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## THE PUBLIC GOOD V. A MONETARY PROFIT: THE NEWS ORGANIZATIONS' UTILIZATION OF THE FAIR USE DOCTRINE

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### ABSTRACT

The main purpose of copyright law is to promote the arts and sciences for the public good. The secondary purpose of copyright law is to ensure the copyright holder retains a benefit for their work. Additionally, the Fair Use Doctrine allows a defense to an individual who uses the copyrighted work without permission, so long as a four-factor test under the Doctrine is properly met. The four factors this test analyzes are the Purpose Factor, The Nature of the Work Factor, The Amount Used Factor, and The Effect on the Market Factor. When news organizations have sought protection under the Fair Use Doctrine, this four-factor test has been unfairly weighed against a finding of fair use. The current trend of the courts is to deny news organization protection under the Fair Use Doctrine, because the Purpose Factor and The Effect on the Market Factor weigh against a fair use finding. Consequently, this comment proposes the primary and secondary purposes of copyright law be taken into closer consideration when deciding fair use questions, and the Fair Use Doctrine be amended to provide a fair analysis to news organizations.

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INTRODUCTION

Imagine a local Chicago news program showed a picture of the convicted Governor Ryan leaving the Dirksen Federal Building in a report on the corruption trial of his successor, Governor Blagojevich.<sup>1</sup> The picture was taken by a local photographer who had a valid copyright to the picture, but did not give permission for the picture to be used for this particular news segment.<sup>2</sup> The photographer files a copyright infringement claim against the news organization, and the news organization claims the affirmative defense of fair use.

But, the defense is rejected!<sup>3</sup> Why? Because the photographer's private interests in gaining monetary value from the picture outweigh the public's interest in obtaining a full "picture" of the news story.<sup>4</sup> If a "picture" really is worth a thousand words, why should news organizations be forced to expend those thousand words, when it could do so more efficiently, and to the public's delight, with a picture?<sup>5</sup> Is a

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<sup>1</sup> *Jury Finds Former Ill. Gov. Ryan Guilty*, USA TODAY, Apr. 17, 2006, [http://www.usatoday.com/news/nation/2006-04-17-ryan\\_x.htm](http://www.usatoday.com/news/nation/2006-04-17-ryan_x.htm) (writing about the conviction of former Governor George Ryan). Former Illinois Governor George Ryan was convicted of racketeering and fraud in 2006. *Id.* In 2011, Governor Ryan's successor, Governor Rod Blagojevich, was convicted on seventeen counts of corruption, including trying to sell President Obama's old Senate seat. *Id.*

<sup>2</sup> For the purposes of this comment, it will be assumed that this picture was used previously by another news organization. The copyright owner only granted permission for the picture to be used in that specific instance, however, and the owner's permission was not obtained in this present scenario.

<sup>3</sup> *Fitzgerald v. CBS Broad.*, 491 F. Supp. 2d 177 (D. Mass. 2007) (rejecting the fair use defense in a similar scenario). In *Fitzgerald*, the claim centered around a picture of a mobster being aired by a news organization, when they were reporting about another mobster who was just convicted by the federal authorities. *Id.* The court rejected the use as fair use, because even though it was "newsworthy," the news organization sought a commercial profit and thus the defense was invalid.

<sup>4</sup> *Id.* at 186-87 (finding the news organization's use for the picture was commercial). "CBS operates the stations for profit, and the stations earn revenue from commercials that run during their newscasts." *Id.* Essentially, the court ruled that news organizations are commercial entities, and the information (including pictures) they broadcast is solely for the purpose to increase viewership. *Id.* at 187.

<sup>5</sup> Anne B. McGrail & Michael Milburn, *The Dramatic Presentation of News and Its Effects on Cognitive Complexity*, 13 POL. PSYCHOL. 613, 613-14 (1992) (contending that television has "replaced newspapers and radio as the primary source of news for most Americans."). Additionally, the

picture not simply just a statement of facts in pictorial form? Why should the interests of one outweigh the interests of the entire public?

This comment examines the newsworthy fair use defense to copyright infringement, and how the courts have shifted away from granting news organizations a fair use defense. Part I will provide a background for the discussion of copyright law and the Fair Use Doctrine. Part II will analyze how the courts are now reluctant to grant a fair use defense to news organizations, and instead favor an individual's monetary profit over the public good. Part III will propose that the courts change direction and reconsider the factors of the Fair Use Doctrine, and instead grant a fair use finding to news organizations when appropriate.

## I. BACKGROUND

This section deals with the history of the copyright law and the Fair Use Doctrine as applied to news organizations. This is important to an analysis of the Fair Use Doctrine because it is crucial to understand the underlying purposes of copyright protection in order to adequately weigh a fair use finding. First, the purpose of copyright protection will be discussed, then what constitutes copyright and copyright infringement, next an overview of the Fair Use Doctrine, and finally how the courts have applied the Fair Use Doctrine in the context of news organizations.

### A. *The Purpose of Copyright*

Copyright's primary purpose is to "stimulate artistic creativity for the general public good."<sup>6</sup> This of course supports the long-term goal of copyright law—"promoting the progress of science and useful arts."<sup>7</sup> Conversely, the instantaneous and secondary purpose of copyright law is to "enable creators to earn a living either by selling or by licensing others to sell copies of the copyrighted work."<sup>8</sup>

The justification of the secondary purpose of copyright law is that artists and creators of unique works will feel their creations are protected, which will in turn

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authors explain that television is a "medium dominated by its visual dimension." *Id.* at 616. As a result, the "[v]isually exciting shots will tend to be selected over less exciting ones." *Id.*

<sup>6</sup> Lisa A. Zakolski, 18 AM. JUR. 2D *Copyright and Literary Property* § 2(2012) (detailing the primary purpose of copyright protection is the public good, and "stimulat[ing] artistic creativity" is used to achieve this end); *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (opining there is a balance of competing interests at play vis-à-vis copyright, but the most important is the public good).

<sup>7</sup> William F. Patry, 2 PATRY ON COPYRIGHT § 3.3(2012) (explaining that on Sept. 5, 1787, it was recommended to Congress that the Constitution include a provision stating "Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.").

<sup>8</sup> On *Davis v. The Gap, Inc.*, 246 F.3d 152, 165 (2d Cir. 2001) (recognizing that an objective of the copyright clause in the Constitution is to protect the author of the work, which in turn promotes the progression of science).

