

# FAIR USE, THE INTERNET AGE, AND RULIFYING THE BLOGOSPHERE

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## ABSTRACT

*The fair use analysis in copyright law is, at present, a confusing and sometimes contradictory entanglement of four factors whose outcome is not guaranteed until it comes before a court ex post. Despite the four factors being listed as clearly delineated points in § 107, in reality, they substantially overlap and courts have provided contradictory rulings even in the same circuit court. This Article builds on the earlier suggestions of Niva Elkin-Koren and Orit Fischman-Afori in suggesting rulification of fair use in specific creative contexts to better distinguish the legal standards for fair use for the population at large. In particular, this Article grounds this discussion in a case example of individually published online content, broadly termed blogs for the purposes of this paper, finding, by reviewing all fair use decisions on posted online content, that these decisions are primarily decided by evaluating three factors: transformative use, commercial purpose, and market effect. The example of rulifying fair use for blogs should just be the beginning, an example of how the delineation of more concrete fair use rules for different creative mediums would benefit the U.S. population at large.*

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## **I. INTRODUCTION**

Fair use is often one of the few parts of copyright law with which laypeople are familiar. When I guest lectured in a freshman English class at the University of Michigan on the basics of copyright, students did not know that ideas are not copyrightable or that copyrights are automatic. But when they were asked if they had heard of fair use, over half of the hands in the class were raised.

But while fair use has a powerful hold on popular imagination regarding the contours of copyright, the reality is much more complicated. While the balancing test of four factors that is codified in § 107 of Title 17 of the United States Code is challenging enough for law students, even the federal courts have frequently been unable to delineate specific rules to help further the understanding of what qualifies as fair use. Indeed, as will be discussed in the first

part of this Article, courts cannot even decide on whether the first or fourth factor is the most important.<sup>1</sup>

This problem of a muddled fair use standard has only been exacerbated by the advent of new media driven by the Internet. Having been drafted in 1976, the fair use standard in § 107 could not have foreseen the possibilities the Internet would bring, let alone how to address fair use in online content, which is fundamentally different from the traditional uses of copyrighted works in art, printed newspapers and books, and over the airwaves and cable.<sup>2</sup> The rise of the Internet has also brought new dangers to the world of copyright, including copyright trolls who extort payments from all manner of uses of copyrighted works, often ignoring fair use.<sup>3</sup> To better assist the populace understand fair use, this Article suggests the importance of delineating specific fair use rules for different types of media, especially in the widely used space of the Internet. The case study this Article employs is the blog medium, used by everyone from high schoolers to renowned law professors<sup>4</sup> and easily created with free programs from sites

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<sup>1</sup> See *infra* Part II.

<sup>2</sup> See, e.g., Oliver Herzfeld, *Fair Use in the Age of Social Media*, FORBES (May 26, 2016, 9:34 AM), <https://www.forbes.com/sites/oliverherzfeld/2016/05/26/fair-use-in-the-age-of-social-media/#234e67e03300> [<https://perma.cc/5QLP-WFGD>].

<sup>3</sup> See generally Constance Boutsikaris, *The Rise of Copyright Trolls in a Digital Information Economy: New Litigation Business Strategies and Their Impact on Innovation*, 20 COMMLAW CONSPECTUS 391 (2012) (discussing how the proliferation of digital technology has allowed copyright trolls extort payments from various victims).

<sup>4</sup> See, e.g., Kate Sundquist, *Starting Your Own Blog in High School*, COLLEGEVINE (May 20, 2017), <https://blog.collegevine.com/starting-your-own-blog-in-high-school> [<https://perma.cc/D38L-8DMG>]; REASON: THE VOLOKH CONSPIRACY (last visited Mar. 15, 2020), <https://reason.com/volokh> [<https://perma.cc/EBS3-N3FA>].

like WordPress, Wix, and Weebly.<sup>5</sup> With 500 million blogs online in 2020,<sup>6</sup> the blogosphere is massive and much larger than the populations who sell art or write books.

Despite the Eleventh Circuit’s recent repudiation of trying to rulify fair use,<sup>7</sup> this Article follows in the vein of wider case precedent and Niva Elkin-Koren and Orit Fischman-Afori’s 2017 article, which advocated for rulifying fair use in specific creative contexts.<sup>8</sup> This Article builds on Elkin-Koren and Fischman-Afori’s work by arguing that the fair use standard is muddled even among the courts, especially in the context of Internet uses. Like the previous scholarship, it argues that creative citizens would benefit from a delineation of the relevant fair use standards on a platform basis,<sup>9</sup> but it contributes a case study of blogs to demonstrate the feasibility of such an analysis and offer a useful resource on best blog copyright practices.

Part II explains that as § 107 currently stands, the fair use analysis is a confusing and sometimes contradictory entanglement of four factors with no real, guaranteed outcome until the use comes before a court *ex post* the use. In Part III, this Article argues that clarifying this standard, which would make it far easier for people to understand their odds of success under fair use, would take a monumental effort from either the Supreme Court or Congress and complete clarity would almost certainly remain elusive. Part

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<sup>5</sup> See Cat Ellis, *Best Free Blogging Site of 2020*, TECHRADAR.PRO (Mar. 9, 2020), <https://www.techradar.com/news/the-best-free-blogging-sites> [<https://perma.cc/KM7Y-M929>].

<sup>6</sup> *How Many Blogs Are There? We Counted Them All!*, HOSTING TRIBUNAL, <https://hostingtribunal.com/blog/how-many-blogs/#gref> [<https://perma.cc/6DXT-HQSK>] (last visited Mar. 9, 2020).

<sup>7</sup> *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1283 (11th Cir. 2014) (endorsing a “no rulification” policy).

<sup>8</sup> See Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161 (2017); see also *id.* at 186 (discussing wider case precedent that allows for a degree of rulification in fair use).

<sup>9</sup> See *id.* at 198 (noting that rulified fair use would help the rule of law).

IV then discusses a related problem: fair use was first codified in 1976, years before the dawn of the Internet, and thus the statute does not foretell how fair use would be understood in the context of Internet uses. Online content creators could greatly benefit from understanding which practices favor or disfavor fair use, and this Article uses blogs as a demonstrative case study in Part V, illustrating that specific media uses can be delineated in the context of fair use to provide greater clarity for users of copyrighted content. Finally, in Part VI, this Article concludes that the delineation of blog fair use should just be the beginning, and that the delineation of more concrete fair use rules for different electronic and Internet media would benefit the population at large.

## II. THE STATE OF FAIR USE

Under the Copyright Act, fair use is an exception to copyright infringement.<sup>10</sup> Fair use is the copying of copyrighted material for a transformative purpose such as criticism, comment, news reporting, teaching, scholarship, or research.<sup>11</sup> While it is but one of sixteen statutory limitations on copyrights under the Copyright Act of 1976, it is by far the most utilized and most known in popular knowledge.<sup>12</sup> Fair use is a limit on the rights granted to copyright owners, and is the most well-known and flexible limit in the Copyright Act.<sup>13</sup> Fair use advances the purpose of copyright by allowing “others to build freely upon the

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<sup>10</sup> 17 U.S.C. § 107 (2018).

<sup>11</sup> *Id.*; see also Richard Stim, *What Is Fair Use?*, STANFORD UNIVERSITY LIBRARIES, <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use> [https://perma.cc/59U2-SRH5] (last visited Mar. 15, 2020).

<sup>12</sup> 17 U.S.C. §§ 107–122 (2018).

<sup>13</sup> JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 563 (4th ed. 2015).

ideas and information conveyed by a work.”<sup>14</sup> But despite fair use’s central role in copyright law as a statutory limitation on the exclusive rights of the copyright holder, the current state of fair use is muddled and indeed seemingly contradictory.

Fair use has its origins in judge-made law. In the seminal case of *Folsom v. Marsh* in 1841, Justice Story laid out criteria the court should consider when deciding whether a use should be allowed, under what would later be termed the fair use doctrine.<sup>15</sup> Justice Story’s factors were used for the next hundred years before Congress decided to finally codify the factors in the Copyright Act of 1976 under § 107.<sup>16</sup>

The preamble to § 107 lists a number of possible fair uses: “criticism, comment, news reporting, teaching[,] . . . scholarship, [and] research.”<sup>17</sup> To determine if a use is fair, the § 107 fair use test looks at four factors: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality of the portion used; and (4) effect of the use upon the potential market.<sup>18</sup> The legislative history does not provide much more guidance.<sup>19</sup> The analysis has remained rather specific for each new fact pattern, leaving the courts a wide breadth to make their own

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<sup>14</sup> *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 262 (4th Cir. 2019) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991)).

<sup>15</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (“In short, we must often, in deciding questions of this sort, 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.”).

<sup>16</sup> COHEN ET AL., *supra* note 13, at 564.

<sup>17</sup> 17 U.S.C. § 107 (2018).

