The Five-Factor Framework: A New Approach to Analyzing Public Benefits in Fair Use Cases

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Fair use is among "the most troublesome [doctrines] in the whole law of copyright."[1] Despite being one of the primary defenses against a claim of copyright infringement, the doctrine is confusingly unpredictable, providing copyright users little *ex ante* certainty about the lawfulness of their actions. Unfortunately, the Supreme Court's latest fair use pronouncement may only further muddle the doctrine.

In *Google, LLC v. Oracle America, Inc.*, the Supreme Court accepted Google's fair use defense for its appropriation of Oracle's copyrighted code.[2] In reaching that conclusion, Justice Breyer made a few unusual moves in his majority opinion. First, he "sidestep[ped]" the threshold question of the allegedly copyrighted work's copyrightability.[3] Second, he contemplated the four fair use factors out of their statutory order.[4] Finally, his analysis of the fourth factor incorporated public benefits as an unconventional market effect.[5] This Note argues that, of these jurisprudential choices, the last—explicit recognition of public benefits' relevance to fair use—is likely to have an outsize impact on future cases. It further contends that Justice Breyer's method for incorporating public benefits will negatively affect the clarity and

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1. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

2. 141 S. Ct. 1183, 1209 (2021). Oracle sued as successor in interest to Sun Microsystems, which owned the allegedly infringed copyright at the time of Google's appropriation. *Id.* at 1194. For simplicity's sake, this Note refers to the code as Oracle's.

3. *Id.* at 1212 (Thomas, J., dissenting).

4. *Id.* at 1201; *see also id.* at 1214–15 (Thomas, J., dissenting) ("[T]he majority evaluates the factors neither in sequential order nor in order of importance."); 17 U.S.C. § 107 (directing courts to consider four nonexclusive factors).

5. Oracle, 141 S. Ct. at 1206; *see also* 4 NIMMER ON COPYRIGHT § 13.05[I][4][d] (describing Justice Breyer's public benefits concerns as "less conventional" market effects); Gary Myers, *Muddy Waters: Fair Use Implications of Google LLC v. Oracle America, Inc.*, 19 NW. J. TECH. & INTELL. PROP. 155, 181 (2022) (public benefits was a "seemingly new consideration").

transparency of these future fair use decisions.[6] Public benefits are relevant to courts' ultimate equitable fair use decisions, but courts must nevertheless accord the statutory considerations their due weight by engaging in the focused, factor-by-factor discussions of them that Congress provided for.

While the public may benefit from a challenged use, "public benefits"—as Justice Breyer used the term—do not bear on the fourth fair use factor as codified by Congress. The fourth factor directs courts to consider "the effect of the use upon the potential market for or value of the copyrighted work."[7] Courts analyze this factor by investigating whether the use usurps the original work's primary market[8] or licensing opportunities,[9] as well as whether the use creates a new market for the original work.[10] "Public benefits," meanwhile, represent non-competitive contributions to social welfare.[11] Public benefits may include facilitating access to copyrighted works (through providing access to new users[12] or making already-authorized users' access more efficient[13]); supporting the challenged user's broader, public-oriented goals;[14] or

6. Fair use presents a "mixed question of law and fact." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985); *accord Oracle*, 141 S. Ct. at 1199. Nevertheless, "questions of law predominate." *Id.* at 1214 (Thomas, J., dissenting) (questioning juries' role in determining fair use). Accordingly, courts, not juries, are central to fair use decisions. To the extent that juries engage in fair use analysis, public benefits analyses may nevertheless be teased out on appeal, as in *Oracle*. This Note collapses judge and jury consideration of fair use under the premise that, in either case, the deciding body can make the appropriate determinations. *See generally* David Nimmer, *Juries and the Development of Fair Use Standards*, 31 HARV. J.L. & TECH. 563 (2018).

7. 17 U.S.C. § 107(4).

8. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994); Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 48 (2d Cir. 2021) (amended opinion) (citing Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 614 (2d Cir. 2006)), *cert. granted*, 142 S. Ct. 1412 (2022); Monge v. Maya Mags., Inc., 688 F.3d 1164, 1182 (9th Cir. 2012).

9. *But see* Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 460 (9th Cir. 2020) (citing *Campbell*, 510 U.S. at 591–92) (relevance of licensing opportunities dependent on copyright owner's likelihood of exploiting them); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930 (2d Cir. 1994) (only "traditional, reasonable, or likely to be developed markets" count in the copyright owner's favor).

10. *Oracle*, 141 S. Ct. at 1207. Courts may also weave a range of privacy and other personal harms into their fourth factor analyses. *See* Andrew Gilden, *Copyright's Market Gibberish*, 94 WASH. L. REV. 1019, 1071 (2019).

11. *See* MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981) (contrasting public benefits with economic considerations); *see also* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992) ("Public benefit need not be direct or tangible, but may arise because the challenged use serves a public interest.").

12. *E.g.*, Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 103 (2d Cir. 2014) (expanding access to non-lucrative print-disabled market); Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901) (expanding access to students).

13. *E.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984) (time-shifting device made authorized third parties' access to copyrighted content more convenient); *HathiTrust*, 755 F.3d at 97 (search engine made researching key terms easier); Authors Guild v. Google, Inc. (*Google Books*), 804 F.3d 202, 207 (2d Cir. 2015) (a use may "augment[] public knowledge" by easing access rather than by contributing new material).

14. *E.g.*, Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n, 953 F.3d 638, 643 (9th Cir. 2020) (raising funds for a high school); Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 44 (2d Cir. 2021) (amended opinion) (defendant had a "mission . . . to advance the visual arts, a mission that is doubtless in the public interest"), *cert. granted*, 142 S. Ct. 1412 (2022); *Texaco*, 60 F.3d at 918–

"promot[ing] or . . . protect[ing] the creative process."[15] In *Oracle*, the challenged use facilitated third parties' creation of new copyright-eligible works.[16] In any given case, therefore, public benefits represent externalities that the public is set to receive notwithstanding the challenged use's effect on the original author's incentives to create or its own creative expression. Justice Breyer's public benefits analysis—necessary though it is to resolving fair use cases equitably—therefore departed from the fourth factor's ambit.[17] If lower courts follow his lead, the relevance of fair use's statutory language will decrease. And if the statutory framework stops guiding fair use analysis, copyright owners and users will face greater uncertainty when predicting whether any given use will be fair, for they will no longer have a means to predict courts' methodologies, let alone what decisions will issue.

Fair use requires contextual analysis within a standardized and coherent framework.[18] To produce greater transparency and predictability, this Note proposes reorganizing fair use analysis to isolate and incorporate public benefits as a fifth factor. Part I uses a potted history of fair use to argue that the defense exists to ensure the public reaps the maximum benefits from copyrighted works. Part II contends that existing approaches to fair use fail to adequately value public benefits deriving from challenged uses of copyrighted works. Part III proposes the five-factor framework, whereby courts would investigate public benefits as a fifth factor and then incorporate their findings into fair use's ultimate holistic balancing. Finally, Part IV applies the new framework to *Oracle* to demonstrate the virtues of clearer reasoning.

19 (for-profit company copied and distributed scientific articles to its researchers, easing the researchers' access by making the articles safer and lighter to carry into laboratories).

15. Golan v. Holder, 565 U.S. 302, 365 (2012) (Breyer, J., dissenting); *see, e.g.*, A.V. *ex rel.* Vanderhye v. iParadigms, 562 F.3d 630, 634 (4th Cir. 2009) (plagiarism detector making it more difficult for students to receive credit for unoriginal papers indirectly produces more original student essays); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1356 (Ct. Cl. 1973) (concluding that "medical science would be seriously hurt if such library photocopying [at issue] were stopped").

16. Google, LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1206 (2021); *accord Sega*, 977 F.2d at 1523 (public benefits found where defendant's "identification of the functional requirements for . . . compatibility [with plaintiff's console] has led to an increase in the number of independently designed video game programs offered for use with the [plaintiff's] console."). American copyright law is premised on the idea that the creation of new works is a boon to social welfare. *See* Terry Hart, *Breyer's Flawed Fourth Fair Use Factor in Google v. Oracle*, COPYHYPE (June 1, 2021), https://www.copyhype.com/2021/06/breyers-flawed-fourth-fair-use-factor-in-google-v-oracle [https://perma.cc/46EY-PQ7P] [https://web.archive.org/web/20221007192824/https://www.copyhype.com/2021/06/breyers-flawed-fourth-fair-use-factor-in-google-v-oracle] (copyrighted works provide "diffuse public benefits"); Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445, 450 (2008) (all later authors "contribute[] something socially beneficial by building on a previous work" to produce a new one); *see also* discussion *infra* Part I.

17. *Oracle* is likely to have an outsize effect on the future of fair use, despite its peculiar, software-specific context. *See Goldsmith*, 11 F.4th at 51 (emphasizing *Oracle*'s "unusual context" while nevertheless accounting for its precedent, including consideration of public benefits); Grant v. Trump, 563 F. Supp. 3d 278, 289 (S.D.N.Y. 2021) (following *Oracle*'s direction to analyze public benefits as part of the fourth factor); *but see* Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 721 (2011).

