

# “FAIREST OF THEM ALL” AND OTHER FAIRY TALES OF FAIR USE

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## I

### INTRODUCTION

Once upon a time, in a happy land, courts decided which usage constituted fair use in copyright cases, and justice prevailed throughout the realm. Then the Royal Council (“Congress”) imported something from beyond the sea called “codification.” Henceforward, the Council proclaimed, the law-books would spell out if usage were fair or unfair in four pellucid factors.<sup>1</sup> The Wisest Men of the Kingdom (“Supreme Court”) declared that the result in any given case would depend on all four of the factors.<sup>2</sup> The Copyright Specialists (“Second Circuit”) added, “[b]ecause this is not a mechanical determination, a party need not ‘shut-out’ her opponent on the four factor tally to prevail,”<sup>3</sup> to which Soothsayers embroidered that if nonetheless “she does so, victory on the fair use playing field is assured.”<sup>4</sup> But these are only fairy tales.<sup>5</sup>

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1. 17 U.S.C. § 107 (2000) embodies four factors, culled from cases decided under the Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976). See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A] (rel. no. 58, 2002).

2. As the Court noted:

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for 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.

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

3. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991).

4. *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1079 (2d Cir. 1992).

5. Apropos of which I must add that the Seventh Circuit long ago recognized protection for research undertaken in the tales of Hans Christian Andersen based upon original Danish sources. See *Toksvig v. Bruce Publ'g Co.*, 181 F.2d 664 (7th Cir. 1950). But the Supreme Court later sang “the swan song for *Toksvig*, a case that has been long derided in any event as a judicial ugly duckling.” 1 NIMMER, *supra* note 1, § 2.11[E].

## II

## FLOSSING AND TRANSUBSTANTIATION

David Lange's foundation paper contains language that usefully serves as the launching pad for my own analysis:

In short, appropriation flourishes. The copyright industries concede privately that it cannot be eliminated in individual cases unless a massive effort at brainwashing should persuade an entire generation of primary school children to accept the main tenets of copyright into their personal belief systems and then to hold them there and act upon them, along with such other items of prescribed doctrine as flossing and transubstantiation.<sup>6</sup>

The final language struck responsive chords for me, given recent copyright cases I have handled in the domains, respectively, of *flossing* and *transubstantiation*.

A few years back, I participated in a case before the Court of Appeals for the Second Circuit, defending Colgate-Palmolive in a case that Procter & Gamble, the maker of Crest, brought against it.<sup>7</sup> When Colgate entered the very lucrative Chinese market, it aired a television commercial showing two eggs: one bathed in fluoride, the other not.<sup>8</sup> After sitting overnight, the egg removed from the fluoride is tapped, and found to be solid; the untreated egg, by contrast, cannot withstand a tap and breaks. So with your teeth, Colgate's ad demonstrated.

But Crest was not buying. In preparing for the case, I reviewed a series of toothpaste commercials going back to the 1960s. Crest had done an earlier ad for the Chilean market actualizing a similar fluoride experiment. I compared the two ads. The one did not look much like the other: one guy was wearing a serape, the other was eating with chopsticks; one commercial was narrated in Spanish, the other in Mandarin. But both did illustrate how putting an egg in fluoride protects it against decay, and why the viewer should go out and buy crate-loads of toothpaste immediately.

*Procter & Gamble Co. v. Colgate-Palmolive Co.* illustrates the idea-expression dichotomy in copyright law. Our client's brief argued extensively that such similarity as existed between Crest's and Colgate's advertisements lay in the unprotectable realm, and did not cross the threshold to becoming substantial similarity in expression. Our client ultimately prevailed in the Second Circuit, although on the alternative basis that Colgate independently created the particular commercial at issue, rather than copying it from Crest.<sup>9</sup>

The other case that comes to mind unfolded earlier this year: I litigated the copyright renewal status of *The Urantia Book*, a 2,000-plus-page occult book

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6. David Lange & Jennifer Lange Anderson, Copyright, Fair Use and Transformative Critical Appropriation 130, 140 (presented at the Duke Conference on the Public Domain, Nov. 9, 2001) available at <http://law.duke.edu/pd/papers/langeand.pdf>.

7. *Procter & Gamble Co. v. Colgate-Palmolive Co.*, 199 F.3d 74 (2d Cir. 1999).

8. A host of commercials were at issue in the case. Some actually used a cowrie shell instead of an egg.

9. *Colgate-Palmolive*, 199 F.3d at 78.

whose devotees believe it was authored, as the tome itself declares, in part by the Archangels of Nebadon, in part by the Corps of Superuniverse Functionaries, with interstitial amendments by the Thought Adjuster, and so on.<sup>10</sup> The Urantia Foundation registered the book as a composite work, a category of the Copyright Act that applies to something to which a great number of individuals contributed, such as an encyclopedia.<sup>11</sup> Both parties to the litigation believed *The Urantia Book* to be a composite work, because they accepted that it was written by the Archangels of the Nebadon, the Corps of Superuniverse Functionaries *et al.* But I argued to the Western District of Oklahoma that, as a secular court, its job was not to investigate the esoteric truth behind the book's revelations, but rather to look at the exoteric circumstances of its composition. Lo and behold, as it appeared in this sublunary realm, its manuscript appeared all in the handwriting of a single individual. Therefore, I concluded, *The Urantia Book* was not a composite work; ergo, it was not validly renewed. The jury found in favor of my client on that basis. The matter currently awaits resolution by the Tenth Circuit.

These cases illustrate the two poles of copyright. The *Colgate* case is one of *transubstantiation*; namely, the idea-expression dichotomy and substantial similarity. It poses the metaphysical inquiries of where an idea ends and expression begins, and how substantial an appropriation must be to infringe. The *Urantia* litigation, by contrast, concerns *flossing*; namely, how does one take the language of the Copyright Act defining “composite work” and break one's teeth on it in a concrete situation? Both problems loom large in the copyright realm.

Someone who wishes to operate a service called, let's say, My.MP3.com,<sup>12</sup> to which 10,000 songs will be uploaded, must actually be prepared to clear rights in 10,000 sound recordings, and separately in another 10,000 musical works,<sup>13</sup> for a subtotal of 20,000. And, of course, there's a reproduction right, a public distri-

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10. Much previous litigation had arisen concerning the same work. *E.g.*, *Urantia Found. v. Maaherra*, 114 F.3d 955 (9th Cir. 1997); *Urantia Found. v. Burton*, 210 U.S.P.Q. 217 (W.D. Mich. 1980); *Urantia Found. v. King*, 194 U.S.P.Q. 171 (C.D. Cal. 1977). *See also infra* note 40. My own paean to the work is contained in David Nimmer, *Back from the Future: A Proleptic Review of the Digital Millennium Copyright Act*, 16 BERKELEY TECH. L.J. 855, 861 (2001) (“So why on Urantia did Congress need to add a specific exemption . . . ?”).

11. *See* 17 U.S.C. § 304(a)(1)(B)(i) (2000).

12. Litigation targeting that service has been multiple. *E.g.*, *Chambers v. Time Warner, Inc.*, 282 F.3d 147 (2d Cir. 2002); *Teevee Toons, Inc. v. MP3.com, Inc.*, 134 F. Supp. 2d 546, 549 (S.D.N.Y. 2001); *UMG Record'gs, Inc. v. MP3.Com, Inc.*, No. 00 Civ. 0472 (JSR), 2000 U.S. Dist. LEXIS 17907 (S.D.N.Y. Nov. 14, 2000); *UMG Record'gs, Inc. v. MP3.Com, Inc.*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000); *UMG Record'gs, Inc. v. MP3.Com, Inc.*, 2000 Copr. L. Dec. ¶ 28,141 (S.D.N.Y. 2000); *UMG Record'gs, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000). In my estimation, the most noteworthy aspect of those multiple decisions has been their revolutionary decoupling of the magnitude of the statutory damages awards from actual damages caused or profits earned by infringement. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §14.04[E][1] (forthcoming 2003) [hereinafter NIMMER 2003].

13. *See* 17 U.S.C. § 106; 1 NIMMER, *supra* note 1, §§ 2.05, 2.10.

bution right, and a public performance right for each copyrighted work.<sup>14</sup> So now we're up to 60,000 potential claimants. But who's to say that only one claimant exists for each right? When jazz legend Billy Strayhorn took the "A" Train to the great hereafter, his estate was composed of one sister and eleven nieces and nephews.<sup>15</sup> Depending on an author's date of death relative to the births of children and grandchildren, it is easy to imagine five or ten heirs to a deceased author's estate. The count could thus reach 300,000 or 600,000 entities whose permission is needed. That's a lot of flossing! In all likelihood, it would not be possible to hire enough dentists and hygienists for the job. Nonetheless, at base, the problem is *mechanical*—if one could identify the numerous claimants and secure rights from each, the situation would be resolved.

