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AMBIGUOUS COMMERCIAL NATURE OF USE IN FAIR USE ANALYSIS

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I. INTRODUCTION

The fair use doctrine is one of the most difficult doctrines to understand and apply. In 1939, the Second Circuit labeled the common-law fair use doctrine as "the most troublesome in the whole law of copyright."[1] In fact, "the only two times before 1976 that the Supreme Court had a 4-4 split in a copyright dispute were both fair use cases."[2]

Codification of the fair use common-law doctrine into the Copyright Act of 1976[3] did not make the doctrine clearer to understand or easier to apply. The doctrine has been "lambasted . . . as hopelessly unpredictable and indeterminate."[4] Also, "[w]riters, historians, publishers, and their legal advisers can only guess and pray as to how courts will resolve copyright disputes."[5] Moreover, there are emotional opinions that "fair use is merely "a lottery argument"[6] and is no more than "the right to hire a lawyer,"[7] and "[i]n the end, reliance on the . . . factors to reach fair use decisions often seems naught but a fairy tale."[8]

Section 107 of the Copyright Act establishes factors to determine if a use is fair or not:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

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

2 DAVID NIMMER, COPYRIGHT ILLUMINATED: REFOCUSING THE DIFFUSE U.S. STATUTE 361 n.23 (2008) [hereinafter COPYRIGHT ILLUMINATED].

3 17 U.S.C. § 107 (2012).

4 Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 716 (2011).

5 Pierre N. Leval, Comment, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

6 Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 48–49 (2012) (quoting LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 187 (2004)) (citations omitted).

7 *Id.* at 49.

8 David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 287 (2003).

> (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.[9]

If a use is fair, it cannot constitute copyright infringement.[10] Nevertheless, there is ambiguity in understanding the fair use factors and their correlation with each other.

Harper & Row Publishers v. Nation Enterprises demonstrates this ambiguity in fair use analysis; on each factor, the majority and dissent reached opposite conclusions.[11] Therefore, it is not surprising that "[t]he body of fair use precedents contains many reversed decisions, split panels, and inconsistent opinions."[12]

Fair use analysis is largely balancing the weight of each factor. Many scholars, litigants, and judges recognize that the first factor, the purpose and character of the allegedly infringing use of the work, is a very important one.[13] This Article will define one sub-factor of this first factor, the commercial nature of use.[14]

Part I of the Article will analyze the commercial nature of use as a sub-factor in fair use analysis. Part II will answer the question if one needs to define "commercial nature," taking into account the transformative use doctrine and commerciality as a matter of degree. Part III will analyze the plain meaning of "commercial nature." Part IV will cover all the fair use cases in the Supreme Court after 1976. Part V will be devoted to eight approaches to defining commerciality.

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9 17 U.S.C. § 107 (2012).

10 *Id.*

11 471 U.S. 539, 594 (1985) (comparing the majority's finding that "[u]nder ordinary circumstances, the author's right to control the first public appearance of this undisseminated expression will outweigh a claim of fair use" to the dissent's finding that "[t]his categorical presumption is unwarranted on its own terms and unfaithful to congressional intent") (internal citations omitted).

12 Peter S. Menell & Ben Depoorter, *Using Fee Shifting to Promote Fair Use and Fair Licensing*, 102 CALIF. L. REV. 53, 65 (2014).

13 *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 496 (1984).

14 *See* 17 U.S.C. § 107(1).

Finally, Part VI will answer the question why "commerciality" should be treated as not in favor of fair use.

This Article will evaluate all eight approaches to defining commerciality, review the *Harper & Row* definition and show the weaknesses of all other definitions when put in several groups.[15] The issue with most approaches defining the commercial nature of use is that the approach is not universal and cannot be consistently applied across various fact patterns. To check its validity, each definition will be applied to the facts of seven cases (the "test set of cases") chosen by the author.[16] The author will consider the outcome of each approach to illustrate its limitations. The author will use the three out of four Supreme Court fair use cases because their outcomes are well known and may not be changed: *Sony v. Universal City Studios, Inc.*,[17] *Harper & Row, Publishers, Inc. v. Nation Enters.*,[18] *Campbell v. Acuff-Rose Music, Inc.*[19] This Article will also apply each definition to

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15 *Harper & Row*, 471 U.S. at 562.

16 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572–73 (1994); *Harper & Row*, 471 U.S. at 562; *Sony*, 464 U.S. at 417; Hustler Mag., Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1149–50 (9th Cir. 1986); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1113 (9th Cir. 2000) [hereinafter *Worldwide Church*]; Authors Guild v. Google, Inc., 804 F.3d 202, 208–11 (2d Cir. 2015); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff'd sub nom.* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1095 (9th Cir. 2002) [hereinafter *Napster*].

17 464 U.S. at 417. Plaintiff Universal Pictures alleged that Sony was liable for contributory copyright infringement because home users of Sony Betamax video recorders used the device to allegedly infringe the Plaintiff's copyright. *Id*. Sony employed the fair use doctrine and proved that home users' recordings of aired content was fair. *Id*.

18 471 U.S. at 539. Harper & Row Publishers had publication rights to Former President Ford's memoirs and licensed Time Magazine to publish some excerpts. *Id*. But The Nation published some quotes of the memoirs without the owner's consent and Time withdrew from the contract. *Id*. Harper & Row Publishers sued The Nation for copyright infringement. *Id*. The Nation asserted fair use defense. *Id*.

19 510 U.S. 571–72. Defendant Rap group 2 Live Crew used Plaintiff's song "Oh, Pretty Woman" to create a parodic version of the song with the same beginning music but very different words. *Id*. The music publisher Acuff-Rose did not allow the use of music and sued for copyright infringement. *Id*. The Defendant claimed fair use. *Id*.

the facts of four following cases: *Hustler Magazine Inc. v. Moral Majority, Inc.*,[20] *Worldwide Church of God v. Phila. Church of God, Inc.*,[21] *Authors Guild v. Google, Inc.*,[22] *A&M Records, Inc. v. Napster, Inc.*[23] Facts of the last four cases are far from the traditional facts of using of copyrighted materials, making them good cases for checking how well each definition of commerciality applies.

II. COMMERCIAL NATURE OF USE AS A SUB-FACTOR IN FAIR USE ANALYSIS

Although a seemingly simple concept, the "commercial nature" of use is only easily applied to ordinary uses of a copyrighted work. For example, if someone copied a part of a book to sell, reproduction of the copyrighted work is probably a commercial use.[24]

However, when business models became more sophisticated and modern life changed for both the world and legal relationships; and it became hard to

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[20] *See* 796 F.2d at 1150. Plaintiff Hustler Magazine Inc. published in Hustler Magazine a caricature of Reverend Jerry Falwell. *Id*. Falwell reproduced this picture on a large scale and used it as an attachment to letters in a fundraising campaign to sue Hustler Magazine. *Id*. Hustler considered reproduction and distribution of the picture to be copyright infringement and filed a claim. *Id*. Defendant used fair use defense. *Id*.

[21] 227 F.3d at 1113. Defendant (a religious organization) distributed copies of a religious book which the Plaintiff (another religious organization) owned the copyright. *Id*. Defendant employed fair use defense. *Id.*

[22] 804 F.3d at 207. Defendant Google started Google Books Project. *Id*. The main target of the project was digitalization of books from libraries and making all the books searchable. *Id*. The Plaintiff Authors Guild considered this kind of unauthorized digitization of copyrighted works to be copyright infringement. *Id*. Google employed fair use defense. *Id*.

[23] 239 F.3d 1010–11. Defendant Napster, Inc. created and operated a peer-to-peer network that allowed users to share and download copyrighted materials (mostly music) without the copyrights holders consent. *Id*. Music published sued Napster for copyright infringement. Napster used fair use defense. *Id*.

[24] *See* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 545 (S.D.N.Y. 2008) (Defendant's encyclopedia drawn primarily from the Plaintiff's books "is certainly for commercial gain. As the testimony of Rapoport and Vander Ark make clear, one of the Lexicon's greatest selling points is being the first companion guide to the Harry Potter series that will cover all seven novels.").

understand what the term "commercial nature of use" meant. As one author remarked, "the term ha[d] been interpreted with enough malleability to cover other arrangements that result less directly in financial enrichment for the user, or perhaps, no financial gain at all."[25] Many approaches to determining the definition of fair use do not consider non-monetary benefits of use.

The Courts have named commerciality in different ways. In *Harper & Row, Publishers, Inc. v. Nation Enterprises,* the Supreme Court, describing the defendant's position on the purpose of the use, stated that the purpose was "pure commercial,"[26] implying that commerciality does not require any definition. The Ninth Circuit, in *Hustler Magazine Inc. v. Moral Majority, Inc.*, named the purpose of use in the same way.[27] The Second Circuit, in *Financial Information, Inc. v. Moody's Investors Service, Inc.*, also used this approach.[28] Alternatively, the Second Circuit, in *Authors Guild v. Google, Inc.* used a different expression in describing commerciality of use: "profit motivation."[29]

The Supreme Court, in *Sony*, used both approaches and made "commercial" and "profit-making" equivalent.[30] Some courts are not concerned with defining the term and just understand commercial use "in the traditional sense."[31]

Nevertheless, none of these approaches to commerciality—or more likely, attempts to avoid a clear definition—help us understand what is "commercial

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[25] Thomas M. Byron, *Past Hits Remixed: Fair Use as Based on Misappropriation of Creative Value*, 82 MISS. L.J. 525, 567 (2013).

[26] 471 U.S. at 562 ("In arguing that the purpose of news reporting is not purely commercial, The Nation misses the point entirely.").

[27] 796 F.2d at 1152 (agreeing with the *Harper* approach by describing that the purpose of the use factor in the analysis requires a look at whether the work is used for a commercial or profit-making purpose).

[28] 751 F.2d 501, 509 (2d Cir. 1984) ("We are disinclined to place great importance on this factor, however, given that the use that Moody's seeks to make of the material is similarly "non-creative" and purely commercial.").

[29] 804 F.3d at 207 ("Google's profit motivation does not in these circumstances justify denial of fair use.").

[30] 464 U.S. at 449 ("If the Betamax were used to make copies for a *commercial or profit-making purpose*, such use would presumptively be unfair.") (emphasis added).

[31] Religious Tech. Ctr. v. Lerma, No. 95-1107-A, 1996 WL 633131, at *6 (E.D. Va. Oct. 4, 1996) ("It may be true that Lerma's intent in posting the Works was not *'commercial' in the traditional sense.*") (emphasis added).

nature" in a fair use analysis.

The Copyright Act requires a fair use analysis to consider "the purpose and character of the use, including whether such use is of a *commercial nature* or is for nonprofit educational purposes."[32] The Act's reference to a commercial use "has caused endless difficulties."[33] Moreover, these difficulties appeared many years ago, and the first fair use factor "has a complex pedigree."[34]

Before grasping the essence of "commercial nature," it is worth determining if the significance of this sub-factor is overestimated. Is it reasonable to define commerciality or is it possible that courts, litigants, and scholars may use general thoughts and their own understanding of this phenomenon?

III. DOES ONE REALLY NEED TO DEFINE "COMMERCIAL NATURE"?

The plain language of the Copyright Act requires considering the purpose and character of the infringing work's use, "*including whether such use is of a commercial nature* or is for nonprofit educational purposes."[35] But it is unclear if the commercial nature should be precisely defined, considered seriously, and examined thoroughly in the fair use analysis.

