In evaluating this aspect of the nature of the use,

⁵⁶ See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 61 (1976); S. REP. NO. 94-473, 94th Cong., 1st Sess. 57 (1975).

⁵⁷ See 17 U.S.C. §§ 1(b)-(e) (1909).

⁵⁸ H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 62-63 (1976).

⁵⁹ See *id.* at 66-67. "The Committee . . . adheres to its earlier conclusion that a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified." The report also stated:

The specific wording of section 107 as it now stands is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes. For example, the reference to fair use 'by reproduction in copies or phonorecords or by any other means' is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use. Similarly, the newly-added reference to 'multiple copies for classroom use' is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of a class.

Id. at 66.

some have proposed placing the commercial nature of a use on a continuum, with commerciality viewed as a matter of degree.

The continuum approach is appealing, as it avoids the artificiality of an either/or choice, instead reflecting the reality of the wide range of possible uses. As the Second Circuit has pointed out:

We do not read Section 107(1) as requiring us to make a clear-cut choice between two polar characterizations, "commercial" and "non-profit." Were that the case, fair use would be virtually obliterated, for "all publications presumably are operated for profit" The commercial nature of a use is a matter of degree, not an absolute⁶⁰

At one extreme of the continuum (the most favorable for the defense) would be a use for educational purposes in a nonprofit institution not charging any fee.⁶¹ At the other extreme would be the use of a copyrighted work to promote or sell a commercial product or service.⁶² The intermediate uses are the ones that

⁶⁰ *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986) (quoting *Koussevitzky v. Allen, Towne & Heath*, 68 N.Y.S.2d 779, 783, *aff'd*, 69 N.Y.S.2d 432 (1st Dept. 1947), as quoted in *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967)), *cert. denied*, 481 U.S. 1059 (1987). *Accord*, *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992). *See also* *New Era Pubs. Int'l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493, 1506-07 (S.D.N.Y. 1988) (citing *Maxtone-Graham*: "Scholars and critics do not lose their license to make fair use by earning their bread from their writing."), *aff'd on other grounds*, 873 F.2d 576 (2d Cir.), *reh'g denied en banc*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

⁶¹ *See, e.g.*, *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). It is not surprising that few of the reported cases involve this type of use.

⁶² Even at this extreme, there will be differences in the degree of commerciality. A use may be seen as less commercial where the product sold is completely separate from the copyrighted work than where the product sold itself incorporates portions of the work. *Compare* *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991) (advertisement for beer copying and satirizing copyrighted advertisement for batteries); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990) (advertisement for beer copying rap group's performance); *Consumers Union of U.S., Inc. v. New Regina Corp.*, 664 F. Supp. 753 (S.D.N.Y. 1987) (advertisement for vacuum cleaners quoting from copyrighted publication evaluating quality of vacuum cleaners) and *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987) (promotional poster for movie) *with* *Dallas Cowboy Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979) (posters of cheerleaders substantially similar to plaintiff's cheerleaders poster); *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (N.D. Ga. 1986) (stickers with satirical versions of plaintiff's wholesome dolls) and *DC Comics Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984) (use of copyrighted characters in providing singing telegram services). *See also* *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1176 (5th Cir. 1980) ("[T]he precise characteristics of the commercial use in this case caution against too much weight being given to the fact that the use is commercial"; copyrighted work used in comparative advertising, rather than in an attempt to palm off).

have led to mixed results: the use of the copyrighted work in literary or artistic expression created by the defendant that is sold in the marketplace. Such uses may include news reporting, critical commentary and scholarship published in book or journal form, and parody—indeed, many of the uses listed as examples in the preamble to section 107. Within this intermediate category, commerciality may come in degrees. The defendant's active marketing of the plaintiff's work, such as the use of copyrighted material on the cover of a larger work to attract buyers, should be considered more commercial than the use of portions of a copyrighted work as only part of another work, such as an article or photograph included within a magazine.⁶³

In assessing the first factor balance, courts should examine the manner in which particular material from the plaintiff's work is used. Did the defendant reproduce the copyright owner's expression for the purpose of marketing the precise form of that expression, or for the purpose of making his own additional statement? Other aspects of the use's "purpose and character," such as its critical function, should not be confused with the question of its degree of commerciality. The question of whether the use is entertainment or scholarship should be separated from the different question of whether it brings in profit, allowing courts to focus on the degree of social benefit fostered by that type of use.⁶⁴

Even within a single work, the "purpose and character" of a defendant's use of material from the plaintiff's work may vary, with some uses by the defendant weighing against fair use while others do not. For example, a biographer's reproduction of a passage from a famous writer's book to illustrate the particular technique she used may be fair use, while the reproduction of "juicy" excerpts from one of the writer's personal letters on the dust jacket of the biography in order to lure people to buy it might not be. Although in both cases the biography is "commercial" in the sense that it is sold for money, and in both it constitutes a form of scholarship, only the former use of the writer's

⁶³ See *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201 (D. Mass. 1986) (plaintiff's photographs reproduced within magazine, not on cover). Cf. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir.) (holding trademark parody protected by First Amendment in part because parody was internal article, not used on cover to sell magazine), *cert. denied*, 483 U.S. 1013 (1987).

⁶⁴ The relevant value to society is that of the work's genre or category, not of that work in particular. Courts should not be engaged in evaluating aesthetic or scholarly quality. See *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, Nos. 92-7933, 92-7935, slip op. at 13 (2d Cir. June 7, 1993 *as amended* July 6, 1993).

work adds to the public discourse in a manner that should cause the first statutory factor to weigh in the defendant's favor.

Finally, it should not matter how successful the defendant's marketing of its work has been. If a use is made for financial gain, the fact that the defendant has sold one hundred copies rather than 100,000 makes the nature of the use—as opposed to its extent—no less commercial. The converse is also true; a best-selling use is no more commercial than a work that ends up in the remainder bin.⁶⁵

3. The Supreme Court's Gloss on "Commercial" Use

Each of the Supreme Court's three fair use opinions refers to the application of the doctrine to commercial uses, although none has analyzed in depth the meaning of "commercial."

a. *Sony Corp. of America v. Universal City Studios, Inc.*⁶⁶

In *Sony*, the Supreme Court did not attempt to define when a use is commercial, concluding without difficulty that the use at issue, time-shifting by consumers in their homes of audiovisual works broadcast over the air, was nonprofit.⁶⁷ Nevertheless, as discussed below,⁶⁸ *Sony* contains important language on the consequences of a use being deemed "commercial."

b. *Harper & Row, Publishers, Inc. v. Nation Enterprises*⁶⁹

In *Harper & Row*, a purported "news reporting" use of President Ford's then-unpublished memoirs was found to have "not merely the incidental effect but the *intended purpose* of supplanting the copyright holder's commercially valuable right of first publication."⁷⁰ The Court observed that *The Nation*, "like its competitor newsweekly . . . was free to bid for the right of abstracting excerpts from [the book]."⁷¹ *The Nation's* failure to do so led the Court to draw the following distinction:

The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted ma-

⁶⁵ This is not to say that the amount of the defendant's sales is irrelevant to the fair use inquiry; it may enter the equation when the fourth factor is considered, in determining the impact on the value of and potential market for the copyrighted work.

⁶⁶ 464 U.S. 417 (1984).

⁶⁷ *Id.* at 449.

⁶⁸ See *infra* text at notes 145-70.

⁶⁹ 471 U.S. 539 (1985).

⁷⁰ *Id.* at 562.

⁷¹ *Id.* at 563.

terial without paying the customary price.⁷²

This statement, resonant and often-quoted, has much to recommend it. It captures the core of commerciality: not just the receipt of income from sales of the defendant's work, but also the financial benefit obtained by avoiding an otherwise-due payment for the use of the copyrighted work.

Harper & Row's "cruX" standard may be apt in cases such as *American Geophysical Union v. Texaco, Inc.*,⁷³ where copyright owners had established a licensing fee arrangement through the Copyright Clearance Center for the reproduction of scientific journal articles, not in order to prevent the reproduction of their works, but to make reproduction easy and inexpensive.⁷⁴ Other courts have also rejected fair use claims where a customary fee was available but unpaid.⁷⁵

On the other side, the *Harper & Row* "cruX" standard might be applied to say that a defendant's willingness to pay a customary fee should weigh *against* a finding of commercial use. In *Acuff-Rose*, for example, application of the standard could result in a finding that 2 Live Crew's use of "Oh, Pretty Woman" was non-commercial since the group *did* offer to pay such a fee.⁷⁶ But the

⁷² *Id.* at 562.

⁷³ 802 F. Supp. 1 (S.D.N.Y. 1992) (Leval, J.), *appeal argued* No. 92-9341 (2d Cir. May 20, 1993). Judge Leval found a commercial purpose in Texaco's photocopying, since the copying was done "to improve Texaco's commercial performance." *Id.* at 16.

⁷⁴ A concern over possible harm to scientific research or excessive burdens on users due to the lack of such easily available licensing may have been responsible for the splintered vote by the Supreme Court in the *Williams & Wilkins* case, which also involved photocopying from scientific journals, but in the days before a pre-approved clearance mechanism for photocopying had been established. *See Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975), *aff'd by equally divided vote* 487 F.2d 1345 (Ct. Cl. 1973).

⁷⁵ *See Telerate Systems, Inc. v. Caro*, 689 F. Supp. 221, 229 (S.D.N.Y. 1988) (citing *Harper & Row* and finding plaintiff had established a customary licensing fee for copying portions of its computer data base); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517, 1526 (S.D.N.Y. 1988) (citing *Harper & Row* and finding plaintiff had established a usual licensing fee for use of its songs in music videos). *See also Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 844 (11th Cir. 1990).

⁷⁶ The amount 2 Live Crew offered to Acuff-Rose was the rate for the mechanical compulsory license set forth in section 115 of title 17, as adjusted by the Copyright Royalty Tribunal. *See* 17 U.S.C. § 115 (1978); 37 C.F.R. § 307. (Currently, the rate is 6.25 cents per song or 1.2 cents per minute of playing time or fraction thereof, whichever is larger.)

The compulsory license itself was not available to 2 Live Crew because it does not extend to parodies. Section 115(a)(2) permits an arrangement of the song only "to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work. . . ." A license for a parody therefore can only be obtained from the copyright owner.

The compulsory license rate is nevertheless a convenient reference point for the value of similar licenses. While the lower courts did not resolve the issue of whether the

resonance of the “crux” passage obscures a fundamental problem. The standard is ultimately circular, given its reference to the failure to pay “the customary price.” By definition, if the defendant’s use is fair, no fee, customary or not, is due. A finding of fair use represents a determination that the use should require neither consent nor fee.

c. *Stewart v. Abend*⁷⁷

This most unlikely of fair use claims—by the motion picture company interests that produced the movie “Rear Window,” involving their use in the movie of the short story “It Had to be Murder”—was quickly dispatched by the Supreme Court. The Court resolved the first factor against the defendants, on the grounds that the use did not fit into any of the section 107 preamble examples, had brought in 12 million dollars when the movie was re-released, and was hardly educational (as the defendants asserted).⁷⁸

Given the factual contexts of the Court’s three fair use cases, it has yet to confront the core of the first factor. The contributory infringement claim in *Sony* concerned noncommercial uses; in *Stewart*, the use was plainly commercial. *Harper & Row* involved the deliberate conversion of a planned use of copyrighted material to make a news event of the very act of infringement. *Acuff-Rose* presents a less obvious array of facts, requiring careful examination of the purpose and character of the use.

4. Other Aspects of a Use’s “Purpose and Character”

Fully evaluating the first statutory factor requires more than just examining the use’s degree of commerciality. The first factor entails a multifaceted inquiry, looking at all aspects of the use’s “purpose and character.” We have already discussed the aspects of productive use and of the use’s social value: is the user engaged in entertainment, scholarship, or criticism? Where the defendant’s use could be characterized as entertainment, courts have tended to find that its commercial nature weighs the first factor against fair use.⁷⁹ Where, on the other hand, the use may be viewed as serious scholarship, the fact that it is sold for money

compulsory license rate offered by 2 Live Crew was adequate, *see* 754 F. Supp. at 1152, it may have been a reasonable benchmark for the *Harper & Row* “customary fee.”

⁷⁷ 495 U.S. 207 (1990).

⁷⁸ *Id.* at 237.

⁷⁹ *See, e.g., Stewart v. Abend*, 495 U.S. 207, 237 (1990) (upholding finding that movie “Rear Window” by Alfred Hitchcock was commercial rather than educational).

has often been eclipsed in evaluating the first factor.⁸⁰

Other aspects of the use's "purpose and character" considered by the courts have included the user's bad faith,⁸¹ distortion of the copyright owner's work,⁸² and the user's interest in responding to a personal attack.⁸³ This list is not exclusive; in appropriate circumstances, courts may examine the public interest, the First Amendment, privacy concerns, or additional equitable factors.⁸⁴ While many of these considerations are appropriately addressed under the rubric of the first statutory factor, they may also be treated as separate and distinct factors beyond the four illustrative ones.

