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## **Is Fair Use Actually Fair in the Digital Age for Good-Faith Creators: A Call for a Broader Interpretation of the Fair Use Doctrine in the Digital Age**

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**IS FAIR USE ACTUALLY FAIR IN THE DIGITAL AGE FOR  
GOOD-FAITH CREATORS?  
A CALL FOR A BROADER INTERPRETATION OF THE FAIR  
USE DOCTRINE IN THE DIGITAL AGE**

*Joseph Tromba*\*

**I. INTRODUCTION TO FAIR USE AND THE INTERNET**

Digital technologies have expanded the reach of copyright law.<sup>1</sup> This expansion opened the doors of creative expression to a myriad of technologically adept individuals willing to take advantage of the fast-growing digital age.<sup>2</sup> The Internet has created fresh and dynamic channels of communication, distribution, and expression for the public, and this ability coexists with the objectives of copyright.<sup>3</sup> Any person with Internet access may communicate with anybody from around the world who also has Internet access.<sup>4</sup> More importantly, the Internet has created alternate methods for distribution of new works for various artists and creators.<sup>5</sup> YouTube is perhaps one of the greatest examples of these avenues available on the Internet because of the innovative functionality it provides creators.<sup>6</sup> However, YouTube's operation has created challenges to copyright protection.<sup>7</sup>

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\*Joseph Tromba is a Juris Doctor candidate at Touro College Jacob D. Fuchsberg Law Center. The author wishes to thank his parents for their crucial guidance and support. Their unwavering love and support for the past 23 years has led the author to reach success that he had only dreamed of. Accordingly, this Note is dedicated to not only his parents but also his heroes, Giuseppe & Ellen Tromba. Thank you.

<sup>1</sup> Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1093 (2007).

<sup>2</sup> *Id.* at 1093.

<sup>3</sup> DanThu Thi Phan, *Will Fair Use Function on the Internet?*, 98 COLUM. L. REV. 169, 200 (1998).

<sup>4</sup> Alex C. McDonald, *Dissemination of Harmful Matter to Minors Over the Internet*, 12 SETON HALL CONST. L.J. 163, 167 (2001).

<sup>5</sup> Olufunmilayo B. Arewa, *YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431, 435 (2010).

<sup>6</sup> *Id.* at 449.

<sup>7</sup> *Id.*

Many copyright concerns relate to the manner in which users and creators can copy or barely alter copyrighted material with ease.<sup>8</sup> YouTube contains copyrighted work, and there is a lack of clarity for creators regarding the types of use that are permitted or protected by the fair use doctrine.<sup>9</sup> Creators are finding it increasingly difficult to gauge or predict what uses they are allowed to post, and what would or would not be considered unauthorized uses of the original creator's work.<sup>10</sup> YouTube has already started to see litigation because of alleged copyright infringement.<sup>11</sup>

Copyright seeks to encourage "the general welfare by protecting the fruits of intellectual creativity from activities that would undermine the author's or inventor's ability to reap a fair return from investments of time, money, or talent."<sup>12</sup> Further, copyright protection also exists "in original works of authorship fixed in any tangible medium of expression."<sup>13</sup> However, a person may recreate copyrighted work for a specific fair use; the owner of the original copyright does not own the sole right to this new use.<sup>14</sup> As the Internet continues to evolve, online copyright infringement continues to evolve as well into an ever-growing issue for copyright holders.<sup>15</sup>

Copyright infringement is a problem that is damaging Internet networks and their users.<sup>16</sup> There are different classes of copyright infringement.<sup>17</sup> The most basic and straightforward type of infringement is direct copyright infringement, which is when a copyright owner actually has ownership of a copyright and the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Arewa, *supra* note 5, at 452.

<sup>11</sup> Phong Dinh, *Click Here to Share! The Impact of the Veoh Litigations on Viacom v. YouTube*, 10 N.C. J. L. & TECH. 447, 450-51 (2009); *Viacom Intern., Inc. v. YouTube, Inc.*, 676 F.3d 19, 41 (2d Cir. 2012) (holding that a jury could find that YouTube was aware of specific clips that might constitute infringement).

<sup>12</sup> Dennis S. Karjala, *Distinguishing Patent and Copyright Subject Matter*, 35 CONN L. REV. 439, 441 (2003).

<sup>13</sup> 17 U.S.C. § 102; *see also* *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

<sup>14</sup> *Id.* at 433.

<sup>15</sup> Catherine Pignataro, *Copyright Law and the Internet: The New Generation of Legal Battles in the Courts*, 18 TOURO L. REV. 783, 786 (2002).

<sup>16</sup> Ankur R. Patel, *BitTorrent Beware: Legitimizing Bittorrent Against Secondary Copyright Liability*, 10 APPALACHIAN J.L. 117, 117 (2011).

<sup>17</sup> Pignataro, *supra* note 15, at 783.

infringer copies that work.<sup>18</sup> Vicarious copyright infringement occurs when a copyright owner has the ability to limit and control the acts of the infringer and derives a direct economic benefit from the infringer's use.<sup>19</sup> Contributory copyright infringement occurs when a copyright owner, aware of the infringing use, materially contributes to another's infringing use.<sup>20</sup> The alleged infringer would likely raise a fair use defense when a copyright owner alleges copyright infringement.<sup>21</sup>

The fair use doctrine has been used as a "defense to claims of copyright infringement"<sup>22</sup> in a wide range of cases.<sup>23</sup> This doctrine's use dates back to the incorporation of copyright protection in order to protect and encourage the progress of art and science.<sup>24</sup> The doctrine protects expressive possibilities for parody, education, criticism, and other methods of communication and expression that could not occur if the copyright owners had complete universal control over the ways in which their works are used.<sup>25</sup>

Fair use weighs a balance between the protection of copyrighted works and the taking from the copyrighted works in the creation of new works.<sup>26</sup> The doctrine draws a distinction between unauthorized copyright infringement and legitimate utilization of another's own work to create a new, useful work.<sup>27</sup> A person who creates a new fair use of an older work is not considered a copyright infringer with his or her use of such work.<sup>28</sup> In effect, fair use allows one to use a creator's copyrighted expression under specific circumstances.<sup>29</sup> Many believe this doctrine is crucial in preserving compatibility of free speech and copyright law.<sup>30</sup> Several fair use concerns pertain to its application and the uncertainty that exists

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<sup>18</sup> Elizabeth Schuerman, *Internet Service Providers and Copyright Liability-Don't Touch! . . . or at Least Not Too Much: Costar v. Loopnet*, 373 F.3d 544 (4th Cir. 2004), 30 S. ILL. U. L.J. 573, 575 (2006).

<sup>19</sup> Pignataro, *supra* note 15, at 787.

<sup>20</sup> Pignataro, *supra* note 15, at 787.

<sup>21</sup> Genan Zilkha, *Fair Use: An Overview*, 86-FEB N.Y. ST. B.J. 40, 40 (2014).

<sup>22</sup> Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2539 (2009).

<sup>23</sup> *Id.*

<sup>24</sup> 17 U.S.C. § 107 (1992).

<sup>25</sup> Carroll, *supra* note 1, at 1092.

<sup>26</sup> Anthony R. Enriquez, *The Destructive Impulse of Fair Use After Cariou v. Prince*, 24 DEPAUL J. ART, TECH & INTELL. PRO. L. 1, 9 (2013).

<sup>27</sup> *Id.*

<sup>28</sup> *Sony Corp. of America*, 464 U.S. at 433.

<sup>29</sup> Carroll, *supra* note 1, at 1089-90.

