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COPYRIGHT HARM, FORESEEABILITY, AND FAIR USE

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I. INTRODUCTION

Copyright law needs a theory of harm that can give effect to its constitutional purpose. The Patent and Copyright Clause of the U.S. Constitution gives Congress the power to enact federal copyright law "To Promote the Progress of Science and useful Arts."[1] In order to achieve this objective, copyright law must balance the rights of owners and users.[2] Copyrights must be broad enough to give authors sufficient incentive to create, yet limited enough to allow others to use and build upon those works.[3]

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1. U.S. CONST. art. 1, § 8, cl. 8.

2. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 66–70 (2003) (explaining how copyright protection raises the cost of new expression); Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 506–11 (1945) (stating that copyright "[p]rotection should not go substantially beyond the purposes of protection," because "the very effect of protecting them is to make the enjoyment of their creations more costly").

3. *See, e.g.*, LANDES & POSNER, *supra* note 2; Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 125 (1999) ("[T]he goal of intellectual property [law] is only to provide the 'optimal incentive,' not the largest incentive possible. Past a certain point, it would be inefficient to withhold works from the public domain in order to provide ever-decreasing 'incentives' to their creators."); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996).

> Copyright law's perennial dilemma is to determine where exclusive rights should end and unrestrained public access should begin. If copyright is cast too narrowly, authors may have inadequate incentives to produce and disseminate creative works . . . . If copyright extends

The fair use doctrine is arguably the most important doctrine for striking this balance with regard to uses of copyrighted expression. Fair use considers four factors, the principal one being "harm to the market for the copyrighted work."[4] Unfortunately, recent developments in copyright law tend to obscure the concept of harm in fair use, preventing copyright law from striking the necessary balance between owners and users. This Article argues for a concept of "copyright harm" that defines the scope of fair use in relation to the purpose of copyright by limiting infringement to foreseeable uses and other harmful uses that are likely to reduce ex ante incentives to create or distribute copyrighted works.

Historically, copyright law attempted to achieve balance by granting very limited rights to copyright owners. The earliest copyright statutes protected only against copying of the original copyrighted work itself, and not against copying of the original work in the creation of new or derivative works.[5] In such cases of close or verbatim copying of the original work, it ordinarily could be presumed that the defendant's copying had caused or would cause the copyright owner to lose sales of the copyrighted work. Thus, infringement was limited to copying that caused direct and material harm of a kind that, if allowed to continue, would affect a reasonable person's decision to create or distribute the work.

When the defendant used the work in a less foreseeable way, perhaps changing its meaning or purpose, the fair use doctrine was invoked to determine whether the use was infringing.[6] Although courts have considered multiple factors in fair use analysis, the main focus has been on whether the defendant's use would cause harm to the copyright owner's

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too broadly, copyright owners will be able to exert censorial control over critical uses of existing works or may extract monopoly rents for access, thereby chilling discourse and cultural development.

Id. Professor Netanel expands on these views in Neil Weinstock Netanel, COPYRIGHT'S PARADOX 30–53, 109–53 (2008).

4. 17 U.S.C. § 107 (2000).

5. *See* Copyright Act of May 31, 1790, ch. 15 § 1, 1 Stat. 124 (granting copyright protection only for maps, charts, and books for an initial term of fourteen years plus a renewal term of fourteen years and not granting protection over derivative works). *See also* Benjamin Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 10 (1966) (arguing that in early copyright law, "if the accused book was a [new] work of authorship, it could not at the same time infringe"); John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 475 (2005) (same).

6. *See, e.g.*, Folsom v. Marsh, 9 F.Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (assessing application of fair use doctrine to defendant's copying of numerous letters in making an abridged version of plaintiff's work but finding that harm could be inferred based on the amount taken and the similarity of the two works). Although courts currently treat fair use as an affirmative defense, the *Folsom* court apparently used it as part of the test for infringement. *See infra* note 34 and accompanying text.

foreseeable markets. The emphasis on market harm in fair use analysis has served copyright's constitutional objective of encouraging innovation by limiting infringement to uses that would likely affect a reasonable copyright owner's decision to create or distribute the work.

Over time, however, the scope of copyright protection has increased dramatically. Copyright owners now have the right to control not only the copying of their own works, but also the preparing of derivative works that "modify," "transform," or "adapt" the copyrighted work in any way.[7] Moreover, in fair use analysis, courts have begun to recognize, as a form of "harm to the market for the copyrighted work," not only lost sales caused by the defendant's use but also the inability to obtain licensing fees for many uses.[8] This expansive view of copyrights leads to circularity in determining when a use is fair. Fair use turns primarily on whether the use causes harm to the copyright owner, but the copyright owner can nearly always argue that she has suffered harm, if only because the defendant could have paid a license fee for the use being challenged.[9] Yet, whether the defendant was required to obtain a license (and thus could be said to have harmed the copyright holder by failure to obtain a license) turns on whether the use is fair.[10]

These developments in copyright law bring into stark relief the importance of fair use. The fair use doctrine serves copyright's constitutional purpose by mediating between the interests of owners and users of copyrighted material.[11] Indeed, the Supreme Court recently held that in most cases it is the fair use doctrine, not the First Amendment, that is responsible for safeguarding free speech in the use of copyrighted material.[12]

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7. *See* 17 U.S.C. §§ 101, 106 (2000).

8. *See, e.g.*, Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1381, 1387 (6th Cir. 1996); Am. Geophysical Union v. Texaco, 60 F.3d 913, 929 (2d Cir. 1994). *See also* Christina Bohannan, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 597 (2006); Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROBS., Spring 2007, at 185, 189–91 (2007).

9. *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990) ("By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties.").

10. *See Princeton Univ. Press*, 99 F.3d at 1387 (discussing circularity argument); *Texaco*, 60 F.3d at 929 (same). *See also* Bohannan, *supra* note 8, at 597; Lemley, *supra* note 8 nn.31–40 and accompanying text.

11. *See, e.g.*, Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975 (2002); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 668 (1993).

12. *See* Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2001).

In an attempt to clarify the meaning of fair use, copyright scholars have posited two theories that have gained considerable support from courts and commentators: fair use as market failure[13] and fair use as a balancing of interests.[14] First, proponents of the fair use as market failure theory (as it is widely understood) say that copyright holders are entitled to payment for copying unless some instance of market failure, typically prohibitively high transaction costs, prevents the defendant from paying.[15] As one scholar has put it, "market failure becomes for copyright, just as it is for private property more generally, the exclusive justification for such government intervention."[16]

Second, supporters of the balancing approach argue against the market failure approach on the ground that copyright's purpose of encouraging innovation requires a fair use doctrine that puts more affirmative limits on copyright protection. Thus, the balancing approach attempts to weigh the social value of the defendant's use against the harm to the copyright owner.[17]

Unfortunately, neither of these proposed approaches fully achieves copyright's purpose. The market failure theory wrongly applies a property approach to nonrivalrous copyrights.[18] In doing so, it assumes that the copyright owner is entitled to payment for virtually all uses of copyrighted material, including those that would make the copyright holder no worse

13. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1984).

14. *See, e.g.*, Lunney, *supra* note 11.

15. Although this theory is derived from Professor Wendy Gordon's seminal article *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1984), her original proposal did not limit fair use this much. *See* Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031, 1031–32 (2002). Professor Gordon argues that "it has become standard for economically-oriented commentators to state that the accepted interpretation of copyright's 'fair use' doctrine is to see fair use as responding to high transaction costs between copyright owner and user. It has also become standard to cite me for that limiting proposition . . . ." *See id.* She argues, however, that "the point of [her] original article was not to limit fair use" but to propose an explanation for why even nontransformative uses might also sometimes be protected as fair use. *See id. See also* Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 130–34 & n.52 (1997) (describing the transaction-cost account of the market failure theory as "the prevailing view" of fair use but stating that "a re-reading of Gordon's article makes quite clear that this was only *one* of her chief insights"); Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149 (2003). Although I credit Professor Gordon for the insightful article that gave rise to the influential market failure theory, I feel compelled to critique the market failure theory as it is commonly understood in the literature, though this does not comport exactly with her original conception.

16. *See* Lunney, *supra* note 11, at 987 (critiquing the market failure theory).

17. *See id*. at 981–85.

18. *See infra* text accompanying notes 50–64.

off than she would have been without the use and would have no effect on the copyright holder's incentives to create or distribute the work. Uses of copyrighted material that cause no harm to the copyright owner are, in economic terms, Pareto improvements.[19] Such uses further the purpose of copyright by making the most of works of authorship without reducing the incentives to create those works.

The balancing theory fares better, as it reflects an attempt to weigh the competing interests at stake in copyright law. Yet the balancing approach is problematic in its application, because it is very difficult for courts to engage in open-ended balancing of the values involved in copyright infringement cases. It is simply not possible for courts to measure or weigh, in individual cases, the value of enforcing a copyright against the value of allowing the use.

Moreover, the balancing theory implicitly assumes that nearly every challenged use causes some harm to the copyright owner that must be outweighed by the use's benefits to society. This assumption is both wrong and dangerous, because it does not force copyright owners to prove that they are actually worse off as a result of the defendant's use, and it discriminates against personal uses that cause neither harm nor social benefit. Thus, although balancing is appropriate in some circumstances, it can be done effectively only when the concept of harm and its role in fair use analysis are properly understood.

In order to serve copyright's purpose, fair use must return to its historical roots as a tort doctrine that makes liability turn on proof of harm. Of course, it is not always easy to define what constitutes copyright harm. Indeed, the reason for the current circularity in fair use is that copyright harm is a legal construct that requires a baseline of entitlement from which to measure. Nonetheless, when applied correctly, a harm-based approach provides a coherent and equitable framework for evaluating fair use that serves copyright's purpose to promote creative progress.

In this Article, I argue that Supreme Court and other cases reflect a harm-based approach to fair use and develop a concept of "copyright harm" that is central to fair use analysis. Read together, and consistent with the incentive purpose of copyright, these cases define copyright harm as the uncompensated violation of an exclusive right that would be likely to have a material effect on a reasonable copyright owner's ex ante decision to create or distribute the work. This definition of harm is an

19. A change is a Pareto improvement if it makes at least one person better off and no one else worse off. This is the strictest conception of economic efficiency. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 12–13 (6th ed. 2003).

objective one that infers harm from foreseeable uses and requires proof of harm for less foreseeable ones. Thus, it avoids the circularity that arises from an abstract legal concept of harm by relating harm to the purpose of copyright. As such, this view of fair use helps to delineate the scope of copyright liability in much the same way that the elements of harm and proximate (legal) cause help to delineate tort liability.

In Part II, I show that the fair use doctrine's role historically was to excuse uses that cause no foreseeable harm to the copyright owner, and that doctrinal developments in copyright law have threatened that role. In Part III, I argue that a harm-based approach to fair use serves copyright's purpose to promote creativity, showing why alternative theories of fair use, including the market failure and balancing theories, are rarely capable of achieving copyright's incentive purpose. I also show how the Supreme Court has attempted to develop a harm-based approach to fair use. In Part IV, I explain how courts do or should apply the statutory fair use provision consistent with the harm-based approach, and I suggest some doctrinal changes courts must make to realize this approach fully. Foremost, I argue that the harm-based approach focuses on harm in fact, requiring proof or a meaningful likelihood that the defendant's use supplanted the plaintiff's sales or licensing revenues. Accordingly, it rejects any theory of "copyright dilution," under which some courts have found "harm" where the defendant's use of a copyrighted work impairs the image or distinctiveness of the work without causing market substitution. I also argue that the harm-based approach requires courts to allow defendants to mitigate evidence of harm to a copyright owner's sales by showing that the defendant's use also increases sales of the plaintiff's work.

II. THE RISE AND DECLINE OF COPYRIGHT HARM

Historically, copyright infringement was in the nature of a tort. Indeed, copyright infringement claims originated as tort claims. Under the English Copyright Act of 1709, on which the United States based its Copyright Act, authors would vindicate their statutory copyrights by bringing an action for trespass on the case.[20] Trespass on the case was the English common law writ used for an indirect invasion of an interest.[21] Unlike the trespass action for direct invasions, which allowed recovery even when the

20. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 453 (4th ed. 2002).

21. *See* DAN B. DOBBS, 1 THE LAW OF TORTS 25–26 (2000); RICHARD A. EPSTEIN, TORTS 76 (1999).

plaintiff suffered no harm, the action for trespass on the case required a showing of harm in the form of physical injury or pecuniary loss.[22]

Consistent with its tort roots, early American copyright law limited infringement to uses of copyrighted works that caused harm to the copyright owner. Initially, statutory copyright protection was quite narrow, protecting only against close copying of the original copyrighted work.[23] Accordingly, only uses that caused or were likely to cause the copyright owner to lose sales of her copyrighted work were deemed infringing. It was this harm to the copyright owner's foreseeable markets that was most likely to reduce her incentive to create or distribute the work. By finding liability only when such harm could be inferred from the allegedly infringing act, copyright law balanced the rights of owners and users and served its purpose to encourage creative progress.

When the defendant used the work in a manner that was less certain to cause the copyright owner to lose sales, the fair use doctrine was invoked. In *Folsom v. Marsh*, the seminal case on fair use, Justice Story emphasized that material injury to the copyright owner was the touchstone of fair use.[24] There, Justice Story stated that drawing the line between lawful and unlawful uses of copyrighted works borders on "metaphysics of the law, where the distinctions are, or at least may be, very subtile [sic] and refined, and, sometimes, almost evanescent."[25] Yet he did not try to simplify the task by granting the copyright owner a broad property right to control all uses of her work. Rather, while asserting that no precise line could be drawn, he stated several times that liability turns on "the degree in which the original authors may be injured" as a result of the alleged infringement.[26] Specifically, it depends upon "the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[27]

In *Folsom*, injury to the copyright owner could be inferred. In producing a two-volume biography of George Washington, the defendant copied verbatim hundreds of Washington's letters, which had been collected in the plaintiff's twelve-volume compilation of Washington's

22. *See* DOBBS, *supra* note 21, at 26.

23. The earliest copyright statutes protected only against copying the original work and granted no right to control the preparation of derivative works. *See* Act of May 31, 1790, ch. 15 § 1, 1 Stat. 124.

24. *See* Folsom v. Marsh, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

25. *Id.* at 344.

26. *Id.* at 349.

27. *Id.* at 348.

writings.[28] Because the copied letters comprised approximately one-third of the defendant's work (its "essential value"), and the defendant's work served the same purpose as the plaintiff's (to describe George Washington primarily through his own writings), the court found the copying was likely to harm the copyright owner.[29]

Interestingly, Justice Story also recognized that the defendant's copying created social value. He acknowledged that the defendant had "produced an exceedingly valuable book" and had "selected only such materials, as suited his own limited purpose as a biographer."[30] Moreover, Justice Story expressed "regret" that his finding of infringement "may interfere, in some measure, with the very meritorious labors of the defendants, in their great undertaking of a series of works adapted to school libraries."[31] Yet, given the clear and substantial harm to the copyright owner, Justice Story did not think it appropriate to balance that harm against the social value of the use.

Justice Story provided four factors to guide courts in determining whether a use was fair. These factors remained in the common law of copyright until they were codified in section 107 of the 1976 Copyright Act. At that time, Congress made clear that its inclusion of the fair use doctrine in the statute was intended merely to restate the common law and not to change the scope of fair use in any way.[32] Section 107 provides:

> [T]he fair use of a copyrighted work, . . . 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—
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> (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;

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28. *Id.* at 345.
29. *See id.* at 349.
30. *See id.* at 348.
31. *See id.* at 349.
32. H.R. REP. No. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680 ("Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.").

> (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.[33]

In the years since *Folsom*, however, developments in copyright law have obscured the meaning and importance of harm in copyright infringement and fair use. As an initial matter, although *Folsom* apparently considered the fair use factors in assessing infringement, and section 107 says that "the fair use of a copyrighted work . . . is not an infringement of copyright," most courts now treat fair use as an affirmative defense.[34] Thus, the plaintiff is not required to prove harm as part of the infringement analysis; rather, the defendant ordinarily bears the burden to prove the *absence* of market harm in the fair use analysis.