Nor need the first factor simply be resolved as "pro" or "con" fair use, depending on which aspect of the use predominates, its profit-making purpose or its scholarly character. Before fair use was incorporated in the statute, courts did not treat the factors as a checklist, with each factor reduced to a plus or minus. The mere listing of four factors in the 1976 Act, however, has led some courts improperly to take this approach.⁸⁵ Certainly as a whole does not support it.

⁸⁰ See, e.g., *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992) (reverse compilation of computer program to gain access to its unprotectible components); *Arica Institute, Inc. v. Palmer*, 970 F.2d 1067 (2d Cir. 1992) (psychology self-help book); *Wright v. Warner Books, Inc.*, 953 F.2d 731 (2d Cir. 1991) (biography).

⁸¹ See *Harper & Row*, 471 U.S. at 562 (finding bad faith in knowing exploitation of purloined manuscript): "Also relevant to the 'character' of the use is the 'propriety of the defendant's conduct.' 3 Nimmer § 13.05[A], at 13-72. 'Fair use presupposes good faith and fair dealing.'" *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (citation omitted). See also *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.) (deliberate removal of copyright notice from plaintiff's work), *cert. denied*, 113 S. Ct. 365 (1992); *Weissmann v. Freeman*, 868 F.2d 1313, 1323-24 (2d Cir. 1989) (attempt to pass off plaintiff's work as defendant's); *Marcus v. Rowley*, 695 F.2d 1171, 1175-76 (9th Cir. 1983) (verbatim copying from the plaintiff's work without giving credit). These types of conduct should be distinguished from the decision to proceed with the use after denial of permission from the defendant, which should not be considered to evidence bad faith. See *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1264 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987); and parody cases discussed in *infra* note 193.

⁸² See *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1261 (2d Cir. 1986) (recognizing relevance of issue but finding no sufficient distortion to consider), *cert. denied*, 481 U.S. 1059 (1987); *Lish v. Harper's Magazine Foundation*, 807 F. Supp. 1090, 1096-97 (S.D.N.Y. 1992) (same).

⁸³ See, e.g., *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

⁸⁴ See, e.g., *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 311-312 (2d Cir. 1966) (Lumbard & Hays, JJ., concurring) (censorship), *cert. denied*, 385 U.S. 1009 (1967); *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (public interest).

⁸⁵ *But see Twin Peaks, Inc. v. Publications Int'l, Ltd.*, Nos. 92-7933, 92-7985, slip op. at 14 (2d Cir. June 7, 1993 as amended July 6, 1993): "'Purpose' in fair use analysis is not an all-or-nothing matter. The issue is not simply whether a challenged work serves one of the non-exclusive purposes identified in section 107, but whether it does so to an insignificant or a substantial extent. The weight ascribed to the 'purpose' factor involves

As the Second Circuit pointed out a decade before enactment of the 1976 Act,

Whether an author or publisher reaps economic benefits from the sale of a biographical work, or whether its publication is motivated in part by a desire for commercial gain, or whether it is designed for the popular market, i.e., the average citizen rather than the college professor, has no bearing on whether a public benefit may be derived from such a work. Moreover, the district court in emphasizing the commercial aspects of the [defendant's] biography failed to recognize that "[a]ll publications presumably are operated for profit . . ." and that "both commercial and artistic elements are involved in almost every [work] . . ." Thus, we conclude that whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use.⁸⁶

Of course, even where the first factor on balance favors the copyright owner, fair use may be found based on other factors in the case—both the three listed in the statute and any other circumstances the court finds relevant.⁸⁷ There is no easy formula, however. One cannot simply calculate that a plus on three or more factors adds up to fair use, while a plus on only two adds up as a draw and therefore does not fulfill the defendant's burden of persuasion on the affirmative defense.⁸⁸ Fair use is not the copy-

a more refined assessment than the initial, fairly easy decision that a work serves a purpose illustrated by the categories listed in section 107."

⁸⁶ *Rosemont Enters. Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966) (citations omitted), *cert. denied*, 385 U.S. 1009 (1967). More recently, the same court explained, "[W]hether the profit element of the fair use calculus affects the ultimate determination of whether there is a fair use depends on the totality of the factors considered; it is not controlling." *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

⁸⁷ The converse may also be true: even a nonprofit educational use may not qualify as fair. *See, e.g.*, the following cases finding educational uses not to be fair use even though no profit was made from the unauthorized reproduction of the copyrighted material: *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983); *Encyclopaedia Britannica Educ. Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978), 542 F. Supp. 1156 (W.D.N.Y. 1982); *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962); *Macmillan Co. v. King*, 223 F. 862 (D. Mass. 1914).

⁸⁸ As expressed by the Second Circuit in *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991), "The fair use test remains a totality inquiry, tailored to the particular facts of each case. Because this is not a mechanical determination, a party need not 'shut out' her opponent on the four factor tally to prevail." *Cf. College Entrance Exam. Bd. v. Cuomo*, 788 F. Supp. 134, 140 (N.D.N.Y. 1992) (two-to-two tie on fair use factors resolved in defendant's favor based on holding that burden of proof is borne by plaintiff in preliminary injunction context). *See also* Leval, *supra* note 49, at 1110 ("The factors do not represent a score card that promises victory to the winner of the majority.").

right equivalent of a political election, in which courts tally up the factors, and the winner takes all. Individual factors may be evenly weighed, strongly or weakly favor one side, or even be unresolved. A weakness in one factor may be marginally offset by a strength on a different factor. Fair use is a weighing process involving nonexclusive and multifaceted factors,⁸⁹ not an exercise in computation.

D. *The Fourth Statutory Factor*

The fourth statutory factor, “the effect of the use on the potential market for or value of the copyrighted work,” raises difficult issues of theory and proof. How should the potential market be defined? What type of harm to the value of the work should be considered? How should the burdens of production and of proof be allocated?

1. Identifying the Relevant Potential Market

As a preliminary matter, it is obvious that the potential market must be confined to those uses that can reasonably be construed to be within the Copyright Act’s grant of rights in sections 106 and 106A, as limited by sections 107-120. As Justice Stevens observed in *Sony*, “An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific rights granted by the copyright statute.”⁹⁰

In an era when licensing and subsidiary rights have taken on increasing importance, the potential market for the copyrighted work goes well beyond the sale of copies of the work in its original form. Today, the market for derivative works is an economically important part of the copyright owner’s market, and therefore an important part of the incentive that drives the copyright system. Recognizing this fact, courts have appropriately included in their consideration of the fourth factor the effect of the defendant’s use on the copyright owner’s ability to license the preparation of derivative works.⁹¹ Many cases have examined the

⁸⁹ The Supreme Court’s opinion in *Harper & Row* provides a good illustration of the multifaceted nature of each statutory factor. On the second factor, the Court examined the degree of creativity of the copyrighted work and whether the work was published or unpublished. 471 U.S. at 563-64. Its analysis of the third factor focused on both the quantitative and the qualitative significance of the amount taken, in relation to both the copyrighted work as a whole and the infringing work. 471 U.S. at 564-66. Finally, on the fourth factor, the Court looked to evidence of actual damage as well as proof of harm to the potential market for derivative works. 471 U.S. at 566-69.

⁹⁰ 464 U.S. 417, 447 (1984).

⁹¹ See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568 (1985)

economic impact of the plaintiff's loss of an opportunity to sell a literary work for publication in a different form, such as a serialization of excerpts or a collection of letters.⁹² In the context of the visual arts, the copyright owner's potential market has been interpreted to include the right to prepare a three-dimensional version of a two-dimensional work of art.⁹³

Too broad an interpretation of the potential market, however, presents its own dangers. If taken to a logical extreme, the fourth factor would always weigh against fair use, since there is always a *potential* market that the copyright owner could in theory license. By definition, once the affirmative defense of fair use is invoked, there has already been a finding of infringement. Accordingly, the defendant's use necessarily falls within the area of the copyright owner's exclusive rights and therefore could have been licensed.

For example, a copyright owner could theoretically could license book reviews as well as serializations. But while a serialization may satisfy some readers' desire to purchase the book, few interested in reading a novel are likely to be satisfied by a review. Including in the potential market uses such as book reviews is therefore inappropriate.

The problem of defining the market is particularly acute where the use is one that the copyright owner disapproves of and is unlikely to exploit or authorize at any price, such as parody. As a derivative work, parody could be viewed as a potential market available for licensing. Because it is almost unheard of for a copyright owner to welcome or even willingly tolerate mockery, however, allowing him or her to retain a veto over such uses raises a real threat of censorship.⁹⁴ The result would be the loss

("Th[e] inquiry [on the fourth factor] must take account not only of harm to the original but also of harm to the market for derivative works.").

⁹² See, e.g., *id.* at 568 and cases cited therein; *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

⁹³ See *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); *Campbell v. Koons*, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. filed April 1, 1993).

⁹⁴ The Ninth Circuit has recognized that "[p]arodists will seldom get permission from those whose works are parodied. Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986). The attitude of many copyright owners toward parody was recently illustrated vividly in Lawrence O'Toole, *Ego, Paranoia and Power in the Land of Musical Rights*, N.Y. TIMES, May 30, 1993, Section 2, at 1: "Requests for comedy uses of 'You'll Never Walk Alone' and 'Climb Ev'ry Mountain' are always turned down, according to Ted Chapin, executive director of the Rodgers and Hammerstein Organization: 'For better or worse, those are our hymns. If we start making fun of them, then that's a problem.' Parody can literally place you in court."

In *Acuff-Rose* itself, 2 Live Crew's request for a license was turned down by Acuff-

of the public interest and First Amendment values in informative criticism and humorous comment.⁹⁵ In the words of the Ninth Circuit, "The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought."⁹⁶

Judicial response to parody has been inconsistent, with courts struggling with issues of what is a legitimate parody, how closely a parodist can imitate the original, and whether distasteful or obscene parodies can be fair use.⁹⁷ While its social value is obvious to most, parody by its nature requires a greater amount of copying than a book review to make its point. Moreover, a parody of a song is still a song, sold in the same record stores as the copyrighted work. It is therefore critical that the potential market for the copyrighted work not be defined so broadly as to sweep within it every conceivable use.⁹⁸

The question remains how to circumscribe the scope of the relevant potential market so as to ensure that the fourth factor has independent meaning and does not become circular, while still protecting the core economic interests of the copyright owner. One possibility would be to include only those uses that the copyright owner has actually licensed, or is negotiating to license.⁹⁹ This approach would not only avoid the censorship problem, but would have the advantage of ruling out speculative harm that may never occur.¹⁰⁰ But it seems overly restrictive to

Rose not on the basis of the nature of 2 Live Crew's parody, but on the categorical ground that "we cannot permit the use of a parody of 'Oh, Pretty Woman.'" See 972 F.2d at 1432.

⁹⁵ It has also been argued that the copyright owner in these circumstances is seeking to exploit moral rights rather than economic rights, and that such an interest is not cognizable under U.S. law. See, e.g., Melanie A. Clemmons, *Author v. Parodist: Striking a Compromise*, 46 OHIO ST. L.J. 3, 8 (1985).

⁹⁶ Fisher v. Dees, 794 F.2d at 437.

Judge Leval has decried what he calls the "widow censor" who vetoes the use of a spouse's writings in historical works that may not be deemed flattering. Leval, *supra* note 49, at 1118. See also O'Toole, *supra* n. 94:

The families, heirs and trustees of departed musical geniuses have their own agendas. . . . A musical estate can argue that a stylized version of a song strays from a composer's intentions, and songwriters are no longer around to give their yea or nay. . . . In keeping a talonlike grip on the rights to music and lyrics, estates—normally run by a small committee of heirs and executors—can be overly protective. Many of them make it their mission to be keepers of the creative flames.

⁹⁷ These issues are discussed at *infra* text accompanying notes 224-25.

⁹⁸ See *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, Nos. 92-7933, 92-7985 slip op. at 22 (2d Cir. June 7, 1993 as amended July 6, 1993).

⁹⁹ Under this approach, the potential market would include such items as the lost contract for the prepublication rights for President Ford's memoirs in *Harper & Row*.

¹⁰⁰ Cf. *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965 (9th Cir. 1992) (insufficient proof of harm to potential market for derivative works where the

limit the copyright owner to markets already in the process of exploitation at the time the infringement takes place. It should not be necessary, for example, for a photographer to have begun to negotiate rights to make a three-dimensional version of his photograph in order to claim that his potential market is hurt by the unauthorized creation of such a work.¹⁰¹ As the Eleventh Circuit has noted, "Copyrights protect owners who immediately market a work no more stringently than owners who delay before entering the market."¹⁰²

A preferable approach would be to give effect to the plain meaning of the term "potential," interpreting the fourth factor to include not only uses currently being exploited, but also uses which the copyright owner might have an interest in exploiting in the future.¹⁰³ If the copyright owner were required to demonstrate that such an interest already existed, many potential sources of income would be excluded from the analysis. Few photographers may have thought of the possibility of licensing three-dimensional rights to their photographs.

