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Two-Factor Fair Use?

Joseph P. Liu*

Fair use reform is in the air. Although copyright's fair use doctrine has long been a target of criticism and complaint,[1] in recent years, the critiques have grown louder and more insistent. In particular, critics have expressed dissatisfaction with the doctrine's lack of clarity.[2] While acknowledging that the flexibility of fair use serves the useful purpose of allowing courts to adapt the doctrine to new circumstances, critics have become increasingly concerned about the price of this flexibility, namely the lack of clear guidance to those who would rely upon fair use. This lack of clarity has become more troubling as digital technology has dramatically expanded the universe of potential uses and users of copyrighted works.

One result of this increased concern has been a flourishing of proposals to fix fair use. Gideon Parchomovsky and Kevin Goldman, for example, have proposed that Congress enact a number of non-exclusive fair use safe harbors.[3] Michael Carroll has proposed that the Copyright Office be given the authority to issue "no-action" letters, immunizing petitioners from liability for proposed uses.[4] In a similar vein, David Nimmer has proposed the creation of administrative tribunals to make fair use determinations in a more cost-effective manner.[5]

This Article takes the opportunity presented by this symposium panel on the four fair use factors to explore the possibility for reform within the existing structure of the fair use doctrine. While many of the above proposals would provide much-needed certainty to fair use, this Article asks if there are reforms within current doctrine that would result in more modest improvements in clarity and accuracy. In other words, can we look for ways of rationalizing or improving

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1. *See, e.g.*, Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 *2d Cir. 1939) (calling the fair use doctrine "the most troublesome in the whole law of copyright").

2. *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE 187 (Penguin Books 2004) ("[F]air use in America simply means the right to hire a lawyer. . . ."); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106-07 (1990); David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263 (2003); Michael J. Madison, *Rewriting Fair Use and the Future of Copyright Reform*, 23 CARDOZO ARTS & ENT. L.J. 391, 402 (2005); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1147 (2007); Gideon Parchomovsky & Kevin Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483 (2007); Matthew Sag, *God In The Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381 (2005).

3. Parchomovsky & Goldman, *supra* note 2, at 1502.

4. Carroll, *supra* note 2, at 1125-27.

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

the doctrine, without (or in addition to) making more significant changes in the structure of fair use?

Along these lines, this Article engages in a thought experiment. It asks whether fair use would be improved if courts gave exclusive consideration to only two of the four statutory factors: (1) the purpose and character of the use; and (2) the impact of the use on the market.[6] In other words, fair use under this proposal would be converted from a contextual multi-factor test into a two-factor balancing test in which courts would expressly and directly weigh one consideration against another. The remaining two factors, *i.e.*, the nature of the work and the amount used, would be eliminated from consideration or, alternatively, relegated to secondary status.

In some ways, this would be a modest change. In several cases, courts have already expressly deemphasized the second and third fair use factors (the nature of the work and the amount used). Existing doctrine already explicitly places the most emphasis on the first and fourth factors. Commentators have long suspected that the second and third factors rarely drive fair use outcomes.[7] Barton Beebe, in important recent empirical work, has confirmed that these factors rarely affect the outcome of fair use cases.[8] Thus, in some ways, this proposal merely makes express what is already happening.[9]

Yet, as I hope to show in this Article, an express move toward a two-factor fair use analysis could have positive effects beyond what the courts have already implicitly recognized. Although the second and third factors rarely drive the result in fair use cases, the need to consider these factors frames the analysis and prevents courts from considering, in a more direct manner, the underlying copyright interests. A shift to a direct balancing test would force courts to confront the competing interests of copyright owner and user more directly, to measure the intensity of these interests, and to make substantive decisions about their relative weight. Thus, although the proposal is in many ways inspired by the desire to reduce uncertainty in fair use determinations, it would have the more important effect of improving the accuracy of fair use determinations, as measured against the underlying policies of copyright law.

At the same time, the proposal in this Article is not without its drawbacks, nor is it likely to be implemented any time soon – hence, its status as a "thought experiment." Although a two-factor approach would simplify and bring some analytical clarity to fair use analysis, it would do so at the expense of the open-ended and flexible texture of the fair use doctrine. The doctrine's ability to capture a wide range of considerations is its great strength, though it comes at a cost. The

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6. The four fair use factors are codified at 17 U.S.C. § 107 (2000).

7. *See, e.g.*, Carroll, *supra* note 4, at 1103 (factor two "tends to do little work in swaying the outcome").

8. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PENN. L. REV. 549 (2008). *See also* Nimmer, *supra* note 2, at 281 (observing, after a review of fair use cases, that "the four factors fail to drive the analysis, but rather serve as convenient pegs on which [judges] hang antecedent conclusions").