<sup>30</sup> Samuelson, *supra* note 22, at 2547

because of a plethora of new situations and mediums.<sup>31</sup> Further, the doctrine demonstrates the widespread appeal and importance of this defense as it pertains to the field of copyright law.<sup>32</sup>

Fair use is a defense in the Copyright Act that should evolve with the new digital age.<sup>33</sup> This Note will argue that the fair use doctrine should be applied broadly as it pertains to copyrighted work on the Internet, and that the doctrine should incorporate an emphasis on both the good faith basis of the original creator in alleging infringement and on the new creator in creating the new work. This Note will be divided into five sections. Section II will analyze the four factors of the fair use doctrine in the context of these Internet-based sites, such as YouTube. Section III will examine how the courts apply the fair use defense, both broadly and narrowly, and suggests that a broader interpretation of the doctrine should be favored. Section IV of this Note will argue that this doctrine should examine the good faith and motivations of both the copyright owner who makes an infringement claim and the alleged infringer of the copyright. Specifically, this section will propose a solution that encourages broadening fair use application and requiring a good faith basis on behalf of both the copyright owners and the alleged copyright infringers. Further, using YouTube as the centerpiece to represent these copyright claims, this section will discuss the importance that good faith should have for both the copyright owner and the alleged infringer.<sup>34</sup> Section V will summarize the proposed solutions, which are a broad application of the doctrine and an increased focus on good faith of both the copyright owners and alleged infringers. This section will also discuss how society should be encouraged, as a whole, to

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<sup>31</sup> Carroll, *supra* note 1, at 1093.

<sup>32</sup> Samuelson, *supra* note 22, at 2547; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (concluding that the commercial purpose of a parody did not make a presumption averse to fair use concerning a copyrighted song). This case involved a rap parody by 2 Live Crew of the song, "Oh, Pretty Woman," by Roy Orbison. *Id.* at 572-74. Acuff-Rose Music, which was the owner of the song, sued 2 Live Crew for infringement of the copyright of the Roy Orbison song. *Id.* at 572-74. *Sony Corp. of America*, 464 U.S. at 445-46.

<sup>33</sup> Jonathan Band, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, 59 J. COPYRIGHT SOC'Y U.S.A. 453, 453 (2012).

<sup>34</sup> YouTube is the center of this discussion because of its prominent position on the Internet. Katrina Wu, *YouTube Marketing: Legality of Sponsorship and Endorsements in Advertising*, 22 J.L. BUS. & ETH. 59, 61 (2016); William Henslee, *Copyright Infringement Pushin': Google, YouTube, and Viacom Fight for Supremacy in the Neighborhood that may be Controlled by the DMCA's Safe Harbor Provision*, 51 IDEA 607, 621 (2011).

exercise its privilege of fair use, especially with the ease of access to copyrighted works that the Internet provides.

## II. FACTORS OF THE FAIR USE DOCTRINE

The fair use doctrine contains four factors that are considered by the court in determining whether a work is protected by fair use or constitutes copyright infringement.<sup>35</sup> These factors help guide the court in determining whether the new work is protected by fair use.<sup>36</sup> The courts have recognized that the doctrine calls for an analysis on a case-by-case basis.<sup>37</sup> Courts do not apply the factors as a strict formula; they are considered as nonexclusive parts of the analysis.<sup>38</sup> The defense requires a delicate analysis to ensure that the public has access to creative works.<sup>39</sup> Further, the four factors are not restrictive, and courts can contemplate other factors.<sup>40</sup> These statutory factors are not controlling of a fair use examination and simply guide the analysis.<sup>41</sup>

The fair use section of the Copyright Act provides:

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--

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<sup>35</sup> 17 U.S.C. § 107 (1992); *see also* Zilkha, *supra* note 21, at 40.

<sup>36</sup> Zilkha, *supra* note 21, at 40.

<sup>37</sup> *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 112 (2d Cir. 1998) (holding that the utilization of a picture was protected by fair use because the transformation of the original picture resulted in access to two specific works, serving specific markets, and would not deter the first work's creator from creating further works).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Byrne v. British Broadcasting Corp.*, 132 F. Supp. 2d 229, 236 (S.D.N.Y. 2001) (finding that a disputed issue of material fact existed regarding the fair use factors in relation to the party's use of a song).

<sup>41</sup> *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir. 1998) (holding that a book did not constitute fair use of the original work because the new work was minimally transformative at best).

- (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.<sup>42</sup>

For a court's fair use analysis, the court examines these factors in order to see if the alleged infringement is protected by this defense.<sup>43</sup>

### A. The First Factor

The first factor of the fair use doctrine is one of the most crucial factors considered when analyzing fair use.<sup>44</sup> The first factor considers "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes" in determining whether the new work infringes on the copyright of the original creator.<sup>45</sup> The main focus of this factor is to decide "whether a new work merely supersedes the objects of the original work, or" instead adds something new.<sup>46</sup> In other words, courts determine whether the nature of the work is "transformative."<sup>47</sup>

Transformation occurs when the work goes beyond simply repackaging the original work.<sup>48</sup> Transformative use of a work means that the new author takes the original author's work and changes, or transforms, the work into something new.<sup>49</sup> For example, if a creator takes a song that another party owns the rights to and utilizes the song in a way that is different from the original song, the new work would

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<sup>42</sup> 17 U.S.C. § 107 (1992).

<sup>43</sup> Zilkha, *supra* note 21, at 40.

<sup>44</sup> See generally 4 Nimmer on Copyright § 13.05 (2017); Zilkha, *supra* note 21, at 40.

<sup>45</sup> 17 U.S.C. § 107 (1992).

<sup>46</sup> *Campbell*, 510 U.S. at 579.

<sup>47</sup> *Id.*

<sup>48</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015) (concluding that the defendant's use of the material weighed in favor of fair use because the snippets of the original work that were shown were in a manner that conveys little of the purpose of the original work). A group of authors brought action against an Internet search engine alleging that the engine allowed the general public to look at the actual texts of the books and at displays of portions of the texts of the books. *Id.* at 208-11.

<sup>49</sup> *Id.* at 214.

be transformative of the original.<sup>50</sup> The examples in the statute should guide the courts, such as whether the original work was used for such purposes as news reporting, teaching, criticism, or research.<sup>51</sup>

In *Fox News Network v. TVEyes*,<sup>52</sup> a television company brought a copyright infringement action against a service that compiled news reports using the television company's video content into databases.<sup>53</sup> The court recognized that a service that compiled news reports provided "social and public benefit"<sup>54</sup> and served "an important public interest," as a result.<sup>55</sup> Further, the media-monitoring service's copying of the original work was transformative and did not constitute a substitute of the original work.<sup>56</sup> However, a second ruling narrowed this decision, finding TVEyes' archiving function to qualify as fair use, but not the downloading and search functions based on date and time.<sup>57</sup>

In *Calkins v. Playboy Enterprises Intern., Inc.*,<sup>58</sup> a photographer sued a magazine alleging that the magazine published one of her model portraits.<sup>59</sup> The court found that the use of a picture was transformative because, although it was a duplicate of the original picture, the new image was smaller and fulfilled a different purpose than the original picture.<sup>60</sup> This case is important because it demonstrates an instance where a court looked at the size of the copyrighted work, a photograph in this case, and used the size difference as a basis for finding that the first factor weighed in favor

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<sup>50</sup> *Campbell*, 510 U.S. at 590-92.

<sup>51</sup> *Los Angeles Times v. Free Republic*, 2000 WL 565200, at \*5 (C.D. Cal. 2000) (finding that the nontransformative purpose of the copying was averse to fair use because of the systematic copying of the duplicates of the articles).

