FACTORLESS FAIR USE? WAS MELVILLE NIMMER RIGHT?

by RICHARD DANNAY*

It is an honor to participate in this symposium celebrating the 50th anniversary of the preeminent copyright treatise, *Nimmer on Copyright*, begun by Professor Melville B. Nimmer, first published in 1963 and, since 1985, continued and expanded by Professor David Nimmer — a treatise that has dominated copyright scholarship and research for fifty years, and counting.

This article is an exploratory consideration of just one example of Professor Melville Nimmer's wisdom and foresight. On November 3, 1964, he proposed — in connection with one of the early copyright revision bills[1] that culminated in the 1976 Copyright Act, effective January 1, 1978 — that the fair use limitation on exclusive rights be a spare, unadorned statement that "fair use of a copyrighted work . . . is not an infringement of copyright." He recommended that the fair use provision (what became Section 107 of the Copyright Act[2]) be reworded to omit the four factors and preamble purposes ultimately enacted in that section and that, instead, it read as follows:

> Notwithstanding the provisions of Section 5, the fair use of a copyrighted work, as such phrase has heretofore been judicially defined and recognized, is not an infringement of copyright.[3]

Was Professor Melville B. Nimmer right? Is a "factorless" fair use preferable?

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1 H.R. 11947, 88th Cong. (1964).

2 Copyright Act, sec. 107, *codified at* 17 U.S.C. § 107 (2006).

3 COPYRIGHT LAW REVISION, 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS, PART 5, 89th Cong. 313, 315-16 (1965). Section 5 of H.R. 11947 was the predecessor of Section 106, the statement of exclusive rights in copyrighted works. The term "factorless" fair use is the author's, not Professor Nimmer's, but is used here to characterize his recommendation.

I. PROFESSOR NIMMER'S RECOMMENDATION

This meditation on a factorless fair use can begin with the July 1961 Report of the Register of Copyrights.[4] Although not mentioned in the 1909 Copyright Act, the fair use doctrine, as it developed in the judicial case law, was the most significant and widely applicable of the limitations on the copyright owner's exclusive rights.[5] The 1961 *Register's Report* described the general scope of the doctrine and gave examples of cases where the concept would be relevant. But it was acknowledged that fair use "eludes precise definition" and that, because of the number and variety of situations in which fair use could be involved, "it would be difficult to prescribe precise rules suitable for all occasions."[6]

The 1961 Report concluded that "the doctrine of fair use is such an important limitation on the rights of copyright owners, and occasions to apply that doctrine arise so frequently, that we believe the statute should mention it and indicate its general scope. It seems anomalous to have the statute specify the rights of copyright owners in absolute terms without indicating that those rights are subject to the limitation of fair use."[7] Thus the report made this recommendation: "The statute should include a provision affirming and indicating the scope of the principle that fair use does not infringe the copyright owner's rights."[8]

The 1961 Report's recommendation was carried over into the preliminary draft copyright revision bill of 1963. Section 6, dealing with the general concept of fair use, provided:

> § 6. Limitations on Exclusive Rights: Fair Use.
>
> All of the exclusive rights specified in section 5 shall be limited by the privilege of making fair use of a copyrighted work. In determining whether, under the circumstances in any particular case, the use of a copyrighted work constitutes a fair use rather than an infringement of copyright, the following factors, among others, shall be considered: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to

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[4] COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87th Cong. (1961) [hereinafter 1961 REGISTER'S REPORT].

[5] A comprehensive review of the development of Section 107, the fair use provision of the Copyright Act, is beyond the scope of this article. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 466-67 and n.15 (1984) (brief summary of origin and development of Section 107); 1 THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976, at 307-88 (Alan Latman and James F. Lightstone, eds., 1981–85) [hereinafter Kaminstein].

[6] 1961 REGISTER'S REPORT, *supra* note 4, at 24-25.

[7] *Id*. at 25.

[8] *Id*.

> the copyrighted work as a whole, and (d) the effect of the use upon the potential value of the copyrighted work.[9]

The 1963 preliminary draft thus included an early version of the "four factors."[10] Despite opposition to a related provision on library photocopying, there was increasing agreement on including a general section on fair use in the statute. Thus, on July 20, 1964, when an early copyright revision bill, H.R. 11947 (and S. 3008) (88th Cong., 2d Sess.), was introduced, further language was added to Section 6 in an attempt to clarify the scope of the fair use doctrine but without freezing or limiting its application to new uses.[11] It provided:

> § 6. Limitations on exclusive rights: fair use.
>
> Notwithstanding the provisions of section 5, the fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. 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;
>
> (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.[12]

The four factors remained, joined now by the preamble purposes. But — surprise! — the fair use language of H.R. 11947 provoked many comments, most of them critical. Author and publisher groups expressed fears that specific mention of uses such as "teaching, scholarship, or research" could be taken to imply that any use even remotely connected with these activities would be a "fair use." On the other side, objections were raised to the use of qualifying language, such as "to the extent reasonably necessary or incidental to a legitimate purpose."[13]

Enter Professor Melville B. Nimmer. On November 3, 1964, he provided the House Committee on the Judiciary with his comments regarding H.R. 11947. Here are his comments on that bill's Section 6, the fair use provision, and his recommended substitute:

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9 KAMINSTEIN, *supra* note 5, at 317. *See also*, COPYRIGHT LAW REVISION, PART 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 26, 89TH CONG. (1965) [hereinafter 1965 REGISTER'S SUPPLEMENTARY REPORT].

10 1961 REGISTER'S REPORT, *supra* note 4, at 24, also described four "criteria" closely resembling the four factors.

11 1965 REGISTER'S SUPPLEMENTARY REPORT, *supra* note 9, at 26-27.

12 *Id*. at 27. H.R. 11947 (and S. 3008), 88th Cong. (1964).

13 1965 REGISTER'S SUPPLEMENTARY REPORT, *supra* note 9, at 27.

