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.\(^3\)


\(^3\) 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, chat, instant messaging, or message boards, were limited to read-only content. Now, companies offer free browser companion services that allow Internet users to post "inline notes" at any point in a World Wide Web site. The inline note services expand a user’s ability to communicate on the Web. In particular, the services enable Internet

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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).


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.\footnote{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 graffiti" or "digital graffiti."}

To provide its browser companion service, the inline note service provider's server\footnote{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).} must copy any Web page that the user visits.\footnote{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.} 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.\footnote{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).} 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.\footnote{See 17 U.S.C. § 107 (1994) (codifying fair use doctrine).} 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.
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. An individual user accesses the Internet through a variety of avenues. 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.

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

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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).
21 Reno, 541 U.S. at 852.
Through the Web, users can view HTML documents that display text, images, sound, and video.\textsuperscript{23} The creators of the Web designed it to allow Internet users access to a global, online store of knowledge.\textsuperscript{24} Many entities now provide documents that offer useful information about their organizations to Internet users.\textsuperscript{25} Additionally, organizations and individuals use the Web to display creative works, such as literary and artistic works.\textsuperscript{26} Today, Internet users not only can view these Web pages, but also may post inline notes directly onto any Web site.\textsuperscript{27}

B. Inline Notes

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

\begin{thebibliography}{99}
\bibitem{note22} World Wide Web, supra note 20.
\bibitem{note24} Howe, supra note 3; Leiner et al., supra note 3.
\bibitem{note25} Howe, supra note 3.
\bibitem{note26} WhatIs Internet, supra note 1.
\bibitem{note28} Dibbell, supra note 9; Oakes, supra note 9; Raynovich, supra note 27; Thompson, supra note 9.
\bibitem{note29} 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.
\bibitem{note30} 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.").
\bibitem{note31} 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
\end{thebibliography}
After a user downloads the service, a frame appears around any Web page that the user accesses. The frame, in effect, pulls in the image, text or audio clip from the viewed Web page into the current document. The frame appears as a border around the Web page.

A user may then employ the browser service to add a comment or note at any point on a Web page. After a user posts a comment, the INSP's server indicates the portion of text that includes the annotation. For example, one company places a small red triangle next to annotated text. 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. Thus, anytime a user employs the service, the INSP's server creates an HTML copy of every Web page a user visits. 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. Congress enacted the Copyright Act of 1976 ("the Act") to further the constitutional aims of copyright law.

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 INSs 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.


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

1. Constitutional Objectives, Exclusive Rights, and Infringement

The United States Constitution provides copyright protection to advance science and the arts. Thus, the primary purpose of copyright law is to secure for the general public the benefits derived from the labor of authors. 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. 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.

Congress enacted the Act to further the two constitutional ends of motivating authors and encouraging others to build upon the works of authors. To achieve these ends, the Act protects authors' original
expressions but allows the free use of facts and ideas within their works. The Act does not protect facts and ideas because they lack the constitutional requirement of originality. However, authors whose original works possess a minimal degree of creativity receive copyright protection in the form of exclusive rights. 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.


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).


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.*


\(^{56}\) 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.
2. The Fair Use Defense

Section 107 of the Act codifies the fair use defense.\textsuperscript{61} The fair use defense limits the protection that a copyright holder enjoys under the Act.\textsuperscript{62} This defense excuses an otherwise infringing use when a finding of infringement would stifle the creativity that copyright law seeks to foster.\textsuperscript{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.\textsuperscript{64} Thus, courts have consistently allowed some fair use of copyrighted materials.\textsuperscript{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


\textsuperscript{61} \textit{id.} § 107.

