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ALL'S FAIR IN LOVE AND NEWS: HOW THE CURRENT
APPLICATION OF THE FAIR USE DOCTRINE FAVORS THE
TRADITIONAL MEDIA OVER AMATEUR PROVIDERS OF
NEWS CONTENT

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I. INTRODUCTION

With camera phones in an estimated 106 million purses and pockets in the United States alone,¹ it is no longer unusual for significant events to be documented by the man on the street who happens to be in the right place at the right time. News agencies have come to rely on their presence to provide immediate coverage of disasters, such as the 2004 tsunami in Southeast Asia² and the London subway bombings.³ When cell phone footage of Michael Richards hurling racist epithets at hecklers surfaced on a celebrity news site, it was picked up by traditional news organizations and broadcast on the nightly news.⁴ An unknown observer of Saddam Hussein's hanging surreptitiously filmed the event with his camera phone so that he could market the work to Al-Jazeera and Arabiya.⁵ On the campus of Virginia Tech, Jamal Albarghouti ran toward the sound of gunfire,

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¹ *Cameraphones Pass 50% Penetration Mark in USA*, CELLULAR NEWS, Apr. 18, 2007, <http://www.cellular-news.com/story/23224.php>.

² Yuki Noguchi, *Camera Phones Lend Immediacy to Images of Disaster*, WASH. POST, July 8, 2005, at A16, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/07>.

³ *Id.*

⁴ Andrew Gumbel, *We're All Under the Microscope Now*, THE INDEPENDENT, Dec. 29, 2006, available at 2006 WLNR 22646885.

⁵ Terry McCarthy, *New Saddam Hanging Video Reveals Testy Exchange*, ABC NEWS, Dec. 30, 2006, <http://www.abcnews.go.com/print?id=2761888>.

camera phone ready, recording images that were broadcast on CNN the day of the Virginia Tech massacre.⁶ Recognizing the value of this new source of content, many news organizations actively solicit amateur photographs and footage of newsworthy events.⁷ Reuters media group president, Chris Ahern describes Reuters's new program: "This is looking out and saying, 'What if everybody in the world were my stringers?'"⁸

Because it is unlikely that all uses of amateur footage will be through a licensing agreement, this trend creates a new challenge for courts, as amateurs and professionals are bound to clash with increasing frequency over what is a fair use of this growing source of news content.

Although amateur photographers and videographers are serving the purposes of copyright by creating socially beneficial expression, and often making it accessible to the world at large via the Internet, the trend among lower court opinions on the fair use of images indicates that, where news organizations engage in the unauthorized use of newsworthy amateur images, the use is likely to be considered transformative and fair based solely upon a change in context or purpose.

The Ninth Circuit's recent decision in *Perfect 10, Inc. v. Amazon.com, Inc.*⁹ highlights the vulnerability of amateur photographers. There, the court held that Google's use of copyrighted images was transformative because it reproduced the images in a socially beneficial context—moving them from a fee-based pornography site to an Internet search engine.¹⁰ In spite of the lack of any change other than size to the images themselves, the court found the use to be "significantly transformative."¹¹ In finding the use transformative, the court largely discounted the strength of Perfect

⁶ Ellen Gray, *Cell Phones: Turning Witnesses Into Reporters*, PHILA. DAILY NEWS, Apr. 17, 2007, available at http://www.philly.com/dailynews/local/20070417_Ellen_Gray_CELL_PHONES__Turning_witnesses_into_reporters.html.

⁷ Saul Hansell, *Have Camera Phone? Yahoo and Reuters Want You for Their News Service*, N.Y. TIMES, Dec. 4, 2006, available at <http://www.nytimes.com/2006/12/04/technology/04yahoo.html>; David Bauder, *Cell-Phone Cameras Change Face of News*, PITTSBURGH POST-GAZETTE, Jan. 9, 2007, at C4, available at 2007 WLNR 385484; see Reuters.com, You Witness News, Terms of Use, <http://www.reuters.com/youwitnessTerms>; CNN.com, iReport Terms of Use, <http://www.cnn.com/exchange/ireports/toolkit/index.html> (last visited Apr. 3, 2008).

⁸ Hansell, *supra* note 7.

⁹ 508 F.3d 1146 (9th Cir. 2007).

¹⁰ *Id.* at 1167.

¹¹ *Id.* at 1166.

10's arguments on the remaining fair use factors, finding the use by Google to be a fair use primarily because it was a *different* use.¹²

Perfect 10 is typical of the lower courts' movement away from the traditional definition of transformative use as one which furthers the purpose of copyright by adding to and changing the original work with "new expression, meaning, or message,"¹³ to a definition based on a change in function which does not require the secondary user to transform the copyrighted expression itself. In many cases, the secondary use serves the same broad purpose as the original, but places the original work in a new context which—particularly in news reporting—the courts view as socially beneficial.¹⁴ This diluted definition of transformation, together with the increasing presumption of fair use where a transformative use is found, frustrates the purpose of copyright by discouraging the creation and dissemination of new works by photographers who are not members of the traditional news media.

The fair use test prescribed by Congress and by the Supreme Court serves the purposes of copyright by recognizing that new works may build on, but not supplant, protected works.¹⁵ When applying the fair use test to the copying of images, lower courts have departed from this test in two ways. First they have made finding a use transformative the "golden ring" which determines the ultimate case outcome.¹⁶ Second, they have diluted the definition of transformation to the point where it requires no transformation at all.¹⁷ These

¹² *Id.* at 1166-68.

¹³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁴ *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 723 (9th Cir.) (use of images in search engine is transformative because such use serves a different and socially beneficial purpose), *amended by* 508 F.3d 1146 (9th Cir. 2007); *Mathieson v. Associated Press*, No. 90 Civ. 6945 (LMM), 1992 WL 164447, at *2-3 (S.D.N.Y. June 25, 1992).

¹⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985); *Campbell*, 510 U.S. at 575-76.

¹⁶ Matthew D. Bunker, *Eroding Fair Use: The "Transformative Use Doctrine" After Campbell*, 7 COMM. L. & POL'Y 1, 15 (2002); Jeremy Kudon, *Form Over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 583 (2000); Jisuk Woo, *Redefining the "Transformative Use" of Copyrighted Works: Toward a Fair Use Standard in the Digital Environment*, 27 HASTINGS COMM. & ENT. L.J. 51, 70-71 (2004); Diane Leenheer Zimmerman, *The More Things Change the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y U.S.A. 251, 260 (1998).

¹⁷ Woo, *supra* note 16, at 65, 68; Paul Goldstein, *Copyright's Commons*, 29 COLUM. J.L. & ARTS 1, 6 (2005).

departures have disadvantaged the creators of copyrighted images to the extent that the incentive to create quality content and make it available to the public is threatened. To reverse this trend, this article advocates that lower courts return to the traditional definition of transformative use and the statutory factor-by-factor analysis. Such a move would continue to allow for uses which truly are fair and reasonable without granting an almost *per se* finding of fair use where the user has copied the original expression of a non-competitor.

II. THE EVOLVING FAIR USE ANALYSIS

Copyright law is intended to promote the creation of original works of expression by protecting the interests of authors and artists.¹⁸ By granting a limited monopoly to authors, copyright seeks not to benefit the author, but to encourage the creation of new works by providing an incentive for their creation.¹⁹ This constitutional bargain results in a certain tension. Too much protection of an author's exclusive rights would squelch creativity; too little would reduce the incentive to create. Recognizing that new works necessarily build on what has gone before, the doctrine of fair use provides a safety valve, preventing authors from exercising an absolute monopoly over the use of their original expression, but requiring that unauthorized uses be reasonable so that the incentive to create is not significantly reduced.²⁰ Thus, the fair use defense provides "a necessary counterbalance to the copyright law's goal of protecting the creator's work product."²¹

Under common law, fair use was based on the premise that, by publishing his work, the author granted implied consent for "reasonable use."²² Because of the impossibility of defining in advance a use that is fair, courts have developed a fact-intensive balancing test focusing on four factors deemed relevant to the determination of whether a secondary use serves the purposes of copyright or merely supersedes the original.²³ Justice Story famously stated these factors in *Folsom v. Marsh* as ". . . the nature and objects of the selections made, the quantity and value of the materials used,

¹⁸ U.S. CONST. art. I, § 8, cl. 8; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Eldred v. Ashcroft*, 537 U.S. 186, 216 (2002).

¹⁹ U.S. CONST. art. I, § 8, cl. 8; *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

²⁰ *Sony*, 464 U.S. at 478-80 (Blackmun, J., dissenting).

²¹ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719 (9th Cir.) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994)), *amended by* 508 F.3d 1146 (9th Cir. 2007).

²² *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549-50 (1985); S. REP. NO. 102-141, at 3 (1991).

²³ H.R. REP. NO. 94-1476 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659.

and the degree to which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”²⁴ In 1976, Congress codified the multi-factor common law test in 17 U.S.C. § 107,²⁵ stating that its intention was to adopt existing case law while allowing courts the freedom to continue to develop the doctrine of fair use on a case by case basis.²⁶

In determining whether a use is fair, courts are to examine each factor separately and then to weigh the results in light of the purpose of copyright, namely “to promote the Progress of Science and useful Arts” by ensuring that authors have a limited monopoly on the use of their works.²⁷ Uses that are fair do not threaten to replace the original, but build upon the original or complement it.²⁸ The first factor in the four-part analysis—purpose and character of the accused use—

²⁴ *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

²⁵ Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

17 U.S.C. § 107 (2006).

²⁶ H.R. REP. NO. 94-1476, *supra* note 23, at 66.

²⁷ U.S. CONST. art. I, § 8, cl. 8.; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994); Mitch Tuchman, *Judge Leval’s Transformative Standard: Can it Really Distinguish Foul from Fair?*, 51 J. COPYRIGHT SOC’Y U.S.A. 101, 105-06 (2003).

²⁸ *See Ty, Inc. v. Publ’ns Int’l, Ltd.*, 292 F.3d 512, 517 (7th Cir. 2002) (“[W]e may say that copying that is complementary to the copyrighted work (in the sense that nails are complements of hammers) is fair use, but copying that is a substitute for the copyrighted work (in the sense that nails are substitutes for pegs or screws), or for derivative works from the copyrighted work, . . . is not fair use.”) (citation omitted).

addresses the creation of new works, while the remaining factors—nature and character of the original work, amount of the original work used, and the effect of the use on the value and potential market for the original—examine the effect on the copyright owner's incentive to create.²⁹

A. Factor One: “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”

The goal of the courts in evaluating the purpose and character of the infringing use is to determine whether “the new work merely ‘supersede[s] the objects’ of the original creation,”³⁰ or whether it promotes the goal of copyright by creating a new work that uses the original only as the raw material for a new work.³¹ In other words, is the use justified?³² Congress suggested some examples of uses that would likely weigh in favor of fair use and directed the courts to also consider whether the use was for commercial or non-profit purposes.³³ In evaluating this factor, courts have also considered public policy, the good faith (or lack thereof) of the user, whether the use was productive, and to what extent the use is transformative.³⁴ These sub-factors aid the courts in determining whether the use is one which promotes the goal of copyright and should, therefore, be granted the “breathing space” provided by the fair use privilege.³⁵

Judge Pierre Leval argued in *Toward a Fair Use Standard* that courts have tended to find uses fair when they were “transformative.”³⁶ Transformative uses, he explained, were those that did more than repackage the original expression, but had instead used the original work as raw material, “transformed in the creation of new information, new aesthetics, new insights and understandings.”³⁷ Leval's transformative use concept was discussed in just three Second Circuit opinions following the publication of *Toward a Fair Use*

²⁹ Tuchman, *supra* note 27, at 107.

³⁰ *Campbell*, 510 U.S. at 579.

³¹ *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998).

³² Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

³³ 17 U.S.C. § 107(1) (2006).

³⁴ *See, e.g., Campbell*, 510 U.S. at 579; *Fitzgerald v. CBS Broad., Inc.*, 491 F. Supp. 2d 177, 184 (D. Mass. 2007).

³⁵ *Campbell*, 510 U.S. at 579.