On the other hand, the potential market should not be deemed to include uses that the plaintiff has an affirmative desire *not* to license—the situation where the plaintiff would prefer that type of use not to be made at all.¹⁰⁴ This would exclude as not

plaintiff had not yet issued or considered issuing altered versions of existing video games or showed reasonable likelihood of such a market), *cert. denied*, 113 S. Ct. 1582 (1993); *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991) (noting lack of evidence that allegedly planned project to publish collection of letters would go forward); *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989) (dismissing plaintiff's arguments as to possible licensing and adaptation of historical book as "purely speculative, . . . [in] the absence of any such offers").

¹⁰¹ See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 365 (1992).

¹⁰² *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir.), *reh'g denied en banc*, 749 F.2d 733 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

¹⁰³ *Cf. Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, Nos. 92-7933, 92-7985 slip op. at 21 (2d Cir. June 7, 1993 *as amended* July 6, 1993) ("in the cases where we have found the fourth factor to favor a defendant, the defendant's work filled a market niche that the plaintiff simply had no interest in occupying," such as parody).

¹⁰⁴ Professor Wendy Gordon has referred to such "anti-dissemination motives" as presenting a situation where ordinary market mechanisms for licensing may break down, justifying in part a finding of fair use. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1632 (1982). Economic analyses of fair use have also been proposed by other commentators, including Richard A. Posner, *When is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992) and William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988).

The central flaw in these economic models is that the ultimate goal of copyright is to reward creativity, not efficiency. The two may not and need not lead to the same results. See critiques of the economic approach in Alfred C. Yen, *When Authors Won't Sell: Parody, Fair Use, and Efficiency in Copyright Law*, 62 U. COLO. L. REV. 79 (1991); Ralph S. Brown, *Eligibility for Copyright Protection: A Search for Principled Standards*, 70 MINN. L.

“potential” in any meaningful sense uses such as publication of private papers that the plaintiff has sought to keep from the public eye,¹⁰⁵ or a parody that ridicules the copyrighted work or connects it to themes the plaintiff finds distasteful. To the extent, however, that a plaintiff’s decision not to exploit a market is based not on censorship but on the judgment that the economic value of the copyrighted work will be greater without such use, that market should be included. In this situation, the plaintiff in essence *is* interested in that market—it just finds it more lucrative to exploit other markets if it withholds a license.¹⁰⁶ Similarly, refraining from exploitation because of long-term business goals should not make the deliberately bypassed market fair game for copiers.¹⁰⁷

2. What Type of Harm to the Value of the Work?

Similar questions arise as to the type of harm to the value of the work that should be cognizable in examining the fourth factor. The central focus should be harm arising from the ability of

REV. 579 (1985). In addition, any economic model is necessarily highly subjective, requiring numerous assumptions and judgments that courts are ill-equipped to make.

Most fundamentally, however, fair use is not about optimal allocation of resources or predictability. Where Congress wanted predictability, or believed that transactional costs imposed too high a burden on copyright owners or users, it created specific exemptions or compulsory licenses. (Even in the area of compulsory licenses, Congress refused to permit the Copyright Royalty Tribunal to set a market rate for cable television retransmissions, and carefully circumscribed the factors that the Tribunal can consider. *See* 17 U.S.C. § 801(b)(2) (1978)). If Congress had wished fair use to serve as a tool in the cause of economic theory, it would not have provided a general provision intended to continue the common law.

¹⁰⁵ *Cf. Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir.) (including in potential market under fourth fair use factor the market for a collection of J.D. Salinger’s unpublished letters, despite Salinger’s notorious desire for privacy, based on the rationale that he might someday change his mind), *cert. denied*, 484 U.S. 890 (1987).

Although evaluation of the fourth factor should not include harm to a potential market that the copyright owner will not exploit, the copyright owner’s desire to keep his work private may be relevant to the fair use analysis in another respect. Under the second statutory factor, the right of first publication means that the unpublished nature of the work will weigh against fair use. *See Harper & Row*, 471 U.S. at 550-51 and 564.

¹⁰⁶ *See Consumers Union of United States, Inc. v. General Signal Corp.*, 730 F.2d 47, 49 (2d Cir. 1984) (Oakes, J., dissenting from denial of petition for rehearing) (potential markets that copyright owner refuses to license because it believes refusal will give copyrighted work greater value should be included in evaluating fourth factor), *cert. denied sub nom. Consumers Union of United States, Inc. v. New Regina Corp.*, 469 U.S. 823 (1984), *on remand*, 664 F. Supp. 753 (S.D.N.Y. 1987). Other legitimate economically-based reasons might include a fear of over-saturating the market.

¹⁰⁷ *See Dr. Pepper Co. v. Sambo’s Restaurants, Inc.*, 517 F. Supp. 1202 (N.D. Tex. 1981) (concern for loss of business goodwill); *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987) (copyright owner’s interest in maintaining reputation as noncommercial artist). One commentator has referred to such bypassed derivative markets as uses that the public might view as “having the stamp of [the author’s] approval.” A. Hunter Farrell, *Fair Use of Copyrighted Material in Advertisement Parodies*, 92 COLUM. L. REV. 1550, 1576 (1992).

the defendant's use to substitute for the plaintiff's work in the marketplace.¹⁰⁸

There are many ways in which the unauthorized use of a copyrighted work may damage its value. Not all of them are relevant to the issue of fair use. While the copying of unprotectible material from a work, such as an important idea,¹⁰⁹ facts,¹¹⁰ or the work's overall style,¹¹¹ may result in competition in the marketplace and lower the number of sales, such loss should not be considered. The harm must be caused by the use of copyrightable expression from the plaintiff's work.¹¹² Accordingly, courts have held that harm caused solely by the fact that the two works compete in the same general market does not fall within the scope of section 107(4).¹¹³

Indirect harm caused to the value of the work by the taking of expression may also be eliminated from consideration. For example, while the use of expression to criticize or ridicule the copyrighted work may indeed diminish consumers' desire to purchase it, that is a risk inherent in making the work public, and not the kind of harm to its value that lessens the likelihood of fair use.¹¹⁴

In the context of parody, the Ninth Circuit has explained:

¹⁰⁸ See *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983), *petition for reh'g denied*, 730 F.2d 47 (2d Cir.), *cert. denied sub nom.* *Consumers Union of United States, Inc. v. New Regina Corp.*, 469 U.S. 823 (1984), *on remand*, 664 F. Supp. 753, 758 (S.D.N.Y. 1987) ("The fourth factor is aimed at the copier who attempts to usurp the demand for the original work"). See also *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991); *Maxtone-Graham v. Burtchell*, 803 F.2d 1253, 1264 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155-56 (9th Cir. 1986) (each focusing on whether the plaintiff's work would be supplanted in the marketplace, and reaching a negative conclusion).

¹⁰⁹ See *Baker v. Selden*, 101 U.S. 99 (1880).

¹¹⁰ See *Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282 (1991).

¹¹¹ Cf. *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

¹¹² See *Wright v. Warner Books, Inc.*, 953 F.2d 731, 739 (2d Cir. 1991).

¹¹³ See *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1992) (harm to market on fourth statutory factor does not include harm from "use which simply enables the copier to enter the market for works of the same type as the copied work"); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) ("defendant, after all, is perfectly entitled to create a competing work").

¹¹⁴ See *Association of Am. Medical Colleges v. Cuomo*, 928 F.2d 519, 525 (2d Cir.) ("Adverse impact that results from criticism or unfavorable comment on the copyrighted work is not considered in evaluating [the fourth statutory] factor"), *cert. denied*, 112 S. Ct. 184 (1991); *Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986); *Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983), *petition for reh'g denied*, 730 F.2d 47 (2d Cir.), *cert. denied sub nom.* *Consumers Union of United States, Inc. v. New Regina Corp.*, 469 U.S. 823 (1984), *on remand*, 664 F. Supp. 753 (S.D.N.Y. 1987) ("The Copyright Act was not designed to prevent . . . indirect negative effects of copying. . . . The copyright laws are intended to prevent copiers from taking the owner's intellectual property, and are not aimed at recompensing damages which may flow indirectly from copying").

In assessing the economic effect of the parody, the parody's critical impact must be excluded. Through its critical function, "a parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically." Copyright law is not designed to stifle critics. . . . [T]he economic effect of a parody with which we are concerned [in assessing the fourth factor] is not its potential to destroy or diminish the market for the original—any bad review can have that effect—but rather whether it *fulfills the demand* for the original. Biting criticism suppresses demand; copyright infringement usurps it. Thus, infringement occurs when a parody supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable.¹¹⁵

It is rare for true parody to perform this function; few fans of a classic song or movie will buy the parody instead, or vice versa. As a result, in most parody cases, the fourth factor will tend to weigh in favor of fair use.¹¹⁶

Finally, some parodies may be in an artistic genre different from the original, giving rise to the claim that the potential market for that particular genre is injured by the defendant's use. For example, in *Acuff-Rose*, because 2 Live Crew's work was not just a parody but a rap parody, the plaintiff might argue that its ability to license rap versions of "Oh, Pretty Woman" had been harmed. Leaving aside the question of the inherent plausibility of the idea that Acuff-Rose would ever license a rap version of the song, such an argument obscures the nature of the relevant market. For a potential derivative market to be harmed in this manner, the defendant's parody must make less likely an authorized non-parody version in the *same* genre. It is not enough to assert that the genre itself represents a potential derivative market; there is no more reason to assume that other rap versions of "Oh, Pretty Woman" will be deterred by 2 Live Crew's rap parody than to assume that any parody will deter the creation of non-parody derivative works.

3. *Harper & Row's* Elevation of the Fourth Factor to Preeminence

In *Harper & Row*, the Court characterized the fourth statu-

¹¹⁵ *Fisher v. Dees*, 794 F.2d at 437-38 (quoting Professor Benjamin Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967)) (holding parody of song "When Sunny Gets Blue," entitled "When Sonny Sniffs Glue," to be a fair use).

¹¹⁶ See *infra* discussion at text accompanying notes 214-15.

tory fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work," as "undoubtedly the single most important element of fair use."¹¹⁷ This phrase has taken on tremendous weight, becoming a lodestar to lower courts.¹¹⁸ Yet its significance has been overstated.

Cases applying the fair use doctrine prior to the 1976 Act did not order the various factors according to importance, nor was there a consensus that the fourth factor was to be given more weight than the others. Indeed, prior to the incorporation in the statute of fair use, courts were free not to analyze the fourth factor at all.¹¹⁹ A number of cases rejected fair use where no harm to the market had been established,¹²⁰ or resolved the defense according to one or more of the first three factors.¹²¹ Justice Story's opinion in the seminal American fair use case, *Folsom v. Marsh*,¹²² rejected the defense despite the lack of any evidence showing harm to the plaintiff's market; to the contrary, the in-

¹¹⁷ 471 U.S. 539, 566 (1985), citing 3 M. NIMMER ON COPYRIGHT § 13.05[A] at 13-76 (1985). This language was repeated in the Supreme Court's third and most recent fair use opinion, *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (again citing only Nimmer).

¹¹⁸ The phrase is quoted or paraphrased in almost every fair use case. See, e.g., *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992); *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992); *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845 (11th Cir. 1990).

¹¹⁹ See *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1495 n.7 (11th Cir.), *reh'g denied en banc*, 749 F.2d 733 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

¹²⁰ See, e.g., *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied sub nom.*, *O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979); *Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 242 (2d Cir. 1983); *Amana Refrig., Inc. v. Consumers Union of United States, Inc.*, 431 F. Supp. 324, 326 (N.D. Iowa 1977); *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968); *Phillips v. Constitution Pub. Co.*, 72 U.S.P.Q. 69 (N.D. Ga. 1947); *Macmillan Co. v. King*, 223 F. 862, 866 (D. Mass. 1914); *West Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 79 F. 756, 770-773 (2d Cir. 1897); *Farmer v. Elstner*, 33 F. 494, 497 (C.C.E.D. Mich. 1888).

¹²¹ See *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962) (extensive copying; no fair use despite nonprofit use); *Eisenschiml v. Fawcett Pubs., Inc.*, 246 F.2d 598, 604 (7th Cir. 1957) (*de minimis* taking); *Toksvig v. Bruce Pub. Co.*, 181 F.2d 664, 667 (7th Cir. 1950) (lack of a productive use); *List Pub. Co. v. Keller*, 30 F. 772 (C.C.S.D.N.Y. 1887) (extensive copying); *Social Register Ass'n v. Murphy*, 128 F. 116 (C.C.R.I. 1904) (lack of a productive use); *Italian Book Corp. v. American Broadcasting Cos.* 458 F. Supp. 65, 70-71 (S.D.N.Y. 1978) (incidental use); *Holdredge v. Knight Pub. Corp.*, 214 F. Supp. 921, 924 (S.D. Cal. 1963) (extensive copying); *Toulmin v. Rike-Kumler Co.*, 137 U.S.P.Q. 533 (S.D. Ohio 1962), *aff'd*, 316 F.2d 232 (6th Cir. 1963) (*de minimis* taking); *Loew's, Inc. v. Columbia Broadcasting System, Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956) (wholesale copying), *aff'd by an equally divided Court*, 356 U.S. 43 (1958); *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836, 837 (E.D. Wis. 1941) (incidental use and implied consent); *Broadway Music Corp. v. F-R Pub. Corp.*, 31 F. Supp. 817, 818 (S.D.N.Y. 1940) (incidental use); *Shapiro, Bernstein & Co. v. P.F. Collier & Son Co.*, 26 U.S.P.Q. 40, 43 (S.D.N.Y. 1934); *Sayers v. Spaeth*, 20 COPYRIGHT OFFICE DECISIONS 625, 626 (S.D.N.Y. 1932) (extensive copying; fair use denied even though defendant had obtained, in good faith, permission from an assignee of plaintiff it mistakenly believed was the copyright owner); *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341 (1968) (*de minimis* taking).