<sup>18</sup> *Id.*

<sup>19</sup> H.R. REP. NO. 94-1476 (1976) (“[S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”).

determinations.<sup>20</sup> Indeed, the Supreme Court proclaimed, “[n]or 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 purpose of copyright.”<sup>21</sup>

While § 107 states that all four factors should be considered, in reality, courts have placed a particular emphasis on the first and fourth factors under § 107. For the first factor, the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* held that transformative works “lie at the heart of the fair use doctrine” and “the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use.”<sup>22</sup> Even copying an entire work can be fair use as long as that use is transformative,<sup>23</sup> defined as adding “something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>24</sup> The preeminence of the first factor, which also includes looking at commercial use, appears well-founded. Legal scholar Barton Beebe found that in fair use cases from 1978 to 2005, over 90% of the opinions that found that the first factor favored use

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<sup>20</sup> COHEN ET AL., *supra* note 13, at 564.

<sup>21</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

<sup>22</sup> *Id.* at 584. The Supreme Court in *Campbell* pulled from the scholarship of Judge Pierre Leval, who first coined the idea of transformative use. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

<sup>23</sup> See *Campbell*, 510 U.S. at 586–87 (“[T]he extent of permissible copying varies with the purpose and character of use.”); see also *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (copying an entire photograph and including it in a larger work of art); *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18 (1st Cir. 2000) (copying an entire photograph and reproducing it in a news story); *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194 (4th Cir. 1998) (copying an entire manuscript for purposes of preservation and scholarship).

<sup>24</sup> *Campbell*, 510 U.S. at 579.

eventually found fair use.<sup>25</sup> Over 95% of cases that disfavored the first factor did not eventually find fair use.<sup>26</sup>

Many lower courts reflected the Supreme Court's emphasis on transformativeness. In *Cariou v. Prince*, appropriation artist Richard Prince took thirty-five photographs from Patrick Cariou's coffee table book on Rastafarians and created collages from them, added blue lozenges, and inserted pictures of women.<sup>27</sup> The Second Circuit primarily looked at whether Prince's works altered Cariou's originals with "new expression, meaning, or message."<sup>28</sup> Although Cariou's photos were still the core of Prince's work, the Court found the minor additions of a collage, blue lozenges, and women together to have "add[ed] something new," creating an "entirely different aesthetic" and qualifying as transformative.<sup>29</sup> In *Bill Graham Archives v. Dorling Kindersley*, a 480-page Grateful Dead coffee table book used seven copyrighted photographs without a license.<sup>30</sup> The Court determined that because the photos were used for a new purpose—illustrating history—the work was transformative, which was determinative regardless of the other fair use factors.<sup>31</sup>

Recent studies on fair use have been divided on the exact strength of transformative use in a fair use determination, although it is undoubtedly a critical factor. Clark Asay has found that transformative use is eating the fair use world, with both district and appellate courts increasingly using transformative use in their opinions and the outcome of the transformative use question increasingly

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<sup>25</sup> Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PENN. L. REV. 549, 597 (2008).

<sup>26</sup> *Id.*

<sup>27</sup> *Cariou v. Prince*, 714 F.3d 694, 699–703 (2d Cir. 2013).

<sup>28</sup> *Id.* at 706.

<sup>29</sup> *Id.* at 699, 706–08.

<sup>30</sup> *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 607 (2d Cir. 2006).

<sup>31</sup> *See id.* at 615.



being decisive for the overall fair use determination.<sup>32</sup> Yet Jane Ginsburg cautions that this trend towards transformative use dominating fair use is starting to be arrested; transformativeness is being subjected to more critical assessments by courts, and the fourth factor is becoming reinvigorated.<sup>33</sup>

While the cases identified above seem to provide a clear statement that transformative use is the primary factor under the fair use analysis, similarly to Asay’s findings, in other cases, courts have rejected this interpretation and have instead continued to look to the fourth factor—market effect—as the primary indicator of fair use, indicating a closer alignment with Ginsburg’s conclusion. For example, in *Author’s Guild v. Google, Inc.*, the Second Circuit looked primarily to the earlier Supreme Court decision of *Harper & Row Publishers, Inc. v. Nation Enterprises* rather than *Campbell*.<sup>34</sup> In doing so, the Second Circuit affirmed that “harm . . . to the market for, or the value of, the copyright for the original, ‘is undoubtedly the single most important element of fair use.’”<sup>35</sup> Meanwhile, the Court saw *Campbell*’s stress on the first factor as important, but did not necessarily hold it to the same high esteem.<sup>36</sup> The Southern District of New York did the same in *Monster Commc’ns Inc. v. Turner Broad. Sys., Inc.*, holding that “the effect of the infringing use on the market for the original copyrighted

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<sup>32</sup> Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 912–13 (2020).

<sup>33</sup> Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, SINGAPORE J. LEGAL STUD. (forthcoming 2020) (18–35); see also Jane C. Ginsburg, *Fair Use Factor Four Revisited: Valuing the “Value of the Copyrighted Work,”* J. OF THE COPYRIGHT SOC’Y U.S.A. (forthcoming 2020) (for analysis on the reinvigoration of the fourth factor in fair use determinations).

<sup>34</sup> See *Author’s Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015).

<sup>35</sup> *Id.* at 214 (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985)).

<sup>36</sup> See *id.* at 214, 223.

work, is the most important.”<sup>37</sup> These are not outliers. In fact, Barton Beebe’s study found that 36.8% of decisions between 1994 and 2005 did not even mention transformativeness.<sup>38</sup> It is also not a circuit split; the Second Circuit decided *Cariou*, *Bill Graham Archives*, and *Author’s Guild*. Other courts, such as the Western District of Texas and the Northern District of California, have also declared the fourth factor to be the most important.<sup>39</sup>

However, even in *Author’s Guild*, the Court’s final decision actually turned on transformativeness. The Court found that Google Books was fair use, even though the use was commercial and the text was made available, because making the texts searchable was for a “highly convincing transformative purpose.”<sup>40</sup> Yet overall, courts, such as the one in *Author’s Guild*, may be correct that market effect remains the preeminent factor: Barton Beebe’s study found that despite the high correlation between the first factor and a fair use determination, the correlation between the fourth factor and a fair use determination was even higher.<sup>41</sup>

Perhaps the reality is that the fair use factors are not actually as delineated as § 107 might suggest. Transformativeness and commercial use, the primary elements of the first factor of fair use, overlap substantially with market effect. Altering the “expressive content or message” in a transformative way creates a different market, lowering the chance that there would be a negative effect on

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<sup>37</sup> *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 495 (S.D.N.Y. 1996).

<sup>38</sup> Beebe, *supra* note 25, at 605.

<sup>39</sup> *Philpot v. WOS, Inc.*, No. 1:18-CV-339-RP, 2019 WL 1767208, at \*7 (W.D. Tex. Apr. 22, 2019) (reasoning the fourth factor is “the most important of the four”); *Dhillon v. Does 1-10*, No. C 13-01465 SI, 2014 WL 722592, at \*6 (N.D. Cal. Feb. 25, 2014) (citing *Harper & Row* and holding that the final factor is “undoubtedly the single most important element of fair use”).

<sup>40</sup> *Author’s Guild*, 804 F.3d at 219.

<sup>41</sup> Beebe, *supra* note 25, at 597.

the market for the original author.<sup>42</sup> For example, in *Adjimi v. DLT Entm't, Ltd.*, the defendant authored the play *3C*, based on the television series *Three's Company*.<sup>43</sup> In fact, *3C* parodied the original series to make fun of its light-hearted demeanor.<sup>44</sup> Because the focus of the play was so drastically different from the television series, the Southern District of New York determined that the work “poses little risk to the market for the original.”<sup>45</sup> The opposite is also true: the less transformative a work, the more likely there was an effect on the market.<sup>46</sup> Commercial use and harm to the market are also interrelated, with a presumption of harm to the market with commercial uses.<sup>47</sup> In addition, transformative use, while perhaps the primary factor under *Campbell*, is not necessarily always required for a use to be fair.<sup>48</sup>

This analysis is not to say that the second and third factors never matter. In fact, the third factor especially can play an important role in establishing fair use where the use

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<sup>42</sup> See *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1177–78 (9th Cir. 2013) (finding fair use where the band Green Day’s use of an image of a screaming face as a stage backdrop was transformative and did not affect the market).

<sup>43</sup> *Adjimi v. DLT Ent., Ltd.*, 97 F. Supp. 3d 512, 515 (S.D.N.Y. 2015).

<sup>44</sup> *Id.* at 528, 531.

<sup>45</sup> *Id.* at 535.