9. *But see* Robert Kasunic, *Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529 (2008) (proposing reinvigoration of second factor).

proposal in this Article can thus be seen as a way to more concretely test how willing we are to trade off flexibility for certainty and clarity in the doctrine.

Part I of this Article starts by highlighting some of the features of the existing four-factor test. It describes how that test is currently implemented, some of the recent research on the application of the factors, and some of the drawbacks of the current approach. Part II sets forth the proposed two-factor test, compares its operation to the existing test, and highlights some of the advantages of such a test. It argues that a two-factor test provides additional clarity and brings the analysis more directly in line with the policies underlying fair use. Part III discusses how such a test might be implemented consistent with the statutory language and case law. It also applies the test to a number of test cases to see how it fares. Finally, Part IV responds to a number of anticipated objections and critiques.

I.

A significant problem with the current four-factor fair use test is its indeterminacy. Courts and commentators have long complained that the existing four-factor test provides scant guidance to those who would engage in fair uses.[10] The indeterminacy is an inherent part of the test and, in many ways, built in to the very idea of fair use. The fair use doctrine is an equitable judge-made doctrine, and when Congress codified the defense in the 1976 Copyright Act, it intended for the courts to continue to apply the doctrine on a case-by-case basis. As a result, despite the development of substantial case law on fair use, the ability to predict with certainty any particular fair use outcome remains limited.[11] And as commentators have repeatedly noted, such uncertainty can have a significant chilling effect on the ability of individuals to rely upon fair use when incorporating existing works into new ones.[12]

The indeterminacy is, of course, the price that we pay for the benefits of flexibility. In many respects, fair use has been enormously successful in adapting copyright to new circumstances. The flexibility of the doctrine has allowed courts to apply fair use in contexts well outside its original scope. Courts have applied it not only to classic cases involving research, education, and commentary,[13] but also to such new technological uses such as video-taping,[14] photocopying,[15] software reverse engineering,[16] and search engine indexing.[17]

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10. *See supra* note 2.

11. *See* Leval, *supra* note 2, at 1105-07.

12. *See, e.g.*, MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, N.Y. UNIV. SCH. OF LAW, WILL FAIR USE SURVIVE: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL 5-6 (2005), *available at* http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf. *See also* Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429 (2007).

13. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985).

14. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 444, 456 (1984).

15. Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 916 (2d Cir. 1994); Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1529-37 (S.D.N.Y. 1991); Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1384 (6th Cir. 1996).

16. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1520-27 (9th Cir. 1992).

The discussion of the indeterminacy of fair use reflects the classic and long-standing debate over rules versus standards.[18] Rules provide clarity and certainty, but at the risk of being rigid and over- or under-inclusive. Standards provide valuable flexibility, but at the cost of predictability. The statutory implementation of fair use reflects a clear decision in favor of a standards-based approach.[19] It also reflects an institutional decision to allocate the important function of setting the scope of fair use to the courts. Many of the proposals to improve fair use seek to make fair use more rule-like, creating more certainty while maintaining flexibility through a rule-making or administrative process. In the end, however, very few proposals appear to be willing to give up the advantages of flexibility provided by fair use.

Even if we would like to preserve some level of flexibility and case-by-case adjudication in fair use, attention can and should be paid to precisely how this flexibility is implemented. A standard could provide little or no guidance to the courts at all, relying upon the courts to develop standards in a case-by-case fashion. The broad delegation of power in the Sherman Act is a classic example.[20] Conversely, a standard could provide more detailed guidance, perhaps by listing a number of factors to be considered when applying that standard.[21]

On this score, the particular doctrinal implementation of fair use may exacerbate the uncertainty. Fair use is a classic example of a multi-factor test. The outcomes of multi-factor tests are notoriously difficult to predict. In part, this results from the sheer number of factors that can influence the determination. So, for example, in the case of trademark, courts consider anywhere from six to thirteen separate factors in determining whether the use of a mark is likely to cause consumer confusion.[22] The more factors there are, the more difficult it is to determine which of these factors is dispositive.

In addition, with multi-factor tests, there is substantial uncertainty surrounding how these different factors should be balanced or weighed. Courts almost uniformly reject a mechanical totting up of the number of factors that favor one party or the other.[23] For example, in the trademark context, courts do not

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17. Kelly v. Arriba Soft Corp., 336 F.3d 811, 817 (9th Cir. 2003).

18. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 140 (1999); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1713 (1976); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592-93 (1988); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995). *See also* Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87 (2004).

19. *See* Carroll, *supra* note 2, at 1101. Note that the Copyright Act, in other areas, does adopt a rules-based approach in crafting certain statutory exemptions. *See, e.g.*, 17 U.S.C. §§ 108, 110-112, 1201(d)-(j) (2000).