A. TRANSFORMATIVE USE DOCTRINE AND COMMERCIALITY

According to Judge Leval commerciality does not play a significant role in the fair use analysis:

> [T]he statute tells little about what to look for in the 'purpose and character' of the second use. The interpretation of the first factor is complicated by the mention in the statute of a distinction based on 'whether such use is of a commercial nature or is for nonprofit educational purposes' . . . *[o]ne should not exaggerate the importance of this distinction*.[36]

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[32] 17 U.S.C. § 107(1) (2012) (emphasis added).

[33] WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:14 (2016); *see also* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 561 (2008) (stating that commerciality sub-factor "has . . . caused no end of trouble").

[34] William W. Fisher III, *Reconstructing the Fair Use Doctrine,* 101 HARV. L. REV. 1659, 1672 n.59 (1988).

[35] 17 U.S.C. § 107 (emphasis added).

[36] Leval, *supra* note 5, at 1116 n.53 (emphasis added) (quoting 17 U.S.C. § 107(1) (1982)).

Leval treats this "commercial or non-commercial education nature" distinction as oversimplified.[37] The appeal not to "exaggerate the importance" of the difference likely is a call not to pay much attention to these statutory sub-factors or, at least, substitute these factors for others.

Analyzing the first factor, Leval instead emphasized the transformative subfactor.[38] The question is whether the secondary use "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[39] According to Leval, transformativeness is the best indicator to evaluate the first fair use factor.[40]

After the Supreme Court used a similar approach in *Campbell v. Acuff-Rose Music Inc.*, the Leval-Campbell transformative use doctrine became the predominant approach to the first fair use factor.[41] Empirical study confirms this approach.[42] Despite this trend, the commerciality sub-factor warrants a greater role in the first factor and should not be substituted by transformativeness.

The commercial nature inquiry is a subfactor of the first factor.[43] The Copyright Act of 1976 does not allow omitting commerciality or substituting

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37 Leval, *supra* note 5, at 1116 n.53 ("This clause, therefore, does not establish a clear distinction between permitted and forbidden users. Perhaps at the extremes of commercialism, such as advertising, the statute provides little tolerance for claims of fair use.").

38 *Id.* at 1116 (noting that Judge Leval used the word "transformative" 21 times in the article, whereas he only used "commercial" in his article six times, one time citing fair use statutory factors and three times appealing not to pay much attention to commerciality).

39 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

40 Leval, *supra* note 5, at 1111 ("In analyzing a fair use defense, it is not sufficient simply to conclude whether or not justification exists. The question remains how powerful, or persuasive, is the justification, because the court must weigh the strength of the secondary user's justification against factors favoring the copyright owner. I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative.").

41 Netanel, *supra* note 4, at 736; *see Campbell*, 510 U.S. at 579.

42 Netanel, *supra* note 4, at 736 ("During 2006-2010, 85.5% of district court opinions and 93.75%, or all but one, of appellate opinions considered whether the defendant's use was transformative . . . .").

43 17 U.S.C. § 107 (2012).

commercial nature analysis with another subfactor.[44] Moreover, the *Sony* opinion directly prescribed weighing the commercial nature of use.[45]

Although "[t]he terms 'including' and 'such as' are illustrative and not limitative,"[46] the words following "including" cannot be ignored or substituted. Section 107 of the Copyright Act contains three instances of "including" and one instance of "such as."[47] Similarly, the preamble includes examples of fair use followed by the phrase "such as": "criticism, comment, news reporting, teaching . . . , scholarship, or research."[48] Just as these preamble examples should not be ignored, the words after "including" in the first factor should also not be ignored. Otherwise, it was vain to show these illustrative examples.

Section 112 of the Copyright Act dictates that Copyright Royalty Judges "shall base their decision on economic, competitive, and programming information presented by the parties, *including*"[49] some factors. The Copyright Royalty Judges are unlikely to "exaggerate the importance"[50] of these factors in their decisions or substitute these factors with others.

As the result of the transformative test approach, courts stopped complying with the Copyright Act. The courts sometimes decide not to "exaggerate the importance"[51] of commercial-noncommercial distinctions; instead, they have overestimated the importance of transformativeness, which "has indeed become almost synonymous with fairness, as critics of broad fair use findings charge."[52] For example, the district court in *Hirsch v. CBS Broadcasting Inc.*, reduced the first factor analysis to the identification of whether the use was

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44 *Sony*, 464 U.S. at 456 ("Section 107(1) uses the term 'including' to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into 'purpose and character.'").

45 *Id.* at 448–49 (quoting H.R. REP. NO. 94-1476, at 66 (1976)) ("Although not conclusive, the first factor requires that 'the commercial or nonprofit character of an activity' be weighed in any fair use decision.").

46 17 U.S.C. § 101.

47 *Id.* § 107.

48 *Id*.

49 *Id.* 112(e)(4) (emphasis added).

50 *Cf.* Leval, *supra* note 5, at 1116 n.53 (noting that the importance of commercial nature should not be exaggerated).

51 *Id.* (noting that it is important not to exaggerate the importance of commercial nature).

52 Rebecca Tushnet, *Content, Purpose, or Both?*, 90 WASH. L. REV. 869, 870 (2015).

transformative.[53] In other words, "[t]he dominance of the transformativeness test makes the actual statutory language regarding non-commercial and educational uses largely irrelevant."[54]

Making the sub-factor less important or substituting sub-factors with others is a violation of the law. Commerciality is a sub-factor that comes from the Copyright Act; there is no transformativeness in the statutory language and it comes from the doctrine. One cannot substitute a statutory sub-factor for a new one from doctrine even if the new doctrine works very well.

Moreover, Judge Leval refers to the famous decision by Justice Story in *Folsom v. Marsh.*[55] This case was the source of the common law fair use doctrine, and Justice Story stated the fair use factors.[56] Nevertheless, the fair use factors were formulated by Congress anew in the 1976 Copyright Act, which directly demanded considering the commercial nature of use.[57] A Judiciary branch from the 19th century cannot cancel or change the Legislative branch's law from the 20th century.

The sub-factors "commerciality" and "transformativeness" could and should be used together. For example, Boorstyn considers "profit element" as "a significant factor," though "not itself controlling."[58] Some commentators directly offer to use these sub-factors together.[59]

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53 No. 17 Civ. 1860 (PAE), 2017 WL 3393845, at *5 (S.D.N.Y. Aug 4, 2017) ("The essence of this factor is whether the copier's use is transformative.") (citation and quotation omitted).

54 Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 388 (2005) [hereinafter *God in the Machine*] (footnotes omitted).

55 *See generally* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

56 *Id.* at 348 ("In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions.").

57 *See* 17 U.S.C. § 107 (2012).

58 NEIL BOORSTYN, BOORSTYN ON COPYRIGHT § 12.03[1], at 12–19 (2000); *see also* COPYRIGHT LITIGATION STRATEGIES 173 (Dale Cendali & Michael Keyes eds., 2017) ("Thus, although the fact that a defendant's use is commercial in nature may not be dispositive in deciding whether the use is a fair use, it remains an important factor expressly set forth by Congress that the courts shall consider.").

59 *See* Taylor B. Bartholomew, Note, *The Death of Fair Use in Cyberspace: YouTube*

The legislative history supports this approach. In the very beginning of the legislative process, there was no sign of commerciality in the first fair use factor.[60] Nevertheless, in 1976, the dependent clause was added.[61] Whether this addition was right or wrong, it "can and *should* be weighed along with other factors in fair use decisions."[62] Moreover, it was explicitly stated that this factor includes a consideration of "whether such use is of a commercial nature or is for non-profit educational purposes."[63] It is impossible "not [to] exaggerate the importance of this distinction,"[64] if the Judiciary Committee pointed out that this sub-factor should be evaluated.

Further, there is an opinion that transformativeness is an excessive factor in fair use analysis. The Seventh Circuit explained:

[A]sking exclusively whether something is "transformative" not

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and the Problem with Content ID, 13 DUKE L. & TECH. REV. 66, 74 (2015) ("The purpose and character of the use under the first prong of the fair use analysis depends upon two elements: (1) whether the use is transformative, and (2) whether the use is commercial.") (citation omitted); Byron, *supra* note 25, at 567 ("In addition to an inquiry into whether a given use is transformative, the first fair use factor also typically considers the 'commerciality' of the use."); Frank J. Lukes, Comment, *The Public Good v. A Monetary Profit: The News Organizations' Utilization of the Fair Use Doctrine*, 11 J. MARSHALL REV. INTELL. PROP. L. 841, 846–47 (2012) ("[T]he Purpose Factor is determined based upon two inquiries. The first inquiry the court will make is to determine 'whether and to what extent the new work is transformative.' The second inquiry is whether the infringing use is "commercial or noncommercial.") (footnotes omitted).

60 PATRY, *supra* note 33, § 10:15 ("In 1963, early in the revision process leading up to the 1976 Act, the Copyright Office circulated a preliminary draft bill that described the first factor as 'the purpose and character of the use.").

61 *Id.* ("It was not until March 3, 1976, shortly before passage of the revision bill, that the phrase "including whether such use is of a commercial nature or is for nonprofit educational purposes" was added by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee to Section 107(1), in order to pacify educators who had lobbied unsuccessfully for an across-the-board exemption for nonprofit educational uses.").

62 H.R. REP. NO. 94-1476, at 5679 (emphasis added).

63 *Id.*

64 Leval, *supra* note 5, at 1116 n.53 (noting the importance of commercial nature should not be exaggerated).

> only replaces the list in § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works . . . The Copyright Act sets out four non-exclusive factors for a court to consider. The district court and the parties have debated whether the t-shirts are a "transformative use" of the photo—and, if so, just how "transformative" the use must be. That's not one of the statutory factors, though the Supreme Court mentioned it in *Campbell v. Acuff-Rose Music, Inc.*[65]

Taking into account that transformative use is a use that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message"[66] and a work is derivative if it "may be recast, transformed, or adapted" [67] , any transformative use likely leads to the creation of a derivative work. A derivative work is described in the Copyright Act, and transformative use is not. Thus, the transformative use doctrine and links to *Folsom v. Marsh*[68] likely is unnecessary because transformativeness is already evaluated in the context of derivative works.[69] Instead of using the transformative use doctrine to define commerciality, there should be a separate evaluation to determine if a secondary work is a derivative one; in this evaluation a court should decide if a work was "recast, transformed, or adapted."[70]

Second, though the commerciality factor may be hard to define, transformative use doctrine made the situation even more intricate.[71]

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[65] Kienitz v. Sconnie Nation L.L.C., 766 F.3d 756, 758 (7th Cir. 2014) (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)).

[66] *Campbell*, 510 U.S. at 579.

[67] 17 U.S.C. § 101 (2012).

[68] *See generally Folsom*, 9 F. Cas. at 348.

[69] *But see* R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 467 (2008) ("I conclude that appellate courts do not view fair use transformativeness as connected with any transformation involved in preparing a derivative work, and that in evaluating transformativeness the courts focus more on the purpose of a defendant's use than on any alteration the defendant has made to the content of the plaintiff's work.").

[70] *See* 17 U.S.C. § 101.