“foster learning, progress, and development.”<sup>9</sup> However, the primary purpose of copyright law is not to reward the author for his work.<sup>10</sup> That is only the means towards the ends of copyright law—achieving a public benefit.

The purpose of providing a public benefit is best achieved using this dual-purpose system, because creating some security for artists is important for the public good.<sup>11</sup> The public receives a benefit from this protection because artists are granted a “temporary monopoly” on their works, allowing them to choose how, when, and *at what cost* the works are to be released.<sup>12</sup> This ability to choose the terms of the release is what drives artists to release their work to the public.<sup>13</sup>

It is important to note, however, that the ability to choose the terms of the release is to support the secondary purpose, and the support of the primary purpose is the release of the works into the public domain.<sup>14</sup> This secondary purpose is not a “function of the copyright law[;]” rather, it exists solely to achieve a public access to the work.<sup>15</sup> It logically follows that without an overall benefit to society, the “grant of a copyright monopoly to individuals would be unjustified.”<sup>16</sup> Thus, the balance between the primary purpose and secondary purpose of copyright law must always be kept in check.

### *B. Defining Copyright and Copyright Infringement*

An explanation defining copyright and copyright infringement is necessary to fully comprehend the Fair Use Doctrine. What defines “copyright” was most recently established in the Copyright Act of 1976 (“Copyright Act”).<sup>17</sup> This Act covers all works after January 1, 1978.<sup>18</sup> All works prior to this date are covered under the Copyright Act of 1909.<sup>19</sup> The idea of copyright dates back much further, however,

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<sup>9</sup> *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 839 (10th Cir. 1993) (holding the Constitution establishes a duty for Congress to ensure the author of the work receives a return for the work, in order to promote the ultimate goal of benefiting the public at large).

<sup>10</sup> 1-1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (2011); *see also Mazer v. Stein*, 347 U.S. 201, 219 (1954) (concluding that the author’s personal gain from the copyright is not the primary purpose of copyright law). The *Mazer* Court opined “that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . .” *Mazer*, 347 U.S. at 219.

<sup>11</sup> *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (acknowledging that the primary purpose of copyright law is to promote the general benefits to the public).

<sup>12</sup> 17 U.S.C. § 106 (2012) (outlining the various exclusive rights the copyright holder has over the work). This includes the right to decide if the work should be published or if the work should remain private. *Id.*

<sup>13</sup> *Cnty. of Suffolk, N.Y. v. First Am. Real Estate Solutions*, 261 F.3d 179, 194 (2d Cir. 2001) (reasoning that the granting of this monopoly to the copyright owner, provides “an incentive to stimulate artistic creativity” for the public good).

<sup>14</sup> *Bond v. Blum*, 317 F.3d 385, 393 (4th Cir. 2003) (holding the benefit to the copyright holder is a “secondary consideration” of the “primary public purpose . . .”)

<sup>15</sup> Zakolski, *supra* note 6, at 3.

<sup>16</sup> NIMMER, *supra* note 10, § 1.03[A].

<sup>17</sup> 17 U.S.C. § 102 (2012).

<sup>18</sup> *Id.* § 301.

<sup>19</sup> *Id.*

with its enumeration in the U.S. Constitution.<sup>20</sup> Through a dissection of the Copyright Act, the fundamentals of copyright law are illuminated.

Under the Copyright Act, a work must satisfy three criteria to be protected: it must be an "original work of authorship[,] fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . ." <sup>21</sup> Copyright protection does not extend so far, however, to protect any "idea, procedure, process, system, method of operation, concept, principle, or discovery . . ." <sup>22</sup>

Furthermore, the Copyright Act does not allow the copyright owner "complete control over all possible uses of his work." <sup>23</sup> The owner of a copyright is only granted six specific exclusive rights that were defined by Congress. <sup>24</sup> These rights include: (1) the right to reproduce the work, (2) create derivative works, (3) distribute copies of the work to the public, (4) perform the work publicly, (5) display the work publicly, and (6) perform the work via audio transmission. <sup>25</sup> The Copyright Act also recognized for the first time "a distinct statutory right of first publication . . ." <sup>26</sup>

If a copyright holder believes any of his exclusive rights have been infringed upon, the holder may bring a copyright infringement claim. <sup>27</sup> In order for the copyright holder to succeed on an infringement claim, the holder must show: "(1) ownership of a valid copyright; and (2) that the [infringer] violated the copyright owner's exclusive rights under the Copyright Act." <sup>28</sup> Additionally, an infringement claim must be supported by the author of the work having previously pre-registered or registered his copyright. <sup>29</sup> If these requirements are met, then the user of the copyrighted work is "an infringer of the copyright." <sup>30</sup>

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<sup>20</sup> U.S. CONST. art. I, § 8, cl. 8 (stating "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .").

<sup>21</sup> 17 U.S.C. § 102 (2012); *see also id.* § 101 ("A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.").

<sup>22</sup> *Id.* § 102.

<sup>23</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (holding the Copyright Act has never been interpreted to allow the copyright holder plenary control over the work). Congress was specific in the exclusive rights granted to the copyright holder, and these rights are laid out in the Copyright Act. *Id.*

<sup>24</sup> 17 U.S.C. § 106.

<sup>25</sup> *Id.* (establishing this is "subject to sections 107 through 122" of the Copyright Act, however, which includes the fair use doctrine).

<sup>26</sup> *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 552 (1985) (writing for the majority, Justice O'Connor recognized the act was the product of a "culmination of a major legislative reexamination of copyright doctrine."). The Court acknowledged the Copyright Act as a merger between common law and statutory copyright protection. *Id.*

<sup>27</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th Cir. 2007) (recognizing that through the Copyright Act, a copyright holder has a legal remedy against copyright infringement); *see also* 17 U.S.C. § 504 (2012) (detailing the remedies available to a copyright holder when pursuing a copyright infringement claim).

<sup>28</sup> *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (recognizing three doctrines of copyright liability: "direct copyright infringement, contributory copyright infringement, and vicarious copyright infringement.").