Moreover, the scope of copyright protection has increased dramatically, making it more difficult to determine when harm has occurred or is likely to occur. Copyright owners now have the right to control not only copying of their own works, but also the preparation of derivative works that "modify, transform, or adapt" the copyrighted work in any way. In addition, attempting to recognize the realities of modern copyright licensing, courts have begun to recognize as a "harm" under the fourth fair use factor not only lost sales caused by the defendant's use, but also the lost opportunity to obtain licensing fees for uses that the copyright holder never even contemplated. The combination of the broad derivative works right with the recognition of a licensing market seems to give the copyright owner the right to control the use of copyrighted material in almost any market, whether or not the use substitutes for sales of the copyrighted work.[35]

Given these developments, it becomes difficult to determine whether a defendant's particular use has actually caused the copyright owner "harm" or has merely deprived her of a potential "benefit."[36] The underlying problem is that "harm" is an abstract legal construct. It requires reference to a predefined baseline of entitlement. The copyright owner's baseline of entitlement clearly includes the right to profit from the sales of the

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33. 17 U.S.C. § 107 (2000).

34. *Compare Folsom*, 9 F.Cas. at 345–49 (assessing fair use factors as part of infringement analysis), *with* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 572, 590 (1994) (describing fair use as an affirmative defense).

35. *See, e.g.*, Bohannan, *supra* note 8, at 597.

36. *See, e.g.*, Wendy J. Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1384–84 (1989).

author's own work. Thus, there is clearly "harm" to the copyright owner where the alleged infringer has copied the work verbatim and supplanted the copyright owner's sales in the intended market. The issue is much harder, however, when there is no evidence that the alleged infringer has supplanted sales, for example, where the allegedly infringing work is not a market substitute for the copyright owner's original work or a standard derivative work. In that case, the copyright owner typically argues that he or she suffered harm because the defendant could have paid her a licensing fee for use of the work.

This argument can render the fair use analysis circular. On one hand, the copyright owner can always argue that he or she suffered harm because the copyright owner could have been paid a license fee to make the very use that is at issue in the case. In other words, the copyright owner could have shared in the benefits of the defendant's use. On the other hand, if the use is fair, then it would seem that the law does not give the copyright holder control over the market for that use, and the alleged infringer was not required to seek a license for the use. As such, failure to obtain a license for the use does not constitute harm to the market for the copyrighted work.[37]

The fallacy of assuming that a plaintiff is entitled to share in profits generated by a defendant might be exacerbated by a misunderstanding of the damages provisions of the Copyright Act. Under section 501 of the Act, copyright holders may obtain as damages either the copyright owner's lost profits or the defendant's earned profits.[38] But this provision does not mean that a copyright owner suffers a legally cognizable harm any time another person makes a profitable use of her copyrighted work. It simply means that when an unauthorized use *does* harm the copyright owner, courts should require the defendant to disgorge profits to discourage such harmful uses.

Professor Wendy Gordon has acknowledged that "[w]hether to call the author's failure to receive revenues from particular copiers a 'harm' . . . depends on how one characterizes the author's baseline."[39] She elaborates as follows:

> If the author is entitled to control all copying of her work then a lack of compensation from these copiers will make her worse off

37. *See* Princeton Univ. Press v. Mich. Document Servs., 99 F.3d 1386, 1387 (6th Cir. 1996) (discussing circularity argument); Am. Geophysical Union v. Texaco, 60 F.3d 913, 929 (2d Cir. 1994) (same). *See also* Bohannan, *supra* note 8, at 597; Lemley, *supra* note 8, at 190–91 & nn.31–40.

38. 17 U.S.C. § 501(a) (2000).

39. *See* Gordon, *An Inquiry Into the Merits of Copyright*, *supra* note 36, at 1384–85.

> than she was legally entitled to be. If "harm" is defined as the extent to which she is worse off in comparison with how she would have fared *had the copier respected her copyright* and paid the license fees the author would have demanded, then these copying activities done without her permission will be said to "harm" her. However, if she is entitled to control all copying of her work, but "harm" is instead defined as the extent to which she is worse off in comparison with how she would have fared *in the defendant's absence*, then it will not be said that she has been "harmed" in these cases. One would say instead that when the copyright law allows a copyright proprietor to sue successfully in such circumstances, it is solely giving her an entitlement to share in the benefits her work generates.[40]

Professor Gordon concludes that "it is largely irrelevant whether the author's entitlement is viewed as an entitlement to be 'free from harm' or 'to share benefit.'"[41]

The definition of harm in fair use is not, however, merely a matter of semantics. It is certainly true that the definition of harm depends on baselines from which to measure any lost entitlements. But determining the appropriate baseline of harm is serious business, and choosing the wrong baseline can be catastrophic. A semantic or rhetorical view of harm leads to the conclusion that a copyright owner may be "harmed" as a result of copying even when "the copying does not affect the copyright owner's *expected* markets," and "the revenues these copiers earn are not revenues the copyright owner could have earned on her own."[42] In this light, we can see that the issue of harm determines answers to some of the most pressing and controversial issues confronting copyright law today,[43] including whether copyright owners must be compensated for uses of copyrighted

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40. *See id.* at 1385.

41. *See id.*

42. *See id.* 1384–85.

> Such a case might arise [where] the copier is a second creative artist with a valuable and novel conception for adapting the copyrighted work, someone who transmits the work to a new audience using a communications technology invented after the work was created, or perhaps an entrepreneur who knows of a market of which the author is ignorant.

Id. Professor Gordon also argues that "it is appropriate that copyright should give rights beyond mere protection against harm (narrowly defined). Among other things, it is desirable for authors to be responsive to the public demand in new areas as well as established ones . . . ." *See id.* Yet, the cases in which no harm can be shown would be ones in which the copyright owner could not foresee the allegedly infringing use and therefore would not have been able to fulfill the public demand for that use.

43. *See infra* Part IV.

material that they could not have made or foreseen and whether harmless copying merely for one's own personal benefit (rather than for the benefit of society) should ever be excused.

Given that copyright's constitutional purpose to "Promote progress" requires balance between copyright holders and users, and the existence of a doctrine like fair use whose purpose is to limit the scope of infringement, one cannot assume that a copyright holder's baseline of entitlement includes control over all uses of her copyrighted work. It follows that one cannot assume that any failure to compensate for a technically infringing use (a violation of an exclusive right under section 106) causes legally cognizable harm to the copyright holder. Rather, for purposes of fair use analysis and copyright law generally, harm should be defined consistently with copyright's purpose. Copyright law does not promote progress under the Patent and Copyright Clause if it prohibits uses that create personal or social value and do not affect a copyright holder's incentive to create or distribute a work. Thus, the scope of fair use (and therefore infringement) should turn on whether the defendant's use has caused or is likely to cause the plaintiff harm.[44]

Current theories of fair use—the market failure and balancing theories—downplay the importance of harm. The fair use as market failure theory virtually eliminates the need for proof of harm. It finds fair use only where some instance of market failure, such as prohibitively high transaction costs or externalities, prevents payment for an allegedly infringing use, regardless of whether the use causes harm.[45] The second theory adopts a balancing approach to fair use.[46] Under this view, courts take harm to the copyright owner into account, but they do not always define harm correctly, and they tend to find fair use only where the social value of the use outweighs the harm.[47]

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44. The Supreme Court recently recognized that fair use is also an important safeguard of First Amendment expression because it mediates between owners and users of copyrighted material. *See* Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2001) (describing fair use as one of copyright's "built-in First Amendment accommodations" and holding that so long as copyright legislation maintains fair use and other internal safeguards of free expression, external First Amendment scrutiny ordinarily would not apply). In future work, I plan to explore how the copyright harm approach to fair use can protect and should be shaped by First Amendment concerns in copyright law.

45. *See, e.g.*, Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 566 n.9 (citing Professor Gordon's market failure theory, perhaps incorrectly, for the view that the fair use doctrine should apply only where market failure prevents payment or the amount that the copyright holder would charge for the use is near zero); Merges, *supra* note 15, at 130–34 & n.52.

46. *See* Lunney, *supra* note 11.

47. *See id*. at 981–85.

In the following sections, I argue that neither of these approaches to fair use fully achieves copyright's purpose, and that an approach that focuses primarily on harm is superior in striking the necessary balance between copyright holders and users. I then show how the Supreme Court has in fact attempted to develop and apply the proposed approach in fair use cases.

III. CURRENT THEORIES OF FAIR USE

A. The Market Failure Approach

Under the market failure theory, fair use excuses copying only where some instance of market failure, such as prohibitively high transaction costs or externalities, prevents the defendant from paying for what otherwise would be an economically valuable use.[48] As such, the market failure theory implicitly adopts a property-oriented approach to copyrights that presumes harm from infringement in the same way that courts presume harm from trespass to real property.[49]

Such a strict property-oriented view of copyright infringement is unconvincing. Unlike real property, copyrighted works are nonrivalrous goods: one person's copying of a copyrighted work does not deprive the owner of her possession or use of the same work.[50] Consequently, while courts may infer at least some nominal harm to a real property owner based on another's trespass, courts may not always infer harm to a copyright owner from another's use of her copyrighted work. Where the copyright owner can show that the alleged infringer supplanted sales that the copyright owner would have made, there is clearly harm. By contrast, where the alleged infringer merely profits from using the copyrighted

48. *See supra* notes 15–16 and accompanying text.

49. For a property-oriented argument against requiring harm in copyright infringement, see David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYR. SOC'Y OF THE USA 421 (1983). Ladd argues that the requirement of harm "is not only unhistoric, but specious." *Id.* at 425. He provides precious little support for this argument, however, offering mainly general observations that the framers of the Constitution were influenced by Locke and believed that private property should not be taken without just compensation. *Id.* at 426. To this he adds a natural-rights justification: "Copyright, after all, merely allows justice. It does not 'give' the author or the publisher anything. It cloaks in legal raiment the undoubted right." *Id.* at 429. Thus, he concludes that "[e]very limitation on copyright is a kind of rate-setting." *Id.* at 431. Ladd's argument ignores consistent Supreme Court precedent specifically rejecting the natural rights view and adopting a positive, utilitarian approach to copyright that necessarily involves statutory limitations on copyrights. *See, e.g.*, Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) ("Congress [in enacting the Copyright Act] did not sanction an existing right, but created a new one."); Wheaton v. Peters, 33 U.S. 591, 661 (1834) (same).

50. *See, e.g.*, Lunney, *supra* note 11, at 987.

work in a way that the copyright owner would not or could not have done, there is no harm to the copyright owner. The copyright owner is no worse off than she would have been had the defendant not used the copyrighted work.

Some technically infringing uses of copyrighted works are efficient because they create social benefit without causing any offsetting harm to the copyright owner.[51] When a legal regime prevents such efficient use of resources, the law itself causes market failure. Because the prevailing view of the market failure theory does not take into account the massive market failure caused when copyright law is used to prevent efficient use of copyrighted works, it misses what is arguably the biggest market failure of all.

The market failure theory conflates two issues that should be addressed separately. In saying that defendants must pay for any technical violation of a copyright owner's exclusive rights unless market failure prevents transacting for permission, it establishes (1) that the copyright owner is entitled to payment for all uses of her copyrighted work that violate her exclusive rights, whether or not such uses cause her harm, and (2) that fair use should excuse nonpayment for such uses where transaction costs or other market failures prevent obtaining a license.

The second point is undoubtedly correct. When market failure prevents payment for uses of copyrighted works, the use should be deemed fair. In that case, the copyright owner is not going to be paid for the use whether or not the law allows it. Accordingly, the copyright owner is no worse off if the defendant uses the work than if he does not. In this light, it is clear that market failure is not an external phenomenon that justifies fair use after the proper scope of copyright protection is determined. Rather, market failure is one basis for finding fair use because it represents a situation in which a copyright owner suffers no real harm as a result of the defendant's allegedly infringing activity.[52] Thus, the basic insight of market failure theory becomes a useful tool for resolving one category of cases under the harm-based approach to fair use. In such cases, the market failure theory is consistent with a harm-based theory of fair use.

By contrast, the first point implicit in the market failure theory—that the copyright owner is entitled to payment for all violations of her exclusive rights, whether or not such uses cause her harm—is much more

51. Such uses are pure Pareto improvements. *See supra* note 19 and accompanying text.

52. *See* Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 398 (2006) (describing the market failure theory as a "[n]arrow version[]" of the injury-based approach to fair use).

controversial. The issue here cuts to the heart of copyright law as it defines the scope of a copyright owner's rights. Fundamentally, the question is whether a copyright owner has the right only to prevent others from using her work in ways that cause her harm, or whether she has the right to share in all of the benefits that others derive from uses of her work.

The market failure theory all but ignores the issue of harm. As previously discussed, it treats copyright infringement like trespass to real property, for which harm is presumed. But copyrights should be treated as property only to the extent consistent with copyright's constitutional purpose to promote creative progress.[53] As the Supreme Court has said, this constitutional provision establishes an incentive theory of copyright.[54] Property rights do not necessarily provide such incentives; they may exist for a variety of reasons. Indeed, one of the reasons for granting real property rights is the Lockean notion that people obtain natural rights in property when they mix their labor with the soil. The Supreme Court has made it clear, however, that any natural rights authors have in their copyrighted works as a result of their labor or creative genius are subservient to copyright's incentive purpose.[55] Taking the incentive theory seriously means that we may not assume it is desirable to grant broad property rights over copyrighted works, particularly given their nonrivalrous nature and the existence of a doctrine like fair use whose purpose is to limit the scope of copyright infringement claims.

Moreover, while a property analogy might provide a common law reality check for a confused area of copyright law,[56] the analogy between copyright infringement and trespass to real property is inapt and misleading.[57] Copyright infringement is more analogous to trespass to

53. *See, e.g.*, Robert P. Merges and Glenn H. Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 52–53 (2000) ("Congress exceeds its authority to grant property rights [over copyrighted works] when those rights do not promote progress.").

54. *See, e.g.*, Harper & Row Publ'rs, Inc. v. The Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

55. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 359–60 (1991) (rejecting "sweat of the brow" doctrine as a basis for copyright protection). *See also* Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L. J. 433, 437 (2007) (arguing that Supreme Court rejected labor theory of copyrights in Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) and Mazer v. Stein, 347 U.S. 201, 219 (1954)).

56. Common law rules are often suggested as baselines when circularity or uncertainty arises in statutory interpretation. *See, e.g.*, Stadler, *supra* note 55, at 469–73 (arguing that "background principles" residing in the common law might be used to avoid circularity that arises in assessing the appropriate amount of copyright protection based on the expectations of copyright owners); Bohannan, *supra* note 8, at 615 ("[The common law of copyright] provides a ready analogy for resolving the ambiguity between the DMCA's prohibitions and the fair use doctrine.").

57. Historically, trespass to real property has been treated as a direct invasion of an interest for

personal property than to trespass to real property. Indeed, the few times the Copyright Act characterizes the property interest in copyright ownership, it is as personal property. For instance, the Act states that copyright ownership "may . . . pass as personal property by the applicable laws of intestate succession."[58]

The tort of trespass to chattels provides a cause of action for interferences with possession of personal property.[59] Yet, both case law and the *Restatement (Second) of Torts* emphasize "that some actual injury must have occurred in order for a trespass to chattels to be actionable."[60] Courts have said that "[w]hile one may have no *right* temporarily to use another's personal property, such use is actionable as a trespass only if it 'has proximately caused injury.'"[61] Moreover, courts find the requisite harm only when the defendant's use caused damage to the property and not merely because the defendant derived value from use of the property.[62]

Thus, for present purposes, it really does not matter whether copyright infringement is more analogous to trespass on the case (the historical view) or trespass to personal property. The important point is that either common law analogue to copyright infringement would require proof that the defendant's conduct caused the plaintiff actual harm, not merely that it deprived her of a potential benefit. Just as the requirement of harm in trespass on the case and trespass to chattels distinguishes between technical and actionable trespasses,[63] so too a requirement of copyright harm in fair use should distinguish between technical violations of a copyright holder's exclusive rights and actionable infringement. As such,

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which harm was presumed. Copyright infringement, by contrast, has been treated as trespass on the case. As such, the infringement was viewed as an indirect invasion of an interest actionable only upon a showing of actual harm. *See supra* notes 20–22.

58. 17 U.S.C. § 201(d) (2000). *Cf.* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 126 S. Ct. 1837, 1840 (2006) ("To be sure, the Patent Act also declares that 'patents shall have the attributes of personal property . . . .'" (quoting 35 U.S.C. § 261) (2000)).

59. *See, e.g.*, Intel Corp. v. Hamidi, 71 P.3d 296, 302 (Cal. 2003) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 14, at 85–86 (5th ed. 1984)).