[71] *God in the Machine*, *supra* note 54, at 388 ("Bright-line distinctions, such as commercial/non-commercial and educational/non-educational, have been superseded by a much more ambiguous notion, transformativeness.").

Commentators, calling transformativeness a "highly contentious topic,"[72] remark on the "fundamental uncertainty"[73] of the doctrine and point out that transformativeness of use is a highly unpredictable issue.[74]

Finally, there is one more interesting intersection between "commerciality" and "transformativeness" that illustrates inconsistency of Judge Leval's doctrine regarding "commerciality." What if a secondary work is highly transformative and is used in advertising? Judge Leval himself assumes that "[p]erhaps at the extremes of commercialism, such as advertising, the statute provides little tolerance for claims of fair use."[75] Nimmer puts advertising at the extreme end of commerciality as well.[76] Boorstyn remarks that transformativeness may outweigh commercialism in the fair use analysis but points out that use in advertising, even if highly transformative, does not favor fair use.[77]

Thus, at least under some circumstances, one *should consider* that "commercial nature," and "commercial nature" may outweigh transformative use. But in *Leibovitz v. Paramount Pictures Corp.*, the use of Demi Moore's famous photo by Annie Leibovitz on the cover of *Vanity Fair* magazine was found fair despite its use in advertising.[78] This begs the question, what are the circumstances when commercialism may overweigh transformativeness?

Moreover, does advertising form the most commercial use? For example, William F. Patry does not consider advertising to be the most commercial. He

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72 Seltzer v. Green Day, Inc., 725 F.3d 1170, 1176 (9th Cir. 2013) ("Although transformation is a key factor in fair use, whether a work is transformative is an often highly contentious topic.").

73 Netanel, *supra* note 4, at 747 ("That fundamental uncertainty about what is a transformative use has led some commentators to challenge the transformative use doctrine as fundamentally untenable.").

74 COPYRIGHT LITIGATION STRATEGIES, *supra* note 58, at 178 ("What makes a use 'transformative' has been subject to debate and may be difficult to predict.").

75 Leval, *supra* note 4, at 1116 n.53.

76 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][1][c] (2013) ("'Commercial uses' are extremely broad. At one extreme, the defendant's use of a copyrighted work in advertising context . . . .").

77 BOORSTYN, *supra* note 58, at 12–29 ("While a high degree of transformation can outweigh a commercial purpose, the use of a copyrighted work to advertise the product, even in a parody, will be entitled to less indulgence under the first factor than the sale of parody for its own sake.").

78 *See generally* 137 F.3d 109 (2d Cir. 1998).

states that the most commercial nature of use "would be verbatim, wholesale copying for resale for others."[79] Without a clear definition of commercialism, either end of the spectrum cannot be identified.

Notably, the first factor consists of *both* "the purpose and character of the use."[80] Commerciality and transformativeness should not contradict, exclude, or substitute each other because they may, can, and should work together for more precise results of fair use analysis.

Black's Law Dictionary defines purpose as "[a]n objective, goal, or end . . . ."[81] Unfortunately, *Black's Law Dictionary* defines "character" only pertaining to a person,[82] but Merriam-Webster Dictionary defines "character" as "a feature used to separate distinguishable things into categories."[83] Therefore, the purpose of use answers the question "for what," and character answers the question "how." Naturally, commercialism may show "for what," and this is a purpose of a use; and transformativeness may show "how," and this is the character of use. Some secondary authorities support this conclusion.[84]

Nevertheless, there are many different opinions on whether the commerciality factor should be considered character or purpose of use, or both. For example, in *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court described 2

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79 PATRY, *supra* note 33, at § 10:16.50.

80 17 U.S.C. § 107(1) (2012) ("[T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.").

81 *Purpose,* BLACK'S LAW DICTIONARY (10th ed. 2014).

82 *Character*, *id.* ("The qualities that combine to make an individual human being distinctive from others, esp. as regards morality and behavior; the disposition, reputation, or collective traits of a person as they might be gathered from close observation of that person's pattern of behavior.").

83 *Character*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/character [https://perma.cc/H3JD-ARR5] (last visited Aug. 2, 2018).

84 *See* Bartholomew, *supra* note 59, at 74 ("The purpose and character of the use under the first prong of the fair use analysis depends upon two elements: (1) whether the use is transformative, and (2) whether the use is commercial.") (internal citations omitted); Brittany Curtis, Note, *Copyright vs. Social Media: Who Will Win?*, 20 INTELL. PROP. L. BULL. 81, 89 (2017) ("When considering the first factor, the purpose and character of the work, courts consider three sub-elements: (1) the commercial nature of the infringing use; (2) whether the infringing use is transformative; and (3) the propriety of the defendant's conduct.") (citation omitted).

Live Crew's use of Acuff-Rose's song as having a "commercial purpose" five times, "commercial character" four times, "transformative character or purpose" one time, "parodic purpose" seven times, and "parodic character" one time.[85]

Other authorities have controversial views on this issue as well. Some consider transformativeness as a purpose of use,[86] while others consider transformativeness as character of use.[87] Some authorities consider commercialism as a purpose of use,[88] others as character.[89] Some authorities mix purpose and

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[85] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 589 (1994).

[86] *See* Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 2006) ("[T]he primary *purpose* of the use was *for social comment*.") (emphasis added); Reese, *supra* note 69, at 493–94 ("If the defendant has a *transformative purpose*, the court has generally found transformativeness, even if she has not altered the work's content in any way, while if the defendant has *no transformative purpose*, the court has generally found no transformativeness, even if she has transformed the content of the work sufficiently to create a derivative work.") (emphasis added).

[87] *See e.g.*, Leibovitz v. Paramount Pictures Corp., 948 F.3d 1214, 1222 (S.D.N.Y. 1996) ("The Nielsen ad is, like all legitimate parodies, '*transformative' in character*.'") (emphasis added); Salinger v. Colting, 641 F. Supp. 2d 250, 262 (S.D.N.Y. 2009) ("[T]he ratio of the borrowed to the novel elements is quite high, and its *transformative character* is diminished.") (emphasis added).

[88] *See* BOORSTYN, *supra* note 58, at 12–29 ("While a high degree of transformation can outweigh a *commercial purpose*.") (emphasis added); William F. Patry & Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 685 (1992) ("Nor need the first factor simply be resolved as 'pro' or 'con' fair use, depending on which aspect of the use predominates, its *profit-making purpose* or its *scholarly character*.") (emphasis added); Christian Palmieri & Monica B. Richman, *Music Sampling: Has the Tune Changed?*, 35 ACC DOCKET 52, 54 (2017) ("Much like the importance of clearing rights for the use of photography and images in publishing and e-commerce, sample clearance--and indeed, clearing rights for any use of copyrighted music for a *commercial purpose*--is a necessary task that reduces the risk of infringement.") (emphasis added); Patrick McKey, Maria Vathis, Jane Kwak & Joy Anderson, *Copycat-Walk: Parody in Fashion Law*, 64 FED. LAW. 78, 82 (2017) ("[T]he *commercial purpose* of a work is only one element of its purpose and character.") (emphasis added).

[89] Rosemary Chandler, Note, *Putting Fair Use on Display: Ending the Permissions Culture in the Museum Community*, 15 DUKE L. & TECH. REV. 60, 67 (2016) ("It looks at the *profit or nonprofit character* of the secondary use.") (emphasis added).

character of use.[90]

However, commerciality does not play any role if transformativeness is purpose or character of use. Transformativeness is only one of two subfactors of the first fair use factor. Even if one assumes that transformativeness is the core of the first factor analysis, after transformativeness evaluation, commerciality still needs to be considered. Based on the language of the Copyright Act, it is impossible to consider one category without the other.[91] In turn, there is no possibility of conducting the whole fair use analysis without the first factor analysis because "[i]n any event, all four of the statutory factors must be considered, notwithstanding the temptation to label some aspects of each as presumptively dispositive."[92]

B. COMMERCIALITY AS A MATTER OF DEGREE

The Second Circuit, in *Maxtone-Graham v. Burtchaell*, diminishes the importance of the commerciality sub-factor.[93] The Court wrote, "We do not read Section 107(1) as requiring us to make a clear-cut choice between two polar characterizations, 'commercial' and 'non-profit' . . . [and] [t]he commercial nature of a use is a matter of degree, not an absolute."[94] William Patry supports this approach. He wrote:

> In evaluating the commercial nature of a use, some courts have proposed placing commerciality on a continuum, viewing it as a matter of degree rather than as an absolute. This approach is appealing, as it avoids the artificiality of an either/or choice, and instead reflects the reality of the wide range of possible uses.[95]

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90 Brownmark Films, L.L.C. v. Comedy Partners, 682 F.3d 687, 693 (7th Cir. 2012) ("The underlying *purpose and character* SPDS's work was *to comment on and critique*.") (emphasis added).

91 *See* Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006) ("The heart of the fair use inquiry is into the first specified statutory factor identified as the purpose and character of the use.") (quotation omitted).

92 NIMMER & NIMMER, *supra* note 76, § 13.05[A][5][a].

93 803 F.2d 1253, 1262 (2d Cir. 1992).

94 *Id.*

95 PATRY, *supra* note 33, § 10:16.50.

Patry adds that "[n]ot all uses may be classified as purely either commercial or noncommercial, and the vast majority of publicly disseminated uses involve some degree of monetary gain, whether direct or indirect."[96]

But if a court does not make a "clear-cut choice,"[97] then the court likely would make an ambiguous guess as the opposite approach. This should not be an option in the law or for a court. Even if a continuum of commerciality is used as a tool for fair use analysis, a clear definition of "commercial" is needed. How can we put a "purely either commercial or noncommercial"[98] use on the continuum if we do not know what is commercial? Could non-commercial use include "some degree of monetary gain"[99] or just non-monetary gain? To answer these questions, one must understand what "commercial nature of use" means. Otherwise, courts, scholars, and litigants should follow their own understanding of commerciality based on their own "traditional sense,"[100] not on statutory or case law.

IV. THE PLAIN MEANING OF "COMMERCIAL NATURE"

The initial step in defining "commerciality" is to analyze the plain meaning of the statutory provision. Section 101 of the Copyright Act does not contain a definition of "commercial."[101] Black's Law Dictionary[102] defines "commercial" as "[o]f, relating to, or involving the buying and selling of goods . . . *[r]esulting or accruing from* commerce or *exchange* <commercial gains> . . . [m]anufactured for the markets; put up for trade <commercial products>."[103]

"[R]esulting or accruing from . . . exchange" supports defining "commercial" as something beyond pure business, because the first meaning for "exchange" is "[t]he act of transferring *interests*, each in consideration for the

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96 *Id.* (footnotes omitted).

97 Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1992).

98 *Id*.

99 *Id.*

100 PATRY, *supra* note 33 § 10:19 ("It may be true that Lerma's intent in posting the Works was not 'commercial' in the traditional sense.").

101 17 U.S.C. § 101 provides the definition of the term "financial gain" that "includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works." 17 U.S.C. § 101 (2012). But obtaining "financial gain" is just a particular case of the commercial nature of use.

102 The latest edition is the 10th edition of 2014.

103 *Commercial*, *supra* note 81 (emphasis added).

other,"[104] and such "interests" may be monetary and non-monetary (artistic, fairness, academic, aesthetic, etc.).