<sup>29</sup> 17 U.S.C. § 411 (2012); *see also* *Coles v. Wonder*, 283 F.3d 798, 799 (6th Cir. 2002) (holding "copyright protection dates from the time that an artist creates an original work that may be

### *C. The Fair Use Doctrine*

The Fair Use Doctrine is essential to maintain the primary and secondary purposes of copyright law—especially when applied to news organizations. To defend against a copyright infringement claim, Congress codified an affirmative defense—the Fair Use doctrine.<sup>31</sup> Congress listed in the statute explicit purposes to be protected such as “criticism, comment, news reporting, teaching . . . scholarship, or research . . . .”<sup>32</sup>

To analyze any given situation and determine if fair use should be applied, Congress listed four factors that must be taken into consideration: (1) the purpose of the use (The Purpose Factor), (2) the nature of the work (The Nature of the Work Factor), (3) the amount of work used in relation to the entire work (The Amount Used Factor), and (4) the effect the use has on the potential market of the work (The Effect on the Market Factor).<sup>33</sup>

These “same general standards of fair use are applicable to all kinds of uses of copyrighted material.”<sup>34</sup> The factors are to be analyzed and explored together and “may not ‘be treated in isolation, one from another.’”<sup>35</sup> Each factor, however, has its own weight and importance to the final determination of a fair use finding.

The Purpose Factor is determined based upon two inquiries.<sup>36</sup> The first inquiry the court will make is to determine “whether and to what extent the new work is transformative.”<sup>37</sup> The second inquiry is whether the infringing use is “commercial

copyrighted . . . [but] a cause of action for infringement cannot be enforced until the artist actually registers the copyright pursuant to the requirements of the Copyright Act.”)

<sup>30</sup> See 17 U.S.C. § 501; see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984) (acknowledging the exception to this rule is when there is a fair use finding of the work, and thus no infringement).

<sup>31</sup> 17 U.S.C. § 107 (establishing 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.”).

<sup>32</sup> *Id.*; see also *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006) (opining that “[t]he text employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the illustrative and not limitative function of the examples given, which thus provide general guidance . . .”).

<sup>33</sup> 17 U.S.C. § 107; see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576 (1994) (writing this fair use language was originally expressed by Justice Story as a common-law doctrine). Justice Story stated, “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects, of the original work.” *Id.* (citing *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4, 901) (C.C.D. Mass. 1841)).

<sup>34</sup> *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 553–54 (1985) (concluding that the “fair use analysis must always be tailored to the individual case.”). Additionally, “[t]he nature of the interest at stake is highly relevant to whether a given use is fair.” *Id.* at 552–53.

<sup>35</sup> *Murphy v. Millennium Radio Grp. L.L.C.*, 650 F.3d 295, 306 (3d Cir. 2011) (opining these factors are weighed, however, “in light of the purposes of copyright.”). This is to ensure the courts do not “stifle the very creativity which [the] law is designed to foster . . . .” *Id.* (citing *Video Pipeline, Inc. v. Buena Vista Home Entm’t, Inc.*, 342 F.3d 191, 197 (3d Cir. 2003)).

<sup>36</sup> *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).

<sup>37</sup> *Id.* (citing *Campbell*, 510 U.S. at 579 (“This . . . focuses on whether the new work merely replaces the object of the original creation or instead adds a further purpose or different character.”)). Additionally, “[c]ourts have been reluctant to find fair use when an original work is merely retransmitted in a different medium.” *Id.* As a result, a transformative work will suggest a finding of fair use. *Id.*

or noncommercial.”<sup>38</sup> The Nature of the Work Factor is then decided by the court through an analysis of whether the copyrighted work is creative or fact-based.<sup>39</sup>

The Amount Used Factor is the next step the court will decide.<sup>40</sup> Here, “[w]holesale copying” of the respective copyrighted work will often result in the court ruling against a fair use finding.<sup>41</sup> Finally, the fourth factor the court will take into consideration when analyzing a fair use defense is The Effect on the Market Factor.<sup>42</sup> For this factor to weigh in favor of fair use, the copied work cannot “materially impair the marketability” of the copyrighted work.<sup>43</sup>

Although these factors are what Congress codified as the doctrine of fair use, the history of fair use dates further back than the Copyright Act.<sup>44</sup> Throughout this history, the importance of fair use has never been lost, and “[f]rom the infancy of

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<sup>38</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584–85 (1994) (explaining “Direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use.”); see also *A & M Records*, 239 F.3d at 1015; *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1117 (9th Cir. 2000) (holding “[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.”).

<sup>39</sup> *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (opining that “[g]iven the difficulty of characterizing the ‘nature’ of the photographs, we find that the impact of their creativity on the fair use finding is neutral.”). The court explains the creative/fact-based dichotomy, as to “the extent to which it is a creative work [will enjoy] broader copyright protection as opposed to a factual work requiring broader dissemination.” *Id.*

<sup>40</sup> *L.A. News Serv. v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992) (holding that “[c]opying even small portion[s] of a copyrighted work may exceed the boundaries of fair use if the material taken is the ‘heart’ of the work.”) (citing *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 564–65 (1985)).

<sup>41</sup> *A & M Records*, 239 F.3d at 1016 (holding the infringer engaged in wholesale copying by copying files entirely from the copyright holder); see also *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986) (reasoning that while “copying of an entire work does not preclude fair use *per se* . . . a subsequent user does not require such complete copying if he is truly pursuing a different functional milieu.”).

<sup>42</sup> *Pacific & S. Co., Inc. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) (holding that this factor is closely related to the first factor). This is true because “[b]y examining the effect of a use, a reviewing court can measure the success of the original purpose and single out those purposes that most directly threaten the incentives for creativity which the copyright tries to protect.” *Id.*

<sup>43</sup> *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (citing *Harper & Row*, 471 U.S. at 566–67. The court noted:

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 . . . *If the intended use is for commercial gain, that likelihood [of market harm] may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.*

*Id.* (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984) (emphasis added)); see also *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (opining “[a]ny allegedly positive impact of defendant’s activities on plaintiff’s prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiff’s copyrighted works.”).

