The Seinfeld Aptitude Test: An Analysis Under Substantial Similarity and the Fair Use Defense

TABLE OF CONTENTS

INTRODUCTION

Although Jerry, Elaine, George, and Kramer[1] no longer appear on prime time airwaves, we can watch repeats of the popular *Seinfeld* series in syndication.[2] However, we cannot test our knowledge of the events in the television series through a particular trivia book. The Second Circuit Court of Appeals declared that a book

[1] *See Seinfeld* (NBC television broadcast, 1989-1998). The four principal characters in the *Seinfeld* television series are Jerry Seinfeld, Elaine Benes, George Costanza, and Cosmo Kramer. *See id.*

[2] *See id.* The series ran on television for nine years until May 1998. *See id.* However, television stations continue to run repeats on a daily basis. *See Seinfeld* (FOX television broadcast, 1999) (broadcasting *Seinfeld* episodes six days per week).

called *The Seinfeld Aptitude Test* ("*The SAT*") infringed upon the copyright owner's rights in the series.[3]

In August 1998, the Second Circuit Court of Appeals held that *The SAT* copied enough material from *Seinfeld* to quantitatively and qualitatively amount to copyright infringement in *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*[4] The court held that *The SAT* did not constitute a fair use of the *Seinfeld* television series[5] because it infringed on protected expression.[6]

Beth Golub, the writer of *The SAT*, acknowledged that she took content from the series in order to write the book.[7] However, mere copying does not rise to the level of infringement.[8] Copyright law requires a showing of improper or unlawful appropriation in addition to a showing that the work was actually copied.[9]

This Note examines whether the court correctly determined that *The SAT* constitutes unlawful or improper copying, and if so, whether the court should have applied the fair use defense. Part I provides a synopsis of copyright law, and the tests used for analyzing whether copyright infringement occurred. Part II presents the facts of *Castle Rock Entertainment* and the court's rationale. Part III argues that the *Castle Rock Entertainment* decision is incorrect for two reasons. First, the court used a quantitative/qualitative analysis to find substantial similarity and dismissed other, more appropriate

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[3] *See* Castle Rock Entertainment v. Carol Publ'g Group, 150 F.3d 132, 138-39 (2d Cir. 1998) (holding that copying was unlawful or improper under quantitative/qualitative approach to determine substantial similarity).

[4] *See id.*

[5] *See id.* at 141-46 (applying four fair use factors). The court applied the four factors, namely the purpose/character of use, the nature of the copyrighted work, the amount and substantiality of work used, and the effect of use on the plaintiff's market. *See id.* The court concluded that the fair use defense did not apply to *The SAT*. *See id.* at 146.

[6] *See id.* at 138-39 (analyzing substantial similarity under quantitative/qualitative approach to conclude that *The SAT* copied from *Seinfeld*'s protected expression).

[7] *See id.* at 137 (explaining that Golub admitted directly copying from *Seinfeld* to create *The SAT* along with explanation of how she copied).

[8] *See id.* (providing overview of elements required for copyright infringement action); Twin Peaks Prods., Inc. v. Publications Int'l, 996 F.2d 1366, 1372 (2d Cir. 1993) (explaining that plaintiff must establish, among other things, that she owned copyright and that defendant copied original elements of her work).

[9] *See* Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 69-70 (2d Cir. 1999) (listing elements required for copyright infringement); Laureyssens v. Idea Group, Inc., 964 F.2d 131, 139-40 (2d Cir. 1992) (stating that after showing that defendant actually copied plaintiff's work, plaintiff must show that copying amounts to improper or unlawful appropriation).

tests too readily.[10] Second, even if the court found copyright infringement, the fair use doctrine provided a viable defense to the copyright infringement claim at issue.[11]

I. COPYRIGHT LAW

Copyright is a property right in an original work of authorship that gives the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.[12] Copyright is a statutory doctrine, expressly authorized by Article 1, Section 8, Clause 8 of the United States Constitution.[13] This Clause grants authors and inventors exclusive rights in their writings and discoveries for the purpose of advancing science and useful arts.[14] Pursuant to this constitutional right, the first Congress enacted the original Copyright Act in 1790.[15] Copyright law continued to evolve as Congress enacted several statutory amendments over time.[16] Congress enacted the current version of the Copyright Act in 1976.[17]

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[10] *Compare Castle Rock*, 150 F.3d at 138-41 (dismissing ordinary observer test, total concept and feel test, nonliteral similarity test, and fragmented literal similarity test), *with* Williams v. Crichton, 84 F.3d 581, 589 (2d Cir. 1996) (applying total concept and feel test to analyze substantial similarity), *and* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (utilizing ordinary observer test to determine substantial similarity).

[11] *Compare Castle Rock*, 150 F.3d at 140-44 (denying fair use defense), *with* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577-93 (1994) (granting fair use defense to rap group's parody of plaintiff's song), *and* New Era Publications Int'l v. Carol Publ'g Group, 904 F.2d 152, 155-56 (2d Cir. 1990) (holding that quotations from copyrighted works were fair use).

[12] *See* 17 U.S.C. § 106 (1994); Agee v. Paramount Communications, Inc., 59 F.3d 317, 321 (2d Cir. 1995); Respect Inc. v. Fremgen, 897 F. Supp. 361, 364 (N.D. Ill. 1995); BLACK'S LAW DICTIONARY 336 (6th ed. 1990) (defining "copyright").

[13] *See* U.S. CONST. Art. 1, § 8, cl. 8 (stating expressly, "To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

[14] *See id.*; *see* also 17 U.S.C. § 106 (defining rights given to authors).

[15] *See* Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790) (repealed 1831); H. R. REP. No. 94-1476, at 2-3 (1976); A. A. GOLDMAN, GENERAL REVISION OF THE COPYRIGHT LAW 1 (1957) (providing history of copyright law).

[16] *See* Copyright Act of 1909, ch. 320, § 1, 35 Stat. 1075 (1909) (repealed 1976); Copyright Act of 1831, ch. 16, 4 Stat. 436 (1831) (repealed 1909); Copyright Act of 1790, ch. 15, 1 Stat. at 124.; Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860-61 (1987) (discussing legislative history of copyright law). Congress enacted the first copyright law in 1790. *See* Copyright Act of 1790, ch. 15, 1 Stat. at 124. Congress enacted constitutional revisions in 1831 and 1909. *See* Copyright Act of 1909, ch. 320, § 1, 35 Stat. at 1075; Copyright Act of 1831, ch. 16, 4 Stat. at 436. In 1976, Congress enacted the current version of the Copyright Act. *See* 17 U.S.C. §§ 101-810. To decide copyright infringement cases, nineteenth-century courts broke copyright infringement down into three elements: independent creation, misappropriation, and fair use. *See* Daly v. Palmer, 6 F. Cas. 1132, 1138 (C.C.S.D.N.Y. 1868) (No. 3,552); Greene v. Bishop, 10 F. Cas. 1128, 1333-34 (C.C.D. Mass. 1858) (No. 5,763); Emerson v. Davies, 8 F. Cas. 615, 618-19 (C.C.D. Mass.

The Copyright Act fulfills its constitutional purpose of promoting the progress of arts and sciences by allowing authors to copyright their work.[18] Copyright law fosters creativity by assuring authors that the law protects their expression from improper or unlawful use by others.[19] However, in addition to benefiting authors by giving them exclusive control over their works, copyright law must serve the broader needs of society.[20] Society's advancement in the arts and sciences requires the use of novel ideas generated by individuals.[21] Therefore, a balance must exist between granting authors monopolistic rights over their creations and al-

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1845) (No. 4,436); Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901); Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaningless of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 724-25 (1987) (discussing how nineteenth-century courts decided copyright infringement cases). Courts reviewed the similarity between the original and the alleged copy to analyze the three elements of independent creation, misappropriation, and fair use. *See Daly*, 6 F. Cas. at 1138; *Greene*, 10 F. Cas. at 1333-34; *Emerson*, 8 F. Cas. at 618-19; *Folsom*, 9 F. Cas. at 344-45.

[17] *See* 17 U.S.C §§ 101-810 (embodying current version of Copyright Act); Litman, *supra* note 16, at 857-58 (stating that 1976 Act is essentially same as 1909 Act, although it does make provision for technological changes that have occurred since 1909). The 1976 Act has been criticized as being too complicated and unclear. *See id.* at 860. In fact, legislative history indicates that instead of being drafted by members of Congress, the 1976 Act is a result of negotiations between authors, publishers, and others with economic interests in copyrights. *See id.* This mix of drafters coupled with their own self interests may have caused the confusion surrounding the interpretation of the Act. *See id.*

[18] *See* 17 U.S.C. § 106 (defining rights given to authors); Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) (stating that copyright assures authors rights to their original expression); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546 (1985) (noting that "rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors"). *See generally* MAGRETH BARRETT, INTELLECTUAL PROPERTY CASES AND MATERIALS 351 (1995) (discussing copyright as monopoly).

[19] *See* 17 U.S.C. § 106 (providing statutory framework of authors rights regarding their creations); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 600 (1997) (noting definitional distinction between copyright law and Copyright Act). For purposes of this Note, "Copyright Act" refers to the Copyright Act of 1976, *see* 17 U.S.C. §§ 101-810, and "copyright law" refers to statutory and case law. Both the terms "Copyright Act" and "copyright law" are used in this Note because case law has played and continues to play an important role in developing copyright law, for example, by formulating tests used to evaluate substantial similarity. *Compare* 17 U.S.C. §§ 101-810 (providing statutory framework of copyright law, but not mentioning term "substantial similarity"), *with* Universal Money Ctrs., Inc. v. American Tel. & Tel. Co., 22 F.3d 1527, 1530 n.2 (10th Cir. 1994) (stating that courts "retain authority to monitor limits the outer limits of substantial similarity"), *and* Warner Bros. v. ABC, 720 F.2d 231, 246 (2d Cir. 1983) (stating that although jury may make factual determinations, courts monitor substantial similarity).

[20] *See* 17 U.S.C. § 106 (providing authors with five exclusive statutory rights). Authors have the right to reproduce their copyrighted works, prepare derivative works, distribute copies to the public, perform their work publicly and display their work publicly. *See id.*

[21] *See* BARRETT, *supra* note 18, at 352 (discussing rights of authors compared to public's interest in having access to copyrighted works).

lowing the public to use the creations to some degree.[22] To reach this balance, copyright law precludes others from using the author's particular form of expression, but permits others to use ideas or information provided in the author's work.[23]

A case illustrating this dichotomy between idea and expression is *Feist Publications, Inc. v. Rural Telephone Service.*[24] In *Feist,* a publishing company compiled an area-wide telephone directory by copying information from Rural's single-county directory.[25] The United States Supreme Court held that this copying was not unlawful or improper and did not constitute copyright infringement.[26] The Court reasoned that the work must owe its originality to the author to qualify for copyright protection.[27] Because Rural had not created the factual information listed in the telephone directory, it could not claim originality to that information.[28] The Court distinguished between ideas and facts, on the one hand, and expression, on the other hand, noting that copyright law protects only expression.[29] The Court explained that copyright protection does not extend to names, telephone numbers and towns because they are

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[22] *See id.* (stating that while primary purpose of copyright law is creation and dissemination of intellectual works for public welfare, secondary purpose is to reward authors for their contribution to society); WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 104 (6th ed. 1986) (explaining that authors' exclusive rights over their works contrast public's interest in having works available); *see also* Princeton Univ. Press v. Michigan Document Serv., 99 F.3d 1381, 1395 (6th Cir. 1996) (stating that the interest in encouraging creation of new works must be balanced against the public's interest in using those works).