<sup>46</sup> *Ferdman v. CBS Interactive Inc.*, 342 F. Supp. 3d 515, 542 (S.D.N.Y. 2018) (finding that the posting of an unaltered picture by itself “is a perfect substitute for the intended market”); *Barcroft Media, Ltd. v. Coed Media Group, LLC*, 297 F. Supp. 3d 339, 355 (S.D.N.Y. 2017) (holding that because “CMG displayed the Images for the very purpose for which they were originally intended, its use necessarily ‘usurp[ed]’ the function of the original works in the market.” (citing *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013))).

<sup>47</sup> *Philpot v. WOS, Inc.*, No. 1:18-CV-339-RP, 2019 WL 1767208, at \*6 (W.D. Tex. Apr. 22, 2019).

<sup>48</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576, 579 (1994) (noting that exact copying for classroom use and recording of television shows for later viewing were both examples of fair use despite being minimally transformative).

itself was extremely fleeting, or *de minimis*. For example, in *Sandoval v. New Line Cinema Corp.*, photographs appeared in the background of a movie scene for only approximately one and a half minutes.<sup>49</sup> In fact, the Southern District of New York warned that courts should not focus too much on commercial use, instead looking to transformative use and, critically, the fleeting use of the copyright-protected image in the movie to find fair use.<sup>50</sup> However, in other cases, even having a large amount of material copied did not override transformative use or a lack of effect on the market.<sup>51</sup>

The second factor has been much more directly questioned, with several courts even calling it irrelevant.<sup>52</sup> Yet Barton Beebe did find in his study that the second factor does continue to influence some courts, and that the creative/factual and the published/unpublished work inquiries cannot be entirely written off.<sup>53</sup> Indeed, the second factor is actually the most clearly delineated of the four fair use factors.<sup>54</sup> However, as Associate Register of Copyrights Robert Kasunic argues, rigorous thought and analysis could potentially be used to make the second factor a more essential part of the fair use analysis than its current, more marginal role.<sup>55</sup>

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<sup>49</sup> *Sandoval v. New Line Cinema Corp.*, 973 F. Supp. 409, 410–11 (S.D.N.Y. 1997), *aff'd*, 147 F.3d 215 (2d Cir. 1998).

<sup>50</sup> *See id.* at 414.

<sup>51</sup> *See, e.g., Adjmi v. DLT Ent., Ltd.*, 97 F. Supp. 3d 512, 535 (S.D.N.Y. 2015) (finding that the “play is a highly transformative parody of the television series that, although it appropriates a substantial amount of Three’s Company, is a drastic departure from the original[.]” and is therefore fair use).

<sup>52</sup> Beebe, *supra* note 25, at 610.

<sup>53</sup> *Id.* at 610–15.

<sup>54</sup> Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529, 529 (2008).

<sup>55</sup> *See generally id.*

A recent empirical study of transformative use found that it is rapidly approaching having a controlling effect on the determination of a fair use analysis, but even this has not streamlined fair use for predictability.<sup>56</sup> Furthermore, the first and fourth factors are incredibly difficult to apply due to being so fact-specific.<sup>57</sup> So while U.S. courts have placed an emphasis on the first and fourth factors, all of the fair use factors continue to play some role. In large part, this is due to the extreme flexibility of the factors, which allow courts to apply them in different ways in different cases. While that is beneficial for the courts in allowing maximum flexibility, it is problematic for those using others' copyrighted works when the boundaries of fair use are more amorphous and thus more difficult for a layperson to determine.

### III. REVISIONS TO FAIR USE

These precedents from fair use cases in federal courts across the country show that fair use can be a powerful and effective tool for preserving creative uses. Yet a clearer set of rules would provide good-faith users of copyrighted works with a better understanding of what is allowed under U.S. copyright law without needing a copyright attorney or court's wisdom for every chord of a song used in a new composition or every picture included on a blog.

This wide discretion has allowed courts under the current fair use standard to create varying decisions. In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court held that transformative works "lie at the heart of the fair use doctrine[,]” and “the more transformative the new work, the

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<sup>56</sup> See generally Jiarui Liu, *An Empirical Study of Transformative Use in Copyright Law*, 22 STAN. TECH. L. REV. 163 (2019).

<sup>57</sup> See Asay, Sloan & Sobczak, *supra* note 32, at 954–55, 959, 962 (noting the difficulty in pinning down concrete applications of the first factor (transformative use and commerciality) and the fourth factor (market effect)).

less will be the significance of other factors . . . that may weigh against a finding of fair use.”<sup>58</sup> Yet other courts refused to see the first factor and transformativeness as the key element of the fair use analysis, instead proclaiming that the fourth factor, market effect, is the most significant factor.<sup>59</sup> This is but one example of the wide degree of discretion courts are allowed with fair use. This could be helpful for a sympathetic defendant, but the obfuscated fair use determination process means that even those who are confident of a fair use finding should be concerned that the outcome is far from certain. There have been attempts to delineate particular copyright rules for a particular type of media, such as this Article’s later discussion of fair use in blogs<sup>60</sup> or American University’s Center for Media and Social Impact’s codes of best practices for media such as software, sound recordings, and online videos.<sup>61</sup> However, these are still just guidelines drawing from prior precedent rather than being binding strictures on courts’ fair use analyses.

The fair use factors are hardly as straightforward as they seem, with an equal balancing test proving elusive. Even if the burden is on the plaintiff to prove that the defendant’s conduct is not fair use,<sup>62</sup> the uncertainty is still a

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<sup>58</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

<sup>59</sup> *See, e.g., Author’s Guild v. Google, Inc.*, 804 F.3d 202, 214, 223 (2d Cir. 2015); *Monster Commc’ns, Inc. v. Turner Broad. Sys., Inc.*, 935 F. Supp. 490, 495 (S.D.N.Y. 1996).

<sup>60</sup> *See infra* Part V.

<sup>61</sup> *Codes of Best Practices*, CTR. FOR MEDIA & SOCIAL IMPACT, <https://cmsimpact.org/codes-of-best-practices> [<https://perma.cc/N7ZZ-G5N2>] (last visited Nov. 12, 2019).

<sup>62</sup> Fair use is “not an infringement of copyright,” which implies that it is not a defense. 17 U.S.C. § 107 (2018). If this is the case, the burden is on the plaintiff to show ownership of a valid copyright and unauthorized copying of the copyrighted work. *See Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003); Brief for Universities: The Board of Trustees of the University of Illinois et al. as Amici Curiae supporting Appellees at 20, *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)

danger that plagues the defendant. It could be useful to break down the factors that are of preeminent importance by media sector or use, or perhaps by outcome, to revise § 107 to make the factors and their relative importance more solidified. If the current landscape of copyright fair use cases tells us anything, it is that the other federal courts do not always heed even the Supreme Court. While attorneys debate and grind out in the courtroom what constitutes fair use, those without access to adequate legal representation are left particularly vulnerable to fair use determinations and potentially risk hundreds of thousands of dollars in statutory damages.<sup>63</sup> This is especially true since fair use determinations are highly fact specific and are therefore rarely decided at the motion to dismiss stage, requiring funding to maintain legal costs through to the later stages of litigation.

Considering how critical fair use is to copyright law, better clarity is needed to allow everyone from nonprofit blogs to doctoral students to utilize it as the intended protected right and reach a determination earlier in litigation. As the Supreme Court stated the same year *Campbell* was decided, “[b]ecause copyright law ultimately serves the purpose of enriching the general public through access to

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(No. 12-4547). However, the Supreme Court has indicated that fair use is an affirmative defense, which would shift the burden to be on the defendant. *Campbell*, 510 U.S. at 590 (“fair use is an affirmative defense”). Overall, the question of whether fair use is a defense or not is mired in a complicated mixed question of law and fact. See Lydia Pallas Loren & R. Anthony Reese, *Proving Infringement: Burdens of Proof in Copyright Infringement Litigation*, 23 LEWIS & CLARK L. REV. 621, 674–77 (2019).

<sup>63</sup> See 17 U.S.C. § 412 (2018) (requiring that a copyright is registered within the earlier of three months after publication or one month after the author learns of the infringement for statutory damages and attorney’s fees to be recoverable); *Id.* § 504(c)(1) (requiring between \$750 and \$30,000 in damages per non-willful infringement); *Id.* § 504(c)(2) (allowing up to \$150,000 in damages per willful infringement).

creative works, it is peculiarly important that the [law’s] boundaries . . . be demarcated as clearly as possible.”<sup>64</sup>

Clarifying the fair use standard could make it more accessible to the populace at large and, thus, a more effective shield against unsubstantiated litigation threats. Either the Supreme Court or Congress could break down the four factors into their constituent parts to provide the full range of considerations to everyone. Next, it could try to delineate how many and which factors must be favorable to find fair use. For example, the nonprofit nature of the use strongly favors fair use.<sup>65</sup> Similarly, posting content on a blog that provides further content or a mere sample of the full work is fair use.<sup>66</sup> If the fair use analysis were more straightforward, it would both allow users to more confidently know that they engaged in fair use and also discourage frivolous lawsuits.

