

Comments

The Fine Art of Copyright Protection: A Suggestion for Change in the Application of the Fair Use Doctrine

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The [artist's] copy [of life] is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it *something irreducible*, which is one man's alone. *That something* he may copyright unless there is a restriction in the words of the act.¹

ART HAS BEEN defined as “a method or device that produces an artistic effect or is used for decorative purposes.”² Fine art has further been defined as “art that is concerned primarily with the creation of beautiful objects . . . [and] art for which aesthetic purposes are primary or uppermost.”³ Individual imaginations provide the inspiration for the creation of works in a variety of mediums, from painting to sculpture to photography. It seems an affront to the spirit of the artist—and to the effort put into each creation—to allow a copyrighted work to be used by another without permission for the primary purpose of financial gain. Under limitations of copyright laws such as the fair use doctrine,⁴ this is exactly what can happen. Artists who create

* Class of 2002. The author would like to dedicate this Comment to his family and thank them for their enduring and unconditional support throughout law school. The author extends special thanks to Barbara Lemmick for showing him, through the art of photography, a different way to appreciate the world.

1. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (emphasis added).

2. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 122 (3d ed. 1993).

3. *Id.* at 852.

4. The fair use doctrine has been defined as:

A privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without the owner's consent, notwithstanding the

original works, quite possibly for their own enjoyment or with quite specific audiences in mind, can lose the right to control where and how their works are displayed.

As detailed below,⁵ the fair use doctrine allows an alleged copyright infringer to legally use a copyrighted work, such as a painting or a photograph, unhindered by the exclusive rights granted to a copyright holder under federal protection.⁶ Under specific circumstances, this doctrine allows use of an artist's creation in ways contrary to some of copyright's fundamental principles. This Comment addresses two instances in which works of fine art deserving copyright protection were used in major motion pictures without the consent of the artist, and the use was justified under this supposedly equitable doctrine.

In order to frame these issues in context with the basic purposes of copyright, Part I discusses the general background and origins of copyright protection. Part II addresses the subject matter of copyright, the types of work that are protected, and the requirements for copyright eligibility. Part III analyzes the fair use doctrine and its history, and focuses on how the doctrine limits copyright protection to creators in specific situations. In addition, Part III discusses two relevant cases where the fair use doctrine has been used to strip fine art copyright owners of some of their exclusive rights to their creative works. Part IV analyzes the problem of applying the fair use doctrine to works of fine art, such that the rights of artists become subordinate to commercial enterprises. Finally, Part V offers a potential solution that provides more adequate protection for fine art copyright owners.

I. The Origin of Copyright Law

British censorship laws of the sixteenth century formed the foundation for United States copyright law.⁷ Early British statutes and laws recognized the rights of authors over their manuscripts based on principles of "natural justice," their ownership stemming from the premise that authors were entitled to enjoy the fruits of their labor.⁸ As technology improved with the invention of moveable type and the poten-

monopoly granted to the owner Fair use involves a balancing process by which a complex of variables determines whether other interests should override the rights of the creators.

BLACK'S LAW DICTIONARY 598 (6th ed. 1990). See also 17 U.S.C. § 107 (2000).

5. See discussion *infra* Part III.

6. See 17 U.S.C. § 107 (2000).

7. See ROBERT A. GORMAN, COPYRIGHT LAW 1 (1991).

8. See ROBERT E. LEE, A COPYRIGHT GUIDE FOR AUTHORS 14 (1995).

tial for copying increased, appropriate legislation was implemented.⁹ The leading publishers in London, known collectively during this era as the Stationer's Company, were granted by the Crown a monopoly over book publication in 1556.¹⁰ With this monopoly, the publication of seditious and heretical works could be controlled more effectively.¹¹ Protection and compensation of authors were not the Crown's initial intent.¹² Rather, publishers were given an exclusive and perpetual right of publication of works.¹³ Expiration of licensing legislation and the emergence of publishers independent of the Stationer's Company resulted in Parliament's enactment of the Statute of Anne in 1710.¹⁴ The Statute of Anne sought to protect authors and their families from the damage caused by unauthorized reproduction of their books.¹⁵ A copyright term of fourteen years was granted to the author upon registration and deposit of a work with an official public library.¹⁶ If the author was alive at the end of this term, he could renew the copyright for an additional fourteen years.¹⁷

The basic principles behind the Statute of Anne have dominated copyright law throughout American history.¹⁸ The statute's commitment to the encouragement of learning gave the United States a framework by which to create its own copyright legislation.¹⁹ Early writers such as Thomas Paine and Noah Webster lobbied to have the Statute of Anne's concepts incorporated into initial state copyright laws.²⁰ The framers of the United States Constitution also saw the need for a uniform system of copyright throughout the states, and subsequently addressed this issue in the Constitution's provision vesting literary property rights in authors.²¹ Article I grants Congress the

9. *See id.*

10. *See GORMAN, supra note 7, at 1.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.* With growing resentment of the power of the Stationer's Company, Parliament actually refused to renew this licensing legislation (known as the Licensing Act of 1667). *See* CHERYL BESENJAK, *COPYRIGHT PLAIN AND SIMPLE* 20 (1997). The subsequent enactment of the Statute of Anne brought about a period of "author's rights." *See id.*

15. *See GORMAN, supra note 7, at 1.*

16. *See LEE, supra note 8, at 14.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See BESENJAK, supra note 14, at 20.*

21. *See* Harriet L. Oler, *Copyright Law and the Fair Use of Visual Images*, in *FAIR USE AND FREE INQUIRY: COPYRIGHT LAW AND THE NEW MEDIA* 268, 268 (John Shelton Lawrence & Bernard Timberg eds., 1980).

power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings.”²² The basic philosophies of copyright are embodied in this clause, which gives Congress the power to expand or restrict its provisions in alignment with the objectives of copyright.²³ The principal purpose of this congressional power is to preserve and nurture cultural history and welfare in the United States.²⁴ The Framers sought to accomplish this goal by protecting authors’ intellectual property rights in their creative expressions once those expressions become fixed in literary, artistic, or musical form.²⁵

The initial federal statutes governing copyrights were enacted by the first Congress in 1790.²⁶ These statutes provided copyright protection for maps, charts, and books.²⁷ Subsequent acts gradually expanded the types of work eligible for copyright protection.²⁸ In an effort to conform to English law, a general revision of the copyright laws added musical compositions and cuts²⁹ to the list of copyrightable works.³⁰ Dramatic performances came under statutory protection in 1856, whereby authors were “granted the right of public performance in dramatic compositions already subject to copyright [protection].”³¹

The copyright laws were again expanded in 1865, when photographs and negatives were expressly added to the list of protected works.³² The commercial value of the photograph emerged through works such as the famous Civil War photographs of Mathew Brady, which provided justification for the extension of copyright protection into this realm of creative works.³³ Congress interpreted its power in

22. U.S. CONST. art. I, § 8.

23. See GORMAN, *supra* note 7, at 1–4.

24. See *id.* at 4.

25. See Oler, *supra* note 21, at 268.

26. See GORMAN, *supra* note 7, at 9.

27. See *id.*

28. Specifically, the Copyright Act of 1909 and the Copyright Act of 1976. See BESENJAK, *supra* note 14, at 21–22. See also Pub. L. No. 60-349, ch. 320, § 5, 35 Stat. 1076–77, repealed by the Copyright Act of 1976; 17 U.S.C. § 102 (2000). See also discussion *infra* Part II.

29. To make a “cut” is “to record a speech, musical selection, or other sound on (a phonograph record).” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 560 (1993).

30. See Stephen Lichtenstein et al., Note, *Study of the Term “Writings” in the Copyright Clause of the Constitution*, 31 N.Y.U. L. REV. 1263, 1270 (1956).

31. *Id.*

32. See *id.* See also Pub. L. No. 60-349, ch. 320, § 5(j), 35 Stat. 1077, repealed by the Copyright Act of 1976.

33. See Lichtenstein et al., *supra* note 30, at 1270.

this regard granted by the Constitution to be as broad as it wished.³⁴ In 1870, paintings, drawings, chromos,³⁵ statuettes, and models or designs intended as works of fine art were new additions to the enumerated list of copyrightable works.³⁶

The year 1909 saw a complete revision and reorganization of the copyright laws.³⁷ These changes continue to serve as the basis for American copyright law today.³⁸ The Copyright Act of 1909³⁹ ("1909 Act") used broader language to increase the scope of copyright protection and wrestle free from the rigid adherence to protecting only those works specifically enumerated in the original statute.⁴⁰ Copyright protection was dependent upon a work being published with notice of copyright, as well as subsequent registration and deposit of the work.⁴¹ Copyrights had an initial term of twenty-eight years under the act, and were renewable for the same period following expiration.⁴² Due to the 1909 Act's flexible (but inarticulate) language, it was subject to frequent ad hoc amendments, providing little guidance during judicial proceedings.⁴³ This act distinguished between federal copyright protection for published works and state copyright protection for unpublished works.⁴⁴ The most important exclusive rights granted to the copyright owner under the 1909 Act included printing or otherwise copying, making adaptations or versions, selling, and public performance.⁴⁵ This act is no longer in effect, but it does govern transactions taking place between 1909 and 1978, many of which are sources of litigation today.⁴⁶

34. *See id.* at 1271.

