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Analyzing Fair Use Claims: A Quantitative and Paradigmatic Approach

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ANALYZING FAIR USE CLAIMS: A QUANTITATIVE AND PARADIGMATIC APPROACH

MATTHEW W. WALLACE*

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I. INTRODUCTION

The doctrine of fair use is one of the most widely-discussed¹

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1. See, e.g., NEIL BOORSTYN, COPYRIGHT LAW § 5.2 (1981 & Supp. 1988); PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE ch. 10 (1989); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (1985); 2A THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 25.07 (1990); Zechariah Chafee Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503 (1945); Jay Dratler Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233 (1988); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988); 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 (1982); Timothy Kevane, *Fair Use in Jackson v. MPI Home Video: Why Bother?*, 10 LOY. ENT. L. J. 595 (1990); Newman, *Not the End of History: The Second Circuit Struggles with Fair*

and hotly debated² areas of copyright law. This is not surprising, because it is "an equitable rule of reason"³ without precise boundaries, rather than a bright line rule of law. Given the fact that it is an equitable, rather than a legal, doctrine, "fair use" will always defy precise definition by statute or analysis.⁴ Many unsuccessful attempts have been made to define the doctrine.⁵ The most widely accepted definition is that fair use is "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."⁶ This definition on its face is of little practical utility, and the courts' treatment of fair use is diverse, confusing, and often contradictory.⁷

The Supreme Court has had enormous difficulty defining the concept,⁸ which has resulted in contradictory opinions. In 1984, the Court first wrestled with fair use,⁹ and, over a strident dissent,

Use, 37 J. COPYRIGHT SOC'Y I (1990). See also WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1985); LEON E. SELTZER, *EXEMPTIONS AND FAIR USE IN COPYRIGHT* (1978); James L. Oakes, *Copyrights and Copypremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983 (1990).

2. See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990), and Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990), for the debate between Judge Leval and Professor Weinreb.

3. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).

4. See Weinreb, *supra* note 2, at 1161. Professor Weinreb suggests that the fluid definition of fair use is an advantage:

The reference to fairness in the doctrine of fair use imparts to the copyright scheme a bounded normative element that is desirable in itself. It gives effect to the community's established practices and understandings and allows the location of copyright within the framework of property generally. Adjudication according to a standard of fairness calls for the exercise of great judicial skill, or art.

See also *Sony*, 464 U.S. at 448 n.31.

5. One observer attempted to define a fair use as one "technically forbidden by the law, but allowed as reasonable and customary on the theory that the author must have foreseen it and tacitly consented to it." RICHARD C. DEWOLF, *AN OUTLINE OF COPYRIGHT LAW* 143 (1925). However, this definition is inconsistent with the practical application of the doctrine because many uses considered "fair" are expressly rejected by the copyright holder. Compare *Towle v. Ross*, 32 F. Supp. 125, 127 (D. Or. 1940) (there is no fair or non-competing use of copyright material unless by consent) (footnote omitted) with *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980) (plaintiffs unsuccessfully sought to prohibit parody of "I Love New York" jingle, because Saturday Night Live version acerbically attacked the slick pro New York advertising).

6. H. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944).

7. See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977) (fair use "cannot be determined by resort to any arbitrary rules or fixed criteria."), *cert. denied*, 434 U.S. 1013 (1978).

8. See *Dratler, supra* note 1, at 260.

9. Before 1984, the Supreme Court had twice affirmed fair use rulings without com-

held that the wholesale public copying of television programs for later viewing represented a fair use.¹⁰ However, less than a year later, the same Court held that a magazine's use of just 300 words from an unpublished 200,000-word manuscript was an impermissible infringement of the author's copyright.¹¹ These sharply-divided opinions,¹² with badly articulated rationales,¹³ have offered little guidance to lower courts¹⁴ and none at all to the lawyer.

The purpose of this article is twofold. First, it attempts to acquaint the lay practitioner¹⁵ with the intricacies of the fair use defense in various factual situations.¹⁶ Second, it presents a novel approach to pleading fair use issues.¹⁷ To accomplish this goal, it has been divided into three sections.¹⁸ Part II begins with an historical analysis of the fair use doctrine, carefully examining the procedural ramifications of invoking the fair use defense. Part III is a detailed analysis of the fair use statute.¹⁹ Part IV analyzes the different factual paradigms, which courts have created in applying

ment in *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd without opinion*, 420 U.S. 376 (1975), and *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd without opinion sub nom. Columbia Broadcasting Sys. Inc. v. Loew's Inc.*, 356 U.S. 43 (1958).

10. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). This decision inspired reams of negative comment. *See, e.g.*, Dratler, *supra* note 1, at 261-88; Fisher, *supra* note 1, at 1667-95. The practical utility of the decision has also inspired defenders. *See Weinreb, supra* note 2, at 1155 ("The overwhelming fact, of which everyone was aware, is that time-shifting [viewing a prior taped program] had become for the public as well as the programmers an ordinary, proper activity. The millions of viewers who taped shows for later viewing had not the least sense that they were doing anything that was forbidden or improper.").

11. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). This decision, also sharply divided, has inspired its share of negative comment. *See, e.g.*, Dratler, *supra* note 1, at 270-76.

12. *Sony* was a 5-4 decision with Justices Blackmun, Marshall, Powell, and Rehnquist dissenting. *Nation Enterprises* was decided by a 6-3 vote with Justices Brennan, White, and Marshall dissenting.

13. *See Weinreb, supra* note 2, at 1153-54 ("Justice Stevens' arguments in favor of fair use . . . are hopelessly inadequate.").

14. *Compare Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875 (S.D. Fla. 1978) (defendant's use of copy of T.V. Guide for an advertising comparison was not a fair use) *with Consumers Union of United States, Inc. v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983) (concluding that it was fair use for defendant to quote from Consumer's Union's favorable report of defendant's product).

15. This includes any lawyer who is attempting to untangle the Gordian knot of the fair use doctrine for the first time.

16. *See infra* text accompanying notes 181-395.

17. For an in-depth discussion of techniques utilized to support the numbers quoted herein, see the Appendix.

18. *See discussion infra* parts IIA, IIIA.

19. 17 U.S.C. § 107 (1988). *See infra* text accompanying note 34.

the fair use defense.²⁰

II. THE FAIR USE DEFENSE

A. Historical Roots

In 1709, the English Parliament created the Statute of Anne in order to limit to a term of years the formerly perpetual rights held by publishers of books and sheet music.²¹ Several decades later, the first judicial declaration of the doctrine of fair use was made in *Gyles v. Wilcox*.²² In *Gyles*, the court held that an abridgement of a longer work represented a fair use.²³

Following the American Revolution, the newly-minted United States incorporated much of English common law into its legal system,²⁴ which included English notions of copyright.²⁵ The first American judicial recognition of the fair use doctrine is found in two early American opinions drafted by Justice Story.²⁶ In *Folsom v. Marsh*,²⁷ Justice Story laid out the basis of what was to become the American fair use defense, noting that:

[W]e 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.²⁸

Subsequent courts adopted Story's broad analysis.²⁹ Indeed, courts continue to cite him with approval today.³⁰

Over the next 125 years, courts continued to wrestle with fair

20. See *infra* text accompanying notes 181-395.

21. 12 Anne ch. 19 (1709); Patry, *supra* note 1, at 6-17.

22. 26 Eng. Rep. 489 (1740).

23. *Id.* at 490.

24. This is especially true in light of *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).

25. Fair use can be fairly read into the Constitution's grant of copyright powers to Congress: "Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . ." U.S. CONST. art. I, § 8, cl. 8.

26. Two years before the acclaimed *Folsom* opinion, 9 F. Cas. 342 (C.C.D. Mass. 1841), Story considered the protection to be given compilations of notes in a Latin grammar in *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839).

27. 9 F. Cas. 342 (C.C.D. Mass. 1841).

28. *Id.* at 348.

29. See, e.g., *Stowe v. Thomas*, 23 F. Cas. 201, 207 (C.C. E.D. Pa. 1853) (The German translation of *Uncle Tom's Cabin* did not infringe author's rights because defendant did not use the same "language in which the conceptions of the author are clothed.")

30. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 550 (1985). But see Goldstein, *supra* note 1, at § 10.1 n.5.

use. Judges complained that the "doctrine is entirely equitable and is so flexible as virtually to defy definition."³¹ In 1955, as part of a wholesale revision of the 1909 Copyright Act, Congress began studying the doctrine,³² which was eventually codified in section 107 of the 1976 Copyright Act.³³ Section 107 states as follows:

Notwithstanding the provisions of section 106, 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; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.³⁴

The first sentence of section 107 lists the following six uses that may bring the unauthorized reproduction of a copyrighted work within its protection: "criticism, comment, news reporting, teaching . . . scholarship or research."³⁵ This laundry list served to codify several longstanding applications of the fair use defense.³⁶ The second part of this section, 17 U.S.C. § 107 (1-4), sets out four

31. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

32. The best congressional study is Alan Latman, *Fair Use of Copyrighted Works, Copyright Study No. 14*, 86 Cong., 2d Sess. (Comm. Print 1960). The Legislative fact finding leading up to the 1976 bill is well described in PATRY, *supra* note 1, at 213-319.

33. 17 U.S.C. § 107 (1988). See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65, *reprinted* in 1976 U.S. Code Cong. & Admin. News 5659 [hereinafter *House Report*] (fair use is "given express statutory recognition for the first time in section 107").

34. 17 U.S.C. § 107 (1988).

35. *Id.* The *House Report*, *supra* note 33, also includes some specific examples: "quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; . . . reproduction by a teacher or a student of a small part of a work to illustrate a lesson; . . . incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported." *Id.* at 65.

36. Parody, for example, has long enjoyed protection under the fair use exception. See, e.g., *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964), *cert. denied*, 379 U.S. 822 (1964). In *Berlin*, a *Mad Magazine* parody of Irving Berlin songs was protected by the fair use defense.

nonexclusive factors to be used to determine whether a particular use of a copyrighted work is "fair."³⁷ These factors, which echo Justice Story's opinion in *Folsom*,³⁸ had been frequently discussed in case law immediately prior to the 1976 Act,³⁹ and reflect Congressional intent to codify the doctrine as it then existed, without enlarging or contracting its scope.⁴⁰ The House Report states as follows:

However, the endless variety of situations and combinations of circumstances that can rise [sic] 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.⁴¹

Empirical research provides evidence that, as applied, 17 U.S.C. § 107's codification of common law fair use has neither expanded nor reduced the boundaries of the doctrine.⁴² In cases involving fair use claims before 1976, the courts found a viable fair use defense in 37.2% of cases in which it was invoked. This compares with a rate of 37.5% in cases following the 1976 statute.⁴³ The difference of less than half of a percentage point represents a statistically insignificant distinction. Further, a graph of these results over time reveals no discernable trend or change in the pat-

37. Commentators have long disagreed whether any other factors beyond these four exist. See *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985) (Justice O'Connor's opinion broadly hints that the way in which *Nation Enterprises* acquired the *Ford memoirs* weighed into the finding against fair use.). The most popular alternative factor is the possible expansion of fair use under the First Amendment. See generally Goldstein, *supra* note 1, at § 10.3, and the good or bad faith of the alleged infringer.

38. See *supra* text accompanying note 27.

39. See, e.g., *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339, 350 (N.D. Ohio 1969); *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 145 (S.D.N.Y. 1968) (quoting H.R. 2512, 90th Cong., 1st Sess. (1967) (codified at 17 U.S.C. § 107 (1988)).

40. HARRY G. HENN, *COPYRIGHT LAW: A PRACTITIONER'S GUIDE* 181 (1988). See also *Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir. 1977).

41. *House Report*, *supra* note 33, at 66. The Supreme Court expressly endorsed this notion in *Nation Enterprises*, 471 U.S. at 549 ("The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine.").