¹²² 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

tended markets for the parties' works were quite different.¹²³

Nor does the statutory language give special emphasis to the fourth factor. On its face, section 107 does not favor any listed factor over any other.¹²⁴ Assigning predetermined weights to individual factors is inconsistent with Congress's recognition that, in applying fair use as an equitable rule of reason, "the relative weight to be given [the statutory factors] will differ from case to case."¹²⁵ Courts should be free to weigh each factor as appropriate on the facts of a given case.

What is the source, then, of this emphasis on the fourth factor? The *Harper & Row* Court did not provide any explanation for the proposition that this factor is the most important, citing only a single commentator, the late Professor Melville Nimmer.¹²⁶ But the handful of cases cited by Professor Nimmer do not bear out the proposition.¹²⁷ Nimmer himself hedged the

¹²³ Justice Story expressed regret that his finding of infringement would interfere "with the very meritorious labors of the defendants, in their great undertaking of a series of works adapted to school libraries." 9 F. Cas. at 349.

¹²⁴ As Justice Blackmun has noted, "No particular weight . . . was assigned to any of th[e] [factors]." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 476 (1984) (Blackmun, J., dissenting).

¹²⁵ H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 72 (1976); S. REP. NO. 94-473, 94th Cong., 1st Sess. 65 (1975).

¹²⁶ 3 M. Nimmer, NIMMER ON COPYRIGHT § 13.05[A] at 13-76 (1985).

¹²⁷ The cases (in the edition cited by *Harper & Row*) were: *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980); *Dow Jones & Co. v. Board of Trade*, 546 F. Supp. 113 (S.D.N.Y. 1982); *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968); *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339 (N.D. Ohio 1969); *H.C. Wainwright & Co. v. Wall Street Transcript Corp.*, 418 F. Supp. 620 (S.D.N.Y. 1976), *aff'd sub nom. Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977); *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); *Public Affairs Assocs. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *vacated for an insufficient record*, 369 U.S. 111 (1962); and *Hill v. Whalen & Martell*, 220 F. 359 (S.D.N.Y. 1914).

Taking these cases one by one, *Public Affairs Associates* did not even discuss market effect, and instead turned on the ground that the declaratory judgment plaintiff planned to take too much of the work, an issue covered by the third factor. *Triangle* merely stated that courts "generally" had placed "most emphasis" on the fourth factor, not that it was *per se* the "single most important element." *Triangle's* support for even this more limited proposition was weak. The opinion lists two authorities: an earlier edition of Nimmer (in the edition cited in *Harper & Row*, Nimmer then cited *Triangle* as support for the same proposition for which *Triangle* had cited Nimmer), and *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968). *Time*, which involved unauthorized reproductions of the Zapruder photographs of President Kennedy's assassination, did not treat the fourth factor as the most important. Although the court cited to a passage from *Folsom v. Marsh* on the subject of injury to the plaintiff, 293 F. Supp. at 144, it was referring to Justice Story's conclusion. In finding fair use, the court rested principally on the ground that "[t]here is a public interest in having the fullest information available on the murder of President Kennedy." 293 F. Supp. at 146.

Dow Jones cites Nimmer, *Triangle Publications*, and one other case, *Meeropol v. Nizer*, 560 F.2d 1061, 1070 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). *Trebonik v. Grossman* listed a number of factors, including good faith. No one factor was treated as determinative, and no statement was made at all about the relative importance of the fourth

proposition's strength by declaring that one had to look beyond the cases' "stated rationale," and undercut his conclusion by citing a number of cases to the contrary.¹²⁸

The fourth factor may be quite important in many cases. Certainly where there is proof of actual harm to the market, as in *Harper & Row*, this factor should weigh heavily in the balance.¹²⁹ In such circumstances, the damage to the copyright owner's incentives may outweigh the loss to the public from forbidding the use.

In any given case, however, other factors may be of equal or greater significance. A use may be fair despite some harm to the potential market if its social value is high; a use may not be fair despite a lack of harm if it takes extensively for no socially valuable type of purpose. Resolution of the fourth factor in the plaintiff's favor should not be a prerequisite for the plaintiff to prevail.¹³⁰ As Justice Story recognized more than a century ago, a plaintiff should not be required to show harm in order to defeat a fair use defense; if a use is excused for lack of such proof, many small uses, innocuous in themselves, may have a cumulative impact of destroying the market.¹³¹

Moreover, requiring proof of harm on the fourth factor for a plaintiff to prevail is inconsistent with the fact that such proof is not necessary either to establish a prima facie case of infringe-

factor. *Wainwright v. Wall Street Transcript* focused principally on defendant's extensive taking. *Williams & Wilkins v. United States* discusses many fair use factors. If one had to choose one factor as the most important to the disposition of that case, it would not, in our opinion, be the potential harm to the copyright owner's market (which seems obvious although unpersuasive to the majority), but the Court of Claims' concern for the public interest in the scientific research conducted by the National Institutes of Health. *Hill v. Whalen & Martell* does emphasize the importance of an adverse market impact, describing it as "ordinarily decisive."

¹²⁸ The same edition of Nimmer cites the following cases as "*cf.*": *Loew's, Inc. v. Columbia Broadcasting System, Inc.*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided Court sub nom. Columbia Broadcasting System, Inc. v. Loews, Inc.*, 356 U.S. 43 (1958); *Associated Music Pub., Inc. v. Debs Memorial Radio Fund, Inc.*, 141 F.2d 852 (2d Cir. 1944); and *Toulmin v. Rike-Kumler Co.*, 137 U.S.P.Q. 533 (S.D. Ohio 1962), *aff'd*, 316 F.2d 232 (6th Cir. 1963). *Benny* was decided on the ground of wholesale copying. *Associated Music* was decided on the grounds of substantial copying and the defendant nonprofit radio station's purpose of boosting its audience. *Toulmin* was decided on the ground of *de minimis* copying.

¹²⁹ 471 U.S. 539, 567 (1985). As the Court observed, "Rarely will a case of copyright infringement present such clear-cut evidence of actual damage."

¹³⁰ The converse is also true: a defendant need not prove lack of harm to the plaintiff's market to establish fair use. No single factor is essential.

¹³¹ 9 F. Cas. at 349. See also *Harper & Row*, 471 U.S. at 569, quoting S. REP. NO. 94-473, 94th Cong., 1st Sess. 65 (1975): "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented."

ment or to obtain damages. If the fourth factor is to be given extra weight not only in cases where there is proof of actual or potential harm, but also in cases where there is not, a finding of fair use would come dangerously close to judicial rewriting of a statute that deliberately departed from prior law requiring the copyright owner to prove the defendant's use was for profit.¹³²

The proposition that the fourth factor is "the single most important element" is also difficult practically to apply. How are courts (or juries)¹³³ to weigh all four factors in light of the importance of the fourth? Is the fourth factor to be given 51% of the total fair use weight? If so, fair use effectively becomes a one-factor doctrine. Is the fourth factor instead to be given more weight individually than each of the other three factors—*i.e.*, 26% or more? And what happens when factors beyond the four set forth in the statute are added to the mix? The common law character of fair use, the plain language of the statute, and *Harper & Row's* general approach to fair use argue against such a mechanistic reading.

4. Evaluating the Fourth Factor

The preeminence given to the fourth factor by *Harper & Row* has been particularly troublesome in light of the tendency of the courts to treat that factor as an either-or proposition: if any harm is established, the factor is deemed to favor the plaintiff; if not, to favor the defendant. Like the first factor issue of commerciality, however, harm to the potential market is a matter of degree. A finding of harm therefore should not necessarily lead to rejection of the fair use defense.¹³⁴

In some circumstances, the defendant's use will cause only minor harm to the plaintiff's potential market, which when weighed in the balance with the other relevant factors, including the public benefit from that type of use, may lead to a finding that the use is fair. An all-or-nothing approach to the fourth factor, combined with a broad definition of the potential market and strengthened by the extra weight conferred by *Harper & Row*, would mean that the defendant loses whenever there is a possi-

¹³² See *supra* text accompanying notes 56-59.

¹³³ See *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir.), *cert. denied*, 459 U.S. 826 (1982).

¹³⁴ Indeed, even a use that *benefits* the market for the copyrighted work may not be fair. See Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1146-47 (1990) (pointing out that the movie *Rear Window* was held not to be a fair use of the underlying story by Cornell Woolrich, despite that fact that it "became a selling point for anthologies containing the . . . story").

bility that the plaintiff might license a similar use. As Judge Leval has pointed out,

[I]f an insubstantial loss of revenue turned the fourth factor in favor of the copyright holder, this factor would never weigh in favor of the secondary user. And if we then gave serious deference to the proposition that it is "undoubtedly the single most important element of fair use," fair use would become defunct. The market impairment should not turn the fourth factor unless it is reasonably substantial.¹³⁵

E. *Presumptions and Burdens of Proof*

1. Burdens of Proof

In an infringement suit, the copyright owner bears the burden of proof in making out her *prima facie* case: ownership of a valid copyright and unauthorized copying by the defendant of substantial expression from the copyrighted work. There is no infringement if the copying involves only unprotectible elements, such as ideas, processes or facts,¹³⁶ or if only insubstantial similarities exist between the expression of the two works.¹³⁷ Once a *prima facie* case has been established, the defendant bears the burden of proof on any affirmative defenses.

In *Harper & Row, Pub., Inc. v. Nation Enterprises*, the Supreme Court held that fair use is an affirmative defense.¹³⁸ The party asserting fair use¹³⁹ thus bears the burden of production as well as the ultimate burden of persuasion. Since fair use is established by weighing all the relevant factors, this means that the proponent of the defense must persuade the court that the factors, taken together, balance in its favor.

If *Harper & Row* had been the Supreme Court's first fair use opinion, fair use analysis today might be considerably simpler. The year before, however, the Court had handed down its opinion in *Sony Corporation of America v. Universal City Studios, Inc.*¹⁴⁰

¹³⁵ Leval, *supra* note 49, at 1124-25.

¹³⁶ See *Feist Pub., Inc. v. Rural Telephone Serv. Co.*, 111 S. Ct. 1282 (1991); *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

¹³⁷ *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992).

¹³⁸ 471 U.S. 539, 561 (1985). See also *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1521 (9th Cir. 1992) (contrasting fair use with the section 117 exemption from the copyright owner's grant of rights).

¹³⁹ Depending on the procedural context of the litigation, the fair use defense may be asserted by any party. In the typical lawsuit, however, it will be the defendant who relies on fair use. Accordingly, we will for the sake of simplicity refer to the party asserting the defense as "the defendant."

¹⁴⁰ 464 U.S. 417 (1984).

Because *Sony* involved complex issues far removed from the traditional arena of fair use, it complicated the Court's effort to formulate general principles.¹⁴¹ In particular, the claim of contributory infringement by marketing a mass-produced consumer article (the Betamax video tape recorder)¹⁴² used for home time-shifting of over-the-air free broadcast programming forced the Court to focus on issues ancillary—if not foreign—to the core of fair use.¹⁴³

The contributory infringement claim arguably could have been dismissed without reaching fair use. Instead, fair use was subsumed as part of the contributory infringement analysis, as a basis for concluding that the Betamax was capable of commercially significant noninfringing uses.¹⁴⁴ In addressing fair use in this specific context, certain references to "presumptions" were made in the majority opinion that have since been applied in widely divergent contexts, giving them a heightened meaning beyond the Court's apparent intent.

¹⁴¹ See *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 22 (S.D.N.Y. 1992), *appeal argued* No. 92-9341 (2d Cir. May 20, 1993) ("*Sony* and *Williams & Wilkins* do not purport to define the heartland of fair use. To the contrary, they present themselves as defining its remote extremities").

¹⁴² Although contributory infringement was a well-established doctrine in copyright law by the time of *Sony*, and had been applied by the Supreme Court in *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) (holding the producer of a motion picture that constituted an unauthorized dramatization of the novel *Ben Hur* liable for sale of copies of picture to jobbers who in turn arranged for theatrical exhibition of the movie), the producer in *Kalem Co.* who was found contributorily liable had personally caused the copyright owner's work to be copied and distributed. *Kalem Co.* was thus quite similar to the traditional "dance hall" contributory infringement cases. See, e.g., *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354 (7th Cir. 1929); *Gershwin Pub. Corp. v. Columbia Artists Mgt., Inc.*, 443 F.2d 1159 (2d Cir. 1971); *Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n, Inc.*, 554 F.2d 1213 (1st Cir. 1977); *KECA Music, Inc. v. Dingus McGee's Co.*, 432 F. Supp. 72 (W.D. Mo. 1977).