20. Sherman Antitrust Act, 15 U.S.C. § 1 (2000) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

21. *See, e.g.*, Anti-Cybersquatting Act, 15 U.S.C. § 1125(d) (2000).

22. Barton Beebe, *An Empirical Study Of The Multifactor Tests For Trademark Infringement*, 94 CAL. L. REV. 1581, 1583 (2006).

23. *See generally* Beebe, *supra* note 8; Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624,

determine the outcome of a likelihood of confusion analysis simply by counting up the number of factors that favor one side versus the other. But if that is the case, then it is profoundly unclear how the factors are weighed in anything more than an impressionistic manner, with only a vague sense of how the factors further the ultimate policy goals of the law.

The four fair use factors present some of the same problems. Courts routinely reject the idea that the result is determined by which side wins the most factors. Instead, courts appear to consider the totality of the four factors in an impressionistic fashion. Although this is often termed "balancing," this rarely involves the careful weighing of the intensity of each factor against the others. Moreover, unlike, say, trademark law, there is no single measure or end goal against which the factors can be balanced. Thus, although the factors provide valuable guidance about what courts will do, the opacity of the formula for weighing the various factors contributes to uncertainty about the scope of fair use.

Of even more concern than indeterminacy is the possibility that the factors have the effect of obscuring the underlying policy concerns. The four fair-use factors do not themselves have a talismanic character. Rather, they are proxies designed to help courts make the ultimate determination: whether allowing the particular use in question would do more harm than good, as measured against some substantive understanding of the purpose of copyright law.[24] The factors are generally attributed to Justice Story's opinion in *Folsom v. Marsh*,[25] and intuitively capture the kinds of considerations that courts would likely find relevant in deciding fair use cases. However, it is important to recognize that they are contingent, a framework designed to guide judicial discretion regarding the ultimate question.

Although the factors are proxies, they may be essential proxies. Deciding the ultimate question, *i.e.*, whether a use would do more harm than good, is not an easy task. Both William Fisher[26] and Glynn Lunney[27] have, at various times, argued that courts deciding fair use cases should disregard the four fair-use factors and instead consider the ultimate question directly, *i.e.*, whether permitting the use would ultimately increase social value more than it would decrease it. However, they both acknowledge that, even if one accepts this as the proper metric (and this is by no means uncontested), answering the question would involve formidable informational requirements.[28] Courts would have to make difficult predictions

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629 (7th Cir. 2003) (Posner, J.).

24. *See* Sag, *supra* note 2.

25. Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841).

26. William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1692 (1988).

27. Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 998-99 (2002) ("In an ideal world with perfect information, courts could resolve the fair use issue by determining precisely the social value of additional authorship resulting from prohibiting a use and then comparing that value to the social value of allowing the use to continue.").

28. *See id.* at 999; Fisher, *supra* note 26, at 1718. *See generally* Matthew J. Sag, *Beyond Abstraction: The Law And Economics Of Copyright Scope And Doctrinal Efficiency*, 81 TUL. L. REV. 187, 230 (2006) ("The idea of resolving fair use decisions through a cost-benefit analysis is simple to state, but difficult to apply"); David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1 (2004).

about how markets would function, the incentive effects of different rules, and so on. Thus, to some extent, proxies are necessary to reduce the informational considerations facing courts to a manageable level.

However, even if we acknowledge that proxies may be necessary, we should turn a critical eye toward determining whether they do a good job of guiding the courts in making their ultimate determinations.

There are good reasons to question whether all of the four factors serve as good proxies in all cases. In particular, the probative value of the second and third factors has frequently been called into question. The second factor, the nature of the work, will be determinative in only a small number of cases. In the vast majority of fair use cases, the work will be a creative work, since copyright is primarily about such works, and such works often have commercial value.[29] Thus, whether a use is fair or not will rarely hinge upon the resolution of this factor.[30] If it does, then it will do so by problematically placing a thumb on the scale against fair use in all of these cases, as courts are forced to count this factor routinely against the defendant. Moreover, many of the considerations underlying this factor are already captured in the first factor, the purpose and nature of the use.[31]

Similarly, the continuing independent importance of the third factor, the amount of the copyrighted work used, is doubtful. As an initial matter, it follows intuitively that the more of a copyrighted work that is used, the less likely the use is to be fair. Yet to a large extent, this is already captured in the fourth factor, the harm to the market, since the use of much of the original work is likely to correlate with harm to a market. Thus, separate consideration of this factor risks double-counting. In addition, in cases where there is no correlation, *i.e.*, no market harm from copying the entire work, this factor actively misleads. So, for example, in *Sony*, the Supreme Court found that the entire work was copied, but that there was no harm to the market.[32]

The changing significance of the third factor reflects some of the dramatic changes in the copyright markets and in copying technology. When *Folsom v. Marsh* was decided, copying was relatively time consuming, and if a defendant copied the entire work, he or she often did so in a way that caused competitive harm. Today, however, copying an entire work is quite trivial and may have little

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29. *See, e.g.*, Campbell v. Acuff-Rose Music, 510 U.S. 569, 572 (1994); *see also generally* Kasunic, *supra* note 9.