35. "Chromo" is short for "chromolithograph," which is defined as "a colored picture produced by making and superimposing multiple lithographs, each of which adds a different color." *ENCARTA WORLD ENGLISH DICTIONARY* (N. Am. Ed. 2001), <http://dictionary.msn.com/find/entry.asp?refid=1861597151&wwi=18624> (last visited Mar. 28, 2002).

36. *See* Lichtenstein et al., *supra* note 30, at 1271.

37. *See id.*

38. *See id.*

39. Pub. L. No. 60-349, 35 Stat. 1075, *repealed by* the Copyright Act of 1976.

40. *See* Lichtenstein et al., *supra* note 30, at 1271-72.

41. *See* LEE, *supra* note 8, at 13. *See also* Pub. L. No. 60-349, ch. 320, §§ 7-10, 35 Stat. 1077-78, *repealed by* the Copyright Act of 1976.

42. *See* LEE, *supra* note 8, at 13.

43. *See* GORMAN, *supra* note 7, at 2.

44. *See id.* at 3. Until the Copyright Act of 1976, common law copyright law and state, rather than federal, law protected unpublished works. *See* BESENJAK, *supra* note 14, at 36. This distinction was subsequently removed in the 1976 Act. *See id.*

45. *See* GORMAN, *supra* note 7, at 2.

46. *See id.* at 2-3.

Congress and the United States Copyright Office made a major effort to revise the copyright laws in the United States, and after a fifteen year study, the dramatic renovations culminated in the Copyright Act of 1976⁴⁷ ("1976 Act"). "The . . . dual copyright system, with its dichotomy between state common-law protection for unpublished works and federal statutory protection for published works, [was] . . . changed to a national copyright system . . ." ⁴⁸ Federal copyright protection became exclusive the moment the author's work was created.⁴⁹ The distinction between published and unpublished works lost its significance as a condition for federal copyright eligibility.⁵⁰ Lack of copyright notice was now curable, and registration became permissive under the 1976 Act.⁵¹ Instead of the twenty-eight to fifty-six year duration provided under the 1909 Act, copyright protection ran for the life of the author plus fifty years.⁵² In 1998, The Sonny Bono Copyright Term Extension Act⁵³ extended protection for an additional twenty years, and copyright protection became exclusive for seventy years beyond the life of the author.⁵⁴ The exclusive rights afforded the author of a copyrighted work remained virtually unchanged from those articulated in the 1909 Act, with the addition of the right of "public display" to take into account transmissions by television and computer.⁵⁵

47. See *id.* at 3. See also 17 U.S.C. § 101 (2000).

48. HARRY G. HENN, COPYRIGHT LAW: A PRACTITIONER'S GUIDE 37 (2d ed. 1988).

49. See GORMAN, *supra* note 7, at 3. For the purposes of copyright law, a work is "created" when it is "fixed in a tangible medium of expression." *Id.* at 3. See also 17 U.S.C. § 101 (2000).

50. See LEE, *supra* note 8, at 13.

51. See *id.*

52. See *id.* Since the life the author cannot efficiently serve as a measure of copyright duration in works made for hire and anonymous or pseudonymous works, where the identity of the author is often difficult or impossible to ascertain, these works had a fixed term of 75 years from publication, or 100 years from creation, whichever expired first. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.10, at 3-9 (2001). Following the passage of the Sonny Bono Copyright Term Extension Act of 1998, these works now have a fixed term of 95 years from publication, or 120 years from creation, whichever expires first. See *id.*

53. Pub. L. No. 105-298, Title I, § 101, 112 Stat. 2827 (1998).

54. See 5 NIMMER & NIMMER, *supra* note 52, § 22.01, at 5-22. See also Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 599 (1999) (arguing for, among other things, a repeal of the Sonny Bono Copyright Term Extension Act of 1998, as it would deny little actual protection to authors).

55. See GORMAN, *supra* note 7, at 3.

In 1988, the Berne Convention Implementation Act⁵⁶ removed the condition of notice from copyright legislation.⁵⁷ Significant changes came about in 1988 and 1990 in an effort to revise United States copyright law to conform to the Berne Convention requirements.⁵⁸ Copyright registration requirements were modified to be consistent with this convention, although registration is still required to bring suit.⁵⁹ In 1990, the Visual Artists Rights Act⁶⁰ ("VARA") was enacted to provide support for visual artists, granting them specific moral rights of attribution to, and integrity in, certain works of visual art.⁶¹

II. The Subject Matter of Copyright

Protection under United States copyright law extends specific and exclusive rights to authors of all types of literary, artistic, and musical works.⁶² Under the authority of Article I of the Constitution, Congress is empowered to grant copyright protection to "authors" for their "writings."⁶³ Codified in section 102, the Copyright Act reads, "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression,

56. Pub. L. No. 100-568, § 1, 102 Stat. 2853 (1988).

57. See LEE, *supra* note 8, at 13. The Berne Convention Implementation Act was signed into law on November 1, 1988. See *id.* at 20. Effective March 1 of the following year, this act continued the transformation of copyright law initiated by the 1976 Act. See *id.* The key change in the copyright law to bring about Berne compatibility was that notice of copyright became optional for published works. See *id.*

58. See GORMAN, *supra* note 7, at 3.

59. See *id.*

60. Pub. L. No. 101-650, Title VI, § 601, 104 Stat. 5128 (1990).

61. See GORMAN, *supra* note 7, at 86-87. VARA applies to a very narrow category of creative works meeting the 1976 Act's definition of "visual art." See Patty Grestenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 450 (1994). Section 106A of the 1976 Act governs this issue, along with the definitions found in that same act. See GORMAN, *supra* note 7, at 87.

"A work of visual art" is

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Pub. L. No. 101-650, Title VI, § 601, 104 Stat. 5128 (1990). See also 17 U.S.C. § 101(1)-(2) (2000).

62. See GORMAN, *supra* note 7, at 9.

63. See *id.* See also U.S. CONST. art. I, § 8.

now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."⁶⁴ Nineteenth century case law interpreted the term "author" to mean anyone "to whom anything owes its origin,"⁶⁵ and "writings" to include "all forms of writing, printing, engraving, . . . by which the ideas in the mind of the author are given visible expression."⁶⁶

To be copyrighted, a work must meet two major requirements: originality and fixation.⁶⁷ First, a work must be an original work of authorship, or put another way, the work merely must be original to the author and possess a modicum of creativity.⁶⁸ Second, a work must be fixed in a tangible form from which it can be perceived, reproduced, or otherwise communicated.⁶⁹

There are eight categories of works protected by copyright.⁷⁰ As listed in the 1976 Act, they are: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."⁷¹ A particular work can be placed in one or more, or none, of these categories and receive copyright protection.⁷²

64. 17 U.S.C. § 102 (2000).

65. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884).

66. *Id.* at 58. In addressing this issue, one group of scholars noted:

The courts do not define writings as the form of a particular subject matter but rather they determine if the subject matter meets certain standards or principles to which all objects, whatever their form, must conform if they are to be entitled to copyright protection. *Writings, thus, are defined not in terms of concrete, tangible forms, but in terms of principles and standards.*

Lichtenstein et al., *supra* note 30, at 1284.

67. See LEE, *supra* note 8, at 7-8.

68. See *id.* at 7. This originality requirement is not nearly as stringent as, for example, the novelty requirement found in patent law. See *id.* This patent condition requires a patentable invention to be new at the time of discovery. See DONALD S. CHISUM, CHISUM ON PATENTS § 3.01, at 3-3 (2001). "[A] prior patent or publication anywhere will negate novelty." *Id.* at 3-4.

69. See 17 U.S.C. § 101 (2000).

70. See 17 U.S.C. § 102(a) (2000).

71. 17 U.S.C. §§ 102(a)(1)-(8). See also LEE, *supra* note 8, at 3.

72. See LEE, *supra* note 8, at 3. The question of how a work can receive copyright protection without fitting into one of the eight enumerated categories can be answered by analyzing the 1976 Act's statutory language preceding section 102, which states: "Works of authorship include the [eight enumerated categories]." 17 U.S.C. § 102(a) (2000). Section 101 provides that the term "including" is "illustrative and not limitative." 17 U.S.C. § 101 (2000) (emphasis added).