### III

#### FAIR USE

Other problems continue to bedevil even those who have done their homework completely. Copyright law is built on such transcendental distinctions as the idea-expression dichotomy, substantial similarity, and finally, fair use. What use is fair? Here, we enter a great divide: All three issues grew up as part of copyright doctrine through its common-law development, but in the Copyright Act of 1976, Congress attempted no categorization of either the idea-expression dichotomy or substantial similarity. As to the former, it simply defined "work[s] of authorship" to exclude "any idea, procedure, process, system, method of operation, concept, principle, or discovery,"<sup>16</sup> without defining those various terms.<sup>17</sup> As to the latter, the Act itself made no attempt to mark the threshold for when similarity becomes substantial, leaving the matter to its traditional domain of judicial explication.<sup>18</sup>

On the fair use front, Congress took a different tack: It synthesized prior case law developments into four statutory factors.<sup>19</sup> Moreover, alone among provisions of the 1976 Act, fair use has reached the Supreme Court on multiple occasions. There are now four majority opinions (and several dissents) explicating the four factors.<sup>20</sup> One could accordingly posit that, unique among copyright's transcendental issues, fair use has been worked through a *Summa Theologica*<sup>21</sup> or, if you will, Talmudic exposition followed by codification in a sort of

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14. It should be noted that the public performance right for sound recordings is limited largely to interactive webcasting. See 2 NIMMER, *supra* note 1, § 8.22.

15. Music Sales Corp. v. Morris, 73 F. Supp. 2d 364, 366 n.2 (S.D.N.Y. 1999).

16. 17 U.S.C. § 102(b).

17. See 17 U.S.C. § 101 (defining numerous other terms).

18. See 4 NIMMER, *supra* note 1, § 13.03.

19. See *supra* note 1.

20. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); Stewart v. Abend, 495 U.S. 207 (1990); Harper & Row, Publ'rs, Inc. v. Nation Enters., 471 U.S. 539 (1985); Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

21. ST. THOMAS AQUINAS, SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., Christian Classics, 1981) (1274). Leave it to one of the world's most original pens to conflate the SUMMA with GULLIVER'S TRAVELS. See Jorge Luis Borges, *A Weary Man's Utopia*, in COLLECTED

*Mishneh Torah*.<sup>22</sup> We should, therefore, expect fair use to have been demystified from transubstantiation to straightforward ingestion.<sup>23</sup>

How do the factors work out in practice? The literature reveals that judges,<sup>24</sup> treatise writers,<sup>25</sup> and other commentators<sup>26</sup> offer a host of different explanations for how fair use cases actually get decided, apart from the four factors. The present examination, by contrast, takes the factors at face value, seeking to test whether, as advertised, they determine the analysis.

The following chart summarizes fair use cases decided since issuance of the most recent decision of the Supreme Court quartet.<sup>27</sup> Each heading in the chart sets forth whether the factor in question favors fair use or cuts against it.<sup>28</sup> Thus, four Fairs represent the “fairest of them all,” four Unfairs the weakest fair use

FICTIONS 461-62 (Andrew Hurley trans., 1998) (“[I]n any case, it is not the reading that matters, but the rereading.”).

22. The great Maimonides took the entire corpus of the *Babylonian Talmud* (itself an elaborate explication of Biblical laws) and distilled it into fourteen volumes, called the *Mishneh Torah* (“repetition of the law”) or *Yad Chazakah* (“strong hand” punning on the fact that the Hebrew word for *hand* signifies the numeral fourteen).

23. Before the 1976 Act, one could posit that confusion clouded the fair use issue. In fact, the only two times before 1976 that the Supreme Court had a 4-4 split in a copyright dispute were both fair use cases. See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff’d by an equally divided court*, 420 U.S. 376 (1975); *Benny v. Loew’s, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff’d by an equally divided court*, 356 U.S. 43 (1958).

24. Fair use may be unique among copyright doctrines in having inspired numerous Second Circuit judges to join battle on the issue not only in their judicial opinions, but also in the pages of the reviews. See, e.g., Pierre N. Leval, *Commentary: Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990); Roger J. Miner, *Exploiting Stolen Text: Fair Use or Foul Play?*, 37 J. COPYRIGHT SOC’Y 1 (1989); Jon O. Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC’Y 12 (1989); James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 38 J. COPYRIGHT SOC’Y 63 (1990). As the Second Circuit itself notes about its members’ scholarly contributions: “Some of these articles are highly critical of the state of the law with respect to the fair use doctrine and offer suggestions for improvement.” *New Era Publ’ns Int’l, ApS v. Carol Publ’g Group*, 904 F.2d 152, 155 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990). In that spirit, Second Circuit Judges Oakes, Leval, and Miner were among the witnesses to testify before Congress regarding an amendment to the fair use doctrine. See H.R. REP. NO. 102-836 (1992).

25. My own opinion is that the fourth factor is the most important. 4 NIMMER, *supra* note 1, § 13.05[A][4]. But “even if viewed as central, this factor cannot substitute for an evaluation of each of the four statutory factors.” *Id.* at 13-182. To flesh out application of the fourth factor, my father proposed application of the “functional test” to determine if a given usage is fair. See *id.* § 13.05[B]. For the application of that test to the chart set forth below, see *infra* note 57.

26. E.g., William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988); Wendy Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1614-22 (1982); Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use? The 1999 Donald C. Brace Memorial Lecture*, 46 J. COPYRIGHT SOC’Y 513 (1999); Karen Burke LeFevre, *The Tell-Tale “Heart”: Determining “Fair” Use of Unpublished Texts*, 55 LAW & CONTEMP. PROBS. 153, 165 (Spring 1992); Lloyd L. Weinreb, *Fair’s Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990).

27. The “quartet” is *Campbell*, *Stewart*, *Harper & Row*, and *Sony*. Given that *Campbell*, the most recent case, was handed down on March 7, 1994, the chart commences after that date.

28. It should be noted that Fair (or Unfair) for one of the four factors indicates that that particular factor inclines the result in that direction; by contrast, the final column in the chart tracks the court’s actual conclusion as to whether the given utilization was Fair (or Unfair).

defense.<sup>29</sup> The column for the first fair use factor (“purpose and character of the use”)<sup>30</sup> resuscitates<sup>31</sup> the label “Productive”<sup>32</sup> to indicate Fair when the defendant reworks the plaintiff’s expression to create a new work of authorship,<sup>33</sup> itself capable of copyright protection,<sup>34</sup> and does not simply re-present the esthetics of plaintiff’s work. The next column recognizes that “[t]he factor two analysis<sup>35</sup> provides additional protection to works that are unpublished or that are creative or fictional.”<sup>36</sup> The next column addresses the third factor<sup>37</sup> by inquiring whether defendant reproduced essentially the entire copyrighted work.<sup>38</sup> Finally, the penultimate column addresses the fourth factor<sup>39</sup> by inquiring whether defendant’s use deprived plaintiff of revenue that likely would have accrued absent the allegedly infringing conduct.

29. The situation is actually more complicated. See *infra* text accompanying note 61. Thus, the first factor alone could be isolated into four discrete subcategories, of which the above chart covers only one. See 4 NIMMER, *supra* note 1, § 13.05[A][1][a] – [d].

30. 17 U.S.C. § 107(1) (2000).

31. The current vogue is to use the label “transformative,” deriving from Leval, *supra* note 24, at 1111. As the Supreme Court comments, citing Judge Leval quoting Justice Story, the “central purpose of this investigation [under the first fair use factor] is to see . . . whether the new work merely ‘supersede[s] the objects’ of the original creation (citation omitted), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 579. I am avoiding that term here, as its application has proven less than uniform in the case law. See 4 NIMMER, *supra* note 1, § 13.05[A][1][b] (“Instead of such conclusory applications, one should perform the transformative inquiry on its own merits, bearing in mind that just because a given use qualifies as ‘transformative’ does not even mean that defendants prevail under the first factor, much less that they prevail altogether on the fair use defense.”).

32. The Ninth Circuit used this standard in *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 970 (9th Cir. 1981), *rev’d* 464 U.S. 417 (1984). Although the Supreme Court reversed, it conceded that the “distinction between ‘productive’ and ‘unproductive’ uses may be helpful in calibrating the balance, but it cannot be wholly determinative.” 464 U.S. at 455 n.40. The dissent discerned productive use as a “common theme” facilitating “socially laudable purposes.” *Id.* at 478-79 (Blackmun, J., dissenting). But it stopped short of declaring “that every productive use is a fair use.” *Id.* at 808.

