Private Rights and Public Wrongs: Fair Use as a Remedy for Private Censorship

Stephen J McIntyre
Private Rights and Public Wrongs: Fair Use as a Remedy for Private Censorship

Stephen McIntyre*

ABSTRACT

Copyright law seeks to promote the public welfare by incentivizing the creation and publication of art, literature, and other original works of authorship. The law bestows exclusive economic rights in expression, which allow copyright holders to exploit the commercial value of their creations in the marketplace. This affords a high degree of control over when and how others use copyright-protected works. These rights, however, are not absolute. The “fair use” doctrine has traditionally permitted unauthorized and uncompensated uses of copyrighted material for socially beneficial purposes.

Under current jurisprudence, the fair use analysis is dominated by concerns about market harm. The doctrine favors “transformative” uses that are unlikely to reduce demand for the original work by substituting for it in the marketplace. This approach makes sense when, as in most infringement cases, a copyright holder sues to protect the commercial value of a work that has been or will soon be published. But when the plaintiff’s motive is to censor his or her work from the public eye altogether, without regard for its commercial value, copyright enforcement is far less compelling. In these “private censorship” cases, the market-oriented fair use analysis routinely overprotects copyrights and produces outcomes that conflict with copyright law’s constitutionally mandated purposes.

This article proposes a reinterpretation of the fair use doctrine in the private censorship context. Eschewing the prevailing “market substitution” framework, this alternative analysis would give greater weight to copyright law’s public-oriented objectives. The proposed analysis would facilitate a more equitable adjudication of private rights and public interests by helping to distinguish legitimate applications of copyright law from illegitimate attempts to suppress information and expression.

* J.D., M.A., Duke University; B.A., Brigham Young University. Many thanks to Jeremy Mullem, Sandeep Vaheesan, and Katherine De Vos Devine for their insightful comments.
I. INTRODUCTION

After sweeping the Nevada Republican Party Primary in June 2010, U.S. Senate candidate Sharron Angle underwent a silent transformation. The outspoken conservative had ridden a wave of right-wing fervor to victory, but

---

with the nomination in hand and the general election only months away, campaign staffers rebranded Angle as a middle-of-the-road alternative to her opponent, Democratic Senator Harry Reid. Whereas Angle’s campaign website originally railed against “illegals,” a revamped website stated simply that the United States “must secure its borders immediately.” Gone too were her earlier calls to shutter the Department of Education and phase out Social Security. Picking up on these discrepancies and seeing an opportunity to land a political blow, Reid’s campaign posted a duplicate of Angle’s earlier website at TheRealSharronAngle.com. “What was good enough for Nevada voters to read during the primary should be good enough for them now,” boasted a Reid spokesperson. Shortly after “The Real Sharron Angle” website went live, however, Angle’s lawyers hit Reid with a sharply worded cease-and-desist letter. Their allegation: copyright infringement.

The motive behind this letter was transparent: the Angle campaign did not like Senator Reid using Angle’s own words against her and hoped to quickly put a stop to it. Copyright provided an efficient and seemingly legitimate means for accomplishing this. Angle’s website qualified for copyright protection, and the Reid campaign had copied it verbatim. This was seemingly a textbook example of infringement. Sure enough, the tactic

3. Id.
4. Id.
6. Id.
7. Id.
8. Id.
10. See What Does Copyright Protect?, U.S. COPYRIGHT OFFICE, http://www.copyright.gov/help/faq/faq-protect.html (last visited Dec. 10, 2011) (“The original authorship appearing on a website may be protected by copyright. This includes writings, artwork, photographs, and other forms of authorship protected by copyright.”).
11. See Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 980 (2d Cir. 1980) (“A verbatim reproduction of another work . . . is actionable as copyright infringement.”).
worked. Upon receiving the cease-and-desist letter, Reid’s staffers abruptly took down the Angle website.\(^ {12} \)

This relatively minor political controversy raises serious questions about the nature of copyright law. Copyright is supposed to promote the creation and dissemination of original expression, not the suppression of it.\(^ {13} \) The law achieves this goal by bestowing limited commercial rights, which provide an economic incentive for authors and artists to bring their works to the public marketplace.\(^ {14} \) In other words, copyright is supposed to deter, rather than facilitate, censorship.\(^ {15} \) And yet in the 2010 Nevada Senate race, it was used to accomplish just the opposite—to restrict access to a candidate’s speech, despite the voting public’s interest in knowing whether a candidate has changed positions on crucial issues.

This was not the first time copyright and censorship crossed paths. The early English precursors to copyright law were in effect censorship statutes that the Crown employed to suppress religious heresy and sedition.\(^ {16} \) By creating monopoly rights in expression, a copyright gives its holder the legal authority to prevent others from using that same expression. As Professor Melville B. Nimmer observed in his seminal 1970 article, copyright law seemingly conflicts with the First Amendment in that it “punishes expressions . . . when such expressions consist of the unauthorized use of material protected by copyright.”\(^ {17} \) Whatever its intended purposes, copyright may serve as a veritable tool for “private censorship.”

The “fair use” doctrine, which permits unauthorized use of copyrighted works in limited circumstances, balances copyright holders’ rights against the public’s interests in free speech and the dissemination of knowledge, information, and culture.\(^ {18} \) Whether a use is “fair” largely hinges on whether it functions as a “market substitute” for the original work.\(^ {19} \) Focusing on market

---


14. Id.

15. See Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1263 (11th Cir. 2001) (“[C]opyright laws were enacted in part to prevent private censorship.”).


harm makes sense in the typical infringement case, for example, when a plaintiff sues to vindicate his or her copyright in a published or soon-to-be-published work. But what about those cases in which the copyright holder attempts to keep his or her work out of the public eye altogether? When a copyright holder has no intention to market a work but uses copyright as means to suppress it, does the fair use doctrine adequately balance public interests and private rights?

This article answers that question in the negative. A review of recent case law shows that courts tend to overprotect copyrights in the private censorship context. Where a plaintiff is more concerned with restricting access than protecting his or her commercial rights, employing a market-based analysis makes little sense and enforcing the copyright may actually conflict with the public’s interest in access. Copyright enforcement is consequently far less compelling in these circumstances. Yet courts, faced with censorship-motivated plaintiffs, nonetheless focus myopically on market harm, to the neglect of copyright’s public-oriented purposes. While privacy is an important value, copyright law is not the appropriate vehicle for protecting it.

This article proposes a reinterpretation of the fair use analysis to facilitate a more equitable adjudication of public and private interests in private censorship disputes. Eschewing the doctrine’s prevailing “market substitution” framework while still adhering to the text of the Copyright Act, this alternative analysis would give greater weight to identifiable public interests in disclosure. It would also place a heavier burden on plaintiffs to prove that they are motivated by legitimate, non-censorial purposes. This analysis is consistent with and supported by the historical contours of the fair use doctrine, the incentives-based economic policy underpinning copyright law, and copyright’s constitutionally mandated objectives. If adopted by the courts, the proposed analysis would help distinguish legitimate applications of copyright law from illegitimate attempts to suppress information and expression.

II. BACKGROUND

A. The Public Interest in Copyright Law

Copyright consists of a bundle of exclusive economic rights that allows authors and artists to exploit the commercial value of their creations. These include the rights to reproduce, distribute, and prepare derivatives based upon

Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)).
21. See id. § 106 (enumerating exclusive rights).
copyrighted works. Copyright subsists in all “original works of authorship,” which range from oil paintings to architectural designs to computer programs, from the moment of their creation. At the expiration of the copyright term, these works fall into the public domain, at which point anybody may use them without permission or payment. Copyright protection only extends to expression. Pursuant to the “idea/expression dichotomy,” anyone may utilize the facts and ideas communicated in a copyrighted work, so long as they do not copy the author’s original expression.

The purpose of copyright law is not to reward authors and artists with a “special private benefit,” but rather to benefit the public by promoting the production and dissemination of creative works. Because intellectual creations are non-rivalrous—“[o]ne person’s enjoyment of the creative expression in a poem does not generally diminish another’s enjoyment of those words” for example—they are susceptible to unauthorized imitation, meaning that “free riders” can copy and exploit them at little or no expense. Without copyright protection, rampant free-riding would likely drive innovators and their socially desirable creations from the marketplace. Copyright law thus

22. See id.
23. See id. § 102(a) (enumerating categories of works that are eligible for copyright protection).
24. See id. (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression”) (emphasis added); see also 17 U.S.C. § 101 (2006) (“A work is ‘created’ when it is fixed in a copy or phonorecord for the first time. . . . A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”).
25. See id. § 302(a) (copyright expires 70 years following author’s death).
29. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit.”).
30. See id. (“It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.” (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948))).
32. See Peter S. Menell, Intellectual Property: General Theories, in 2
seeks to avert this market failure by preserving commercial incentives to engage in creative activity. 33 As the Supreme Court of the United States has explained, copyright rests on the philosophy that “encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . . .”34 That policy is enshrined in the United States Constitution, which empowers Congress “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.”35 The provision of private rights is simply a means of encouraging activity that is beneficial to society at large. These rights are intrinsically linked with, and subservient to, copyright’s public-oriented and constitutionally mandated purposes.36

B. Fair Use and Market Substitution

The rights bestowed by copyright are exclusive but not absolute. One limitation on authors’ rights is the fair use doctrine. Fair use guarantees “breathing space within the confines of copyright,”37 whereby persons may, under certain circumstances, borrow from a copyrighted work without receiving permission from or paying remuneration to the copyright holder.38 Fair use has historically applied where the copying serves socially beneficial purposes, “such as criticism, comment, news reporting, teaching . . . , scholarship, or research.”39 The Supreme Court has observed that fair use “fulfill[s] copyright’s very purpose, ‘[t]o promote the Progress of Science and useful Arts . . . .’”40 By allowing the otherwise unauthorized use of copyrighted expression, the doctrine eases the inherent tension between copyright law and

33. See Harper & Row, 471 U.S. at 558 (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).


38. See Sony Corp., 464 U.S. at 433 (“Any individual may reproduce a copyrighted work for a ‘fair use’; the copyright owner does not possess the exclusive right to such a use.”).


40. Campbell, 510 U.S. at 575 (quoting U.S. CONST. art. I, § 8, cl. 8).
the First Amendment. Some courts have even suggested that because the doctrine incorporates First Amendment values, fair use is a constitutional necessity.  

From the doctrine’s beginnings in eighteenth-century England, the effect of the defendant’s use on the market for the original work has been relevant to the fair use inquiry. When Justice Joseph Story penned his opinion in *Folsom v. Marsh*, the 1841 decision that has served as a “bedrock for . . . American decision making and legislation” on fair use, he emphasized that courts must consider “the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” As judges elaborated upon the doctrine over subsequent decades, they remained wary of uses that “met exactly the same demand on the same market” as the original copyrighted work. Writing in 1970, Professor Nimmer characterized fair use as “copying by others which does not materially impair the marketability of the work which is copied.”

Section 107 of the Copyright Act of 1976, which was intended to codify the judge-created fair use doctrine, instructs courts to weigh four non-exhaustive factors when considering a fair use defense:

---


42. WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 3 (2d ed. 1995).

43. *See Matthew Sag, The Prehistory of Fair Use*, 76 BROOKLYN L. REV. 1371, 1401 (2011) (focus on market substitution was “pervasively ingrained in the discourse of late eighteenth- and early nineteenth-century copyright cases.”).