Courts have emphasized three principles justifying the existence of copyright protection. First, authors have an inherent right to their own works.⁷³ Second, authors have the right to the rewards and fruits of their labor, thus encouraging further production of copyrightable works.⁷⁴ Third, courts have analyzed the public benefit derived from such encouragement to authors in their creative endeavors.⁷⁵ This encouragement results in further creation of objects of beauty, thus increasing the public's exposure to and knowledge of the arts and sciences.⁷⁶

In *Burrow-Giles Lithographic Co. v. Sarony*,⁷⁷ a landmark case in 1884 involving a photograph by Oscar Wilde, the United States Supreme Court established that a photograph was deserving of copyright

The history of copyright law has been one of gradual expansion in the types of works accorded protection Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. [The 1976 Act] does not intend either to freeze the scope of copyrightable technology or to allow unlimited expansion into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51 (1976). The fact that a work is not included in the eight enumerated categories does not automatically disqualify it from copyright protection. See 1 NIMMER & NIMMER, *supra* note 52, § 2.03, at 1-2. "If such a new form is sufficiently analogous to the kinds of works that are expressly protected in the eight categories, it will be regarded as falling within [the intent of Congress], even though the similarity is only by analogy." *Id.*

73. See Lichtenstein et al., *supra* note 30, at 1290. See also *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (holding defendant liable for copyright infringement of a photograph found to be an original work of art and the product of plaintiff's intellectual invention); *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907) (affirming lower court decision granting respondent replevin of petitioner's copies of a painting after finding respondent validly bought the reproduction rights to the original painting, and those rights were protected by the Copyright Act); *Bracken v. Rosenthal*, 151 F. 136 (C.C.N.D. Ill. 1907) (holding defendants' photographs of plaintiff's copyrighted sculptures constituted copyright infringement).

74. See Lichtenstein et al., *supra* note 30, at 1290. See also *Mazer v. Stein*, 347 U.S. 201 (1954) (holding use by respondents of petitioners' statuettes as bases for table lamps constituted copyright infringement, as the statuettes were original, tangible expressions of the petitioners' ideas and deserving of copyright protection).

75. See Lichtenstein et al., *supra* note 30, at 1290. See also *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (holding that copyrights were not entitled to exemption from state taxation after appellant sought to enjoin collection of a tax upon motion picture receipts); *King Features Syndicate v. Fleischer*, 299 F. 533 (2d Cir. 1924) (holding that plaintiff cartoonist's conception of humor was copyrightable, and defendants' subsequent manufacture of a doll based on plaintiff's character deprived the plaintiff of the commercial value of its copyright and constituted copyright infringement).

76. See Lichtenstein et al., *supra* note 30, at 1290.

77. 111 U.S. 53 (1884).

protection as a "work of art."⁷⁸ The Court discussed the origin and purposes of copyright, stating, "the framers of the Constitution . . . underst[ood] the nature of copyright and the objects to which it was commonly applied, . . . as the *exclusive right of a man to the production of his own genius or intellect . . .*"⁷⁹

In the 1907 case of *American Tobacco Co. v. Werckmeister*,⁸⁰ the Supreme Court, guided by principles of copyright, prevented the copying of a painting.⁸¹ In enforcing the copyright, the Court stated that the foundation of copyright was the "natural dominion which every one has over his own ideas . . . embodied in visible forms or characters . . ." ⁸² An Illinois court of appeal decision, *Bracken v. Rosenthal*,⁸³ held in that same year that a sculpture deserved copyright protection because it was

in accord with the reason and spirit of the law. . . . [T]he copyright acts "secure to the author the original and natural rights, and it was said that the various provisions of the law in relation to copyrights should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work."⁸⁴

This inherent right, which section eight of Article I grants Congress the power to protect, overlaps with the idea that authors are entitled to the fruits and rewards of their own labor.⁸⁵ In essence, this is the right of authors to publish, copy, and sell their works.⁸⁶ As the Court said in *Mazer v. Stein*,⁸⁷ "[s]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."⁸⁸ The encouragement of this individual effort by the author has been said to be the most effective means of advancing the public welfare.⁸⁹

78. *Id.* at 60.

79. *Id.* at 58 (emphasis added).

80. 207 U.S. 284 (1907).

81. *See generally id.*

82. *Id.* at 291 (quoting 1 BOUVIER'S LAW DICTIONARY 436 (Rawles' ed. n.d.)).

83. 151 F. 136 (C.C.N.D. Ill. 1907).

84. *Id.* at 137 (citation omitted).

85. *See* Lichtenstein et al., *supra* note 30, at 1291.

86. *See id.*

87. 347 U.S. 201 (1954).

88. *Id.* at 219.

89. *See id.*

III. The Fair Use Doctrine

Possibly the most significant limitation on a copyright owner's exclusive rights finds its form in the fair use doctrine.⁹⁰ Gradually manifested in early case law, this doctrine was and is considered an equitable rule of reason developed by English judges who articulated a "cohesive set of principles [which] govern[ed] the use of a first author's work by a subsequent author without the former's consent."⁹¹ Future Supreme Court Justice Joseph Storey, sitting as a circuit judge in *Folsom v. Marsh*,⁹² interpreted the principles of the English courts concerning the fair use exception, and articulated what became the foundation for the doctrine in future American jurisprudence on the subject.⁹³

In *Folsom*, Storey explained that the act of quoting copyrighted materials for use in a George Washington biography could be justified or excused, but not "[i]f so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another."⁹⁴ He felt it important to examine the "nature and objects of the selections made," as well as the "quantity and value of the materials used."⁹⁵ Other courts added to Storey's opinion, emphasizing the need to examine whether the unauthorized copying of protected material would benefit the public's interest in the free and open dissemination of information, and whether the preparation of the allegedly infringing work

90. See GORMAN, *supra* note 7, at 93. In the absence of defenses such as the fair use doctrine, the exclusive rights normally granted under 17 U.S.C. § 106 of the 1976 Act give a copyright owner the right to seek royalties from those who wish to use the copyrighted work. See Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 73 (2d Cir. 1997).

91. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 3 (Bureau of National Affairs, Inc. 2d ed. 1995).

92. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901) (finding copyright infringement through early fair use analysis where defendant had taken 353 pages of plaintiff's multi-volume work on George Washington for use in his own Washington biography). While Justice Storey's articulation of the principles of fair use in this case has been considered the foundation for American fair use decisions, it has been said that Storey's thoughts concerning the doctrine were actually articulated by him two years earlier in *Gray v. Russell*, 10 F. Cas. 1035 (C.C.D. Mass. 1839) (No. 5,728) (involving the scope of protection afforded to compilations of public domain materials). See PATRY, *supra* note 91, at 19.

93. See PATRY, *supra* note 91, at 3.

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

95. *Id.*

“requires some use of prior materials dealing with the same subject matter.”⁹⁶

The fair use doctrine, which emerged as a creature of common law from holdings and dicta, was not thought to have a concrete presence in the realm of copyright law.⁹⁷ Scholars have argued that while the doctrine has been praised as “entirely equitable and . . . so flexible as virtually to defy definition[,]”⁹⁸ early English and American case law is not in line with this claim.⁹⁹ Before the doctrine was codified, it was heavily debated whether the doctrine was deserving of codification.¹⁰⁰ Some argued that since the doctrine does “defy definition,”¹⁰¹ it would be more beneficial to allow the courts to set the boundaries of the doctrine and enforce it at their discretion.¹⁰² Since fair use depended upon a variety of factual circumstances, codification in a statute could not provide any clear guidelines for enforcing the doctrine.¹⁰³ Conversely, renowned copyright expert Melville Nimmer argued that while the fair use doctrine should not attempt to enumerate any specific instances of fair use, it should receive recognition by express legislation.¹⁰⁴

The fair use doctrine was eventually codified in the 1976 Act.¹⁰⁵ It is an affirmative defense,¹⁰⁶ only relevant after a plaintiff has established a prima facie showing of copyright infringement.¹⁰⁷ There is no infringement if the alleged copying involves exclusively unprotectible elements such as ideas, processes, or facts.¹⁰⁸ Additionally, there is no infringement if only insubstantial similarities are present between the

96. *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert denied*, 385 U.S. 1009 (1967), (applying the fair use doctrine to uphold the use of plaintiff's magazine articles concerning a celebrity for defendant's autobiography).

97. *See* PATRY, *supra* note 91, at 3.

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

99. *See* PATRY, *supra* note 91, at 4.

100. *See id.* at 262.

101. *Id.*

102. *See id.* This is how the 1909 Act dealt with the issue. *See id.*

103. *See id.*

104. *See id.*

105. *See* 17 U.S.C. § 107 (2000).

106. An affirmative defense is defined as: “In pleading, matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it. A response to a plaintiff's claim which attacks the plaintiff's legal right to bring an action, as opposed to attacking the truth of claim.” BLACK'S LAW DICTIONARY 60 (6th ed. 1990).