33. Another area of confusion concerns whether the defendant’s usage qualifies as “productive” because the defendant produced a new work that itself transforms plaintiff’s work, or alternatively reproduces plaintiff’s work wholesale, albeit in the context of a greater whole that is itself copyrightable. For instance, in Case Nine treated below, a newspaper reproduced an allegedly racist allegory from a police monthly newsletter. *Belmore v. City Pages*, 880 F. Supp. 673, 675 (D. Minn. 1995). There is no question that defendant’s newspaper, considered as a whole, is a new work of authorship. Yet, because it reproduced the allegory in its entirety, the usage is listed as non-productive.

34. For this purpose, I elide the further inquiry whether the defendant’s incorporation of material from plaintiff without authorization would itself deprive defendant of copyright protection for its new creation. See 17 U.S.C. § 103(a) (“The subject matter of copyright . . . includes . . . derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”)

35. The statute simply refers to “the nature of the copyrighted work.” 17 U.S.C. § 107(2).

36. *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 841 (S.D.N.Y. 1995).

37. 17 U.S.C. § 107(3) (“amount and substantiality of the portion used in relation to the copyrighted work as a whole”).

38. Again raising case-specific questions, such as: Was the usage less than the plaintiff’s registered work, but nonetheless the entirety of a work that is capable of living its own copyright life? The phrase, albeit arising in another context, is drawn from *Robert Stigwood Group Ltd. v. O’Reilly*, 530 F.2d 1096, 1105 (2d Cir. 1976), *cert. denied*, 429 U.S. 848 (1976).

39. 17 U.S.C. § 107(4) (“effect of the use upon the potential market for or value of the copyrighted work”).

<u>CASE</u>		<u>FACTORS</u>				<u>CONCLUSION</u>
<u>CITATION</u>	<u>PRECIS</u>	<u>1. PRODUCTIVE</u>	<u>2. PUBLISHED AND FACTUAL</u>	<u>3. WHOLESALE</u>	<u>4. CAUSING LOSS OF REVENUE</u>	<u>FAIR USE</u>
1. American Geophys. Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994)	Copying articles for research library of corporation	UNFAIR	FAIR	UNFAIR	UNFAIR	UNFAIR
2. Marshall & Swift v. BS&A Software, 871 F. Supp. 952 (W.D. Mich. 1994)	Copying tables from <i>Michigan Assessor's Manual</i>	FAIR	FAIR	UNFAIR	FAIR	UNFAIR
3. Sega Enters. Ltd. v. Maphia, 857 F. Supp. 679 (N.D. Cal. 1994); <i>modified</i> , 948 F. Supp. 923 (N.D. Cal. 1996)	Copying of video games to BBS to facilitate piracy	UNFAIR	UNFAIR	UNFAIR	UNFAIR	UNFAIR
4. Robinson v. Ransom House, Inc., 877 F. Supp. 830 (S.D.N.Y. 1995)	Copying of material into rival book about Pan Am Airways	FAIR	FAIR	FAIR	FAIR	UNFAIR
5. Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., 900 F. Supp. 1287 (C.D. Cal. 1995)	Copying of elements of James Bond into fanciful car commercial	FAIR	UNFAIR	FAIR	FAIR	UNFAIR
6. Religious Tech. Ctr. v. Netcom On-Line Commun. Servs., Inc., 923 F. Supp. 1231 (N.D. Cal. 1995)	Copying of L. Ron Hubbard writings to criticize him	UNFAIR	UNFAIR	UNFAIR	UNFAIR	UNFAIR
7. Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1362 (E.D. Va. 1995)	Copying of L. Ron Hubbard writings in <i>Washington Post</i>	FAIR	UNFAIR	FAIR	UNFAIR	FAIR
8. Religious Tech. Ctr. v. F.A.C.T.NET, Inc., 901 F. Supp. 1519 (D. Colo. 1995)	Copying of L. Ron Hubbard writings in web postings about scientology	FAIR	UNFAIR	FAIR	UNFAIR	FAIR
9. Belmore v. City Pages, Inc., 880 F. Supp. 673 (D. Minn. 1995)	Copying of "fable" from police newsletter to demonstrate racism	UNFAIR	UNFAIR	UNFAIR	FAIR	FAIR

	<u>CASE</u>		<u>FACTORS</u>				<u>CONCLUSION</u>
	<u>CITATION</u>	<u>PRÉCIS</u>	<u>1. PRODUCTIVE</u>	<u>2. PUBLISHED AND FACTUAL</u>	<u>3. WHOLESALE</u>	<u>4. CAUSING LOSS OF REVENUE</u>	<u>FAIR USE</u>
10.	College Entrance Exam. Bd. v. Pataki, 889 F. Supp. 554 (N.D.N.Y. 1995)	Copying of standardized test pursuant to state law to foster openness	UNFAIR	UNFAIR	UNFAIR	FAIR	UNFAIR
11.	Compaq Computer Corp. v. Procom Tech., Inc., 908 F. Supp. 1409 (S.D. Tex. 1995)	Copying of warning IDs used in computer hard drives	UNFAIR	FAIR	UNFAIR	FAIR	UNFAIR
12.	Triad Sys. Corp. v. Southeastern Express Co., 64 F.3d 1330 (9th Cir. 1995)	Copying by independent service organization of software necessary to service computer	UNFAIR	FAIR	UNFAIR	FAIR	UNFAIR
13.	Monster Communs., Inc. v. Turner Broad. Sys., Inc., 935 F. Supp. 490 (S.D.N.Y. 1996)	Copying of footage about Muhammed Ali into documentary <i>When We Were Kings</i>	FAIR	UNFAIR	FAIR	FAIR	FAIR
14.	Princeton Univ. Press v. Michigan Doc. Servs., Inc., 99 F.3d 1381 (6th Cir. 1996)	Copying of "course packs" for college courses	UNFAIR	UNFAIR	UNFAIR	UNFAIR	UNFAIR
15.	Lamb v. Starks, 949 F. Supp. 753 (N.D. Cal. 1996)	Copying of "trailer" of motion picture in order to demonstrate defendant's "3-D" technology	UNFAIR	UNFAIR	UNFAIR	FAIR	UNFAIR
16.	Ringgold v. Black Entm't Telev., Inc., 126 F.3d 70 (2d Cir. 1997)	Showing <i>Church Picnic Story Quilt</i> in <i>ROC</i> TV show	FAIR	UNFAIR	UNFAIR	FAIR	UNFAIR

<u>CASE</u>		<u>FACTORS</u>				<u>CONCLUSION</u>
<u>CITATION</u>	<u>PRÉCIS</u>	<u>1. PRODUCTIVE</u>	<u>2. PUBLISHED AND FACTUAL</u>	<u>3. WHOLESALE</u>	<u>4. CAUSING LOSS OF REVENUE</u>	<u>FAIR USE</u>
17. Jackson v. Warner Bros., Inc., 993 F. Supp. 585 (E.D. Mich. 1997)	Showing plaintiff's lithographs of African ceremonies in <i>Made in America</i> film; when two characters kiss, they knock the lithographs sideways	FAIR	UNFAIR	UNFAIR	FAIR	FAIR
18. Sandoval v. New Line Cinema Corp., 973 F. Supp. 409 (S.D.N.Y. 1997)	Fleeting and obscured use of photos in film <i>Seven</i>	FAIR	UNFAIR	UNFAIR	FAIR	FAIR
19. Higgins v. Detroit Educ. Telev. Found., 4 F. Supp. 2d 701 (E.D. Mich. 1998)	Use of two barely discernable snippets of an instrumental portion of song as background music to public interest <i>Club Connect</i> episode "Stop the Fighting II"	FAIR	UNFAIR	FAIR	FAIR	FAIR
20. Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997)	Unauthorized use of video in news program showing Reginald Denny beating	UNFAIR	FAIR	UNFAIR	UNFAIR	UNFAIR
21. Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997)	Reworking of Dr. Seuss anapestic tetrameter to retell O. J. Simpson double murder story	FAIR	UNFAIR	FAIR	FAIR	UNFAIR
22. Kulik Photography v. Cochran, 975 F. Supp. 812 (E.D. Va. 1997)	Court TV broadcast photo that Johnnie Cochran had admitted into evidence at O. J. Simpson trial	UNFAIR	UNFAIR	UNFAIR	FAIR	FAIR
23. Castle Rock Entm't v. Carol Publ'g Group, Inc., 150 F.3d 132 (2d Cir. 1998)	Publishing of quiz book called <i>The Seinfeld Aptitude Test</i>	FAIR	UNFAIR	FAIR	FAIR	UNFAIR