42. See Appendix, for details of the empirical procedure.

43. The case sample considers cases following 1978, the date on which section 107 became effective.

tern.⁴⁴ These facts indicate that the scope of the common law fair use doctrine was successfully translated into statutory form via the 1976 Act⁴⁵

B. Procedural Aspects

Before analyzing the four statutory factors in detail,⁴⁶ several procedural aspects of the fair use defense are worth noting. First, fair use is an affirmative defense which must be pleaded and proved by the alleged infringer.⁴⁷ At least one court has refused to read a fair use defense into pleadings that did not explicitly contain one.⁴⁸ The court stated that the "doctrine of fair use . . . was meant to be used and has only been used, as a defense in infringement actions."⁴⁹ The court went on to note that fair use would not excuse a technical failure to establish a copyright.⁵⁰ In dismissing the fair use doctrine, the district judge noted that the "defendant can not cite a single authority to support its unique claim that the doctrine can be asserted to excuse a failure to put copyright notice on copies of a work of art intended for distribution to the press."⁵¹

Further, the fair use defense must be clearly pleaded. In *Dallas Cowboy Cheerleaders v. Scoreboard Posters, Inc.*,⁵² the judge chided the defendants that "[i]t may well be that if the parties had developed their proof instead of rushing from this most preliminary hearing to appeal the defendants' fair use defense might prevail."⁵³ The court, while clearly sympathetic, refused to read the defense into the pleadings. "Nothing beyond an unelaborated invocation of the term 'parody' was ever put before the district court,

44. See Appendix.

45. See *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980) (The legislature "in no way intended to depart from Court-created principles or to short-circuit further judicial development.").

46. See *infra* text accompanying notes 93-166.

47. Fair use defense is a complete defense to an infringement action. See, e.g., *Association of Am. Medical Colleges v. Mikaelian*, 571 F. Supp. 144, 151 (E.D. Pa. 1983) ("Since the fair use exception to the Copyright Act is an affirmative defense to a suit for copyright infringement, the party asserting the exception bears the burden of production and persuasion to show that the exception (and the defense) is applicable."), *aff'd*, 734 F.2d 3 (3d Cir. 1984). However, the statute itself is not explicit on this point. See GOLDSTEIN, *supra* note 1, at § 10.1.5. See also PATRY, *supra* note 1, at 477-78 n.4.

48. *Letter Edged in Black Press, Inc. v. Public Building Comm'n of Chicago*, 320 F. Supp. 1303 (N.D. Ill. 1970).

49. *Id.* at 1311.

50. *Id.*

51. *Id.*

52. 600 F.2d 1184 (5th Cir. 1979).

53. *Id.* at 1188.

and we cannot fault the court if it found the simple allusion to the concept of parody insufficient to shift the calculus of probability in the defendants' favor."⁵⁴

One commentator has observed that "if the defendant discharges its burden on one or more of section 107's four factors, the burden may shift to the plaintiff to prove that the defendant's use was unfair."⁵⁵ However, another commentator, William Patry, reaches the opposite result by relying on the Supreme Court's opinion in *Sony Corp. of America v. Universal City Studios, Inc.*,⁵⁶ regarding commercial uses.⁵⁷ According to Patry, "procedurally, commercial uses must overcome two presumptions: (a) that the defense itself is available, and (b) that, as regards the fourth factor, a likelihood of future harm does not exist."⁵⁸

These facts can be alleged and the affirmative defense established at any stage allowed by the Federal Rules of Civil Procedure.⁵⁹ Fair use often is the basis of dispositive motions for either summary judgment⁶⁰ or declaratory judgment.⁶¹ The outlines of fair use may also be raised at the preliminary injunction hearing.⁶²

Empirical analysis shows that over 68% of all fair use decisions are made following either a summary judgment motion or a preliminary injunction hearing.⁶³ The following table details the various stages of litigation at which a court has made a final decision as to the validity of a fair use defense:

STAGE OF LITIGATION	% OF FINAL DECISION
Motion to dismiss/strike	9.9%
Preliminary Injunction	30.5%
Declaratory Judgment	1.5%
Summary Judgment	38.2%
Trial	16.8%
J.N.O.V.	3.1%

Motions to dismiss are rarely fertile ground for resolution of the fair use defense. For example, one judge determined that while

54. *Id.*

55. GOLDSTEIN, *supra* note 1, at § 10.1.5.

56. 464 U.S. 417 (1984). *See infra* text accompanying notes 152-54.

57. *See infra* text accompanying notes 155-76.

58. PATRY, *supra* note 1, at 478.

59. *See, e.g.*, FED. R. CIV. PRO. 8(c).

60. *See infra* text accompanying notes 66-72.

61. *See infra* text accompanying note 80.

62. *See generally* NIMMER, *supra* note 1.

63. For details of the empiricism underlying the conclusion, see the Appendix.

fair use may be appropriately determined on summary judgment, it is not relevant subject matter for a motion to dismiss.⁶⁴

Fair use defenses are more commonly decided on motions for preliminary injunction.⁶⁵ Because the grant or denial of a preliminary injunction so drastically affects negotiating positions of both parties, it is critical that the affirmative defense be clearly and convincingly demonstrated at this stage of the litigation.

More fair use defenses are resolved at the summary judgment stage than at any other.⁶⁶ This is unusual, given district courts' traditional reluctance to grant summary judgment.⁶⁷ Summary judgment is proper only if there is "no genuine issue as to any material fact" in dispute.⁶⁸ The subtle weighing of equitable factors inherent in fair use cases makes summary judgment a difficult issue for the judge. Paul Goldstein divides the summary judgment process in a fair use case into two steps:⁶⁹ First, "the question whether a defendant's use is for purposes such as criticism, comment, news reporting, teaching, scholarship or research, and thus comes within the scope of fair use under the first sentence [of section 107], is particularly amenable to disposition as a matter of law."⁷⁰ Further, Goldstein concludes that if the defendant cannot demonstrate this, "summary judgment for the plaintiff is appropriate."⁷¹ Second, if "the defendant's use comes within the scope of fair use, the court must make an essentially factual determination on each of the four factors."⁷²

Historically, in part because fair use is an equitable doctrine

64. *Chicago Lawyer, Ltd. v. Forty-Sixth Ward Regular Democratic Org.*, 220 U.S.P.Q. 511 (N.D. Ill. 1982). *But see Broadway Music Corp. v. F-R Publishing Corp.*, 31 F. Supp. 817 (S.D.N.Y. 1940) (motion to dismiss allowed on basis of fair use defense). Many of these earlier decisions (1938-1950) still bear the hallmarks, both in practice and decision, of a slow adjustment to notice pleading and the Federal Rules. *See generally* JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 5.8 (1985).

65. *E.g.*, *Pacific & S. Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984); *D.C. Comics, Inc. v. Crazy Eddie, Inc.*, 205 U.S.P.Q. 1177 (S.D.N.Y. 1979).

66. *See* chart on page _____.

67. District courts have become less reluctant to grant summary judgment following 1986 Supreme Court decisions broadly expanding the reach of summary judgment. *See generally* Matthew W. Wallace, Comment, *Overruling Tradition: Summary Judgment in the Eleventh After 1986*, 41 MERCER L. REV. 737 (1990), for an analysis of these changes in the 11th Circuit.

68. FED. R. CIV. PRO. 56(c).

69. GOLDSTEIN, *supra* note 1, at § 10.1.5.

70. *Id.*

71. *Id.* Goldstein's analysis is, at this point, a bit too rigid and ignores the equitable nature of the fair use doctrine. The list of six uses in the first sentence of 17 U.S.C. § 107 is not designed to be exhaustive and Goldstein's interpretation, would not allow for fair uses.

72. *Id.*

without precise legal boundaries, courts concluded that when there was any doubt, summary judgment in these cases would be improper.⁷³ Many judges also opposed pre-trial resolution of fair use defenses, because, as one noted: "On the whole, I am persuaded that the determination of the 'fair use' should not be resolved on affidavits but is best left to the trial judge."⁷⁴

Courts have, however, become more willing to grant summary judgment when both parties seek it.⁷⁵ The issue can thus be considered ripe for decision on summary judgment when both parties make cross-motions for summary judgment.⁷⁶ When "the facts are fully exposed without dispute and both sides agree that summary judgment is proper, each asking for such judgment" the issue may be resolved in this manner.⁷⁷ Infrequently, fair use may arise on declaratory judgment.⁷⁸ Such a motion, however, must be clear as to the facts and record.⁷⁹ A declaratory judgment in favor of fair use can be made.⁸⁰

Despite the considerable confusion in cases like *Salinger v. Random House, Inc.*⁸¹ and *New Era Publications International v. Henry Holt and Co.*,⁸² as well as the numerous, confusing and often contradictory commentators,⁸³ trial court determinations regarding fair use are safer on appeal than are other types of civil cases.⁸⁴ Empirical research conducted for this Article revealed that

73. *E.g.*, *Thompson v. Gernsback*, 94 F. Supp. 453, 454 (S.D.N.Y. 1950) ("At least, the court entertains a doubt in that regard and for that reason this motion [for summary judgment] is denied."). *See also* *D.C. Comics Inc. v. Reel Fantasy, Inc.*, 696 F.2d 24, 28 (2d Cir. 1982) (revocation of summary judgment where defense cannot be held valid as a matter of law).

74. *New York Tribune v. Otis & Co.*, 39 F. Supp. 67, 68 (S.D.N.Y. 1941). *See also* *Dellar v. Samuel Goldwyn*, 104 F.2d 661 (2d Cir. 1939).

75. *See* *Dow Jones & Company, Inc. v. Board of Trade of the City of Chicago*, Copy L. Rep. P 25,411 (E.D. Ill. 1982) (summary judgment on fair use issue is improper unless both parties seek it). *See also* *Higgins v. Baker*, 309 F. Supp. 635 (S.D.N.Y. 1970).

76. *See, e.g.*, *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964).

77. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144 (S.D.N.Y. 1968).

78. *FED. R. CIV. P.* 57.

79. *See* *Public Affairs Assocs., Inc. v. Rickover*, 284 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962), *on remand*, 268 F. Supp. 444 (D.D.C. 1967).

80. *See* *Bruzzone v. Miller Brewing Co.*, 202 U.S.P.Q. 809 (N.D. Cal. 1979).

81. 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987). *See* Judge Leval's article, *supra* note 2. Judge Leval, who has had two fair use opinions reversed, discusses his rationales at length.

82. 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir.), *reh'g denied*, 884 F.2d 659 (2d Cir. 1989).

83. *See supra* note 1.

84. To date, no comprehensive study of rates of reversal on appeal for fair use claims has been published.

78.6% of all cases appealing fair use issues were affirmed,⁸⁵ compared to an affirmance rate of 64% in all civil claims.⁸⁶ The empirical analysis also shows that a slightly greater percentage of nonfair uses than fair uses were affirmed.

AFFIRMANCE AND REVERSAL RATES

FAIR USE AFFIRMED	NON-FAIR USE AFFIRMED
73.7%	82.6%
FAIR USE REVERSED	NON-FAIR USE REVERSED
26.3%	17.4%

These high affirmance rates indicate that there is substantial agreement between judges in the court of appeals and the district courts.⁸⁷

It is worth noting, however, that the appellate courts have the power to fully review each of the section 107 statutory factors.⁸⁸ Appellate courts may also decide the issue based on the lower court's factual findings. The Eleventh Circuit, for instance, has held that "[f]air use is probably best characterized as a mixed question of law and fact that can be decided by an appellate court if the trial court has found facts sufficient to evaluate each of the four statutory factors."⁸⁹

The Congressional codification of the fair use doctrine is, on the whole, a marvel of drafting. The statute establishes broad interpretive guidelines, yet retains substantial flexibility.⁹⁰ The exact boundaries of fair use are undefinable. As Professor Dratler noted:

In the twilight zone of fair use, there are no statutory rules, only factors for consideration. Therefore the form of a judicial opinion may be as important as its substance. . . . Courts do not advance Congress' purpose by omitting portions of the congressional prescription. Nor do they advance it by mixing one fraction with another, adulterating the fractions with extraneous

85. See Appendix for methodology.

86. See Federal Judicial Center, *Summary Judgment Practice in Three District Courts* 9 (1987).

87. This, in itself, also indicates the high caliber of judges that populate the federal bench.

88. *E.g.*, *Puma Indus. Consulting, Inc. v. Daal Assocs.*, 808 F.2d 982, 987 (2d Cir. 1987).

89. *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984).

90. Section 107 states in pertinent part: "In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include . . ." subsections (1) through (4). 17 U.S.C. § 107 (1988). This opens the door to a broad range of additional factors, some of which are discussed *infra* notes 167-80.

matter, or neglecting to weigh and mix all the fractions in light of copyright policy.⁹¹

Dratler's analysis points to the necessity that courts speak in a common language. By authoring opinions centered around these four statutory factors, courts can better explain to the practitioner exactly why they held for or against the fair use defense.⁹²

Before discussing the various factual paradigms, this Article will analyze in detail each of the factors enumerated in section 107(1-4) in order to illustrate quantitatively and qualitatively how the courts utilize them.