30. Dow Jones & Co. v. Bd. of Trade, 546 F. Supp. 113, 120 (S.D.N.Y. 1982) ("The nature of the copyrighted work seems to be the least important and most unclear of the four factors enumerated in § 107"); *but see* Kasunic, *supra* note 9.

31. The fact that a work is unpublished is also relevant under the second factor and does appear to have an impact on fair use determinations. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985); Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 484 U.S. 890 (1987). However, to the extent this concern reflects the economic value of first publication, as in *Harper & Row*, this consideration is already captured in the fourth factor. To the extent that this concern reflects a non-economic concern about the privacy interests of the author, copyright is at best an imperfect vehicle for protecting such privacy interest.

32. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 444, 449-50 (1984); *see also* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

effect on the original market for the good. For example, in *Sega v. Accolade* the court gave little weight to this factor, as the defendant in that case made copies of the entire software program, but only as an intermediate step toward creating its own compatible programs.[33] As Glynn Lunney has pointed out, the factors were developed under outdated technological assumptions. In a digital landscape, the significance of this factor may be very different.[34]

Although factors two and three may be of doubtful relevance in all cases, factors one and four have a much more direct connection to the values underlying fair use and copyright law more generally. Certainly, factor four, the harm to the market, is of direct relevance, as it goes to the basic incentive-creating purpose of copyright.[35] Similarly, factor one, the nature and purpose of the use, is directly relevant to the main purposes of the fair use defense.[36] If a use is for a "favored" purpose, such as education or criticism, this connects directly to the very reason we have fair use in the first place. In addition, the focus on the transformative character of the use relates to the desire for copyright to provide incentives not only for creating initial works, but also works that build upon the original. Thus, factors one and four are far more relevant when measured against copyright policy concerns.

Indeed, the courts themselves have repeatedly recognized the limited relevance of factors two and three. In *Sony*, the Supreme Court gave little weight to the fact that the copyrighted works were creative and copied in their entirety.[37] Similarly, in *Campbell v. Acuff-Rose*, the Court dismissed the creative nature of the copyrighted work, noting that parodies almost always target creative works.[38] In *Sega v. Accolade*, the court deprecated the importance of both factors two and three.[39] Thus, the courts have repeatedly recognized that these factors have less relevance than the other fair use factors. And Barton Beebe's recent empirical research confirms that these factors, in fact, rarely drive outcomes in fair use cases.[40]

Thus, in the end, the existing four-factor fair use test suffers from two main limitations. First, the multi-factor test is significantly indeterminate, providing scant guidance to potential fair users. Second, and perhaps more importantly, the test requires courts to consider factors that may not be relevant to, or may at times

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33. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1511 (9th Cir. 1992).

34. *See* Lunney, Jr., *supra* note 27.

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

36. Kelly v. Arriba Soft Corp., 77 F. Supp. 2d 1116, 1121 (C.D. Cal. 1999) ("The first factor of the fair use test is the most important in this case"); Leval, *supra* note 2, at 1116.

37. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 444, 449-50 (1984).

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

39. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1522, 1526-27 (9th Cir. 1992).

40. Beebe, *supra* note 8. It could be argued that, while the third factor does not drive many copyright decisions, it plays an important role in shielding users outside the context of litigation. In other words, many users may in practice rely heavily upon the minimal scope of their copying, and without this factor, they would feel far less certain. In such cases, however, it is likely that factors one and four would continue to provide ample breathing space. For example, a small quotation in a book review will have no impact on the market and will fall safely within the primary purpose of fair use. In the rare cases where a minimal amount of copying would have an impact on the market, the case should quite properly be a closer call.

obscure from courts, the ultimate policy concerns underlying fair use more generally.

II.