SECTION 6

An attempt to define "fair use," even as loosely as is done in Section 6, may lead to trouble. For example, is the principle of *ejusdem generis* applicable in the first sentence so that "legitimate purpose" must be of a nature similar to the specific purposes set forth in that sentence? If so, would this mean, for example, that quotation of several lines from the lyrics of a popular song within a novel would not be considered a fair use? On the whole, I think it would be better to reword Section 6 in its entirety as follows:

"Notwithstanding the provisions of Section 5, the fair use of a copyrighted work, as such phrase has heretofore been judicially defined and recognized, is not an infringement of copyright."[14]

His view to include only a spare recognition of the fair use doctrine, without the four factors and other embellishments, prevailed — for a while.

As described in the *Supplementary Report* of the Register of Copyrights on the General Revision of U.S. Copyright Law (May 1965), it appeared impossible to reach agreement expressing the scope of the fair use doctrine. Since in any event the doctrine emerged from a body of judicial precedent and not from the statute, the Register "decided with some regret to reduce the fair use section to its barest essentials."[15] Section 107 of identical revision bills introduced in the House and the Senate in 1965, H.R. 4347 and S. 1006, contained a fair use provision even more spare than Professor Nimmer's version, but still shorn of the four factors and preamble purposes. In its entirety, it read:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of Section 106, the fair use of a copyrighted work is not an infringement of copyright.[16]

The Register's 1965 *Supplementary Report* concluded: "We believe that, even in this form, the provision serves a real purpose and should be incorporated in the statute. . .The intention of section 107 is to give statutory affirmation to the present judicial doctrine, not to change it."[17]

But it did not take long for the four factors and preamble purposes to reappear. Thus Section 107 of H.R. 4347, 89th Cong., 2d Sess. (1966), provided:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or re-

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14 1964 Revision Bill with Discussions and Comments, *supra* note 3, at 315-16.

15 1965 REGISTER'S SUPPLEMENTARY REPORT, *supra* note 9, at 28.

16 H.R. 4347, S. 1006, 89th Cong. (1965).

17 1965 REGISTER'S SUPPLEMENTARY REPORT, *supra* note 9, at 28, and 192-193 (comparative table of fair use provisions in 1963 preliminary draft and 1964 and 1965 revision bills).

search, is not an infringement of copyright. 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;

(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.[18]

And that version remained in the copyright revision bill in later Congresses and, with a few additions, was of course similar to the provision enacted in the 1976 Copyright Act that took effect on January 1, 1978:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 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.[19]

And, to fast forward to the present, Section 107 of the Copyright Act, the current fair use provision, with a few additions, is closely similar to the one enacted in 1976:

§ 107 - Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 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

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[18] H.R. REP. NO. 89-2237, at 5, 58-66, 173, 194 (1966).

[19] Copyright Act, sec. 107, *codified at* 17 U.S.C. § 107 (2006) (effective Jan. 1, 1978).

> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[20]

The four factors and preamble purposes had reappeared quickly and remained. Professor Melville B. Nimmer's recommended barebones statement of fair use, without mention of the four factors (and preamble purposes), is simply a footnote to the history of United States copyright revision. But has history proved him right? Would a factorless fair use provision be preferable? Before attempting an answer, this inquiry requires, for context, some review of the continuing preoccupation with the fair use doctrine and especially the dissatisfaction with its four-factor test.

II. FOUR-FACTOR FRUSTRATION

It is no secret that the fair use doctrine, as recognized in Section 107, has generated continuing frustration, much of it centered on the four factors. Consider the recent observations of the Ninth Circuit in *Monge v. Maya Magazines, Inc.*:

> In the years following the 1976 Act, courts have decided countless cases involving the fair use doctrine. Some commentators have criticized the factors, labeling them "billowing white goo" or "naught but a fairy tale," echoing courts that threw up their hands because the doctrine is "so flexible as virtually to defy definition." *Princeton Univ. Press v. Mich. Doc. Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (citation omitted). A leading treatise in this area notes that the statute provides "no guidance as to the relative weight to be ascribed to each of the listed factors," and, in the end, "courts are left with almost complete discretion in determining whether any given factor is present in any particular use." *Nimmer on Copyright* § 13.05[A] (footnotes omitted).[21]

But despite the frustration, the Ninth Circuit pressed ahead: "We acknowledge the porous nature of the factors but nonetheless recognize that we are obliged to make sense of the doctrine and its predicates."[22]

Nearly seventy-five years earlier, the Second Circuit called the fair use doctrine (long before its statutory recognition) "the most troublesome

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[20] The Visual Artists Rights Act of 1990 amended Section 107 by adding the reference to Section 106A. Pub. L. No. 101-650, 104 Stat. 5089, 5132. In 1992, Section 107 was also amended to add the last sentence. Pub. L. No. 102-492, 106 Stat. 3145.

[21] 688 F.3d 1164, 1171 (9th Cir. 2012) (footnotes omitted). The commentaries the court cited in footnotes are: Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008) and David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 287 (2003).

[22] *Monge*, 688 F.3d at 1171.

in the whole law of copyright."[23] Professor Barton Beebe, in his empirical study of fair use opinions from 1978–2005, notes that Section 107 and the fair use concept have attracted "an enormous amount of scholarly attention" and that "[n]early all of this commentary has been highly critical of section 107's four-factor test and how courts have applied it."[24]

Perhaps no more colorful characterization of fair use frustration has been made than Professor Paul Goldstein's:

> Fair use is the great white whale of American copyright law. Enthralling, enigmatic, protean, it endlessly fascinates us even as it defeats our every attempt to subdue it.[25]

The hunt for fair use solutions may more resemble the pursuit of the Grail than the Whale. However elusive, though, the search continues unabated. By Professor Goldstein's count (in 2008), "no fewer than 389 articles in American law reviews have squared off with the [fair use] defense since the doctrine's first appearance under that name."[26] In Professor Beebe's study, he calculates (also in 2008) that there has been a ratio of about 2.4 fair use articles for every one court opinion involving fair use during the period 1990–2005.[27] Professor Goldstein notes "the fatal attractions of the hunt."[28] Still, law review symposia remain devoted to the quest.[29]

The frustration, of course, is inherent in the doctrine. As the Supreme Court described in 1994 in our leading fair use case, *Campbell v. Acuff-Rose*, the fair use doctrine not only permits — it requires — courts to avoid rigid application of the statute when, on occasion, it would stifle the very creativity the law is designed to foster.[30] "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[31] This scheme is embedded in the statute itself, with its several preamble purposes and four factors that are non-exclusive, illustrative, and that begin the analysis but do not necessarily exhaust it.

