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Fair Use in Commercial Advertising

FAIR USE IN COMMERCIAL ADVERTISING

The copyright clause of the United States Constitution[1] empowers Congress to promote the progress of science and the arts by granting authors a limited monopoly over subsequent use of their creations in the form of a copyright.[2] The Copyright Act of 1976[3] (Copyright Act) is the most recent legislation under

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1. U.S. CONST. art. I, § 8, cl. 8.

2. *Id.* The copyright clause of the Constitution grants Congress the power to promote the progress of science and the arts by giving authors and inventors exclusive rights over the use of their writings and discoveries. *Id.* In the Copyright Act of 1976, Congress construed the word writings to mean any tangible expression that a person can reproduce with or without the aid of a machine. 17 U.S.C. § 106 (1982). Congress adopted this construction of the scope of the term writings from prior case law. *See* Mazer v. Stein, 347 U.S. 201, 208-09 (1954) (pictorial, graphic, or sculptured works appropriate subjects for copyright protection); Shaab v. Kleindienst, 345 F. Supp. 589, 590 (D.D.C. 1972) (sound recording firms contitutionally equivalent to authors and therefore have copyright protection).

The first copyright statute was England's statute of Anne. 8 Anne, ch. 19, § 1 (1710). The Statute of Anne granted authors of existing books copyrights of 21 years dating from April 10, 1710. *Id.* The statute granted copyrights to authors of new books for a period of 14 years, dating from the time of publication. *Id.* The statute also contained a supplemental provision to extend copyright protection another 14 years if the author was still living when the original copyright expired. *Id. See generally* B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 7 (1967) (discussing Statute of Anne). In the United States, the Statute of Anne provided the basis for early copyright legislation. *See* Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 210-12 (1954) (discussing English origins of American copyright legislation). Connecticut enacted the first American copyright statute in January, 1783. *See* Acts and Laws of the State of Connecticut, in America 133-34 (1786) (discussing Connecticut copyright statute). The Connecticut statute granted a 14 year copyright to authors of new works with a provision renewing the copyright for another 14 years if the author was still alive at the expiration of the original 14 year copyright. *Id.* By the time of the Constitutional convention, all of the original 13 states except Delaware had enacted copyright statutes. B. KAPLAN, *supra* at 25. Congress enacted the first federal copyright statute pursuant to the copyright clause in 1790. 1 Stat. 124, § 1 (1790). *See generally* T. SOLBERG, COPYRIGHT ENACTMENTS OF THE UNITED STATES 1793-1906 32-77 (1908) (reprinting United States copyright statues prior to 1906). The 1790 statute defined writings as maps, charts, and books and limited the copyright to two 14 year terms. 1 Stat. 124, § 1 (1790); T. SOLBERG, *supra*, at 32. In 1802, Congress amended the definition of writings to include etchings and, in 1831, to include musical compositions. T. SOLBERG, *supra*, at 35, 37; *see* 2 Stat. 171, § 2 (1802) (designers of etchings may copyright creations); 4 Stat. 436, § 1 (1831) (writings includes musical compositions). The 1831 statute also required an author to deposit a copy of the writing in the local district court clerk's office. 4 Stat. 436, § 4 (1831); T. SOLBERG, *supra*, at 38. In 1846, however, Congress amended the 1831 statute to require an author to deliver a copy of his writing to the Smithsonian Institution, which the 1846 Act created. T. SOLBERG, *supra*, at 38. In 1865, Congress again amended the definition of writings to include photographs. 13 Stat. 530, § 1 (1865); T. SOLBERG, *supra*, at 44. In 1873, Congress enacted copyright legislation under Title 60 and placed the administration of the Copyright Office under the Librarian of the Library of Congress. 60 U.S.C. § 4948, 18 Stat. 79 (1873); T. SOLBERG, *supra*, at 53. The 1909 Act, the last major copyright legislation before the 1976 Act, included lectures, sermons, and movies within the definition of writings. 17 U.S.C. § 5 (c), (l), (m) (1909), *amended by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101 to 810 (1982)).