III. 17 U.S.C. § 107 - THE FAIR USE STATUTE

A. *The Purpose of the Use*

The first statutory factor of section 107 requires that courts analyze "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."⁹³ "Purpose and character" implicitly includes factors such as "criticism, comment, news reporting" and others,⁹⁴ but it is the commercial use/noncommercial use distinction that looms largest in calculating the weight to be given to § 107(1).⁹⁵

The Supreme Court has held that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."⁹⁶ A year later, the Court further refined its analysis: "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 material without paying the customary price."⁹⁷

This commercial/noncommercial distinction extends to other

91. Dratler, *supra* note 1, at 288.

92. Not all courts engage in a point-by-point discussion of each factor enumerated in section 107(1-4). However, the Second Circuit, by and large, attempts to discuss each of the statutory factors in reaching its decisions. Significantly, the Supreme Court failed to do this in *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984), and *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

93. 17 U.S.C. § 107(1) (1988).

94. 17 U.S.C. § 107.

95. See generally NIMMER, *supra* note 1, at § 13.05[a][1].

96. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984). See also *Sony's* articulation of section 107(4), *infra* notes 153-54 and accompanying text.

97. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

nonprofit uses. In *Weissmann v. Freeman*,⁹⁸ for example, an educational syllabus written and used by a researcher and his assistant was unfairly used by the researcher when he deleted his assistant's name and distributed it at a conference on nuclear medicine.⁹⁹ The district court struck down arguments by the defendant that a use without economic gain was always noncommercial.¹⁰⁰ The court reasoned as follows:

Monetary gain is not the sole criterion. Dr. Freeman stood to gain recognition among his peers in the profession and authorship credit with his attempted use of Weissmann's article; he did so without paying the usual price that accompanies scientific research and writing, that is to say, by the sweat of his brow. Particularly in an academic setting, profit is ill measured in dollars. Instead, what is valuable is recognition because it so often influences professional advancement and academic tenure. The absence of a dollars and cents profit does not inevitably lead to a finding of fair use.¹⁰¹

Thus, any use of copyrighted material for profit, whether personal or economic, represents a presumptively unfair use.

Commercial purposes overwhelmingly dominate the empirical analysis of fair use.¹⁰² In over 90% of the cases sampled, courts found the use at issue to be "commercial" in some form. *Sub rosa* all courts seem to weigh the degree of commercial use. For example, in *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*,¹⁰³ the defendant copied three sentences about the benefits of smoking from the plaintiff's scientific work.¹⁰⁴ The defendant's use of this information in an advertising pamphlet was held unfair.¹⁰⁵

Courts seem less rigorous when another use, in addition to commercial benefit, can be shown. One alternative use is "public benefit." In *Rosemont Enterprises, Inc. v. Random House, Inc.*,¹⁰⁶ the United States Court of Appeals for the Second Circuit held that: "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 . . . has no bear-

98. 868 F.2d 1313 (2d Cir. 1989).

99. *Id.* at 1315-16.

100. *Id.* at 1324.

101. *Id.*

102. See Appendix.

103. 23 F. Supp. 302 (E.D. Pa. 1938).

104. *Id.* at 304.

105. *Id.*

106. 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

ing on whether a public benefit may be derived from such a work."¹⁰⁷ These two decisions demonstrate, at least in part, that a different set of principles may be applied to factually distinct, but legally similar, situations.¹⁰⁸

The next clause of section 107(1)—“or is for nonprofit educational purposes,”¹⁰⁹—lumps together two distinct aspects of permissible fair uses: nonprofit uses and educational uses.¹¹⁰ At least one commentator has read into the Supreme Court’s *Sony*¹¹¹ opinion a presumption that noncommercial, charitable uses are fair.¹¹² This reading is too broad. As one copyright attorney explained: “[T]he court was careful not to create a presumption in favor of fair use for every nonprofit use.”¹¹³ This analysis is consistent with “the explicit refusal of Congress to create such a presumption that nonprofit educational uses were not to be given any special status under section 107. . . .”¹¹⁴

Nonetheless, the use of a copyrighted item by a nonprofit organization, or for a nonprofit purpose, is likely to be deemed fair.¹¹⁵ The number of such cases is small, but courts found the use fair 55.6% of the time, which is significantly higher than the 37.4% found in fair use cases generally.¹¹⁶ In *Wojnarowicz v. American Family Ass’n*,¹¹⁷ a not-for-profit organization published complete copies of the plaintiff’s exhibit to help criticize the National Education Association’s funding of the plaintiff’s work.¹¹⁸ The court ruled that the use was fair, and noted that because of “the controversial issue of federal funding of contemporary art, the pamphlet is entitled to great protection because the appropriateness of such funding must remain open to vigorous challenge and those who ac-

107. *Id.* at 307. See also *Wojnarowicz v. American Family Ass’n*, 745 F. Supp. 130 (S.D.N.Y. 1990).

108. This is the root of the differing factual paradigms which are discussed fully *infra* text accompanying notes 181-395.

109. 17 U.S.C. § 107(1) (1988).

110. This is not what was intended, because nonprofit, noneducational uses are protected, see, e.g., *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978) (fire chief may make copies of map and distribute them to firehouses without violating copyright), just as for-profit educational uses are sometimes protected.

111. 464 U.S. 417 (1984).

112. GOLDSTEIN, *supra* note 1, at § 10.2.2.I.(a).

113. See PATRY *supra* note 1, at 370.

114. *Id.*

115. *But see* *Encyclopedia Britannica Educational Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1978), 542 F. Supp. 1156 (W.D.N.Y. 1982), 558 F. Supp. 1247 (W.D.N.Y. 1983) (wholesale taping by nonprofit organization held to be an unfair use).

116. See Appendix.

117. 745 F. Supp. 130 (S.D.N.Y. 1990).

118. *Id.* at 132.

cept federal funds must also accept the right of others to protest such expenditures."¹¹⁹

Educational uses, the second part of section 107(1), are favored by the statute.¹²⁰ Moreover, the exact parameters of classroom use are clearly delineated.¹²¹ Despite these generous guidelines, however, "educational purposes have not fared as consistently well in the courts."¹²² An educational purpose is alleged as a defense in 30.5% of all fair use cases,¹²³ and accepted by the court 52.5% of the time (considerably more than the 37.4% average).¹²⁴ Describing an unauthorized use of copyrighted material as "educational" lends significant weight to the fair use defense.¹²⁵

B. Nature of Copyrighted Work

Under section 107(2), "the nature of the copyrighted work"¹²⁶ is analyzed to help determine whether a given use of that work is fair. Of the four provisions in section 107, this is the least used in practice and least discussed in fair use scholarship.¹²⁷ Professor Dratler explains: "Courts generally agree that analysis of the 'nature' factor requires placing the underlying work on the spectrum from fact to fancy."¹²⁸ This analysis, however, covers one important aspect of the second factor and ignores another.

119. *Id.* at 143.

120. See GOLDSTEIN, *supra* note 1, at § 10.2.2.(b).

121. An excellent discussion can be found in PATRY, *supra* note 1, at 272-291. As Patry noted:

The book and periodical guidelines allow single copying "by or for a teacher at his or her individual request" for scholarly research or use in teaching or preparation for teaching of (a) a chapter from a book; (b) an article from a periodical or newspaper; (c) a short story, short essay, or short poem, "whether or not from a collective work"; (d) a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper. The making of multiple copies for these purposes is not permitted, however.

Id. at 405 (quoting *House Report*, *supra* note 32, at 68.).

122. GOLDSTEIN, *supra* note 1, at § 10.2.2.(b).

123. Historical works and biographies are deemed educational uses.

124. See Appendix, for an empirical analysis.

125. See, e.g., *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (historical value of films of Kennedy assassination). *But see* *Roy Export Co. v. Columbia Broadcasting System, Inc.*, 208 U.S.P.Q. 580 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982) (copies of Charlie Chaplin films not of great historical moment because Chaplin was excluded from the United States because of procommunist activities).

126. 17 U.S.C. § 107(2) (1988).

127. An analysis of cases citing the various provisions of section 107(1-4) demonstrates that section 107(2) is the least discussed of the four.

128. Dratler, *supra* note 1, at 303.

There are two different considerations in section 107(2) analysis. First, the statute recognizes that an unpublished work enjoys substantially more protection than a published work.¹²⁹ In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹³⁰ the Supreme Court determined that the unpublished nature of a work "is a critical element of its 'nature.'"¹³¹ The Court further noted that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use."¹³² It follows, then, that the unpublished nature of a copyrighted work enhances its protection from "fair" use by an infringer.¹³³

Second, section 107(2) addresses the difference between factual and fictional works.¹³⁴ While this distinction is better defined by the factual paradigms discussed in Part IV, simply stated,¹³⁵ it operates as follows: A copyrighted work that is primarily factual in nature, such as a telephone book, receives less protection from fair use.¹³⁶

C. Amount and Substantiality Used

According to section 107(3), courts should consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"¹³⁷ in determining fair use. This approach, along with the section 107(4),¹³⁸ is rooted in Justice Story's opinion in *Folsom v. Marsh*.¹³⁹ There are two complementary sub-considerations: 1) the quantitative amount copied by the infringer,¹⁴⁰ and 2) the qualitative value of the infringed section.¹⁴¹

129. See NIMMER, *supra* note 1, at § 13.05[a][2].

130. 471 U.S. 539 (1985).

131. *Id.* at 564.

132. *Id.* at 555.

133. See also *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

134. See *infra* text accompanying notes 276-301.

135. See *infra* text accompanying notes 191-395.

136. See, e.g., *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977).

137. 17 U.S.C. § 107(3) (1988).

138. See *infra* text accompanying notes 147-67.

139. 9 F. Cas. 342 (C.C.D. Mass. 1841).

140. For example, the unfair use in *Nation Enterprises* was some 300 words from an unpublished 200,000-word manuscript. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 580 (1985). As Professor Dratler has noted, all nine justices agreed that both a quantitative and qualitative measure should be taken. See Dratler, *supra* note 1, at 310.

141. Theoretically, if a single word of a 10,000-word poem held the core of the entire

This calls for a delicate balancing act. "[I]n examining the third fair use factor, one must look to the value of the portion appropriated as well as the quantity. Note too that the analysis is of the amount and substantiality of the portion used in relation to the *copyrighted work* and not to defendant's work."¹⁴²

Courts will generally rule against a fair use defense if the defendant has appropriated all or substantially all of a work.¹⁴³ Empirical research supports this conclusion.¹⁴⁴ In fair use cases where substantial copying occurred, courts sustained a fair use defense only 16.3% of the time. The first notable case finding a fair use despite substantial copying was *Williams & Wilkins Co. v. United States*,¹⁴⁵ wherein the Court of Claims held that copies of copyrighted medical journals made by government medical research constituted a "fair use."¹⁴⁶

D. Effect on the Potential Market

The final factor in section 107 is "the effect of the use upon the potential market for or value of the copyrighted work."¹⁴⁷ The Supreme Court has unanimously agreed that this factor "is undoubtedly the single most important element of fair use."¹⁴⁸ As noted earlier,¹⁴⁹ Justice Story discussed this factor in his *Folsom* opinion.¹⁵⁰ This element of the fair use doctrine factor springs most directly from the heart of copyright law. If the market for the original work is diminished then, presumably, the incentive for creating new works is diminished as well.¹⁵¹ There is, however, a countervailing presumption that by limiting the ability to build upon the works of a predecessor, creative development is limited as

work's meaning, such an appropriation would not be a fair use.

142. PATRY, *supra* note 1, at 452 (emphasis in original). See also *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

143. See, e.g., *Phillips v. Constitution Pub. Co.*, 72 U.S.P.Q. 69 (N.D. Ga. 1947); *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339 (N.D. Ohio 1969).

144. See Appendix.

145. 487 F.2d 1345 (Ct. Cl. 1973).

146. *Id.* at 1381. See also *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984). Parody represents a special case, see the factual paradigms discussed *infra* text accompanying notes 227-68.

147. 17 U.S.C. § 107(4) (1988).

148. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985). The dissenting justices also endorsed this proposition. See *id.* at 602 (Brennan, J., dissenting).