Moreover, the definition of "commercial use" in *Black's Law Dictionary* goes beyond pure financial gain. "Commercial use" is "[a] use that is connected with or furthers an ongoing profit-making activity."[105] Thus, *"commercial use" is a "profit-making activity."* In its turn, "profit" is determined as "[t]he excess of *revenue* over expenditures in a business transaction."[106] "Revenue" is "[i]*ncome* from any and all sources."[107] Finally, "income" is "[t]he *money* or other form of *payment* that one receives . . . from employment, business, investments, royalties, gifts, and the like."[108]

Therefore, *any kind of payment* as income (or revenue) constitutes commercial use. Payment is "[m]oney or *other valuable things* so delivered in satisfaction of an obligation."[109] "Other valuable things" in "commercial use" is similar to "interest" in "commercial" and implies that commercial use is not limited to pure monetary gain.

Non-law dictionaries confirm this conclusion. The Oxford English Dictionary defines "commerce" as an "[e]xchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise, esp. as conducted on a large scale between different countries or districts; including the whole of the transactions, arrangements, etc., therein involved";[110] "exchange" is defined as "[t]he action, or an act, of reciprocal giving and receiving."[111] Thus, although some variants of the definition in the Oxford English Dictionary involve finance, "reciprocal giving and receiving" does not imply only money exchange.

The first definition of "commerce" in Merriam-Webster Dictionary emphasizes the social aspect; only the second definition deals with buying and

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104 *Exchange*, *id.* (emphasis added).

105 *Commercial use*, *id.*

106 *Profit*, *id.*

107 *Revenue*, *id.* (emphasis added).

108 *Income*, *id.* (emphasis added).

109 *Payment*, *supra* note 81 (emphasis added).

110 *Commerce*, OXFORD ENG. DICTIONARY, (emphasis omitted) https://en.oxforddictionaries.com/definition/commerce [https://perma.cc/8YWM-AYQK] (last visited Sept. 23, 2018).

111 *Exchange*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/65762?rskey=vGNLSE&result=1&isAdvanced=false#eid [https://perma.cc/EWW8-77AJ] (last visited Aug. 2, 2018).

selling, still using "exchange."[112] This supports the Oxford English Dictionary in using "commercial" for designation of non-monetary aspects of exchanging.[113]

Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) establishes the obligations of members to use criminal law to punish copyright infringers in a case of copyright piracy on a *commercial* scale.[114] In 2009, the Dispute Settlement Body of the World Trade Organization used New Shorter Oxford English Dictionary to define the "commercial" in "commercial scale." The Dispute Settlement Body of the World Trade Organization panel concluded that "[e]ngaged in commerce; of, pertaining to, or bearing on commerce"[115] is an "apposite"[116] definition. The definition includes the term "commerce," which is defined as "buying and selling; the exchange of merchandise or services."[117] Nevertheless, the panel omitted "the exchange" language and concluded that "[r]eading this definition into the definition of 'commercial' indicates that 'commercial' means, basically, engaged in buying and selling, or pertaining to, or bearing on, buying and selling."[118] The panel did not answer the question of what "basically" means or how "exchange" relates to "commerce," but it considered the parties "would have included all commercial

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112 *Commerce*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/commerce [https://perma.cc/4EB5-68EU] (last visited Aug. 2, 2018) (defining "commerce" as "social intercourse: interchange of ideas, opinions, or sentiments" and "the exchange or buying and selling of commodities on a large scale involving transportation from place to place").

113 *See* Sag, *supra* note 6, at 60 (citing 3 OXFORD ENG. DICTIONARY 552 (2d ed. 1989)).

114 *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*, 33 I.L.M. 81, 105 (1994) [hereinafter *Agreement on I.P. Trade*] ("Members shall provide for criminal procedures and penalties to be applied at least in cases of [willful] trademark counterfeiting or copyright piracy on a *commercial* scale.") (emphasis added).

115 WTO, China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights, Report of the Panel, WT/DS362/R, at 107 (Jan. 26, 2009) [hereinafter Panel Report] (using the 1993 definition of "commercial"). Materials on the WTO dispute is available online at https://perma.cc/EK45-QVL4.

116 *Id.* at 108.

117 *Id.*

118 *Id.*

activity."[119] This statement does not allow us to clearly and consistently define what is "commercial."

Thus, a plain language analysis sounds confusing because "commercial" may be connected with something else beyond buying/selling and gaining money as a result. Such the result of analysis does not allow for a definition of commerciality using dictionaries. "Commercial" may be connected with exchanging and gaining any kind of benefits. Moreover, the plain language analysis creates new discussions about the meaning of words such as "profit," "revenue," and "gain." Such a result supports the conclusion that "the designation of 'commercial use' in fair use cases sometimes confounds common sense understandings of what is, and is not, commercial."[120]

V. THE SUPREME COURT ABOUT COMMERCIAL NATURE OF USE

In the post-1976 era, the Supreme Court had four opportunities[121] to explain how statutory factors of fair use must be considered. Despite the emphasis the Supreme Court gave to the question of *how* to consider the factors, the Court has stated a clear definition of "commercial nature" in *Harper & Row*.[122]

In *Sony Corporation of America v. Universal City Studios, Inc.*, the Supreme Court faced fair use analysis for the first time after its codification in the 1976 Copyright Act. [123] This decision laid the foundation for future fair use doctrine application, but it did not explain what constitutes "commercial nature" of use. Analyzing fair use statutory factors in this case, the Court suggested that "[i]f the Betamax were used to make copies for *a commercial or profit-making purpose*, such use would presumptively be unfair."[124] This presumption inspired many arguments, but for this Article's purpose, it is more important that the Supreme

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119 *Id.* at 109.

120 Sag, s*upra* note 6, at 72–73 (highlighting the results of studies used to predict fair use based on individual markets and factors).

121 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576–77 (1994); Stewart v. Abend, 495 U.S. 207, 236–37 (1990); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560–61 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 447 (1984).

122 471 U.S. at 562.

123 464 U.S. at 447.

124 *See id.* at 496 ("The Court confidently describes time-shifting as a *noncommercial, nonprofit* activity.") (emphasis added).

Court equated "commercial" and "profit-making" purposes.[125] When the Court mentioned "use . . . for commercial gain,"[126] it gave grounds for treating "commercial use" as a use that provides a profit to a user. Nevertheless, what kind of profit or gain it should be to constitute "commercial nature" is beyond the decision. For example, it is not clear if saving money has a "profit-making purpose." Notably, *Sony*, in its fair use discussion, concerned home users;[127] therefore, it is difficult to analyze the commercial nature of use for non-commercial home use.

Harper & Row, Publishers, Inc. v. Nation Enterprises, a case ruled the year after *Sony*, is more useful because it involved two legal entities that wanted to earn money using copyrighted material.[128] Naturally, any use intended to make money should require some degree of commerciality. Analyzing the issue, the Court drew several conclusions related to defining "commercial nature." The Court considered the publication of quotes from President Ford's memoirs "commercial as opposed to nonprofit."[129] The Court recognized "commercial nature" as the opposite of "non-commercial nature."[130] This recognition does not help much because this conclusion is common knowledge; "non" changes the meaning to the opposite.

But the Court went further, commenting on the defendant's argument that "news reporting is not purely commercial"[131] The Court explained, "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but *whether the user stands to profit from exploitation of the copyrighted*

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125 *But see id.* at 496 ("As one commentator has observed, time-shifting is noncommercial in the same sense that stealing jewelry and wearing it—instead of reselling it—is noncommercial.").

126 *Id.* at 451.

127 *Id.* at 442 ("For one potential use of the Betamax plainly satisfies this standard, however it is understood: private, noncommercial time-shifting in the home. It does so both (A) because respondents have no right to prevent other copyright holders from authorizing it for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use.") (footnotes omitted).

128 *Harper & Row*, 471 U.S. at 542–43.

129 *Harper & Row*, 471 U.S. at 562.

130 *Id.*

131 *Id.*

material without paying the customary price."[132]

In *Stewart v. Abend*, the courts did not pay much attention to the first fair use factor.[133] The Defendant had movie rights to the short story "It Had to Be Murder," but the initial copyright owner died before the copyright renewal.[134] The Plaintiff sued the Defendant, the author of a derivative work, for copyright infringement. The Defendant employed a fair use defense and argued that the use was more educational than commercial, but the courts concluded that the use was of a commercial nature.[135] Both the Ninth Circuit and the Supreme Court dedicated only a few lines in their opinions to the commercial nature of the use and confirmed the findings of the district court.[136]

Campbell v. Acuff-Rose Music, Inc. deals a lot with commerciality.[137] Rap group 2 Live Crew used Plaintiff's song "Oh, Pretty Woman" to create a parodic version of the song with the same beginning music but different words.[138] The Plaintiff, music publisher Acuff-Rose, sued for copyright infringement. The Defendant claimed fair use.[139]

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132 *Id.* (emphasis added).

133 495 U.S. 207, 235 (1990) (finding that the petitioners received $12 million from re-release of the motion picture was commercial rather than educational).

134 *Id.* at 211.

135 *Id.* at 237.

136 *Id.* ("Petitioners asserted before the Court of Appeals that their use was educational rather than commercial. The Court of Appeals found nothing in the record to support this assertion, nor do we."); Abend v. MCA, Inc., 863 F.2d 1465, 1482 (9th Cir. 1988) ("This case presents a classic example of an unfair use: a commercial use of a fictional story that adversely affects the story owner's adaptation rights.").

137 510 U.S. 569, 569 (1994) ("The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use"); *id*. at 572 ("a parody's commercial character"); *id*.at 573 ("the commercial purpose of 2 Live Crew's song"); *id*. at 574 ("blatantly commercial"); *id*. at 584 ("The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.").

138 *See id.* at 572.

139 *Id.*

There was no doubt that 2 Live Crew's use was commercial.[140] The Court did not even try to define "commercial nature"; instead, the majority of the discussion concerned weighing of the fair use factors and balancing exclusive rights with parodies.[141]

VI. "COMMERCIAL NATURE OF USE" IN CASE LAW AND SCHOLARLY WORKS

Despite the precise definition of commerciality, the *Harper & Row* Court[142] gave, courts and commentators often analyze "commerciality" as a sub-factor using their own understanding of the meaning or without attempting to define what use is of "commercial nature." Consequently, the definition changes with the circumstances of each case.[143]

No doubt, "the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact

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140 Thomas Irvin, *If That's the Way It Must Be, Okay: Campbell v. Acuff-Rose on Rewind*, 36 LOY. L.A. ENT. L. REV. 137, 147 (2016) ("All three courts gave considerable space to discussions of the importance of the commerciality of the work, which is part of the first statutory fair use factor."); *see also* MCA, Inc. v. Wilson, 677 F.2d 180, 185 (2d Cir. 1981).

141 *Campbell*, 510 U.S. at 579 ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."). *MCA* has similar facts to *Campbell* but came out differently; the court concluded:

> We are not prepared to hold that a commercial composer can plagiarize a competitor's copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. Such a holding would be an open-ended invitation to musical plagiarism. We conclude that defendants did not make fair use of plaintiff's song.

MCA, 677 F.2d at 185.

142 471 U.S. 539, 562 (1985).