3. 17 U.S.C. §§ 101-810 (1982).

the copyright clause.[4] In addition to defining the procedures for obtaining a copyright,[5] the Copyright Act enumerates certain exceptions to the copyright holder's monopoly.[6] Section 107 of the Copyright Act addresses the most important of these exceptions, fair use.[7] Section 107 is the first codification of the fair use doctrine.[8] Prior to 1976, fair use was an equitable common law doctrine that balanced the author's interest in remuneration with society's interest in reasonable access to useful information.[9] Traditionally, courts limited findings of fair use to noncommercial uses, reasoning that commercial uses did not advance society's interest in access to useful information.[10] Although courts more recently have concluded that the commercial nature of a given use does not necessarily preclude a finding of fair use,[11] courts still consider the commercial nature of a use relevant in a determination of fair use.[12] A

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4. *Id; see* B. KAPLAN, *supra* note 2, at 1-38 (discussing history of copyright clause); L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 9-10 (1978) (discussing United States copyright statutes).

5. 17 U.S.C. §§ 701-702 (1982) (discussing administrative procedures of Copyright Office). To obtain federal copyright protection, an author must register his writings with the Copyright Office. *Id.* § 708(a). Once the author has registered the work, the author must put the public on notice of the copyright. *Id.* § 401(a), 402(a). If the public can perceive the work visually, with or without the aid of a machine, the notice must contain the symbol © or the word "copyright" or the abbreviation "copr.", the first year of publication, and the author's name. *Id.* § 401(b)(1), (2), (3). If the work is a sound recording, the notice should contain the symbol P, the first year of publication of the sound recording, and the name of the sound recording's producer. *Id.* § 402(b)(1), (2), (3). If the author created the work on or after January 1, 1978, the copyright would last for the duration of the author's life and for 50 years after the author's death. *Id.* § 302(a). If the author created the work before January 1, 1978, the same duration of copyright protection applies, provided that the protection shall last at least 25 years. *Id.* § 303.

6. *See, e.g., id.* § 107 (discussing fair use); § 108 (library and archive reproduction); § 109 (record sales); § 110 (school performances of dramatic works); § 111 (secondary transmission of primary transmission); § 112 (movie showings); § 113 (discussing scope of exclusive rights in pictorial, graphic, and sculptural works); § 114 (discussing scope of exclusive rights in sound recordings); § 115 (discussing scope of exclusive rights in nondramatic musical works); § 116 (discussing jukeboxes); § 117 (discussing scope of copyright protection in computer programs); § 118 (discussing scope of rights with regard to noncommercial broadcasting).

7. *See id.* § 107 (discussing fair use exemption to copyright protection).

8. L. SELTZER, *supra* note 4, at 10.

9. Rosemont Enterprises v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966) (fair use is point at which courts subordinate author's interest in financial return to public interest in development of useful knowledge), *cert. denied*, 385 U.S. 1009 (1967); *see infra* text accompanying notes 57-59 (§ 107 does not change common law fair use doctrine).

10. *See, e.g.*, Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279, 284 (5th Cir. 1970) (defendant's use not fair because defendant's purpose commercial); Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (commercial purpose of defendant's use precludes fair use).

11. *See, e.g.*, Rosemont Enterprises v. Random House, Inc., 366 F.2d 303, 309 (2d Cir. 1966) (whether use is commercial has little bearing on fair use question), *cert. denied*, 385 U.S. 1009 (1967); Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Products, Inc., 508 F. Supp. 854, 861 (N.D. Ga. 1981) (commercial nature of defendant's use does not automatically preclude fair use finding).

12. *See, e.g.*, Consumers Union, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) (commercial nature of defendant's use merely relevant to fair use question); Triangle

minority of courts, however, are reluctant to hold that a particular form of commercial use, commercial advertising, is fair use because courts still adhere to a traditional view of fair use case law that commercial advertising cannot promote a public interest.[13] The courts' emphasis on whether a particular use promotes a public interest, however, has resulted in confusion of the purpose of copyrights and fair use.[14]

The framers of the Constitution included the copyright clause to ensure that society will benefit from the growth of culture and knowledge.[15] The copyright clause gives authors the incentive to produce by allowing authors to obtain payment for use of their writings, thereby encouraging authors to promote the growth of useful knowledge.[16]

Copyright protection is necessary since without copyright protection, an author could not control or receive payment for nonconsensual uses.[17] The limited monopoly of a copyright, however, enables an author to relinquish physical control of his writings while retaining the legal right to charge for use.[18] As a result, authors will have the incentive to create, contributing to the growth of useful knowledge and benefiting society.[19] Typically, an author's

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Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980) (commercial nature of defendant's use not controlling but still relevant); Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202, 1208 (N.D. Tex. 1981) (courts should not give too much weight to commercial nature of defendant's use); Roy Export Co. v. Columbia Broadcasting System, 503 F. Supp. 1137, 1144 (S.D.N.Y. 1980) (commercial nature of defendant's use not determanitive but only relevant), *aff'd on other grounds*, 672 F.2d 1095, 1096 (2d Cir. 1982); *see also* H.R. REP. No. 1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679 (fair use is not limited to nonprofit uses).