18. *See* 17 U.S.C. § 107 (directing courts to apply a framework comprising four nonexclusive factors to the facts "in any particular case").

I. FAIR USE EXISTS TO ENSURE THE PUBLIC RECEIVES THE BENEFITS OF COPYRIGHT

Copyright bargains that protecting works of authorship will stimulate creative production, which in turn will generate societal Progress.[19] The Constitution grants Congress the power to issue copyrights and patents "[t]o promote the Progress of Science and useful Arts"—not to reward individual intellectual labor on its own merits.[20] But the public needs access to protected works if it is to experience the fruits of that Progress.[21] Access is also necessary for authors themselves, who must build off prior works to create new works and thereby generate social Progress.[22] Thus, copyright law balances authorial incentives to create new works against the public's need for access to those works.

Liberal readings of early copyright laws to ensure this necessary access was lawful eventually developed into the equitable defense against infringement claims that we now call fair use.[23] In *Folsom v. Marsh*, Justice Story shaped what would become fair use by introducing factors to guide courts toward determining when permitting otherwise-unauthorized access to and use of copyrighted works was justified.[24] The *Folsom* defendants had adapted an exhaustive biography of George Washington into a school-library version.[25] In reaching his conclusion that the challenged appropriation of copyrighted material was not "justifiable," Justice Story weighed "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."[26] Describing the use as potentially "justifiable" hints at inspiration from criminal law's utilitarian idea that society should tolerate blameworthy actions where their benefits outweigh their costs.[27] That the challenged use had public benefits relevant to the case's disposition is evident in Justice Story's lament that equity required

19. Gilden, *supra* note 10, at 1021; *Google Books*, 804 F.3d at 212 (copyright incentivizes authors "to create informative, intellectually enriching works for public consumption"); REGISTER OF COPYRIGHTS, 87TH CONG., REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 5 (H.R. Judiciary Comm. Print 1961) (Copyright "foster[s] the growth of learning and culture for the public welfare, and the grant of exclusive rights . . . is a means to that end."); H.R. REP. NO. 60-2222, at 7 (1909) ("Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.").

20. U.S. CONST. art. I, § 8, cl. 8; *see also Oracle*, 141 S. Ct. at 1203 ("[C]reative 'progress' . . . is the basic constitutional objective of copyright itself."); H.R. REP. NO. 100-609, at 17 (1988) (Copyright's objective is to "secure for the public the benefits derived from the author's labors"). From the start, Anglo-American copyright law has granted protection "for the Encouragement of Learning." 8 Anne., ch. 19 (1710) (as quoted in Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1256 (11th Cir. 2014)); *see also* Haochen Sun, *Copyright Law as an Engine of Public Interest Protection*, 16 NW. J. TECH. & INTELL. PROP. 123, 142 (2019).

21. BJ Ard, *Taking Access Seriously*, 8 TEX. A&M L. REV. 225, 226 (2021).

22. Heymann, *supra* note 16, at 450.

23. *See* Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371, 1381 (2011).

24. Folsom v. Marsh, 9 F. Cas. 342, 348–49 (C.C.D. Mass. 1841) (No. 4901).

25. *Id.* at 345.

26. *Id.* at 348.

27. *See generally* Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1 (2003). *Cf.* Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 174 (2d Cir. 2018) (holding that defendant's work could not be "*justified* as a fair use") (emphasis added).

upholding an injunction against the defendants' "very meritorious labors."[28] This merit lurked beneath Justice Story's reasoning, though he did not rest his decision on it. His decision to include this lament, however, demonstrates that equity requires accounting for a challenged use's public benefits, even where they do not outweigh other concerns.

In the century after *Folsom*, courts developed "justifiable use" into fair use.[29] In doing so, courts inconsistently weighed Justice Story's factors and weighed them alongside a fluctuating host of other considerations, including the challenged use's public benefits.[30] In line with Justice Story's conception of fair use as "justifiable," courts expressly engaged in cost-benefit analysis to find that public benefits compelled authorizing even substantial copyright infringement.[31]

Congress' codification of fair use in the Copyright Act of 1976 attempted—but perhaps failed—to add consistency to the doctrine.[32] The fair use provision, § 107, includes an illustrative list of archetypal fair uses, then mandates courts "shall" consider four nonexclusive factors in their determinations:

> (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.[33]

28. *Folsom*, 9 F. Cas. at 349.

29. *See* Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 693 (1995).

30. *Id.* at 694–95 (collecting cases).

31. Meredith Corp. v. Harper & Row, Publishers, Inc., 378 F. Supp. 686, 690 (S.D.N.Y. 1974); *accord, e.g.*, Gardner v. Nizer, 391 F. Supp. 940, 944 (S.D.N.Y. 1975); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973); Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 309 (2d Cir. 1966); Berlin v. E. C. Publ'ns, Inc., 329 F.2d 541, 544 (2d Cir. 1964); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

32. *See* Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101–810). Fair use is codified at 17 U.S.C. § 107. The codification of a common-law doctrine is, by nature, an effort at precision. *See* H.R. REP. 94-1476, at 65 (1976).

33. 17 U.S.C. § 107(1)–(4). This Note mostly ignores the second and third factors, as they have played an unimportant role in both the general history of fair use and in the specific incorporation of public benefits into fair use. *See, e.g.*, Google, LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1215 (2021) (Thomas, J., dissenting) (the first and fourth factors are "more important under our precedent"). The Supreme Court has characterized the fourth factor as "undoubtedly the single most important element of fair use." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985). The first factor, meanwhile, "can prove dispositive." Google, LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1215 n.5 (2021) (Thomas, J., dissenting) (citing *Harper & Row*, 471 U.S. at 550); *see also* Jane C. Ginsburg, *Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work,"* 67 J. COPYRIGHT SOC'Y U.S.A. 19, 19–20 (2020) (the first factor often "engulf[s]" the others). Justice Breyer's unusual move to weigh the second factor first may revitalize the importance of that factor, though not in the context of public benefits. *See* discussion *supra* note 4 and accompanying text.

Codification attempted to recognize how courts had "evolved" fair use since *Folsom*[34] but "not to change, narrow, or enlarge [the doctrine] in any way."[35] Moreover, Congress intended to preserve fair use's common law tradition, leaving courts "free to adapt the doctrine" as equity required—though only so long as they, at the least, considered the four factors Congress determined they "shall" evaluate in any case.[36] Accordingly, the statutory text provides only limited guidance while explicitly authorizing "courts to excuse infringement because it is not the sort of thing that really *is* copyright infringement."[37] Congress' understanding of fair use as an "equitable rule of reason"[38] resulted in a deliberately unclear statutory provision.[39] Unsurprisingly, § 107 immediately proved difficult to apply.[40] And with no obvious place in the statutory scheme for incorporating public benefits, courts and commentators have adopted and proposed a variety of unsatisfying approaches to doing so.

II. THE FAILURES OF PRIOR APPROACHES TO INCORPORATING PUBLIC BENEFITS

The statutory fair use factors filter evaluating the challenged use through its relation to the original work. In doing so, the factors elevate copyright's concern for incentivizing authors to produce works in the first place over copyright's role in increasing social welfare via the public's enjoyment of those works. This Part questions prior attempts to integrate public benefits back into fair use determinations, especially through liberally interpreting the existing statutory factors.

A. THE FOURTH FACTOR CONTEMPLATES MARKET HARM, NOT PUBLIC BENEFITS

The fourth fair use factor concerns market effects.[41] Because public benefits are inherently non-competitive with the original work, no amount of public benefits should affect the fourth factor's disposition.[42] Justice Breyer's declaration in *Oracle* that public benefits do, in fact, evince fourth-factor market effects thus deviates from fair

34. H.R. REP. 94-1476, at 65 (1976); *Oracle*, 141 S. Ct. at 1197.

35. H.R. REP. 94-1476, at 66 (1976).

36. *Id.*

37. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1563 (2004) (emphasis in original).

38. H.R. REP. 94-1476, at 65 (1976).

39. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106 (1990); David Nimmer, *The Public Domain: "Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROB. 263, 281 (2003) ("Congress included no mechanism for weighing divergent results [for each factor] against each other and ultimately resolving whether any given usage is fair."); Madison, *supra* note 37, at 1552.

40. *See* Nimmer, *supra* note 39, at 267.

41. The fourth factor mandates that courts consider "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4); *see* discussion *supra* notes 7–10 and accompanying text.

42. *See* discussion *supra* notes 11–17 and accompanying text.

use's statutory language.[43] This Section identifies the origins of Justice Breyer's statement and challenges the prudence of his interpretation.