44. Patry, *supra* note 42, at 3.


46. College Entrance Book Co. v. Amsco Book Co., 119 F.2d 874, 876 (2d Cir. 1941); see also Meeropol v. Nizer, 560 F.2d 1061, 1071 (2d Cir. 1977) (“[I]t was clear that the infringing parody had neither the effect nor the intent of fulfilling the demand for the original work . . .”); Trebonik v. Grossman Music Corp., 305 F. Supp. 339, 350 (D. Ohio 1969) (“The market for his copyrighted book is thereby substantially affected, since another work portraying the same material in the same organizational scheme is available from the defendant.”); West Publ’g Co. v. Edward Thompson Co., 169 F. 833, 843 (E.D.N.Y. 1909) (“It is apparent that a map or a directory, which is merely a new edition, or what would be equivalent to a new edition, if gotten out by the same parties, is merely an attempt, on the part of those responsible for the publication, to obtain the market, and take away the rights of the persons selling the older book.”).


(1) the purpose and character of the use . . . ;
(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.\(^{49}\)

Though only the fourth factor expressly references the market, market substitution underpins the entire analysis. Indeed, as modern decisional law demonstrates, market harm is the fair use doctrine’s central concern.\(^{50}\)

1. Factor One: The Purpose and Character of the Use

The Supreme Court’s decision in *Campbell v. Acuff-Rose Music*\(^{51}\) articulates the economic basis for the first fair use factor, the “purpose and character of the use.”\(^{52}\) Writing for a unanimous court, Justice Souter stated that this factor invites courts to determine whether the new use is “transformative”—that is, whether it “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”\(^{53}\) While a verbatim copy “supersed[e]” the original work, transformativeness bears directly upon market substitution: when the use is transformative, market substitution is “less certain, and market harm may not be so readily inferred.”\(^{54}\) To the extent that the defendant alters or does something new with the original work, his or her use is unlikely to reduce demand for the work in the marketplace, and is therefore more likely to be deemed fair.\(^{55}\)


\(^{50}\) Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 618 (2008); see DSC Commc’ns Corp. v. DGI Techs., Inc., 898 F. Supp. 1183, 1191 n.4 (N.D. Tex. 1995) (“If the challenged use would diminish potential sales, interfere with marketability or usurp the market, this factor may outweigh all other considerations.” (citing Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992))).


\(^{53}\) *Campbell*, 510 U.S. at 579.

\(^{54}\) *Id.* at 579, 591 (alterations in original) (quoting Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4,901)).

\(^{55}\) See *id.* at 591 (“This is so because the [transformative use] and the original usually serve different market functions.”); Sony Computer Entm’t, Inc. v. Connectix Corp., 203 F.3d 596, 607 (9th Cir. 2000) (“Whereas a work that merely supplants or supersedes another is likely to cause a substantially adverse impact on the potential market of the original, a transformative work is less likely to do so.”).
2. Factor Two: The Nature of the Copyrighted Work

The Court’s decision in *Harper & Row v. Nation Enterprises*\(^\text{56}\) highlights the market overtones of the second factor, the “nature of the copyrighted work.”\(^\text{57}\) In *Harper & Row*, the Court held that *The Nation* magazine had violated the Copyright Act when it published an excerpt from a “purloined” copy of President Gerald Ford’s unpublished autobiography.\(^\text{58}\) As the Court explained, a work’s unpublished status “is a critical element of its ‘nature’” for “the scope of fair use is narrower with respect to unpublished works.”\(^\text{59}\) This owes, in large part, to the commercial value of the author’s right of first publication.\(^\text{60}\) The prerogative to decide when to publish, which allows an author to “develop [his] ideas free from fear of expropriation” is “valuable in [itself] and serve[s] as a valuable adjunct to publicity and marketing.”\(^\text{61}\) When a secondary user publishes a previously unpublished work, he or she saps the copyright holder’s ability to exploit prepublication rights. In *Harper & Row*, the market impact was obvious: as a result of *The Nation*’s article, *TIME* magazine canceled a lucrative contract to print an excerpt from President Ford’s autobiography in advance of the book’s publication.\(^\text{62}\)

3. Factor Three: The Amount and Substantiality of the Portion Used

Market substitution likewise informs the third fair use factor, the “amount and substantiality” of the defendant’s borrowing.\(^\text{63}\) As stated in *Campbell*, “[t]he facts bearing on this factor . . . reveal[] the degree to which the [new use] may serve as a market substitute for the original or potentially licensed derivatives.”\(^\text{64}\) This is intuitive; where only modest borrowing occurs, consumers are unlikely to opt for the new work instead of the original. But where the borrower engages in extensive copying, the new use is more likely to supplant demand for the original.\(^\text{65}\) The degree of permissible borrowing also

---


\(^{58}\) Harper & Row, 471 U.S. at 542–43, 569.

\(^{59}\) Id. at 564 (citation omitted).

\(^{60}\) Id.

\(^{61}\) Id. at 555.

\(^{62}\) See id. at 567 (“Rarely will a case of copyright infringement present such clear-cut evidence of actual damage.”).


\(^{65}\) See id. at 587–88 (“[A] work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.”).
relates to whether the use is transformative. If a use is transformative, more extensive borrowing may be justified since the use is less likely to serve as a market substitute for the original work.

4. Factor Four: Effect on the Potential Market

The fourth fair use factor directs courts to weigh “the effect of the use upon the potential market for or value of the copyrighted work.” The inquiry addresses not only actual market harm, but also whether widespread use would harm the potential market for the original work and licensed derivatives. However, the inquiry is not unbounded; courts may decline to consider harm to a “potential” market that the copyright holder is unlikely to enter. The Ninth Circuit, for instance, rejected toymaker Mattel’s claim that photographs depicting “nude and often sexualized figures” of Barbie harmed a potential market for the popular doll. Because the defendant’s photographs “could only reasonably substitute for a work in the market for adult-oriented artistic photographs of Barbie” and it was “safe to assume that Mattel will not enter such a market or license others to do so” any alleged market substitution was irrelevant.

Market harm is “undoubtedly the single most important element of fair use.” It is not simply that the fourth factor is weighted more heavily than the preceding three. Though only the fourth factor explicitly invokes the market, all four factors, taken together, determine whether the defendant’s use usurps demand for the original work (or licensed derivatives) by substituting for it in

66. See id. at 586–87 (“[T]he enquiry will harken back to the first of the statutory factors, for . . . we recognize that the extent of permissible copying varies with the purpose and character of the use.”).

67. See Mattel, Inc. v. Pitt, 229 F. Supp. 2d 315, 323–24 (S.D.N.Y. 2002) (“[T]he third fair use factor acts as a link between the first and fourth factors to screen out works that lack transformative character or threaten to serve as a market substitute for the original work.”).


69. See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir. 1997) (“Under this factor, we consider both the extent of market harm caused by the publication and distribution of The Cat NOT in the Hat! and whether unrestricted and widespread dissemination would hurt the potential market for the original and derivatives of The Cat in the Hat.”).

70. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994) (“The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”).

71. Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 805 (9th Cir. 2003).

72. Id. at 805–06.

the marketplace. Thus, as the author of an empirical study of fair use cases observes, the “fourth factor essentially constitutes a metafactor under which courts integrate their analyses of the other three factors and, in doing so, arrive at the outcome . . . of the overall test.”

III. THE PROBLEM OF PRIVATE CENSORSHIP

In run-of-the-mill copyright infringement cases, the fair use doctrine’s market-based philosophy is coherent and defensible. Copyright law creates commercial incentives for authors and artists to produce and publicly disseminate creative works. Where a copyrighted work is published or on the verge of publication, copyright law has served its constitutionally mandated purpose: the author or artist has expended the effort and expense necessary to produce a new creative work, and has chosen to introduce it into the marketplace for public consumption. Copyright law should protect this new work’s marketability by preventing superseding uses.

In these cases, fair use is rightly inapplicable. Unauthorized verbatim copying merely erodes the market for a work to which the public already has (or will imminently have) access. A finding of fair use would deprive the copyright of its value and undercut any commercial incentive to engage in future creative activity, while not producing any additional public benefit. On the other hand, if the copying is minimal or highly transformative, such that there is no serious threat of market substitution, then a finding of fair use serves copyright’s intended purposes by facilitating socially beneficial uses while not diminishing artists’ incentives. In the classic copyright case, the fair use doctrine is reasonably well-suited to copyright law’s public-oriented objectives. However, not all copyright infringement cases fit the traditional mold.

74. Beebe, supra note 50, at 617.
75. Cf. Wendy J. Gordon, Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 COLUM. L. REV. 1600, 1613 (1982) (“In the ordinary copyright case, the court assumes that the defendant could have, and therefore should have, proceeded through the market.”).
76. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (“The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’” (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990))).
77. See Bond v. Blum, 317 F.3d 385, 396 (4th Cir. 2003) (“Where there is no evidence that the use of Bond’s manuscript . . . would adversely affect the potential market for the manuscript, one cannot say the incentive for creativity has been diminished in any sense.”).
A. Copyright Enforcement and Private Censorship

Plaintiffs frequently sue for reasons completely unrelated to the marketability of their works. In fact, copyright holders sometimes “use their [intellectual] property rights not to protect their economic interests but to suppress speech they want kept out of the marketplace of ideas.” 78 Several public figures have sued under the Copyright Act to prevent publication of unauthorized biographies. 79 Religious groups have used their copyrights to silence critics and dissidents. 80 Companies have cried infringement in order to prevent damaging information from being made public. 81 Politicians and news organizations have likewise suppressed political speech under the guise of copyright enforcement. 82 In such circumstances, copyright does not function to protect a work’s marketability, but acts as an instrument of “private censorship.” 83

Though intended as an “engine of free expression,” 84 copyright law has overlapped with censorship since its inception. 85 Because a copyright

83. See Neil Weinstock Netanel, Copyright and Democratic Civil Society, 106 YALE L.J. 283, 287 n.9 (1996) (“Indeed, many critics have argued cogently that . . . copyright has already become an instrument of private censorship, of the elevation of property rights over public access to the expressive foundations for challenging established social and cultural norms.”).
85. See RONALD V. BETTIG, COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF
“encloses” speech, creating monopoly rights in expression, it restricts others’ ability to make that speech without the copyright holder’s permission. In the twenty-first century, copyright law’s potential for censorship is especially high. The scope of copyright protection has expanded significantly in recent decades, covering more types of expression for longer periods of time. Statutory damages have likewise ballooned; a single act of infringement may result in tens of thousands of dollars in liability. Since copyright infringement is a strict liability offense, copyright holders do not even have to prove culpability. If the infringement is shown to be willful, however, liability may jump to as much as $150,000 per act of infringement. The sheer scale of potential liability gives copyright holders considerable coercive power; even defendants whose use is most likely legal have a major incentive to acquiesce to copyright holders’ demands. The Digital Millennium Copyright Act’s provision of an extrajudicial means for targeting digital “piracy” allows rights holders to intimidate users and online intermediaries into submission without the necessity of stepping into a courtroom. Thus, while it may be the case that “copyright laws were enacted in part to prevent private censorship,” in practice, copyright has proven to be an effective tool for silencing expression.

