I Did You a Favor By Taking Your Work: Reconsidering the Harm-Based Approach To the Fourth Fair Use Factor

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INTRODUCTION

American copyright law is predominantly utilitarian.[1] Fair use—codified to promote copyright's utilitarian goals—has emerged as one of the most nebulous doctrines in American law. This is partially by design. Passing the Copyright Act of 1976 (the "Act"), Congress sought to endorse "the purpose and general scope of the judicial doctrine of fair use," but made clear that "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."[2] This judicial deference—combined with the case-by-case nature of fair use determinations—has led to evolving and inconsistent applications of section 107.[3]

Interpretation of section 107(4), which instructs courts to consider "the effect of the use upon the potential market for or value of the copyrighted work,"[4] is illustrative. Though a plain reading of section 107(4) leaves room for consideration of all market effects,[5] most courts and commentators agree that the inquiry into this factor concerns

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1. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107–12 (1990) (stating that copyright law exists "to stimulate activity and progress in the arts for the intellectual enrichment of the public" and that "[t]his utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts"); *see also* 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:1 (rev. ed. 2022) ("[C]opyright in the United States is not a property right, much less a natural right. Instead, it is a statutory tort, created by positive law for utilitarian purposes: to promote the progress of science."). *But see* THE FEDERALIST No. 43 (James Madison) (offering a natural rights-based justification for the Progress Clause).
2. H.R. REP. No. 94-1476, at 66 (1976).
3. *See, e.g.*, Jane C. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, 2020 SING. J. LEGAL STUD. 265 (2020) (cataloging the shifting fair use landscape, including the dwindling supremacy of transformative use and the reinvigoration of the fourth factor).
4. 17 U.S.C.A. § 107 (West).
5. *See generally* David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359 (2014) (advocating for a plain reading of § 107(4) that includes considerations of market help: infringing behavior that boosts the value of a copyrighted work).

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only deleterious effects on the copyright owner's actual or potential markets.[6] Some have expressed hostility toward consideration of positive market effects on the ground that an infringing use that might improve sales of a copyrighted work is also likely to invade the market for derivative works.[7]

In limited circumstances, courts and commentators have recognized the relevance of an unauthorized use providing financial gain for a copyright holder. In *Authors Guild, Inc. v. Google Inc.*, Judge Chin indicated that Google Books increased exposure and sales for the copyright holders, concluding that "the fourth factor weighs strongly in favor of a finding of fair use."[8] While the Second Circuit declined to adopt Judge Chin's explicit reasoning,[9] *Authors Guild* remains a powerful endorsement of the plain reading of section 107(4). In *Google LLC v. Oracle Am., Inc.*, the Supreme Court indicated that analysis of the fourth factor should weigh public benefits against private harms, endorsing a more holistic balancing of interests.[10] In the wake of a reinvigorated fourth factor,[11] it is worth reassessing whether economic benefits from infringement have any place in the market impact inquiry.

This Note addresses the current status of market benefits: monetary gains conferred upon a copyright holder by a third party's unauthorized use of a copyrighted work. While courts are still unwilling to treat market benefits as dispositive, they are moving away from the view that the fourth factor concerns only market harm. Expanded analysis of a fourth factor now balances private economic effects, public benefits, and in some cases, non-monetary concerns[12] related to the value of a work.[13] Market benefit proponents assert that their inclusion is more in line with the text and history 1976 Act, as well as the overall goals of copyright.[14] Further, weighing market benefits against market harms helps to address problems related to circularity.[15]

This Note considers the viability of market benefits as both a dispositive and a relevant component of fourth factor interpretation. Part I provides a basic overview of the traditional approach to the fourth factor before defining and distinguishing

6. *But see* Jane C. Ginsburg, *Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work"—Essay,* 67 J. COPYRIGHT SOC'Y USA 19 (2020) (advocating that "the value of the copyrighted work" should be analyzed separately from market substitution).

7. 17 U.S.C. § 106(2) ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following . . . (2) to prepare derivative works based upon the copyrighted work[.]").

8. Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013), *aff'd*, 804 F.3d 202 (2d Cir. 2015).

9. Authors Guild v. Google, Inc., 804 F.3d 202, 223–24 (2d Cir. 2015).

10. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1206–08 (2021).

11. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3.

12. Andrew Gilden, *Copyright's Market Gibberish,* 94 WASH. L. REV. 1019, 1019 (2019) ("In a wide range of copyright cases, plaintiffs use economic and market-based theories to achieve goals that have little to do with economic rights.").

13. Ginsburg, *Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work"—Essay*, *supra* note 6.

14. *See, e.g.*, Fagundes, *supra* note 5; Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015).

15. *See, e.g.*, 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:152 (rev. ed. 2022).

between different types of market benefits. Part II analyzes recent caselaw acknowledging market benefits and proposes a framework for proving market benefits as part of a reinvigorated fourth factor. Part III addresses the viability of market benefit arguments across different sectors of copyrighted works and the possible implications of increased acceptance. It concludes that, despite enhanced recognition, market benefits still lack widespread applicability and are unlikely to change the outcome of any present fair use determination.

I. THE RELATIONSHIP BETWEEN SECTION 107(4) AND MARKET BENEFITS

A. THE TRADITIONAL APPROACH TO MARKET EFFECTS IN FAIR USE

1. A Brief Overview

The Constitution grants Congress authority to "[p]romote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[16] Protecting authorship enriches the public by encouraging the creation and dissemination of original works. However, this is a delicate balance. Too much protection for authors stifles innovation by discouraging new works, while too little protection stifles innovation by removing economic incentives for creation.

Fair use is designed to further copyright's dual aims. Originating in common law,[17] fair use is an affirmative defense[18] to copyright infringement that expressly limits authors' exclusive rights related to their copyrighted works. Carve-outs for education and criticism encourage "productive thought and instruction without excessively diminishing the incentives for creativity."[19] Determining whether a particular use is fair, courts are instructed to weigh four non-exclusive factors:

> (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.[20]

16. U.S. CONST. art. I, § 8, cl. 8.

17. Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). Justice Story introduced several factors with modern equivalents in 17 U.S.C. § 107, including "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." *Id.* at 348.

18. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

19. Leval, *supra* note 1, at 1110.

20. 17 U.S.C. § 107.

While this may seem like a relatively straightforward four-prong test, these overlapping factors reflect the doctrine's heterogenous, common-law origins.[21] Enshrining fair use in section 107, Congress intended to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[22]

Section 107 instructs courts to consider at least four factors but does not assign relative weight or importance to any particular factor. The first and fourth statutory factors—closely related to one another[23]—emerged as the dominant considerations in fair use determinations.[24] The fourth factor enjoyed early supremacy, bolstered by the Supreme Court's proclamation in *Harper & Row Publishers, Inc. v. Nation Enterprises* that it was "undoubtedly the single most important element of fair use."[25]

Almost a decade later, *Campbell v. Acuff-Rose Music, Inc.* altered the judicial approach to fair use. The Court emphasized the importance of the first factor and a finding of a "transformative use."[26] Lower courts followed the Supreme Court's lead in subsequent decades, expanding the importance of the first statutory factor.[27] Though technically not dispositive,[28] a "finding of 'transformativeness' often foreordained the ultimate outcome, as the remaining factors, especially the fourth . . . withered into restatements of the first."[29] Essentially, a transformative use, by definition, occupied a nontraditional market. Accordingly, the presence or lack of transformativeness emerged as an excellent predictor of fair use.[30]

21. Fagundes, *supra* note 5, at 371 ("In the roughly 135 years between Story's opinion in *Folsom* and the passage of the Copyright Act of 1976, the fair use doctrine developed in the absence of any centralized statutory guidance. This development was heterogeneous by design, and thus did not give rise to a uniform fair use standard.").

22. H.R. REP. NO. 94-1476, at 66 (1976).

23. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978–2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1, 18 (2020) ("[t]he outcomes of factors one and four are also strongly correlated with each other. Indeed, in 72.5% of the 579 opinions, the court arrived at exactly the same outcome under both factors (out of six possible coded outcomes per factor).").

24. *See, e.g., id.* at 4 ("The same two factors that drove the test through 2005 have continued to do so: the first factor, going to the 'purpose and character' of the defendant's use, including whether it qualifies as 'transformative,' and the fourth factor, going to 'the effect of the [defendant's] use upon the potential market for or value of the copyrighted work.'").

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

26. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (citing Leval, *supra* note 1, at 1111).

27. *See, e.g.*, Ginsburg, *Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work"—Essay*, *supra* note 6, at 19 ("In the decades after the U.S. Supreme Court's adoption of 'transformative use' as a criterion for evaluating the first statutory fair use factor ('nature and purpose of the use'), a spate of lower court decisions enlarged the ambit of 'transformative use' analysis to engulf all of fair use.").