1. The Origins of *Oracle*'s Market Effects Analysis

Justice Breyer's one citation for his public benefits theory of the fourth factor is to *MCA, Inc. v. Wilson*, a forty-year-old Second Circuit ruling.[44] In *MCA*, the Second Circuit affirmed a district court's rejection of the fair use defense for a "take-off" of a copyrighted song in an off-color theatrical production.[45] The *MCA* court understood that copyright's grant of limited monopolies attempts to "stimulate artistic creativity for the benefit of the public."[46] When expounding the fourth factor, the panel accordingly wrote that fair use balances "the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied."[47] That is, the less the market harm, the less the public benefits needed to offset it. In support of this proposition, the *MCA* court cited several cases contemporary with fair use's codification, all of which demonstrate that fair use *as a whole* requires this balancing, not that this balancing should be part of the market effects inquiry.[48] In its subsequent review of the case at bar, the *MCA* court did not review the district court's fact findings factor-by-factor,[49] nor did the panel explicitly identify, let alone incorporate, public benefits into its analysis. Indeed, the *MCA* panel never held public benefits are specifically relevant to fair use's fourth factor, focusing instead on their relevance to fair use's holistic inquiry.[50] Thus, although the *MCA* court pontificated on the relationship between market harm and public benefits while expounding the fourth factor, these lines may amount to dicta.

Because much of its statutory interpretation is arguably dicta, the *MCA* panel provided limited practical guidance to future fair use adjudicators. In *Wright v. Warner Books, Inc.*, for example, a subsequent Second Circuit panel quoted *MCA*'s fourth factor interpretation but incorporated the challenged use's "contribut[ions] to the public's understanding" at the final fair use balancing stage rather than within its market harm discussion.[51] Similarly, the *Bill Graham Archives v. Dorling Kindersley Ltd.* court quoted the same language from *MCA* while restricting its market harm analysis to licensing

43. *See* Google, LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1206 (2021).

44. 677 F.2d 180 (2d Cir. 1981); *see Oracle*, 141 S. Ct. at 1206.

45. *MCA*, 677 F.2d at 181–82, 188.

46. *Id.* at 183; *cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994) (directing courts to weigh the fair use factors "in light of the purposes of copyright").

47. *MCA*, 677 F.2d at 183.

48. *See id.* (citing Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973)); Berlin v. E. C. Publ'ns, Inc., 329 F.2d 541, 543–44 (2d Cir. 1964); Meeropol v. Nizer, 560 F.2d 1061, 1070 (2d Cir. 1977); Elsmere Music, Inc. v. Nat'l Broad. Co., 482 F. Supp. 741, 747 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980) (per curiam); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 146 (S.D.N.Y. 1968); *cf.* Hart, *supra* note 16 (asserting a contextual reading of *MCA* entails weighing public benefits against the other factors, not within them).

49. *Cf. Campbell*, 510 U.S. at 578 (analyzing each factor separately).

50. *MCA*, 677 F.2d at 183.

51. 953 F.2d 731, 739, 740 (2d Cir. 1991).

markets.[52] Thus, although these courts perpetuated *MCA*'s meditation on fair use, they did not adhere to it in the way Justice Breyer later did. But these courts nevertheless decontextualized *MCA*'s dicta—setting up the foundation for Justice Breyer's error—by omitting internal citations. The upshot was a pithy but misleading quote instructing courts to consider public benefits within the fourth factor.

Swatch Group Management Services Ltd. v. Bloomberg L.P. demonstrates the consequences of this misrepresentation of *MCA*.[53] There, the district court confronted the defendant news organization's dissemination of an audio recording of the plaintiff's earnings call.[54] In its analysis of the fourth factor, the district court held that the fourth factor favored fair use partially because the defendant's "use conferred substantial benefit on the public"[55]—thereby understanding *MCA* as holding public benefits bear on the fourth factor. In doing so, it presaged *Oracle*'s flawed fourth factor analysis and the need for jurisprudential reform.

2. *Oracle*'s Fourth Factor Analysis Departs from § 107

In *Oracle*, the oddness of considering public benefits as part of market harm reached its zenith, with the Supreme Court replicating *Swatch*'s statutorily unmoored analysis. Justice Breyer began his majority opinion's fourth factor discussion ordinarily enough, by distinguishing relevant market harms (e.g., usurping an obvious licensing market) from irrelevant ones (e.g., suppressed sales following a scathing review).[56] Next, however, Justice Breyer opined:

> Further, we must take into account the public benefits the copying will likely produce. Are those benefits, for example, related to copyright's concern for the creative production of new expression? Are they comparatively important, or unimportant, when compared with dollar amounts likely lost (taking into account as well the nature of the source of the loss)?[57]

There are two problems with this interpretation. First, to the extent that public benefits embodied by the challenged use represent "new expression," the transformativeness inquiry under the first factor accounts for them.[58] Because, as discussed *infra*, Justice Breyer engaged in the transformativeness inquiry as well, he double-counted the new

52. 448 F.3d 605, 614–15 (2d Cir. 2006).

53. Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P. (*Swatch I*), 861 F. Supp. 2d 336 (S.D.N.Y. 2012). On appeal, the Second Circuit reached the related conclusion that no market harm existed because marketing the call at issue did not motivate Swatch's production of it. Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P. (*Swatch II*), 756 F.3d 73, 90–91 (2d Cir. 2014) (quoting *Bill Graham Archives*, 448 F.3d at 613).

54. *Swatch I*, 861 F. Supp. 2d at 338.

55. *Id.* at 342; *cf.* Jacob Victor, *Utility-Expanding Fair Use*, 105 MINN. L. REV. 1887, 1916 (2021) (predicating fair use on utility assumes social value outweighs true market harm).

56. Google, LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1206 (2021).

57. *Id.* (citing MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981)).

58. *See* discussion *infra* Part II.B.

use's creative value.[59] Second, Justice Breyer also counterintuitively indicated that the fourth factor may favor fair use where the challenged use harms the copyrighted work's market.[60] This interpretation is too absurd to represent congressional intent. Why mandate courts consider the original work's market if harm to that market could favor fair use? A use may be fair *despite* its negative market effects, but it cannot be fair *because of* its market usurpation. Nevertheless, Justice Breyer's misinterpretation of the fourth factor flows directly from the decontextualized reading of *MCA*, one that infuses the congressionally mandated investigation of market effects with extraneous information.

Justice Breyer's framing thus led him to deviate from the statute when applying the fourth factor to *Oracle*'s facts. First, he speculated Google's use might have benefited Oracle's market by producing a greater valuation of its code.[61] He reached this conclusion despite the substantial, actual market harm in the record.[62] On this evidence, the fourth factor should have *dis*favored fair use. And Justice Breyer seemingly betrayed doubt in his holding by introducing irrelevant evidence to justify his fourth factor conclusion—evidence related to public benefits. Rejecting fair use, he wrote, would inhibit the public's ability to vindicate "copyright's basic creativity objectives,"[63] whereas accepting Google's fair use defense would allow developers to create new programs.[64] The public benefits of facilitating the development of these new, third-party works certainly bear on the case's equity, but because these public benefits were not shown to compete with Oracle's code, they bear little on the original work's market and the fourth factor.[65]

Copyrighted works provide "diffuse public benefits" that courts protect by investigating challenged uses' effects on incentives to create new works.[66] The fourth fair use factor uses market substitution effects as one such proxy. Complicating the fourth factor's inquiry with extraneous considerations disrespects Congress's attempt to focus attention on it. Although public benefits are relevant to fair use, they are irrelevant to the fourth factor.

59. *See* discussion *infra* notes 87–93 and accompanying text; *see also Swatch I*, 861 F. Supp. 2d at 340–42 (double-counting public benefits).

60. *Oracle*, 141 S. Ct. at 1206 (citing *MCA*, 677 F. 2d at 183, as "calling for a balancing of public benefits and losses to copyright owner *under this factor*") (emphasis added).

61. *Id.* at 1207–08.

62. *See id.* at 1216–17 (Thomas, J., dissenting) (internal citations omitted) (noting the Federal Circuit had found "overwhelming" evidence of "disastrous" market effects); Myers, *supra* note 5, at 182 (Oracle's market harm estimated at $9 billion); *cf. Oracle*, 141 S. Ct. at 1207–08 (implicitly conceding market harm by recognizing that rejecting the fair use defense could "prove highly profitable" to Oracle).

63. *Oracle*, 141 S. Ct. at 1208. *But see id.* at 1217 (Thomas, J., dissenting) (arguing that future creativity was irrelevant in a suit for damages where the challenged use had already been discontinued).

64. *Id.* at 1207.

65. Moreover, if the creation of third-party works does bear on the original work's market indirectly, it is through the creation of competing works, which should confirm the fourth factor weighs against fair use.

66. Hart, *supra* note 16; *cf. Oracle*, 141 S. Ct. at 1218 (Thomas, J., dissenting) (arguing that the majority's analysis failed to account for creativity-related harms that might result from sanctioning Google's use).