<sup>52</sup> 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (holding that the copying of broadcast content for indexing and slipping services constituted fair use). This case concerned a media-monitoring service which aggregated news reports into searchable databases. *Id.* at 383-87. A television news company sued the service for copyright infringement. *Id.* at 383-88.

<sup>53</sup> *Id.* at 383-87.

<sup>54</sup> *Id.* at 397.

<sup>55</sup> *Fox News Network*, 43 F. Supp. 3d at 397.

<sup>56</sup> *Id.* at 393.

<sup>57</sup> *Fox News Network, LLC v. TVEyes, Inc.*, 124 F. Supp. 3d 325, 337 (S.D.N.Y. 2015).

<sup>58</sup> 561 F. Supp. 2d 1136 (E.D. Cal. 2008) (ruling that fair use protected a magazine's utilization of a picture because the use was transformative and the use of the picture in the magazine was creative and had no demonstrable outcome on plaintiff's potential market). A magazine published a piece that contained a portion of a professional photographer's portraits of a model in the magazine's centerfold. *Id.* at 1138-39. The photographer brought a copyright infringement action against the magazine for the use of the photographer's portraits. *Id.*

<sup>59</sup> *Id.* at 1138-39.

<sup>60</sup> *Id.* at 1141.



of fair use.<sup>61</sup> This idea has also been enforced in *Perfect 10, Inc. v. Amazon.com, Inc.*<sup>62</sup>

The first factor is crucial in any fair use analysis because the transformativeness, or lack thereof, of any work that allegedly infringes a copyright is the general point on which courts focus.<sup>63</sup> Thus, this factor is one of the ultimate guiding points for courts to use in any fair use evaluation.<sup>64</sup>

## B. The Second Factor

The second factor considers “the nature of the copyrighted work.”<sup>65</sup> This factor acknowledges that innovative works are more related to the basic ideas of copyright protection than informational or fictional works are, and that the fair use defense is harder to establish when innovative works are copied.<sup>66</sup> Pertaining to this point, courts consider relevant factors, such as: “(1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished . . . .”<sup>67</sup> This factor seeks to ensure that the author retains the right to exclusively control the initial public appearance of the expression of the work prior to the release of the work.<sup>68</sup> Further, the second factor

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<sup>61</sup> *Calkins*, 561 F. Supp. 2d at 1141.

<sup>62</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007) (ruling that the incorporating of linked images of photographs did not constitute a display of the copyright owner’s works).

<sup>63</sup> Zilkha, *supra* note 21, at 42.

<sup>64</sup> Zilkha, *supra* note 21, at 42.

<sup>65</sup> 17 U.S.C. § 107 (1992).

<sup>66</sup> Kristen Chiger, *South Park & The Law*, 14 TEX. REV. ENT. & SPORTS L. 47, 53 (2012). Generally, the consensus is that the second point is not crucial in analyzing fair use. *Leibovitz*, 137 F.3d at 113. A photographer took a photograph of Demi Moore, an actress, for the cover of a magazine. *Id.* at 111. Moore was nude and eight months pregnant in the photograph. *Id.* Paramount utilized a similar photograph to market the release of its newest *Naked Gun* film. *Id.* The photographer sued Paramount alleging that the marketing infringed on the copyright in the photograph. *Id.*

<sup>67</sup> *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006) (concluding that the second fair use factor had limited weight in the case because the alleged infringer used the work in a transformative manner to comment on her image’s social and aesthetic meaning rather than to exploit its creative virtues). A fashion photographer sued a visual artist and institutions that displayed his paintings after an artist used her photograph in a collage painting. *Id.* at 246-49.

<sup>68</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 564 (1985) (concluding that the petitioners demonstrated actual damage caused by the infringing conduct of the respondents and that the second factor weighed against fair use). *Harper & Row*

is not crucial in parody cases since parodies essentially copy publicly renowned expressive works.<sup>69</sup>

In *Gaylord v. United States*,<sup>70</sup> a sculptor sued the United States because the Postal Service released a stamp containing a depiction of the sculptor's sculptures.<sup>71</sup> The court found that the second factor weighed against fair use because a stamp, the new work, did not use The Column, the alleged infringed upon original copyrighted work in question, in a transformative way because "the purpose and character of the use were identical."<sup>72</sup> The court concluded that the second factor worked against fair use because the new work simply used the original work and added nothing creative or expressive to it; essentially, the new work was a recreation of the originally published work.<sup>73</sup>

In *Los Angeles News Service v. Tullo*,<sup>74</sup> a news service sued a news clipping service alleging that the news clipping service infringed on copyrights by selling recordings of videotapes of events, such as a train wreck and an airplane crash to other parties.<sup>75</sup> The court found that the second factor weighed in favor of fair use because the copied material consisted of videotapes of news occurrences, which are factual works as opposed to fantasy or fiction.<sup>76</sup> Accordingly, the court decided the second factor weighed in favor of fair use because factual works are more important to protect under this doctrine than works of fantasy or fiction.<sup>77</sup> The basis for this view is that factual works are

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Publishers had the right to publish the memoirs of President Ford. *Id.* However, Nation Enterprises published an article on the memoirs and quoted a specific portion about the pardon of Nixon. As a result, Harper & Row sued Nation Enterprises for copyright infringement. *Id.*

<sup>69</sup> *Campbell*, 510 U.S. at 586.

<sup>70</sup> 595 F.3d 1364 (Fed. Cir. 2010) (holding that the government's stamp was not fair use because permitting the government to exploit a creative work would not further the goals of copyright). A sculptor, who created sculptures of soldiers in a Korean War memorial, sued the United States for copyright infringement because the Postal Service issued a stamp including a depiction of the sculptures. *Id.* at 1369-71.

<sup>71</sup> *Id.* at 1368-71.

<sup>72</sup> *Id.* at 1374.

<sup>73</sup> *Id.*

<sup>74</sup> 973 F.2d 791 (9th Cir. 1992) (holding that fair use did not protect the alleged infringer from liability because of the use of the most important portion of the material, the commercial purpose of the use, and the hostile impact on the original author's potential market). The Los Angeles News Service sued a news clipping service because the service allegedly infringed copyrights in videotapes of news events, which included a train wreck and an airplane crash, by distributing recordings of television transmissions to other individuals. *Id.* at 792-93.

<sup>75</sup> *Id.* at 792-93.

<sup>76</sup> *Id.* at 798.

<sup>77</sup> *Id.*

more important to society as a whole, and the courts are more likely to find fair use with factual works than works of fantasy or fiction.<sup>78</sup>

Generally, the second factor weighs in favor of fair use when a copyrighted work has an emphasis on information or facts.<sup>79</sup> Ultimately, the second factor is usually not found to be indicative of whether the defense applies; however, it may play a great part in the determination of fair use for cases pertaining to unpublished or factual works.<sup>80</sup>

### C. The Third Factor

The third factor considers “the amount and substantiality of the portion used in relation of the copyrighted work as a whole.”<sup>81</sup> The amount used in the new work is determined by how much one draws from the original work.<sup>82</sup> The general notion is that the less taken “from the original work,”<sup>83</sup> the greater the chance “that the new work will be found to be fair use.”<sup>84</sup> However, if the section taken from the work is the main focus, then fair use will most likely not be applied.<sup>85</sup> Essentially, the greater the amount (the quantitative elements of the work), or the more crucial the portion (the qualitative elements of the work), of the original work that is taken, the higher the possibility that the new work might be a substitute for the original work, and therefore decrease the original copyright holder’s sales or profits.<sup>86</sup>

In *Denison v. Larkin*,<sup>87</sup> an attorney sued a disciplinary commission for using sections of her blog, which she owned the copyright to, against her in a proceeding.<sup>88</sup> The court held that the

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<sup>78</sup> *Los Angeles News Service*, 973 F.2d at 798.