¹⁴³ These issues included the meaning of the legislative history of the 1971 Sound Recording Amendment and its relationship to section 107 of the 1976 Act, the manner in which harm to the market might be demonstrated in the case of new technologies, the appropriate remedy in a contributory infringement case brought against the manufacturer of a consumer article such as the Betamax (including the controversial issue of judicially-imposed compulsory licensing), copying for private use, productive versus nonproductive uses, and the question of single versus multiple copying.

¹⁴⁴ This subordination of the fair use issue is evident from the structure of the Court's opinion. The discussion of fair use occurs in Part IV, which begins:

The question is whether the Betamax is capable of commercially significant noninfringing uses. In order to resolve that question, we need not explore *all* the different potential uses of the machine and determine whether or not they would constitute infringement. Rather, we need only consider whether on the basis of the facts as found by the district court a significant number of them would be non-infringing.

464 U.S. at 442. Two types of potential uses were examined, authorized and unauthorized time-shifting. Part IVA contains the Court's discussion of authorized time-shifting; Part IVB contains the Court's discussion of unauthorized time-shifting, and its analysis of fair use.

2. The *Sony* "Presumptions"

a. *The First Factor "Presumption"*

Ironically, the last-minute addition to the first statutory factor of the phrase, "including whether such use is of a commercial nature or is for nonprofit educational purposes," intended to give solace to nonprofit educators,¹⁴⁵ has been applied vigorously against commercial users. This surprising twist has come about because of later interpretations of the following statement made in *Sony*, in the context of finding the use of the Betamax tape recorder for time-shifting purposes to be fair use: "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of copyright."¹⁴⁶

This passage has haunted fair use ever since, appearing in some form in virtually every commercial use case of the past decade. Absent from these subsequent opinions, however, has been serious analysis of what the statement means.¹⁴⁷ The conclusion is inescapable from both the textual and the historical context that the Court did not intend to establish a true presumption in the technical sense, shifting burdens of production or proof.¹⁴⁸ Nor would such a presumption be appropriate as a method of determining the affirmative defense of fair use.

Most basic is the seldom-noted fact that since the use before the Court in *Sony* was found to be noncommercial, the statement is pure dictum. It was made in passing, without any explanation of what such a presumption might mean or how it was to be applied. Other language in the opinion makes clear that what was intended was not a technical presumption (let alone a near-con-

¹⁴⁵ See *supra* text accompanying notes 54-59.

¹⁴⁶ 464 U.S. at 451. See also *id.* at 449: "If the Betamax were used to make copies for a commercial or profit-making purpose, such use would presumptively be unfair."

¹⁴⁷ Two notable exceptions are the Second Circuit's opinion in *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987), which concluded, "[W]e do not read [the sentence from *Sony*] as altering the traditional multi-factor fair use inquiry. . . . Only an unduly narrow reading of the language in *Sony Corp.* and an inattention to the context could lead to the conclusion that the Court intended to attach heightened significance to the element of commerciality," and Judge Leval's opinion in *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 12-13 (S.D.N.Y. 1992), *appeal argued* No. 92-9341 (2d Cir. May 20, 1993).

¹⁴⁸ Cf. Fed. R. Evid. 301:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

clusive one), but simply a recognition that the commercial nature of a use should be considered in the fair use balance, and would tend to weigh against a finding of fair use. In an earlier paragraph, the Court stated, "Although not conclusive, the first factor requires that 'the commercial or nonprofit character of an activity' be weighed in any fair use decision," quoting the statement in the House Report that this aspect of a use "can and should be weighed along with other factors."¹⁴⁹

Sony's entire approach to fair use belies an intent to establish any system of presumptions. The Court stressed the nature of the doctrine as "an equitable rule of reason," quoting language from the House Report recognizing that no general definition of fair use was possible, and that each case must be decided on its own particular facts.¹⁵⁰ The opinion noted that the Senate Committee too had "eschewed a rigid, bright line approach to fair use."¹⁵¹ Finally, in rejecting the Court of Appeals' holding that non-productive uses could never be fair, the Court criticized the lower court for not having engaged in any "equitable rule of reason" analysis, but instead applying a "rigid" requirement that every fair use must be productive. Explaining that this understanding of fair use was erroneous, the Court stated:

Congress has plainly instructed us that fair use analysis calls for a sensitive balancing of interests. The distinction between "productive" and "unproductive" uses may be helpful in calibrating the balance, but it cannot be wholly determinative. Although copying to promote a scholarly endeavor certainly has a stronger claim to fair use than copying to avoid interrupting a poker game, the question is not simply two-dimensional.¹⁵²

The same reasoning applies equally to artificial distinctions between "commercial" and "noncommercial" uses.

The Supreme Court has subsequently interpreted the *Sony* first factor "presumption" as an element in the fair use balance rather than as a true presumption. In *Harper & Row, Pub., Inc. v.*

¹⁴⁹ 464 U.S. at 448-49 and n.32, quoting H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 66 (1976). In addition, if the Court had intended a technical presumption of unfair use to follow from a finding of commerciality, there would have been no need to provide an additional presumption of harm to the market on the fourth factor. See *infra* discussion at text accompanying notes 158-70.

¹⁵⁰ 464 U.S. at 448-49 n.31, quoting H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65-66.

¹⁵¹ 464 U.S. at 449 n.31, citing S. REP. NO. 94-473, 94th Cong., 1st Sess. 65-66 (1975).

¹⁵² 464 U.S. at 455 n.40.

Nation Enterprises,¹⁵³ the Court quoted the famous sentence from *Sony*, but prefaced it with the following: "The fact that a publication was commercial as opposed to nonprofit is a separate factor that *tends to weigh* against a finding of fair use."¹⁵⁴ *Harper & Row's* approach is consistent with the pre-1976 Act case law—case law that Congress intended section 107 to confirm.¹⁵⁵

The same result should follow as a matter of policy. Not only are presumptions as an analytical technique antithetical to the nature of fair use, a presumption of unfairness based on commerciality is inappropriate. No use should be considered presumptively either fair or unfair based solely on the user's financial benefit; the determination can only be made based on all the facts. Even uses for nonprofit educational purposes may easily fail to qualify as fair—for example, a teacher's preparation and distribution of an anthology from numerous copyrighted works to her class as a substitute for purchase of those works.¹⁵⁶ Finally, in the Supreme Court's next foray into the turbulent waters of fair use, *Harper & Row*, the Court rejected an argument that particular uses were presumptively fair,¹⁵⁷ a holding that should equally apply to particular uses being presumptively unfair.

b. *The Fourth Factor "Presumption"*

The majority opinion in *Sony* contains yet another reference to "presumptions" in its analysis of the fourth statutory factor. The Court stated:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of fu-

¹⁵³ 471 U.S. 539 (1985).

¹⁵⁴ *Id.* at 562 (1985) (emphasis added). See also *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

¹⁵⁵ See *supra* text accompanying note 31.

¹⁵⁶ See *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983); *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions and Guidelines for Educational Uses of Music*, contained in H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 68-71 (1976), reproduced in *THE FAIR USE PRIVILEGE*, *supra* note 1, at 507-11.

¹⁵⁷ The drafters of the 1976 Act "resisted pressures from special interest groups to create presumptive categories of fair use." 471 U.S. at 561.

ture harm exists. *If the intended use is for commercial gain, that likelihood may be presumed.* But if it is for a noncommercial purpose, the likelihood must be demonstrated.¹⁵⁸

This language too has caused problems in fair use analysis. Again, the central question is whether the Court intended to create a technical presumption. Does *Sony* shift the burden of production on the fourth statutory factor depending on the commerciality of the use in each case? As with the first factor presumption, it must be noted that the statement is dictum, made without a full exposition in the context of examining a noncommercial use. Moreover, the Court tells us the likelihood of harm “may” be presumed, not that it must be—the language of permissible inference rather than mandatory burden-shifting. Nevertheless, the statement’s context is quite different from that of the first factor presumption. It occurs not in passing in the course of a general discussion of the fourth factor, but as part of a specific analysis of burdens of proof.

There is a certain logic to the idea of presuming harm where the use is commercial. All things being equal, a commercial use, by virtue of its nexus to the marketplace, may be more *likely* to cause economic harm than a nonprofit use.¹⁵⁹ But this will not always be the case. Some commercial uses may cause no harm at all; some nonprofit uses may have a far more devastating impact than a commercial use. For example, the market may be entirely destroyed when a nonprofit organization distributes material portions of a copyrighted work, without charge, to those individuals who constitute the principal audience for the work.

Since harm to the copyright owner’s market from a commercial use is far from inevitable, it should not be presumed without evidence. Doing so collapses the first and fourth factors, making the commercial nature of the use so powerful as to be nearly conclusive. This is an inappropriate result for several reasons. First, it virtually eliminates one factor from the fair use balance. Sec-

¹⁵⁸ 464 U.S. at 451 (emphasis added).

¹⁵⁹ The 1976 House Judiciary Committee report demonstrates similar reasoning in the context of newsletters:

Whether the copying of portions of a newsletter is an act of infringement or a fair use will necessarily turn on the facts of the individual case. However, as a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals. The commercial nature of the user is a significant factor *in such cases*: Copying by a profit-making user of even a small portion of a newsletter *may* have a significant impact on the commercial market for the work.

H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 73-74 (1976) (emphasis added).

ond, it raises anew the difficulty of defining what uses are “commercial” and to what extent.¹⁶⁰ In addition, any logical basis for the presumption disappears once one acknowledges that the commerciality of the use is but one aspect of its “purpose and character.”¹⁶¹ For certain commercial works, such as parody, it is more likely than not that the defendant’s use will *not* affect the plaintiff’s potential market in a manner cognizable under section 107—that is, by serving as a substitute for the original.¹⁶²

Given the *Sony* Court’s permissive rather than mandatory language, it may have meant no more than that a commercial use will tend to harm the potential market more readily than a non-profit use. It seems unlikely that the Court meant to direct lower courts to regard all commercial use as resulting in harm to the potential market for the work unless the defendant proves otherwise.

The key to understanding the *Sony* “presumptions” and burden-shifting may be found in two assumptions under which the majority may have operated.

The first assumption is manifested in the majority’s apparent search for a discrete “right to prohibit time-shifting,” and its treatment of that right as not included in the bundle of exclusive rights granted to the copyright owner under section 106. The district court expressly so held.¹⁶³ The Ninth Circuit began its opinion by rejecting this conclusion, recognizing that the 1976 Act was structured so as to provide a broad grant of rights, subject to specific privileges, exemptions, and compulsory licenses.¹⁶⁴ To the court of appeals, time-shifting was an infringement of the copyright owner’s exclusive right to reproduce the work in copies unless excused by fair use.¹⁶⁵

Although the Supreme Court did not directly rule on this point, there is language in the majority opinion supporting the district court’s interpretation. For example, the opinion concludes as follows:

¹⁶⁰ See *supra* text accompanying notes 60-78.

¹⁶¹ See *supra* text accompanying notes 79-80.

¹⁶² See *supra* text accompanying notes 115-16.

¹⁶³ 480 F. Supp. 429, 443 (C.D. Cal. 1979): “The broad language of the New Act suggests that copyright holders have monopoly power over all reproductions of their works. Legislative history, however, shows that Congress did not intend this broad statement to include reproductions of sound recordings for home use. The central question here is whether Congress intended the same language to give copyright holders of audiovisual works monopoly power over off-the-air recording of their works for home use. Legislative history does not show this intent.”

¹⁶⁴ See *supra* text accompanying notes 56-59.

¹⁶⁵ 659 F.2d 963, 965-69 (9th Cir. 1981).

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.¹⁶⁶

Yet section 106 on its face imposes just such a prohibition. The Ninth Circuit was therefore correct on this point. The importance of the Supreme Court's lack of clarity as to whether time-shifting was outside of the copyright owner's rights, or within those rights but excused, was carried over into the second assumption, which concerns the procedural posture of fair use.

The carry-over is reflected in the following passage in the *Sony* majority opinion, which appears to mix the issues of scope of rights and of fair use: "All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a fair use; the copyright owner does not possess the exclusive right to such a use."¹⁶⁷ While not free of ambiguity, this passage suggests that the *Sony* majority, writing a year before *Harper & Row*, did not regard fair use as an affirmative defense. If so, this may explain why the Court felt free to treat commercial and noncommercial uses differently.¹⁶⁸

Under *Sony*, if the use is deemed commercial, the burden of proving fair use appears to be placed on the defendant.¹⁶⁹ If the use is deemed noncommercial, at least a portion of the burden shifts: the burden of proving harm to the market under the fourth factor is placed on the copyright owner, becoming part of the copyright owner's case-in-chief.¹⁷⁰ If, however, fair use is an affirmative defense, as *Harper & Row* now instructs, this disparate treatment of commercial and noncommercial uses does not make sense: the burden of proving the defense should remain throughout on the party asserting it.

The Court's two fair use decisions after *Sony* indicate that no technical presumption was intended. Both involved uses found to be commercial on the first factor; neither applied a presump-

¹⁶⁶ 464 U.S. at 456.

¹⁶⁷ *Id.* at 433.