However, fair use is a vast swamp, so being able to create strict hard and fast rules may be a Sisyphean task. As Congress recognized back when it first drafted § 107, “[a]lthough the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. . . . [S]ince the doctrine is an

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<sup>64</sup> Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994).

<sup>65</sup> See, e.g., Clark v. Transp. Alts., Inc., 18 Civ. 9985, 2019 WL 1448448, at \*4 (S.D.N.Y. Mar. 18, 2019) (“[U]se of the Photograph for non-commercial purposes — an opinion post on a non-profit organization’s blog — further supports a finding that the first factor cuts in favor of fair use.”); Bell v. Powell, 350 F. Supp. 3d 723, 729 (S.D. Ind. 2018) (finding that since the conference was for a charitable purpose, the inclusion of the photo in the brochure was not commercial use).

<sup>66</sup> See, e.g., Dhillon v. Does 1-10, No. C 13–01465 SI, 2014 WL 722592, at \*5 (N.D. Cal. Feb. 25, 2014) (finding the use of the headshot to be transformative since it was embedded in an article criticizing the subject of the headshot); Righthaven, L.L.C. v. Realty One Grp., Inc., No. 2:10–cv–1036, 2010 WL 4115413, \*2–3 (D. Nev. Oct. 19, 2010) (finding that posting the first eight sentences of an article on a blog and linking to the rest was fair use). Cf. BWP Media USA, Inc. v. Gossip Cop Media, Inc., 196 F. Supp. 3d 395, 405 (S.D.N.Y. 2016) (finding no fair use where the images were used for the same purpose on a blog as the original use).



equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”<sup>67</sup> Although greater clarity may be possible, it is likely that fair use could never be turned into a strictly numerical or predictable test. Even if such a bright-line test was possible, it is unlikely it would age well with the progress of technology. Suggestions to abandon transformative use and retreat to just the four factors enumerated in § 107,<sup>68</sup> even if feasible, would not untangle the knotted morass of fair use, since there are still four moving factors and no bright-line test. When *Campbell* was decided in 1994, blogs and search engines were still rudimentary and were far from the considerations of the Supreme Court in its decision.

Fair use can be and is a useful tool for protecting transformative uses such as blogs against frivolous or hastily filed litigation. However, as it currently stands, the ambiguity of the fair use factors and the extreme discretion allowed to courts make fair use a weakened shield. Instead of proposing a wholesale overhaul of fair use, which would be unlikely to come about and would overturn decades of precedent, this Article will propose taking a media-specific approach to analyzing fair use, especially in light of post-1976 innovations such as the Internet. This rulification approach would promote enhanced certainty and greater adherence to fair use.<sup>69</sup>

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<sup>67</sup> H.R. REP. NO. 94-1476, (1976).

<sup>68</sup> Benjamin Reiser, *Anything You Can Use, I Can Use Better: Examining the Contours of Fair Use as an Affirmative Defense for Theatre Artists, Creators, and Producers*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 873, 912 (2020).

<sup>69</sup> Elkin-Koren & Fischman-Afori, *supra* note 8, at 189–93.

#### IV. THE CHANGING SCENE OF FAIR USE

It has been twenty-four years since fair use was codified in the Copyright Act of 1976. Since that time, much in the landscape of copyright has changed beyond recognition. Undoubtedly the biggest change was the creation of the Internet. While the Internet Protocol was first successfully used in 1976,<sup>70</sup> the same year of the Copyright Act, the real transformation started with the public launch of the World Wide Web in 1991.<sup>71</sup> The rise of new media for creative works and increased dangers of abuse by copyright owners demonstrate that fair use has been undergoing increasingly substantial pressure since 1976.<sup>72</sup>

The four fair use factors codified in § 107, despite stretching back to *Folsom v. Marsh* in 1841, did not envision the panoply of modern innovations that have emerged since, much like other sections of the Copyright Act. For example, the Digital Millennium Copyright Act addressed the emergence of the Internet and liability and takedown procedures for posted online copyrighted content.<sup>73</sup> The Music Modernization Act updated several portions of the Copyright Act relating to music, including a blanket mechanical license for digital phonorecord delivery of a

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<sup>70</sup> Ben Tarnoff, *How the Internet Was Invented*, GUARDIAN (July 15, 2016 7:00 AM), <https://www.theguardian.com/technology/2016/jul/15/how-the-internet-was-invented-1976-arpa-kahn-cerf> [https://perma.cc/65KM-A5QS].

<sup>71</sup> *History of the Web*, WORLD WIDE WEB FOUND., <https://webfoundation.org/about/vision/history-of-the-web> [https://perma.cc/B4LH-FVZQ] (last visited Mar. 9, 2020).

<sup>72</sup> See David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 U.S.F. L. REV. 1, 38-41 (1998); see also Oliver Herzfeld & Marc Aaron Melzer, *Fair Use in the Age of Social Media*, FORBES (May 26, 2016 9:34 AM), <https://www.forbes.com/sites/oliverherzfeld/2016/05/26/fair-use-in-the-age-of-social-media/#6814684c3300> [https://perma.cc/B8BL-S8DC].

<sup>73</sup> Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

musical work for interactive digital music providers such as Spotify, a digital performance right for pre-1972 sound recordings, and revised distribution of sound recording royalties to producers, sound engineers, and mixers.<sup>74</sup>

While the types of media that involved copyright had certainly evolved from 1841 to 1976, such as the advent of broadcasting and cable television,<sup>75</sup> the 1976 Congress could hardly have imagined the range of possible copyrighted work uses in 2020. Indeed, mankind has made enormous technological advancements in the past forty-four years. Almost certainly, the greatest of these for the purposes of copyright is the Internet, which has already shown its enormous impact on the use of copyright through the passage of the previously mentioned Digital Millennium Copyright Act and the Music Modernization Act.<sup>76</sup> The ability to upload, transfer, download, and modify online content has not only vastly increased the number of cases of use of a copyrighted work, but also greatly raised the likelihood that such a use would be found by the copyright owner.<sup>77</sup>

These advancements have also affected the contours of fair use. While fair use was envisioned for physical art, music, literature, and the like, it did not have the ability to predict new uses such as online adaptations, digital editing, or the insertion of content onto webpages. While the first century and a half of fair use is still extremely valuable as precedent, the use of such new media does have a profound

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<sup>74</sup> Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018); *see generally* Todd Larson, Jeremy C. Cain, & Jeremy P. Auster, *Music Licensing Overhaul Signed Into Law*, 30 INTELL. PROP. & TECH. L.J. 7 (Dec. 2018).

<sup>75</sup> *See, e.g.*, Susan C. Greene, *The Cable Television Provisions of the Revised Copyright Act*, 27 CATHOLIC U. L. REV. 263 (1978).

<sup>76</sup> *See supra* notes 70–72 and accompanying text.

<sup>77</sup> *See, e.g.*, PIXSY, <https://www.pixsy.com> [<https://perma.cc/LL9E-3TL6>] (last visited Mar. 9, 2020) (one option for reverse image searches that specifically tailors its services to copyright owners).

effect on the importance of different factors during the fair use analysis.

An additional complication with fair use in the twenty-first century is the rise of the copyright troll. The risk of being found by the copyright owner, or their agent, is generally a positive for copyright law, but troubles arise with copyright trolls. Copyright trolling is where the plaintiff is more interested in gaining income through litigation, or rather the threat of litigation, than actually selling or licensing their work.<sup>78</sup> In general, authors of copyrighted works are motivated to pursue copyright litigation for a number of reasons, including moral rights and perceived financial loss.<sup>79</sup> Yet, in some cases, artists make far more money through their pursuit of copyright litigation than their art itself. For example, Malibu Media filed thousands of copyright infringement suits in 2015-2016, resulting in net profits of several million, far exceeding the profits from licensing their pornographic videos.<sup>80</sup> A photograph or other work may only have a nominal licensing value, but any work, no matter how famous or not, if it is registered in a timely manner, can achieve the same statutory damages,

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<sup>78</sup> Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1108 (2015); see also Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 732 (2013) (defining a copyright troll as “an entity whose business revolves around the systematic legal enforcement of copyrights in which it has acquired a limited ownership interest”). Sag argues that we should not focus on abstract characteristics and status to define a copyright troll, but instead look directly at the conduct. Sag, *supra* note 78, at 1113.

<sup>79</sup> See generally Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2456–78, 2483–84 (2016).