13. *See* Rubin v. Boston Magazine Co., 645 F.2d 80, 84 (1st Cir. 1981) (defendant's use of plaintiff's copyrighted work in advertisement not fair use because defendant's use solely for commercial gain); Martin Luther King, Jr., Center For Social Change, Inc. v. American Heritage Products, Inc., 508 F. Supp. 854, 861 (N.D. Ga. 1981) (defendant's use in advertisement of plaintiff's copyrighted speeches not fair use since use promotes no public interest); D.C. Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979) (defendant's use in commercial advertisement not fair use as use was unjustified appropriation for personal gain).

14. *See infra* text accompanying notes 94-102 (discussing court's misuse of copyright and fair use equities).

15. *See* U.S. CONST. art. I, § 8, cl. 8. The basis for the copyright clause is that authors will have more incentive to produce if authors are ensured of personal gain for their creative efforts. Mazer v. Stein, 347 U.S. 201, 219 (1954).

16. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (reward to author induces release to public of creative works).

17. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1610 (1982). The necessity for copyright protection stems from the public goods characteristics of uncopyrited writings. *Id.* Uncopyrighted writings are public goods because once the author has published a writing, the public can use the work without the author's consent and without exhausting the supply that the words comprise. *Id.* at 1611; *see* Demsetz, *The Private Production of Public Goods*, 13 J.L. & ECON. 293, 295 (1970) (discussing public goods concept).

18. *See* 17 U.S.C. § 106 (1982) (copyright owner has exclusive right to reproduce and distribute copyrighted work).

19. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) (copyright gives authors incentive to produce creative works); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (copyright

interest in remuneration will coincide with society's interest in access to useful knowledge.[20] In some instances, however, copyright restrictions on use will inhibit public access to useful knowledge and thereby defeat the constitutional purpose of the copyright clause.[21] To ensure that the author's right to control serves the constitutional purpose of the copyright clause, courts developed the doctrine of fair use.[22]

Although the concept of fair use is difficult to define,[23] courts often characterize fair use as a privilege of noncopyright holders to use copyrighted

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induces author to release to public products of creative labors).

20. Gordon, *supra* note 17, at 1602.

21. Comment, *Photocopying and Fair Use: An Examination of the Economic Factor In Fair Use*, 26 EMORY L.J. 849-50 (1977) [hereinafter cited as *Economic Factor*]. The normal assumption behind the copyright clause is that a copyright owner will seek others to pay for a use. Mazer v. Stein, 347 U.S. 201, 219 (1954). Often, however, copyright owners purchase copyrights to prevent use by others. Rosemont Enterprises v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). This antidissemination motive defeats the purpose of the copyright clause which is to allow societal access to useful knowledge. Mazer, 347 U.S. 201, 219 (1954); *see, e.g.*, Rosemont, 366 F.2d 303, 310-311 (2d Cir. 1966) (court found that copyright owner purchased copyrights not to publish works but to prevent uncontrolled use); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957, 961 (D.N.H. 1978) (court found fair use when political candidate sought to prevent political opponent's use of copyrighted material in gubernatorial campaign).

22. *See* Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1973) (courts developed fair use to serve constitutional purpose of promoting science and arts), *aff'd per curiam by an equally divided court*, 420 U.S. 376 (1975). The *Williams* court held that wholsesale library photocopying was fair use. 487 F.2d at 1356. The Copyright Act of 1976, however, rendered the *Williams* decision irrelevant by providing that library photocopying is an exemption to copyright protection. *See* 17 U.S.C. § 108 (1982) (discussing photocopying exemption to copyright).