143 *See e.g.* Religious Tech. Ctr. v. Lerma, No. 95-1107-A, 1996 WL 633131, at *6 (E.D. Va. Oct. 4, 1996) ("It may be true that Lerma's intent in posting the Works was not *"commercial" in the traditional sense*.") (emphasis added); Authors Guild v. Google, Inc., 804 F.3d 202, 207 (2d Cir. 2015) ("Google's *profit motivation* does not in these circumstances justify denial of fair use.") (emphasis added).

rules in the statute,"[144] but consistency is one of the most important features of the law. There must be a strong, clear, and consistent definition, because "[w]ithout a universally agreed-upon understanding of what is meant by 'commercial'—one that is accepted by the courts—it will continue to be a challenge to assess the role of commerciality when evaluating fair use."[145] Another commentator remarked that "[a]t a minimum, the Supreme Court ought to make clear which of the definitions now in circulation the lower courts should employ."[146]

As mentioned above, the issue with most approaches defining the commercial nature of use is that they cannot be universally applied; they do not work properly in each set of factual circumstances. To check for consistent application, various commerciality definitions will be applied to the facts of the seven test set of cases[147] chosen by the author. The author will consider the outcome of each approach to illustrate the limitations.

A. "COMMERCIAL NATURE" AS "NOT PAYING CUSTOMARY PRICE"

The Supreme Court in *Harper & Row* contained the best definition of commercial nature of use; the Court explained: "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[148] This is the most fair definition of commerciality.

The Court stressed that "monetary gain" was not determinative of "commercial nature" of use.[149] The Court very powerfully states that the

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144 H.R. REP. NO. 94-1476, at 5680 (1976).

145 Jennifer E. Rothman, *Commercial Speech, Commercial Use, and the Intellectual Property Quagmire*, 101 VA. L. REV. 1929, 1948 (2015).

146 Fisher, *supra* note 34, at 1674.

147 *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572–73 (1994); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 542–43 (1985); Authors Guild v. Google, Inc., 804 F.3d 202, 208–11; A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff'd sub nom.* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002); Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1117 (9th Cir. 2000); Hustler Mag., Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1149–50 (9th Cir. 1986); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 419–24 (1984).

148 *Harper & Row*, 471 U.S. at 562.

149 *Id.*

commercial nature of use may not be connected to money.[150] In the second part of the definition, there are two conditions under which a use may be commercial: (1) the user stands to profit from the use and (2) the user does not pay the customary price.[151] So, *profit made by a user via not paying "the customary price"* is a controlling factor in commerciality.

It sounds paradoxical that paying money makes the use noncommercial and not paying makes the use commercial. However, this conclusion is logical because if a customer pays a copyright owner, the customer is not unfairly enriched, and a customer's use becomes noncommercial in terms of a customer's enrichment. Vice-versa, if a customer does not pay for the use, the nature of use would be commercial because it will enrich the user.

For example, in *Harper & Row*, The Nation benefitted from the publication of the memoirs and thereby was enriched; but The Nation did not pay the price to the copyright owner, and that is why The Nation's use was commercial.[152] Alternatively, imagine a situation wherein The Nation had paid the price for the right to publish the memoirs. Harper & Row Publishers would have suggested a price and paying this money would have made it problematic for The Nation to earn money from this deal or earn just a little bit. In other words, this would not have unfairly enriched Nation, and that is why this kind of use in the hypothetical example is noncommercial.

The *Harper & Row* definition arranges the priorities properly. This definition covers non-monetary benefits because "profit" may be in any form and because the Court highlighted not only a user's benefit but also a copyright owner's losses.[153] Simultaneously, the price may be paid anyhow.

Similar to the "customary price" approach definition of commerciality, another proposed definition "incorporate[s] a saving of money to the user or denial of return to the copyright holder."[154] Naturally, not paying the price should

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150 *Id.*

151 *Id.*

152 *Id.* ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use. . . . In evaluating character and purpose we cannot ignore The Nation's stated purpose of scooping the forthcoming hardcover and Time abstracts.").

153 *Harper & Row*, 471 U.S. at 562 ("The crux of the profit/nonprofit distinction *is not whether the sole motive of the use is monetary gain* but whether the user stands to profit from exploitation of the copyrighted material *without paying the customary price*.") (emphasis added).

154 Adrienne J. Marsh, *Betamax and Fair Use: A Shotgun Marriage*, 21 SANTA CLARA L. REV. 49, 70 (1981).

constitute saving money; in such cases, under this definition, the use is commercial. But this definition is too money oriented. It was proposed in 1981 and does not consider non-monetary benefits that are very common in the modern world.[155] That is why this "saving money" approach will be omitted and only the "customary price" approach will be applied to the "test cases" to check its consistency.

All of the test cases would have the same outcome if one tries to apply the "customary price" approach. It confirms that this definition perfectly fits every facts pattern. In *Sony*, most home users did not try to profit from the records and did not have to pay the price of aired movies and programs because they were aired free. [156] In *Campbell*, 2 Live Crew wanted to earn money by recording a commercial album and did not pay the price for using the music; thus, the use was commercial.[157] In *Hustler Magazine*,[158] Reverend Jerry Falwell used the work at issue to collect donations but did not pay the customary price; standing to profit from the use and not paying the customary price for use made Reverend Falwell's use commercial. In *Worldwide Church*, the defendant used a copyrighted work to benefit itself via new members who pay tithe but the defendant did not pay for the use.[159] In *Authors Guild v. Google, Inc.*, Google had more viewers of the advertisement and benefited from it both from its competitive advantages and money from the advertisers' points of view with zero-dollar price.[160] In *A&M Records, Inc. v. Napster, Inc.*, the use of pirated works allowed the users to save money and to earn money for the web-site without paying the price to copyright owners. [161]

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155 Since 1981 business models has changed a lot. Today, a user can infringe copyright not to earn or save money but to have more followers in Twitter or more "Likes" in Facebook.

156 464 U.S. 417, 486 (1984) (finding home VTR users do not record for commercial gains).

157 510 U.S. 569, 572 (1994).

158 796 F.2d 1148, 1158 (9th Cir. 1994).

159 227 F.3d 1110, 1118 (9th Cir. 2000) ("*MOA*'s use unquestionably profits PCG by providing it at no cost with the core text essential to its members' religious observance, by attracting through distribution of *MOA* new members who tithe ten percent of their income to PCG, and by enabling the ministry's growth.").

160 804 F.3d 202, 209, 218 (2d Cir. 2015).

161 239 F.3d at 1015.

B. "COMMERCIAL NATURE" AS "COMMERCIAL GAIN"

At first glance, the best definition of commercial nature of use may be "any uses conducted with the purpose to profit from them."[162] In copyright law, a commercial nature is often indicative of a for-profit use.[163] Another commentator proposed "to equate, as does the current standard, commercial use with 'for profit' use."[164] Some actors understand commerciality as commercial exploitation when "the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material."[165]

One more option in defining commercial nature of use is determining if "the defendant used the plaintiff's work as part of a commercial product or service or as an intermediate step to creating a commercial product or service."[166] These two categories are very close because "commercial product" from the second group implies "financial reward" from the first group, implying that they may be combined.[167]

There are two objections against defining commercial nature as commercial gain. First, the definitions are too limitative. The definitions are consistent with *Sony*, in which the Supreme Court defined commercial as "use . . . for commercial gain."[168] However, "for-profit use" or "commercial gain use" does not cover the uses of non-monetary benefits.[169] The fact that a user may benefit not only monetarily should preclude using these definitions.

There is also an attempt to divide commercial use for direct and indirect

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162 Rothman, *supra* note 145, at 1962.

163 *Id.* at 1963.

164 *See also* Marsh, *supra* note 154, at 70.

165 PATRY, *supra* note 33, § 10:16.50 (quoting Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 922 (2d Cir. 1994)); *see also* Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977) ("[W]hether or not the Rosenberg letters were used primarily for scholarly, historical reasons, or predominantly for commercial exploitation.").

166 Sag, *supra* note 6, at 61.

167 Sag, *supra* note 6, at 61.

168 *Sony*, 464 U.S. at 251.

169 *See* Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1117 (9th Cir. 2000); Weissmann v. Freeman, 868 F.2d 1313, 1324 (2d Cir. 1989).

commercial exploitation.[170] Oversimplifying, direct commercial exploitation is earning money, and indirect commercial exploitation is saving money. Nevertheless, this distinction is not useful because both direct and indirect commercial uses are still commercial uses; neither considers non-financial reward.

Second, defining commercial use as commercial gain is problematic because it is unclear how far behind a court should go to find the monetary benefits. How many additional steps should a court take to find the monetary interest? If a celebrity posts a picture on Instagram to attract more followers, this grants no financial reward for the celebrity. This use seemingly appears non-commercial. Nevertheless, the celebrity may sell advertising on his or her Instagram or may perform live concerts, both clearly aimed at a financial reward. Should the use of the picture on Instagram be considered as bringing a monetary benefit? The unclear nature of this question hinders the ability to use commercial gain as the standard for commercial use.

Worldwide Church[171] is another good example of excluding non-monetary benefits. The Court kept in mind that "religion is generally regarded as 'not dollar dominated,'"[172] but then the Court took one more step to show that this non-commercial activity was aimed at profit-making thus making the use commercial:

> Putting aside the disputed question whether PCG uses *MOA* to generate income, and having in mind that like academia, religion is generally regarded as "not dollar dominated," *MOA*'s use unquestionably profits PCG by providing it at no cost with the core text essential to its members' religious observance, by attracting through distribution of *MOA* new members who tithe

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170 *See* Leval, *supra* note 5, at 61 ("Any use of the plaintiff's copyrighted work in a product or service sold to the public was classified as direct commercial exploitation unless: (1) the work was only used or copied as part of an intermediate process; or (2) the defendant had taken an extra step, applying its own labor or creativity to somehow change the original copyrighted work."); *see also Am. Geophysical Union*, 60 F.3d at 921 ("Rather, our concern here is that the Court let the for-profit nature of Texaco's activity weigh against Texaco without differentiating between a direct commercial use and the more indirect relation to commercial activity that occurred here. Texaco was not gaining direct or immediate commercial advantage from the photocopying at issue in this case—*i.e.*, Texaco's profits, revenues, and overall commercial performance were not tied to its making copies of eight *Catalysis* articles for Chickering.").

171 *See* 227 F.3d at 1118.

172 *Id.*

> ten percent of their income to PCG, and by enabling the ministry's growth.[173]

This method of defining commerciality puts defining the term in an awkward position. Taking into account that "criticism, comment, news reporting, teaching . . . , scholarship, or research"[174] are typically for-profit activities,[175] all such use should be of a commercial nature. Or a court could decide when and why to stop analyzing and state that a non-monetary-dominated purpose is enough for a use to be non-commercial.

Moreover, the *Harper & Row* Court commented that commercial nature is "not whether the sole motive of the use is monetary gain."[176] Though this decision was made in 1985, at the beginning of Internet era, it sounds oracular. It is clear now that the profit-related definition is obsolete and does not account for modern business models and technologies.

Applying the "commercial gain" approach to the test set of cases leads to the same conclusion; four out of seven cases would have an unclear outcome in the commerciality sub-factor analysis. It is clear that in *Harper & Row*[177] and *Campbell*,[178] the users aimed to make a profit, thus making the use of a commercial nature. In *Sony*, the use of copyrighted works was clearly non-commercial.[179] In *Hustler Magazine Inc.*,[180] the work was used to obtain donations that are a direct commercial gain and, thus, the outcome is the same.