60. *Hamidi*, 71 P.3d at 302. *See also* Thrifty-Tel, Inc. v. Bezenek, 54 Cal. Rptr. 2d 468, 473 (Cal. App. 4th Dist. 1996); RESTATEMENT (SECOND) OF TORTS § 218.

61. *Hamidi*, 71 P.3d at 306.

62. *See, e.g.*, *Thrifty-Tel*, 54 Cal. Rptr. 2d 468 (holding that plaintiff telephone company could not recover for trespass to chattels because it had suffered no actual harm where plaintiff could not show damage to efficient functioning of its telephone system but only that defendant profited by making free long-distance telephone calls).

63. *See, e.g.*, *Hamidi*, 71 P.3d at 303 ("But while a harmless use or touching of personal property may be a technical trespass, an interference . . . is not actionable, under modern California and broader American law, without a showing of harm." (internal citation omitted)); *supra* notes 20–22 and accompanying text (copyright infringement historically treated as trespass on the case which is actionable only upon proof of harm).

the harm-based approach to fair use gives copyright protection against harmful uses that are likely to affect the copyright owner's incentives to create or distribute the work.

By contrast, the market failure approach assumes that copyright holders are entitled to control all copying of their works and presumes harm from such uses. As such, it allows copyright holders to control uses that fall outside their intended or foreseeable markets. If copyright holders cannot foresee such uses, giving copyright holders control over those uses is unlikely to enhance ex ante incentives to create or distribute copyrighted works.[64] In those cases, denying fair use and finding infringement discourages socially beneficial uses of copyrighted works with no offsetting benefit.

B. The Balancing Approach

The balancing approach fares better than the market failure approach. It aspires to promote progress by balancing the harm to the copyright owner, such as lost sales of the copyrighted work or lost licensing fees, against the public benefit of allowing the use, such as the enjoyment of a new work that builds on the copyrighted work or increased access to the copyrighted work.

Yet the balancing approach is problematic because it calls for an undisciplined and open-ended weighing of all of the values at stake in copyright infringement. First, if courts are to decide fair use by balancing interests in every case, it is unclear whether the statutory copyright really gives the copyright owner anything. For instance, Professor Glynn Lunney argues that under the balancing approach, "[o]nly where the copyright owner has demonstrated by the preponderance of the evidence that the net benefit to society will be greater if a use is prohibited, should a court conclude that the use is unfair."[65]

Thus, this approach invites courts to rethink statutory entitlements at the wholesale level. Indeed, under Professor Lunney's approach, the defendant may invoke the fair use doctrine for almost any reason, including that the defendant's use will increase unauthorized access, which

64. *See* Gordon, *An Inquiry Into the Merits of Copyright*, *supra* note 36, at 1385 nn.192–93. Gordon observes that "[i]t might be argued that potential revenues from unexpected uses are unlikely to play much of a role in the author's pre-creation planning, and they are thus irrelevant to incentives" but responds that broad rights on one copyrighted work might subsidize the creation of other works by the same author, and that it might sometimes be difficult to draw the line on "what is or is not an 'expected' use." *Id*.

65. Lunney, *supra* note 11, at 977–78.

will almost always be true.[66] Once the defendant invokes fair use, the copyright owner must "justify recognition of her private ownership rights" by proving that "the net benefit to society will be greater if a use is prohibited."[67] But such a requirement is tantamount to requiring individual copyright plaintiffs to prove that we should have a copyright system in the first place, and it will ordinarily not be possible for any individual plaintiff to make such a showing.

Second, the balancing approach leaves courts too much discretion, producing incorrect and inconsistent results. When dealing with uses of copyrighted material, there is likely to be substantial disagreement over which values are at stake and how they should be measured. Consider, for example, parody cases. There will often be substantial disagreement over whether a particular parody has any social value at all. Surely there are people who believe society would be better off without some of the bawdy parodies that are the subject of copyright litigation, or at least that their value is not so substantial as to require copyright owners to subsidize them. Nor can we measure the competing "social value" of enforcing copyrights. Indeed, the whole of copyright law is based on the principle that the existence and enforcement of copyrights themselves serve the public interest by encouraging creativity. Without any concrete guidance on how to weigh these interests, courts are left to their own value judgments.[68] It is no wonder, then, that we get conflicting results in cases purporting to apply the balancing approach.[69]

Third, while the market failure approach systematically over-protects copyrights by prohibiting many harmless uses, the balancing approach both over- and under-protects for the same reason: neither approach pays sufficient attention to proof of harm. The balancing approach can under-protect copyrights because it is virtually always possible to imagine some abstract social value associated with a defendant's use of copyrighted material. Indeed, it is precisely because copyrighted works generate social value that we grant copyrights to encourage their creation. If a copyright

66. *Id.* at 977.

67. *Id.*

68. *See* Madison, *supra* note 52, at 400 ("Even if courts have been deciding cases based on an unarticulated normative vision of the good, the standards that they have used . . . are just short of useless as substantive guides to behavior and decision-making.").

69. *Compare* Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (finding little social value and therefore no fair use in alleged parody), *and* MCA, Inc. v. Wilson, 677 F.2d 180 (1981) (same), *with* Mattel, Inc. v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003) (finding social value and therefore fair use for alleged parody).

owner demonstrates real harm, that harm should not be lightly dismissed because of some general notion of a social benefit.

The balancing test can also over-protect copyrights. The balancing approach seems to assume that challenged uses typically cause some harm to the copyright owner that must be outweighed by a social benefit. This assumption is not well founded; there are many cases in which a defendant's use does not cause the plaintiff to be any worse off than she would have been otherwise. Yet, as previously discussed, current theories of fair use do not always require copyright owners to prove real harm. Instead, they can rely on hypothetical harm that they might or might not suffer as the result of sales that they might or might not have made at some point in the future.

To be sure, balancing cannot and should not be avoided in all cases. In some instances the social benefit of allowing a use clearly exceeds the harm, even if neither benefit nor harm can be accurately measured. Yet, given the problems associated with wholesale balancing, it is equally clear that courts must take harm more seriously in determining when and how to balance. Indeed, because a harm-based approach finds infringement only where there is proof that the copyright owner has suffered real harm and allows uses that do not cause such harm, it will often be the best way to balance the rights of owners and users. Courts should engage in further balancing only when there is real proof of harm to the copyright owner, and only when that harm is clearly outweighed by the social value in allowing the use. If courts engage in balancing in cases that are very close, they risk an unacceptably high rate of error.

C. The Harm-Based Approach

Under a harm-based approach, the fair use doctrine protects uses that technically violate the copyright holder's exclusive rights under section 106 but do not cause any material harm. As previously discussed, however, it is not always easy to determine what constitutes copyright harm. Copyright harm is not purely a fact question, for it depends on a legal baseline of entitlement from which to measure.

Consistent with copyright's purpose, copyright harm should be limited to profits that would be likely to affect incentives to create or distribute copyrighted works. As one judge has explained:

> The guiding principle of the Copyright Act is that the financial earnings of original works be channeled exclusively to the creators of the works insofar—and *only* insofar—as they are necessary to motivate the creation of original works . . . . The copyright holder's

> statutory monopoly does not encompass profits from derivative works that the copyright holders do not themselves seek to market or that do not harm the value of works that the copyright holders do seek to market; the monopoly privileges need not include these profits because these profits do not function as incentives to prospective creators.[70]

The problem is that, because the expansion of copyrights over time has created expectations on the part of creators, it might be argued that "anything less than perfect control . . . provide[s] creators with insufficient incentives."[71] Given the lack of empirical evidence on what motivates copyright owners, it could be said that more profits always lead to more incentives to create, and therefore that any uncompensated use of a copyrighted work should be viewed as a harm to the copyright owner. It also could be said that because some amount of unforeseeability is foreseeable, savvy copyright owners who cannot foresee all of the potential uses for their works could still bank on being compensated for those uses.

Taken to its logical conclusion, this line of argument suggests that the copyright owner might be entitled to control all uses of her copyrighted work, including uses she never would or could have dreamed of.[72] But then copyright law would differ from virtually all other areas of law, which ordinarily do not provide a cause of action for purely speculative harms. Rather, the law ordinarily requires evidence that the plaintiff is demonstrably worse off as a result of the defendant's allegedly wrongful act.

Moreover, legal rules generally use an objective, reasonable person standard in judging human behavior. To the extent that reasonable copyright owners are rational economic actors, they will make marginal investments in creating and distributing copyrighted works based on expected marginal returns, not based on an unforeseeable payoff.[73] The

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70. Princeton Univ. Press v. Mich. Doc. Serv., Inc., 99 F.3d 1381, 1409 (6th Cir. 1996) (Ryan, J., dissenting).

71. *See, e.g.*, Stadler, *supra* note 55, at 435 ("[I]ncreasingly, anything less than perfect control is thought to provide creators with insufficient incentive. . . . Over time, the increase of rights under copyright law creates expectations among creators . . . and [c]reators form incentives based on those expectations.").

72. *See, e.g.*, Stadler, *supra* note 55, at 435 ("[I]ncreasingly, anything less than perfect control is thought to provide creators with insufficient incentive. . . . Over time, the increase of rights under copyright law creates expectations among creators . . . and [c]reators form incentives based on those expectations.").

73. This concept is known in the literature as "bounded rationality," which refers to the idea that people act rationally based on the limited information they have. *See, e.g.*, Shyam Balganesh,

omniscient, perfectly rational economic actor does not exist; economic actors have limited information and therefore cannot foresee and evaluate all future events or their consequences. Even if reasonable copyright owners are not strictly rational economic actors, they are expected to be ordinary people, who act with regard to ordinary, not extraordinary, circumstances. The reasonable copyright owner might be thrilled when her copyrighted work is used in some unexpected way. In all likelihood, she would like to share (and might even develop an ex post expectation to share) in any profits derived from the use. But if she is a reasonable person acting reasonably, she would not count on those profits in deciding ex ante whether to create or distribute her work.

Thus, just as tort law requires courts to engage in substantive line-drawing regarding the extent of liability based on what a reasonable person would foresee, the harm-based approach to fair use requires courts to do the same in copyright infringement cases. Accordingly, under the harm-based approach to fair use, courts should presume harm only where the defendant's use usurps the copyright holder's most foreseeable markets, or those markets which a reasonable copyright owner would have taken into account in deciding whether to create or distribute the copyrighted work. For less foreseeable uses, copyright holders must be required to prove actual harm in order to establish infringement. A copyright plaintiff can prove actual harm by showing that (1) the defendant's unauthorized use deprived him of sales or license fees from another (third-party) source, or (2) the defendant's own failure to pay for the use constitutes harm because the plaintiff was actively exploiting the market for the use made by the defendant and, if payment were required, the defendant would have been more likely to pay for the use than to forgo it.

For the lion's share of cases dealing with economic injuries, the copyright harm approach to fair use is extremely useful. As will be shown later, however, this approach does not take account of noneconomic injuries such as damage to the image of the copyrighted work or the

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Foreseeability and Copyright Incentives, HARV. L. REV. (forthcoming 2008) (using bounded rationality to argue for a "foreseeable copying" test as part of copyright infringement analysis rather than as part of a fair use defense); Russell Korobkin, *Bounded Rationality, Standard Form Contracts and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1457 n.106 (2007). *Cf.* Randal C. Picker, *Fair Use vs. Fair Access* (Univ. of Chicago Law & Econ. Olin Working Paper #392, Mar. 1, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104764 (suggesting that copyright should include temporally-staged bundles of rights, such as the right to publish in English now and in Mandarin later, but limiting the analysis to foreseeable uses).

reputation of the copyright owner, or simply the loss of exclusive artistic control of the copyrighted work. While these perceived injuries might be deterrents to creating or distributing copyrighted works, copyright law does not purport to insulate copyright owners from all interference with or criticism of their copyrighted works. Indeed, fair use historically has protected critical uses more than noncritical ones, in part because allowing a copyright owner to suppress criticism or expression of a different viewpoint would be detrimental to First Amendment interests. Moreover, the Copyright Act provides only very limited rights against uses that might harm the image of the work or the author's reputation.[74] Thus, broader judicial recognition of harm to an author's reputation under the fair use doctrine would seem inconsistent with American copyright law generally.[75]

The next Part discusses how the most recent Supreme Court cases on fair use have applied a harm-based approach. These cases establish harm as the touchstone of fair use, rejecting fair use when there is clear evidence of harm to the copyright owner, even when the defendant's use has social value, and finding fair use when there is no evidence of harm or a meaningful likelihood of harm.

These cases also provide guidance on what constitutes copyright harm. In general, they focus on harm in fact, that is, harm actually suffered or likely to be suffered by the copyright owner. They find harm based only on sales or licensing fees that the plaintiff likely would have received but for the defendant's allegedly infringing acts. As such, they reject the view

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74. The only part of the Copyright Act that protects the image or reputation of an author or work is section 106A, which covers moral rights. Moral rights protect primarily an author's rights to claim authorship of a work and "to prevent any intentional distortion, mutilation, or other modification of [a] work which would be prejudicial to his or her honor or reputation." *See* 17 U.S.C. § 106A.

By contrast to the right to copy and other exclusive rights granted in section 106, the moral rights granted in section 106A are severely limited in scope. Moral rights apply only to "works of visual art," which include paintings, sculptures, and a few other types of fine art, but not to more typical copyrighted works such as books, motion pictures, or any works made for hire. They apply only to the original works, not to copies of the works. Moreover, an author has the right to prevent modifications that are prejudicial to her reputation only where such modifications are intentional. In addition, only the original authors can assert the claims, as they may not be transferred.

In light of all of these qualifications, it is clear that Congress intended to create moral rights that are very limited in scope. To the extent that courts recognize reputation- or image-related harms to copyrighted works outside the carefully delineated limitations of section 106A, they thwart congressional intent.

75. Because the copyright harm model is based on incentives to create or distribute copyrighted works, its utility might be limited in assessing fair use claims involving the copying of works never intended to be published. Additional work is contemplated to determine whether the First Amendment concerns underlying copyright law might shape the copyright harm model of fair use in ways that would take account of noneconomic injuries.

that a copyright plaintiff is entitled to payment for all violations of her exclusive rights and therefore suffers a legal harm whenever a defendant profits from the use of her work. Moreover, the Court presumes harm when the defendant's use falls within the copyright owner's most foreseeable uses but requires actual proof of harm for less foreseeable uses. This view of fair use delineates the scope of copyright liability in much the same way that the elements of harm and proximate (legal) cause help to delineate tort liability.[76]

IV. COPYRIGHT HARM AND THE SUPREME COURT

A. Sony v. Universal Pictures

Advocates of the market failure and balancing approaches to fair use each claim that Supreme Court case law supports their approach. They focus primarily on the *Sony* Betamax case as an example.[77] Although the result in the *Sony* case is superficially consistent with both of these theories, the decision is best described as a harm-based approach to fair use.

In *Sony*, the owners of copyrights in television programs sued *Sony*, the manufacturer of the Betamax home video recorder, arguing that Sony's machines facilitated copyright infringement by home viewers.[78] In evaluating the contributory infringement claim against *Sony*, the Supreme Court considered whether the viewers' primary use of the machines—taping programs for the purpose of "time-shifting," or watching the

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76. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 239–51 (1987). Landes and Posner argue that a negligent act is deemed to be a legal (proximate) cause of another's harm where the probability that harm would occur without due care ($p|v$) minus the probability that harm would occur with due care ($p|nv$) is substantial. They argue that where the difference between these probabilities ($p|v - p|nv$) is substantial, taking care to avoid the harm is likely to have a significant effect in terms of avoiding the harm. In that situation, liability should be imposed to encourage taking precautions that have great social value. By contrast, they argue that where the difference between these probabilities is not substantial, there should be no liability because taking care is less likely to avoid the harm, and therefore other considerations such as the possibility of deterring socially valuable activities and litigation costs loom larger.

Applied to copyright law, this theory of causation suggests that harm to the copyright owner (and liability) should be found where there is a substantial difference between the probability that a copyright owner would create the copyrighted work if the alleged infringer's use of the copyrighted work is permitted minus the probability that a copyright owner would create the work if the alleged infringer's use of the work is not permitted (i.e., is deemed an infringing use that requires payment). This approach makes copyright's purpose paramount in defining harm and the scope of fair use.

77. *See generally* Gordon, *Fair Use as Market Failure*, *supra* note 13; Lunney, *supra* note 11.

78. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 420 (1984).

programs at a later time than they were broadcast—was fair use.[79] By a very slim margin, the Court determined that such "time-shifting" was a noninfringing fair use, and therefore that *Sony* was not liable for contributory infringement because the machine was "capable of substantial non-infringing uses."[80]

Since that time, scholars have disagreed over what the *Sony* case stands for. One side argues that *Sony* sets forth a market failure approach to fair use.[81] Because the verbatim copying of entire television programs constituted a violation of the copyright owners' exclusive right of reproduction under section 106 of the Copyright Act, the home-tapers were legally required to obtain a license for that recording unless a defense such as fair use applies. But because the amount that each home-taper would pay to time-shift each program would be small relative to the transaction costs each home-taper would incur in negotiating a license with each copyright owner, these transactions were unlikely to occur.[82] Thus, the market for time-shifting would fail, and the time-shifting should be permitted as a fair use.

Others have offered an alternative account of *Sony*'s approach to fair use. For instance, Professor Lunney has written that "[w]hen we reexamine *Sony* as it was written, we find that the market failure account is, at best, a one-dimensional caricature of Justice Stevens's sensitive and careful attempt to understand the economic consequences of time-shifting in light of the evidence presented."[83] Rather, he says *Sony* recognizes fair use as the "central and vital arbiter" between the public interest in enforcing copyrights to encourage authors to create new works and the public interest in allowing others to use and build upon existing works.[84] Thus, Professor Lunney suggests that *Sony* reflects a balancing approach to fair use:

> In defining the balance between these competing public interests, *Sony* begins with a presumption in favor of fair use and a broad conception of the public interest that fair use protects. Merely increasing access to a work, even unauthorized access, represents a sufficient public interest to invoke the fair use doctrine. . . . Once the fair use doctrine is invoked, *Sony* places the burden squarely on

79. *Id.* at 443.
80. *Id.* at 456.
81. *See* Gordon, *Fair Use as Market Failure*, *supra* note 13.
82. *See id.* at 1628–29.
83. *See* Lunney, *supra* note 11, at 978–79.
84. *See id.* at 977.

> the copyright owner to justify recognition of her private ownership rights. Only where the copyright owner has demonstrated by the preponderance of the evidence that the net benefit to society will be greater if a use is prohibited, should a court conclude that the use is unfair.[85]

Although both the market failure and balancing theories are superficially consistent with *Sony*'s ultimate conclusion that time-shifting is fair use, neither accurately describes the Court's reasoning. The debate in *Sony* was fundamentally about harm.[86] Specifically, it was about whether a copyright owner must show some kind of harm to anticipated markets—harm that could have affected her decision to create the copyrighted work in the first place—or whether it is enough for liability that she could have shared in the benefits produced by the defendant's use.[87]

The majority's analysis of fair use, written by Justice Stevens, clearly takes the view that the copyright owner must show harm, or at least some meaningful likelihood of harm.[88] His point is critically important, yet it has been overlooked. He states as follows:

> The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.
>
> Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the

85. *Id.* at 977–78.
86. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).
87. *Id.*
88. *Id.* at 450–51.

> copyright holder with no defense against predictable damage . . . . What is necessary is a showing by a preponderance of the evidence that *some meaningful likelihood of future harm exists*.[89]

Applying this harm requirement, Justice Stevens reviewed the district court's decision, looking for evidence that time-shifting was likely to cause any real harm to the copyright owners. He noted that in the district court the plaintiffs admitted they had not yet suffered any actual harm.[90] Addressing "potential future harm," the district court made extensive factual findings as to whether time-shifting would reduce advertising revenues, television re-run audiences, or the like.[91] Ultimately, Justice Stevens observed that "the District Court restated its overall conclusion several times, in several different ways. 'Harm from time-shifting is speculative and, at best, minimal.'"[92]

The *Sony* Court's emphasis on proof of harm is inconsistent with both the prevailing market failure theory and the balancing theory of fair use. It is inconsistent with the market failure theory because that theory would require payment for all copying of copyrighted works—even where the copyright owner cannot show that she has suffered any harm as a result of the use—unless transaction costs are prohibitive. It would not matter whether the plaintiff was in a position to exploit the market or was otherwise harmed by the use of copyrighted material.

By contrast, the dissent would have held that copyright owners are entitled to share in the benefits of all copying of their copyrighted works, and that their inability to do so could be said to constitute harm. The dissent stated:

> The development of the [VCR] has created a new market for the works produced by the Studios. That market consists of those persons who desire to view television programs at times other than when they are broadcast, and who therefore purchase [VCR] recorders to enable them to time-shift. Because time-shifting of the Studios' copyrighted works involves the copying of them, however, the Studios are entitled to share in the benefits of that new market. . . . Respondents therefore can show harm from [VCR] use simply

89. *Id.* (emphasis added in part) (footnotes omitted).

90. *See id.* at 425–27; Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 469 (C.D. Cal. 1979).

91. *See Universal Studios*, 480 F. Supp. at 439–40, 465–68.

92. *See Sony*, 464 U.S. at 454 (quoting *Universal Studios*, 480 F. Supp. at 467).

> by showing that the value of their copyrights would *increase* if they were compensated for the copies that are used in the new market.[93]

Nor does the *Sony* majority apply a balancing test. It is true that *Sony* says "a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create," and that "[t]he prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit."[94] But these statements simply show that balancing was unnecessary because the Court found that there was no meaningful proof of harm to the copyright owner in the first place.

The *Sony* opinion also does not suggest that once the copyright owner has shown some harm, a court is free to disregard that harm and find fair use whenever there is social value in the infringement. Indeed, the Court's opinion can be seen as very deferential to the rights of copyright owners where harm is clear. In distinguishing between commercial and noncommercial uses of copyrighted works, it states broadly that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . ."[95] There is no suggestion that this presumption against fair use protection for commercial uses was based on a balancing of interests. Rather, the reason *Sony* says that fair use is less available for commercial uses is that when (as in *Sony*) entire works are copied verbatim for commercial purposes, such uses are more likely to cause harm to copyright owners.[96] In *Campbell v. Acuff-Rose Music*, the Court clarified that *Sony* did not establish a "hard evidentiary presumption" against fair use for commercial uses and stated that "what *Sony* said simply makes common sense: when a commercial use amounts to mere duplication of the entirety of an original, it clearly . . . serves as a market replacement for it, making it likely that cognizable market harm to the original will occur."[97]

Thus, *Sony*'s fair use doctrine does not reflect a market failure approach in which courts find fair use only if market failure prevents the defendant from paying for her use of copyrighted material, whether or not the copyright owner suffers any harm as a result of the infringement. Nor

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93. *Sony*, 464 U.S. at 497–98 (Blackmun, J., dissenting).
94. *Id.* at 450–51.
95. *Id.* at 451.
96. *See id.* at 451 ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . .").
97. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994).

does *Sony* balance proven harm to a copyright owner against some "broad conception of the public interest."[98] Rather, *Sony* takes a middle position that emphasizes proof of harm in fair use analysis. Under this approach, courts will find fair use where a defendant's use of copyrighted material, while technically a violation of a copyright owner's exclusive rights, causes no meaningful harm to the copyright owner of a kind that is likely to affect incentives to create copyrighted works.

B. Harper & Row v. The Nation

More recent Supreme Court decisions, such as *Harper & Row v. The Nation*, also embrace a harm-based approach to fair use.[99] In *Harper & Row*, the defendant obtained a purloined copy of President Ford's manuscript of *A Time to Heal*, which was about to be published.[100] The defendant published important excerpts dealing with the pardon of President Nixon in its news magazine.[101] There was evidence that, because the defendant "scooped" the story, *Time Magazine* cancelled a contract for prepublication excerpts of the book and refused to make final payment.[102]

The defendant argued that its copying was fair use because its purpose was to report on a newsworthy matter of high public importance.[103] The Supreme Court rejected the defendant's argument and noted that the fourth

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98. *See* Lunney, *supra* note 11, at 977.

99. 471 U.S. 539 (1985). The Court's approach to fair use in *Stewart v. Abend*, 495 U.S. 207 (1990) is very similar to its approach in *Harper & Row*. *Stewart* is not analyzed in depth here because the fair use defense was a relatively minor issue in the case. Nevertheless, it clearly reflects a harm-based approach to fair use. In *Stewart*, the owner of the copyright in the short story *It Had to Be Murder* sued the owners of the movie *Rear Window*, which was based on the short story, for copyright infringement. *Id*. at 212–13. The original owner of the copyright in the short story had authorized the creation of the defendant's motion picture during the initial term of copyright, but the author died before the renewal term vested in him, and the renewal term vested in a trust. *Id*. at 212. The executor of the trust, as plaintiff, argued that by re-releasing the movie for public viewing during the copyright's renewal term without permission, the defendants were liable for copyright infringement. *Stewart*, 495 U.S. at 211–13. After holding that the statute did not entitle the defendants to continue to exploit their derivative work during the renewal term without permission, the Court briefly considered the defendants' argument that re-release of the motion picture constituted fair use. The Court stated:

> The fourth factor [market harm] is the most important, and indeed, central fair use factor. The record supports the Court of Appeals' conclusion that re-release of the film impinged on the ability to market new versions of the story. Common sense would yield the same conclusion. . . . This case presents a classic example of an unfair use: a commercial use of a fictional story that adversely affects the story's adaptation rights.

Stewart, 495 U.S. at 238 (citations and quotations omitted).

100. 471 U.S. at 542.

101. *Id*.

102. *Harper & Row*, 471 U.S. at 542.

103. *Id.* at 555–56.

fair use factor, which considers harm to the market for the copyrighted work, "is undoubtedly the single most important element of fair use."[104] The Court also agreed with the trial court that there was "not merely a potential but an actual effect on the market" because "Time's cancellation of its projected serialization and its refusal to pay . . . were the direct effect of the infringement."[105] The Court emphasized that "[r]arely will a case of copyright infringement present such clear-cut evidence of actual damage."[106]

Although the result in *Harper & Row* is consistent with the market failure approach because transaction costs did not prevent negotiation of a license for the use, the decision is best described as a harm-based approach to fair use. The market failure approach to fair use does not turn on proof of harm, yet *Harper & Row* explicitly states that harm to the copyright owner is the most important inquiry in fair use analysis.

Moreover, the case does not reflect a balancing approach either. Indeed, it was the majority's focus on copyright harm and its refusal to balance interests that the dissent criticized most. The dissent lamented the majority's "exceedingly narrow definition of the scope of fair use" which protects "the copyright owner's economic interest" at the expense of "[t]he progress of arts and sciences and the robust public debate essential to an enlightened citizenry . . . ."[107] Thus, the dissent argued that despite the harm to the copyright owner, the defendant's purpose, which it characterized as news reporting on a matter of historical importance, benefitted the public and therefore should be deemed fair.[108]

In truth, however, the *Harper & Row* decision highlights the perils involved in wholesale balancing of the interests at stake in copyright cases and shows that the harm approach, when properly applied, can actually serve the public interest. The majority points out that "[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work."[109] Yet, the statutory protections of the Copyright Act are also intended to serve the public interest by giving an economic incentive to create copyrighted works. As the Court observed, "If every

104. *Id.* at 566.
105. *Id.* at 567.
106. *Id.*
107. *Id.* at 579 (Brennan, J., dissenting).
108. *Id.* at 590–91 (Brennan, J., dissenting) ("Like criticism and all other purposes Congress explicitly approved in § 107, news reporting informs the public . . . . In light of the explicit congressional endorsement in § 107, the purpose for which Ford's literary form was borrowed strongly favors a finding of fair use.").
109. *Id.* at 569.

volume that was in the public interest could be pirated away by a competing publisher, . . . the public [soon] would have nothing worth reading."[110]

Specifically, the Court showed that where there is clear evidence of harm, it is not always appropriate to balance that harm against the social value of the defendant's use. Thus, where the defendant's use causes harm by supplanting the copyright owner's own attempts to enter the market for socially beneficial uses of a copyrighted work, that harm will not be weighed against the abstract public interest in allowing the defendant to copy for the same socially beneficial purposes. If copyrights have any legitimacy, it is when they protect against unauthorized copying that results in a demonstrable loss of profits that the copyright owner can prove she would have had but for the defendant's infringement. Although that harm might sometimes be balanced against the social value of the defendant's use, *Harper & Row* shows that it will not be excused simply because it may be said that there is some abstract social value associated with that general type of use.

C. Campbell v. Acuff-Rose Music, Inc.

The Supreme Court's most recent fair use decision, *Campbell v. Acuff-Rose Music, Inc.*, also reflects a harm-based approach. In *Campbell*, the rap group 2 Live Crew asked Acuff-Rose Music, the owner of the copyright in Roy Orbison's song *Pretty Woman*, for permission to make a rap version of the song.[111] When the music company refused, the group produced the song anyway.[112] The rap song borrowed the opening line, basic melody, and the characteristic guitar riff of the original song, but substituted derogatory and sexually suggestive lyrics that ridiculed the romantic sentiment of the original lyrics.[113] As such, the new song would have constituted an infringing derivative work if not saved by the fair use doctrine. In considering the fair use argument, the Supreme Court held that the use was a parody of the original.[114] Its fair use analysis strongly indicated that the use was fair, but it remanded the case for further findings on the issue of harm to derivative markets.[115]

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110. *Id.* at 559 (citations omitted).
111. 510 U.S. at 572 (1994).
112. *Id.* at 573.
113. *Id.* at 588, 583.
114. *Id.* at 583.
115. *Id.* at 593–94.

The Court's fair use analysis in *Campbell* reached two conclusions that are of importance here. First, the Court held that 2 Live Crew's purpose was to make a parody of the original.[116] The Court held that parody of a copyrighted work is obviously transformative and deserving of protection under the fair use doctrine to the same extent as other forms of commentary or criticism.[117]

However, the Court distinguished between parody and satire, holding that satire is not as deserving of protection under the fair use doctrine.[118] The Court observed that parody is commentary on a particular work, whereas satire is broader commentary on a genre of works or society at large that "has no critical bearing on the substance or style of the original composition."[119] The Court explained that when a copyrighted work is used for purely satirical purposes, "the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger."[120] The Court conceded, however, that parody of a copyrighted work often merges with satire of society, and therefore it would often be difficult to distinguish between the two.[121] It attempted to reduce the likelihood that parody would be mistaken for satire by creating a safe harbor for parody. Therefore, while concluding that the parodic content of 2 Live Crew's song was probably not great, the Court found it sufficient that the "song reasonably could be perceived as commenting on the original or criticizing it, to some degree."[122]

Second, the Court held that market harm under the fourth factor does not include the loss of sales or license fees for parodies of the copyrighted work. The Court explained that market harm includes harm only in those markets that copyright owners "would in general develop or license others to develop," and that copyright owners would not ordinarily license others to make fun of their works.[123] In addition, the Court held that the parodic song would not supplant sales of the original song, so there was no harm

116. *Id*. at 583.

117. *Id.* at 579 ("Suffice it to say now that parody has an obvious claim to transformative value . . . . Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one.").

118. *Id.* at 581.

119. *Id.* at 580, 581 n.15.

120. *Id.* at 580.

121. *Id.* at 581 ("[P]arody often shades into satire when society is lampooned through its creative artifacts . . . .").

122. *Id.* at 583.

123. *Id.* at 592.

to the market for the original song.[124] However, because copyright owners also control markets for derivative works that are based on the copyrighted work, the Court remanded the case to the district court for a determination as to whether 2 Live Crew's song harmed the market for nonparody rap versions of *Pretty Woman*.[125]

The *Campbell* decision is consistent with a harm-based approach to fair use. The Court's decision attempts to clarify which types of uses cause harm that copyright law should recognize and which ones do not. First, the Court held that fair use analysis does not consider harm due to "disparagement" but only harm due to "displacement."[126] The Court explained that "when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce harm cognizable under the Copyright Act."[127] Thus, "the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.'"[128] The Court also said that because copyright owners do not typically exploit (and are not in a good position to exploit) the market for parodies and other criticism of their works, the licensing fee the copyright owners could have obtained for parody does not count as a "harm" for purposes of fair use analysis.[129]

Second, the Court's distinction between satire and parody reflects the view that copyright owners are in a better position to exploit the market for satirical uses of their works than for parodic uses. This is because when a work is used purely for satirical purposes, the "target" of the use is society rather than the copyrighted work itself, and the copyrighted expression is merely the vehicle (or the "weapon") for conveying a message unrelated to the copyrighted work.[130] For this reason, copyright owners may have a greater and more legitimate expectation to control uses of their work for purely satirical purposes.