23. *See* 3 M. NIMMER, NIMMER ON COPYRIGHT, § 13.05, at 13-55 to 13-56 (1978) (discussing various definitions of fair use); Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (fair use most troublesome doctrine in copyright law). Courts have developed at least four definitions of fair use. *See* 3 M. NIMMER, *supra*, § 13.05, at 13-55 to 13-56. The earliest definition was that fair use was a use that did not merely copy the original work but improved upon the work in some way. *See* Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4,901) (defendant's use not fair because defendant merely copied author's work). Courts following the mere copying rationale reasoned that improvements on the original promoted the growth of knowledge and therefore achieved the goal of fair use. *See* Harper v. Shoppell, 26 F. 519, 521 (C.C.S.D.N.Y. 1886) (court must find fair use to insure growth of useful knowledge when defendant's use improved on original); *see also infra*, notes 25-43 and accompanying text (discussing *Folsom* and mere copying rationale). Another definition of fair use was a use to which the author impliedly consented. *See* Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (law implies that author consents to later scientific use of his work). Courts adopting the implied consent definition of fair use restricted findings of fair use to later scientific uses because courts reasoned that authors would consent only to later scientific uses of their copyrighted work. *See infra* note 74 (discussing implied consent rationale). Some courts defined fair use as an insubstantial taking. *See* Robertson v. Batten, Barton, Durstine, and Osborne, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956) (defendant's use not fair because substantial copying). The difficulty with defining fair use as an insubstantial similarity is that the test for infringement is a substantial similarity. 3 M. NIMMER, *supra*, § 13.05, at 13-56. Consequently, any noninfringement would be a fair use. *See id.* Fair use, however, is a use that courts allow despite infringement or substantial similarity. *See* 17 U.S.C. § 108 (1982) (fair use is exception to copyright). Fair use as an exception to copyright is the fourth, and latest, definition of fair use. 3 M. NIMMER, *supra*, § 13.05, at 13-56.

material without the copyright holder's consent.[24] The fair use doctrine first appeared in the United States in *Folsom v. Marsh*.[25] In *Folsom*, the plaintiff alleged that the defendant had infringed the plaintiff's copyright by copying 388 pages from the plaintiff's work into the defendant's work.[26] The defendant argued that he had a right to copy from the plaintiff's work in the composition of a new work.[27] The *Folsom* court stated that the question was whether the defendant's use was a justifiable use that the law did not consider an infringement.[28] In considering whether the defendant's use was justifiable, the *Folsom* court stated that the question involved the nature of the two works,[29] the extent of the copying,[30] and the economic effect of the use on the

24. Rosemont Enterprises v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966) (fair use is nonconsensual use that courts recognize as limited privilege of noncopyrighted holders), *cert. denied*, 385 U.S. 1009 (1967); *see* Rubin v. Boston Magazine Co., 645 F.2d 80, 83 (1st Cir. 1981) (citing *Rosemont* for definition of fair use); *accord* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1174 (5th Cir. 1980) (citing *Rosemont*); Roy Export Co. v. Columbia Broadcasting System, 503 F. Supp. 1137, 1143 (S.D.N.Y. 1980) (citing *Rosemont*), *aff'd on other grounds*, 672 F.2d 1095, 1096 (2d Cir. 1980).

25. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). Although *Folsom* was the first American fair use case, the term fair use did not appear in American jurisprudence until *Lawrence v. Dana*. 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136).

26. 9 F. Cas. at 343. In *Folsom*, the author of the infringing work was Charles W. Upham. *Id.* Although Upham was the infringer, the plaintiffs brought the suit against the publishers because the publishers, and not Upham, offered the work for sale. *Id.* Under the then current copyright statute, a copyright owner could bring a suit for infringement only against the party that offered the infringing work for public sale. *See* Harper v. Shoppell, 26 F. 519, 520-21 (C.C.S.D.N.Y. 1866) (defendant who sold printing plate of copyrighted work to newspaper which later printed impression of plate not guilty of infringement in part because defendant did not offer work for sale).

In *Folsom*, the author of the work which the plaintiff had published was Jared Sparks. *Id.* Spark's work, *The Writings of George Washington*, consisted of 12 volumes. *Id.* The first volume was an original biography of Washington that Sparks had written. *Id.* at 344. The remaining 11 volumes, however, consisted entirely of the collected writings of Washington. *Id.* Sparks earlier had obtained the copyright jointly with Chief Justice John Marshall from Justice Bushrod Washington, nephew of President Washington. *Id.*

27. *Id.* In addition to claiming that an author of an essentially new work has the right to quote from a similar work, the defendant in *Folsom* alleged two other defenses to the plaintiff's charge of infringement. *Id.* First, the defendant claimed that the letters of Washington were not the subject of copyright because the letters were not literary. *Id.* The *Folsom* court held, however, that any writing which the author intends to be private is literary and therefore copyrightable. *Id.* at 345-46. The defendant's second defense was that the writings of Washington were the property of the United States and, therefore, the plaintiff had no property right on which to base a suit for infringement. *Id.* at 344. The *Folsom* court found that Congress purchased the letters and, therefore, the letters were, to that extent, the property of the United States. *Id.* at 347. The court stated, however, that Congress purchased the letters subject to the copyright which the author already held on the writings. *Id.* The plaintiff, therefore, retained a sufficient property interest in the letters to bring suit for infringement. *See id.*

28. *Id.* at 344.

