

COMMENT

Selling Spray Paint in Cyberspace: Applying the Fair Use Defense to Inline Note Service Providers

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INTRODUCTION

The Internet is a constantly growing communications medium that connects computers and computer networks worldwide and allows rapid transmission of communications without direct human involvement.¹ No single entity controls the Internet.² Instead, the Internet is a decentralized medium of communications.³

¹ *Reno v. ACLU*, 521 U.S. 844, 849-53 (1997) (noting that by 1996, Internet linked over 9,400,000 host computers); *All About the Internet: What is the Internet?*, Internet Society, at <http://www.isoc.org/internet> (last modified Apr. 5, 2001); Marshall Brain, *How Web Servers and the Internet Work: How the Internet Works*, Marshall Brain's HowStuffWorks, at <http://www.howstuffworks.com/web-server1.htm> (last visited Apr. 6, 2001); *Internet, WhatIs.com*, at http://whatis.techtarget.com/definition/0,289893,sid9_gci212370,00.html (last modified Oct. 5, 2000) [hereinafter *WhatIs Internet*].

² *Reno*, 541 U.S. at 853; Walt Howe, *What is the Internet?*, Walt's Navigating the Net Forum, at <http://www.walthowe.com/navnet/faq/internet.html> (last modified June 22, 1998).

³ *Reno*, 541 U.S. at 853. The designers of the Internet initially created a distributed system of information, called the ARPANET, so that if one part of the network was malfunctioning, important information could arrive at its intended destination along an alternate route. Walt Howe, *A Brief History of the Internet: An anecdotal history of the people and communities that brought about the Internet and the Web*, at <http://www0.delphi.com/navnet/history.html> (last modified Apr. 13, 2001); Barry M. Leiner et al., *A Brief History of the Internet, Origins of the Internet*, Internet Society, at <http://isoc.org/internet/history/brief.html> (last modified Aug. 4, 2000); *WhatIs Internet*, *supra* note 1.

Traditionally, a user's communications over the Internet, including e-mail,⁴ chat,⁵ instant messaging,⁶ or message boards,⁷ were limited to read-only content.⁸ Now, companies offer free browser companion services that allow Internet users to post "inline notes" at any point in a World Wide Web site.⁹ The inline note services expand a user's ability to communicate on the Web.¹⁰ In particular, the services enable Internet

⁴ E-mail, or electronic mail, allows users on the Internet to send messages over the network to other users or groups of users. *Reno*, 541 U.S. at 851; *E-mail*, WhatIs.com, at http://whatis.techtarget.com/definition/0,289893,sid9_gci212051,00.html (last modified Oct. 14, 1999). These messages are stored on servers or mail hosts until the recipient retrieves them. *Reno*, 541 U.S. at 851.

⁵ Chat groups allow contemporaneous communication among several people who may or may not be anonymous. *Chatting*, WhatIs.com, at http://whatis.techtarget.com/definition/0,289893,sid9_gci211777,00.html (last modified Oct. 7, 1999). Most chats are focused on a particular topic of interest. *Id.*

⁶ Instant messaging allows Internet users to see whether a chosen individual is connected to the Internet and, if they are, to exchange messages with them. *Instant messaging*, WhatIs.com, at http://whatis.techtarget.com/definition/0,289893,sid9_gci510743,00.html (last modified Jan. 4, 2001). Instant messaging allows more immediate message exchange than e-mail. *Id.*

⁷ Messaging, or electronic messaging, allows multiple users to send messages to a single central location. *Messaging*, WhatIs.com, at http://whatis.techtarget.com/definition/0,289893,sid9_gci212554,00.html (last modified May 9, 2000).

⁸ Read-only content is material that a user can hear, see, or read, yet cannot directly respond to. See generally Michael Margolis & David Resnick, *Third Voice: Vox Populi Vox Dei?*, FIRSTMONDAY, Aug. 11, 1999, available at http://www.firstmonday.dk/issues/issue4_10/margolis/ (last visited Apr. 6, 2001) (discussing initial concepts and subsequent growth of Internet and World Wide Web).

⁹ Julian Dibbell, *Let Third Voice Be Heard*, SPEAKOUT.COM, Aug. 19, 1999, at <http://www.speakout.com/Content/ICArticle/4181/>; James C. Luh, *Peanut Gallery*, INTERNET WORLD MAG., Aug. 15, 2000, available at <http://www.internetworld.com/081599/8.15content3.jsp>; Chris Oakes, *The Web's New Graffiti?*, WIRED NEWS, June 9, 1999, available at <http://www.wired.com/news/technology/0,1282,20101,00.html> (describing look and feel of new services as "Post-It notes stuck onto a Web page"); Clive Thompson, *Surf Bored?*, GLOBETECHNOLOGY.COM, Oct. 29, 1999, at <http://www.globetechnology.com> (discussing new software application that allows Internet users to "talk back to Web sites"); see, e.g., *BrowseUp*, at <http://www.browseup.com> (last visited Apr. 6, 2001); *uTOK*, at <http://www.utok.com> (last visited Apr. 6, 2001). Five other companies, esgear, Gooey, Hypernix, Third Voice, and zadu, also previously provided this service but now no longer do so. Third Voice was the first company to provide this capability. See *Third Voice*, at <http://www.thirdvoice.com> (last visited Apr. 6, 2001) (stating that as of April 2, 2001, consumer version of search and annotation tools are no longer available). In the early years of the Web, similar inline, open annotation was possible but never caught on. Dibbell, *supra*. Early enthusiasts had hoped that the Internet would "free people from being largely passive consumers of information doled out by the established mass media." Margolis & Resnick, *supra* note 8, at 1 (noting that in early days of Internet, every user could become "both a reader and a publisher, a viewer and a broadcaster").

¹⁰ Dibbell, *supra* note 9; Oakes, *supra* note 9; Thompson, *supra* note 9.

users to integrate their own thoughts and opinions into the existing content on a Web page and to read other users' comments alongside the Web page content.¹¹

To provide its browser companion service, the inline note service provider's server¹² must copy any Web page that the user visits.¹³ These copies may violate Web page authors' exclusive rights under copyright law, including the rights to reproduce and create new works based on the original Web page materials.¹⁴

This Comment argues that although inline note service providers may violate the exclusive copyrights of Web page authors, courts should permit inline note service providers' use of Web page materials under copyright law's fair use exception.¹⁵ Part I surveys the Internet and inline notes and then examines the relevant provisions of the Copyright Act of 1976, including recent applications of the fair use defense. Part II applies the factors of the fair use defense to the problem of inline notes and weighs these factors in light of the objectives of copyright law. Part III proposes that inline note service providers' use of Web page materials constitutes fair use under copyright law.

¹¹ Dibbell, *supra* note 9; John Gartner, *Readers Speak with Third Voice*, WIRED NEWS, May 17, 1999, available at <http://www.wired.com/news/technology/0,1282,19722,00.html>; Oakes, *supra* note 9; Thompson, *supra* note 9. The postings are visible only to users who have signed up with an INSP and have chosen to open the notes. Margolis & Resnick, *supra* note 8. Among users, the services provide the capability to allow only specified users to view certain notes and to use the software for online tutorials and discussions. Gartner, *supra*; Georgie Raik-Allen, *New startup gives browsers their voice*, RED HERRING, May 18, 1999, available at http://www.redherring.com/index.asp?layout=story_generic&doc_id=RH1580011158; Thompson, *supra* note 9. Inline notes are commonly referred to as "virtual grafitti" or "digital grafitti."

¹² A server is a computer program that provides services to other computer programs in the same or other computers. *Server*, WhatIs.com, at http://whatis.techtarget.com/definition/0,289893,sid9_gci212964,00.html (last modified Oct. 5, 2000).

¹³ See Jeremy Bowers, at <http://www.cse.msu.edu/~bowersj2/third.voice/node2.html>; Dibbell, *supra* note 9; Oakes, *supra* note 9; Say No to Third Voice – Mission Statement, at <http://saynotothirdvoice.com/mission.htm> (last modified Apr. 5, 2001). The service provider's server creates a copy when a user posts notes, reads notes, or simply visits a Web page. See Bowers, *supra*. After downloading the browser companion service, the user may choose to browse without it. However, a user must employ the browser service to view notes posted by other users. Margolis & Resnick, *supra* note 8.

¹⁴ See 17 U.S.C. § 106 (1994 & Supp. V 1999) (listing exclusive rights of copyright holder); *id.* § 501 (1994 & Supp. V 1999) (defining copyright infringement).

¹⁵ See 17 U.S.C. § 107 (1994) (codifying fair use doctrine).

I. BACKGROUND

The Internet has revolutionized the way people communicate. Recently, inline note service providers have further enhanced Internet communications by enabling discussion and commentary at any point on a Web page. In providing its services, an inline note service provider's server makes entire copies of Web pages that may constitute copyright infringement. However, copyright law, which seeks to encourage the creation of works that benefit the public, may permit inline note service providers to copy works on the Internet.

A. The Internet

The Internet enables advanced modes of global communication.¹⁶ An individual user accesses the Internet through a variety of avenues.¹⁷ Users commonly connect to the Internet through an "Internet access provider" ("IAP"), which offers users the extensive resources of the Internet in an organized manner.¹⁸

Once individuals gain access to the Internet, a variety of methods for communicating become available.¹⁹ A well-known method of communication on the Internet is the World Wide Web ("the Web").²⁰ The Web is a network of documents stored in many computers that are linked together by telephone and other high-speed data lines.²¹ The Web utilizes a special formatting language called hypertext markup language

¹⁶ *Reno v. ACLU*, 521 U.S. 844, 850 (1997); Leiner et al., *supra* note 3, Introduction.

¹⁷ Users may establish an actual link to the Internet by using a computer which is directly connected to a computer network which is itself directly or indirectly connected to the Internet. *Reno*, 541 U.S. at 850-51. Users may also establish an indirect link to the Internet from a personal computer by using a "modem" and telephone line to connect to a computer network which is itself directly or indirectly connected to the Internet. See Brain, *supra* note 1. Many academic, governmental, and commercial entities make both direct and modem communications available. See *id.*

¹⁸ *Reno*, 541 U.S. at 850-51; *Internet access provider*, WhatIs.com, at http://whatis.techtarget.com/definition/0,289893,sid9_gci214092,00.html (last modified Nov. 11, 1999) [hereinafter *WhatIs Internet access provider*]. An Internet access provider ("IAP") allows a user to gain access to the Internet by dialing in to the IAP's computer network which is itself connected to the Internet. *Reno*, 541 U.S. at 850-51; *WhatIs Internet access provider*, *supra*. Users usually pay a modest fee for the service. By 1996, almost 12,000,000 individuals subscribed to these commercial IAPs. *Reno*, 541 U.S. at 850-51.

¹⁹ *Reno*, 541 U.S. at 851-53 (listing e-mail and chat among present methods).

²⁰ *Id.* at 852; *World Wide Web*, CNET: Glossary, at <http://www.cnet.com/Resources/Info/Glossary/Terms/www.html> (last visited Apr. 6, 2001). For a history on the development of the World Wide Web, see links provided by Internet Society, at <http://www.isoc.org/internet/history/> (last visited Apr. 6, 2001).

²¹ *Reno*, 541 U.S. at 852.

("HTML").²² Through the Web, users can view HTML documents that display text, images, sound, and video.²³

The creators of the Web designed it to allow Internet users access to a global, online store of knowledge.²⁴ Many entities now provide documents that offer useful information about their organizations to Internet users.²⁵ Additionally, organizations and individuals use the Web to display creative works, such as literary and artistic works.²⁶ Today, Internet users not only can view these Web pages, but also may post inline notes directly onto any Web site.²⁷

B. Inline Notes

Inline notes are comments that Internet users can post directly on to any point on a Web page.²⁸ Inline note service providers ("INSPs") offer the ability to post these inline notes free of charge.²⁹ Moreover, they provide free links to other Web sites and other services to their users.³⁰ Generally, however, they recoup their costs by soliciting advertisements.³¹

²² *World Wide Web*, *supra* note 20.

²³ *HTML*, CNET: Glossary, at <http://www.cnet.com/Resources/Info/Glossary/Terms/html.html> (last visited Apr. 6, 2001).

²⁴ Howe, *supra* note 3; Leiner et al., *supra* note 3.

²⁵ Howe, *supra* note 3.

²⁶ *WhatIs Internet*, *supra* note 1.

²⁷ Martin Lindstrom, *Can Truth Kill Brands?*, CLICKZ TODAY, Sept. 30, 1999, at <http://clickz.com/article/cz.764.html>; Margolis & Resnick, *supra* note 8; R. Scott Raynovich, *Attack of the viral Web notes*, RED HERRING, July 24, 1999, available at http://www.redherring.com/index.asp?layout=story_generic&doc_id=RH1800011380; Thompson, *supra* note 9. Third Voice, the first company to enable Internet users to post inline notes, introduced its product in May 1999. Lindstrom, *supra*. However, as of April 2, 2001, Third Voice no longer provides the consumer version of its search and annotation tools. Third Voice, at <http://www.thirdvoice.com> (last visited Apr. 6, 2001). Four other companies, esgear, Gooey, Hypermix, and zadu, also previously provided this Internet service but have since discontinued their service.