B. Copyright Enforcement is Less Compelling in Private Censorship Cases

Copyright is premised on the assumption that authors care about the commercial value of their works. The law seeks to “motivate the creative activity of authors . . . by the provision of a special reward”: limited monopoly rights, which make it possible for the author to turn a profit. The promise of

89. See Educ. Testing Serv. v. Simon, 95 F. Supp. 2d 1081, 1087 (C.D. Cal. 1999) (“There is no need to prove anything about a defendant’s mental state to establish copyright infringement; it is a strict liability tort.”).
pecuniary gain is supposed to “induce [the author to] release to the public of the products of his creative genius.” 94 Therefore, in the traditional copyright dispute, upholding the author’s monopoly rights is consistent with the constitutional purpose of copyright law; it vindicates the author’s commercial interest in his or her work and safeguards the economic incentive to engage in further creative activity, which in turn benefits the public. 95

But as noted above, there are cases in which the author is not at all concerned with the commercial value of his or her work. 96 Where a copyright owner uses copyright not to protect its economic interests but to censor a work, enforcing monopoly rights may conflict with copyright law’s public-oriented purposes. The parties’ competing interests, and the relationship of those interests to the goals of copyright law, are fundamentally different when the copyright holder hopes to keep a work out of the marketplace and out of the public eye altogether. In these “private censorship” cases, copyright enforcement is far less compelling. Consequently, the case for fair use is stronger. This is so for three major reasons.

1. The Irrelevance of the Market

First and most importantly, private censorship plaintiffs do not sue to protect the market value of their works, but rather to prevent their works from entering the market in the first place. The Church of Scientology has repeatedly brought infringement actions to enjoin unauthorized disclosure of secret religious materials. 97 Public figures have likewise sued under the Copyright Act for the purpose of protecting their privacy or concealing embarrassing information, even where there is significant commercial interest in the work in question. 98 In one well-known case, J.D. Salinger, the reclusive author of The Catcher in the Rye, sued to enjoin Random House from publishing an unauthorized biography about him. 99 The biographer’s

94.  Id. (quoting United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948)).
96.  See supra notes 78–83 and accompanying text.
manuscript relied substantially on roughly seventy unpublished letters,\(^{100}\) which carried an estimated market value of $500,000.\(^{101}\) Salinger had no interest in disclosing the content of his letters, however, and intended to prevent Random House from doing so.\(^{102}\) For Salinger, the perceived threat to his closely guarded privacy outweighed the letters’ market value.\(^{103}\)

At its core, copyright is a commercial interest that is tied directly to the constitutionally dictated policy of promoting public access to “Science and useful Arts . . . .”\(^{104}\) Where a plaintiff seeks to enforce a copyright for noncommercial reasons—say, to protect privacy or to deter criticism—he or she acts in a manner unrelated to the purposes of copyright law.\(^{105}\) The justification for enforcing copyright in these circumstances is correspondingly weaker.\(^{106}\)

2. The Public Interest in Access

The second reason copyright enforcement is less compelling in private censorship cases is that the public would not otherwise have access to the disputed work. Copyright primarily seeks to “enrich[] the general public through access to creative works,”\(^{107}\) while rewarding authors is a secondary


\(^{101}\) Salinger II, 811 F.2d at 99.

\(^{102}\) See id. at 99 (“[Salinger] has disavowed any intention to publish [the letters] during his lifetime.”).

\(^{103}\) See id. at 92 (“[Salinger] has not published since 1965 and has chosen to shun all publicity and inquiry concerning his private life.”); Salinger I, 650 F. Supp. at 416 (“[Salinger] replied that he would regard any biography written during his lifetime as an invasion of privacy.”). When biographer Ian Hamilton contacted Salinger to seek his cooperation, Salinger flatly refused, requesting that Hamilton not “break into [his] privacy.”

\(^{104}\) U.S. Const. art. I, § 8, cl. 8.

\(^{105}\) See Gordon, supra note 75, at 1634 (“Market failure [justifying fair use] should be found only when the defendant can prove that the copyright owner would refuse to license out of a desire unrelated to the goals of copyright—notably, a desire to keep certain information from the public” (emphasis added)).

\(^{106}\) See Gulfstream Aerospace Corp. v. Camp Sys. Int’l Inc., 428 F. Supp. 2d 1369, 1380 (S.D. Ga. 2006) (“Copyright law does not mean to protect an ‘author’ such as Gulfstream on these facts, where Gulfstream’s desire for copyright protection has nothing to do with needing an incentive to create its manuals.”); Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1117 (1990) (Stating fair use “should favor the original creator more heavily in the case of a work . . . created for publication, than in the case of a document written for reasons having nothing to do with the objectives of copyright law.”).
consideration. An author’s interest in profit is ordinarily consistent with the public’s interest in access. But since “private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts,” an author who uses copyright purely as a tool for limiting access to his or her work acts in a manner that is inconsistent with federal copyright policy and patently at odds with the public’s interest in disclosure.

Worldwide Church of God v. Philadelphia Church of God brings this dynamic into focus. That case centered on an evangelical denomination’s repudiation of Mystery of the Ages, a religious work that its charismatic founder had published prior to his death. Due to perceived “ecclesiastical error” in the book, the church ceased printing Mystery of the Ages and destroyed all excess copies in its inventory. A splinter group, which considered Mystery of the Ages “central to its religious practice,” subsequently sprung up and began printing its own copies. When the original church sued under the Copyright Act, the public’s interest in access came into direct conflict with the church’s perceived “duty to keep [its founder’s] doctrinal errors out of circulation.” As Judge Brunetti pointed out in dissent, enjoining the splinter group’s use “would merely inhibit access to ideas without any countervailing benefit” to the public.


109. See Gordon, supra note 75, at 1634 (“When an owner refuses to license because he is concerned that defendant’s work will substitute for his own work or derivative works, the owner is representing not only his own interest, but also the interest of his potential customers and thus the public interest.”).

110. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).


112. Id. at 1113.

113. Id.

114. Id. All members of the splinter group (the Philadelphia Church of God) were required to read Mystery of the Ages as a condition for baptism into the faith.

115. Id. at 1113–14.

116. Worldwide Church of God, 227 F.3d at 1124 (Brunetti, J., dissenting).

117. Id. at 1125 (Brunetti, J., dissenting) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450–51 (1984)); cf. Thomas F. Cotter, Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism, 91 CALIF. L. REV. 323, 384 (2003) (“Here [in Worldwide Church of God] the copyright owner is suppressing a copyrighted work not to inhibit market competition for the work itself or for a derivative work, but rather to forestall a broader form of competition—competition among religious groups—that is, on one reading of the First Amendment, constitutionally privileged.”).
3. The Unprotectability of Facts and Ideas

The third factor mitigating against copyright enforcement in private censorship cases is that, frequently, the copyright holder is not so much concerned with the publication of expression per se as he or she is with the disclosure of ideas and facts contained within copyrighted expression. *Online Policy Group v. Diebold, Inc.* provides a case in point. That case centered on internal emails belonging to Diebold Election Systems, a manufacturer of electronic voting machines. When a group of students posted to the Internet an archive of emails in which Diebold acknowledged problems with its machines, Diebold sent take-down letters to several Internet service providers in an attempt to squelch the students’ revelations. The company wanted the emails removed because they contained damaging information about its voting machines’ unreliability. Diebold was not concerned with the students’ use of its copyrighted expression, but rather with their disclosure of embarrassing but uncopyrightable facts.

Not every private censorship case fits this mold, of course. Celebrities suing to prevent publication of a “sex tape,” for example, are most likely troubled by the revelation of copyrighted expression—the videotaped depiction of their amorous encounter—rather than the mere fact of their relationship.


119. *Id.* at 1197.

120. *Id.* at 1197–98.

121. *See id.* at 1203 (“Diebold has identified no specific commercial purpose or interest affected by publication of the email archive, and there is no evidence that such publication actually had or may have any affect [sic] on the putative market value, if any, of Diebold’s allegedly copyrighted material.”); Garfield, *supra* note 78, at 1190 (“[T]he case had nothing to do with Diebold’s rights to economically exploit these copyrightable works. . . . To the contrary, Diebold wanted the emails taken off the Net because they were embarrassing. The emails openly acknowledged problems with Diebold’s voting machines and the potential risk that the machines might incorrectly tabulate the results of an election.”).

122. The emails were thin on expressive content. As Online Policy Group (which represented the students) pointed out in its summary judgment motion, “[v]ery little of the archive is expressive or creative in nature.” Plaintiff’s Motion for Summary Judgment at 11 *Online Policy Grp. v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004), available at https://www.eff.org/files/filenode/OPG_v_Diebold/OPG_MSJ.pdf. In fact, the district court judge questioned whether the emails were sufficiently expressive to merit copyright protection. *See Online Policy Grp.*, 337 F. Supp. 2d at 1203 (noting that “Diebold did not identify and has never identified specific emails that contain copyrighted content”).


But if it may reasonably be inferred that a rights holder is using copyright “as an instrument to suppress facts [or ideas],”\textsuperscript{125} which lie beyond the scope of copyright protection, then enforcing the copyright is not justified. Countenancing the use of a thin veneer of copyrighted expression to hinder another’s use of, and restrict public access to, uncopyrighted material frustrates the purposes of copyright and unjustifiably burdens speech.

\textbf{C. How Fair Use Gets It Wrong}

Although known as “the most troublesome [doctrine] in the whole law of copyright,”\textsuperscript{126} fair use represents the most fitting tool for grappling with private censorship. As Wendy J. Gordon observes in her landmark article on fair use and market failure, legislative solutions (such as compulsory license schemes) are generally “too sweeping” to effectively resolve all cases in which the market fails to properly mediate private rights and the public interest.\textsuperscript{127} Furthermore, because legislative solutions inevitably involve “hard-fought political issues,”\textsuperscript{128} with powerful interests exerting tremendous pressure on lawmakers,\textsuperscript{129} Congress is far from an ideal forum in which to conduct the delicate interest balancing that private censorship cases require. In those myriad circumstances in which users and copyright owners cannot achieve a

\begin{itemize}
\item \textsuperscript{125} Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985). The Supreme Court describes this practice as “abuse of the copyright owner’s monopoly. . . .” Id.
\item \textsuperscript{126} Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). Professors David L. Lange and H. Jefferson Powell characterize fair use as an “[a]ll but indecipherable hodgepodge of precedents and statutory mandates.” DAVID L. LANGE & H. JEFFERSON POWELL, NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 97 (2009). A detailed analysis of 60 fair use decisions has led David Nimmer to conclude that courts first judge whether a use is fair, and then align the four-factor analysis so as to fit that result as neatly as possible. David Nimmer, “Fairest of them All” And Other Fairy Tales of Fair Use, 66 LAW & CONTEMP. PROBS. 263, 281–82 (2003). The open-ended nature of the Section 107 test is meant to ensure flexibility, but it has made practical application of the doctrine quite difficult. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (“The fair use doctrine thus permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990))).
\item \textsuperscript{127} Gordon, supra note 75, at 1613.
\item \textsuperscript{128} Id. at 1623–24. Gordon cites as an example the House Report on compulsory license provisions for cable television. Id., at 1623 n.132.
\item \textsuperscript{129} The Walt Disney Company’s extensive lobbying efforts to pass the 1998 Copyright Term Extension Act, which extended the copyright term in existing works by 20 years, inspired the Act’s popular nickname: the Mickey Mouse Protection Act. See Lawrence Lessig, Copyright’s First Amendment, 48 UCLA L. REV. 1057, 1065, 1069 (2001).
\end{itemize}
consensual bargain, including instances where copyright owners act for
censorial purposes, fair use facilitates “flexible, equitable, context-sensitive
judgments” on a case-by-case basis.