[23] *See* Feist Publications v. Rural Tel. Serv., 499 U.S. 340, 349-50 (1991) (stating that copyright law protects only author's original expression); Baker v. Selden, 101 U.S. 99, 107 (1879) (holding that blank account books showing method of bookkeeping were not copyrightable because method was idea, not expression); BARRETT, *supra* note 18, at 422 (stating that fundamental principal of copyright law is that copyright does not protect ideas but does protect expression of ideas).

[24] *See Feist,* 499 U.S. at 340.

[25] *See id.* at 342-43.

[26] *See id.* at 360-64 (holding that copying was not lawful or improper because defendant did not copy anything that was "original" to plaintiff).

[27] *See id.* Throughout the Court's analysis, it emphasized that the work must have originated with the author to warrant copyright protection. *See id.* at 345-48. Because Rural did not create the listings within the telephone directory, the listings were not protected. *See id.* at 361. The Court stated that even if the plaintiff was the first to publish the names, towns, and telephone numbers in its directories, the information did not owe its originality to plaintiff, and was, thus, uncopyrightable. *See id.*

[28] *See id.* at 362-64 (classifying names, telephone numbers, and towns as "ideas and information" that copyright law does not protect).

[29] *See id.* at 349-50 (stating that copyright protects author's expression but encourages public to use ideas and information provided in author's work).

purely factual in nature.[30] The Court held that while copyright law protects the arrangement of directories that evince originality, Rural's directory showed no originality, since it was arranged alphabetically.[31] Thus, for copyright infringement to occur, the alleged infringer must have copied the author's expression.[32]

A. *Copyright Infringement*

The Copyright Act grants copyright owners exclusive rights over reproduction, adaptation, publication, performance, and display of their work.[33] A copyright owner can bring an infringement action under the Copyright Act if the alleged infringer encroaches upon any fundamental rights provided in the Act.[34] However, the Copyright Act fails to adequately define what constitutes copyright infringement. Accordingly, courts have developed several tests to determine if infringement occurred.[35]

In general, courts find copyright infringement when the owner of a valid copyright demonstrates unauthorized copying of protected expression.[36] Courts impose the burden of proof on the party alleging infringement.[37] The plaintiff must prove that he or

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[30] *See id.* at 362 (stating that listing names, telephone numbers, and towns in alphabetical order lacks creativity).

[31] *See id.* at 362-63 (stating that although unique arrangements requiring originality are protected under copyright law, plaintiff's arrangement was unoriginal).

[32] *See id.* at 360-64 (holding that expression requires degree of originality).

[33] *See* 17 U.S.C. § 501(b) (1994).

[34] *See id.*

[35] *See* Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) (developing *Krofft* test which consists of extrinsic test and intrinsic test to determine substantial similarity); Roth Greetings Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (developing total concept and feel test to determine substantial similarity); Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 196 (1990) (stating that courts enunciate their own standards as to what constitutes infringement due to lack of definition by Congress).

[36] *See Feist*, 499 U.S. at 361; Repp v. Webber, 132 F.3d 882, 889 (2d Cir. 1997); *see also* Laureyssens v. Idea Group, Inc., 964 F.2d 131, 141-42 (2d Cir. 1992) (discussing elements of copyright infringement).

[37] *See* Johnson v. Jones, 149 F.3d 494, 506-07 (6th Cir. 1998) (stating that plaintiff bore burden of establishing defendant's gross revenue from infringing plaintiff's drawings); The Saenger Org., Inc. v. Nationwide Ins. Assocs., Inc., 119 F.3d 55, 59 (1st Cir. 1997) (requiring plaintiff to prove that defendant copied plaintiff's text book); Motta v. Samuel Weiser, Inc., 768 F.2d 481, 483 (1st Cir. 1985) (stating that plaintiff bore burden of proving that defendant copied plaintiff's works of Mystic English); PATRY, *supra* note 22, at 191 (stating that copyright owner bears initial burden of proving prima facie case of infringement).

she owns the subject matter of the copyright.[38] If the plaintiff meets this burden, the courts apply a two-part test to analyze the alleged infringement.[39] First, the plaintiff must show that the defendant actually copied the work.[40] Second, the plaintiff must establish that the copying was unlawful or improper.[41]

1. Work Must Actually Be Copied

The plaintiff can show that the defendant copied the work by either direct or indirect evidence.[42] Direct evidence of copying occurs when an individual admits copying.[43] Indirect evidence occurs when the defendant has access to the plaintiff's copyrighted work.[44] Because direct evidence of actual copying is rare, plaintiffs commonly use indirect evidence of copying to prove actual copying.[45]

For example, in *Twin Peaks Productions, Inc. v. Publications International*,[46] in the absence of direct evidence, the plaintiff used indirect evidence to establish infringement.[47] The copyright owner of the television series *Twin Peaks* brought an infringement claim against the writer and publisher of a book about the series.[48] The book covered areas such as the show's popularity, the characters and actors who played the roles, the plots of eight episodes, and trivia

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[38] *See* Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 790 (5th Cir. 1999) (confirming that plaintiff must prove ownership to succeed in infringement action).

[39] *See Laureyssens*, 964 F.2d at 140 (stating that plaintiff must satisfy two-part test to establish that infringement occurred).

[40] *See Repp*, 132 F.3d at 889 (stating that substantial similarity need only be shown after plaintiff establishes actual copying); *Laureyssens*, 964 F.2d at 139-40 (summarizing two-part test).

[41] *See Laureyssens*, 964 F.2d at 140; Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (discussing improper appropriation as issue for trier of fact to decide).

[42] *See* Folio Impressions v. Byer California, 937 F.2d 759, 765 (2d Cir. 1991). The court stated that because direct evidence of copying is rarely found, a court can infer that copying occurred. *See id.* For the courts to make this inference, the plaintiff must demonstrate that the defendant accessed the plaintiff's copyrighted work and that both works are substantially similar. *See id.*; Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1072 (2d Cir. 1992) (discussing evidence of copying in both direct and indirect terms).

[43] *See* Fasa Corp. v. Playmates Toys, Inc., 912 F. Supp. 1124, 1168 (N.D. Ill. 1996) (giving example of direct evidence of copying). An example of direct evidence of copying is a witness observing the defendant copying. *See id.* at 1168.

[44] *See Laureyssens*, 964 F.2d at 140 (describing ways actual copying can be established by indirect evidence); *Arica*, 970 F.2d at 1072 (discussing evidence of copying in indirect terms).

[45] *See Laureyssens*, 964 F.2d at 140 (circumstantial evidence in form of access along with substantial similarity is more commonly used as indirect evidence of copying).

[46] *See* Twin Peaks Prods. Inc. v. Publications Int'l, 996 F.2d 1366 (2d Cir. 1993).

[47] *See id.* at 1372 (using access to plaintiff's work to prove actual copying).

[48] *See id.* at 1371.

questions.[49] In deciding whether the defendant actually copied the work, the court considered the defendant's access to the broadcasted programs.[50] Thus, the court used indirect evidence of copying to determine that infringement occurred. Direct evidence, such as an individual witnessing the defendant physically copying, was unavailable.[51] Therefore, either direct or indirect evidence suffices to prove the required element of copying. In addition to showing that the copying occurred by direct or indirect methods, the plaintiff must establish that the copying was unlawful or improper.

2. Copying Must Be Unlawful or Improper Under the Substantial Similarity Standard

To prevail on a copyright infringement claim, the plaintiff must show that the defendant actually copied the original work and that the copying was unlawful and improper.[52] Even if evidence of copying exists, a court may still deem the copying lawful and find for the defendant if the material copied is not protected by copyright.[53] For example, in *Hoehling v. Universal City Studios, Inc.*[54] the court found lawful copying, ruling for the defendant even though the defendant admitted copying.[55] In *Hoehling*, the defendant wrote and published a book about the destruction of the Hindenberg airship entitled *The Hindenburg*.[56] The defendant acknowledged

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[49] *See id.* at 1370-71.

[50] *See id.* at 1372 (noting that defendant's access plus similarity to plaintiff's copyrighted work is sufficient for infringement).

[51] *See id.* at 1372-73 (discussing defendant's access to plaintiff's work combined with substantial similarity to override defendant's claim of no direct evidence of access).

[52] *See* Repp v. Webber, 132 F.3d 882, 889 (2d Cir. 1997) (establishing elements of copyright infringement). In *Twin Peaks*, the court found unlawful copying when an author copied episodes of the *Twin Peaks* television series in narrative detail. *See* 996 F.2d at 1375. The defendant's 128-page book included a 46-page narrative description of the show's plots. *See id.* at 1372-73. The Second Circuit Court of Appeals found literal similarity, nonliteral similarity and infringement of the plaintiff's right to make derivative works. *See id.* at 1372.

[53] *See* Baker v. Selden, 101 U.S. 99, 107 (1879) (holding that blank account books showing method of bookkeeping were not copyrightable because they constituted idea, not expression); *see also* BARRETT, *supra* note 18, at 414 (noting that copying news stories, factual narratives, and biographies is lawful); COPYRIGHT REVISION ACT OF 1976 12 (Commerce Clearing House, Inc. ed., 1976) (stating that ideas, procedures, systems, and processes cannot be protected because they are ideas, not expression).

[54] *See* Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d. Cir. 1980).

[55] *See id.* at 975, 979-80.

[56] *See id.* at 975 (explaining that defendant wrote his book 10 years after publication of plaintiff's book).

consulting the plaintiff's book on the same topic for details.[57] Although the defendant admitted using information contained within the plaintiff's book to write his own book, the Second Circuit deemed the copying lawful.[58] The court explained that the factual information that the defendant copied was in the public domain.[59] Furthermore, the court stressed the practical importance of saving time by referring to another's work for historical facts, rather than duplicating the research.[60] As the *Hoehling* ruling indicates, copying must be unlawful or improper to prevail on a copyright infringement claim.[61]

The most common way to establish that the copying is unlawful or improper is to show that the allegedly infringing work is substantially similar to the copyrighted work.[62] Because substantial similarity is such an elusive term, courts have developed different approaches to analyze the concept.[63] Courts generally choose an

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[57] *See id.* at 976 (discussing that in addition to consulting plaintiff's book, especially for its sabotage theory, defendant researched national archives and other sources).

[58] *See id.* at 978-80 (explaining that defendant copied historical facts which belong to public, not to author).

[59] *See id.* at 979.

[60] *See id.* (discussing policy reasons for placing factual works within public domain). The court emphasized that if factual works were not within the public's usage, this would deter authors from writing about historical events. *See id.* at 978.

[61] *See id.* at 979-80 (emphasizing that not all copying constitutes infringement, especially copying historical works).

[62] *See* Repp v. Webber, 132 F.3d 882, 889 (2d Cir. 1997) (describing ways to establish unlawful or improper copying in absence of direct copying); Laureyssens v. Idea Group, Inc., 964 F.2d 131, 139-40 (2d Cir. 1992) (establishing that once plaintiff proves actual copying, next step is to show substantial similarity between two works).