B. UNDER CURRENT PRECEDENT, THE FIRST FACTOR REQUIRES TRANSFORMATIVENESS, NOT PUBLIC BENEFITS

If the fourth factor does not provide a textual hook for incorporating public benefits into fair use analysis, the first factor, perhaps, might. This factor directs courts to consider the "the purpose and character of the use," including its commerciality.[67] Either the character or the purpose of a use might be providing public benefits. Fair use cases, however, have evolved the first factor into an inquiry into "transformativeness," an interpretation that should exclude public benefits from the first factor.

1. Transformativeness Entails Shedding Light on Appropriated Content

"Transformativeness" has its origins in Judge Pierre N. Leval's seminal article *Toward a Fair Use Standard*. Perhaps the article's most important contribution was Judge Leval's conclusion that a challenged use's "purpose and character" favors fair use where the use is transformative—where it "adds value to the original" by imbuing it with "new information, new aesthetics, new insights and understandings."[68] Leval thus saw Congress as having directed courts to consider the use's "purpose and character" in relation to the original work, not in isolation.[69] The preambular example fair uses indicate Leval's intuition was correct; all of Congress's examples supplement the meaning of copyrighted works.[70]

When the Supreme Court adopted Judge Leval's understanding of § 107 in *Campbell v. Acuff-Rose Music, Inc.*, it confirmed that public benefits do not bear on the first factor.[71] In *Campbell*, the Court held the first factor will favor fair use where the use alters the original work "with new expression, meaning, or message."[72] Considering whether a challenged parody should be permitted, the Court wrote that, to the extent that "social

67. 17 U.S.C. § 107(1). The first factor's commerciality language has done relatively little work in courts' first factor analyses. *See, e.g.*, *Oracle*, 141 S. Ct. at 1204 (commerciality does not make the first factor weigh against fair use where the use is transformative); Authors Guild v. Google, Inc. (*Google Books*), 804 F.3d 202, 219 (2d. Cir. 2015) (summarizing Second Circuit decisions as "repeatedly reject[ing] the contention that commercial motivation should outweigh a convincing transformative purpose"). Following *Oracle*, in which the Supreme Court held the first factor favored fair use despite the defendant's billions of dollars in revenue, it is unclear how much commerciality matters at all. *See Oracle*, 141 S. Ct. at 1194 (the allegedly infringing software generated $42 billion in revenue for the defendant within eight years of its release); *cf.* Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 22 (1st Cir. 2000) (examples of protected fair use in the preamble of § 107, including news reporting, are frequently conducted for commercial gain). Although not written into the statute, courts sometimes also consider a defendant's good faith as relevant to the first factor. *E.g.*, Bell v. Eagle Mountain Saginaw Indep. Sch. Dist., 27 F.4th 313, 322–23 (5th Cir. 2022). The *Oracle* Court indicated skepticism toward this approach. *Oracle*, 141 S. Ct. at 1204 (citing Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 585 n.18 (1994); Leval, *supra* note 39, at 1126). *But see* Myers, *supra* note 5, at 184–85 (arguing that *Oracle* has no holding on good faith).

68. Leval, *supra* note 39, at 1111.

69. *Id.*

70. *See* 17 U.S.C. § 107; *cf. Campbell*, 510 U.S. at 577–78 (preambular examples guide interpreting the first factor).

71. Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 818 (2015).

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

benefit[s]" might bear on the first factor, these benefits included only the challenged use's ability to "shed[] light on an earlier work."[73] Under Judge Leval's theory, as incorporated in *Campbell*, the challenged use's value-add must be to the original work, not to the public. Public benefits included within the first factor—the use's "transformativeness"—are therefore limited to the use's ability to supplement the public's understanding of the copyrighted work.

Courts since *Campbell* have nevertheless disagreed as to what, exactly, transformativeness requires while mostly accepting transformativeness as the correct inquiry under the first factor.[74] Some courts have held transformativeness means adding *any* expressive content to the work.[75] Under this interpretation, use of copyrighted material "in the furtherance of distinct creative or communicative objectives" is transformative.[76] In *Cariou v. Prince*, the "high-water mark" of this line of cases,[77] the Second Circuit nevertheless recognized that adding a new aesthetic or new expression would not necessarily make a work transformative.[78] To hold otherwise might conflate transformative uses with derivative works.[79]

Other cases indicate that, as Judge Leval intended, transformativeness requires creativity or communication that *relates back* to the appropriated work.[80] This

73. *Id.* Later courts have interpreted *Campbell* as requiring an inquiry into whether the challenged use has a new expressive purpose, not whether it has added new expressive content. Netanel, *supra* note 17, at 747–48; *see also* Victor, *supra* note 55, at 1895–96 (observing *Campbell*'s ambiguity as to whether the challenged use must transform the content or purpose of the original work, or both, and how). Nevertheless, the *Campbell* inquiry remains expressive in nature.

74. *Compare* Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1203 (2021), *and* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 37–39 (2d Cir. 2021) (amended opinion), *cert. granted*, 142 S. Ct. 1412 (2022), *and* Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176 (9th Cir. 2013) (collecting cases), *with* Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (Easterbrook, J.) (observing that the transformativeness test is judicially adopted but not compelled by the text of § 107). Despite agreement on its relevance, disagreement on its meaning has imbued transformativeness with a "Delphic oracular quality." Samuelson, *supra* note 71, at 825. The Supreme Court may resolve this tension when it decides the *Goldsmith* appeal, which presents the question of "[w]hether a work of art is 'transformative' when it conveys a different meaning or message from its source material . . . , or whether a court is forbidden from considering the meaning of the accused work where it 'recognizably deriv[es] from' its source material (as the Second Circuit has held)." Petition for a Writ of Certiorari at i, Andy Warhol Found. for the Visual Arts v. Goldsmith, No. 21-869 (2021), *cert. granted*, 142 S. Ct. 1412 (2022).

75. *See* Heymann, *supra* note 16, at 455 (transformativeness originally considered whether the challenged use "signif[ied] something different from the first," not whether it signified something *about* the first).

76. Blanch v. Koons, 467 F.3d 244, 253 (2d Cir. 2006).

77. *Goldsmith*, 11 F.4th at 38 (quoting TCA Television Corp. v. McCollum, 839 F.3d 168, 181 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2175 (2017)).

78. *Id.* at 38–39 (discussing Cariou v. Prince, 714 F.3d 694, 711 (2d Cir. 2013)).

79. *Id.* at 39.

80. Netanel, *supra* note 17, at 746 (identifying the two potential meanings of "added expression"). *Compare, e.g.*, *Goldsmith*, 11 F.4th at 41 ("[W]here a secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created, the bare assertion of a 'higher or different artistic use,' is insufficient to render a work transformative.") (quoting Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992)), *and* Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 453 (9th Cir. 2020) ("extensive new content" alone does not make an artistic work transformative), *with*

interpretation flows from the preambular list of example fair uses, each of which communicates something about the content it appropriates.[81] New expression alone, therefore, does not make an unauthorized use transformative.[82] This is especially true where *any* source material would enable the author to generate their insight, because the author then lacks a justification for infringing a *particular* source material.[83] Instead, transformative uses alter the "*expressive content or message* of the original work."[84] For example, a museum exhibition's focus on a guitar featured in a photograph would transformatively use the photograph by expanding the viewer's understanding of its contents.[85] The consistent theme through case law is that the first factor directs courts to investigate whether the challenged use communicates new information "not inherent to the [original] Work itself,"[86] as opposed to whether the work has the sort of freeform public benefits Justice Breyer envisioned.

2. Incorporating Public Benefits Would Muddle the First Factor

Oracle affirmed *Campbell*'s holding that the first factor centers on transformativeness while simultaneously confusing the meaning of the term.[87] The Court held Google's use was transformative because it "add[ed] something new and important" to Oracle's

Marano v. Metro. Museum of Art, 844 F. App'x 436, 438 (2d Cir. 2021) (museum's use of a photo was transformative where it provided context on the subject in the photograph).

81. *See* 17 U.S.C. § 107 (fair use may be "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research").

82. *Goldsmith*, 11 F.4th at 41.

83. *Id.* at 41, 47 ("Nor can Warhol's appropriation of the Goldsmith Photograph be deemed reasonable in relation to his purpose. While Warhol presumably required a photograph of Prince to create the Prince Series, AWF proffers no reason why he required Goldsmith's photograph."); *accord* Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 759 (7th Cir. 2014) (Easterbrook, J.) ("There's no good reason why defendants should be allowed to appropriate someone else's copyrighted efforts as the starting point in their lampoon, when so many noncopyrighted alternatives . . . were available. The fair-use privilege under § 107 is not designed to protect lazy appropriators."); MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981) ("[I]f the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up."); *cf.* Campbell v. Acuff Rose Music, Inc., 510 U.S. 569, 580 (1994) (distinguishing parody, which "needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination" from satire, which "can stand on its own two feet and so requires justification for the very act of borrowing").