<u>CASE</u>		<u>FACTORS</u>				<u>CONCLUSION</u>
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24. Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d 329 (S.D.N.Y. 1998)	Publishing of fan book called <i>The Joy of Trek</i>	FAIR	UNFAIR	FAIR	FAIR	UNFAIR
25. Toho Co. v. William Morrow & Co., 33 F. Supp. 2d 1206 (C.D. Cal. 1998)	Similar holding regarding <i>The Official Godzilla Compendium</i>	FAIR	UNFAIR	FAIR	FAIR	UNFAIR
26. Duffy v. Penguin Books USA Inc., 4 F. Supp. 2d 268 (S.D.N.Y. 1998)	Intermediate photocopying of book setting forth "style and fashion for large sized women"	FAIR	UNFAIR	UNFAIR	FAIR	FAIR
27. Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104 (2d Cir. 1998)	Service allowing subscribers "to listen over the telephone to contemporaneous radio broadcasts in remote cities"	UNFAIR	UNFAIR	UNFAIR	FAIR	UNFAIR
28. Lucent Info. Mgmt., Inc. v. Lucent Techs., Inc., 5 F. Supp. 2d 238 (D. Del. 1998)	Use of survey from trademark infringement case by adverse party	UNFAIR	UNFAIR	UNFAIR	FAIR	FAIR
29. Columbia Pictures Indus., Inc. v. Miramax Films Corp., 11 F. Supp. 2d 1179 (C.D. Cal. 1998)	Poster for Michael Moore documentary showing him smirking in front of an oversized microphone, mocking famous <i>Men in Black</i> poster	FAIR	UNFAIR	FAIR	FAIR	UNFAIR
30. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998)	Staging nude photo of pregnant Leslie Nielsen in place of Demi Moore, to advertise <i>Naked Gun</i> , a film "due this March"	FAIR	UNFAIR	UNFAIR	FAIR	FAIR

<u>CASE</u>		<u>FACTORS</u>				<u>CONCLUSION</u>
<u>CITATION</u>	<u>PRÉCIS</u>	<u>1. PRODUCTIVE</u>	<u>2. PUBLISHED AND FACTUAL</u>	<u>3. WHOLESALE</u>	<u>4. CAUSING LOSS OF REVENUE</u>	<u>FAIR USE</u>
31. Storm Impact, Inc. v. Software of the Month Club, 13 F. Supp. 2d 782 (N.D. Ill. 1998)	Distribution of free shareware outside licensed terms	UNFAIR	FAIR	UNFAIR	FAIR	UNFAIR
32. Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998)	Unauthorized posting to Internet of a film depicting celebrities having sex	UNFAIR	UNFAIR	UNFAIR	FAIR	UNFAIR
33. Sundeman v. Seajay Soc'y, Inc., 142 F.3d 194 (4th Cir. 1998)	Reproducing unpublished story by author of <i>The Yearling</i>	UNFAIR	UNFAIR	UNFAIR	FAIR	FAIR
34. Richard Feiner & Co. v. H.R.I. Indus., Inc., 10 F. Supp. 2d 310 (S.D.N.Y. 1998)	Unauthorized use of colorized photo of Laurel & Hardy perched at the edge of a tall building to introduce <i>Hollywood Reporter's</i> "Special Effects & Stunts" section	FAIR	FAIR	FAIR	FAIR	UNFAIR
35. Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65 (2d Cir. 1999)	Selling abstracts of news articles	FAIR	FAIR	FAIR	UNFAIR	UNFAIR
36. Lyons P'ship v. Giannoulas, 179 F.3d 384 (5th Cir. 1999)	Parody of Barney the dinosaur assaulted by The Famous Chicken at sporting event	FAIR	UNFAIR	FAIR	FAIR	FAIR
37. DSC Communs. v. Pulse Communs., Inc., 170 F.3d 1354 (Fed. Cir. 1999)	Pulsecom created copies of software on its cards by using RBOCs' Litespan systems	FAIR	FAIR	FAIR	FAIR	UNFAIR

<u>CASE</u>		<u>FACTORS</u>				<u>CONCLUSION</u>
<u>CITATION</u>	<u>PRÉCIS</u>	<u>1. PRODUCTIVE</u>	<u>2. PUBLISHED AND FACTUAL</u>	<u>3. WHOLESALE</u>	<u>4. CAUSING LOSS OF REVENUE</u>	<u>FAIR USE</u>
38. Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc., 55 F. Supp. 2d 1113 (D. Nev. 1999)	Use of plaintiff's photo as starting point to produce digitally altered scene of Las Vegas strip	FAIR	FAIR	UNFAIR	FAIR	UNFAIR
39. Ty, Inc. v. Publications Int'l, Ltd., 81 F. Supp. 2d 899 (N.D. Ill. 2000)	Book about Beanie Babies, replete with historical essay, doll-by-doll data, evaluation as to price, and recommendation as to purchase	FAIR	UNFAIR	UNFAIR	FAIR	UNFAIR
40. Educational Testing Serv. v. Simon, 95 F. Supp. 2d 1081 (C.D. Cal. 1999)	Copying questions from standardized test for "Hot Questions" portion of test preparation course	FAIR	UNFAIR	FAIR	FAIR	UNFAIR
41. Chicago Sch. Reform Bd. of Trs. v. Substance, Inc., 79 F. Supp. 2d 919 (N.D. Ill. 2000)	Newspaper stirs public debate about the educational value of standardized test by publishing substantial portions of it	FAIR	UNFAIR	UNFAIR	FAIR	UNFAIR
42. Sony Computer Entm't Am., Inc. v. Bleem, LLC, 214 F.3d 1022 (9th Cir. 2000)	Reproduction of "screen shot" from Sony's copyrighted game to show superior resolution of defendant's hardware	FAIR	UNFAIR	FAIR	FAIR	FAIR
43. Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000)	Reverse engineering of entire Sony PlayStation BIOS to achieve interoperability	FAIR	FAIR	UNFAIR	FAIR	FAIR

<u>CASE</u>		<u>FACTORS</u>				<u>CONCLUSION</u>
<u>CITATION</u>	<u>PRÉCIS</u>	<u>1. PRODUCTIVE</u>	<u>2. PUBLISHED AND FACTUAL</u>	<u>3. WHOLESALÉ</u>	<u>4. CAUSING LOSS OF REVENUE</u>	<u>FAIR USE</u>
44. Williams v. Columbia Broad. Sys., Inc., 57 F. Supp. 2d 961 (C.D. Cal. 1999)	Army cadets appropriated “Mr. Bill” to generate “spirit message” broadcast during Army/Navy game	FAIR	UNFAIR	UNFAIR	FAIR	FAIR
45. Images Audio Visual Prods., Inc. v. Perini Bldg. Co., 91 F. Supp. 2d 1075 (E.D. Mich. 2000)	Party to construction arbitration introduced into evidence photographs that it commissioned but declined to pay for	UNFAIR	UNFAIR	UNFAIR	UNFAIR	UNFAIR
46. Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000)	After reformed church withdrew <i>Mystery of the Ages</i> for theological error, breakaway church distributed it to traditional adherents	UNFAIR	UNFAIR	UNFAIR	FAIR	UNFAIR
47. Núñez v. Caribbean Int’l News Corp., 235 F.3d 18 (1st Cir. 2000)	Newspaper published old fashion photograph depicting nude Joyce Graud, after she was named “Miss Universe Puerto Rico”	UNFAIR	UNFAIR	UNFAIR	UNFAIR	FAIR
48. National Ass’n of Gov’t Employees/Int’l Bhd. of Police Officers v. BUCI Telev., Inc., 118 F. Supp. 2d 126 (D. Mass. 2000)	<i>Boston Globe</i> used excerpts of videotape to bolster its reportage that talk show host made veiled anti-Semitic comments	FAIR	FAIR	FAIR	FAIR	FAIR