<sup>79</sup> Douglas J. Frederick, *Watching the Watchdog: Modifying Fair Use of Works Produced by the Institutional Press*, 87 IOWA L. REV. 1059, 1068 (2002).

<sup>80</sup> Zilkha, *supra* note 21, at 42.

<sup>81</sup> 17 U.S.C. § 107 (1992).

<sup>82</sup> Chiger, *supra* note 66, at 54.

<sup>83</sup> Chiger, *supra* note 66, at 54.

<sup>84</sup> Chiger, *supra* note 66, at 54.

<sup>85</sup> Chiger, *supra* note 66, at 54.

<sup>86</sup> *Authors Guild*, 804 F.3d at 221; *Haper & Row Publishers, Inc.*, 471 U.S. at 601.

<sup>87</sup> 64 F. Supp. 3d 1127 (N.D. Ill. 2014) (finding that a state attorney disciplinary commission’s utilization of copyrighted work from an Internet blog was protected under fair use because the utilization of the blog in a state disciplinary action does not create any hostile impact on any potential market for the blog). An attorney brought action against an attorney disciplinary commission because of the commission’s utilization of parts of the attorney’s copyrighted Internet blog. *Id.* at 1129-31.

<sup>88</sup> *Id.* at 1129.

amount taken from a blog was reasonable in relation to its purpose because fifteen paragraphs is not a market substitute for a blog that contained 1,000 pages.<sup>89</sup> Essentially, the court considered whether the amount utilized was rational regarding the intended basis of the copying.<sup>90</sup>

In *Swatch Group Management Services Ltd. v. Bloomberg L.P.*,<sup>91</sup> a Swiss corporation sued a Delaware corporation which recorded the Swiss corporation's earnings call and made it available online to the Delaware corporation's subscribers.<sup>92</sup> The Swiss corporation claimed the recording infringed its copyright.<sup>93</sup> The court acknowledged that the interest for public concern is more effectively served by the examination of the entirety of the information, which includes oral speech that may not be on the page but is crucial to understanding the factual content.<sup>94</sup> Accordingly, the court concluded that the new work constituted fair use even though the defendant used the entire copyrighted work because of the effect that it could have on the public.<sup>95</sup> This decision is reflective of how one might take the entire copyrighted work of another, but use it in a different way that betters the public.<sup>96</sup>

Generally, if the alleged infringer uses the entire original work, this factor will weigh against fair use, whereas if only a small and insignificant portion of the work is used, it will weigh in favor of fair use.<sup>97</sup> However, this factor is ultimately tough to gauge because there is no bright line rule as to how much of an original work may be used in a new work.<sup>98</sup> Thus, this factor is not the most helpful in determining whether fair use applies.<sup>99</sup>

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<sup>89</sup> *Id.* at 1135.

<sup>90</sup> *Id.* at 1134.

<sup>91</sup> 756 F.3d 73 (S.D.N.Y. 2012) (holding that the use of the copyrighted work was fair use because the goals of copyright law were better served by permitting the utilization of the copyrighted work). A manufacturer of watches brought suit against a news service claiming that the service infringed the manufacturer's copyright in an earnings call recording by recording the audio without authorization from the manufacturer and making a transcript of the call accessible to paid subscribers. *Id.* at 78-79.

<sup>92</sup> *Id.* at 79.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 90.

<sup>95</sup> *Swatch Group Management Services Ltd.*, 756 F.3d at 90.

<sup>96</sup> *Id.*

<sup>97</sup> Zilkha, *supra* note 21, at 42.

<sup>98</sup> Zilkha, *supra* note 21, at 42.

<sup>99</sup> Zilkha, *supra* note 21, at 42.

#### D. The Fourth Factor

This fourth factor considers “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>100</sup> This factor is often regarded as the most important factor of fair use.<sup>101</sup> The question that is asked when determining the fourth factor is whether actual damage followed from the new creator’s utilization of the original material.<sup>102</sup> The court considers whether the use of the new work has any effect on the original owner’s ability to utilize his or her copyrighted work.<sup>103</sup> This factor compels courts to contemplate not only the scope of market damage created by the actions of the alleged copyright infringer, but whether the alleged infringer’s unrestricted use would produce a detrimental effect on the original work’s possible economic market, which includes derivative works.<sup>104</sup> The less of a detrimental impact that the new work has on the copyrighted owner’s potential financial gain, the less benefit to the public is required to be shown to warrant its use.<sup>105</sup> Courts have also applied the server test, which examines whether a computer owner is providing electronic information to the user directly.<sup>106</sup> This factor requires courts to contemplate the potential extent of market damage, as well as whether widespread conduct to the level of defendant’s conduct would result in an adverse reaction on the possible market for the copyrighted work.<sup>107</sup>

In *Sundeman v. Seajay Society, Inc.*,<sup>108</sup> the executor of an author’s estate brought suit against an organization that kept a manuscript of an unpublished novel of the deceased author because the executor claimed that the organization’s possession of the manuscript

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<sup>100</sup> 17 U.S.C. § 107 (1992).

<sup>101</sup> *Harper & Row Publishers, Inc.*, 471 U.S. at 566.

<sup>102</sup> Chiger, *supra* note 66, at 55.

<sup>103</sup> Chiger, *supra* note 66, at 55.

<sup>104</sup> *Campbell*, 510 U.S. at 590-92.

<sup>105</sup> *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981) (holding that the utilization of a song was not protected under fair use because the infringing work was not a parody of the infringed work). A show, “Let My People Come,” performed a song, “Cunnilingus Champion of Company C,” that sounded similar to an already existing copyrighted song, “Boogie Woogie Bugle Boy of Company B.” *Id.* at 181-82.

<sup>106</sup> *Perfect 10, Inc.*, 508 F.3d at 1159.

<sup>107</sup> *Campbell*, 510 U.S. at 590.

<sup>108</sup> 142 F.3d 194 (4th Cir. 1998) (concluding that the alleged infringer made a fair use of the author’s novel). An executor of a deceased writer’s estate sued a nonprofit organization that possessed a manuscript of the writer’s unpublished novel alleging copyright infringement. *Id.* at 197-201.

amounted to copyright infringement.<sup>109</sup> The court considered the possibility that the allegedly infringing work, a presentation, actually increased market demand for the original work, a novel.<sup>110</sup> Accordingly, the court decided that the presentation's effect on the market weighed in favor of fair use.<sup>111</sup> The court's analysis is important because it emphasized the idea that the new material actually benefitted the original work and the original author because of the utilization of the original work in the new material.<sup>112</sup> Thus, one must take into account the potential positive market effect the new material may have on the original work, and how this weighs in favor of protection under fair use.<sup>113</sup>

Generally, this factor weighs in favor of a new work when the new work occupies a niche in a market that the original copyright owner was uninterested in occupying.<sup>114</sup> However, the courts should place more of an emphasis on whether the new work benefits the potential market for the original work.<sup>115</sup> The utilization of the original work in the new work might actually benefit the market for the original work.<sup>116</sup> This emphasis on potential market benefit is crucial to the fair use analysis because of the fourth factor's significance in the ultimate fair use analysis.<sup>117</sup> Courts tend to apply this factor to reach both broad and narrow results under fair use.<sup>118</sup>

### III. BROAD VS. NARROW INTERPRETATION OF THE FAIR USE DOCTRINE

A broad interpretation of the fair use doctrine ultimately allows room for good faith to enter the equation, which is needed in the digital era.<sup>119</sup> Congress intended for § 107 to restate the fair use doctrine, not to change, broaden, or narrow the doctrine.<sup>120</sup> However, the fair use

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<sup>109</sup> *Id.* at 198-99.