84. Seltzer v. Green Day, Inc., 725 F.3d 1170, 1177 (9th Cir. 2013) (emphasis in original).

85. *Marano*, 844 F. App'x at 438; *cf.* Perfect 10, Inc. v. Amazon, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) (transformative use may occur through recontextualization where the material is "transformed into a new creation"). *But see* TCA Television Corp. v. McCollum, 839 F.3d 168, 181–83 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2175 (2017) (recontextualization alone is insufficient for transformativeness); Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 263–64 (4th Cir. 2019) ("new context" alone may not be sufficiently transformative). Recontextualization through verbatim copying, moreover, may amount to a mere change of medium, resulting in a derivative work—not a fair use. *See* 17 U.S.C. § 101 (defining derivative works); Authors Guild v. Google, Inc. (*Google Books*), 804 F.3d 202, 215–16 (2d Cir. 2015) (distinguishing derivative works and transformative uses).

86. Peterman v. Republican Nat'l Comm., 369 F. Supp. 3d 1053, 1061 (D. Mont. 2019).

87. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1203 (2021); *accord id.* at 1218 (Thomas, J., dissenting) (the first factor concerns commerciality and transformativeness).

code, in part by identifying its most useful features.[88] Moreover, Google's own use demonstrated how these utilitarian elements might be repurposed.[89] Under *Campbell*, that should have sufficed for transformativeness, and Justice Breyer expressly disclaimed altering precedent with his opinion.[90]

Justice Breyer also wrote, however, that transformativeness lay in how Google's code served as an "innovative tool" with which programmers might "further the development of computer programs."[91] This functionality inhered in the code Google took—and the boon to developers represents the public benefits Justice Breyer thought bore on the fourth factor as well.[92] This line of analysis, therefore, accepts the original work's character as bearing on the use's character (when transformativeness and § 107(1) direct courts to look at the relationship the other way around) and also double-counts public benefits in elucidating the case's equities.[93] But because *Oracle* claims to affirm *Campbell*, *Oracle* should be read as holding that appropriation for continued use by third parties may be transformative, but only because of such appropriation's illumination of the original work's most functional features. The public benefits of expanding the code's utility perhaps shine a light on how Google's use itself shined a light on Oracle's code, but they do not directly bear on the use's transformativeness because they exist separate from the challenged use–original work relationship.

Earlier "utility-expanding" technology cases expose the limits of weighing public benefits within, rather than against, the first factor.[94] Courts have, for example, held search engines transformative.[95] But a search engine does not shed light on the works it compiles or create new meaning or message; it merely catalyzes research processes.[96] Thus, a searcher could more laboriously peruse all relevant, copyrighted content and reproduce the results of a search engine. If copying and distributing alone could make

88. *Id.* at 1203; *accord* Oracle Am., Inc. v. Google Inc., No. C 10-03561 WHA, 2016 U.S. Dist. LEXIS 74931, at *32–34 (N.D. Cal. June 8, 2016) (holding Google's discerning selection and recontextualization of Oracle's code was transformative).

89. *Oracle*, 141 S. Ct. at 1203–04.

90. *Id.* at 1208 ("[W]e have not changed the nature of [traditional copyright] concepts. We do not overturn or modify our earlier cases involving fair use.").

91. *Id.* at 1203–04.

92. *Id.* at 1203 (Google's use was a "reimplementation"); *see also id.* at 1219 (Thomas, J., dissenting).

93. *Cf.* Myers, *supra* note 5, at 186–87 (arguing Justice Breyer's understanding of transformativeness might lead courts to find transformativeness more often).

94. *See, e.g.*, Brammer v. Violent Hues Prods., LLC, 922 F.3d 255, 263 (4th Cir. 2019) (equating transformativeness with "generat[ing] a societal benefit").

95. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 97 (2d Cir. 2014); Perfect 10, Inc. v. Amazon, Inc., 508 F.3d 1146, 1165 (9th Cir. 2007) (search engine's "social benefit" demonstrates its transformativeness); Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003).

96. Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 177 (2d Cir. 2018) (search engine allows "nearly instant access to a subset of material—and to information about the material—that would otherwise be irretrievable, or else retrievable only through prohibitively inconvenient or inefficient means"); *see* also L.A. News Serv. v. CBS Broad., Inc., 305 F.3d 924, 938–39 (9th Cir. 2002) ("[m]erely plucking" the most valuable content from a work "cannot be said to have added anything new" and thereby be transformative), *amended*, 313 F.3d 1093 (9th Cir. 2002); *cf.* Folsom v. Marsh 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901) (Story, J.) (For fair use, "[t]here must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.").

a use transformative, then every act of infringement would be transformative.[97] Perhaps utility-expanding uses are *justifiable* where their public benefits outweigh their harms to authorial incentives, but not because the uses are transformative.[98] If the first factor contemplates transformativeness, added utility for third parties does not bear on its disposition. As with including public benefits when applying the fourth factor, including public benefits when applying the first factor devalues Congress' intended inquiry.

C. OTHER SOLUTIONS RISK OVER- OR UNDERVALUING PUBLIC BENEFITS

Other ideas for incorporating public benefits into fair use analyses fall mainly into three camps. The first approach involves inserting cursory mentions of public benefits at fair use's final balancing stage without expository analysis. The second approach involves reinterpreting the first or fourth factors to accommodate public benefits. And the third approach employs patterns to guide fair use decisions toward more predictable outcomes. None of these options appropriately weighs public benefits within Congress' vision of copyright's access-incentives paradigm.

The first alternative approach involves inserting public benefits casually when balancing the factors. This is the *Folsom* approach: referencing offhandedly how "very meritorious" the defendant's labors were as the court pronounces its judgment.[99] Justice Story left the import of public benefits on his decision unstated—public benefits clearly weighed on him, but his casual reference to them fails to demonstrate to what extent. The modern version of this approach amounts to vaguely weighing the statutory factors "along with any other relevant considerations"[100] or "in light of the purposes of copyright."[101] The *Castle v. Kingsport Publ'g Corp.* court, for example, casually included in its holistic balancing that the defendant's use "provided a benefit to the community."[102] Offhandedly throwing in references to public benefits at this stage, however, risks double-counting relevant considerations, and it provides no guidance to copyright users on how courts might rule on their fair use defenses.[103] A separate

97. Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1282 (11th Cir. 2014).

98. *See* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1840 (2006) (accusing the *Kelly v. Arriba* court of "twisting" the first factor "to accommodate" discussion of Progress).

99. *Folsom*, 9 F. Cas. at 349.

100. *TVEyes*, 883 F.3d at 180.

101. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994). Professor Dotan Oliar suggests courts should "recognize the constitutional purpose of the copyright system" as a fifth factor. Oliar, *supra* note 98, at 1840. This approach minimizes Congress' attempt to define relevant considerations in § 107. That is, § 107 already points courts toward one half of copyright's bargain, authorial incentives. What is missing is the *quo* to this *quid*—what the public receives in exchange for copyright's limited monopoly. This Note proposes incorporating public benefits as an express consideration in fair use analysis.

102. No. 2:19-CV-00092-DCLC, 2020 WL 7348157, at *8 (E.D. Tenn. Dec. 14, 2020); *accord* Wright v. Warner Books, Inc., 953 F.2d 731, 740 (2d Cir. 1991) (incorporating public benefits at the final stage).

103. *See* discussion *supra* Part II.B (without guiding constraints, the transformative use inquiry, like the market effects inquiry, may improperly incorporate public benefits).

inquiry into public benefits, by contrast, would reveal just how meritorious a challenged use really is.

Other scholars propose recharacterizing the first or fourth factors to incorporate public benefits. Professor Haochen Sun, for example, argues that the first factor should be reinterpreted to ask whether the challenged use "added something new to [the primary work] with a further purpose."[104] This proposal replicates the challenged interpretations in the search engine cases.[105] Rather than simplifying matters, this proposal asks courts to determine not only if the challenged use adds something expressively new but also if that something new has a subjectively defined further purpose.[106] Professor Sun also proposes market harm analysis incorporate tolerance of public benefits,[107] an approach that lacks textual grounding and, when combined with his redefinition of the first factor, would double-count public benefits.[108] The pitfalls of *Oracle* would thus be reproduced in every case, increasing ambiguity rather than transparency. As the *MCA* court recognized, public benefits are best balanced against the statutory factors, not within them.[109]

Finally, some scholars have proposed meta frameworks that sort challenged uses into predictable patterns. Professor Pamela Samuelson proposes that courts identify a challenged use's "policy-relevant cluster," then consider the cluster in addition to the four factors.[110] One problem with this solution, besides the difficulty of placing a use within an unknown number of clusters,[111] is that it offers little guidance on what, exactly, courts are supposed to do with the policy cluster. Considering, for example, the "public interest in access to newsworthy information" within Professor Samuelson's news cluster might reproduce *Swatch*'s errant analysis.[112] Professor Michael J. Madison's similar "pattern-oriented" proposal requires courts to consider to what extent the application of each factor fits within an identified pattern of uses.[113] His patterns, however, are each defined by the information they add to an original work—in effect,

104. Sun, *supra* note 20, at 139. Moreover, Sun argues that the first factor should include a public interest analysis, which, at its broadest, would consume or render null the other factors. *Id.* at 149.