149. See *supra* note 27.

150. See *supra* text accompanying note 27.

151. This notion is not new. See *Dratler, supra* note 1, at 321; *NIMMER, supra* note 1, at § 13.05[4].

well.¹⁵²

The Supreme Court, in its seminal *Sony* opinion,¹⁵³ resolved this tension by establishing a presumption against commercial uses.¹⁵⁴ The court determined that:

[A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. 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 future 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.¹⁵⁵

While this construction has come under considerable criticism by commentators,¹⁵⁶ empirical research indicates that if the infringement of a copyrighted work has substantial market impact, either presumed¹⁵⁷ or actual,¹⁵⁸ any fair use claim is doomed. If a court finds a substantial market impact, which happens in 38.2% of cases, a fair use defense is successful only 12% of the time.¹⁵⁹ For example, in *Rubin v. Boston Magazine Co.*,¹⁶⁰ *Boston Magazine* reprinted a copyrighted questionnaire about love which was compiled by research scientists.¹⁶¹ In finding the use unfair, the court observed:

The defendants' use of the plaintiff's copyrighted material clearly affected the plaintiff's potential market for the [love] scales. Before defendants had used the scales, *Reader's Digest* had shown an interest in paying the plaintiff for a license to use

152. This competing tension is the underlying conflict between the needs and the limitations of copyright law.

153. 464 U.S. 417 (1984).

154. See generally Dratler, *supra* note 1, at 265.

155. *Sony*, 464 U.S. at 451 (emphasis in original).

156. See Dratler, *supra* note 1, at 265-66.

157. See, e.g., *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983).

158. See, e.g., *Mills Music Inc. v. State of Arizona*, 187 U.S.P.Q. 22 (D. Ariz. 1975).

159. See Appendix.

160. 645 F.2d 80 (1st Cir. 1981).

161. *Id.* at 83.

them. It may reasonably be inferred that after defendants' use, *Reader's Digest* and other publishers would be less inclined to pay the plaintiff for use of his material in a popular magazine.¹⁶²

Courts are willing to speculate, in their section 107 analysis, about the amount of direct damage caused to the copyright holder's primary market flowing from unauthorized use of the protected material; they generally will not deny a fair use claim because of a merely indirect effect on that same primary market.¹⁶³ In *Consumers Union of United States, Inc. v. General Signal Corp.*,¹⁶⁴ the Second Circuit held that it was a fair use for Regina Vacuum Cleaners to quote from a *Consumer Reports* article in advertisements for its products.¹⁶⁵ The court rejected the magazine's argument that an endorsement of a product, which might be implied by the appearance of its article in the advertisement, "could be the demise of Consumers Union since such commercial use could lead the public to view Consumers Union as [an] unfair tester of products."¹⁶⁶ The court noted that such injury is beyond the reach of the fourth factor: "[I]t is the value of possible *future* issues of *Consumer Reports* which [Consumers Union] seeks to protect. This clearly does not involve the fourth factor which focuses upon the effect of the use upon the potential market for or value of the copyrighted work."¹⁶⁷

E. Additional Factors

While the four factors listed in 17 U.S.C. § 107(1-4) were never intended to be exclusive, courts disagree over which other factors should be considered in the fair use analysis.¹⁶⁸ The two most frequently mentioned are the mental state of the alleged infringer, and whether the First Amendment is implicated in the fair use.¹⁶⁹

More than one court has held that the fair use doctrine presupposes good faith on the part of the infringer.¹⁷⁰ There is nothing in a plain reading of the statute, however, to indicate that good

162. *Id.* at 84.

163. See generally GOLDSTEIN, *supra* note 1, at § 10.2.2.4.

164. 724 F.2d 1044 (1983).

165. *Id.* at 1046.

166. *Id.* at 1050.

167. *Id.* at 1051 (emphasis in original).

168. See *supra* note 1.

169. See *supra* text accompanying notes 174-80.

170. See, e.g., *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983). See also Justice O'Connor's references in *Nation Enterprises* to the "purloined manuscript." *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562-63 (1985).

or bad faith should be considered at all,¹⁷¹ or the effect such a finding should have. *Sub rosa* many courts seem to apply a good faith standard, even in places where the copyright holder opposed the use.¹⁷² The application of good faith standards have a differing role depending upon the factual paradigm involved.¹⁷³

A second consideration in fair use analysis is whether the First Amendment is implicated, and whether it should broaden the scope of fair use.¹⁷⁴ Prior to 1985, courts were split on this issue,¹⁷⁵ but many endorsed the notion that the "scope of [fair use] is undoubtedly wider when the information conveyed relates to matters of high public concern."¹⁷⁶

The Supreme Court appeared to settle this issue in *Nation Enterprises*:¹⁷⁷

In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure [President Ford] exception to copyright. Whether verbatim copying from a public figure's manuscript in a given case is or is not fair must be judged according to the traditional equities of fair use."¹⁷⁸

While there might be separate First Amendment claims, the Supreme Court sharply blunted the argument that the First amendment broadens the scope of fair use.

There is, however, still room for maneuver. Recently, the

171. "[C]laims of bad faith have little place in the statutory structure built by Congress. . . . Unpleasant conduct, however, is peripheral to the concerns of copyright law. Accordingly, bad faith should be considered, if at all, as a separate nonstatutory factor and given relatively little weight." Dratler, *supra* note 1, at 336.

172. One obvious example is parody, where the plaintiff may not relish his role as the subject of satire. See, e.g., *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp 741 (S.D.N.Y. 1980).

173. Compare *infra* text accompanying notes 232 and 347.

174. See generally GOLDSTEIN, *supra* note 1, at § 10.3.

175. Compare *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) ("The First Amendment is not a license to trammel on legally recognized rights in intellectual property.") with *Keep Thomson Governor Comm. v. Citizens for Gallen Committee*, 457 F. Supp. 957, 960 (D.N.H. 1978) ("Conflicts between interests protected by the First Amendment and the copyright laws can be resolved by application of the fair use doctrine.").

176. *Consumers Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983). Accord *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*, 46 F. Supp. 198 (D. Mass. 1942).

177. 471 U.S. 539 (1985).

178. *Id.* at 560.

United States District Court for the Southern District of New York, in *Wojnarowicz v. American Family Ass'n*,¹⁷⁹ held that "the breadth of fair use varies and where vital First Amendment concerns are implicated, as here, that breadth expands and accords greater protection to what might otherwise constitute an infringement."¹⁸⁰

IV. FACTUAL PARADIGMS: AN ALTERNATIVE APPROACH

The four statutory elements of section 107 form the basis for any fair use defense.¹⁸¹ Simple analysis of these factors, however, provides little or no tactical guidance for the practitioner who must choose how to best argue a fair use issue and evaluate his or her likelihood of success. Part IV of this Article suggests an alternative approach: to analyze fair use cases with emphasis on their factual similarity.¹⁸² From this perspective most¹⁸³ fair use cases fall within one of six broad interactive paradigms:¹⁸⁴ (1) incidental appropriation; (2) appropriation by or for nonprofit purpose; (3) appropriation for satire or parody; (4) appropriation for criticism or historical comment; (5) exploitation of factual complications or data bases; and (6) appropriation for commercial exploitation. Each of these paradigms will be discussed in turn, explaining the appropriate boundaries and the applicable principles. These paradigms are intended to be a helpful guide in the procedural aspects such as pleading or responding to fair use defenses. Each factual paradigm emphasizes the elements of a particular fair use claim and the method by which that claim can best be supported or attacked.

A. Incidental Appropriation

The core of this first paradigm is that the reproduction of the

179. 745 F. Supp. 130 (S.D.N.Y. 1990).

180. *Id.* at 147. For a more complete discussion of *American Family*, see *infra* text accompanying notes 218-19. See also Oakes, *supra* note 1, at 989.

181. 17 U.S.C. § 107(1-4) (1988). See *supra* text accompanying notes 131-78.

182. Factual similarity is distinct from legal similarity. Legal similarity means two factual situations that have similar legal consequences. For example, a human thumb found in a plug of chewing tobacco and an airplane crashing without reason possess legal similarity in that *res ipsa loquitur* allies to both.

183. With very few exceptions, this approach covers all fair uses. The exceptions involve novel questions. See, e.g., *Association of American Medical Colleges v. Cuomo*, 1991 U.S. App. LEXIS 4075 (2d Cir. 1991) (conflict between copyright holder and New York Standardized Testing Act).

184. The concept of paradigm has been used because differing standards and elements such as good faith carry slightly different meanings in each functional grouping.

copyrighted material was merely incidental to the infringer's actions. Stated otherwise, the alleged infringement occurred as an indirect and unintentional by-product of the copying. In *Italian Book Corp. v. American Broadcasting Cos.*,¹⁸⁵ an ABC television crew, while filming a parade, included a portion of plaintiff's song which was subsequently telecast.¹⁸⁶ The court found that "[i]t would have been unreasonable for the technicians at ABC to do anything other than they did, in preparing the film clip for inclusion in the news telecast."¹⁸⁷ ABC's incidental use of the song was held to be fair. Essentially, then, infringement by accident is a fair use. This paradigm will rarely be seen, because the nature of the use is incidental to both the copyright holder and the infringer.¹⁸⁸

B. Appropriation by or for Nonprofit Purposes

Except for incidental appropriation,¹⁸⁹ the other paradigms are interrelated and cannot be defined by bright line tests. This is because any set of facts may carry several, often opposing, values. For example, parodies,¹⁹⁰ which may have been produced for a commercial benefit, qualify for a greater protection than generic commercial uses.¹⁹¹ Given the conflict between two paradigms, a use which can be cast as something other than mere commercial exploitation is more likely to find judicial favor.

An appropriation by or for a nonprofit purpose is significantly more likely to be given fair use protection, so long as the alleged fair use does not demonstrably reduce the copyrighted work's market.¹⁹² In *Key Maps, Inc. v. Pruitt*,¹⁹³ the court found a fire chief's

185. 458 F. Supp. 65 (S.D.N.Y. 1978).

186. *Id.* at 66.

187. *Id.* at 70. Some commentators would analyze this in terms of the high transaction cost implicit in attempting to spend time contracting each copyright holder whose rights might be infringed in broadcasting news film clips. See, e.g., Landers & Posner, *An Economic Analysis of Copyright Law*, 18 JOURNAL OF LEGAL STUDIES 325, 357 (1989).

188. Hypothetically, a news report of a meeting in which an edition of a copyrightable book is displayed or read aloud could constitute an infringement of the author's copyright. However, if the news report, when broadcast, is about something other than either the book or its author, the publication of the copyrighted material is only incidental to the report itself, and the use may be fair. For an example of a commercial exploitation inappropriately cloaked as an incidental appropriation, see *Schumann v. Albuquerque Corp.*, 664 F. Supp. 473 (D.N.M. 1987); *infra* notes 360-62 (broadcast of playing band by spot pickup infringes performers right to exclusive performance).

189. See *supra* text accompanying notes 185-88.

190. See *infra* text accompanying notes 227-68.

191. See *infra* text accompanying notes 253-68. This same conflict holds true for biological uses (often for profit), and educational uses as well.

192. See *infra* discussion of *Encyclopedia Britannica Educational Corp. v. Crooks*, 447

reproduction and distribution of maps drawn by plaintiff to be a fair use.¹⁹⁴ Pruitt, the fire chief, engaged Key Maps to produce fire maps of the unincorporated areas of Harris County, Texas.¹⁹⁵ When Key Maps produced the maps, but delayed making copies of them, Chief Pruitt had reproductions made elsewhere.¹⁹⁶ After reproducing the map, Pruitt distributed them to fire departments, sheriff's offices, and the like.¹⁹⁷

When Key Maps brought a claim for copyright infringement, the court barred recovery "because the use of the composite Fire Zone Map was for a legitimate, fair, and reasonable purpose, namely, the coordination of fire prevention activities in the incorporated areas of Harris County."¹⁹⁸ The court went on to note that "Pruitt's use of the maps was not of a commercial nature because the distribution was not in competition with the Plaintiff but solely for internal purposes which related to a discernable public interest."¹⁹⁹ In *Key Maps*, the actions of the Fire Chief marginally infringed upon Key Maps' market by depriving them of the value of making copies, which were made by a competitor.²⁰⁰

However, a nonprofit use is not automatically a fair use. Courts have held against fair use involving nonprofit organizations where the damage to the copyright holder's market is real and convincingly proven,²⁰¹ or where the nonprofit use eliminates the copyright holder's entire market.²⁰²

The Ninth Circuit denied fair use protection to a defendant who copied almost 50% of a copyrighted book, even though the copied portion was utilized in a nonprofit classroom exercise.²⁰³ Rowley, the teacher, copied portions of the plaintiff's cake decorating book after attending an adult education class.²⁰⁴ Rowley then incorporated portions of the book into a Learning Activity Package ("LAP"), which she made available to her students.²⁰⁵ "Plaintiff

F. Supp. 243 (W.D.N.Y. 1978), 542 F. Supp. 1156 (W.D.N.Y. 1982), 558 F. Supp. 1247 (W.D.N.Y. 1983).

193. 470 F. Supp. 33 (S.D. Tex. 1978).

194. *Id.* at 38.