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173 *Id.*

174 17 U.S.C. § 107 (2012).

175 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 592 (1985) (Brennan, J., dissenting).

176 *Id.* at 562.

177 *Id*.

178 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 583 (1994).

179 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 425 (1984) ("The District Court concluded that noncommercial home use recording of material broadcast over the public airwaves was a fair use of copyrighted works and did not constitute copyright infringement. It emphasized the fact that the material was broadcast free to the public at large, the noncommercial character of the use, and the private character of the activity conducted entirely within the home.").

180 Hustler Mag., Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1152 (9th Cir. 1986)

But in *Worldwide Church*, the Court took additional steps to find commercial gain;[181] at first, the Court confirmed that religious activities were out of commerce but then came to the conclusion that the Defendant's activities were aimed to attract more parishioners to have more tithe from them. Those additional steps made the outcome less clear and more difficult to consistently apply the analysis. Apply the "commercial gain" definition to *Authors Guild*, the same issues arise because digital copies were not used for obtaining direct commercial gain but instead for increasing the audience for the company, dependent on advertising income.[182] It is not clear if the Court should have taken into consideration this secondary motive.

The Ninth Circuit in *Napster* fairly criticized this approach.[183] The Court wrote, "Direct economic benefit is not required to demonstrate a commercial use."[184] Thus, this rule is not applicable to *Napster* at all.

C. "COMMERCIAL NATURE" IN OPPOSITION TO "NONCOMMERCIAL NATURE"

Some judges and scholars address the commercial nature sub-factor as a "commercial-noncommercial distinction."[185] For example, the *Harper & Row* Court pointed out that the publication "was commercial as opposed to nonprofit."[186] However, despite its usefulness in some cases, defining the antithesis of commercial nature is not helpful in defining commerciality.

Section 107(1) of the Copyright Act also requires consideration of nonprofit, educational purposes.[187] "This passage is frequently *misquoted* as 'noncommercial.'"[188] Using a commercial and noncommercial distinction is

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181 Worldwide Church of God v. Phila. Church of God, Inc., 227 F.3d 1110, 1117–18 (9th Cir. 2000).

182 Authors Guild v. Google, Inc., 804 F.3d 202, 206–07 (2d Cir. 2015).

183 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1015 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff'd sub nom.* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

184 *Id.*

185 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.2.1 (2017); *see also Sag*, *supra* note 6, at 61 ("This study distinguishes *between noncommercial and commercial uses*.") (emphasis added).

186 *Harper & Row*, 471 U.S. at 562.

187 17 U.S.C. § 107(1) (2012).

188 PATRY, *supra* note 33, § 10:17 (emphasis added).

misguided because § 107(1) does not contrast commercial with noncommercial; rather, § 107(1) juxtaposes "commercial" with "nonprofit educational."[189] Characterizing this juxtaposition as a commercial/noncommercial distinction should not be used in the first fair use factor analysis.

D. "COMMERCIAL NATURE" AS MARKET SUBSTITUTION/MARKET HARM

William F. Patry defines "commerciality" as "a substitutional purpose"; a use of a commercial nature, under this definition, "displac[es] sales [of] the original by giving the end-user so much of the original's expressive content that there is no need to purchase or license the original."[190] In other words, a user replaces a primary work with a secondary one. [191] For example, making a copy of a book leads to substitution. If one makes a copy, he or she will not have to buy the book, because the copy gives "so much of the original's expressive content that there is no need to purchase or license the original."[192] Here, this use is of a commercial nature.

However, this substitution definition is not suitable in some situations. This failure is illustrated by peer-to-peer network sharing ("P2P"). Is an infringer who is uploading a movie from a DVD to the Internet "displacing sales"? At first glance, yes. But let's go deeper. In the book example above, an actor infringed reproduction rights and displaced sales of the book due to the infringement. But in the P2P example, the main purpose of the primary actor is not to displace sales; only end-users (not the primary actor) displace sales. The primary infringer would never license distribution rights and, thus, cannot displace sales by himself; he is helping the end-users displace sales.

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189 17 U.S.C. § 107(1).

190 PATRY, *supra* note 33, § 10:16.50; *see also* Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932, 941 (4th Cir. 2013) ("[T]he commerciality inquiry is most significant when the allegedly infringing use acts as a direct substitute for the copyrighted work.").

191 *Sag*, *supra* note 6, at 60 ("Defining commerciality in this way is consistent with the essential purpose of copyright law: creating market incentives by protecting creators of original expression from certain types of substitution, primarily expressive substitution.").

192 PATRY, *supra* note 33, § 10:16.50.

In *Napster*, the district court spoke only about secondary use of infringed works, in the context of substitution.[193] Though the Court mentioned both downloading and uploading, the Court only used uploading to illustrate the substitution effect.[194] In other words, the Court skips a primary user (who uploaded or shared the work) and, in illustrating the substitution approach, refers to the end-user (who downloaded the work).

Thus, there is no evidence that a person who is sharing the file via P2P has a purpose to displace sales. It is not relevant that an end-user of a P2P site displaces sales, and therefore, commerciality should not account for uploading user's nature of use through downloading user's nature of use.

Moreover, the market substitution approach may lead to a paradoxical outcome. For example, academic course packs include copyrighted materials and, therefore, substitute primary works. But this substitution should not be determinative; if a student makes a course pack, this use may be noncommercial, whereas if a copyshop makes a course pack, this use may be commercial. The Sixth Circuit addressed this issue in *Princeton University Press v. Michigan Document Services, Inc.*; the Court wrote, "It is true that the use to which the materials are put by the students who purchase the course packs is noncommercial in nature. But . . . [wh]at the publishers are challenging is the duplication of copyrighted materials for sale by a for-profit corporation . . . ."[195]

One more similar attempt to define the commercial nature of use via substitution is to consider "non-commercial in the sense that the copy does not enter the market in direct competition" with the primary work. [196] In other words, if the copy cannot substitute the primary work, the use should be treated as non-commercial.

Applying the substitution approach to the test set of cases shows a weakness in this definition as well. The substitution approach changes the outcome of commerciality analysis in three cases out of seven, and one case would have an unclear result.

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193 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (2d Cir. 2001).

194 *Id.* at 912 ("Napster users get for free something they would ordinarily have to buy.").

195 99 F.3d 1381, 1386 (6th Cir. 1996) (en banc).

196 NATIONAL RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 130 (2000).

In *Sony*,[197] time shifting by a home user should be considered commercial because a user replaced a primary aired work by a secondary work that was taped. Any kind of "shifting"—time-shifting or place-shifting—would automatically substitute the primary work that would make such a use commercial. In *Campbell*,[198] the nature of the use should be considered non-commercial because the secondary work cannot replace the primary work due to the difference in the melody and words. In *Authors Guild*,[199] the substitution approach should change the outcome of the commerciality analysis as well. Google does not sell digital copies and used secondary works only for text search; thus, it is impossible to replace primary works, and Google's use of the work should be considered non-commercial. In *Harper & Row*,[200] the outcome of the substitution approach is unclear because the answer to the question of whether the excerpt in The Nation could substitute the whole work depends on a reader's preference to read the whole article or just the most interesting part of the memoirs. Moreover, this question raises the following issue: If a secondary work uses only one important part of a primary work, can the secondary work substitute the primary work?

Related to market substitution, market harm has been used by some commentators to define commerciality. While the *Campbell* Court equates these two categories,[201] they are distinct because market harm is the potential consequence of substitution. Some actors still try to define commercialism via market harm; for example, some courts view commerciality by considering what "cause[s] a commercial (as in economic) injury to the plaintiff."[202] If a customer does not purchase or license a copyrighted work, it will shrink the market.

The "market harm" definition is similar to the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work ";[203] as a result, confusion may ensue. What should each of the phenomenon evaluate? As mentioned above, Patry defines "commerciality" as "a substitutional purpose" when there is "no need to purchase or license the original."[204] It suggests

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197 *Sony*, 464 U.S. at 422.

198 *See generally Campbell*., 510 U.S. 569.

199 *See Authors Guild*, 804 F.3d at 223–25.

200 *Harper & Row*, 471 U.S. 539.

201 510 U.S. at 570 ("The cognizable *harm is market substitution*, not any harm from criticism.") (emphasis added).

202 Rothman, *supra* note 145, at 1964.

203 17 U.S.C. § 107(4) (2012).

204 PATRY, *supra* note 33, § 10:16.50.

that one should not buy the original that clearly leads to affecting potential markets.[205] Both phenomena use a combination of subfactors, and these patterns should work the same way: "buying-selling" and "no buying—no selling." Only if the market does not exist would not buying an original work not affect the market.[206] Thus, "commercial nature" of use would always affect the market the same way; there is "the potential lost fees and ripple effect of . . . nonpayments on the plaintiff."[207] And if "commercial nature" always affects the market the same way, this dichotomy should not be considered as two separate statutory factors.

Moreover, "[i]f commercial use is an *independent* factor . . . , it must mean something analytically distinct from market effect."[208] This important remark does not give grounds for defining the first factor via the fourth factor because both harm to market and nature of use should be considered separate factors.

Any attempt to treat commerciality as market harm or market substitution would mean "double counting"[209] because both of these first factor definitions consider the same facts of the fair use analysis in the fourth factor analysis.

Applying the market harm approach to the test set of cases shows a weakness of the market harm definition. This approach changes the outcome of commerciality analysis in three cases. First, in *Campbell*,[210] under the market harm approach, the nature of use should be considered non-commercial because the primary and the secondary work are not in the same market and no harm to the market is possible. Second, in *Hustler Magazine Inc.*,[211] the use should be considered non-commercial in nature because market harm would have been possible only if Reverend Jerry Falwell had bought thousands of magazines to cut out the picture. Obviously, he would have never done this. Finally, in *Authors Guild*,[212] a market harm approach should change the outcome of the commerciality analysis as well;

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205 *See* 17 U.S.C. § 107(4).

206 The issue is "what is the market" and may "market" mean something non-financial; but this is beyond this Article's scope, and the common understanding is that "market" exists for having revenue. *See generally Market*, *supra* note 81; *Revenue*, *id*.

207 Rothman, *supra* note 145, at 1964.

208 Sag, *supra* note 6, at 60 (emphasis added).

209 Fisher, *supra* note 34, at 1672.

210 *Campbell*, 510 U.S. at 591–93.

211 796 F.2d 1148.

212 804 F.3d 202.

Google could not harm a market that does not exist for copyright owners (internet search), and that means Google's use was non-commercial.

E. "COMMERCIAL NATURE" AS "COMMERCIAL STATUS OF A USER"

There is a strong temptation to define "commercial nature" through the status of a user. Matthew Sag, Professor of Law at Loyola University Chicago, explained:

> Part of the confusion about commercial fair use stems from a failure to distinguish between commercial uses and uses by commercial actors. Lawyers with limited copyright experience often reflexively suggest that the status of the defendant as a for-profit entity makes fair use unavailable as a defense to copyright infringement.[213]

It would be very convenient to say that an educational institution's use cannot be of "commercial nature" or that a for-profit enterprise always uses a work commercially. Nevertheless, many cases reject this approach and show that nonprofit entities' use may be commercial. For example, in *Worldwide Church*, he Court found that the non-commercial church's use of the copyrighted work was commercial because the use was aimed to attract more parishioners and increase tithe.[214] In *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*, Archbishop Gregory is not a businessman, however, his use of the religion texts was found to be of a commercial nature.[215] In *Lish v. Harper's Magazine Foundation*, Harper's

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213 Sag, *supra* note 6, at 59.