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[23] Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam).

[24] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 552 (2008) (footnote omitted).

[25] Paul Goldstein, *Fair Use in Context*, 31 COLUM. J.L. & ARTS 433 (2008).

[26] *Id.*

[27] Beebe, *supra* note 24, at 565 n. 64.

[28] Goldstein, *supra* note 25, at 433.

[29] Symposium: Fair Use: *"Incredibly Shrinking" or Extraordinarily Expanding?*, 31 COLUM. J.L. & ARTS 433-635 (2008); Fair Use Symposium, 57 J. COPYRIGHT SOC'Y 315-682 (2010).

[30] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

[31] *Id.*

In fact, the Supreme Court instructs that "the four statutory factors [not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."[32]

This approach is not only dictated by Section 107's express recognition of the judicial doctrine of fair use, it is explicit in the statute's legislative history, as the critical congressional reports accompanying passage of the 1976 Copyright Act explain:

> Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. . . . The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute.[33]

Moreover, Congress emphasized that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." Thus, beyond the very broad statement of what fair use is, "and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." In short, "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[34]

Thus, despite the relentless pursuit of "a general, encompassing theory of fair use,"[35] perhaps no such definitive goal is attainable. Even if we could transform fair use into a doctrine of specific guidelines and safe harbors that maximized certainty and predictability, we would likely see the courts reinvent fair use in its familiar malleable, protean form to meet new challenges.

Congress considered the four factors, "though in no case definitive or determinative," at least "relevant in determining whether the basic doctrine of fair use . . . applies in a particular case" and "some gauge for balancing the equities."[36]

Do the four factors even accomplish that goal? There is no consensus. David Nimmer, in his intriguing 2003 article "*Fairest of Them All" and Other Fairy Tales of Fair Use*,[37] reminds us that there is no mechanism for weighing the factors, even after each is tallied. What does a court do

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[32] *Id*. at 578.

[33] H.R. REP. NO. 94-1476, at 65-66 (1976) [hereinafter HOUSE REPORT]; S. REP. NO. 94-473, at 62 (1975) [hereinafter SENATE REPORT].

[34] HOUSE REPORT, *supra* note 33, at 66; SENATE REPORT, *supra* note 33, at 62.

[35] Goldstein, *supra* note 25, at 433.

[36] HOUSE REPORT, *supra* note 33, at 65; SENATE REPORT, *supra* note 33, at 62.

[37] Nimmer, *supra* note 21.

when there are two factors pro and two con? When can one factor outweigh three? David Nimmer's review of the cases leads him to an important but perhaps not surprising insight about how judges actually resolve fair use cases. First, he says, they make a judgment that the outcome is fair use or not. Then, he believes, they "align the four factors to fit that result as best they can." The "four factors fail to drive the analysis but rather serve as convenient pegs on which to hang" predetermined "conclusions." So it's largely a "fairy tale" to conclude that the four factors determine the outcome of concrete cases.[38]

But Professor Beebe, in his empirical study of fair use cases, disputes the conclusion that courts "stampede" the four factors by bending their outcomes to fit the ultimate fair use finding. "Rather than make a fair use determination first and then 'align the four factors to fit that result as best they can,' courts appeared quite willing to call the factor outcomes as they saw them, even when those outcomes did not support the overall test outcome." He considered this "a highly encouraging finding."[39]

Who's right? Is it a matter of careful empirical study, intuition, faith or guesswork? One commentator concludes that "leading courts and commentators generally acknowledge that the four-factor test as interpreted provides very little guidance for predicting whether a particular use will be deemed fair."[40]

Seventh Circuit Judge Richard A. Posner properly reminds us that, as the Supreme Court made clear not only in *Campbell* but also in *Sony*, "the four factors are a checklist of things to be considered rather than a formula for decision; and likewise the list of statutory purposes."[41]

The *Campbell* court emphasized that "the four statutory factors [may not] be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."[42] This has led courts to conclude their analysis of each of the four factors by engaging in "[t]he aggregate assessment necessary for an ultimate decision."[43]

But as Judge Posner correctly cautioned, because the factors (and purposes) are "not exhaustive," litigants "can get nowhere . . . by arguing that some or even all of them lean [for or] against the defense of fair use."[44] The question in each case is whether there is fair use or not, and not how the four factors stack up.

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38 *Id*. at 281, 287.
39 Beebe, *supra* note 24, at 555.
40 Michael W. Carroll, *Fixing Fair Use*, 85 N.C.L. REV. 1087, 1106 (2007).
41 Ty, Inc. v. Publ'ns Int'l, Ltd., 292 F.3d 512, 522 (7th Cir. 2002).
42 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).
43 Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 117 (2d Cir. 1998).
44 *Ty, Inc*., 292 F.3d at 522.

Professor Goldstein cautions that "attaching primacy to the statutory factors, as section 107 would have courts do, is the source of the problem, and not the source of the solution. Neither section 107's preamble, nor its four factors, constitute a theory of fair use any more than tent poles constitute a tent; indeed, even as tent poles they are a signal failure."[45] As he puts it, "the barren seas of the statute's four factors" offer no fair use "predictability."[46]

His and other criticism point out the mechanical, methodical application of the four factors in all cases without regard to context. But the chief problem is the *tyranny* of the statutory four factors, not the considerations they embody if and to the extent they are relevant in the particular circumstances of a case.[47] Are there solutions?

