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Fair Use in the Information Age

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ABSTRACT

The application of the fair use doctrine to services which provide and associate information about a work with the work itself has proved to be an enigma. Even since Judge Leval's seminal 1990 article, circuit courts have applied precedent to a new paradigm of available information inconsistently. In particular, the Second Circuit's ruling in *Fox News v. TVEyes* represents a subtle step backward from that circuit's progressive rulings in *Authors Guild v. Google* and *Authors Guild v. HathiTrust*. With little recent Supreme Court jurisprudence on fair use, and no rulings on critical uses of content made available by third party services such as TVEyes and Google Books, the *TVEyes* decision provides a perfect opportunity for the Supreme Court to refine the fair use framework in this context. This article argues that the Supreme Court ought to accept *TVEyes'* petition for certiorari in order adopt what the author terms the "broad view" of fair use that the Second Circuit used in both *Google Books and HathiTrust.* The broad view of fair use appropriately balances the intellectual property rights provided under copyright law with incentivizing creative expression by both extending the market-harm rule in *Campbell v. Acuff-Rose* to information about a work and finding transformative use where the work or how it is accessed is transformed.

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I. INTRODUCTION

[1] Fair use has long engendered debate over its scope, application, and place within copyright law. Fair use is predicated on the belief that creators must have property rights to incentivize development, but the public must retain the right to make certain uses of the work to fully realize the creative vision of copyright. The rights retained against the copyright holder are strongest when the proposed use of the work is different from that which is copyrighted—the alleged fair use fundamentally changes: the character of the work (such as in parody), changes how the work is experienced (such as by time-shifting), or brings additional functionality and information to the work itself (such as the ability to search the text of a work).

[2] In recent years, courts have begun to see a number of challenges to services which provide a new way to use, understand, and access information about copyrighted works.[1] In particular, several cases have come before the Second Circuit regarding services which make portions of copyrighted works available to those whose search terms appear within the work.[2] The Second Circuit has not set forth a clear and consistent set of guidelines for how such uses are to be treated for the fair use analysis.

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[1] *See, e.g.*, Keith Kupferschmid, *Copyright Law in 2017: 12 Big Court Cases to Know About*, COPYRIGHT CLEARANCE CENTER (Jan. 10, 2018), http://www.copyright.com/blog/copyright-law-2017-12-big-court-cases-know/ [https://perma.cc/82Q8-CC6K] (listing recent important copyright cases).

[2] *See* Scott Alan Burroughs, *The Eyes Have Had It: How the Second Circuit Addressed Its Copyright Fair Use Problem*, ABOVE THE LAW (Apr. 4, 2018, 5:44 PM), https://abovethelaw.com/2018/04/the-eyes-have-had-it-how-the-second-circuit-addressed-its-copyright-fair-use-problem/ [https://perma.cc/V489-XZP9]; Benjamin E. Marks & Erin James, *Clarifying Outer Bounds of Copyright Fair Use, Second Circuit Finds Video Monitoring Service Infringing*, LEXOLOGY (Mar. 2, 2018), https://www.lexology.com/library/detail.aspx?g=1a515268-3ecf-48d7-a4a8-dcce7bb0d535 [https://perma.cc/3G6N-L4MA]. *See generally Archives*, COPYRIGHT &

[3] This article will seek to provide such a framework by outlining the underlying rationale for copyright and fair use as well as the basic test for determining whether a particular use is a fair use under present law. It will outline the current state of fair use jurisprudence to show that while there are a number of common themes and threads, there is great disconnect and uncertainty regarding important concepts, particularly with regard to the creation of searchable and accessible text, images, and video.

[4] Ultimately, this article argues that the Supreme Court ought to grant certiorari for *TVEyes* to review the current state of fair use, particularly in light of the growing importance of services which provide searchable access to information (especially portions of copyrighted works). It also argues that the Supreme Court should adopt the broad view of fair use protection, derived from the *Google Books* and *HathiTrust* cases. The broad view of fair use provides a clear standard for a finding of transformative use, clarifying that the relevant market does not include the potential market for information about the work, and recognizing that fair use, while a defense, is not an affirmative defense.

II. FAIR USE AND THE DEPARTURE OF *TVEYES*

A. The Purpose of Copyright and Value of Fair Use

i. The Purpose of Copyright

[5] Although a full history of the law of copyright would be beyond the scope of this article,[3] modern copyright law is generally derived from the

FAIR USE, https://fairuse.stanford.edu/courts/u-s-2nd-circuit-court-of-appeals/ [https://perma.cc/5U29-7BJ5] (archiving copyright and fair use decisions made by the Second Circuit Court of Appeals).

[3] There are several excellent resources on the history of copyright law. In particular, the United States Copyright Office hosts an excellent webpage with a timeline of US Copyright law and a great deal of other resources for learning about the history of copyright law. *See History and Education*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/history/ [https://perma.cc/cP3Z-A4KG]. In addition, several books chart various aspects of the development of copyright law; *see also* RONALD A.

Statute of Anne,[4] which granted publishers the first legal right that a modern audience would recognize as a copyright in the works they published.[5] Although the Statute of Anne granted to authors "the sole Right and Liberty of printing," publishers typically simply purchased the right, along with the work—effectively providing the right to the publisher in most cases.[6] U.S. copyright law is based in Article I, Section 8, Clause 8 of the U.S. Constitution (the intellectual property clause), which takes the Statute of Anne as a philosophical predecessor.[7] The intellectual property clause provides that: "The Congress shall have power…[t]o promote the progress

BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY (1996) (providing fairly solid overview of the copyright system). *See generally* Friedermann Kawohl, *Commentary on Imperial Privilege for Conrad Celtis (1501/02)*, *in* PRIMARY SOURCES ON COPYRIGHT (1450–1900) (L. Bently & M. Kretschmer eds., 2008), http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_d_1501 [https://perma.cc/2FYH-W4LH] (providing numerous citations to works charting the history of copyright over 250 years prior to the Statute of Anne (discussed in this section)).

[4] More formally titled "An Act For The Encouragement Of Learning, By Vesting The Copies Of Printed Books In The Authors Or Purchasers Of Such Copies, During The Times Therein Mentioned" 8 Ann. C. 21. Alternatively known as the "Copyright Act of 1710" and cited as 8 Ann. C. 19. *See The Statute of Anne—1710*, HISTORY OF COPYRIGHT, http://historyofcopyright.org/pb/wp_ff342f50/wp_ff342f50.html [https://perma.cc/9CJ4-JPMM].

[5] *See, e.g.*, JONATHAN ROSENOER, CYBERLAW: THE LAW OF THE INTERNET 34–35 (1997); CHARLOTTE WAELDE ET AL., CONTEMPORARY INTELLECTUAL PROPERTY LAW AND POLICY 34 (3d ed., 2014).

[6] *See* Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427, 1432, 1462 (2010).

[7] The founding fathers, as British subjects would have operated under British law, including the Statute of Anne, as it was implemented in England. Their frame of reference for the development of intellectual property law would certainly have included the Statute of Anne.

of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[8]

[6] As observed elsewhere, the intellectual property clause makes clear that its underlying purpose is the advancement of society by encouraging creation, reflecting the founders' view on intellectual property rights as necessary to encourage innovation.[9] It is not without significance that the intellectual property clause is the only enumerated power that also includes an explicit policy rationale—the purpose of granting Congress the power to protect intellectual property rights at a federal level is to incentivize innovation, both by providing for the rights themselves and creating uniformity among the states.[10]

[7] The first apparent reference to what would become the intellectual property clause appears to be in the Federalist Papers.[11] Madison proposed the intellectual property clause[12] in Federalist No. 43 as the first power within the fourth class of powers[13] he believed a federal government should

[8] U.S. CONST. art. I, § 8, cl. 8. This clause is commonly known as the "intellectual property clause" and will be referred to as such herein.

[9] *See, e.g.*, JAMES BOYLE, *Thomas Jefferson Writes a Letter*, *in* THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 27 (2008); John Perry Barlow, *Selling Wine Without Bottles: The Economy of Mind on the Global Net*, ELECTRONIC FRONTIER FOUNDATION, https://www.eff.org/pages/selling-wine-without-bottles-economy-mind-global-net [https://perma.cc/5TXA-4VJ9].

[10] *See, e.g.*, 17 U.S.C. § 301 (2018) (preempting state law copyright).

[11] THE FEDERALIST NO. 43 (James Madison).

[12] In virtually identical language to the ultimately enacted version. *See id.*

[13] What he calls the "miscellaneous powers." Madison described six sets of powers that the Constitutional Congress proposed to provide to the Federal Government:

1. Security against foreign danger;
2. Regulation of the intercourse with foreign nations;
3. Maintenance of harmony and proper intercourse among the states;
4. *Certain miscellaneous objects of general utility;*
5. Restraint of the states from certain injurious acts;

hold. Although Madison does not further analyze the underlying rationale for intellectual property protection, his description focuses on the "utility" of "useful" works, along with the interest-alignment between the public and inventors in ensuring that such activities are incentivized.[14] Additionally, it is without doubt that Jefferson, who expressed a famous skepticism for the grant of intellectual property rights beyond those necessary to encourage creation and innovation, influenced the drafting and acceptance of the intellectual property clause.[15] Thus, the intellectual property clause was shaped by the founders' desire to provide only as much intellectual property protection as was necessary to incentivize the desired creativity and innovation.

[8] Beyond copyright's Constitutional underpinnings, Supreme Court jurisprudence reinforces the intellectual property clause's underlying rationale for copyright.[16] As far back as the *Trademark Cases*, the Court has emphasized that the purpose of copyright protection is to incentivize the type of original and inventive activities that promote progress, and not

6. Provisions for giving due efficacy to all these powers.
THE FEDERALIST NO. 41 (James Madison) (emphasis added).

[14] Madison, *supra* note 11.

[15] "Society may give an exclusive right to the profits arising from [inventions], as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody. Accordingly, it is a fact, as far as I am informed, that England was, until we copied her, the only country on earth which ever, by a general law, gave a legal right to the exclusive use of an idea. In some other countries it is sometimes done, in a great case, and by a special and personal act, but, generally speaking, other nations have thought that these monopolies produce more embarrassment than advantage to society; and it may be observed that the nations which refuse monopolies of invention, are as fruitful as England in new and useful devices." Thomas Jefferson, *Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813)*, *in* THOMAS JEFFERSON WRITINGS 333–35 (Merrill D. Peterson ed., 1984).