107. *See* PATRY, *supra* note 91, at 413. A prima facie case of copyright infringement requires the plaintiff to establish copying and substantial similarity between the original work and the allegedly infringing work. *See id.*

108. *See id.*

copyrightable expression of both works.¹⁰⁹ The similarity must involve *copyrightable* expressions.¹¹⁰ Once the copying and substantial similarity (and thus, infringement) are established, the court must determine if the given use is fair.¹¹¹ Statutory and case law both serve as reference points in the court's determination.¹¹² In codifying the fair use doctrine, Congress emphasized that the doctrine's statutory recognition intended to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."¹¹³ However, one change in the 1976 Act mandated, via use of the word "shall," that the courts analyze the affirmative defense of fair use in accordance with the four factors enumerated in section 107.¹¹⁴ The 1976 Act provides the statutory foundation for the fair use doctrine:

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

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

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹¹⁵

It should be noted that the six purposes delineated in the preamble to section 107 are illustrative, not exclusive.¹¹⁶ In addition, the mere fact that an allegedly infringing use fits into one of these catego-

109. *See id.*

110. *See id.* "Copyrightable" expressions are those expressions satisfying the requirements necessary to obtain copyright protection. *See GORMAN, supra* note 7, at 9.

111. *See PATRY, supra* note 91, at 413.

112. *See id.*

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

114. *See PATRY, supra* note 91, at 414.

115. 17 U.S.C. § 107 (2000) (emphasis added).

116. *See PATRY, supra* note 91, at 418. The six purposes delineated in the statute are: criticism, comment, news reporting, teaching, scholarship, and research. *See* 17 U.S.C. § 107.

ries does not make it presumptively fair.¹¹⁷ While the four statutory factors must all be analyzed in order to determine whether the application of the fair use doctrine is appropriate, courts are not limited to them.¹¹⁸ “No relative weight is assigned to any individual factor, in order to permit the courts to tailor their inquiry to the circumstances of each case.”¹¹⁹ Where relevant, additional factors are taken into consideration.¹²⁰ In light of constant technological advances, Congress intended to create a flexible doctrine capable of adjustment.¹²¹

A. The Purpose and Character of the Use

The first factor of the fair use analysis, a factor which arguably should be more relevant and determinative in the specific situations detailed in this Comment, provides guidance on acceptable or unacceptable fair use applications. The purpose of this factor was clarified in a 1975 House Report:

The Committee has amended the first of the criteria to be considered—“the purpose and character of the use”—to state explicitly that this factor includes a consideration of “whether such use is of a commercial nature or is for non-profit educational purposes.” This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or nonprofit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.¹²²

This factor considers the type of use being made of the copyrighted work to be determinative, not the status of the entity making the use.¹²³ Justification lies in the fact that the type of use and the

117. See PATRY, *supra* note 91, at 418.

118. See *id.* See also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (“Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”).

119. PATRY, *supra* note 91, at 418.

120. In the past, courts have looked to, among other things, whether a work was published or unpublished in making its determination of fair use applicability. See LEE, *supra* note 8, at 56. In response to these judicial interpretations, Congress passed the “Unpublished Work Fair Use Act” on October 24, 1992. See *id.* Intending to nullify an author’s argument that the unpublished status of a work in itself negates the fair use defense, the Act added the following sentence to section 107 of the Copyright Act of 1976: “The fact that a work is not published shall not itself bar a finding of fair use if such finding is made upon consideration of [the four factors].” *Id.* See also 17 U.S.C. § 107.

121. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976) (“The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in statute, especially during a period of rapid technological change.”).

122. *Id.*

123. See PATRY, *supra* note 91, at 420.

status of the entity do not necessarily coincide.¹²⁴ A nonprofit entity may engage in clearly commercial practices while using a copyrighted work.¹²⁵ By contrast, an entity traditionally earning profit may partake in nonprofit activities.¹²⁶ The Supreme Court stated in *Campbell v. Acuff-Rose Music, Inc.*,¹²⁷ “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”¹²⁸

Analysis of the commercial or nonprofit educational aspects of a given entity making use of a copyrighted work does not, however, end the inquiry.¹²⁹ Since inclusion in one of these categories constitutes but a single aspect of an entity’s multifaceted purpose, courts may reach beyond this blanket categorization and analyze other attributes of the purpose and character of the use.¹³⁰ It is unfortunately difficult to neatly categorize all uses as either commercial or nonprofit educational.¹³¹ For example, not all nonprofit uses are educational, and often commercial uses may have nonprofit motives.¹³²

Early interpretations of the first factor did not include the commercial versus nonprofit educational distinction.¹³³ Disheartened educators who had unsuccessfully lobbied for a blanket exception in copyright law for nonprofit educational uses played a large role in the 1976 codification of this distinction.¹³⁴ This phrase of the fair use statute was intended to pacify a displeased interest group, and while not intended to affect the substance of the fair use doctrine, it plays an important role (and arguably should play a *more* important role) in the analysis.¹³⁵

Commentators have proposed that the commercial nature of the use is often a matter of degree, and should be placed on a continuum

124. *See id.*

125. *See id.*

126. *See id.*

127. 510 U.S. 569 (1994) (reversing an appellate court’s finding of fair use in defendant’s use of plaintiff’s copyrighted song, “Oh, Pretty Woman,” as a parody for defendant’s own rap song, “Pretty Woman”).

128. *Id.* at 584.

129. *See* PATRY, *supra* note 91, at 420.

130. *See id.* at 420–21. This could include an analysis of whether the copyrightable material was used for the purposes of criticism or comment. *See id.* at 421.

131. *See id.* at 420.

132. *See id.*

133. *See id.*

134. *See id.* at 421–22.

135. *See id.*

to determine its weight.¹³⁶ One end of the continuum, an end the defense would surely favor, would be use by a nonprofit institution for educational purposes (not charging a fee).¹³⁷ The other end of the continuum would be use of a particular copyrighted work for the purpose of promoting or selling a commercial product or service.¹³⁸ "If the use is commercial rather than nonprofit, it is presumed to be unfair"¹³⁹ Those instances positioned somewhere in the middle of this continuum present the difficulty in determining whether or not a use is commercial.¹⁴⁰

In analyzing the first factor, courts often determine whether the use was primarily for entertainment or scholarship, and whether the use brings profit.¹⁴¹ Thus, the courts can focus on the public benefit derived from the use.¹⁴² When the use is characterized as entertainment, courts tend to find the commercial nature favors the plaintiff alleging infringement.¹⁴³

In *Campbell v. Acuff-Rose Music, Inc.*,¹⁴⁴ the Supreme Court emphasized that the transformative nature of a work is crucial in this part of the fair use analysis.¹⁴⁵ In deciding whether the rap group 2 Live Crew's parody of Roy Orbison's song, "Oh, Pretty Woman" constituted fair use, it was necessary to consider whether the subsequent work "merely supersede[d]" the former work, or actually "add[ed] something new, with a further purpose or different character, altering the first with new expression, meaning or message."¹⁴⁶ The process of creating a transformative work tends to promote the overarching goals of copyright law, and thus will weigh against other factors which often preclude a finding of fair use, such as commercialism.¹⁴⁷

136. See *id.* at 422.

137. See *id.* at 423.

138. See *id.*

139. GORMAN, *supra* note 7, at 95.

140. See *id.*

141. See PATRY, *supra* note 91, at 425.

142. See *id.*

143. See *id.* at 426. See, e.g., *Stewart v. Abend*, 495 U.S. 207 (1990) (holding that use of a short story in Alfred Hitchcock's *Rear Window* was for commercial, not educational, purposes).

144. 510 U.S. 569 (1994).

145. See *id.* at 579.

146. *Id.*

147. See *id.* See also 4 NIMMER & NIMMER, *supra* note 52, § 13.05, at 4-13. "Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works" *Campbell*, 510 U.S. at 579.

Unfortunately, the first factor in the fair use analysis does not have a strong enough emphasis in certain situations. More emphasis should be placed on this factor when works of fine art are being used for commercial purposes.¹⁴⁸ As stated in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹⁴⁹ “[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹⁵⁰

B. The Nature of the Copyrighted Work

Legislative history and case law are distinctly lacking in this second factor, which examines the nature of the copyrighted work.¹⁵¹ Typically receiving little attention, this factor comes into play in the judicial distinction between “informational” and “entertainment” works (that is, factual and nonfactual works).¹⁵² If an informational work is at issue, a court weighs the second factor in the defendant’s favor.¹⁵³ Conversely, the plaintiff is favored if an entertainment work is involved.¹⁵⁴ Supreme Court Justice Blackmun explained this rationale in his dissenting opinion in *Sony Corp. of America, v. Universal City Studios, Inc.*¹⁵⁵ He stated, “informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment.”¹⁵⁶ This theory has been criticized, however, since many informational works contain and require a substantially greater amount of creativity than some creative, nonfactual works.¹⁵⁷

Section 107 of the 1976 Act acknowledges this alleged inconsistency and narrows the scope of the fair use doctrine when applied to factual works such as newsletters, standardized tests, textbooks, and

148. See generally *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (S.D.N.Y. 1997); *Jackson v. Warner Bros., Inc.*, 993 F. Supp. 585 (E.D. Mich. 1997).