III. FAIR USE FIXES

The principle that offered the best promise of providing the "general, encompassing theory of fair use"[48] was the standard of "transformative use" described by Judge Pierre Leval in his groundbreaking 1990 *Harvard Law Review* article, *Toward a Fair Use Standard*.[49] This standard was adopted four years later by the Supreme Court in its *Campbell* decision in applying the first fair use factor.[50] The standard asks whether the new work merely supersedes the objects of the original creation or instead adds something new, "with a further purpose or different character, altering the first with new expression, meaning, or message" — i.e., "whether and to what extent the new work is 'transformative.'"[51] While transformative use is not "absolutely necessary" for a finding of fair use, it lies "at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright." As the Supreme Court declared, in elevating transformative use to its dominant status in fair use analysis, "the more

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45 Goldstein, *supra* note 25, at 437.

46 *Id*. at 443.

47 In fact, the four factors have become so dominant that at times they even obscure the preamble purposes. Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 78 (2d Cir. 1997) ("[W]e note preliminarily that the District Court gave no explicit consideration to whether the defendants' use was within any of the categories that the preamble to section 107 identifies as illustrative of a fair use, or even whether it was similar to such categories. . . [T]he categories should not be ignored."). "[T]he first sentence of section 107" is "the basic doctrine of fair use." House Report, *supra* note 33, at 65.

48 Goldstein, *supra* note 25, at 433.

49 Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

50 *Id*. at 1111; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

51 *Id*.

transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[52]

The transformative use standard was not merely foundational and an invaluable contribution to fair use jurisprudence. It refocused copyright law on the law's true objectives — productive uses — and away from the preoccupation with commercial uses, a characteristic of virtually every use. In short, "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."[53]

The transformative use standard built upon and improved the "productive use" standard that the Supreme Court had previously considered but not embraced.[54] It also had roots in literary criticism. For example, it recalled T.S. Eliot's famous formulation of the "indebtedness" of Philip Massinger to earlier poets and dramatists:

> Immature poets imitate; mature poets steal; bad poets deface what they take, and good poets make it into something better, or at least something different. The good poet welds his theft into a whole of feeling which is unique, utterly different from that from which it was torn; the bad poet throws it into something which has no cohesion.[55]

But the transformative use standard introduced its own uncertainties and ambiguities and found its own skeptics and detractors. Thus the Second Circuit in 1998 in *Castle Rock Entertainment v. Carol Publishing*, in considering whether a trivia quiz book based on the *Seinfeld* television series was fair use, noted "a potential source of confusion in our copyright jurisprudence over the use of the term 'transformative.'"[56] A "derivative work," over which a copyright owner has exclusive control, is defined as a work based on one or more preexisting works, such as translations and motion picture versions, "or any other form in which a work may be recast, *transformed*, or adapted."[57] So while the trivia book "transformed" the *Seinfeld* program it did not do so for a "transformative purpose,"[58] and fair use was rejected.[59]

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52 *Campbell*, 510 U.S. at 579.

53 *Id*.

54 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 455 n.40 (1984).

55 T.S. Eliot, *Philip Massinger*, *in* THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM. 82, 83 (Dodo Press 2009) (1920).

56 Castle Rock Entm't v. Carol Publ'g Group, Inc., 150 F.3d 132, 143 (2d Cir. 1998).

57 Copyright Act secs. 101 ("derivative work"), 106(2) (exclusive right to prepare derivative works) (emphasis added), *codified at* 17 U.S.C. §§ 101, 106(2) (2006).

58 *Castle Rock*, 150 F.3d at 143.

59 *See* Ty, Inc. v. Publ'ns Int'l, Ltd., 292 F.3d 512, 518 (7th Cir. 2002), where Judge Posner, finding the distinction between "transformative" and "superseding"

Professor R. Anthony Reese examined this "potential source of confusion" in his article *Transformativeness and the Derivative Work Right*, analyzing all published circuit court opinions applying fair use between the 1994 *Campbell* decision and the end of 2007.[60] He came to the welcome conclusion that courts that found infringement by the unauthorized creation of derivative works had not treated the transformation involved in the preparation of the derivative works as transformativeness in analyzing the first fair use factor. Thus, in his judgment, courts were not using the *Campbell* view that transformative uses are more entitled to fair use so as to narrow the scope of the copyright owner's derivative-work right by viewing derivative works as necessarily or even generally transformative uses.[61]

Professor Reese concluded: "If the defendant has a transformative purpose, the court has generally found transformativeness, even if she has not altered the work's content in any way, while if the defendant has no transformative purpose, the court has generally found no transformativeness, even if she has transformed the content of the work sufficiently to create a derivative work."[62]

To some extent this conclusion may help dispose of another criticism of the transformative-use concept. Professor Paul Goldstein has described the troublesome tension between transformation of content and transformation of context.[63] Cases that excuse uses that transform the work itself, he argues, "substantially undermine" the "grant of the exclusive right to prepare derivative works" under Section 106(2) of the 1976 Copyright Act. Cases where only the context of a work's use is transformed rather than the content of the work, "unless circumscribed, can be applied to excuse virtually any use that a court decides is socially beneficial, without regard to section 107's limiting first sentence or its prescribed four factors."[64]

As Professor Reese points out,[65] and many court decisions confirm, it is now firmly established that transformativeness for a fair use finding may be recognized whether the work's content or the work's context is altered.

One such case is *Bill Graham Archives v. Dorling Kindersley Limited*, in which the Second Circuit ruled that the use of seven images of Grateful

copies "confusing," suggested that the distinction be made instead between "complementary and substitutional copying."

60 R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 471 (2008).

61 *Id*. at 476.

62 *Id*. at 493-94.

63 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.2.2.1(c) (3d ed. 2012) ("Transformation of content or of context?").