[16] *See, e.g.*, Trade-Mark Cases, 100 U.S. 82, 93–94 (1879); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1994).

solely to protect the rights of inventors.[17] Under current copyright jurisprudence, the Court refers to originality as the "touchstone" of copyright law.[18] While a work must be original to further the Constitutional purpose of encouraging innovation and progress, it must also be available, in at least a limited way for others to use in developing creative works.[19] Thus, the purpose of copyright is to advance progress, disseminate knowledge, and incentivize the development of additional creative works.

[9] While the goal of progression is accomplished through the grant of limited property rights to the creators,[20] the underlying objective of fair use

[17] *See Trade-Mark Cases*, 100 U.S. at 93–94 (1879) (observing that the Constitution authorizes Congress to legislate protections for copyrights, which "promote the progress of science and useful arts," but not for trademarks, which have "no necessary relation to invention or discovery"); *see also Sarony*, 111 U.S. at 56 (1884).

[18] Feist Publ'ns., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347 (1991).

[19] *See id.* at 359–60. And, while the requirement of originality is typically not challenging to meet, it has been enforced by the Supreme Court. *See id.* at 363–64. The publisher of a telephone directory in *Feist* was denied copyright protection for its alphabetical arrangement of all telephone number holders and their telephone numbers. *See id.* at 364.

[20] *See* U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have power . . . [t]o promote the progress of science and useful arts, *by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries*") (emphasis added). Although perhaps counter intuitive at first, the purpose of the grant of rights is to provide content creators an economic incentive to create, rather than leaving creation to the wealthy, and those commissioned by the wealthy. *See* Bracha, *supra* note 6, at 1431. This is one of the key innovations of the Statute of Anne. *Id.* However, this right is both limited and fundamentally different than other property rights. Although it is a fundamental concept and tenet in copyright law, understanding the counterintuitive nature of this right is critical to any analysis of modern copyright law. It is not at all obvious why the Second Circuit allowed not only HathiTrust, but also Google to copy millions of works without a solid understanding of the underlying purpose of copyright law—a mere fair use analysis, without reference to the underlying doctrine would provide little to no useful rule for future analysis. *See* Authors Guild v. Google, Inc., 804 F.3d 202, 225 (2d Cir. 2015) ("[I]n light of the goals of copyright, we conclude that Google's making of a complete digital copy of Plaintiffs' works for the purpose of providing the public with its search and snippet view functions . . . is a fair use and does not infringe Plaintiffs' copyrights in their books."); Authors Guild, Inc. v. HathiTrust,

is in tension with this grant—those works are intended to be used and built upon to create new works. At times, this structure can put current rights holders at odds with those seeking to innovate. The challenge of the courts in those cases has been to balance the strength of the right to be protected with the need to ensure that the framework continues to incentivize innovation.[21]

ii. The Purpose of Fair Use

[10] Fair use is one way that courts balance the interests of the creator's property rights and incentivizing innovation, which traces its basis to the origin of copyright law.[22] As with the right to make use of a copyrighted work under certain conditions, fair use is an important feature of the type of non-exclusive right the intellectual property clause creates.[23] It is, in the

755 F.3d 87, 94–95 (2d Cir. 2014) ("[O]ur law recognizes that copyright is 'not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.'").

[21] *See infra* Part II(A)(iii).

[22] *See* L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTELL. PROP. L. 431, 431–32, 441–42 (1998).

[23] *See, e.g.*, Benjamin Kaplan, *An Unhurried View of Copyright: Proposals and Prospects*, 66 COLUMBIA L. REV. 831, 843 (1966). That is, in the strictest possible sense, if copyright were to prevent the use of *any* portion of the work, critics would be forbidden from commenting on the work, advertisers from referencing the work, scholars from publishing research in which any mention of the work was identifiable, etc. To quote Kaplan:

> It seems hardly a statesmanlike result to leave a sizable fraction of the population (including, I fancy, some in this audience) thus uncertainly subject to civil and even criminal liability for acts now as habitual to them as a shave in the morning, especially as publishers are still far from devising any simple methods by which this public could calculate and make the payments that might clearly legitimate those habits.

Id.

words of Congress, an "equitable rule of reason," which balances the interests of the copyright holder against the interest of society in using the work.[24]

[11] The U.S. Supreme Court issued its first landmark copyright decision in 1834,[25] a decision in which Justice Story joined the majority opinion adopting the positive law theory of copyright.[26] Seven years later, Justice Story would, while serving as a circuit judge, issue the opinion that forms the basis for fair use, *Folsom v. Marsh*.[27]

[12] In *Folsom*, while Judge Story found that the defendant had infringed the copyright, he stated the newly developed fair use doctrine as follows:

> *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.*[28]

Story's fair use factors have been restated as "(1) the nature of the work, (2) the amount of the work used, and (3) the effect of the use on the work's economic value."[29] The analysis under these factors is very similar to the current fair use analysis, with the exception that the *Folsom* factors do not

[24] H.R. REP. NO. 94-1476, at 65 (1976).

[25] *See* Wheaton v. Peters, 33 U.S. 591 (1834).

[26] *See id*. at 657.

[27] *See* Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841).

[28] *Id.* at 348.

[29] L. Ray Patterson, *Understanding Fair Use*, 55 L. & CONTEMP. PROBS. 249, 256 (1992).

consider whether the use is transformative.[30] That is, much of the current test for fair use has existed for nearly 200 years.[31]

[13] Despite its common law origins, the present version of fair use is statutory.[32] Current fair use is based on the Copyright Act of 1976, which provides that "[s]ubject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to . . ." use or license the work.[33] Copyright provides a number of exclusive rights to the copyright holder, including the right to reproduce, distribute, display, or perform a work and to make derivatives of the original work.[34] An exclusive right allows the right-holder to exercise a right, while also permitting the right-holder to exclude others from doing so.[35] It is these exclusive rights that give copyright economic value. Section 107 defines "fair use" by saying that the right to exclude others from making a fair use of the copyrighted material is not included in the bundle of rights constituting copyright.[36] In this sense, fair use defines the very limit of copyright.

[14] The underlying purpose of fair use is the same as the underlying purpose of the intellectual property clause—to promote societal progress through the appropriate balancing of individual authors' interests in their

[30] *See* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 731 (2011).

[31] *See* Patterson, *supra* note 29, at 257.

[32] *See id.* at 260.

[33] 17 U.S.C. § 106 (2018).

[34] *See generally* 17 U.S.C. § 106 (2018) (listing the exclusive rights and authorizations awarded to the copyright owner).

[35] *See, e.g.*, 17 U.S.C. § 106(A) (2018) (describing when a right-holder can prevent the use of their name).

[36] *See* 17 U.S.C. § 107 (2018).

works with society's interest in using those works to create new works.[37] Fair use accomplishes this objective by providing for an exception to the reach of copyright—the author does not receive the property rights otherwise provided in Section 106 with regard to fair uses of the work.[38]

iii. Fair Use: A Four Element Test

[15] Whether a particular use is a "fair use" is a four-part test. The test itself is laid out in 17 U.S.C. §107. The four statutory factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[39]

[37] *See* Patterson, *supra* note 29 at 266.

[38] *See id.* at 262.

[39] 17 U.S.C. §§107(1)–(4) (2018).

[16] Courts typically give the most weight to the first,[40] third,[41] and fourth factor,[42] with relatively little weight given to the second factor,[43] beyond an analysis regarding whether the use is within the "core"[44] of the interests that copyright is intended to protect.

[17] The first factor analysis primarily focuses on whether a particular use changes the character of the original, whether the use is "transformative,"[45] and whether the intended use is educational or commercial.[46] A finding of transformative use, or educational use, is persuasive in finding a fair use.[47]

[18] In determining whether a use is transformative, the court considers whether the work "alter[s] the original with new expression, meaning, or

[40] *See, e.g.*, Peter Letterese & Assocs. v. World Inst. of Scientology Enters. Int'l, 533 F.3d 1287, 1309 (11th Cir. 2008); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1269 (11th Cir. 2001).

[41] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 476–77 (1984).

[42] *See, e.g.*, Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 926 (2d Cir. 1994) ("Prior to Campbell, the Supreme Court had characterized the fourth factor as 'the single most important element of fair use'" (citation omitted), but that such language was conspicuously absent from *Campbell*, replaced instead with the instructions to consider all four factors weighed together).

[43] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994).

[44] *Id.*

[45] *See* Cariou v. Prince, 714 F.3d 694, 704 (2d Cir. 2013).

[46] *See* Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006).

[47] Furthermore, a finding that a particular use is not a transformative use is not dispositive—that a particular use is non-transformative will not necessarily mean that the use is not a fair use. *See* Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932, 939 (4th Cir. 2013). Although it is less persuasive than a finding of transformative use, a finding that the given use is educational also tends to be persuasive in finding that a particular use is a fair use.

message."[48] Beyond this formulation, the courts have not provided consistent rules for determining whether an alteration is significant enough to be "transformative" in any given case.[49] Although a transformative use is not necessary for a use to be a fair use,[50] it is extremely persuasive because in the context of fair use, transformation is the essence of the creation that the Constitution and the Copyright Act seek to protect.[51] Thus, in cases where use is transformative, the Court has been reluctant to find that the use is not fair use.[52]

[19] Although determining the amount and substantiality of the use, as discussed below, is a somewhat more factual inquiry than determining the purpose, character, educational nature, and effect on the potential market, evaluating the third factor presents challenges as well. Courts have rejected bright line rules[53] and found that even uses of relatively small portions of a work can be too substantial to allow a finding of fair use.[54] The third factor analysis typically reduces to weighing the plaintiff's argument that it used a small portion of the work when considered in relation to the whole[55] with the defendant's argument that the section used was the essence or "heart"

[48] *Acuff-Rose*, 510 U.S. at 579.

[49] *See id. But see* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455, n.40 (1984).

[50] *See Sony*, 464 U.S. at 455, n.40.

[51] *See Acuff-Rose*, 510 U.S. at 579.

[52] *See More Information on Fair Use*, U.S. COPYRIGHT OFFICE, (July 2018), https://www.copyright.gov/fair-use/more-info.html [https://perma.cc/BK8E-5XPZ]; *see also* Blanch v. Koons, 467 F.3d 244, 251, 252 (2d. Cir. 2006).

[53] *See, e.g.*, Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1271–72 (11th Cir. 2014).