[63] *See, e.g.*, Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977) (developing *Krofft* test which consists of extrinsic test and intrinsic test to determine substantial similarity); Roth Greetings Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (developing total concept and feel test to determine substantial similarity); Jeannette Rene Busek, *Copyright Infringement: A Proposal for a New Standard for Substantial Similarity Based on the Degree of Possible Expressive Variation*, 45 UCLA L. REV. 1777, 1787-91 (1998) (discussing pattern test, abstractions test, and total concept and feel test); Jeffrey D. Coulter, *Computers, Copyright and Substantial Similarity: The Test Reconsidered*, 14 J. MARSHALL J. COMP. & INFO. L. J. 47, 54-56 (1995) (discussing *Krofft* test as applied to computer programs); Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 190-92 (1994) (discussing common tests courts use for substantial similarity and discrediting them); Cohen, *supra* note 16, at 747-57 (discussing *Salked* approach and *Krofft* approach to find substantial similarity). The issue of what amounts to substantial similarity has been called one of the most difficult questions in copyright law. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(a) (1992) [hereinafter NIMMER, NIMMER ON COPYRIGHT]. In fact, some commentators advocate a change in this standard. *See, e.g.*, Cohen, *supra* note 16, at 758 (advocating and describing new approach that distinguishes idea and expression, and utilizes objective test to determine substantial similarity). Critics focus on the lack of clarity for the amount of simi-

approach that suits the specific facts of each case.[64] Furthermore, courts frequently apply more than one approach to support their determination of substantial similarity.[65] This Note focuses on five common approaches: (1) the qualitative/quantitative analysis; (2) the ordinary observer test; (3) the total concept and feel test; (4) the fragmented literal similarity test; and (5) the nonliteral similarity test.

First, the qualitative/quantitative analysis considers the amount and nature of the work copied.[66] To satisfy the qualitative component, the alleged infringer must have copied the plaintiff's expression.[67] On the other hand, the quantitative component deals with how much the alleged infringer exactly copied from the original copyrighted work.[68] To establish substantial similarity, the amount of work copied must be above a de minimis threshold.[69] Therefore, copyright law does not condemn trivial copying.[70] Because of its generalistic nature, courts do not usually apply the quantitative/qualitative analysis as the sole basis for determining substantial similarity. If courts decide to use the quantitative/qualitative ap-

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larity required to be "substantial," the failure to separate "copying" from misappropriation and an inadequate dealing with the idea/expression dichotomy. *See, e.g., id.* (describing problems associated with term "substantial similarity" as used in copyright infringement cases).

[64] *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 548-49 (1985) (applying fragmented literal similarity test because plaintiff alleged literal copying); Williams v. Crichton, 84 F.3d 581, 589 (2d Cir. 1996) (applying total concept and feel test because plaintiff's allegedly infringed work was children's book with simple plot line).

[65] *See* Knitwaves v. Lollytogs, 71 F.3d 996, 1003-04 (2d Cir. 1995) (using both ordinary observer test and total concept and feel test to analyze similarity between sweaters); Wildlife Express Corp. v. Carol Wright Sales, Inc., 18 F.3d 502, 509-11 (using both ordinary observer test and total concept and feel test to analyze similarity between soft sculptured animal heads and tails on duffel bags); Tree Publ'g Co. v. Warner Bros. Records, 785 F. Supp. 1272, 1275 (M.D. Tenn. 1991) (using both quantitative/qualitative analysis and fragmented literal similarity test to analyze similarity between songs).

[66] *See* Ringgold v. Black Entertainment Television, 126 F.3d 70, 74-77 (2d Cir. 1997) (describing quantitative/qualitative approach).

[67] *See* Feist Publications v. Rural Tel. Serv., 499 U.S. 340, 360-64 (1991) (holding that originality requires degree of expression); NIMMER, NIMMER ON COPYRIGHT, *supra* note 63, at § 13.03(a)(1) (discussing qualitative component).

[68] *See* NIMMER, NIMMER ON COPYRIGHT, *supra* note 63, at § 13.03(a)(2) (discussing quantitative component).

[69] *See Ringgold*, 126 F.3d at 75. The de minimis standard comes from the legal maxim "de minimis non curat lex" meaning "the law does not concern itself with trifles." *See id.* at 74. Therefore, the quantitative component permits a minimal degree of copying. *See id.*

[70] *See id.*

proach, they usually use it in conjunction with another test to determine substantial similarity.[71]

The Second Circuit found infringement based on the quantitative/qualitative analysis in *Ringgold v. Black Entertainment Television, Inc.*[72] In *Ringgold*, the creator of the *Church Picnic Quilt Story* painting brought a copyright infringement action against a television producer for using a poster of the painting as a set decoration for a program.[73] Qualitatively, the court found that because the plaintiff had created the painting, the poster used in the set consisted of protected expression.[74] Quantitatively, the court found that nine shots of the poster, totaling twenty-six seconds of television time, exceeded the de minimis threshold.[75] Thus, the quantitative/qualitative analysis focuses on the amount and nature of the defendant's use of the plaintiff's copyrighted work.[76]

Courts also employ the ordinary observer test to determine whether two works are substantially similar.[77] The essential inquiry

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[71] *See, e.g.*, Nihon Kezai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 70-71 (2d Cir. 1999) (using quantitative/qualitative analysis and ordinary observer test to analyze similarity between news articles); Worth v. Selchow & Righter Co., 827 F.2d 569, 570 n.1, 572 (9th Cir. 1987) (using quantitative/qualitative analysis and total concept and feel test to determine substantial similarity between encyclopedias and trivia game); Metro Goldwyn Mayer, Inc. v. ABC, 900 F. Supp. 1287, 1299-1300 (C.D. Cal. 1995) (using quantitative/qualitative analysis and total concept and feel test to determine substantial similarity between television advertisement character and James Bond character).

[72] *See Ringgold*, 126 F.3d at 74-77 (analyzing substantial similarity under quantitative/qualitative approach).

[73] *See id.* at 72-73 (describing poster of painting and how it was positioned in defendant's television program).

[74] *See id.* at 77 (stating that painting was recognizable in television program with detail viewable to average observer).

[75] *See id.* at 76 (describing observability of poster during television program, including camera angles and airtime).

[76] *See id.* at 74-76 (explaining how courts use this approach). Courts apply a de minimis approach to determine if more than a trivial amount was copied. *See id.* at 76-77; Sandoval v. New Line Cinema Corp., 147 F.3d 215, 217 (2d Cir. 1998). Courts then inquire into the quality of the copying, in other words, what exactly has been copied and how it has been copied. *See Ringgold*, 126 F.3d at 75-77 (describing qualitative element of copying to determine substantial similarity, and evaluating whether expressive elements of plaintiff's work were copied).

[77] *See* Compco Corp. v. Day-Brite Lighting, Inc. 376 U.S. 234, 235 (1964) (using ordinary observer test to determine substantial similarity between patented reflectors); Dawson v. Hinshaw Music Inc., 905 F.2d 731, 734-36 (4th Cir. 1990) (describing ordinary observer test). The *Dawson* court pointed out that the ordinary observer test should be narrowed to consider the audience for whom the work was created. *See* 905 F.2d at 734. If the intended audience was the general public, then courts should use the ordinary observer test in its broadest form, with the jury making the determination. *See id.* However, if the defendant targets the work at a narrower audience, then the court should ascertain whether a member of that audience would find the two works to be substantially similar. *See id.* To determine

is whether a lay observer would believe that the defendant's allegedly infringing work originated from the plaintiff's copyrighted work.[78] The ordinary observer test protects the copyright owner's market position by guarding against consumer confusion between the original work and the alleged copy.[79] Therefore, application of this test is most appropriate where the danger of guarding against consumer confusion exists as to source.[80]

The Second Circuit applied the ordinary observer test in *Arnstein v. Porter.*[81] In *Arnstein,* the plaintiff composer alleged that the defendant unlawfully copied several of his musical compositions.[82] The court examined whether lay listeners would find that the defendant wrongfully appropriated the plaintiff's work.[83] The court remanded the case to the district court along with instructions that the court play the plaintiff's and defendant's musical compositions to the jury as lay listeners.[84] The court employed the ordinary observer test because a danger existed that consumers would believe that the two works originated from the same composer. On remand, the jury did not find substantial similarity between the plaintiff's and defendant's compositions.[85] Thus, under the ordinary observer test in *Arnstein,* ordinary listeners decided the issue of infringement.[86]

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whether a member of that audience would find the two books substantially similar, testimony from people within the intended audience should be given at trial. *See id.*

[78] *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (discussing whether ordinary observers would believe that defendant's dresses originated from plaintiff). The *Peter Pan* court stated, "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." *Id.* Many other courts applying the ordinary observer test quote this statement from *Peter Pan* to determine an ordinary observer's reactions. *See, e.g.,* Knitwaves, Inc. v. Lollytogs, 71 F.3d 996, 1002 (2d Cir. 1995); Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1072 (2d Cir. 1992); Laureyssens v. Idea Group, Inc., 964 F.2d 131, 141 (2d Cir. 1992).

[79] *See* Douglas Y'Barbo, *The Heart of The Matter: The Property Conferred by Copyright,* 49 MERCER L. REV. 643, 647 (1998) (describing ordinary observer test). The goal of the ordinary observer test is to provide consumers with an accurate account of originality. *See id.* With this knowledge, the public can make more informed decisions about particular works. *See id.*

[80] *See id.* (describing goal of ordinary observer test is to eliminate consumer confusion).

[81] *See* Arnstein v. Porter, 154 F.2d 464, 468, 473 (2d Cir. 1946) (phrasing ordinary observer test in terms of "lay listeners").

[82] *See id.* at 467 (documenting plaintiff's allegations).

[83] *See id.* at 473.

[84] *See id.* (instructing district court how to apply ordinary observer test).

[85] *See* Arnstein v. Porter, 158 F.2d 795, 795 (2d Cir. 1946) (dismissing complaint, thereby finding no substantial similarity).

[86] *See id.* The jurors who were deemed lay listeners dismissed the complaint. *See id.*

Another case exemplifying the ordinary observer test is *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*[87] In *Peter Pan*, both the plaintiff and defendant manufactured textiles with similar prints.[88] Although slight differences existed between the prints, the court found that the ordinary observer would overlook these differences and consider their aesthetic appeal identical.[89] Thus, the court found copyright infringement.[90]

In 1970, the Ninth Circuit formulated a third test, the total concept and feel test, which other circuits have embraced.[91] Courts apply this test when a plaintiff alleges that the defendant copied the overall combination of elements provided in the plaintiff's work, thereby copying the work in its totality.[92] For example, the Second Circuit used the total concept and feel test to conclude that no infringement occurred in *Williams v. Crichton.*[93] In *Williams*, the plaintiff, author and copyright owner of children's stories called *Dinosaur World*,[94] claimed that the defendants' novel and movie *Jurassic Park* infringed upon the plaintiff's work.[95] After comparing the themes, plots, pace, characters, and settings of the two works, the court found that they differed substantially.[96] The court observed that the theme of *Jurassic Park* was a horror story, whereas the *Dinosaur World* books were adventure stories.[97] The

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[87] *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

[88] *See id.* at 488 (describing how plaintiff and defendant produced similar Byzantium prints).

[89] *See id.* at 489 (describing how ordinary observer would not be able to detect subtle differences in either plaintiff's or defendant's prints upon general examination of their respective dresses).

[90] *See id.* at 490.

[91] *See* Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970) (formulating total concept and feel test to analyze substantial similarity between plaintiff's and defendant's greetings cards). Other circuits now also use this test. *See, e.g.*, Towler v. Sayles, 76 F.3d 579, 584 (4th Cir. 1996) (applying total concept and feel test to analyze substantial similarity between screen plays); Williams v. Crichton, 84 F.3d 581, 588-89 (2d. Cir. 1996) (using total concept and feel test to analyze substantial similarity between children's books and movie); Cartier v. Jackson, 59 F.3d 1046, 1049 (10th Cir. 1995) (using total concept and feel test to analyze similarities between songs).