29. *Id.* In *Folsom*, the court concluded that both works were of great public value. *Id.* at 348. The court stated, however, that even the publicly beneficial nature of the defendant's use was not conclusive. *Id.* The court concluded, instead, that the crucial issue was the effect of the use on the market value of the plaintiff's work. *Id.; see infra* note 31 (discussing *Folsom* court's analysis of economic effect issue).

30. 9 F. Cas. at 344. In *Folsom*, the court stated that when considering the extent of the

copyrighted work.[31] The court examined the defendant's work and concluded that the defendant's work was a substitute for the plaintiff's work because the defendant's work was composed primarily of copied portions of the plaintiff's work.[32] The court held, therefore, that the defendant's copying was not a justifiable use because the defendant's work unfairly affected the value of the plaintiff's work.[33]

The significance of *Folsom* is that the court's several considerations have become the accepted criteria for determining whether a particular use of a copyrighted work is a fair use.[34] Of equal significance in early fair use cases, however, is the *Folsom* court's emphasis in denying fair use because the copied sections of plaintiff's work were the major source of the societal value of the defendant's work.[35] In other words, the defendant had attempted to reap financial benefit by charging the public for use of information that the defendant merely copied from the plaintiff's work.[36] In commercial advertising fair use cases before 1976, the mere copying rationale underlies one of the two major lines of cases.[37] The leading commercial advertising fair use case employing the mere copying rationale is *Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc.*[38] In *Conde Nast*, the plaintiff brought suit to enjoin the defendant from using the term "Vogue" or covers of past issues of *Vogue* magazine in the defendant's advertising.[39] In considering the defendant's fair use defense, the *Conde Nast* court noted that the defendant copied

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copying, a court not only should consider the quantitative percentage of the use in relation to the copyrighted work but also should examine whether the use is of the most valuable portions of the copyrighted work. *Id.* at 348-49. The court concluded that this qualitative examination best determines the economic effect of the use on the copyrighted work. *Id.*

31. *Id.* at 344-45. The *Folsom* court stated that the economic effect of the use on the copyrighted work was the most important factor in determining whether a particular use was a fair use. *See id.* at 345. The court held that if the court found that a defendant's allegedly infringing use substituted for the copyrighted work by merely copying the original, the use was not a justifiable use. *Id.* The court also concluded that the economic effect analysis should include a determination of the effect of other similar uses on the copyrighted work because a finding that one use is a fair use would mean that other similar uses would also be fair uses. *Id.* at 349; *see infra* note 112 (discussing economic effect factor and res judicata).

32. 9 F. Cas. at 349.

33. *Id.*

34. *See* 17 U.S.C. § 107 (1982) (factors in examination of fair use include nature of uses, extent of copying, and economic effect of copying); H.R. REP. No. 1476, 94th Cong., 2d Sess. 65-66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679 (§ 107 restates present common law of fair use).

35. *See* Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901) (portions of plaintiff's work that defendant copied impart greatest value to defendant's work).

36. *Id.*

37. *See infra* text accompanying notes 45-49 (two rationales of early commercial advertising fair use cases were mere copying and per se theories).

38. 105 F. Supp. 325 (S.D.N.Y. 1952).

39. *Id.* at 327. In *Conde Nast*, the plaintiff alleged that the defendants infringed the registered trademark, "Vogue," as the name of the corporation overseeing the plaintiff's magazine and the common law trademark Vogue as the name of the plaintiff's magazine. *Id.* The plaintiff also alleged that the defendants unlawfully appropriated the plaintiff's name and goodwill. *Id.*

the essence of the plaintiff's copyrighted covers not to benefit the public by providing new information but only to make an unearned profit.[40] The United States District Court for the Southern District of New York held, therefore, that the defendant's use was not a fair use.[41]