³⁶ Leval, *supra* note 32, at 1111.

³⁷ *Id.*

Standard, one by Judge Leval himself,³⁸ before it received the apparent endorsement of the Supreme Court in *Campbell v. Acuff-Rose Music*.³⁹

A unanimous Court in *Campbell* stated that copyright favors “transformative uses,” suggesting that the more transformative the use, the less significant will be the other fair use factors.⁴⁰ The Court concluded that 2 Live Crew’s parody of “Oh, Pretty Woman” was transformative because it used elements of the original work for purposes of commentary and criticism.⁴¹ Rather than making transformative use the sole, or even primary, focus of its analysis, however, the Court went on to examine elements which contributed to making parody a purpose that weighed in favor of fair use,⁴² and to consider factors two through four separately, in light of that use.⁴³

The lower courts subsequently adopted the transformative use inquiry,⁴⁴ reasoning that, where a use fails to transform the original in any meaningful way, it supersedes the purpose for which the original was created and does not advance the goal of copyright.⁴⁵ For example, in *On Davis v. The Gap*, Judge Leval, writing for the Second Circuit, held that the use of copyrighted, non-functional, designer eyeglasses in a photograph in an advertisement for items of clothing was not transformative because the glasses depicted in the advertisement were being used for their intended purpose: to be worn.⁴⁶ The fact that the glasses were placed in a different medium (a photograph) and used to help sell another product (clothing) did not add new meaning or expression. Likewise, in *Ringgold v. Black Entertainment Television*, the Second Circuit found that the

³⁸ *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1375 (2d Cir. 1993) (Martin, J.); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1530 (S.D.N.Y. 1991) (Motley, J.); *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 12-14 (S.D.N.Y. 1992) (Leval, J.), *amended and superseded by* 60 F.3d 913 (2d Cir. 1994).

³⁹ *Campbell*, 510 U.S. at 576-79 (citing Leval, *supra* note 32, at 1111, 1132-34), 585 (citing Leval, *supra* note 32, at 1126-27), 587 (citing Leval, *supra* note 32, at 1123), 591-94 (citing Leval, *supra* note 32, at 1124-25).

⁴⁰ *Campbell*, 510 U.S. at 579.

⁴¹ *Id.* at 583.

⁴² *Id.* at 579-86.

⁴³ *Id.* at 586-94.

⁴⁴ Since Justice Souter’s opinion in *Campbell*, the lower courts have applied the transformative use test in sixty-four copyright cases.

⁴⁵ *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 923 (2d Cir. 1994).

⁴⁶ *On Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001) (Leval, J.).

defendant's use of a poster depicting the plaintiff's copyrighted story quilt as a set decoration for a television program was in no sense "transformative."⁴⁷ The defendant had used the quilt for the same purpose for which it had been designed: to be decorative.⁴⁸

In other decisions, however, the lower courts have confused transformation of the work itself with transformation of the use.⁴⁹ As Professor Paul Goldstein has observed:

Under the putative authority of Justice Souter's opinion in *Campbell v. Acuff-Rose*, contemporary decisions have stretched the notion of transformative use to the breaking point. A substantial majority of courts have taken the view that transformative use doctrine will excuse a use even if the user has done no more than alter the context in which the copyrighted work is used—changing the frame, not the picture.⁵⁰

Such was the case in *Bill Graham Archives v. Dorling Kindersley*, where, in contrast to its earlier holding in *On Davis*, the Second Circuit held that the use of reduced images of copyrighted concert posters in a biographical work on the Grateful Dead was transformative because the images were being used, not to advertise rock concerts, but to illustrate a timeline which included those same concerts.⁵¹ Both uses marked the same events. Both used the works in their entirety, although Dorling Kindersley did considerably shrink them before placing them along a timeline of the Grateful Dead's career.⁵² Yet, the Second Circuit found the secondary use different enough from the original to be transformative.⁵³

The Ninth Circuit has gone down a similar path, holding in two separate instances that images were transformed by reduction in size and display as a result of using an Internet search engine.⁵⁴ Despite its

⁴⁷ *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 79 (2d Cir. 1997) (Newman, J.).

⁴⁸ *Id.*

⁴⁹ Woo, *supra* note 16, at 65.

⁵⁰ Goldstein, *supra* note 17, at 6.

⁵¹ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

⁵² *Id.* at 607.

⁵³ *Id.* at 609.

⁵⁴ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003) (because Arriba had "created a different use for [Kelly's reduced] images, Arriba's use is transformative"); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 721 (9th Cir.) ("a search engine puts [thumbnail] images 'in a different context' so that they are 'transformed into a new creation'"), *amended by* 508 F.3d 1146 (9th Cir. 2007).

previous holding in *Napster* that merely transferring a work to a different medium was not transformative,⁵⁵ in *Perfect 10* and in *Kelly*, the Ninth Circuit concluded that a change in medium *was* transformative where the new medium served a socially beneficial purpose—that of illustrating websites within a search engine.⁵⁶

Since *Campbell*, the lower courts have tended to allow a finding of transformation to color their analysis of both the purpose and character of the secondary use and the remaining factors.⁵⁷ Melville and David Nimmer in *Nimmer on Copyright* caution that a finding of transformative use does not mean that the defendant will prevail on the other factors as well.⁵⁸ In practice, however, where a court finds a use transformative, it is likely to hold that other considerations weigh in favor of fair use. For example, Section 107 directs courts to consider whether the purpose and character of the use was commercial or non-profit,⁵⁹ but after finding a use to be transformative courts tend largely to ignore a secondary user's commercial purpose.⁶⁰ Further, where a court finds a transformative use, it tends to give less weight and less real analysis to factors two through four. For a creator of photographs or video, this means that, not only are courts likely to find a transfer of their work to a news context transformative, but upon finding it transformative, courts are even more likely to find the use fair as well.

B. Factor Two: “the nature of the copyrighted work.”

The second factor in the fair use analysis looks to where the original work lies along the spectrum of copyright protection, as well as whether the work is published or unpublished. Copyright protects “original works of authorship.”⁶¹ Accordingly, the work must be both independently created, and must have “some minimal degree of creativity.”⁶² Facts are discovered rather than created, and, therefore,

⁵⁵ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

⁵⁶ *Kelly*, 336 F.3d at 818-20; *Perfect 10*, 487 F.3d at 721, *amended by* 508 F.3d 1146 (9th Cir. 2007).

⁵⁷ *Bunker*, *supra* note 16, at 2, 9; *Zimmerman*, *supra* note 16, at 260.

⁵⁸ 4 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1][b] (2007).

⁵⁹ 17 U.S.C. § 107(1) (2006).

⁶⁰ *E.g.*, *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001).

⁶¹ 17 U.S.C. § 102(a) (2006).

⁶² *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

do not fall within the constitutionally mandated monopoly granted to the writings of authors.⁶³ Because facts cannot be original expression, factual elements within a work are not protected, even though the work as a whole enjoys protection.⁶⁴ Where works are primarily factual, there is a greater public interest in providing broader access to those works.⁶⁵ Thus, the further the original work is from the creative “core of intended copyright protection,” or the more factual it is, the thinner the copyright and the more the second factor will weigh in favor of fair use.⁶⁶ As the fair use doctrine seeks to balance incentives to authors of creative works against the public interest in access to information,⁶⁷ works that are factual are more vulnerable to a fair use defense.⁶⁸ Judge Leval noted that it is unclear whether fictional works receive more protection in a fair use analysis primarily because they do not lend themselves to productive uses as well as do factual works, or simply because they contain less unprotected expression.⁶⁹ Regardless, the nature of the copyrighted work factor carries little weight in the overall fair use analysis.⁷⁰

Whether a work is published or unpublished receives greater attention because of the one-time value of the author’s right of first publication and his or her interest in privacy and control.⁷¹ Fair use is based in part on the assumption that an author who has placed her work in the market has impliedly consented to reasonable use.⁷² Authors of unpublished works have not given that consent.⁷³ Additionally, where an infringer uses an unpublished work, he or she also appropriates the creator’s right of first publication, “an important marketable subsidiary right” which cannot be replaced.⁷⁴ Because an author should be able to choose when and where she wishes to first publish her work, the Supreme Court held that the unauthorized use of an unpublished work is rarely fair.⁷⁵ Recent decisions have extended this reasoning, holding that, in many cases, not only does a work’s

⁶³ U.S. CONST., art. I, § 8, cl. 8; *Feist*, 499 U.S. at 347.

⁶⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985); *Feist*, 499 U.S. at 347-48.

⁶⁵ *Harper & Row*, 471 U.S. at 563.

⁶⁶ *Id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

⁶⁷ *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984).

⁶⁸ *Harper & Row*, 471 U.S. at 563 (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”).

⁶⁹ *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 17 (S.D.N.Y. 1992), *amended and superseded by* 60 F.3d 913 (2d Cir. 1994).

⁷⁰ WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE* 505 (2d ed. 1995).

⁷¹ *Harper & Row*, 471 U.S. at 562-64.

⁷² *Id.* at 550.

⁷³ *But see id.*

⁷⁴ *Id.* at 549.

⁷⁵ *Id.* at 553-55.

unpublished nature weigh strongly against fair use, but a work's *published* nature favors fair use, counterbalancing the creative nature of the work.⁷⁶ Works that are unpublished are to receive greater protection, but there is no *per se* rule that copying of unpublished works is unfair.⁷⁷

A photograph is considered to contain original creative expression even where its subject matter is factual.⁷⁸ The photographer's depiction of the original scene "is the personal reaction of an individual upon nature"⁷⁹ formed by a series of choices made by the photographer.⁸⁰ Thus, almost any photograph may be protected under copyright.⁸¹ The amount of protection that each photograph receives varies with its level of originality.⁸² Photographs receive their originality from three basic sources: rendition, timing, and

⁷⁶ See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 723 (9th Cir.), *amended by* 508 F.3d 1146 (9th Cir. 2007).

⁷⁷ Congress clarified that the fact that a work is unpublished is not a bar to fair use in 1992, by adding a sentence of explanation following the four factors: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." Congress was reacting to a series of Second Circuit opinions concerning the use of unpublished writings in biographies. H.R. REP. NO. 102-836, at 8-9 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 2553, 2560-61. See *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987); *New Era Publ'ns Int'l, ApS v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir. 1989); *Wright v. Warner Books, Inc.*, 748 F. Supp. 105 (S.D.N.Y. 1990), *aff'd*, 953 F.2d 731 (2d Cir. 1991).

⁷⁸ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249-50 (1903).

⁷⁹ *Id.* at 250.

⁸⁰ Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 394 (2004) ("The seeming transparency of photography works to deny that it is a complex construction. However, each photograph involves a series of choices made by its producer.").

⁸¹ *Strauss v. Hearst Corp.*, No. 85 Civ. 10017, 1988 WL 18932, at *5 (S.D.N.Y. Feb. 19, 1988) (photographs of fishing gear held to be "plainly creative expressions"); *E. Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395, 417-18 (S.D.N.Y. 2000) (photographs of common industrial items for catalog possessed sufficient originality and creativity); *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 310-11 (S.D.N.Y. 2000) (photographs of picture and mirror frames possess requisite level of originality). *Cf.* *Oriental Art Printing, Inc. v. Goldstar Printing Corp.*, 175 F. Supp. 2d 542, 546-47 (S.D.N.Y. 2001) ("rare case" in which photographs lack expressive elements necessary for copyright protection where photographs depicted common Chinese dishes on plates bearing a common pattern, and where plaintiff failed to describe how the photographs were taken).

⁸² *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451 (S.D.N.Y. 2005).

subject matter.⁸³ Rendition concerns the choices that the photographer made in depicting his or her subject matter.⁸⁴ For example, in Abraham Zapruder's famous film of President Kennedy's assassination, the district court found creativity in Zapruder's choice of camera, film, lens, and viewing point.⁸⁵ A photographer achieves originality in timing simply by being at the right place at the right time.⁸⁶ Others are free to attempt to duplicate the photograph by creating the same subject matter, but they may not copy the photograph itself.⁸⁷ Lastly, a photograph may possess originality in its subject matter to the extent that the photographer actually created the scene.⁸⁸ A famous example of originality in subject matter is the photograph of Oscar Wilde taken by Napoleon Sarony.⁸⁹ The Supreme Court found creativity not only in the rendition of the photograph, but in the pose and setting, as well.⁹⁰ The infamous posed photographs of the guards and prisoners at Abu Ghraib prison are a more recent example. Because the photographers posed their subjects, as well as made choices affecting the rendition of each photograph, their work should be accorded a greater degree of protection than the short video of Saddam Hussein's hanging, in which the scene was not created by the photographer.