[92] *See Towler*, 76 F.3d at 580 (stating plaintiff's allegation that defendant copied overall elements in plaintiff's screen plays); *Williams*, 84 F.3d at 582 (stating plaintiff's allegation that defendant copied overall elements in plaintiff's books).

[93] *See Williams*, 84 F.3d at 589-90.

[94] *See id.* at 582 (plaintiff created four fictional works for children entitled *Dinosaur World*, *Lost in Dinosaur World*, *Explorers in Dinosaur World*, and *Saber Tooth*).

[95] *See id.*

[96] *See id.* at 588-89 (applying total concept and feel test to determine that plaintiff's and defendant's works did not invoke same type of feelings).

[97] *See id.* (discussing plaintiff's and defendant's works in terms of theme).

court also found that the sets amounted to ideas and thus were not protected.[98] Finally, the court distinguished the plots and pace between the two works because the *Dinosaur World* stories transpired within a day, and the *Jurassic Park* story occurred over a longer time period.[99]

Courts also apply a fourth approach, the nonliteral similarity test, when the alleged infringer takes an abstract of the copyright owner's work instead of copying specific elements.[100] The nonliteral similarity test differs from the total concept and feel test in that the total concept and feel test is more generalized, with courts analyzing the totality of two works to find similarities. The total concept and feel test permits rather than compels courts to evaluate factors such as organization, themes, settings, plots and characters to determine whether the two works invoke the same type of feelings.[101]

The nonliteral similarity test is useful when the plaintiff specifically alleges that the defendant copied aspects of his or her work such as themes, plots, settings, and characters.[102] Although the *Williams* court analyzed the similarities between theme, plots, settings and characters, the overall inquiry compared the totality of concept and feel between *Jurassic Park* and the *Dinosaur World* books.

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[98] *See id.* (concluding that settings constitute "scenes a faire," which law does not protect). Scenes a faire are settings which are standard in a given situation. *See* Atari v. North American Philips Consumer Elecs., 672 F.2d 607, 616 (7th Cir. 1982) (providing definition of "scenes a faire"). To illustrate, works about the life of policemen on duty would likely include drunkards, cars, and prostitutes. *See* Walker v. Time Life Films, Inc., 784 F.2d 44, 50 (2d Cir. 1986). Therefore, similarities based on these issues are unprotectable as scenes a faire. *See id.*

[99] *See Williams*, 84 F.3d at 589-90 (distinguishing time frame that plaintiff's and defendant's works covered).

[100] *See* NIMMER, NIMMER ON COPYRIGHT, *supra* note 63, at § 13.03 (explaining nonliteral similarity test); Adaline Hilgard, *Can Choreography and Copyright Waltz Together in the Wake of Horgan v. McMillan, Inc.?*, 27 U.C. DAVIS L. REV. 757, 789 (1994) (stating that issue in nonliteral similarity case is whether defendant has appropriated ideas or expression).

[101] *See* Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990) (illustrating nonliteral similarity). In *Shaw*, the writer of a pilot script entitled "The Equalizer," brought a copyright infringement action against the writers of a television series also entitled "The Equalizer." *See id.* at 1355 (describing events leading up to filing of suit). The plaintiff alleged nonliteral similarity for appropriating nonliteral elements of expression from the pilot script such as theme, mood, pace, characters, and plot. *See id.* at 1357-58. Both works shared the same character, the plots of the two works shared many common events, and both shows occurred in large cities. *See id.* at 1362-63. For these reasons, the court found infringement based on nonliteral similarity. *See id.* at 1363; *see also* BARRETT, supra note 18, at 483 (summarizing Shaw v. Lindheim in terms of nonliteral similarity).

[102] *See* NIMMER, NIMMER ON COPYRIGHT, *supra* note 63, at § 13.03 (explaining that themes, plots, settings, and characters are nonliteral elements).

The plaintiff in *Williams* did not specifically allege that *Jurassic Park* copied the *Dinosaur World* books' theme, characters, plots, or settings. Instead, the plaintiff generally alleged that *Jurassic Park* copied the *Dinosaur World* books.[103] In contrast, courts apply the nonliteral similarity test when the plaintiff alleges, for example, that the defendant copied the plaintiff's main character.[104] The court then analyzes the similarities between the plaintiff's and defendant's main character.[105] Therefore, the nonliteral similarity test focuses on similarities of specific elements between the copyrighted work and the allegedly infringing work.

Finally, courts apply the fragmented literal similarity test when the alleged infringer copies the copyright owner's work precisely.[106] For example, if the plaintiff alleges that the defendant engaged in verbatim copying or copied quotes, the courts would apply the fragmented literal similarity test to determine substantial similarity.[107] When applying this test, courts must determine whether the defendant appropriated enough of the plaintiff's work to constitute copyright infringement.[108] Courts decide this issue on a case by case basis.[109]

For instance, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, the United States Supreme Court held that literally copying 0.25%

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[103] *See Williams*, 84 F.3d at 582 (stating plaintiff's allegation that defendant copied overall elements in plaintiff's books).

[104] *See* Beal v. Paramount Pictures Corp., 20 F.3d 454, 456, 456 n.1 (11th Cir. 1994) (alleging nonliteral similarity between plaintiff's character, Hakim, and defendant's character, Prince Akeem, in movie *Coming to America*); *Shaw*, 919 F.2d at 1357-58 (alleging nonliteral similarity between plaintiff's and defendant's main character, the Equalizer).

[105] *See Beal*, 20 F.3d at 456 n.1, 462 (analyzing similarity between plaintiff's character Hakim, and defendant's character, Prince Hakim); *Shaw*, 919 F.2d at 1357-58 (analyzing nonliteral similarity between plaintiff's and defendant's main character, the Equalizer).

[106] *See* NIMMER, NIMMER ON COPYRIGHT, *supra* note 63, at § 13.03(a)(2).

[107] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 544-45 (1985) (using fragmented literal similarity test because plaintiff alleged verbatim copying); Paramount Pictures Corp. v. Carol Publ'g Group, 11 F. Supp. 2d 329, 333-34 (S.D.N.Y. 1998) (using fragmented literal similarity test because plaintiff alleged that defendant copied quotes from *Star Trek* television series).

[108] *See supra* text accompanying notes 67-76 (discussing quantitative element of infringement under quantitative/qualitative approach).

[109] *See Harper*, 471 U.S. at 564 (stating that copying approximately 0.25% of plaintiff's work (between 300 and 400 words from 200,000 word manuscript) sufficed to constitute infringement because material copied constituted "heart" of plaintiff's work); New Era Publications, Int'l v. Carol Publ'g Group, Inc., 904 F.2d 152, 158 (1990) (stating that copying 6% is not enough to constitute infringement); Salinger v. Random House, Inc., 811 F.2d 90, 98 (2d Cir. 1987) (stating that copying 10% is enough to constitute infringement).

of President Ford's memoirs amounted to infringement.[110] The Court reasoned that the copied description of why President Ford pardoned President Nixon constituted the "heart" of the memoirs.[111] Courts consider the amount of work copied and whether that portion is important in the overall context of the copyrighted work.[112] Thus, courts have considerable discretion in applying this test.[113]

Courts usually choose which test to use based on the circumstances of the case.[114] However, even if a court finds that the plaintiff has satisfied one of these tests, the defendant can assert the fair use defense to avoid liability.

B. The Fair Use Defense

The Copyright Act provides a fair use defense to a copyright infringement claim.[115] This defense allows copyright law to achieve a balance between encouraging creativity and providing the public with the knowledge, use and enjoyment of the author's work.[116]

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[110] *See Harper*, 471 U.S. at 568, 579 (explaining that defendant copied between 300 and 400 words from 200,000 word manuscript).

[111] *See id.* at 564, 568 (explaining court's rationale for why literally copying 0.25% of copyrighted work was sufficient to constitute copyright infringement).

[112] *See Harper*, 471 U.S. at 564-65 (stating that material copied by defendant comprised heart of plaintiff's work); *New Era*, 904 F.2d at 158-59 (stating that defendant did not copy key portions of plaintiff's work).

[113] *See* Compaq Computer Corp. v. Procom Tech., Inc., 908 F. Supp. 1409, 1421 (S.D. Tex. 1995) (stating that amount and substantiality of copying does not turn on mechanical measurement of percentage of copied material).

[114] *See Harper*, 471 U.S. at 544-45 (applying fragmented literal similarity test because plaintiff alleged verbatim copying); Williams v. Crichton, 84 F.3d 581, 588 (2d. Cir. 1996) (using total concept and feel test because plaintiff alleged that defendant copied totality of plaintiff's elements); Arnstein v. Porter, 154 F.2d 464, 468-69, 473 (2d Cir. 1946) (using ordinary observer test because danger existed of confusing source of plaintiff's and defendant's works); MICHAEL EPSTEIN, MODERN INTELLECTUAL PROPERTY ch. 5 (1)(c) (2d ed. 1984-1992) (stating that no bright line rules exist to determine copying, which therefore must be determined on ad hoc basis); Lape, *supra* note 63, at 191-92 (explaining that courts usually choose one or more of standard tests to help them determine whether infringement had occurred).

[115] *See* 17 U.S.C § 107 (1994).

[116] *See Harper*, 471 U.S. at 551 (stating that fair use requires balancing of equities between availability to potential user and copyright owner's right); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109-10 (1990) (stating that fair use must stimulate productive thought in public domain without excessively diminishing incentives for creativity).

The fair use defense recognizes that dissemination of knowledge benefits society.[117]

The Copyright Act sets forth four factors a court must consider in deciding whether the fair use defense applies.[118] The first factor considers the purpose and character of the use.[119] The second factor deals with the nature of the copyrighted work.[120] The third factor concerns the amount and substantiality of the portion used in relation to the copyrighted work as a whole.[121] Finally, the fourth factor considers the effect of the use upon the potential market for the copyrighted work.[122] The Copyright Act does not specify how courts should weigh these factors.[123] Generally, courts apply the four factors on a case by case basis.[124]

For the first factor, courts evaluate the purpose and character of use to ascertain whether the use of the plaintiff's work furthers or frustrates the goals of copyright law.[125] If a court finds that the de-

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[117] *See Harper*, 471 U.S. at 546 (noting that potential users of copyrighted work benefit from availability of author's work); Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After* Rogers v. Koons, 59 BROOK L. REV. 373, 375-76 (1993) (equating fair use defense to equitable remedy that gives society a privilege to use the copyrighted work).

[118] *See* 17 U.S.C. § 107.

[119] *See id.* § 107(1).

[120] *See id.* § 107(2).

[121] *See id.* § 107(3).

[122] *See id.* § 107(4).

[123] *See id.* § 107. There is no language suggesting how to apply the factors, or how much weight should be accorded to each factor. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (stating that Congress intended that courts continue common-law tradition of weighing fair use factors).