Third, the Court recognized that the defendant's parodic use could potentially cause harm to markets that the copyright owner would be entitled to control, such as the market for nonparody rap versions of the song. At oral argument, counsel for Acuff-Rose Music referenced

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124. *Id.* at 593.
125. *Id*. at 593–94.
126. *Id*. at 592.
127. *Id.* at 591–92.
128. *Id.* at 592 (internal citations omitted).
129. *Id.*
130. *See* LANDES & POSNER, *supra* note 2, at 152–53 (arguing that copyright owners might be less willing to license the use of their copyrighted work as a "target" than they would to license its use as a "weapon").

anecdotal evidence of a market for rap versions of popular music.[131] The Court remanded the case so that the district court could determine whether this was a likely market or whether Acuff-Rose was attempting to exploit this market.[132]

Moreover, the *Campbell* decision is inconsistent with both the market failure and balancing approaches. The Court's decision that 2 Live Crew's parody was likely a fair use was not based on prohibitive transaction costs that prevented the rap group from compensating Acuff-Rose for the use. 2 Live Crew had, in fact, contacted Acuff-Rose to ask for permission, and Acuff-Rose could have granted permission as easily as it rejected it. Transaction costs were no barrier to their negotiation.

Although it is possible the Court thought there was market failure because the parody created external social benefits that could not be internalized in the negotiations between the two parties, this is a poor explanation of the Court's reasoning. The externalities argument is a slippery slope because once externalities are taken into account they are everywhere. It is true that a parody of a copyrighted work creates external benefits to society, but so does satire. Moreover, giving copyright owners control over uses of their works also creates social benefits. This is, after all, why copyright law encourages the creation of copyrighted works. Although it would be wrong to give copyright owners control over parodies of their works, this is not due to market failure.

In addition, while the *Campbell* Court stated that fair use requires "a sensitive balancing of interests,"[133] the decision is not defensible under a balancing theory. In particular, the Court's distinction between parody and satire runs contrary to the balancing approach. Because a balancing approach takes into account the social value of the defendant's use, it would seem perverse to privilege parody of an individual copyrighted work over satirical commentary on broader social issues of arguably greater public value.[134]

Some lower court cases are illustrative. In *Suntrust Bank v. Houghton Mifflin Co.*, Alice Randall was sued because she wrote a novel entitled *The*

131. Transcript of Oral Argument at 31–32, *Campbell*, 510 U.S. 569 (No. 92-1292).

132. *Campbell*, 510 U.S. at 593–94.

133. *Campbell*, 510 U.S. at 584 (quoting Sony Corp. of Am. v. Universal City Studies, Inc., 464 U.S. 417, 455 n.40 (C.D. Cal. 1979)).

134. *See, e.g.*, Robert P. Merges, 21 AIPLA Q.J. 305, 311–12 (1993) (arguing against Landes and Posner's view that using the copyrighted work as a "target" is fair use whereas using it as a "weapon" is not, on the ground "that 'weapon' cases are [arguably] more deserving of fair use protection since they presumably serve the goal of promoting criticism of and commentary on larger social issues and values" (some internal quotations omitted)).

Wind Done Gone that ridiculed Margaret Mitchell's *Gone With the Wind* by describing the story and characters from a slave girl's point of view.[135] Randall's novel should not be viewed as more valuable if it is deemed to comment solely on Mitchell's novel than if it is deemed to comment solely on aspects of the antebellum South—including interracial relationships and the injustice of slavery—that Mitchell's novel ignores. Likewise, in *Dr. Seuss Enters., L.P. v. Penguin Books USA*, the defendant used an image of the Cat in the Hat and mimicked Dr. Seuss's style in writing a book that ridiculed the O.J. Simpson murder case.[136] The Ninth Circuit held that the defendant's use was not fair because it was a satire of the Simpson case and not a parody of the *Dr. Seuss* books themselves.[137] Yet, under the balancing approach, it would seem that commentary on the most controversial murder case in decades (and the justice system's mishandling of that case) should weigh heavier than criticism of a book of children's rhymes.

The point here is not to defend *Campbell*'s parody/satire distinction, but simply to show that it is difficult to square much of the *Campbell* opinion with the balancing approach to fair use. Rather, the central focus of *Campbell* is on identifying the harm that should be counted in fair use analysis. It includes the harm resulting from market substitution and excludes the harm resulting from criticism, and then observes that satire is more likely to cause market substitution than parody. Ultimately, the court remanded for further findings related to harm in derivative markets. Although the decision might leave open the possibility that such harm could be balanced against the social value of the use, the decision indicates that a proper focus on harm is a precondition to balancing.

V. TOWARD A HARM-BASED THEORY OF FAIR USE

As the foregoing shows, the Supreme Court has taken an essentially harm-based approach to fair use. Thus, the Court has said that the fourth fair use factor, which considers harm to the market for the copyrighted work, "is undoubtedly the single most important element of fair use,"[138] and commentators have observed that courts typically treat the other three fair use factors merely as proxies for determining whether harm under the

135. *See* 268 F.3d 1257, 1259 (11th Cir. 2001).
136. 109 F.3d 1394, 1396–97 (9th Cir. 1997).
137. *Dr. Seuss*, 109 F.3d at 1401.
138. Harper & Row Publ'rs, Inc. v. The Nation Enters., 471 U.S. 539, 566 (1985).

fourth factor is likely.[139] As the following subsections show, courts often apply the four fair use factors consistently with the harm-based approach, usually finding liability for uses that cause actual or foreseeable harm in the form of lost sales or licensing fees and fair use where no such harm can be shown or inferred. In other cases, however, the fair use analysis is not entirely consistent with a harm-based approach. This Part will show how courts generally have interpreted the statutory fair use factors using a harm-based approach, as well as offer suggestions for interpretation that would fully realize such an approach.

A. First Factor: Purpose or Character of the Use

The first factor of the fair use analysis, purpose and character of the defendant's use, focuses on three aspects of the defendant's use. Arguably, the most important aspect is whether the use is transformative. As the Supreme Court has explained, "[t]he central purpose of this investigation is to see . . . whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[140] The Court has held that because the purpose of copyright law is to encourage creative works, transformative works are entitled to greater protection under the fair use doctrine than works in "which the alleged infringer merely uses [the copyrighted work] to get attention or to avoid the drudgery in working up something fresh."[141]

Another aspect that courts consider when characterizing the purpose and character of the defendant's use is whether it is commercial in nature.[142] The conventional wisdom is that commercial uses are less fair than noncommercial uses, though the cases are sometimes unclear on the precise role commerciality plays. Some courts have also considered a third aspect of the defendant's use, namely, whether the defendant's use was a

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139. *See, e.g.*, Lemley, *Should a Licensing Market Require Licensing?*, *supra* note 8, at 188 ("Transformativeness and the extent of the taking matter for fair use on this analysis, but primarily as a secondary indicator of what the doctrine really cares about: whether the use substitutes for the copyrighted work and so is likely to cost the copyright owner a sale."); LANDES & POSNER, *supra* note 2, at 153–57 (discussing the distinction between parody and satire in terms of whether the use substitutes for the original work).

140. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 572, 579 (1994) (quoting Folsom v. Marsh, 9 F.Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)) (internal citations omitted).

141. *See Campbell*, 510 U.S. at 580.

142. *See* 17 U.S.C. § 107(1) (2000).

"personal" use.[143] Typically, a use is characterized as "personal" if it is both noncommercial and nontransformative.[144]

The following sections show how these three types of uses are and should be addressed under a harm-based approach to fair use.

1. Transformative Uses

a. Transformativeness Generally

Determining whether a use is transformative is a very important element of fair use analysis. Generally speaking, courts are much more likely to find fair use for transformative uses. Yet, there is no precise definition of what constitutes a transformative use. Section 107, the statutory fair use provision, does not use the term "transformative" in any of its four factors.[145] It states in the preamble, however, that "the fair use of a copyrighted work, . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright."[146] Courts have characterized these illustrative fair uses as "transformative."[147] Accordingly, when courts consider the first statutory factor, "the purpose and character of the use," they use the statute's illustrative uses as a baseline for assessing whether a challenged use is transformative.[148]

Interpreting transformativeness in light of the statute's illustrative fair uses, many courts say that a transformative use is one that produces social benefits. In *Campbell*, for instance, the Supreme Court stated that "parody has an obvious claim to transformative value" because "it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[149] Justice Blackmun made a similar point in his *Sony* dissent when he said that scholarly uses of copyrighted material are

143. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 & n.40 (discussing personal uses of copyrighted material).

144. *See id.* at 455 n.40 (distinguishing between "productive" uses and "personal" uses).

145. *See* 17 U.S.C. § 107 (2000). The term came from Leval, *Toward a Fair Use Standard*, *supra* note 9, at 1111 (arguing that fair use should depend primarily on whether the defendant's use was "transformative").

146. *See* 17 U.S.C. § 107.

147. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 572, 579 (1994).

148. *See, e.g.*, *Campbell*, 510 U.S. at 579 (comparing parody to "other forms of comment and criticism").

149. *See Campbell*, 510 U.S. at 579.

privileged because, unlike "ordinary" uses, they create "external benefits from which everyone profits."[150]

This view of transformative uses would seem to support the balancing approach to fair use. Transformative uses are deemed fair, the argument goes, because they create benefits to society that outweigh the harm to the copyright owner. Many courts and commentators seem to accept this view.[151]

However, close analysis of the case law on transformative uses challenges the analytical integrity and robustness of the "social benefit" account of transformative uses and, by extension, the balancing approach to fair use. This analysis shows that courts frequently do not decide whether a defendant's use of a copyrighted work is transformative based on the social benefits it creates or by balancing these social benefits against harm to the copyright owner. Rather, they find that the defendant's use is transformative if it changes the work or its purpose in a way that does not threaten to harm the copyright owner by supplanting sales in her intended markets. Moreover, while the balancing approach might explain some cases in which courts find that the defendant's use is transformative, it is less effective at explaining cases finding no transformativeness. The harm-based approach helps to explain both sets of cases.

In the first set of cases, the court finds that the challenged use is transformative where there is no likelihood of harm to the copyright owner in her foreseeable markets. Parody cases provide a classic example. For instance, in *Mattel, Inc. v. Walking Mountain Productions*, the Ninth Circuit held that the defendant's photographs of the plaintiff's copyrighted Barbie doll were transformative parodies.[152] The court explained that in some of the photos, "Barbie is about to be destroyed or harmed by domestic life in the form of kitchen appliances, yet continues displaying her well known smile, disturbingly oblivious to her predicament."[153] In other photos, Barbie is shown as a "nude doll in sexually suggestive contexts."[154] The court held that the photographs were strongly transformative, saying "[i]t is not difficult to see the commentary that [the defendant] intended or the harm that he perceived in Barbie's influence on gender roles and the position of women in society."[155]

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150. *See Sony*, 464 U.S. at 477–78 (Blackmun, J., dissenting) (emphasis added).

151. *See, e.g.*, *Campbell*, 510 U.S. at 579; Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 801, 806 (9th Cir. 2003); Lunney, *supra* note 11; Madison, *supra* note 52.

152. 353 F.3d at 802–03.

153. *Mattel*, 353 F.3d at 802.

154. *Id.*

155. *Id.*

Thus, the court suggested that the defendant's photographs were transformative because they provided social benefit through criticism. Significantly, however, the court also found that the defendant's critical changes to the original copyrighted work made it a poor substitute for the original work in its intended markets.[156] Indeed, the court found that the defendant's "work could only reasonably substitute for a work in the market for adult-oriented artistic photographs of Barbie," and that it was "safe to assume that Mattel will not enter such a market or license others to do so."[157] Accordingly, the court found no harm to the copyright owner.[158] Ultimately, the court decided to apply a balancing test to the fair use issue. After it had "balanced" the factors, the court concluded that the defendant's use was fair because it "had no discernable impact on Mattel's market," while "the benefits to the public in allowing such use . . . are great."[159]

Yet, it is clear that once the *Mattel* court properly considered the harm issue, balancing became unnecessary. The court really did not need to require social value or balance that value against anything, because there was no harm to the copyright owner on the other side of the scale. This is frequently true in cases involving transformative uses.[160] The more the defendant changes the meaning, message, or purpose of a work, the less likely the use is to substitute for the copyright owner's work or its most foreseeable derivatives. Although it is still possible to characterize this as "balancing"—albeit a very easy case in which there is nothing on one side of the scale—this approach essentially collapses into a pure harm-based approach in which transformativeness turns on whether or not there is harm. The reference to balancing merely reflects the point made throughout this piece that there is social benefit in allowing people to use copyrighted material when the use causes no harm to the copyright owner.

The second set of cases also shows that transformativeness does not turn on whether the defendant's use is socially beneficial. In these cases, courts find that the defendant's use is not transformative despite the apparently socially beneficial nature of the use. Indeed, courts do not necessarily decide that a use is transformative even when it falls within one of the categories listed in section 107. Yet, these categories (including

156. *Id*. at 806.
157. *Id.*
158. *Id*.
159. *Id.*
160. *See also, e.g.*, Perfect 10 v. Amazon.com, 487 F.3d 701, 724–25 (9th Cir. 2007).

comment, criticism, news reporting, research, etc.) represent paradigmatic socially beneficial uses.

For instance, in *Harper & Row*, the Supreme Court did not find a transformative use where The Nation magazine published excerpts from President Ford's soon-to-be-published memoirs, even though the use clearly constituted news reporting. [161] Likewise, in *American Geophysical Union v. Texaco*, the Second Circuit refused to find a transformative use where Texaco scientists copied scientific journal articles, even though the articles were relevant to their research.[162]

Thus, courts do not decide whether a use is transformative based generally on whether the type of use may be labeled as socially beneficial. Rather, courts determine transformativeness based on the extent to which a challenged use changes the meaning, function, or purpose of the copyrighted work. In other words, a use has to be transformative *relative to the copyright owner's use*, not just socially beneficial in the abstract. Courts often conflate these two definitions, saying a use is transformative because it adds new meaning or message, thereby creating social value. But these two definitions are not always consistent. In *Harper & Row*, the Supreme Court held that the defendant's purpose was not just to report the news, but also to scoop the story of President Ford's memoirs before *Time*'s licensed article hit the stands.[163] Similarly, in *Texaco*, the court acknowledged that Texaco's ultimate purpose in copying the journal articles was to conduct research, but held that the researchers' immediate purpose was to create archival copies for their individual offices. Because Texaco's purpose in buying authorized subscriptions to the journals was to keep archival copies in its library, the court held that Texaco's unauthorized creation of additional copies for the same purpose was not transformative.[164]

While transformative uses do typically benefit the public, the primary question is whether a use is sufficiently different from the copyright owner's use of the work that it is unlikely to cause the copyright owner economic harm. When a copyright owner's intended or most foreseeable markets include news reporting, research, or other socially beneficial markets, courts do not ignore potential harm to the copyright owner's sales

161. Harper & Row Publ'rs, Inc. v. The Nation Enters., 471 U.S. 539, 569 (1985) (observing that "[a]ny copyright infringer may claim to benefit the public by increasing public access to the copyrighted work").

162. Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 924–25 (2d Cir. 1994).

163. *Harper & Row*, 471 U.S. at 568.

164. *Texaco*, 60 F.3d at 924–25.

on the ground that the defendant's use of the work in those core markets is socially beneficial. The copyright owner's work itself serves the public interest. The defendant's use of the work—even for socially beneficial purposes—is likely to supplant the copyright owner's sales, causing harm to the copyright owner that is likely to decrease incentives to create such works. Moreover, because the defendant is merely attempting to exploit the same socially beneficial markets as the copyright owner, there is no reason to believe that allowing the defendant's use will result in a net social benefit.

Thus, in determining whether a challenged use of copyrighted material is transformative, courts often do not and should not focus generally on whether the use is socially beneficial. Rather, under the harm-based approach, the defendant's use is transformative if it changes the work or its purpose in a way that does not threaten to supplant the copyright owner's intended or most foreseeable markets. When a challenged use threatens material harm to the copyright owner's markets, courts should find that the use is not transformative, even if it would seem to be socially beneficial. Conversely, a court's finding of "transformativeness" will often be equivalent to a finding of "no-harm," because the defendant's changes to the meaning or purpose of the copyrighted work render it a poor substitute for the copyright owner's work.

b. Parody and Satire

As previously discussed, the *Campbell* Court held that parody is entitled to greater fair use protection than satire because copyright owners are in a better position to exploit the market for satirical uses of their works than for parodic uses. Thus, the *Campbell* Court's distinction between parody and satire in determining transformativeness is theoretically consistent with a harm-based approach to fair use.