64 *Id*.

65 Reese, *supra* note 60, at 488-92.

Dead concert posters displayed in significantly reduced size in a 480-page "coffee table" book about the band was fair use and not copyright infringement.[66] The DK book, *Grateful Dead: The Illustrated Trip*, was a biographical work documenting the 30-year history of the Grateful Dead. The court concluded that the publisher's use of the disputed images fulfilled "DK's transformative purpose of enhancing the biographical information in [the book], a purpose separate and distinct from the original artistic and promotional purpose for which the images were created."[67] The court rejected BGA's "limited interpretation of transformative use," including its claim that each image required "comment or criticism related to the artistic nature of the image."[68]

The transformative nature of the use was strengthened, the court found, by the manner in which the publisher displayed the images, in significantly reduced size combined with a prominent timeline and other material creating "a collage of text and images on each page of the book." "Overall, DK's layout ensures that the images at issue are employed only to enrich the presentation of the cultural history of the Grateful Dead, not to exploit copyrighted artwork for commercial gain."[69] The poster images were reduced substantially in size - large enough to convey "the historical significance of the posters" but "inadequate to offer more than a glimpse of their expressive value."[70] Moreover, the BGA images were an "inconsequential portion" of DK's book[71] and not used in commercial advertising or sales promotion.[72]

Thus, the court found that a defendant's use can be transformative for fair use analysis even when there is no alteration of the work itself and the use is not accompanied by direct comment or criticism of the work, if the defendant's use is for a sufficiently different and "transformative purpose" from the plaintiff's original use of the work.[73]

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66 448 F.3d 605 (2d Cir. 2006). The author was lead counsel for the defendant publisher.

67 *Id*. at 610.

68 *Id*. at 609.

69 *Id*. at 611.

70 "In short, DK used the minimal image size necessary to accomplish its transformative purpose." *Id*.

71 *Id*.

72 *Id*. at 612.

73 *See* Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) (online search engine's use of thumbnail-sized images found highly transformative and fair use, improving access to information on the Internet unrelated to any aesthetic purpose); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (same); Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 24 (1st Cir. 2000) (copying controversial photos in their entirety was fair use because any less than the entire images would have made them useless to the news story); A.V. v. iParadigms, LLC, 562 F.3d 630, 639 (4th Cir. 2009)

Other commentators have found shortcomings in the transformative-use standard. Professor Diane Zimmerman concluded that "transformative use" was a worthy but failed effort "at avoiding the fair use mess."[74] She acknowledged the significance of a finding of transformative use in reaching a conclusion of fair use, and the difficulty of avoiding a fair use finding if the use was held to be transformative. She discussed several cases in which she noted that "the courts engaged in so much twisting and turning to avoid the seemingly obvious conclusion that, whatever else might have been troubling in the defendants' cases, the uses in question were at least 'transformative': they clearly did provide the public with a new or substantially reworked product."[75]

One such case Professor Zimmerman discussed was *Castle Rock* involving the trivia quiz book about the *Seinfeld* television series. She believed that the borrowing (posing questions testing the reader's knowledge of obscure details of plot and characters in eighty-four of eighty-six episodes in the series) was "so modest and took such a different expressive form from that of the original that, even taking into account the 'thick' copyright protection given to creative works, reasonable minds could well disagree over whether what had occurred rose even to the level of actionable copying," especially since the book relied on fans' own knowledge of the episodes and did not directly reproduce them or even brief summaries of them. But the court nonetheless ruled against the fair use defense largely on the ground that the trivia book's claim to be transformative was "slight to non-existent."[76]

Thus, however invaluable the transformative-use principle, it is not self-executing, and vagueness and ambiguity remain. The central paradox persists: Even though some works are transformed, they are not necessarily transformed for a transformative purpose, and fair use may be rejected despite the transformation. What standard do we adopt to distinguish "transformed" from "transformative," i.e., when do we know whether the alteration of a work is simply a violation of the derivative-work right or, instead, represents change for a transformative purpose likely to be fair use? And if the work itself has not been altered, how do we know whether

(copying of entire student papers in database for comparison with other student works to identify plagiarism was transformative fair use; "The use of a copyrighted work need not alter or augment the work to be transformative in nature. Rather, it can be transformative in function or purpose without altering or actually adding to the original work.").

74 Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem "Transformed": Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC'Y 251, 268 (1999).

75 *Id*. at 259.

76 *Id*. at 258; Castle Rock Entm't v. Carol Publ'g Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998).

its use in another context is for a transformative purpose likely to be fair use or simply a use that violates the copyright owner's rights?

Transformativeness may be the guiding principle of fair use analysis, but what standard guides our decision about transformative purpose or use? Some cases are easy. A highly transformative use may not qualify as fair use simply because it is so obviously the unauthorized exercise of the right to prepare derivative works. The Alfred Hitchcock classic motion picture *Rear Window* was a brilliantly transformative use of the renowned suspense writer Cornell Woolrich's "novelette" *It Had to be Murder* (first published in *Dime Detective Magazine* in 1942). The film made many valuable changes in the story, including the addition of the character played by Grace Kelly and the love interest with the character played by James Stewart.[77] The litigation involving the story and the movie turned on the intricacies of the copyright renewal scheme, but the Supreme Court agreed with the Ninth Circuit that, had the movie not been produced under a license, it would have been "a classic example of an unfair use."[78]

Many other thoughtful proposals have been advanced to repair fair use and overcome the dissatisfaction with the statutory four factors. Whether they are offered as modest fixes or broad solutions is not always clear. Here are some, in no particular order: Apply fewer factors, namely, the first and fourth;[79] apply more factors, including anything reasonably bearing on the issue of what's "fair" such as customary practices and broader social values;[80] consult readers' responses;[81] abandon fair use and injunctions in favor of monetary damages for unauthorized derivative works;[82] enhance the second factor's role and importance in the fair use

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77 Robin H. Smiley, *Rear Window*, FIRSTS: THE BOOK COLLECTOR'S MAG., Apr. 2004, at 61-63. Woolrich's most famous short story was originally titled *Murder from a Fixed Viewpoint*, and the publisher J. B. Lippincott gave the story its final title, *Rear Window*, in 1944 when it was published in the book *After-Dinner Story*, a collection of stories released under Woolrich's pseudonym William Irish. Another innovation in the movie version was making the central character played by Jimmy Stewart a news photographer who had broken his leg taking a risky shot, thus explaining both the character's injury and his curiosity in observing the residents in the adjacent apartments.