²⁸ Dibbell, *supra* note 9; Oakes, *supra* note 9; Raynovich, *supra* note 27; Thompson, *supra* note 9.

²⁹ Oakes, *supra* note 9; Penelope Patsuris, *Talking back on the web*, FORBES.COM, May 21, 1999, at <http://www.forbes.com/1999/05/21/feat.html> (explaining that INSPs' sites generate revenue through advertising, sponsorships, and transaction agreements with e-commerce enterprises); Raynovich, *supra* note 27.

³⁰ See Raik-Allen, *supra* note 11; Luh, *supra* note 9. A link is a highlighted word or picture that an Internet user can select to connect immediately to another file. *Link*, WhatIs.com, at http://whatis.techtarget.com/definition/0,289893,sid9_gci212475,00.html (last modified Nov. 8, 1999) ("Links are what make the World Wide Web a web.").

³¹ Patsuris, *supra* note 29; Raik-Allen, *supra* note 11; Raynovich, *supra* note 27. Patsuris has noted, however, that INSPs may have difficulty attracting advertisers. Patsuris, *supra*

After a user downloads the service, a frame appears around any Web page that the user accesses.³² The frame, in effect, pulls in the image, text or audio clip from the viewed Web page into the current document.³³ The frame appears as a border around the Web page.³⁴

A user may then employ the browser service to add a comment or note at any point on a Web page.³⁵ After a user posts a comment, the INSP's server indicates the portion of text that includes the annotation.³⁶ For example, one company places a small red triangle next to annotated text.³⁷ Subsequent users of the inline note service actually view the copy made by the server with the addition of the comments made by previous users.³⁸ Thus, anytime a user employs the service, the INSP's server creates an HTML copy of every Web page a user visits.³⁹ These copies potentially violate the copyrights of Web page authors.

C. Copyright Law

Copyright protection originates from article I, section 8, clause 8, of the United States Constitution.⁴⁰ Congress enacted the Copyright Act of 1976 ("the Act")⁴¹ to further the constitutional aims of copyright law.⁴²

note 29 (noting that INSP's browser companion toolbar is limited in space and that users probably will not keep large toolbars open for long time).

³² The frame appears every time the user connects to the Internet with the service turned on. See Luh, *supra* note 9; Oakes, *supra* note 9; Patsuris, *supra* note 29; Raik-Allen, *supra* note 11. A user may choose to connect to the Internet with the browser service disabled.

³³ See Luh, *supra* note 9; Oakes, *supra* note 9; Patsuris, *supra* note 29; Raik-Allen, *supra* note 11.

³⁴ See Luh, *supra* note 9; Oakes, *supra* note 9; Patsuris, *supra* note 29; Raik-Allen, *supra* note 11.

³⁵ Dibbell, *supra* note 9; Lindstrom, *supra* note 27; Luh, *supra* note 9; Patsuris, *supra* note 29; Raynovich, *supra* note 27.

³⁶ Luh, *supra* note 9; Margolis & Resnick, *supra* note 8; Patsuris, *supra* note 29. In effect, a subsequent user sees an overlay of "virtual Post-It notes" when viewing the Web with an INSP's browser service. Gartner, *supra* note 11; Thompson, *supra* note 9.

³⁷ Luh, *supra* note 9; Margolis & Resnick, *supra* note 8. Other examples of indicators used by INSPs are rotating paddles, icons representing various tools, and pop-up windows.

³⁸ See Bowers, *supra* note 13; Dibbell, *supra* note 9; Oakes, *supra* note 9; Say No to Third Voice – Mission Statement, *supra* note 13. In order to view the comments of previous users, a subsequent user must employ the browser service. Margolis & Resnick, *supra* note 8.

³⁹ See Bowers, *supra* note 13; Dibbell, *supra* note 9; Oakes, *supra* note 9; Say No to Third Voice – Mission Statement, *supra* note 13.

⁴⁰ U.S. CONST. art. I, § 8, cl. 8.

⁴¹ 17 U.S.C. §§ 101-1101 (1994 & Supp. V 1999).

⁴² H.R. REP. NO. 94-1476, at 47 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5660.

The Act imposes liability on individuals who violate the exclusive rights of authors.⁴³ However, it also allows some use of copyrighted materials.⁴⁴

1. Constitutional Objectives, Exclusive Rights, and Infringement

The United States Constitution provides copyright protection to advance science and the arts.⁴⁵ Thus, the primary purpose of copyright law is to secure for the general public the benefits derived from the labor of authors.⁴⁶ To this end, copyright law balances two objectives. On the one hand, copyright law seeks to motivate authors to create works by assuring exclusive rights to their original works.⁴⁷ On the other hand, copyright law provides limitations and exceptions to those exclusive rights to encourage others to build freely upon the ideas and information conveyed by a work.⁴⁸

Congress enacted the Act to further the two constitutional ends of motivating authors and encouraging others to build upon the works of authors.⁴⁹ To achieve these ends, the Act protects authors' original

⁴³ See 17 U.S.C. § 501(a) (1994 & Supp. V 1999). See generally 17 U.S.C. § 106 (1994 & Supp. V 1999) (listing exclusive rights).

⁴⁴ See 17 U.S.C. § 107 (1994) (codifying fair use defense).

⁴⁵ U.S. CONST. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

⁴⁶ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.03[A], at 1-66.9 to -66.10 (2000).

⁴⁷ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (noting that copyright law protects only original expressions); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432-33 (1984); *Aiken*, 422 U.S. at 156; *Mazer*, 347 U.S. at 219; 1 NIMMER & NIMMER, *supra* note 46, § 1.03[A], at 1-66.10.

⁴⁸ See *Feist*, 499 U.S. at 350; *Harper & Row*, 471 U.S. at 556-57 (stating that copyright law allows free communication of facts); *Sony*, 464 U.S. at 433 (noting limitation of author's exclusive rights when use would lead to public benefits); *Aiken*, 422 U.S. at 156 (recognizing general public good of access to literature, music, and other arts as ultimate aim of copyright protection); 1 NIMMER & NIMMER, *supra* note 46, § 1.03[A], at 1-66.10 (noting that copyright protection allows uses that increase public welfare through talents of authors). *Feist* points out that the fact that raw facts may be freely copied is not unfair. 499 U.S. at 350. The copying of facts is how copyright advances the progress of science and art. See *id.*

⁴⁹ H.R. REP. NO. 94-1476, at 47 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5660. The Copyright Act of 1976 was not Congress's first effort to implement copyright protection pursuant to its authority under the United States Constitution. See 1 NIMMER & NIMMER, *supra* note 46, OV-1 to -3 (chronicling current Act's history, noting relevant dates and events). The very first Congress began federal copyright protection in 1790. Act of May 31, 1790, ch. 15, 1 Stat. 124. Then, Congress enacted the Copyright Act of 1909. Act of March 4,

expressions but allows the free use of facts and ideas within their works.⁵⁰ The Act does not protect facts and ideas because they lack the constitutional requirement of originality.⁵¹ However, authors whose original works possess a minimal degree of creativity receive copyright protection in the form of exclusive rights.⁵² Section 106 of the Act confers to a copyright owner the exclusive rights to reproduce, prepare derivative works of, distribute, publicly perform, and publicly display the copyrighted work.⁵³

1909, ch. 320, 35 Stat. 1075. Congress amended The Copyright Act of 1909 several times until shortly before it adopted the current Act. Act of Dec. 3, 1974, 88 Stat. 1873. For example, in 1912, Congress amended the 1909 Act to render motion pictures expressly copyrightable. Act of Aug. 24, 1912, ch. 356, 37 Stat. 488. In 1939, Congress added protection for prints and labels used for articles of merchandise. Act of July 31, 1939, 53 Stat. 1142. The Sound Recording Amendment Act of 1971, another amendment to the 1909 Act, provided protection to sound recordings. Act of Oct. 15, 1971, Pub. L. 92-140, 85 Stat. 391. Then, Congress enacted the Copyright Act of 1976, a comprehensive revision to the Copyright Act of 1909, that became effective on January 1, 1978. Act of Oct 19, 1976, Pub. L. 94-553, 90 Stat. 2541.

⁵⁰ 17 U.S.C. § 102(a) (1994 & Supp. V 1999); *Feist*, 499 U.S. at 344-46; H.R. REP. NO. 94-1476, at 51-52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5664-65 (describing originality that merits copyright protection). Further, copyright law protects only original works that are "fixed in a tangible medium of expression." 17 U.S.C. § 102(a); H.R. REP. NO. 94-1476, at 52-53 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665-67. A work is fixed when its embodiment in a copy is permanent enough that it can be perceived or otherwise communicated for more than transitory duration. 17 U.S.C. § 101 (1994 & Supp. V 1999); H.R. REP. NO. 94-1476, at 53 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5666.

⁵¹ 17 U.S.C. § 102(b); *Feist*, 499 U.S. at 344-48 (characterizing originality requirement as sine qua non of copyright protection). In *Feist*, the Supreme Court explained that facts do not receive copyright protection because they do not owe their origin to an act of authorship. 499 U.S. at 347 (observing that person who finds and reports fact is merely discoverer and not creator of fact).

⁵² See 17 U.S.C. § 106 (1994 & Supp. V 1999) (listing exclusive rights).

⁵³ *Id.*

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

A violation of one or more exclusive rights of the copyright owner constitutes copyright infringement.⁵⁴ Several parties may be liable for an act of infringement.⁵⁵ After establishing a user's direct liability,⁵⁶ a copyright holder may initiate a claim of contributory liability or vicarious liability against a third party.⁵⁷ Third parties are contributorily liable when they know of the infringing activity and induce, cause, or materially contribute to another's infringing conduct.⁵⁸ Third parties are vicariously liable for a primary infringer's actions when they can control the infringer's acts and have a direct financial interest in the infringing activity.⁵⁹ Despite the three theories of liability, copyright protection is not absolute: Congress has enacted many statutory limitations to

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id. A reproduction in a copy is a material object that "fixes" a work and allows that others to perceive or communicate the work. *Id.* § 101. A derivative work is a work based upon one or more original works. *Id.*; H.R. REP. NO. 94-1476, at 62 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5675. The exclusive right to prepare derivative works is broader than the reproduction right but overlaps it to some extent. *Id.*

⁵⁴ 17 U.S.C. § 501(a) (1994 & Supp. V 1999). The remedies for infringement are provided in Chapter 5 of the Act. *See, e.g., id.* § 502 (1994 & Supp. V 1999) (providing remedy of injunction); *id.* § 503 (1994 & Supp. V 1999) (providing remedies of impoundment and disposition of infringing articles); *id.* § 504 (1994 & Supp. V 1999) (providing remedies of damages and profits); *id.* § 505 (1994 & Supp. V 1999) (providing remedies of costs and attorney's fees); *id.* § 510 (1994 & Supp. V 1999) (providing remedies for alteration of programming by cable systems).

⁵⁵ *See, e.g., Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1367-77 (N.D. Cal. 1995) (applying three theories to defendant internet access provider Netcom).

⁵⁶ The elements of direct copyright infringement are: (1) the owner holds a valid copyright to the work and (2) the defendant copied the work. 4 NIMMER & NIMMER, *supra* note 46, § 13.01, at 13-5 to -6. Direct infringement does not require a particular state of mind. *Netcom*, 907 F. Supp. at 1367. Rather, it is a strict liability determination. *Id.* at 1367 n.10.

⁵⁷ The absence of express language in the Act imposing copyright liability on parties other than those who have directly engaged in the infringing activity does not preclude the imposition of liability on those other parties. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984); *Netcom*, 907 F. Supp. at 1373. A defendant may be contributorily liable or vicariously liable for an act of infringement even if the defendant was not directly involved in the infringing activity. *See, e.g., id.* at 1373-77.

⁵⁸ *Sony*, 464 U.S. at 435, 437; *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971); *Netcom*, 907 F. Supp. at 1373-75.

⁵⁹ *Sony*, 464 U.S. at 435, 437-39; *Shapiro Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963); *Netcom*, 907 F. Supp. at 1375-77. In contrast to contributory liability, vicarious liability is based not on the defendant's contribution to the infringement but on the defendant's relationship to the direct infringer. *Id.* at 1375.

copyright liability, including the fair use defense.⁶⁰

2. The Fair Use Defense

Section 107 of the Act codifies the fair use defense.⁶¹ The fair use defense limits the protection that a copyright holder enjoys under the Act.⁶² This defense excuses an otherwise infringing use when a finding of infringement would stifle the creativity that copyright law seeks to foster.⁶³ Although fair use limits a copyright owner's exclusive rights, it fulfills copyright law's constitutional purpose of advancing science and the arts by allowing others to build upon the content of a work of authorship.⁶⁴ Thus, courts have consistently allowed some fair use of copyrighted materials.⁶⁵ Section 107 sets forth the four factors of the fair use analysis.

a. The Four Factors of the Fair Use Analysis

The four factors courts consider in a fair use determination are the purpose and character of the use, the nature of the copyrighted work, the substantiality of the portion used in relation to the copyrighted work as a

⁶⁰ *E.g.*, 17 U.S.C. § 107 (1994) (fair use); *id.* § 108 (1994 & Supp. V 1999) (reproduction by libraries and archives); *id.* § 117 (1994 & Supp. V 1999) (computer programs).