	<u>CASE</u>		<u>FACTORS</u>				<u>CONCLUSION</u>
	<u>CITATION</u>	<u>PRÉCIS</u>	<u>1. PRODUCTIVE</u>	<u>2. PUBLISHED AND FACTUAL</u>	<u>3. WHOLESALE</u>	<u>4. CAUSING LOSS OF REVENUE</u>	<u>FAIR USE</u>
49.	Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001)	Advertisement for clothing store featuring model sporting plaintiff's eyeglass jewelry	FAIR	FAIR	UNFAIR	FAIR	UNFAIR
50.	UMG Recordings, Inc. v. MP3.Com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000)	Company offered service "advertised as permitting subscribers to store, customize, and listen to the recordings contained on their CDs from any place where they have an internet connection."	UNFAIR	UNFAIR	UNFAIR	UNFAIR	UNFAIR
51.	Hofheinz v. AMC Prods., Inc., 147 F. Supp. 2d 127 (E.D.N.Y. 2001)	Clips from B movies used to create documentary about the impact the genre exerted on the public	FAIR	UNFAIR	FAIR	FAIR	FAIR
52.	Hofheinz v. A&E Television Networks, 146 F. Supp. 2d 442 (S.D.N.Y. 2001)	Brief snippets used of a famous actor's early film appearances in the context of a biography about his career	FAIR	UNFAIR	FAIR	FAIR	FAIR
53.	Byrne v. British Broad. Corp., 132 F. Supp. 2d 229 (S.D.N.Y. 2001)	Usage of music as background to BBC story about Irish terrorists	FAIR	UNFAIR	FAIR	FAIR	UNFAIR

	<u>CASE</u>		<u>FACTORS</u>				<u>CONCLUSION</u>
	<u>CITATION</u>	<u>PRÉCIS</u>	<u>1. PRODUCTIVE</u>	<u>2. PUBLISHED AND FACTUAL</u>	<u>3. WHOLESALE</u>	<u>4. CAUSING LOSS OF REVENUE</u>	<u>FAIR USE</u>
54.	World Wrestling Fed'n Entm't, Inc. v. Bozell, 142 F. Supp. 2d 514 (S.D.N.Y. 2001)	After 14 year-old boy killed 6 year-old girl and jury rejected his “wrestling defense,” media watchdog engaged in fundraising efforts by copying portions of <i>SMACKDOWN!</i>	FAIR	UNFAIR	FAIR	FAIR	UNFAIR
55.	Fleming v. Miles, 181 F. Supp. 2d 1143 (D. Or. 2001)	Use of image from artist's portfolio	UNFAIR	UNFAIR	UNFAIR	FAIR	FAIR
56.	A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)	Internet search engine provided peer-to-peer access to MP3 files	UNFAIR	UNFAIR	UNFAIR	UNFAIR	UNFAIR
57.	SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001)	Alice Randall's <i>The Wind Done Gone</i> rectifies racist underpinnings of the largest seller of all time (except <i>The Bible</i> )	FAIR	UNFAIR	FAIR	FAIR	FAIR
58.	Greenberg v. National Geo. Soc'y, 244 F.3d 1267 (11th Cir. 2001)	Morphing image in sequence highlighting a century of photographs contributed to famous magazine	FAIR	FAIR	UNFAIR	UNFAIR	UNFAIR
59.	Lucasfilm Ltd. v. Media Mkt. Group, Ltd., 182 F. Supp. 2d 897 (N.D. Cal. 2002)	Pornographic animated version of <i>Star Wars</i> entitled <i>Starballz</i>	FAIR	UNFAIR	FAIR	FAIR	FAIR
60.	Kelly v. Arriba Soft Corp., 280 F.3d 934 (9th Cir. 2002)	Internet search engine reproduced photographs in thumbnail form	UNFAIR	UNFAIR	UNFAIR	UNFAIR	FAIR

First, the obligatory disclaimers. Every column in the chart is controversial,<sup>40</sup> even the first one setting forth the case citation, as some cases were otherwise disposed of on appeal<sup>41</sup> (and even the number to the left [1, 2, 3. . .], given that not every reported case is rigorously included in the chart). The last column is especially controversial, because some district court cases merely denied summary judgment rather than reaching a final conclusion on fair use,<sup>42</sup> and some appellate courts remanded for further factfinding rather than make a final pronouncement of fair or unfair.<sup>43</sup> Despite these difficulties, every cell in the grid is assigned an entry of Fair or Unfair, as objectively as I could determine.<sup>44</sup>

To illustrate the chart's composition, let us begin with Case One. In *American Geophysical Union v. Texaco Inc.*,<sup>45</sup> a scientist named Dr. Chickering made photocopies from the *Journal of Catalysis* to support experiments he performed in his Texaco lab.<sup>46</sup> Because he did not write a new article based on submissions to the *Journal*, but simply made wholesale copies, his exploitation was not productive. Factor One, therefore, receives an Unfair (by itself, inclining against fair use).<sup>47</sup> The subject articles that Dr. Chickering copied were both published in the *Journal of Catalysis* and of a factual rather than creative nature. Factor Two receives a Fair (by itself, inclining toward fair use). The subject photo-

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40. As an example of the difficulty, consider Cases Six to Eight concerning the writings of L. Ron Hubbard. Is the copyrighted work at issue factual? If so, the answer to Factor Two will be Fair; if not, Unfair. To a Scientologist, the answer is yes, thus indicating Fair. One could take the prophet "at [his] word and assume that [his narrative] is an unalterable fact, the product of discovery and not creativity." *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1076 (2d Cir. 1992) (addressing Oscar Ichazo's "enneagram"). Or one could adopt the stance of another court confronting copyright claims over religious writings: "If I were to declare *The Urantia Book* to be a divine revelation dictated by divine beings, I would be trampling upon someone's religious faith. If I declared the opposite, I would be trampling upon someone else's religious faith. I shall do neither." *Urantia Found. v. Maaherra*, 895 F. Supp. 1337, 1338 (D. Ariz. 1995). Neither of those dodges strikes me as tenable for current purposes. I have therefore called Hubbard's writings "creative." Although that label might offend devotees, it actually supports the Church of Scientology, as it helps to weigh the second factor against fair use.

41. *E.g.*, *Richard Feiner & Co. v. H.R.I. Indus., Inc.*, 10 F. Supp. 2d 310 (S.D.N.Y. 1998), *vacated without opinion* by 182 F.3d 901 (2d Cir. 1999); *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409 (S.D.N.Y. 1997), *aff'd on other grounds* 147 F.3d 215 (2d Cir. 1998).

42. Even more equivocal is denying a preliminary injunction based on a failure to prove a likelihood of success at an initial stage of the proceedings, as occurred in *Lucasfilm Ltd. v. Media Market Group, Ltd.*, 182 F. Supp. 2d 897, 901 (N.D. Cal. 2002).

43. The Supreme Court did just that in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994).

44. Particularly vexing are cases that contain two separate fair use analyses, reaching a different alignment of factors and even a different bottom line. *See infra* note 75.

45. 60 F.3d 913 (2d Cir. 1994).

46. *Id.* at 915-16.

47. One constant lesson to be borne in mind is that every formulation in the fair use realm is capable of its own exegesis. Thus, one could define "productive" to mean "in service of a socially laudable function," in which case a Fair would go into the Factor One box. As indicated above, "productive" for current purposes means that the defendant reworked the plaintiff's expression to create a new work of authorship, itself capable of copyright protection. By that formulation, Dr. Chickering's usage fails. However, one could legitimately define the term otherwise, such that laboratory research potentially leading to a future publication, or creation of a plastic copy in case of chemical spills, deserves the label "productive."

copies were of whole articles, thereby earning an Unfair for Factor Three.<sup>48</sup> Finally, absent Dr. Chickering’s copying activities, Texaco would have needed to enter more subscriptions to the *Journal of Catalysis* to have the desired articles in his laboratory, meaning there was actual damage to an established market.<sup>49</sup> Factor Four, therefore, also receives an Unfair. The court denied the fair use defense, so the final column is filled in with Unfair. In this case, three factors support the court’s conclusion.

Case Two differs from Case One with respect to the entries for Factors One and Four. In *Marshall & Swift v. BS&A Software*,<sup>50</sup> defendant did not simply photocopy plaintiff’s works; it took tables from the *Michigan Assessor’s Manual* and produced its own computer Equalization Appraisal Program to automate the real estate assessment process.<sup>51</sup> Accordingly, the use was productive, and Factor One gets a Fair. In addition, although plaintiff claimed that it would have charged defendant \$95,000 as a licensing fee to reproduce the copied materials, there is no indication from the case that an established market existed for those materials, or that plaintiff suffered actual damage in the process (that is, that defendant would have paid the fee absent the infringement, the way that Texaco presumably would have entered more subscriptions for the *Journal of Catalysis* absent photocopying in Case One). In light of the circumstances, I entered a Fair for Case Two as to Factor Four, cognizant that the situation is not altogether different from Case One, which attracted the opposite entry for this factor.<sup>52</sup> In this case, only one factor supports the court’s conclusion.<sup>53</sup>

In nonscientific form,<sup>54</sup> this top-sixty chart attempts to determine if a mechanistic view of the four factors reveals the secret of how fair use cases get resolved. What does it reveal? I am not very adept at statistics, but I studied

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48. Nonetheless, one could look at this issue differently, given that the subject photocopies did not reproduce whole issues of the *Journal of Catalysis*.