[54] *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters. 471 U.S. 539, 548–50 (1985).

[55] *See id.* at 564–65.

of the work.[56] In cases in which the alleged transformation was the provision of–and association with–information about the work, the defendant necessarily must copy all–or virtually all–of the work.[57] In those cases, courts have not been entirely consistent in how they evaluate and analyze the extent of the work made available to the public, they consider both the use made by the entity which transforms the work for third-party use as well as the use made by those who ultimately receive access to the service.[58]

[20] In evaluating the fourth factor, courts consider "not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[59] That is, the court evaluates the market harm caused by the use, both by the challenged user, as well as the harm that would be caused if the use became widespread. However, the courts have not clearly defined the market upon which the effects are to be measured.[60] As discussed more fully below, courts have come to differing conclusions as to the relevant market.[61] In particular, courts have disagreed on whether use of an original work that does not affect the primary market for the work, but may affect a secondary market or potential market for

[56] *See id.* at 565.

[57] *See* 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/#3993ee083300 [https://perma.cc/5PXE-6S9U].

[58] *See, e.g.*, Fox News Network, L.L.C. v. TVEyes, Inc., 883 F.3d 169, 178–79 (2d Cir. 2018); Authors Guild v. Google, Inc., 804 F.3d 202, 218–19 (2d Cir. 2015); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 96 (2d. Cir. 2014).

[59] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (citing 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 13.05[A] [4] (1993)).

[60] *See id.* at 590–91.

[61] *See id.*

licenses or portions of the work,[62] constitutes a market impact that is remediable under copyright law.[63]

[21] In one case, the Supreme Court defined the relevant market as narrower than the entire market for the work itself.[64] In some cases, the Second Circuit has limited the market to currently-available licenses for portions of the work;[65] others defined the market as broadly as any potential licenses that the copyright holder might choose to offer in the future.[66] It does seem clear that there is no protection for information *about* the work.[67] While the extent of the market that must be considered is unsettled, it is at least clear that the relevant market only includes the work and potential portions thereof, but does not extend to information that merely describes the work or the content therein.[68]

B. The Current State of Fair Use

[22] To describe the current state of the relevant portions of the fair use analysis, this article outlines the answers to three questions. First, what is transformative use? Second, what rights do authors have to demand royalties for the use of portions of their works? And third, what is the current status of fair use as a defense? In developing the answers to these questions,

[62] For example, if an excerpt from a book is used, but the court determines that the excerpt is neither the "heart of the work," nor will the use of the excerpt cause individuals who otherwise would have purchased the book not to do so, but that the publisher of the book could have obtained a royalty or "permission fee" to use that portion of the book.

[63] *See Acuff-Rose*, 510 U.S. at 592.

[64] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 598 (1985).

[65] *See* Authors Guild v. Google, Inc., 804 F.3d 202, 225 (2d Cir. 2015).

[66] *See* Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613–14 (2d Cir. 2006).

[67] *See Google, Inc.*, 804 F.3d at 220 (2015).

[68] *See id.*

this article will identify the current status of fair use, evaluate the strengths and weaknesses of that status, and set up the background for the policy and jurisprudential recommendations provided in the final section.

i. What is Transformative?

[23] One of the key issues in any fair use analysis is whether the particular use is a transformative one. While a finding of transformative use does not resolve the fair use question,[69] parties making transformative uses have a far easier time convincing the court that the use itself is a fair one. However, there is no clear standard for what is transformative and what is not.[70] The courts essentially approach the issue on a case-by-case basis in deciding whether a particular use adds enough to the original use to have transformed it into a new work with separate utility.[71] In the words of Judge Leval, author of what is generally considered the seminal article on fair use, as well as the *Google Books* opinion, "[t]he use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original" to be transformative.[72] The challenge has been drawing the line where a use is different, or for a different purpose.[73] To wit, courts have generally found that parody is transformative because it comments on the original work,[74] but that a trivia game is not because it does not alter the

[69] That is, a finding of transformative use does not mean that the use necessarily must be a fair use, nor does a finding that a use is *not* fair use necessarily require that the use be considered an infringing use.

[70] *See Google, Inc.*, 804 F.3d at 214.

[71] *See id.* at 213.

[72] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990), (citing Cary v. Kearsley (1802) 170 Eng. Rep. 679, 681–82 (KB) and Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 480 (1984) (Blackmun, J., dissenting)).

[73] *See id.* at 1105–06, 1135.

[74] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579–81 (1994).

original expression sufficiently.[75] Similarly, placing concert posters in a timeline is transformative because it alters the original expression,[76] as is creating searchable library of video content,[77] but providing course materials to students through a university's electronic reserve system did not.[78] This lack of clarity makes it challenging for would-be fair users to draw a bright line regarding whether a particular use is transformative.

[24] In fact, in some circumstances, copying portions of copyrighted works, even without further alteration, may be considered transformative if the copy serves a different function than the original work.[79] While the use must add "something new, with a further purpose or different character, altering the first with new expression, meaning or message,"[80] a party may be able to copy the entire work and make portions thereof available—even to the general public—if the reason for doing so is to provide *information about the work*, rather than access to itself.[81] That is, providing and associating information about the work can serve as the addition of something new and provide a sufficiently different purpose and character to be considered transformative. Recognition that a use may be transformative

[75] *See* Castle Rock Entm't, Inc. v. Carol Publ'g. Grp., Inc., 150 F.3d 132, 142–43 (2d. Cir. 1998).

[76] *See* Bill Graham Archives v. Doring Kindersley Ltd., 448 F.3d 605, 609 (2d. Cir 2006).

[77] *See* Fox News Network, L.L.C. v. TVEyes, Inc., 883 F.3d 169, 176–77 (2d Cir. 2018).

[78] *See* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1262 (11th Cir. 2014).

[79] *See, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202, 220 (2d Cir. 2015); *Patton*, 769 F.3d at 1262; A.V. v. iParadigms, L.L.C., 562 F.3d 630, 640 (4th Cir. 2009); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007); *Bill Graham Archives*, 448 F.3d at 609.

[80] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[81] *See Google, Inc.*, 804 F.3d at 225; Authors Guild, Inc. v. Hathitrust, 755 F.3d 87, 105 (2d Cir. 2014).

without altering the content of the underlying work is critical to supporting many new and innovative uses of works.[82]

[25] On the other hand, a pair of cases from the 1990s found that copying portions of copyrighted material and reproducing those portions in a professor-assigned "coursepack" for use by students in the professor's university course by a commercial document copying and printing service was not for a purpose different from the original purpose of the work.[83] These cases focused on the document service's copying activity and the portion of the work copied for inclusion in the course pack, rather than whether the work had been transformed by the professor's arrangement of portions of various works within a single coursepack for pedagogical purposes.[84] Thus, re-arranging or juxtaposing works or portions thereof is insufficient to be considered transformative.[85]

ii. An Author's Right to Royalties

[26] While transformative use is critical in making a fair use determination, perhaps the single most important factor in the fair use analysis is whether the use impacts the market for the work used. In order to determine whether a particular use affects the market for a work, a preliminary step is determining what constitutes the relevant market.[86] There are essentially three options: the market for the original work, without considering the market for licenses for portions of the original work; the market for the original work, along with any currently-existing licenses; and

[82] *See Google, Inc.*, 804 F.3d at 225.

[83] *See* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1391 (6th Cir. 1996); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1526, 1547 (S.D.N.Y. 1991).

[84] *See Princeton Univ. Press*, 99 F.3d at 1391; *Basic Books, Inc.*, 758 F. Supp. at 1547.

[85] *See Princeton Univ. Press*, 99 F.3d at 1391; *Basic Books, Inc.*, 758 F. Supp. at 1547.

[86] *See* Harper & Row, Publishers. v. Nation Enters., 471 U.S. 539, 566 (1985).

the market for the original work, along with any potential licenses that the copyright holder could offer.[87]

[27] Courts have differed regarding whether and how licenses for portions of the work are considered in determining the relevant market for the purpose of the fourth factor.[88]

[28] The narrowest view of the relevant market is set forth in *Harper & Row*, in which a competing publication "scooped" Time Magazine's exclusive right to license certain pre-publication portions of President Ford's memoirs.[89] In that case, the Supreme Court found that the relevant market was the very narrow market for pre-publication rights in portions of the memoir at issue.[90] This case represents the view that the relevant market is the market for the specific work at issue, and not licenses for portions thereof.[91]

[29] The Supreme Court has also taken a more flexible, fact-based approach to the definition of the relevant market in *Campbell v. Acuff-Rose*.[92] In that case, the Supreme Court examined whether a parodic rap

[87] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590–93 (1994); Fox News Network, L.L.C. v. TVEyes, Inc., 883 F.3d 169, 180 (2d Cir. 2018).

[88] *See* Rich Stim, *Measuring Fair Use: The Four Factors*, COPYRIGHT & FAIR USE., https://fairuse.stanford.edu/overview/fair-use/four-factors/#the_effect_of_the_use_upon_the_potential_market [https://perma.cc/C6P2-BD7D].

[89] *See Harper & Row*, 471 U.S. at 540.

[90] *See id.* at 564, 569.

[91] *See generally id.* at 569 ("[A] fair use doctrine that permits extensive prepublication quotations from an unreleased manuscript without the copyright owner's consent poses substantial potential for damage . . . . Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented.").

[92] *See generally Acuff-Rose*, 510 U.S. at 590 (finding that courts must consider not only

song infringed upon the copyright in an earlier musical work.[93] The court considered the potential harm to a limited set of derivative works, specifically, non-parodic rap versions of the song at issue.[94] This approach expanded the market to be measured commensurate with the extent to which the purportedly fair use was similar to, or competed with, a derivative of the original work.[95]

[30] *TVEyes* represents the broadest possible market.[96] In *TVEyes*, the Second Circuit began from the principle that the fair use analysis requires consideration of "not only the ... market harm caused by the particular actions of the alleged infringer," but also the market harm that would result from "unrestricted and widespread conduct of the [same] sort."[97] The court then rejected *TVEyes'* argument that its service was unlikely to compete with Fox News' broadcast television product[98] in favor of Fox News' argument that "TVEyes undercuts Fox's ability to profit from licensing searchable access to its copyrighted content to third parties."[99] Thus, the Second Circuit endorses the view that the relevant market *includes* the provision of information about a work, effectively undermining the

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the market harm caused by particular actions of the alleged infringer but also if unrestricted and widespread conduct similar to that engaged in by the infringer would have a substantially adverse impact on the potential market).