78 Stewart v. Abend, 495 U.S. 207, 238 (1990), aff'g Abend v. MCA, Inc., 863 F.2d 1465, 1482 (9th Cir. 1988). *See* Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1144 & n.34 (1990).

79 Joseph P. Liu, *Two-Factor Fair Use?* 31 COLUM. J.L. & ARTS 571 (2008).

80 Weinreb, *supra* note 78.

81 Laura A. Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008).

82 Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y 513 (1999) (The 1999 Donald C. Brace Memorial Lecture). *But see* Richard Dannay, *Copyright Injunctions and Fair Use: Enter*

analysis;[83] apply the fair use factors more flexibly and to the extent they respond to recurring categories of cases such as parody and new technologies, to enhance fair use predictability and uniformity;[84] reserve fair use for situations in which true market failure has occurred;[85] rely on nonbinding fair use arbitration, with a de novo court determination available on liability but with some effect, up or down, on damages depending on the outcome;[86] institute an administrative procedure (a Fair Use Board in the Copyright Office) to provide anticipatory, nonprecedential adjudications offering immunity from suit;[87] rely on the Supreme Court's *eBay* four-factor test for a rigorous and consistent evaluation of the propriety of injunctive relief in fair use cases;[88] develop "best practices" for categories of works such as documentaries, poetry, and others, to introduce greater predictability and reduce litigation risks.[89]

All of these are worthy proposals that promise greater certainty and predictability in fair use analysis without sacrificing the doctrine's flexibility and adaptability. But in the context of this brief review of fair use "fixes," let's return to Professor Nimmer's proposal for factorless fair use.

IV. WAS PROFESSOR NIMMER RIGHT?

Do the statutory four factors aid or impede fair use analysis? Should the statute be reworded to omit the four factors and preamble purposes and instead adopt the spare statement of fair use Professor Melville Nim-

eBay – Four-Factor Fatigue or Four-Factor Freedom?, 55 J. COPYRIGHT SOC'Y 449, 452 (2008) (The 37th Annual Donald C. Brace Memorial Lecture); MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 14.06 [A] [5] [a], [b], § 14.06 [B] [1].

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

84 Goldstein, *supra* note 25.

85 Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

86 David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11 (2006).

87 Carroll, *supra* note 40.

88 Dannay, *supra* note 82. *See also*, eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006); Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008); Salinger v. Colting, 607 F.3d 68 (2d Cir. 2010); Flexible Lifeline Sys., Inc. v. Precision Lift, Inc., 654 F.3d 989 (9th Cir. 2011) (per curiam); Flava Works, Inc. v. Gunter, 689 F.3d 754 (7th Cir. 2012).

89 PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011).

mer recommended, in 1964, that "fair use . . . is not an infringement of copyright"?[90]

The fair use provision of H.R. 4347 as introduced in 1965, reduced to the bare statement that "the fair use of a copyrighted work is not an infringement of copyright," was supported by those believing "the doctrine should remain as flexible as possible," and criticized by others believing it was "vague and nebulous." The latter group recommended restoration of the part of the 1964 bill referring to the fair use purposes and factors, and they prevailed.[91]

If we adopted Professor Nimmer's recommendation, how would we analyze and decide fair use cases? By what standard and based on what considerations? Would we, despite the refreshing simplicity, simply end up with the same methodology, the same factors, the same considerations — and thus the same fair use frustration? After all, the factors derive largely from judicial precedents that Professor Nimmer's recommendation acknowledged should be the touchstone for defining and applying the phrase "fair use," so what difference would it make to modify the statute or to retain or drop them? In fact, the factors trace back at least as far as Justice Story's 1841 opinion in *Folsom v. Marsh*:

> In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.[92]

The answer would seem to be, yes, whether recognized in the statute or not, the four factors, transformativeness, and other fair use considerations would continue to be critical in fair use analysis — and correctly so.[93]

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[90] *See* Ty, Inc. v. Publ'ns Int'l, Ltd., 292 F.3d 512, 522 (7th Cir. 2002), where Judge Posner found the "statutory definition" of fair use "though extensive . . . not illuminating. (More can be less, even in law)."

[91] H.R. REP. NO. 89-2237, at 59 (1966).

[92] Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). *See* Goldstein, *supra* note 25, at 436-37. "[I]t was precisely Story's factors that courts later — much later — borrowed, modified and supplemented to fashion a fair use doctrine for the twentieth century, and it was these decisions from which, in his much-cited study prepared fifty years ago as part of the effort to revise the 1909 Act, Alan Latman culled the 'general criteria' of fair use that in turn contributed to the four factors at the heart of section 107." Goldstein, *id.* at 437. *See* ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS 5 (1958) (Study No. 14, Studies Prepared for Subcomm. on Patents, Trademarks and Copyrights of the Sen. Comm. on Judiciary, 86th Cong., 2d Sess).

[93] Castle Rock Entm't v. Carol Publ'g Group, Inc., 150 F.3d 132, 146 (2d Cir. 1998) (Exploring "other factors," the court stated: "As we have noted, the four statutory fair use factors are non-exclusive and serve only as a guide to promote the purposes underlying the copyright law.")

But the analysis might possibly be more candid, more direct, less Procrustean in evaluating and weighing each of the factors, less concerned with four-factor weighing and tallies and "aggregate assessment," less vulnerable to "twisting and turning" in finding or rejecting transformative purpose or use. We would not need to worry whether the four factors are a "fairy tale" or "stampeded" to reach a predetermined conclusion. Nor would it matter whether content was altered or context shifted.