<sup>44</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (stating “In copyright cases brought under the Statute of Anne of 1710, English courts held that in some instances ‘fair abridgements’ would not infringe an author’s rights . . .”).



copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose . . . ."<sup>45</sup>

Thus, it logically flows that in order to "promote the Progress of Science and useful Arts[.]" a certain degree of copying must occur.<sup>46</sup> It is then expected and required that when a court analyzes a fair use defense, the court should "avoid rigid application of the copyright statute when . . . it would stifle the very creativity which that law is designed to foster."<sup>47</sup> Consequently, while these factors are enumerated in the statute, a court may also consider other factors as it deems necessary to promote the spirit of the statute.<sup>48</sup>

#### *D. How News Organizations Are Analyzed Under the Fair Use Doctrine*

News organizations are disadvantaged by the rigid four-factor test of the Fair Use Doctrine, resulting in news organizations not being granted a fair use finding. This is odd because news-reporting falls under the fair use exception of the Copyright Act.<sup>49</sup> It logically fits well into fair use, because the news is "information respecting current events . . . not the creation of the writer . . . [but a] history of the day."<sup>50</sup> This is relevant because news and news organizations are critical to a well-informed society.<sup>51</sup> The court will not involve itself, however, with what is and is not "news."<sup>52</sup> The main issue of contention is "whether a claim of news-reporting is a valid fair use defense" to a charge of copyright infringement.<sup>53</sup>

Additionally, the United States Supreme Court has held that the assurance to authors that their work will not be expropriated "outweighs any short-term 'news

<sup>45</sup> *Campbell*, 510 U.S. at 575 (writing the very purpose of copyright is to "promote the Progress of Science and useful Arts . . . .") (citing U.S. CONST., art. I, § 8, cl. 8). Additionally, the Copyright Act was designed to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" and intended that courts continue the common-law tradition of fair use adjudication." *Id.* at 577.

<sup>46</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>47</sup> *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (writing "The doctrine is an 'equitable rule of reason,'" designed to provide fairness in copyright law) (citing *Sony*, 464 U.S. at 448).

<sup>48</sup> *Iowa State Univ. Research Found., Inc. v. Am. Broad. Co.*, 621 F.2d 57, 60 (2d Cir. 1980) (opining "that the resolution of a fair use claim 'depends on an examination of the facts in each case (and) cannot be determined by resort to any arbitrary rules or fixed criteria . . . .'" (citing *Meeropol v. Nizer*, 560 F.2d 1061, 1068 (2d Cir. 1977)).

<sup>49</sup> 17 U.S.C. § 107 (2012) ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting . . . is not an infringement of copyright.").

<sup>50</sup> *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918); see also *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 556 (1985) (noting that the "copyright's idea/expression dichotomy 'strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'").

<sup>51</sup> See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 449 (2002) (quoting Justice Stewart referring to the press as the "fourth estate" providing a check on the three branches of government).

<sup>52</sup> *Harper & Row*, 471 U.S. at 561 (affirming the circuit court "that the trial court erred in fixing on whether the information contained in the memoirs was actually new to the public.").

<sup>53</sup> *Id.* (holding that the newspaper was not entitled to a fair use defense because it "went beyond simply reporting uncopyrightable information and actively sought to exploit the headline value of its infringement, making a 'news event' out of its unauthorized first publication . . . .").

value' to be gained from premature publication . . .”<sup>54</sup> Essentially, the Supreme Court favors the secondary purpose of copyright protection, and disfavors the primary purpose of copyright law. Furthermore, the United States Supreme Court finds nothing in the Copyright Act to “prevent an author from hoarding all of his works during the term of the copyright.”<sup>55</sup>

The Supreme Court justifies this with the strong interest the author has in deciding under what conditions to publish his work, in order to take advantage of “publicity and marketing.”<sup>56</sup> The Supreme Court believes that if fair use is allowed whenever the “social value of dissemination . . . outweighs any detriment to the artist,” then the copyright holder would be deprived of his chance to make a large monetary profit.<sup>57</sup>

The Supreme Court has held that just because a use falls into a category outlined in the statute does not make it a *per se* fair use.<sup>58</sup> Consequently, a fair use finding analysis of news organizations is to receive no greater deference than other fair use findings analyses. This means, in effect, each factor of the Fair Use Doctrine “is to be explored, and the results weighed together, in light of the [United States Supreme Court’s] purposes of copyright.”<sup>59</sup> This has resulted in news organizations being disproportionately denied fair use findings.<sup>60</sup> A clear example of this misapplication is in *Fitzgerald v. CBS Broadcasting*,<sup>61</sup> which will be analyzed further in the next section.

## II. ANALYSIS

### *A. News Organizations Serve the Primary Benefit to Society by Dispersing the News.*

If news programs do not show visual imagery, it logically follows there will be fewer viewers, a fall in ratings, and a decline in revenue.<sup>62</sup> The main service provided by news organizations is keeping the public informed about the important issues and

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<sup>54</sup> *Id.* at 555; see Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983, 1006 (1970) (stating the “brevity and expedience” was the justification for the protection granted to unpublished works); see also *Belushi v. Woodward*, 598 F. Supp. 36, 37 (D.C. 1984) (opining that to be successful with publication, there needs to exist strong marketing for the first publication).

<sup>55</sup> *Stewart v. Abend*, 495 U.S. 207, 229 (1990) (maintaining that this monopoly is what provides an incentive to the author to continue to keep creating valuable works for the public); see also *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (holding an author can arbitrarily withhold consent for another to use his work).

<sup>56</sup> *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 555 (1985) (commenting, “exploitation of subsidiary rights is necessary to financial success of new books . . .”).

<sup>57</sup> *Id.* at 559 (citing Wendy J. Gordan, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)).

<sup>58</sup> *Id.* at 561.

<sup>59</sup> *Gaylord v. United States*, 595 F.3d 1364, 1372 (Fed. Cir. 2010).

<sup>60</sup> See *Pacific & S.Co. v Duncan*, 744 F.2d 1490 (11th Cir. 1984); *Fitzgerald v. CBS Broad.*, 491 F. Supp. 2d 177 (D. Mass. 2007); *L.A. News Service v. Reuters Television*, 149 F.3d 987 (9th Cir. 1998).

<sup>61</sup> *Fitzgerald v. CBS Broad.*, 491 F. Supp. 2d 177 (D. Mass. 2007).

<sup>62</sup> *McGrail*, *supra* note 5, at 616.

facts of the day.<sup>63</sup> It is a social benefit to have a society up-to-date on current issues.<sup>64</sup> A democracy is dependent on having a well-informed constituency to be able to vote intelligently.<sup>65</sup> If news organizations were not free (to some extent) to publish pictures and video footage relevant to the day's events, then viewership would fall, which would result in lower public knowledge about current events.<sup>66</sup>

Even though news organizations are charged with a duty to inform the public, they essentially consist of business entities.<sup>67</sup> Very few news organizations are funded by the government; in fact, the large majority are privately operated.<sup>68</sup> As a result of our capitalist society, news organizations must battle one another for ratings and subscriptions.<sup>69</sup> This is beneficial to society, because the best products (including news organizations) are only achieved through fierce competition,<sup>70</sup> which results in better quality and lower prices.