As with written works, films and photographs enjoy no protection for their factual elements.⁹¹ Facts and the news of the day are part of the public domain.⁹² Hence, the newsworthy subject matter of a photograph or film is not protected.⁹³ Nevertheless, the fact that a film or photograph depicts newsworthy events does not obviate its protection under copyright law.⁹⁴ As explained in *Harper & Row*, if courts were to hold that copying was more likely to be fair because of strong public interest in the subject matter of a work, there would be

⁸³ *Id.* at 451-53; *see also* *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992) ("Elements of originality in a photograph may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved.") (citations omitted).

⁸⁴ *Mannion*, 377 F. Supp. 2d at 452.

⁸⁵ *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 143 (S.D.N.Y. 1968).

⁸⁶ *Mannion*, 377 F. Supp. 2d at 452-53.

⁸⁷ *Id.* at 453; *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000) (noting that copyright protection extends only to the photographer's contribution to the work).

⁸⁸ *Mannion*, 377 F. Supp. 2d at 453.

⁸⁹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 55 (1884).

⁹⁰ *Id.* at 60.

⁹¹ *Id.*; *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

⁹² *Int'l News Serv.*, 248 U.S. at 234.

⁹³ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

⁹⁴ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557 (1985).

reduced incentive to produce any works of value.⁹⁵ “It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public.”⁹⁶

Nevertheless, even where a work is found to be creative and within the core protection of copyright, the second fair use factor may not weigh in favor of the copyright owner when the work is deemed to be transformative.⁹⁷ In *Campbell*, the Court reasoned that, because parodists “almost invariably copy publicly known, expressive works,” the nature of the original works is of little help “in separating the fair use sheep from the infringing goats.”⁹⁸ Subsequent to *Campbell*, many lower courts have discounted the expressive nature of original works whenever the secondary work is found to be transformative, regardless of whether the secondary use is one, like parody, which requires the copying of core protected expression.⁹⁹ For example, after finding Google’s use of reduced copies of images “significantly transformative” in *Perfect 10*, the Ninth Circuit concluded that, although Perfect 10’s images of nude models were creative, this was countered by the fact that they had been previously published,¹⁰⁰ a factor weighing in favor of fair use. In *Bill Graham Archives*, the Second Circuit recognized that the creative nature of the plaintiff’s artistic concert posters placed them within the core of copyright protection, but it nonetheless found that creativity of little relevance in light of Dorling Kindersley’s transformative use of the images in an illustrated biography.¹⁰¹

The fair use doctrine provides courts with room to maneuver when it appears that rigidly enforcing the monopoly of copyright

⁹⁵ *Id.* at 559. *But see* *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968).

⁹⁶ *Harper & Row*, 471 U.S. at 559.

⁹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (nature of the work is a neutral factor where the infringing use is parody); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612-13 (2d Cir. 2006) (creative works’ use by infringer for historical purpose).

⁹⁸ *Campbell*, 510 U.S. at 586.

⁹⁹ *Blanch v. Koons*, 467 F.3d 244, 257 (2d Cir. 2006) (finding that creative nature of original photograph has limited weight where the secondary work is transformative).

¹⁰⁰ *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 723-24 (9th Cir.), *amended by* 508 F.3d 1146 (9th Cir. 2007); *see also* *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (where secondary was use found to be transformative and work was previously published, creative nature of artistic photographs weighed only slightly against fair use).

¹⁰¹ *Bill Graham Archives*, 448 F.3d at 612-13.

would stifle the very creativity it was designed to promote.¹⁰² With the dissemination of creative expression as the goal, it makes sense to give greater weight in a fair use analysis to those works that are closer to this ideal. Despite this, lower courts have largely ignored the extent to which the original work adds to the collective pool of creative expression. Where lower courts find the challenged use to be transformative, the creative nature of the original work is given short shrift, even where that work is significantly more creative than the secondary work. Thus, where news organizations engage in the unauthorized use of even significantly creative works, it is unlikely that the work's creativity will prevent a finding of fair use if the secondary use is deemed transformative.¹⁰³

C. Factor Three: “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”

The third factor of the fair use analysis directs the courts to weigh “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”¹⁰⁴ This is consistent with copyright's goal of encouraging the dissemination of creative expression through incentives to creators. When courts allow secondary users to take too much of the original work or copy its most valuable portions, they decrease the incentive to create, throwing the balancing act of copyright out of kilter. This third factor then looks to whether the use was reasonable in light of the quantity and quality of material taken.¹⁰⁵ The quantity and quality of the portion taken from the original indicates whether the secondary use is likely to be a superseding use.¹⁰⁶ If there is extensive copying from the original, the new work is more likely to serve the same purpose as the original, and thus to replace or to compete with the original in the market.¹⁰⁷ Where

¹⁰² Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980).

¹⁰³ Mathieson v. Associated Press, No. 90 Civ. 6945 (LMM), 1992 WL 164447, at *8 (S.D.N.Y. June 25, 1992).

¹⁰⁴ 17 U.S.C. § 107(3) (2006).

¹⁰⁵ Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (“look to...the quantity and value of the materials used”); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587 (1994).

¹⁰⁶ Campbell, 510 U.S. at 587; Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155 (9th Cir. 1986).

¹⁰⁷ NIMMER, *supra* note 58, § 13.05[D][1] (in general, complete copying is not necessary where the new work serves a different purpose from the original); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566-68 (1985) (actual

a secondary use incorporates substantial portions of the original, or portions that would be considered the “heart” or qualitatively most valuable portions of the original work, the use is less likely to be one that could be considered reasonable, and, consequently, less likely to weigh in favor of fair use.¹⁰⁸

Where the “heart” of the original work is taken, the amount of use should weigh in the plaintiff’s favor, even if the amount is small.¹⁰⁹ The core or heart of a work is that portion, or portions, “most likely to be news-worthy and important in licensing serialization.”¹¹⁰ Verbatim copying¹¹¹ and the manner in which the secondary work uses the excerpts from the original¹¹² indicate the value of the excerpts to both the author and the alleged infringer. For example, the Supreme Court found that the use of only three hundred words lifted from President Ford’s autobiography weighed against fair use where *The Nation* chose those portions that were the “heart of the book,” and structured its article around verbatim quotes from the book.¹¹³ Similarly, in *Elvis Presley Enterprises*, the Ninth Circuit found that the amount used weighed against fair use where the defendant’s sixteen-hour documentary used short clips from Presley’s television appearances, but the excerpted portions featured copyrighted footage of Presley singing the most familiar portions of his most popular songs.¹¹⁴

In the case of parody, which requires extensive copying in order to succeed, the Court held that wholesale copying, or even taking the heart of the original, was a fair use,¹¹⁵ because in order for a parody to succeed it must evoke the original.¹¹⁶ Once the user has

damage from *The Nation*’s use of excerpts when *Time* canceled its serialization of *A Time to Heal*).

¹⁰⁸ See *Harper & Row*, 471 U.S. at 564-66 (third factor weighed against fair use where *The Nation* used verbatim quotes representing the “heart” of the original work); *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 630 (9th Cir. 2003) (when using the heart of a film clip, the use is more likely to require licensing).

¹⁰⁹ *Harper & Row*, 471 U.S. at 564-65.

¹¹⁰ *Campbell*, 510 U.S. at 587, see *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 941 (9th Cir. 2002).

¹¹¹ *Harper & Row*, 471 U.S. at 565; *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000) (citing *Hustler*, 796 F.2d at 1155).

¹¹² *Harper & Row*, 471 U.S. at 566.

¹¹³ *Id.* at 564-66.

¹¹⁴ *Elvis Presley Enters. v. Passport Video*, 349 F.3d 622, 630 (9th Cir. 2003).

¹¹⁵ *Campbell*, 510 U.S. at 588-89.

¹¹⁶ *Id.* at 580-81, 588.

copied enough for the parody to succeed, how much more he may legitimately borrow from the original depends upon whether the parody is likely to supersede the original.¹¹⁷ In *Campbell*, 2 Live Crew took the heart of the original song, but sufficiently added to it so that the end product was not primarily made up of verbatim copying from the original.¹¹⁸

There is no clear line indicating how much is too much as to the amount of the original material used.¹¹⁹ The amount required to reduce the incentive to create necessarily depends on the nature of the secondary use.¹²⁰ A greater portion of the original may be used to the extent that the secondary work is non-superseding.¹²¹ In *Hustler*, the Ninth Circuit observed that, where a defendant uses all or nearly all of the plaintiff's original work, the secondary work necessarily performs the same function as the original.¹²² This is consistent with the traditional fair use analysis, in which the likelihood that the secondary work is transformative is inversely related to the amount of the original that is taken.¹²³ Despite this, where a work is found to be transformative on the basis of a different function or medium, the trend has been to find that even the use of all or nearly all of an image is justified.¹²⁴

As the fair use inquiry has continued to zero in on whether the infringing use is transformative, lower courts have cited *Campbell* for the proposition that even wholesale copying does not weigh against fair use when the secondary use is transformative.¹²⁵ This is especially true where the original work is visual rather than written. For example, in *Bill Graham Archives*, the Second Circuit concluded that

¹¹⁷ *Id.* at 588.

¹¹⁸ *Id.* at 589.

¹¹⁹ *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1263 (2d Cir. 1986).

¹²⁰ *Campbell*, 510 U.S. at 586-87.

¹²¹ *Id.* at 587-88.

¹²² *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1154 (9th Cir. 1986).

¹²³ *Campbell*, 510 U.S. at 587; *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001) (“[F]ragmentary copying is more likely to have a transformative purpose than wholesale copying.”).

¹²⁴ *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820-21 (9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 724 (9th Cir.), *amended by* 508 F.3d 1146 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

¹²⁵ *Kelly*, 336 F.3d at 821 (finding that images of artwork used in their entirety did not weigh against fair use where the images were reduced and used in a search engine); *Núñez*, 235 F.3d at 23-24 (concluding that complete photographs used in news story did not weigh against finding of fair use where the photos served a different purpose than that originally intended).

importing entire images of creative works into a coffee table book did not weigh against a finding of fair use because the images served a different, transformative purpose in the infringing work.¹²⁶ The visual analogy to *Campbell*, however, is not copying an entire image into a new medium, but altering an image for purposes of parody, as was seen in *Liebovitz v. Paramount Pictures*.¹²⁷ In that case, the court found that copying more than was strictly necessary of Liebovitz's portrait of a pregnant Demi Moore for the purposes of parody did not weigh significantly against fair use because the use commented on the original and was unlikely to interfere with the market for the original work.¹²⁸

By diluting the definition of transformative use and then reasoning that the user may copy as much as is necessary for that purpose—even the entirety of a work—the lower courts have significantly reduced the analytical role of the third factor, contrary to the objectives of the statute. In the case of news reporting, where the use of an entire image may be copied to illustrate a news story, a finding of transformative use on the first factor may lead the court to ignore the fact that wholesale copying should indicate that the use was not transformative at all.

D. Factor Four: “the effect of the use upon the potential market for or value of the copyrighted work.”

The fourth factor of the fair use analysis focuses upon the extent to which the use is likely to interfere with the author's ability to obtain a fair return on his labor.¹²⁹ Thus, a finding of commercial use on the first factor creates a presumption of market harm on the fourth.¹³⁰ Here, the courts weigh the effect of the secondary use on only the protected portions of the original work—on its original expression—but also consider the effect on currently undeveloped markets.¹³¹ The potential market for a work encompasses the

¹²⁶ *Bill Graham Archives*, 448 F.3d at 613.