Unfortunately, as currently understood, the fair use doctrine fails to
account for each of the points discussed in the previous section. Courts
applying the doctrine in private censorship cases often give unnecessary
attention to market harm, even though the copyright owner clearly does not
care about the marketability of his or her work. Perversely, the doctrine affords
more copyright protection to works to which the public does not have access.
Finally, courts’ insistence on transformativeness (and concomitant devaluing
of verbatim copying) neglects societal interests and effectually countenances
the suppression of uncopyrightable material. By treating private censorship cases
in the same manner as traditional copyright disputes, courts engage in awkward
analyses that fail to properly balance public and private interests. As a result,
the existing fair use regime overprotects private censorship plaintiffs at the
public’s expense, in violation of constitutional copyright policy.

1. The Market Effects Inquiry

Where a copyright holder sues precisely for the purpose of preventing a
work from entering the marketplace, it makes little sense to weigh the “effect of
the [defendant’s] use upon the potential market for or value of the copyrighted
work.” As Judge Pierre Leval explains, the market factor’s significance
derives from copyright’s utilitarian philosophy: uses that impair the market for
a work directly impact the author’s economic incentive to bring the work to
market in the first place. But where the author has no interest in marketing
or publishing a work, regardless of its commercial value, and where a
document is “created for purely private purposes and not as a work of
authorship for the public benefit,” permitting disclosure is unlikely to affect the

---

130. See Gordon, supra note 75, at 1615, 1632–35.
131. Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of
“Rights Management,” 97 Mich. L. Rev. 462, 562 (1998); see Gordon, supra note 75, at
1637 (noting fair use doctrine’s “case-by-case flexibility”).
133. Judge Leval was the district court judge in the Salinger litigation. See Salinger I,
134. See Leval, supra note 106, at 1124 (“The utilitarian concept underlying the
copyright promises authors the opportunity to realize rewards in order to encourage them to
create. A secondary use that interferes excessively with an author’s incentives subverts the
aims of copyright. Hence the importance of the market factor.”).
author’s incentives and the rationale underlying the market harm inquiry evaporates.\footnote{Id. at 1134; see Gordon, supra note 75, at 1618 (where nonenforcement of copyright “would not deprive the owner of any revenues he would otherwise receive, there is no injury to incentives that might militate against a grant of fair use.”).}

Yet, in private censorship cases, courts regularly consider market harm, even in the face of evidence establishing the plaintiff’s indifference to it. The resulting analyses largely overlook the parties’ actual concerns. In 
\textit{Michaels v. Internet Entertainment Group, Inc.}, the “sex tape” case mentioned above, celebrities Bret Michaels and Pamela Anderson Lee sued to prevent publication of a video depicting the two of them engaged in sexual activity.\footnote{Michaels v. Internet Entm’t Grp., Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998).} In addition to copyright infringement, Michaels and Lee alleged several privacy-based torts, including intrusion of privacy and disclosure of private facts.\footnote{Id. at 828–29. Notably, this was not Lee’s first skirmish with Internet Entertainment Group (“IEG”). One year earlier, Lee had sued to prevent IEG from distributing a sex tape involving then-husband Tommy Lee. \textit{See} Jeff Pelline, \textit{Pamela Lee Drops Video Case}, CNET NEWS (Dec. 1, 1997, 11:50 AM), http://news.cnet.com/Pamela-Lee-drops-video-case/2100-1023_3-205848.html.} They presented evidence that publicity in association with hardcore pornography would damage their ability to exploit their public personae\footnote{Michaels, 5. F. Supp. 2d at 829.} and disclaimed any intent to publish the video.\footnote{Id. at 838.} Indeed, taken together, the plaintiffs’ copyright and privacy claims strongly suggest that they did not want the sex video to be made public—despite obvious demand for it.\footnote{Id. at 835.} Nonetheless, in assessing the defendants’ fair use defense, the court held that their use would “saturat[e] the potential market for the plaintiffs’ copyrighted work” which “weigh[ed] against a finding of fair use.”\footnote{See Pelline, supra note 137 (when Internet Entertainment Group broadcast Lee’s prior sex tape over the Internet, traffic to the website tripled).} The court’s emphasis on market harm is difficult to square with the plaintiffs’ obvious lack of concern for the sex tape’s marketability. Given that the plaintiffs sued for privacy reasons, a motive unrelated to and at odds with copyright’s utilitarian purpose,\footnote{Michaels, 5. F. Supp. 2d at 836.} the court’s market analysis is both unjustified and nonsensical.

Yet courts have repeatedly fallen back on the market harm inquiry in disputes that have little or nothing to do with a work’s commercial value. In
Salinger v. Random House, it was beyond dispute that J.D. Salinger had no intent to sell or license his unpublished letters. Nonetheless, after repeating the adage that the market effect is “the single most important element of fair use,” the Second Circuit held that Random House’s biography would likely result in “some impairment of the market” for Salinger’s letters. Brushing aside Salinger’s disinterest in marketing the letters, the court stated that he had “the right to change his mind.” However, the court failed to explain how protecting this purported “right” serves the incentives-preserving policy that underpins the market inquiry to begin with.

144. See Salinger II, 811 F.2d 90, 99 (2d Cir. 1987) (“[Salinger] has disavowed any intention to publish [the letters] during his lifetime.”).
146. Id.
147. See id. (“[T]he need to assess the effect on the market for Salinger’s letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime.”).
148. Id.
149. See id. In a subsequent decision (which, incidentally, also involved J.D. Salinger), the Southern District of New York attempted to articulate an economic rationale for Salinger v. Random House’s market-effects holding. In that case, which involved an unauthorized sequel to J.D. Salinger’s celebrated novel The Catcher in the Rye, the district court stated:

Furthermore, although Salinger has not demonstrated any interest in publishing a sequel or other derivative work of Catcher, . . . the Second Circuit has previously emphasized that it is the “potential market” for the copyrighted work and its derivatives that must be examined, even if the “author has disavowed any intention to publish them during his lifetime,” given that an author “has the right to change his mind” and is “entitled to protect his opportunity to sell his [derivative works].” . . .

This approach is also consistent with the purposes of copyright in “promot[ing] the Progress of Science and useful Arts . . .” U.S. Const., Art. I, § 8, cl. 8, because some artists may be further incentivized to create original works due to the availability of the right not to produce any sequels. This might be the case if, for instance, an author’s artistic vision includes leaving certain portions or aspects of his character’s story to the varied imaginations of his readers, or if he hopes that his readers will engage in discussion and speculation as to what happened subsequently. Just as licensing of derivatives is an important economic incentive to the creation of originals, so too will the right not to license derivatives sometimes act as an incentive to the creation of originals.

Salinger v. Colting, 641 F. Supp. 2d 250, 268 (S.D.N.Y. 2009), vacated on other grounds, 607 F.3d 68 (2d Cir. 2010).

It is far from clear that the “right not to license derivatives” actually constitutes an economic incentive to create an original work. See David A. Simon, In Search of
Because plaintiffs in cases like *Michaels* and *Salinger* are disinterested in selling or licensing their work in *any* market, invocations of supposed market harm do not address the actual interests at stake in the dispute.

2. Unpublished Works: The “Favorite Sons” of Fair Use

Courts have aptly described unpublished works as “the favorite sons of factor two.” In *Harper & Row*, the Court emphasized that “the scope of fair use is narrower with respect to unpublished works,” since “the author’s right to control the first public appearance of his expression weighs against such use of the work before its release.” Thus, where a work is not published, that fact “tend[s] to negate the defense of fair use.” Although Congress amended Section 107 in 1992 to specify that a work’s unpublished status “shall not itself bar a finding of fair use,” courts have generally continued to adhere to the rule that unpublished works enjoy stronger protection against fair use. Courts apply a similar rule to previously published works that have been withdrawn from the marketplace.

(Maintaining) the Truth: The Use of Copyright Law by Religious Organizations, 16 Mich. Telecomm. Tech. L. Rev. 355, 379 n.168 (2010). But in any case, the *Colting* court’s explanation presupposes that the author has chosen to publish the original work. It is therefore inapplicable in cases such as *Salinger v. Random House*, in which the author has disavowed any intent to do so.

151. *Id.* at 739.
152. *Id.* at 551 (quoting 4 Nimmer & Nimmer, supra note 95, § 13.05 n. 3).
154. See, e.g., Peter Lesserese & Assocs., Inc. v. World Inst. of Scientology Enters., Int’l, 533 F.3d 1287, 1313 (11th Cir. 2008) (referring to “policies underlying the greater protection of unpublished works”); Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003) (“The fact that a work is published or unpublished also is a critical element of its nature. Published works are more likely to qualify as fair use because the first appearance of the artist’s expression has already occurred.”) (footnote omitted); Bond v. Blum, 317 F.3d 385, 395 (4th Cir. 2003) (“That Bond’s manuscript is unpublished . . . weigh[s] against a finding of fair use.”).
155. See Peter Lesserese, 533 F.3d at 1313 (“Although the book’s withdrawal did not thereby render it an ‘unpublished’ work, we find that the policies underlying the greater protection of unpublished works are implicated to a certain degree . . . .”). As the Eleventh
An across-the-board presumption against fair use of unpublished works is difficult to square with the Copyright Act’s express terms. More importantly, it conflicts with copyright’s goal of promoting access and disclosure. Because copyright’s “central concern is for the protection of material conceived with a view to publication,” according stronger protection to unpublished works is “bizarre and contradictory.” Nevertheless, courts routinely do just that. In both Salinger and Michaels, for instance, the courts held that the works’ unpublished nature weighed against fair use, even though the plaintiffs had no interest in publishing their works.

Religious Technology Center v. Netcom On-Line Communication Services struck a similar chord. That case centered on confidential religious documents belonging to the Church of Scientology. When a disaffected minister posted excerpts from secret “Advanced Technology” works to the Internet, the Church sued for copyright infringement. The Church was

Circuit noted, however, “the personal interests of the author are less compelling” in the case of withdrawn works than in the case of unpublished works, since the author of a withdrawn work “already had ample opportunity to exercise creative and quality control” prior to the work’s first publication. Id. at 1313. By contrast, out-of-print works enjoy less protection—owing to the fact that it was a “market mechanism,” i.e., lack of demand that pushed the work out of print. See id. at 1313.