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


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

\textsuperscript{65} \textit{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. \textit{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." \textit{id.} Accordingly, courts have consistently recognized the fair use doctrine, even though Congress enacted the initial copyright statute without explicit reference to the doctrine. \textit{See Campbell}, 510 U.S. at 576. The doctrine remained judge-made until codification in the Copyright Act of 1976. \textit{See id.} at 577; \textit{Carey v. Kearsley}, 4 Esp. 168, 170, 170 Eng. Rep. 679, 681 (K.B. 1803).
whole, and the potential market effect of the use.\textsuperscript{66} Courts determine whether a use is fair on a case-by-case basis.\textsuperscript{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.\textsuperscript{68}

(1) Purpose and Character of the Use

The first statutory fair use factor examines the purpose and character of the use.\textsuperscript{69} In the preamble to section 107, Congress listed several purposes that generally constitute fair use, including criticism, commentary, news reporting, and scholarship.\textsuperscript{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.\textsuperscript{71} For example, criticisms or

\begin{itemize}
  \item \textsuperscript{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.

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


\textsuperscript{69} 17 U.S.C. § 107(1).

\textsuperscript{70} \textit{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.").

\textsuperscript{71} \textit{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.\footnote{Id. at 580. In \textit{Campbell}, the Court distinguished a legitimate user from one who uses an original work merely to avoid the drudgery in creating a new work. \textit{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. \textit{Id.} at 580-81.}


A work is transformative if it adds new expression, meaning, or message to the original work rather than merely superseding or supplanting the original.\footnote{\textit{Campbell}, 510 U.S. at 579; \textit{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. \textit{Id.} at 142. In \textit{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. \textit{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. \textit{Id.} Thus, the SAT was not transformative because it did not seek to educate,} Generally, verbatim copies of a copyrighted
work or portions thereof are not transformative in nature. 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. 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.

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

A determination that a use has a commercial purpose does not bar a finding of fair use. Likewise, a use with a noncommercial purpose does not guarantee a finding of fair use. Courts generally refuse such
criticize, comment upon, or research the original Seinfeld shows. Id.

79 E.g., Nihon Keizai Shim bun, 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.


84 Harper & Row, 471 U.S. at 562.

85 See id.


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

Second, the purposes listed in the preamble at the beginning of section 107 generally create profit. See 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).


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

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.


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. However, the use of the copyrighted work must not exceed the necessary isolated expressions.

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

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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 understanding 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).


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., Robart v. J.R. O'Dwyer Co., 34 U.S.P.Q.2d 1085, 1088 (S.D.N.Y. 1995) (characterizing unixed, 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.\textsuperscript{104} Courts evaluate both the quantity\textsuperscript{105} and the quality\textsuperscript{106} of the copyrighted materials used.\textsuperscript{107} Both must be reasonable in relation to the purpose of the copying.\textsuperscript{108} For example, copying almost all of an original work might be fair if the purpose is parody or news reporting.\textsuperscript{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.\textsuperscript{110} Similarly, an insubstantial taking does not presumptively render a fair use finding.\textsuperscript{111} For example, appropriating a small percentage of verbatim quotes that constitutes the essence of a copyrighted work might weigh against fair use.\textsuperscript{112} Generally, the new work must take no more than necessary from the original work in order to qualify as a fair use.\textsuperscript{113}

\textsuperscript{104} 17 U.S.C. § 107(3) (1994).
\textsuperscript{105} E.g., Consumers Union of the United States, Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1984) (holding that verbatim copying of 29 words out of total of 2100 words was fair use), cert. denied, 469 U.S. 823 (1984).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{111} Campbell, 510 U.S. at 587; Harper & Row, 471 U.S. at 565.
\textsuperscript{112} Harper & Row, 471 U.S. at 565.
\textsuperscript{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. This factor is the most important factor of the fair use analysis because copyright law seeks to provide authors with economic incentives to create useful works for the general public good. Thus, the fourth factor protects against uses that impair the economic value of an original work.

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. 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.


16 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.

17 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.

18 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. However, copyright law does not protect against uses that merely decrease demand for the original. Rather, it protects against copies that usurp the demand for the original. For example, harsh criticism might decrease demand for the original work, but it does not usurp the market for the original. Accordingly, a transformative use that serves a different market function than the original work favors a finding of fair use.