¹²⁷ *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998).

¹²⁸ *Id.* at 116-17.

¹²⁹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985); *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992) (“The reason for this rule relates to a central concern of copyright law that unfair copying undercuts demand for the original work and, as an inevitable consequence, chills creation of such works.”).

¹³⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

¹³¹ NIMMER, *supra* note 58, § 13.05[A][4].

exclusive rights granted by Section 106: reproduction, creation of derivative works, distribution, and public display and performance.¹³² The scope of this potential market is not unlimited. Fair use ensures that the rights of individual authors are not so strictly enforced that licensing is required for all uses, regardless of how minimal, reasonable, or transformative.¹³³ On the other hand, were this factor interpreted as protecting only those uses that the author is currently exploiting, the exclusive right to create derivative works would be virtually eliminated.

When determining whether the secondary work has harmed the potential market for a copyrighted work, courts should define the potential market as one the copyright owner is currently likely to enter.¹³⁴ Other sections of the Copyright Act confirm that Congress did not intend for this market to be frozen at the time of creation.¹³⁵ For example, the termination provisions of Section 304 were intended to give authors of works whose value was not immediately apparent an opportunity to renegotiate contracts that no longer reflect the economic value of the work.¹³⁶ Similarly, in Section 201(c), Congress sought to preserve the author's ability to profit from later, unforeseen markets, where the work has been published as part of a collective work, by strengthening the author's position vis-à-vis his initial publisher.¹³⁷

Any unauthorized use has some potential to harm the market for the original.¹³⁸ Nevertheless, it is not enough for the plaintiff to assert that an infringer interfered with a potential market if the market is one the plaintiff is unlikely to exploit.¹³⁹ Consequently, in order for the effect on the potential market to weigh against fair use, the secondary use must be in a market that the copyright holder is

¹³² 17 U.S.C. § 106 (2006).

¹³³ PATRY, *supra* note 70, at 557; *see also* Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTEL. PROP. L. 1, 24 (1997) (“[B]ecause any work inevitably builds on previous works, some to a greater extent than others, providing too large a monopoly will actually hinder the development of new works by limiting future creators [sic] use of earlier works. Herein lies the fundamental tension in copyright law.”) (footnote omitted).

¹³⁴ PATRY, *supra* note 70, at 559.

¹³⁵ 17 U.S.C. §§ 304, 201(c) (2006).

¹³⁶ 17 U.S.C. § 304; *Stewart v. Abend*, 495 U.S. 207, 229 (1990).

¹³⁷ 17 U.S.C. § 201(c); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 495-97 (2001) (holding that freelance authors' copyrights in individual works were violated where the publisher licensed publication by an electronic database that allowed users access to the works individually).

¹³⁸ *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1387 (6th Cir. 1996).

¹³⁹ NIMMER, *supra* note 58, § 13.05[A][4].

currently likely to have an interest in exploiting.¹⁴⁰ Thus, the use of “Who Are You” as the theme song for *C.S.I.: Crime Scene Investigation* is within the potential market for the work under a fair use analysis, even if Pete Townsend and Roger Daltry did not contemplate such a use when The Who released the song in 1978. Conversely, use of the song in a parody is not within the potential market because it is unlikely that Townsend and Daltry would choose to exploit the market for parodies of their own work.¹⁴¹

Courts must also consider whether the accused use would harm the market for the original work should the use become widespread.¹⁴² Changes in technology may greatly increase the potential for harm by making exact duplicates of original works readily and cheaply available.¹⁴³ Copying that was once customary and largely *de minimis* may grow to reduce demand for the legal copies of original works, thus reducing the incentive to create original works.¹⁴⁴ The market often reacts by reducing transaction costs and creating licensing systems in order both to protect the rights of copyright holders and to exploit the new market for their works,¹⁴⁵ as it has recently with respect to images and footage licensed to Internet sites and news organizations.¹⁴⁶ Where authors and publishers have created a licensing market, such as for stock photographs or Internet content, the courts should find market harm when copying circumvents that market by using the work for free.¹⁴⁷ Unauthorized use decreases the value of the work itself because the copyright owner is no longer able to provide a truly exclusive license.¹⁴⁸ This is especially important when

¹⁴⁰ *Id.*

¹⁴¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

¹⁴² *Id.* at 590.

¹⁴³ See *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 917 (2d Cir. 1994); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

¹⁴⁴ *Am. Geophysical Union*, 60 F.3d at 931; *A&M Records*, 239 F.3d at 1016.

¹⁴⁵ *Am. Geophysical Union*, 60 F.3d at 930; Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 188-90 (2003).

¹⁴⁶ Hansell, *supra* note 7 (reporting on major news organizations' efforts to solicit amateur news footage); Tom Sowa, *Selling an Image: Microstock Sites Offer More Choices to Photogs, Buyers*, SPOKESMAN-REV., Aug. 6, 2007, available at http://www.spokesmanreview.com/tools/story_pf.asp?ID=203264 (reporting on growth of internet market for stock photography).

¹⁴⁷ See *Am. Geophysical Union*, 60 F.3d at 931.

¹⁴⁸ Brief of the Am. Soc'y of Media Photographers, Inc. et al. as Amici Curiae Supporting Plaintiff-Appellant Leslie A. Kelly at 14, *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2000) (No. 00-55521), 2000 WL 34004384.

a work is considered newsworthy because the harm from lost licensing fees and overexposure is greatest when the work is at peak demand; it is then that unauthorized use is most likely to reduce actual sales, and the value of the work is most vulnerable.¹⁴⁹

In practice, where a court finds that a defendant's use has been transformative, it is more likely to find little or no market harm based upon the assumption that the defendant's work necessarily occupies a different market.¹⁵⁰ For example, in *Perfect 10*, the district court found that, because Perfect 10 had licensed another party to sell reduced-size images to cell phone users, "[c]ommonsense dictate[d] that [mobile users of Google Search which included thumbnail versions of Perfect 10's images would] be less likely to purchase the downloadable P10 content."¹⁵¹ On appeal, the Ninth Circuit disagreed, reasoning instead that, where the secondary use is transformative, there is no presumptive harm to the market, even where the secondary use is commercial.¹⁵² Because Perfect 10 had failed to show actual harm by presenting evidence of Google users downloading Perfect 10's images to their cell phones, the court ruled that the fourth factor did not weigh in favor of Perfect 10.¹⁵³

Similarly, the Second Circuit found no market harm in *Bill Graham Archives*, despite the fact that Bill Graham had an established market for licensing its copyrighted concert posters.¹⁵⁴ Bill Graham had an established market for licensing its images and had, in fact, been negotiating a licensing agreement with Dorling Kindersley prior to its decision to publish the images without authorization.¹⁵⁵ Despite this, the court found that Bill Graham suffered no market harm from the loss of those fees because Dorling Kindersley's use fell within a transformative market for the images, over which Bill Graham could not hold a monopoly.¹⁵⁶ In so holding, the court appeared to have narrowed the definition of potential market to exclude any use that

¹⁴⁹ *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 20 (S.D.N.Y. 1992), *amended and superseded by* 60 F.3d 913 (2d Cir. 1994).

¹⁵⁰ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614-15 (2d Cir. 2006).

¹⁵¹ *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 851 (C.D. Cal. 2006), *aff'd in part, rev'd in part by* 487 F.3d 701 (9th Cir.), *amended by* 508 F.3d 1146 (9th Cir. 2007).

¹⁵² *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 ("this presumption does not arise when a work is transformative because 'market substitution is less certain...' Google's use of thumbnails for search engine purposes is highly transformative, and so market harm cannot be presumed.").

¹⁵³ *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d at 1168.

¹⁵⁴ *Bill Graham Archives*, 448 F.3d at 614-15.

¹⁵⁵ *Id.* at 614.

¹⁵⁶ *Id.* at 615.

was not originally intended by the creator, even markets for derivative works, making it almost impossible for a copyright owner to allege market harm once the secondary use is found transformative.

The recent tendency of the courts to discount even actual economic harm once a use is declared transformative is a distortion of the Supreme Court's observation that transformative uses are unlikely to harm the market for the original work. The presumption by many lower courts—that, where the court has deemed the secondary use transformative, there is no substantive effect on the market for or value of the original work—is a powerful disincentive to the development of new markets for copyrighted works.¹⁵⁷ Where this narrow definition of potential market is combined with a broad definition of transformation, copyright holders who are initially unaware of a potential market for their works are unfairly disadvantaged. Under the Second Circuit's holding in *Bill Graham Archives*, even if the copyright owner later develops and enters a new market, he will receive no protection from the courts when a secondary user opts to avoid the now customary fee.

In *Campbell*, Justice Souter observed that there is an inverse relationship between the degree of transformation and the significance of other factors in the fair use analysis.¹⁵⁸ Having found 2 Live Crew's use transformative, the Court did not ignore the remaining factors, but noted the effect that the use of the work as a parody had on the significance of these factors in evaluating whether the parody was a superseding or fair use.¹⁵⁹ The creative nature of the original work was little help in determining whether the use was fair, because "parodies almost invariably copy publicly known, expressive works."¹⁶⁰ In evaluating the third factor, the Court noted that parody must copy enough of the original for the listener to recognize the secondary work as a parody.¹⁶¹ Lastly, the Court found that the parody was not a superseding work likely to reduce the market for the original because copyright holders are unlikely to create derivative works criticizing the original work.¹⁶²

¹⁵⁷ Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 328 (1988).

¹⁵⁸ *Campbell v. Rose-Acuff Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁵⁹ *Id.* at 586-94.

¹⁶⁰ *Id.* at 586.

¹⁶¹ *Id.* at 588.

¹⁶² *Id.* at 591-92.

Where courts require that the secondary use truly incorporate the original only as the raw material to which the infringer has added his own expression to create “new information, new aesthetics, new insights and understandings,”¹⁶³ this approach to the analysis of the remaining factors is reasonable, and a recognition—rather than a predetermination—of the interrelationship between transformation and the other factors. Where, however, the courts consider uses to be transformative which merely import the original work into a new medium or market, and presume that the remaining factors necessarily weigh in favor of fair use as well, the copyright owner of the original work is placed at a distinct disadvantage. If the secondary use is one, such as news reporting, that is considered to be a favored use, any use that does not usurp the works of a competitor is almost *per se* fair. As traditional news agencies continue to rely on amateur content, increasing the likelihood of litigation, the current application of the fair use doctrine will likely become a disincentive to the creation and sharing of original works of amateur news content.

III. HOW THE LOWER COURTS APPLY THE FAIR USE DOCTRINE TO COPYING BY NEWS ORGANIZATIONS.

When Congress codified the fair use doctrine in Section 107, it suggested uses that might weigh in favor of fair use: criticism, comment, news reporting, teaching, scholarship, and research.¹⁶⁴ These uses, however, are not *per se* fair.¹⁶⁵ In particular, the Supreme Court has clearly stated that news reporting is not a presumptively fair use.¹⁶⁶ If copying were to be considered fair whenever the social benefit from access to that particular work outweighs the harm to its creator, the incentive to create socially important works would be substantially reduced.¹⁶⁷ This, in turn, would subvert the purpose of copyright to promote “the Progress of Science and useful Arts.”¹⁶⁸ Although the first factor, purpose and character of use, may shift the analysis in favor of fair use because of the productive or socially beneficial purpose of news reporting, the courts must still evaluate the

¹⁶³ Leval, *supra* note 32, at 1111.

¹⁶⁴ 17 U.S.C. § 107 (2006).

¹⁶⁵ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); H.R. REP. NO. 94-1476, *supra* note 23, at 65.

¹⁶⁶ *See Harper & Row*, 471 U.S. at 557-61; *see also* PATRY, *supra* note 70, at 488 (“This concept of a reasonable, good faith use seems difficult for the media to grasp, perhaps because they tend, egotistically to believe they *are* the public interest and thus that everything they do must also be in the public interest.”).

¹⁶⁷ *Harper & Row*, 471 U.S. at 559; *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1497 (11th Cir. 1984).