[93] *See id.* at 572–73.

[94] *See id.* at 592–93.

[95] *See* Pierre N. Leval, *Campbell v. Acuff-Rose: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 19–20 (1994).

[96] *See* Fox News Network, L.L.C. v. TVEyes, 883 F.3d 169, 174–75 (2d Cir. 2018).

[97] *Id.* at 179 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994)).

[98] *See id.*

[99] *Id.* at 180.

transformative use analysis in both *TVEyes*[100] and *Google Books.*[101] Under this rule, virtually any use of a copyrighted work would affect the relevant market.

[31] In any event, an author's right to royalties cannot be so broad that it effectively eliminates the right of fair use by allowing a copyright holder to demand royalties for any use of the work or information about it.[102] The idea that a copyright holder may demand that a potential user take a license for any potential use of the work or any commercial service that the copyright holder may decide to develop at a later date—which implicates or uses the copyrighted work or information about it—is strikingly similar to the interpretation of the Digital Millennium Copyright Act (DMCA) that was rejected in various forms in various cases in the wake of the DMCA's passage.[103] Though perhaps not as immediately as the argued constructions under the DMCA, allowing copyright holders to define the market for their work with reference to the market for not only the work, but also for services that the copyright holder might choose to offer that use portions of the work

[100] *See id.* at 177.

[101] *See* Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015).

[102] *See* Andrea Peterson, *Google Books Just Won a Decade-Long Copyright Fight*, THE HUFFINGTON POST (Apr. 28, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/04/18/google-books-just-won-a-decade-long-copyright-fight/?utm_term=.9e8b07873131 [https://perma.cc/9WAR-6HER] (noting that with the decision in *Google, Inc.*, the Supreme Court recognized the potential impact of expanding author's rights to royalties for any use of their work, including disseminating information to the public).

[103] *See, e.g.*, Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1202 (Fed. Cir. 2004) (finding that the DMCA does not affect fair use, stating that "[the rejected interpretation] would therefore allow any copyright owner, through a combination of contractual terms and technological measures, to peal the fair use doctrine with respect to an individual copyrighted work...we therefore reject [this] proposed construction in its entirety"); MDY Indus., L.L.C. v. Blizzard Entm't, Inc., 629 F.3d 928, 950 (9th Cir. 2010) (disagreeing with the Federal Circuit's analysis in *Chamberlain*, but agreeing that the DMCA did not—and could not—abrogate the defense of fair use: "[the DMCA] does not limit the traditional framework of exclusive rights [. . .] or defenses to those rights such as fair use").

or information about the work, expands the scope of the market to be considered for fair use purposes such that showing a lack of market harm would be difficult in any case in which a work appears in a medium of commercial interest.[104]

iii. The Status of Fair Use as a Defense

[32] Although the Supreme Court has characterized fair use as an "affirmative defense,"[105] it is unclear whether this characterization is correct. Clearly, fair use must be raised by the alleged infringer as a defense.[106] However, there appears to be at least some recognition that fair use is not truly an affirmative defense but a defense which, if established, negates the infringement rather than merely excusing it.[107]

[33] In *Campbell v. Acuff-Rose*, the Supreme Court laid down what appeared to be a clear rule: fair use was an affirmative defense.[108] However, at least one court has argued that fair use should not be considered an affirmative defense, the Ninth Circuit in *Lenz v. Universal* found that fair use was a defense, but not an affirmative defense.[109] It analogized fair use to a license and found that while both license and fair use have been characterized as affirmative defenses, neither should be considered such because they represent an assertion that the conduct was not in fact prohibited; in contrast with an affirmative defense, which would assert that

[104] *See Chamberlain*, 381 F.3d at 1202.

[105] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (citing Harper & Row, Publishers, Inc. v. Nation Enters. 471 U.S. 539, 561 (1985); H.R.REP. NO. 102-836, 3, n.3 (1992)).

[106] *See id.* at 590.

[107] *See id.*

[108] *See id.*

[109] *See* Lenz v. Universal Music Corp., 815 F.3d 1145, 1153 (9th Cir. 2015).

while the conduct was prohibited, it was somehow excused.[110] In *Lenz*, the Ninth Circuit cites a 2015 law review article,[111] which argues that in enacting the 1976 Copyright Act, Congress did not intend for fair use to be treated as an affirmative defense.[112]

[34] As a result, while the Supreme Court appears to treat fair use as an affirmative defense, there is at least some support for the proposition that it should not be treated as such.[113] This interpretation is supported by the structure of the Copyright Act, which positions fair use as an exception to the grant of copyright protection and not as an affirmative defense.[114]

C. *HathiTrust, Google Books* and the Broad View of Fair Use

i. The *Google Books* and *HathiTrust* Litigation

[35] Although both *Google Books* and *HathiTrust* arose from Google's reproduction of a number of copyrighted works, there were several differences between how those works were ultimately used. The court in *HathiTrust* described the use as:

> Beginning in 2004, several research universities including the University of Michigan, the University of California at Berkeley, Cornell University, and the University of Indiana agreed to allow Google to electronically scan the books in their collections. In October 2008, thirteen universities announced plans to create a repository for the digital copies and founded an organization called HathiTrust to set up and

[110] *Id.*

[111] *See* Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685 (2015).

[112] *Id.* at 696–97.

[113] *Id.* at 697.

[114] *See* 17 U.S.C. § 107 (2018).

> operate the HathiTrust Digital Library (or "HDL"). Colleges, universities, and other nonprofit institutions became members of HathiTrust and made the books in their collections available for inclusion in the HDL. HathiTrust currently has 80-member institutions and the HDL contains digital copies of more than ten million works, published over many centuries, written in a multitude of languages, covering almost every subject imaginable.[115]

While the same court in *Google Books* described that project's use as:

> Through its Library Project and its Google Books project, acting without permission of rights holders, Google has made digital copies of tens of millions of books, including Plaintiffs', that were submitted to it for that purpose by major libraries. Google has scanned the digital copies and established a publicly available search function. An Internet user can use this function to search without charge to determine whether the book contains a specified word or term and also see "snippets" of text containing the searched-for terms. In addition, Google has allowed the participating libraries to download and retain digital copies of the books they submit, under agreements which commit the libraries not to use their digital copies in violation of the copyright laws.[116]

[36] The program that would lead to the *HathiTrust* litigation began in 2004, four years prior to the establishment of HathiTrust itself, when several research institutions permitted Google to scan their library collections.[117] In 2008, a total of thirteen institutions formed HathiTrust to

[115] Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 90 (2d Cir. 2014).

[116] *See* Authors Guild v. Google, Inc., 804 F.3d 202, 207 (2d Cir. 2015).

[117] *See HathiTrust*, 755 F.3d at 90.

develop a repository for digital copies of the institutions' works.[118] The repository allowed the public to search the library and identify relevant works, and without showing any portion of the works, permitted those with print disabilities to access the full text of works at member libraries, and allowed member institutions to order a replacement copy of works when original copies were destroyed and were not obtainable elsewhere.[119] The Second Circuit found that HathiTrust transformed the works at issue,[120] and did not harm the market for the works because the search function did not provide the public with access to the works themselves and the print, while providing access to those with print disabilities and replacement copies to libraries whose works were destroyed served markets that the copyright holders did not.[121] As a result, the use made by HathiTrust was a fair use.[122]

[37] In *Google Books*, the Author's Guild challenged the Google Books program to scan works and make them available for search on the internet.[123] Despite the broader scope of the use in *Google Books*, the court again determined that Google had made a fair use of the works at issue, despite the fact that Google—unlike HathiTrust—made portions of the work available to searchers.[124] The Second Circuit started from the premise that the primary intended beneficiary of copyright is the public,[125] and that copying books in order to develop a search and identification feature was a highly transformative use[126] that served the public interest. It found that the

[118] *See id.*

[119] *See id.* at 91–92.

[120] *See id.* at 97.

[121] *See id.* at 100, 103.

[122] *See HathiTrust*, 755 F.3d at 105.

[123] *See* Authors Guild v. Google, Inc., 804 F.3d 202, 207 (2d Cir. 2015).

[124] *See id.* at 229.

[125] *See id.* at 212.

restrictions placed by Google on the access to works by those using the search function were reasonable[127] to ensure that the search and access functionality did not tend to act as a market substitute for the original work.[128] As a result, the Second Circuit found fair use on the basis that the use was transformative, served the public interest, and did not affect the market for the original work.[129]

ii. The Broad View of Fair Use

[38] *HathiTrust* and *Google Books* represent what this article terms the "broad view" of fair use. That is, the view that fair use is a fundamental limitation on the breadth of copyright that serves to resolve the apparent tension between the property rights granted to the author, the underlying societal purpose of copyright, and the First Amendment.[130] Under the broad

[126] *See id.* at 216–18.

[127] *See id.* at 222 ("Google has constructed the snippet feature in a manner that substantially protects against its serving as an effectively competing substitute for Plaintiffs' books…These include the small size of the snippets (normally one eighth of a page), the blacklisting of one snippet per page and of one page in every ten, the fact that no more than three snippets are shown—and no more than one per page—for each term searched, and the fact that the same snippets are shown for a searched term no matter how many times, or from how many different computers, the term is searched. In addition, Google does not provide snippet view for types of books, such as dictionaries and cookbooks, for which viewing a small segment is likely to satisfy the searcher's need. The result of these restrictions is, so far as the record demonstrates, that a searcher cannot succeed, even after long extended effort to multiply what can be revealed, in revealing through a snippet search what could usefully serve as a competing substitute for the original . . . .").

[128] *See Google, Inc.*, 804 F.3d at 222.

[129] *See id.* at 207.

[130] *See id.*; Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 94–95 (2d Cir. 2014). This view has, also been endorsed by a number of library associations. *See Libraries Laud Appeals Court Affirmation that Mass Book Digitization by Google Is "Fair Use"*, ALA NEWS (Oct. 16, 2015), http://www.ala.org/news/press-releases/2015/10/libraries-laud-

view, while fair use is still asserted as a defense, it remains both a right retained by the public against the copyright holder as well as a restriction on the copyright holder's ability to prevent other uses.[131]

[39] The broad view manifests in several ways: in a broad reading of the requirement that a use be transformative, an interpretation of the market harm evaluated under the fourth factor that confines that analysis to the work itself and any derivatives thereof, rather than attempting to extend that protection to a potentially unlimited market of potential licenses for information about the work; and in viewing the assertion of fair use as a defense, but not as an affirmative defense. Where the court takes the broad view, it is much more likely to find that a particular use was a fair use.