[124] *See Campbell*, 510 U.S. at 577 (stating that application of bright line rules in fair use analysis is unhelpful). For example, in New Era Publications, Int'l v. Carol Publ'g Group, Inc., 904 F.2d 152, 155-60 (1990), the defendant wrote and published an unfavorable biography of L. Ron Hubbard, the founder of the Church of Scientology. *See id.* at 153-54. New Era was the exclusive licensee of Hubbard's works. *See id.* at 154. The court held that although the defendant copied some of Hubbard's works, each of the four fair use factors weighed in the defendant's favor. *See id.* at 160. Regarding the first factor, the defendant's purpose in using the plaintiff's works was to show that the Church of Scientology was a dangerous cult. *See id.* at 156. The court held that this was a legitimate purpose for enriching the defendant's biography. *See id.* The second factor favored the defendant because Hubbard's writings were factual rather than fictional. *See id.* at 157-58. The third factor, amount and substantiality also weighed in the defendant's favor because the defendant used a small amount of the plaintiff's work, which did not constitute the "heart" of the works. *See id.* at 158-59. Finally, the court held that a critical unauthorized biography serves a different function than an authorized biography, thereby not affecting the plaintiff's market. *See id.* at 159-60. Therefore, defendants use of the works fell within the fair use defense. *See id.* at 160.

[125] *See Campbell*, 510 U.S. at 578-79 (concluding that purpose of defendant's use of plaintiff's work was parody, which furthers goals of copyright law); Sony Corp. of America v.

fendant's use benefits society in some way, this factor favors a finding of fair use.[126] In the past, commercial uses weighed against fair use whereas nonprofit uses favored fair use.[127] Today, this distinction has lost most of its force because courts recognize that commercial gain results from most uses of copyrighted works.[128]

The first factor also considers whether the second work transforms the original. Transformation occurs by taking another's work and adding value in some way to that work.[129] The more alterations made to the original piece, the higher the transformative value of the final work. Courts usually apply the fair use defense when the second work has high transformative value.[130]

In evaluating the second fair use factor, the nature of the copyrighted work, courts consider whether the original work was fictional or factual.[131] Courts apply the fair use defense to factual works because copyright law does not protect facts, which belong in the public domain.[132] On the other hand, courts are reluctant to

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Universal City Studios, Inc., 464 U.S. 417, 442 (1984) (holding that defendant's purpose of selling copying equipment allowing public to copy television programs onto video cassette furthered goals of copyright law); Sundeman v. The Seajay Soc'y, 142 F.3d 194, 202 (4th Cir. 1998) (stating that defendant's scholarly use of plaintiff's work furthered goals of copyright law); Leval, *supra* note 116, at 1111 (discussing first statutory factor).

[126] *See Campbell*, 510 U.S. at 579 (stating that parody benefits society and thereby finding fair use); *Sony*, 464 U.S. at 421 (holding that video recorders benefit society by allowing public to record programs and watch them at their own convenience); BARRETT, *supra* note 18, at 354 (suggesting that in case of conflict between author's rights and public rights, public must prevail).

[127] *See* Mary L. Shapiro, *An Analysis of the Fair Use Defense in* Dr. Seuss Enterprises v. Penguin, 28 GOLDEN GATE U. L. REV. 1, 11 (discussing evolution of significance of commercial gain in first fair use factor).

[128] *See Campbell*, 510 U.S. at 584 (stating that nearly all uses are conducted for commercial profit); San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S 522, 541 n.19 (1987) (stating that monetary gain should not dictate analysis of first fair use factor).

[129] *See*, Leval, *supra* note 116, at 1111 (emphasizing importance of transformative value in determining first fair use factor).

[130] *See, e.g.*, *Campbell*, 510 U.S. at 579 (stating that rap group's version of plaintiff's song had high transformative value and, thus, warranted application of fair use defense); Nihon Kezai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 72 (2d Cir. 1999) (holding defendant's abstracts of plaintiff's financial, business, and industry news were not transformative and, thus, fair use defense not applied).

[131] *See Campbell*, 510 U.S. at 586 (stating that fair use defense is more difficult to establish when fictional works are copied); Stewart v. Abend, 495 U.S. 207, 237 (stating that fair use defense is more applicable to factual works than fictional works); Shapiro, *supra* note 127, at 13 (explaining that courts will more likely find fair use with factual works because they involve less creativity than fictional works).

[132] *See* Hoehling v. Universal City Studios, 618 F.2d 972, 979 (2d Cir. 1980) (discussing protectability of historical factual works).

grant the fair use defense for copying fictional works because the work owes its originality to an author.[133]

As its name suggests, the third factor of amount and substantiality acknowledges the volume of copied work.[134] Recently, the United States Supreme Court stated that courts should inquire into whether the extent of copying was more than necessary to further the purpose and character of the use.[135] In general, a high volume of copied work negates the fair use defense.[136] However, even a small portion of copied work nullifies the defense if the copied work comprises the heart of the work.[137]

Finally, in evaluating the effect on the market factor, courts consider whether the defendant's work will compete in the same market as the plaintiff's work.[138] If the two will compete in the same market, courts strongly disfavor the defense.[139] The United States Supreme Court described this factor as the most influential factor in the fair use analysis.[140] However, the holding of a recent case suggests that the other statutory factors may be given equal weight.[141] *Castle Rock Entertainment* involved a copyright infringe-

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[133] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563 (1985) (involving copying from factual works). The fact that the defendant copied plaintiff's copyrighted factual work was a significant factor in denying the application of the fair use defense. *See id.*

[134] *See* 17 U.S.C. § 107(3) (1994); *Harper*, 471 U.S. at 564-66 (stating that amount and substantiality factor considers amount of expression taken in relation to copyrighted work as whole); Shapiro, *supra* note 127, at 13 (explaining how courts analyze amount of work copied).

[135] *See Campbell*, 510 U.S. at 586-87 (discussing whether defendant's parody of plaintiff's song took more than required from plaintiff's lyrics).

[136] *See id.* at 579 (stating that if new work is highly transformative, other factors are less significant); Leval, *supra* note 116, at 1112 (finding correlation between volume of copied work and likelihood of finding infringement).

[137] *See Harper*, 471 U.S. at 565 (holding that small amount of work copied sufficed for copyright infringement). In *Harper*, the court held that although the defendant took only 300-400 words from the plaintiff's 200,000 word manuscript, the portion of work taken constituted the "heart" of the matter. *See id.* This was sufficient for copyright infringement. *See id.*

[138] *See Campbell*, 510 U.S at 578 (stating that defendant's rap version of plaintiff's song did not adversely affect plaintiff's market); *Harper*, 471 U.S. at 566-67 (finding that defendant's news article would compete directly in plaintiff's market); Leval, *supra* note 116, at 1123; Shapiro *supra* note 127, at 15-16 (discussing fourth statutory factor).

[139] *See Harper*, 471 U.S. at 566-67 (finding that defendant's news article would compete directly in plaintiff's market, thereby finding no fair use); Shapiro, *supra* note 127, at 15-16.

[140] *See Harper*, 471 U.S. at 566 (stating that last factor is most important element of fair use).

[141] *See Campbell*, 510 U.S. at 578 (stating that all statutory factors are to be explored and results weighed together in determining copyright infringement). Although these four factors are specifically enumerated by statute, Congress did not intend them to be a conclusive end to the determination of fair use. *See Harper*, 471 U.S. at 560 (stating that four statu-

ment action of a highly successful television series and the fair use defense.

II. *THE SEINFELD APTITUDE TEST*: INFRINGEMENT OR NOT? — THE COURT'S ANALYSIS IN *CASTLE ROCK ENTERTAINMENT V. CAROL PUBLISHING GROUP*

Castle Rock Entertainment ("Castle Rock") produces and owns the copyright in the *Seinfeld* television series.[142] The series ran on television for nine years,[143] with an estimated thirty million viewers watching each episode.[144] The series, famous for being a show about "nothing,"[145] chronicled the daily adventures of Jerry Seinfeld and his three friends.

Beth Golub, the writer of *The SAT*, is a lawyer.[146] She created *The SAT* by taking notes while watching televised and videotaped episodes.[147] A 132-page book filled with 643 trivia questions and answers resulted from the notes.[148] Golub organized the questions on a multiple-choice basis, although she also presented matching and

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tory fair use factors are not exclusive in determination on fair use defense). Thus, courts can and often do consider other factors in the analysis. *See Campbell*, 510 U.S. at 579 (stating that if second work is highly transformative, this reduces significance of other factors, such as commercialism); Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 449 n.32 (1984) (stating that commercial or nonprofit characteristics should be weighed along with other factors); New Era Publications Int'l v. Carol Publ'g Group, 904 F.2d 152, 160 (2d Cir. 1990) (discussing additional factors); Leval, *supra* note 116, at 1125-30 (discussing existence of additional factors).

[142] *See* Castle Rock Entertainment v. Carol Publ'g Group, 150 F.3d 132, 135 (2d Cir. 1998) (explaining that Castle Rock owns copyright of each episode of *Seinfeld* television series).

[143] *See Seinfeld* (NBC television broadcast, 1998). The last episode aired in May 1998. *See id.*

[144] *See* Aaron Barnhart, *Haven't We Heard This Conversation Before?* (visited Mar. 18, 1999) <http://www.echonyc.com/barnhart/seinfeld2.tex> (on file with author) (stating that *Seinfeld* regularly attracts 30 million viewers). The show won the number one spot in the Nielson Media Ratings for three consecutive years from 1995-1998. *See id.* 76 million viewers watched the final episode, although NBC estimated that 105 million viewers watched at least some part of it. *See* David Bauder, *Seinfeld Ratings Points to 76 Million Viewers* (visited Mar. 18, 1999) <http://www.detnews.com/1998.accent/9805/16/05160148.htm> (on file with author).

[145] *See Castle Rock*, 150 F.3d at 135-36 (describing how series revolved around Jerry Seinfeld and his three friends in New York City).

[146] *See Trivia Book Based on TV Show Infringes Copyright, Does Not Constitute Fair Use*, 6 Mealey's Litig. Rep. Intell. Prop. No. 21, at 4 (Aug. 3, 1998) (explaining facts and outcome of case).

[147] *See Castle Rock*, 150 F.3d at 136.

[148] *See id.* at 135.

short answer questions.[149] In the multiple-choice section, Golub embedded the correct answer in either three or four wrong answers that she created.[150] Golub further divided the questions into five levels of difficulty named after anecdotes from the show.[151]

Eighty-six *Seinfeld* episodes aired prior to the publication of the book.[152] *The SAT* asked questions on eighty-four of those episodes.[153] Every question concerned an event from one of the episodes.[154] The name "Seinfeld" was present on the front and back cover of the book.[155] Furthermore, Carol Publishing Group ("Carol Publishing") placed a disclaimer on the back cover stating that the producers of *Seinfeld* did not approve or license the book.[156] Golub described *The SAT* as a book which was "devoted to the trifling, picayune and petty annoyances encountered by the show's characters on a daily basis."[157]

The SAT enjoyed a good reception amongst the television community.[158] The National Broadcasting Corporation, which broadcasted *Seinfeld*, requested free copies to distribute along with other promotions of the show.[159] Furthermore, the executive producer of *Seinfeld* described *The SAT* as a "fun little book."[160] No evidence existed to suggest that *The SAT* harmed *Seinfeld* in any way.[161] On the contrary, after publication of *The SAT*, *Seinfeld*'s audience increased.[162]

Castle Rock brought this action in federal district court against Golub, as writer of the book, and Carol Publishing Group, as publisher.[163] Both parties moved for summary judgment.[164] The district

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[149] *See id.*

[150] *See id.* at 135-36.

[151] *See id.* at 135 (stating that Golub grouped questions in increasing order of difficulty). The five groups of questions are called "Wuss Questions," "This, That, and Other Questions," "Tough Monkey Questions," "Atomic Wedgie Questions," and "Master of Your Domain Questions." *See id.*

[152] *See id.* at 135-36.

[153] *See id.* at 135.

[154] *See id.* at 136.