¹⁶⁸ U.S. CONST., art. I, § 8, cl. 8; *Harper & Row*, 471 U.S. at 557.

secondary use on the basis of all four factors.¹⁶⁹ To do otherwise subverts the purpose of copyright by discouraging the creation of new works.

With the current tendency to label a use transformative if the original work is merely put to a different purpose, photographers who create works that are not marketed as news are more likely to find that the courts will consider even wholesale copying of their photos a fair use if the secondary user is a news organization. The transfer of images to a news context is considered by many courts to “almost inevitably add[] new meaning or message to a copyrighted work,”¹⁷⁰ despite the fact that those images, like the eyeglasses in *On Davis*, still perform essentially the same function. A comparison of how courts have analyzed the fair use defense, as applied to the unauthorized use of photographs or film clips by news organizations, illustrates the uphill battle faced by photographers who do not originally market their works as news.

A. How courts treat unauthorized use by competing news organizations.

Courts tend to apply a traditional fair use analysis in cases of copying by competing news organizations. Where the secondary use is by a competitor, the use is essentially the same as the original use, even under the narrow definition applied by the lower courts in recent decisions.¹⁷¹ Thus, the court is unlikely to find the secondary use transformative unless the user has actually transformed the original work and not made “merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.”¹⁷² Without a finding of transformative use on the first factor, courts tend to conduct a more searching analysis on the remaining three factors.¹⁷³ In the case of copying by a competitor, the courts’ finding of effect on

¹⁶⁹ *Harper & Row*, 471 U.S. at 561.

¹⁷⁰ Matthew D. Bunker, *Transforming the News: Copyright and Fair Use in News-Related Contexts*, 52 J. COPYRIGHT SOC’Y U.S.A. 309, 312-13 (2004).

¹⁷¹ Compare *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997), with *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18 (1st Cir. 2000), and *Mathieson v. Associated Press*, No. 90 Civ. 6945 (LMM), 1992 WL 16447 (S.D.N.Y. June 25, 1992).

¹⁷² *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901).

¹⁷³ Compare *KCAL-TV*, 108 F.3d 1119, with *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002).

the market and the value of the original work will nearly always weigh against fair use, despite the increasingly narrow view of a work's potential market.¹⁷⁴

The three Los Angeles News Service cases, in which a business providing raw footage to television news outlets sought to protect its rights in the video of the Reginald Denny beating, demonstrate that when there is no change in the original intended purpose of the work the four-factor analysis is rigorously applied.

Los Angeles News Service (LANS) was a business operating in the Los Angeles area in which a husband and wife team, Marika and Robert Tur, created aerial news footage and licensed it to local and national news organizations.¹⁷⁵ On April 29, 1992, after learning that the intersection of Florence and Normandie Avenues would be the likely center of protest if the four police officers charged in the Rodney King beating were acquitted, the Turs and other LANS personnel flew to the intersection following the announcement of the verdict.¹⁷⁶ When the beating of Reginald Denny occurred, Marika Tur filmed the event, while Robert Tur directed the crew and narrated the footage.¹⁷⁷ The feed was broadcast live by KCOP, a local television station and licensee.¹⁷⁸ LANS granted licenses to use the footage to other local stations and to NBC.¹⁷⁹ However, the use of the footage spread beyond the actual licensees, resulting in three separate lawsuits.¹⁸⁰

Los Angeles News Service v. KCAL TV Channel 9

KCAL is a CBS affiliate in Southern California.¹⁸¹ After KCOP broadcast the LANS footage of the riots, KCAL requested a license to use the footage, but LANS refused.¹⁸² Notwithstanding that refusal, KCAL secured a copy from another station, and broadcast

¹⁷⁴ See *Núñez*, 235 F.3d 18. *But see CBS*, 305 F.3d 924.

¹⁷⁵ *CBS*, 305 F.3d at 929.

¹⁷⁶ Brief of Petitioner-Appellant at 10-11, *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997) (No. 95-55261), 1995 WL 17066760.

¹⁷⁷ *Id.* at 11.

¹⁷⁸ *KCAL-TV*, 108 F.3d at 1120.

¹⁷⁹ *Id.*; *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 990 (9th Cir. 1998).

¹⁸⁰ See, e.g., *Tur v. YouTube, Inc.*, No. CV064436 FMC AJWX, 2007 WL 1893635 (C.D. Cal. June 20, 2007) (action for copyright infringement and unfair competition arising out of YouTube's publication of the Denny footage).

¹⁸¹ See *CBS 2-KCAL 9*, <http://cbs2.com>.

¹⁸² *KCAL-TV*, 108 F.3d at 1120; Brief of Petitioner-Appellant, *supra* note 176, at 12 (according to LANS, the refusal to license the tape to KCAL was based on KCAL's failure to pay for previously licensed footage).

thirty seconds of the four-minute, forty-second tape several times on April 30, 1992.¹⁸³ When LANS brought suit in district court, the court granted summary judgment in favor of KCAL, finding fair use.¹⁸⁴ The court based its decision on the newsworthiness of the tape, LANS's failure to identify any economic harm, and KCAL's use of the tape for purposes of news reporting.¹⁸⁵

The Ninth Circuit reversed.¹⁸⁶ In applying the first fair use factor, it found that the purpose of the use weighed for neither party.¹⁸⁷ Although news reporting is a productive use, the fact that KCAL competed with LANS's licensees without paying the same licensing fee outweighed any merit accorded for its favored use.¹⁸⁸ The fact that the tape itself was news might have weighed in KCAL's favor had it made the tape the story, creating what is sometimes called a "meta-use" in which the user comments on the original work itself rather than its subject matter.¹⁸⁹ Instead KCAL used the footage just as if it had paid a licensing fee, presenting the tape as its own, adding only its logo and a voice-over.¹⁹⁰ The court found that this use added nothing "new or transformative to what made the LANS work valuable—a clear, visual recording of the beating itself."¹⁹¹ Additionally, the court noted KCAL's bad faith in using an unauthorized copy after LANS's refusal to grant a license, and in superimposing its own logo on that infringing copy.¹⁹²

Continuing its factor-by-factor analysis, the court found that the nature of the work was primarily factual and informational, which weighed heavily in KCAL's favor.¹⁹³ The court also noted that although KCAL used only a small amount of the entire tape, it chose the most valuable part, shifting the balance away from a finding of fair use.¹⁹⁴ As to the effect on LANS's market, the court noted that,

¹⁸³ *KCAL-TV*, 108 F.3d at 1120-21.

¹⁸⁴ *Id.* at 1120.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 1123.

¹⁸⁷ *Id.* at 1121.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1121-22; Bunker, *supra* note 16, at 325 (commenting that courts seem to favor meta-uses in which the user comments on the original, rather than merely on what the original depicts).

¹⁹⁰ *KCAL-TV*, 108 F.3d at 1122.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

should such use become widespread, it would reduce the incentive to create news footage.¹⁹⁵ Although KCAL's use could be viewed as in the public interest because of the significance of the content of the footage, the court noted that there was no evidence that the LANS tape was the only footage of the Denny beating.¹⁹⁶ The court also noted that even though the tape had been previously published and licensed, there was no evidence that KCAL's use did not have an impact on the market for the footage.¹⁹⁷ Accordingly, the court reversed the district court's holding that fair use was the only reasonable conclusion.¹⁹⁸

Los Angeles News Service v. Reuters

LANS also licensed use of the Denny tape to NBC, which broadcast the footage on the *Today* show.¹⁹⁹ Reuters and Visnews had a news supply agreement with NBC News Overseas.²⁰⁰ When NBC broadcast the footage it simultaneously transmitted to Visnews in New York, which made a copy and transmitted it to overseas subscribers in Europe and Africa, and to the New York office of the European Broadcasting Union.²⁰¹ The European Broadcasting Union made its own copy and transmitted it to Reuters's London branch.²⁰² The Ninth Circuit upheld the lower court's rejection of Reuters's and Visnews's fair use defense.²⁰³ The court recognized the news reporting purpose of the secondary use, but noted that the use was "not very transformative."²⁰⁴ Reuters added nothing to the original work, and yet profited from it "without paying the customary price."²⁰⁵ Additionally, the court found that Reuters's use was commercial, in that it provided the footage to other media outlets for a fee, making LANS a competitor with Reuters in the licensing of its own work.²⁰⁶ This necessarily affected LANS's ability to market and to profit from the footage.²⁰⁷ Thus, Reuters's actions stood to have "a substantially

¹⁹⁵ *Id.* at 1123.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 980 (9th Cir. 1998).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 997.

²⁰⁴ *Id.* at 993.

²⁰⁵ *Id.* at 994 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)).

²⁰⁶ *Reuters*, 149 F.3d at 994.

²⁰⁷ *Id.*

adverse impact” on the market for LANS’s footage.²⁰⁸ Finding that only the factual nature of the original work weighed in Reuters’s favor, the court ruled that the district court had correctly held that the fair use defense did not apply.²⁰⁹

Los Angeles News Service v. CBS

LANS offered to license the riot footage, totaling approximately nine minutes, to Group W Newsfeed, a video news service owned at that time by Westinghouse.²¹⁰ Group W declined.²¹¹ LANS discovered later that Group W had distributed four of LANS’s pieces covering the riot.²¹² One of the recipients of the unauthorized footage was Court TV.²¹³ The network used a clip from the Denny footage to promote its coverage of the trial of Denny’s assailants, and incorporated some of the footage into a montage which introduced one of its programs, “Prime Time Justice.”²¹⁴ The clip was two seconds long, tinted orange and gray, and appeared momentarily in the changing background of an orange clock design.²¹⁵ Court TV also used the same clip to promote its coverage of the Damien Williams and Henry Watson trial.²¹⁶

Although the court emphasized that “mere rebroadcast” is not transformative,²¹⁷ the Ninth Circuit agreed that Court TV’s use was fair.²¹⁸ Court TV’s use of a short clip combined with updates from the trial of Denny’s attackers was not transformative because it did not change the essential purpose of the footage, that of depicting the attack.²¹⁹ The use of the clip in the Prime Time Justice montage, however, was found to “at least plausibly incorporate[] the element of creativity beyond mere republication, [] serv[ing] some purpose

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 994-95.

²¹⁰ *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 929 (9th Cir. 2002).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 929-30; Appellee’s Answering Brief at 5, *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924 (9th Cir. 2002) (Nos. 00-56470, 00-57000), 2001 WL 34091295.

²¹⁶ *CBS*, 305 F.3d at 929.

²¹⁷ *Id.* at 938.

²¹⁸ *Id.* at 942.

²¹⁹ *Id.* at 939.

beyond newsworthiness.”²²⁰ The court noted that this use was commercial because it was used to promote Court TV’s coverage, but that the impact of the commercial use was reduced by the fact that Court TV had transformed the footage for the opening montage.²²¹ The court found that the use of the footage in the teasers was closer to news reporting, and thus less commercial, but that the use was also less transformative because Court TV had done nothing to alter the footage itself.²²² The significance of the commercial use was further discounted when the court reasoned that, because the teasers were used to promote coverage of the Williams trial and not of the Denny beating, LANS and Court TV were not in direct competition.²²³ The purpose and character of Court TV’s use thus weighed slightly in favor of fair use.²²⁴

The court found that the nature of the original work weighed in favor of fair use as in the prior LANS cases,²²⁵ and that the amount used—two to three seconds out of nine minutes of footage—was neutral, especially in light of the length of the clips used by Reuters—forty-five seconds which LANS had also claimed to be the heart of the work.²²⁶ In analyzing the fourth factor, the court found that the use of the clip in the montage was unlikely to have a negative effect on the market for the work because it was transformative.²²⁷ The rebroadcast of the clip during the trial coverage was a closer call, as the three-second clip was used at a time when a market for the Denny footage had reemerged.²²⁸ The court was swayed by the fact that Court TV and LANS operated in “significantly different market[s],” and that the amount of footage used was much less than the forty-five seconds that LANS had claimed in *Reuters* deserved to be considered the heart of the work.²²⁹ The court reasoned that most of LANS’s licensees would use the work in news coverage, which would require far more than the two to three seconds used by Court TV, and that the market for the entire work was already saturated.²³⁰ Having found that none of the four factors weighed against fair use, the court upheld the district court’s finding of fair use.²³¹

²²⁰ *Id.*

²²¹ *Id.* at 939-40.