105. *See* discussion *supra* notes 94–98 and accompanying text.

106. Related approaches focus on incorporating functionality into transformativeness. *See, e.g.*, Jeremy Kudon, Note, *Form over Function: Expanding the Transformative Use Test for Fair Use*, 80 B.U. L. REV. 579, 583–84 (2000) (concluding that transformativeness should include functionality); Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 837 (2010) (proposing a distinct fair use framework for technology cases); *see also* discussion *supra* notes 87–93 and accompanying text (discussing shining light on preexisting functionality—as opposed to adding functionality—as a transformative element in *Oracle*).

107. Sun, *supra* note 20, at 151.

108. *See* discussion *supra* Part II.A (arguing that public benefits do not and should not be thought to bear on market effects).

109. MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981).

110. Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2542 (2009).

111. Professor Samuelson pointedly refuses to identify all clusters, suggesting instead that doing so is impossible. *Id.* at 2546.

112. *Id.* at 2558; *see* Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P. (*Swatch I*), 861 F. Supp. 2d 336, 340–341 (S.D.N.Y. 2012).

113. Madison, *supra* note 37, at 1530, 1643.

turning the whole fair use inquiry into a search for transformativeness.[114] These approaches disregard statutory and precedential directions to consider each factor independently and fail to give independent weight to non-creative benefits from challenged uses.

None of these alternative approaches satisfactorily incorporates public benefits into fair use analysis. The statutory fair use factors do not contemplate public benefits, but reinterpreting the factors risks exacerbating their ambiguities. Approaching public benefits first at the balancing stage produces opaque decisions, while patterned approaches simply duplicate existing inquiries. Public benefits bear on fair use, and the best solution to incorporating them is the simplest one: respecting their relevance as distinct from the statutorily mandated inquiries.

III. THE FIVE-FACTOR FRAMEWORK

This Part proposes a new solution to the problem of public benefits in fair use analysis: analyze public benefits as a fifth factor and then insert the fruits of this analysis into fair use's holistic balancing. The five-factor framework offers a structural method of identifying, analyzing, and incorporating—without giving undue weight to—public benefits. The five-factor framework can and should be implemented immediately by courts.

A. WEIGHING PUBLIC BENEFITS

After applying the four statutory factors to any case's facts, courts should analyze the challenged use's public benefits as a fifth factor and then incorporate their findings into their final equitable determination on fair use.[115] Courts already bring normative judgments on public benefits into fair use cases; what courts need is purchase for expounding these judgments and their relevance to case outcomes.[116] The statutory factors focus courts' attention on the diffuse public benefits of a copyrighted work's expressive invention,[117] but considering only the statutory factors may lead courts to miss, discount, or fumble the accused use's concentrated public benefits. Fifth-factor analyses, by contrast, would elucidate the challenged use's full social utility.[118] The five-

114. Professor Madison's taxonomy of patterns includes journalism/news reporting, parody/satire, scholarship/research, criticism/comment, reverse engineering, legal/political argument, storytelling, comparative advertising, and so-called intrinsic function. *Id.* at 1646–65.

115. *See* Monge v. Maya Mags., Inc., 688 F.3d 1164, 1183 (9th Cir. 2012) (describing the final step of fair use analysis as tossing the factors "in the judicial blender to find the appropriate balance").

116. *Cf.* Matthew Africa, Note, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CALIF. L. REV. 1145, 1148–49 (2000) (encouraging courts to find a way to sanction works that should rightfully belong to the public).

117. *See* Hart, *supra* note 16. Relatedly, the Supreme Court has held that because copyright and fair use advance expressive interests, there is no need for a separate First Amendment defense against copyright infringement. *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

118. *Cf.* Africa, *supra* note 116, at 1166 (suggesting areas in which there are greater public benefits than authorial benefits are areas where fair use can curb the author's outsize and improper power as a gatekeeper).

factor framework thus allows courts to contemplate public benefits without displacing other considerations.

A key advantage to this approach is that it can be implemented immediately.[119] Fair use "originat[ed] in the courts,"[120] and codification "preserve[d] the courts' discretion" to evolve the doctrine.[121] Moreover, the four factors are nonexclusive—§ 107's text recognizes that courts may contemplate other factors as they deem necessary.[122] Accordingly, courts have the power to consider whether permitting a particular use would "disrupt[] the copyright market without a commensurate public benefit" through the five-factor framework.[123]

The five-factor framework acknowledges a challenged use may be justifiable for its contributions to public welfare even where it substantially harms authorial incentives.[124] A use may help advance education without itself being educational,[125] or it may facilitate transformative research without embodying advances in research,[126] or it may enable the public to access creative works more conveniently.[127] The public indeed benefits from such uses, but the author whose work has been appropriated may be substantially harmed. The five-factor framework accepts a utilitarian premise: Uses are justifiable where their public benefits outweigh their authorial harms.[128]

119. By contrast, many other fair use reform proposals would require congressional action to implement. For example, Professor Jane C. Ginsburg has proposed turning fair use into a form of compulsory licensing. *See generally* Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383 (2014); *cf.* Victor, *supra* note 55, at 1932 (noting that congressional action "would be the most straightforward way to allow for a compulsory license alternative"). Another proposal suggests eliminating two of the factors. Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 962–63 (2020). Other scholars propose recodifying fair use as a public right. Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 to Avoid the "Fared Use" Fallacy*, 2007 UTAH L. REV. 619, 656 (2007). Unlike these proposed changes to the statutory text, the five-factor framework does not require legislation because the statutory factors are expressly nonexclusive.

120. Google, LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1196 (2021) (internal citation omitted).

121. Ard, *supra* note 21, at 259; H.R. Rep. 94-1476, at 66 (1976) ("[T]he courts must be free to adapt the doctrine.").

122. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 16 (2d Cir. 2021) (amended opinion), *cert. granted*, 142 S. Ct. 1412 (2022); *see also* Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1152 (1990) ("[U]nless one disregards the plain language of the statute, the statutory factors are not exclusive."); *cf. id.* at 1150 (proposing courts implement fundamental fairness as a fifth factor).

123. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 n.9 (1985).

124. *Cf.* Samuelson, *supra* note 110, at 2617 (copyright "promotes the public good" when it authorizes "developers of new technologies [to] provide new opportunities for the public to make . . . reasonable uses" of copyrighted works).

125. *See, e.g.*, Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n, 953 F.3d 638, 643 (9th Cir. 2020).

126. *See, e.g.*, Author's Guild v. Google, Inc. (*Google Books*), 804 F.3d 202, 207 (2d Cir. 2015).

127. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 454 (1984).

128. *See* Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 35–36 (2d Cir. 2021) (amended opinion) (a use may "serve[] the public interest, either in and of itself or by generating funds that enable the secondary user to further a public-facing mission" without being transformative), *cert. granted*, 142 S. Ct. 1412 (2022); *cf.* Lape, *supra* note 29, at 694–95 (discussing the public's interest in diverse exploitations of copyrighted works).

B. THE FIFTH FACTOR MATTERS MOST WHEN A CHALLENGED USE IS NEARLY TRANSFORMATIVE

Applying the five-factor framework to past cases and hypotheticals will demonstrate its methodological superiority. The approach is likely to add the most value in the most confounding cases, including where a use is not transformative but enables third parties to make their own transformative uses of the copyrighted work.

1. Expressive Contexts

Professor Laura G. Lape hypothesizes challenges to a pornographic adaptation of a novel and a service that mails newspaper copies to underserved communities, suggesting the former is more likely to be declared fair use but the latter, because it contributes more to social welfare, is more worthy of fair use.[129] The pornographic adaptation, especially if it is a parody, may be a simple fair use case under *Campbell*, with all four factors favoring allowing the use to proceed.[130] Applying the five-factor framework, the reviewing court might additionally conclude that the pornographic use's utility is confined to increasing public knowledge in whatever ways that a pornographic adaptation sheds light on the work it parodies and that creative works in general advance social welfare. This fifth factor analysis would reveal a lack of additional spillover effects, and there is value in knowing whether and to what extent the case implicates persons other than the parties.

But the five-factor framework is more advantageous with expressive, *non*-transformative uses. Consider *Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, involving a non-parodic mash-up of unlicensed, copyrighted sheet music, the arrangement of which the defendants performed at competitions and a school fundraiser.[131] The Ninth Circuit held that including the appropriated material within "a new work with new meaning" was a transformative act.[132] Recontextualization without commentary, however, should not be considered transformative.[133] And to the extent that commerciality bears on the first factor, the defendant's nonprofit educational identity does not mean its appropriation was for nonprofit educational purposes.[134] As to the crucial fourth factor, the defendants appropriated the sheet music

129. Lape, *supra* note 29, at 715.

130. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 597–98 (1994) (Kennedy, J., concurring); *accord* SunTrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1268 (11th Cir. 2001) (most parodies will have colorable fair use defenses).

131. Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n, 953 F.3d 638, 643 (9th Cir. 2020).

132. *Id.* at 650.

133. *See* discussion *supra* note 85.

134. *See* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 45 (2d Cir. 2021) (amended opinion) (use by a nonprofit organization is not necessarily for nonprofit purposes), *cert. granted*, 142 S. Ct. 1412 (2022).

despite the copyright holder's existing licensing market.[135] The two key fair use factors thus might both disfavor allowing the use.

The five-factor framework could have channeled the *Tresóna* court to find the challenged use nevertheless justified. Generously, perhaps, the court might conclude that the use offered creative outlets for students and supported an educational institution—both of which have merit. That is, the infringement was indirectly related to teaching, and an equitable outcome should recognize this.[136] Once created, however, the mash-up could have been performed in less equitable settings, for which a court would presumably be less sympathetic—because the public benefits would not outweigh fair use's other considerations. The five-factor framework allows courts to distinguish unauthorized follow-on works from the uses to which they are put.

Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith presents that alternative example. Andy Warhol had licensed Lynn Goldsmith's photograph as a source image for a single work but created a full series.[137] She challenged his successor-in-interest Foundation's later licensing of one of the additional works to a magazine.[138] In dicta, the Second Circuit indicated it would find Warhol's creations non-transformative under an ordinary observer standard: Warhol had applied his signature style to the photograph but did so without adding meaning to the original work.[139] As to the case at hand, however, the court's holding was simply that *licensing* the Warhol silkscreen added no informational value to Goldsmith's original photograph.[140] Moreover, the original work was unpublished and creative, the appropriation was substantial, and the works had competing licensing opportunities.[141] The panel concluded the four statutory factors all weighed against fair use.[142] A public benefits discussion would buttress this decision by adding attention on the effects of the licensing use Goldsmith actually challenged, which at least indirectly provided support for the Foundation's "mission . . . to advance the visual arts."[143] As opposed to *Tresóna*, this connection between the use and its public benefits is more intermediate, lessening the value of the public benefits.[144]

135. The Ninth Circuit considered whether the complete challenged use would substitute for the primary work but discounted whether authorizing the use would lead to widespread disregard of the plaintiff's licensing rights. *Tresóna*, 953 F.3d at 651; *but see Campbell*, 510 U.S. at 590 (the question posed by the fourth factor is whether "widespread," similar conduct would disrupt one of the markets to which the copyright holder is entitled). The *Tresóna* court essentially merged the first and fourth factors, holding that exploitation of a transformative market did not constitute market substitution. *Tresóna*, 953 F.3d at 652.

136. *See* 17 U.S.C. § 107 (including "teaching" among example fair uses).

137. *Goldsmith*, 11 F.4th at 32.

138. *Id.* at 34–35.

139. *See* discussion *supra* notes 80–83 and accompanying text.

140. *See Goldsmith*, 11 F.4th at 55 (Jacobs, J., concurring) ("Goldsmith does not claim that the original works infringe and expresses no intention to encumber them; the opinion of the Court necessarily does not decide that issue.").

141. *Id.* at 49.

142. *Id.* at 51.

143. *Id.* at 44.

144. It is important to bear in mind, however, that while any public benefits in *Goldsmith* came from "the character of the *user*[, not] the *use*," fair use, as its name suggests, considers the use itself. *See id.* at 44 (emphasis in original); *see also* 17 U.S.C. § 107(1) (courts must consider the "purpose and character of the *use*") (emphasis added).

By considering, and rejecting, public benefits as too indirect to affect the case's equity, a court may demonstrate its decision is truly supported by all relevant considerations.

2. Access-Expanding Contexts

The five-factor framework would also lead courts to evaluate Professor Lape's second hypothetical use more presciently. Under the statutory framework, commercial photocopying to increase access is unlikely to be declared fair use, despite its high social utility.[145] The challenged use adds no new information and intrudes on an obvious market opportunity. But efforts to foster a better-informed citizenry may have important social value, value the court may prudently recognize depending on what the information being conveyed is and how it is conveyed. How much the use contributes toward this goal, therefore, is relevant to justifying the use itself.[146]

Authors Guild, Inc. v. HathiTrust suggests that supplying a market too small for a copyright owner to reasonably exploit may be fair use. HathiTrust usurped the plaintiffs' print-disabled market[147] without transformatively supplementing the original works.[148] To do so, HathiTrust appropriated substantial amounts of the plaintiffs' highly expressive works.[149] As in Professor Lape's hypothetical, therefore, *HathiTrust* presents a non-transformative, highly appropriative, market-usurping use—but one that provides significant public benefits through "assur[ing] equality of" access.[150] The *HathiTrust* court found these public benefits justified the use, but it did so while bending the statutory factors to accommodate discussion of them. Teasing out public benefits separately, by contrast, would transparently reveal when a use should be permitted despite harm to the copyright owner.

Swatch presents a similar example.[151] In *Swatch*, the defendant's verbatim dissemination of the plaintiff's work had only an "arguably" transformative purpose.[152] The defendant attempted news coverage but straddled the line of what qualifies as reporting.[153] As in *HathiTrust*, the market at issue in *Swatch* was probably insignificant to the plaintiff.[154] The crucial factors in *Swatch* thus appeared to favor fair use, but to

145. Lape, *supra* note 29, at 715.

146. Public benefits exist on a spectrum of value, not a yes/no binary.

147. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 103 (2d Cir. 2014).

148. *But see id.* at 101 (finding the use transformative despite a failure to shed light on the original works).

149. *Id.* at 102–03.

150. *Id.* at 102.

151. *See* discussion *supra* notes 53–55 and accompanying text.

152. Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P. (*Swatch II*), 756 F.3d 73, 85 (2d Cir. 2014). The lack of other avenue to weighing public benefits may have contributed to internal pressure on the Second Circuit to betray doubt in its conclusion. Recontextualization may accomplish a transformative purpose, but only if it has the effect of supplementing the "meaning or message" of the original work. *See* discussion *supra* note 85.

153. *Swatch II*, 756 F.3d at 82 (describing the defendant's activities as constituting " 'news reporting,' 'data delivery,' or any other turn of phrase"); *id.* at 84 (slotting defendant's activity within "the context of news reporting and analogous activities"); *see also* 17 U.S.C. § 107 (listing "news reporting" as a favored fair use).

154. Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P. (*Swatch I*), 861 F. Supp. 2d 336, 342 (S.D.N.Y. 2012); *Swatch II*, 756 F.3d at 91. The plaintiff, seeing the market's value after the defendant's exploitation of

an uncertain extent. Public benefits analysis would force the scales: The defendant's actions leveled the competitive, investment playing field by expanding access to information.[155] As in *HathiTrust*, improving equality of access to information provided public benefits that would outweigh unlikely market harm from an "arguably" transformative use where the information disparity put market participants without access at a competitive disadvantage. In access-expanding contexts, therefore, the public benefits of equal access may suffice to displace any concerns about authorial incentives, especially where the use targets smaller markets for copyright owners.

3. Access-Easing Contexts

Finally, there are contexts in which third-party end users already have authorized access to the appropriated work but in which the challenged use nevertheless eases the exercise of this access. In *HathiTrust*, for example, the challenged HathiTrust Digital Library allowed users to search across scanned full texts for keywords.[156] But anyone with access to the books could already find the keywords within the texts, albeit through intellectual labor.[157] The functionality of the use thus derived from the copyrighted works themselves. Because the HathiTrust library added nothing to the copyrighted works, it was not properly transformative even if it had merit. Market harm, moreover, was uncertain yet probable, in part because market harm inheres in a challenged use's proving that a market exists.[158] Thus, *HathiTrust* presented non-transformative appropriation of large portions of literary works, with some amount of market substitution likely to occur.[159] All four factors might have weighed against fair use.

it, nevertheless could license the audio from future earnings calls. The use might therefore be a "potential" market. *See* 17 U.S.C. § 107(4).

155. *Swatch II*, 756 F.3d at 92. International dimensions may have further played a role in *Swatch*: Had the earnings call at issue been conducted by an American company, SEC rules would have required greater disclosure, thus ensuring *ex ante* the equality of access that the defendant news organization provided. *See id.* at 82–83.

156. *Id.* at 91; *see also* Authors Guild v. Google, Inc. (*Google Books*), 804 F.3d 202, 207 (2d Cir. 2015) (use similarly involved allowing third parties to search scanned books for keywords).

157. With the help of an index, the labor required to search a particular book might not be difficult, though the labor to search many books would remain painstaking. *See* MidlevelU, Inc. v. ACI Info. Grp. 989 F.3d 1205, 1224 (11th Cir. 2021) (affirming jury verdict against fair use for non-transformative, commercial indexing); *cf.* VHT, Inc. v. Zillow Grp., Inc., 918 F.3d 723, 742 (9th Cir. 2019) (distinguishing "closed-universe" search engines from the crawlers at issue in *Kelly* and *Perfect 10*).