156. As just noted, the 1992 amendments expressly made unpublished works subject to fair use. See supra note 153 and accompanying text. And as Nimmer writes, A categorical presumption against prepublication fair use cannot harmonize with the statutory scheme. Section 106(3) of the Copyright Act confers the right of first publication . . . . Section 106 makes that right “[s]ubject to section[107 . . . .] Section 107 in turn allows fair use ‘[n]otwithstanding the provisions of section 106,’ Therefore, the right of first publication under Section 106 by its terms is limited by the right of fair use under Section 107; accordingly, there can be no categorical presumption against fair use for the Section 106 right of first publication. 4-13 NIMMER & NIMMER, supra note 95, § 13.05 n.172; see also Leval, supra note 106, at 1119 (“To suggest that simply because a written document is unpublished, fair use of that document is . . . disfavored, has no logical support in the framework of copyright law.”).

157. Leval, supra note 106, at 1119 (Judge Leval proceeds to argue that placing unpublished works “under lock and key, immune from any fair use, for periods of fifty to one hundred years, conflicts with the purposes of the copyright clause. Such a rule would use copyright to further secrecy and concealment instead of public illumination.”).

158. See Salinger II, 811 F.2d 90, 97 (2d Cir. 1987) (“Since the copyrighted letters are unpublished, the second factor weighs heavily in favor of Salinger.”); Michaels v. Internet Entm’t Grp., Inc., 5 F. Supp. 2d 823, 835 (C.D. Cal. 1998) (Plaintiffs had “no intent of publishing [the video] at any time.” Second fair use factor “weigh against a finding of fair use . . . .”).


160. Id. at 1239.

161. Id. at 1238–39.
extremely protective of these documents, employing “elaborate security measures” to ensure their confidentiality. Needless to say, it had no intention of publishing them. In spite of this, the court held that the works’ unpublished nature weighed “strongly” against the former minister’s fair use defense.

Concededly, the presumption may be defensible in cases like Harper & Row, where the plaintiff’s work is on the verge of publication. As the Court stated, “[w]here an author and publisher have invested extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by pre-empting the right of first publication.” In these circumstances, public access is already assured. Copying merely usurps demand for a work to which the public will imminently have access, and a finding of fair use would undermine incentives to produce and disseminate original works. But in cases like Netcom, in which the plaintiff’s only interest is in preventing public access to his work, the market substitution rationale is inapposite and the unpublished work rule falls apart. Courts’ uncritical adherence to the rule merely facilitates private censorship, and “[t]he

162. Id. at 1239.
163. See id. at 1245 (Church of Scientology “kept [Advanced Technology works] confidential using tight security measures.”).
164. Id. at 1245–46.
166. See David Kohler, This Town Ain’t Big Enough for the Both of Us—Or Is It? Reflections on Copyright, The First Amendment and Google’s Use of Others’ Content, 2007 DUKE L. & TECH. REV. 005, at P19 (2007) (“As the court recognized [in Harper], what was at issue was the right of first publication, and not the issue of whether the excerpts or the work itself would be published.”); Diane Leenheer Zimmerman, Is There a Right to Have Something to Say? One View of the Public Domain, 73 FORDHAM L. REV. 297, 367 n.298 (2004) (“The majority . . . pointed out that the publication of the infringing article occurred while the book itself was ‘poised’ for public release and therefore could not be excused by any pressing need for public access.”).
167. In private censorship cases, the plaintiff’s harm “is not the economic loss that results from the usurpation of the right to profit from the copying and distribution of a creative work.” James Gibson, Once and Future Copyright, 81 NOTRE DAME L. REV. 167, 217 (2005). Censor-plaintiffs are motivated by a variety of harms—intrusion of privacy or harm to reputation, for example—none of which is cognizable under copyright law. See id. at 216–220. Unlike the plaintiffs in Harper & Row, censor-plaintiffs hope to keep their works off the open market altogether. Because the unpublished work rule assumes the copyright holder’s intent to ultimately bring his work to market, see Harper & Row, Publishers, Inc. v. National Enters., 471 U.S. 539, 557 (1985), it breaks down when that assumption does not hold true.
168. See Kate O’Neill, Against Dicta: A Legal Method for Rescuing Fair Use from the Right of First Publication, 89 CALIF. L. REV. 369, 389 (2001) (“On the other hand, a
laudable ‘right of first publication’ becomes a lamentable ‘right of no publication.’”

3. The Anathema of Verbatim Copying

Ever since the Court handed down its decision in *Campbell*, “transformativeness” has been a cornerstone of the fair use analysis, so much so that “not transformative” has essentially become shorthand for “not fair.” Privileging transformative use makes sense from a market substitution perspective, in that “a ‘transformative’ work is by definition different in some important way from the copied work,” and is therefore less likely to supersede that work in the marketplace. A parody of Roy Orbison’s “Oh, Pretty Woman” that highlights the song’s “bland[ness] and banal[ity]” is unlikely to substitute for the original, just as photos of Barbie dolls in sexualized, “ridiculous and apparently dangerous situations” will not supplant authorized Mattel products. And because transformative works alter existing works by adding “new expression, meaning, or message,” they generally further “the goal of copyright, to promote science and the arts.”

However, courts’ emphasis on transformativeness may work against the purposes of copyright as well. Copyright law is concerned not only with works’ creation, but also with their availability to the public. As Rebecca

presumption against fair use of unpublished materials can lead to unjustified censorship. For example, the present state of the law allows the famous subject of a potential biography to use copyright to control her public image and to engage in rent-seeking, extracting licensing fees for expression that is merely the by-product of a life.”).


171. 4-13 *Nimmer & Nimmer, supra* note 95, at § 13.05[A][1][b] (many applications of fair use “appear to label a use ‘not transformative’ as a shorthand for ‘not fair,’ and correlative ‘transformation’ for ‘fair.’”).

172. Niels B. Schaumann, *An Artist’s Privilege, 15 Cardozo Arts & Ent. L.J. 249, 267 (1997); see also NXIVM Corp. v. Ross Inst., 364 F.3d 471, 485 (2d Cir. 2004) (“As *Campbell* pointed out, these inquiries, specified in the first and fourth listed factors of § 107, are correlated: the greater the transformative purpose of the secondary use, the less potential purchasers will see it as an alternative means of acquiring the original.”).


174. *See Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 802 (9th Cir. 2003).*

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

Tushnet points out, under *Campbell* and its progeny, “nontransformative copying . . . begins to look unfair.” 177 Many traditional forms of fair use—including the socially beneficial uses enumerated in the preamble to Section 107, such as news reporting, teaching, and scholarship 178—now look increasingly suspect. 179 Ignoring “the historic status of pure copying at the core of fair use,” 180 the transformative use doctrine distracts from what should be a principal consideration: the social utility of the disputed use. 181 As the beneficial uses specified in Section 107’s preamble suggest, the public may benefit from verbatim as well as transformative copying. 182 Inordinate emphasis on transformativeness means that “[t]he values of public access and dissemination that were also traditionally part of fair use,” and which verbatim copying may serve, “get left behind.” 183

Courts’ reverence for transformative use is especially troubling in private censorship cases. As explained in *Campbell*, the central purpose of the transformativeness inquiry is to determine whether the defendant’s work “supersede[s]” or “supplant[s]” the original. 184 In other words, the inquiry simply the creation of works, but all the benefits that are derived from the works, the most significant of which is the exchange of ideas among our populace. Thus, availability of works is as significant as their creation.” (footnotes omitted).

177. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 556 (2004); cf. *Campbell*, 510 U.S. at 579 (“[Transformative] works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyrightFalse”).

178. See 17 U.S.C. § 107 (2006) (“[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

179. See Tushnet, *supra* note 177, at 537 (“Courts increasingly find that these traditional fair uses, which do not directly involve critical commentary, are unfair and require the copyright owner’s permission.”); Sag, *supra* note 170, at 388 (“The dominance of the transformativeness test makes the actual statutory language regarding non-commercial and educational uses largely irrelevant.”) (footnote omitted).


182. See Matthew D. Bunker, *Eroding Fair Use: The “Transformative” Use Doctrine After Campbell*, 7 COMM. L. & POL.’y 1, 21 (2002) (“Fair use should properly be an analysis of the public benefit of dissemination of the work, regardless of whether that dissemination is reproduced verbatim from the original or modified in some way, balanced against the commercial harm to the statutory rights of the copyright holder.” (emphasis added)); Lape, *supra* note 176, at 713 (“The list of favored uses in the preamble of section 107 is expressly not exclusive, and was intended to suggest a larger class of uses that serve the public interest.”).

183. Tushnet, *supra* note 177, at 552.

derives from copyright’s concern for market substitution. But as already established, the private-censor-plaintiff is by definition indifferent to the market value of his or her work; the objective is to prevent the work from entering the marketplace to begin with. Nor are defendants in private censorship cases merely “avoid[ing] the drudgery in working up something fresh,” as they often provide access to a work of public interest that would not otherwise see the light of day. Private censorship cases are therefore exactly converse to traditional copyright disputes: society’s interest in access is directly at stake while the plaintiff’s interest in avoiding market substitution is virtually an afterthought. Disclosure by means of verbatim copying serves the copyright policies of promoting public access and maximizing social welfare.

The courts’ fixation on transformativeness distracts from these public-oriented purposes. In Netcom, the district court acknowledged that the former Scientologist minister’s noncommercial use—publishing confidential religious documents on the Internet—served the “protected purpose of criticism,” but faulted him for its “only minimally transformative” nature. The court apparently did not consider that the public’s interest in the dissemination of information, a value that copyright is supposed to promote,

---

185. Id. at 591; see Christopher S. Yoo, Copyright and Public Good Economics: A Misunderstood Relation, 155 U. Pa. L. Rev. 635, 712 (2007) (whereas superseding uses “are thought to be more likely to compete directly with the original work on which they are based . . . [d]erivative uses that are transformative are often thought to be less likely to compete with the original.”).

186. Campbell, 510 U.S. at 5.

187. See Lloyd L. Weinreb, Fair’s Fair: A Comment on the Fair Use Doctrine, 103 Harv. L. Rev. 1137, 1143 (1990) (“A use may serve an important, socially useful purpose without being transformative, simply by making the copied material available.”).

188. Access is not an issue in the traditional copyright dispute because the plaintiff’s work is usually available (or will imminently become available) through market channels. Such cases typically center on the plaintiff’s desire to protect the commercial value of his or her work.

189. See Weinreb, supra note 187, at 1143 (“[T]he scope of the inquiry is broader than [the transformative use test . . . allows.”).

190. Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc., 923 F. Supp. 1231, 1243–44 (N.D. Cal. 1995). The court nonetheless found that the first Section 107 factor “weigh[ed] slightly in Erlich’s favor despite the minimally transformative nature of Erlich’s use.” Id. It ultimately concluded, however, that “copying . . . works in their entirety with very little added criticism is almost certainly not fair use.” Id. at 1258.