28. *Campbell*, 510 U.S. at 581 ("[p]arody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.").

29. Ginsburg, *Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work"—Essay*, *supra* note 6, at 19.

30. *See, e.g.*, Beebe, *supra* note 23, at 25 ("[o]f the 78 core opinions since *Campbell* in which a court found transformativeness, in all but three the court went on to find fair use.").

2. *Campbell* and the Harm-Based Approach To the Fourth Factor

After *Campbell,* the market effect inquiry became subordinate to a finding of transformativeness. Perhaps even more significant for the purposes of this Note, *Campbell* popularized "market harm"[31] as shorthand for the fourth factor.[32]

Since *Campbell,* courts applying section 107(4) have primarily considered economic harm resulting from an infringing use. The key to this inquiry is whether the secondary use constitutes a market substitute for the original or its derivatives.[33] To determine this, courts look to "not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original."[34]

Courts are not concerned "whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use usurps the market of the original work."[35] This reflects the observation from *Campbell* that "there is no protectible derivative market for criticism."[36] Similarly, even though the "taking of unprotectable material such as important ideas, laboriously researched facts, or the copying of the work's overall style may cause lower sales, such losses should not be considered. The harm must be caused by the use of expression."[37]

Section 107(4) instructs courts to consider the effects on the "potential market" for a work, which includes revenue generated from derivative works and licensing fees.[38] One does not need to prove actual market harm, as "*some* meaningful likelihood of future harm"[39] is sufficient. The party raising a fair use defense has the burden to prove that their use has not, and will not, harm the potential market for the copyrighted work

31. Fagundes, *supra* note 5, at 365 ("*Acuff-Rose* is significant also for its introduction of the term 'market harm' as shorthand for the fourth fair use factor. The Court not only used that term throughout its opinion, but observed in summarizing its holding that 'the fourth [fair use factor is] market harm.' In so doing, the Court not only solidified the conceptual equivalence between market effect and adverse economic impact that its earlier opinions had introduced, but it popularized 'market harm' as the quick-reference term for this take on the fourth factor that swiftly became (and remains) ubiquitous among courts and commentators alike.").

32. *Campbell*, 510 U.S. at 590 n.21 ([t]he Court acknowledges—though ultimately rejects—market benefit arguments: "Even favorable evidence, without more, is no guarantee of fairness. Judge Leval gives the example of the film producer's appropriation of a composer's previously unknown song that turns the song into a commercial success; the boon to the song does not make the film's simple copying fair. This factor, no less than the other three, may be addressed only through a 'sensitive balancing of interests.' Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.") (citations omitted).

33. *Id.* at 590–94.

34. *Id.* at 590.

35. NXIVM Corp. v. Ross Inst., 364 F.3d 471, 482 (2d Cir. 2004).

36. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592(1994)

37. PATRY, *supra* note 15, at § 10:150.

38. *Id.*; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574 n.4, 592-93 (1994)

39. Sony Corp. Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (emphasis in original).

or any derivatives.[40] It is not entirely clear how defendants can meet this burden without speculation, leading some to conclude that "placing the burden on defendant is tantamount to ruling against it."[41]

The fourth factor faces circularity problems. The mere fact that a fair use defense is raised demonstrates that there is a potential market for a copyrighted work. As Nimmer explains:

> [A] potential market, no matter how unlikely, has always been supplanted in every fair use case, to the extent that the defendant, by definition, has made some actual use of plaintiff's work, which use could in turn be defined in terms of the relevant potential market. In other words, it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar.[42]

Though broad, the scope of potential markets is not unlimited. In *American Geophysical Union v. Texaco Inc.*, after bemoaning the "vice of circular reasoning" and declaring that it "arises only if the availability of payment is conclusive against fair use,"[43] the Second Circuit declared that a market must be "traditional, reasonable, or likely to be developed" to receive protection against usurpation.[44] In *Castle Rock Ent., Inc. v. Carol Pub. Grp., Inc.*, the Second Circuit explained that copyright owners may not expand their potential market by attempting to license or develop markets for fair uses:

> [C]opyright owners may not preempt exploitation of transformative markets, which they would not "*in general* develop or license others to develop," by actually developing or licensing others to develop those markets. Thus, by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work, a copyright owner plainly cannot prevent others from entering those fair use markets.[45]

In many contexts, courts consider an artist's decision not to enter a particular market strategic or artistic. In 1998, the Second Circuit held that an unauthorized Seinfeld trivia book did not constitute fair use, despite the fact that "Castle Rock has evidenced little if any interest in exploiting this market for derivative works based on *Seinfeld*,

40. *Campbell*, 510 U.S. at 590 (1994). ("Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.").

41. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (rev. ed. 2021).

42. *Id.*

43. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 931 (2d Cir. 1994).

44. *Id.* at 930.

45. Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 145 n.11 (2d Cir. 1998) (emphasis in original).

such as by creating and publishing *Seinfeld* trivia books."[46] Even explicit rejection of a certain market does not grant a third party immunity to usurp that derivative market.[47] In a case regarding unpublished letters from J.D. Salinger, the Second Circuit noted that "the need to assess the effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime."[48] In another case concerning J.D. Salinger, the court declared that an unauthorized sequel to *Catcher in the Rye* was not fair use even though "Salinger has publicly disclaimed any intention of authorizing a sequel."[49] The court noted that "Salinger has the right to change his mind and, even if he has no intention of changing his mind, there is value in the right *not* to authorize the derivative work."[50]

Together, these cases demonstrate that the fourth factor is not necessarily limited to monetary loss. If it were, it would be hard to justify protecting a market that a copyright holder has disavowed any intention to exploit.[51] Andrew Gilden cites the Salinger cases as examples of "market gibberish," in which "plaintiffs use economic and market-based theories to achieve goals that have little [to] do with economic rights."[52] Gilden suggests that, by denying fair use of Salinger's letters or an unauthorized sequel, the Second Circuit was "manipulating market interests in order to variably protect privacy concerns."[53] This is problematic because courts engaged in market gibberish "obscure the diverse range of economic, emotional, and cultural interests at stake within copyright law."[54] This in turn creates undesirable distributive consequences, as "famous and wealthy individuals can more easily cloak themselves in business narratives in order to vindicate personal interests."[55] To address this problem, courts should utilize an "interest-transparent approach," in which they "openly and explicitly discuss the range of interests they are weighing when deciding whether a given use is infringing."[56]

46. *Id.* at 145.

47. Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987), *op. supp. On den. Of reh'g*, 818 F.2d 252 (2d Cir. 1987).

48. *Id.* at 99.

49. Salinger v. Colting, 607 F.3d 68, 74, 83 (2d Cir. 2010).

50. *Id.* at 74 (emphasis in original).

51. PATRY, *supra* note 15, at § 10:152 ("[I]f there is no longer a licensing market, it is hard to see how a non-existent market can be harmed.").

52. Gilden, *supra* note 12, at 1019.

53. *Id.* at 1040.

54. *Id.* at 1019.

55. *Id.* at 1062.

56. *Id.* at 1023.

B. MARKET BENEFITS

Expanding the fourth factor inquiry beyond market harm may help address problems related to circularity[57] and the protection of non-economic interests.[58]

1. Defining Market Benefits

Market benefits consist of monetary gains conferred upon a copyright holder by a third party's unauthorized use of a copyrighted work. To be clear, proof of market benefits does not mandate—or even suggest—a finding of fair use.

Consider Leval's classic example of a famous director taking an unknown tune, putting it into her movie without permission from the composer, and turning the tune into a commercial success.[59] The fact that the composer receives a financial windfall from the attention conferred by the unauthorized inclusion of the tune does not render the use fair, as it is still "unjustified under the first factor."[60] Although the secondary use is commercial, non-transformative, and not protected as fair use, it still provides a market benefit: a monetary gain caused by an unauthorized use.

A highly transformative search engine that stimulates book sales by providing snippet views with links to copyright holders' websites also provides a market benefit. Although the use is not authorized, it confers a financial benefit upon the copyright holder. These examples illustrate that the presence of market benefits depends on the monetary effect to a copyright holder's work, not a commercial or transformative use or purpose.

2. Distinguishing Market Benefits

There are two general types of market benefit arguments. While there is overlap, these arguments should be considered distinct.

The first type of argument, which I term "dispositive market benefits," suggests that a use should be fair if an infringer can show that an unauthorized use made the copyright holder more money than it cost her, even if the secondary use is commercial and non-transformative. This echoes "the long-spurned argument that defendant's copying does the plaintiff a favor by bringing the work to greater public attention."[61] Acceptance of dispositive market benefits would reward lawbreakers and restrict a copyright holder's ability to produce derivative works. This is precisely the type of argument that courts have long rejected,[62] and are likely to continue to reject in the future.