195. *Id.*

196. *Id.* at 36.

197. *Id.*

198. *Id.* at 38.

199. *Id.*

200. *Id.* at 36.

201. *See infra* note 208 and accompanying text.

202. *See infra* notes 210-15 and accompanying text.

203. *Marcus v. Rowley*, 695 F.2d 1171, 1177 (1983).

204. *Id.* at 1173.

205. *Id.*

learned of Rowley's LAP . . . when a student in plaintiff's adult education class refused to purchase plaintiff's book. The student's son had obtained a copy of the LAP from Rowley's class.²⁰⁶ The court held that Rowley's use was unfair.²⁰⁷ The linchpin of the court's reasoning was that Rowley's infringement directly and concretely affected the market for the plaintiff's copyrighted work.²⁰⁸ That demonstrable impact, coupled with Rowley's blatant unauthorized duplication of the book, outweighed the nonprofit nature of Rowley's use.²⁰⁹

Similarly, the nonprofit status of an infringer can be outweighed when the use would destroy the copyright holder's entire market. In *Encyclopedia Britannica Educational Corp. v. Crooks*,²¹⁰ three educational film producers sued the Board of Cooperative Educational Services of Erie County (BOCES) for videotaping and distributing plaintiff's educational programs to area schools.²¹¹ As the trial judge noted: "The scope of BOCES' activities is difficult to reconcile with its claim of fair use. This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing video tapes on a massive scale."²¹² The videotaping activity used five to eight full-time employees and "makes as many as ten thousand tapes per year."²¹³ In a subsequent opinion, the court settled on this salient fact:

Fair use must be reasonable . . . it is . . . not reasonable to drive plaintiffs from the educational television market. Plaintiffs' choice of facing unlimited videotape copying [of their programs] or abandonment of the educational television market cannot be seen as providing reasonable market alternatives to fair use by the defendants.²¹⁴ The educational contents and nature of the films in this case do not, in and of itself, 'empower a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.'²¹⁵

206. *Id.*

207. *Id.* at 1178.

208. *Id.* at 1177.

209. *Compare* *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962) (no fair use when defendant attempted to profit by appropriation of plaintiff's copyright).

210. 447 F. Supp. 243 (W.D.N.Y. 1978), 542 F. Supp. 1156 (W.D.N.Y. 1982), and 558 F. Supp. 1247 (W.D.N.Y. 1983). For a valuable discussion of the multiple *Crooks* opinions, see *PATRY*, *supra* note 1, at 195-200.

211. 447 F. Supp. at 246.

212. *Id.* at 252.

213. *Id.*

214. 542 F. Supp. at 1174.

215. *Id.* at 1178 (quoting *Iowa State Univ. Research Foundation, Inc. v. American*

Notably absent from this paradigm is a special place for educational uses. Analysis of case law leads to the conclusion that educational uses and nonprofit uses are favored in different ways.²¹⁶ While nonprofit educational uses may fall into this category, for-profit educational uses do not.²¹⁷ Claims for a nonprofit civic purpose or political argumentation also fall within this paradigm.

As noted earlier, the District Court for the Southern District of New York held that the publication of pictures of an art exhibit funded by the National Education Association in order to criticize funding was a fair use.²¹⁸ The court imposed a quid pro quo that those who receive federal funds must subject themselves to fair use criticism of the funding.²¹⁹

Similarly, collecting pictures for a nuisance abatement proceeding fell within the scope of fair use.²²⁰ In *Jartech, Inc. v. Clancy*, an investigator who snuck into a theater showing pornographic movies used audio-visual equipment to record the pictures and sound.²²¹ The pictures were subsequently utilized at a city council nuisance abatement proceeding.²²² Plaintiff brought suit claiming copyright infringement.²²³ The court broadly read section 107 to find fair use:

The alleged infringers made abbreviated copies of the films, not for subsequent use and enjoyment, but for evidence to be used in the nuisance abatement proceeding While the statutory standards are not precisely applicable to the facts at bar, because there was evidence that the Council's use was neither commercially exploitive of the copyright holder's market, the jury's verdict [of fair use] is certainly supported by substantial evidence.²²⁴

Any use that is armed with the badge of nonprofit activity is

Broadcasting Cos., 621 F.2d 57, 61 (2d Cir. 1980)). In *Crooks*, the defendants asserted a First Amendment defense which the court readily dismissed. *Id.* at 1180-81.

216. See *infra* notes 267-95, for history and biographical works.

217. See, e.g., *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963) (manual of solutions to problems in college textbook was an unfair use). This analysis may seem perverse in light of discussion in *supra* note 110. The purpose of that discussion, however, was to point out that both nonprofit and educational uses were favored under 17 U.S.C. § 107(1) (1988).

218. *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990).

219. *Id.* at 143.

220. *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982).

221. *Id.* at 404.

222. *Id.* at 405.

223. *Id.* at 404.

224. *Id.* at 407.

much more likely to be declared fair. This general rule has been applied to election campaigns²²⁵ as well as solicitations by churches for money.²²⁶

C. Appropriation for Satire or Parody

Parody²²⁷ has long enjoyed protection as a viable category of fair use.²²⁸ Many commentators have found a unique niche for parody.²²⁹ The dean of copyright law, Professor Nimmer, determined that satire and parody represent a "functional differentiation" and that "such a functional differentiation has been recognized to support a fair use defense."²³⁰ The parody factual paradigm mimics this "functional differentiation" by recognizing that "parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism."²³¹

The focus here is less on the good faith of the infringer and more on the nature of the parody, because rarely would the copyright holder grant his or her consent to be the object of satire. Unless there is any demonstrable market damage or misuse of the purpose of the parody, a parody or satire will usually be held a fair use under section 107(3).²³² "Courts apply a special version of the third factor in determining whether a parody constitutes a fair use: the extent to which the defendant has taken more than is necessary to conjure up the copyrighted work."²³³

225. See, e.g., *Keep Thomsom Governor Committee v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978) (defendant's use of plaintiff's copyrighted song in a political advertisement considered fair).

226. See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1156 (9th Cir. 1986) (Jerry Falwell sent out copies of harsh parody of himself in order to raise money to sue *Hustler's* publisher Larry Flynt. The court found the use fair, noting that Falwell's action had not diminished sales of the magazine.).

227. Parody is defined in *Dallas Cowboys Cheerleaders v. Pussycat Cinema*, 467 F. Supp. 366 (S.D.N.Y. 1979), as follows:

A parody is a work in which the language or style of another work is closely imitated or mimicked for comic effect or ridicule. A satire is a work which holds up the vices or shortcomings of an individual or institution to ridicule or derision, usually with an intent to stimulate change; the use of wit, irony or sarcasm for the purpose of exposing and discrediting vice or folly.

Id. at 376.

228. See generally GOLDSTEIN, *supra* note 1, at § 10.2.1.2.

229. See PATRY, *supra* note 1, at 147-76.

230. NIMMER, *supra* note 1, at § 13.05[c].

231. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

232. 17 U.S.C. § 107(3) (1988). See *supra* notes 136-45 and accompanying text.

233. GOLDSTEIN, *supra* note 1, at § 10.2.2.3. This analysis relies on the oft-quoted language from *Berlin*, 329 F.2d at 545, which states as follows:

In *Elsmere Music, Inc. v. National Broadcasting Co.*,²³⁴ the court found Saturday Night Live's biting parody of the "I Love New York" jingle to be a fair use.²³⁵ Central to the court's finding was the brief nature of the parodied lyrics.²³⁶

[T]he court believes that the repetition of the phrase ["I Love . . ."], sung *a capella* and lasting for only eighteen seconds, cannot be said to be clearly more than was necessary to 'conjure up' the original. Nor was it so substantial a taking as to preclude this use from being a fair one.²³⁷

The same court reached the opposite result in *Walt Disney Productions v. Mature Pictures Corp.*²³⁸ In the defendant's movie, "The Life and Times of the Happy Hooker," the Mickey Mouse March was repeated "over and over again."²³⁹ The court suggested that defendants were attempting to parody the sexual behavior of the call girls' clients.²⁴⁰ However, it was the repetitive nature of the song's use and the broad object of the parody that doomed the defendant's fair use defense.²⁴¹ The repeated use of the copyrighted music was more than necessary to parody the original work. "While defendants may have been seeking in their display of bestiality to parody life, they did not parody the Mickey Mouse March but sought only to improperly use the copyrighted material."²⁴²

A permissible parody may not take more of the original work than is necessary to conjure up the image of cartoon character. In *Walt Disney Productions v. Air Pirates*,²⁴³ the parodist portrayed Mickey Mouse and Company as members of a drugged out, promiscuous counterculture.²⁴⁴ The use was clearly an intentional par-

At the very least, where, 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.

234. 482 F. Supp. 741 (S.D.N.Y. 1980).

235. *Id.* at 747. The tune was changed to "I Love Sodom." *Id.* at 743.

236. *Id.* at 744. "Of this [the original composition] only four notes, D C D E (in that sequence), and the words "I Love" were taken and used in the SNL sketch.

237. *Id.* at 747 (quoting without attribution from *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964)).

238. 389 F. Supp. 1397 (S.D.N.Y. 1975).

239. *Id.* at 1398.

240. *Id.*

241. *Id.*

242. *Id.*

243. 581 F.2d 751 (9th Cir. 1978).

244. *Id.* at 753.

ody, but the fair use defense proved inapplicable. "By copying the images in their entirety, defendants took more than was necessary to place firmly in the reader's mind the parodied work and those specific attributes that are to be satirized."²⁴⁵

These cases also suggest that courts may cast a more critical eye at sexual parodies.²⁴⁶ For example, the Second Circuit considered a parody of the song "Boogie Woogie Bugle Boy of Company C," entitled "Cunnilingus Champion of Company C," an unfair use.²⁴⁷ However, in *Guccione v. Flynt*,²⁴⁸ the court upheld as fair the republication in *Hustler* magazine a photo originally printed in *Penthouse* magazine.²⁴⁹ *Hustler's* publisher printed alongside the pirated photograph a long diatribe against the *Penthouse* owner, describing in lurid detail the rival publisher's physical attributes and his fondness for girls young enough to be his daughter.²⁵⁰ With "genuine reluctance" to become the "referee" in this matter, the court held that use was fair,²⁵¹ reasoning that:

"*Penthouse* has failed to submit any evidence that the value of its September 1983 issue [from which *Hustler* appropriated the photograph] was diminished because of the copyright violation. Given the limited reproduction in question and the fact that the September 1983 issue was off the newsstands by the time the [*Hustler*] article was published in November, such a showing is unlikely."²⁵²

The parody paradigm also distinguishes between merely exploitive attempts at parody and genuine satirical comment.²⁵³ The best articulation of this distinction can be found in *Metro-Goldwyn-Mayer v. Showcase Atlanta Cooperative Productions, Inc.*²⁵⁴ In *Showcase*, the district court held that "Scarlett Fever," a musi-

245. *Id.* at 758. See also *D.C. Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110, 118 (N.D. Ga. 1984) (defendants stripping Superman "tarnishes the 'all-American' image that plaintiff has labored to create. . .").

246. This reference is to sexual in the prurient sense, not the poems of Ovid.

247. *MCA, Inc. v. Wilson*, 677 F.2d 180, 187 (2d Cir. 1981). The court clearly indicated that the show was lacking in artistic merit: "The producers, perhaps wisely, refrained from seeking reviews by established theater critics." *Id.* at 181.

248. No. 83 Civ. 8020 (S.D.N.Y. June 5, 1984).

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Benny v. Loew's Inc.*, 239 F.2d 532 (9th Cir. 1956) (attempting to divide parodies into satire and burlesque, the latter use not considered fair). *Benny*, often overanalyzed, has been virtually overruled by subsequent decisions. See, e.g., *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 756 (9th Cir. 1978).

254. 479 F. Supp. 351 (N.D. Ga. 1979).

cal version of "Gone With the Wind," was a commercial exploitation, not a defensible parody.²⁵⁵ In a well-reasoned opinion the court clearly articulated the distinction between parody and comedic commercial exploitation, noting that

in order to constitute the type of parody eligible for fair use protection, parody must do more than merely achieve comedic effect. It must also make some critical comment or statement about the original work which reflects the original perspective of the parodist, thereby giving the parody social value beyond its entertainment function.²⁵⁶

This distinction fits neatly into the parody paradigm because it tends to differentiate between commercially exploitive uses²⁵⁷ and genuine parody.²⁵⁸ This distinction was effectively wielded in a subsequent case, *New Line Cinema Corp. v. Bertlesman Music Group*.²⁵⁹ In *Bertlesman* the rap artist D.J. Jazzy Jeff made a music video of his song entitled "A Nightmare on My Street," which deliberately evoked the image of Freddy Krueger, the bizarrely popular character of the "Nightmare on Elm Street" movies.²⁶⁰ The court applied the *Showcase* test and found that the music video was not entitled to the fair use defense.²⁶¹

The Court has serious doubts about whether the D.J. Jazzy Jeff video constitutes a parody under this definition. The work does not appear to make a critical comment or statement . . . reflecting a unique perspective. In fact, the video does not appear even to be making fun of the movies themselves. Rather, the video serves solely an entertainment and promotional function for [defendant's] song.²⁶²

But a genuine parody, even if used for profit, is still protected

255. *Id.* at 361.