<sup>80</sup> Susan Decker & Christopher Yasiejko, *Porn Purveyors’ Use of Copyright Lawsuits Has Judges Seeing Red*, CLAIMS J. (Aug. 5, 2019), <https://www.claimsjournal.com/news/national/2019/08/05/292355.htm> [<https://perma.cc/HNU8-VXS4>]; Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 578 (2018).

making a work that was not economically viable monetizable through litigation.<sup>81</sup> Frequently, these copyright trolls threaten hundreds to thousands of alleged infringers, hoping that many will settle quickly for a price rather than defend themselves against the trolls' uncertain and often unsubstantiated claims.<sup>82</sup> Not uncommonly, the claims may be dubious, but that does not deter the opportunistic copyright troll from taking advantage of the high potential damages in copyright litigation to achieve a lucrative quick settlement.<sup>83</sup> The rise of image and text searching mechanisms through systems such as Google have given copyright owners and attorneys the ability to find uses of their work, but have also increased the risk of uses being threatened with lawsuits without undergoing a fair use analysis.

The flexibility of fair use, as seen in Part I, becomes much more problematic when online content posters have become the target of poorly substantiated claims that have not adequately examined fair use. Indeed, online blogs have been a frequent target of copyright trolls.<sup>84</sup> Yet their incorporation of copyrighted works can have a strong fair use argument. Scholar Brad Greenberg argues that fair use is an adequate shield against copyright trolls since judges can use it flexibly.<sup>85</sup> Yet that same flexibility is also risky for copyright defendants since even if they have a strong fair use argument, without any definite rules, the court may still decide against them. This is perhaps most concerning because fair use, as it has been interpreted so far by U.S.

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<sup>81</sup> See 17 U.S.C. § 412 (2018) (requiring that a copyright is registered within the earlier of three months after publication or one month after the author learns of the infringement for statutory damages).

<sup>82</sup> Sag, *supra* note 78, at 1108.

<sup>83</sup> *Id.* at 1113–14.

<sup>84</sup> Balganesch, *supra* note 78, at 741–42.

<sup>85</sup> Brad A. Greenberg, *Copyright Trolls and the Common Law*, 100 IOWA L. REV. BULL. 77, 85–86 (2015).

courts, is actually strongly in favor of the sort of uses that are often the targets of copyright trolls.<sup>86</sup> Greater dangers of threatening lawsuits and an unclear fair use standard might have a strong chilling effect on the creation and dissemination of new works, which is the exact opposite of the goal of copyright.<sup>87</sup>

Fair use is a “context-sensitive inquiry,”<sup>88</sup> and we can better delineate fair use factors in relation to specific types of media.<sup>89</sup> Online content has been the greatest and perhaps least predictable media that has emerged since 1976. When the fair use factors were originally codified, the Internet was not yet in existence. Yet today, millions of photos, blogs, and other pieces of online content are posted every day; for example, there are 474,000 new tweets and 69,444 new Instagram posts per minute.<sup>90</sup> With such enormous creative activity, it is vital to understand how fair use operates in the online content space. It is to this space that we now turn.

## V. FAIR USE ON BLOGS: A CASE STUDY

Posted online content in the form of blog posts can be a prime example of utilizing fair use, but the four fair use factors are not applied equally to blog posts as they would

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<sup>86</sup> See, e.g., Michael P. Goodyear, *A Shield or a Solution: Confronting the New Copyright Troll Problem*, 21 TEX. REV. ENT. & SPORTS L. 77, 87–89 (2020).

<sup>87</sup> See Elkin-Koren & Fischman-Afori, *supra* note 8, at 190–91 (discussing chilling due to a lack of fair use rules in the specific contexts of schools and libraries).

<sup>88</sup> *Ferdman v. CBS Interactive, Inc.*, 342 F. Supp. 3d 515, 530 (S.D.N.Y. 2018) (quoting *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)).

<sup>89</sup> See generally Elkin-Koren & Fischman-Afori, *supra* note 8.

<sup>90</sup> Jeff Schultz, *How Much Data Is Created on the Internet Each Day?*, MICRO FOCUS BLOG (Aug. 6, 2019), <https://blog.microfocus.com/how-much-data-is-created-on-the-internet-each-day/#> [<https://perma.cc/R9MK-GV3S>].

be in other media, such as music, video, or physical artwork. Instead, this Article draws specific rules for fair use for this type of media, dissecting the eighteen cases decided before 2020 on posted online content as well as similar cases from related media. This case study of blog posts is meant to serve as an example of the benefits of delineating fair use by specific media, especially media in which there are frequent attempts at fair use of copyrighted works.

The context of blogs is especially important to understand as blogs are a common and easily accessible medium,<sup>91</sup> and they are especially at risk of lawsuits due to the ease of searching their content through online search engines such as Google.<sup>92</sup> The rise of blogging platforms has allowed anyone with access to the Internet the ability to start posting content to a blog.<sup>93</sup> This ease of access, however, means that budding writers and designers unfamiliar with copyright are even more at risk for violating copyright law by not knowing where the fair use lines are drawn. The ability for bona fide and copyright troll owners to easily find uses of their works also raises the chance of a misunderstanding of fair use, turning a writing hobby into a costly and litigious nightmare.

Based on the analysis in Part I, we can attempt to draw a few preliminary hypotheses. By using the original unaltered work in a new context or for a new purpose, the work is at the very least transformative, which is the

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<sup>91</sup> See Ellis, *supra* note 5 (discussing the free platforms for creating a blog); *How Many Blogs Are There?*, *supra* note 6 (finding that there are 500 million blogs online in 2020).

<sup>92</sup> See, e.g., *Find Related Images with Reverse Image Search*, GOOGLE, <https://support.google.com/websearch/answer/1325808?co=GENIE.Platform%3DAndroid&hl=en> [<https://perma.cc/HRU5-3VBA>] (last visited Mar. 9, 2020).

<sup>93</sup> See Brenda Barron, *How Blogging Began: The Fascinating History of a Cultural Phenomenon*, BLOGGING.COM (April 3, 2020), <https://blogging.com/history> [<https://perma.cc/T4UC-5KAP>].

overarching factor in a fair use analysis.<sup>94</sup> Commercial use, at least nominally, is a less important factor in determining fair use, as is the effect on the market, because transformative use is the key factor in fair use determinations,<sup>95</sup> although all factors can play their role in the fair use analysis. For example, in perhaps the quintessential nonprofit blog case, the Eleventh Circuit found that the use of a photograph on a blog constituted fair use where the author sought to educate others, made no money from the use, and transformed the photograph by adding her own commentary to the post.<sup>96</sup>

To better delineate fair use for blogs and posted online content in general, I reviewed the eighteen judicial opinions that have been written on fair use and posted online content.<sup>97</sup> In sixteen out of eighteen cases, the analysis

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<sup>94</sup> See *supra* Part II.

<sup>95</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (transformative works “lie at the heart of the fair use doctrine[.]” and “the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use”).

<sup>96</sup> *Katz v. Google Inc.*, 802 F.3d 1178, 1182–84 (11th Cir. 2015). It is important to note that § 107 considers the commercial nature of an act, not the entity itself. So, if a nonprofit was using a copyrighted photo for a calendar it is selling for a fundraiser, that act would likely be considered commercial even if the nonprofit itself is not.

<sup>97</sup> See *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723 (9th Cir. 2019); *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255 (4th Cir. 2019); *Katz*, 802 F.3d 1178; *Swatch Group Mgmt. Servs. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24 (1st Cir. 2000); *Yang v. Mic Network, Inc.*, 405 F. Supp. 3d 537 (S.D.N.Y. 2019); *Philpot v. WOS, Inc.*, No. 1:18-CV-339-RP, 2019 WL 1767208 (W.D. Tex. Apr. 22, 2019); *Clark v. Transp. Alts., Inc.*, 18 Civ. 9985, 2019 WL 1448448 (S.D.N.Y. Mar. 18, 2019); *Ferdman v. CBS Interactive, Inc.*, 342 F. Supp. 3d 515 (S.D.N.Y. 2018); *Otto v. Hearst Commc’ns, Inc.*, 345 F. Supp. 3d 412 (S.D.N.Y. 2018); *Barcroft Media, Ltd. V. Coed Media Group, LLC*, 297 F. Supp. 3d 339 (S.D.N.Y. 2017); *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395 (S.D.N.Y. 2016); *N. Jersey Media Grp., Inc. v. Pirro*, 74 F. Supp. 3d 605 (S.D.N.Y. 2015); *Dhillon v. Does 1-10*, No. C 13–01465, 2014



turned primarily on the first or fourth factors, or both.<sup>98</sup> In just two cases were all four factors found to be against fair use.<sup>99</sup> Meanwhile, as noted by the Southern District of New York, the second factor in the fair use analysis “has rarely

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WL 722592 (N.D. Cal. Feb. 25, 2014); *Righthaven, L.L.C. v. Jama*, No. 2:10-CV-1322, 2011 WL 1541613 (D. Nev. Apr. 22, 2011); *Righthaven, L.L.C. v. Realty One Grp., Inc.*, No. 2:10-cv-1036, 2010 WL 4115413 (D. Nev. Oct. 19, 2010); *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, 553 F. Supp. 2d 680 (N.D. Tex. 2008); *Wilen v. Alt. Media Net, Inc.*, 03CIV2524, 2005 WL 167589 (S.D.N.Y. Jan. 26, 2005).