149. 471 U.S. 539 (1985).

150. *Id.* at 562.

151. See PATRY, *supra* note 91, at 504.

152. See *id.* at 505.

153. See *id.*

154. See *id.*

155. 464 U.S. 417 (1984) (Blackmun, J., dissenting).

156. *Id.* at 496–97 (Blackmun, J., dissenting).

157. See PATRY, *supra* note 91, at 505–06. Examples given by Patry for creative nonfactual works which require arguably less creativity than factual works (such as computer programs and test questions) are “formula romances and thrillers found in airport and grocery stores.” *Id.*

periodicals for the educational market.¹⁵⁸ The legislative justification for this codified detail is that the taking of even a small portion of this material may harm a copyright owner's potential market.¹⁵⁹ Many scholars opine that a broad, general rule encompassing the fair use doctrine should be shunned in favor of a case by case approach which takes the specifics of a situation into account.¹⁶⁰ The vast list of works protected by copyright may quite possibly contain both "informational" and "creative" components, and their existence would frustrate the application of a general rule.¹⁶¹

The massive renovation of the copyright laws in the 1976 Act focused little attention on the interests of fine artists.¹⁶² As a result, fair use and fine art issues were included within discussions concerning the proposed educational exemption, nonprofit broadcasting, and "the exclusion of pictorial, graphic, and sculptural works from the library photocopying exemption [found in] [s]ection 108 [of the 1976 Act]."¹⁶³ When fine art is the subject of an alleged infringement, the second factor tends to weigh in favor of plaintiffs who argue against the fair use of their copyrighted works.¹⁶⁴ Unfortunately, this factor often receives too little attention in the fair use analysis.¹⁶⁵

C. The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

Nineteenth century English courts aptly articulated the third factor of the fair use analysis, a factor concerned with the "amount and substantiality of the portion used in relation to the copyrighted work as a whole,"¹⁶⁶ in an early case stating:

When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not

158. See 17 U.S.C. § 107 (2000).

159. See PATRY, *supra* note 91, at 506.

160. See *id.* See also *Webb v. Powers*, 29 F. Cas. 511 (C.C.D. Mass. 1847) (No. 17,323) (finding against copyright infringement because defendant's work was too different from plaintiff's work to be an abridgment); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

161. PATRY, *supra* note 91, at 507.

162. See *id.* at 526.

163. *Id.* See also 17 U.S.C. § 108 (2000).

164. See PATRY, *supra* note 91, at 526.

165. See discussion *supra* Part III.B.

166. 17 U.S.C. § 107(3) (2000).

only quantity, but value that is always looked to. It is useless to refer to any particular cases as to quantity.¹⁶⁷

Supreme Court Justice Storey's opinions adhered to this principle in both *Gray v. Russell*¹⁶⁸ and *Folsom v. Marsh*,¹⁶⁹ and the Supreme Court subsequently dealt with the issue in *Harper & Row, Publishers*.¹⁷⁰ The defendant in this 1985 case admitted to copying 300 to 400 words from President Gerald Ford's then-unpublished autobiography.¹⁷¹ The Court found this sufficient to satisfy a prima facie case of infringement because the defendant "took what was essentially the heart of the book."¹⁷²

Since the passage of the 1976 Act, it has generally been held that fair use as an affirmative defense will be rejected if an entire or substantial portion of the work is copied.¹⁷³ This raises the question of why the fair use defense has been upheld in instances where an entire photograph or painting has been copied for use in a commercial enterprise.

D. The Effect of the Use Upon the Potential Market for, or Value of, the Copyrighted Work

The rights enumerated in sections 106 and 106A of the Copyright Act govern the scope of the potential market in the fourth factor of the fair use analysis.¹⁷⁴ The potential market encompasses more than just the sale of copies of the work in its original form; it addresses the effect the allegedly infringing use will have upon the market for the author's derivative works as well.¹⁷⁵ The importance of the derivative

167. *Bramwell v. Halcomb*, 3 My. & Cr. (Ch.) 737, 738 (1836) (dissolving an injunction in favor of defendant, who had allegedly copied plaintiff's work for use in his own treatise concerning the passage of private bills in England).

168. 10 F. Cas. 1035, 1039 (C.C.D. Mass. 1839) (No. 5,728).

169. 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901).

170. 471 U.S. 539 (1985).

171. *See id.* at 539.

172. *Id.* at 564-65.

173. *See* PATRY, *supra* note 91, at 552-53.

174. *See id.* at 557. Section 106 in essence grants exclusive rights in copyrighted works to authors, protecting their rights to reproduce the work, prepare derivative works, distribute copies or phonorecords, perform their work publicly, display their work publicly, or perform it publicly by means of digital audio transmission. *See* 17 U.S.C. § 106 (2000). Section 106A covers artists' rights of attribution and integrity, granting them the right to claim authorship of their works, to prevent the use of their names in works they did not create, and to prevent the distortion, mutilation, or other modification of their work which would prejudice their honor or reputation. *See* 17 U.S.C. § 106A (2000).

175. *See* PATRY, *supra* note 91, at 557. A derivative work is defined as:

[A] work based on a pre-existing work, such as a translation, musical arrangement, fictionalization, motion picture version, abridgment or any other form in

market should not be underestimated, as it often represents an economically important element of the copyright owner's market and is crucial to the incentives that underlie copyright law.¹⁷⁶

It is also important not to extend the scope of a copyrighted work's potential market too broadly, since a potential market could always exist for a copyright owner should he choose to license his work in that market.¹⁷⁷ The Supreme Court in *Campbell* articulated the scope of the potential market as examined in this fourth factor.¹⁷⁸ Justice Souter explained, "the market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."¹⁷⁹ It is significant that the potential market does not include uses or areas the plaintiff has clearly refused to license. This factor gives (or should give) copyright holders the right and the ability to control where and in what manner their works are distributed or displayed.¹⁸⁰

The proper focus of the fourth factor is on the harm arising from the ability of the alleged infringer's use of the copyrighted work to supplant the plaintiff's work in the marketplace.¹⁸¹ However, the alleged infringer need not turn a profit or charge for his work in order to cause harm to the plaintiff's market.¹⁸²

The Supreme Court in *Harper & Row, Publishers* issued an opinion which became a source of confusion for those who sought to apply the fourth factor of the fair use analysis.¹⁸³ The Court classified the fourth factor as "undoubtedly the single most important element of fair use."¹⁸⁴ The Supreme Court later quoted this phrase in the 1990 case of *Stewart v. Abend*.¹⁸⁵ Lower courts were consistently, although mistakenly, guided by this phrase in the application of the fourth factor.¹⁸⁶

which a work may be recast, transformed, or adapted . . . Only the holder of copyright in the underlying work (or one acting with his permission) may prepare a derivative work. The preparation of such a work by any other party constitutes infringement.

BLACK'S LAW DICTIONARY 444 (6th ed. 1990).

176. See PATRY, *supra* note 91, at 557.

177. See *id.* at 557.

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

179. *Id.*

180. See PATRY, *supra* note 91, at 558-59.

181. See *id.* at 560.

182. See *id.*

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

184. *Id.* at 566.

185. See 495 U.S. 207, 238 (1990).

186. See, e.g., *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992) (upholding defendants' use of plaintiff's copyrighted work because it did not exhibit the modicum of

This eventually forced the Supreme Court to clarify the issue in 1994 in *Campbell*.¹⁸⁷ Justice Souter explained:

[T]he task is not to be simplified with bright-line rules [T]he statute, like the doctrine it recognizes, calls for [a] case-by-case analysis Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.¹⁸⁸

No single factor should carry so much weight as to constitute a bright-line rule; instead, a case by case analysis will provide the basis for weighing one factor more heavily than another.¹⁸⁹ Prior to the 1976 codification of the fair use doctrine, courts were free to apply whichever factors were relevant in a given situation; they even had the liberty to ignore one or more of the factors.¹⁹⁰ While section 107 states that all four factors “shall” be analyzed in a fair use analysis, any one of the factors may be of equal or greater importance in any particular case.¹⁹¹ “A use may be fair despite some harm to the potential market if its social value is high; a use may not be fair despite a lack of harm if it takes extensively for no socially valuable purpose.”¹⁹² A case by case analysis will enable this “equitable rule of reason” to be applied fairly, with the particulars of each case affecting which factors deserve greater influence.

E. Case Law

A look at the following examples will clarify why—in certain circumstances and in order to achieve equitable results—factors other than the fourth are of greater importance in the fair use analysis, and why the Supreme Court’s above-noted statement in *Campbell* is correct.¹⁹³

creativity required for copyright protection, and the portions that did exhibit sufficient creativity were nonetheless available to the defendants after an analysis of the four factors of the fair use doctrine); *Los Angeles News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992) (holding defendant operators of an audio/video reporting service liable for copyright infringement of plaintiffs’ video clips through an analysis of the four factors of the fair use doctrine).