Ultimately, in this writer's observation, the decision on fair use really turns on this balancing test: Mindful of the purposes of copyright law and the public interest, is there sufficient "justification" for the use to outweigh the copyright owner's interests in prohibiting the use or at least in being compensated for it, if an injunction is not warranted?[94]

This is not offered as a grand theory or resolution, but rather as a recognition that, after consideration of the four factors, the preamble purposes, transformativeness, and whatever else may be relevant or helpful, the real test for deciding fair use may be the "gut" balancing of interests I described. Adopting factorless fair use, so far as the statute reads, would help avoid the risk of being tethered to the "porous" factors or the ambiguities of "transformativeness" or to a methodology that arguably is a result-oriented "fairy tale."

This approach might be a more candid way to decide fair use and possibly even a recognition of the way fair use is really decided now, even if not acknowledged openly. And a factorless fair use, as Professor Melville Nimmer recommended, would facilitate its implementation.

Using this "justification" principle is already part of fair use analysis even if subordinate to other terms and the statute's factors and purposes. As Judge Leval wrote, the first fair use factor ("the purpose and character of the use") "raises the question of justification":

> In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner.
>
> I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is *transformative*. . .. The transformative justification must overcome factors favoring the copyright owner.[95]

And the Supreme Court in *Campbell* referred to the "justification for the borrowing."[96]

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[94] Concerning injunctive relief in fair use cases, see *supra* note 88 (Dannay, and *eBay*, *Winter*, *Salinger*, *Flexible Lifeline*, *Flava*), and *supra* note 82.

[95] Leval, *supra* note 49, at 1111.

[96] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581 n.14, 586 (1994).

But it seems to me that "justification" embraces more than just transformativeness or the first factor but rather all of the other considerations and factors favoring fair use that ultimately must be weighed against the copyright owner's interests in finding infringement (including assessment of these same considerations and factors). Each side should make its best case — justification for the use or not — using (or not) the four factors, the preamble purposes, transformativeness, and other considerations, but not being shackled by any of them.

Justification would not require the manipulation of transformative use or purpose to align that consideration with the ultimate fair use outcome. Surely the decision in *Castle Rock* involving the *Seinfeld* television series can be better explained by lack of "justification" than by the trivia quiz book's lack of "transformative purpose." The trivia quiz book was, well, trivial — more souvenir or commodity than substance, more opportunistic than substantive. For Judge Posner, the court's holding that the book was not protected by fair use "seems to rest in part . . . on the court's judgment that the book was frivolous." But "very dubiously," he believed, because "the fair-use doctrine is not intended to set up the courts as judges of the quality of expressive works." He implied that the presumed lack of quality of the book did not mean it failed in any way to "comment upon, criticize, educate the public about, or research *Seinfeld* and contemporary television culture," as the Second Circuit held.[97] The infringement, as Judge Posner notes, consisted of the copying of the scripts in the form of fictitious "facts" taken from the series.[98] It seems difficult to conclude that the use of these "facts" for creation of a quiz book was not transformative. But it seems reasonable to conclude that the taking was not sufficiently justified to overcome the copyright owner's interests. One could have acknowledged the transformativeness without imperiling the rejection of fair use.

The controversial case of *Dr. Seuss Enterprises L.P. v. Penguin Books USA, Inc.*[99] was also cited by Professor Zimmerman as an example of the "twisting and turning" of the transformativeness principle in order to avoid a fair use finding. There the Ninth Circuit affirmed a preliminary injunction against a book spoofing the O.J. Simpson double murder trial titled *The Cat NOT in the Hat! A Parody of Dr. Juice*. The defendant authors borrowed Dr. Seuss's distinctive rhyming style, the Cat's distinctive stove-pipe hat, and the Cat's image. The court found that the O.J. book was satire, not parody (because it commented on the trial, not the

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97 Ty, Inc. v. Publ'ns Int'l, Ltd., 292 F.3d 512, 523 (7th Cir. 2002); *Castle Rock*, 150 F.3d at 146.

98 *Ty, Inc.,* 292 F.3d at 523; *Castle Rock*, 150 F.3d at 138-39.

99 Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997).

Seuss style or classic book), and concluded: "Because there is no effort to create a transformative work with 'new expression, meaning, or message,'" the Penguin book failed to win the first factor of the fair use test.[100]

Because so much of the O.J. book was original to the defendants, it seems difficult to conclude that the use was not "transformative," as Professor Zimmerman argued.[101] But it would seem reasonable to conclude, and perhaps was the true basis of the decision, that the O.J. book made a distasteful and unjustified use of the beloved and admired Dr. Seuss characters and style. So that even if there was transformative use or purpose, there was insufficient justification for the borrowing to outweigh the copyright owner's interests.[102] Possibly there even was comment on the Seuss book, in contrasting its unblemished, iconic reputation and dark humor (as embodied in the Cat character) with the tawdry spectacle of the O.J. trial. But even if this was so and amounted to parody and transformativeness, the question of justification could have been confronted directly to resolve the fair use defense.

Perhaps the 1997 Second Circuit case of *Ringgold v. Black Entertainment Television, Inc.* best exemplifies the interplay of transformativeness and justification.[103] In *Ringgold*, the court held that use of a poster titled "Church Picnic Story Quilt" as set decoration for a sitcom episode to which the poster had no thematic significance or relevance, was for "the same decorative purpose for which the poster is sold," weighing against fairness under the first factor.[104] In contrast, the court noted in dicta:

> It is not difficult to imagine a television program that uses a copyrighted visual work for a purpose that heavily favors fair use. If a TV news program produced a feature on Faith Ringgold and included camera shots of her story quilts, the case for a fair use defense would be extremely strong. The same would be true of a news feature on the High Museum that included a shot of "Church Picnic."[105]

Justification cannot be found in the poster's use as pure set decoration but can be found in its use as part of a news story or feature. It really should not matter whether the latter use was transformative, but not the

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100 *Id*. at 1401 (citation and footnote omitted).