57. PATRY, *supra* note 15, at § 10:152.

58. *See generally* Gilden, *supra* note 12.

59. Leval, *supra* note 1, at 1124 n.84.

60. *Id.* at 1124.

61. Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1412 (2014).

62. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 n.21 (1994).

The second type of argument, which I deem "relevant market benefits," is more in line with current jurisprudence. This argument suggests that a court should balance market benefits, market harms, and additional factors for a more holistic assessment of the fourth statutory factor. Though relevant, the existence of market benefits does not rescue an otherwise infringing use. Rather, it should be one of several considerations germane to a court's determination of market impact.

Like many other aspects of fair use, market benefits ought to be relevant, not dispositive.

3. Deriving Market Benefits

Balancing market benefits against market harms is arguably more compatible with the language, purpose, and legislative history of section 107(4) than the current judicial approach.

The beginning point for any statutory interpretation is the text of the statute.[63] Section 107(4) instructs courts to consider "the effect of the use upon the potential market for or value of the copyrighted work."[64] An ordinary reading suggests that courts should consider all potential effects, not just harmful ones. There are no positive or negative words that might imply a limited consideration of market harms.

Despite the straightforward reading of section 107(4), courts may consult the legislative history to resolve ambiguities of interpretation.[65] The legislative history of the Copyright Act of 1976 contains limited discussion of fair use and the fourth factor,[66] but offers some valuable insights.[67] The general intention behind section 107 can be interpreted broadly, as "there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."[68] While this seems to clash with the suggestion that section 107 is "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way,"[69] both of these statements reflect the common law origin and flexible nature of fair use. Due to "the endless variety

63. *See, e.g.*, Sebelius v. Cloer, 569 U.S. 369 (2013) ("As in any statutory construction case, '[w]e start, of course, with the statutory text,' and proceed from the understanding that '[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" (citing BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006))).

64. 17 U.S.C. § 107(4).

65. "The commonest bridge from text to legislative history is a finding that the statutory language is not plain, but instead is unclear or 'ambiguous.'" LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 44 (2014). *See also id.* at 44 n.303 ("'In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress.' United States v. Great Northern Ry., 287 U.S. 144 (1932). On the other hand, 'we do not resort to legislative history to cloud a statutory text that is clear.' Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994).").

66. H.R. Rep No. 94-1476 (1976).

67. *Id.*

68. *Id.* at 66.

69. *Id.*

of situations" that can arise related to fair use, "the courts must be free to adapt the doctrine to particular situations on a case-by-case basis."[70]

Nothing in the legislative history seems to foreclose consideration of market benefits, nor endorse exclusive consideration of all market harms.[71] Tracing the history of section 107(4), Fagundes notes that Alan Latman's Congressionally commissioned study on fair use contained "several different versions of the fair use factors."[72] Although these versions included "various market-harm formulations," the drafters of the fair use test deliberately "chose the market neutral language" attributed to Judge Leon Yankwich and Professor Saul Cohen.[73] The drafters had access to "no shortage of alternative phrasings" that would have covered only "negative economic impacts of unauthorized use," but still chose to use market neutral language.[74] Fagundes notes that "the sole economic impact considered during the pre-codification history of fair use was indeed a harmful one: reduced demand for the plaintiff's work due to the unauthorized use," but insists that this does not foreclose the relevance of market benefits.[75]

Looking beyond the text of the statute and legislative history, Fromer argues that balancing market benefits and market harms "advances copyright's goal of promoting the creation of artistic and cultural works from which society can benefit."[76] On the other hand, consideration of only market harms distorts the incentives/access tradeoff because "infringement—and no fair use—can be found too readily."[77] She suggests that balancing all market effects "solves a longstanding concern with circular and short-circuited reasoning in consideration of the fourth fair use factor."[78] This argument has some instinctive appeal. A nuanced approach to the fourth factor could reduce tautological problems by eliminating the almost dispositive impact of a finding of market harm. It may be easier to balance dual aims of promoting creativity and protecting authorship in a regime where market harms do not largely dictate an outcome.[79]

70. *Id.*

71. For a more thorough discussion of the relevant legislative history, including preliminary drafts and language, see Fagundes, *supra* note 5, at 370–77.

72. *Id.* at 373.

73. *Id.* at 374.

74. *Id.* at 375.

75. *Id.*

76. Fromer, *supra* note 14, at 615.

77. *Id.* at 649.

78. *Id.* at 640.

79. This is not to suggest that market harms are dispositive, only that a finding of market harm strongly correlates with a lack of fair use. *See* Beebe, *supra* note 23, at 33 ("Of the 169 core opinions that found that factor four disfavored fair use from 1978 through 2019, all but three ultimately found no fair use, and none of the three outlying opinions that found fair use offers particularly compelling analysis to explain its divergence between factor four and the overall outcome.").

II. MARKET BENEFIT CASE LAW AND PROOF

A. DEVELOPING MARKET BENEFITS

1. Pre-*Campbell* Market Benefits

Amsinck v. Columbia Pictures Indus., Inc.,[80] highlights the importance of market effects prior to *Campbell*. This case considered whether Defendant Columbia Pictures Industries, Inc. ("CPI") had infringed Plaintiff Carola Amsinck's copyright in her "pastel-colored teddy bears" artwork by displaying the work in a motion picture without seeking permission, and whether CPI was entitled to a fair use defense.[81] Beginning its analysis with the fourth factor,[82] the court found that "the defendants' use of Amsinck's artwork did not prejudice sales of her design or of the Mobile bearing the design" and "could not be used as a substitute."[83] The court also referenced a market benefit argument: "Indeed, the Court believes that, notwithstanding the lack of identification of the Mobile, its use in the film might actually increase the demand for mobiles in general, thereby benefitting plaintiff indirectly."

Amsinck relied on the fourth factor as the dispositive consideration in its fair use analysis:

> While the other three factors may lean toward the plaintiff, their significance in this case is outweighed by this most important factor [section 107(4)]. Because this key factor all but requires a finding of fair use, defendants will be entitled to a finding of fair use unless all the other factors weigh strongly against such a finding.[84]

While the court's reliance on the fourth factor may seem unusual in a post-*Campbell* landscape, it was not as controversial at the time.[85] In this case, the lack of market harm appears to serve a similar role to transformativeness under *Campbell:* saturating the court's assessment of each other factor and determining the ultimate outcome.[86] In *Amsinck,* the court's analysis of the first factor focused on the commercial nature of the film, rather than any sort of transformative use or purpose.[87] The court also mentioned

80. Amsinck v. Columbia Pictures Indus., 862 F. Supp. 1044 (S.D.N.Y. 1994).

81. *Id.* at 1045–46.

82. *Id.* at 1048.

83. *Id.* at 1049.

84. *Id.*

85. *See, e.g.,* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 566 (1985) (the fourth factor is considered "undoubtedly the single most important element of fair use.").

86. *See also* Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3, at 266 ("'[T]ransformative use' analysis has engulfed all of fair use, becoming transformed, and perhaps deformed, in the process. A finding of 'transformativeness' often foreordained the ultimate outcome, as the remaining factors, especially the fourth (impact of the use on the market for or value of the copied work), withered into restatements of the first.") (footnote call number omitted).

87. Amsinck, 862 F. Supp. at 1049.

the lack of substitutive value in its discussion of the third factor.[88] Weighing the fourth factor more than the other three combined, the court considered Defendant's use fair.[89]

Interestingly, *Amsinck* presents a market benefits scenario similar to the one contemplated and rejected by Leval and, in turn, the Supreme Court in *Campbell.* Leval's example involves a movie's unlicensed use of a song from an unknown artist, garnering attention and profits for the artist.[90] Similarly, the *Amsinck* court suggests that the attention conferred upon Plaintiff's artwork by Defendants' unauthorized use in a movie would drive up demand, benefitting Plaintiff, and permitting a fair use defense.[91]

2. Subsequent Market Benefit Cases

Though courts typically remain hostile to market benefits due to clashes with derivative work rights and conferral of benefits upon lawbreakers, cases from varied district and circuit courts may suggest growing acceptance of relevant market benefits. Alternatively, these cases may signal reluctance to extend copyright owners limited monopoly to non-existent and hypothetical markets. In each of these cases, the court found the use fair, and the secondary work transformative. As a result, each of these cases concerns relevant market benefits, not dispositive market benefits.