191. See Rosemont Enters., Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d. Cir. 1966) (indicating that application of fair use depends, inter alia, on “whether their distribution would serve the public interest in the free dissemination of information.”).
may have been better served by the defendant’s verbatim copying than by a transformative use. The Ninth Circuit committed the same fallacy when it denied the splinter group’s fair use defense in *Worldwide Church of God*.193 There, the court found that the splinter group’s verbatim reproduction of *Mystery of Ages* was nontransformative in that it “supersede[d] the object” of the original.194 The court brushed aside the public’s interest in access, noting that the limited copyright term ensures that “the public will not be permanently deprived” of the work.195 (This probably came as cold comfort to the splinter sect, since *Mystery of Ages* will not enter the public domain until 2056.196) As dissenting Judge Brunetti pointed out, the court ignored the fact that “altering or adding to *MOA* would defeat [the splinter group’s] religious purpose because it believes that *MOA* is a divinely inspired text.”197 Verbatim reproduction of a religious text that had been deliberately removed from the marketplace was the defendant’s entire objective. Denying that use merely restricted access without producing any countervailing public benefit.198

Courts’ aversion to verbatim copying also permits plaintiffs to control the dissemination of facts and ideas, which lie beyond the scope of copyright.199 While there is usually greater leeway for fair use of informational works,200 defendants who disseminate copyrighted material with little or no alteration

192. Time Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968), provides an example of such a case. There, the Southern District of New York found fair use where the defendant had reproduced several frames from the “Zapruder film” in the book *Six Seconds in Dallas*. *See id.* at 131–32. The court based its ruling, in part, on the “public interest in having the fullest information available on the murder of President Kennedy.” *Id.* at 146. The court rejected the contention that the defendant should have depicted the events using artistic sketches rather than verbatim, non-transformative reproductions from the film itself. *Id.* at 139, 146.


194. *Id.* at 1117.

195. *Id.* at 1116 (quoting Steward v. Abend, 495 U.S. 207, 228 (1990)).


198. *Id.* at 1125 (Brunetti, J., dissenting) (“The prohibition of PCG’s noncommercial, religious use ‘would merely inhibit access to ideas without any countervailing benefit.’” (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450–51 (1984))).


often lose on the fair use front, even if the plaintiff is unambiguously seeking to suppress the flow of information. Such was the case in *Religious Technology Center v. Lerma*. The facts in *Lerma* were nearly identical to those in *Netcom*: Arnoldo Lerma, a critic of the Church of Scientology, posted secret religious documents on the Internet and the Church sued for infringement. The documents in question spelled out a “detailed program for warding off . . . evil influences” a process Scientologists believe must be followed with exactness. The Church was clearly concerned with information rather than expression—it warned that improper disclosure of the “detailed program,” “process,” and “procedures” conveyed in the documents risked “harm of global proportions.” The defendant contended that his copying was fair, since it “add[ed] new value to public knowledge and understanding” in furtherance of copyright’s purposes. The court was not persuaded. This argument, the court held, cannot justify “wholesale copying” (even though other courts have held to the contrary). The court emphasized that the defendant’s verbatim reproduction categorically disqualified him from claiming fair use, noting that he could have done something transformative or expressed the

---


202. *Id.* at *1–3.

203. *Id.* at *3.

204. *Id.* at *3; cf. 17 U.S.C. § 102(b) (2006) (copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . .” (emphasis added)).


206. *Id.* Although the court was unimpressed with the critic’s appeal to the public interest, in an earlier proceeding it had found that the Church of Scientology, its secret documents, and its treatment of critics were “newsworthy.” *Lerma I*, 908 F Supp. 1362, 1366, 1369 (E.D. Va. 1995).

207. *See* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165, 1168 (9th Cir. 2007) (concluding that, in light of socially beneficial purpose, copying images in their entirety was justified); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006) (“[C]opying the entirety of a work is sometimes necessary to make a fair use of the image.”); Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003) (“[A]lthough Arriba did copy each of Kelly’s images as a whole, it was reasonable to do so in light of Arriba’s use of the images.”); *cf.* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586–87 (1994) (“We recognize that the extent of permissible copying varies with the purpose and character of the use.”).

208. *See* *Lerma III*, 1996 U.S. Dist. LEXIS 15454, at *15 (“That argument does not justify the wholesale copying and republication of copyrighted material.”); *id.* at *23 (“A majority of these 33 exhibits contain verbatim copying, as if Lerma obtained the copyrighted materials and summarily transferred them into cyberspace.”); *id.* at *23–24 (“Such blatant reproduction has been prohibited even in the context of educational instruction.”).
Scientologist’s procedures in a different manner. Lost on the court, it seems, was the fact that the plaintiff was using a thin shell of copyrighted expression to suppress uncopyrighted ideas.

When rights holders sue for reasons unrelated to the purposes of copyright law, several factors militate against enforcement. For one, private censors’ indifference to the commercial value of their works means that market substitution is a non-issue. Further, the desire to forestall disclosure directly implicates the public’s interest in access. Finally, where plaintiffs seek to suppress facts or ideas rather than protect expression, permitting verbatim copying vindicates speech interests without offending copyright law’s concern for original expression. But as the foregoing discussion shows, fair use fails on all three points. Courts appeal to market concerns even when they are irrelevant, while giving short shrift to public access and extending broad protection to nonpublic works. Courts’ insistence on transformativeness means that, notwithstanding its traditional status at the core of fair use, verbatim copying has taken on second-class status. As a result, private censors’ copyrights are consistently overprotected.

IV. REFORMING FAIR USE

There is a serious disconnect between the fair use doctrine and the unique considerations presented by private censorship cases. Whereas copyright is supposed to accommodate (even promote) free expression and fair use is supposed to provide necessary “breathing space within the confines of copyright,” the fair use analysis produces absurd results when censorship is at play. But whatever its shortcomings, fair use is still copyright law’s most fitting tool for remedying private censorship. Courts have frequently employed fair use to “permit uncompensated transfers that are socially

---

209. See id. at *15 (emphasizing “the absence of commentary on most of [Lerma’s] Internet postings.”); id. at *9 (“The ideas and concepts of the Scientology religion can be discussed independently of the OT documents.”).

210. See Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (“We do not suggest this right not to speak would sanction abuse of the copyright owner’s monopoly as an instrument to suppress facts.”). Notably, in an earlier phase of the Lerma litigation, the court stated that it was “convinced that the primary motivation of RTC in suing Lerma, DGS and The Post is to stifle criticism of Scientology in general and to harass its critics.” Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1353, 1360 (E.D. Va. 1995) [hereinafter Lerma II].


desirable but not capable of effectuation through the market.”

Comprehensive reformation of the doctrine is not necessary. What is required is simply a modest reinterpretation of Section 107, in light of copyright’s underlying purposes, in cases in which an author attempts to block access to an unpublished work for noneconomic reasons. This analysis must take account of not only the litigants’ interests, but also the public’s interest in gaining access to the work in question. In weighing these interests, courts should be guided by the degree to which a finding of fair use would serve copyright’s constitutional objectives.

A. Threshold Inquiry: Is It Private Censorship?

Courts must first determine whether a copyright claim amounts to private censorship. A plaintiff’s motives are often difficult to detect, but courts can make a reasonable inference in appropriate cases. As a threshold matter, the court must ask whether the copyrighted work in question is published. In its most basic form, censorship consists of suppressing information or content that a party deems objectionable. If a work is already available to the public, that fact strongly suggests that the plaintiff is not simply trying to keep the work out of the public eye. If, on the other hand, the work is unpublished (or has been withdrawn from the marketplace), then the court may reasonably infer that the suit may be motivated by something other than a concern for market harm. In these circumstances, the court may presume a censorial motive.

This is not to say that every copyright dispute involving an unpublished work amounts to private censorship. Recall that in Harper & Row, the plaintiffs had a clear market-based reason for enforcing their copyright in President Ford’s unpublished autobiography. A court should therefore not proceed with the alternative fair use analysis without first allowing the plaintiff an opportunity to rebut the presumption of censorial purpose. If the plaintiff can point to concrete plans to publish the work in question, then the presumption of censorship is no longer warranted and the customary fair use analysis is appropriate.

In order to rebut the presumption, the plaintiff should have to produce more than speculative, unsubstantiated claims about the possibility of future publication. Indeed, the plaintiff should provide concrete evidence of intent to

213. Gordon, supra note 75, at 1601.
214. Id. at 1601, 1615, 1633.
publish. Antitrust doctrine is instructive in this regard. Antitrust law provides that, under certain circumstances, a plaintiff who has not yet entered a market may nonetheless recover for antitrust violations in that market.\(^{217}\) To prevail, the plaintiff must prove “intent and preparedness” to enter the market, which may consist of affirmative action on the plaintiff’s part to engage in the prospective business, an ability to finance the business, and/or the consummation of contracts.\(^{218}\) If the plaintiff fails to show intent and preparedness to enter a market, then the court cannot conclude that the plaintiff was harmed by anticompetitive conduct in that market.\(^{219}\) By the same token, if a copyright holder cannot produce evidence of its intent and preparedness to introduce its work into the marketplace, then it cannot be said to have suffered market harm due to the defendant’s use.\(^{220}\)

Under this rule, the Worldwide Church of God’s unsupported suggestion that it might publish an annotated version of *Mystery of Ages* at some future date would be wholly insufficient to rebut a presumption of censorship.\(^{221}\) The church could not point to any evidence of concrete plans to reenter the publishing market.\(^{222}\) By contrast, in *HarperCollins v. Gawker Media*, the plaintiffs produced evidence of a “detailed publicity plan” to publish and promote the work in question—former Alaskan Governor Sarah Palin’s *America by Heart*.\(^{223}\) The court found that plaintiffs were “in the home stretch of a carefully orchestrated promotional campaign,” the purpose of which was to

\(^{217}\) Antitrust Laws and Trade Regulation, Ch. 171, § 171.02[4] (Matthew Bender).

\(^{218}\) Id.

\(^{219}\) See Andrx Pharms., Inc. v. Biovail Corp. Int’l, 256 F.3d 799, 807 n.11 (D.C. Cir. 2001) (there can be “no loss of profits” where the plaintiff fails to show intent and preparedness to enter a market); Brotech Corp. v. White Eagle Int’l Techs. Grp., Inc., No. Civ.A.03-232, 2004 WL 1427136, at *5 (E.D. Penn. June 21, 2004) (“[I]n determining whether RenalTech has sufficiently pled an injury, or threatened injury, . . . the Court must examine its intent and preparedness to enter the market for its polymeric resin.”).

\(^{220}\) See Christina Bohannan & Herbert Hovenkamp, IP and Antitrust: Reformation and Harm, 51 B.C. L. Rev. 905, 990 (2010) (drawing from “intent and preparedness” principle to argue that finding IP infringement is inappropriate where the defendant’s use “occupies a market that is remote from the IP holder’s original market.”).

\(^{221}\) See Worldwide Church of God v. Phila. Church of God, 227 F.3d 1110, 1124 (9th Cir. 2000) (Brunetti, J., dissenting) (“[T]he failure of WCG to make any reasonable progress on the annotation over the course of a decade as well as WCG’s belief that it has a Christian duty to keep Armstrong’s doctrinal errors out of circulation tends to undermine the credibility of WCG’s intention to publish any such annotation.”).

\(^{222}\) See id.