<sup>110</sup> *Id.* at 207.

<sup>111</sup> *Sundeman*, 143 F.3d at 208.

<sup>112</sup> *Id.* at 207.

<sup>113</sup> *Id.*

<sup>114</sup> Zilkha, *supra* note 21, at 42.

<sup>115</sup> *Sundeman*, 143 F.3d at 207.

<sup>116</sup> *Id.*

<sup>117</sup> *Harper & Row Publishers, Inc.*, 471 U.S. at 566.

<sup>118</sup> *Campbell*, 510 U.S. at 577.

<sup>119</sup> Samuelson, *supra* note 22, at 2579.

<sup>120</sup> *Campbell*, 510 U.S. at 577.

doctrine has been interpreted both broadly and narrowly since its inception.<sup>121</sup> The courts apply the previously mentioned fair use factors to allegations of copyright infringement, and that has resulted, depending on the case, in both broad and narrow interpretations of the defense.<sup>122</sup>

### A. Broad Interpretation

The broad application of the fair use doctrine raises a concern that it would undermine, decrease, or reduce incentives to create works of art.<sup>123</sup> The Supreme Court, in *Harper & Row Publishers, Inc.*, stated if fair use doctrine permitted “extensive prepublication quotations from an unreleased manuscript without the copyright owner’s consent,”<sup>124</sup> it would pose significant harm to the profitability of the rights of the copyright owner.<sup>125</sup> However, the fear of undermining incentives blinds many to what broad application of fair use could achieve.<sup>126</sup> Fair use could promote the creation of works of art.<sup>127</sup> If an artist believes that fair use may apply to his use, he may act on expressing his artistic ideas, as opposed to an artist possibly not acting on his ideas because of the fear that the fair use defense will not protect his work.<sup>128</sup>

The court has expressed that the reach of fair use varies depending on the degree of innovation and creativity ingrained in the new work.<sup>129</sup> A work that is fact-oriented or deemed to include minimal creativity or innovation is automatically presumed to allow for a broader scope for noninfringing copying.<sup>130</sup> Non-factual works are deemed to be highly innovative and allow for narrower ranges of copyright.<sup>131</sup> The idea behind this is creators of non-factual based work are capable of producing their own work, using their own

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Samuelson, *supra* note 22, at 2545.

<sup>124</sup> *Harper & Row Publishers, Inc.*, 471 U.S. at 569.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*; Carroll, *supra* note 1, at 1092.

<sup>129</sup> Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1559 (2004).

<sup>130</sup> *Id.* at 1559-60.

<sup>131</sup> *Id.* at 1560.

imaginations, like the creators whose copyrighted works they infringe on.<sup>132</sup> Further, comment and criticism may be preferred purposes for trying to assert fair use because they relate to works that require higher creativity, but within narrow bounds.<sup>133</sup> This view is misguided because one may be able to create on his own through using another author's work as a starting point.<sup>134</sup> If a new author uses a portion of a preexisting work, it should not be assumed that this author does not share the creativity of the original author.<sup>135</sup> Quite the contrary, if a new author copies a portion from a preexisting work and adds to it or changes it, the author should be thought of in high regard because he managed to have a different vision for the work.<sup>136</sup> Fair use that allows authors and creators to copy from one another and to add to or change the work promotes the expression of art from a plethora of different minds and allows for interpretation of a work in more than one specific medium or dimension.<sup>137</sup>

In *Cariou v. Prince*,<sup>138</sup> Prince's artworks, which incorporated Cariou's photographs, were advertised to celebrities including Tom Brady, Anna Wintour, and Beyonce.<sup>139</sup> A series of the artworks sold at a gallery for upwards of \$10 million.<sup>140</sup> In *Cariou*, the court ruled that Prince's unlicensed utilization of Cariou's photographs with minor modifications was protected under fair use and did not constitute copyright infringement.<sup>141</sup> The court reached this conclusion because Prince's images had "a different character, g[a]ve Cariou's photographs a new expression, and employ[ed] new aesthetics with creative and communicative results distinct from Cariou's."<sup>142</sup> Further, Prince had not displayed the work in a different way than Cariou, but instead he added new elements and displayed images with

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Madison, *supra* note 129, at 1560.

<sup>135</sup> Madison, *supra* note 129, at 1560.

<sup>136</sup> Madison, *supra* note 129, at 1560.

<sup>137</sup> Madison, *supra* note 129, at 1560.

<sup>138</sup> 714 F.3d 694 (2d Cir. 2013).

<sup>139</sup> *Id.* at 709.

<sup>140</sup> Liz Brown, *Remixing Transformative Use: A Three-Part Proposal for Reform*, 4 NYU J. INTELL. PROP. & ENT. L. 139, 141 (2014).

<sup>141</sup> *Id.*

<sup>142</sup> *Cariou*, 714 F.3d at 708.



a completely different aesthetic.<sup>143</sup> Accordingly, this case broadened the scope of fair use.<sup>144</sup>

A broader application of fair use allows for advancements of already existing works.<sup>145</sup> It allows for the mindset that adding new elements to already existing works or displaying the original works in a completely new light is what this doctrine should be.<sup>146</sup> The public should have a defense that allows for the evolution of art and creativity, which would be better than a narrow approach.

### B. Narrow Interpretation

When applying fair use narrowly, courts will analyze the fair use claims strictly, which makes it more difficult for a fair use defense to apply. Fair use's scope tends to be "narrower with respect to unpublished works than to published works."<sup>147</sup> The idea behind a narrow interpretation of the defense is "to preserve the author's right of first publication."<sup>148</sup> This right of first public appearance by the author for a work that he or she puts out is thought to outweigh a defense of fair use, but the fact the work is unpublished does not, by itself, bar fair use from applying.<sup>149</sup> Further, on a more general scale, the basis behind this narrow approach is that many specific types of works warrant greater protection.<sup>150</sup>

Initially, the fair use defense was intended to apply narrowly.<sup>151</sup> The doctrine was created to preserve copyright's balance through analyses of specific individual works, and was not intended to apply broadly.<sup>152</sup> Traditionally, the holding of one specific fair use case narrowly impacts future cases.<sup>153</sup> However, it is common knowledge

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<sup>143</sup> *Id.*

<sup>144</sup> Brown, *supra* note 140, at 141.

<sup>145</sup> Brown, *supra* note 140, at 141.

<sup>146</sup> Brown, *supra* note 140, at 141.

<sup>147</sup> David R. Ellis, *As Fair as They Wanna Be—The U.S. Supreme Court Upholds the Fair Use Parody Defense*, 68-NOV FLA. B.J. 83, 83 (1994).

<sup>148</sup> Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1, 34 (1999).

<sup>149</sup> *Harper & Row Publishers, Inc.*, 471 U.S. at 540. 17 U.S.C. § 107 (1992).

<sup>150</sup> Crews, *supra* note 148, at 58.

<sup>151</sup> Kevin M. Lemley, *The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110 PENN ST. L. REV. 111, 133 (2005).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

that laws evolve and they should be allowed to evolve accordingly with the advancement of the Internet.<sup>154</sup> Further, the concept of changing a narrow interpretation of fair use should not frighten the courts, but encourage the courts to restructure fair use to reflect the artistic achievements that digital platforms offer.