<sup>98</sup> *Katz*, 802 F.3d at 1184 (finding that the first, second, and fourth factors weighed in favor of fair use); *Swatch Group*, 756 F.3d at 92 (finding that the first, second, and fourth factors favored fair use); *Nunez*, 235 F.3d at 25 (finding that the first, second, and fourth factors weighed in favor of fair use); *Yang*, 405 F. Supp. 3d at 548 (S.D.N.Y. 2019) (finding that transformativeness, the second factor, and the fourth factor favored fair use); *Philpot*, 2019 WL 1767208, at \*5–7 (finding that transformativeness, the second factor, and the fourth factor favored fair use); *Clark*, 2019 WL 1448448, at \*4 (finding that the first and fourth factors favor fair use, but noting that the second factor barely matters); *Ferdman*, 342 F. Supp. 3d at 542 (determining that the first and fourth factors weighed against fair use for the Gallery Article, but that the first factor was enough with the Holland Article to deny summary judgment and give the fair use question to the jury); *Otto*, 345 F. Supp. 3d at 433 (finding that the first, third, and fourth factors weigh against fair use); *Barcroft Media*, 297 F. Supp. 3d at 355 (finding that the first, third, and fourth factors weigh against fair use); *BWP Media*, 196 F. Supp. 3d at 410 (finding that the first, third, and fourth factors weigh against a finding of fair use); *N. Jersey Media Grp.*, 74 F. Supp. 3d at 623 (finding that the transformativeness element of the first factor and the fourth factor weighed against fair use); *Dhillon*, 2014 WL 722592, at \*5–6 (holding that transformativeness, the second factor, and the fourth factor weigh in favor of fair use); *Righthaven*, 2011 WL 1541613, at \*5 (finding the first, second, and fourth factors to favor fair use); *Righthaven*, 2010 WL 4115413, at \*2–3 (finding that the second, third, and fourth factors favor fair use); *Super Future Equities*, 553 F. Supp. 2d at 701 (finding that the second and fourth factors weighed in favor of fair use); *Wilen*, 2005 WL 167589, at \*4 (finding on the basis of transformativeness alone that there was no fair use).

<sup>99</sup> *VHT*, 918 F.3d at 744; *Brammer*, 922 F.3d at 269.

played a significant role in the determination of a fair use dispute.”<sup>100</sup> The third factor is also usually inconsequential for the fair use analysis of posted online media. Out of the eighteen cases, thirteen used the entire work, and four others were only minimally cropped.<sup>101</sup> This signals that the use of content online is almost always the same: used in its entirety or minimally altered. Furthermore, when the entire work was used, the Court instead referred to the purpose of the use, the first factor.<sup>102</sup> Where the entire work was used reasonably in light of the purpose of the use, the third factor was neutral and did not affect the outcome of the fair use analysis.<sup>103</sup> Using an entire photograph matters less than

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<sup>100</sup> *Clark*, 2019 WL 1448448, at \*4 (quoting *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d Cir. 2015)); *see also Ferdman*, 342 F. Supp. 3d at 538 (quoting *Fox News Network v. Tveyes, Inc.*, 883 F.3d 169, 178 (2d Cir. 2018)) (stating the same); *Otto*, 345 F. Supp. 3d at 430 (quoting *On Davis v. The Gap, Inc.*, 246 F.3d 152, 175 (2d Cir. 2001)) (stating the same); *BWP Media*, 196 F. Supp. 3d at 409 (second factor is “rarely found to be determinative” (quoting *Arrow Prods., LTD v. Weinstein Co. LLC*, 4 F. Supp. 3d 359, 371 (S.D.N.Y. 2014))); *N. Jersey Media Grp.*, 74 F. Supp. 3d at 620 (stating the same).

<sup>101</sup> The lone exception was *Righthaven*, 2010 WL 4115413, at \*2, where just eight out of thirty sentences were copied.

<sup>102</sup> *Katz*, 802 F.3d at 1184; *Swatch Group*, 756 F.3d at 90; *Ferdman*, 342 F. Supp. 3d at 539–40; *Super Future Equities*, 553 F. Supp. 2d at 699–700.

<sup>103</sup> *Katz*, 802 F.3d at 1184 (finding that using any less of the image “would have made the picture useless to [the defendant’s] story” (quoting *Nunez*, 235 F.3d at 24)); *Swatch Group*, 756 F.3d at 90 (finding that the third factor did not favor either side); *Nunez*, 235 F.3d at 24 (holding that the third factor is of “little consequence” because although the full picture was copied, it would have been useless to the purpose if less was copied); *Yang*, 405 F. Supp. 3d at 547 (stating that due to being necessary for the purpose, copying all of the expression weighed minimally in the fair use analysis); *Clark*, 2019 WL 1448448, at \*4 (finding that although the use reproduced the entire photograph, it was “reasonable in relation to the purpose of the copying” (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994))); *Ferdman*, 342 F. Supp. 3d at 539–40 (finding that “no more of the works were taken than necessary” (quoting *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104,

using the entire work in a different medium, as the use needs the full picture to preserve the meaning.<sup>104</sup>

For the purposes of fair use on blogs, there are really three primary factors to consider in determining fair use. The first factor—purpose and character of work—is really two factors: “(1) whether the use serves a nonprofit educational purpose, as opposed to a commercial purpose; and (2) the degree to which the work is a transformative use.”<sup>105</sup> As a general rule, “[a] finding of a transformative nature and a nonprofit purpose support a finding of fair use.”<sup>106</sup> The final factor for blogs is the fourth factor in the fair use analysis under § 107, market effect.<sup>107</sup>

### ***A. Transformative Use***

The primary indicator of fair use under *Campbell* is transformativeness. “[T]he use of an image solely to present the content of that image” is not transformative.<sup>108</sup> In other words, adding an image to a blog simply to make it more interesting is not fair use, while actually commenting on it,

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110 (2d Cir. 1998)); *N. Jersey Media Grp.*, 74 F. Supp. 3d at 621; *Dhillon*, 2014 WL 722592, at \*5 (finding that the third factor was neutral); *Righthaven*, 2011 WL 1541613, at \*3–4.

<sup>104</sup> *Ferdman*, 342 F. Supp. 3d at 539 (quoting *N. Jersey Media Grp.*, 74 F. Supp. 3d at 621).

<sup>105</sup> *Katz*, 802 F.3d at 1182 (quoting *Peter Letterese & Assocs., Inc. v. World Inst. Scientology Enter.*, 533 F.3d 1287, 1309 (11th Cir. 2008)).

<sup>106</sup> *Super Future Equities*, 553 F. Supp. 2d at 697 (citing *Campbell*, 510 U.S. at 578–85).

<sup>107</sup> *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165, 1168 (9th Cir. 2007) (holding that the use “did not harm the photographer’s ability to sell or license his full-sized images, thus favoring fair use” (citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821–22 (9th Cir. 2003))).

<sup>108</sup> *Ferdman*, 342 F. Supp. 3d at 534, 542 (“a wholly untransformative and unaltered copy of Plaintiff’s photographs [weighs strongly against fair use]” (citing *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 407 (S.D.N.Y. 2016))).

criticizing it, or using it for another purpose are transformative. In *Ferdman v. CBS Interactive Inc.*, the Southern District of New York found an article that just contained copyrighted photographs completely untransformative.<sup>109</sup> On the other hand, it found another article that contained a photo and commentary about it potentially transformative.<sup>110</sup> Similarly, in *Barcroft Media Ltd. v. Coed Media Group, LLC*, the defendant displayed the images in the exact same way and for the exact same purpose as the original, so the use was found to not be transformative.<sup>111</sup> In *Brammer v. Violent Hues Prods., LLC*, the mere inclusion of a photograph in a new context was not enough; otherwise, “virtually all illustrative uses of photography would qualify as transformative.”<sup>112</sup> The *Brammer* Court held that using a photograph expressly for its content, rather than for a new purpose, such as data organization or historical preservation, was not transformative.<sup>113</sup> The use of a work needs to say something new.<sup>114</sup> After all, fair use “is not designed to protect lazy appropriators.”<sup>115</sup>

To determine transformativeness, courts look at whether the work is used for a different purpose or in a different context. Using the copyrighted work for a different purpose, such as “criticism, comment, news reporting,

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<sup>109</sup> *Id.* at 534.

<sup>110</sup> *Id.* However, the amount of commentary still bordered on just announcing that photographs of the filming took place, so the decision went to the jury to determine whether or not the commentary was sufficiently transformative. *Id.* at 536–37.

<sup>111</sup> *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 351–52 (S.D.N.Y. 2017).

<sup>112</sup> *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 264 (4th Cir. 2019).

<sup>113</sup> *Id.* at 264.

<sup>114</sup> *Id.* at 269.