“increase sales of [the] book upon its release." The plaintiffs’ unambiguous plans to publish *America By Heart* would have defeated a presumption of censorship, and application of the conventional fair use inquiry was therefore proper. While producing evidence of intent and preparedness to publish may be the usual way of rebutting a censorship presumption, one might imagine other means. In rare circumstances, for example, confidential works that are not made available to the general public may be sold on “private” markets. These materials may not be publicly marketed, but nonetheless have genuine commercial value. Evidence that an unpublished work is sold on a private market supports application of the conventional, market-oriented fair use inquiry. Alternatively, if a work is primarily informational or factual in nature, proof that the facts or information expressed therein are substantially available from other, public sources would tend to undermine a presumption of censorship. Thus, had information about Diebold voting machine defects been widely available, a presumption of censorial motive would not have been nearly as compelling on the facts of that case.

If the plaintiff fails to rebut the presumption of censorship, then market substitution should not dominate the fair use inquiry. Rather, in considering the Section 107 factors, the court should be guided by the public’s interest in access and the extent to which finding fair use would serve the purposes of copyright law. The analysis should take the following form.

**B. Factor One: The Purpose and Character of the Use**

Under current jurisprudence, transformativeness dominates the first Section 107 factor, “the purpose and character of the use." The degree to which a

---

224. *Id.* at 307.

225. *See id.* at 306.


228. *See id.* at 636 (citing Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1155–56 (9th Cir. 1986) (defendant’s unauthorized copies of Advanced Technology materials “fulfill ‘the demand for the original’ works and ‘diminish or prejudice’ their potential sale.”)).

229. Where a work is highly expressive, of course, this avenue for rebutting the presumption would be unavailable.

disputed use is transformative is certainly probative of likely market substitution, but the centrality of transformative to factor one is much less coherent when market substitution is a non-concern for both parties. As discussed above, the fair use doctrine has historically been characterized by verbatim but socially beneficial copying. The preamble to Section 107 enumerates several “public interest” uses that illustrate the type of copying that fair use protects, and factor one expressly calls attention to those uses. When access to the copyrighted work is at stake, courts should focus less on transformativeness and more on the extent to which the “purpose and character” of the defendant’s use serves the public interest.

This is not a radical proposition. Courts frequently appeal to the public interest in fair use cases, often within the framework of factor one. This article merely suggests that private censorship cases demand attention to the public interest in a way that traditional copyright disputes do not. Wendy J. Gordon observes, “[w]hen an owner refuses to license because he is concerned that defendant’s work will substitute for his own work or derivative works, the owner is representing not only his own interest, but also the interest of his potential customers and thus the public interest.” By contrast, when a rights holder employs copyright for purposes of censorship, he or she stands in opposition to the public interest in access. The strength of this public interest should take center stage under factor one.

Talismanic invocation of “public interest” or “access” should not alone be sufficient to support a finding of fair use. As the Supreme Court noted in *Harper & Row*, “[a]ny copyright infringer may claim to benefit the public by

---


232. Tushnet, supra note 177, at 556.


234. See id. (“[T]he purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.” (emphasis added)). See also 4-13 Nimmer & Nimmer, supra note 95, § 13.05[A][1] (suggesting that the uses listed in Section 107’s preamble should inform factor one).

235. See 4-13 Nimmer & Nimmer, supra note 95, § 13.05[B][5] (“The public interest is also a factor that continually informs the fair use analysis.”); see, e.g., Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1992) (noting that courts are “free to consider the public benefit resulting from a particular use . . . .”).

236. See, e.g., Sony Computer Entm’t Am., Inc. v. Bleem, LLC, 214 F.3d 1022, 1027 (9th Cir. 2000); Rogers v. Koons, 960 F.2d 301, 309 (2d Cir. 1992); Triangle Publ’ns, Inc. v. Knight-Rider Newspapers, Inc., 626 F.2d 1171, 1175–76 (5th Cir. 1980).

237. Gordon, supra note 75, at 1634 (footnotes omitted).

238. See id. (suggesting that fair use may be appropriate where the copyright owner “refuse[s] to license out of a desire unrelated to the goals of copyright—notably, a desire to keep certain information from the public.”).
increasing public access to the copyrighted work." 239 The public’s interest must amount to more than an interest in disclosure generally; the interest should be specific to the use in question. To require anything less would risk eviscerating copyright in unpublished works altogether—an unacceptable outcome in light of the Copyright Act’s express provision of copyright in unpublished works 240 and the sound economic reasons for granting such protection. 241 Even when a plaintiff brandishes copyright as an instrument of censorship, society’s interest in gaining access to the copyrighted work may be insufficient to compel disclosure. Thus, while the public interest in receiving information about President John F. Kennedy’s assassination, 242 issues affecting the integrity of elections, 243 and important public figures 244 is readily apparent, it is “difficult if not impossible to articulate a social value that [would] be advanced by dissemination” of Bret Michaels’ and Pamela Anderson Lee’s sex tape. 245 Under Section 107’s first factor, a court’s willingness to find fair use should correspond with the strength of an identifiable public interest in the work’s disclosure.

This in turn requires that transformativeness take a back seat. Currently, even courts that find fair use on the strength of a public interest tend to cloak their reasoning in Campbell-esque language. In Diebold, the court grounded its fair use finding in a public interest, reasoning that “[i]t is hard to imagine a subject the discussion of which could be more in the public interest” than voting machine defects (recall that the case was decided in an election year). 246 The court then perplexingly stated that the students’ copying was “transformative,” even though they did not alter the emails in any way, but reproduced them verbatim. 247 Other courts have similarly stretched the meaning of “transformative” to uphold socially beneficial uses. 248 There is

---

241. See supra Part III.C.2.
247. Id.
248. See, e.g., Kelly v. Arriba Soft Corp., 336 F.3d 811, 818–19 (9th Cir. 2003) (putting images to new use, but not otherwise altering them (except for resizing) is “transformative”); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165–66 (9th Cir. 2007) (same).
simply no need to engage in such doctrinal gymnastics. In private censorship cases, society’s interest in access is directly implicated while transformativeness is largely irrelevant. Analysis of the first factor should reflect this.

C. Factor Two: The Nature of the Copyrighted Work

The second factor, the “nature of the copyrighted work,”\(^\text{249}\) entails two inquiries: whether the work is expressive or informational, and whether the work is published or unpublished.\(^\text{250}\) The former “calls for recognition that some works are closer to the core of intended copyright protection than others.”\(^\text{251}\) While expressive or creative works are entitled to more protection, there is greater leeway for fair use of factual or informational works.\(^\text{252}\) This rule makes just as much sense in private censorship cases as in others. When the disputed work is informational in nature, it is more likely that the plaintiff is using copyright to suppress uncopyrightable facts or ideas rather than to protect copyrighted expression. This militates against enforcement, meaning courts should more readily find fair use. If a work is highly expressive, on the other hand, the plaintiff is more likely concerned with the expression itself. In such circumstances, copying is generally less tolerable unless the defendant shows a specific public interest in having access to the expressive work.

The publication inquiry is more problematic. Ordinarily, a work’s unpublished status weighs against a finding of fair use.\(^\text{253}\) As discussed in the previous section, this across-the-board rule is difficult to square with copyright’s policy of promoting access, as well as the statutory language that a work’s unpublished status “shall not itself bar a finding of fair use.”\(^\text{254}\) In fact, the legislative history shows private censorship was among the concerns that prompted the addition of this language in 1992. The amendment arose in response to a string of Second Circuit decisions that established a virtual per se rule against fair use in unpublished works.\(^\text{255}\) According to the Senate Report, the Second Circuit rule hindered the work of historians, biographers, authors, and publishers, since “a copyright owner or the owner’s estate may exercise virtual veto power over uses of unpublished materials—a veto likely to be


\(^{250}\) 4-13 NIMMER & NIMMER, supra note 95, § 13.05[A][2].


\(^{252}\) Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006) (quoting 2 HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 15:52 (2006)).


exercised in precisely those cases where the materials could cast their author in an unfavorable light.”

The bill was intended to overrule the Second Circuit precedent and return the fair use doctrine to its status under Harper & Row.

In Harper & Row, the Court held that “the fact that the plaintiff’s work is unpublished . . . is a factor tending to negate the defense of fair use,” but stopped short of erecting a per se rule. The Court’s reasoning was largely rooted in the right of first publication’s “commercial guise.” Granting increased protection to works created with a view to publication during the “period encompassing the work’s initiation, its preparation, and its grooming for public dissemination” safeguards economic incentives for authors to create and publish original works. When an author is on the verge of publishing his or her work voluntarily, the public interest in access does not support a finding of fair use. But when the copyright holder has no plans to publish a work—when he or she cannot show intent and preparedness to enter the market—the economic rationale for the Harper & Row rule falls out, and the public interest in access becomes directly relevant. In private censorship cases, there is no reason for courts to treat unpublished works as the “favorite sons” of factor two.

In Harper & Row, the Court briefly alluded to two additional rationales for the unpublished work rule: privacy and the First Amendment. Neither is persuasive. The Court noted in passing that “common-law copyright was often enlisted in the service of personal privacy,” dropping a citation to Samuel Warren and Louis D. Brandeis’ seminal 1890 article on the right of privacy. Before the Copyright Act of 1976 took effect, unpublished works enjoyed perpetual common-law copyright protection under state law. So long as the work remained unpublished, “the author’s right to the privacy of his manuscript

256. Id. at 4.
257. Id. at 5–6.
259. Id. at 554–55.
260. Id. at 555.
261. See id. at 557 (“Where an author and publisher have invested extensive resources in creating an original work and are poised to release it to the public, no legitimate aim is served by pre-empting the right of first publication.”).
262. See Crews, supra note 212, at 15 (“The Court’s repeated justifications based on the economic value of the manuscript, the pending publication plans, and the author’s right to prepare the work adequately for public dissemination have little or no relevance to private writings.”).
264. 1-4 Nimmer & Nimmer, supra note 95, § 4.01[B].
could properly prevail over the public’s right of access.” 265 Only if the author chose to publish his work did it enter the federal copyright system and become subject to the limited term of protection. 266 The Copyright Act of 1976 eliminated common-law copyright, however, by granting federal copyright protection in all eligible works from the moment of creation. 267 Judge Leval rightly points out that the Copyright Clause does not empower Congress to pass tort laws on the protection of privacy, for this does not serve to promote the progress of science and useful arts. 268 This is not to say that privacy is unimportant. States may appropriately promote the right of privacy—indeed, the states have long recognized privacy-based torts. 269 However, federal copyright law does not concern privacy. 270 As the Fourth Circuit has stated, “the protection of privacy is not a function of the copyright law” and instead “offers a limited monopoly to encourage ultimate public access to the creative work of the author.” 271 Privacy therefore does not support Harper & Row’s unpublished work rule.