The downside to capitalism is that our society does not reward business entities that fail to make a profit.<sup>71</sup> Due to the emergence of a wide variety of news media, a news organization must be willing to make the extra effort and appeal to as many viewers as possible.<sup>72</sup> Combine this with the ever-growing 24/7 television news cycle,<sup>73</sup> and the product is a society which focuses largely on visual electronic devices. Written news organizations such as the newspaper are decreasing in popularity in today's society, and television news organizations are now the predominant means by which people receive the news of the day.<sup>74</sup>

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<sup>63</sup> Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS. L. REV. 1547, 1585–86 (2008) (explaining the importance the media plays in engaging society in the political process).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Eric Klinenberg, *Convergence: News Production in a Digital Age*, ANNALS OF THE AM. ACAD. OF POLITICAL AND SOC. SCI., Jan. 2005, at 48, 49 (discussing the importance news organizations play in society and the various aspects of life they effect).

<sup>67</sup> Clay Calvert, *Bailing Out the Print Newspaper Industry: A Not-So-Joking Public Policy and First Amendment Analysis*, 40 MCGEORGE L. REV. 661, 680 (2009) (explaining the importance of the news being independent from the government and remaining private entities).

<sup>68</sup> Allen P. Grunes & Maurice E. Stucke, *Why More Antitrust Immunity for the Media is a Bad Idea*, 105 NW. U.L. REV. 1399, 1399–1400 (2011).

<sup>69</sup> *Id.*

<sup>70</sup> Edwin West, *Capitalism: The Evidence*, ECONOMIC AFFAIRS, Nov. 1991, at 40, 41 (discussing the benefits of a capitalist society on growing nations).

<sup>71</sup> Douglas A. McIntyre, *The 10 Most Endangered Newspapers in America*, TIME (Mar. 9, 2009), <http://www.time.com/time/business/article/0,8599,1883785,00.html> (detailing the newspapers that have gone out of business and the newspapers at risk of shutting down).

<sup>72</sup> McGrail, *supra* note 5, at 615–16.

<sup>73</sup> David Jackson, *Obama: 24/7 Media Makes it Hard to Focus "On the Long Term,"* U.S.A. TODAY (Oct. 13, 2010), <http://content.usatoday.com/communities/theoval/post/2010/10/obama-247-media-makes-it-hard-to-focus-on-the-long-term/1> (writing how President Obama commented on the 24/7 news cycle and the effect it has had on Washington, D.C. and the public).

<sup>74</sup> Edward L. Carter, *Copyright Ownership of Online News: Cultivating a Transformation Ethos in America's Emerging Statutory Attribution Right*, 16 COMM. L. & POL'Y 161, 171 (2011). (Explaining that the use of copyright-protected news is the reason news organizations like newspapers are failing). Courts are less likely to tolerate a copyright infringement of one news organization from another. *Id.* See also 61% Are Confident Online and Other Sources Can Replace Newspapers, RASMUSSEN REPORTS (Apr. 2, 2009), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/march\\_2009/61\\_are\\_confident\\_online\\_and\\_other\\_sources\\_can\\_replace\\_newspapers](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/march_2009/61_are_confident_online_and_other_sources_can_replace_newspapers).

As technology has evolved, so have news organizations.<sup>75</sup> News delivery using newspapers or bulletins was the predominant mode of news delivery before electronic devices were invented.<sup>76</sup> Over time, however, the news evolved so that it no longer was confined to the written word.<sup>77</sup> The emergence of the radio allowed news stories to be transmitted to the public in a way never before thought possible.<sup>78</sup> Once again, however, technology advanced and television and the Internet re-defined how the public accessed news stories—through visual works.<sup>79</sup> Presently, it is hard to imagine a household that does not have a television or computer to access the news.<sup>80</sup> As a result, news organizations have adapted through an explosion of television programs and Internet websites.

In today's competitive economy, news organizations need to have strong ratings for their respective television programs and Internet sites in order to stay afloat.<sup>81</sup> Consequently, they need to be able to quickly release news-worthy pictures and video footage that is relevant to the news of the day.<sup>82</sup> It is only if news organizations are able to post time sensitive photographs that society will be able to receive the news easier and more effectively than ever before.<sup>83</sup>

*B. Fitzgerald v. CBS Broadcasting Illustrates Negative Trends in Fair Use Analysis.*

The Purpose Factor analyzes the transformative use of the work and whether the use was commercial in nature.<sup>84</sup> In *Fitzgerald v. CBS Broadcasting*, the District Court of Massachusetts looked at whether a news program violated copyright law

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<sup>75</sup> Lawrence W. Lichty, *Video Versus Print*, 6 THE WILSON QUARTERLY, Special Issue 1982, at 49,51–52 (discussing the expansion of news organizations from print to televised news).

<sup>76</sup> Anderson, *supra* note 51, at 446–47.

<sup>77</sup> *Id.*

<sup>78</sup> *The Quality That Made Radio Popular*, FED. COMM'N COMM'N (Nov. 21, 2005) <http://transition.fcc.gov/omd/history/radio/quality.html> (explaining the significance of the radio in the history of communication in the U.S. and the role it played in developing other communication devices).

<sup>79</sup> *The State of the News Media: An Annual Report on American Journalism*, PEW PROJECT FOR EXCELLENCE IN JOURNALISM (2010) <http://stateofthemediamedia.org/2010/overview-3/major-trends/> (concluding that sixty-one percent of the population in the U.S. receive their news via the Internet).

<sup>80</sup> Brian Stelter, *Ownership of TV Sets Falls in U.S.*, N.Y. TIMES (May 3, 2011) <http://www.nytimes.com/2011/05/03/business/media/03television.html> (stating that although there has been a small drop in households with a television, 96.7% of homes in the U.S. own at least one television).

<sup>81</sup> McGrail, *supra* note 5, at 616 (explaining the competition of news organizations in today's society).

<sup>82</sup> *Id.*

<sup>83</sup> See Doris A. Garber, *Press Freedom and the General Welfare*, 101 POL. SCI. Q. 257, 258 (1986) (writing that the press serves a distinct and important role in improving the general welfare of the country and its citizens through its services).