⁶¹ *Id.* § 107.

⁶² *See id.* ("Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . is not an infringement of copyright."). *See generally* § 106 (1994 & Supp. V 1999) (subjecting copyright owner's exclusive rights to exceptions under sections 107 through 118).

⁶³ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (observing that copyright protection must foster creativity); *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (meriting copyright protection for only creative works); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558-59 (1985) (noting that copyright law must not deprive authors of incentive to create).

⁶⁴ *See Campbell*, 510 U.S. at 577 (noting that allowing beneficial uses of copyright works promotes progress of science and arts); *Stewart*, 495 U.S. at 236 (1990) (observing benefit to society when copyright law permits certain uses of copyright works); *Harper & Row*, 471 U.S. at 545, 549 (recognizing that certain reasonable uses benefit general public).

⁶⁵ *Campbell*, 510 U.S. at 575 (noting that courts have recognized fair use doctrine from infancy of copyright protection). Courts have always implied the copyright owner's consent to a reasonable use of the copyrighted works as a necessary to further the constitutional policy of promoting the progress of science and the useful arts. *See* H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944). Prohibiting such use would prevent people from attempting to improve upon prior works and thus "frustrate the very ends sought to be attained." *Id.* Accordingly, courts have consistently recognized the fair use doctrine, even though Congress enacted the initial copyright statute without explicit reference to the doctrine. *See Campbell*, 510 U.S. at 576. The doctrine remained judge-made until codification in the Copyright Act of 1976. *See id.* at 577; *Carey v. Kearsley*, 4 Esp. 168, 170, 170 Eng. Rep. 679, 681 (K.B. 1803).

whole, and the potential market effect of the use.⁶⁶ Courts determine whether a use is fair on a case-by-case basis.⁶⁷ Rather than treat the four statutory factors in isolation, courts explore each factor in light of the other factors and the purposes of copyright law.⁶⁸

(1) Purpose and Character of the Use

The first statutory fair use factor examines the purpose and character of the use.⁶⁹ In the preamble to section 107, Congress listed several purposes that generally constitute fair use, including criticism, commentary, news reporting, and scholarship.⁷⁰ However, courts subsequently determined that criticisms or commentaries which have no critical bearing on the substance or style of the original work do not weigh in favor of a fair use finding.⁷¹ For example, criticisms or

⁶⁶ 17 U.S.C. § 107.

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

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

Id. These factors are nonexclusive. *See id.* Moreover, section 107 does not indicate how much weight courts should ascribe to each factor. *See id.* The defendant in a copyright infringement case has the burden of demonstrating fair use because fair use is an affirmative defense. *See Campbell*, 510 U.S. at 589-91.

⁶⁷ *Campbell*, 510 U.S. at 577; *Harper & Row*, 471 U.S. at 552, 560; *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1378 (N.D. Cal. 1995); H.R. REP. NO. 94-1476, at 65-66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A], at 13-154 to -155.

⁶⁸ *Campbell*, 510 U.S. at 578; *Castle Rock*, 150 F.3d at 141; *Netcom*, 907 F. Supp. at 1378; H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A], at 13-152 to -155.

⁶⁹ 17 U.S.C. § 107(1).

⁷⁰ *Id.* § 107 ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.").

⁷¹ *E.g.*, *Campbell*, 510 U.S. at 580-81.

commentaries that use an original work merely to avoid the labor of creating a new work will diminish a claim to fair use.⁷²

A finding that a particular use falls within one of the preamble's listed purposes does not establish the use as presumptively fair.⁷³ Section 107's preamble is simply one element to consider in the entire fair use analysis.⁷⁴ Courts often consider two other elements when determining the purpose and character of the use.⁷⁵ First, courts investigate whether and to what extent a new work is "transformative."⁷⁶ Second, courts examine whether a use has commercial or noncommercial purposes.⁷⁷

A work is transformative if it adds new expression, meaning, or message to the original work rather than merely superseding or supplanting the original.⁷⁸ Generally, verbatim copies of a copyrighted

⁷² *Id.* at 580. In *Campbell*, the Court distinguished a legitimate user from one who uses an original work merely to avoid the drudgery in creating a new work. *Id.* As an example, the Court contrasted parody that mimics an original work to make its point and thus has some claim to fair use with satire that "can stand on its own two feet" and thus requires more justification for borrowing. *Id.* at 580-81.

⁷³ See *Campbell*, 510 U.S. at 578-79; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (noting that drafters of Act resisted establishing presumptive categories of fair use). Courts use the preamble merely to guide the first factor analysis. See *Campbell*, 510 U.S. at 578-79; *Harper & Row*, 471 U.S. at 561. Further, courts may consider uses beyond the six that the preamble to section 107 enumerates. H.R. REP. NO. 102-836, at 3 n.6 (1992), reprinted in 1992 U.S.C.C.A.N. 2553. Parody is a common example of such a use. *Id.*

⁷⁴ See *Campbell*, 510 U.S. at 576-79; *Harper & Row*, 471 U.S. at 560-61. Notwithstanding a particular use's falling within one of the section 107 preamble's listed purposes, a court still must complete the statutory four-factor analysis. *Campbell*, 510 U.S. at 576-79; *Harper & Row*, 471 U.S. at 561; H.R. REP. NO. 94-1476, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679.

⁷⁵ In addition, when applicable, courts make a third inquiry: they consider the propriety of the defendant's conduct because fair use presupposes good faith and fair dealing. See, e.g., *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1379 (N.D. Cal. 1995); see also 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][1][d], at 13-167 to -170 (discussing effect of defendant's conduct on fair use determination).

⁷⁶ See *Campbell*, 510 U.S. at 579 (noting that creation of transformative works generally furthers goal of copyright, to promote science and arts); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][1][b], at 13-160 to -161.

⁷⁷ 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][1][c], at 13-162 to -167.

⁷⁸ *Campbell*, 510 U.S. at 579; *Harper & Row*, 471 U.S. at 562; *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 142-43 (2d Cir. 1998). For example, the Second Circuit stated that works which create new aesthetics and understandings add something new to original works and thereby create transformative works. *Id.* at 142. In *Castle Rock*, the Second Circuit found that the trivia quiz book, "The Seinfeld Aptitude Test" ("the SAT"), was not a transformative work which added upon the Seinfeld television show. *Id.* at 142-43. The court found that the SAT's clear purpose was to supersede the original work by giving viewers something that would satisfy their desire for the original television shows. *Id.* Thus, the SAT was not transformative because it did not seek to educate,

work or portions thereof are not transformative in nature.⁷⁹ A finding that a work is transformative weighs in favor of fair use, but a contrary finding does not preclude a finding of fair use.⁸⁰ The more transformative a work is, the less significant a finding of commercial purpose will be in determining whether the work is a fair use.⁸¹

A primarily commercial purpose cuts against a finding of fair use.⁸² However, courts distinguish uses that have a distinctly commercial purpose from uses that happen to supplant a commercially valuable right of the copyright holder.⁸³ For example, an unauthorized publication of quotations from copyrighted materials supplants the original author's commercially valuable right of first publication.⁸⁴ But if the unauthorized publication was not motivated by profit, then it would not have a distinctly commercial purpose.⁸⁵

A determination that a use has a commercial purpose does not bar a finding of fair use.⁸⁶ Likewise, a use with a noncommercial purpose does not guarantee a finding of fair use.⁸⁷ Courts generally refuse such

criticize, comment upon, or research the original Seinfeld shows. *Id.*

⁷⁹ *E.g.*, *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 69, 72 (2d Cir. 1999) (finding mostly direct English translations of Japanese articles to be infringing news abstracts); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 990, 993 (9th Cir. 1998) (characterizing unauthorized videotape copies of news programs not transformative because defendant did not explain footage, edit content of footage, or include editorial comment).

⁸⁰ *Campbell*, 510 U.S. at 579 (noting that creation of transformative works generally furthers goals of copyright).

⁸¹ *See id.* In *Castle Rock*, the Second Circuit stated that it would not give much weight to whether a secondary use of a copyrighted work was for commercial gain. 150 F.3d at 142. It noted the Supreme Court's observation that individuals generally conducted for profit even the uses listed in the preamble to section 107. *Id.* (citing *Campbell*, 510 U.S. at 584). The *Castle Rock* court stated that the more critical inquiry under the first fair use factor was whether the new work was transformative. *Id.*

⁸² *See Campbell*, 510 U.S. at 584; *Harper & Row*, 471 U.S. at 562; *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1379 (N.D. Cal. 1995).

⁸³ *See Harper & Row*, 471 U.S. at 562; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir. 1992).

⁸⁴ *Harper & Row*, 471 U.S. at 562.

⁸⁵ *See id.*

⁸⁶ *Campbell*, 510 U.S. at 584; *Harper & Row*, 471 U.S. at 593 (Brennan, J., dissenting); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992); *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1175-76 (5th Cir. 1980); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966); *N.Y. Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217, 221 (D.N.J. 1977); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][1][c], at 13-162 to -164.

⁸⁷ *Campbell*, 510 U.S. at 584; *Marcus v. Rowley*, 695 F.2d 1171, 1173, 1175-76 (9th Cir. 1983) (explaining that first factor weighed against fair use despite finding of nonprofit

presumptions for two reasons. First, giving dispositive weight to one factor would be improper because courts must consider all four factors in a fair use analysis.⁸⁸ Second, the purposes listed in the preamble at the beginning of section 107 generally create profit.⁸⁹ After considering the purpose and character of the use, courts examine the nature of the copyrighted work.

(2) Nature of the Copyrighted Work

The second factor of the fair use analysis is the nature of the copyrighted work.⁹⁰ Two considerations aid a court's analysis under this factor. First, fair use is more difficult to establish with creative or expressive works than with factual works.⁹¹ Second, the scope of fair use is narrower with respect to unpublished works than with published works.⁹²

The law generally observes a greater need to disseminate factual works.⁹³ A finding that an original work is creative weighs against fair use⁹⁴ but is not dispositive.⁹⁵ In fact, some creative expressions are inseparable from the underlying ideas, and, in these cases, the law allows users to copy the expressive elements in order to adequately

educational purpose); *Rosemont Enters.*, 366 F.2d at 306-07; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][1][c], at 13-166 to -167.

⁸⁸ See *Campbell*, 510 U.S. at 585; *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 21 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A], at 13-154 to -155.

⁸⁹ *Campbell*, 510 U.S. at 583-84; *Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][1][c], at 13-162. For example, newspapers and magazines generally conduct news reporting, which is listed in section 107, for profit. See *Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting).

⁹⁰ 17 U.S.C. § 107(2) (1994).

⁹¹ *Campbell*, 510 U.S. at 586; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][2][a], at 13-171.

⁹² *Campbell*, 510 U.S. at 586; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][2][a], at 13-174 to -179. In *Harper & Row*, the Supreme Court extended this protection to a soon-to-be-published manuscript, because the author desired prepublication confidentiality. 471 U.S. at 554, 564. However, the Act itself states that a new work is not presumptively barred from a finding of fair use simply because the original work is unpublished. 17 U.S.C. § 107.

⁹³ See *Campbell*, 510 U.S. at 586; *Stewart v. Abend*, 495 U.S. 207, 237 (1990); *Harper & Row*, 471 U.S. at 563; Robert A. Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. COPYRIGHT SOC.'Y 560, 561 (1982).

⁹⁴ *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981), *rev'd sub nom. Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][2][a], at 13-170 to-171.

⁹⁵ See *Sony*, 464 U.S. at 448 (characterizing fair use defense as "equitable rule of reason"); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 972 (9th Cir. 1992).

convey the underlying facts.⁹⁶ However, the use of the copyrighted work must not exceed the necessary isolated expressions.⁹⁷

Another critical element in considering the nature of a work is whether the work is published.⁹⁸ An unpublished work receives greater protection because copyright law recognizes authors' rights to control the first appearance of their expression.⁹⁹ Thus, the scope of fair use is considerably narrower when, for example, a copyright owner has an interest in keeping a work confidential until the date of first publication.¹⁰⁰ On the other hand, substantial quotes taken from a published work may qualify as a fair use.¹⁰¹ For example, fair use is easier to establish when a speech has been delivered to the public or disseminated to the press.¹⁰² Thus, copyrighted works that are publicly available and that contain primarily factual elements are more susceptible to a finding of fair use.¹⁰³

⁹⁶ See, e.g., *Harper & Row*, 471 U.S. at 563 (observing The Nation's argument that President Ford's characterization of White House tapes as "smoking gun" was so integral to underlying idea that use of this characterization should not weigh against fair use). The notion that some expressions are so integral to the ideas underlying them is often called the idea/expression dichotomy. The extent of permissible use of expressive language to assure dissemination of the underlying facts is often difficult to determine and varies from case to case. Gorman, *supra* note 93, at 563.