¹⁶⁸ Even portions of Justice Blackmun's dissent may be read to treat fair use considerations as part of the copyright owner's case-in-chief, *see* 464 U.S. at 462-63, 482 (proposing to place certain burdens on the copyright owner in fair use claims), although on balance the dissent appears to regard fair use as an affirmative defense.

¹⁶⁹ *Id.* at 451.

¹⁷⁰ *Id.*

tion of harm on the fourth factor, or even discussed the possibility of doing so. Rather, each examined evidence showing harm to the plaintiff's actual or potential market.¹⁷¹

Equally as important, *Harper & Row* clarified the status of fair use as an affirmative defense.¹⁷² The *Sony* "presumptions" must therefore be reexamined from a new procedural perspective: the burden of proving the defense (including logically all elements of the defense) remains on the party asserting it. If no evidence is produced on the question of harm to the market, the fourth factor should not be resolved in either side's favor. Since the ultimate burden of proof on the defense rests with the defendant whether the use is commercial or not, the defendant will have to convince the court that the other factors on balance establish fair use.

F. *The Sony/Harper & Row "Double Whammy" for Commercial Uses*

Unfortunately, the dangers inherent in treating the *Sony* language as creating true presumptions, rather than as *Harper & Row*'s weighted consideration, have been realized in a number of subsequent decisions. Although not all courts have been led astray, some have. Many courts still examine all the circumstances, and engage in the sensitive balancing fair use demands.¹⁷³ But others have been less thoughtful, citing the *Sony* presumptions and the preeminence of the fourth factor, and concluding after only superficial analysis of the facts that a commercial use is plainly unfair.¹⁷⁴ At its worst, the analysis proceeds via the following chain of logic: (1) defendant's use is commercial; (2) commercial uses are presumptively unfair and presumptively

¹⁷¹ See *Stewart v. Abend*, 495 U.S. 207, 236-38 (1990); *Harper & Row*, 471 U.S. 539, 566-69 (1985).

¹⁷² See *supra* text accompanying notes 138-39.

¹⁷³ One good example is the district court's opinion in *Acuff-Rose*, 754 F. Supp. 1150 (M.D. Tenn. 1991). See also *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992); *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *appeal argued* No. 92-9341 (2d Cir. May 20, 1993); *Caratzas v. Time Life, Inc.*, COPYR. L. REP. (CCH) ¶ 27,012 (S.D.N.Y. 1992).

¹⁷⁴ See, e.g., *Financial Info., Inc. v. Moody's Investors Serv., Inc.*, 751 F.2d 501, 508-09 (2d Cir. 1984) ("*Sony* repeatedly stresses that the 'first factor'—whether the use is commercial or nonprofit—not only must necessarily be a part of a court's analysis, but *must* also, if the use proves commercial, give rise to a presumption of unfair use. The Court could hardly have been more lucid on this point. . . . *Sony* requires that we recognize a presumption of unfair use by Moody's arising from its commercial use of the copyrighted material"); *Kepler-Tregoe, Inc. v. Leadership Software, Inc.*, 22 U.S.P.Q.2d 1788 (S.D. Tex. 1992); *Paramount Pictures Corp. v. Labus*, 16 U.S.P.Q.2d 1142 (W.D. Wis. 1990); *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 640 F. Supp. 386, 390 (D. Minn. 1986).

result in harm to the potential market for the copyrighted work; (3) harm to the market is the single most important fair use factor; (4) defendant's use is therefore not fair use. In sum, the two *Sony* "presumptions," magnified by *Harper & Row's* elevation of the fourth factor, have the potential to become a nearly invincible double whammy, transforming what should be only one part of a single fair use factor into a *per se* disqualification.

The Sixth Circuit's majority opinion in *Acuff-Rose* is a graphic illustration of this type of decision making.¹⁷⁵ On the first fair use factor, the majority cited *Sony* for the proposition that "[t]he use of a copyrighted work primarily for commercial purposes has been held by the Supreme Court to be presumptively unfair."¹⁷⁶ Rejecting the district court's weighing of the value of parody in the first factor balance,¹⁷⁷ the court of appeals tied the first factor to the fourth, stating that it was 2 Live Crew's burden to rebut the *Sony* presumption of unfairness by convincing the court that "the parody does not unfairly diminish the economic value of the original."¹⁷⁸

The majority opened its fourth factor analysis with *Harper & Row's* "single most important element" statement.¹⁷⁹ Quoting *Sony's* fourth factor "presumption" language, it concluded: "In the instant case, the use of the copyrighted work is wholly commercial, so that we presume a likelihood of future harm to *Acuff-Rose* exists."¹⁸⁰ Criticizing the district court for "refus[ing] to indulge the presumption," the court rejected its finding, based on evidence in the record, that 2 Live Crew's version of the song is extremely unlikely to affect the market for the *Acuff-Rose* original, because the audiences for the two works are entirely different.¹⁸¹ The brand of presumption applied here was strong

¹⁷⁵ The Sixth Circuit majority did not cite the only other Sixth Circuit fair use case decided under the 1976 Act—a case that differs sharply in both result and analysis. See *Pro Arts, Inc. v. Hustler Magazine, Inc.*, 787 F.2d 592 (6th Cir. 1986) (table), Nos. 85-3022, 85-3041 (unpublished *per curiam* opinion, filed March 25, 1986), discussed at *infra* note 201.

¹⁷⁶ 972 F.2d at 1436.

¹⁷⁷ See *infra* text accompanying notes 221-23.

¹⁷⁸ 972 F.2d at 1437 (quoting *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986)).

¹⁷⁹ 972 F.2d at 1438.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1439. The district court's findings are reported at 754 F. Supp. at 1158. The majority explained that the evidence in the record was "irrelevant" because it did not take into account harm to the potential market for derivative works. 972 F.2d at 1439. The court did not, however, explain what type of derivative works should have been considered. If what it had in mind was the potential market for licensing parodies, such a market should not have been considered in the fourth factor analysis, given the censorship danger. See *supra* text accompanying notes 94-96.

indeed, if not conclusive.¹⁸²

Cases like *Acuff-Rose* thus demonstrate that following *Sony* and *Harper & Row*, fair use analysis has come to embody the phenomenon identified by Professor Phillip Areeda in the context of antitrust law:

As with most instances of judging by catch-phrase, the law evolves in three stages: (1) An extreme case arises to which a court responds.¹⁸³ (2) The language of that response is then applied—often mechanically, sometimes cleverly—to expand the application. With too few judges experienced enough with the subject to resist, the doctrine expands to the limits of its language, with little regard to policy. (3) Such expansions ultimately become ridiculous, and the process of cutting back begins.¹⁸⁴

The Supreme Court's review of *Acuff-Rose* will hopefully begin a salutary cutting back process.

G. Fair Use and Parody

1. Parody As a Favored Use

The Sixth Circuit's analysis in *Acuff-Rose* is particularly disturbing in light of the humorous nature of the work involved. Parody is a type of use that has elicited generous fair use treatment in recent years.¹⁸⁵ This generosity stems from the recogni-

¹⁸² At one point in the opinion, the majority stated: "We have already determined that harm for purposes of the fair use analysis *has been established* by the presumption attaching to commercial uses." 972 F.2d at 1439 (emphasis added).

¹⁸³ In the case of fair use, the initial extreme case to which the Supreme Court responded was *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). See *supra* discussion in text at notes 140-70.

¹⁸⁴ Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTI-TRUST L.J. 841, 841 (1989).

¹⁸⁵ The following is a partial list of the fair use opinions involving parody decided under the 1976 Act: *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1642 (1993); *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Pro Arts, Inc. v. Hustler Magazine, Inc.*, 787 F.2d 592 (6th Cir. 1986) (table), Nos. 85-3022, 85-3041 (unpublished per curiam opinion, filed March 25, 1986); *Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231 (2d Cir. 1983); *DC Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24 (2d Cir. 1982); *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (per curiam); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom.* *O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); *Campbell v. Koons*, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. filed April 1, 1993); *Eveready Battery Co. v. Adolph Coors Co.*, 765 F. Supp. 440 (N.D. Ill. 1991); *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990); *New Line Cinema Corp. v. Bertlesman Music Group, Inc.*, 693 F. Supp. 1517 (S.D.N.Y. 1988); *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (N.D. Ga. 1986); *Update Art, Inc. v. Maariv Israel Newspaper*,

tion of parody as a use that confers a real public benefit, comparable to the uses listed in the preamble to section 107.¹⁸⁶ In the words of the Second Circuit, “[P]arody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law.”¹⁸⁷ Commentators too have noted that parody furthers First Amendment values as well as copyright values.¹⁸⁸

The Supreme Court has yet to address the subject of parody in a written opinion. Its sole venture into the field occurred thirty-five years ago, when it affirmed by an equally divided vote a decision by the Ninth Circuit holding that a television parody by the comedian Jack Benny of the movie “Gaslight” (starring Charles Boyer, Ingrid Bergman and Joseph Cotton), entitled

Inc., 635 F. Supp. 228 (S.D.N.Y. 1986); DC Comics Inc. v. Unlimited Monkey Business, Inc. 598 F. Supp. 110 (N.D. Ga. 1984); Dr. Pepper Co. v. Sambo’s Restaurants, Inc., 517 F. Supp. 1202 (N.D. Tex. 1981); Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981); DC Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177 (S.D.N.Y. 1979); Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop Prods., Inc., 479 F. Supp. 351 (N.D. Ga. 1979).

¹⁸⁶ While not included in the language of section 107 itself, parody is mentioned in the legislative reports as an example of possible fair use. See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65 (1976); S. REP. NO. 94-473, 94th Cong., 1st Sess. 61 (1975) (listing “use in a parody of some of the content of the work parodied” as a type of activity that might be regarded as fair use “under the circumstances”). In an oblique statement during the revision process leading up to the 1976 Act, the Copyright Office expressed the hope that reference to parody in the legislative reports would give wider latitude to the courts to find fair use than would a specific statutory reference. See COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS, 89th Cong., 1st Sess. 101 (House Comm. Print 1965), quoted and discussed in THE FAIR USE PRIVILEGE, *supra* note 1, at 234-235.

¹⁸⁷ Rogers v. Koons, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992). See also Warner Bros., Inc. v. American Broadcasting Cos., 720 F.2d 231, 242 (2d Cir. 1983) (“It is decidedly in the interests of creativity, not piracy, to permit authors to take well-known phrases and fragments from copyrighted works and add their own contributions of commentary or humor”); Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252, 253 (2d Cir. 1980) (per curiam) (“[I]n today’s world of often unrelieved solemnity, copyright law should be hospitable to the humor of parody”); Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.) (“[A]s a general proposition, we believe that parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism”), *cert. denied*, 379 U.S. 822 (1964). Cf. Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490, 493 (2d Cir. 1989) (“parody is a form of artistic expression” protected by the First Amendment); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 33 (1st Cir.) (recognizing “the vital importance of parody,” despite fact that it is “often offensive”), *cert. denied*, 483 U.S. 1013 (1987).

¹⁸⁸ Among the numerous articles addressing the topic of fair use and parody, particularly eloquent encomiums to parody can be found in M. Chagares, *Parody or Piracy: The Protective Scope of the Fair Use Defense to Copyright Infringement Actions Regarding Parodies*, 12 COL. J. L. & ARTS 229, 230-31 (1988); Julie Bisceglia, *Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act*, 34 COPYRIGHT L. SYMP. (ASCAP) 1, 4-6 and 33-36 (1987); Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923, 923-24 (1985); Charles C. Goetsch, *Parody as Free Speech—The Replacement of the Fair Use Doctrine by First Amendment Protection*, 3 W. NEW ENG. L. REV. 39, 40-42 (1980).

“Autolight,” was an infringement not excused by the defense of fair use.¹⁸⁹ The Ninth Circuit’s conclusion was based on both the extensive degree of copying,¹⁹⁰ and the refusal to offer parody treatment more lenient than that accorded to the ordinary act of appropriation.¹⁹¹ Much has changed since then. Later cases, particularly in the Ninth and Second Circuits, have significantly refined the application of fair use to parody.

It is now generally accepted that, while there is no absolute parody defense, parody may qualify as fair use in appropriate circumstances.¹⁹² Moreover, the courts have accorded parody more favorable fair use treatment than the ordinary use in several respects. The most meaningful differences have emerged in the analysis of the first and fourth statutory factors.¹⁹³

¹⁸⁹ *Columbia Broadcasting System, Inc. v. Loew’s, Inc.*, 356 U.S. 43 (1958), *aff’d* 239 F.2d 532 (9th Cir. 1956). This case is discussed in THE FAIR USE PRIVILEGE, *supra* note 1, at 153-58.

¹⁹⁰ The court stated: “The fact that a serious dramatic work is copied practically verbatim, and then presented with actors walking on their hands or with other grotesqueries, does not avoid infringement of the copyright If the material taken by appellants from ‘Gas Light’ [sic] is eliminated, there are left only a few gags, and some disconnected and incoherent dialogue.” 239 F.2d at 536.

¹⁹¹ 239 F.2d at 537 (accepting the district court’s holding that “parodized or burlesqued taking is to be treated no differently from any other appropriation”).