<sup>84</sup> *Fitzgerald v. CBS Broad.*, 491 F. Supp. 2d 177, 184 (D. Mass. 2007) (opining that the analysis will include “whether it added anything to the copyrighted work in its use, and thus use treatable more as a new work referencing the old than as an instance of strict copying.”). Additionally, the court will then make a conclusion as to “whether the use was commercial—i.e. whether it primarily served defendant's private interests rather than the public interest in underlying copyright law.” *Id.*

when it showed a copyrighted picture of a mobster, while broadcasting a segment about the criminal conviction of one of his associates.<sup>85</sup>

The court held that the original purpose of taking the picture was for news-reporting.<sup>86</sup> Thus, the court concluded it was irrelevant that the picture was being used in a different news program about a different criminal—using the picture in *any* news reporting was non-transformative.<sup>87</sup>

Also, the *Fitzgerald* court concluded that the news organization’s broadcasting of the picture was a commercial use, consequently weighing against the defendants’ permissible fair use finding.<sup>88</sup> The court held the decision to broadcast the picture was made to affect “ratings and commercial revenues *in the future* . . . .”<sup>89</sup> The court further explained, “[T]he profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from the exploitation of the copyrighted material . . . .”<sup>90</sup> Here, the court reasoned the photo’s purpose was to increase revenue and attract additional viewers.<sup>91</sup> Consequently, the news organization showing the picture constituted a commercial use.<sup>92</sup>

Additionally, the court considered The Effect on the Market Factor.<sup>93</sup> Under this factor, the court asked whether the use of the copyrighted work actually affects the copyright holder’s future use of the copyright in a negative manner.<sup>94</sup> To determine whether the market will be negatively impacted, the court asked two questions: “(i) the extent of the market harm caused by the specific infringing incident, and (ii) whether unrestricted and widespread conduct of the sort engaged in by the

<sup>85</sup> *Id.* at 184–85 (holding that the court will not make a determination as to how “new” something has to be to constitute news). Furthermore, the court held that the second story about the most current mobster being arrested was news and was reasonably related to the old mobster being arrested. *Id.* Additionally, the court found this to be “enough to establish CBS’s use as ‘news reporting’ for fair use purposes.” *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 186 (holding that the picture was being used for a news purpose, and this was the same purpose for the publication the first time the picture was published); compare *Nunez*, 235 F.3d at 22–23 (holding that a newspaper publishing a photograph taken of a female model was transformative, because the original intent of the picture was for fashion and the newspaper’s intent was covering a controversy in the model participating in the contest) with *L.A. News Serv.*, 149 F.3d at 994–95 (holding that news organization could not use a video shot by another news organization of the L.A. riots, because the video was not edited and reproduced in its entirety without any additional comment).

<sup>88</sup> *Fitzgerald v. CBS Broad.*, 491 F. Supp. 2d 177, 186–87 (D. Mass. 2007) (writing that the news channels were “undisputedly commercial entities.”). Additionally, the court took into consideration that “CBS operates the stations for profit, and the stations earn revenue from commercials that run during their newscasts.” *Id.*

<sup>89</sup> *Id.* at 187 (holding that it does matter if the commercials were already in place before the picture was broadcast, because showing the picture would increase viewership in the future; thus, constituting a commercial use); see also *Roy Export Co. Est. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980) (holding that broadcasting a commercial-free program was still commercial use, because it was designed to increase ratings and revenue in the future for the station).

<sup>90</sup> *Fitzgerald*, 491 F. Supp. at 187.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 189.

<sup>94</sup> *Id.*

[infringer] would result in a substantially adverse impact on the potential market for the original [work].”<sup>95</sup>

In *Fitzgerald*, the court concluded the harm caused by the news organization showing this specific picture was minimal.<sup>96</sup> The reasoning was that by the news organization showing the picture in this specific instance, interest about the figure in the photograph would “heat up” and thus increase demand for the picture.<sup>97</sup> Consequently, the news organization’s infringement on the owner’s copyrighted picture would greatly benefit the owner of the copyright, and not cause any measureable harm in this instance.<sup>98</sup>

The court, however, did not find a benefit to the owner of the copyright when it analyzed the second sub-factor: the economic effects of widespread use of the work.<sup>99</sup> The court reasoned if “CBS’s use was fair use, then all media uses—and uses like them in the future—would also be fair use; destroying the only potential market existing for the photographs.”<sup>100</sup> The court further reasoned if this type of fair use was allowed, photographers would be unmotivated to capture difficult photos if they could not collect any fees.<sup>101</sup>

Due to this sub-factor, the court found The Effect on the Market Factor weighed against a finding of fair use by the news organization.<sup>102</sup> Consequently, the court balanced these factors in favor of the owner of the photograph and ruled against a finding of fair use by the news organization.<sup>103</sup>

*C. If the Current Trend of Cases Analyzing Fair Use Defenses Continues, A Fair Use Finding Will Never Be Found in Favor of A News Organization.*

If the current trend of cases interpreting the Fair Use Doctrine continues, courts will never find that a news organization can use a copyrighted work without permission as a permissible fair use exception. As outlined in Part B of this section, courts have generally found The Purpose Factor and The Effect on the Market Factor to weigh against a finding of fair use. A noted professor analyzed court opinions applying the Fair Use Doctrine from 1978-2005, and revealed a strong pattern vis-à-

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<sup>95</sup> *Id.*; see also *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 110 (2d Cir. 1998) (acknowledging these two inquiries are critical to the determination of the effect of the use upon the potential market).

<sup>96</sup> *Fitzgerald v. CBS Broad.*, 491 F. Supp. 2d 177,189 (D. Mass. 2007).

<sup>97</sup> *Id.*; see also *Ringgold v. Black Entm’t Television*, 126 F.3d 70, 81 (2d Cir. 1997) (holding the “the failure to receive licensing revenue cannot be determinative in the plaintiff’s favor.”).

<sup>98</sup> *Fitzgerald*, 491 F. Supp. at 189.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; see also *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 236 (S.D.N.Y. 2001) (recognizing a whole-sale copying of a song to be re-sold for use, it is clear that the market for the music would then be drastically harmed).

<sup>101</sup> *Fitzgerald*, 491 F. Supp. at 189; but see *Righthaven LLC v. Hoehn*, 729 F. Supp. 2d 1138, 1150–51 (D. Nev. 2011) (holding that without showing actual harm caused by copying the work, it cannot be found the owner was harmed vis-à-vis the potential market to sell the work in the future).