49. It has already been remarked that the columns in the chart are more limited than the actual fair use factors. In particular, Factor Four as defined in the statute is not limited to loss of revenue (the simplified form in the chart). Instead, it looks to the entire potential market for the copyrighted work. See 17 U.S.C. § 107(4) (2000).

50. 871 F. Supp. 952 (W.D. Mich. 1994).

51. *Id.* at 954-55.

52. Among many tough choices, Factor Four presented a disproportionate share. Consider Case Five. In *Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co.*, 900 F. Supp. 1287 (C.D. Cal. 1995), the owner of film rights to James Bond filed suit over a humorous commercial involving a suave spy, in the company of a beautiful woman, making his getaway from grotesque villains in a Honda. There is an established market for 007 movies, but it is difficult to imagine actual damage to it from a car commercial. In reality, plaintiff was apparently aggrieved because it had a product placement agreement with BMW, and the Honda commercial perhaps threatened actual damage to that relationship. *Id.* at 1301. But there was no indication that loss of revenue would result.

53. Based on a universe of only these two cases, one would conclude that the factors only have 50% reliability in predicting the ultimate resolution of the cases in which they arise. As will be seen, the aggregate tally is basically in accord with that initial estimate.

54. Not only does the chart as a whole fail to cover every reported decision since 1994, but of the cases selected, one could dispute just about every entry. Indeed, it would take little to convince me to substitute Fair for Unfair (or vice versa) in many instances. Whether my detractors will wish to champion the Mirror Chart (in which the polarity of each entry is reversed) remains to be seen.

the chart to discern correlations. Of the twenty-four cases upholding fair use, and the thirty-six cases denying its existence, the findings are as follows:

- (1) The first factor corresponds to the conclusion of fair use fifty-five percent of the time;<sup>55</sup>
- (2) The second factor corresponds to the conclusion of fair use forty-two percent of the time;
- (3) The third factor corresponds to the conclusion of fair use fifty-seven percent of the time;<sup>56</sup>
- (4) The fourth factor corresponds to the conclusion of fair use fifty percent of the time;<sup>57</sup>
- (5) The cumulative correspondence for all four factors is slightly under fifty-one percent.<sup>58</sup>

Beyond elevating the first and third factors slightly, while denigrating the second, the numbers hardly tell a compelling story. The last figure is the most revealing. Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.

This conclusion is not to say that judges enter findings as to the four factors in support of their ultimate fair use determination only half the time. Perusal of fair use cases would reveal that the figure actually approaches ninety percent. In other words, judges who uphold fair use almost always find that three, if not four, of the factors incline in its favor; judges who deny the fair use defense almost always find that three, if not four, of the factors incline against it.<sup>59</sup> The difference between the chart's figure, showing virtually a dead heat, and the actual figure pushing ninety percent, stems from the malleability of the fair use factors.

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55. Every time the final column indicates "Fair," there is a correspondence in the first column when it indicates "Fair." Every time the final column indicates "Unfair," there is a correspondence in the first column when it indicates "Unfair." Obviously, the test employed for the remaining factors is the same.

56. It is a chestnut that "generally, it may not constitute a fair use if the entire work is reproduced." *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109 (2d Cir 1998), quoting 4 NIMMER, *supra* note 1, § 13.05[A][3]. Yet the chart reveals that among the cases in which wholesale reproduction of the copyrighted work took place, thirty-six percent upheld the usage as fair. (In other words, even when the entry for Factor Three is Unfair, the case ultimately rules the utilization Fair in the chart's final entry thirty-six percent of the time.)

57. To test my own pet theory, I redid the chart pursuant to the functional test, by asking whether the defendant used the work for a different function not within the purview of the plaintiff's normal exploitation of the work. The result (again, as agonizing and subject to disagreement as every other attempt to fill in the chart) was to answer Fair for Cases 1, 5-10, 12, 15-18, 20, 22-27, 30, 33, 34, 36, 39-43, 47-49, 51, 52, 54, 55, and 59, and Unfair for all others. To my chagrin, that change resulted in a fifty-nine percent correspondence rate—an improvement, but hardly the silver bullet that I desired. But, as previously noted, even with the functional test, one must still analyze each of the four factors. *See supra* note 25.

58. In other words, of the 240 entries in the chart for Fair or Unfair under factors one through four, the match with the ultimate conclusion of Fair or Unfair worked out only 50.8 % of the time.

59. *See infra* text accompanying notes 63-65.

First, each column heading in the chart represents far less than the totality of the Copyright Act factor at issue.<sup>60</sup> It has already been noted that the first factor, for example, contains categories in addition to productive usage.<sup>61</sup> The third factor, to offer another example, investigates the “amount and substantiality of the portion used in relation to the copyrighted work as a whole,” as compared to the chart’s sole inquiry whether the usage is one hundred percent. A given utilization could be less than one hundred percent (meaning it would be listed as Fair in the chart) but still constitute substantially all of the copyrighted work quantitatively (inclining against fair use) or qualitatively (again inclining against fair use). Plenty of room exists, therefore, for courts to reach results not reflective of the reductionist approach of the chart.

Second, each factor contains wide room for subjective evaluation to come into play. In the third factor just encountered, for example, what is *qualitatively* substantial? In the first factor, what is a fair *purpose*? One could multiply the questions endlessly, without finding ready answers.

Third, even after each factor is tallied, Congress included no mechanism for weighing divergent results against each other and ultimately resolving whether any given usage is fair. What is to be done when two factors are pro and two con? When can one factor outweigh three? On those matters, the statute is mute. Courts must therefore proceed by the seat of their pants.

In the ultimate analysis, my review of the cases convinces me that the high correspondence in judicial opinions between the individual fair use factors and courts’ ultimate disposition, as opposed to the absence of any meaningful correspondence in the chart, reflects an important insight into how judges actually resolve fair use cases: Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can.<sup>62</sup> At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.

The courts are not to blame for that state of affairs. Rather, by injecting such a high degree of subjectivity and imprecision into each factor and into their cumulative application, as canvassed above, Congress essentially foreordained that result in the 1976 Act. Thus, it is not surprising to discover, in a given case, that the district judge found each of the four factors favoring fair use, whereas the Court of Appeals, in reversing, concluded the very opposite as to each factor.<sup>63</sup> To quash the facile explanation that the district judge in such a case

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60. The exception is Factor Two. Given that the chart combines both “published” and “factual,” Factor Two actually represents a composite capturing most of the complexity of this prong of the analysis—it reflects a Fair entry only when both those subfactors favor fair use.

61. *See supra* note 29.

62. Alternatively, as courts work their way through the four factors, at some point they decide what the ultimate conclusion should be—which, in turn, molds the way that they reach resolution as to which direction each factor points.

63. *E.g.*, *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 751 F.2d 501 (2d Cir. 1984). That decision could be explained as straddling the Supreme Court’s clarification in *Sony*. But such an excuse fails to

simply failed to understand copyright law as well as did the appellate panel of three, it suffices to note that the same phenomenon has unfolded at the Supreme Court level. In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>64</sup> six justices analyzed each of the four factors as disfavoring fair use; three justices, in dissent, reached the opposite conclusion as to each factor.<sup>65</sup>

By now, we have come far enough to realize that, pious words notwithstanding, it is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases.<sup>66</sup> What of the conclusion that “a party need not ‘shut-out’ her opponent on the four factor tally to prevail”?<sup>67</sup> It turns out to be a fairy tale, too. The clash of the nine justices themselves in *Harper & Row* demonstrates that jurists up to the Supreme Court level feel the need to align the factors unanimously in favor of the desired result, perceiving that any deviation could be a fatal chink in the armor.

But if there is a “shut-out,” the common wisdom goes, “victory on the fair use playing field is assured.”<sup>68</sup> Is at least that much true? The chart again belies it. One need proceed no further than Case Four before encountering unanimous Fair entries for the four factors—meaning that this case must be the “fairest of them all,” yet the ultimate conclusion rejects fair use! Specifically, in *Robinson v. Random House, Inc.*,<sup>69</sup> the author of *American Saga: Juan Trippe and His Pan Am Empire* alleged copyright infringement via publication of *American Icarus: The Majestic Rise and Tragic Fall of Pan Am*. The latter book was a new work of authorship, and therefore productive (Factor One inclining toward fair use); the former book was both published and factual in nature (Factor Two inclining toward fair use); the latter book copied far less than the totality of the former (Factor Three inclining toward fair use); and the posture more closely matches Case Two (loss of imputed license fee that copyright owner claimed adverse party should have paid) than Case One (ready market in subscription already existed, which would have resulted in revenue had the infringing conduct not occurred). Therefore, I conclude that the former book did not cause a loss in revenue (Factor Four inclining toward fair use). In sum, all four factors of the chart show Fair, yet the court<sup>70</sup> determined Unfair. The situation is not an anomaly; Cases Thirty-Four and Thirty-Seven show the same

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apply to the district court’s finding three factors against fair use and one neutral in *New Era Publications International, ApS v. Carol Publishing Group*, 729 F. Supp. 992 (S.D.N.Y. 1990), followed by a reversal in which the Second Circuit concluded that each of the four factors inclined in favor of fair use. 904 F.2d 152 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990).