101 Zimmerman, *supra* note 74, at 258-59.

102 Perhaps, however, the injunctive relief might have been withheld post-*eBay*. See cases cited in note 88, *supra*, and Dannay *eBay* article, *supra* note 82, at 460 ("[C]ourts *must* now consider the impact of *eBay* in *all* copyright cases and especially in those devilishly difficult fair use cases that have tantalized or tormented us all."); 4 NIMMER & NIMMER, *supra* note 82, § 14.06 [A] [5] [b] and n.190.

103 126 F.3d 70 (2d Cir. 1997).

104 *Id*. at 79.

105 *Id*. (citation and footnotes omitted).

former. Perhaps each use was transformative, or neither, but we could conclude that one use was justified and the other not when weighed against the plaintiff's interests.[106]

Consider an ordinary example from the daily newspapers. Obituaries often reproduce song lyrics, poems, cartoons, or other copyrighted material to illustrate the work of the lyricist, poet, cartoonist, or other artist who died. Obituaries are part news story (that the artist died) and part biography (a brief account of the artist's life and work). Here's one example, from the New York Times obituary of Tammy Wynette, whose 1968 hit, *Stand by Your Man*, established her as a queen of country music. The obituary noted that this song, and others, established both her public image and her style, emphasizing "weepers about holding a marriage together or declaring her unending love." The obituary commented that *Stand by Your Man* sold over two million copies, and then quoted the heart of the lyrics:

> Sometimes it's hard to be a woman, giving all your love to just one man. You'll have bad times and he'll have good times doin' things that you don't understand. But if you love him, you'll forgive him even though he's hard to understand. And if you love him, oh be proud of him 'cause after all he's just a man.[107]

Let's assume those lyrics were published without permission. Essential to use? Transformative? Does it matter? Surely there was justification for the use that outweighed any interest of the copyright owner. For if it were otherwise, surely we would be left with arid news reports, biographies, and other creative and informative works.[108]

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106 Blanch v. Koons, 467 F.3d 244, 254-55 (2d Cir. 2006) (section entitled: "*Parody, Satire, and Justification for the Copying*").

107 Jon Pareles, *Tammy Wynette, Country Singer Known for 'Stand by Your Man,' is Dead at 55*, N.Y. TIMES, Apr. 8, 1998, at B11.

108 *See* Rogers v. Koons, 960 F.2d 301, 312 (2d Cir. 1992). "[F]air use permits lyrics or music to be copied in a literary magazine, but where the same material is published in a song sheet magazine, purchased for playing and not simply for reading, it is an unfair use. *Id*." (citing 3 NIMMER & NIMMER, *supra* note 82, § 13.05[B]). *See* Professor Melville Nimmer's November 3, 1964 comments on H.R. 11947, *supra* text at note 14, suggesting that "quotation of several lines from the lyrics of a popular song within a novel" would be fair use. Hofheinz v. A&E Television Networks, 146 F. Supp. 2d 442, 446-47 (S.D.N.Y. 2001) (use of movie clip in television biography of actor "was for the transformative purpose of enabling the viewer to understand the actor's modest beginnings in the film business," and not "to recreate the creative expression" in plaintiff's film).

V. CONCLUSION[109]

The simplicity of the factorless fair use provision Professor Melville B. Nimmer proposed in 1964, saying little more than "fair use of a copyrighted work is not an infringement of copyright," looks now like a wise recommendation. It's not merely its simplicity. But it would also remove the tyranny of the "porous" four factors and the weighing and aggregating they impose, and the more than occasional Procrustean efforts to align them with the ultimate fair use outcome. The four factors would not be forsaken, only subordinated (along with the preamble purposes and any other considerations) to the ultimate question we probably ask and answer in each case: In light of the purposes of copyright law and the public interest, is there sufficient justification for the use to outweigh the copyright owner's interests in prohibiting the use or at least in being compensated for that use, if an injunction is not warranted?

I end with the question I began with in this exploratory essay: Do the statutory four factors aid or impede fair use analysis? Professor Melville Nimmer may have hit the fair-use sweet spot when he proposed a factorless fair use. Professor David Nimmer may have recognized its wisdom by concluding that the four factors are, really, only a "fairy tale."

Maybe, then, it's time to reconsider a factorless fair use. On the fiftieth anniversary of the Nimmer copyright treatise, something to ponder. In the continuing, perhaps endless search for fair use "solutions," maybe Samuel Beckett deserves the final word:

> Ever tried. Ever failed. No matter.
> Try again. Fail again. Fail better.[110]

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109 Author's Note: In April 2013, well after this article was completed, the Second Circuit decided the long-awaited fair use case on appropriation art and transformativeness. Cariou v. Prince, 2013 U.S. App. LEXIS 8380 (2d Cir. Apr. 25, 2013). Reversing the district court, the Second Circuit found twenty-five of Prince's thirty "crude and jarring" artworks based on Cariou's "serene" photographs of Rastafarians transformative fair use as a matter of law, and remanded determination of the remaining five to the district court for further consideration. The Second Circuit clarified that there was no requirement that Prince's works "comment" on Cariou's or fall within any of Section 107's nonexclusive preamble purposes. (*See* text at note 73, *supra*.) Instead, consistent with *Campbell*, the new work, to qualify as transformative fair use, generally must alter the original with "new expression, meaning, or message." The court held that most of Prince's work met this standard, but for five it could not say for sure "whether Prince has transformed Cariou's work enough to render it transformative." *Id.* at *31. See my earlier discussion about the "central paradox" of transformativeness: "What standard do we adopt to distinguish 'transformed' from 'transformative' . . . ?"

110 Samuel Beckett, *Worstward Ho* (1983).