<sup>102</sup> *Fitzgerald*, 491 F. Supp. at 189 (holding the news organization was not entitled to a fair use finding). The copyright owner did not show the harm which would result by the news publishing the picture in this one instance, nor was it shown that there would be a harm to the market if the other news published the picture. *Id.*

<sup>103</sup> *Id.* at 190.

vis The Purpose Factor and The Effect on the Market Factor with the final outcome of the fair use question.<sup>104</sup>

The professor concluded that when a court weighed The Purpose Factor against a fair use finding, it was 95.3% likely to also find a final outcome denying a fair use finding.<sup>105</sup> Furthermore, when a court weighed The Effect on the Market Factor against a finding of fair use, it was 99.3% likely to also find a final outcome denying a fair use finding.<sup>106</sup> Thus, under this current trend a news organization is almost certainly prohibited from a favorable fair use ruling.

Based upon these statistics, The Purpose Factor and The Effect on the Market Factor are given the most weight when deciding a fair use finding. According to the United States Supreme Court in *Campbell v. Acuff-Rose Music*, this is not an advantageous approach to analyze fair use findings, because all the factors should be explored and weighed together.<sup>107</sup> The Fair Use Doctrine calls for a case-by-case analysis, and none of the factors should be analyzed in isolation from the others.<sup>108</sup> As a result of The Purpose Factor and The Effect on the Market Factor receiving more weight than the other two factors, the balancing test “in light of the purposes of copyright”<sup>109</sup> is lost. In order to re-gain this balancing test, the Fair Use Doctrine needs to be amended or applied in accordance with the *Campbell* ruling.

Furthermore, this trend contradicts the primary and secondary purposes of copyright protection by not giving adequate weight to the public good.<sup>110</sup> Instead of deciding a fair use question with the primary and secondary benefits in mind, courts have instead applied a formulaic approach to the fair use factors.<sup>111</sup> This approach analyzes one factor at a time and in isolation from the others. In *Chicago Board of Education v. Substance, Inc.*, the United States Court of Appeals for the Seventh Circuit (“Seventh Circuit”) noted that the four-factor test did not “constitute an algorithm that enables decisions to be ground out mechanically.”<sup>112</sup> A study analyzed 306 opinions in which the four-factor test was used and found that 59.5% of the judges engaged in this formulaic approach.<sup>113</sup>

Subsequently, courts rarely consider factors outside the four-factor test, and almost never consider fewer than all of the factors.<sup>114</sup> Thus, actual fairness is never brought into the equation when evaluating fair use.<sup>115</sup>

Not differentiating between the primary and secondary purposes of copyright when deciding a fair use is inefficient.<sup>116</sup> The distinction between the primary and

<sup>104</sup> Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 555–56 (2008).

<sup>105</sup> *Id.* (explaining the two sub-factors which compose the purpose of the work factor of the Fair Use Doctrine).

<sup>106</sup> *Id.* at 617. (explaining the purpose of the work factor and the effect on the potential market factor are the two most important of the Fair Use Doctrine).

<sup>107</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Beebe, *supra* note 104, at 561–62.

<sup>111</sup> *Id.*

<sup>112</sup> *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003).

<sup>113</sup> Beebe, *supra* note 104, at 562.

<sup>114</sup> *Id.* at 564.

<sup>115</sup> *Id.*

<sup>116</sup> Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

secondary purposes of copyright was designed to produce clear objectives of copyright law.<sup>117</sup> Judge Leval captured this idea best when he wrote, “the copyright [law] is an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. *It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.*”<sup>118</sup> While it is true the protection of the monopoly the copyright holder has over his works are key to a robust society, it is also important for that monopoly to have limits.<sup>119</sup> These limits are what produce a fair protection of copyright law, since after all “[f]air use is not a grudgingly tolerated exception to the copyright owner’s rights of private property, but a fundamental policy of the copyright law.”<sup>120</sup>

### III. PROPOSAL

This section proposes that the Fair Use Doctrine be amended to include two new provisions. The first is an additional factor to the test, which weighs the benefit to the public of letting news organizations use a work without permission against the policy of requiring permission to use the work (Weighing the Public Benefit Factor). The second change to the Fair Use Doctrine is a statutory amendment, which creates a requirement if a news organization publishes a work without permission from the copyright holder, the copyright holder can choose to seek a “quid-pro-quo”<sup>121</sup> compensation from the news organization instead of pursuing litigation (The Quid-Pro-Quo Amendment).

These two additional changes, when analyzed in harmony, take into consideration the primary and secondary benefits of copyright law: (1) the public good of viewing copyrighted works, and (2) the benefit to the copyright holder of retaining publishing rights.<sup>122</sup>

#### A. *Weighing the Public Benefit Factor*

The additional factor the court should weigh in its fair use analysis is the Weighing the Public Benefit Factor. Applying this factor, if the court concludes the benefit to the public of letting the news organization use the work without permission outweighs the policy of requiring permission, this factor weighs in favor of the fair use being granted to the news organization. Using this factor in an analysis, the Judge would need to apply the intermediate scrutiny of clear and convincing evidence.<sup>123</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* (emphasis added).

<sup>119</sup> *Id.* at 1136.

<sup>120</sup> *Id.* at 1135.

<sup>121</sup> BALLENTINE’S LAW DICTIONARY (3rd Ed. 2010): “The consideration for a contract. That which is supplied by one party in consideration of that which is supplied by the other party.”

<sup>122</sup> NIMMER, *supra* note 10, § 1.03.

<sup>123</sup> See *Price v. Symsek*, 988 F.2d 1187, 1191 (Fed. Cir. 1993).



In *Price v. Symsek*,<sup>124</sup> the Federal Circuit noted the burden of proof a litigant needed to overcome to invalidate a patent is clear and convincing evidence.<sup>125</sup> Conversely, if the court decides the policy of requiring permission is of greater weight, then this factor weighs against a fair use finding. This is because a regularly issued patent has a presumption of validity, and so a defense must be established with the clearest proof possible.<sup>126</sup> This should be equally true when applied to this new factor. The presumption should be in favor of the copyright holder, and the news organization would have to show by clear and convincing evidence the benefit to the public outweighs the policy of requiring permission.