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

188. *Id.* at 577–78.

189. See PATRY, *supra* note 91, at 563–64.

190. See *id.* at 560.

191. See *id.* at 562. See also 17 U.S.C. § 107 (2000).

192. PATRY, *supra* note 91, at 563.

193. See discussion *supra* Part III.D.

1. *Jackson v. Warner Bros., Inc.*¹⁹⁴

Plaintiff Earl Jackson ("Jackson") is an African American artist who distributed his copyrighted artwork throughout the United States, and specifically, to an art gallery in Oakland County, Michigan. His work includes two copyrighted paintings entitled *Following the Path* and *A Place of Crossing*.¹⁹⁵ Both are pieces of fine art portraying rights of passage of young Africans and traditional African ceremonies celebrating the passage of youth into adulthood.¹⁹⁶

Defendant Warner Brothers, Inc. ("Warner Brothers") allegedly purchased these two original works for use in their feature film, *Made in America*.¹⁹⁷ In the film, Whoopie Goldberg portrays Sarah, the owner of "The African Queen," a bookstore which sells African American books and other cultural items.¹⁹⁸ Ted Danson plays Hal, a Caucasian car salesman who is the biological father of Sarah's daughter Zora.¹⁹⁹ Sarah's home is decorated with African art, and during two scenes in the film, Earl Jackson's paintings are displayed on the wall in her living room.²⁰⁰ Clearly seen in the background, Sarah and Hal, engaged in a passionate kiss, accidentally bump into Jackson's *Following the Path* painting, nearly knocking it off the wall.²⁰¹ The painting remains uneven for the duration of the scene.²⁰² In a second scene, Jackson's paintings appeared for a total of approximately sixty seconds.²⁰³

Jackson initiated an action against Warner Brothers in the District Court for the Eastern District of Michigan, alleging copyright infringement for Warner Brothers' use of his artwork in the film.²⁰⁴ Jackson claimed that Warner Brothers' use of his paintings constituted a violation of section 107 of the 1976 Act, since Warner Brothers never contracted with Jackson to use his two paintings in the film.²⁰⁵ Jackson also maintained that since he considers the film to be "cultur-

194. 993 F. Supp. 585 (E.D. Mich. 1997).

195. *See id.* at 586.

196. *See id.*

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.* at 586-87.

203. *See id.* at 587. After reviewing the pertinent portion of the movie, the court decided that Jackson's other painting, *A Place of Crossing*, was not clearly shown. *See id.* at 586 n.2.

204. *See id.* at 587.

205. *See id.*

ally exploitative," he would never have allowed his paintings to be used.²⁰⁶

Warner Brothers filed a motion for summary judgment, alleging that there were no issues of material fact.²⁰⁷ The defendant argued it was entitled to the affirmative defense of fair use under the 1976 Act because the art was used only as a prop and the display of Jackson's artwork in their movie did not violate the copyright law.²⁰⁸ For the reasons set forth below, the court ruled in favor of Warner Brothers, allowing the use of Jackson's paintings because it was within the scope of the fair use doctrine.²⁰⁹

Initially, the district court described the two requirements necessary to successfully assert a claim of copyright infringement.²¹⁰ First, ownership of a valid copyright must be found, and second, there must be copying of the protected work by the alleged infringer.²¹¹ Jackson's copyright ownership was not in dispute.²¹² The issue before the court was whether Warner Brothers' display of Jackson's paintings in the film constituted a fair use.²¹³ The burden was on Warner Brothers to establish that the copying was justified under the fair use doctrine, as analyzed under the four factors articulated in section 107 of the 1976 Act.²¹⁴

a. The Purpose and Character of the Use

The court determined that Warner Brothers' use of Jackson's paintings in the film was clearly commercial.²¹⁵ As set forth by the Supreme Court in *Campbell*, "the fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."²¹⁶ Jackson strongly objected to the manner in which his paintings were used in the film.²¹⁷ He argued that

206. *See id.*

207. *See id.*

208. *See id.*

209. *See id.* at 592.

210. *See id.* at 588.

211. *See id.*

212. *See id.* Jackson registered *Following the Path* for copyright in 1991. *See id.* Having determined that Jackson's other painting, *A Place of Crossing*, was not clearly shown, the court did not consider it in the fair use analysis. *See id.* at 588 n.2.

213. *See id.* at 588.

214. *See id.*

215. *See id.*

216. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 439 (1985)).

217. *See Jackson*, 993 F. Supp. at 588.

since his works portray traditional African rites of passage into adulthood by young males and females, it was inappropriate to display his works in a film he believed exploited the very culture he sought to truthfully represent.²¹⁸

In its defense, Warner Brothers relied upon *Amsinck v. Columbia Pictures Industries*,²¹⁹ a New York appellate decision which stated that the issue is not whether the sole motive of the defendant is monetary gain, but "whether the user stands to profit from its exploitation of the copyrighted material without paying the customary price."²²⁰ Warner Brothers also analogized to *Ringgold v. Black Entertainment Television, Inc.*,²²¹ in which the defendant argued that the commercial nature of the television program was undercut by the fact that the defendant's use of the plaintiff's art work did not encourage viewers to watch the show or otherwise promote its sale.²²²

The court reasoned that while the Warner Brothers' movie was clearly a commercial project, Jackson's paintings never became the movie's focus.²²³ They were not used in the movie's advertisements, nor were the works used to increase sales for the movie.²²⁴ The court concluded that Warner Brothers' use could not be said to have exploited Jackson's paintings.²²⁵ Moreover, Warner Brothers did not stand to gain a profit from Jackson's work without paying the customary price.²²⁶ The use of the paintings was seen, in the language of the court, as "fleeting and impermanent,"²²⁷ and not a copy for the purposes of a copyright infringement action.²²⁸ Despite the obvious commercial nature of the defendant's use of Jackson's artwork, the first factor in the fair use analysis weighed in favor of Warner Brothers.

218. *See id.*

219. 862 F. Supp. 1044 (S.D.N.Y. 1994). In *Amsinck*, the artist created a design of pastel colored teddy bears licensed for use in a musical mobile suspended over a baby's crib. *See id.* at 1045. Defendant Columbia Pictures Industries included the mobile in a film about a family that wanted to adopt a child. *See id.* at 1045-46.

220. *Id.* at 1049 (quoting *Harper & Row, Publishers*, 471 U.S. at 504).

221. 126 F.3d 70 (1997). In *Ringgold*, a copyright infringement suit was brought against Black Entertainment Television for its use of the plaintiff Ringgold's art work entitled *Church Picnic*. *See id.* at 72. The art work was included as part of the background set of a television show called ROC. *See id.*

222. *See id.* at 73.

223. *See Jackson*, 993 F. Supp. at 589.

224. *See id.*

225. *See id.*

226. *See id.*

227. *Id.* at 590.

228. *See id.*

b. The Nature of the Copyrighted Work

Jackson argued that his work was only licensed in specific, limited markets that embrace and represent his ideals.²²⁹ His subjects are mostly African Americans, and his work serves to further Afrocentric principles and beliefs.²³⁰

The court found that Jackson's work was composed of elements of creativity, imagination, and originality, and found the second factor weighed in favor of the artist.²³¹ The court did not, however, place much emphasis on this factor—an approach consistent with the relatively limited legislative and case history of this section of the fair use analysis.

c. The Amount and Substantiality of the Portion Used

Warner Brothers contended that the use of Jackson's paintings in the movie was so insubstantial as to be *de minimis*.²³² The defendants relied on the *Amsinck* court's analysis, which stated, "[i]n situations where the copyright owner suffers no demonstrable harm from the use of the work, fair use overlaps with the legal doctrine of *de minimis*, requiring a finding of no liability for infringement."²³³

The district court found that since Jackson had not shown that adverse action was taken against his work as a result of Warner Brothers' inclusion of it in the film, this factor of the fair use analysis favored the defendants.²³⁴ Jackson's "personal affront to the manner in which his art work was used" was not enough to sway the court's decision regarding this factor.²³⁵ According to the court, Warner Brothers' showing of Jackson's work for less than sixty seconds supported the fair use assertion.²³⁶

d. The Effect of the Use Upon the Potential Market

In analyzing the fourth factor, the *Jackson* court reiterated the Supreme Court's position in *Campbell*, requiring that, in examining the effect of the use upon the potential market, courts should

229. *See id.*

230. *See id.*

231. *See id.*

232. *See id.*

233. *Amsinck v. Columbia Pictures Indus.*, 862 F. Supp. 1044, 1049 (S.D.N.Y. 1994).

234. *See Jackson*, 993 F. Supp. at 590.