214 227 F.3d at 1118 ("During the time of PCG's [Philadelphia Church of God] production and distribution of copies of *MOA* [Mystery of the Ages] its membership grew to some seven thousand members. It is beyond dispute that PCG "profited" from copying *MOA*—it gained an 'advantage' or 'benefit' from its distribution and use of *MOA* without having to account to the copyright holder. The first factor weighs against fair use.").

215 689 F.3d 29, 61 (1st Cir. 2012) ("[W]e agree with the Monastery that the Archbishop 'profited' from his use of the Works. Regardless of whether the Archbishop's versions generated actual financial income for himself or the Dormition Skete, he benefitted by being able to provide, free of cost, the core text of the Works to members of the Orthodox faith, and by standing to gain at least some recognition within the Orthodox religious community for providing electronic access to identical or almost-identical English translations of these ancient Greek texts. For these reasons, we conclude that as to the first factor, the scales tip in the Monastery's favor.").

Magazine Foundation tried to employ the status-of-a-user approach to prove non-commercial nature of use; the Court unequivocally denied this attempt because it is the use (not the user and his status) that is the focus of fair use analysis.[216] Moreover, an educational institution may earn money that may equate its nature of use with commercial use.[217]

Although the Second Circuit in *American Geophysical Union v. Texaco* pointed out that not considering the nature of a user would be an oversimplification of the first fair use factor,[218] the Court also confirmed that the nature of a user is not determinative in commerciality analysis.[219]

Just as a non-profit status is not determinative, a for-profit legal entity's use may be of a noncommercial nature. For example, if a use is incidental or a for-profit organization does something in the public interest. In *Bouchat v. Baltimore Ravens Limited Partnership*, the for-profit legal entity's use was found to be of a noncommercial nature.[220] Moreover, in *Seltzer v. Green Day, Inc.* the Court called

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216 *See* 60 F.3d 913, 921–22 (2d Cir. 1994) ("Harper's argument that its use was permissible, under the statute, as being for a 'non-profit educational' purpose because Harper's is owned by a non-profit foundation and operates at a loss, is unpersuasive. . . . [T]he mere fact that Harper's is a non-profit organization that operates at a loss does not preclude a finding of 'commercial use;' non-profit organizations enjoy no special immunity from determinations of copyright violation. The question under factor one is the purpose and character of the use, not of the alleged infringer . . . . In sum, Harper's use of Lish's Letter was of a 'commercial nature.'").

217 NIMMER & NIMMER, *supra* note 76, § 13.05[A][1][C] ("Likewise, an educational use that is rendered for profit may be regarded as the equivalent of a commercial use.").

218 60 F.3d at 922–23 ("Though Texaco properly contends that a court's focus should be on the *use* of the copyrighted material and not simply on the *user*, it is overly simplistic to suggest that the 'purpose and character of the use' can be fully discerned without considering the nature and objectives of the user.").

219 *Id.* at 921 ("We generally agree with Texaco's contention that the District Court placed undue emphasis on the fact that Texaco is a for-profit corporation conducting research primarily for commercial gain. Since many, if not most, secondary users seek at least some measure of commercial gain from their use, unduly emphasizing the commercial motivation of a copier will lead to an overly restrictive view of fair use.").

220 737 F.3d 932, 948–49 (4th Cir. 2013) (quoting Bouchet v. Balt. Ravens Ltd. P'ship, 619 F.3d 301, 314 (4th Cir. 2010) [*Bouchet IV*]) ("The mere use of a logo in a profit-making venture . . . is quite different from its commercial

the unauthorized use of the Plaintiff's illustration by the commercial entity in the video backdrop "incidentally commercial" and treated the first fair use factor in favor of fair use.[221]

In *Authors Guild*,[222] the district court noted that "even assuming Google's principal motivation is profit, the fact is that Google Books serves several important educational purposes."[223] Nevertheless, the main reason for finding the first factor in favor of fair use was transformativeness of use.[224]

Patry confirmed the conclusions above: "It should also be kept in mind that nonprofit or noncommercial status does not necessarily imply a nonprofit or noncommercial use within the meaning of § 107(1): while the 'nature' of an entity may be nonprofit or noncommercial, a particular use may be of a commercial 'character.'"[225] As The Second Circuit noted in *American Geophysical Union v. Texaco Inc.*, "[C]ourt's focus should be on the *use* of the copyrighted material and not simply on the *user*."[226]

Applying this status-of-the-user approach to the test set of cases shows a weakness of this definition; the nature of the use is changed for three cases, and one case would have an unclear result. In both *Hustler Magazine Inc.*[227] and *Worldwide Church*,[228] this approach should change the use from commercial to

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exploitation . . . The Ravens are 'not gaining direct or immediate commercial advantage from' any logo display at issue . . . '*i.e.,* [the team's] profits, revenues, and overall commercial performance [are] not tied to' the use.").

221 Seltzer v. Green Day, Inc., 725 F.3d 1170, 1178 (9th Cir. 2013) ("Green Day's use of *Scream Icon* was only incidentally commercial; the band never used it to market the concert, CDs, or merchandise.").

222 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *aff'd sub nom*. *Authors Guild*, 804 F.3d 202.

223 954 F. Supp. 2d 282, 292.

224 *Authors Guild*, 804 F.3d at 219 ("[W]e see no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose . . . .").

225 PATRY, *supra* note 33, § 10:19.

226 60 F.3d at 921–22 (even though "it is overly simplistic to suggest that the 'purpose and character of the use' can be fully discerned without considering the nature and objectives of the user"); *see* Sag, *supra* note 6, at 59 ("[S]tatute . . . focuses on the character of the 'use,' not the identity of the user.").

227 796 F.2d at 1150.

228 227 F.3d at 1112.

noncommercial because the defendants are non-profit enterprises. In *Campbell*,[229] the nature of use by all the defendants was commercial; applying "the user approach" to the case will turn the use to noncommercial, at least for Luther Roderick Campbell because he is a private individual (even if he was involved in business).

Moreover, *Campbell and Napster* raise an interesting question regarding the status of a user approach: If there are two defendants, each with a different status, how should fair use analysis work? Does the approach mean that the same activities that were conducted by a for-profit legal entity and a private individual should be treated differently regardless of the circumstances? This should not be the case because doing so would not be conducting the fair use analysis properly; the main purpose of the fair use analysis is to consider all of the circumstances.

F. "COMMERCIAL NATURE" AS OPPOSED TO "ARTISTIC"/"CREATIVE"

There is an opinion that a true artist is something opposite to commerciality.[230] Though "[s]uch distinctions are less frequent in copyright law,"[231] it is still an option for defining commerciality. Under this definition, the less artistic or creative a secondary work is, the more "commercial" the use will be. In 2009, the Dispute Settlement Body of the World Trade Organization rejected defining "commercial" as "[i]nterested in financial return *rather than artistry*."[232]

As Justice Brennan remarked "[m]any use[] § 107 lists as paradigmatic examples of fair use, including criticism, comment, and news reporting, are generally conducted for profit in this country."[233] If the focus is only on creativity

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229 510 U.S. at 583.

230 Rothman, *supra* note 145, at 1964 ("Courts often contrast what is commercial with what is valuable, in the sense of being informative or expressive or artistic.").

231 *Id.*

232 Panel Report, *supra* note 115, ¶¶ 7.534, 7.537 (emphasis added) ("The Panel notes that the third definition, which includes the qualifiers 'rather than artistry' and 'mere,' refers to usages such as a 'commercial artist,' 'commercial film' or 'commercial writing' in the sense of those who are more interested in financial return than the artistic merit of a work, works that are of such a nature that they are likely to make a profit and works that are regarded as a mere matter of business rather than as expressions of other values. This definition is not apposite.").

233 *Harper & Row*, 471 U.S. at 593 (Brennan, J., dissenting) (emphasis omitted).

and not profit, only "sermons and classroom lectures"[234] may be found not commercial. This definition excludes the possibility of most works being non-commercial just because the work was created to earn money. Applying this approach to the test set of cases shows that all the cases except *Campbell* involve pure copying that does not allow for complete analysis of the use.

At the same time, this approach has a strong connection to the doctrine of transformative use by Judge Pierre Leval.[235] Leval wrote:

> The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story's words, it would merely "supersede the objects"' of the original.[236]

Nonetheless, it is impossible to use transformativeness to define "commercial nature" because Judge Leval treats "commercial nature" as something distinct from transformativeness.[237] Moreover, transformative character of use shows the purpose and character of work in general, rather than the commercial or noncommercial nature of use.

G. "COMMERCIAL NATURE" AS RELATED TO "COMMERCIAL SPEECH"

Fair use, arguably, is an integral part of free speech. [238] As such,

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234 Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1456 (1997).

235 *See generally* Leval, *supra* note 5, at 1111.

236 Leval, *supra* note 5, at 1111 (footnotes omitted).

237 *Id.* at 1116, 1116 n.53 ("The interpretation of the first factor is complicated by the mention in the statute of a distinction based on 'whether such use is of a commercial nature or is for nonprofit educational purposes.' 17 U.S.C. § 107(1) (1982) . . . . [I]t is not suggested in any responsible opinion or commentary that by reason of this clause all educational uses are permitted while profitmaking uses are not. Surely the statute does not imply that a university press may pirate whatever texts it chooses . . . . [T]his clause, therefore, does not establish a clear distinction between permitted and forbidden users. Perhaps at the extremes of commercialism, such as advertising, the statute provides little tolerance for claims of fair use.").

238 Pamela Samuelson, *Unbundling Fair Use*, 77 FORDHAM L. REV. 2537, 2567 (2009) ("[F]air use is the main mechanism in copyright law for

"commercial nature of use" may mean "commercial speech."[239] Using a copyrighted work in an advertising context is an extreme example of commercial use.[240]

Deciding if a particular speech is commercial or not, courts usually employ the three-factor *Bolger* test.[241] This test applies well to fair use cases wherein a person expresses something, and a person employs any kind of activity that lies within the meaning of "speech" set forth in the First Amendment (e.g., advertising, making a movie, writing a book, etc.).[242]

But this approach fails to define "commercial" because the test fails when a person does something that does not lie within the meaning of "speech" in the U.S. Constitution. Is copying a textbook without the copyright owner's consent to sell it freedom of speech? It is unlikely. These activities are far from legitimate "interests of second comers."[243]

As stated above, this approach is excellent for particular cases but cannot be used as a general rule. Applying this approach to the test set of cases shows that the "commercial speech" approach is so limited that it does not allow for defining commercial nature of use via commercial speech. For most of the test cases, it would not be possible to balance the public interests in the free speech because "criticism, comment, news reporting, teaching . . . , scholarship, or research"[244] are typically for-profit activities.[245] Thus, these activities would always be commercial.

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balancing free speech/expression interests of second comers and the public against the commercial interests of authors and commercial exploiters.").