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


\[120\] Campbell, 510 U.S. at 591-92; 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); 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).


\[125\] 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

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128 Id.
129 See id. at 574-94; Harper & Row, 471 U.S. at 560-69.
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.
the parody's criticism and commentary on the earlier work had obvious transformative value because it shed light on the original song.\textsuperscript{\textasciitilde{137}} Further, the Court stated that the court of appeals erred in giving virtually dispositive weight to the commercial nature of the parody.\textsuperscript{\textasciitilde{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.\textsuperscript{\textasciitilde{139}} In analyzing the third factor, the Court observed that the parody used a substantial portion of the original work.\textsuperscript{\textasciitilde{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.\textsuperscript{\textasciitilde{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.\textsuperscript{\textasciitilde{142}} Moreover, the Court noted that potential derivative markets include only those markets that creators of the original works would develop.\textsuperscript{\textasciitilde{143}} Thus, the Court stated that 2 Live Crew's derivative use was not harmful because criticism is not a protectible derivative market.\textsuperscript{\textasciitilde{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.\textsuperscript{\textasciitilde{145}}

\textsuperscript{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).

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

\textsuperscript{139} Id. at 586.

\textsuperscript{140} Id. at 587.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{143} Id. at 592.

\textsuperscript{144} Id.

\textsuperscript{145} Id. at 594.

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

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

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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. Thus, the Court held that The Nation's use had a commercial purpose. Regarding the second factor, the Court found that The Nation's publication featured the author's subjective individualized expressions. Moreover, the memoirs were unpublished and confidential works. These findings under the second factor cut against a finding of fair use.

In applying the third factor, the Court observed that the verbatim quotes constituted a small portion of the original manuscript. However, the Court found The Nation's taking substantial because the quotes contained expressive value and served as focal points in the unauthorized publication. 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. After analyzing the four factors, the Court concluded that The Nation was not entitled to a fair use defense.

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. Religious Technology Center v. Netcom On-Line Communication Services, which discusses the liability of IAPs, provides some guidance for applying the fair use defense to Internet services. Additionally, Netcom is instructive in analyzing cases involving the activities of Internet users.

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. An Internet user, a former minister of Scientology, posted portions of plaintiffs' copyrighted works on the Internet. These postings included verbatim quotes from Hubbard, followed by the user's own brief editorials. The user gained Internet access through Netcom On-Line Communication Services, an IAP. Thus, plaintiffs filed a copyright infringement action against Netcom and several other defendants. The district court concluded that Netcom might be contributorily liable and that Netcom was not

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166 See id. at 1378-81.

167 See id.

168 Id. at 1365.

169 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 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 systems). Thomas Klemensrud, another defendant in this case, operated the BBS. Netcom, 907 F. Supp. at 1365-66.

172 Netcom, 907 F. Supp. at 1365-66. Plaintiffs also filed copyright infringement actions against Thomas Klemensrud, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{177} Further, Netcom's use of the works served an entirely different purpose than plaintiffs' use.\textsuperscript{178} Thus, the court considered the second factor, the nature of the copyrighted work, unimportant to the fair use determination.\textsuperscript{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.\textsuperscript{180} Consequently, the court determined that the third factor would not bar Netcom from an otherwise valid fair use defense.\textsuperscript{181} Lastly, regarding the fourth factor, the court found that widespread conduct like Netcom's could hurt the potential market for plaintiffs' work.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{176} Id. at 1378-79.

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

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{181} Id.
works. The court observed that groups had used stolen copies of the Church's scriptures in the past to charge for Scientology-like religious training. Thus, the court held that Netcom's facilitation of users' posting of "secret scriptures" on the Internet might hurt the market for plaintiffs' works. After applying the four factors, the court held that Netcom's use did not constitute a valid fair use defense.

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. 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 infringement because the INSP's server makes HTML copies of the Web pages. However, the

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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 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.