256. *Id.* at 357.

257. *See, e.g.*, *D.C. Comics, Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984) (finding Superstud and Wonderwench parodies to be unfair of plaintiff's Superman and Wonderwoman characters).

258. *See also* *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986) "When Sonny Sniffs Glue" considered fair use parody if "When Sunny Gets Blue."

259. 693 F. Supp. 1517 (S.D.N.Y. 1988).

260. *Id.* at 1518.

261. *Id.* at 1525.

262. *Id.* at 1525. The court went on to assume that the video was a parody, and found that it failed the four factor analysis under section 107. *Id.* at 1529. A similar result was reached in *Tin Pan Apple, Inc. v. Miller Brewing Co.*, 737 F. Supp. 826, 832 (S.D.N.Y. 1990) (Comedian Joe Piscopo's exaggerated comedic version of the rap group Fat Boys was not a fair use. The court applied *Showcase* analysis and concluded that "defendants' commercial does not qualify as a parody. The commercial's use is entirely for profit: to sell beer.").

as a fair use. In *Acuff-Rose Music, Inc. v. Campbell*,²⁶³ the Middle District of Tennessee found that the rap group 2 Live Crew's parody of the late Roy Orbison's song, "Oh Pretty Woman," was a genuine parody entitled to the fair use defense.²⁶⁴ "In sum, 2 Live Crew is an anti-establishment rap group and this song derisively demonstrates how bland and banal the Orbison song seems to them."²⁶⁵ The court also noted, "[I]n 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. . . .'"²⁶⁶ If the producer of a work that parodies a copyrighted work can demonstrate that it has a satiric purpose beyond its mere entertainment value, does not utterly devastate the original work's market value, and avoids prurient sexuality, it is virtually assured of being declared a fair use by the court.

D. Appropriation for Criticism or Historical Comment

Criticism, comment, and quotation for historical purposes are all well recognized as fair uses.²⁶⁷ The criticism/comment paradigm focuses primarily on the substantiality of the work taken.²⁶⁸ Once a colorable critical or historical purpose has been alleged, the fair use defendant should focus on the amount and substantiality of the copyright infringed. "Criticism, comment and review are well-recognized areas of fair use, even if profit is derived thereby."²⁶⁹ With the exception for unpublished works,²⁷⁰ the substantiality of the taking will be the determinative factor.

In *Robert Stigwood Group Ltd. v. O'Reilly*,²⁷¹ for example, the court found that a copy of "Jesus Christ Superstar," made verbatim by Catholic priests, infringed the copyright of that work and the fair use defense was unavailable.²⁷² "The defendants assert the plaintiffs' production [the original, copyrighted work] 'clearly is an unfavorable and offensive comment on the Passion and Death of

263. 754 F. Supp. 1150 (M.D. Tenn. 1991).

264. *Id.* at 1154.

265. *Id.* at 1155.

266. *Id.* at 1158 (quoting *Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986)).

267. *See supra* text accompanying note 94.

268. *See supra* text accompanying notes 137-46 for an in-depth analysis of 17 U.S.C. § 107(3) (1988).

269. *Bruzzone v. Miller Brewing Co.*, 202 U.S.P.Q. 809, 812 (N.D. Cal. 1979) (fair use of copies of commercial storyboards in order to comment on their effectiveness).

270. *See infra* text accompanying notes 299-318.

271. 346 F. Supp. 376 (D. Conn. 1972).

272. *Id.* at 384.

Jesus, and is offensive to long-held Christian beliefs about him.'"²⁷³ The defendants argued that because they portrayed a more virtuous Christ than did the original,²⁷⁴ "[their] performance is within the scope of the fair use doctrine as a 'literary and religious criticism of the plaintiff's work.'"²⁷⁵ The court held simply that "it seems crystal clear . . . that defendants' almost total copying of plaintiffs' work cannot possibly be considered a 'fair use.'"²⁷⁶

In direct contrast is *Karll v. Curtis Publishing Co.*²⁷⁷ In *Karll*, the court found that the reproduction of the words to the Green Bay Packer fight song could be quoted in a history of the football franchise.²⁷⁸ "When the [the holder of the song's copyright] dedicated the song to the Green Bay Packers, by implication at least he consented to a reasonable use thereof associated with the Packers."²⁷⁹

The line between substantial taking, which is an unfair use, and reasonable appropriation, a fair use, is difficult to draw²⁸⁰ and has resulted in contrasting opinions. For example, in striking a fair use defense, one court found that the plaintiff's diary, which he kept while serving as an ambassador for the Shah of Iran, could not be elsewhere reproduced in its entirety.²⁸¹ "A virtual wholesale lifting of extensive excerpts from plaintiff's book quoted in another authorized serialization cannot be considered reasonable as a matter of law."²⁸²

If the copyrighted item represents a novel or unique historical

273. *Id.* (quoting, apparently, defendant's brief).

274. *Id.*

275. 346 F. Supp. 376, 384.

276. *Id.*

277. 39 F. Supp. 836 (E.D. Wis. 1941).

278. *Id.* at 836-37.

279. *Id.* at 837. *See also* *Broadway Music Corp. v. F-R Publishing Corp.*, 31 F. Supp. 87 (S.D.N.Y. 1940) (court found copy of lyrics to Perils of Pauline could be utilized in connection with Pearl White's epitaph.) *But see* *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921 (S.D. Ca. 1963).

280. *Compare* *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) *with* *Craft v. Kobler*, 667 F. Supp. 120, 129 (S.D.N.Y. 1987) (excerpts from Stravinsky's personal letters). In finding against the fair use defense, the *Time Inc.* court held "Kobler's takings are far too numerous and with too little instructional justification to support the conclusion of fair use . . . the appropriations constitute approximately 3% of the volume of Kobler's book. The importance of these passages to the book far exceeds that percentage. . . . I think Kobler might agree that they are the liveliest and most entertaining part of the biography." *Id.* at 129.

281. *Radji v. Khakbaz*, 607 F. Supp. 1296 (D.D.C. 1985).

282. *Id.* at 1303. *See* *Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142 (2d Cir. 1984) (finding it was a fair use to publish edited version of lawyer's letter to editor).

property, then a significantly broader scope of fair use defense is available.²⁸³ To date, only a single case has met the requirements for this broader scope of fair use.²⁸⁴ When Abraham Zapruder set up his camera in Dallas, Texas on November 22, 1963, he did not realize that the home movies he took would be of the assassination of John F. Kennedy.²⁸⁵ Zapruder copyrighted the film, gave two copies to the government and sold still photos to *Life* magazine.²⁸⁶ The author of a book, entitled *Six Seconds in Dallas*, utilized charcoal reproductions of certain frames from Zapruder's film which had been published in *Life*.²⁸⁷ Despite the defendant's colorable bad faith, the court found "a public interest in having the fullest information available on the murder of President Kennedy."²⁸⁸ [The defendant] did serious work on the subject and has a theory entitled to public consideration."²⁸⁹ This case, however, is an anomaly. A practitioner attempting to craft a fair use defense within the contours of the criticism/comment paradigm should emphasize the insubstantial amount of the work taken and, if possible, some educational or historical value derived from the use.

In *Maxtone-Graham v. Burtchaell*,²⁹⁰ the Second Circuit held that a Catholic priest's extensive quotation from a copyrighted prochoice book in drafting his own anti-abortion work was a fair use.²⁹¹ "One need not agree with the merit, methodology or conclusions of [the defendant's book] to recognize that [the priest] applied substantial intellectual labor to the verbatim quotations, continually offering his own insights and opinions."²⁹² The court ruled in favor of the priest, holding that the use of plaintiff's work "was precisely the type of criticism of or comment on copyrighted materials anticipated by [s]ection 107."²⁹³

283. The property itself must be unique and not simply evoke a unique character. See *Roy Export Co. v. Columbia Broadcasting System, Inc.*, 208 U.S.P.Q. 580 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982) (court rejected Columbia Broadcasting's claim that expulsion in the 1950's made copyrighted films historical work).

284. *Time Inc.*, 293 F. Supp. at 130.

285. *Id.* at 131.

286. *Id.* at 133-34.

287. *Id.* at 135.

288. *Id.* at 146. ("There is an initial reluctance to find any fair use by defendants because of the conduct of [the defendant] in making his copies and because of the deliberate appropriation in the book, in defiance of the copyright owner.")

289. *Id.*

290. 803 F.2d 1253 (2d Cir. 1986).

291. *Id.* at 1265.

292. *Id.* at 1260.

293. *Id.* at 1265. (The court also weighed into the calculus the fact that plaintiff's book had been out of print for over ten years, making any claim for future market damage too

One element of the criticism/comment paradigm that deserves special attention is the unique status enjoyed by unpublished letters and documents.²⁹⁴ There is considerable conflict over whether, and to what extent, fair use can be made of unpublished letters and writings during the creation of a biography or historical work. The debate has raged on particularly through the Second Circuit²⁹⁵ and the law reviews.²⁹⁶ Fortunately for the practitioner, the application of fair use doctrine to unpublished letters and documents is relatively easy. A work that utilizes quotations from previously published materials will customarily be declared a fair use provided the quotation is reasonable as to quantity.²⁹⁷

In *Salinger v. Random House, Inc.*,²⁹⁸ the Second Circuit barred publication of a biography containing quotations from unpublished letters of the reclusive author, J.D. Salinger.²⁹⁹ Despite the fact that Hamilton, the biographer, obtained copies of Salinger's letters from several library archives, the court remanded the case with directions to issue an injunction against publication.³⁰⁰ The court found unavailing Hamilton's argument that the quotations need be used to evoke Salinger's ironic literary style.³⁰¹ "To deny a biographer . . . the opportunity to copy the expressive content of unpublished letters is not, as appellees contend, to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported."³⁰² But "Salinger has a right to protect the expressive con-

speculative.)

294. This question arises almost exclusively in biography cases, in which the plaintiff seeks to reduce public exposure to personal letters and other information. *See, e.g., Love v. Kwitny*, 706 F. Supp. 1123 (S.D.N.Y. 1989).

295. *See, e.g., New Era Publications Int'l v. Henry Holt and Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir.), *reh'g denied*, 884 F.2d 659 (2d Cir. 1989). *See also Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987).

296. *See* debate between Judge Leval and Professor Weinreb, *supra* note 2. *See also* NIMMER, *supra* note 1; NEWMAN, *supra* note 1.

297. *See, e.g., Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966). *Rosemont* held that extensive quotations from published works about Howard Hughes were fair use. *Id.* at 305. The court noted that "it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works." *Id.* at 307. *Accord Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977) (fair use to quote from letters written by Rosenberg which were later published).

298. 811 F.2d 90 (2d Cir. 1987).

299. *Id.* at 100.

300. *Id.*

301. *Id.* at 96-97.

302. *Id.* at 100.

tent of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use under 'ordinary circumstances.'³⁰³

The Scientology movement has also contributed to the jurisprudence of fair use.³⁰⁴ In a pair of cases involving erstwhile biographies of the founder of Scientology, the Second Circuit upheld the distinction between quotation of published material—considered fair—and quotation of unpublished material—presumptively unfair.³⁰⁵ In both *Henry Holt* and *Carol Publishing*, New Era sought to prevent publication of biographies of L. Ron Hubbard, the founder of the Dianetics movement.³⁰⁶ Both works sought to expose Hubbard as little more than a hack pulp writer turned prophetic savior, a fraud, and pathological liar.³⁰⁷ In *Carol Publishing*, the Second Circuit affirmed the trial court's finding of fair use because the author quoted directly from only a small portion of Hubbard's previously published work.³⁰⁸

Henry Holt can be divided into two parts, because the biographer in that case drew extensively from Hubbard's published works as well as his unpublished efforts.³⁰⁹ Reproduction of the published works was a fair use. "Neither appellant nor the majority opinion disputes Judge Leval's conclusion about Hubbard's published works: that all the quotations or paraphrases from these works were either non-infringing or fairly used. . . ."³¹⁰ The quotations from Hubbard's unpublished works, however, could not be utilized.³¹¹

303. *Id.* (quoting *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555 (1985)).