[155] *See id.*

[156] *See id.*

[157] *Id.*

[158] *See id.* (explaining how NBC requested copies of *The SAT* and how *Seinfeld*'s executive producer described *The SAT* as one "fun little book").

[159] *See id.*

[160] *See id.*

[161] *See id.* at 144.

[162] *See id.*

[163] *See id.* at 135-36.

court granted summary judgment in favor of Castle Rock, holding that *The SAT* infringed upon their status as copyright owner.[165] More specifically, the court stated that the book was sufficiently similar to the television series to warrant infringement.[166] In addition, the court held that the fair use defense did not apply.[167] The court permanently enjoined Carol Publishing from publishing *The SAT*, ordered the company to pay $403,000 damages to Castle Rock and to destroy any copies in their control.[168]

The Second Circuit affirmed the district court's holding.[169] In deciding the issue of copyright infringement, the court considered the two elements required, actual copying and improper or unlawful purpose.[170] Because Golub admitted directly copying from the show to create the book, Carol Publishing met the "actual copying" requirement.[171] The court only had to determine whether the copying was unlawful or improper and if so, whether the fair use defense applied.[172] The court first looked at the issue of substantial similarity to decide whether Golub unlawfully or improperly copied *Seinfeld*.

A. The SAT: *Substantial Similarity*

The court employed a quantitative/qualitative analysis to decide whether *The SAT* was substantially similar to *Seinfeld*, and, therefore, whether Golub engaged in unlawful or improper copying.[173] To decide the quantitative aspect, the court analyzed whether the amount actually copied from *Seinfeld* exceeded a de minimis level.[174] The court evaluated infringement on a cumulative basis, determining that the book excessively copied from eighty-four epi-

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[164] *See id.* at 135 (noting that initially, both plaintiff and defendant moved for summary judgment).

[165] *See* Castle Rock Entertainment v. Carol Publ'g Group, 955 F. Supp. 260, 274 (S.D.N.Y. 1997) [hereinafter Castle Rock I] (granting summary judgment to plaintiff).

[166] *See id.* at 264-65 (analyzing substantial similarity).

[167] *See id.* at 267-72 (holding fair use inapplicable under four statutory factors).

[168] *See Castle Rock*, 150 F.3d at 135 (describing district court's holding); *Castle Rock I*, 955 F. Supp. at 274 (setting case management conference to determine measure of relief of damages).

[169] *See Castle Rock*, 150 F.3d at 146.

[170] *See id.* at 137. To determine the unlawful or improper purpose issue, the court analyzed the case in terms of substantial similarity. *See id.* at 138-39.

[171] *See id.* at 137 (noting that Golub freely admitted copying).

[172] *See id.* at 137, 141.

[173] *See id.* at 138-39.

[174] *See id.* at 138 (discussing quantitative element).

sodes to create 643 questions.[175] Based on these numbers, the *Castle Rock Entertainment* court concluded that *The SAT* crossed the quantitative copying threshold by exceeding a de minimis level.[176]

In evaluating the qualitative aspect, the court analyzed the content of the copied work, concluding that it constituted legally protected expression.[177] The court concluded that the book infringed upon *Seinfeld's* creative expression, reasoning that *The SAT* quizzes everyday occurrences in the lives of four fictitious characters.[178] Because the writers of *Seinfeld* conceived these characters, they were not facts.[179] Instead, the court protected the show's content because it represented the author's creative expression.[180] In doing so, the court distinguished *Feist*,[181] where the Court found the defendant not liable for directly copying from plaintiff's single-county telephone directory.[182] Thus, the court found substantial similarity between *Seinfeld* and *The SAT* and concluded that copyright infringement had occurred.[183]

The court dismissed many other tests used to determine substantial similarity.[184] The court defined substantial similarity under the ordinary observer test as occurring when an ordinary observer con-

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[175] *See id.* at 138. The court had the choice of evaluating the copying on a per-episode basis or to analyze the cumulative amount copied from *Seinfeld* as a whole. *See* Twin Peaks Prods., Inc. v. Publications Int'l, 996 F.2d 1366, 1372-73, 1380-81 (2d Cir. 1993) (finding substantial similarity between book and television series as whole, but awarding damages based on each individual episode). In *Twin Peaks*, the defendant wrote and published a book about the *Twin Peaks* television series. *See id.* at 1370. The *Twin Peaks* court chose to evaluate infringement on a cumulative basis. *See id.* at 1372-73. The *Castle Rock* court chose to follow the *Twin Peaks* analysis to follow precedent. *See Castle Rock*, 150 F.3d at 138.

[176] *See Castle Rock*, 150 F.3d at 138 (analyzing copying on aggregate basis).

[177] *See id.* at 138-39 (distinguishing ideas from expression).

[178] *See id.* (providing examples of fictitious instances in *Seinfeld* television series).

[179] *See id.*

[180] *See id.* (stating that characters and events on *Seinfeld* arise from author's imagination).

[181] *See* Feist Publications v. Rural Tel. Serv., 499 U.S 340 (1991). In *Feist*, the Court did not find infringement because telephone numbers are facts and not creative expressions. *See id.* at 361. In effect, *Feist* required creative expression in order to grant copyright protection. *See id.* at 345 (requiring "creative spark" for copyright protection).

[182] *See Castle Rock*, 150 F.3d at 138-39 (distinguishing facts in phone book, which do not owe their origin to act of authorship, to facts in *The SAT*, which constitute expression created by *Seinfeld* writers).

[183] *See id.* at 138-39 (analyzing substantial similarity under quantitative/qualitative approach to conclude infringement had occurred).

[184] *See id.* at 139-40 (dismissing ordinary observer test, total concept and feel test, nonliteral similarity test, and fragmented literal similarity test).

siders the aesthetic appeal between the two works as identical.[185] The court dismissed the ordinary observer test because *Seinfeld* and *The SAT* share no common aesthetic appeal.[186] The court also dismissed the total concept and feel test as unhelpful in analyzing works in different genres, namely television and books.[187] The court stated that *The SAT*'s lack of direct quotations or paraphrases from *Seinfeld* precluded use of the fragmented literal similarity test.[188] Finally, the court dismissed the nonliteral similarity test as unhelpful to the substantial similarity analysis.[189] Having lost the copyright infringement claim, Carol Publishing argued that *The SAT* constituted a fair use of *Seinfeld.*

B. The SAT*: Fair Use Defense*

The *Castle Rock Entertainment* court denied Carol Publishing the fair use defense.[190] The court analyzed whether the fair use defense protected Carol Publishing under the four factors enumerated in the Copyright Act.[191] The court found that the first factor, purpose and character of the use, weighed against finding fair use for two reasons.[192] First, the court noted that Golub used *Seinfeld* for commercial gain.[193] However, the court concluded that because most uses are conducted for commercial gain, this fact was indeterminate.[194]

Second, the court considered whether *The SAT* bore any transformative value. The court reasoned that if *The SAT* transformed and added value to *Seinfeld,* then it enriched society and consti-

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[185] *See id.* at 139 (defining substantial similarity under ordinary observer test, as requiring aesthetic appeal between two works) (citing Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)).

[186] *See id.* at 139-40 (stating that *Peter Pan* definition of substantial similarity cannot be logically applied to *Castle Rock,* and dismissing test).

[187] *See id.* at 140.

[188] *See id.*

[189] *See id.* at 140-41.

[190] *See id.* at 141-46 (applying four statutory factors to case and denying application of fair use defense).

[191] *See id.*

[192] *See id.* at 141-43.

[193] *See id.* at 141-42.

[194] *See id.* (denying force to fact that *The SAT* resulted in commercial gain for defendant by recognizing that most defendants use the plaintiff's work for commercial gain).

tuted a fair use.[195] Carol Publishing claimed that *The SAT* was transformative because Golub took the *Seinfeld* television series and added value by transforming it into a trivia quiz book.[196] They argued that Golub transformed the series by putting it into a question-answer format and by creating the questions and the wrong answers.[197]

Carol Publishing argued that even though the subject matter of the quiz was light and entertaining rather than scholarly, it was nonetheless eligible for fair use protection.[198] The *Castle Rock Entertainment* court agreed with the assertion that *The SAT* could constitute a transformative work.[199] However, the court ultimately determined that any transformative value held by *The SAT* was slight to nonexistent.[200]

The court also found that *The SAT* did not satisfy the second statutory factor regarding the nature of the copyrighted work.[201] Because the defendants acknowledged the fictitious nature of their work, this factor was not at issue. Therefore, the second factor weighed against a finding of fair use.[202]

The third fair use factor required the court to consider the amount and substantiality of *Seinfeld* that *The SAT* used.[203] The court noted that *The SAT* must necessarily reconstruct some of the show's expression to test readers about *Seinfeld*.[204] However, the court found that the amount of *Seinfeld* that Golub used to create

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[195] *See id.* at 142 (using Leval's description of transformative value). Leval stated that society is enriched if a secondary work creates new information, new aesthetics, or new insights through transformation. *See* Leval, *supra* note 116, at 1111.

[196] *See Castle Rock*, 150 F.3d at 142 (claiming two transformative qualities of *The SAT*, namely testing one's knowledge of *Seinfeld* and decoding mystery surrounding *Seinfeld*).

[197] *See id.* at 143.

[198] *See id.* at 142. Carol Publishing cited Twin Peaks Prods v. Publications Int'l, 996 F.2d 1366, 1374 (2d Cir. 1993), for the proposition that "[a] comment is as eligible for fair use protection when it concerns Masterpiece Theater . . . as when it concerns 'As the World Turns.'" *Id.* The *Castle Rock* court agreed with this assertion, reasoning that "the fact that the subject matter of the quiz is plebeian, banal, or ordinary stuff does not alter the fair use analysis". *Id.* at 142.

[199] *See id.* at 143 (conceding that creating trivia book does require some creativity but not giving much importance to this fact).

[200] *See id.* at 142 (rejecting *The SAT*'s transformative value).

[201] *See id.* at 143-44 (dismissing second factor because *Seinfeld* is fictional creation, not factual work).

[202] *See id.*

[203] *See* Leval, *supra* note 116, at 1122-23 (outlining third statutory factor); Shapiro, *supra* note 127, at 13-15 (providing examples of amount and substantiality copied).

[204] *See Castle Rock*, 150 F.3d at 144 (recognizing argument that *The SAT* needed to be able to copy some of *Seinfeld*'s expression to pose questions about *Seinfeld* effectively).

the 643 trivia questions was excessive.[205] Therefore, the court also dismissed the third fair use factor.[206]

Carol Publishing presented their strongest claim in the fourth factor, namely the effect of *The SAT* on the potential market of the television series.[207] Carol Publishing argued that there was no proof that *The SAT* damaged *Seinfeld*.[208] In support of Carol Publishing's argument, the court noted that *Seinfeld* ratings increased after publication of *The SAT*.[209] Carol Publishing further argued that because Castle Rock showed no intent to create trivia quiz books about *Seinfeld*, others should be allowed to enter the *Seinfeld* trivia quiz book market.[210]

Despite Carol Publishing's arguments, the court rejected the fourth factor. The court noted that the fourth factor's proper analysis considers whether *The SAT* acted as a substitute for *Seinfeld*.[211] In response, the court found that the book may substitute for a derivative market that Castle Rock may wish to enter later.[212] As such, the court concluded that *The SAT* was not a fair use.[213] In summary, the court upheld Castle Rock's rights and awarded summary judgment in their favor.[214]

III. ANALYSIS

Although the *Castle Rock Entertainment* court correctly determined that the only element at issue was whether unlawful or improper copying existed, the court reached an incorrect holding. The court improperly found substantial similarity between the two works by summarily dismissing many tests used to analyze the standard.[215] Furthermore, Carol Publishing had a viable fair use defense.