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. To establish a valid defense under section 107, an INSP must show that the four factors together weigh in favor of fair use. 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.

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. 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. Section 107 lists these activities as purposes that generally justify a finding of fair use. However, uses that involve criticism or commentary do not automatically warrant a conclusion in favor of fair use.

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190 See 4 Nimmer & Nimmer, supra note 46, § 13.05[A], at 13-152 to -155.
193 Dibbell, supra note 9; Gartner, supra note 11; Oakes, supra note 9; Thompson, supra note 9.
use.\footnote{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. Lerman, 40 U.S.P.Q.2d 1569, 1574 (E.D. Vir. 1996).} 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.\footnote{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); Lerman, 40 U.S.P.Q.2d at 1574; 4 Nimmer & Nimmer, supra note 46, § 13.05[A][1][a], at 13-155.} 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.\footnote{Cf. Campbell, 510 U.S. at 579-80 (stating that criticism and commentary transform works by shedding light on earlier work).} 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.\footnote{Id. at 579-80, 583.} As the Court noted, criticism and commentary transform a work by changing the purpose and character of the original work.\footnote{Id. at 579.} 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.\footnote{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); Patsouris, supra note 29 (describing how INSPs make Web pages content for criticism and commentary).} Therefore, courts will likely view an INSP's use of Web page as transformative.\footnote{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.}

stated that the relevant inquiry was whether the user would profit by exploiting copyrighted material without paying the customary price.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{206} To determine whether an INSIP's purposes are commercial, Harper \& Row and Netcom require examining whether the INSIP directly profits from its Web page copies.\textsuperscript{207}

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

\textsuperscript{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. \textit{Id.} Accordingly, the Court found that The Nation's intended purpose was to compete with original. \textit{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. \textit{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. \textit{Id.}

\textsuperscript{204} Harper \& Row, 471 U.S. at 562-63.

\textsuperscript{205} Netcom, 907 F. Supp. at 1378-79.

\textsuperscript{206} \textit{Id.} at 1379.

\textsuperscript{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).

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

\textsuperscript{209} See Patsuris, supra note 29 (noting that INSIPs sites generate revenue through advertising, sponsorships, and transaction agreements); Raik-Allen, supra note 11 (explaining that business model of one INSIP is based simply on advertising through INSIP's Web site and on Web pages referred through another user); Raynovich, supra note 27 (observing that business models like INSIPs' include generation of advertising and e-commerce revenue).
from their services by soliciting advertisements, they are unlike Netcom who gained nothing from its copies.\footnote{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).} 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.\footnote{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).}

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.\footnote{See generally 17 U.S.C. § 107(2) (1994) (listing second statutory fair use factor).}  

2. Nature of the Copyrighted Work

An examination of the nature of the copyrighted Web pages supports a fair use finding for three reasons.\footnote{For examples of both informational and creative Web pages, simply browse the World Wide Web.} 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.\footnote{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.} 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.
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.\textsuperscript{216} The court found that Netcom's purpose of facilitating postings to the Internet was different from RTC's purpose of providing religious training.\textsuperscript{217} Accordingly, the court concluded that the creative and unpublished nature of RTC's works was unimportant to the fair use analysis.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

Further, published works generally receive less copyright protection than unpublished works\textsuperscript{222} because authors have the right to control the first appearance of their work.\textsuperscript{223} Accordingly, a court must determine

\textsuperscript{216} Netcom, 907 F. Supp. at 1379 (citing Campbell, 510 U.S. at 586).

\textsuperscript{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.

\textsuperscript{218} Id. at 1379.

\textsuperscript{219} Dibbell, supra note 9; Luh, supra note 9; Oakes, supra note 9; Thompson, supra note 9.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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. 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. Similarly, Web page owners have exercised their right to control the first appearance of their works by placing their materials on the Internet. Thus, courts should treat Web pages as published works that receive less protection.