158. *Compare Google Books*, 804 F.3d at 224 ("We recognize that the snippet function can cause *some* loss of sales."), *with* Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 100 (2d Cir. 2014) ("[T]he full-text search function does not serve as a substitute for the books that are being searched.").

159. The defendant's use appropriated the quantitative wholes of original, creative works, and indicated the second and third factors should disfavor fair use. *Google Books*, 804 F.3d at 221 (quoting *HathiTrust*, 755 F.3d at 98). The *Google Books* court, citing *HathiTrust*, held the second factor had limited value but favored fair use because it enabled the challenged use to be transformative, perhaps betraying an unwillingness to conclude the "rarely . . . significant" factor should have weighed against fair use. *Id.* at 220 (quoting *HathiTrust*, 755 F.3d at 98).

The *HathiTrust* panel nevertheless stampeded toward a fair use outcome.[160] Considering separately the public benefits of these access-easing uses, however, might allow for an honest contemplation of the statutory factors.[161] The challenged use did not represent scholarship or research, though it enabled third parties to engage in those activities.[162] Courts should be willing to sanction such uses, at least where their support for third-party creativity is substantial. The public benefits factor would allow courts to justify their equitable outcome without mischaracterizing the statutory factors.

The decision in *Associated Press v. Meltwater U.S. Holdings, Inc.* demonstrates this point. The defendant Meltwater "use[d] a computer program to scrape news articles [and] provide[] excerpts" to subscribers.[163] The court found the challenged use copied "without adding any commentary or insight" and hence was not transformative.[164] Further, Meltwater's use usurped the plaintiff's market, so the fourth factor weighed "strongly against" fair use.[165] On these conclusions alone, the court likely should have rejected the defendant's fair use defense.

Within the context of the first factor, however, the *Meltwater* court analyzed public benefits, proving their importance even where the statutory fair use analysis produces a clear-cut answer. The court distinguished defendant's "business relat[ing] to news reporting and research" from whether its actions advanced those purposes.[166] As in *Goldsmith*, *Tresóna*, and *Swatch*, the defendant engaged in meritorious activities, though not necessarily through the particular use.[167] In *Meltwater*, the court reckoned with the concentrated public benefits of permitting the defendant's use but reached the conclusion that they were less weighty than the diffuse public benefits gained from protecting the plaintiff's incentives to create news. The defendant's use was not justified, even after considering the effects of enjoining it. The *Meltwater* court thereby confirmed the value in engaging with the full, equitable stakes of the case—which the five-factor framework facilitates.

Where the statutory fair use analysis produces indeterminate results, courts need not stretch the statutory factors to reach an outcome. Instead, they should expand their inquiry to consider public benefits as a fifth factor. This enhanced framework improves even straightforward cases by providing transparent proof that courts have done the equitable balancing fair use requires.

160. *HathiTrust*, 755 F.3d at 101 (holding three of four factors favored fair use, and one had insubstantial import, and thus the use was justified); *see also* 4 NIMMER ON COPYRIGHT § 13.05[I][4][d] (discussing "stampeding" in Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021)); *cf.* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 584 (2008) (fair use factors are correlated with one another).

161. The five factors could then "drive the analysis, [rather than] serve as convenient pegs on which to hang antecedent conclusions." Nimmer, *supra* note 39, at 281.

162. *See* 17 U.S.C. § 107.

163. Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 541 (S.D.N.Y. 2013).

164. *Id.* at 552.

165. *Id.* at 560.

166. *Id.* at 552–53.

167. *Id.* at 553 (relevant public benefits included value to specific clients and providing "democratic, instantaneous, and efficient access to information").

C. THE FIVE-FACTOR FRAMEWORK IS PRACTICABLE, NECESSARY, AND TRANSPARENT

Counterarguments against the five-factor framework are unavailing. First, there should be no concern about the judiciary adding a new factor to the statutory scheme. The § 107 factors are nonexclusive.[168] Moreover, courts *already* analyze public benefits; the five-factor framework suggests a procedural approach to consolidating and clarifying, not reinventing, fair use. Separately considering public benefits would not upset Congress' vision of copyright's access-incentives balance.[169] Copyright pursues Progress, not creativity.[170] If protecting creative endeavors is a means to an end, a court applying an equitable limit to copyright *should* inquire into whether the end is being achieved. Considering the diffuse benefits of protecting creativity while ignoring the concentrated benefits of allowing the defendant's use does a disservice to the public.

Parsing public benefits separately is also necessary. As the example applications show, public benefits analysis adds transparency and cements that a particular decision equitably resolves even obvious cases.[171] In more difficult cases, the five-factor framework allows courts to stay faithful to congressional intent when applying the statutory factors while nevertheless transparently justifying their equitable conclusions.

Finally, courts are competent to analyze public benefits. Professor Edward Lee argues against turning fair use into a cost-benefit analysis because courts are likely to miscalculate public benefits.[172] The problems with this objection are twofold: First, courts are already engaging with public benefits; the question is *how*, not *whether*, they should do so. The five-factor framework is thus normatively grounded in transparency. Second, courts are used to speculating in fair use analyses. The statutory factors already involve speculative line-drawing, for example, when courts determine that a use is "arguably" transformative,[173] that certain markets did not incentivize a work's creation,[174] or that the copyright owner might not be able to compete in a particular market.[175] The flexibility of considering public benefits is an asset, allowing courts to engage in truly holistic—and transparent—adjudication.

168. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1197 (2021) ("In applying [§ 107], we, like other courts, have understood that the provision's list of factors is not exhaustive (note the words 'include' and 'including')").

169. *See* Hart, *supra* note 16 (comparing diffuse and concentrated benefits in the access-incentives paradigm).

170. *See* discussion *supra* Part I.

171. *See* discussion *supra* Part III.B; *cf.* Weinreb, *supra* note 122, at 1150 (proposing fairness as a fifth factor).

172. Lee, *supra* note 106, at 839. This concern may be particularly acute where new technologies are involved. *See* R. Anthony Reese, *The Problems of Judging Young Technologies: A Comment on* Sony*, Tort Doctrines, and the Puzzle of Peer-To-Peer*, 55 CASE W. RES. L. REV. 815, 882 (2005).

173. *E.g.*, Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P. (*Swatch II*), 756 F.3d 73, 85 (2d Cir. 2014).

174. *E.g.*, *id.* at 91.

175. *E.g.*, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1208 (2021).

IV. *ORACLE* REVISITED

The five-factor framework represents a change to fair use methodology that aligns with prior outcomes. Fair use's problem is not that courts are blessing the wrong uses but that opaque reasoning limits *ex ante* predictability.[176] This Note provides a path forward. By facilitating the investigation of public benefits in fair use analyses, the five-factor framework will lead to clearer explanations of which uses fulfill copyright's mission.

This Note therefore ends where it began, considering why Google's appropriation of Oracle's code was justified. Google's use was arguably transformative, for it shed light on the functional parts of Oracle's code.[177] Oracle's code was also "further than are most computer programs . . . from the core of copyright."[178] But Google appropriated a "large" amount of code[179] to "disastrous effect" on Oracle's market.[180] The first and second factors might thus have favored fair use to some extent, while the third and fourth factors should properly have disfavored it. Reckoning with conflicting indicators may explain the Court's decision to stampede toward its desired outcome instead.[181]

Adding the fifth factor would illuminate the case's most equitable disposition. As Justice Breyer noted, allowing Google's use to proceed would produce substantial public benefits, including by enabling programmers' subsequent development of new computer programs.[182] The context of the dispute was thus not *Oracle v. Google* but *Oracle v. Google and the Public*. This framing is implicit in all fair use cases, and the five-factor framework would make it explicit. When Google's use is considered in this broader context, the holistic fair use scales tip in Google's favor. The use is justified because the beneficial externalities are substantial; protecting Oracle's monopoly would deprive the public of the weighty spillover effects from Google's appropriation, including all the future programs third-party developers would create using Google's product to exploit their functional knowledge about Oracle's code. The five-factor framework supplies a transparent organizational structure for reaching this conclusion.

Fair use needs reform to accommodate public benefits. Currently, some courts subsume public benefits into one of the existing factors, despite textual and doctrinal indicators not to. Other courts rip through public benefits offhandedly, revealing that unmentioned factors lurked in the background of their decisions. Or courts ignore public benefits altogether and thereby fail to consider the full equity in fair use cases. Only by analyzing public benefits as a fifth factor can courts properly give public benefits their due.

176. *See* Myers, *supra* note 5, at 179 (discussing the unpredictable nature of fair use).
177. *See* discussion *supra* notes 87–93 and accompanying text.
178. *Oracle*, 141 S. Ct. at 1202.
179. *Id.* at 1204–06.
180. *Id.* at 1217 (Thomas, J., dissenting).
181. 4 NIMMER ON COPYRIGHT § 13.05[I][4][d].
182. *Oracle*, 141 S. Ct. at 1207.