Given the above, are there ways we might modify the test to both increase certainty and bring fair use analysis more directly in line with copyright policy objectives? One extreme possibility would be to do away with the factors entirely and give courts the discretion to craft exceptions as necessary to "promote progress" or some other overall value. This would, of course, merely exacerbate the uncertainty and provide little guidance to the courts or parties. The other extreme would be to add a host of additional factors for consideration.[41] Although this might result in a more finely-tailored fair use test, it would also add to the uncertainty, insofar as there would be even less guidance as to how the factors should be balanced and weighed against each other.[42]

This Article explores the possibility of simplifying fair use analysis by turning fair use into a two-factor balancing test.[43] Under this experimental proposal, courts would do away with factors two and three entirely and instead directly balance factors one and four. Courts would first consider the purpose and character of the use. In so doing, a court would look at whether a work is non-commercial, whether it is transformative, and more generally, whether the use serves a positive social purpose. Courts would then expressly weigh such considerations against the potential for the use to harm the market for the original work, as well as potential future markets.

Such a two-factor test would reduce some of the indeterminacy in the fair use doctrine. True, it would not eliminate the indeterminacy. Yet by reducing the number of factors, such an approach reduces the universe of considerations and factors that can influence a fair use determination. The determination would focus on two main considerations: the nature of the use and the harm to the market. In addition, it would provide a clearer algorithm for weighing the two factors, thus eliminating the uncertainty of multi-factor balancing. Results would be based not on an indeterminate and impressionistic balancing of multiple factors, but on an express weighing of two considerations, one against the other.

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41. Like many other authors, I have elsewhere proposed that courts consider additional factors in their fair use determinations. *See* Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409 (2002) (proposing that courts consider the age of the work). The thought experiment proposed in this Article serves to highlight the fact that such proposals come at a price.

42. *See* Beebe, *supra* note 22, at 1645-46 ("[M]ultifactor tests of ten or even eight factors appear to ask too much of the judge's ability simultaneously to weigh competing concerns and may simply result in the stampeding of less significant factors").

43. Other possibilities for doctrinal reform certainly exist. For example, Robert Kasunic, in his contribution to this symposium, argues that courts should develop a more nuanced view of factor two. *See* Kasunic, *supra* note 9. In many ways, Kasunic's diagnosis of the current treatment of factor two accords with the diagnosis in this Article, insofar as both articles note the declining importance of factor two. However, the prescriptions in the two articles differ significantly. Whereas Kasunic believes courts will arrive at better decisions if given more information, this Article suggests that they will do so if given less information.

Such a two-factor test would do away with factors that rarely, if ever, affect fair use cases. It could be argued that since courts already disregard these factors, there is little harm in retaining them. Yet the continuing existence of these rarely-dispositive factors poses the risk that they may lead courts astray. Some courts do an admirable job of applying the factors in a nuanced fashion, with an eye toward copyright policies.[44] However, the risk exists that courts less familiar with these policies might apply the factors more mechanistically, in a way that is not true to the underlying goals of copyright.[45] In other words, courts that interpret the factors in a nuanced way reach the right result despite, rather than because of, the four factors.

One advantage of such an approach would be that courts could more easily take account of the intensity or magnitude of the two factors. Under a multi-factor balancing test, it is difficult to register the relative strength of the factors. Thus, we see in many fair use cases a binary, on/off assessment of the factors. For example, factors one and two favor defendant, while factors three and four favor the plaintiff. With a two-factor approach, courts can more easily determine and weigh the relative strength of factors one and four. Factor one may point in a different direction from factor four. But the strength of factor one may greatly outweigh the strength of factor four, or vice versa. While courts can still measure the magnitude of the factors in a multi-factor test, this kind of measurement is easier and takes on more significance when the two factors are expressly weighed against each other.

By focusing on these two factors, courts might also be freed up to develop more extensive intra-factor doctrine. Already, courts have developed the doctrine within the fourth factor, regarding how one measures the market, which kinds of markets count, and who bears the burden of proof. With the first factor, courts have made distinctions between commercial and non-commercial uses, transformative and non-transformative uses. Yet, perhaps, courts would take advantage of the increased focus on only two factors to develop more nuanced theories about what kinds of uses get favored treatment.[46] For example, courts might more actively consider the positive externalities or spillovers generated by certain productive or socially-valuable uses.[47]

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44. *See, e.g.*, *Sega*, 977 F.2d 1510.

45. *See, e.g.*, Religious Tech. v. Netcom, 923 F. Supp. 1231 (N.D. Cal. 1995) (finding against fair use where first and fourth factors supported fair use, but second and third weighed against). *See also generally* Beebe, *supra* note 8 (noting that in 59.5% of the cases studied, the courts adopted "the rhetorical practice of explicitly stating which party each factor favored"); Sag, *supra* note 2, at 386 ("The current practice of most courts, treating the factors as outcome-determinative as opposed to question-framing, masks a priori assumptions and distorts judicial reasoning."); Nimmer, *supra* note 2, at 280.