²²² *Id.* at 940.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 940-41.

²²⁷ *Id.* at 941.

²²⁸ *Id.* at 941-42.

²²⁹ *Id.* at 942.

²³⁰ *Id.*

²³¹ *Id.*

The LANS cases illustrate that the lower courts' dilution of the term "transformative use" does not disadvantage professional producers of news content. The application of the fair use doctrine to disputes between competitors continues to provide protection against unscrupulous business tactics while allowing for reasonable use of the original work. Courts tend not to apply the same analysis, however, when evaluating copying by non-competitors. There, because the work is moved from a non-news to a news context, the courts' efforts to promote uses they deem socially beneficial leads them to dilute the definition of transformation in order to find the use fair. This functional view of transformation limits the rights of non-news photographers where the newsworthiness of a work emerges after its creation and initial publication.

B. How courts treat copying of works by professionals who are not competitors.

Where a photograph or film clip was not originally intended to be news, courts tend to find the infringing work transformative based solely on the transfer of the work to a news medium or context. Combined with the gravitational pull a finding of transformative use exerts on the remaining factors, the dilution of "transformative use" makes a finding of fair use almost a foregone conclusion. This holds true even when a news agency uses an entire work without adding "new information, new aesthetics, new insights [or] understandings"²³² In some cases, the accused use does more than simply copy the work and the work itself is the subject of the story, much like a work of fiction may be the subject of a book review.²³³ In others, however, the work was originally intended to illustrate its subject matter, and serves exactly the same essential purpose in its infringing use.²³⁴ Despite this, courts are likely both to define the purpose of the work more narrowly and to find a change in purpose to be transformative without requiring any change to the work itself, allowing news organizations to publish entire works created by non-competitors under the cover of fair use.

²³² Leval, *supra* note 32, at 1111.

²³³ Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 22 (1st Cir. 2000).

²³⁴ Mathieson v. Associated Press, No. 90 Civ. 6945 (LMM), 1992 WL 164447, at *1-*2 (S.D.N.Y. June 25, 1992); *see also* Four Navy SEALS v. Associated Press, 413 F. Supp. 2d 1136, 1141-42 (S.D. Cal. 2005).

Mathieson v. Associated Press

A pre-*Campbell* case, *Mathieson v. Associated Press*, illustrates how the functional interpretation of the first factor favored the news media even before its articulation as part of the transformative use analysis. There, the District Court for the Southern District of New York granted summary judgment to the Associated Press, holding that its use of professional photographs originally published in a corporate brochure was fair because the use illustrated a news story.²³⁵ Greg Mathieson did a photo shoot for Guardian Technology International's promotion of its line of body armor.²³⁶ Twenty of these photographs were included in the corporation's sales brochure, including two cover shots.²³⁷ One of these photographs was of Oliver North, who had personally endorsed the line, and the other was a composite photograph showing a model wearing a bulletproof vest.²³⁸ The photo had been digitally altered so that, on one half of the model's torso, the armor was exposed; while on the other half, the armor was covered by a shirt.²³⁹ In April 1990, the Associated Press (AP) disseminated a story covering the body armor, focusing on the manufacturer's association with Colonel North.²⁴⁰ AP accompanied the story with the two cover shots taken by Mathieson, on which it affixed its own copyright symbol.²⁴¹

AP admitted to copying and distributing the photographs, but claimed fair use based on their use as part of a news story.²⁴² The court agreed, stating that "the characterization of defendant's use as news-related carries great weight in the analysis of fair use."²⁴³ The court emphasized that AP had used the photographs to illustrate the nature of the business and North's involvement.²⁴⁴ When Mathieson pointed out that, in addition to using the photographs in conjunction with the news story, AP had made copies available for sale to the public in its subsidiary company, World Wide Photos,²⁴⁵ the court responded that Mathieson could not object as long as AP sold his photos as part of its news reporting activities, "an expressly

²³⁵ *Mathieson*, 1992 WL 164447, at *9.

²³⁶ *Id.* at *1.

²³⁷ *Id.*

²³⁸ *Id.* at *6.

²³⁹ *Id.*

²⁴⁰ *Id.* at *1.

²⁴¹ *Id.*

²⁴² *Id.* at *2.

²⁴³ *Id.* at *5.

²⁴⁴ *Id.* at *3.

²⁴⁵ *Id.* at *1.

permissible fair use.”²⁴⁶ When Mathieson argued that AP’s use was commercial, the court answered that, when the use is news reporting, that fact “dispels the notion of theft or of piracy which has characterized other actions.”²⁴⁷ Upon finding that AP’s use of the photographs in news reporting weighted the first factor heavily in its favor, the court informed Mathieson that it “must lean decidedly in the direction of finding fair use even as it looks at the other three factors,”²⁴⁸ and then did so.

The court stated that in order for the second factor to weigh against fair use, the original work must be “creative, imaginative, and original.”²⁴⁹ Accordingly, the court found that the creative nature of the composite photograph weighed against fair use, while the lack of creativity in the head shot of Oliver North weighed for fair use.²⁵⁰ The court found that even if each photograph were considered to be an independent and complete work, rather than a portion of the promotional brochure, the amount and substantiality of use did not weigh against fair use because the photos had been used in conjunction with news reporting.²⁵¹ Additionally, the court pointed out that Mathieson had failed to allege an actual instance in which a copy had been sold through World Wide Photos,²⁵² requiring a showing of actual harm, rather than merely that harm was likely to result if such use should become widespread.²⁵³ The court found that Mathieson failed to show that AP’s use had harmed the market for the two photographs—ignoring the market for stock photographs—and ruled that the fourth factor weighed in favor of fair use.²⁵⁴

Although the district court issued its opinion prior to the Supreme Court’s endorsement of the transformative use inquiry and its later dilution by lower courts, the court’s reasoning anticipates later opinions in which the first factor of the fair use analysis falls in favor of fair use where a work is transferred to a news medium, and in

²⁴⁶ *Id.* at *3.

²⁴⁷ *Id.* at *5.

²⁴⁸ *Id.* at *6.

²⁴⁹ *Id.* (quoting *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981)).

²⁵⁰ *Mathieson*, 1992 WL 164447, at *7.

²⁵¹ *Id.* at *8.

²⁵² *Id.* at *4.

²⁵³ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985).

²⁵⁴ *Mathieson*, 1992 WL 164447, at *9.

which such a finding shifts the balance of the other factors in favor of fair use, even before the court conducts its factor-by-factor analysis.²⁵⁵

Psihoyos v. National Examiner

In contrast to its holding in *Mathieson*, the same district court found a similar use was not fair when the *National Examiner*, a supermarket tabloid, used a copyrighted photograph in a feature story.²⁵⁶ The *Examiner* ran a story entitled “CAR-RAZY: Take a Ride on the Wild Side in Kookie Vehicles.”²⁵⁷ It prominently featured Louis Psihoyos’s copyrighted photograph of Larry Fuentes and his decorative Cadillac.²⁵⁸ When the *Examiner* claimed that its use was transformative because the photo was used in news reporting, the court stated that “the mere fact that the photo depicts a newsworthy item does not justify copying it entirely without permission.”²⁵⁹

Having found that the first factor weighed against fair use, the court conducted a thorough analysis of the remaining factors. Despite the *Examiner*’s argument that the work was not creative because it did nothing more than depict Fuentes and his Cadillac, the court considered Psihoyos’s choice of background and positioning of the car, finding that the photograph was creative.²⁶⁰ Although the *Examiner* argued that its use of nearly the entire photograph did not weigh against fair use because the amount of the photograph used was necessary for its news reporting purpose, the court rejected this reasoning.²⁶¹ Using the entire work might have been acceptable if the purpose of the article was to comment on Psihoyos’s photography, but because the *National Examiner* had reported on the subject of the photograph itself, the court found that the amount of the use was designed to save the *Examiner* the trouble of creating its own photo, and thus weighed against fair use.²⁶²

Turning to the fourth factor, the court noted that Psihoyos was not required to show that he had experienced actual loss due to the

²⁵⁵ *Id.* at *6 (“Because defendant’s use of plaintiff’s photos clearly falls within the permissible use category of ‘news reporting,’ the Court must lean decidedly in the direction of finding fair use even as it looks at the other three factors.”).

²⁵⁶ *Psihoyos v. National Examiner*, No. 97 Civ. 7624(JSM), 1998 WL 336655, at *6 (S.D.N.Y. June 22, 1998).

²⁵⁷ *Id.* at *1.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at *4.

²⁶⁰ *Id.*; see, e.g., *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 451-53 (S.D.N.Y. 2005) (finding choices in the creation of the subject of a photograph and in its rendition as elements of creative expression).

²⁶¹ *Psihoyos*, 1998 WL 336655, at *4.

²⁶² *Id.*

Examiner's use.²⁶³ Responding to the *Examiner's* contention that its use would increase demand for Psihoyos's work, the court stated that even if that were true, it did not account for the licensing fee to which Psihoyos was entitled for the *Examiner's* unauthorized use.²⁶⁴ The court also noted that the *Examiner's* publication of the photograph as a full-page spread was a market substitute for a derivative work of the original as a poster, despite the likely difference in quality.²⁶⁵ Finding that all four factors weighed against fair use, the court denied the *Examiner's* motion for summary judgment.²⁶⁶

A comparison to the same court's holding in *Mathieson*, where the Associated Press likewise did not comment on the original work, suggests that it is the identity of the defendant that primarily swayed the court's decision, and that the outcome may have been different had the *National Examiner* been a conventional newspaper rather than a tabloid. Both news organizations used entire original works without paying a customary licensing fee, and in both works the court recognized the creativity in the original photographs. However, because the *Examiner* used Psihoyos's photograph in a feature article rather than as hard news, its use was not given the same deference that the unauthorized publication of Mathieson's photograph received. This, in turn, affected the court's approach to the remaining factors, even to the extent of dispensing with the requirement of actual harm that it had insisted on in *Mathieson*. This indicates that non-traditional news outlets will have to do more than show a news purpose in order to have their use declared transformative.

²⁶³ *Id.* at *5.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at *6.

Núñez v. Caribbean International News Corp.

The First Circuit's holding in *Núñez v. Caribbean International* has been cited repeatedly in support of the fair use of images based upon a change in purpose alone.²⁶⁷ The plaintiff, Sixto Núñez, was a professional photographer who had taken photos of Joyce Giraud for her modeling portfolio.²⁶⁸ After Giraud won Miss Puerto Rico Universe, some of Núñez's photographs portraying Giraud in semi-nude poses were reportedly circulated by rivals in an effort to unseat her.²⁶⁹ A local television station published the photographs and polled citizens to determine if they considered the photos pornographic.²⁷⁰ Two stations interviewed Giraud regarding her fitness to be Miss Puerto Rico.²⁷¹ After obtaining copies of the photos, *El Vocero*, a local newspaper, published several articles accompanied by three of Núñez's photographs without permission.²⁷²

Based primarily on its finding that placing the modeling portraits in a news context was transformative, the First Circuit agreed with *El Vocero* that its use was a fair one.²⁷³ The court conceded that, in placing photos of the semi-nude Giraud on its front page, *El Vocero* was seeking to increase its circulation.²⁷⁴ This commercial purpose, however, was tempered by the need to inform the public about the details of the controversy surrounding Giraud by placing the articles in context.²⁷⁵ The court distinguished the copying in *Harper & Row*, where *The Nation* used unauthorized access to President Ford's memoirs to scoop a competing news organization.²⁷⁶ Unlike *The Nation*, *El Vocero* did not usurp Núñez's right of first publication, and Núñez did not compete in the same market with *El Vocero*.²⁷⁷

The court found that the first factor favored fair use because *El Vocero* had used the photographs as news, whereas Núñez had created

²⁶⁷ Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006); Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701, 722 (9th Cir.), amended by 508 F.3d 1146 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811, 819-20 (9th Cir. 2003).