In *Nunez v. Caribbean Int'l News Corp.*, the court found fair use where a newspaper reprinted three photos of Miss Puerto Rico Universe without the photographer's permission on the grounds that the images served an informative—albeit commercial—purpose.[92] Acknowledging that a market may have existed for licensing controversial photos to news outlets, and that "El Vocero's use of the photograph without permission essentially destroys this market,"[93] the court nonetheless found that Nunez had not suffered market harm because there was no evidence that such a market existed in this case. Noting that "the only discernible effect of the publication in El Vocero was to increase demand for the photograph," the court found that the fourth factor favored fair use.[94] In this case, unlike others discussed in this section, the court suggested that the first factor may have been "neutral."[95]

Hofheinz v. AMC Prods., Inc., presents a similar example of relevant market benefits.[96] The issue in this case was whether AMC's unauthorized use of copyrighted clips in documentary about James Nicholson, Hofheinz's late husband, constituted fair use.[97] Determining the use was fair, the court noted that the documentary was both transformative and unlikely to reduce the potential market for Hofheinz's works.[98]

88. *Id.* at 1050.
89. *Id.*
90. Leval, *supra* note 1, at 1124 n.84.
91. Amsinck, 862 F. Supp. at 1049.
92. Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 22 (1st Cir. 2000).
93. *Id.* at 25.
94. *Id.*
95. *Id.* at 23.
96. Hofheinz v. AMC Prods., Inc., 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001).
97. *Id.* at 129–30, 137.
98. *Id.* at 141.

Analyzing the fourth factor, the court suggested that the documentary may actually confer a benefit upon the copyright holder:

> I find at this point that it the [sic] Documentary may increase market demand for plaintiff's copyrighted works and make more people aware of the influence that AIP had in developing the 'B' movie genre. Moreover, defendants' brief display of the photographs, poster, and model monsters at issue should only increase consumer demand as well as the value of those items after the Documentary heightens public awareness of AIP's role in shaping Hollywood productions.[99]

The court rejected Hofheinz's argument that future lost licensing revenue should prevent a determination that the use is fair, suggesting that this would "eviscerate the affirmative defense of fair use." This reasoning, however, seems to ignore the word "potential" in section 107(4). Copyright holders are afforded protection over both their works and any derivative works,[100] so the likely effects on a licensing market are relevant.

Corbello v. DeVito, provides another pertinent example of relevant market benefits.[101] In this case, the widow of the ghostwriter for Tommy DeVito's unpublished autobiography ("the Work") alleged copyright infringement by DeVito and his bandmates for using the Work to create the Broadway musical "Jersey Boys."[102] Ultimately, the court found that defendants were "entitled to a judgment as a matter of law on the fair use issue."[103]

Corbello stands out for its recent insistence that the "fourth, *most important* factor strongly favors a finding of fair use."[104] Beginning its fair use analysis with the fourth factor, the court noted that "before [Jersey Boys] debuted, the Work had no market value."[105] It endorsed the idea that Jersey Boys may have positively impacted the market for the Work it allegedly infringed: "To the extent the Work may be profitable today, it is almost certainly only because of the Play . . . If anything, the Play has increased the value of the Work."[106]

Confusingly, the *Corbello* court found both that the secondary work was transformative for its "change of purpose" and "character,"[107] and that the "first factor weighs against fair use in the present case as it does in most cases, because the producers

99. *Id.* at 140.

100. 17 U.S.C.A. § 106(2) (West).

101. Corbello v. DeVito, 262 F. Supp. 3d 1056 (D. Nev. 2017), *aff'd sub nom.* Corbello v. Valli, 974 F.3d 965 (9th Cir. 2020).

102. *Id.* at 1059–1065.

103. *Id.* at 1079.

104. *Id.* at 1069 (emphasis added).

105. *Id.* at 1068.

106. *Id.* at 1069.

107. *Id.* at 1076.

of the Play have profited from exploitation of copyrighted material without paying the customary price."[108] The court did not explain its decision to separate the first factor from transformation.[109] While the court did note that "the transformative nature of the use diminishes the significance of the sole factor weighing against fair use," it at no point suggested that the first factor may in fact favor a finding of fair use.[110] It is not clear whether this is an error, a deliberate attempt to reinvigorate the fourth factor at the expense of the first, or something else entirely. As a result of the nontraditional opinion, it is difficult to suggest that this case should be seen as instructive.

A small sampling of other federal cases may demonstrate growing acceptance of market benefits as a viable component of fair use analysis. In a case regarding a manuscript's admission into evidence, the Fourth Circuit noted that "the use would have 'absolutely zero' detrimental effect on the potential market for the copyrighted work and could, 'in a perverse way,' actually increase its market value."[111] In a case regarding a South Park parody of an online video, the Seventh Circuit noted that the allegedly infringing work's "likely effect, ironically, would only increase ad revenue."[112] In a case addressing the unauthorized submission of a plaintiff's resume in a litigation matter, the Eastern District of Virginia asserted that the "effect of that use, if anything, would seem to aid plaintiffs by increasing their prominence or visibility in the field."[113] Finally, the Northern District of Mississippi expressed openness to arguments related to enhanced market value in a case about an unauthorized use of a William Faulkner quote in a Woody Allen movie.[114] The acknowledgement of possible market benefits in each of these cases is significant, even if the benefits did not change the outcome.

There are at least three common elements of each of the cases introduced in this section: (1) a finding of fair use, (2) acknowledgement of potential market benefits, and (3) a transformative use or purpose. Taken together, these cases do not suggest that discussion of market benefits guarantees a finding of fair use. Courts routinely raise the issue of market benefits before dismissing them as irrelevant.[115] Rather, these cases demonstrate that a finding of transformativeness continues to dictate both the outcome of the fourth factor and the overall fair use determination. Therefore, even in market

108. *Id.* at 1069.

109. On appeal, the Ninth Circuit did not address the fair use issue. ("[w]e affirm on the sole ground that Jersey Boys did not infringe DeVito's biography, and so do not reach the district court's fair use rationale"). Corbello v. Valli, 974 F.3d 965, 971 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2856 (2021).

110. Corbello v. DeVito, 262 F. Supp. 3d 1056, 1069 (D. Nev. 2017).

111. Bond v. Blum, 317 F.3d 385, 392 (4th Cir. 2003).

112. Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 693 (7th Cir. 2012).

113. Devil's Advoc., LLC v. Zurich Am. Ins. Co., No. 1:13-CV-1246, 2014 WL 7238856, at *7 (E.D. Va. Dec. 16, 2014), *aff'd*, 666 F. App'x 256 (4th Cir. 2016).

114. Faulkner Literary Rights, LLC v. Sony Pictures Classics, Inc., 953 F. Supp. 2d 701 (N.D. Miss. 2013).

115. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 n.21 (1994) (citing and rejecting example from Leval, *supra* note 1).

benefit cases, courts appear to retain the "*Cariou*-era formula, if transformative, then no market harm, therefore fair use."[116]

3. Digital Copying and Market Benefits

Cases discussing search engines, snippet views, and other mass digitalization technology are strong candidates for consideration of market benefits. Courts have found fair use in cases where a defendant has not necessarily produced a transformative work, but has used a work for a transformative purpose.[117] Digital copying is especially relevant in a market benefits context, as several mass databases convey information about copyrighted works without risking usurpation.[118] Nonetheless, transformativeness still controls; all the successful fair use defenses discussed in this section relied on a finding of transformativeness more than a demonstration of market benefits (or lack of market harm).

In *Kelly v. Arriba Soft Corp.,* the Ninth Circuit considered whether Arriba's reproduction of Kelly's copyrighted photographs as lower-quality thumbnails was fair use.[119] Despite the fact that "Arriba made exact replications of Kelly's images," the court held that Arriba's use was transformative because it served "a different function than Kelly's use—improving access to information on the internet versus artistic expression."[120] By creating "a different purpose for the images, Arriba's use is transformative."[121] The court reasoned that this determination was in line with the goals of copyright, noting that "[t]he thumbnails do not stifle artistic creativity because they are not used for illustrative or artistic purposes and therefore do not supplant the need for the originals. In addition, they benefit the public by enhancing information-gathering techniques on the internet."[122]

Regarding the fourth factor, the court held that Arriba's use did "not harm the market for or value of Kelly's images."[123] It did not matter that "Kelly could sell or license his photographs to other websites or to a stock photo database," because "the search engine would guide users to Kelly's web site rather than away from it."[124] Thus, despite an existing market for online photo licensing, the thumbnails did not serve as a market substitute for the higher quality, larger photos. Concluding that the fourth

116. Jane C. Ginsburg, *Letter from the US, Part I: The Fair Use Pendulum Oscillates*, REVUE INTERNATIONALE DU DROIT D'AUTEUR (Nov. 15, 2021), https://la-rida.com/sites/default/files/2021-12/270-CEVA.pdf [perma.cc link unavailable] [Wayback Machine link unavailable].