¹⁹² *See Fisher v. Dees*, 794 F.2d 432, 435-36 (9th Cir. 1986) (describing the *Benny v. Loew’s* decision as “essentially repudiated by Congress’s recognition of parody in the notes to the Copyright Act of 1976,” and stating that “in *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979), we gave the *Benny* opinion a narrow interpretation and acknowledged that parody is a potential fair use subject to the multi-factor analysis codified in section 107”).

¹⁹³ Parody also benefits incidentally from two other aspects of fair use analysis, relating to the first and fourth statutory factors. On the first factor, in dealing with claims of bad faith based on the decision to proceed with the use after denial of permission by the copyright owner, courts may take into account the fact that copyright owners rarely consent to parody. *See Fisher v. Dees*, 794 F.2d at 437 (“To consider [the parodist] blameworthy because he asked permission would penalize him for this modest show of consideration. Even though such gestures are predictably futile, we refuse to discourage them”); *Pro Arts, Inc. v. Hustler Magazine, Inc.*, 787 F.2d 592 (6th Cir. 1986) (table), Nos. 85-3022, 85-3041 (unpublished per curiam opinion, filed March 25, 1986) (“The district court further erred in considering the fact that plaintiff would not consent to defendants’ use relevant to the fair use determination. Fair use does not require the copyright owner’s consent. Rather, fair use, as a statutory defense, anticipates that consent will not be forthcoming.”) (citations omitted).

On the fourth factor, a true parody is highly unlikely to fulfill the same demand in the market as the original, or even a licensed derivative work. *See supra* text accompanying notes 88-97. Accordingly, this factor is likely to weigh in favor of fair use in most parody cases. *Compare Pro Arts*, 787 F.2d 592 with *Acuff-Rose*, 972 F.2d at 1438-39. *Acuff-Rose’s* presumption of harm to the market is therefore even more inappropriate. *See supra* text at notes 175-84.

The remaining statutory factor, “the nature of the copyrighted work,” typically weighs against fair use in the context of parody. Most works parodied are entertainment properties, works that are highly creative. Moreover, they are virtually always publicly disseminated, as parodists almost by definition aim at well-known targets. Again, however, this is just one factor in the analysis; if given too much weight, few parodies could qualify as fair use.

In assessing the first factor, parody has been recognized as a productive use, providing a benefit to society—an aspect of the “purpose and character of the use” that weighs in favor of a finding of fair use.¹⁹⁴ Indeed, most courts examining parody fair use claims have found that the satiric purpose outweighed the commercial aspects of the use in evaluating the first factor, and have either refrained from applying the *Sony* “presumption” or have held it to be rebutted.¹⁹⁵

An exception to this approach is the Sixth Circuit’s opinion in *Acuff-Rose*. The district court had granted summary judgment to 2 Live Crew, finding that it was entitled to the fair use defense as a matter of law.¹⁹⁶ In examining the first statutory factor, the court had cited *Harper & Row*’s statement that a commercial purpose merely “tends to weigh against a finding of fair use,”¹⁹⁷ and noted that parody was a favored use, with many parodies more in the nature of commentary than commercial exploitation.¹⁹⁸

In its opinion reversing the district court and finding that 2 Live Crew’s use was not fair, the Sixth Circuit reprimanded the district court for its lenient approach to parody:

We agree that commercial purpose is not itself controlling on the issue of fair use, but find that the district court placed insufficient emphasis on the command of *Harper & Row*, wherein the Supreme Court expressly reaffirmed its earlier holding that “[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” Therefore, in analyzing the purpose and character of 2 Live Crew’s use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair. . . . Although in this case we do not set aside the district court’s conclusion that 2 Live Crew’s song is a criticism in the nature of a parody in the popular sense, we nevertheless find that the district court

¹⁹⁴ See Leval, *supra* note 49, at 1111 (characterizing parody as one type of “transformative” use).

¹⁹⁵ See, e.g., *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986); *Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981). See also Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 HARV. L. REV. 1395, 1408 (1984). In the above cases, the commercial aspect was the sale of the parody for money. The first factor balance may differ in situations where the degree of commerciality is greater, for example, where the parody is used to advertise a commercial product. See, e.g., *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826 (S.D.N.Y. 1990); *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986).

¹⁹⁶ *Acuff-Rose Music, Inc. v. Campbell*, 754 F. Supp. 1150 (M.D. Tenn. 1991).

¹⁹⁷ 754 F. Supp. at 1154 (quoting *Harper & Row*, 471 U.S. at 562).

¹⁹⁸ 754 F. Supp. at 1154.

erred in the process of determining that the criticism constituted a fair use of the copyrighted work. We find that the admittedly commercial nature of the derivative work—the *purpose* of the work being no less important than its *character* in the Act's formulation—requires the conclusion that the first factor weighs against a finding of fair use.¹⁹⁹

Under the Sixth Circuit's reasoning, parody is treated no differently from any ordinary use. If sold for money, it will be deemed commercial and presumptively unfair, with the first factor resolved against the parodist. Indeed, the majority opinion goes beyond any reasonable interpretation of *Sony* by holding that the first factor not only *may* but *must* be resolved against fair use where the use is commercial. This result ignores the value of parody as recognized by Congress, commentators and other courts (including the only other Sixth Circuit fair use opinion under the 1976 Act).²⁰⁰

The other advantage given to parody by the courts is in the treatment of the third statutory factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."²⁰¹ After some uncertainty in the early

¹⁹⁹ 972 F.2d at 1436-37 (citations omitted).

²⁰⁰ See *Pro Arts, Inc. v. Hustler Magazine, Inc.*, 787 F.2d 592 (6th Cir. 1986) (table), Nos. 85-3022, 85-3041 (unpublished per curiam opinion, filed March 25, 1986). In *Pro Arts*, the Sixth Circuit reversed a finding of copyright infringement, holding that the reproduction of the plaintiff's poster in the background of a photograph used in the defendant's advertisement constituted fair use. In an approach diametrically opposed to that in *Acuff-Rose*, the court of appeals stated:

[C]ommercial motivation, while relevant to the fair use inquiry, is not conclusive. . . . The commercial character of defendants' use must be weighed along with the other factors relevant to the fair use issue. The facts of the instant case caution against according too much weight to this factor. While the primary purpose of defendants' use . . . was commercial gain, it is apparent that a secondary purpose . . . was to parody the culture of the seventies.

Id. The court concluded, "In viewing 'the general commercial nature of defendants' use' as dispositive of the question of fair use, the district court incorrectly applied 17 U.S.C. § 107." *Id.*

²⁰¹ The majority in *Acuff-Rose* agreed with *Fisher v. Dees*, 794 F.2d 432, 438 n.4 (9th Cir. 1986), that "[t]he amount of the original work which is appropriated is a factual issue, but the question whether the taking is excessive under the circumstances is one of law." 972 F.2d at 1438. This holding misconstrues the nature of the inquiry under the third factor. As part of its *prima facie* case, the copyright owner must prove the defendant appropriated a substantial amount of protected material. *De minimis* uses do not rise to this level. Thus, at one end of the spectrum, we have a *de minimis* amount of copying or less, resulting in a directed verdict for the defendant. In the middle of the spectrum is the defendant's copying of a substantial amount, an issue that is routinely decided by juries. As an affirmative defense, fair use deals with the middle to upper end of the spectrum: a taking so substantial that, absent the defense, judgment for the copyright owner results. Analysis of the third fair use factor is but a continuation of the substantial similarity inquiry. See *Narell v. Freeman*, 872 F.2d 907, 914 (9th Cir. 1989). There is thus no reason why the third factor should be one solely for the court. Indeed, since fair use may be decided by a jury, *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir.), *cert. denied*,

cases,²⁰² the Second and Ninth Circuits have concluded that parody, in order to be effective, needs extra breathing room. Accordingly, they have held that parodists should be given additional leeway to use more of the copyrighted work than would be permitted the ordinary copier.²⁰³

Exactly how much more is a question no one has been able to answer, and perhaps no one can, given the fact-specific nature of fair use.²⁰⁴ Plainly there must be limits; not anything goes.²⁰⁵

459 U.S. 826 (1982), it is difficult to see how the *Fisher/Acuff-Rose* approach could work. The jury would be given the first, second, and fourth factors to decide, but not the third. The court would decide the third factor, and presumably then direct the jury to balance all the factors, taking into account the court's ruling.

²⁰² These early cases suggested a test allowing the parodist to take just enough to recall or conjure up the work parodied. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 757 (9th Cir. 1978), *cert. denied sub nom. O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979) ("courts have analyzed the substantiality of copying by a parodist by asking whether the parodist has appropriated a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire"); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.) ("[W]here, as here, it is clear that the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper.") (dictum), *cert. denied*, 379 U.S. 822 (1964); *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348, 350 (S.D. Cal. 1955) ("In historical burlesque a part of the content is used to conjure up, at least the general image, of the original. Some limited taking should be permitted under the doctrine of fair use, in the case of burlesque, to bring about this recalling or conjuring up of the original.").

²⁰³ See *Rogers v. Koons*, 960 F.2d 301, 311 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992); *Fisher v. Dees*, 794 F.2d 432, 438-39 (9th Cir. 1986); *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252, 253 n.1 (2d Cir. 1980) (per curiam) ("[T]he concept of 'conjuring up' an original came into the copyright law not as a limitation on how much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. A parody is entitled at least to 'conjure up' the original.").

²⁰⁴ Cf. Judge Learned Hand's observation in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931), referring to his "abstractions" test for separating idea from expression: "Nobody has ever been able to fix that boundary, and nobody ever can."

²⁰⁵ The Ninth Circuit has suggested that the amount permitted to be taken should depend on various factors, among them "the degree of public recognition of the original work, the ease of conjuring up the original work in the chosen medium, and the focus of the parody." *Fisher v. Dees*, 794 F.2d at 439. In the case of a song, greater leeway would be given than in the case of other works, such as the graphic arts. The court explained:

Like a speech, a song is difficult to parody effectively without exact or near-exact copying. If the would-be parodist varies the music or meter of the original substantially, it simply will not be recognizable to the general audience. This 'special need for accuracy' provides some license for 'closer' parody. . . . To be sure, that license is not limitless: the parodist's desire to make the best parody must be 'balanced against the rights of the copyright owner in his original expressions.'

Id. (quoting *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied sub nom. O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979)). See also *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) ("the fact that defendants' parodies were written in the same meter as plaintiffs' compositions would seem inevitable if the original was to be recognized"); *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031, 1035-36 (N.D. Ga.

Yet as long as the parody is different enough from the original to be identifiable as a separate work, one that would not serve as a satisfactory substitute for the original, substantial leeway should be given. Up to a point (probably the point where the works are no longer clearly differentiated),²⁰⁶ the more that is copied, the funnier the parody, providing multiple shocks of recognition in an incongruous context. Maybe a parodist should not be entitled to make the best parody possible,²⁰⁷ but the public also loses if only mediocre parodies can qualify as fair use.

2. What Is a Fair Use Parody?

Given these major advantages in the fair use analysis, the characterization of a use as parody is often quite significant. It is therefore critical to determine what qualifies a use as a parody for fair use purposes. A number of subsidiary questions may be raised.

First, what is the satirical target of the parody? Is it a comment on the plaintiff's work in particular, or a use of the plaintiff's work as a vehicle to make a humorous statement about society generally? A number of courts have held that the plaintiff's work must be at least in part an object of the parody for the parody to qualify for special fair use status.²⁰⁸ As long as it is liberally interpreted, this conclusion is appropriate. If the defendant is commenting on something that has nothing to do with the plaintiff's work, he has no need to use the plaintiff's work to make that comment. He can equally well create his own expression, or use material in the public domain.²⁰⁹ Without such a limitation on the parody defense, anyone's expression would be

1986) (in rejecting fair use defense for satirical version of popular soft-sculptured dolls, distinguishing *Fisher v. Dees* in part on ground that graphic arts require less close copying than musical works).

²⁰⁶ *Cf.* *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 494 (2d Cir. 1989): "[T]he keystone of parody is imitation. . . . A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is *not* the original and is instead a parody. To the extent that it does only the former but not the latter, it is not only a poor parody but also vulnerable under trademark law, since the consumer will be confused."

²⁰⁷ *See* *Walt Disney Prods. v. Air Pirates*, 581 F.2d at 758.

²⁰⁸ *See* *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992); *Fisher v. Dees*, 794 F.2d at 439 n.5; *MCA, Inc. v. Wilson*, 677 F.2d 180, 183-85 (2d Cir. 1981).

²⁰⁹ Fair use should not excuse the copying of a melody just because it is familiar or tuneful, to use as a vehicle for unrelated lyrics that will make people laugh. *See* *Fisher v. Dees*, 794 F.2d at 439 n.5 (describing purpose of defendant's copying in *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981), as "simply to reap the advantages of a well-known tune and short-cut the rigors of composing original music"). *Cf.* *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) (defendants created words to be sung to famous tunes; melodies referred to by title rather than copied).

fair game as a vehicle to make an unrelated statement.²¹⁰ In the absence of a need to use that particular work, there is inadequate justification for carving out a substantial chunk of the copyright owner's exclusive rights.