64. 471 U.S. 539 (1985).

65. See 4 NIMMER, *supra* note 1, § 13.05[A][5].

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

67. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991).

68. *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1079 (2d Cir. 1992).

69. 877 F. Supp. 830 (S.D.N.Y. 1995).

70. Of course, the court bolstered its finding by aligning Factors One, Two, and Four against fair use. As previously noted, the chart does not track the analysis actually employed in fair use cases, as that exercise would show a 90% correspondence.

pattern.<sup>71</sup> This recurring equation of *Fair x 4 = Unfair* is a frightening confirmation of how deeply rooted the fairy tales have become.

What about the converse phenomenon? Case Sixty presents an exemplar. In *Kelly v. Arriba Soft Corp.*,<sup>72</sup> plaintiff Kelly complained that photographs on his web site had been made subject of thumbnail sketches on defendant’s search engine. The engine simply presented the images as is, rather than molding them into new works of authorship, so no productive use was present (Factor One inclining against fair use); the photographs in question evinced creativity, unlike articles about catalysis or tables of Michigan property values (Factor Two inclining against fair use); the subject thumbnails reproduced the whole images (Factor Three inclining against fair use);<sup>73</sup> and plaintiff was at least able to present an argument that he had suffered damage to an established market (Factor Four inclining against fair use).<sup>74</sup> In this instance, all four entries in the chart show Unfair, yet both district court and Ninth Circuit determined Fair on fair use.<sup>75</sup> Again, the situation is not wholly anomalous, as Case Forty-Seven demonstrates.<sup>76</sup>

71. Another instance almost matching the same scenario is Case 53. In *Byrne v. British Broadcasting Corp.*, 132 F. Supp. 2d 229 (S.D.N.Y. 2001), the BBC used background music in a television segment on an FBI investigation of gun smuggling from Florida to Ireland. Its segment was a new work of authorship, and therefore productive; the plaintiff’s song in issue was published, but not factual (therefore making Factor Two equivocal); the BBC’s copying related only to a small segment, far less than the whole; and there would have been no payment for the song absent the BBC’s infringing conduct. In sum, three and a half factors favored fair use, but the court denied it.

72. 280 F.3d 934 (9th Cir. 2002).

73. The salient fact about thumbnail reproductions is that they lose most digital information from the original. Therefore, from both a qualitative and quantitative perspective, much less than the whole is reproduced. Nonetheless, in filling out the chart, I put Unfair for Factor Three, inasmuch as the thumbnail sketch nominally reproduces the plaintiff’s image wholesale.

74. The opinion below ventilates this aspect:

Plaintiff argues the market for his various products has been harmed. Defendant’s conduct created a possibility that some users might improperly copy and use Plaintiff’s images from Defendant’s site. Defendant’s search engine also enabled users to “deep link” directly to the pages containing retrieved images, and thereby bypass the “front page” of the originating Web site. As a result, these users would be less likely to view all of the advertisements on the Web sites or view the Web site’s entire promotional message.

*Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1120-21 (C.D. Cal. 1999). One must lean very far in plaintiff’s direction to accept his self-serving characterizations.

75. Actually, there were two fair use decisions in the case. The one I highlight in the chart concerns thumbnail images, which drew a long analysis from the Ninth Circuit. See *Kelly*, 280 F.3d at 940-44. Personally, I agree with that determination in favor of fair use. See 4 NIMMER 2003, *supra* note 12, §13.05[G]. But a separate part of the opinion treats, in more abbreviated form, defendant’s claim of fair use for inline linking to full-size images. See *Kelly*, 280 F.3d at 947-48. As to that issue, the court rejected fair use, a conclusion in which I part company with the Ninth Circuit. See 3 NIMMER 2003, *supra* note 12, § 12B.01[A][2]. Instead of including two separate references in the chart for the same case, I encapsulated it into its primary ruling. (As of this writing, the Ninth Circuit has decided to entertain rehearing on the latter issue in *Kelly*, meaning that it still remains possible for the case’s two fair use holdings to converge.)

76. In *Núñez v. Caribbean International News Corp.*, 235 F.3d 18 (1st Cir. 2000), the reproduction of a nude photograph of “Miss Universe Puerto Rico” was not productive, even though it appeared in the larger context of a newspaper, for the reason set forth in *supra* note 33. Although a photograph of the Las Vegas strip may be so pedestrian as to be essentially factual rather than imaginative (see Factor Two for Case Thirty-Eight, *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113 (D. Nev. 1999)), I am presuming that the artistic decisions involved in posing Ms. Giraud nude made that

The “assured” victory when all factors incline a certain way turns out to be just another fairy tale.<sup>77</sup> Instead, fair use runs deeper than any mechanistic exercise can capture.<sup>78</sup> For that reason, it seems unlikely that anyone will develop a heuristic device for computer programs to calculate when fair use should apply—at least, at any time before machines become human.<sup>79</sup>

#### IV

##### THE POESIE ALBUM

It is time now to leave the cornucopia of cases in the chart, which collectively defy convenient categorization, and to focus on a single case, that might itself confound. Consider the image that a client recently brought to me, set forth on the facing page, which has never before been published.

On March 4, 1940, Nazi troops had already taken over Czechoslovakia and Poland. In Western Europe, relative calm still prevailed, albeit punctuated by infinite worry. A Jewish girl named Henny Scheerder hosted a birthday party in Amsterdam, to which she invited her friends. One was a young lady named Anne Frank. In her keepsake book (*poesie album*), Henny asked the assembled friends to each sign a page with personal memories. Young Anne affixed some stickers (presumably copyrighted by someone else, although that is not the focus here) to Henny’s album, then she wrote *Beate Henny* (“Dear Henny”) followed by (translating loosely from the Dutch): “It’s of little worth what I can offer you—pluck roses on earth, and forget me not.”

In her paper for this conference, Pamela Samuelson contrasts a grocery list, that she calls “detritus,” against a “gem” like a Mozart symphony.<sup>80</sup> I submit

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photograph closer to the creative side of the spectrum. In terms of loss of revenue (Factor Four), the standard used in the chart is whether defendant’s usage deprived the plaintiff of revenue that likely would have accrued absent the allegedly infringing conduct. When the only allegation is that defendant’s own utilization should have occasioned a royalty payment, there is no such damage (which is why Factor Four inclines toward Fair in such instances as Case Fifteen, *Lamb v. Starks*, 949 F. Supp. 753 (N.D. Cal. 1996); absent defendant’s usage of the subject movie trailer to demonstrate its 3-D technology, no market for that usage would have likely arisen). In this case, by contrast, after Ms. Giraud was named “Miss Universe Puerto Rico,” there could have been a market for old photographs of her, independent of defendant’s exploitation, which could have been harmed by that exploitation. For that reason, Factor Four indicates Unfair.

77. One could also posit other explanations for the cases in the chart, such as: Usage in Litigation Is Always Fair (see Cases 22 and 28). But it is not always so (see Case 45). Another candidate might be: Usage for News Is Always Fair (see Cases 9, 22, 47, 48). Again, not always (see Cases 20, 35, 41, 53). What about: Capitalizing on Sex Is Always Unfair (see Case 32). Nope (see Cases 30, 47, 59). At the moment, Combating Prejudice in Plaintiff’s Work Is Always Fair (see Cases 9, 48, 57) holds sway, with no contrary case. But one would have to be foolhardy in the extreme to guarantee victory on the fair use defense to a defendant in the next case in which it is combating prejudice in plaintiff’s work.

78. Indeed, if one takes seriously the notion that the four factors are nonexclusive, meaning that non-enumerated factors may also be taken into account, then it must be so. See *New Era Publ’ns Int’l, ApS v. Henry Holt and Co.*, 873 F.2d 576, 588 (2d Cir. 1989) (Oakes, C.J., concurring) (“I emphasize non-exclusive. . .”).

79. See David Nimmer, *Brains and Other Paraphernalia of the Digital Age*, 10 HARV. J.L. & TECH. 1 (1996).

80. Paula Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 151 (Winter/Spring 2003). See also David Nimmer, *Copyright in the Dead Sea*

ver-

geet



mij



4-3-40.