⁹⁷ See, e.g., *Harper & Row*, 471 U.S. at 563-64 (finding that newspaper's use of President Ford's subjective descriptions and portrayals of public figures exceeded use necessary to convey facts).

⁹⁸ See 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][2][b], at 13-174 to -179.

⁹⁹ *Harper & Row*, 471 U.S. at 564; *Galoob*, 964 F.2d at 970-71; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][2][b], at 13-175. In addition, copyright law provides more protection when copyright holders have held their works as confidential. *Harper & Row*, 471 U.S. at 564. On the other hand, when authors have not sought confidentiality, users may be more entitled to claim fair use. E.g., *Rotbart v. J.R. O'Dwyer Co.*, 34 U.S.P.Q.2d 1085, 1088 (S.D.N.Y. 1995) (characterizing unfixed, undissemated talk, delivered publicly, as de facto published).

¹⁰⁰ E.g., *Harper & Row*, 471 U.S. at 564.

¹⁰¹ See *id.*

¹⁰² *King v. CBS*, 13 F. Supp. 2d 1347, 1353 (N.D. Ga. 1998); see also *Harper & Row*, 471 U.S. at 564.

¹⁰³ Although the unpublished nature of a work is highly relevant, it is not a determinative factor. *Harper & Row*, 471 U.S. at 555. Each case must be decided on its own facts. *Id.* at 551, 555, 562 (noting that facts in given case may lead to finding that prepublication use is fair). In fact, the second factor "more typically recedes into insignificance." 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][2][a], at 13-170.

(3) Substantiality of the Portion Used

The third factor of the fair use analysis considers the substantiality of the portion used in relation to the copyrighted work as a whole.¹⁰⁴ Courts evaluate both the quantity¹⁰⁵ and the quality¹⁰⁶ of the copyrighted materials used.¹⁰⁷ Both must be reasonable in relation to the purpose of the copying.¹⁰⁸ For example, copying almost all of an original work might be fair if the purpose is parody or news reporting.¹⁰⁹ A parody must conjure up enough of the original to make the original recognizable as the object of the parody's criticism and commentary.¹¹⁰ Similarly, an insubstantial taking does not presumptively render a fair use finding.¹¹¹ For example, appropriating a small percentage of verbatim quotes that constitutes the essence of a copyrighted work might weigh against fair use.¹¹² Generally, the new work must take no more than necessary from the original work in order to qualify as a fair use.¹¹³

¹⁰⁴ 17 U.S.C. § 107(3) (1994).

¹⁰⁵ *E.g.*, *Consumers Union of the United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983) (holding that verbatim copying of 29 words out of total of 2100 words was fair use), *cert. denied*, 469 U.S. 823 (1984).

¹⁰⁶ *E.g.*, *Harper & Row*, 471 U.S. at 565 (holding that verbatim copying of 300 words out of 200,000 words unfair because quotes were "heart" of plaintiff's book); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1154-55 (9th Cir. 1986) (distinguishing copying of single advertisement in magazine from copying of essence of contents of magazine); *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 (5th Cir. 1980) (finding copy of magazine cover was fair use, whereas copying "essence" of magazine, including contents, might not be).

¹⁰⁷ *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 587 (1994); *Harper & Row*, 471 U.S. at 564; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][3], at 13-180 to -181.

¹⁰⁸ Thus, even substantial quotations from an original work will not be dispositive; courts will consider whether the portions taken are reasonable in light of the other three factors. *See Campbell*, 510 U.S. at 586-87; *Harper & Row*, 471 U.S. at 565-66. Conversely, a quantitatively small taking of a work does not necessarily favor fair use when the taking includes a qualitatively valuable portion of original work. *Consumers Union of the United States, Inc. v. New Regina Corp.*, 664 F. Supp. 753, 762 (S.D.N.Y. 1987).

¹⁰⁹ *Campbell*, 510 U.S. at 586-89. *But see Harper & Row*, 471 U.S. at 564-65 (finding new work's prominently featuring quotes and most expressive portions of original memoirs of President Ford to be beyond allowable fair use).

¹¹⁰ *Compare Campbell*, 510 U.S. at 586-89, 594 (finding that parody was permissible use because it took no more of original than necessary), *with Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 754-56 (9th Cir. 1978) (holding that parodist copied too much of original to warrant finding of fair use).

¹¹¹ *Campbell*, 510 U.S. at 587; *Harper & Row*, 471 U.S. at 565.

¹¹² *Harper & Row*, 471 U.S. at 565.

¹¹³ In order to be fair, the use also must not appropriate the "heart" of a work with only minor changes or additions. *Campbell*, 510 U.S. at 586-89; *Harper & Row*, 471 U.S. at 565-66. A use that takes the heart of an original work may be unfair if it fulfills the demand for the original. *Campbell*, 510 U.S. at 590-92; *Harper & Row*, 471 U.S. at 566-69. However, excessive

(4) Potential Market Effect

The fourth factor examines whether the use of a work results in an adverse impact on the potential markets of the original work.¹¹⁴ This factor is the most important factor of the fair use analysis¹¹⁵ because copyright law seeks to provide authors with economic incentives to create useful works for the general public good.¹¹⁶ Thus, the fourth factor protects against uses that impair the economic value of an original work.¹¹⁷

Generally, a use that diminishes potential sales, interferes with marketability, or usurps the market of an original work constitutes an economic harm to the original.¹¹⁸ In particular, a market substitute that

copying which takes the original's heart does not raise a presumption of unfair use. *Campbell*, 510 U.S. at 588; *Harper & Row*, 471 U.S. at 565. Courts must examine what the user contributed to original. *Campbell*, 510 U.S. at 588; *Harper & Row*, 471 U.S. at 565-66. For example, if the user added other expressions which made the work more transformative, courts may consider the use fair. *See Campbell*, 510 U.S. at 589.

¹¹⁴ 17 U.S.C. § 107(4) (1994).

¹¹⁵ *Harper & Row*, 471 U.S. at 566; *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845 (11th Cir. 1990); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1481 (9th Cir. 1988), *aff'd sub nom. Stewart v. Abend*, 495 U.S. 207, 238 (1990); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986); *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1177 (5th Cir. 1980); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1380 (N.D. Cal. 1995); *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1558 (M.D. Fla. 1993); *Dow Jones & Co. v. Bd. of Trade*, 546 F. Supp. 113, 121 (S.D.N.Y. 1982); *H.C. Wainwright & Co. v. Wall St. Transcript Corp.*, 418 F. Supp. 620 (S.D.N.Y. 1976), *aff'd sub nom. Wainwright Sec. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977); *Trebonik v. Grossman Music Corp.*, 305 F. Supp. 339, 350-51 (N.D. Ohio 1969); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][4], at 13-182; *see also id.* § 13.05[B][3], at 13-198 to -200 (observing that fourth factor explains results in recent Supreme Court cases).

¹¹⁶ *Harper & Row*, 471 U.S. at 558-59; *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The fourth factor balances the benefit to the public in allowing the use against the personal gain for copyright owner in denying the use. *Harper & Row*, 471 U.S. at 558-59; *MCA, Inc. v. Wilson*, 677 F.2d 180, 189 (2d Cir. 1981); 1 NIMMER & NIMMER, *supra* note 46, § 1.03[A], at 1-66.9 to -66.11. The less adverse effect the use has on the copyright owner's expectation of gain, the less public benefit the user must show to justify the use. 1 *id.* § 13.05[A][4], at 13-181.

¹¹⁷ *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 994-95 (9th Cir. 1998); *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1993); *Hustler*, 796 F.2d at 1155-56; *Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 935-36 (N.D. Cal. 1996); *Religious Tech. Ctr. v. Lerma*, 40 U.S.P.Q.2d 1569, 1573 (E.D. Va. 1996); *Netcom*, 907 F. Supp. at 1380; *Frena*, 839 F. Supp. at 1558-59. Further, when relevant to the fourth factor, courts consider not only whether a particular defendant's actions caused a potential market harm, but also whether widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact to potential markets. 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][4], at 13-181 to -183.

¹¹⁸ *Accolade*, 977 F.2d at 1523; *Hustler*, 796 F.2d at 1155-56.

directly competes for a share of the original work's market cuts against a finding of fair use.¹¹⁹ However, copyright law does not protect against uses that merely decrease demand for the original.¹²⁰ Rather, it protects against copies that usurp the demand for the original.¹²¹ For example, harsh criticism might decrease demand for the original work, but it does not usurp the market for the original.¹²² Accordingly, a transformative use that serves a different market function than the original work favors a finding of fair use.¹²³

Further, the fourth factor considers not only potential harm to the market for original works, but also potential harm to the market for derivative works.¹²⁴ Consequently, a use that harms a potential derivative market of the original work is less susceptible to a finding of fair use.¹²⁵ However, copyright protection extends only to derivative markets that the copyright holder generally would develop.¹²⁶ For example, copyright law does not recognize criticism as a likely derivative market because creators of imaginative works generally do not license critical reviews.¹²⁷ Thus, criticism is not a protectible derivative market

¹¹⁹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994); *Harper & Row*, 471 U.S. at 568.

¹²⁰ *Campbell*, 510 U.S. at 591-92; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][4], at 13-181.

¹²¹ *Campbell*, 510 U.S. at 591-92; *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986); *Consumers Union of the United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][4], at 13-181.

¹²² *Campbell*, 510 U.S. at 591-92; *Gen. Signal Corp.*, 724 F.2d at 1051.

¹²³ *See Campbell*, 510 U.S. at 591-92; *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998).

¹²⁴ *Campbell*, 510 U.S. at 592; *Harper & Row*, 471 U.S. 568; *Castle Rock*, 150 F.3d at 145-46; *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845 (11th Cir. 1990); *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1558-59 (M.D. Fla. 1993).

¹²⁵ *Campbell*, 510 U.S. at 592. Copyright law protects against harm to derivative markets because it observes a copyright holder's creative and economic choice to fulfill likely market niches. *Castle Rock*, 150 F.3d at 145-46. Copyright law recognizes that the licensing of derivatives is an important economic incentive to the creation of originals. *Campbell*, 510 U.S. at 593.

¹²⁶ *Compare Castle Rock*, 150 F.3d at 145-46 (recognizing protection for *Seinfeld* trivia books despite little, if any, interest shown by copyright holders of *Seinfeld* television show in filling particular market niche), *with Campbell*, 510 U.S. at 592-93 (refusing to find critical parody protectible derivative market of original song because no protectible derivative market exists in criticism). Nevertheless, the fact that the copyright holder has not yet filled a particular market does not preclude the copyright holder from establishing that derivative market as a protectible market under the fourth factor. *Castle Rock*, 150 F.3d 145-46.

¹²⁷ *Campbell*, 510 U.S. at 592-93.

that weighs against a finding of fair use.¹²⁸

b. Cases Applying Fair Use

Two Supreme Court cases best illustrate the application of the fair use defense.¹²⁹ The decisions contextualize the analysis of the four fair use factors. Further, a district court case that examined an IAP's fair use defense is instructive as to how the defense may apply to Internet services.¹³⁰

(1) *Campbell v. Acuff-Rose Music, Inc.*

In *Campbell v. Acuff-Rose Music, Inc.*,¹³¹ Acuff-Rose Music, Inc., sued the individuals collectively known as 2 Live Crew for copyright infringement.¹³² 2 Live Crew, a rap music group, recorded and released a song entitled "Pretty Woman" that parodied an earlier rock ballad called "Oh, Pretty Woman."¹³³ The district court granted summary judgment for 2 Live Crew, finding that its use was fair.¹³⁴ The court of appeals reversed and remanded.¹³⁵

The United States Supreme Court reversed the judgment of the court of appeals and remanded the case, finding that 2 Live Crew's parody could be a fair use and therefore that summary judgment for Acuff-Rose was improper.¹³⁶ Regarding the first fair use factor, the Court found that

¹²⁸ *Id.*

¹²⁹ *See id.* at 574-94; *Harper & Row*, 471 U.S. at 560-69.

¹³⁰ *See Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1378-81 (N.D. Cal. 1995).

¹³¹ 510 U.S. 569.

¹³² *Id.* at 572-73.

¹³³ *Id.* at 572. Roy Orbison and William Dees wrote the original rock ballad "Oh, Pretty Woman" in 1964 and subsequently assigned their rights in the song to Acuff-Rose Music, Inc. *Id.* at 572. Acuff-Rose, who owned rights to the original song, had registered the song for copyright protection. *Id.* at 572-73.