117. *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003) ("[w]e must determine if Arriba's use of the images merely superseded the object of the originals or instead added a further purpose or different character. We find that Arriba's use of Kelly's images for its thumbnails was transformative.").

118. *See, e.g.*, Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013).

119. *Kelly*, 336 F.3d at 821.

120. *Id.* at 818–19.

121. *Id.*

122. *Id.* at 820.

123. *Id.* at 822.

124. *Id.* at 821.

factor weighed in favor of fair use, the court noted that Arriba's thumbnails directed users to Kelly's website, the only place where someone could access the full photos.[125]

The Ninth Circuit reached a similar result in *Perfect 10 v. Amazon,* finding that Google's display of thumbnail images was fair use.[126] Relying on *Kelly,* the court held that Google's use was "highly transformative," and therefore the first factor weighed "heavily in favor of Google."[127] The court compared search engines to parody in terms of their social benefit and transformative value, suggesting that search engines "may be more transformative."[128] Unlike the plaintiff in *Kelly, Perfect 10* demonstrated that they had "a market for reduced-sized images."[129] However, this was not sufficient to demonstrate market harm, as the court reasoned that any potential harm "remains hypothetical." Ultimately, Google's transformative use outweighed its commercial nature and any "unproven use of Google's thumbnails for cell phone downloads."[130]

Authors Guild, Inc. v. Google, Inc. represents one of the strongest endorsements of market benefit arguments to date. In that case, plaintiffs brought a class action suit against Google for scanning and displaying "snippets" of copyrighted books via Google Books.[131] Circuit Judge Denny Chin (sitting by designation) found that the use was fair and granted Google's motion for summary judgment.[132] Judge Chin rejected assertions by the copyright holders that Google Books served as a market replacement for their works, noting that "a reasonable factfinder could only find that Google Books enhances the sales of books to the benefit of copyright holders."[133] By providing "convenient links to booksellers to make it easy for a reader to order a book," there is "no doubt but that Google Books improves books sales."[134] Judge Chin concluded that the fourth factor "weighs strongly in favor of a finding of fair use."[135] The discussion did not contain any mention of market harm.

Affirming the motion for summary judgment, Second Circuit Judge Pierre Leval did not explicitly adopt Judge Chin's reasoning.[136] After acknowledging the potentially

125. *Id.* at 822.

126. Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

127. *Id.* at 1167–68.

128. *Id.* at 1165. ("Just as a 'parody has an obvious claim to transformative value' because 'it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one,' a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool. Indeed, a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the same entertainment purpose as the original work.") (internal citations omitted). *But see* VHT, Inc. v. Zillow Grp., Inc., 918 F.3d 723, 742 (9th Cir. 2019) (finding no fair use where Zillow's photos served as a market substitute, despite the fact that they were delivered via search engine; "the label 'search engine' is not a talismanic term that serves as an on-off switch as to fair use. Rather, these cases teach the importance of considering the details and function of a website's operation in making a fair use determination.").

129. *Perfect 10*, 508 F.3d at 1168.

130. *Id.* at 1168.

131. Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

132. *Id.* at 283.

133. *Id.* at 293.

134. *Id.*

135. *Id.*

136. Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

harmful economic effects of snippet view, Judge Leval declared that "the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original."[137] Judge Leval then characterized Google's use as supplying information about copyrighted works, thus falling outside the scope of section 106(2).[138] While the judges offered alternate justifications to reach the same result, it is significant that neither considered suggestions (though no evidence) of lost book sales or licensing fees dispositive.

In the mass digitalization context, transformativeness remains the benchmark for a finding of fair use. Although information delivering sources like search engines may serve complementary market functions with existing copyrighted works, that is not enough to sustain a fair use defense.

4. Shifting Fair Use Landscape

Some recent cases suggest that "transformativeness" may be losing its dominant status in the fair use calculus. In *Fox News Network, LLC v. Tveyes, Inc.,* the Second Circuit held that TVEyes' searchable media database infringed plaintiff's copyrights and was not a fair use.[139] The court characterized TVEyes' database, which redistributed news in 10-minute clips, as "somewhat transformative,"[140] noting that the first factor "favors TVEyes only slightly."[141] Despite recognition of transformativeness, the court declined to find fair use because the third and fourth factors strongly favored Fox.[142] This represents a very rare case in which the first and fourth factors are not in alignment.[143] Professor Ginsburg argues that this characterization "strains the concept of transformativeness," though it "is significant that the courts rejected the fair use defense notwithstanding a finding of transformative use."[144]

Though *Fox* indicated a shift away from traditional transformativeness, it may still be dispositive. "In other words, 'transformativeness' may remain decisive, but the equation has flipped. The formula 'if transformative work/purpose, then no market harm' meets its corollary: '*[i]f commercial and not transformative, then market harm.*' Thus, fair use continues to reduce to a one-factor test, but one that cuts both ways."[145]

While *Authors Guild* failed to usher in an era of market benefits, another recent Google case may alter the fair use inquiry in a way that leads to a more holistic

137. *Id.* at 224.

138. *Id.* at 226.

139. Fox News Network, LLC v. Tveyes, Inc., 883 F.3d 169 (2d Cir. 2018).

140. Judge Kaplan took issue with this characterization in his concurrence, arguing that somewhat transformative "is entirely immaterial to the resolution of this case" because "the other factors relevant to the fair use determination carry the day in favor of Fox regardless of whether the Watch function is or is not transformative." *Id.* at 181.

141. *Id.* at 181.

142. *Id.* at 179–81.

143. Beebe, *supra* note 23, at 18.

144. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3, at 284.

145. *Id.* at 287 (emphasis added).

assessment of the fourth factor. In *Google LLC v. Oracle Am., Inc.,* the Supreme Court held that Google's unauthorized copying and use of Oracle's API was fair.[146] Justice Breyer balanced public benefits against private harms in his discussion of the fourth factor.[147] Though Oracle may forgo significant profit based on Google's use, any loss is more than made up for by the public benefits of enhanced creativity and interoperability.[148] While public benefits are not always relevant, they are relevant in this case "to determine the likely market effects of Google's reimplementation."[149] Following *Google*, other courts have reconfigured their fourth factor analysis to balance public benefits with harms to the copyright holder.[150]

One should not conflate market benefits and public benefits. However, to the extent that *Google* contemplates a more holistic fourth factor assessment, market benefits and public benefits may both be important. Market benefits, unlike public benefits, are entirely monetary and limited to the copyright holder. Public benefits, on the other hand, concern matters such as access to information and resources, and are largely unaffected by the copyright holder's financial situation. As an illustration, in *Authors Guild*, any author who enjoyed enhanced sales from snippet view received market benefits.[151] Each person who benefited from the Google Books service as an informational tool received a public benefit. As market benefits still lack dispositive value, the most realistic path to relevance may be a reconfigured fourth factor assessment that balances private economic effects and public benefits.[152]

146. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021).

147. *Id.* at 1206. ("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)?").

148. *Id.* at 1208. ("given programmers' investment in learning the Sun Java API, to allow enforcement of Oracle's copyright here would risk harm to the public. Given the costs and difficulties of producing alternative APIs with similar appeal to programmers, allowing enforcement here would make of the Sun Java API's declaring code a lock limiting the future creativity of new programs. Oracle alone would hold the key.").

149. *Id.* at 1206.

150. Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26, 50 (2d Cir. 2021) ("our analysis of the fourth factor also 'take[s] into account the public benefits the copying will likely produce.' *Google*, 141 S. Ct. at 1206.").

151. The fact that the authors may have lost some sales or licensing fees does not affect the applicability of market benefits. Market benefits refer to any monetary gain, not necessarily one that exceeds monetary loss. By the same token, market harm refers to any monetary loss, not necessarily one that exceeds monetary gain.

152. Fromer asserts that the presence of market benefits suggests societal benefits: "when there are market benefits to the copyright owner, there tends also to be societal benefit. All in all, policies weighing in favor of fair use suggest that market benefits to the copyright holder offer a signal that there is a societal benefit favoring fair use, which might also benefit the copyright holder." Fromer, *supra* note 14, at 633.

B. PROVING MARKET BENEFITS

Since *Campbell,* there have not been any cases in which market benefits overcame a lack of transformativeness to establish fair use. While proving dispositive market benefits may not be possible under present standards, it is possible to prove relevant market benefits. Anyone raising a market benefit argument should have to satisfy at least two elements: (1) enhanced profitability of a copyrighted work (2) caused directly by an unauthorized use of that work.