46. *See, e.g.*, Laura A. Heymann, *Everything is Transformative*, 31 COLUM. J.L. & ARTS 445; R. Anthony Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467; Rebecca Tushnet, *User Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497.

47. Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997). Consider, for example, the interesting debate between the majority and dissenting opinions in *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381,

Perhaps the most important advantage of such an approach is that it brings fair use analysis more directly in line with the underlying policy considerations. Factor one becomes ultimately a question about the value of the use. Factor four becomes ultimately a question about the harm to the copyright owner. With a two-factor balancing test, these considerations can be expressly weighed against each other, without the distracting and potentially misleading influence of extraneous factors. This approach thus clarifies what is really at stake in fair use cases.

It also has the effect of incorporating different competing conceptions of fair use in a single analysis. Much of the above analysis has been purposely vague about the underlying policies behind fair use, mostly because these policies are sometimes contested. Is fair use best understood in terms of curing market failure?[48] What do we mean by market failure?[49] Or is fair use best understood as privileging certain socially-valuable uses (*e.g.*, education, criticism, etc.), regardless of whether a market exists for those uses?[50] Or does fair use represent a rough assessment of what is "fair" based on custom, practice, and other considerations?[51]

A two-factor approach would permit many of these competing visions of fair use to be considered more expressly, without the need to fit the analysis into a particular four-factor test. The focus on factor four represents, to some extent, an economic analysis of fair use, focusing on the harm to incentives from the use. It also permits consideration of the influential market-failure theory of fair use. Courts can thus expressly consider whether a particular use will harm an existing or future market for a work. By the same token, factor one becomes a proxy for the more traditional view of fair use, as driven by a need to encourage and facilitate education, research, comment, criticism and news reporting. As more express attention is focused on this factor, it can serve as more of a counterweight to market-based views of fair use. So, for example, a court might find it easier to find fair use for a sufficiently productive or newsworthy use, despite some harm to a market.[52]

1384 (6th Cir. 1996), regarding the value of copying materials for coursepacks.

48. Wendy Gordon, *Fair Use as Market Failure*, 82 COLUM. L. REV. 1600, 1601 (1982).

49. *Id.* at 1607; Robert Merges, *The End of Friction? Property Rights and Contract in the Newtonian World of OnLine Commerce*, 12 BERKELEY TECH. L.J. 115 (1997); Paul Goldstein, *Fair Use In A Changing World*, 50 J. COPYRIGHT SOC'Y U.S.A. 133 (2003).

50. *Cf.* Loren, *supra* note 47; Frischmann & Lemley, *supra* note 47.

51. Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1138 (1990); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525 (2004); William F. Patry & Richard A. Posner, *Fair Use and Statutory Reform in the Wake of* Eldred, 92 CAL. L. REV. 1639, 1645 (2004).

52. To some extent, the two-factor proposal represents a modest doctrinal implementation of the approach suggested by Lunney and, to a lesser extent, Fisher. *See* Fisher III, *supra* note 26, at 1692. As noted above, Lunney has argued that courts considering fair use cases should engage in direct cost-benefit analysis to determine whether the costs of allowing a particular use outweigh the advantages. Lunney, Jr., *supra* note 27. One drawback of this approach is the formidable informational demands this places on judges, who must consider a wide range of circumstances in order to make accurate determinations. Sag, *supra* note 2, at 386. A two-factor balancing approach moves courts more in this direction.

III.

How might such a two-factor approach be implemented? To some extent, courts are already moving in this direction. As mentioned above, courts have at times expressly acknowledged the limited value of factors two and three.[53] In parody cases, for example, factor two is all but irrelevant, as the Supreme Court expressly acknowledged in *Campbell*.[54] Moreover, in many cases, courts have called into question the relevance of factor three. The Supreme Court did so in *Sony* and, to a lesser extent, in *Campbell*. Other courts, particularly in cases involving digital technology, have done the same.[55] Thus, to a large extent, moving to a two-factor approach would merely acknowledge what the courts have already been doing.

A more serious obstacle is the statutory language. When Congress codified fair use, it expressly did not mean to limit the range of considerations in which courts could engage, insofar as it did not make the four factors exclusive. However, Congress appears to have required that courts at least consider the four factors, as the language in the statute states that the list of factors courts consider "shall" include the four factors. Thus, arguably, courts are required to consider the four factors, and an approach that expressly barred them from doing so would be at odds with the statutory language.[56]

If this is the case, one way of addressing the issue would be to retain consideration of factors two and three but give them hardly any weight whatsoever. The statute says nothing about how much importance should be given to any of the factors. And indeed, the courts have at times accorded different weights to the different factors. Thus, it is certainly open to courts to develop in more detail the relative weights of the factors, and this proposal could be implemented by simply according those two factors minimal weight. Factors two and three could be considered "secondary factors" that might tip the balance in close cases, where the primary factors are indeterminate.