¹³⁴ *Id.* The district court reasoned that 2 Live Crew's commercial purpose was not a bar to fair use; that the parody was a commentary on the original song; that the group used no more than was necessary of the original work in order to parody it; and that the parody would not likely adversely affect the market for the original. *Id.*

¹³⁵ *Id.* The court of appeals held that the commercial character of the parody required the conclusion that the use was presumptively unfair and barred 2 Live Crew from the fair use defense. *Id.* at 572-74. This court also found that 2 Live Crew had qualitatively taken too much from the original. *Id.* at 572, 574. In addition, the court noted that the commercial character of the parody created a presumption of harmful effect on the potential market both for the original and for derivative works. *Id.* at 574.

¹³⁶ *Id.* at 594. 2 Live Crew acknowledged that its song would constitute copyright infringement under section 106 of the Act, 17 U.S.C. § 106 (1994 & Supp. V 1999), unless the Court found a fair use through parody. *Campbell*, 510 U.S. at 574.

the parody's criticism and commentary on the earlier work had obvious transformative value because it shed light on the original song.¹³⁷ Further, the Court stated that the court of appeals erred in giving virtually dispositive weight to the commercial nature of the parody.¹³⁸ Concerning the second factor, the Court found that an examination of the nature of the work did not aid the fair use determination because parodies almost always copy publicly known, expressive works.¹³⁹

In analyzing the third factor, the Court observed that the parody used a substantial portion of the original work.¹⁴⁰ However, the Court noted that, in relation to the first factor, 2 Live Crew used no more than was necessary to make the object of the criticism recognizable.¹⁴¹ Under the fourth factor, the Supreme Court observed that this parody would not likely affect the market for the original because parodies and their originals usually serve different market functions.¹⁴² Moreover, the Court noted that potential derivative markets include only those markets that creators of the original works would develop.¹⁴³ Thus, the Court stated that 2 Live Crew's derivative use was not harmful because criticism is not a protectible derivative market.¹⁴⁴ After analyzing the four factors, the Court found that 2 Live Crew may be entitled to a fair use defense and therefore that Acuff-Rose could not prevail on its motion for summary judgment.¹⁴⁵

¹³⁷ *Id.* at 579-83 (finding that narrator's demands for sex and sigh of relief from paternal responsibility in 2 Live Crew's parody commented on and rejected earlier work's naivete).

¹³⁸ *Id.* at 584-85 (emphasizing that commercial purpose of work is only one element of first factor of fair use inquiry).

¹³⁹ *Id.* at 586.

¹⁴⁰ *Id.* at 587.

¹⁴¹ *Id.* at 588-89. The Court rejected the court of appeals' explanation that qualitatively taking the essence of the original was unreasonable. *Id.* at 587-88. The Court reasoned that a parody must take enough of an original work in order to make the object of the criticism recognizable. *Id.* at 588-89. Thus, the Court found that 2 Live Crew's parody was not excessive in light of this purpose. *Id.* at 588-89.

¹⁴² *Id.* at 591-92 (explaining that "kill[ing] demand for original" in itself is not necessarily cognizable harm under copyright). In stating that the fourth factor precluded 2 Live Crew from prevailing on its motion for summary judgment, the Court noted that the reason was not that no harmful market effect likely existed. *Id.* at 593-94. Rather, the Court found that 2 Live Crew had not introduced evidence or affidavits addressing the likely effect of the parody rap song on the market for the non-parody original. *Id.* In addition, the Court observed that critical parody was a derivative market that the creator of this original work probably would not develop. *Id.* at 592-93. Further, the Court explained that the important consideration with derivative works, as with original works, is market substitution and not mere market impairment. *Id.*

¹⁴³ *Id.* at 592.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 594.

(2) *Harper & Row, Publishers, Inc. v. Nation Enterprises*

In *Harper & Row, Publishers, Inc. v. Nation Enterprises*,¹⁴⁶ the Supreme Court applied the fair use defense to a magazine's unauthorized publication of verbatim quotes from former President Ford's memoirs.¹⁴⁷ The Nation, a political commentary magazine, published an unauthorized 2250-word article that included at least 300 words of verbatim quotes from the memoirs.¹⁴⁸ Harper & Row, Publishers, Inc., who owned the right to publish the memoirs,¹⁴⁹ filed a lawsuit against Nation Enterprises, alleging copyright violations.¹⁵⁰ The district court found The Nation liable for copyright infringement.¹⁵¹ The court of appeals reversed, finding that The Nation's publication qualified as a fair use.¹⁵²

The Supreme Court reversed the judgment of the court of appeals and remanded the case.¹⁵³ The Court found that The Nation's use of the verbatim quotes alone did not qualify as a fair use.¹⁵⁴ Under the first factor, the Court noted that The Nation's general purpose was news reporting.¹⁵⁵ However, the Court found that The Nation went beyond

¹⁴⁶ 471 U.S. 539 (1985).

¹⁴⁷ *Id.* at 560-69. Harper & Row owned the exclusive first serial right to license prepublication excerpts from Mr. Ford's memoirs. *Id.* at 542. Harper & Row negotiated a prepublication licensing agreement which authorized Time Magazine to excerpt 7500 words from the memoirs in exchange for money payment. *Id.* at 542-43.

¹⁴⁸ *Id.* The Nation published its article shortly before Time's scheduled release. *Id.* The Nation had received the unpublished memoirs from an unauthorized source. *Id.*

¹⁴⁹ *Id.* at 542.

¹⁵⁰ *Id.* at 542-44. Harper & Row instituted this lawsuit after Time canceled its article and refused to pay the balance it owed to Harper & Row. *Id.* at 542-43. In its lawsuit, Harper & Row also alleged conversion and tortious interference with contract. *Id.* at 543.

¹⁵¹ *Id.* at 542, 544. The district court held that The Nation's publication of the protectible Ford memoirs constituted copyright infringement under the Act and refused to find a fair use. *Id.*

¹⁵² *Id.* at 542, 544-45.

¹⁵³ *Id.* at 542, 569.

¹⁵⁴ *Id.* at 548-49 (observing but not considering The Nation's use of other portions of copyrighted manuscript). In applying the fair use defense, the Court noted that the right of first publication, like the other rights under section 106 of the Act, was expressly made subject to the fair use analysis of section 107. *Id.* at 552-53. However, the Court recognized that the nature of the interest at stake is highly relevant to whether a given use is fair and must be examined on a case-by-case basis. *Id.* at 553.

¹⁵⁵ *Id.* at 561. The Court characterized The Nation's general purpose in using the memoirs as news reporting because the memoirs contained information regarding a period of time in history and the morality and personalities involved. *Id.* at 542. In particular, the memoirs included information concerning the Watergate crisis, Mr. Ford's pardon of former President Nixon, and Mr. Ford's reflections on historical events and people. *Id.* The preamble to section 107 lists news reporting as a purpose which favors a finding of fair use.

mere news reporting because it exploited the value of being the first to publish this particular work.¹⁵⁶ Thus, the Court held that The Nation's use had a commercial purpose.¹⁵⁷ Regarding the second factor, the Court found that The Nation's publication featured the author's subjective individualized expressions.¹⁵⁸ Moreover, the memoirs were unpublished and confidential works.¹⁵⁹ These findings under the second factor cut against a finding of fair use.¹⁶⁰

In applying the third factor, the Court observed that the verbatim quotes constituted a small portion of the original manuscript.¹⁶¹ However, the Court found The Nation's taking substantial because the quotes contained expressive value and served as focal points in the unauthorized publication.¹⁶² Under its analysis of the fourth factor, the Court stated that the verbatim quotes directly competed for a share of the market for prepublication excerpts.¹⁶³ After analyzing the four factors, the Court concluded that The Nation was not entitled to a fair use defense.¹⁶⁴

17 U.S.C. § 107 (1994).

¹⁵⁶ *Harper & Row*, 471 U.S. at 562.

¹⁵⁷ *Id.* at 562-63 (acknowledging The Nation's stated purpose of quickly publishing excerpts before Time's publication release). The Court found a commercial purpose in The Nation's exploitation of the headline value of publishing a noted figure's copyrighted expression. *Id.* It observed that The Nation had intended to supplant the copyright holder's commercially valuable right of first publication. *Id.* at 562. The Court added that The Nation's knowing exploitation of the valuable manuscript was not a good faith use. *Id.* at 562-63 (stating that fair use presupposes good faith and fair dealing).

¹⁵⁸ *Id.* at 563-64. The Court found that The Nation used more than facts and integrally linked expressions when it excerpted the memoirs. *Id.* It also noted that The Nation's article featured verbatim quotes. *Id.* at 565-66 (observing that quotes comprised at least 13% of The Nation's article). In light of the expressive value of the excerpts, the Court stated that The Nation essentially took the "heart" of the book. *Id.* at 564-66.

¹⁵⁹ *Id.* at 564. The Court found not only that the unpublished nature of the work critical, but also that the copyright holders' interest in confidentiality before their own licensed publication was significant. *Id.* The Court noted that The Nation's use restricted Time's opportunity for creative quality or control. *Id.*

¹⁶⁰ *Id.* at 566.

¹⁶¹ *Id.* at 565-66.

¹⁶² *Id.*

¹⁶³ *Id.* at 568 (observing that The Nation's use of quotes lent special air of authenticity and clearly and materially impaired marketability of copied work). The Court emphasized that the factor concerning potential market effect is the most important element of fair use. *Id.* at 566. Moreover, the Court found not merely potential but actual market effect when Time canceled its article and refused to pay the balance it owed to Harper & Row. *Id.* at 567.

¹⁶⁴ *Id.* at 569.

(3) *Religious Technology Center v. Netcom On-Line Communication Services*

More recent cases have applied the four factors of the fair use defense to activities relating to Internet services.¹⁶⁵ *Religious Technology Center v. Netcom On-Line Communication Services*,¹⁶⁶ which discusses the liability of IAPs, provides some guidance for applying the fair use defense to Internet services.¹⁶⁷ Additionally, *Netcom* is instructive in analyzing cases involving the activities of Internet users.¹⁶⁸

Religious Technology Center and Bridge Publications, Inc. ("plaintiffs") owned the copyrights to the religious writings of L. Ron Hubbard, the late founder of the Church of Scientology.¹⁶⁹ An Internet user, a former minister of Scientology, posted portions of plaintiffs' copyrighted works on the Internet.¹⁷⁰ These postings included verbatim quotes from Hubbard, followed by the user's own brief editorials.¹⁷¹ The user gained Internet access through Netcom On-Line Communication Services, an IAP.¹⁷² Thus, plaintiffs filed a copyright infringement action against Netcom and several other defendants.¹⁷³ The district court concluded that Netcom might be contributorily liable and that Netcom was not

¹⁶⁵ See, e.g., *Michaels v. Internet Entm't Group*, 5 F. Supp. 2d 823, 834-36 (C.D. Cal. 1998); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1175-76 (N.D. Ill. 1997); *Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 933-36 (N.D. Cal. 1996); *Religious Tech. Ctr. v. Lerma*, 40 U.S.P.Q.2d 1569, 1572, 1573-82 (E.D. Va. 1996); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1378-81 (N.D. Cal. 1995); *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1557-59 (M.D. Fla. 1993).

¹⁶⁶ 907 F. Supp. 1361.

¹⁶⁷ See *id.* at 1378-81.

¹⁶⁸ See *id.*

¹⁶⁹ *Id.* at 1365.

¹⁷⁰ *Id.* at 1365-66. The user posted these works on an on-line forum for discussion and criticism of Scientology. *Id.* at 1365. The on-line forum was called the Usenet. *Id.* The Usenet is a collection of user-submitted notes or messages on various subjects that are posted to servers on a worldwide network. *Usenet*, WhatIs.com, at http://whatis.techtarget.com/definition/0,289893,sid9_gci213262,00.html (last modified Mar. 28, 2001).

¹⁷¹ *Netcom*, 907 F. Supp. at 1365-66.

¹⁷² *Id.* at 1366. Actually, the user gained access through a bulletin board service (BBS) that was not directly linked to the Internet but that gained its connection through IAP Netcom. *Id.* See generally *Bulletin board system*, WhatIs.com, at http://whatis.techtarget.com/definition/0,289893,sid9_gci213807,00.html (last modified Aug. 8, 2000) (defining and describing features of bulletin board system). Thomas Klemesrud, another defendant in this case, operated the BBS. *Netcom*, 907 F. Supp. at 1365-66.