235. *Id.*

236. *See id.*

consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the original. . . . The enquiry "must take into account not only harm to the original but also . . . harm to the market for derivative works."²³⁷

The court decided that Jackson's work would not be adversely affected in "profitability or popularity,"²³⁸ and that he had not articulated a harm cognizable under the 1976 Act.²³⁹ While finding merit in the artist's argument that the Warner Brothers film was culturally exploitative, it did not find that contention persuasive enough to hold this factor in his favor.²⁴⁰ It found Jackson unable to prove that the relevant market in which his work was sold suffered adverse consequences.²⁴¹ In its conclusion, the court stated, "[t]he overall inquiry for analyzing the fair use doctrine is whether a reasonable author would consent to the use."²⁴²

2. *Sandoval v. New Line Cinema Corp.*

In *Sandoval v. New Line Cinema Corp.*,²⁴³ plaintiff Jorge Antonio Sandoval ("Sandoval"), an artist and photographer who resided and worked in Southern California, created a series of fifty-two untitled photographs depicting himself in a variety of unusual poses.²⁴⁴ Pictures of the artist with his face tightly wrapped in wire, covered in soap bubbles, or apparently lying on a bed of thorns are examples of the content of these photographs.²⁴⁵ Sandoval undisputedly owned the copyright to these works, which were untitled, unpublished, and never publicly shown (and were never intended to be).²⁴⁶

Defendant New Line Cinema Corporation ("New Line") produced and began distribution of the feature film *Seven* in 1995.²⁴⁷ The movie depicts a deranged photographer who commits a series of grisly murders, each based upon one of the seven deadly sins recognized by

237. *Id.* at 590-91 (citations omitted).

238. *Id.* at 591.

239. *See id.*

240. *See id.*

241. *See id.*

242. *Id.* at 592 (quoting *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 840 (S.D.N.Y. 1995)).

243. 147 F.3d 215 (2d Cir. 1998).

244. *See id.* at 216.

245. *See id.*

246. *See Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 410 (S.D.N.Y. 1997).

247. *See Sandoval*, 147 F.3d at 216.

the Roman Catholic Church.²⁴⁸ Approximately one hour and sixteen minutes into the movie, the photographer's apartment is searched by two investigators seeking evidence linking him to the murders.²⁴⁹ On the rear wall of the suspect's apartment is a light box, upon which are several photographic transparencies.²⁵⁰ Both Sandoval and New Line agreed that of these transparencies, ten were reproductions of Sandoval's self-portraits.²⁵¹ The light box is subsequently illuminated and Sandoval's photographs are shown in as many as ten camera shots totaling approximately thirty seconds.²⁵² The photographs are either obstructed or out of focus during that period.²⁵³ It was admittedly difficult but possible for the artist and two unnamed parties to identify the works as Sandoval's.²⁵⁴ The artist filed suit alleging copyright infringement, seeking an injunction from further distribution and display of the film, as well as actual and statutory damages.²⁵⁵ New Line contended that the "fleeting and insignificant use" of the photographs constituted fair use under section 107 of the 1976 Act.²⁵⁶ The district court upheld New Line's use of Sandoval's photographs under the fair use doctrine,²⁵⁷ and the Court of Appeals for the Second Circuit subsequently affirmed the decision, holding that the use of the artist's photographs was *de minimis*.²⁵⁸ For the purposes of this Comment, it is necessary to review the district court's analysis of the case pursuant to the four factors articulated in section 107, as well as the reasons why the decision was affirmed on appeal.

a. The District Court's Analysis of the Fair Use Factors

(1) Purpose and Character of the Use

The district court first analyzed whether or not the use by New Line was of a commercial or nonprofit nature.²⁵⁹ The court de-emphasized this factor, however, because the Second Circuit had recently explained that most secondary users seek at least some minimal

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *See Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 411 (S.D.N.Y. 1997).

253. *See Sandoval*, 147 F.3d at 216.

254. *See Sandoval*, 973 F. Supp. at 409, 411.

255. *See id.* "Sandoval subsequently withdrew his privacy and emotional distress claims." *Id.* at 411 n.4.

256. *See id.*

257. *See id.* at 414.

258. *See Sandoval*, 147 F.3d at 216.

259. *See Sandoval*, 973 F. Supp. at 412.

amount of commercial gain from their use.²⁶⁰ The court also examined whether New Line's use could be considered transformative.²⁶¹

The court decided that the use was clearly commercial, but also transformative "in the sense that defendants used the visual images created in plaintiff's work in furtherance of the creation of a distinct visual aesthetic and overall mood for the moviegoer watching the scene in the killer's apartment."²⁶² It found that the defendants did not use Sandoval's work in the promotion of *Seven*, nor were they trying to directly exploit the artist's theoretical market.²⁶³ While the use was ultimately deemed commercial, the district court determined that the transformative nature of New Line's use caused the first factor to weigh in favor of the defendant.²⁶⁴

(2) The Nature of the Copyrighted Work

The district court disposed of this factor quickly, finding Sandoval's photographs were creative and original works of art.²⁶⁵ It emphasized that since the unpublished nature of a copyrighted work favors rejection of the fair use doctrine, the fact that Sandoval had not yet publicly displayed his work helped shift this second factor in his favor.²⁶⁶

(3) The Amount and Substantiality of the Portion Used

In its analysis of the third factor, the district court explained that the "fleeting and obscured use of plaintiff's work did not and cannot capture the essence or value of the plaintiff's work."²⁶⁷ Although the works were used in their entirety—which normally favors the plaintiff and weighs against a finding of fair use—the court held that since the photographs were barely identifiable by the ordinary viewer "concentrating on the foreground action," it declined a finding precluding fair use.²⁶⁸

260. *See id.* at 412–13.

261. *See id.* at 413.

262. *Id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. *See id.*

267. *Id.*

268. *Id.* at 413–14.

(4) The Effect of the Use Upon the Potential Market

The district court cited the Supreme Court's statement in *Harper & Row, Publishers*²⁶⁹ which read, "[the fourth factor] is undoubtedly the single most important element of fair use."²⁷⁰ Although the court went on to mention the Supreme Court's more recent clarification in *Campbell* that the fourth factor was not necessarily the most important element,²⁷¹ this did not seem to affect the outcome of the *Sandoval* case.²⁷² In explaining the purpose of this factor, the *Sandoval* court stated, "[t]his factor requires courts to consider not only the extent of market harm caused by the specific use in question, but the effect that would occur if that type of use became widespread."²⁷³

In holding that the fourth factor weighed in favor of New Line, the district court determined that the market potential and value of Sandoval's work was not adversely affected, since it was difficult to identify the artist's work in the film.²⁷⁴ The court stated that "[e]ven widespread uses of Sandoval's [p]hotographs in such a fleeting, obscured, and out-of-focus manner could not begin to encroach on the potential market for his work. In short, this important factor weighs decidedly in defendants' favor."²⁷⁵

b. The Second Circuit's Analysis

The Court of Appeals for the Second Circuit found that New Line's use of Sandoval's photographs was *de minimis*, and affirmed the district court's application of the fair use doctrine.²⁷⁶ The court stated that the district court erred in its fair use analysis in not first determining whether the New Line's use was *de minimis* in nature.²⁷⁷ "To establish that the infringement of a copyright is *de minimis*, and therefore not actionable, the alleged infringer must demonstrate that the copying of the protected material is so trivial 'as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.'²⁷⁸

269. 471 U.S. 539 (1985).

270. *Id.* at 566. *See also Sandoval*, 973 F. Supp. at 414.

271. *See Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 577-78 (1994).

272. *See Sandoval*, 973 F. Supp. at 414.

273. *Id.*

274. *See id.*

275. *Id.*

276. *See Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 216 (2d Cir. 1998).

277. *See id.* at 217.

278. *Id.* (quoting *Ringgold v. Black Entm't Television*, 126 F.3d 70, 74 (2d Cir. 1997)).

IV. The Problem

The confusing and often inconsistent application of the fair use doctrine's four factors creates difficulties for courts in determining whether there has been copyright infringement in any given case. An analysis of existing case law does not clearly reveal which factors are the most important in any given situation. The frequently influential fourth factor, dealing with the effect upon the potential market of the copyrighted work, has been given the most judicial attention. Labeling it "undoubtedly the single most important element of fair use," the Supreme Court gave deference to the fourth factor in *Harper & Row, Publishers*.²⁷⁹ Subsequent lower courts agreed, at least until the Supreme Court's clarification in *Campbell*.²⁸⁰ Perhaps the *Harper & Row, Publishers* description of the fourth factor, however, still remains, if only subtly, in the minds of judges.

The fourth factor may indeed be the most important factor in *certain* situations.²⁸¹ "Certainly where there is proof of actual harm to the market, as in [*Harper & Row, Publishers*], this factor should weigh heavily in the balance."²⁸² But in some circumstances, any one of the other three factors may play a more crucial role in determining the scope and applicability of the fair use doctrine.²⁸³ An alleged infringer's use of a copyrighted work could be considered fair despite some harm to the potential market, provided the social value of that use is high.²⁸⁴ Conversely, "a use may not be fair despite a lack of harm if it takes extensively for no socially valuable purpose."²⁸⁵ A plaintiff should not lose simply because the fourth factor was not held in his favor.²⁸⁶ Rather, specific situations require individualized analysis.