More fundamentally, in codifying fair use, Congress clearly meant for it to remain a dynamic doctrine. In delegating the authority to craft exceptions to the federal courts, Congress envisioned future development of the law.[57] It is thus quite likely that Congress, despite the seemingly mandatory language of the code, would be untroubled by judicial adaptation of fair use doctrine in the ways outlined by this Article. The approach in this Article would, at the very least, be consonant with Congress's broader purpose in codifying fair use.

The more significant question would be how the balancing test would change actual fair use analysis. Here, it might be worth considering a number of prominent fair use cases, to see how a balancing approach would fare. In some cases, a two-

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53. *See, e.g.*, Beebe, *supra* note 8, at 610 (noting that, with respect to factor two, "17.7% of the 306 opinions failed even to refer to the factor, while an additional 6.5% did so only to call it irrelevant").

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

55. Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1511 (9th Cir. 1992); Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 599 (9th Cir. 2000); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

56. Ty, Inc. v. Publications Intern., Ltd., 333 F.Supp.2d 705, 715-16 (N.D. Ill. 2004).

57. H.R. Rep. No. 94-1476 (1976); S. Rep. No. 94-473 at 66 (1975).

factor balancing test might have little concrete impact on the result. For example, in both *Sony* and *Campbell*, the Court limited the consideration of factors two and three.[58] These, and other cases minimizing the impact of the middle two factors, to some extent reflect the proposal in this Article. However, a balancing approach might have permitted more express and direct consideration of the tradeoffs between factors one and four. The Court would have had to weigh the advantages of the uses in question (*i.e.*, time-shifting and parody) against the evidence of market harm.

In other cases, a balancing test might well change the result. In his data set of fair use opinions, Barton Beebe noted a single case in which factors one and four pointed for fair use, but the court found no fair use based largely on factors two and three.[59] That case, *Religious Technology Center v. Netcom*, involved the posting of copyrighted unpublished Scientology documents.[60] The court in that case found no fair use, based largely on the unpublished nature of the works and the extent of the copying. Under the proposal in this Article, the case would have come out the other way. Thus, in the admittedly rare cases where factors two and three are at odds with factors one and four, the result would be different.

In still other cases, the results may not be so dramatic, yet might still be influenced by the change. Beebe's study indicates that factor three, in particular, is often correlated with factors one and four.[61] Thus, in most cases, not considering factor three might make little difference in outcome. However, for those cases where factor three points the other way, it would be far easier for courts to reach the ultimate result. Thus, for example, in cases like *Kelly v. Arriba Soft* or *Sega v. Accolade*, the courts would be able to reach their results more easily.

What about cases where factor two or three helps reach a result that we may find intuitively appealing? Take, for example, *Bridgeport v. Dimension Films*, which involved sampling of a sound recording.[62] Here, the third factor would point toward a finding of fair use. By eliminating consideration of the third factor, more pressure is put on the fourth factor. And in that case, the court relied very much on the fourth factor, finding that there was an effective market for sampling and thus that the use was not fair.

As an initial matter, some of the policy concerns captured by factor three may still survive under the *de minimis* doctrine. Thus, for truly small-scale uses, there may be a separate avenue for escaping liability.[63]

Putting that to the side for the moment, the focus on factors one and four is still desirable insofar as it puts the emphasis on the relevant considerations: the nature of the use and the harm to the market. The sheer amount used does not have the

58. *See also Sega*, 977 F.2d at 1511.

59. Beebe, *supra* note 8.

60. Religious Tech. Ctr. v. Netcom On-Line Commc'n Svcs., Inc., 923 F. Supp. 1231 (N.D. Cal. 1995).

61. Beebe, *supra* note 8.

62. Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004).

63. *See generally* Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575 (2005).

same direct correlation with copyright interests as factors one and four. We might quibble about how the court applied the fourth factor in *Bridgeport*, for example, if we believed that the licensing market for samples was not an effective one. We might also criticize the failure to give due regard to the first factor, the nature of the use, by recognizing the critically important value of sampling to a particularly rich art form. The point is that the two-factor test identifies the proper considerations and ties them more directly to the underlying copyright policies.