¹⁷³ *Netcom*, 907 F. Supp. at 1365-66. Plaintiffs also filed copyright infringement actions against Thomas Klemesrud, the operator of the BBS where its works were posted, and Dennis Erlich, who posted the infringing works to the BBS. See *id.*

entitled to summary judgment regarding its fair use defense.¹⁷⁴

The district court's fair use inquiry focused on whether Netcom's actions qualified as a fair use and not whether the direct user engaged in fair use.¹⁷⁵ Under the first factor, Netcom's use of plaintiffs' works had a commercial purpose in that it carried out Netcom's function as an IAP.¹⁷⁶ However, the court found that the purpose of Netcom's use weighed in its favor, because Netcom's financial incentive in distributing messages to the Internet was unrelated to the infringing activity.¹⁷⁷ Further, Netcom's use of the works served an entirely different purpose than plaintiffs' use.¹⁷⁸ Thus, the court considered the second factor, the nature of the copyrighted work, unimportant to the fair use determination.¹⁷⁹

Although Netcom made available substantial or entire copies of plaintiffs' works, it copied no more of the works than was necessary to function as an IAP.¹⁸⁰ Consequently, the court determined that the third factor would not bar Netcom from an otherwise valid fair use defense.¹⁸¹ Lastly, regarding the fourth factor, the court found that widespread conduct like Netcom's could hurt the potential market for plaintiffs'

¹⁷⁴ *Id.* at 1380-81. Summary judgment is proper when the moving party has raised no genuine issue of material fact and has shown entitlement to judgment as a matter of law. FED. R. CIV. P. 56(c). A genuine issue of material fact exists when the moving party has shown that a reasonable juror could find for the party opposing the motion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). A court must enter a summary judgment if the moving party has failed to make a sufficient showing establishing the existence of an essential element to that party's case, and on which that party would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court, however, must draw all justifiable inferences in favor of the nonmoving parties. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991).

¹⁷⁵ *Netcom*, 907 F. Supp. at 1378. The court noted that Erlich, the user, probably would not be entitled to a fair use defense because "his postings contained large portions of plaintiffs' works and were verbatim quotes with little added commentary." *Id.*

¹⁷⁶ *Id.* at 1378-79.

¹⁷⁷ *Id.* at 1379 (noting that Netcom received no direct financial benefit from users' acts of infringement).

¹⁷⁸ *Id.* (observing that facilitating posting of works on Usenet served entirely different purpose than plaintiffs' purpose of distributing religious materials to draw people to religion).

¹⁷⁹ *Id.* The *Netcom* court observed that when a new work serves an entirely different purpose than the original work, the original work's published or unpublished nature is not important to the fair use determination. *Id.*

¹⁸⁰ *Id.* at 1379-80 (stating that IAP Netcom had no other feasible way to carry out its socially useful purpose). The court noted that copying all posted files was permissible because Netcom could not feasibly prescreen postings for potential copyright liability. *Id.* at 1380. Moreover, the court recognized that, when essential to the purpose of the copying, copying even an entire work still may be fair. *Id.*

¹⁸¹ *Id.*

works.¹⁸² The court observed that groups had used stolen copies of the Church's scriptures in the past to charge for Scientology-like religious training.¹⁸³ Thus, the court held that Netcom's facilitation of users' posting of "secret scriptures" on the Internet might hurt the market for plaintiffs' works.¹⁸⁴ After applying the four factors, the court held that Netcom's use did not constitute a valid fair use defense.¹⁸⁵

The fair use exception to copyright protection constitutes a significant limitation on a copyright holder's exclusive rights. *Campbell, Harper & Row*, and *Netcom* provide a framework to examine the applicability of the fair use defense to inline notes.¹⁸⁶ Although no court has yet ruled on whether inline notes constitute a fair use, an analysis of the four factors provides insight as to the availability of the fair use defense.

II. ANALYSIS

When an Internet user posts or reads inline notes on a Web page, the INSP is potentially liable for copyright infringement¹⁸⁷ because the INSP's server makes HTML copies of the Web pages.¹⁸⁸ However, the

¹⁸² *Id.* (stating that relevant question was whether postings fulfilled demand of individual who sought to follow religion's teachings and not whether Erlich's posted criticisms suppressed desire of individual).

¹⁸³ *Id.*

¹⁸⁴ *Id.* Because so many people accessed the Internet, users might have viewed the "secret scriptures" over the Internet instead of participating in the religion. *Id.*

¹⁸⁵ *Id.* at 1380-81 (noting as significant that Netcom's purpose was not to get to unprotected idea behind plaintiffs' works). The *Netcom* court found that plaintiffs had presented enough evidence to raise a genuine issue regarding whether Netcom had a valid fair use defense. *Id.* Despite its refusal to find that Netcom's use was fair as a matter of law, the court noted that plaintiffs would ultimately lose on their copyright infringement claims if they could not prove that Netcom's uses would harm the market for their works. *Id.* at 1381.

¹⁸⁶ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574-94 (1994); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560-69 (1985); *Netcom*, 907 F. Supp. at 1378-81.

¹⁸⁷ See 17 U.S.C. § 501 (1994 & Supp. V 1999) (imposing copyright liability for violation of any of copyright owner's exclusive rights). This Comment discusses the liability of the service providers, as users would not be likely defendants in such a lawsuit. The users themselves are potentially liable for infringement of the reproduction and derivative work rights under section 106 of the Act. See *id.* § 106 (1994 & Supp. V 1999).

¹⁸⁸ See 17 U.S.C. § 106 (codifying copyright owner's exclusive rights); *id.* § 501 (providing that anyone who violates any of exclusive rights of copyright owner is infringer of copyright). INSPs may be contributorily liable or vicariously liable for the activities of their users, but they are probably not directly liable for copyright infringement. See *supra* notes 54-59 and accompanying text (discussing three theories of liability). INSPs should not be directly liable because they do not directly engage in the infringing activity. Cf. *Netcom*, 907 F. Supp. at 1368-73 (holding that IAP Netcom was not directly liable for copies

activities of an INSP may constitute a fair use of Web page materials, resulting in no liability. This section applies the four fair use factors to an INSP's use of Web page materials to determine whether an INSP's activities constitute fair use. In addition, it examines whether an INSP's use of Web pages furthers the goals of copyright law.

A. Applying the Four Factors to an Inline Note Service Provider's Use of Web Pages

An INSP that infringes any one of a Web page owner's exclusive rights under section 106 of the Act may escape liability by virtue of the fair use defense.¹⁸⁹ To establish a valid defense under section 107, an INSP must show that the four factors together weigh in favor of fair use.¹⁹⁰ In a fair use analysis, courts do not examine the four factors in isolation but rather consider all relevant factors to determine whether that particular factor weighs in favor of fair use.¹⁹¹

1. Purpose and Character of the Use

In applying the first factor to an INSP's use of Web pages, three considerations support and one consideration cuts against a finding of fair use.¹⁹² First, INSPs' stated purposes fall into two of section 107's listed categories, criticism and commentary. Second, their services transform Web pages by changing their character and purpose. Third, their use does not directly derive commercial benefit. However, INSPs have some commercial attributes that weigh against a finding of fair use.

INSPs enable their users to engage in criticism and commentary of Web pages.¹⁹³ Section 107 lists these activities as purposes that generally justify a finding of fair use.¹⁹⁴ However, uses that involve criticism or commentary do not automatically warrant a conclusion in favor of fair

of plaintiffs' works posted on Internet).

¹⁸⁹ See 17 U.S.C. § 106 (subjecting copyright owner's exclusive rights to §§ 107-120); *id.* § 107 (1994) (codifying fair use defense).

¹⁹⁰ See 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A], at 13-152 to -155.

¹⁹¹ *Campbell*, 510 U.S. at 578; *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141 (2d Cir. 1998); *Netcom*, 907 F. Supp. at 1378; H.R. REP. NO. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A], at 13-154 to -155.

¹⁹² See generally 17 U.S.C. § 107(1) (listing first statutory fair use factor).

¹⁹³ *Dibbell*, *supra* note 9; *Gartner*, *supra* note 11; *Oakes*, *supra* note 9; *Thompson*, *supra* note 9.

¹⁹⁴ 17 U.S.C. § 107.

use.¹⁹⁵ While courts observe the significance of Congress' suggested categories, courts still consider section 107's listed uses as only one step in a multi-factored analysis.¹⁹⁶ Accordingly, under the first factor, courts still examine the transformative nature and commercial purposes of an INSP's copies.

Applying the reasoning of *Campbell*, inline notes are transformative uses of Web pages because they contain criticism and commentary.¹⁹⁷ In *Campbell*, the Supreme Court found that 2 Live Crew's parody could be a fair use because it transformed the original song by commenting on and criticizing it.¹⁹⁸ As the Court noted, criticism and commentary transform a work by changing the purpose and character of the original work.¹⁹⁹ Similarly, an INSP's copies are transformative uses that do not merely substitute the original Web pages but instead provide the forum whereby an INSP's users may criticize or comment on the original Web pages.²⁰⁰ Therefore, courts will likely view an INSP's use of Web page as transformative.²⁰¹

The next consideration under the first factor is whether an INSP's purposes are commercial in nature. *Harper & Row* and *Netcom* illustrate the proper focus of this inquiry.²⁰² In *Harper & Row*, the Supreme Court

¹⁹⁵ *Campbell*, 510 U.S. at 578-79; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985) (stating that Congress did not intend list in section 107 to be exhaustive or to single out any use as presumptively fair); *Castle Rock*, 150 F.3d at 141; *Religious Tech. Ctr. v. Lerma*, 40 U.S.P.Q.2d 1569, 1574 (E.D. Vir. 1996).

¹⁹⁶ *Campbell*, 510 U.S. at 576-79 (using preamble uses only as guide in further fair use determination); *Harper & Row*, 471 U.S. at 561; *Castle Rock*, 150 F.3d at 140; *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984) (holding that trial court erred in refraining from considering four fair use factors on grounds that use did not fall within preamble enumeration); *Lerma*, 40 U.S.P.Q.2d at 1574; 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][1][a], at 13-155.

¹⁹⁷ *Cf. Campbell*, 510 U.S. at 579-80 (stating that criticism and commentary transform works by shedding light on earlier work).

¹⁹⁸ *Id.* at 579-80, 583.

¹⁹⁹ *Id.* at 579.

²⁰⁰ See Martha Mendoza, *Telling It Like It Is*, BUFFALO NEWS, May 25, 1999, at 8D (suggesting that INSPs turn Web pages into centers for discussion and means of education and research purposes); Paturis, *supra* note 29 (describing how INSPs make Web pages content for criticism and commentary).

²⁰¹ Further, even with no annotations, an INSP's copies of Web pages are transformative works that add something new to the original Web pages. *Cf. Castle Rock*, 150 F.2d at 142-43 (observing that works which create new aesthetics and understandings are transformative). An INSP's frame or toolbar, along with its tools, create new aesthetics and understandings by providing the ability to annotate Web pages.

²⁰² See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562-63 (1985); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1378-79 (N.D. Cal. 1995).

stated that the relevant inquiry was whether the user would profit by exploiting copyrighted material without paying the customary price.²⁰³ The Court found that The Nation's use weighed against a finding of fair use because The Nation had intentionally exploited Harper & Row's commercially valuable right of first publication.²⁰⁴ On the other hand, the *Netcom* court determined that Netcom's financial incentive in distributing infringing writing to the Internet was unrelated to the infringing activities themselves.²⁰⁵ Although the court found that Netcom's use of plaintiffs' works carried out its commercial function as an IAP, the court noted that Netcom gained nothing from transmitting the infringing messages to the Internet.²⁰⁶ To determine whether an INSP's purposes are commercial, *Harper & Row* and *Netcom* require examining whether the INSP directly profits from its Web page copies.²⁰⁷

Courts may conclude that an INSP's purposes are commercial because they gain some benefit by offering their services. An INSP's use is distinguishable from The Nation's in that INSPs do not profit from their use of the copyrighted Web pages.²⁰⁸ Rather, they derive profit from the advertisements they solicit.²⁰⁹ However, because INSPs gain some profit

²⁰³ *Harper & Row*, 471 U.S. at 562 (explaining that proper focus of inquiry was not whether primary motive of use was monetary gain). In *Harper & Row*, The Nation's intent in publishing the excerpts from the memoir was to supplant a commercially valuable right of the copyright holder: the right of first publication. *Id.* Accordingly, the Court found that The Nation's intended purpose was to compete with original. *Id.* at 562-63 (holding that The Nation's use had commercial purpose).

Conversely, in *Marobie-FL, Inc. v. National Ass'n of Fire and Equipment Distributors*, the district court concluded that defendant's placement of copyrighted clip art on its website without paying the copyright owners could be considered commercial, despite defendant's non-profit status. 983 F. Supp. 1167, 1175 (N.D. Ill. 1997). Although the defendant in *Marobie* provided its files free of charge to Internet users, the court found that the defendant could have a commercial purpose. *Id.* In particular, the *Marobie* court noted that the defendant's activities on its Web site provided benefit in that they were used to generate revenue and to promote an association whose members pay dues. *Id.*

²⁰⁴ *Harper & Row*, 471 U.S. at 562-63.

²⁰⁵ *Netcom*, 907 F. Supp. at 1378-79.

²⁰⁶ *Id.* at 1379.

²⁰⁷ See *Harper & Row*, 471 U.S. at 562-63 (examining whether user exploits commercially valuable right); *Netcom*, 907 F. Supp. at 1378-79 (considering whether commercial benefit directly derives from use).

²⁰⁸ Cf. *Harper & Row*, 471 U.S. at 562-63 (finding that The Nation derived benefit directly from using infringing material).