²⁶⁸ *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 21 (1st Cir. 2000); Miss Puerto Rico: Joyce Giraud: Beauty Queen Fights to Keep Title, <http://www.samsloan.com/miss-pr.htm> (last visited Apr. 3, 2008).

²⁶⁹ Miss Puerto Rico: Joyce Giraud: Beauty Queen Fights to Keep Title, <http://www.samsloan.com/miss-pr.htm> (last visited Apr. 3, 2008).

²⁷⁰ *Núñez*, 235 F.3d at 21.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* at 25.

²⁷⁴ *Id.* at 22.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 22-23.

²⁷⁷ *Id.* at 23.

the photos for use in a modeling portfolio.²⁷⁸ The court was careful to point out that it was not the newsworthiness of the photographs that justified *El Vocero*'s unauthorized use, but the fact that the use with its accompanying commentary had not superseded Núñez's original purpose of portraying Giraud in a manner designed to promote her modeling career, but instead had given the photographs new meaning and purpose.²⁷⁹ The court did not take into account that the photos themselves, like the eyeglasses in the Gap advertisement,²⁸⁰ still performed the same essential function of depicting Giraud. Instead, the court held that the placement of the photographs in a news context was transformative, and that this was enough to counteract the exploitive use of the photos by *El Vocero*, so that the first factor was neutral or slightly in favor of fair use.²⁸¹

The court's findings on the remaining factors were shaped by its belief that the use of the photographs was transformative. Although, as posed portraits designed for a modeling portfolio, there was creative expression in both the subject matter and the rendition of the photographs, the court found the nature of the works to be a neutral factor.²⁸² It reasoned that, because Núñez's creative expression was used to showcase Giraud's modeling abilities rather than his own ideas or emotions, the creative nature of the portraits did not weigh against fair use.²⁸³ Additionally, because the court agreed with *El Vocero* that its publication of all three pictures copied in their entirety, was necessary to illustrate the news stories, it found that the amount and substantiality of use was a neutral factor as well.²⁸⁴ The court did not address the fact that the public had already seen the pictures when they were broadcast on local television stations,²⁸⁵ nor whether the same need to inform would justify their unauthorized publication were the photos truly scandalous, as was the case in the Vanessa Williams controversy.²⁸⁶

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ On *Davis v. The Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001).

²⁸¹ *Núñez*, 235 F.3d at 23.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 24.

²⁸⁵ *Id.* at 21.

²⁸⁶ Hilary Levey, *Here She Is...And There She Goes?*, 6 CONTEXTS 70, 71 (2007).

Lastly, the court examined the effect of the use on the market.²⁸⁷ The court recognized that it was the effect on the market for the specific works, and not on Núñez's services as a photographer, that was at issue.²⁸⁸ Núñez had previously distributed the photographs among the modeling community in order to promote Giraud as a model and himself as a photographer.²⁸⁹ The court reasoned that the publicity created by *El Vocero's* use would likely increase demand for the portfolio, and that, even if the use became widespread, the availability of newsprint photographs would not reduce demand for higher-quality prints.²⁹⁰ Although the court noted that the use had interfered with the potential sale of the photographs to newspapers, it found the "market for professional photographs publishable only due to the controversy of the photograph itself" to be too speculative to weigh against fair use.²⁹¹ This finding was made despite the fact that Giraud was already something of a local celebrity.²⁹² Finding that the only effect on the market was to increase demand for the photographs, and discounting any right that Núñez might have to exploit the increased demand for the photographs at issue, the court ruled that the fourth factor favored fair use.²⁹³ Upon finding all the factors either neutral or favoring fair use, the court ruled in favor of *El Vocero*.²⁹⁴

The First Circuit emphasized the functional and contextual change to Núñez's photos: "[W]hat is important here is that plaintiff's photographs were originally intended to appear in modeling portfolios, not in the newspaper; the former use, not the latter, motivated the creation of the work."²⁹⁵ The court's decision essentially endorses the unauthorized use of newsworthy photographs as long as the photographs were not originally intended to be news, and denies the creator of those photographs the opportunity to profit from their notoriety by auctioning exclusive rights to the highest bidder.

C. Applying the same analysis to the growing number of amateur news reporters.

So far, there have been few copyright cases in which amateurs have challenged the use of their works by news agencies. With the

²⁸⁷ *Núñez*, 235 F.3d at 24.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 21.

²⁹⁰ *Id.* at 25.

²⁹¹ *Id.*

²⁹² *The Joyce of Life*, OPEN YOUR EYES MAGAZINE, 2003, <http://www.oyemag.com/joyce.html>.

²⁹³ *Núñez*, 235 F.3d at 25.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 23.

pervasive presence of camera phones, and the news media's increasing reliance upon amateur footage, conflicts over whether unauthorized use is fair are bound to emerge. If the lower courts continue to apply a diluted definition of transformative use, and to allow a finding of transformation to shape their findings on the remaining factors of the fair use analysis, amateur creators will find that their exclusive Section 106 rights in their images are not so exclusive after all. As the courts' holdings in *Perfect 10*, *Bill Graham*, *Kelly*, *Núñez*, and other cases suggest, news organizations may publish the works of amateurs with impunity by merely claiming that they have "transformed" the original work by placing it in a socially beneficial context, i.e., "the news." This has the potential to dramatically reduce the monetary incentive for amateurs to create and disseminate these works. This is best illustrated by a look at how some recent publications of amateur footage would be analyzed under the current fair use analysis.

Four Navy SEALs v. Associated Press

In December 2004, Seth Hettena, a reporter for the Associated Press, downloaded pictures from an Internet "smugmug" account, which had been posted there by the wife of a Navy SEAL, believing that the account could not be accessed by the general public.²⁹⁶ The thirteen photos depicted Navy SEALs with Iraqi captives.²⁹⁷ Hettena wrote an article on prisoner abuse by Navy SEALs, which was published by nearly every American newspaper, accompanied by some of the photos from the smugmug account.²⁹⁸ Shortly after the publication of the photographs, four unnamed Navy SEALs and the Navy wife who had maintained the smugmug account filed a complaint against the Associated Press, claiming copyright infringement and three state law claims for violation of privacy.²⁹⁹

The district court failed to reach the issue of whether AP's infringement was fair because it found that the plaintiffs had failed to plead ownership of a valid copyright.³⁰⁰ Even if the plaintiffs had met this requirement, however, it is highly likely that the court would have found the infringing use fair. The Associated Press had appropriated

²⁹⁶ *Four Navy SEALs v. Associated Press*, 413 F. Supp. 2d 1136, 1141 (S.D. Cal. 2005).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 1142.

³⁰⁰ *Id.* at 1148.

images that were meant for personal use and had turned them into news, a socially beneficial use.³⁰¹ According to the Ninth Circuit's reasoning in *Kelly* and *Perfect 10*, a new use which provides a social benefit—even more so than parody—is transformative because it provides a new use for the original work.³⁰² Under the reasoning of the First Circuit in *Núñez*, the shift in context, from a personal website where the photos memorialized events for friends and family to newspapers where they illustrated a story on prisoner abuse, is enough to make the secondary use by the Associated Press transformative because the creator of the photographs did not originally intend for them to appear in the press.³⁰³

After finding the use transformative, the court would interpret the remaining factors in light of this finding, weighting the total analysis in favor of fair use. Thus, in considering the nature and character of the original photographs, the court would discount the fact that many of the pictures were posed³⁰⁴ and entitled to greater protection under copyright for their greater creative expression,³⁰⁵ in light of its finding of transformative use and the photographs' prior publication on the Internet.³⁰⁶ The court would likely hold that the amount and substantiality of the portion used was also a neutral factor because the use of the entirety of each photograph was reasonable and necessary for AP's news reporting purpose.³⁰⁷ The court would also likely discount the effect on the market and on the value of the work, reasoning that because the secondary use was transformative, it necessarily is a non-superseding use, and, therefore, outside of the plaintiff's potential market.³⁰⁸

By contrast, under a traditional fair use analysis, while the Associated Press's use would be considered a preferred use as news reporting and commentary,³⁰⁹ it would not be considered transformative merely because the photographs had been transferred

³⁰¹ *Id.* at 1146.

³⁰² *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007) (“Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use of the original work, while a parody typically has the same entertainment purpose as the original work.”); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003).

³⁰³ *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000).

³⁰⁴ *Four Navy SEALs*, 413 F. Supp. 2d at 1141.

³⁰⁵ *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 453 (S.D.N.Y. 2005).

³⁰⁶ *Perfect 10*, 508 F.3d at 1166-67.

³⁰⁷ *Id.* at 724; *Kelly*, 336 F.3d at 821; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

³⁰⁸ *Perfect 10*, 508 F.3d at 1167-68.

³⁰⁹ 17 U.S.C. § 107 (2006).

into a different medium with no changes to the photos themselves.³¹⁰ The court would also consider Seth Hettena's bad faith in taking photographs from a website that he had reason to believe was private,³¹¹ and the Associated Press's commercial use of the photographs.³¹² The court might also view the AP's use as adding nothing that made the photographs valuable—much like KCAL's rebroadcast of the Denny video. Based upon these considerations, the court would likely find the use non-transformative and first-factor neutral.

In weighing the remaining factors, the creative nature of the photographs would carry greater weight, as would the fact that the photographs had not been released to the public. Although the works themselves may not be the type of work that society has an interest in promoting, they do fall within the creative original expression protected by the Copyright Act. The nature and character of the use would thus weigh in favor of the plaintiff. Under a traditional fair use analysis, the court considers that where the defendant has used an entire work, it is likely that the secondary use will supersede the original in the market.³¹³ The amount and substantiality of use would, therefore, weigh against fair use as well. Finally, the court would consider the effect of the use on the market for and value of the original. The Supreme Court has remarked that this factor is the most significant because it directly impacts the incentive to create.³¹⁴ Worldwide news circulation of photographs by military personnel of themselves that engendered threats of legal action and physical harm—like parody of one's own work—is not a market that the creators of the photographs were likely to enter.³¹⁵ This factor would weigh in favor of fair use.

Weighed together in light of the purpose of copyright, a finding of fair use is a closer call. This factor-by-factor analysis is much less likely to disincentivize amateur photographers by making

³¹⁰ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998).

³¹¹ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562-63 (1985).

³¹² 17 U.S.C. § 107(1) (2006).

³¹³ *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986).

³¹⁴ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984); *Harper & Row*, 471 U.S. at 566 (“This last factor is undoubtedly the single most important element of fair use.”).

³¹⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-92 (1994).

unauthorized copying by news organizations nearly *per se* fair. If the market is one which the photographer might foreseeably enter, his right to profit from the newsworthiness of his photograph is protected. Furthermore, the enforcement of these rights encourages news organizations to create licensing schemes, such as those created by Reuters and Yahoo!, rather than endorses the tempting practice of cruising the Internet for free content to save news organizations the trouble of creating their own. Such licensing schemes, in turn, will increase the incentive for amateurs to create content that is socially beneficial.

McClatchey v. Associated Press

Where an amateur photographer immediately markets her work as news, her rights are more likely to be protected against infringing news organizations. Valencia McClatchey witnessed the crash of Flight 93 and photographed the mushroom cloud left by its impact.³¹⁶ Her photograph has been included in various exhibits, and McClatchey sold copies of the photograph, donating her profits to the Todd Beamer Foundation.³¹⁷ One year after the crash, AP reporter Charles Sheehan decided to write an article about McClatchey and her photograph, and sent an AP photographer to her home to take photos of McClatchey holding the “End of Serenity” photograph.³¹⁸ McClatchey claimed that the photographer took photos of the work itself without her permission.³¹⁹ The article and photograph depicting only “End of Serenity” were then distributed separately to AP’s PhotoStream member news organizations.³²⁰ When McClatchey filed suit, AP brought a motion for summary judgment based on its fair use defense.³²¹

Here, however, the court found that AP’s use was more commercial than it was educational.³²² The original photograph had lost much of its newsworthiness in the year following September 11, 2001, because the crash of Flight 93 had already received extensive coverage.³²³ Additionally, AP had distributed the photo apart from the

³¹⁶ *McClatchey v. Associated Press*, No. 3:05-CV-145, 2007 WL 776103, at *1 (W.D. Pa. Mar. 9, 2007).