Beste Henny,

t'Is weinig van waards,  
Hetgeen ik je liid.

Pluk rozen op aarde

En vergeet mij niet.

Door mij geschreeven  
Door mij gedaan  
Anne Frank  
Een is mijn naam

Tips top-top,  
de d'atien  
steat  
en

niet.

Photo courtesy the Simon Wiesenthal Center.

A poem written and signed by Anne Frank, in the *poesie album* of her classmate Henny Scheerder. Dated March 4, 1940.

that Anne Frank’s words penned on March 4, 1940, challenge that dichotomy. Having left her parents that day amidst news from the east of the Nazi juggernaut (may their names be blotted out), Anne offered “nothing” but the advice to “pluck roses on earth, and forget me not.” In my estimation, her short reflection offers much more than its “nothing” self-characterization—indeed, it is a little gem.

Henny survives to this day, thank G-d. Her *poesie album*, meanwhile, has come into the possession of The Simon Wiesenthal Center in Los Angeles, California, which came to me for *pro bono* copyright advice.<sup>81</sup> (The Center is getting full value for what it paid!) Although the Wiesenthal Center has no objection to my setting forth the image, it does not pretend to be the copyright owner. The claimant to that status is The Anne Frank Foundation in Basel, Switzerland, purportedly recipient of a grant from Anne Frank’s sole survivor, her father.<sup>82</sup> The Foundation has not consented to the use of the work in any form.

What is the status of the exploitation planned by the Wiesenthal Center of selling postcards and posters of this image at its onsite gift shop? From the standpoint of the four fair use factors, one could posit at first blush that such a use poses an easy copyright case requiring denial of the defense. Running quickly through the four factors: the purpose of the use is fundraising and hence commercial; the nature of Anne’s work is creative and unpublished; the amount to be copied is one hundred percent; and the potential market for the Swiss foundation to sell its own postcards and posters will be clobbered. Accordingly, all four factors disfavor the fair use defense.

One delightful aspect of David Lange’s foundation paper<sup>83</sup> is its utter lack of concern for any precedent or decided case. Explicitly employing that methodology, let us run backwards through the four factors as they affect the subject page from the *poesie album*.

The fourth factor looks to the effect on the potential market. Justin Hughes, a colleague at UCLA, has developed an intriguing way of looking at the fair-use doctrine without giving undue deference to copyright owners whose terms Congress may repeatedly extend. He posits that courts should examine the effect on the market over time.<sup>84</sup> So, if *The Jazz Singer* from 1928 is at issue, any usage made in 2002 will leave the work unaffected from 1928-2001, and therefore can exert only a relatively limited effect on the copyright considered over its life as a whole. How does that logic apply here? Anne Frank’s murder

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*Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 41 n.155, 177 (2001) (considering copyright in laundry lists) [hereinafter Nimmer, *Dead Sea Scrolls*].

81. Since receiving the donation of the *poesie album*, the Wiesenthal Center has placed it on display at its Museum of Tolerance, located a few blocks from my home. A public display does not constitute publication. See 1 NIMMER, *supra* note 1, § 4.09.

82. Another potential claimant could be the Netherlands State Institute for War Documentation, recipient of all Anne Frank’s papers. For simplicity, current analysis will focus on the Swiss foundation.

83. See Lange & Anderson, *supra* note 6.

84. Justin Hughes, *Fair Use Across Time*, 43 UCLA L. REV. (forthcoming 2003). I thank Justin for his many helpful suggestions incorporated herein.

in 1945<sup>85</sup> means that her work would have expired in 1995,<sup>86</sup> except its unpublished status gave it protection through at least December 31, 2002.<sup>87</sup> Congress' later extension of all terms, via the Sonny Bono Copyright Term Extension Act,<sup>88</sup> now protects this work through 2015.<sup>89</sup> No matter what my client does today, there will be no effect on the market for Anne Frank's page during at least the period from its inception in 1940 through 2003. Accordingly, the potential effect on the market (solely during its last twelve years of subsistence) is highly circumscribed, inclining Factor Four in favor of fair use.

Looked at from another perspective, The Anne Frank Foundation in Basel not only has never exploited this work, but does not even possess a single copy of it that it could exploit; the sole original is at the Wiesenthal Center. The Foundation thus has no potential market for the work which could be adversely affected. Again, Factor Four would favor fair use.<sup>90</sup>

Winding back to the third factor, what is the "amount and substantiality of the portion used in relation to the copyrighted work as a whole?"<sup>91</sup> I previously mentioned that the copying was one hundred percent (corresponding to the term "wholesale" in the chart above). But the statute does not refer to percentages; it refers to "amount." The amount of the copying in this case is precisely eighteen words (or sixteen, excluding the salutation, *Beate Henny*). That amount is minuscule. In the nonprecedential way that I am currently proceeding, this factor therefore inclines sharply in favor of fair use.

What about the second factor, looking to the nature of the work? Anne's few words were no more destined for publication than a grocery list.<sup>92</sup> They are, in that sense, no more dear to the copyright core than is a ransom note—something that is technically subject to copyright protection, but which was not written because of the incentive to promote the progress of science and the useful arts.<sup>93</sup> This factor could favor fair use as well.

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85. Historians believe that Anne perished in the typhus epidemic at the Bergen-Belsen Concentration Camp in March 1945.

86. 17 U.S.C. § 302(a) (1976) (amended 1978).

87. 17 U.S.C. § 303(a) (1976) (amended 1978). Failure to publish the work by that date forfeited the option of extending its term until December 31, 2047. *Id.*

88. Pub. L. No. 105-298, 11 Stat. 2827 (1998).

89. See Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173 (Winter/Spring 2003); Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 111 (Winter/Spring 2003).

90. This conclusion is admittedly glib. After all, to the extent that the Center began selling postcards and posters, the Swiss Foundation would have access to something that it itself could exploit. Indeed, even if the Center only displayed the work, the Foundation could send someone to Los Angeles to view it and subsequently sketch it from memory. See *supra* note 81.

91. 17 U.S.C. § 107(3) (2000).

92. EDITOR'S NOTE: When this article was in proof prints, the Wiesenthal Center conveyed to Professor Nimmer information it had just learned about the *poesie album*, indicating that the poem might indeed have been intended for publication (and, what is more, was based on a poem authored by another). For ruminations about this latest twist, see David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 482-83 (Winter/Spring 2003).

93. Leval, *supra* note 24, at 1108.

Finally, we return to the first factor. Considering the *nature* of the work, I cannot get past the fact that its author pleaded “forget me not.” That request affects the *purpose* of the use, to which the first factor adverts. The Wiesenthal Center’s exploitation is designed to preserve the memory of a most poignant victim of the Holocaust. To use copyright law as an instrument to suppress dissemination of her words runs afoul of both the author’s purpose and the work’s nature.<sup>94</sup> From the nonprecedential method just elaborated, the four factors unanimously favor a finding of fair use.

## V

### CONCLUSION

So which is it, fair use or unfair use? I firmly believe the Wiesenthal Center’s potential exploitation of the *poesie album* to be fair. But the problem with the four factors is they are malleable enough to be crafted to fit either point of view.<sup>95</sup> Where does that leave us? The Supreme Court puts it pithily:

Professor [Melville] Nimmer notes: Perhaps no more precise guide can be stated than Joseph McDonald’s clever paraphrase of the Golden Rule: Take not from others to such an extent and in such a manner that you would be resentful if they so took from you. This equitable rule of reason permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.<sup>96</sup>

Father knows best. Although that formulation scarcely resolves concrete cases, it provides the beginning of wisdom<sup>97</sup> by acknowledging that rigid application of set formulae may itself prove inexact. In the end, reliance on the four statutory factors to reach fair use decisions often seems naught but a fairy tale.

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94. This case presents the inverse of the Dead Sea Scrolls case—there, the owner of the one physical artifact containing the historic words tried to use copyright law to keep the world out by avoiding publication; in the instant case, by contrast, the owner of that one artifact is trying to achieve wide-scale dissemination and faces a potential copyright claim in return. See Nimmer, *Dead Sea Scrolls*, *supra* note 80.

95. As to the Supreme Court’s decisions in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, *Harper & Row, Publishers Inc. v. Nation Enterprises*, 471 U.S. 539, and *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569,

The malleability of fair use emerges starkly from the fact that all three cases were overturned at each level of review, two of them by split opinions at the Supreme Court level.

4 NIMMER, *supra* note 1, § 13.05 (footnote omitted).

96. *Harper & Row*, 471 U.S. at 550 n.3(citations and quotations omitted).

97. Cf. *Proverbs* 1:7; *Psalms* 111:10.