304. See *infra* text accompanying notes 306-12.

305. *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir.), *reh'g denied*, 884 F.2d 659 (2d Cir. 1989); *New Era Publications Int'l v. Carol Publishing Group*, 904 F.2d 152 (2d Cir. 1990).

306. In *Carol Publishing*, 904 F.2d at 153, the book was entitled *A Piece of Blue Sky: Scientology, Dianetics and L. Ron Hubbard Exposed*, and in *Henry Holt*, 873 F.2d 576 (2d Cir. 1989), the title was *Bare-Faced Messiah: The True Story of L. Ron Hubbard*.

307. The best discussion of this can be found in the lower court *Henry Holt* opinion, 695 F. Supp. at 1508-24.

308. 904 F.2d at 159.

309. 695 F. Supp. at 1498.

310. 873 F.2d at 591 (Oakes, J., concurring).

311. 873 F.2d at 584. Judge Leval's opinion offers some helpful language which is good law:

This means that a biographer/critic who purports to make fair use of unpublished copyrighted matter must make a particularly compelling demonstration of justification, upon full consideration of the relevant fair use factors. She must show that her use of protected expression is not done simply to enliven her text by appropriating her subject's lively expression. The use of the protected expres-

A recent case out of the Southern District of New York put a new spin on *Salinger*.³¹² *Wright v. Warner Books, Inc.*³¹³ deviated from *Salinger* when it allowed a biographer to quote from the unpublished letters of the novelist Richard Wright.³¹⁴ The court distinguished *Salinger* in two ways: 1) Wright no longer had the same privacy interest as Salinger;³¹⁵ and 2) unlike Salinger's letters, the Wright materials had been "sold to Yale University's Beinecke Library for a considerable sum."³¹⁶ According to the court, this meant that it was "reasonable to conclude that for the purchase price, and pursuant to the sales contract, the University became free to share Wright's work with interested scholars."³¹⁷

In sum, the critical focus in the criticism/comment paradigm is the amount and substantiality of the infringement, and as long as the taking is reasonable the use will be fair, even if the use is profitable. The primary exception to the above rule is that unpublished works enjoy a virtual per se protection that greatly restricts the duplication of such works.³¹⁸

E. Exploitation of Factual Compilations or Data Bases

Along with the commercial exploitation paradigm,³¹⁹ the factual compilation paradigm will only rarely be deemed a fair use.³²⁰ A factual compilation is any form of factual data published in order to provide information to a large audience. For example, the racing form, the phone book, or other type of data base are all factual complications. Unlike commercial exploitation, where good faith and appropriation of the copyright holder's market are central, the factual complication paradigm has evolved its own unique set of principles.³²¹

sion must be reasonably necessary to the communication and demonstration of significant points being made about the subject and must have no significant adverse effect on the market for the copyrighted work.

695 F. Supp. at 1504.

312. See *supra* text accompanying notes 299-304.

313. 748 F. Supp. 105 (S.D.N.Y. 1990).

314. *Id.* at 113.

315. *Id.* This is particularly startling because in *Henry Holt*, 873 F.2d at 583, the court of appeals gave little attention to the fact that L. Ron Hubbard was dead.

316. 748 F. Supp. at 110 (emphasis in original).

317. *Id.*

318. This area of law will continue to be in flux for some time since the unpublished writings of an individual are critical to a biographer's work.

319. See *infra* text accompanying notes 345-94.

320. Often, discussions involving factual complications center around 17 U.S.C. § 107(2), the nature element.

321. The archetype of this paradigm is the phone book case, in which the defendant

Reproductions of factual compilations are fair only if the copyrighted work is used as an independent source to check or confirm data,³²² or if the use is completely distinct from the copyrighted work.³²³ The Seventh Circuit defined the paradigm as follows: "It is recognized that a compiler of a directory or the like may make a fair use of an existing compilation serving the same purpose if he first makes an honest, independent canvass; he merely compares and checks his own compilation with that of the copyrighted publication"³²⁴ This holding is common to all the jurisdictions.³²⁵

In cases involving factual compilations, defendants frequently argue that their use of the copyrighted information serves a purpose distinct from that of the holders of the copyright.³²⁶ This legal argument usually fails. For example, in *Chain Store Business Guide, Inc. v. Wexler*,³²⁷ a mailing list business took a marketing directory, copied the names, and created a mailing list.³²⁸ The defendant argued that the use should be fair as long as it copied the information but not the format of the original.³²⁹ The court disagreed.³³⁰ Similarly, in *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*,³³¹ creating narratives out of statistical race results was not a fair use.³³² The acquisition of computer data

has copied factual information. See, e.g., *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937).

322. See, e.g., *Southern Bell Tel. & Tel. Co. v. Associated Telephone Directory Publishers*, 756 F.2d 801 (11th Cir. 1985).

323. See, e.g., *New York Times, Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977).

324. *G.R. Leonard & Co. v. Stack*, 386 F.2d 38, 39 (7th Cir. 1967). Another court completely ruled out fair use in these circumstances. *Illinois Bell Tel. Co. v. Haines and Co.*, 688 F. Supp. 1204, 1210 (N.D. Ill. 1988) ("When a defendant fails to start with his own independent canvass and instead starts with plaintiff's copyrighted information . . . this defense is unavailable.").

325. See *Southwestern Bell Media, Inc. v. Trans Western Publishing, Inc.*, 670 F. Supp. 899 (D. Kan. 1987). See also *Northwestern Tel. Systems, Inc. v. Local Publications, Inc.*, 208 U.S.P.Q. 257, 258 (D. Mon. 1979) ("[A] compiler of a directory may make a fair use of an existing compilation serving the same purpose if he first makes an honest, independent canvass. . . .").

326. See, e.g., *Rand McNally & Co. v. Fleet Management Systems, Inc.*, 600 F. Supp. 933 (N.D. Ill. 1984) (unfair use to take mileage data from printed map and input into computerized data base.).

327. 79 F. Supp. 726 (S.D.N.Y. 1948).

328. *Id.* at 727.

329. *Id.*

330. *Id.* at 728.

331. 46 F. Supp. 198 (D. Mass. 1942).

332. *Id.* at 199.

bases also violates fair use.³³³

Even an independent canvas does not allow for appropriation of financial analysis of data. In *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*,³³⁴ for example, the court found that Wall Street Transcripts "appropriated almost verbatim the most creative and original aspects of the reports, the financial analysis and predictions, which represent a substantial investment of time, money and labor."³³⁵

Nor can industry practices represent a valid defense. In *Bell-South Advertising and Publishing Corp. v. Donnelley Information Publishing, Inc.*,³³⁶ the defendant sought to prove fair use by demonstrating that the practice in the industry was to take existing works.³³⁷ The court stated:

Donnelley alleges that 'keying' (obtaining a copy of the local directory and placing the business listing information of name, address, telephone numbers, and business classification from that directory into a computer data base) is a standard industry practice among competitive directory publishers. Donnelley's claim is analogous to that of a driver stopped for speeding. The driver may claim that everybody drives over fifty-five and it is unfair to stop him. Just as widespread abuse of speed limits is irrelevant to the crime of speeding, industrial piracy of directories, even if widespread should not be probative of whether such piracy is fair use.³³⁸

If the alleged infringer can demonstrate a use which is totally dissimilar in nature, such a use might be fair. In *N.A.D.A. Services Corp. v. Business Data of Virginia, Inc.*,³³⁹ the court considered the copying of automobile prices from plaintiff's guide to prepare pricing guides for tax assessors to be a fair use.³⁴⁰ The use was considered fair because the enjoying of BDV's business would not, in any way, profit N.A.D.A.³⁴¹

333. See *Telerate Systems, Inc. v. Caro*, 689 F. Supp. 221 (S.D.N.Y. 1988) (presumption of unfair use when defendant is drawing financial information from plaintiff's wire). See also *National Business Lists, Inc. v. Dun & Bradstreet, Inc.*, 552 F. Supp. 89 (N.D. Ill 1982).

334. 558 F.2d 91 (2d Cir. 1977).

335. *Id.* at 96 (footnotes omitted.).

336. 719 F. Supp. 1551 (S.D. Fla. 1988).

337. *Id.* at 1556.

338. *Id.* at 1561. See also *United Tel. Co. of Mo. v. Johnson Publishing Co.*, 855 F.2d 604 (8th Cir. 1988) (20% of phone book copied was unfair use.)

339. 651 F. Supp. 44 (E.D. Va. 1986).

340. *Id.* at 46.

341. *Id.* at 48. See also *New York Times Co. v. Roxbury Data Interface, Inc.*, 434 F.

With a few notable exceptions, namely, the use of compilation as a confirming source,³⁴² compilations of data may not be mined for their value under the aegis of fair use. In this regard, they are similar to the cases involving appropriation for commercial exploitation.³⁴³

F. Appropriation for Commercial Exploitation

Commercial exploitation is any attempt to utilize another's copyright for gain, pecuniary or otherwise.³⁴⁴ The two crucial elements in this paradigm are the amount of damage done to a copyright holder's market,³⁴⁵ and the good or bad faith of the alleged infringer, both of which the courts examine more critically than in any other paradigm.³⁴⁶ This paradigm analyzes the broad base of copyright uses which are done for profit, and which cannot cloak themselves in the protective garb of historical comment³⁴⁷ or of parody.³⁴⁸ Most uses which fall into the commercial exploitation paradigm are little more than economic piracy.³⁴⁹ For example, in a case where a builder copied the architect's plans, dismissed the architect, and constructed the building according to the same plans,³⁵⁰ the court dismissed the builder's fair use defense, noting

Supp. 217 (D.N.J. 1977) (creation of short name index to the New York Times was fair use). *Roxbury* is troublesome because of the courts inability to find any damage to the New York Time's market for a similar product.

342. See *supra* note 323.

343. See *infra* text accompanying notes 345-94.

344. See, e.g., *Weismann v. Freeman*, 868 F.2d 1313 (2d Cir. 1989) (gain through academic prestige and notice).

345. This can go from total appropriation, see, e.g., *WPOW, Inc. v. MRLJ Enterprises*, 584 F. Supp. 132 (D.C.D.C. 1984) (defendant completely copied plaintiff's application to the FCC for new radio station). The Court found no fair use to a beneficial exposure for the copyrighted work, *Haberman v. Hustler Magazine*, 626 F. Supp. 201 (D. Mass. 1986) (Haberman's sales increased after exposure in *Hustler* magazine. The use was adjudged fair.).

346. Compare *Iowa State Univ. v. American Broadcasting Cos.*, 621 F.2d 57, 61 (2d Cir. 1980) (ABC sports broadcasted segments of plaintiff's film and then denied doing so. In finding against fair use, the court declared that the "fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work material of possible public importance.") with *Matthews Conveyor Co. v. Palmer-Bee Co.*, 135 F.2d 73 (6th Cir. 1943) (affirming fair use of defendant's drawing from photograph of common products). See also *Roy Export Co. v. Columbia Broadcasting System, Inc.*, 208 U.S.P.Q. 580, 587 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095 (2d Cir. 1982) (CBS used copies of Chaplin films unfairly.).

347. See *supra* text accompanying notes 267-90.

348. See *supra* text accompanying notes 227-67.

349. See, e.g., *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339 (N.D. Ohio 1969) (Defendant completely copied plaintiff's elaborate system for teaching guitar cords. Court found fair use defense did not apply.).

350. *Aitken, Hazen, Hoffman, Etc. v. Empire Construction Co.*, 542 F. Supp. 252 (D.

that the Belmont appropriation "destroyed plaintiff's potential market."³⁵¹

Similarly, bad faith colored the efforts by MPI Home video to sell copies made of Jesse Jackson's speech at the National Democratic Convention.³⁵² MPI made several thousand copies of the Jackson speech and distributed them in less than a week.³⁵³ Not only did the defendant destroy the market, he also engaged in a bad faith race to get his tape out to capture the market.³⁵⁴

The same implicit recognition of bad faith actions by the infringer can be found in *Whitol v. Crow*.³⁵⁵ In *Whitol*, a choral director copied the plaintiff's song, added several bars, and then offered to sell his new arrangement back to the plaintiff.³⁵⁶ The director's rearrangement and redistribution with only his name as composer, infringed plaintiff's copyright rights.³⁵⁷

The effect of the infringement is the single most determinative factor in finding a potential fair use in this paradigm.³⁵⁸ Perhaps the most obvious violation of a copyrighted song, occurred at the Arizona State Fair.³⁵⁹ The state infringed the plaintiff's copyright by playing his song, "Happiness Is," over four thousand times.³⁶⁰ The court found in plaintiff's favor, noting that "defendant's taking of plaintiff's right was total, every right contemplated by the copyright statute. This sort of activity is a long way from the quotation of an excerpt for the purpose of literary comment. . . ."³⁶¹

Neb. 1982).