1. Enhanced Profitability

As part of an affirmative defense, the defendant bears the burden of proof[153] to show that their unauthorized use conferred a financial benefit upon the copyright holder. This burden of proof is problematic in cases of alleged market harm, as it is inherently speculative to argue that one's use will not have future deleterious effects on the market for a given work or its potential derivative markets.[154] However, for the sake of statutory consistency, it is preferable to apply similar empirical standards to both market harms and market benefits. Therefore, to empirically demonstrate a market benefit, a defendant must show "by a preponderance of the evidence that some meaningful likelihood of future"[155] benefit exists.

One can demonstrate "meaningful likelihood"[156] of monetary gain in several ways. Much like market harm, showing that the copyright holder had already benefitted financially would confirm the presence of market benefits. Proof of enhanced sales, or a meaningful likelihood of enhancement, could be sufficient, albeit difficult to prove a causal connection. Unless one can demonstrate that they directed people to a place in which they could purchase the product in question,[157] and correlate that with increased sales data, it may not be possible to prove enhanced sales.

If other empirical methods are unavailable, proof of enhanced exposure may be sufficient to demonstrate a market benefit. One way to estimate this would be to measure the cost of advertising required to achieve the same increase in exposure. Every dollar saved on advertising could be considered a market benefit. This can be problematic in a copyright regime, as the wealth and fame that occasionally accompany authorship create disparities in both the cost and effectiveness of advertising. Further, exposure does not necessarily result in increased sales, and it may also be difficult to assess what constitutes standard exposure.[158]

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153. *See, e.g.,* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) ("Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.").

154. *See generally* NIMMER & NIMMER, *supra* note 41, at 74.

155. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

156. *Id.*

157. For example, by providing links to purchase full books after displaying a snippet. *See* Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

158. Returning to the Leval example of a movie director using an unknown song, would different genres require different levels of exposure? For example, one can imagine someone looking up the lyrics to a

Ongoing business practices provide both a framework and an obstacle for measuring profitability. Businesses regularly engage in market-benefit like calculations when deciding whether to bring copyright infringement actions, and this could provide insight into what courts should consider.[159] Businesses weigh the financial benefits of enhanced community engagement and exposure against the potential cost of diminished sales and litigation. The notoriously protective Disney engaged in this sort of calculation when they decided not to bring suit against unauthorized third-party uses of their movie Frozen. Disney decided that "fan created content—even in cases where that content is generating revenue that is not captured by Disney—is cross-promotional marketing that money can't buy."[160] It appears that Disney is making a profitable bet that the unauthorized uses create brand loyalty and other market benefits that outweigh lost licensing fees. Though the "dividing line" between a permissible and impermissible use is "increasingly blurry,"[161] Disney's strategic decision represents an excellent example of an unauthorized but permitted use.

Tim Wu describes the strategic decisions by Disney and others as "tolerated use," defined as "technically infringing, but nonetheless tolerated, use of copyrighted works."[162] While there is significant overlap, tolerated use and fair use are distinct because the former is infringement and the latter is not.[163] Nonetheless, many of these tolerated uses consist of unauthorized uses that confer monetary gain upon a copyright holder in the same manner as a market benefit. In this sense, a tolerated use or a market benefit can both be a complement: "a good that makes another good more valuable."[164] Using fan created websites as examples,[165] Wu argues that treating complementary uses

song they like from a movie rather than trying to figure out the name of an instrumental track. On the other hand, the instrumental track may be "exposed" on screen much longer, as it is more compatible with spoken dialogue. So, what really matters—exposure or the results of exposure? The lack of certainty is illustrative of several problems related to empirical determinations.

159. However, if copyright owners are best suited to determine when to bring an infringement suit, why should a court second guess their judgement? Would bringing an infringement suit not demonstrate that the owner feels she is not receiving adequate market benefits?

160. Andrew Leonard, How Disney Learned to Stop Worrying and Love Copyright Infringement, SALON (May 23, 2014), https://www.salon.com/2014/05/23/how_disney_learned_to_stop_worrying_and_love_copyright_infringement [https://perma.cc/DG9S-UVW5] [https://web.archive.org/web/20230216225808/https://www.salon.com/2014/05/23/how_disney_learned_to_stop_worrying_and_love_copyright_infringement].

161. *Id.*

162. Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008).

163. *Id.* at 620.

164. *Id.* at 630. ("Examples are easy to describe. The sale of screws makes a screwdriver more valuable. My coffeemaker becomes more valuable the more varieties of coffee are available."); *id.* at 631.

165. *Id.* at 630 ("For example, if I create a film that is obscure, and a fan creates a loving website for the film that uses images from the film, it is probably the case that the fan has infringed. Nonetheless it is also obvious that the web site creates value for the owner of the original work. In fact, many fan websites and other tolerated uses are exactly the kind of thing that content creators pay for when it is called 'marketing.'"). As further illustration of this critical point, consider "the fan site for the popular TV show Lost, broadcast by ABC, which is called the 'Lostpedia.' Among other things, the Lostpedia posts full transcripts of the program; such postings are almost certainly copyright infringement. But nothing is done, not because ABC is lazy, but because it doesn't think suing the Lostpedia is a good idea. Such lack of enforcement against fan sites seems

as fair "might solve some of the problems of tolerated use."[166] Similar principles can be helpful in the application of market benefit arguments.

Kristelia Garcia catalogues a similar choice by Microsoft to embrace network effects via piracy:

> Microsoft tolerated rampant piracy of its operating system ('OS') in China because, as then-CEO Bill Gates famously said, 'As long as they're going to steal [software], we want them to steal ours.' Today, the company actively rewards pirates by offering upgrades of all outdated Microsoft operating systems—legitimate and pirated—to the latest version for free. Why? Because 'Microsoft is making a strategic play to get as many users hooked on the Windows 10 platform as possible . . . The more users Microsoft gets now, the more services it can sell downstream—and it's hoping even pirates can be flipped into paying customers.[167]

On the other hand, copyright holders' voluntary choice to engage in tolerated use or other similar practices may confirm that they are better positioned than anyone else to determine when to bring an infringement suit. In that regard, it is difficult to justify supplanting the copyright holder's economic calculation with the court's view that the market effect is beneficial.

2. Causation

Causation presents a difficult issue that does not have an analogue in the market harms calculation, in which the defendant bears the burden of proof to show that their use did not cause the alleged harm. To prove market benefits, however, a defendant would need to prove that their unauthorized use directly caused (or was likely to cause) the alleged benefit to the market for the plaintiff's work.

Causation may be easier to prove in cases of mass digitalization, in which technology companies often keep extensive user records that may indicate increased web traffic, sales, and more. For example, in *Authors Guild,* assuming, *arguendo,* that Google maintained comprehensive book sale data, they may have been able to demonstrate that participants' books sold better than similarly situated non-participants (isolating for other variables). This may be wishful thinking, as enhanced exposure is no guarantee of enhanced profit, and correlation does not equal causation. That said, extensive user

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to represent copyright owners' judgment that the infringing uses are complementary to the main copyrighted products—or put more simply, that fan sites will increase, not hurt, demand for the show." *Id.* at 619.

166. *Id.* at 631.

167. Kristelia Garcia, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265 (2020).

records demonstrating improved sales may demonstrate causation by a preponderance of the evidence.[168]

It is important to delineate attention conferred by unauthorized use from attention conferred by legal controversy. Market benefits apply only to monetary gains conferred directly by an allegedly infringing use, not notoriety generated by possible public interest in the litigation. A quintessential example comes from the controversy surrounding Marvin Gaye's "Got to Give It Up" and the modern pop hit "Blurred Lines." The Gaye family brought suit for copyright infringement against the owners of "Blurred Lines," and the jury found for the Gaye family and awarded millions in damages.[169] While "Got to Give It Up" saw some increased attention after the release of "Blurred Lines," it did not regain national prominence until people caught wind of the copyright infringement suit.[170] This would not be a case of market benefits.

III. THE PRESENT AND FUTURE OF MARKET BENEFITS

Explicit consideration of market benefits appears to fundamentally alter the inquiry into the fourth fair use factor. In practice, however, market benefits are unlikely to change the outcome of most fair use cases. Existing case law suggests that market benefit arguments may only hold weight in the limited context of search engines and other snippet technologies.[171] Nonetheless, any carveout for consideration of market benefits represents a significant change to fourth factor analysis.

A. SEARCHING FOR DISPOSITIVE MARKET BENEFITS

It remains to be seen if market benefits alone can overcome a non-transformative, commercial use.[172] In the cases where courts have acknowledged market benefits as

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168. Objections that this standard conflicts with rules of evidence against speculation must be equally applied to market harm and the speculation required to prove that one's infringement (if it were to become widespread) will not have deleterious effects on potential and derivative markets.

169. Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018).

170. *Id. See also* Victoria Kim et al., Ruling *T*hat *'*Blurred Lines*'* *C*opied Marvin Gaye *S*ong *R*ocks *M*usic *W*orld*,* LA TIMES (Mar. 10, 2015), https://www.latimes.com/local/california/la-me-blurred-lines-trial-20150311-story.html [https://perma.cc/8DTN-B37Q] [https://web.archive.org/web/20230220015817/https://www.latimes.com/local/california/la-me-blurred-lines-trial-20150311-story.html].

171. *See* Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) (finding Google and Amazon's display of copyrighted thumbnails was transformative, fair use); Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003) (fair use to display copyrighted thumbnails in search results because "Arriba's use of Kelly's images in its thumbnails does not harm the market for Kelly's images or the value of his images. By showing the thumbnails on its results page when users entered terms related to Kelly's images, the search engine would guide users to Kelly's web site rather than away from it.").

172. Fagundes provides an example of a non-profit fan site that enhances exposure to a work: "On one hand, Matters of Grey's verbatim taking of audio clips was only weakly transformative, and Arrested Development is a highly creative work. But on the other hand, Matters of Grey took no more of Fox's work than it needed to make ringtones, and it posted the ringtones without any profit motivation in mind (indeed, Matters of Grey is not a for-profit operation)." Fagundes, *supra* note 5. Unfortunately, this example has

relevant, they have also found a transformative use or purpose. In *Author's Guild*, for example, Judge Chin's assertion that "there can be no doubt but that Google Books improves books sales" was not dispositive.[173] Though market benefits were relevant, tipping the fourth factor to weigh heavily in Google's favor, there was no indication that this finding could overcome a lack of transformative use.

One narrow possibility for dispositive market benefits is a work that falls on the border between parody and satire. While neither label is dispositive in itself,[174] courts typically find that a parody is transformative while a satire is not.[175] This has always been a fraught line, as "parody often shades into satire."[176]

Satires, unlike parodies, impermissibly borrow expressive elements of a copyrighted work to comment on something unrelated to the underlying work.[177] However, there is no definitive rule about how much a parody can address society at large before it crosses into satire. What if eighty percent of a parody song ridicules the original work, but twenty percent lampoons society at large?

The importance of this distinction is reflected in the relevance of commercial status. A parody, like criticism, cannot harm the market for the original work, even if it suppresses demand for the original.[178] Parody, like any transformative work, will not be considered a market replacement because transformative works do not occupy traditional markets.

What about a famous satirist? One of the reasons satire does not enjoy fair use protection is that it borrows fame from an existing work to advance an unrelated message.[179] However, what if a satire conferred fame rather than borrowed it? In this scenario, a court may find that the satire is non transformative and commercial, tipping the first factor in favor of the original artist. However, the court may find that the satire exposed the original work to a much larger audience than it would have been otherwise exposed to. Using a market benefit approach, the court may find that the profits conferred by the unauthorized satire significantly outweigh any actual loss of licensing

minimal applicability because the use in question was not commercial. The more difficult question is whether a non-transformative, commercial use can rely on market benefits to achieve fair use.

173. *Authors Guild*, 954 F. Supp. 2d at 293.

174. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581 (1994) ("parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.").

175. *Id.* at 579 ("[P]arody has an obvious claim to transformative value," while "satire can stand on its own two feet and so requires justification for the very act of borrowing.").

176. *Id.* at 580.

177. *Id.* at 579.

178. *Campbell*, 510 U.S. at 591–92 ("We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,' B. Kaplan, *An Unhurried View of Copyright* 69 (1967), the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.'").

179. *Campbell*, 510 U.S. at 579*; see also* Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443 (9th Cir. 2020).

fees or potential loss of ability to profit off derivative works. As such, while there is clear market harm in the form of lost licensing fees, the market benefits are far greater.

Similarly, imagine a scenario where a celebrity comedian covers a song from an unknown YouTube artist with distinctive characteristics, changing the lyrics make fun of both the unknown artist and the internet music industry as a whole. The previously unknown artist becomes an overnight sensation, with views on their YouTube videos skyrocketing. The unknown artist signs a deal to record more music, and then brings a copyright infringement suit against the comedian for unauthorized use of their work. Is this a case like *Cabello,* in which the lack of market value before infringement would weigh in favor of fair use?[180]

In this scenario, it is an open question as to whether the comedian's use is transformative or not. While both songs use the same beat, they are arguably different genres (comedy vs. anything else) and made for different audiences (fans of the comedian vs. YouTubers). Licensing song covers is a traditional market, but it's not clear there was any market for licensing before the comedian's unauthorized use.

Perhaps there is room for dispositive market benefits in a case where a work is "somewhat transformative."[181] Imagine the facts of *TV Eyes* were altered: assume TV Eyes service included links to each channel's streaming platform, which users had to click on in order to get full context for a desired video. Otherwise, they could only view a 30 second clip.[182] Further imagine that data showed most TV Eyes users did click the links, significantly increasing viewership on the plaintiffs' channels and generating ad revenue. But for TV Eyes' service, users would have no idea that their desired clip was located on plaintiffs' channels and would be less likely to visit. In that case, a "somewhat transformative" work—in the sense that it fully reproduced copyrighted material in a slightly different online context—could be fair use if market benefits are considered.

Both scenarios come close, but they appear to suffer from fatal flaws. Either a work is transformative, and therefore does not compete as a market substitute, or it is not transformative, and therefore impedes a copyright holders derivative work rights. A "somewhat transformative" work may not be a helpful distinction because it likely usurps the derivative work right.[183] So long as "transformativeness" dictates outcomes, it is not clear that dispositive market benefits are possible.

B. WHY NOT ALSO LICENSE THE WORK?

An unauthorized use can improve the market for a copyrighted work through enhanced public attention and reputation, though the effects vary case by case. Is it necessary to demonstrate that an unauthorized use made the copyright holder more

180. Corbello v. DeVito, 262 F. Supp. 3d 1056 (D. Nev. 2017) ("[B]efore [Jersey Boys] debuted, the Work had no market value.").

181. Fox News Network, LLC v. Tveyes, Inc., 883 F.3d 169, 180 (2d Cir. 2018).

182. *Id.*, designed to contrast actual ten minutes. However, this change may enhance transformative value if the court agrees that shorter clips are equivalent to snippets from *Authors Guild* or low-quality thumbnails from *Kelly.*

183. Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3.

money than an authorized use would have? While initially appealing in theory, this is almost impossible to prove in practice because an authorized use does not necessarily diminish the financial benefits of an unauthorized use. Consider the Leval example[184] of a movie popularizing an unfamiliar song: the songwriter gets the same financial benefits from enhanced exposure regardless of whether the use is authorized or not. The difference is that the songwriter loses out on licensing and royalty fees if the use is unauthorized. Even in cases of substantial financial benefit, a copyright holder will almost always make more from an authorized use.

Put another way, the enhanced exposure or attention conferred by a secondary work does not depend on whether that secondary work is authorized or not. An artist that profits from the attention conferred by an unauthorized use would receive the same profits for an authorized use, plus any royalties or licensing fees. The only scenario in which an unauthorized use can be more profitable is if the other option is no use at all. Of course, rewarding an otherwise unwilling creator for an infringing work may benefit a lawbreaker without actually serving copyright's dual aims.

One way to understand this and frame the issue is to ask, why not also license the work? Typical responses demonstrate the difficulty of establishing dispositive market benefits.

1. It Was Too Expensive To License

A familiar response for up-and-coming artists—especially musicians looking to sample famous music—this argument rests on the idea that one should still be able to use a work without authorization so long as they make the copyright holder money. Imagine, for example, a small band who cannot afford to sample the opening guitar riff of the Rolling Stones "Paint It Black," but uses it anyway. Further imagine that the small band produces an improbable hit, landing both the unknown artist and "Paint It Black" on the Billboard 100. Unusually high streaming for "Paint it Black" generates thousands of dollars more than the Rolling Stones anticipated for that year. While many assume that the unknown artist propelled the revival of "Paint it Black," it is also possible that the resurgence is attributable to something else (such as people interested in possible litigation involving Mick Jagger).