In practice, however, this distinction can be very problematic. It can be nearly impossible to draw the line between parody and satire. This is especially true for uses of famous copyrighted works, which are often the subject of parody and satire cases.[165] When a copyrighted work is so

165. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583 (1994) (holding that rap version of popular song "Pretty Woman" "reasonably could be perceived" as parody); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1259 (11th Cir. 2001) (reversing lower court's ruling that novel *The Wind Done Gone* was not parody of famous novel *Gone With the Wind*); Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1402–03 (9th Cir. 1997) (holding book written in style of *The Cat in the Hat* telling the story of the O.J. Simpson murder case was satire, not parody);

famous that it nearly defines a genre or historical period, or is *sui generis*, it borders on the metaphysical to discern whether the allegedly infringing work comments on the copyrighted work itself or on the genre or period it represents.

For example, any parody of *Gone With the Wind* would seem to satirize the antebellum South, because images of *Gone With the Wind* practically define that era in the minds of many readers.[166] Moreover, where a new work seeks to comment on the historical inaccuracy of a famous work like *Gone With the Wind*, it is inevitable that the author will also "provide a more balanced view" of history in the process.[167]

The *Campbell* case also shows how difficult it is to determine whether a use constitutes a parody, a satire, or neither. The district court granted summary judgment to 2 Live Crew, holding that the use was a parody. The Sixth Circuit reversed, stating that it had difficulty discerning the element of parody in the defendants' song. The Supreme Court then reversed the Sixth Circuit and remanded,[168] holding that the use reflected at least some marginally parodic content:

> While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naiveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody . . . .[169]

MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1997) (finding sexually humorous version of song *Boogie Woogie Bugle Boy* not parody).

166. As *The Wind Done Gone* author Alice Randall has said, "[*Gone With the Wind*]—the book, the movie, the costumes, the quips—has reached the status of myth in our culture. It is more powerful than history, because it is better known than history." *See* Suntrust Bank v. Houghton Mifflin Co., 136 F. Supp. 2d 1357, 1375 (N.D. Ga. 2001) (quoting the "Conversation with Alice Randall" at the end of Randall's novel).

167. *See Suntrust*, 136 F. Supp. 2d at 1377 ("Many of the critical elements of *The Wind Done Gone* attack *Gone With the Wind* but, as explained by Ms. Randall, the new work also seeks to, and does provide, a more balanced view of the antebellum South.").

168. *See* Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150 (M.D. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 510 U.S. 569 (1994).

169. *Campbell*, 510 U.S. at 583.

The harm-based approach to fair use provides guidance to courts on how to deal with parody and satire cases. First, it helps courts to draw a functional line between parody and satire. Under *Campbell*, copyright harm occurs when a use substitutes for the original copyrighted work, not when a use suppresses the demand for it through criticism. Because copyright holders are not in a good position to exploit the market for criticism of their own work—and arguably should expect such criticism in a robust marketplace of ideas—copyright holders do not control the market for works that are critical of their own. Accordingly, if the defendant's use criticizes either the copyrighted work or social views that the copyright owner might like to protect from criticism, then the court should find that the defendant's use falls within *Campbell*'s safe harbor for parody.[170]

Second, the harm-based approach sheds light on the appropriate treatment of satirical uses. While *Campbell* held that fair use protects parody more than it protects satire, it did not hold that satire is never fair use. Indeed, the Court expressly reserved the question of whether the lack of compensation for satirical uses of copyrighted works would constitute harm to a copyright owner's foreseeable markets.[171] Thus, even if a court finds that a use is purely satirical, it still must decide whether the use causes copyright harm. This determination requires the court to decide whether harm may be inferred or whether it must be proved, depending on how foreseeable the satirical use is and how likely it is to supplant the copyright owner's markets.

2. Commercial Uses

The second inquiry in assessing the purpose and character of a use in the fair use analysis is whether the use is commercial in nature. The conventional wisdom is that commercial uses are less fair than noncommercial uses. In fact, however, the case law is unclear on the significance of commerciality in the analysis.

In *Sony*, the Supreme Court suggested that commercial uses are presumptively unfair.[172] The *Campbell* Court subsequently retreated from that position, however, stating that although commerciality weighs against

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170. *Id.* (holding that a use is protected as parody if it "reasonably could be perceived as commenting on the original or criticizing it, to some degree").

171. *See id.* at 592 n.22 ("We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it.").

172. *See supra* text accompanying notes 94–97.

a finding of fair use, it does not create a presumption.[173] Moreover, *Campbell* suggests that the commercial nature of a use does not weigh against fair use unless the use is likely to supplant sales of the copyrighted work or its derivatives.[174] The Court explained that harm may not be inferred from a commercial use when the use alters the work in such a way that it is unlikely to compete with the original work in the marketplace. The Court added that most of the examples of transformative uses listed in section 107 "are generally conducted for profit in this country."[175]

Thus, *Campbell* suggests that the commerciality factor should not possess independent significance in the analysis. Rather, consistent with a harm-based approach to fair use, it is merely an indicator of whether the defendant's use is likely to cause harm to the copyright owner.[176] As the *Sony* case reflects, the commerciality factor allows a presumption of harm where the defendant copies the copyrighted work closely for commercial gain. In these cases, harm to the copyright owner is likely, and fair use ordinarily should be denied.

A few courts have held that the commercial nature of a use weighs against fair use, regardless of harm. These courts might have embraced, at least to some extent, the market failure theory for commercial uses. The prevailing view of the market failure theory is particularly inhospitable to commercial uses. Commercial users are likely to profit more from using copyrighted works and are also in a better position to overcome transaction costs. Yet, in many cases, commercial uses cause no more harm to the copyright owner than do noncommercial uses. Moreover, commercial uses often benefit the public more than personal uses do, because they result in more widespread public access to the copyright owner's original work or the defendant's improvement of the original work. As such, the market failure theory's treatment of commercial uses discourages progress and leads to gross inefficiencies.

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173. *Campbell*, 510 U.S. at 584:

> The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character . . . . Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence.

174. *See id.* at 583–85.

175. *See id.* at 584 (quoting Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 592 (1985) (Brennan, J., dissenting)).

176. Justice Ginsburg raised the issue of whether the commercial nature of a use should be given independent weight in a question to an advocate during the oral argument in the *Campbell* case. *See* Transcript of Oral Argument at *14, Campbell v. Acuff-Rose Music, Inc., 1993 WL 757656 (Nov. 9, 1993).

For example, courts sometimes reject fair use claims for uses that result in new commercial products[177] even when there is no likelihood that the new product will substitute for the copyrighted work or its foreseeable derivatives. In many of these cases, courts deny fair use protection for commercial uses by saying that the use is not transformative, even when it clearly transforms the original. In the *Wind Done Gone* case, the district court granted the plaintiff's motion for a preliminary injunction against distribution of the defendant's book, rejecting the defendant's claim that the book was a transformative fair use.[178] The court "conclude[d] that while *The Wind Done Gone* in part criticizes *Gone With the Wind*, the book's overall purpose is to create a sequel to the older work and provide Ms. Randall's social commentary on the antebellum South."[179]

The district court in the *Wind Done Gone* case failed to recognize that the transformative purpose of Randall's book is not primarily to expose the reality of the antebellum South, but to expose how *Gone With the Wind* diverged from that reality. Rather than writing a direct historical critique of the original book, however, Randall chose to write another book that juxtaposes *Gone With the Wind*'s glamorous story of gallant men and charming women during the Civil War period with a second story of a black girl's impressions of prejudice, slavery, and miscegenation during the same period. The dissonance produced by this juxtaposition exposes the myth of *Gone With the Wind*.[180] In this light, the book is essentially the fictional equivalent of other forms of commentary traditionally deemed to be fair use, such as book and film reviews, which are also produced for profit.[181] The district court's erroneous approach to this transformative and commercial use was reversed on appeal.[182]

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177. *See* Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 124–28 (2001) ("Use of protected material in news reporting, comment, or parody tend to yield more favorable fair use decisions than creative uses that result in new products.").

178. Fortunately, the district court's decision was reversed on appeal. *See* Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

179. *See Suntrust*, 136 F. Supp. 2d at 1378.

180. *See id.* at 1375 (quoting a portion of the "Conversation with Alice Randall," which is included at the end of *The Wind Done Gone*, in which Randall says that *Gone With the Wind* "is an inaccurate portrait of Southern history. It's a South without miscegenation, without whippings, without families sold apart, without free blacks striving for their education, without Booker T. Washington and Frederick Douglass. *GWTW* depicts a South that never ever existed.").

181. *See Campbell*, 510 U.S. at 584 (noting that most of § 107's illustrative fair uses, including teaching, news reporting, and research, are "conducted for profit in this country" (quoting Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 592 (1985) (Brennan, J., dissenting))).

182. *See Suntrust*, 268 F.3d at 1259.

Other courts likewise have dismissed the transformative content of commercial products in denying fair use. In *MCA, Inc. v. Wilson*, the Second Circuit held that the defendant's song *Cunnilingus Champion of Company C*, a sexually humorous adaptation of the song *Boogie Woogie Bugle Boy of Company B*, did not constitute fair use.[183] The court emphasized the commercial nature of the use, observing that the defendant's use resulted in a new commercial product of the same general type as the copyrighted work (both were songs). The court noted that "plaintiffs and defendants were competitors in the entertainment field," and that both songs were "performed on the stage," "sold as recordings," and "sold in printed copies."[184] Yet, the court did not indicate how any of these general commonalities between the two very different songs showed that the defendant's song supplanted the market for the plaintiff's song.

To the extent that all of the fair use factors are related because they indicate whether harm is likely to occur, judicial blurring of the line between the transformativeness factor and the commerciality factor in fair use analysis is not, in and of itself, a particular cause for concern. The real problem is that some courts are letting the commerciality of a defendant's use cloud their judgment as to whether the plaintiff has suffered or is likely to suffer harm of a kind that is likely to affect incentives to create or distribute her work. Decisions affording less fair use protection for new commercial products regardless of harm are particularly troubling because these products include creative works such as novels and songs that greatly benefit the public and ordinarily lie at the core of copyright law's protection. Indeed, they often convey a more powerful message than nonfictional histories and biographies that typically receive favored treatment as research or commentary.[185] Moreover, they serve copyright's speech-enhancing function by generating public discourse on social and historical issues. For instance, the novel *The Da Vinci Code* spurred much more comment on the historical and religious issues discussed therein than the nonfictional works from which it borrowed.[186] Similarly, following the release of the movie *Pearl Harbor* in 2001, several newspaper articles critiqued the movie for historical inaccuracy.[187] Numerous newspaper

183. *See* MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1957).

184. *See id.* at 185.

185. *See, e.g.*, MARTHA C. NUSSBAUM, POETIC JUSTICE 5–7 (Beacon Press, Boston 1995) ("Literary art [in Aristotle's view] . . . is 'more philosophical' than history, because history simply shows us 'what happened,' whereas works of literary art show us 'things such as might happen' in a human life.").

186. *See generally infra* notes 243–45 and accompanying text.

187. One article criticized virtually the entire movie, interviewing World War II historians who

articles also debated the historical accuracy of the film *Titanic* following its release in 1997.[188]

Even outside the context of new products, commercial uses are deemed less fair under the market failure theory than noncommercial uses. For instance, in *Princeton University Press v. Michigan Document Services*, publishers sued a copyshop for copying student coursepacks containing excerpts of their copyrighted material.[189] The copyshop argued that because copying of such excerpts by the students themselves ordinarily would be deemed a fair use, and the copyshop was simply doing the same copying more efficiently, their copying should also be deemed a fair use.[190] The copyshop was essentially arguing that the copyright owners suffered no harm, because if the copyshop had not done the copying, the students would have done it instead, and the students' copying would not have required payment. The copyright owners, on the other hand, argued that the copyshop was deriving a commercial benefit from infringement of their copyrighted works, and they were entitled to share in this benefit.[191] Applying the fair use as market failure theory, the majority held that the use was not fair because the copyshop profited from copying the materials and easily could have paid for permission to copy the materials through the Copyright Clearance Center.[192]

Under a harm-based approach, the court's decision against fair use might be defensible if the students' own copying of the course material would have been deemed fair solely on the ground that transaction costs prevented the students from obtaining permission to copy. As previously

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pointed out, among other things, that the Japanese attack on Pearl Harbor was not as surprising to the United States administration as the movie suggests, and that President Roosevelt never would have used his medical condition to motivate people the way his character did in the movie. *See* Mick LaSalle, *Hollywood vs. History; Historians Say "Pearl Harbor's" Version of the World War II Attack is Off the Mark*, S.F. CHRON., May 29, 2001, at E1. *See also* Marilyn Salisbury, *Portrayal of FDR Tampers with History*, SAN DIEGO UNION-TRIBUNE, June 24, 2001, at E2 (arguing that portrayal of FDR in the film was inaccurate and offensive to people afflicted by polio); *Smoke-Free War Films Irksome*, TORONTO STAR, June 23, 2001, at 11 (finding it particularly irksome that although the movie was set in 1941, only one character in the movie smokes cigarettes).

188. *Compare* Douglas W. Phillips, *Viewpoints: Titanic's True History Sunk*, HOUSTON CHRON., Mar. 18, 1998, at A35 ("Numerous testimonies from survivors detail the heroic deeds of first-class passengers on behalf of third-class passengers, . . . [showing that *Titanic*'s] neo-Marxist version of a Titanic embroiled in the throes of class warfare is simply false."); *with* Mellissa Wright, *Viewpoints: Survivors Mostly Male*, HOUSTON CHRON., Mar. 26, 1998, at A35 (responding that author of the previous article "failed to mention that more first-class male passengers survived than did third-class women and children," indicating that "[n]ot every rich man on that vessel was a hero").

189. Princeton Univ. Press v. Mich. Doc. Serv., Inc., 99 F.3d 1381 (6th Cir. 1996).

190. *Id.* at 1386 n.2.

191. *Id.* at 1387.

192. *Id.*

discussed, prohibitive transaction costs represent one situation in which the copyright holder suffers no harm, because she will not receive payment whether or not the copying is allowed, and therefore the copying makes her no worse off. Thus, if that was the sole basis upon which the students' copying would have been deemed fair, and the copyshop was able to consolidate and reduce those transaction costs so that they were no longer prohibitive, then the copyshop's use would not be deemed fair.

It is likely, however, that the students' copying would have been deemed fair on the ground that their copies of excerpts of various works was not likely to displace the copyright holders' foreseeable sales or license fees. There was no evidence that the plaintiff publishers planned to create compilations of excerpts of their works for educational use or that, if they had planned to do so, compilations selected by individual professors would have impaired that market.[193] Moreover, the record contained numerous declarations from professors indicating that they would not have assigned the entire original works under any circumstances, whether they were allowed to make the compilations or not.[194] The only remaining question is whether the professors would have been likely to assign excerpts of the copyrighted works in the coursepacks if they knew that payment of license fees for such use was required. If the professors or students would simply forgo the use of those works entirely rather than pay the license fees, the copying causes no harm to the copyright owner whether it is done by the students or by the copyshop. The case should have been remanded for fact findings on this issue so that harm could be determined.

Under a harm-based approach, such copying should be deemed fair unless the copyright holder could prove that the copying caused her economic harm. Under the market failure approach, however, the court held that the use was not fair. The result is likely a net social loss, as students suffer a loss of educational opportunities that their professors would like to afford them, with no offsetting benefit to the copyright holders or creative progress.

3. Personal Uses

While personal uses are generally considered fairer than commercial uses, the judicial preference for transformative uses in recent years has caused debate over whether purely personal, nontransformative uses may

193. *Id.* at 1386.
194. *Id.* at 1409 (Ryan, J., dissenting); *id.* at 1398 (Merritt, J., dissenting).

be deemed fair use.[195] The dissent in *Sony* describes the preference for transformative uses over personal uses:

> [T]here is a crucial difference between the scholar and the ordinary user. When the ordinary user decides that the owner's price is too high, and forgoes use of the work, only the individual is the loser. When the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits.[196]

Yet, the *Sony* majority recognized that personal uses can be fair. As previously discussed, *Sony*'s harm-based approach to fair use holds that a personal use is fair if it does not deprive the copyright owner of sales she would have made otherwise. Given that personal copying is not generally very profitable, people who use copyrighted material for personal purposes will often forgo the use rather than pay for the material if payment is required. Moreover, transaction costs will often be prohibitive relative to the value of the use. In these situations, the copyright owner is unlikely to be compensated for these uses whether or not they are deemed fair, so the copying makes the copyright owner no worse off than she would have been without it. Because there is no harm, the use is presumably fair.