Additionally, this factor will weigh more heavily than the other fair use factors, because the level of scrutiny applied is so high. This is to ensure the primary purpose of copyright remains at the heart of the analysis, and counters the unfairness of The Purpose Factor and The Widespread Use Factor when applied to news organizations.<sup>127</sup> Most importantly, the beneficial aspect of the Weighing the Public Benefit Factor is that it retains the primary purpose of copyright law.

Furthermore, this factor allows the courts to utilize their best judgment in individual cases as to whether or not the public good was served.<sup>128</sup> This would permit a finding of fair use that before would have been denied under the existing factors.<sup>129</sup> As a result, the primary purpose of copyright law will be considered and taken into context when deciding a news organization's fair use finding.<sup>130</sup> A potential problem with the addition of this factor, however, is an increase in litigation and placing a heavy burden on the courts in deciding fair use questions.

This problem of over-crowding the courts would not come to fruition due to the general nature of fair use cases.<sup>131</sup> A majority of fair use controversies never even reach the complaint stage of a lawsuit due to the effects of cease-and-desist letters.<sup>132</sup> Furthermore, the complaints which do reach the courts are more likely than not to be decided on summary judgment.<sup>133</sup> Two explanations exist for this phenomenon. The first is the lower courts continue to apply the *Sony* Court's presumption that every commercial use is unfair, thus weighing against fair use.<sup>134</sup> The second explanation is that beginning in the 1990s there was a "wave of circuit court affirmances of summary decisions in fair use cases."<sup>135</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Beebe, *supra* note 104, at 616–17.

<sup>128</sup> *Id.* at 572 (discussing the role summary judgment plays in the litigation process of intellectual property).

<sup>129</sup> See *Educ. Testing Serv. v. Stanley H. Kaplan, Educ. Ctr.*, 965 F. Supp. 731, 736 (D. Md. 1997) (abandoning with the factor analysis of the Fair Use Doctrine and instead relying on the "broader perspective" of the unfairness of copying).

<sup>130</sup> See Michael J. Madison, *Complexity and Copyright in Contradiction*, 18 CARDOZO ARTS & ENT. L.J. 125, 170–71 (2000) (arguing that in general there needs to be a more contextual sensitivity when deciding on copyright matters).

<sup>131</sup> Beebe, *supra* note 104, at 572.

<sup>132</sup> MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 36 (2005) (explaining the effects of cease-and-desist letters in copyrighting infringement claims).

<sup>133</sup> Beebe, *supra* note 104, at 572.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

Consequently, district judges and litigants were more confident turning to summary adjudication instead of trial.<sup>136</sup> Regardless of which of these explanations is correct, it is hard to imagine that one additional factor would stimulate trial activity in the area of copyright infringement.

### *B. The Quid-Pro-Quo Amendment*

The additional protection allotted to the copyright holder under this proposal is the Quid-Pro-Quo Amendment. Under this amendment to the Copyright Act, the copyright holder can forego copyright litigation and instead seek an immediate out-of-court quid-pro-quo compensation from the news organization which published the work. This amendment would serve as an alternative to a copyright infringement lawsuit, and instead, the copyright holder would have the option to choose which avenue to pursue compensation.<sup>137</sup> Also, an additional benefit of the amendment is the judicial efficiency it will provide to the courts in processing copyright litigation.<sup>138</sup> This amendment would provide the means for the copyright holder to be compensated after news organizations publish a work without first acquiring permission from the copyright holder.

Furthermore, the only news organizations which would fall under this amendment would be those that publish a work on a television news program, and do so without the copyright holder's permission. This is because of the high importance news organizations play in society and because the showing of a video or picture for immediate viewing can be of critical importance to the public.<sup>139</sup> This compensation would be a quid-pro-quo exchange between the news organization who published the work without permission, and the copyright holder of the work. Such an amendment would benefit copyright law for various reasons.

The first benefit for including the Quid-Pro-Quo Amendment into the Fair Use Doctrine is to ensure that the long-standing rules of copyright law would not be affected. The Quid-Pro-Quo Amendment would not encroach on determinations of fair use, due to this being an alternative to litigation.

Also, the primary purpose of the public benefit being served through copyright law would be protected, because news organizations would be able to publish a work for the public good without first obtaining permission from the copyright holder.<sup>140</sup> Thus, the public good would be served by educating the public using the copyrighted work. The secondary purpose of copyright law would also be protected, because the copyright holder would receive a quid-pro-quo compensation from the news organizations who publish the work on television without obtaining

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (alluding that litigation is difficult and few cases proceed to full trial).

<sup>138</sup> *Id.*

<sup>139</sup> McGrail, *supra* note 5, at 616 (discussing why news organizations need to release visual pictures and video to the audience on a real-time basis).

<sup>140</sup> NIMMER, *supra* note 10, § 1.03.

permission.<sup>141</sup> Thus, artists and photographers would not be deterred from creating art and seeking copyright protection.<sup>142</sup>

An additional benefit of the Quid-Pro-Quo Amendment is the predictable results it will produce. As a statutory law, this provision would negate the arguments over permission, fair use findings, and compensation.<sup>143</sup> Every news organization that published the work without first acquiring permission to the copyright would need to provide a quid-pro-quo compensation to the copyright holder. Consequently, each news organization would have to pay the same amount, and a court would not need to make any determinations as to fair use of the work.

#### IV. CONCLUSION

The current state of the law to determine when a fair use finding should be made for news organizations does not adequately represent the primary and secondary purposes of copyright law. The four-factors currently used to decide fair use determinations do not collectively take into account the public benefit news organizations provide to society. As a result, The Purpose Factor as well as The Effect on the Market Factor need to be given less weight when deciding fair use. Also, the Weighing the Public Benefit Factor needs to be added to the analysis when determining a fair use finding for a news organization to better represent the primary and secondary goals of copyright law. Additionally, the Quid-Pro-Quo Amendment also solidifies the primary and secondary goals of copyright law by providing a copyright holder another avenue than litigation when a news organization publishes a work without permission.

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<sup>141</sup> Patry, *supra* note 7, § 3.3.

<sup>142</sup> See *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 930–31 (2d Cir. 1994) (opining that “[I]t is sensible that a particular unauthorized use should be considered ‘more fair’ when there is no ready market or means to pay for the use.”).

<sup>143</sup> William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 667–68 (1993) (discussing the complications that arise from analyzing fair use questions and calling for an end to the confusion which results from the application of the Fair Use Doctrine).