²⁰⁹ See Patsuris, *supra* note 29 (noting that INSPs' sites generate revenue through advertising, sponsorships, and transaction agreements); Raik-Allen, *supra* note 11 (explaining that business model of one INSP is based simply on advertising through INSP's Web site and on Web pages referred through another user); Raynovich, *supra* note 27 (observing that business models like INSPs' include generation of advertising and e-commerce revenue).

from their services by soliciting advertisements, they are unlike Netcom who gained nothing from its copies.²¹⁰ Accordingly, a court may find that an INSP's use of Web pages involves a commercial purpose that weighs against a finding of fair use.²¹¹

In sum, a court would likely conclude that the first factor favors a finding of fair use. INSPs transform Web pages into a forum for criticism and commentary and do not derive direct benefit from the inline notes. Although INSPs have some commercial attributes in that they generate revenue by soliciting advertisements, a court would likely find that the other considerations under the first factor outweigh any commercial purpose. Moreover, *Campbell* both demonstrates the fallacy of considering the first factor in isolation and mandates that the other factors may override considerations of commerciality.²¹²

2. Nature of the Copyrighted Work

An examination of the nature of the copyrighted Web pages supports a fair use finding for three reasons.²¹³ First, the Web pages that are factual and informational in nature receive less protection under copyright law. Second, the overall nature of the Web pages, whether factual or creative, is minimally important to the fair use determination because an INSP's use serves different purposes than the Web pages themselves. Third, Web page owners arguably have published their works by placing them on the Internet.

The Web materials that an INSP's server copies range from factual works, which are informative in nature, to creative works, which contain more expressive elements.²¹⁴ Because the fair use exception is broader for factual or informational works than for creative works, an INSP's copies of factual or informational Web pages are more susceptible to a finding of fair use than its copies of creative Web pages.²¹⁵

²¹⁰ Cf. *Netcom*, 907 F. Supp. at 1378-79 (finding that Netcom's gain did not derive from infringing activity itself but from activities as IAP).

²¹¹ Cf. *id.* (concluding that IAP Netcom's use was not commercial even though Netcom's general services had commercial attributes because Netcom derived no direct benefit from infringing activity).

²¹² 510 U.S. 569, 583-85 (1994).

²¹³ See generally 17 U.S.C. § 107(2) (1994) (listing second statutory fair use factor).

²¹⁴ For examples of both informational and creative Web pages, simply browse the World Wide Web.

²¹⁵ See *Campbell*, 510 U.S. at 586; *Stewart v. Abend*, 495 U.S. 207, 237 (1990); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][2][a], at 13-170 to -171.

Moreover, an INSP's use of creative Web pages does not impair a finding of fair use under the *Netcom* analysis. In *Netcom*, the court stated that the nature of the original work was insignificant to the fair use determination when the new work served an entirely different purpose than the original work.²¹⁶ The court found that *Netcom*'s purpose of facilitating postings to the Internet was different from *RTC*'s purpose of providing religious training.²¹⁷ Accordingly, the court concluded that the creative and unpublished nature of *RTC*'s works was unimportant to the fair use analysis.²¹⁸

Netcom's treatment of the second factor is relevant to an INSP's use of Web pages. An INSP uses its Web page copies to facilitate discussion and critical review by its users.²¹⁹ Commentary on a Web page's content, which aims to enhance another user's understanding of the content, serves a different purpose than the Web page's content itself, which conveys some idea or expression.²²⁰ Thus, under the reasoning of *Netcom*, the precise nature of a Web page that an INSP copies is not important to the fair use determination.²²¹

Further, published works generally receive less copyright protection than unpublished works²²² because authors have the right to control the first appearance of their work.²²³ Accordingly, a court must determine

²¹⁶ *Netcom*, 907 F. Supp. at 1379 (citing *Campbell*, 510 U.S. at 586).

²¹⁷ *Id.* *Netcom* copied and transmitted plaintiffs' works in serving its function as an IAP and as a Usenet server. *Id.* at 1379-80. In contrast, plaintiffs provided the L. Ron Hubbard works to the Church of Scientology's members for the purpose of religious training. *Id.* at 1380.

²¹⁸ *Id.* at 1379.

²¹⁹ Dibbell, *supra* note 9; Luh, *supra* note 9; Oakes, *supra* note 9; Thompson, *supra* note 9.

²²⁰ *Cf. Campbell*, 510 U.S. at 580-83 (observing that parodic purposes of commentary and criticism are different from purposes of object of discussion itself).

²²¹ *See Netcom*, 907 F. Supp. at 1379. Both *Netcom* and *Hustler Magazine, Inc. v. Moral Majority* provide further illustration on this point. In *Netcom*, the court observed that *Netcom*'s use of the works served to facilitate their posting to the Usenet BBS. 907 F. Supp. at 1379. The court found that this use was entirely different than plaintiff's purpose in its original works. *Id.* In *Hustler*, the plaintiff published a parodic advertisement recounting defendant Jerry Falwell's alleged first sexual encounter. 796 F.2d 1148, 1153 (9th Cir. 1986). Defendant raised money by reproducing and distributing the ad to his supporters, to show the depths to which his opponents had sunk. *Id.* Although defendant had copied the entire ad minus a few words, the court held that the reproduction of the ad was reasonable for the purpose of facilitating understandable comment on the ad's derogatory content. *Id.*

²²² *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970-71 (9th Cir. 1992); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][2][b], at 13-174 to -175.

²²³ *Harper & Row*, 471 U.S. at 564 (noting that use of unpublished works is less susceptible to finding of fair use because author has not exercised right to control first appearance).

whether the author has disseminated the original work, making it available for public discussion.²²⁴ For example, in *Harper & Row*, the Court stated that a review of a published work or a news account of a publicly delivered speech may qualify as fair use because the author controlled the work's first appearance.²²⁵ Similarly, Web page owners have exercised their right to control the first appearance of their works by placing their materials on the Internet.²²⁶ Thus, courts should treat Web pages as published works that receive less protection.²²⁷

Consequently, a court would likely conclude that the second factor favors a finding that an INSP's use of Web pages constitutes fair use. The factual Web pages an INSP copies receive less protection than creative works. Moreover, an INSP's copies serve an entirely different purpose than that of the pages' original authors. In addition, Web pages are publicly disseminated works that should receive the same limited protection as published works.

3. Substantiality of the Portion Used

Under the third factor, both the quantity and the quality of the copyrighted Web pages that an INSP uses are relevant to the fair use analysis.²²⁸ An INSP's server automatically creates entire copies of every Web page a user browses.²²⁹ Generally, copying of an entire work

²²⁴ Compare *Rotbart v. J.R. O'Dwyer Co.*, 34 U.S.P.Q.2d 1085, 1088 (S.D.N.Y. 1995) (finding that unfixed, undissemated talk was de facto published because it was delivered publicly), and *Diamond v. Am-Law Publ'g Corp.*, 745 F.2d 142, 148 (2d Cir. 1984), with *Michaels v. Internet Entm't Group*, 5 F. Supp. 2d 823, 835 (C.D. Cal. 1998) (rejecting defendant IEG's contention that third party's single publication of portion of work on Internet established that work was published).

²²⁵ *Harper & Row*, 471 U.S. at 564.

²²⁶ See *Reno v. ACLU*, 521 U.S. 844, 853 (1997) (characterizing Web as "vast library including millions of readily available and indexed publications"); *Harper & Row*, 471 U.S. at 564 (stating that right of first publication encompasses choices of when, where, and in what form to publish work); *Michaels*, 5 F. Supp. 2d at 835 (finding that absence of evidence that plaintiffs posted 148-second clip of video on Internet weighed against fair use because plaintiffs still had interest in controlling first authorized publication of video clip on Internet).

²²⁷ In *Harper & Row*, the Court found critical the copyright holders' irrefutable interest in keeping Mr. Ford's manuscripts confidential until their first publication. 471 U.S. at 564. However, Web page owners' purposeful display of materials on the Internet relinquishes any claims to confidentiality. See *id.* (noting that dissemination of work to public renders work less susceptible to fair use).

²²⁸ See 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][3], at 13-180 to -181. See generally 17 U.S.C. § 107(3) (1994) (listing third statutory fair use factor).

²²⁹ See *Bowers*, *supra* note 13; *Dibbell*, *supra* note 9; *Oakes*, *supra* note 9; *Say No to Third Voice - Mission Statement*, *supra* note 13.

weighs against a finding of fair use.²³⁰ In addition, taking the key expressive elements of a work also weighs against a finding of fair use.²³¹ Despite these two basic principles, INSPs' copies of Web pages may still constitute fair uses because the purposes of INSPs' services are criticism and commentary.

Campbell and *Netcom* shed light on why an application of the third factor to an INSP's total copies of Web pages may still favor a finding of fair use.²³² Both courts stated that the extent of permissible copying varies in relation to the first factor, the purpose and character of the use.²³³ In *Campbell*, the Court found that 2 Live Crew's parody did not copy more of the original song than was necessary to make its criticism of the original recognizable.²³⁴ Likewise, the *Netcom* court observed that Netcom's total copying was essential to its function as an IAP and a Usenet server.²³⁵ Thus, the third factor did not preclude either 2 Live Crew or Netcom from establishing an otherwise valid fair use defense despite their substantial taking of copyrighted works.²³⁶

Like 2 Live Crew and Netcom, an INSP's total copying is essential to its function as an INSP.²³⁷ Without making entire copies of Web pages, INSPs would not be able to provide their users with the ability to add commentary and criticism to the Web pages.²³⁸ Thus, under *Campbell* and *Netcom*, courts should not preclude INSPs from establishing an otherwise

²³⁰ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1379 (N.D. Cal. 1995). But see *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 971 (9th Cir. 1992) (finding that entire reproduction did not preclude finding of fair use because reproduction merely enabled users to see original work which users had been invited to witness free of charge).

²³¹ See, e.g., *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (1977) (noting that, although copyrighted letters constituted less than 1% of infringing work, defendant's use of letters was qualitatively too much because letters were displayed prominently); *Playboy Enters. v. Frena*, 839 F. Supp. 1552, 1558 (M.D. Fla. 1993) (finding that photographs in Playboy magazine were essential to success of plaintiff's copyrighted work and thus very important part of copyrighted publications); see also *Harper & Row*, 471 U.S. at 564-65 (requiring qualitative evaluation of copying of copyrighted work).

²³² See *Campbell*, 510 U.S. at 586-89; *Netcom*, 907 F. Supp. at 1379-80.

²³³ *Campbell*, 510 U.S. at 586-89 (observing that "context is everything"); *Netcom*, 907 F. Supp. at 1379-80 (requiring examination of first factor when evaluating third factor).

²³⁴ 510 U.S. at 588.

²³⁵ 907 F. Supp. at 1379-80 (refusing to preclude fair use based on fact that Netcom's server automatically copied anything transmitted through it).

²³⁶ See *Campbell*, 510 U.S. at 588-89; *Netcom*, 907 F. Supp. at 1380.

²³⁷ See, e.g., *Bowers*, *supra* note 13.

²³⁸ See *Bowers*, *supra* note 13; *Dibbell*, *supra* note 9; *Oakes*, *supra* note 9; *Say No to Third Voice - Mission Statement*, *supra* note 13.

valid fair use defense despite their total copies of Web pages.²³⁹

4. Potential Market Effect

The fourth factor requires examining whether an INSP's use potentially harms any protectible markets of the Web page owners.²⁴⁰ Because an INSP's use of Web pages presents no cognizable market harm to original Web pages, this factor favors a finding of fair use.²⁴¹ In addition, an INSP's use does not harm any protectible derivative markets of the Web pages.²⁴² *Netcom's* discussion of the fourth factor illuminates its application to INSPs.²⁴³

In *Netcom*, the court found that *Netcom's* copies might harm the potential market for RTC's Scientology materials.²⁴⁴ The economic harm subsisted in RTC's inability to receive the price they might charge for the scripture-based religious training because people could view the works on the Internet instead.²⁴⁵ RTC had not placed their copyrighted works on the Internet²⁴⁶ and *Netcom's* facilitation of the postings of RTC's works potentially impaired the marketability of the works.²⁴⁷

Unlike *Netcom's* use, an INSP's use causes no loss of revenue or market substitution that harms the value of the original works. Accordingly, a Web page owner's reliance on *Netcom* to defeat an INSP's defense would be misplaced.²⁴⁸ *Netcom's* postings potentially competed for a share of the market for RTC's works.²⁴⁹ On the other hand, an INSP's copies do not serve as market substitutes that compete for a share

²³⁹ Cf. *Campbell*, 510 U.S. at 588-89 (reversing appellate court's finding that third factor weighed against 2 Live Crew as matter of law); *Netcom*, 907 F. Supp. at 1380 (finding that because defendant *Netcom's* use took no more of original than necessary, despite making verbatim copies, third factor weighed in favor of defendants).

²⁴⁰ See 17 U.S.C. § 107(4) (1994).

²⁴¹ See *Netcom*, 907 F. Supp. at 1380; *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1523-24 (9th Cir. 1993); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155-56 (9th Cir. 1986).