³¹⁷ *Id.* at *1; Milan Simonich, *Judge Preserves Lawsuit Over Sept. 11 Photo*, PITTSBURGH POST-GAZETTE, Apr. 3, 2007, at B1, available at <http://www.post-gazette.com/pg/07093/774585-85.stm>.

³¹⁸ *McClatchey*, 2007 WL 776103, at *2.

³¹⁹ *Id.*; Simonich, *supra* note 317.

³²⁰ *McClatchey*, 2007 WL 776103, at *2.

³²¹ *Id.* at *3.

³²² *Id.*

³²³ *Id.*

article on McClatchey.³²⁴ The court also noted that AP did not change the photograph in any way, but merely copied it and made it available to its subscribers without paying the usual licensing fees.³²⁵ Although the market for the photograph was not large, the court found that AP had distributed it to McClatchey's most likely customers by making it available to approximately 2,000 PhotoStream member news organizations.³²⁶ The court concluded that it could not find fair use as a matter of law.³²⁷

The court's holding appears to indicate that media savvy amateurs who post their newsworthy photos on GroundReport³²⁸ or Citizen Image,³²⁹ where they have an opportunity to market their photographs as news, have a greater chance of having their rights protected than do amateurs who post on MySpace or YouTube. As *Psihoyos* and *Mathieson* demonstrate, the courts do not view all news outlets equally.

Virginia Tech

The coverage of the April 16, 2007, shooting at Virginia Tech relied heavily on content provided by students. Dan Abrams, general manager of MSNBC, commented: "On this story, the Internet and digital technology have been a driving force like never before."³³⁰ Before CNN's reporters had arrived on the scene, graduate student Jamal Albarghouti, camera phone in hand, was running toward the sound of gunshots.³³¹ CNN aired his footage and referred to him throughout the day as "our I-reporter."³³² CNN, like many networks,

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at *2-3.

³²⁷ *Id.* at *4.

³²⁸ <http://www.groundreport.com> (revenue-sharing internet site which features user-submitted news and opinion articles).

³²⁹ <http://www.citizenimage.com> (provides marketplace for selling pictures online).

³³⁰ David Zurawik, *Eyewitness Testimonies and Footage Dominate News*, BALTIMORE SUN, Apr. 17, 2007, available at <http://www.baltimoresun.com/news/nationworld/bal-te.media17apr17,0,7252873.story?coll=bal-nationworld-headlines> (last visited Apr. 6, 2008).

³³¹ *Id.*; *On the Beat with Citizen Reporters*, THE AGE (Australia), May 24, 2007, available at <http://www.theage.com.au/articles/2007/05/23/1179601421038.html> (last visited Apr. 6, 2008); Gray, *supra* note 6.

³³² Gray, *supra* note 6.

solicits reports, commentary, or images.³³³ CNN specifies that, by submitting content, authors agree to a “non-exclusive, perpetual, worldwide license” without payment.³³⁴ Albarghouti, however, was reportedly paid an undisclosed sum for the footage that was viewed by more than 900,000 persons on CNN.com by 3:14 p.m. on the day of the shooting.³³⁵

In search of their own citizen reporters, other networks trolled MySpace and Facebook for content.³³⁶ Postings by Virginia Tech staff and students on blogs and on social networking sites created a communal record of the event.³³⁷ The students posted pictures and commentary online as part of the community grieving process.³³⁸ The immediate availability of firsthand accounts and images was a source few journalists could resist.³³⁹ One blogger’s entry recording his wounded girlfriend’s experience triggered a slew of postings from news organizations attempting to arrange an interview.³⁴⁰ Not all students appreciated what they perceived as the voyeurism of the media. One student wrote: “If this is where all the news broadcasters are contacting me from, stop doing it.”³⁴¹

Were a news organization to copy and to broadcast one of those students’ images of his grief-stricken or wounded friends, it appears that, under the current fair use standard, the student’s rights in his original work would be unprotected. If the image was originally posted on a social networking site, the court would likely find that the use in news reporting is transformative even though the image still performed its essential function of depicting the student.³⁴² The fact

³³³ CNN.com, iReport Assignment Desk, <http://www.ireport.com/community/assignment> (last visited Apr. 6, 2008).

³³⁴ CNN.com, iReport Terms of Use, *supra* note 7 (“By submitting your material, for good and valuable consideration, the sufficiency and receipt of which you hereby acknowledge, you hereby grant to CNN and its affiliates a non-exclusive, perpetual, worldwide license to edit, telecast, rerun, reproduce, use, syndicate, license, print, sublicense, distribute and otherwise exhibit the materials you submit, or any portion thereof, as incorporated in any of their programming or the promotion thereof, in any manner and in any medium or forum, whether now known or hereafter devised, without payment to you or any third party.”).

³³⁵ Gray, *supra* note 6.

³³⁶ Zurawik, *supra* note 330.

³³⁷ K.C. Jones, *Cell Phones, Blogs Enable Live Reporting of Virginia Tech Shooting*, INFORMATIONWEEK, Apr. 16, 2007, <http://www.informationweek.com/news/showArticle.jhtml?articleID=199001329>.

³³⁸ *Id.*

³³⁹ Daniel Terdiman, *Journalists Look to Bloggers for Virginia Tech Story*, ZDNET NEWS, Apr. 16, 2007, http://zdnet.com/2100-9588_22-6176579.html.

³⁴⁰ *Id.*

³⁴¹ Zurawik, *supra* note 330.

³⁴² See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (use transformative where concert poster was originally used for artistic

that the use was commercial would be noted, but would likely have little weight in light of the public interest in the event.³⁴³ The degree of creativity invested in the work or the amount used by the news organization would likely have little or no weight once the secondary use had been found to be transformative.³⁴⁴ The fact that the image was published on an Internet site to which others have access would also count toward fair use.³⁴⁵ The court would also likely find that the use had little or no effect on the market because the photographer had not intended to market the image at the time it was created, but instead had created it for personal and social use.³⁴⁶ If the student provided evidence of the market for such works, including the various solicitations for content on news organization websites and the prominent use of Albarghouti's video, the court may hold that, because the student was unable to show actual damage, the fourth factor does not weigh for the student in light of the news organization's transformative use.³⁴⁷ Upon a finding that all four

expression and concert promotion, and secondary use was to illustrate events within a biography); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818-19 (9th Cir. 2006) (artist's photographs transformed when reduced to thumbnail images and used in search engine); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 723 (9th Cir.) (photographs reduced to thumbnails found "significantly transformed" by use in search engine even where copyright owner licensed sale of thumbnail versions of its images), *amended by* 508 F.3d 1146 (9th Cir. 2007). *But see* *On Davis v. Gap, Inc.*, 246 F.3d 152, 174 (2d Cir. 2001) ("nothing transformative" in use of copyrighted eyeglasses in clothing advertisement because eyeglasses still performed essential purpose); *Ringgold v. Black Entm't Television Inc.*, 126 F.3d 70, 78-79 (2d Cir. 1997) ("[i]n no sense is defendants' use transformative" where poster depicting copyrighted quilt was displayed in background during episode of television sitcom); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (conversion of music to MP3 format for transmission over the Internet is not transformative); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (no transformation where radio programs are broadcast over phone lines to enable advertisers to confirm commercials are being properly aired).

³⁴³ See *Núñez v. Carribbean Int'l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000).

³⁴⁴ *Id.* at 23; see generally *Kelly*, 336 F.3d at 820; *Bill Graham Archives*, 448 F.3d at 612 ("second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose.").

³⁴⁵ See *Perfect 10*, 508 F.3d at 1166-67 (creative nature of photographs weighed only slightly against fair use because works were previously published); *Kelly*, 336 F.3d at 820.

³⁴⁶ See generally *Núñez*, 235 F.3d at 24-25; *Mathieson v. Associated Press*, No. 90 Civ. 6945, 1992 WL 164447, at *8 (S.D.N.Y. June 25, 1992).

³⁴⁷ See *Perfect 10*, 508 F.3d at 1168; see also *Bill Graham Archives*, 448 F.3d at 614.

factors were either neutral or weighed in favor of fair use, the court would then declare the use fair.

Such a verdict is consistent with recent lower court rulings on the use of images and on copying by news organizations, but it would have a chilling effect on the dissemination of amateur news content. When creators of images, who up until now have been happy to share their creations for free, realize that news organizations can copy and profit from their works with impunity, they are likely to become much more cautious about what they will release to the public at large. This will reduce the quality of content available on sites other than the traditional media sites. The rule of the commons, whereby a common free resource is squandered because no one is held accountable, will reduce the quality of Internet content. Some will be allowed to exploit the labors and creativity of others without paying the customary fee, and eventually those creators will get wise.

IV. CONCLUSION

Amateur photographers and “citizen reporters” are more likely to be disadvantaged by the current diluted transformative use standard where they have posted photographs or film clips on Internet sites that are not deemed to be traditional news outlets. As licensing fees become standard, the more savvy creators of amateur footage will become increasingly leery of making their work publicly available on non-news websites where they cannot rely on the courts to protect their rights.³⁴⁸ As more and more creators of content find their work on the evening news without their authorization, the quality of the content on these sites will decline. Thus, the courts’ current approach, which turns a blind eye to misappropriation by news agencies if the work was taken from a non-competing source, is likely to impede, rather than promote, “the Progress of Science and the useful Arts.”³⁴⁹

Although some scholars argue that copyright protection has become too strong,³⁵⁰ and that the emphasis on transformative use in

³⁴⁸ Recognizing the value of amateur footage of real life crime, one New Yorker produced DVDs titled “Criminals Gone Wild,” which he sells for \$26.98 each. Alison Gendar & Corky Siemasko, *N.Y. Man Films “Criminals Gone Wild,”* N.Y. DAILY NEWS, Dec. 11, 2007, available at http://www.nydailynews.com/news/ny_crime/2007/12/11/2007-12-11_ny_man_films_criminals_gone_wild.html. “The minute you come out with crime footage everybody wants to buy it.” *Id.*

³⁴⁹ U.S. CONST. art. I, § 8, cl. 8.

³⁵⁰ Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 U.C. DAVIS L. REV. 1207, 1210 (2007) (“Copyright in recent years has certainly become too strong for its own good. It protects more content and outlaws more acts than ever before. It stifles creativity and hampers discovery of and sharing of culture and knowledge.”).

the fair use analysis unfairly favors copyright owners, this is not true when the secondary use is one, such as news reporting, that courts deem to be socially beneficial. In such cases, feeling that a finding of transformative use is a prerequisite for a fair use, the courts apply a diluted definition of “transformative” which includes uses that merely place the original work in a different context or apply it to a different purpose. This results in nearly every secondary use of a work that was not originally used in news reporting being found transformative, even where the news organization has added no new expression to the existing work. Further, because a finding of transformation shifts the analysis of the remaining three factors in favor of fair use, the non-news creator of works that are appropriated by news agencies finds himself with copyright protection that is quite weak. Faced with this reality, the amateur creator must choose to either immediately license his work to a traditional news agency or to keep his photograph or footage away from the prying eyes of the media.

The combination of the diluted definition of transformative use, combined with the greater weight toward fair use given to each factor upon a finding of transformative use, thus places creators of newsworthy photography and film at a marked disadvantage. Because many courts agree that news reporting “almost inevitably adds new meaning or message to copyrighted work,”³⁵¹ it is currently highly unlikely that the concerned citizen who films a teacher subduing a student or a foiled kidnapping attempt will be able to defend his or her copyright against appropriation by news organizations. If a secondary user need only show that it is using the original work in a different manner that is more socially beneficial than the original purpose, the secondary user has a greater incentive to borrow rather than to create, and the creator of the original work has a decreased incentive both to create and to share. In order to promote the creation of works of amateur news photography and footage, the lower courts must apply the traditional definition of transformative use and the statutory factor-by-factor analysis—just as they do to copying by competing news organizations. Such a move will ensure that fair uses truly are fair.

³⁵¹ Bunker, *supra* note 16, at 312.