Jackson and *Sandoval* illustrate two situations in which courts should give more attention to the other factors of the fair use doctrine. "The basic purpose of copyright is to enrich our society's wealth of culture and information. The means for doing so is to *grant exclusive rights in the exploitation and marketing of a work as an incentive to those who create it*."²⁸⁷ As a limitation to this exclusive protection, the fair use

279. 471 U.S. 539, 566 (1985).

280. See PATRY, *supra* note 91, at 564.

281. See *id.* at 563.

282. *Id.*

283. See *id.*

284. See *id.*

285. *Id.*

286. See *id.*

287. GORMAN, *supra* note 7, at 1 (emphasis added).

doctrine prevents a copyright owner's rights from detrimentally affecting the public's interest in the dissemination of knowledge, and unauthorized copying must be tolerated by copyright owners if they do not suffer adverse economic consequences.²⁸⁸

The *Jackson* and *Sandoval* cases illustrate situations which clash with fundamental principles of copyright law. First, a strong argument can be made that the public's interest in the dissemination of knowledge would not be hindered by preventing Hollywood movie studios from including individual artist's work in films without express authorization. The courts in both cases mentioned that the ordinary viewer barely noticed the inclusion of the works in the films. This could also be construed in favor of the artist: If the amount of the artist's work included in the film was so minimal that the public was not benefiting from its presence, then the public will surely not be injured by its absence. Other works could easily be substituted for the non-permitted works.

Second, courts have paid specific attention to the economic repercussions upon an artist's work when applying the fair use doctrine.²⁸⁹ Consequently, the fourth factor has often been held to be the most important of the four statutory factors.²⁹⁰ Perhaps the situations of artists like Earl Jackson and Jorge Antonio Sandoval strike more of a moral chord than a financial one. Courts have long held that if an artist did not suffer adverse financial consequences, a finding of fair use would usually result. The courts determined just that in both *Jackson* and *Sandoval*. Neither artist could prove harm to their potential market. In *Sandoval*, however, the photographer *never even intended* to market his work.²⁹¹ His photographs were unpublished, untitled, and never publicly shown.²⁹² While the district court in *Sandoval* acknowledged the Supreme Court's clarification in *Campbell*, explaining that the fourth factor of the fair use doctrine was in fact not always the most important, the factor analyzing the effect on the artist's potential market still appears to be the most influential.²⁹³ Referring to this factor, the district court in *Sandoval* stated, "[i]n short, this important factor weighs decidedly in defendants' favor."²⁹⁴ The other three factors may have received short shrift in comparison to how the district

288. See *id.* at 93.

289. See PATRY, *supra* note 91, at 561.

290. See *id.*

291. See *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 410 (S.D.N.Y. 1997).

292. See *id.*

293. See *id.* at 414.

294. *Id.*

court interpreted the fourth. In affirming the district court's decision, the Second Circuit never addressed the manner in which the lower court handled this factor.

Intuitively, when copyrighted works of fine art are used in commercial enterprises without authorization or remuneration, the justification is elusive. The fair use doctrine allows the use of copyrighted materials in some circumstances, thereby promoting the "[p]rogress of Science and the useful Arts."²⁹⁵ Allowing access to certain works, such as factual or utilitarian creations or educational materials, is in accord with this principle. Society can benefit tangibly from this access through educational and technological advancement and, ultimately, further creation and invention. Through the fair use doctrine, interpreted inflexibly in *Jackson* and *Sandoval*, society's progress may be impeded by inhibiting creation. Ultimately, this will hinder the advancement which occurs through improvement upon previous works. Pinpointing the interest in using the copyrighted works of an artist or a photographer without compensation is a difficult task. Is there a specific advancement that will be made by allowing the use? While the secondary user needs access in order to build upon what has gone before, this need not happen in every circumstance. Rather, a secondary user is reaping what they have not sown,²⁹⁶ and should be forced to take appropriate measures in order to secure permission for the use of an artist's copyrighted work.

V. The Solution

To reiterate the warning in *Campbell* against bright line rules concerning the fourth factor, the Supreme Court stated, "the statute, like the doctrine it recognizes, calls for a case-by-case analysis Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."²⁹⁷

When an artist's work of fine art is used by a secondary user for commercial gain, the first two factors of the fair use analysis should play a more important role. Both the *purpose and character of the use* and the *nature of the work* should be analyzed in accord with the purposes of

295. U.S. CONST. art. I, § 8.

296. See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 239 (1918) (holding that the plaintiff's interest in the news it gathered was worthy of protection from interference by defendant business competitor).

297. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994).

copyright law.²⁹⁸ If the balance is shifted in instances such as those described above, an artist's right to control the manner in which his work is publicly displayed should have a more substantial role in the analysis.

In both *Jackson* and *Sandoval*, the artists produced works of obvious creativity and originality.²⁹⁹ The paintings depicting African ancestral ceremonies by Jackson and the self-portraits of the photographer Sandoval did not serve clear utilitarian purposes.³⁰⁰ Both were used in a definitively commercial enterprise—the motion picture industry.³⁰¹ The question should be asked: What public good is served by allowing these works to be used against the artists' will? Entertainment value, possibly. But does that supersede the principles of copyright law to protect these artists' rights to the fruits of their labor? There was no knowledge or information to be extrapolated from the use of Jackson's and Sandoval's works. To state again appropriate language from *Mazer v. Stein*, "[s]acrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."³⁰²

In his paintings, Jackson depicted scenes of African ancestral ceremonies integral to his cultural ideals and beliefs.³⁰³ Jackson had the right to prevent his works from being used in a motion picture that he felt exploited the very culture he was trying to preserve. Should he wish *not* to have his work associated with Warner Brothers, he should have that right—a right consistent with the principles of copyright law. Interestingly, the court in *Jackson* asked whether a reasonable author would consent to the use of the work in the film.³⁰⁴ An objective standard does not, however, seem appropriate when the reasons Jackson protested the use of his work were cultural and religious. They were reasons *personal to him*. On the same note, Sandoval had a right to control the dissemination of his photographs and the medium in which they were displayed. Those rights are clearly enumerated in the 1976 Act.³⁰⁵ The fact that Sandoval never published, titled, or publicly

298. See 17 U.S.C. § 107 (2000).

299. See *Jackson v. Warner Bros., Inc.*, 993 F. Supp. 585 (E.D. Mich. 1997); *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (S.D.N.Y. 1997).

300. See *Jackson*, 993 F. Supp. at 590; *Sandoval*, 973 F. Supp. at 413.

301. See *Jackson*, 993 F. Supp. at 588; *Sandoval*, 973 F. Supp. at 413.

302. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

303. See *Jackson*, 993 F. Supp. at 586.

304. See *id.* at 592.

305. See 17 U.S.C. § 106 (2000). See also discussion *supra* Part I.

displayed any of the prints clearly illuminates his right to have more control, despite the de minimis nature of New Line's use.³⁰⁶

To grant greater weight to the first two factors of the fair use analysis in these situations would bestow an artist of fine art with more control over when, where, and how her work is expressed. Adjusting the fair use analysis in this manner may also turn certain infringement cases in the artist's favor. If the secondary use is clearly commercial, then that secondary user is standing to profit from an artist's work without providing the artist with just compensation. Instead, courts have tended to focus on the *substantiality of the amount used* and the *effect upon the potential market*.³⁰⁷ If the work had no market, the artists should not lose the right to control its display simply because they chose to keep it private. This defies logic, and does not seem to be a fair use under a doctrine answering to the same name. While granting injunctions in both *Jackson* and *Sandoval* to stop further distribution and performance of the respective movies is neither a realistic nor appropriate remedy, just compensation is due the artists whose work was used in these commercial enterprises, even if some courts could label the use de minimis.

Conclusion

In the interests of judicial economy, certain situations are so minimally invasive that the judicial system can choose not to spend valuable time and resources resolving them. There are, however, situations where judicial intervention is necessary. The two situations above illustrate the need for judicial intervention when copyrighted works of fine art are used in commercial enterprises without the express consent of the artists or some type of remuneration. Had these artists been permitted the opportunity to refuse to allow their works to be shown, film companies as large as the respective defendants would surely have had sufficient resources to find suitable alternatives. If this practice were to become widespread, as defendants in these cases and others become more confident in their use of copyrighted works without the need to pay the appropriate compensation, then artists like Earl Jackson and Jorge Antonio Sandoval will suffer the consequences. Simple compliance with the formalities required for the use of a copyrighted work is necessary in these types of cases to prevent such an unjust result.

306. See *Sandoval*, 973 F. Supp. at 409.

307. See PATRY, *supra* note 91, at 561.