### C. Broader is Better

Many commentators have proposed that fair use be applied broadly to older works, such as those that are out of print, no longer commercially utilized, or have authors that are difficult to locate.<sup>155</sup> This Note argues that fair use should be applied broadly regarding all works, not just older works. It is crucial now more than ever that the fair use doctrine be applied broadly because if a new author uses the original work in any way that is different from the original way, fair use should be contemplated and analyzed in regard to the new work.

Public access to copyrighted works grows every day, and it allows the public to display its artistic expression of these copyrighted works.<sup>156</sup> A narrow and strict application of the fair use defense might scare an individual away from creating new works if he or she believes that fair use may not apply to his or her particular case.<sup>157</sup> In applying the fair use defense narrowly, the world may miss out on the next big artistic achievement or breakout work because of the restriction on changing another creator's work.<sup>158</sup> Broad application of the fair use doctrine incentivizes individuals to create works based on other people's works because they would receive attention and profits for their work without the fear of potential copyright infringement suits.<sup>159</sup>

## IV. PROPOSED SOLUTIONS

The Supreme Court should institute a procedure that provides "relief for users who erroneously rely on fair use in good faith."<sup>160</sup> A focus on good faith would allow the Court to adopt a broader approach

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<sup>154</sup> Allan C. Hutchinson, *Work-In-Progress: Evolution and Common Law*, 11 TEX. WESLEYAN L. REV. 253, 261 (2005).

<sup>155</sup> Samuelson, *supra* note 22, at 2579.

<sup>156</sup> Samuelson, *supra* note 22, at 2579.

<sup>157</sup> Samuelson, *supra* note 22, at 2579.

<sup>158</sup> Samuelson, *supra* note 22, at 2579.

<sup>159</sup> Samuelson, *supra* note 22, at 2579.

<sup>160</sup> Carroll, *supra* note 1, at 1149.

to fair use, which should be the approach, because of the Internet's capability to "improve and strengthen learning, democratic participation, and the creation of new artistic works."<sup>161</sup> Accordingly, the Court should institute an increased focus on what is missing from analyses on fair use—a concern with the way in which the new works are used.<sup>162</sup> The Court should focus on whether the new work promotes the original work. Further, the Supreme Court should focus on the good faith basis of the copyright owner in making a claim, as well as the new creator in using the original work. Courts should also apply fair use broadly in order for all to potentially receive the protection of the defense.

### A. Promoting the Original Work

Congress and the courts established that the Copyright Act's main goal is to further the output and availability of knowledge through public access.<sup>163</sup> This goal leads to teaching, research, and scholarship as three favored uses in the fair use doctrine because of the purpose to further the availability of knowledge.<sup>164</sup> However, this is not where the analysis of promotion, as it pertains to the new work, should end. Accordingly, the fourth factor's application should become crucial to the analysis of where the fair use defense applies.<sup>165</sup>

If the new work promotes the older work, the new work should be protected under fair use. This idea lends itself to the fourth factor of the fair use doctrine because if a new work promotes the old work then this promotion will benefit the older work and the author.<sup>166</sup> Similarly, this concept of promoting the original work is essentially what the court in *Sundeman* referenced, but did not expand on.<sup>167</sup>

As demonstrated in several cases, such as *Fox News Network* and *Calkins*, fair use is often reached by balancing the four factors, but one of the factors may weigh heavily in favor of fair use and ultimately indicate whether fair use applies even if the other three factors weigh against it.<sup>168</sup>

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<sup>161</sup> Thi Phan, *supra* note 3, at 216.

<sup>162</sup> Madison, *supra* note 129, at 1545.

<sup>163</sup> Samuelson, *supra* note 22, at 2580-81.

<sup>164</sup> Samuelson, *supra* note 22, at 2580-81.

<sup>165</sup> Samuelson, *supra* note 22, at 2580-81.

<sup>166</sup> *Perfect 10, Inc.*, 508 F.3d at 1168.

<sup>167</sup> *Sundeman*, 142 F.3d at 207.

<sup>168</sup> *Fox News Network*, 43 F. Supp. 3d at 397; *Calkins*, 561 F. Supp. 2d at 1141.

Accordingly, the fact that a new work may invoke a reaction that sees the rise in popularity of the original work should be an important factor to consider when examining market effect, which is a component of the fourth factor.<sup>169</sup> For example, if a new song contains elements of an old song, this may actually help the old song because individuals who listen to the new song may not be familiar with the original song and will want to experience the first song, which would help, not hurt, the original song.<sup>170</sup> Further, the new song may not only recreate interest in the original song, but those experiencing the new song may wonder what new songs the original author created.<sup>171</sup> Essentially, a new work may reinvigorate the public interest in the original work and make it seem fresh all over again.<sup>172</sup> Thus, the fact that a new work often can have a positive promotional effect on the original work or the author should be a crucial factor in analyzing whether the fair use defense protects a new work.<sup>173</sup>

## B. YouTube

YouTube.com (hereinafter “YouTube”) is an Internet site that sees the cultivation of art through different cultures and generations, and is an efficient online platform to analyze fair use for the purposes of this Note.<sup>174</sup> Currently, YouTube is the “posterchild for the general public’s passion for copyright infringement, yet its importance as a medium for creativity and cultural discussion is widely misunderstood.”<sup>175</sup> YouTube is a popular Internet site that hosts videos.<sup>176</sup> On YouTube, users upload videos for others to watch and share.<sup>177</sup> YouTube allows the public to display and express their artistic endeavors on a global platform that makes it possible for individuals around the world to experience and reflect on the artistic

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<sup>169</sup> Chiger, *supra* note 66, at 55.

<sup>170</sup> *Sundeman*, 143 F.3d at 207.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Kurt Hunt, *Copyright and YouTube: Pirate’s Playground or Fair Use Forum?*, 14 MICH. TELECOMM. & TECH L. REV. 197, 200-02 (2007).

<sup>175</sup> *Id.* at 207.

<sup>176</sup> *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1149 (9th Cir. 2015) (denying a copyright owner’s motion to dismiss because the owner had to contemplate the fair use doctrine in providing a takedown notice and would have to act in good faith in providing the notice).

<sup>177</sup> *Id.*

expression.<sup>178</sup> This site has been labeled “as ‘the future of movie-marketing’ by some, and an ‘illegal free-for-all’ by others.”<sup>179</sup>

YouTube is effective in blurring “the line between publication and everyday conversation.”<sup>180</sup> Given the dependence “on YouTube as a platform for independent reviews by multitudes of content creators, fair use should be a cornerstone for creativity on the site.”<sup>181</sup> The site allows the sharing of debate, ideas, and culture in ways that were previously impossible, and thus, plays a progressive and crucial role in society.<sup>182</sup> YouTube provides a platform for the “independent entrepreneurial enthusiast to offer their opinion on the latest release, while simultaneously garnering modest revenue from each offering.”<sup>183</sup> Accordingly, this site has created quarrels as it pertains to copyright and copyright infringement.<sup>184</sup> Case law and federal statutes require fair use analyses “of user-generated content on a case-by-case basis,” which presents a problem because of the plethora of content constantly uploaded to YouTube.<sup>185</sup> Consequently, the general “public needs the protection of a strong and flexible fair use limitation now more than ever” because of the potential infringing on the public’s right to comment and criticize the work of others.<sup>186</sup>

This Note, to be clear, is not “intended to condone the act of uploading full-movies, television shows, music videos, or songs on user-generated sites like YouTube.”<sup>187</sup> Instead, this Note proposes more extensive protection and rights for “uploaders who specifically create and upload a particular type of content known as a ‘derivative work.’”<sup>188</sup> A derivative work is defined as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other

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<sup>178</sup> Arewa, *supra* note 5, at 432-33.