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[205] *See id.* (finding that excessive amount of copying suggests that purpose of *The SAT* was to entertain).

[206] *See id.*

[207] *See id.*

[208] *See id.*

[209] *See id.* (noting increase in *Seinfeld*'s ratings after *The SAT* was published, but not commenting on whether this was related or coincidental increase).

[210] *See id.* at 144-45.

[211] *See id.* at 145 (relating substitution to transformative value).

[212] *See id.* at 145.

[213] *See id.* at 146.

[214] *See id.* at 145-46 (discussing Castle Rock's rights to enter market for derivative works of *Seinfeld*).

[215] *See id.* at 139-41 (dismissing ordinary observer test, total concept and feel test, nonliteral similarity test, fragmented literal similarity test).

A. *Proof of Unlawful or Improper Copying*

Based on precedent and the facts of the case, the *Castle Rock Entertainment* court should have applied any of the four tests used to determine substantial similarity. The court's approach of only applying a quantitative/qualitative analysis to decide substantial similarity is unique.[216] In fact, the court does not even label the approach a "test."[217] This isolation of the quantitative/qualitative approach is not effective considering how many well-established tests are available for determining substantial similarity.[218] Yet, the court dismissed all such tests.[219] Based on precedent, the court should have applied other tests such as the ordinary observer test, the total concept and feel test, the nonliteral similarity test and the fragmented literal similarity test. If the court had applied any one of these four popular tests for finding substantial similarity, the court would likely have concluded that no infringement occurred.

The court declined to apply the ordinary observer test on the assumption that it required the court to determine, from the ordinary observer's perspective, the similarity of the aesthetic appeal of the two works.[220] This formulation of the test originated in *Peter Pan Fabrics*, a case concerning dress designs in which aesthetic appeal was a significant factor.[221] However, it was not appropriate for the court to use this definition of substantial similarity in *Castle Rock Entertainment* because aesthetic appeal was not at issue. Because Castle Rock alleged that its television series was copied into a literal question and answer format, the question of aesthetics did not arise.

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[216] The only other case that solely applies a quantitative/qualitative approach is Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997). *Ringgold* is distinguishable, however, because it concerns visual works, *see id.* at 72, whereas *Castle Rock* concerns literary and television works, *see* 150 F.3d at 132.

[217] *See Castle Rock*, 150 F.3d at 138-39. The failure of the *Castle Rock* court to recognize the quantitative/qualitative approach as a "test" is significant considering there are many well established tests that assist in determining substantial similarity. *See supra* notes 77-109 and accompanying text (describing four common tests to determine substantial similarity).

[218] *See supra* notes 77-109 and accompanying text (describing ordinary observer test, total concept and feel test, nonliteral similarity test, and fragmented literal similarity test).

[219] *See Castle Rock*, 150 F.3d at 139-40.

[220] *See id.* at 139.

[221] *See* Peter Pan Fabrics, Inc., v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) (involving infringement of plaintiff's copyrighted Byzantium print design for dresses).

The court erred in assuming that the ordinary observer test applies only where aesthetic appeal is at issue.[222] In *Arnstein*, for instance, the court used the ordinary observer test to determine substantial similarity between musical compositions.[223] Courts can use this test in any situation where consumers may confuse the source of two works, whether the works are literary, musical or visual.[224] Therefore, as in *Arnstein*, the *Castle Rock Entertainment* court could have used the ordinary observer test. Had the court applied the ordinary observer test, it may not have found infringement.

The ordinary observer test queries whether a lay observer believes that the allegedly infringing work originated from the copyrighted work.[225] As the back cover of *The SAT* contained a statement disclaiming any association between *The SAT* and *Seinfeld*, the ordinary observer would understand that the two works did not derive from the same source. Furthermore, the statement "open this book to satisfy your *between* episode cravings" demonstrates that *The SAT* was not designed to replace the show in any way.[226] Rather, the book was designed to entertain between episodes.

The court also readily dismissed the total concept and feel test because *The SAT* and *Seinfeld* exist in two different genres.[227] However, the court's dismissal is inconsistent with its prior decision in *Williams*. *Williams* compared children's stories with the novel and movie *Jurassic Park* to conclude that no infringement occurred.[228] Similarly, the *Castle Rock Entertainment* court compared a book with a television series. Thus, the court's argument that the total con-

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[222] *See Castle Rock*, 150 F.3d at 139-40 (failing to proceed with ordinary observer test once court determined aesthetic appeal not at issue).

[223] *See* Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (employing ordinary observer test so that lay listeners would determine issue of infringement).

[224] *See, e.g.*, Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65, 70 (2d Cir. 1999) (employing ordinary observer test to analyze defendant's abstracts of publisher's news articles); Beaudin v. Ben & Jerry's Homemade, Inc., 95 F.3d 1, 2 (2d Cir. 1996) (using ordinary observer test to determine whether defendant's hats containing cow-like splotch patterns infringed upon plaintiff's hats); *Arnstein*, 154 F.2d at 473 (using ordinary observer test to determine infringement between musical works).

[225] *See Arnstein*, 154 F.2d at 473 (defining substantial similarity under ordinary observer test in terms of lay listeners); Y'Barbo, *supra* note 79, at 647 (describing goal of ordinary observer test is to avoid confusion as to source between plaintiff's and defendant's works).

[226] *See Castle Rock*, 150 F.3d. at 136 (emphasis added).

[227] *See id.* at 140 (concluding that *The SAT* and *Seinfeld* are incomparable because *Seinfeld* is television series whereas *The SAT* is literary).

[228] *See* Williams v. Crichton, 84 F.3d 581, 582-87 (2d Cir. 1996).

cept and feel test is not applicable to works in different genres is unpersuasive given its own precedent.[229]

Carol Publishing argued that *Seinfeld* and *The SAT* were completely incomparable in terms of concept and feel, because *The SAT* has no plot.[230] Each episode of *Seinfeld* centers around a particular theme with a plot. The episodes together tell a continuing story of four friends.[231] On the other hand, *The SAT* does not recount any stories.[232] *The SAT* focuses on single moments taken from eighty-four episodes at random.[233] There is no plot or continuing story to be told unlike the book in *Twin Peaks*, which retold the Twin Peaks story in narrative detail.[234] Therefore, had the court correctly applied the total concept and feel test, it may have found the two works to be different, precluding a finding of copyright infringement.

The court also dismissed the fragmented literal similarity test because *The SAT* copied few direct quotations or close paraphrases from *Seinfeld*.[235] *The SAT* contains 643 questions, of which 41 contain quoted dialogue.[236] *The SAT* only quoted between 3.6 % and 5.6 % from any single episode.[237] However, if the United States Supreme Court in *Harper* applied the test to find infringement where the defendant copied a mere 0.25 % of the plaintiff's work,[238] the fact that *The SAT* quoted up to 5.6 % of dialogue weighs in favor of applying the fragmented literal similarity test.

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[229] *See id.* at 589-90. In *Williams*, the court analyzed similarities such as feel, plot, pace and setting to conclude that there was no substantial similarity under the total concept and feel test, and therefore no copyright infringement. *See id.* at 588-89.

[230] *See Castle Rock*, 150 F.3d at 140.

[231] *See Seinfeld* (NBC television broadcast, 1989-1998).

[232] *See Castle Rock*, 150 F.3d at 135-36 (explaining content of *The SAT*).

[233] *See id.*

[234] *See* Twin Peaks Prods., Inc. v. Publications Int'l, 996 F.2d 1366, 1372-73 (2d Cir. 1993) (finding that defendant's book was substantially similar to plaintiff's Twin Peaks episodes because it included "elaborate recounting of plot details").

[235] *See id.* at 140 (raising and dismissing fragmented literal similarity test as irrelevant to this case).

[236] *See id.* at 135-36.

[237] *See id.* at 136 (providing plaintiff's and defendant's assertions of how much defendant copied from most-drawn episode, "The Cigar Store Indian").

[238] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985) (stating that approximately 0.25% of copying — copying between 300 and 400 words from 200,000 word manuscript — was enough to constitute infringement because copied material constituted "heart" of plaintiff's work).

The fragmented literal similarity test mandates an inquiry into the quantity of work copied.[239] Although in *Harper* copying 0.25 % was enough to constitute infringement, the portion of copied work comprised the "heart" of the copyrighted work.[240] In contrast, *The SAT* did not copy from the most significant parts of the *Seinfeld* series, but instead copied randomly from numerous episodes.[241]

In *Twin Peaks*, the Second Circuit found substantial similarity between a book and eight episodes of the *Twin Peaks* television series under the fragmented literal similarity test.[242] However, in *Twin Peaks*, the book described the content of the episodes in narrative detail, therefore abstractly copying a large amount of the series.[243] Furthermore, two chapters of the book consisted of numerous literal quotations from the series.[244] In contrast, *The SAT* does not attempt to describe the themes or storylines of the *Seinfeld* series,[245] but rather poses questions that cannot be answered without seeing the series. Based on these differences, if the court had applied the fragmented literal similarity test to determine substantial similarity, it would likely have concluded that infringement had not occurred.

Some may argue that the application of the quantitative/qualitative analysis was sufficient to determine substantial similarity because courts can choose which test to apply. However, courts choose tests that are appropriate given the facts of the case and precedent.[246] The quantitative/qualitative approach is so general that it is not suited to any particular fact pattern, which makes the court's sole application of this test unique. Furthermore, courts may apply more than one test or synthesize tests in order to strengthen their substantial similarity analysis.[247] The *Castle Rock*

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[239] *See supra* notes 106-13 and accompanying text (discussing fragmented literal similarity test).

[240] *See Harper*, 471 U.S. at 564-65.

[241] *See Castle Rock*, 150 F.3d at 135-36 (explaining creation and contents of *The SAT*).

[242] See Twin Peaks Prod., Inc. v. Publications Int'l, 996 F.2d 1366, 1372-73 (2d Cir. 1993) (finding substantial similarity through application of literal similarity and nonliteral similarity tests).

[243] *See id.* (noting that third chapter of book about *Twin Peaks* television series was detailed description of first eight episodes).

[244] *See id.* at 1372 (describing contents of allegedly infringing book).

[245] *See supra* notes 149-55 and accompanying text (describing contents of *The SAT* in detail).

[246] *See supra* note 64 (collecting cases illustrating that proper test for substantial similarity depends upon facts of particular case).

[247] *See supra* note 65 (collecting cases illustrating that courts often apply more than one test for substantial similarity).

Entertainment court failed to apply any tests other than the quantitative/qualitative approach. Had the court applied other more appropriate tests, it may not have found infringement.

B. *The Fair Use Defense*

The court inappropriately denied Carol Publishing the fair use defense. In reaching this conclusion, the court misapplied the four statutory factors. Under the first factor, the court must assess the defendant's purpose in using the plaintiff's work, and the character of the use.[248] In particular, the court must consider the transformative value of the defendant's work.[249] The transformative value of *The SAT*, measured by the way it altered *Seinfeld*, weighs in favor of finding fair use. The book takes *Seinfeld* and completely transforms it into a trivia quiz of *Seinfeld*,[250] without describing or telling the stories of the episodes.[251] Moreover, a great deal of imagination went into the selection and arrangement of questions, as well as the creation of wrong answers to the multiple choice questions.[252]

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[248] *See supra* notes 125-30 and accompanying text (describing first statutory fair use factor).