²⁴² Cf. *Campbell*, 510 U.S. at 591-92 (directing examination of whether use of work harms markets for either originals or derivatives).

²⁴³ See *Netcom*, 907 F. Supp. at 1380.

²⁴⁴ *Id.*

²⁴⁵ *Id.* Moreover, the *Netcom* court found that others might use the scriptures obtained from the Internet to charge for Scientology-like religious training. *Id.*

²⁴⁶ *Id.* at 1365-66.

²⁴⁷ *Id.* at 1380.

²⁴⁸ Cf. *id.* at 1380 (refusing to grant summary judgment for IAP *Netcom* because use potentially caused market substitution).

²⁴⁹ *Id.*

of the market of the original Web pages.²⁵⁰ Rather, an INSP's copies merely facilitate criticism and commentary of the Web pages.²⁵¹

The Supreme Court has noted that commentary and criticism usually serve different market functions than the works they discuss.²⁵² Although criticism or commentary might decrease demand for the original works, copyright law does not recognize decreased demand as a protectible harm.²⁵³ Only works that supersede the originals will militate against a finding of fair use.²⁵⁴ An INSP's copies do not impair the market value of the Web pages and this fact favors a finding of fair use.

Finally, copyright law does not recognize the commentary and criticism contained in inline notes as a likely derivative market that Web page owners would develop. In *Campbell*, the Court regarded commentary and criticism as unlikely derivative markets.²⁵⁵ The Court observed that authors generally would not license potentially negative reviews of their own works.²⁵⁶ Thus, because an INSP's copies do not harm any protectible markets of the original Web pages, the fourth factor favors a finding of fair use. Under the four-factor analysis, while the first factor has elements that both favor and cut against a finding of fair use, the second, third, and fourth factors support a finding of fair use.

B. Inline Note Service Providers are Entitled to a Finding of Fair Use

After separately applying each fair use factor to an INSP's use, a court will consider the four factors together.²⁵⁷ In this analysis, the fourth factor carries the most weight because it is the central fair use factor.²⁵⁸

²⁵⁰ Cf. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591-92 (1994) (finding that parody for purpose of criticism and commentary did not serve as market substitute of original song and explaining that parody and original usually serve different market functions).

²⁵¹ See Dibbell, *supra* note 9; Oakes, *supra* note 9; Raynovich, *supra* note 27; Thompson, *supra* note 9.

²⁵² *Campbell*, 510 U.S. at 591.

²⁵³ See *id.* at 591-92 (stating that courts must distinguish between criticism which merely suppresses demand and copyright infringement which usurps it).

²⁵⁴ See *id.*; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 567-68 (1985).

²⁵⁵ 510 U.S. at 591-93 (finding unlikely that authors would desire potentially negative review of their works).

²⁵⁶ *Id.* (stating that authors and creators generally desire praise for their original works).

²⁵⁷ *Id.* at 578 ("All [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright."); *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 141, 146 (2d Cir. 1998); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1380-81 (N.D. Cal. 1995); see, e.g., *Harper & Row*, 471 U.S. at 567.

²⁵⁸ See sources cited *supra* note 115.

The underlying goals of copyright law also inform the fair use analysis.²⁵⁹

1. Four Factors Favor Fair Use

Examining the four factors together, an INSP's use of Web pages constitutes fair use. Although no one factor is dispositive of the fair use determination, courts consistently assign the most weight to the fourth factor.²⁶⁰ Under this factor, the lack of negative market effect strongly favors a finding of fair use.²⁶¹ An INSP's copies do not serve as market substitutes that impair the economic value of the original Web pages.²⁶² In addition, the conclusions under the first three factors support a finding that an INSP's use of Web page is a fair use.²⁶³

Critics may argue that an INSP's commercial purposes under the first factor require the conclusion that an INSP's use of Web pages does not constitute fair use.²⁶⁴ Although they derive no direct profit from their Web page copies, INSPs generally solicit advertisements to recoup their costs in providing their services.²⁶⁵ However, despite an INSP's commercial purposes, several considerations uphold a finding of fair use.

First, a finding of commercial purpose does not carry presumptive weight in the fair use analysis.²⁶⁶ In *Campbell*, the Supreme Court stated that the court of appeals erred in concluding that the commercial nature

²⁵⁹ *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992) ("The 'fair use' exception applies where the Copyright Act's goal of encouraging creative and original work would be better served by allowing the use than by preventing it."). See generally U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to grant copyright protection to promote goal of advancing science and arts).

²⁶⁰ See sources cited *supra* note 115.

²⁶¹ See *supra* Part II.A.4 (determining that fourth factor favors INSPs because INSPs' copies do not harm any protectible markets of original Web pages).

²⁶² Cf. *Campbell*, 510 U.S. at 591-92 (finding lack of market substitution by parody that served purpose of criticism and commentary).

²⁶³ See *supra* Part II.A.1-3 (applying first three factors of fair use analysis to INSPs' use of Web pages).

²⁶⁴ See *Campbell*, 510 U.S. at 584; *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *Religious Tech. Ctr. v. Netcom On-Line Communication Servs.*, 907 F. Supp. 1361, 1379 (N.D. Cal. 1995).

²⁶⁵ See *Patsuris*, *supra* note 29; *Raik-Allen*, *supra* note 11; *Raynovich*, *supra* note 27.

²⁶⁶ *Campbell*, 510 U.S. at 584; *Harper & Row*, 471 U.S. at 593 (Brennan, J., dissenting); *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1078 (2d Cir. 1992); *Triangle Publ'ns, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir. 1980); *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966); *N.Y. Times Co. v. Roxbury Data Interface, Inc.*, 434 F. Supp. 217 (D.N.J. 1977); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][1][c], at 13-162 to -164.

of 2 Live Crew's parody rendered the use presumptively unfair.²⁶⁷ Second, an INSP's purposes are not entirely commercial because their primary service is to provide the ability to post commentary on Web pages.²⁶⁸ Further, they provide these services at no cost to their users.²⁶⁹ Third, even participants in section 107's listed uses, which generally justify a finding of fair use, often conduct these activities for profit.²⁷⁰

Two elements of the fair use analysis further weaken the significance of a commercial purpose. A commercial purpose carries less weight in the fair use determination when the use is transformative and does not act as a market substitute.²⁷¹ Because an INSP's use of Web pages transforms the original works,²⁷² a commercial purpose should not weigh as heavily against fair use.²⁷³ More importantly, the fourth factor inquiry establishes that an INSP's copies do not impair any protectible markets of the original Web pages.²⁷⁴ As the fourth factor is the central fair use factor, an absence of market harm outweighs a finding of commercial purpose.²⁷⁵ Thus, a consideration of all relevant factors, particularly the fourth factor, requires a finding of fair use.

²⁶⁷ 510 U.S. at 582-85, 594 (reversing judgment of court of appeals).

²⁶⁸ See Dibbell, *supra* note 9; Oakes, *supra* note 9; Raynovich, *supra* note 27; Thompson, *supra* note 9.

²⁶⁹ Oakes, *supra* note 9; Patsuris, *supra* note 29; Raynovich, *supra* note 27.

²⁷⁰ *Campbell*, 510 U.S. at 583-84 ("If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . ."); *Harper & Row*, 471 U.S. at 592 (Brennan, J. dissenting).

²⁷¹ *Campbell*, 510 U.S. at 590-91.

[W]hen a commercial use amounts to mere duplication of the entirety of an original, it clearly "supercede[s] the objects," of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.

Id. at 591 (citations omitted).

²⁷² See *supra* notes 197-201 and accompanying text.

²⁷³ Cf. *Campbell*, 510 U.S. at 579, 590-91 (requiring stronger showing of commerciality when use is transformative).

²⁷⁴ See *supra* Part II.A.4.

²⁷⁵ Cf. *Campbell*, 510 U.S. at 591-94 (reversing court of appeals' refusal to find fair use based on use's commercial purpose because lack of market harm under fourth factor and clear transformative purpose under first factor weakened significance of commercial purpose).

2. Finding of Fair Use Furthers the Constitutional Objectives of Copyright Law

A finding that an INSP's use of Web pages constitutes fair use also furthers the constitutional goals of copyright law. Copyright protection seeks both to encourage authors to continue producing creative works and to motivate others to build upon those works.²⁷⁶ Critics may argue that an INSP's use of Web pages discourages authors from creating beneficial works.²⁷⁷ Further, critics may contend that permitting an INSP's use of Web pages would deprive authors of the constitutionally mandated economic incentives.²⁷⁸ However, contrary to these arguments, an INSP's copies further the aims of copyright law.

An INSP's copies of Web pages allow its users to participate in criticism and commentary of works.²⁷⁹ Criticism and commentary provide public benefit and do not chill the creation of works of authorship.²⁸⁰ While a critical review might decrease the public's demand for the original, it does not supersede the original in a way that merits copyright protection.²⁸¹ The fourth factor discussion established

²⁷⁶ See 1 NIMMER & NIMMER, *supra* note 46, § 1.03[A], at 1-66.9 to -66.11.

²⁷⁷ See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (stating that, although immediate effect of copyright law is to secure fair return for author's labor, ultimate aim of copyright is to stimulate artistic creativity for general public good); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (recognizing that Constitution grants copyrights because encouragement of individual effort by personal gain is best way to advance public welfare through talents of authors and inventors in science and useful arts); 1 NIMMER & NIMMER, *supra* note 46, § 1.03[A], at 1-66.9 to -66.10 (noting that copyright protection ultimately advances public benefit).

²⁷⁸ See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (observing that copyright law provides authors with economic incentive to create and disseminate ideas); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432-33 (1984) (noting that copyright law seeks to secure fair return for author's creative labor); *Aiken*, 422 U.S. at 156 (encouraging private motivation to create works by rewarding authors' labor with copyrights); *Mazer*, 347 U.S. at 219 (recognizing Constitution's economic philosophy that copyrights encourage individual effort by personal gain); 1 NIMMER & NIMMER, *supra* note 46, § 1.03[A], at 1-66.10 (noting importance of economic incentives to promote creative activities of authors).

²⁷⁹ See *Dibbell*, *supra* note 9; *Oakes*, *supra* note 9; *Raynovich*, *supra* note 27; *Thompson*, *supra* note 9.

²⁸⁰ See *Campbell*, 510 U.S. at 579 (noting that creation of transformative works generally furthers goal of copyright, to promote science and arts); 1 NIMMER & NIMMER, *supra* note 46, § 1.03[A], at 1-66.10 (observing that copyright law seeks to protect uses that increase public welfare through talents of authors).

²⁸¹ See *Campbell*, 510 U.S. at 591-92; *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986); *Consumers Union of the United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1050 (2d Cir. 1983); 4 NIMMER & NIMMER, *supra* note 46, § 13.05[A][4], at 13-181.

that INSPs do not impair the economic value of Web pages.²⁸² Further, criticism and commentary, in and of themselves, are uses that the Act endorses.²⁸³ Consequently, inline notes promote the goals of copyright law not only by advancing the arts through their existence, but also by encouraging others to create new works. A finding that inline notes are impermissible uses of Web pages would improperly stifle the creativity that the Constitution intended to foster through copyright law.²⁸⁴

III. PROPOSAL

Courts will soon face the challenge of deciding whether an INSP's use of Web page materials for inline notes is fair. Notwithstanding a finding of infringement, an application of the four factors to an INSP's use supports a finding of fair use.²⁸⁵ In addition, an INSP's use furthers the constitutional aims of copyright law.²⁸⁶ Courts should find that an INSP's copies of Web pages constitute fair use because this finding comports with both fair use principles and the goals of copyright law.

CONCLUSION

Courts should allow INSPs to continue their use of Web pages because inline notes enhance communications on the Internet. INSPs allow their users to go beyond the traditional methods of communication. In order to allow users the benefits of its services, INSPs must make copies of Web pages. The commentary involved in inline notes is meaningful only when viewed within the context of their discussion, the Web pages. Moreover, an INSP's use of Web pages does not impair the economic value of the Web pages. Although INSPs potentially violate a copyright holder's exclusive rights under the Act, courts should find that INSPs'

²⁸² See *supra* Part II.A.4.

²⁸³ See 17 U.S.C. § 107 (1994).

²⁸⁴ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-58 (1985); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432-33 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Mazer v. Stein*, 347 U.S. 201, 219 (1954); 1 NIMMER & NIMMER, *supra* note 46, § 1.03[A], at 1-66.10.

²⁸⁵ See *supra* Part II.B.1.

²⁸⁶ See *supra* Part II.B.2.

use of Web page materials is a fair use. This finding is warranted under the Act and serves the constitutional purpose of copyright law, "to promote the progress of science and useful arts."²⁸⁷

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²⁸⁷ U.S. CONST. art. I, § 8, cl. 8.

* I would like to thank Angus M. MacDonald, who provided both the topic and the inspiration for this Comment. I would also like to thank Tae-Soon Kim, Ann Aesin Kim, and Thomas J. Kim, whose constancy and affection have been a fountain of comfort and motivation through this entire process.