[40] Thus, in evaluating a case under the broad view, the court will determine whether copyright infringement is implicated at all by evaluating the alleged use to determine whether the user provides information about a work with sufficiently short portions of the work that merely contextualize that information, which would not constitute a use at all, or uses a more substantial portion of the work triggering the fair use analysis. Whether the portion of the work is small enough to qualify as only providing context to the work is evaluated by determining whether it is longer than reasonably necessary to allow a reasonable user of the service providing information and incidental access to contextualize the information provided by that service. In evaluating a fair use defense, the court will not require that the user plead the defense with specificity or bear the burden of proof of establishing fair use.

appeals-court-affirmation-mass-book-digitization-google-fair [https://perma.cc/KR9G-QCK7].

[131] *See Google, Inc.*, 804 F.3d at 207, 213; *HathiTrust*, 755 F.3d at 94–95; *Libraries Laud Appeals Court*, *supra* note 130. To use the phrasing common in first year property law courses, one of the "sticks" in the "bundle of sticks" that forms the property interest that is a copyright is retained by the public and not granted to the copyright holder.

D. How *TVEyes* Departs from the Path of *HathiTrust* and *Google Books*

[41] *TVEyes* provides a textbook example of a technology that does not fit within any model that the courts had considered previously. The Second Circuit described TVEyes' service as follows:

> [TVEyes] offers a service that enables its clients to easily locate and view segments of televised video programming that are responsive to the clients' interests. It does so by continuously recording vast quantities of television programming, compiling the recorded broadcasts into a database that is text-searchable (based primarily on the closed-captioned text copied from the broadcasts), and allowing its clients to search for and watch (up to) ten-minute video clips that mention terms of interest to the clients.[132]

[42] The *TVEyes* court focused heavily on the quantity of Fox News' content that TVEyes made available to subscribers in finding that its use was not fair use.[133] While the use was transformative,[134] the court found that TVEyes offered a product that would tend to compete with Fox News' copyrighted content, particularly when considered in the aggregate,[135] at least in part due to the length of clips that TVEyes permitted subscribers to access, combined with the relative lack of controls to prevent subscribers from accessing the entire work (or at a minimum, obviating the need to purchase the work to access the content therein).[136] In reaching this conclusion, the court defined the relevant market to include the market for

[132] Fox News Network, L.L.C. v. TVEyes, 883 F.3d 169, 173–74 (2d Cir. 2017).

[133] *See id.*

[134] *See id.* at 180–81.

[135] *See id.* at 179–80.

[136] *See id.*

royalties from both traditional derivative works as well as the right to offer a service containing the information TVEyes did, notwithstanding that Fox News had not opted to do so.[137] Thus, the Second Circuit took a very broad view of copyright protection and a narrow view of fair use

[43] Users of services like TVEyes' include so-called media accountability services and corporate marketing departments.[138] The use made of television content by those services is different from the use made by the typical consumer of television content and TVEyes' service is tailored specifically for those markets.[139] Furthermore, although there are similarities to the services offered by *Google Books* and *HathiTrust*, there are also critical differences; while accessing information about a text-based work can be contextualized with a relatively short snippet of text, a somewhat more significant segment of video might be required to understand the context of a given term in a television broadcast.

[44] In reaching the conclusion that TVEyes did not make a fair use of Fox News' copyrighted content, *TVEyes* makes minor but important changes to the manner in which the court approaches whether a particular use is transformative[140] and how the market is measured.[141] This subtle departure creates uncertainty regarding how uses involving portions of works for the purpose of providing information about the works will be analyzed in future cases.

[137] *See TVEyes*, 883 F.3d at 179–80.

[138] *See id.* at 174–75.

[139] *See id.*

[140] *See id.* at 178, 180–81 (needing the transformative character to be more than the manner in which it delivers content).

[141] *See id.* at 179–81.

i. A Missing Piece of the *TVEyes* Analysis: Information About a Work is Not Copyrighted

[45] Since the analogies between the service that TVEyes offers in the television context to what Google Books and HathiTrust offered with regard to books are so strong, it is notable that the court in *TVEyes* did not consider an element that it found important in *Google* and *HathiTrust*.[142] As discussed earlier, the Second Circuit found in both *Google* and *HathiTrust* that providing information about a work was not copyrighted, or copyrightable.[143] However, in *TVEyes*, the Second Circuit does not directly address this question in nearly the same depth.[144] *TVEyes* constrains its analysis of information about a work strictly to facts about the work such as the title, year of publication, and the number of times a work appears within the work.[145]

[46] This is important for three reasons—first, because the Second Circuit relied heavily on the fact that Google Books was still providing information about the works when it provided access to the small portions of the works themselves,[146] but secondly, because it provided a useful and common-sense delineation and principle in an area of use that is of critical and growing importance.

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[142] *Compare TVEyes*, 883 F.3d at 175–176, 178 (briefly considering the nature of the copyrighted work), *with* Authors Guild v. Google, Inc., 804 F.3d 202, 220 (2d Cir. 2015) (analyzing information about the copyrighted works), *and* Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 95–97 (2d Cir. 2014) (nature of copyrighted work cannot act as a substitute for the original work).

[143] *See Google, Inc.*, 804 F.3d at 215, 220; *HathiTrust*, 755 F.3d at 95–97.

[144] *See TVEyes*, 883 F.3d at 176–77 ("communicat[ing] something new and different from the original or [otherwise] expands its utility").

[145] *See id.* at 174.

[146] *See id.* at 177.

[47] It is also notable for a third reason, clearly both Google and the end user "used" (in the literal sense) the copyrighted works on some level.[147] At a minimum, Google must have accessed the works to scan them and apply its technology to make them searchable.[148] Similarly, those who access the works would presumably have read a snippet in order to determine whether the work suited that person's purposes.[149] However, the Second Circuit finds that in providing information about the work there was, in fact, no use of the work.[150] This rule is both useful and important because it effectively authorizes the development and use of search services that must provide at least some preview of a work (or what is contained therein) to be useful. The rule also creates an implementable standard under which organizations can operate: information about a work is not copyrighted, so using and providing access—as well as the association of that information with passages from a work sufficient to allow an individual to search for and identify useful works—to that information cannot be infringement.

[48] Although it is somewhat unsurprising that the Second Circuit came to the conclusion that information such as how many times a particular word appears in a work,[151] or where that word appears,[152] is no more copyrightable than the year the work was published, the court's conclusion that Google's snippet view is not a use of the work, but rather an extension of the information about the work[153] is somewhat more surprising (and ultimately, given that it was not as clearly established, more important). That holding indicates that, at least in some circumstances, the Second

[147] *See id.*

[148] *See id.*

[149] *See TVEyes*, 883 F.3d at 177.

[150] *See id.* at 177.

[151] *See* Authors Guild v. Google Inc., 804 F.3d 202, 208–09, 223–24 (2d Cir. 2015).

[152] *See id.* at 218.

[153] *See id.* at 226.

Circuit[154] will conclude that providing access to small portions of a work in order to contextualize information about it remains mere information about a work.[155] This more important conclusion is precisely the element that is missing from the analysis in *TVEyes*.

[49] Although the ten minute clips that *TVEyes* provided its subscribers are certainly a more significant portion of the work than was provided in *Google Books*—and likely provide too great a portion of the work to be considered a fair use—the Second Circuit does not even consider this portion of its *Google Books* holding (even if only to dismiss it as inapplicable) raises some concern that it does not place significance on that portion of the analysis, or that it does not intend to extend that rule to analogous situations.[156] In the context of *TVEyes*, it would seem that showing a short clip[157] providing context to the identification of a particular user-defined search term within a work should be considered information about the work, rather than use of the work.[158] Although it does not come from intellectual property law, the concept of "not greater than necessary,"

[154] And, given its historical importance in copyright matters, the Second Circuit's views are certainly informative to those outside the Second Circuit.

[155] *See Google, Inc.*, 804 F.3d at 218.

[156] *See* Fox News Network, L.L.C. v. TVEyes, Inc., 883 F.3d 169, 179 (2d Cir. 2018).

[157] Although it is unlikely that a court would provide a safe harbor in the sense of defining a number of seconds (in the same way that it did not provide a precise number of words in *Google Books*) the author believes that a thirty second clip linked to each time a key word appeared, with provisions to prevent users from using software or other means to access substantial portions of an entire broadcast, would be within the scope of an analysis similar to that in *Google Books*. Although thirty seconds of airtime is likely lengthier than the amount of time it would take to read one of the snippets provided in *Google Books*, given the relatively disparate nature of television programs, the importance of tone, situation, and non-verbal cues in a live medium such as television, and that TVEyes' subscribers are unlikely to be accessing this service for the sole purpose of watching television programming. This standard appears appropriate to both protect content providers' right to exploit their copyrighted works with TVEyes' right to make information about such works available to its subscribers.

[158] *See TVEyes*, 883 F.3d at 174.

which has been used in a variety of areas, including federal criminal sentencing,[159] covenants not to compete,[160] bankruptcy, [161] and tax[162] is informative and would provide an appropriate standard. In this context then, the question would become whether the access provided was greater than reasonably necessary to make the provision of information about the work useful. While *TVEyes* does not explicitly change the law on this point, the courts should be careful about implicitly abrogating and introducing uncertainty about such rules.

[50] Finally, the rule that small portions of a work, made available to provide context to user searches for the work or portions thereof, has never been fully recognized by the Supreme Court.[163] Although a somewhat analogous rule was developed in the Ninth Circuit as a result of the *Perfect 10* cases with regard to thumbnail images, there is significant heterogeneity among the circuits on this issue.[164] The Supreme Court could provide helpful clarity in this context by adopting the rule that the Second Circuit set forth in *Google Books*, with the guidance that such use must be no greater than reasonably necessary to facilitate access and use of information

[159] *See, e.g.*, Kimbrough v. U.S., 552 U.S. 85, 101 (2007); U.S. v. Booker, 543 U.S. 220, 268 (2005).

[160] *See* Mantek Div. of NCH Corp. v. Share Corp., 780 F.2d 702, 709 (7th Cir. 1986); H&R Block Tax Servs., Inc. v. Circle A Enters., Inc., 693 N.W.2d 548, 553 (Neb. 2005) (finding that a covenant not to compete was enforceable as a matter of law).