<sup>115</sup> *Id.* at 262 (quoting *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 759 (7th Cir. 2014)).

teaching, scholarship, or research,” is transformative.<sup>116</sup> This use must alter the original with “new expression, meaning, or message” to be transformative.<sup>117</sup> Even when the copyrighted work is the core of the use, manifesting an “entirely different aesthetic” or adding “something new” is enough to be transformative.<sup>118</sup> For example, in *Campbell*, the Supreme Court found that a parody of Roy Orbison’s song *Pretty Woman* “could be perceived as commenting on the original or criticizing it.”<sup>119</sup> Using a work as part of a much larger piece also militates in favor of transformative use.<sup>120</sup>

In this determination of transformativeness, courts have also looked at the purpose of the original work. In *Righthaven, L.L.C. v. Jama*, the District of Nevada was dismissive of copyright trolls and looked at the purpose of the current copyright owner instead of the original creator.<sup>121</sup> Because the owner was now a copyright troll that only wanted to use the copyright to file infringement suits, the Court used litigation as the purpose for evaluating transformativeness of subsequent uses.<sup>122</sup> The holding in

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<sup>116</sup> 17 U.S.C. § 107 (2018); *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 609–10 (2d Cir. 2006) (holding that using former advertisements as historical photographs in a biography was transformative).

<sup>117</sup> *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>118</sup> *Id.* at 706–08 (citing *Leibovitz, v. Paramount Pictures Corp.*, 137 F.3d 109, 114 (2d Cir. 1998)).

<sup>119</sup> *Campbell*, 510 U.S. at 583.

<sup>120</sup> *Bell v. Powell*, 350 F. Supp. 3d 723, 729–30 (S.D. Ind. 2018) (holding that the inclusion of a photograph in a brochure about sexual assault was fair use); *Bill Graham*, 448 F.3d at 607 (holding that the use of seven photographs in a coffee table book of 2000 photographs was fair use).

<sup>121</sup> *Righthaven, L.L.C. v. Jama*, No. 2:10-CV-1322, 2011 WL 1541613, at \*5 (D. Nev. Apr. 22, 2011).

<sup>122</sup> *Id.* (finding a different, transformative purpose from engaging in litigation).

*Righthaven* is an especially helpful precedent in countering copyright trolls.

The Eleventh Circuit found transformative use where the surrounding commentary in the blog posts changed the context in which the copyrighted work was originally used.<sup>123</sup> “Courts often find such uses [of faithfully reproduced works] transformative by emphasizing the altered purpose or context of the work, as evidenced by the surrounding commentary or criticism[,]” which is frequently the case with news and information sources.<sup>124</sup> For example, using a headshot was transformative when it was embedded in an article criticizing the subject of the headshot, rather than using the headshot for identification, as was the purpose of the original use.<sup>125</sup> On the other hand, the Southern District of New York rejected “allow[ing] media companies to steal personal images and benefit from the fair use defense by simply inserting the photo in an article which only recites factual information.”<sup>126</sup> As that Court noted, “the use of an image solely to illustrate the content of that image, in a commercial capacity, has yet to be found as fair use.”<sup>127</sup> Instead of looking solely at new context, the Fourth Circuit looked at whether this new use would “generate a societal benefit by imbuing the original with new function or meaning.”<sup>128</sup> In *Brammer*, it found that the mere placement

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<sup>123</sup> *Katz v. Google Inc.*, 802 F.3d 1178, 1182–83 (11th Cir. 2015).

<sup>124</sup> *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014).

<sup>125</sup> *Dhillon v. Does 1-10*, No. C 13–01465, 2014 WL 722592, at \*5 (N.D. Cal. Feb. 25, 2014) (noting that the headshot was initially used for identification instead of criticism).

<sup>126</sup> *Otto v. Hearst Commc’ns, Inc.*, 345 F. Supp. 3d 412, 428 (S.D.N.Y. 2018).

<sup>127</sup> *Id.* (citing *BWP Media USA, Inc. v. Gossip Cop Media, Inc.*, 196 F. Supp. 3d 395, 407 (S.D.N.Y. 2016)).

<sup>128</sup> *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 263 (4th Cir. 2019) (citing *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007)).

of a photograph on a webpage for tourists, without more, was not transformative.<sup>129</sup>

While surrounding commentary can make the use transformative, merely making small changes to the work does not. For example, if willfully concealing the copyright notice on a reproduced work is the only change, the work is not fair use.<sup>130</sup> Similarly, merely changing the size of the picture and adding a hashtag are too minimal of changes to rise to the requisite level of transformiveness set out by the Second Circuit in *Cariou*.<sup>131</sup> In one case, these mere cosmetic changes added no new expression and the aesthetic remained the same, so the Court found no fair use.<sup>132</sup> Adding a photo with no actual engagement with the photo in a blog weighs strongly against fair use.<sup>133</sup> Similarly, putting original content in a data dump does not qualify as transformative.<sup>134</sup>

## ***B. Commercial Purpose***

The use of a photograph on a nonprofit or educational blog also supports fair use. The use of a work on a “wholly noncommercial blog” that does not request

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<sup>129</sup> *Id.* at 263–64.

<sup>130</sup> *Wilen v. Alt. Media Net, Inc.*, No. 03CIV2524, 2005 WL 167589, at \*4 (S.D.N.Y. Jan. 26, 2005).

<sup>131</sup> *N. Jersey Media Grp., Inc. v. Pirro*, 74 F. Supp. 3d 605, 615–6 (S.D.N.Y. 2015); *see also Brammer*, 922 F.3d at 263 (holding that mere cropping of a photograph does not make it transformative).

<sup>132</sup> *N. Jersey Media Grp.*, 74 F. Supp. 3d. at 616–17.

<sup>133</sup> *Ferdman v. CBS Interactive Inc.*, 342 F. Supp. 3d 515, 534, 542 (S.D.N.Y. 2018) (“[A] wholly untransformative and unaltered copy of Plaintiff’s photographs [weighs strongly against fair use.]” (citing *BWP Media USA, Inc v. Gossip Cop Media, Inc.*, 196 F.Supp.3d 395, 407 (S.D.N.Y. 2016))).

<sup>134</sup> *Barcroft Media, Ltd. V. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 352–53 (S.D.N.Y. 2017).

payment favors a finding of fair use.<sup>135</sup> Using a photograph on a blog for an educational purpose where no money is derived from the use cuts in favor of fair use.<sup>136</sup> Using a work for a charitable or public interest purpose also cuts in favor of fair use.<sup>137</sup>

“For a commercial use to weigh heavily against a finding of fair use, it must involve more than simply publication in a profit-making venture,” such as publishing photographs on the front page of a newspaper to solicit purchases.<sup>138</sup> In *Kelly v. Arriba Soft Corp.*, the Ninth Circuit drew a distinction between directly using a copyrighted work to gain income through self-promotion or sale—which militated against a finding of fair use—and merely including photographs in a search or blog, because “it was more incidental and less exploitative in nature than more traditional types of commercial use.”<sup>139</sup>

It is important to note that receiving advertising revenue for the posted content is a commercial use.<sup>140</sup> However, advertising revenue, while it weighs against fair use, is not dispositive.<sup>141</sup> One factor is determining what

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<sup>135</sup> *Dhillon v. Does 1-10*, No. C 13–01465, 2014 WL 722592, at \*1, 4 (N.D. Cal. Feb. 25, 2014) (finding fair use where a non-commercial blog published a headshot in an article about the subject of the headshot).

<sup>136</sup> *Katz v. Google Inc.*, 802 F.3d 1178, 1182 (11th Cir. 2015) (finding that the use of a photograph on a blog was educational and non-commercial since no money was made from the post); *Clark v. Transp. Alts., Inc.*, No. 18 Civ. 9985, 2019 WL 1448448, at \*4 (S.D.N.Y. Mar. 18, 2019) (finding that an opinion post on a non-profit organizations’ blog was non-commercial and weighed in favor of fair use).

<sup>137</sup> *Bell v. Powell*, 350 F. Supp. 3d 723, 728–30 (S.D. Ind. 2018) (finding that the use of a photograph in a brochure about professional networking to reduce sexual assault was fair use).

<sup>138</sup> *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 22 (1st Cir. 2000).

<sup>139</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

<sup>140</sup> *Otto v. Hearst Commc’ns, Inc.*, 345 F. Supp. 3d 412, 429 (S.D.N.Y. 2018).