351. *Id.* at 260. See also *Schuchart & Assocs. v. Solo Service Corp.*, 220 U.S.P.Q. 170 (W.D. Tex. 1983) (Use of previous plan in creation of shopping center was not fair.).

352. *Jackson v. MPI Home Video*, 694 F. Supp. 483, 485 (N.D. Ill. 1988). See generally *Kevane, supra* note 1, at 595.

353. *Jackson*, 694 F. Supp. at 484-85.

354. *Id.* at 490. The court rejected defendant's argument that this activity was news reporting, concluding that this case was clear and simple commercial exploitation. See also *Baldwin Cooke Co. v. Keith Clark, Inc.*, 383 F. Supp. 650 (N.D. Ill.), *aff'd*, 505 F.2d 1250 (7th Cir. 1974).

355. 309 F.2d 777 (8th Cir. 1962).

356. *Id.* at 779.

357. *Id.* at 780. See *Northwestern Bell Tel. Co. v. Bedco of Minnesota, Inc.*, 501 F. Supp. 299, 303 (D. Minn. 1980) (denying fair use defense to publisher of yellow pages who made photocopies of advertisements in competing company's directories and offered to publish exact duplicates). See also *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 445 F. Supp. 875, 880 (S.D. Fla. 1978), *aff'd*, 626 F.2d 1171 (5th Cir. 1979) ("The use of a copyrighted work by a commercial enterprise for commercial advantage was not the primary concern in the development of the fair use doctrine.").

358. Contrast this with parody, where the infringer intentionally destroys a copyrighted item's market. See *supra* text accompanying note 266.

359. *Mills Music, Inc. v. State of Ariz.*, 187 U.S.P.Q. 22 (D. Ariz. 1975).

360. *Id.* at 25.

361. *Id.* at 37. See also *Hill v. Whalen & Martell*, 290 F. 359 (S.D.N.Y. 1914) (new

In the commercial exploitation paradigm, if the alleged infringer's use merely competes or diminishes the copyright holder's direct market, a finding of fair use is unlikely.³⁶² For example, in *Update Art, Inc. v. Maariv Israel Newspaper, Inc.*,³⁶³ an Israeli newspaper copied art from the plaintiff.³⁶⁴ In finding against fair use, the court found that the "full page copy of [the art work] in defendants' newspaper and plaintiff's original, however, are in direct competition with each other as posters. Under these circumstances, defendants' actions can be seen as affecting the market for plaintiff's product."³⁶⁵

Another form of appropriation is a naked exploitation, which exploits a copyright through a transforming use.³⁶⁶ For example, where the defendant made plastic busts of Dr. Martin Luther King, Jr. and placed copyrighted quotes on the busts,³⁶⁷ the court decided: "Defendants have copied the actual copyrighted material for no purpose but their own financial gain. Defendants' use of substantial passages from Dr. King's creative works was purely to induce consumers to buy the plastic busts and to convey the impression that the Center approved of the product."³⁶⁸

Additionally, in *Horn Abott Ltd. v. Sarsaparilla Ltd.*,³⁶⁹ the manufacturer of the Trivial Pursuit board game obtained an injunction against a book publisher who sought to publish a book with all of the questions and answers from the game.³⁷⁰ The plaintiffs argued, and the court agreed, that the use was unfair "because it has stolen the essence of the game, all of the questions and answers."³⁷¹

comic strip "Nutt and Giff" impinged market for "Mutt and Jeff" cartoons).

362. See, e.g., *Schymann v. Albuquerque Corp.*, 664 F. Supp. 473 (D.N.M. 1987) (radio broadcast songs of band during spot pickup was considered unfair use). See also *Associated Music Publishers v. Debs Memorial Radio Fund*, 141 F.2d 852 (2d Cir. 1944).

363. 635 F. Supp. 228 (S.D.N.Y. 1986), *aff'd*, 843 F.2d 67 (2d Cir. 1988) (affirming only extraterritorial application of copyright law and damages).

364. *Id.* at 229.

365. *Id.* at 232. See also *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490 (11th Cir. 1984) (defendant unfairly infringed copyright when he videotaped news broadcasts and sold them to subject of the news reports); *New Boston Television, Inc. v. Entertainment Sports Programming Network, Inc.*, 215 U.S.P.Q. 755 (D. Mass. 1981) (finding unfair ESPN's use of film highlights in violation of plaintiff's copyright).

366. See, e.g., *Rubin v. Boston Magazine Co.*, 645 F.2d 80 (1st Cir. 1980) (transforming in the sense that the infringing use is of a different type than the originally held copyright).

367. *Martin Luther King, Jr. Center for Social Change v. American Heritage, Inc.*, 508 F. Supp. 854, 856 (N.D. Ga. 1981).

368. *Id.* at 861.

369. 601 F. Supp. 360 (N.D. Ill. 1984).

370. *Id.* at 362.

371. *Id.* at 367. See also *Publications Int'l Ltd. v. Bally Mfg. Corp.*, 215 U.S.P.Q. 861

The transforming use will never be considered fair if it demolishes the value of the copyright. For example, in *Educational Testing Services v. Katzman*,³⁷² the court found that Princeton Review's use of SAT questions infringed ETS' copyright.³⁷³ While the court agreed that the "Review . . . is not in competition with ETS, use of ETS' materials by the Review renders the materials worthless to ETS."³⁷⁴ Similarly, in *Association of American Medical Colleges v. Mikaelian*,³⁷⁵ the court found that inclusion of prior copyrighted questions in a study aid harmed the copyright holder and consequently represented an unfair use.³⁷⁶

Rarely will a commercially exploitive use be found to be fair.³⁷⁷ However, when the use is radically different and in good faith, it may be adjudged fair. In *Rokeach v. Avco Embassy Pictures Corp.*,³⁷⁸ the plaintiff, a scientist, had written and copyrighted a case study entitled *The Three Christs of Ypsilanti*, which analyzed three mental patients who believed themselves to be Jesus Christ.³⁷⁹ Defendants produced, wrote, and directed a comedy called "The Ruling Class" about delusional Christs confronting each other.³⁸⁰ Defendant utilized quotes from *The Three Christs* in authoring the play.³⁸¹ The court found that the fact that the "motion picture and play are commercial ventures does not violate the artistic merits of the production nor bar the author from using the materials in this manner. *The Three Christs* is quite

(N.D. Ill). *But see* *Universal City Studios v. T-Shirt Gallery, Ltd.*, 634 F. Supp. 1468 (S.D.N.Y. 1986).

372. 793 F.2d 533 (3d Cir. 1986).

373. *Id.* at 543.

374. *Id.*

375. 571 F. Supp. 144 (E.D. Pa. 1983).

376. *Id.* at 152. *See also* *Meridith Corp. v. Harper & Row Publishers, Inc.*, 500 F.2d 1221 (2d Cir. 1974); *Addison-Wesley Publishing Co. v. Brown*, 223 F. Supp. 219 (E.D.N.Y. 1963) (solutions manual for copyrighted textbook was unfair use).

377. *See, e.g.*, *Mura v. Columbia Broadcasting System, Inc.*, 245 F. Supp. 587 (S.D.N.Y. 1965) (plaintiff's puppets were used on Captain Kangaroo show). In finding the use fair the court noted:

Commentators agree that among the most important factors bearing on whether a use is a fair one, perhaps *the* most important, is whether the use tends to interfere with the sale of copyrighted article. Here, if anything, the exhibition on television would stimulate sales of the hand puppets rather than prejudice them. Further, the 'copies' complained of here could not be used as a substitute for the original work. In addition, these hand puppets were not the principal attraction on the television programs. Rather, their use was incidental.

Id. at 590 (citations omitted) (emphasis in original).

378. 197 U.S.P.Q. 155 (S.D.N.Y. 1978).

379. *Id.* at 156-57.

380. *Id.* at 157.

381. *Id.* at 160-61.

plainly the report of a scientific case study, bearing no resemblance to the baroque satire dramatized in 'The Ruling Class.'"³⁸²

As noted previously,³⁸³ the two defining elements of the commercial exploitation paradigm are good faith and effect on the market. To prevail in this paradigm, it is beneficial to show a positive effect on the market. In both *Haberman v. Hustler Magazine, Inc.*³⁸⁴ and *Brewer v. Hustler Magazine, Inc.*,³⁸⁵ *Hustler* published copies of plaintiffs' artwork.³⁸⁶ The courts, however, reached opposite results.³⁸⁷ The distinction can be found in the proof of damages at trial. In *Brewer*, the court decided that "[s]ince the use was of a commercial nature, harm to *Brewer* could be presumed."³⁸⁸ The *Haberman* court, however, reached the opposite result, holding the use fair because the sales of plaintiff's copyrighted work went up after the reproduction in *Hustler*.³⁸⁹

Similarly, the existence of bad faith is fatal to a fair use claim in this paradigm.³⁹⁰ In two separate cases, *Consumer Reports* sought to prevent publication of their review of a certain product.³⁹¹ The court found publication in an advertisement to be a fair use where the claim was accurate.³⁹² Where the claim was inaccurate, fair use was not applicable.³⁹³ When a party seeks gain through appropriation of a copyrighted work, and cannot cloak its use in a manner to suggest a public benefit, the use will be deemed per se unfair and subject to critical scrutiny.

V. CONCLUSION

The six factual paradigms outlined above represent a new approach to untangling the Gordian knot of the fair use doctrine for the practitioner. While the lawyer still must fashion arguments

382. *Id.* at 161. See also *Narell v. Freeman*, 872 F.2d 907 (9th Cir. 1989) (fair use for defendant to mix part of historical work into pulp novel in order to create antibellum perspective).

383. See *supra* note 346 and accompanying text.

384. 626 F. Supp. 201 (D. Mass. 1986).

385. 749 F.2d 527 (9th Cir. 1984).

386. *Haberman*, 626 F. Supp. at 203; *Brewer*, 749 F.2d at 529.

387. See *Haberman*, 626 F. Supp. at 206 (finding fair use); *Brewer*, 749 F.2d at 529 (not finding fair use).

388. 749 F.2d at 529.

389. 626 F. Supp. at 206.

390. Bad faith is copying after being denied permission.

391. *Amara Refrigeration, Inc., v. Consumers Union of the United States, Inc.*, 431 F. Supp. 324 (N.D. Iowa 1977); *Consumers Union of United States, Inc., v. General Signal Corp.*, 724 F.2d 1044 (2d Cir. 1983), *reh'g denied*, 730 F.2d 47 (2d Cir. 1984).

392. 724 F.2d at 1049.

393. 431 F. Supp. at 326.

about each of the four statutory factors,³⁹⁴ these factual paradigms may provide guidance about which elements to emphasize or attack in support a fair use claim.

394. 17 U.S.C. § 107(1-4) (1988).

APPENDIX

Quantitative analysis is, at best, an inexact science, and provides, at most, inferential elements of trends or aspects of the decision making process. In the drafting of this study, practical limits affected the sample size and available cases. A computer search found 349 cases which utilized the terms "copyright" and "fair use." After culling the cases that did not reach the issue or did not provide a final resolution, I used the remainder as a sample base.

In researching this sample, I sought only the final decision of a court on the fair use issue. This eliminated prior, reversed or affirmed, opinions. Each of the cases in the sample were analyzed for procedural posture, and the existence of a list of binomial (yes/no) variables. The categories included: commercial purpose, charitable/nonprofit Educational biographical, historical, and informational, critical claims by the alleged infringer as well as the existence of First Amendment, substantiality of taking, and impact on the market.

Most of all the useful information produced by this matrix is discussed in the proceeding text. Chronological analysis, both before and after the 1976 codification, reveal no discernable trend or pattern. Geographically, the Second Circuit handles the overwhelming number of claims. The percentage of cases handled by each circuit are illustrated below.

CIRCUIT	% OF FAIR USE CLAIMS ANALYZED
1st	6.1%
2nd	44.3%
3rd	4.6%
4th	1.0%
5th	4.5%
6th	3.8%
7th	9.9%
8th	4.6%
9th	12.9%
10th	2.3%
11th	3.8%
D.C.	2.2%

All of the numbers have been rounded off to a significant digit.