[161] *See, e.g.*, Texas v. Lowe, 151 F.3d 434, 437–38, 439 (5th Cir. 1998).

[162] *See* 26 C.F.R. § 1.513-1(d)(3) (2018).

[163] *See* Jeff John Roberts, *Be Glad the Supreme Court Ended the Google Books Case*, FORTUNE (Apr. 18, 2016), http://fortune.com/2016/04/18/google-books-supreme-court-analysis/ [https://perma.cc/EP6X-MJYL].

[164] *See generally* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1148, 1160–68, 1176 (9th Cir. 2007) (finding that thumbnail images provided by Google were not considered infringement under the Copyright Act).

about the work for the purpose of identifying a work, its contents, and/or whether that would be necessary and/or useful to the user's goals.[165]

[51] Like in *Google Books* and *Perfect 10*, the copyright holder may lose revenue as a result of such a rule where an individual or organization seeks information about a work, rather than portions of the work itself.[166] However, copyright law in general, particularly the Copyright Act, is not a guarantee of a copyright holder's right to revenue or licenses, instead it is protection for a copyright holder's rights in the holder's copyrighted works.[167] Where non-copyrighted information is sought, the copyright holder has no right to require a license or earn revenue from that information under the Copyright Act.[168]

ii. Why Information About a Work is a "Fact" Within the Meaning of the Copyright Act

[52] Although the treatment of information about a work as not subject to copyright protection is adequately supported by the legal and policy reasons discussed above,[169] it is also directly analogous to another type of information that courts have determined to be uncopyrightable facts as well. In several cases, the Second Circuit has been faced with a number of cases arguing that a user committed a state law tort by using non-copyrighted

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[165] *See* Authors Guild v. Google, Inc., 804 F.3d 202, 221 (2d Cir. 2015).

[166] *See generally* Nari Na, *Testing the Boundaries of Copyright Protection: The Google Books Library Project and the Fair Use Doctrine*, 16 CORNELL J. L. & PUB. POL'Y 417, 420 (2007).

[167] *See id.* at 444 (citing ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS, AND TRADEMARKS, 228, 230 (2003); Edward Wyatt, *Googling Literature: The Debate Goes Public*, N.Y. TIMES (Nov. 19, 2005), https://www.nytimes.com/2005/11/19/books/googling-literature-the-debate-goes-public.html [https://perma.cc/D5MM-TYHS]).

[168] *See* 17 U.S.C. § 106 (2018).

[169] *See* discussion *supra* Section (II)(D)(i).

information or non-copyrighted elements of a work.[170] In those cases, the Second Circuit has found a number of uses to be information about the work, rather than uses of the copyrighted work itself.[171]

[53] In *National Basketball Ass'n v. Motorola* (NBA),[172] the Second Circuit found that both statistical information regarding professional basketball games,[173] as well as the games themselves, were not protectible under the Copyright Act[174] because neither is the type of fixed, creative expression to which copyright protection can attach.[175] To the extent either become fixed in a tangible medium—other than through a copyrightable broadcast—it is through the factual information about the event, which itself is not copyrightable.[176] More recently, the Second Circuit also found

[170] *See* discussion *infra* notes 172–81 and accompanying text. The fact that the user was not using a copyrighted work in these cases was important to the analysis because the Copyright Act preempted state law claims (including state law tort claims) regarding rights protected under the Copyright Act (or similar state law rights).

[171] *See id.*

[172] *See* NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).

[173] *See id.* at 847; *see also* Barclays Capital Inc.. v. Theflyonthewall.com, Inc., 650 F.3d 876, 896 (2d Cir. 2011) ("No matter how 'unfair' Motorola's use of NBA facts and statistics may have been to the NBA—or Fly's use of the fact of the Firms' Recommendations may be to the Firms—then, such unfairness alone is immaterial to a determination whether a cause of action for misappropriation has been preempted by the Copyright Act."). Although the conclusion that the court in *NBA* reached has not been the subject of much controversy, it is an interesting and subtle point—despite the importance and relevance of information (such as statistics) to understanding and appreciating a copyrighted work (such as a television broadcast of a professional basketball game), that information is still not copyrightable. That is, while a television network may acquire the exclusive rights to broadcast a basketball game on television, it has no power to stop competitors from providing the score, analysis, or player statistics regarding the game, nor may it prevent fans and analysts from accessing, using, and manipulating data regarding the game.

[174] *See NBA*, 105 F.3d at 846.

[175] *See id.* at 847.

that information regarding a financial firm's recommendation to buy, sell, or hold a stock or security was a fact, even if obtained from communications sent by that firm to its subscribers.[177] That the recommendation may have been contained in a broader work that was subject to copyright protection was not material.[178] Thus, despite the fact that sports statistics and stock recommendations are both pieces of information which may be gathered from a copyrighted work, neither are subject to copyright protection.[179]

[54] Furthermore, the court in each case recognized the economic value of this information and determined that despite that economic value, the information was still not subject to copyright protection.[180] In *NBA*, the court concluded that despite the economic value of the statistical information, as well as the NBA's present plans to commercialize that information, "SportsTrax" was an "informational product" that did not infringe on the NBA's copyrights.[181] Similarly, in *Flyonthewall.com*, the court found that there was value in both the financial firm's analysis as well as its recommendations, but determined that while the reports were copyrightable, by reporting only the recommendation, the defendant had used only factual information.[182] As a result, whether information has economic value does not determine if it is subject to copyright protection;

[176] *See id.*

[177] *See Theflyonthewall.com, Inc.*, 650 F.3d at 896, 902.

[178] *See id.* at 896.

[179] In *NBA*, those reporting statistics were generally reporting them from the copyrighted broadcast of the event, not from the non-copyrightable live event itself. *See NBA*, 105 F.3d at 844.

[180] *See id.* at 846, 853–54; *see also Theflyonthewall.com*, 650 F.3d at 896, 902–03, 905–07.

[181] *See NBA*, 105 F.3d at 853–54.

[182] *See Theflyonthewall.com*, 650 F.3d at 903.

facts may have economic value, but such value will not make them protectible under the Copyright Act.[183]

[55] This is reminiscent of the analysis in *Google Books*, which rejects the Author's Guild's claim that Google was required to take a license to digitize copyrighted works and make them searchable.[184] In *Google Books*, the court explicitly rejected the contention that Google's use was covered by any license in existence and finds that the Author's Guild could not require a license (even a free one) to provide the *Google Books* service.[185] It also rejected the contention that Google had replaced a comparable service provided by the Author's Guild in a manner that could be violative of the Copyright Act.[186] It did so because the court recognized that the information provided by *Google Books* was not the type of copyrighted material for which a license would be required, but instead facts about the work.[187] This analysis reflects a similar concern as in *NBA* and

[183] *See id.* at 906–07.

[184] *See* Authors Guild v. Google, Inc., 804 F.3d 202, 211–12, 226, 228–29 (2d Cir. 2015).

[185] *See id.* at 226.

[186] *See id*. at 226–227 ("In the cases cited, however, the purpose of the challenged secondary uses was not the dissemination of information *about* the original works, which falls outside the protection of the copyright, but was rather the re-transmission, or re-dissemination, of their expressive content. Those precedents do not support the proposition Plaintiffs assert—namely that the availability of licenses for providing unprotected information about a copyrighted work, or supplying unprotected services related to it, gives the copyright holder the right to exclude others from providing such information or services. While the telephone ringtones at issue in the *ASCAP* case Plaintiffs cite are superficially comparable to Google's snippets in that both consist of brief segments of the copyrighted work, in a more significant way they are fundamentally different. While it is true that Google's snippets display a fragment of expressive content, the fragments it displays result from the appearance of the term selected by the searcher in an otherwise arbitrarily selected snippet of text. Unlike the reading experience that the Google Partners program or the Amazon Search Inside the Book program provides, the snippet function does not provide searchers with any meaningful experience of the expressive content of the book.") (emphasis in original).

[187] *See id.* at 227.

Flyonthewall.com, that information about a work, even if it is ultimately contained within the work, is an unprotectible fact under copyright law.

[56] Thus, facts and information about a work are broad exceptions to copyrightability. Those facts and pieces of information are not made copyrightable by the copyright holder's ability or desire to exploit them, or the potential value that incorporating information about that work could add to a service that the copyright holder could offer. Permitting short portions of a copyrighted work to be incorporated in a service that allows for the search and analysis of video content without being considered use of the underlying work appears to be a relatively uncontroversial position when considered in light of the non-copyrightability of sports statistics, sporting events, and stock recommendations.

III. DEFINING THE APPROPRIATE SCOPE OF FAIR USE

A. Why it is Time for the Supreme Court to Recognize that Providing Information About a Work is Fair Use

[57] The Supreme Court ought to grant certiorari in *TVEyes*, even if only to hold that providing information about a work is a fair use. Although *Google Books* and *HathiTrust* established this point,[188] *TVEyes* reintroduced uncertainty. The Supreme Court ought to resolve that uncertainty in favor of the rule announced in *Google Books* and *HathiTrust*.

[58] Affirming that providing information about a work is a fair use would also reflect the economic realities of modern society. At present, a great deal of the information on the internet would be far harder to reliably access under the rule that a copyright holder has the right to prevent access to information regarding copyrighted works if it might potentially offer licenses to use that information in the future.

[188] *See id.* at 206, 217, 225; *see also* Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 93, 97, 105 (2d Cir. 2014).

[59] Those cases also provide a useful framework for analyzing whether providing information about a work is transformative in a given case. Ultimately, in *Google Books*, the Second Circuit determined that the transformative nature of providing information about the works at issue supported a finding of fair use.[189] The Second Circuit highlighted in its evaluation of "snippet view" that "[w]hat matters in such cases is not so much the 'amount and substantiality of the portion used' *in making a copy*, but rather the amount and substantiality of *what is thereby made accessible* to the public."[190] In *Google Books*, the limited portion of the work made available to the public for the purpose of contextualizing the search result was sufficiently small, such as to not provide more information about the work than was necessary to provide the information sought about the work.[191] Similarly, the Second Circuit found that TVEyes' use of Fox News' content was a transformative, use,[192] quoting *Google Books* for the proposition that the appropriate focus with regard to the amount or substantiality of the portion of the work is the portion made available to the general public.[193] However, it found that TVEyes' use was not protected by fair use.[194] Since *TVEyes* involved the use of a substantial portion of the underlying work and likely far more than was required to provide context to the search results,[195] the Second Circuit's analysis does not make clear where a line might be drawn with regard to a less extensive use of Fox News' content.