The two-factor test may be most helpful in deciding current cases involving new digital technology, such as the pending Google Book Search litigation. Google is currently engaging in a project to digitize the world's books, and has entered into agreements with a number of major research libraries to scan books in their collections. Google will index the results, and make them possible for individuals to run text searches through the database of scanned books. If a book is in the public domain, Google will make it available to the searcher in its entirety. If a book is under copyright, Google will make available a "snippet" of text from the book, immediately before and after the search term. Several book publishers and authors have sued Google for copyright infringement.[64]

Under the standard four-factor analysis, Google Book Search does not fare well. In particular, factors two and three point against fair use, insofar as many of the works are creative and Google admittedly copies them in their entirety. Yet weighing these two factors too heavily would be potentially misleading. In most fair use cases, factor two tilts against fair use, so it rarely affects outcomes. Moreover, copying the entirety of the books is an intermediate step towards making a smaller subset of text available through search. The amount copied thus bears little relationship to any harm being suffered.[65]

Instead, the focus in this case should ideally be placed on factors one and four. Is there a harm to an existing or potential market? And is the purpose and character of the use such that we should favor it? A court may balance these two considerations in very different ways. It could place greater emphasis on existing markets or equal emphasis on future markets. It could view the use that Google is making in many different ways, either as an important contribution to making the world's knowledge accessible or an attempt to privately enrich itself at the expense of authors and publishers. The test itself does not dictate a result. However, it does focus the attention of the court on the relevant considerations in a more direct fashion. It eliminates consideration of factors that do not shed light on the ultimate question.

In the end, eliminating consideration of factors two and three may not have a dramatic impact on the outcomes of fair use cases in the short term, particularly to the extent that these factors, in practice, rarely drive fair use outcomes. However, it would focus more attention on the two remaining factors, reduce the level of

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64. *See* Class Action Complaint, The Author's Guild v. Google, Inc., No. 05-CV-8136, 2005 WL 2463899 (S.D.N.Y. filed Sep. 20, 2005); Complaint, The McGraw-Hill Cos., Inc., et al. v. Google, Inc., No. 05-CV-8881, 2005 WL 2778878 (S.D.N.Y. filed Oct. 19, 2005).

65. *See* Sony Computer Entm't, Inc. v. Connectix Corp., 203 F.3d 596, 599 (9th Cir. 2000); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

uncertainty in fair use determinations to some extent, permit assessment of the intensity of those two factors, allow courts to expressly weigh them against each other, and ultimately tie fair use considerations more tightly to the underlying policy interests.

IV.

A two-factor approach to fair use is not without its drawbacks, and a number of significant objections could be raised against the proposal advanced here. For example, it could be argued that even a two-factor fair use analysis would leave fair use decisions highly indeterminate, as potential fair users would have no firm guidance regarding how a court might balance the two factors. While it is true that there would still be some uncertainty, a two-factor approach reduces the number of potential considerations and presents a clearer method for balancing the interests. Thus, we should expect some marginal increase in certainty and predictability.

A related critique is that the two-factor test is too reductionistic. By reducing fair use to a more directly-manageable two factors, such an approach may increase the predictability and analytic clarity of fair use, but it would do this at the expense of the richness and complexity of the defense. Fair use has been so successful adapting to a wide range of new circumstances precisely because it cannot be easily pinned down. The existing four-factor test is sufficiently open-ended that it can accommodate a wide range of considerations that would be excluded from a two-factor test. For example, what about custom, or industry-practices, or a more general sense of what is fair? What about fairness to the author and his or her vision of the work? By reducing fair use to just two factors, we lose something important.

I am in fact quite sympathetic to this view. Fair use has in practice accommodated and incorporated a wide range of competing theories, and no one theory can successfully explain the wide range of circumstances in which fair use determinations arise. In some ways, the loose correlation of the four fair-use factors to underlying copyright policies represents an intentional lack of clarity, which allows us to agree on certain fair use results without specifying (or debating) the underlying theory, about which there may be fundamental disagreement.[66]

At the same time, the proposal in this Article does not entirely eliminate the ability of fair use to adapt to new circumstances. Factors one and four are still sufficiently open-ended that courts will be able to incorporate different conceptions of fair use and additional considerations. And it is not as if factors two and three, by themselves, facilitate this kind of open-ended consideration. The defense will ultimately remain an equitable one, and courts will be free to continue to adapt it.

In the end, however, it is true that the proposal in this Article has the effect of simplifying fair use and reducing its flexibility and open-ended texture to some extent. Thus, the proposal ultimately presents us with a concrete choice. Are we willing to sacrifice some degree of flexibility in exchange for increased certainty

66. *See* Cass Sunstein, *Incompletely Theorized Agreement*, 108 HARV. L. REV. 1733 (1995).

and analytic clarity? Or do we ultimately prefer to maintain the flexibility in the face of its inherent costs? The proposal offered in this Article cannot by itself answer that question, but it serves to at least highlight, in a more concrete way, the nature of the tradeoffs.