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. An INSP’s server automatically creates entire copies of every Web page a user browses. Generally, copying of an entire work

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224 Compare Rotbart v. J.R. O’Dwyer Co., 34 U.S.P.Q.2d 1085, 1088 (S.D.N.Y. 1995) (finding that unfiled, undisseminated talk was de facto published because it was delivered publicly), and Diamond v. Am-Law Pub’l’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).


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. In addition, taking the key expressive elements of a work also weighs against a finding of fair use. 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. Both courts stated that the extent of permissible copying varies in relation to the first factor, the purpose and character of the use. 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. Likewise, the Netcom court observed that Netcom's total copying was essential to its function as an IAP and a Usenet server. 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.

Like 2 Live Crew and Netcom, an INSP's total copying is essential to its function as an INSP. 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. Thus, under Campbell and Netcom, courts should not preclude INSPs from establishing an otherwise

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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).


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{241} In addition, an INSP’s use does not harm any protectible derivative markets of the Web pages.\textsuperscript{242} \textit{Netcom}’s discussion of the fourth factor illuminates its application to INSPs.\textsuperscript{243}

In \textit{Netcom}, the court found that Netcom’s copies might harm the potential market for RTC’s Scientology materials.\textsuperscript{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.\textsuperscript{245} RTC had not placed their copyrighted works on the Internet\textsuperscript{246} and Netcom’s facilitation of the postings of RTC’s works potentially impaired the marketability of the works.\textsuperscript{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 \textit{Netcom} to defeat an INSP’s defense would be misplaced.\textsuperscript{248} Netcom’s postings potentially competed for a share of the market for RTC’s works.\textsuperscript{249} On the other hand, an INSP’s copies do not serve as market substitutes that compete for a share

\begin{itemize}
\item \textsuperscript{239} \textit{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); \textit{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).
\item \textsuperscript{240} \textit{See 17 U.S.C. § 107(4) (1994)}.
\item \textsuperscript{241} \textit{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).
\item \textsuperscript{242} \textit{Cf. Campbell}, 510 U.S. at 591-92 (directing examination of whether use of work harms markets for either originals or derivatives).
\item \textsuperscript{243} \textit{See Netcom}, 907 F. Supp. at 1380.
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{245} \textit{Id.} Moreover, the \textit{Netcom} court found that others might use the scriptures obtained from the Internet to charge for Scientology-like religious training. \textit{Id.}
\item \textsuperscript{246} \textit{Id.} at 1365-66.
\item \textsuperscript{247} \textit{Id.} at 1380.
\item \textsuperscript{248} \textit{Cf. id.} at 1380 (refusing to grant summary judgment for IAP Netcom because use potentially caused market substitution).
\item \textsuperscript{249} \textit{Id.}
\end{itemize}
of the market of the original Web pages.\textsuperscript{250} Rather, an INSP's copies merely facilitate criticism and commentary of the Web pages.\textsuperscript{251}

The Supreme Court has noted that commentary and criticism usually serve different market functions than the works they discuss.\textsuperscript{252} Although criticism or commentary might decrease demand for the original works, copyright law does not recognize decreased demand as a protectible harm.\textsuperscript{253} Only works that supersede the originals will militate against a finding of fair use.\textsuperscript{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 \textit{Campbell}, the Court regarded commentary and criticism as unlikely derivative markets.\textsuperscript{255} The Court observed that authors generally would not license potentially negative reviews of their own works.\textsuperscript{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.

\textbf{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.\textsuperscript{257} In this analysis, the fourth factor carries the most weight because it is the central fair use factor.\textsuperscript{258}

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{251} See Dibbell, supra note 9; Oakes, supra note 9; Raynovich, supra note 27; Thompson, supra note 9.
\item \textsuperscript{252} Campbell, 510 U.S. at 591.
\item \textsuperscript{253} See id. at 591-92 (stating that courts must distinguish between criticism which merely suppresses demand and copyright infringement which usurps it).
\item \textsuperscript{255} 510 U.S. at 591-93 (finding unlikely that authors would desire potentially negative review of their works).
\item \textsuperscript{256} Id. (stating that authors and creators generally desire praise for their original works).
\item \textsuperscript{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 Entmt, 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.
\item \textsuperscript{258} See sources cited supra note 115.
\end{itemize}
The underlying goals of copyright law also inform the fair use analysis.\footnote{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."). \textit{See generally} U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to grant copyright protection to promote goal of advancing science and arts).}