<sup>141</sup> *Philpot v. WOS, Inc.*, No. 1:18-CV-339-RP, 2019 WL 1767208, at \*4 (W.D. Tex. Apr. 22, 2019) (holding that a transformative purpose can



exactly is driving the advertising revenue, which is a complicated and costly determination.<sup>142</sup> On the other hand, the purpose of building personal reputation alone is not a commercial use.<sup>143</sup>

A use does not have to generate direct revenue or include advertising, however, to be a commercial use. Instead, courts ask “whether the use was exploitative, in that others usually pay to engage in similar conduct.”<sup>144</sup> With blogs, it is customary for a commercial enterprise to buy licenses to use stock photography.<sup>145</sup> Since a commercial market exists for stock imagery, a commercial enterprise’s failure to pay the customary licensing fee weighs against a finding of fair use.<sup>146</sup>

### **C. Market Effect**

If the publication has a minimal effect on the original author’s photography business, it weighs in favor of fair

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outweigh advertising revenue); *see also* *Ferdman v. CBS Interactive, Inc.*, 342 F. Supp. 3d 515, 537 (S.D.N.Y. 2018) (noting that the commercial nature of the use cannot, by itself, be dispositive (quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004))).

<sup>142</sup> *See Philpot*, 2019 WL 1767208, at \*4.

<sup>143</sup> *Super Future Equities, Inc. v. Wells Fargo Bank Minn., N.A.*, 553 F. Supp. 2d 680, 698 (N.D. Tex. 2008) (“If mere recognition by one’s peers constituted ‘personal profit’ to defeat a finding of a noncommercial use, courts would seldom find any criticism fair use and much valuable criticism would be discouraged.” (quoting *Religious Tech. Ctr. v. Netcom On-Line Commc’ns Servs., Inc.*, 923 F. Supp. 1231, 1244 (N.D. Cal. 1995))).

<sup>144</sup> *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 265 (4th Cir. 2019).

<sup>145</sup> *See id.* (citing Eric E. Johnson, *The Economics and Sociality of Sharing Intellectual Property Rights*, 94 B.U.L. REV. 1935, 1962-72 (2014)).

<sup>146</sup> *Id.*

use.<sup>147</sup> Where, on the other hand, the “[d]efendant’s use of these photographs is a perfect substitute for the intended market,” this factor weighs against fair use.<sup>148</sup>

The plaintiff must prove that there is a tangible detrimental effect on the copyright owner’s market for the copyrighted work; there does not have to be an actual, calculable effect.<sup>149</sup> The Southern District of Indiana dismissed the existence of actual market effect where the assertion was “highly speculative.”<sup>150</sup> This can be shown by demonstrating that the owner has “[n]ever sought or received a licensing fee [for the image] from anyone at any time.”<sup>151</sup> In addition, a mere willingness to charge for the use at issue in litigation does not win the market effect element.<sup>152</sup> Being used for the same purpose shows that the defendant usurped the market,<sup>153</sup> but so does being used for a related, derivative

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<sup>147</sup> *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 21–22 (1st Cir. 2000) (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

<sup>148</sup> *Ferdman v. CBS Interactive Inc.*, 342 F. Supp. 3d 515, 534, 542 (S.D.N.Y. 2018) (citing *BWP Media USA, Inc v. Gossip Cop Media, Inc.*, 196 F.Supp.3d 395, 407 (S.D.N.Y. 2016)).

<sup>149</sup> *Campbell*, 510 U.S. at 590 (articulating that the court must consider “whether unrestricted and widespread conduct of the sort engaged in by the defendant. . . would result in a substantially adverse impact on the potential market” (quoting 3 M. NIMMER & D. NIMMER, *Nimmer on Copyright* § 13.05(A)(4), p.13-102.61 (1993))).

<sup>150</sup> *Bell v. Powell*, 350 F. Supp. 3d 723, 729 (S.D. Ind. 2018).

<sup>151</sup> *Dhillon v. Does 1-10*, No. C 13–01465, 2014 WL 722592, at \*6 (N.D. Cal. Feb. 25, 2014).

<sup>152</sup> *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 615 (2d Cir. 2006) (“A publisher’s willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images.”).

<sup>153</sup> *Barcroft Media, Ltd. v. Coed Media Group, LLC*, 297 F. Supp. 3d 339, 355 (S.D.N.Y. 2017); *see also* *Brammer v. Violent Hues Prods., LLC*, 922 F.3d 255, 268 (4th Cir. 2019) (noting that since the heart of the work was copied, the plaintiff “need not demonstrate that the licensing market for his Photo would be depressed” if the defendant’s use became widespread).

market.<sup>154</sup> Being a commercial use creates a presumption of harm to the market, but the defendant can rebut this presumption by showing that there was no actual market.<sup>155</sup>

A notable example for the blog context is that excerpting from publicly available documents generally does not harm the market. For example, the District of Nevada found that posting the first few lines of an article and linking to the full original article did not dilute the market, even though it was a commercial blog.<sup>156</sup>

#### ***D. Overall Approach to Fair Use on Blogs***

Having surveyed the body of existing case law on copyright cases related to blogs, we can now draw several important rules from this analysis for blogs and fair use.

First, the second factor has been actively deemed insubstantial by courts.<sup>157</sup> But the third factor, despite not being vocally lambasted like the second, is also insignificant in blog fair use cases.<sup>158</sup> The overriding focus of the fair use analysis for blogs then is on the first and fourth factors.

For clarity, it is valuable to break the first factor into two components: transformativeness and commerciality. The key aspect of transformativeness for blogs is that copyrighted content cannot be included just for its aesthetic appeal; the blog must comment on or address it or adapt it in

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<sup>154</sup> *Campbell*, 510 U.S. at 590 (“The enquiry ‘must take account not only of harm to the original but also of harm to the market for derivative works.’” (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985))).

<sup>155</sup> *Philpot v. WOS, Inc.*, No. 1:18-CV-339-RP, 2019 WL 1767208, at \*6–7 (W.D. Tex. Apr. 22, 2019) (finding that the Defendant introduced substantial evidence that there was no market for the Plaintiff’s photographs despite being a commercial use).

<sup>156</sup> *Righthaven, L.L.C. v. Realty One Grp., Inc.*, No. 2:10–cv–1036, 2010 WL 4115413, at \*2–3 (D. Nev. Oct. 19, 2010) (finding fair use).

<sup>157</sup> See *supra* note 98 and accompanying text.

<sup>158</sup> See *supra* note 98 and accompanying text.

a way that makes it something new.<sup>159</sup> One way of doing this is to use the work for a different purpose than the original work or change the surrounding context of the work by using the larger blog for a different purpose, even if the copyrighted work is being used in the same way.<sup>160</sup> Surrounding content directly addressing the copyrighted work is perhaps the most effective way to have the blog post qualify as fair use, although this cannot be *de minimis*; there must be actual engagement with the photo.<sup>161</sup>

The commercial aspect of the first fair use factor in the context of blogs draws a line that favors free, noncommercial blogs, and weighs against blogs that charge for access.<sup>162</sup> Intangible benefits such as building personal reputation do not count against a finding of fair use, and although advertising revenue does count, it is not dispositive since some advertising revenue needs to be driven by the use.<sup>163</sup> However, the mere inclusion of a copyrighted work in a blog lowers the strength of its commercial nature, since it is usually derivative to the larger content of an article, but could be more commercial if it is the primary part of the post.<sup>164</sup> On the other hand, courts have found that where the copyrighted work could have been licensed, the use should be considered a commercial use.<sup>165</sup>

The fourth factor, market effect, is very similar for blogs and other types of more traditional media. If the use is for the same or a derivative market purpose, it is seen as weighing against fair use.<sup>166</sup> However, related but non-

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<sup>159</sup> See *supra* Part V(A).

<sup>160</sup> See *supra* Part V(A).

<sup>161</sup> See *supra* Part V(A).

<sup>162</sup> See *supra* Part V(B).

<sup>163</sup> See *supra* Part V(B).

<sup>164</sup> See *supra* Part V(B).

<sup>165</sup> See *supra* Part V(B).

<sup>166</sup> See *supra* Part V(C).

harmful uses, such as excerpting an article in a blog and linking to the full article, do not weigh against fair use.<sup>167</sup>

Finally, the three factors of transformativeness, commerciality, and market effect must be weighed together. This is by far the most opaque part of the fair use determination, but transformativeness and market effect appears to predominate in line with the broader fair use dispute about the preeminence of these two factors.<sup>168</sup> While the exact outcome of any fair use case is still subjective, especially in regards to weighing the factors, the above conclusions from case precedent helps elucidate what conduct on blogs aligns with or against fair use.

## VI. CONCLUSION

Elkin-Koren and Fischman-Afori's work started the conversation on the importance of clearer rules for fair use. This Article continued that conversation, focusing especially on the importance of delineating rules for fair use for specific online media. While this Article delineated such rules for the important fair use media of blogs, this should not be the end of the conversation. Given the complex, sometimes contradictory, and often subjective state of fair use, such delineation of rules benefits the courts and creative persons, allowing for a more straightforward path for fair use in the digital age built on the precedents of both bygone eras and the nascent twenty-first century.

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<sup>167</sup> See *supra* Part V(C).

<sup>168</sup> See *supra* Part I.