To the extent that courts apply a balancing approach to fair use, however, they are likely to focus on the social value of the defendant's use. The balancing approach's emphasis on social value, especially when coupled with lax standards for proof of harm, results in an inherent bias in favor of transformative uses.[197] Personal uses lose out because they typically generate little social value beyond the enjoyment the use brings to the individual user.

The harm-based approach to fair use is a workable one that eliminates this bias. Requiring copyright owners to prove harm is a neutral requirement that applies equally to transformative, personal, and other

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195. *See, e.g.*, Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1898–1903 (2007) (arguing that transformativeness should not determine whether personal use is fair); Rebecca Tushnet, *Copy this Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 537 (2004) (arguing that emphasis on transformativeness has "limited our thinking" and has "begun to shrink" scope of fair use with regard to personal and socially beneficial uses).

196. *See* Sony Corp. v. Universal City Studies, Inc., 464 U.S. 417, 477–78 (Blackmun, J., dissenting).

197. *See* Tushnet, *supra* note 195.

types of uses. Moreover, it serves the purpose of copyright by finding infringement only when harm can be shown.

B. Second Factor: Nature of the Copyrighted Work; and Third Factor: Amount and Substantiality of the Use

The second fair use factor assesses the nature of the copyrighted work, and the third factor assesses the amount and substantiality of the defendant's borrowing. While courts dutifully consider these factors in their fair use analysis, they are interpreted in light of whether the copyright owner is likely to suffer harm as a result of the defendant's use. For instance, the Supreme Court has held that in considering the nature of the copyrighted work under the second factor, creative works receive more protection than factual works.[198] Yet, potential harm to the copyright holder seems to be the driving force in the fair use analysis for both types of works. Thus, copying from a creative work entitled to maximum copyright protection is still deemed a fair use if done for the purpose of transforming the work, ordinarily because the transformation makes the defendant's work a poor substitute for the original. Likewise, copying from a less-protected factual work is often not deemed a fair use unless done for transformative purposes.

The third factor, which takes into account both the quantity and quality of the portion of the copyrighted work taken, is similarly used to predict whether the defendant's use is likely to cause material harm to the copyright owner. Thus, the Supreme Court has held that the use of even a relatively small portion of a copyrighted work might constitute a substantial use under this factor if that portion constitutes the "heart" of the work. In *Harper & Row*, the Supreme Court held that although the *Nation* had copied only 300 words from President Ford's 22,000-word manuscript, that portion was nevertheless substantial for purposes of the fair use analysis because it constituted the "heart" of the book—the part discussing President Ford's pardon of Richard Nixon.[199] Because there was actual evidence of market harm, the Court held that the defendant's use of the short excerpt was not fair.[200]

The Court has since reiterated its view that the amount and substantiality factor should be evaluated in light of potential harm to the

198. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 489 U.S. 340, 348–51 (1991); Stewart v. Abend, 495 U.S. 207, 237–38 (1990).

199. Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985).

200. *Id.* at 567.

copyright owner. In *Campbell*, the Court held that even if the defendant's rap version of the plaintiff's song appropriated the heart of the original by taking the characteristic bass guitar riff and some of the most recognizable lyrics, the defendant's use was still potentially fair use.[201] The Court explained that a parodist is permitted to use *at least* the amount of the copyrighted work necessary to "conjure up" the original, and that how much more may be taken "will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original."[202]

C. Fourth Factor: Harm to the Market for the Copyrighted Work

As previously discussed, and consistent with the harm-based approach to fair use, courts already treat the fourth factor, harm to the market for the copyrighted work, as the most important factor in fair use analysis and use the other factors as proxies for determining whether a defendant's use causes such harm. Yet, this factor is not always easy to apply, particularly given the potential for circularity identified here and elsewhere. This section is devoted to clarifying the proper approach to harm in a variety of cases.

1. Presumptions and Proof of Harm

There are essentially three categories of cases for determining whether a defendant's acts constitute harmful infringement or fair use. The first category of cases includes those in which the plaintiff can provide specific proof that the defendant's copying caused her to lose sales she would have made but for the defendant's infringement. The Court's decision in *Harper & Row* is perhaps the clearest example. There, Harper & Row was able to show that they actually had lost $12,500 when *Time Magazine* cancelled its publication contract after the defendant magazine scooped the story. The Court correctly observed that harm to the copyright owner is the most

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201. *See supra* note 168 and accompanying text. The district court granted 2 Live Crew's motion for summary judgment on the ground that the parodic use of the song was fair use. The appeals court reversed the lower court's summary judgment, holding that because 2 Live Crew's use of the song was commercial, it was presumptively unfair. The Supreme Court reversed the appellate court, holding that 2 Live Crew was not entitled to summary judgment where it had not submitted evidence regarding the potential for harm to the market for rap derivatives of the original under the fourth fair use factor. *See Campbell*, 510 U.S. at 590–91.

202. *Campbell*, 510 U.S. at 588.

important inquiry in fair use analysis. Accordingly, it held that where the defendant's use causes harm by supplanting the copyright owner's own attempts to enter the market for socially beneficial uses of a copyrighted work, that harm will not be weighed against the abstract public interest in allowing copying for socially beneficial purposes.

In the second category of cases, the defendant engages in close or verbatim copying in the copyright owner's foreseeable markets, but there is no specific evidence of actual harm to the copyright owner. In these cases copyright owners are entitled to a presumption of harm even without specific proof, subject to rebuttal by the defendant. In some instances, there is a high likelihood that the defendant's use will usurp plaintiff's foreseeable markets, such as where the defendant distributes a motion picture version of the plaintiff's short story.[203] In others, the plaintiff can claim as harm the fair market value of a license fee for the defendant's own use of the work in those markets.[204] Thus, courts currently presume copyright harm when the defendant's use falls within the markets that the copyright owner "would in general develop or license others to develop"[205] or "traditional, reasonable, or likely to be developed markets."[206] Clearly, these courts are attempting to limit liability to foreseeable markets, which are the markets most likely to influence an author's decision to create a copyrighted work.

In the third category of cases, the defendant might copy less from the copyrighted work, add to or transform the work, or exploit the work in markets that are more remote from the copyright owner's foreseeable markets. The cases in this category have been more difficult to resolve. Indeed, these cases are mainly responsible for circularity in the definition of market harm and fair use. On one hand, when the defendant's use changes the work or uses it in an unforeseeable market, it is very unlikely to substitute for the copyrighted work. On the other hand, because the copyright owner also controls the right to produce derivative works based on her work, it might be said that the copyright owner suffers a loss if she

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203. *See Stewart*, 495 U.S. at 237–38 (defendant's re-release of motion picture based on plaintiff's short story was not fair use because it affected plaintiff's expected markets for derivative works). *See also* Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (defendant's verbatim copying of hundreds of letters from plaintiff's biography of George Washington to produce a shorter but similar biography not fair use).

204. *See* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 924–25 (2d Cir. 1994) (copying individual journal articles for archival purposes was not fair use where copies were used for same purpose as purchased subscriptions and viable means of obtaining license for such copies existed).

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

206. *See Texaco*, 60 F.3d at 930.

is not paid at least a license fee for these uses. After all, the defendant has used and profited from the copyright owner's property, and such activity seems to implicate trespass, free-riding, and unjust enrichment principles.

As we have seen, however, this broad view of a copyright owner's entitlements is often antithetical to copyright's purpose of promoting innovative and creative works. Many courts have recognized this problem and have applied what is essentially a copyright harm approach to fair use. Under this view, if the defendant changes the meaning or message of the work or uses it in markets that are remote from or unrelated to the copyright owner's intended markets, then the use is not very foreseeable. In these cases, a court is less likely to presume harm and more likely to require proof of actual harm.

The *Perfect 10 v. Amazon.com*[207] case, recently decided by the Ninth Circuit, provides a good illustration. There, Google used reduced-sized versions of Perfect 10's photographic images as thumbnails to facilitate internet searches on its search engine. The district court entered a preliminary injunction, holding that Google was unlikely to prevail in its fair use defense.[208]

On appeal, the Ninth Circuit vacated the injunction, holding that Google was likely to be successful in establishing fair use.[209] The court first concluded that although Google's use did not add new meaning or message to the photographs, Google's purpose—to facilitate internet searches—was "highly transformative" because thumbnails serve an entirely different function than the original photographs.[210] The court explained that "[a]lthough an image may have been created originally to serve an entertainment, aesthetic, or informative function, a search engine transforms the image into a pointer directing a user to a source of information."[211]

Moreover, the appeals court disagreed with the district court's conclusion that Google's use was likely to cause market harm. The court considered three potential sources of harm to the copyright owner. First, Perfect 10 argued that the court should presume market harm because Google used the images commercially. The court rejected that argument, explaining that "this presumption does not arise when a work is transformative because 'market substitution is at least less certain, and

207. 487 F.3d 701 (9th Cir.), *amended on reh'g*, 508 F.3d 1146 (9th Cir. 2007).
208. *See Perfect 10*, 487 F.3d at 710.
209. *Id.*
210. *Id*. at 721–22.
211. *Id.* at 721.

market harm may not be so readily inferred.'"[212] Second, following the Ninth Circuit's previous decision in *Kelly v. Arriba Soft Corp.*,[213] the *Perfect 10* court held that the use of photographic images as thumbnails in a search engine did not harm the market for sales of the full-size photographs. In both cases, the Ninth Circuit concluded that given the small size and poor resolution of thumbnails, consumers were not likely to download the images as a substitute for buying the photographs.[214]

Third, the *Perfect 10* court considered harm to the "market for reduced-size images."[215] Perfect 10 had licensed the downloading of smaller images for display on cell phones. The district court inferred that Google's use of the thumbnails was likely to harm this market because "persons who can obtain Perfect 10 images free of charge from Google are less likely to pay for a download, and the availability of Google's thumbnail images would harm Perfect 10's market for cell phone downloads."[216]

The Ninth Circuit disagreed, refusing to infer harm to a market so remote from the copyright owner's intended markets. The court emphasized that "[t]his potential harm . . . remains hypothetical" because "the district court did not make a finding that Google users have downloaded thumbnail images for cell phone use."[217] Thus, the case makes clear that fair use turns on proof of harm to the copyright owner. When a use transforms the copyrighted work as to meaning or function, or exploits the work in a remote market, harm will not be inferred and must be proved through substituted sales or license fees.

Interestingly, having examined carefully the issue of harm, the Ninth Circuit then purported to apply a balancing approach to fair use:

> Google has put Perfect 10's thumbnail images (along with millions of other thumbnail images) to a use fundamentally different than the use intended by Perfect 10. In doing so, Google has provided a significant benefit to the public. Weighing this significant transformative use against the unproven use of Google's thumbnails for cell phone downloads, and considering the other fair use factors,

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212. *Id.* at 724 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994)).
213. 336 F.3d 811 (9th Cir. 2003).
214. *See Perfect 10*, 487 F.3d at 724; *Kelly*, 336 F.3d at 821.
215. The Ninth Circuit refused to consider this type of harm in the *Kelly* case because there was no evidence that the plaintiff had licensed reduced-size images. *See Kelly*, 336 F.3d at 821–22.
216. *Perfect 10*, 487 F.3d at 724–25.
217. *Id.* at 725.

> all in light of the purpose of copyright, we conclude that Google's use of Perfect 10's thumbnails is a fair use.[218]

Yet, it is clear here, as it was in *Mattel*, that the court did not really have to engage in balancing. There was undoubtedly public benefit in Google's use, but there was no proven harm to balance against it. Rather, the *Perfect 10* case reflects a harm-based approach to fair use. Under this approach, when no harm can be proved or inferred, the use is deemed fair, and balancing is unnecessary.

It is important to note, however, that *Perfect 10* is the kind of case in which balancing would have been appropriate if some minor harm had been found. For instance, if the court had found that Google's use did decrease somewhat cell phone downloads of the copyrighted images, this harm would have been slight (especially in light of transaction costs) and would have occurred in remote markets, thus affecting incentives to create or distribute the work very little. By contrast, the social value of Google's use was substantial. Moreover, the social value of the use was concrete and not merely duplicative of value the plaintiff would have produced through use of its own copyrighted material. Unlike in *Harper & Row* where the social value of the defendant's use (news reporting) was merely abstract because it substituted for the value that the plaintiff's own intended use would have produced, Google's use of images in its search engine produced new value that the copyright owner was not in a position to produce.

2. "Copyright Dilution" and Copyright Harm

In other cases, however, courts have deviated from the proposed copyright harm approach and have denied fair use protection for uses that do not supplant the copyright holder's sales or revenues. These courts wrongly recognize a different kind of harm that I will call "copyright dilution" due to its resemblance to the harm associated with trademark dilution.[219] In general, courts have recognized two types of dilution for

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218. *Id.* at 725.

219. *See* The Federal Trademark Dilution Act (FTDA), 15 U.S.C. § 1125(c)(1) (2000), *superseded by* The Trademark Dilution Revision Act of 2006 (TDRA), Pub. L. No. 109-312, 120 Stat. 1730 (codified as amended at scattered sections of 15 U.S.C.). The FTDA granted the use of injunctive relief against any use of a famous mark that "causes dilution of the distinctive quality of the mark." *See id.* The FTDA defined "dilution" as "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of the presence or absence of (1) competition between the owner of the famous mark and other parties, or (2) likelihood of confusion, mistake or deception." 15 U.S.C. § 1127. By allowing the owner of a famous trademark to exclude others from using the mark

famous trademarks: blurring, in which a famous mark is used in connection with noncompeting goods in a way that reduces the distinctiveness of the mark; and tarnishment, in which a famous mark is used in connection with goods or services that could cause negative associations with the mark.[220] Unlike the harm of consumer confusion associated with traditional trademark infringement, the harm associated with trademark blurring or tarnishment can be very speculative.[221]

Whatever the legitimacy of dilution in trademark law, it is wholly inappropriate in copyright law. The Copyright Act provides no statutory basis for dilution in copyright law. Indeed, as previously discussed, the Act provides very little protection of image or reputation at all, and the Supreme Court has explicitly said that only harm due to market substitution should count in the fair use analysis. Nevertheless, courts sometimes apply, at least implicitly, a theory of copyright dilution that finds harm where the defendant's use seems to blur or tarnish the distinctiveness of famous copyrighted works but does not seem to cause lost sales or license fees in expected markets.[222]

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when there is no likelihood of confusion as to the source of goods in commerce, the FTDA unleashed trademark law from its traditional moorings and created a new right with uncertain boundaries. This "'fundamental shift in the nature of trademark protection'" has attracted a great deal of negative attention from legal commentators. Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029, 1030 (2006) (quoting Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1698 (1999)). "[C]oncerned that dilution law represents an expansion in property rights at the expense of the public domain[,] . . . [commentators] worry that it stifles expression, hampers commercial communication, or reduces competition." *Id*.

220. *See* Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 429–32 (2003) (discussing types of dilution recognized under state anti-dilution laws and the FTDA).

221. *See, e.g.*, Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789 (1997); Long, *supra* note 219, at 1059 (arguing that while trademark owners might not like having to share their consumers' attention with other sources or products using the same mark, "[t]o say that this injures the [trademark owner] . . . presupposes that it has a right to a consumer's attention span, an argument that is hard to make with a straight face.").

222. Given the central role that fame of a trademark plays in trademark dilution cases, it is interesting to note the role that fame of a copyrighted work sometimes plays in fair use analysis. First, the fame of a copyrighted work affects application of the third factor, the amount and substantiality of the portion taken from the work. When a copyrighted work is so famous that it has become a household name or image, virtually any use of the work may seem like an appropriation of the "heart" of the work. *See generally* Harper & Row Publ'rs, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985).