On the other hand, the relationship between the parody and the original need not be consanguineal. The parody could legitimately comment on other aspects of society as well if the plaintiff's work is lampooned in the process. It should also be sufficient if the plaintiff's work is associated in the public mind with the aspect of society commented on.²¹¹ Otherwise parodists would be severely constrained in their ability to satirize a distinct era or style. Nor does the parody have to be subtle, clever, or sophisticated. Even broad caricature or a simplistic poking of fun may merit treatment as parody;²¹² it is not for judges to impose on the public their own views of what constitutes good humor, any more than good art.²¹³

²¹⁰ The Second Circuit has concluded that

this is a necessary rule, as were it otherwise there would be no real limitation on the copier's use of another's copyrighted work to make a statement on some aspect of society at large. If an infringement of copyrightable expression could be justified as fair use solely on the basis of the infringer's claim to a higher or different artistic use—without ensuring public awareness of the original work—there would be no practicable boundary to the fair use defense. . . . The rule's function is to insure that credit is given where credit is due. By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.

Rogers v. Koons, 960 F.2d at 310.

Of course, the defendant's use might still qualify as fair upon a full analysis; it simply would not be afforded the more lenient treatment given parody. See Rogers v. Koons, 960 F.2d 301; Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. 124 (N.D. Ga. 1981) (rejecting defendant's claim that work was a parody, but evaluating the fair use defense).

²¹¹ For example, the Capitol Steps, a political satire musical group, has recorded a song, "Like a Suburban Drone," that cleverly uses Bob Dylan's famous song "Like a Rolling Stone." By substituting lyrics that describe the bourgeois, middle-class life now led by the people who may have associated themselves in the 1960s with Dylan's lyrics, the song lampoons those individuals precisely by its use of the original song. This type of use should be considered a parody for fair use purposes.

On the other hand, where a political satire group reproduces the music to a song that has no connection to the lyrics it creates, fair use is unlikely. There is not and should not be a *per se* rule favoring parody merely because the parodist's message is political. Each use must be evaluated on its own.

²¹² Cf. Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc., 886 F.2d 490, 495-96 (2d Cir. 1989) ("[P]arody may be sophisticated as well as slapstick; a . . . work is a parody if, taken as a whole, it pokes fun at its subject.").

²¹³ In the famous words of Justice Holmes:

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. At the one extreme some

While it should not be necessary for the plaintiff's work to be well-known, its degree of notoriety will bear on the credibility of a claim that the defendant's use is a parody.²¹⁴ Although it is theoretically possible that one would wish to satirize an unknown work, it is unlikely. The market for such a satire would be small indeed; rather, most purchasers would buy ignorant of the parody, unaware that there were two separate works involved, the plaintiff's and the defendant's.²¹⁵

Facts extrinsic to the nature of the defendant's work itself should not be considered. Thus, it is irrelevant whether the defendant's work is embodied in a traditional medium for parody, such as a satirical revue²¹⁶ or a comedy album,²¹⁷ as opposed to a single song on a non-comic album, or a single illustration or article in a serious magazine.²¹⁸ Nor should it matter whether the

works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903). The same principle applied in the context of parody was well expressed in *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301, 307 (App. Div. 1965): "Whether [the defendant's work] is good burlesque or bad, penetrating satire or blundering buffoonery, is not for us to decide. It is fundamental that courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases." See also *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964) ("While the social interest in encouraging the broad-gauged burlesques of *Mad Magazine* is admittedly not readily apparent, and our individual tastes may prefer a more subtle brand of humor, this can hardly be dispositive here") (citing *Bleistein*, 188 U.S. at 239).

²¹⁴ See *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993) (defendant artist's parody claim unconvincing where he testified that he was not familiar with subject of claimed parody); *Campbell v. Koons*, 1993 U.S. Dist. LEXIS 3957 (S.D.N.Y. filed April 1, 1993); *Yankee Publishing Inc. v. News Am. Publishing Inc.*, 809 F. Supp. 267, 281 (S.D.N.Y. 1992) (distinguishing *Rogers v. Koons*, 960 F.2d 301 (2d Cir.), *cert. denied*, 113 S. Ct. 365 (1992), as involving a finding of lack of veracity as to whether defendant was engaging in parody where parody treatment of original difficult to discern, object of parody not known to intended audience, and copying done in bad faith).

²¹⁵ Cf. definition in *Clemmons*, *supra* note 95, at 12:

A parody is a work that transforms all or a significant part of an original work of authorship into a derivative work by distorting it or closely imitating it, for comic effect, in a manner such that both the original work of authorship and the independent effort of the parodist are recognizable.

²¹⁶ See, e.g., *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F.2d 252 (2d Cir. 1980) (per curiam) (song used as part of "Saturday Night Live" television show).

²¹⁷ See, e.g., *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) (song on comedy album entitled, "Put It Where the Moon Don't Shine").

²¹⁸ Cf. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir.), *cert. denied*, 483

defendant has a track record as a parodist.²¹⁹ First-time parody is equally as deserving of protection as the parody of experience, and even a serious artist is entitled to an occasional foray into humor.²²⁰ Parodists must get their start somewhere, and the public benefits in exactly the same way.

The treatment of the question of the work's status as parody by the Sixth Circuit in *Acuff-Rose* can best be described as schizophrenic. The majority began its fair use discussion by announcing that, for purposes of the opinion, it would accept the district court's finding that 2 Live Crew's song was a parody of "Oh, Pretty Woman."²²¹ It immediately undercut this statement, however, with a lengthy footnote explaining that it did so "with considerable reservation, as the district court's parody analysis [did] not, in our view, comport with proper analysis of that term."²²²

U.S. 1013 (1987) (parody of plaintiff's catalogue within otherwise non-humorous adult magazine).

²¹⁹ Cf. *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031, 1034 (N.D. Ga. 1986) ("Neither are the Garbage Pail Kid stickers merely one of a series of spoofs of various different products, as defendant has produced in the past, nor a single cartoon or editorial in a broader satirical product such as *Mad Magazine*.").

²²⁰ Many serious and well-known writers have been known to "tr[y] their hand at parody." Dorsen, *supra* note 188, at 952-53 and n.141 (listing as examples Shakespeare, Pope, Fielding, Austen, Hemingway, and Faulkner).

²²¹ 972 F.2d at 1435. The district court's parody finding, as explicitly accepted by the court of appeals, extended to both the work's character and its purpose. *Id.*

²²² *Id.* n.8. The basis for the disagreement was the Sixth Circuit's inability to "discern any parody of the original song." The Court explained:

In our opinion, this is not a new work which makes ridiculous the style and expression of the original, although there is plainly an element of the ridiculous to the new work. We cannot see any thematic relationship between the copyrighted song and the alleged parody. The mere fact that both songs have a woman as their central theme is too tenuous a connection to be viewed as critical comment on the original.

Id. at 1436 n.8. In a persuasive dissenting opinion, Judge Nelson took the opposite view, concluding that

the 2 Live Crew song is a quintessential parody. . . . [It] both imitates and distorts the original work for comic or satiric effect, and does so in such a way that both the original work and the work of the parodist are readily recognizable. The parody (done in an African-American dialect) was clearly intended to ridicule the white-bread original—and if a higher criticism is necessary to qualify the derivative work as true parody, such criticism is readily discernible.

Id. at 1441-42. Indeed, the majority's inability to see 2 Live Crew's version of the song as parody is difficult to understand. It suggests a certain myopia when faced with crude satire or the humorous perspective of a different culture.

It is also interesting to note that *Acuff-Rose* presents the relatively rare situation of a song parody where the music is parodied as well as the words. As described by the district court, "[t]he parody also employs a number of musical devices that exaggerate the original and help to create a comic effect," including a heavily distorted "scrapper" sound, vocalists singing simultaneously in different keys, and an annoyingly repetitious use of the original's distinctive bass riff. 754 F. Supp. at 1155. In the handful of existing song parody cases, the humor has generally focused on the lyrics. See *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *Elsmere*

And the court's analysis of the fair use defense treated the defendants' work as a typical commercial use, refusing to give any consideration to its status as parody.²²³

An additional question that has been raised in analyzing parody is whether the defendant's work is *disqualified* for special treatment by pornographic, vulgar or otherwise offensive content? Arguably such content might be viewed as one aspect of the "character" of the work. Some courts appear to have concluded, at least implicitly, that the answer is yes.²²⁴ Again, such a conclusion impermissibly involves the court in evaluating aesthetic content. Copyright law should be applied to further copyright values, not unrelated values that may be protected, if at all,

Music, Inc. v. National Broadcasting Co., 623 F.2d 252 (2d Cir. 1980) (per curiam). Of course, satirizing the lyrics alone would be enough to make the resulting work a parody of the entire song. See 17 U.S.C. § 102(a)(2) (1978) (category of "musical works" subject to copyright protection includes "any accompanying words").

²²³ Thus, the Sixth Circuit found that the first statutory factor weighed against fair use because of the commercial nature of the use, without giving the customary weight to the character of the work as parody. See *supra* text accompanying note 200. On the third factor, the court gave the defendants no extra leeway. Noting the district court's finding that no more was taken than necessary to accomplish the defendants' parodic purpose, the court of appeals stated, "Near verbatim taking of the music and meter of a copyrighted work without the creation of a parody is excessive taking," 972 F.2d at 1438, an odd statement in the context of its previously stated acceptance of the finding that the work was a parody. The sole explanation given for rejecting the district court's finding on this factor was the cryptic and inaccurate statement that "the [district] court was using the term parody in its popular [as opposed to legal] sense." *Id.* See also *id.* at 1435 (positing a distinction between the popular definition of "parody" and its "statutory definition"). The district court clearly held that the use was a parody in the legal sense. See 754 F. Supp. at 1154-55.

²²⁴ See *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom. O'Neill v. Walt Disney Prods.*, 439 U.S. 1132 (1979); *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (N.D. Ga. 1986); *DC Comics Inc. v. Unlimited Monkey Business, Inc.* 598 F. Supp. 110 (N.D. Ga. 1984); *Walt Disney Prods. v. Mature Pictures Corp.*, 389 F. Supp. 1397 (S.D.N.Y. 1975). *But see Pillsbury Co. v. Milky Way Prods., Inc.*, 215 U.S.P.Q. 124, 131 (N.D. Ga. 1981) ("The Copyright Act . . . does not expressly exclude pornographic materials from the parameters of the fair use defense The character of the unauthorized use is relevant, but, in the court's judgment, the fact that this use is pornographic in nature does not militate against a finding of fair use."). It is arguable that the Sixth Circuit was influenced by similar reasoning in examining the undeniably crude lyrics in *Acuff-Rose*, despite the district court's finding that "2 Live Crew's version is neither obscene nor pornographic." 754 F. Supp. at 1155 n.4. (By 2 Live Crew's standards, they may have been, as the title of their album suggests, "As Clean As They Wanna Be.")

The Second and Ninth Circuits have so far both declined to take an explicit position on this issue. See *Fisher v. Dees*, 794 F.2d 432, 437 ("Assuming without deciding that an obscene use is not a fair use, . . . we conclude, after listening to it, that the parody is innocuous—silly perhaps, but surely not obscene or immoral."); *Warner Bros., Inc. v. American Broadcasting Cos.*, 720 F.2d 231, 242 n.8 (2d Cir. 1983) ("We have no occasion in this case to consider the limiting principle that arises when attempts at parody take the form of scatological humor."). Cf. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26 (1st Cir.), *cert. denied*, 483 U.S. 1013 (1987) (repudiating similar principle in the context of trademark parody).

through other bodies of law.²²⁵

In light of the acceptance of parody as a type of use to be encouraged, the Sixth Circuit's use of the "double whammy" in *Acuff-Rose* is doubly destructive. Not only does it perpetuate a disturbing development in fair use analysis generally, it also distorts the evolving body of parody law.

III. CONCLUSION

As difficult as it is to apply, fair use must remain a sensitive, flexible doctrine, responsive to the facts of each individual case. Presumptions, formulas and rigid rules are foreign both to the doctrine's traditional nature and to its statutory formulation.

It might be argued that this approach leaves courts free simply to follow their gut instincts, legitimized by the recitation of statutory terminology. Some might prefer a more objective framework, governed by fixed criteria. Such a preference is entirely rational; greater predictability would unquestionably assist second authors in creating and lawyers in advising them.²²⁶

But equity and reasonableness, the essence of fair use, cannot be cast in stone, and Congress has wisely eschewed such an approach. Within the guidance of the statutory factors, and judicial precedent applying those factors, Congress has instructed that the courts are to continue a common law, fact-specific approach. The desired open-endedness is necessary if the fair use doctrine is to preserve its function of calibrating the optimal balance of public interests on both sides of the copyright scale.

²²⁵ Cf. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1289-90 (1991) (perceived unfairness of allowing free rides through copying of material collected through great effort and investment cannot be remedied under copyright law, which implements values of creativity, not fairness). Concerns over the content of a parody may be addressed through the invocation of obscenity laws, or an action for defamation, disparagement or tarnishment.

²²⁶ The negative effects of the doctrine's lack of predictability have been noted by a number of commentators. See, e.g., Leval, *supra* note 49, at 1106-07.