The Harper & Row Court also stated that the First Amendment “right to refrain from speaking at all” supports the heightened protection given unpublished works. 272 Like the Court’s appeal to privacy, this dictum is uncompelling. First Amendment expert Eugene Volokh writes that “[t]his logic is flawed; it wasn’t necessary to the result in Harper & Row, and it ought to be rejected.” 273 The Court’s reasoning ignores the basic principle that the First Amendment applies only to governmental conduct, not private actors (like

265. Id. § 4.03.
266. Id. § 4.01[B].
270. Gibson, supra note 167, at 217.
271. Bond v. Blum, 317 F.3d 385, 395 (4th Cir. 2003) (“If privacy is the essence of Bond’s claim, then his action must lie in some common-law right to privacy, not in the Copyright Act.”).
alleged infringers). More importantly, unauthorized copying cannot be analogized to “right not to speak” cases, because, quite simply, it does not involve compulsion. *Wooley v. Maynard*, the case cited in *Harper & Row*, held that Jehovah’s Witnesses could not be required to display license plates emblazoned with the motto “Live Free or Die.” *Wooley* in turn relied on *West Virginia State Board of Education v. Barnette*, in which the Supreme Court upheld the right of public school students to refuse to recite the Pledge of Allegiance. Indeed, “[s]peech compulsion involves compulsion, the application of coercive force or legal command.” In *Harper & Row*, President Ford spoke voluntarily; the government did not force him to write an autobiography. While being quoted without one’s permission “may be upsetting or embarrassing,” it does not constitute compelled speech and therefore does not implicate the First Amendment right to not speak.

The only persuasive argument in favor of the presumption against fair use of unpublished works is the incentives-based theory discussed above: when voluntary publication is imminent, unauthorized copying serves only to usurp demand for the author’s work without producing any tangible public benefit. The unpublished work rule therefore only makes sense in cases that resemble *Harper & Row*, i.e., cases in which the copyright holder has a demonstrable intent and preparedness to publish. When a copyright holder sues in order to censor his or her own work, the rule devolves into incoherence and should not be applied.

**D. Factor Three: The Amount and Substantiality of the Portion Used**

The third fair use factor requires courts to weigh the “amount and substantiality” of the defendant’s copying in relation to the copyrighted work as a whole. As the Court explained in *Campbell*, this factor is intrinsically linked to the first: the amount and substantiality of the disputed copying must be reasonable in relation to its purpose and character. The test is normally driven by market substitution concerns; if the defendant’s borrowing is qualitatively or quantitatively significant, it is likely to usurp the market for the original, but if the use is transformative, then market substitution is less

---

274. *Id.* at 729.
278. *Id.*
probable and more extensive copying is permissible.\footnote{281} In private censorship cases, the amount and substantiality of the copying should also be weighed against its purpose and character. As noted above, the “purpose and character” inquiry should be directed at the strength of the public interest rather than the degree to which the use is transformative. Under the third factor, then, the use must be measured against that interest: does the public interest pertain to the entire work or to a discrete portion of it? Did the defendant copy only that portion that serves the public interest, or did he or she indiscriminately reproduce the work in its entirety? Courts must keep in mind that even wholesale copying may be justified in appropriate circumstances.\footnote{282}

\textit{Time, Inc. v. Bernard Geis Associates} is instructive.\footnote{283} That case centered on a film strip depicting President Kennedy’s assassination (the “Zapruder film”), which the court characterized as “undoubtedly the most important photographic evidence concerning the fatal shots.”\footnote{284} The defendants published a detailed book on the assassination, which reproduced “[s]ignificant parts of [twenty-two] copyrighted frames” taken from the Zapruder film.\footnote{285} Citing the “public interest in having the fullest information available on the murder of President Kennedy,” the court found fair use.\footnote{286} In doing so, the court rejected the plaintiff’s contention that the defendant should have depicted the events using artistic sketches rather than verbatim reproductions from the film itself.\footnote{287} As Professor Nimmer later observed, the Zapruder film provided “authoritative answers . . . that no other source could supply with equal credibility.”\footnote{288} The defendants’ copying, though significant, was reasonable in relation to the strong public interest that it furthered.

\textbf{E. Factor Four: The Effect of the Use Upon the Potential Market}

The fourth fair use factor probes the “effect of the use upon the potential market for or value of the copyrighted work.”\footnote{289} While potential market harm is the most significant factor in traditional copyright disputes, it deserves little weight in private censorship cases. Courts have long held that a fair use
factor’s significance may fluctuate (and even dissipate) depending on the circumstances of the case. The second and third Section 107 factors, for instance, may carry little or no importance in transformative use cases.\textsuperscript{290} Since the defining attribute of private censorship cases is the copyright holder’s desire to keep his or her work out of the marketplace altogether, the market effect inquiry bears little relevance to the actual interests at stake. Courts should acknowledge as much and conduct the fair use analysis accordingly.

Courts sometimes become hung up on the fourth factor’s “potential market” language. In \textit{Salinger}, the Second Circuit pointed to this language in support of Salinger’s purported “right to change his mind” about publication.\textsuperscript{291} However, the fourth factor does not call for open-ended speculation about what an author might do. The only “potential” markets relevant to fair use are those the plaintiff is interested in exploiting.\textsuperscript{292} If a plaintiff “simply [has] no interest in occupying” a given market, there is no reason to take that market into account in the fair use analysis,\textsuperscript{293} and usually courts do not.\textsuperscript{294} Indeed, “the potential market should not be deemed to include uses that the plaintiff has an affirmative desire not to license,” such as where the plaintiff seeks to keep private papers out of the public eye.\textsuperscript{295} Thus, when a copyright owner fails to provide tangible evidence of an intent to exploit any market, there is no “potential” market harm under the fourth factor. The factor simply becomes inapposite.

F. Moving in the Right Direction

This article has focused mainly on courts’ failure to properly analyze fair use in the private censorship context. While one searches in vain for a “model” case, some courts have been more successful than others in adjudicating private censorship disputes. One example is \textit{Online Policy v. Diebold}, discussed

\begin{notes}
\begin{enumerate}
\item See Nunez v. Caribbean Int’l News Corp., 235 F.3d 18, 25 (1st Cir. 2000) (third factor “does not seem particularly relevant” in cases involving transformative use); Castle Rock Entm’t, Inc. v. Carol Pub’g Grp., Inc., 150 F.3d 132, 144 (2d Cir. 1998) (second factor “may be of less (or even of no) importance when assessed in the context of certain transformative uses . . . .”).
\item See \textit{Salinger II}, 811 F.2d 90, 99 (2d Cir. 1987).
\item See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592 (1994) (“The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop.”).
\item Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd., 996 F.2d 1366, 1377 (2d Cir. 1993).
\end{enumerate}
\end{notes}
In analyzing the students’ fair use defense, the district court emphasized that their use was supported by a strong public interest in learning about the voting machines’ defects. If Diebold’s machines were in fact defective, the court reasoned, “the very legitimacy of elections would be suspect”—an especially concerning topic during an election year (the case was decided in 2004, against the backdrop of the contested 2000 presidential election). The court went on to dismiss the emails’ unpublished status as irrelevant since Diebold had disavowed any intention to publish them. It further stated that copying the email archive in its entirety was necessary to effectuate a socially beneficial purpose. Finally, the court held that market harm was not relevant to the dispute.

In *Religious Technology Center v. F.A.C.T.NET, Inc.*, a case related to the Lerma litigation, the District of Colorado charted a similar course. The opinion explains that Arnoldo Lerma was a director of a non-profit corporation that maintained a library of information concerning the Church of Scientology’s allegedly abusive practices. As in Lerma, the plaintiffs sued over confidential religious documents that Lerma posted to the Internet. The District of Colorado found that Lerma’s posting served an identifiable public interest: “advanc[ing] understanding of issues concerning the Church which are the subject of ongoing public controversy.” After noting that the Church of

---

297. *See Online Policy Grp.*, 337 F. Supp. 2d at 1203 (“It is hard to imagine a subject the discussion of which could be more in the public interest.”).
298. *Id.*
300. *See Online Policy Grp.*, 337 F. Supp. 2d at 1203 n.13 (“The fact that Diebold had not published the email archive is not dispositive. The ‘first publication right’ permits the creator to control the final expression of the published work. There is no such interest here, in the context of an archive of fact-based or proprietary emails. Because Diebold clearly has indicated that it never intended to publish the emails, the fact that the email archive was unpublished does not obviate application of the fair use doctrine.”).
301. *See id.* at 1203 n.14 (“Plaintiffs additionally have argued that they were required to post the entire email archive because Diebold has accused Plaintiffs and others of taking individual emails out of context.”).
302. *Id.* at 1203 (“Diebold has identified no specific commercial purpose or interest affected by publication of the email archive, and there is no evidence that such publication actually had or may have any effect on the putative market value, if any, of Diebold’s allegedly copyrighted material.”).
304. *Id.* at 1521.
305. *Id.* at 1521–22.
306. *Id.* at 1525.
 Scientology does not permit public access to these documents, the court held that “the concerns of the Court in Harper & Row do not apply,” because the defendants did not publish the documents in order to deprive a “planned publication of its full impact.” It was unclear from the record whether Lerma had copied the works in their entirety, but the court acknowledged that even wholesale copying could constitute fair use.  With respect to market effects, the court frankly stated that the plaintiffs had presented no evidence of potential market harm or market substitution.

In each of these cases, the court showed attentiveness to the plaintiff’s censorial motivations. Recognizing that Diebold had no plans to publish the email archive, the Diebold court grounded its holding in an identifiable public interest: ensuring public knowledge of an issue affecting the legitimacy of elections. The district court wisely declined to apply the Harper & Row unpublished work rule; because Diebold had no intent to publish the archive, the students’ internet posting did not usurp market demand that Diebold hoped to exploit. The court also acknowledged that the relevant public interest shaped the amount of permissible copying, just as this article suggests.

The district court’s opinion in F.A.C.T.NET is notable for similar reasons. The court expressly recognized that Lerma’s copying served a public interest—advancing understanding of issues at the center of “an ongoing public controversy.” The court wasted no ink on transformativeness, never once referring to Campbell. Perhaps most impressive is the court’s careful reading of Harper & Row. Rather than uncritically apply the unpublished work rule, the court adopted the narrower reading advocated in this article. In other words, because Lerma’s use did not undercut a “planned publication,” the well-founded concerns that held sway in Harper & Row were simply inapplicable. As in Diebold, the court in F.A.C.T.NET tailored its analysis to remedy private censorship and further the goals of copyright. These two decisions demonstrate

307. Id. at 1521–22.
308. Id. at 1525.
309. Id. at 1525.
310. Id. at 1526.
312. See id. ("Publishing or hyperlinking to the email archive did not prevent Diebold from making a profit from the content of the archive because there is no evidence that Diebold itself intended to or could profit from such content.").
313. See id. at 1203 n.14 (posting archive in its entirety necessary to disprove Diebold’s claim that students took individual emails out of context).
315. See id. at 1527.
316. Id. at 1525.
that proper adjudication of private censorship cases requires only a modest reinterpretation of current doctrine, guided by copyright law’s founding principles and objectives.

V. CONCLUSION

If copyright law is supposed to prevent private censorship, it could be doing a better job. Under the Constitution, copyright law’s primary purpose is to encourage the production and dissemination of new creative works. Private censorship claims, which inhibit access without producing any public benefit, patently conflict with this policy. Fair use remains copyright’s most fitting remedy, but its overarching concern for market substitution produces awkward analyses and perverse results when censorship is at play. The modest reinterpretation suggested in this article avoids these outcomes by refocusing the analysis on the public interest. Where a work is unavailable through market channels and the plaintiff cannot point to a concrete commercial interest at stake, courts may presume censorial intent and should find fair use when the copying is reasonable in scope and supported by an identifiable public interest. Courts would then be better equipped to prevent copyright law, the “engine of free expression” from breaking down.