[189] *See Google Inc.*, 804 F.3d at 229.

[190] *Id*. at 222.

[191] *See id.* at 221–22, 225–27.

[192] *See* Fox News Network, L.L.C. v. TVEyes, Inc., 883 F.3d 169, 177–78 (2d Cir. 2018).

[193] *See id.* at 178–79 (citing Authors Guild v. Google, Inc., 804 F.3d 202, 222 (2d Cir. 2015)).

[194] *See id.* at 174.

[195] *Cf. id.* at 178–79 (holding that TVEyes' use of Fox News content was a transformative use but not a fair use due to TVEyes' use being "extensive").

[60] The underlying principle is that providing information about a work is both a transformative use and a fair use, and the extent of the portion of the work provided must be measured against the portion of the work that would be required to provide the information about the work. In order to provide information about the work, TVEyes, much like Google Books, must provide access to at least a portion of Fox News' content to show the context in which the searched-for term appeared and how it was used to "reveal whether the term is discussed in a manner or context falling within the scope of the searcher's interest."[196] However, TVEyes provided a far larger portion of the work than was necessary to do so.[197] As a result, it is unlikely that even taking the broad view of fair use would change the result in *TVEyes*.

B. Clarifying the Standard for Market Measurement

[61] In granting the petition for certiorari in *TVEyes*, the Supreme Court ought to extend the rule for parody laid down in *Campbell v. Acuff-Rose* in this new context to find that when a use provides information about a work, there is no effect on a relevant market.

[62] In *TVEyes*, this approach likely would not make a difference regarding the outcome of the case. While it would restrict the extent of the inquiry into whether the information provided regarding the television programming at issue harmed the market for Fox News' programming, the

[196] Authors Guild v. Google, Inc., 804 F.3d 202, 217–18 (2d Cir. 2015) (providing the following illustration: "For example, a searcher seeking books that explore Einstein's theories, who finds that a particular book includes 39 usages of 'Einstein,' will nonetheless conclude she can skip that book if the snippets reveal that the book speaks of 'Einstein' because that is the name of the author's cat. In contrast, the snippet will tell the searcher that this is a book she needs to obtain if the snippet shows that the author is engaging with Einstein's theories." This example clearly and succinctly shows the weakness in the argument that no access to portions of the work itself is needed to access information about the work. Without some ability to view the search term in context, the ability to access information about a work is of limited utility).

[197] *Cf. TVEyes*, 883 F.3d at 178–79 (stating that TVEyes' use of Fox News content was substantial).

length of the available clips would likely cause the use to harm Fox News' legitimate interest in licensing portions of its television programming; ten minutes is a substantial portion of a news broadcast,[198] and likely far longer than would be necessary to understand the context of the searched term. Thus, TVEyes likely provides a cognizable market for the portions of the work to its customer beyond the market for the information about the content.

[63] Although there may be some concern that by permitting content providers to require a license for lengthier portions of content, they may be able to eliminate access to information. This approach provides a built-in safeguard because to enable the service to provide information at all, a service like *TVEyes* must record all content.[199] The market is only harmed if the copyright holder offers a license for content which the copyright holder does not license; the service could offer a much more liberal portion without harming the copyright holder's market for the work.

[64] Therefore, if the Supreme Court elects to grant certiorari in *TVEyes*, it should approach the case by finding that market harm in cases where the allegedly infringing use involves the provision of mere information about a work is measured with respect to the market for the work or portions thereof, and not the market for licenses for information about the work. Allowing copyright holders to determine how information about the work is provided expands the scope of copyright too far.

[65] Certainly, if the copyright holder has made a derivative work, or alleges that the use made of portions of its work amount to a derivative work,[200] then the market for that derivative work clearly may be protected. However, by considering whether the copyright holder's market for licenses to information about the work might be affected by the use and provision of

[198] *See id.* at 179.

[199] *See id*. at 174.

[200] *Cf. id.* at 176, 179 (explaining the factor in determining "transformative" or "derivative".

access to small portions of the work in order to contextualize that information, *TVEyes* went much further than the protection offered for derivative works. In effect, if this rule regarding the provision of information about the work were widely adopted, essentially all search technology would always harm a market for information regarding the work.[201]

[66] In reviewing *TVEyes*, the Supreme Court ought to adopt this rule: that the relevant market is the market for the work itself and any derivative works, but that there is no right to control the provision of information about the work. Explicitly adopting this standard would help resolve the disconnect between the Second Circuit's line of reasoning in *Google Books* and *HathiTrust* with its line of reasoning in *TVEyes*, while balancing the interests of the copyright holder with the interests of the public in their ability to access information about works.

C. Case Study on Fair Use: How the *TVEyes* Decision Might Impact Higher Education

[67] One illustrative example of *TVEyes*' importance beyond the context of television broadcasts is the impact that it could have on to fair use by institutions of higher education. To examine how the court's approach in that case might affect college and university efforts to preserve and provide greater access to their collections of works, this article considers the potential changes that the uncertainty introduced by *TVEyes* to the rules provided by *HathiTrust* and *Google Books*.

[68] While *TVEyes* says nothing about the use of works for a non-profit, educational purpose, and perhaps the Second Circuit would have analyzed portions of the case differently in that context, the Second Circuit would impose a significantly broader license requirement in *TVEyes* than it did in either *HathiTrust* or *Google Books*. As discussed above, in both *Google*

[201] *See* Perfect 10, Inc. v. Google, Inc., 653 F. 3d 976, 981 (9th Cir. 2011) (rejecting the argument that Google infringed on Perfect 10's copyright by providing a thumbnail version); *see also* Perfect 10, Inc. v. Amazon.com, 508 F. 3d 1146, 1160 (9th Cir. 2007) (finding that Amazon did not infringe on Perfect 10's copyright).

Books and *HathiTrust*, the Second Circuit explicitly rejects the proposition that a transformative user could be required to obtain a license by a copyright holder.[202] But in *TVEyes*, the court appears to back away from this position, instead taking an expansive view of the licensing requirement, finding that a license could be required—even if a work was transformative—if the copyright holder might be able to later develop a copyrightable work which the fair use would infringe.[203]

[69] As more copyrighted works continue to be created and information continues to become more accessible, the need to make fair use of copyrighted works to achieve pedagogical purposes will continue to increase. Since colleges and universities already provide a great deal of information about works to their students and faculty and will continue to do so, a rule that prevents use where the copyright owner is unwilling to provide a license to the institution gives the copyright holder a de facto right to prevent the efficient location and use of copyrighted works, preventing the type of progress and creative expression that copyright is intended to promote.

[70] Incentivizing the use of copyrighted works by institutions of higher education should be of particular interest given the constitutional basis for copyright protection. Use of copyrighted works by colleges and universities is typically in furtherance of their educational and research missions, precisely the type of activities which achieve the express purposes of intellectual property under the copyright clause.[204] As a result, any potential barriers to such use should be carefully analyzed to determine if such barrier is justified by a legitimate need to protect a valid and needed intellectual property right that will, itself, increase the level of creative and innovative works.

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[202] *See* Authors Guild v. Google, Inc. 804 F.3d 202, 223 (2nd Cir. 2015); *see also* Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 99 (2nd Cir. 2014) (both cases limiting the type of economic injury the fourth factor is concerned with).

[203] *See* Fox News Network, L.L.C. v. TVEyes, Inc., 883 F.3d 169, 180 (2nd Cir. 2018).

[204] *See* U.S. CONST. art. I, § 8, cl. 8.

i. *HathiTrust*, Course Materials, and the Digitization of University Libraries

[71] In order to understand how *TVEyes* might affect the ability of colleges and universities to provide access to their constituents, there are three key considerations: recent prior litigation in which colleges and universities have confronted issues of fair use, how colleges and universities use copyrighted works, and how colleges and universities will continue to evolve in the future.

[72] Working backwards from the most recent litigation, the higher education industry has been engaged in two major legal battles regarding the provision and use of copyrighted materials for educational purposes with copyright holders over the last several decades: from coursepack assembly, to online repositories, to the provision of access to works within the University's collection.

[73] As a bit of context for *HathiTrust*, HathiTrust describes itself as a "partnership of major research institutions and libraries working to ensure that the cultural record is preserved and accessible long into the future."[205] The HathiTrust seeks to enhance "research, scholarship, and the common good by collaboratively collecting, organizing, preserving, communicating, and sharing the record of human knowledge."[206] It began as a project to digitize college and university library collections, to facilitate access to out of print works and reduce (and hopefully halt) the number of out-of-print works lost due to decaying print.[207] Thus, HathiTrust is a project which does not provide access to any more works than an institution or its faculty and students already had access to. The major difference is that the access would now be available in a more convenient digital format and would not tend to

[205] *About*, HATHITRUST DIGITAL LIBRARY, https://www.hathitrust.org/about [https://perma.cc/47D7-F6VM].

[206] *Id.*

[207] *See Our Membership*, HATHITRUST, https://www.hathitrust.org/partnership [https://perma.cc/LL6L-5YAD].

destroy the original work.[208] Furthermore, in *HathiTrust*, member institutions were named as co-defendants.[209] As a result, the holding in that case was clearly and immediately relevant within higher education.

[74] Although the *Google Books* litigation was a separate case (with its own substantial procedural history) which began prior to *HathiTrust* and ultimately ended after *HathiTrust*, it was seen as inextricably linked to *HathiTrust*, by the publishing industry, the court, and the institutions themselves.[210] Not only was the scanning and conversion work handled by Google in both cases, but the ultimate aim—access to information about and portions of books—was the same in a broad sense.[211]

[75] In determining whether making course materials available on a course website was a fair use, the Eleventh Circuit found that the copying was not transformative before ultimately remanding the case to the district court for additional analysis on whether the use in question was a fair use; taking issue with the district court's original analysis as too mechanical.[212]

[76] These three sets of cases illustrate three important uses of copyrighted works by colleges and universities: the preservation, dissemination, and access of materials contained in the organization's library, or the library of another organization which has granted permission to the first institution's personnel to use its works; the selection and inclusion of works (or portions thereof) in digital repositories, which may be used for a single course or a longer period of time; and the inclusion of portions of works within coursepacks distributed to students to provide

[208] *See Mission and Goals*, HATHITRUST, https://www.hathitrust.org/mission_goals [https://perma.cc/97ZW-RSGT].