Furthermore, in parody and satire cases, the amount that may be borrowed from famous works is sometimes less than the amount that may be taken from lesser-known works. *See, e.g.*, Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 757 (9th Cir. 1978) (holding when a parody targets a work with "widespread public recognition," less copying is necessary to "conjure up" the original). Arguably, widespread recognition of a famous work could cut in the opposite direction, however. When a work is well known, a defendant who copies less from a copyrighted work in producing a parody of the work could cause confusion as to whether the use constitutes a parody of the work or a more general satire. Indeed, given that parody is heavily favored over satire and other transformative products, it is often important for a parodist to emphasize the elements borrowed from the original rather than the new

For instance, in the *Dr. Seuss* case,[223] the Ninth Circuit purported to find harm based on market substitution, but the harm it describes is more related to a loss of distinctiveness or reputation of Dr. Seuss books. The court held that by depicting O.J. Simpson in a red-and-white-striped stove-pipe hat like the one ordinarily worn by the plaintiff's *The Cat in the Hat* character, the defendants had appropriated the plaintiff's "highly expressive core" and therefore had taken a substantial portion of the copyrighted work under the third factor.[224] Moreover, the court explained that because "[t]he good will and reputation associated with Dr. Seuss's work is substantial," the satirical use of the work is more likely to result in market substitution, and therefore "market harm may be more readily inferred."[225]

The court's analysis in *Dr. Seuss* is seriously flawed. First, although it is true that the image of *The Cat in the Hat* character is perhaps the most famous element of the Dr. Seuss works, the defendants did not depict plaintiff's character. Instead, it merely depicted O.J. Simpson wearing a similar hat. Moreover, the appropriation of this element was insignificant in light of the other fair use factors. The purpose of the O.J. Simpson book was to make a parodic or satirical use of the original. It comprised very different subject matter and borrowed very little literal expression from the plaintiff's books. Second, the defendant's book of rhymes chronicling the murder trial of O.J. Simpson would never compete with the Dr. Seuss childrens' books. And despite the fame of Dr. Seuss works—or perhaps because of it—the Dr. Seuss copyright holder does not seem to be in a good position to produce or license works of a nature similar to the works produced by the defendants.

As for market substitution, the most that could be said is that the copyright owner feared that the defendant's use could cause some hypothetical or speculative harm at some point in the distant future. Rather, the court incorrectly assumed harm based, at least implicitly, on a theory of copyright dilution. The court's emphasis on Dr. Seuss's reputation and the misappropriation of Dr. Seuss's image is reminiscent of trademark dilution claims, where any use that incorporates or replicates

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elements. For instance, any parody of *Gone With the Wind* should probably include a female character who is very much like Scarlet O'Hara; otherwise, the audience will assume the work is a satire of the South rather than a parody of *Gone With the Wind*.

223. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc. 109 F.3d 1394 (9th Cir. 1997).

224. *See id.* at 1402.

225. *Id.* at 1403. The Ninth Circuit apparently reconsidered its inference of harm for transformative uses in the *Perfect 10* and *Kelly* cases, discussed *supra* at text accompanying notes 207–17.

that distinctive quality in a new product renders the original less distinctive. It is this supposed loss of distinctiveness—not any real potential market substitution—that the court characterizes as "market harm" in its fair use analysis.

At the very least, the *Dr. Seuss* court should have required the plaintiff to provide concrete evidence of market harm, showing that it has licensed such works in the past or that it had immediate plans to do so. If the plaintiff could not provide such evidence, the use should have been deemed fair.

A district court similarly adopted a dilution theory of harm in a case involving Ty's Beanie Babies.[226] The defendant, West Highland Publishing, created a book that provided information about all of the collectible stuffed animals, including historical essays, evaluations as to price, and recommendations on whether to buy. Because the book also contained photographs of the Beanie Babies, however, the court found that the book infringed Ty's copyright.[227]

In granting Ty's motion for a preliminary injunction against the manufacturing and selling of defendant's books, the court rejected the defendant's argument that the book was a transformative work deserving of protection under the fair use doctrine. Although Ty would not be in a position to create a book providing impartial market assessments of the collectibles, and it was not clear that such a book would compete with an ordinary book of Beanie Babies photographs, the court found the book harmed Ty's market for derivative works.[228]

It is clear, however, that the court was more concerned with dilution of the Beanie Babies' famous and distinctive image than with harm to markets that Ty might reasonably exploit. The court noted that the "popularity" of the Beanie Babies is due largely to Ty's "own shrewd business practice of creating a shortage in order to excite the market," and that "[b]y recurring shortages, Ty seeks to maintain the enormous demand and popularity of Beanie Babies for as long as possible, and consequently seeks to avoid overexposure or market saturation."[229] Thus, the court found that these "derivative works could have a negative long-term effect

226. *See* Ty, Inc. v. West Highland Publ'g, Inc., No. 98 C 4091, 1998 WL 698922, at *15–16 (Ill. App. Ct. 1998).
227. *Id.* at *9.
228. *Id.* at *15–16.
229. *Id.* at *16.

on the market for Ty's works by destroying the marketing image Ty has carefully created for its products . . . ."[230]

The type of harm that occurs when a defendant's work "destroy[s] the marketing image" of a plaintiff's work is obviously very different from the type that occurs when a defendant's work actually supplants sales of the plaintiff's work.[231] Indeed, the concern with "avoiding overexposure" in order to maintain a work's distinctive "image" is the heart of a dilution claim.[232]

Another example of copyright dilution—this time by tarnishment—was the Second Circuit's decision in *MCA, Inc. v. Wilson*.[233] As previously discussed, the court held that a song entitled *Cunnilingus Champion of Company C*, which combined new, sexually humorous lyrics with the tune of *Boogie Woogie Bugle Boy of Company B*, did not constitute fair use.[234] The court rejected the defendant's testimony indicating that the purpose of the new song was to "combin[e] the innocent music of the '40's with words often considered to be taboo to make a very funny point,"[235] although it is difficult to imagine what other purpose the defendant would have had in producing the work. The court therefore concluded that the new song was neither parody nor satire and was not otherwise transformative,[236] even though the obvious and critical differences between the two songs made it highly unlikely that the new song would supplant the demand for the original and no other harm was proved.

Rather than using an incentive theory of fair use based on harm, the Second Circuit essentially applied a dilution theory based on tarnishment and free-riding. The court found offensive the juxtaposition of what the defendants referred to as "the humorous practice of cunnilingus" with a song that the court said "achieved its greatest popularity during the tragic and unhappy years of World War II, in which 292,131 Americans lost their lives."[237] The court summarized its fair use analysis by saying, "We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform

230. *Id.*
231. *Id*.
232. *Id*.
233. 677 F.2d 180 (2d Cir. 1981).
234. *MCA*, 677 F.2d at 185.
235. *Id.*
236. *Id.* at 184.
237. *Id.* at 184 n.1 (internal quotations omitted).

it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society."[238]

Thus, although the Supreme Court held in *Campbell* that only the demonstrable harm of market substitution should be considered in fair use analysis, a few lower courts have rejected fair use claims based on the speculative harm of copyright dilution. But copyright law should not embrace a concept of harm that replicates the uncertainty and confusion that dilution has produced in trademark law. Some trademark scholars have argued that the harm associated with dilution is "dauntingly elusive," resulting in trademark protection that "is by its nature absolute and unlimitable."[239] Others have produced empirical evidence showing that, at least prior to the 2006 amendments to the Federal Trademark Dilution Act (FTDA), courts had become uncomfortable with the lack of definition of the harm associated with trademark dilution and had begun to rein in dilution claims.[240]

The fair use as market failure theory facilitates claims based on copyright dilution. By recognizing a nearly absolute property right in copyrights, the market failure theory condemns dilution of copyrighted works even when it causes no demonstrable economic harm to the copyright owner. Under the proposed harm-based approach, copyright harm occurs only where the defendant's use supplants the demand for the plaintiff's work, not where it causes some vague or speculative harm to the image of a work. Where the defendant's use of the copyrighted work—often to create a new work—produces value to the defendant or the public without supplanting any of the copyright owner's sales, it increases the number or availability of creative works without harming the copyright owner's incentives to create. Denying fair use in these circumstances is inefficient and does not serve the incentive theory of copyright.

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238. *Id.* at 185.

239. *See* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 684 (2004).

240. *See* Long, *supra* note 219 (reporting empirical evidence showing a significant decline in the rates of relief in trademark dilution cases over the past several years). In 2003, the Supreme Court held in *Moseley v. V Secret Catalogue* that trademark owners must show "actual dilution," rather than merely a likelihood of dilution, indicating that some harm is required. *See* Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003). Congress recently responded by amending the FTDA to effect a legislative overruling of the *Moseley* case. *See* 15 U.S.C. § 1125(c)(1) (granting injunctive relief for uses of famous marks that are "likely to cause dilution by blurring or tarnishment"). For a description of the main provisions of the FTDA prior to these amendments, *see supra* note 219.

D. Additional Considerations: Burdens of Proof, Harm Offsets, and Injunctive Relief

If copyright law is to realize fully a harm-based approach to fair use, courts must make three important changes to existing doctrine (in addition to what has already been discussed): they must change the allocation of the burden of proof, allow defendants to offset proof of harm with proof that their use also increased sales of the copyrighted work, and refuse to grant injunctive relief where the social value of the defendant's use is substantial.

1. Burdens of Proof

As much of the foregoing analysis has already suggested, courts must change the way they assign the burden of proof in many fair use cases. Currently, most courts require the defendant to bear the burden of proof on all fair use factors, including the harm to the market factor.[241] When the defendant's use usurps the plaintiff's most foreseeable markets, meaning that the use is likely to cause material harm in the form of lost sales or license fees, it is appropriate to require the defendant to rebut the presumption of harm by showing that, in fact, her use has not caused harm. Conversely, when the defendant's use does not fall within one of the plaintiff's foreseeable uses or is not otherwise likely to cause lost sales, assigning the burden of proof to the defendant is not appropriate. Under the harm-based approach to fair use, and consistent with the Supreme Court's decision in *Sony*,[242] the plaintiff should bear the burden in such cases to prove that such harm has occurred or is likely to occur.

2. Offsets

Because the harm-based approach to fair use emphasizes proof of the harm actually suffered or likely to be suffered by the copyright owner, courts should recognize that uses of copyrighted works can increase as well as decrease sales. There are many cases in which the defendant's work actually increases sales of the original work. For instance, in a recent English case, Random House, publisher of the book *The Holy Blood and*

241. *See, e.g.*, *Campbell*, 510 U.S. at 590.

242. 464 U.S. at 451 (when no presumption of harm is warranted, plaintiff bears burden of proof to show harm in fair use analysis). *See also* 17 U.S.C. § 107 (2000) (indicating that fair use may be viewed as a limitation on prima facie infringement rather than as an affirmative defense in stating that "the fair use of a copyrighted work . . . is not an infringement of copyright").

the Holy Grail, sued Dan Brown, the author of *The Da Vinci Code*, for copyright infringement.[243] The court held that Brown had borrowed only uncopyrighted material, and therefore he was not liable for infringement.[244] But if the case had proceeded in an American court, and the court had reached the issue of fair use, harm would have been the central issue. In the unlikely event that the plaintiff was able to show that the defendant's book caused any harm to the plaintiff's book, the court also should have allowed the defendant to submit evidence of an offsetting increase in sales. As a CBS news story reported, the plaintiff's book "has enjoyed enhanced popularity on the coattails of the Da Vinci Code's success," and "Amazon.com reported a 3,500 percent increase in sales right after the [English] trial began."[245] Although better empirical evidence is needed, there is also anecdotal evidence suggesting that other transformative works increase sales of the works on which they are based.[246]

Currently, most courts do not take into account evidence that the allegedly infringing work actually increased sales of the copyrighted work. It seems that only the Seventh Circuit considers such evidence. Judge Posner has held that uses that increase sales of the original work (economic complements) are fair while uses that supplant sales of the original work (economic substitutes) are not fair.[247] The substitute-complement distinction approximates the harm approach, though it does not seem to contemplate that many uses can be both substitutes as well as complements.

In service of copyright's incentive purpose, the harm-based approach to fair use requires courts to determine the actual effect a challenged use has on markets for the copyrighted work. Thus, it is imperative that courts allow a defendant to offset any lost sales that his use causes by showing that the use has also increased sales of the work. This single doctrinal change would produce obvious and correct outcomes in some cases that

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243. *See* Richard Roth, CBS News, *Mining Da Vinci*, http://www.cbsnews.com/stories/2006/03/10/listening_post/main1390534.shtml (Mar. 13, 2006) [hereinafter *Mining Da Vinci*]; Carol Memmott, *'Da Vinci' Paperback vs. the Jesus Papers*, USA TODAY, Mar. 27, 2006, at D1; Gordon Raynor & Ben Quinn, *Code Author Clear as Book Sales Soar—Court Victory Sparks Yet More Conspiracy Talk*, THE SUNDAY MAIL (Austl.), Apr. 9, 2006, at 5.

244. *See Mining Da Vinci*, *supra* note 243.

245. *See id.* ("Sales have increased 745 percent just in the U.K., . . . [reflecting] a jump from about 350 copies a week to around 3,000.").

246. *See, e.g.*, Bohannan, *supra* note 8, at 596 (discussing anecdotal marketing evidence suggesting that transformative works based on the novels *Jane Eyre*, *Lolita*, or *Mrs. Dalloway* might have increased the sales of the original works).

247. *See, e.g.*, Ty, Inc. v. Publ'ns Intern. Ltd., 292 F.3d 512, 517–19 (7th Cir. 2002).

are considered difficult under current law. For instance, where the plaintiff is unable to show that the defendant's use has caused or will cause her to lose sales, and makes the potentially circular argument that she has suffered harm in the form of a lost license fee, the defendant would be permitted to offset that harm by showing that the use has increased sales of the copyrighted work.

3. Entitlement to Injunctive Relief

Following the Supreme Court's recent statement in *eBay v. MercExchange*, courts should not assume that when copyright infringement is found, injunctive relief will necessarily follow.[248] The Court noted that it "has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed."[249] Such "equitable considerations" include the effect of granting an injunction on the public interest.[250] Thus, even when the harm caused by the defendant's use requires compensation, the social value of the defendant's use should weigh heavily in a court's decision on whether to grant an injunction.

This approach maximizes the relevant interests by imposing a license that allows the socially beneficial use to continue while compensating copyright owners for their harm. In this way, the harm-based approach is consistent with recent proposals for limited injunctive relief when the fair use issue is a close call.[251]

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248. Although *eBay* involved the issue of injunctive relief in a patent infringement case, the court reasoned by analogy to copyright injunctions. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 126 S. Ct. 1837, 1840 (2006) ("[T]he Copyright Act provides that courts 'may' grant injunctive relief 'on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.'" (quoting 17 U.S.C. § 502(a) (2000)).

249. *Id.*

250. *Id.* at 1839.

251. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 572, 578 n.10 (1994) ("Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing . . . the goals of copyright law . . . are not always best served by automatically granting injunctive relief . . . ."); Lemley, *Should a Licensing Market Require a License?*, *supra* note 8, at 186–87 ("[I]n many circumstances fair use should separate the idea that the copyright owner should be compensated for a use from the idea that the copyright owner should be able to control that use."); Leval, *Toward a Fair Use Standard*, *supra* note 9, at 1132 (arguing that injunctive relief is justified in cases of "simple piracy" but not in cases "raising reasonable contentions of fair use"). *Cf. eBay*, 126 S. Ct. at 1839–40 (2006) (prevailing plaintiff in patent infringement action on unpracticed patent not automatically entitled to permanent injunction under Patent Act but must satisfy traditional four-factor test for equitable remedy).

VI. CONCLUSION

Copyright's incentive purpose requires courts to find fair use for uses of copyrighted works that do not harm or that actually increase incentives to create or distribute those works. Historically, copyright law served that purpose by granting narrow protection against uses that were obviously likely to cause copyright owners to lose sales of their works. As copyrights have expanded, the fair use doctrine has been invoked to mediate between uses that serve copyright's purpose and those that do not. Unfortunately, current theories of fair use, including the market failure theory and the balancing theory, are not only ineffective at achieving this purpose but also potentially harmful to it.

A harm-based approach to fair use fully serves copyright's purpose. The Supreme Court and other courts have attempted to develop the harm-based approach to fair use. Under this approach, a use constitutes infringement only when the use causes harm that is likely to affect a reasonable copyright owner's decision to create or distribute the work. Once such harm is found, however, courts should balance that harm against the social value of the use only where the harm is slight or remote in relation to the social value of allowing the use. If courts take the proposed steps to realize this approach fully, copyright law has a much better chance of fulfilling copyright's constitutional purpose of encouraging creative progress.