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.\footnote{See sources cited \textit{supra} note 115.} Under this factor, the lack of negative market effect strongly favors a finding of fair use.\footnote{See \textit{supra} Part II.A.4 (determining that fourth factor favors INSPs because INSPs’ copies do not harm any protectible markets of original Web pages).} An INSP’s copies do not serve as market substitutes that impair the economic value of the original Web pages.\footnote{\textit{Cf. Campbell}, 510 U.S. at 591-92 (finding lack of market substitution by parody that served purpose of criticism and commentary).} In addition, the conclusions under the first three factors support a finding that an INSP’s use of Web page is a fair use.\footnote{\textit{See supra} Part II.A.1-3 (applying first three factors of fair use analysis to INSPs’ use of Web pages).}

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.\footnote{See \textit{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).} Although they derive no direct profit from their Web page copies, INSPs generally solicit advertisements to recoup their costs in providing their services.\footnote{See Patsuris, \textit{supra} note 29; Raik-Allen, \textit{supra} note 11; Raynovich, \textit{supra} note 27.} 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.\footnote{\textit{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, \textit{supra} note 46, § 13.05[A][1][c], at 13-162 to -164.} In \textit{Campbell}, the Supreme Court stated that the court of appeals erred in concluding that the commercial nature
of 2 Live Crew's parody rendered the use presumptively unfair.\textsuperscript{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.\textsuperscript{268} Further, they provide these services at no cost to their users.\textsuperscript{269} Third, even participants in section 107's listed uses, which generally justify a finding of fair use, often conduct these activities for profit.\textsuperscript{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.\textsuperscript{271} Because an INSP's use of Web pages transforms the original works,\textsuperscript{272} a commercial purpose should not weigh as heavily against fair use.\textsuperscript{273} More importantly, the fourth factor inquiry establishes that an INSP's copies do not impair any protectible markets of the original Web pages.\textsuperscript{274} As the fourth factor is the central fair use factor, an absence of market harm outweighs a finding of commercial purpose.\textsuperscript{275} Thus, a consideration of all relevant factors, particularly the fourth factor, requires a finding of fair use.

\textsuperscript{267} 510 U.S. at 582-85, 594 (reversing judgment of court of appeals).
\textsuperscript{268} See Dibbell, supra note 9; Oakes, supra note 9; Raynovich, supra note 27; Thompson, supra note 9.
\textsuperscript{269} Oakes, supra note 9; Patsuris, supra note 29; Raynovich, supra note 27.
\textsuperscript{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).
\textsuperscript{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.

\textit{Id.} at 591 (citations omitted).
\textsuperscript{272} See supra notes 197-201 and accompanying text.
\textsuperscript{273} Cf. Campbell, 510 U.S. at 579, 590-91 (requiring stronger showing of commerciality when use is transformative).
\textsuperscript{274} See supra Part II.A.A.
\textsuperscript{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. Critics may argue that an INSP's use of Web pages discourages authors from creating beneficial works. Further, critics may contend that permitting an INSP's use of Web pages would deprive authors of the constitutionally mandated economic incentives. 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. Criticism and commentary provide public benefit and do not chill the creation of works of authorship. 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. The fourth factor discussion established

278 See 1 Nimmer & Nimmer, supra note 46, § 1.03[A], at 1-66.9 to –66.11.
279 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).
that INSPs do not impair the economic value of Web pages. Further, criticism and commentary, in and of themselves, are uses that the Act endorses. 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.

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. In addition, an INSP's use furthers the constitutional aims of copyright law. 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'
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."  

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* 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.