Despite the mutual financial benefit, this should not be considered fair use. Licensing samples is a well-established and lucrative market for musicians. Denying a copyright holder a substantial ability to profit off their creative work will disincentivize future creation. In this scenario, it does not matter that Mick Jagger is ultra-wealthy and the small band is not. Allowing market benefits to outweigh market harms in these cases could diminish authorial protection enough to discourage the creation of future works, thereby harming the public. It does not matter if unauthorized sampling typically

184. Leval, *supra* note 1, at 1124 n.84.

enhances the sampled song's sales and exposure[185] because the owner of the sampled song would always make more money through licensing or royalties. This demonstrates that many cases of market benefit do not alter the fair use calculation. However, one should not confuse a lack of determinativeness with a lack of importance.

2. We Tried To Obtain a License and They Said No

If a creator tries to license another work and fails, they are left with two options: use the work without permission, or do not use the work. This argument suggests that using a work without permission is justified so long as one confers a monetary benefit upon the copyright holder. However, this argument clashes with an author's exclusive derivative works right under § 106(2). The case law is clear that an author may exercise control over whether or if she wishes to enter a particular market.[186] While exceptions exist for things like parody and criticism, control extends over any "traditional, reasonable, or likely to be developed market."[187] If someone writes a bestselling novel and declines to turn it into a movie, a director cannot justify ignoring the author to develop a movie just by sharing profits. In a case like *Campbell*, assuming the song was not found to be a parody or otherwise transformative, the fact that 2 Live Crew only used "Oh Pretty Woman" after Acuff-Rose rebuffed their license request[188] would weigh heavily against a finding of fair use.[189]

3. Too Impractical To License

In cases of mass infringement, this argument implies that individual licensing would be so burdensome that the licensing party is forced to produce an inferior product or abandon creation altogether. Consider *Authors Guild*, in which Google would have to acquire permission to reproduce insignificant snippets of every single available book. The combined cost and effort of this acquisition may outweigh any expected benefits from Google Books by so much that they decide to scrap the whole project, depriving public access to a valuable research tool.[190] This argument likely only fits with mass digital infringement, demonstrating the still narrow applicability of market benefits.

185. Mike Schuster et. al., *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177 (2019) (relying on data demonstrating a correlation between sampling and increased music sales to argue that sampling should be considered fair use).

186. Salinger v. Random House, Inc., 811 F.2d 90, 99 (2d Cir. 1987); Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132 (2d Cir. 1998).

187. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994).

188. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572–73 (1994).

189. *See, e.g.*, Fox News Network, LLC v. Tveyes, Inc., 883 F.3d 169, 180 (2d Cir. 2018) ("[i]t is of no moment that TVEyes allegedly approached Fox for a license but was rebuffed: the failure to strike a deal satisfactory to both parties does not give TVEyes the right to copy Fox's copyrighted material without payment.").

190. "In my view, Google Books provides significant public benefits. It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders. It has become an invaluable research tool that permits students, teachers, librarians, and others to more efficiently identify and locate

To understand the carveout, it may be helpful to compare search technology to free samples at stores. A candy store owner that gives a free piece of fudge to everyone who enters is not doing so out of altruism; she is doing so because she believes that offering free samples will cause people to buy more than they might have otherwise. Of course, she will attract some people who only come in for the free piece of fudge, but it is fair to assume that she would not continue the practice if it cost her more than it made. Search engines and thumbnail displays achieve a similar effect. Some consumers will be satisfied by the limited results in front of them, but others will be persuaded to spend money they might not have otherwise. So long as Google Books does not provide more than a snippet of the copyrighted work, it is merely identifying sources without necessarily diminishing sales.[191]

It is difficult to imagine another present context in which market benefits might have the same impact. Translating easily to other types of searches or similar musical software like Shazam, the impracticality argument falls apart with smaller data sets. An album that samples hundreds of songs may make individual license acquisition seem difficult, but pales in comparison to the millions of books or songs available on Google or Shazam. Of course, there is something perverse about immunizing mass infringers instead of medium or small-scale infringers. It almost amounts to permission to break the law, provided one breaks it over and over again. Professor Ginsburg describes this problem with mass digitalization fair use as an "obvious anomaly: the fewer works one copies, the weaker the case for market-failure fair use; but vast, immodest, copying entitles the copyist to persist, without permission and without paying."[192]

It is also difficult to separate this argument from a consideration of public benefits. Though distinct, market benefits and public benefits share utilitarian justifications rooted in copyright's underlying goals. Following Justice Breyer's analysis in *Google,* the fourth factor now includes a balancing of private harms against public benefits.[193] Expanding the inquiry to balance all market effects against all public effects is more holistic but could also give the fourth factor outsize influence. The benefits of diminishing the dispositive nature of the first factor may disappear if the fourth factor simply takes its place.

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books. It has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. It preserves books, in particular out-of-print and old books that have been forgotten in the bowels of libraries, and it gives them new life. It facilitates access to books for print-disabled and remote or underserved populations. It generates new audiences and creates new sources of income for authors and publishers. Indeed, all society benefits." Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 293 (S.D.N.Y. 2013).

191. It may also help to think of this in terms of Dale Cendali's distinction between "finding" and "delivering" non-transformative works. *See* Memorandum of Law in Support of Plaintiff Fox News Network, LLC's Renewed Motion for Summary Judgment at 1, Fox News Network, LLC v. TVEyes, Inc., 43 F. Supp. 3d 379 (S.D.N.Y. 2014) (No. 1:13-cv-05315-AKH), 2015 WL 4656263, Document No. 134 (advocating that providing a substantial portion of a work in response to a search (delivering) should not be fair use, but simply identifying (finding) a work in response to a search can be a fair use); *see also* Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3, at 293–94 (discussing the finding/delivering distinction).

192. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, *supra* note 61, at 1407.

193. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183 (2021).

C. IMPLICATIONS OF ACCEPTANCE

The beneficiaries of market benefits depend on the scope of their acceptance. Widespread adoption is unlikely anytime soon due to lack of dispositive capability, and clash with existing rights. While a balance of market harms and market benefits better reflects the text of section 107(4), it not likely to change results in many cases.

Accepted widely, it is possible that consideration of market benefits would enrich established businesses more than newcomers because it would be easier to justify unauthorized use of less popular works. If a major tech company—like Google—can shield itself from copyright infringement by making someone money, it will be incentivized to routinely misappropriate others' works for its own purposes. In a musical context, a popular band or artist might feel emboldened to steal their favorite beats and lyrics from unknown artists, knowing that they can justify their theft if they bring attention to the unknown.

Alternatively, one could imagine a mixed market benefits regime in which some smaller artists and authors benefit as much or more than established ones thanks to enhanced exposure and sales conferred by infringers. Small artists may also be able to borrow from established works without as much fear, though it will be more difficult to prove that their largely unknown use enhanced the profitability or exposure of an already famous work. Further, it is possible that widespread acceptance of market benefits will erode small artists control of their work, thereby diminishing derivative work rights under section 106(2).

IV. CONCLUSION

Courts are poised to expand their inquiry into the fourth fair use factor, but not necessarily by including market benefits. Nonetheless, market benefits can serve an important role in an interpretative regime that weighs both public effects and market effects. If courts embrace Justice Breyer's fair use approach from *Google,* then it is only a matter of time before the holistic balancing of market and public effects becomes mainstream.[194] While *Google* may not signal increased acceptance of market benefit arguments, it does continue the trend reinvigorating the fourth factor.[195] If some benefit (to society or the copyright holder) can overcome market harm in fourth factor analysis, then a demonstration of market harm is not dispositive. Any sort of fourth factor balancing test is likely to diminish circularity by recognizing that infringement can have positive and negative effects.

It is important to reiterate that relevant market benefits are not the same as dispositive market benefits. While dispositive market benefits are not yet feasible,

194. After *Google,* the Second Circuit issued a new opinion in the Andy Warhol case, noting that "analysis of the fourth factor also 'take[s] into account the public benefits the copying will likely produce.' Google, 141 S. Ct. at 1206." Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith, 11 F.4th 26 (2d Cir. 2021). While this did not alter the outcome, it did alter the approach. Compare with Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 992 F.3d 99 (2d Cir.), *opinion withdrawn and superseded on reh'g sub nom.*

195. *See generally* Ginsburg, *Fair Use in the United States: Transformed, Deformed, Reformed?*, *supra* note 3.

relevant market benefits are increasingly applicable. Any court should weigh market harms against market benefits for the sake of thoroughness and adherence to the plain meaning of § 107(4), but failure to do so is unlikely to affect the outcomes of most cases.

It seems unlikely at the moment, but one cannot fully dismiss the potential acceptance of market benefit arguments in the future. Fair use is an evolving doctrine, and eventually these arguments may develop relevance outside of a search context, or in a case of non-transformative, commercial use. Companies like Google are incentivized to push the limits of fair use and attempt to shape the contours to their benefit. For now, however, American copyright law remains hostile to the idea that taking someone's work without permission should be regarded as a favor.