[209] *See* Authors Guild, Inc. v. Hathitrust, 755 F.3d 87, 87 (2d Cir. 2014).

[210] *See, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202, 217 (2d Cir. 2015).

[211] *See Google, Inc.*, 804 F.3d at 207–09; *Hathitrust*, 755 F.3d at 90, 91, 97.

[212] *See* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1260, 1284 (11th Cir. 2014).

those students with reading materials to accompany a particular professor's course.

[77] The rule that appeared to be rising from those cases was that providing information about a work, even if accompanied by portions of the work, would be protected as long as the level of access transformed the portion of the work to be used fit within the classroom exception,[213] or was otherwise considered a fair use. The services which merely made portions of pre-existing works available on a course website or through learning management software were not transformative, though in some cases the portion of the work provided was sufficiently small to constitute a fair use. This appeared to be true even if there was a bona fide pedagogical purpose for the arrangement. On the other hand, providing information about those works was not an infringement.

[78] As a result, professors typically obtained clearance for inclusion of portions of desired works within a coursepack,[214] but the institution had flexibility in developing (or affiliating with organizations which had already developed) systems to digitize its library collections and to provide appropriate access to the institution's constituents and others.[215]

[79] However, since the most recent litigation regarding these issues, traditional colleges and universities have continued to expand their online

[213] *See* 17 U.S.C. § 110(1) (2018).

[214] For a more in-depth description of the mechanics involved in obtaining clearances and assembling course packs, *see, e.g.*, *Academic Coursepacks*, COPYRIGHT & FAIR USE, https://fairuse.stanford.edu/overview/academic-and-educational-permissions/academic-coursepacks/ [https://perma.cc/7XZA-Q2BT].

[215] *See* Patricia Aufderheide et al., *Statement of Best Practices in Fair Use of Collections Containing Orphanworks for Libraries, Archives, and Other Memory Institutions*, CTR FOR MEDIA & SOC. IMPACT 18–19 (2014), http://cmsimpact.org/wp-content/uploads/2016/01/orphanworks-dec14.pdf [https://perma.cc/V52L-XYTT].

course offerings.[216] Online courses bring a host of significant challenges in the copyright area, including the loss of the classroom use exception for works shown to students.[217] In particular "Massively Open Online Courses" or "MOOCs" are structured significantly differently from other college and university courses, are often produced on small budgets, and are typically aimed at topics of broad interest.[218] As a result, these courses pose many different issues from a traditional classroom setting.

[80] A MOOC has been defined as an "an open-access online course (i.e., without specific participation restrictions) that allows for unlimited (massive) participation."[219] The MOOC format represents a fundamentally different model from traditional classroom instruction. MOOCs may have far larger class sizes,[220] do not require matriculation,[221] generally do not lead to graduation or recognized credentials,[222] and may be offered in

[216] *See* Eric Bettinger & Susanna Loeb, *Promises and Pitfalls of Online Education*, BROOKINGS INST. (June 9, 2017), https://www.brookings.edu/research/promises-and-pitfalls-of-online-education/ [https://perma.cc/2EKL-BWP4].

[217] *See Exceptions & Limitations: Classroom Use, Fair Use, and More*, UNIV. OF MINNESOTA LIBRARIES, https://www.lib.umn.edu/copyright/limitations [https://perma.cc/4APP-2SUQ].

[218] *See* GREGORY M. SALTZMAN, *The Economics of MOOCs*, *in* THE NEA 2014 ALMANAC OF HIGHER EDUCATION 23 (2014), https://www.nea.org/assets/docs/HE/2014_Almanac_Saltzman.pdf [https://perma.cc/JGP5-N2ZM].

[219] Andreas M. Kaplan & Michael Haenlein, *Higher Education and the Digital Revolution: About MOOCs, SPOCs, Social Media, and the Cookie Monster*, 59 BUS. HORIZONS 441, 443 (2016).

[220] *See id.* at 443.

[221] *See* Maria Joseph Israel, *Effectiveness of Integrating MOOCs in Traditional Classrooms for Undergraduate Students*, 16 INT'L REV. RES. IN OPEN & DISTRIBUTED LEARNING 102, 107 (2015).

[222] *See id.* at 103.

connection with or through a for-profit service provider.[223] A MOOC may or may not offer college credit for courses taken.[224] Finally, MOOCs may require students to pay or may be entirely free to the student.[225] While some MOOC content is likely governed under traditional copyright principles and current copyright precedent, there are also a large number of unanswered legal questions regarding the use of copyrighted materials in the context of MOOCs.[226]

[81] In particular, not only does the institution lose the protection of the classroom use exception, but it also may no longer be able to accurately identify the number of students enrolled in the MOOC, control access to copyrighted material shown, or otherwise enforce restrictions on how MOOC students use such works. In addition, the analysis in *Georgia State University* in which the Eleventh Circuit struggles with whether Georgia State University's inclusion of copyrighted material within an online repository was a commercial, rather than educational use increases the likelihood that providing MOOC students access to a copyrighted work without a license would not be a transformative use; making a finding of fair use challenging in such a case.[227] This is coupled with the fact that the indeterminate number of MOOC students who may access the work makes obtaining a license to provide the work to those students challenging. As a result, an institution's ability to provide information about a work, including small portions thereof, in order to enable MOOC students to determine

[223] *See* Kaplan & Haenlein, *supra* note 219, at 442–43.

[224] *See id.*at 442–47.

[225] *See id.* at 442–45.

[226] Both related to copyright as well as other areas of law, including accreditation, tax liability and "nexus," privacy, and federal student financial aid. *See* Michael Goldstein & Greg Ferenbach, *Legal and Regulatory Aspects of MOOC Mania*, UNIV. BUS. (Mar. 26, 2013), https://www.universitybusiness.com/article/legal-and-regulatory-aspects-mooc-mania [https://perma.cc/6MLW-YMQ2] (discussing various legal and regulatory issues surrounding MOOCs).

[227] *See* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1263–66 (11th Cir. 2014).

whether they will need to access such works to obtain information required to complete the MOOC is needed, while professors seeking to offer MOOCs will likely need to rely on materials that they have created more heavily than in other contexts, they may still require the ability to reference outside works and materials.

ii. The Challenge of Uncertainty

[82] While MOOCs reflect changes in how the higher education industry operates and raise issues regarding how colleges and universities will respond to those changes, *TVEyes* also creates uncertainty in areas previously thought to be settled. *TVEyes'* analysis creates a number of questions and concerns regarding how fair use will be interpreted going forward, particularly in cases that involve the provision of information about a work coupled with access to portions of the work.[228] This is particularly challenging in the context of both the higher education industry, in which budgets typically do not support major copyright defense efforts, and the copyright context, where the threat of an overzealous publisher creates major concerns regarding risk management and mitigation.

[83] Although uncertainty can never be truly eliminated, if the Supreme Court grants certiorari in *TVEyes* it could adopt the analysis from *Google Books*, even if it determines that TVEyes' use of copyrighted material was too extensive to avoid infringing. The Supreme Court could thereby distinguish *Google Books* and *HathiTrust* on the basis that the use in those cases was significantly narrower than that in *TVEyes*.

D. Adopting the Broad View of Fair Use

[84] Despite how the Second Circuit evaluated the *TVEyes* case, the better approach to fair use is the broad view. The broad view strikes the proper balance between the rights held by copyright holders and potential fair users without simply subsuming the entire copyright regime.

[228] *See supra* Section II, at [15]–[18].

[85] With regard to the first factor, the broad view finds transformative use where the use either transforms the work itself or adds new utility, including association of the work with information about it to allow for more efficient and effective access to its content and context. In the context of *TVEyes*, the broad view analysis would find that *TVEyes'* use of the copyrighted content was transformative.

[86] Under the broad view, the fourth factor is evaluated with reference to the market for the work and its derivatives; the copyright holder does not have a right to require a license to make information about the work available when only the portion of the work reasonably necessary to understand and interpret that information is provided. In the context of *TVEyes*, the use of copyrighted material likely exceeds the minimal amount needed to contextualize the information provided by TVEyes' search feature. As a result, there is likely some harm to Fox News' market for its copyrighted material. Similarly, the third factor analysis would indicate that TVEyes' use of the copyrighted material included a substantial portion of the work itself. As the Second Circuit noted, even a single ten-minute segment of a news program likely represents a substantial portion of that work.[229]

[87] Finally, the broad view treats fair use as a defense, but not as an affirmative defense. While many courts continue to treat fair use as an affirmative defense, some recent decisions have questioned whether fair is an affirmative defense.[230] The Supreme Court could use the opportunity created by *TVEyes* to clarify that fair use should be treated as a defense, but not as an affirmative defense.

[88] While the broad use would expand fair use beyond the extent recognized in *TVEyes*, it is far from unlimited and would retain strong copyright protection in the vast majority of areas in which works enjoy such protection today. Copyright holders would still retain the right to protect their work, its derivatives, and the market to license portions thereof. The

[229] *See supra* Section II, at [17]–[18].

[230] *See supra* Section II, at [12]–[13].

broad view would, however, limit the copyright to those areas, eliminating the possibility that a copyright holder could restrict the use of information about a copyrighted work to make identifying, searching, and determining whether to make use of that work impossible. As a result, the broad view aligns closely with the underlying purpose of copyright law; it provides for a strong property right in the work itself, providing the protection needed to incentivize innovation and the development of new creative works, while restricting that property right from applying to the provision of information about the work.[231]

IV. CONCLUSION

[89] *TVEyes* offers a perfect opportunity for the Supreme Court to clarify the interpretation of fair use. The case offers a potentially novel extension of fair use in a new medium. Furthermore, since the last fair use case considered by the Supreme Court, the circuits have begun to tackle fair use in additional contexts and diverge in their interpretation of the fair use factors. As a result, *TVEyes* permits the Supreme Court to update its analysis and settle these analytical differences. Ultimately, by adopting the broad view, courts can encourage the creation and authorship of creative works that the intellectual property clause and the Copyright Act seek to encourage. The Supreme Court ought to consider granting certiorari *TVEyes* to adopt the broad view of fair use, whether it affirms the ultimate decision by the Second Circuit or not.

[231] *See supra* Section I, at [15].