<sup>179</sup> Hunt, *supra* note 174, at 198.

<sup>180</sup> Hunt, *supra* note 174, at 199-200.

<sup>181</sup> Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 77 (2015).

<sup>182</sup> Hunt, *supra* note 174, at 200.

<sup>183</sup> Bartholomew, *supra* note 181, at 77.

<sup>184</sup> Hunt, *supra* note 174, at 202.

<sup>185</sup> Hannibal Travis, *Free Speech Institutions and Fair Use: A New Agenda for Copyright Reform*, 33 CARDOZO ARTS & ENT. L.J. 673, 707 (2015).

<sup>186</sup> Hunt, *supra* note 174, at 209.

<sup>187</sup> Laura Leister, *YouTube and The Law: A Suppression of Creative Freedom in the 21<sup>st</sup> Century*, 37 T. MARSHALL L. REV. 109, 113 (2011).

<sup>188</sup> *Id.* at 113.

form in which a work may be recast, transformed or adapted.”<sup>189</sup> Essentially, derivative works are works that utilize, borrow, or take from original works.<sup>190</sup> Arguably, this category is art and should not be considered infringement.<sup>191</sup> However, YouTube, and similar platforms, have made it difficult to identify whether the content is a derivative work of the original or if the work is the first publication.<sup>192</sup>

An author’s right of first publication is not the same concept it used to be.<sup>193</sup> As it pertains to “a constantly changing collaborative environment like YouTube, the nature of the first posting becomes increasingly irrelevant as the transformative process takes place.”<sup>194</sup> Now, it is often difficult to identify the first publication, and the transformative nature of many diverse expressions makes it increasingly difficult to even isolate the origin of the initial material.<sup>195</sup> An unaltered, unauthorized clip posted on YouTube may “not be transformative if there is never any discussion or criticism added to it.”<sup>196</sup> However, the same clip should be deemed transformative if the clip is repeatedly responded to and discussed in outside commentaries because the clip would now be the subject of criticism, which is a commonly protected factor under fair use.<sup>197</sup>

Copyright owners argue that YouTube intentionally built its platform through broad and wide-scale copyright infringement.<sup>198</sup> However, YouTube has provided a platform for a viewer to add to a copyrighted work or change the work in the way that the viewer sees fit.<sup>199</sup> A user’s ability to interpret another’s work in his own way is crucial for the exchange of art and ideas because the artistic community is similar to the scientific community where expounding on previous ideas creates something entirely new.<sup>200</sup> An argument that may be

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<sup>189</sup> 17 U.S.C. § 101 (2000) (defining “derivative work”).

<sup>190</sup> Matthew H. Schwartz, *On Target with the Parody Defense to Copyright Infringement*, 26 BEVERLY HILLS B. ASS’N J. 57, 57 (1992).

<sup>191</sup> Leister, *supra* note 187, at 113.

<sup>192</sup> Hunt, *supra* note 174, at 215.

<sup>193</sup> Ellis, *supra* note 147, at 83.

<sup>194</sup> Hunt, *supra* note 174, at 215; *see discussion supra* Section II (A) (discussing the author’s right to first publication and transformative use).

<sup>195</sup> Hunt, *supra* note 174, at 215.

<sup>196</sup> Hunt, *supra* note 174, at 215.

<sup>197</sup> Hunt, *supra* note 174, at 215.

<sup>198</sup> Michael S. Sawyer, *Filters, Fair Use & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J. 363, 368 (2009).

<sup>199</sup> Bartholomew, *supra* note 181, at 77.

<sup>200</sup> Bartholomew, *supra* note 181, at 77.

made, which lends itself to the fourth factor of fair use, is that these new creators who take the existing work and add to it should not receive monetary gain because the work is not entirely original.<sup>201</sup> However, if a viewer of a YouTube video sees copyrighted material and adds to it or changes it, why should the viewer not be entitled to any sort of compensation for his vision? The original work and the new work both exist in their own right and, even if the work contains minor changes, the changes to the work by the viewer constitute creativity.<sup>202</sup> There is sure to be copyright infringement on YouTube for those that simply do not change a preexisting work in any way.<sup>203</sup> However, this should not be thought of as a blanket characterization of the entire website because doing so inhibits the creativity and artistic expression that is displayed in many cases that incorporate elements of preexisting copyrighted material.<sup>204</sup>

The balancing of the four factors of fair use is required on a case-by-case basis for YouTube videos because of the wide variety of types of videos found on YouTube.<sup>205</sup> The website, as a whole, is too broad to apply a general analysis of the four factors.<sup>206</sup> This Note suggests that the courts conduct a careful examination of fair use as it pertains to the specific video and apply the doctrine broadly. While many argue that the doctrine permits copying, YouTube provides a platform where an individual can provide his or her own take on a preexisting work, which changes the expression and essence of the preexisting work completely.<sup>207</sup>

For the smallest of changes, the change transforms the original work nonetheless, and the transformative nature exists, even if the change is minor because the new work is not entirely reflective of the original work. The *Cariou* decision echoes this point because even the minor modifications in that case, such as painting material over facial features and utilizing small portions of the images, constituted transformative use.<sup>208</sup> This change reflected artistic expression of another's preexisting work by adding minor modifications that the new

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<sup>201</sup> Zilkha, *supra* note 21, at 42-43.

<sup>202</sup> Zilkha, *supra* note 21, at 42-43.

<sup>203</sup> Zilkha, *supra* note 21, at 42-43.

<sup>204</sup> Zilkha, *supra* note 21, at 42-43.

<sup>205</sup> Hunt, *supra* note 174, at 210.

<sup>206</sup> *Id.*

<sup>207</sup> Bartholomew, *supra* note 181, at 77.

<sup>208</sup> Brown, *supra* note 140, at 141.

author wanted to create, which changed the essence of the work.<sup>209</sup> This is the kind of expression that should be encouraged, and it is expression that is found commonly on YouTube and is the material that copyright owners claim constitutes infringement.<sup>210</sup>

The holding from *Fox News Network* opens up debate pertaining to YouTube because of the court's focus on whether the interest of the alleged infringement constituted a public interest.<sup>211</sup> Arguably, the very concept of YouTube furthers a public interest like that mentioned in *Fox News Network*.<sup>212</sup> Although it depends on the video under examination, entertainment and art both further the general public interest because the concepts, besides being the expression of the creator's own ideas and potentially being a catalyst for financial gain, are shared with the public for the public's own use and enjoyment.<sup>213</sup>

### C. Good and Bad Faith

Individuals who, on a good faith basis, rely on the original work and believe that their work is non-infringing should not be punished for their good faith reliance.<sup>214</sup> The courts themselves have applied fair use in such an inconsistent way that one would never be able to fully recognize whether the new work is protected under fair use.<sup>215</sup> This inconsistency by the courts allows the copyright owners to frivolously threaten litigation because the new creators are not aware of whether the new work is protected.<sup>216</sup> At the same time, bad faith by the copyright owner should be taken into account when analyzing any copyright infringement claim.<sup>217</sup> YouTube avoids deciding fair use and gives the issue to the courts if it arises.<sup>218</sup> Thus, copyright owners should be held accountable for frivolously accusing others of stealing their copyrights.<sup>219</sup>

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<sup>209</sup> Brown, *supra* note 140, at 141.