[249] *See* Leval, *supra* note 116, at 1111-12 (explaining that transformative value is part of analysis under first factor).

[250] *See* Castle Rock Entertainment v. Carol Publ'g Group, 150 F.3d 132, 135-36 (2d Cir. 1998) (describing creation and organization of *The SAT*). *Compare id.* (rejecting transformative value of *The SAT*), *with* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (accepting transformative value of defendant's parody of plaintiff's song).

[251] *See Castle Rock*, 150 F.3d at 136 (describing how each question centered around single moments from show). *Compare id.* at 141-43 (explaining that *The SAT* does not retell any *Seinfeld* stories), *with* Twin Peaks Prods., Inc. v. Publications Int'l, 996 F.2d 1366, 1372-73 (2d Cir. 1993) (explaining that book about *Twin Peaks* television series included detailed description of episodes). For example, an excerpt from the book reads:

> FBI Special Agent Dale Cooper
> drives into town, primly dressed
> in a dark suit and tie and dictating
> the minutiae of his travels to his
> secretary, Diane, into a microcassette
> recorder. When he meets Sheriff
> Truman — Harry S. Truman, that is — he
> immediately questions Truman about
> the local trees, beginning his
> preoccupation with the local flora
> and fauna.

Id. at 1373 n.2.

[252] *See Castle Rock*, 150 F.3d at 136 (describing how Golub created *The SAT*).

Despite acknowledging the need for a case by case analysis, the court used the transformative value of the book in *Twin Peaks* as a benchmark for transformative value.[253] The court dismissed *The SAT*'s transformative value by concluding that it was less transformative than the book in *Twin Peaks*.[254] By doing so, the court created a bright line rule for determining transformative value. This finding is incorrect because the narrative description of the television series in the *Twin Peaks* book distinguishes that case from *Castle Rock Entertainment*. *The SAT* did not include narrative descriptions of *Seinfeld* episodes, but merely posed trivia questions about *Seinfeld*.[255] In *Twin Peaks*, however, the author of the book included detailed descriptions of the plots of eight episodes.[256] Posing trivia questions differs from describing episodes because formulating questions requires imagination and creativity. Moreover, bright line rules by definition go against the very essence of case by case determinations.

Courts evaluate the allegedly transformed work against the original work to identify improvements and alterations.[257] The court rejected the idea that *The SAT* bore transformative value by inappropriately concluding that *The SAT*'s purpose was to repackage *Seinfeld*.[258] The court's reasoning is incorrect because Golub did not intend *The SAT* as a replacement for *Seinfeld*.[259] Golub transformed the original by turning a television series into an entertaining trivia book.[260] Therefore, the first factor weighed in favor of finding fair use.

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[253] *See id.* at 143.

[254] *See id.*

[255] *See id.* at 135-36 (describing creation and organization of trivia questions).

[256] *See Twin Peaks*, 996 F.2d at 1372-73 (observing that defendant's infringing book contained descriptions of *Twin Peaks* episodes).

[257] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579-82 (1994) (holding that defendant transformed plaintiff's work by altering it to fit rap song); Sony Corp. Of America v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984) (holding that defendant did not transform plaintiff's television programs); Leval, *supra* note 116, at 1112 (stating that courts must compare each allegedly infringing passage to original work). Furthermore, the subject matter of the quiz is not dispositive of transformative value. *See Twin Peaks*, 996 F. 2d, at 1374 (suggesting that works commenting on frivolous or entertaining works as well as those addressing academic or serious works may garner fair use protection).

[258] *See Castle Rock*, 150 F.3d at 142.

[259] *See id.* at 136 (observing that *The SAT*'s back cover characterized the book's purpose as between-episode entertainment).

[260] *See id.* (describing creation and organization of *The SAT*).

The second factor of the fair-use analysis is the nature of the copyrighted work.[261] This factor favored Castle Rock because courts provide greater protection to fictional works than to factual works.[262] Both *Seinfeld* and *The SAT* are clearly fictional works because individual authors created them.[263] Therefore, the court correctly decided that the second factor weighed against finding fair use.

However, the court's application of the third fair use factor was more problematic. The United States Supreme Court recently stated that courts should inquire into whether the extent of copying was more than necessary to further the purpose and character of the use.[264] In other words, courts should consider whether the amount of copying was excessive. The *Castle Rock Entertainment* court conceded that *The SAT* must take enough from the show to be able to test readers' knowledge of *Seinfeld*.[265] The court then concluded that by posing 643 trivia questions, *The SAT* excessively copied from the show.[266]

The court failed to give adequate consideration, however, to the size of the book.[267] For example, a book containing ten questions will draw less from the original source than a book containing one hundred questions. Because *The SAT*'s purpose was to "expose Seinfeld's 'nothingness,'" it had to include "exhaustive examples deconstructing Seinfeld's humor."[268] Posing 643 questions on eighty-four episodes does not constitute excessive copying of the *Seinfeld* series taken as a whole. Thus, the court's rationale limited the size of the book without warrant.

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[261] *See supra* notes 131-33 and accompanying text (discussing second factor of fair use analysis).

[262] *See Campbell*, 510 U.S. at 586 (stating that fair use defense is more difficult to establish when fictional works are copied); Stewart v. Abend, 495 U.S. 207, 237 (1990) (stating that fair use defense is more applicable to factual works than fictional works); *Twin Peaks*, 996 F.2d at 1376 (1993) (explaining preference for denying fair use defense for fictional works).

[263] *See Castle Rock*, 150 F.3d at 135 (explaining that Castle Rock is copyright owner of *Seinfeld* and Golub authored *The SAT*).

[264] *See Campbell*, 510 U.S. at 586-87 (discussing whether defendant's parody of plaintiff's song copied excessively from plaintiff's lyrics).

[265] *See Castle Rock*, 150 F.3d at 144 (stating that *The SAT* could not expose *Seinfeld*'s value without using examples from *Seinfeld*).

[266] *See id.* at 138, 144.

[267] *See* Twin Peaks Prods. Inc. v. Publications Int'l, 996 F.2d 1366, 1372-73 (2d Cir. 1993) (analyzing substantial similarity on aggregate basis rather than on per-episode basis).

[268] *See Castle Rock*, 150 F.3d at 144.

The fourth factor, effect on the market, also favored finding fair use. Despite the court's conclusion that *The SAT* diminished *Seinfeld*'s value,[269] no evidence existed to suggest that *The SAT* adversely affected *Seinfeld*'s market in any way.[270] More importantly, as the court recognized, the book paid homage to *Seinfeld*.[271] The fourth statutory factor takes derivative works into account.[272] Castle Rock did not show any intention of entering the derivative trivia quiz book market.[273] To preclude Carol Publishing from entering this market is unfair.

The *Castle Rock Entertainment* court chose to weigh all four factors equally even though the fourth factor is more significant.[274] The United States Supreme Court in *Harper* expressly gave more importance to the fourth statutory factor.[275] However, the United States Supreme Court recently stated in dicta that all factors are to be weighed together.[276] The *Castle Rock Entertainment* court interpreted this to mean that all factors are to be weighed equally.[277] However,

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[269] *See id.* at 144-45 (discussing fourth factor and concluding that *The SAT* impinges on plaintiff's right to produce derivative works).

[270] *See id.* at 144 (explaining that *The SAT* did not detract any *Seinfeld* viewers away from television series).

[271] *See id.* at 145.

[272] *See* Shapiro, *supra* note 127, at 15-16 (stating that alleged infringer bears burden for showing no harm to plaintiff's market
for derivative works).

[273] *See Castle Rock*, 150 F.3d at 145-46 (stating that although Castle Rock showed no interest of entering market, it still had right to produce derivative works).

[274] *See id.* at 140-46. The court mentioned that the fourth statutory factor was considered the most important until the decision in *Harper*, where the Supreme Court stated "all factors are to be explored, and the results weighed together". *See id.* at 144. However, this statement does not say all factors must be weighed *equally*. *See id.* It only says that all factors must be considered together. *See id.* (noting precise language United States Supreme Court used). Therefore, *Harper* does not dictate that all factors be given equal weight.

[275] *See Harper*, 471 U.S. at 578. Even before *Harper*, courts considered the impact of the fourth statutory factor highly significant. *See* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451, 456 (1984).

[276] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 559, 578 (1994) (stating that all statutory factors are to be explored and results weighed together in determining copyright infringement). Although these four factors are specifically enumerated by statute, Congress did not intend them to be a conclusive end to the determination of fair use. *See Harper*, 471 U.S. at 560 (stating that four statutory fair use factors are not exclusive in determination on fair use defense). Thus courts can and often do consider other factors in the analysis. *See Campbell*, 510 U.S. at 579 (stating that if second work is highly transformative, this reduces significance of other factors, such as commercialism); *Sony*, 464 U.S. at 450 n.32 (stating that commercial or nonprofit characeristics should be weighed along with other factors); New Era Publications Int'l v. Carol Publ'g Group, 904 F.2d 152, 160 (2d Cir. 1990) (discussing additional factors); Leval, *supra* note 116 at 1125-30 (posing rhetorical question whether additional factors exist).

[277] *See Castle Rock*, 150 F.3d at 140-46.

dicta is not sufficient to overrule longstanding precedent that the fourth factor is the most important factor in the fair use analysis. Thus, *Harper* has not been overruled and courts continue to follow *Harper*.[278] Therefore, the *Castle Rock Entertainment* court should have given more importance to the last factor, which dictates finding fair use because *The SAT* did not adversely affect *Seinfeld*'s market.

Regardless, with two of the four factors weighing in the defendant's favor, and one that could go either way, the fair use defense should apply in this case. *The SAT* 's transformative value coupled with its lack of negative effect on the *Seinfeld* series strongly invokes the application of the fair use defense and precludes finding copyright infringement.[279]

CONCLUSION

Castle Rock Entertainment concerned copyright infringement of a highly successful television series. The Second Circuit determined that *The SAT*, a trivia quiz book, constituted copyright infringement under a qualitative/quantitative approach.[280] However, based on precedent, the court should have applied other tests to determine substantial similarity. Had the court applied other tests, it would have found a lack of substantial similarity between *Seinfeld* and *The SAT* and would not have found infringement. In addition, the court should have found fair use because the court misapplied the statutory fair use defense factors.

By it's holding, the court tipped the balance in favor of granting copyright holders a monopolistic right over their works. This can only hurt society by depriving the public of a "fun little book"[281] to the detriment of creativity, progress and senses of humor everywhere. Had the court appropriately applied the substantial similarity tests or alternatively, applied the fair use defense, *The SAT*

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[278] See Infinity Broadcast Corp. v. Kirkwood, 150 F. 3d 104, 110 (2d Cir. 1998) (following *Harper* analysis); Princeton Univ. Press v. Michigan Document Serv., 99 F.3d 1381, 1385 (6th Cir. 1996) (calling fourth factor first among equals).

[279] *See supra* notes 250-60 and accompanying text (arguing that *The SAT*'s transformative value should be considered). Equally important is the fact that *The SAT* did not harm *Seinfeld* in any way. *See Castle Rock*, 150 F.3d at 145.

[280] *See Castle Rock*, 150 F.3d at 136-38 (applying quantitative/qualitative approach to find substantial similarity).

[281] *See id.* at 136-37 (describing how *Seinfeld*'s executive producer described *The SAT*).

would likely still be on bookshelves today, entertaining *Seinfeld* fans, and perhaps encouraging nonviewers to tune in.

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