239 Rothman, *supra* note 145, at 1961.

240 *See* NIMMER & NIMMER, *supra* note 76, § 13.05[A][1][C].

241 Rothman, *supra* note 145, at 1961–62 ("[T]hree factors: (1) whether the speech is advertising; (2) whether the speech refers to a specific product; and (3) whether the speaker has an economic motivation for the speech.").

242 Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006); Nunez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000); L.A. News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997).

243 Samuelson, *supra* note 238, at 2567.

244 17 U.S.C. § 107 (2012).

245 *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 593 (1985) (Brennan, J., dissenting).

In *Sony*[246] and *Napster*,[247] it is impossible to consider the defenders' activities as exercising their free speech right because home time-shifting and illegal file sharing are not First Amendment rights. Therefore, this approach cannot be used as a general rule to define commerciality.

H. "COMMERCIAL NATURE" AS NON-PRIVATE/PERSONAL COPYING

Some commentators state that commercial nature of use should be connected with copying not in a private interest. For example, one commentator highlighted that "under either the current for-profit standard or the personal use standard one who copies any protected work escapes liability as long as he uses it only at home."[248] Another commentator suggested pairing "noncommercial" and "private" use.[249] Under this approach, a use may be considered as commercial if it was not made for personal or private purposes.

Nevertheless, this approach likely is not helpful. The issue may arise with the cases with huge amount of home users who infringe copyright.[250] This idea was reiterated by the district court in *Napster*.[251] The Court wrote, "Even if the type of sampling supposedly done on Napster were a non-commercial use, plaintiffs have demonstrated a substantial likelihood that it would adversely affect the potential market for their copyrighted works if it became widespread."[252]

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246 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 425 (1984).

247 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), *as amended* (Apr. 3, 2001), *aff'd sub nom.* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

248 Marsh, *supra* note 154, at 70 ("A standard of personal versus nonpersonal or public use would not solve the problem in *Sony* or similar cases where large numbers of personal uses, when combined, have an enormous impact on the plaintiff."); *see also* NIMMER & NIMMER, *supra* note 76, § 13.05[A][1][C] ("[A]ctivity that is wholly noncommercial to the extent that it takes place within the home."); Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 178 (2017) ("The *Sony* decision was widely understood to mean that consumers do not violate the law when they 'tape television programs off the air' and that private non-commercial copying is fair use.") (citation omitted).

249 DIGITAL DILEMMA, *supra* note 196, at 131–32.

250 Marsh, *supra* note 154, at 70 n.127.

251 *Napster*, 239 F.3d at 1018 (citation omitted).

252 *Id*. at 912.

Therefore, this definition cannot be applied consistently. It is not fair if a use is noncommercial (favoring fair use) but harms the market for a copyrighted work.

Like the "user status" approach, this non-personal approach oversimplifies the first fair use factor analysis and predetermines the outcome. A private person's use could be both commercial and noncommercial, but the approach dictates that an organization's use would always be commercial. To apply this approach, all legal entities would be excluded from noncommercial uses because they cannot do anything for personal purposes. Even a nonprofit organization's use would always be of commercial nature. Moreover, any "nonprofit educational use" that was made by a legal entity would be commercial, though § 107 juxtaposes "nonprofit educational use" with commercial use.[253]

The above approach also poses the question of how to consider the nature of use if there are many users. For example, in *Campbell*, if Luther Campbell had written his version of "Oh, Pretty Woman" for his family and then decided to include the song in the album, should this use be of noncommercial nature?

Applying the approach to the test set of cases illustrates that the outcome of the analysis is predetermined though it did not change the outcome of the cases. As soon as a defendant is a legal entity that cannot do anything for private use the use would be commercial in spite of any facts. This outcome works for *Hustler Magazine Inc.*, *Worldwide Church*, *Authors Guild v. Google, Inc.*, *Campbell*, and *Napster*. And vice-versa, as soon as a user is a private person and uses a work for himself this approach always makes the use non-commercial.[254] Such predominance lessens the importance of the commerciality sub-factor and, therefore, is an inappropriate definition for commerciality.

VII. WHY "COMMERCIALITY" SHOULD BE TREATED NOT IN FAVOR OF FAIR USE

While it is beyond the scope of this Article to define how commerciality should be weighed in the fair use analysis, understanding the role of this sub-factor sheds light on the proper definition of commerciality. In fair use analysis, the Copyright Act requires that "the factors to be considered shall include . . . the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[255] The Act does not specify how the factors should be considered or whether courts should consider commercial

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253 17 U.S.C. § 107 (2012).

254 *E.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 418 (1984).

255 17 U.S.C. § 107(1).

nature of use in favor of finding fair use or not. But the history of the fair use doctrine and the case law consider commercial use as weighing against fair use.[256]

In *Sony*, the Court found that "*every commercial use* of copyrighted material is *presumptively an unfair exploitation of the monopoly privilege* that belongs to the owner of the copyright."[257] Although the *Campbell* Court corrected its position,[258] usually courts treat commercial nature of use as weighing against fair use[259] because a court should consider an author interest to get the incentives for the work.

The aim of this Part is to understand not *how* to consider the commerciality sub-factor, but *why* courts treated commerciality to be less likely to find fair use.

The *Authors Guild* Court described copyright as "a commercial right, intended to protect the ability of authors to profit from the exclusive right to merchandise their own work."[260] In turn, the fair use doctrine counterbalances the private interest of authors with the need to use preexisting works "to promote the Progress of Science and useful Arts."[261]

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256 Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985) ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."); *Sony*, 464 U.S. at 451 ("[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."); Marsh, *supra* note 154, at 71 ("While non-profit use weighs more heavily in the defendant's favor than commercial use, the statute indicates that a 'nonprofit educational purpose,' counterposed to commercial use, is the most likely purpose to be considered fair use.").

257 464 U.S. at 496 (emphasis added) ("The Court confidently describes time-shifting as a *noncommercial, nonprofit* activity.") (emphasis added).

258 510 U.S. at 584 ("[T]he language of the statute makes clear that the commercial of nonprofit educational purpose of a work is *only one element* of the first factor enquiry into its purpose and character.") (emphasis added).

259 Today, courts follow the *Campbell* rule and attach less importance to commercialism if the use was transformative. *E.g.*, *Authors Guild*, 804 F.3d at 219 ("[W]e see no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose . . . .").

260 Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015).

261 U.S. CONST. art. I, § 8, cl. 8.

Thus, fair use analysis should evaluate a copyright owner's private financial interest against the public good. Monetary and non-monetary benefits of a user are not relevant to the society's interests and, therefore, disfavors fair use.

A court should decide if a user enriches himself or the whole society. Consequently, if a user benefits from using a work without the author's consent, this use is unfair because the user is a "free rider." If such a use gives benefits to the public (as opposed to commercial nature of use) or "advance[s] human knowledge,"[262] a court should be more favorable to finding fair use.

Another issue is deciding what constitutes a benefit to the public. Not all public benefits should be considered in the fair use analysis: though the dissemination of knowledge and progress of art and science are obviously not the same that entertainment is,[263] sometimes, dissemination of knowledge and progress of art and science is difficult to separate from entertainment.[264]

However, benefits to the public must not exclude a copyright owner's interests. Otherwise, an author will "promote useful arts" only for a short period of time until the author's death from starvation because the author cannot promote arts for free and has to earn money for living by the works. Secondary use that is claimed to be fair should deprive an author's incentives by as little as possible.[265] That is why illegal P2P sharing cannot be considered as fair use. For example, an author of a textbook must be incentivized to write the book, though free use of the textbook is in the public good.[266]

Moreover, "it seems likely that commercial uses usually result in more severe injuries to copyright owners than noncommercial uses."[267] An additional

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262 Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938).

263 Marsh, *supra* note 154, at 61 ("[F]air use is grounded on the dissemination of knowledge and progress of art and science, and not on entertainment . . . .").

264 Stanley v. Georgia, 394 U.S. 557, 567–68 (1969) ("The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.").

265 MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981) ("The less adverse effect that an alleged infringing use has on the copyright owner's expectation of gain, the less public benefit need be shown to justify the use.").

266 *See e.g.*, Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1391 (6th Cir. 1996) (en banc) ("And how will artistic creativity be stimulated if the diminution of economic incentives for publishers to publish academic works means that fewer academic works will be published?").

267 Fisher, *supra* note 34, at 1673.

reason why commercial use should weigh against fair use is a reason of general tradition to perceive commercial use to be against fair use.[268]

The fair use doctrine is an equitable doctrine; the purpose of the doctrine is to balance monetarily incentivizing an author and providing society with knowledge to continue developing. In other words, courts "must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."[269]

However, an author's interest must prevail until such author's activities stop societal development.[270] Otherwise, an author will have neither economic incentive, due to somebody's free riding, or public recognition, due to lack of moral right in the U.S. copyright law. Consequently, it is the price that a user must pay for the use that plays a significant role in fair use first factor analysis.

VIII. CONCLUSION

The Article addresses what is a commercial nature of use in fair use analysis. As H.L. Mencken said, "For every complex problem there is an answer that is clear, simple, and wrong."[271] This is exactly the case with the commercial nature of use.

It may seem that the meaning of "commercial nature" is obvious and easy to define. But after a plain language analysis, the meaning is not so clear. Case law and scholarly articles show that there are at least eight approaches to the definition: "commercial nature" as (1) "not paying customary price," (2) as

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268 Marsh, *supra* note 154, at 68 n.118 (1981) ("Fair use has traditionally been more readily found for noncommercial uses, especially nonprofit educational purposes."). *See generally* H. C. Wainwright & Co. v. Wall St. Transcript Corp., 418 F. Supp. 620, 625 (S.D.N.Y. 1976), *aff'd sub nom.*, 558 F.2d 91 (2d Cir. 1977); Williams & Wilkins v. United States, 487 F.2d 1345, 1347 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975); Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 131–32 (S.D.N.Y. 1968); ALAN LATMAN, HERBERT HOWELL & WILLIAM F. PARTY, LATMAN'S THE COPYRIGHT LAW 29–31 (5th ed. 1979); MELVILLE B. NIMMER, 4 NIMMER ON COPYRIGHT § 13.05 (1980).

269 Berlin v. E.C. Publ'ns, Inc., 329 F.2d 541, 544 (2d Cir. 1964).

270 *See* COPYRIGHT LITIGATION STRATEGIES, *supra* note 58, at 188 ("In other words, there may be little reason to excuse infringement if the only benefit to society is another work that is largely indistinguishable from the original and serves the same purpose.").

271 *H.L. Mencken*, https://en.wikiquote.org/wiki/H._L._Mencken [https://perma.cc/28L2-HM6S] (last visited Aug. 3, 2018).

"commercial gain," (3) as opposition to "noncommercial nature," (4) as a market substitution/causing market harm, (5) as the "commercial status of a user," (6) as opposition to artistry and creativity, (7) as related to "commercial speech," and (8) as non-private or personal copying. Nevertheless, almost all of them have their own weaknesses.

Applying these approaches to test cases proves that each approach may change the outcome of the commerciality sub-factor analysis. The problems with these approaches illustrate the need for a clear definition of commerciality. The best definition is one that is based on a customary price that a user must pay if he or she wants to obtain a profit because this approach to defining commerciality is precise, consistent, universal and works well with any set of facts.