<sup>210</sup> Sawyer, *supra* note 198, at 368.

<sup>211</sup> *Fox News Network*, 43 F. Supp. 3d at 397.

<sup>212</sup> *Id.*

<sup>213</sup> Hunt, *supra* note 174, at 207.

<sup>214</sup> *Lenz*, 815 F.3d at 1154.

<sup>215</sup> Carroll, *supra* note 1, at 1118.

<sup>216</sup> Bartholomew, *supra* note 181, at 74.

<sup>217</sup> *Lenz*, 572 815 F.3d at 1154.

<sup>218</sup> Bartholomew, *supra* note 181, at 74.

<sup>219</sup> Bartholomew, *supra* note 181, at 74.



There should be a greater burden on copyright owners to establish that their infringement claims are made on a good faith basis.<sup>220</sup> Copyright owners are required to contemplate the fair use defense when looking at the use of the copyrighted material in the way complained of and whether the owner or the law authorized it.<sup>221</sup> A copyright owner acts in bad faith if he or she attacks the author of the new work without even contemplating all the possible authorized uses of the copyrighted work, including fair use.<sup>222</sup> The original copyright owner, when making an infringement claim, must contemplate whether the new material's utilization of the original material is fair use.<sup>223</sup> The original copyright owner must carry this burden when bringing infringement claims; if the original owner wants to make an accusation, it must not be frivolous and must have a reasonable basis.<sup>224</sup> Without an emphasis on the good faith basis of copyright infringement claims by the copyright owner, frivolous claims brought by many copyright owners are encouraged because owners could claim infringement of anything relating to their original work in any context, which is a dangerous condition to encourage.<sup>225</sup>

As copyright law continues to live in this digital age, the focus on good and bad faith needs to become more prevalent.<sup>226</sup> With the ease of accessing both original copyrighted work and new work, it is easier now for a copyright owner to allege infringement simply by the click of a button.<sup>227</sup> Accordingly, that ugly label of infringer may become associated with the new author when the new author is acting within the limits of fair use.<sup>228</sup> Copyright owners need to be held to a higher standard when it comes to alleging copyright infringement claims.<sup>229</sup> Litigation costs generally outweigh the profits made from a video on YouTube, so if a copyright owner claims infringement then the alleged infringer may just take down the video to prevent litigation,

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<sup>220</sup> Carroll, *supra* note 1, at 1145.

<sup>221</sup> *Lenz*, 815 F.3d at 1151.

<sup>222</sup> *Id.*

<sup>223</sup> Andre Menko Bleech, *What's the Use? Good Faith Evaluations of 'Fair Use' and Digital Millennium Copyright Act 'Takedown' Notices*, 18 COMMLAW CONSPECTUS 241, 264-65 (2009).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Carroll, *supra* note 1, at 1145.

<sup>227</sup> Sheila M. Cruz-Rodriguez, *Recorded Music in a World Driven by Social Media*, 6 No. 1 U. PUERTO RICO BUS. L. J. 50, 52-53 (2014).

<sup>228</sup> *Id.*

<sup>229</sup> Carroll, *supra* note 1, at 1145.

even if he is protected by fair use.<sup>230</sup> Further, the Supreme Court should create a new doctrine that contemplates the new author's good faith basis to determine whether the new author believed he or she was protected under fair use.

Congress should change fair use by decreasing "the scope of liability for those who infringe with an erroneous but good faith belief that the infringing use was a fair use."<sup>231</sup> If it is found that the new author acted in good faith then the only punishment should be the extinguishment or removal of the new work from the public eye, not any financial payment from the new author to the original author.<sup>232</sup> The mandate that a copyright owner must "make a good faith determination as to whether the use was authorized or not, including statutory fair use of the material, is a helpful clarification."<sup>233</sup>

## V. CONCLUSION

This country's founders presented Congress with the authority to encourage creativity.<sup>234</sup> Fair use can be a crucial factor in achieving this goal.<sup>235</sup> The Supreme Court has stated that the fair use doctrine "permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."<sup>236</sup> Fair use, as it applies to digital technologies, is easy to misconstrue because of all the readily accessible content available at the click of a button.<sup>237</sup> Accordingly, there needs to be a procedure instituted that provides relief for creators who erroneously depend on the fair use defense in good faith.<sup>238</sup> The courts should focus on good faith of the new authors in creating their works, and possible bad faith claims by the original authors in alleging infringement in analyzing copyright infringement claims.<sup>239</sup>

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<sup>230</sup> Bartholomew, *supra* note 181, at 85.

<sup>231</sup> Carroll, *supra* note 1, at 1145.

<sup>232</sup> Carroll, *supra* note 1, at 1145.

<sup>233</sup> Bleech, *supra* note 223, at 268.

<sup>234</sup> Amy R. Mellow, *...And The Ruling on the Field Is Fair: A Fair Use Analysis of Uploading NFL Videos onto YouTube and Why the NFL Should License its Material to the Website*, 17 S. CAL. INTERDISC. L.J. 173, 200 (2007).

<sup>235</sup> *Id.* at 200.

<sup>236</sup> *Campbell*, 510 U.S. at 577.

<sup>237</sup> Carroll, *supra* note 1, at 1149.

<sup>238</sup> Carroll, *supra* note 1, at 1149.

<sup>239</sup> Carroll, *supra* note 1, at 1145.

The Internet is a powerful medium for artistic expression and reflection.<sup>240</sup> Accordingly, the Internet, especially YouTube, has blurred the lines even more when it comes to differentiating between works protected by fair use and works that constitute copyright infringement.<sup>241</sup> The ease in “which digital content can be manipulated allows for unparalleled possibilities for fair use commentary and parody.”<sup>242</sup> The courts should provide copyright owners with the means to implement their rights against “commercial piracy”<sup>243</sup> while providing users their freedoms to utilize copyrighted works under certain circumstances.<sup>244</sup> The fair use doctrine should be applied broadly in order to allow individuals to work together to create new art because it benefits the broader public interest and society as a whole.<sup>245</sup>

The fair use doctrine’s evolution in interpretation has been crucial to the artistic expression of society since its inception.<sup>246</sup> It is important now, more than ever, that the fair use doctrine becomes clearer as copyright evolves on the digital landscape of the Internet.<sup>247</sup> Accordingly, there should be an increased focus on the good faith basis of the copyright owner in making a claim as well as the new creator in using the original work.<sup>248</sup> Further, there should be an increased focus on whether the new work promotes the original work and benefits the work or the author as a result of the promotion.<sup>249</sup> Lastly, there should be a broader application of fair use in order for all to potentially receive the protection of the defense.<sup>250</sup>

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<sup>240</sup> Hunt, *supra* note 174, at 199.

<sup>241</sup> Hunt, *supra* note 174, at 199-200.

<sup>242</sup> Sean M. O’Connor, *Creators, Innovators, and Appropriation Mechanisms*, 22 GEO. MASON L. REV. 973, 988 (2015).

<sup>243</sup> Carroll, *supra* note 1, at 1122.

<sup>244</sup> Carroll, *supra* note 1, at 1122.

<sup>245</sup> Samuelson, *supra* note 22, at 2547.

<sup>246</sup> *Byrne*, 132 F. Supp. 2d at 233.

<sup>247</sup> See discussion *supra* Section IV.

<sup>248</sup> See discussion *supra* Section IV(C) (discussing good faith).

<sup>249</sup> See discussion *supra* Section IV(A) (discussing promoting the original author’s work).

<sup>250</sup> See discussion *supra* Section IV(B) (discussing a broad application, using YouTube as the example).