The courts employing the mere copying rationale focused on the public value of the allegedly infringing work by determining whether the defendant's work provided new information to the public or whether the defendant merely copied information that already existed in the plaintiff's work.[42] In addition, the courts employing the mere copying rationale examined the economic effect of the use on the original work because the courts reasoned that a passive use rendered the use a substitute for the original work and thus unfairly affected the market value of the copyrighted work.[43] Although the other line of commercial advertising fair use cases also examined whether the use promoted the public interest, the other courts applied a per se rule that excluded all commercial advertising from fair use, reasoning that commercial advertisements could never promote the public interest.[44] In *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*,[45] the United States District Court for the Eastern District of Pennyslvania considered whether the defendant's use of excerpts from the plaintiff's book in the defendant's commercial advertising could be fair use.[46] The *Holt* court stated that the fair use doctrine allows use of

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The court held for the plaintiff on all three counts. *Id.* at 331-32. The plaintiff based the claim of copyright infringement on the defendants' nonconsensual use of the artistic value of the covers of plaintiff's magazine in the defendants' advertising. *Id.* at 332-33.

40. *Id.*

41. *Id.* The *Conde Nast* court's holding that the defendants' use was not a fair use because the defendants copied the plaintiff's magazine covers only to save effort was also the rationale of at least one other pre-1976 commercial advertising fair use case. *See* Robertson v. Batten, Barton, Durstine & Osborn, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956). In *Robertson*, the defendants used segments from the plaintiff's copyrighted melody in a singing commercial. *Id.* at 797. In finding that the defendant's use was not a fair use, the *Robertson* court stated that the defendant's use was a mere copying of that portion of the plaintiff's work on which the commercial success of plaintiff's work depended. *Id.* at 798.

42. *See* Robertson v. Batten, Barton, Durstine, and Osborne, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956) (defendants' use not fair because mere copy of valuable parts of plaintiff's work); Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc., 105 F. Supp. 325, 332-33 (S.D.N.Y. 1952) (defendant's use not fair since motive only to save effort); Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (defendant's use not fair because mere copy of plaintiff's work).

43. *See* Robertson v. Batten, Barton, Durstine, and Osborne, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956) (defendants' use of crucial parts of plaintiff's work decreased market value of plaintiff's work); Conde Nast Publications, Inc. v. Vogue School of Fashion Modelling, Inc., 105 F. Supp. 325, 333 (S.D.N.Y. 1952) (defendant's use of essence of plaintiff's magazine covers detracted from market value of plaintiff's work).

44. *See infra* notes 45-50 and accompanying text (discussing cases employing per se rationale in fair use examination).

45. 23 F. Supp. 302 (E.D. Pa. 1938).

46. *Id.* at 303. In *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, the plaintiff was the publisher of a book discussing the human voice mechanism. *Id.* The defendant, a tobacco company, published an advertisement in which the defendant quoted from the plaintiff's book that smoking could not harm the throat. *Id.*

copyrighted works to promote science and the arts because the law implies that the copyright owner would consent to such a use.[47] The court concluded, however, that commercial advertisements do not promote useful knowledge and thus the plaintiff would not consent to the defendant's use.[48] As a result, the defendant's use did not fall within the scope of fair use.[49] Prior to 1976, therefore, courts employed two standards to determine whether a particular use was fair use, the mere copying rationale and the *Holt* per se rule.[50]

In the Copyright Act of 1976, Congress first codified the fair use doctrine.[51] More specifically, section 107 of the Copyright Act enumerates four factors

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47. *Id.* at 304. In stating that courts intended fair use to promote science and the arts, the *Holt* court followed the traditional justification for fair use. *Id.; see* Sayre v. Moore, 102 Eng. Rep. 139, n.140 (K.B. 1785) (fair use insures that progress of arts not hampered); Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. ASCAP 43, 48-50 (1955) (discussing legal justifications for fair use). The *Holt* court's consensual basis for fair use was an early explanation for fair use. *See supra* note 23 (discussing various definitions of fair use).

48. 23 F. Supp. at 304. The *Holt* court's reasoning that the defendant's use was not a fair use as the plaintiff would not have consented to the use since the defendant's use did not promote a public interest is a rationale that courts and commentators have rejected as a legal fiction. *See* 3 M. NIMMER, *supra* note 23, § 13.05, at 13-55 (consent rationale manifestly fiction). Professor Nimmer notes that a restrictive legend on a work prohibiting copying gives no more protection than a copyright notice. *Id.* Furthermore, one of the uses that the Copyright Act states should be considered fair is criticism. *See* 17 U.S.C. § 107 (1982) (fair use includes criticism and comment). Since an author would not consent to criticism, fair use could not be consensually based. *See* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1172 (5th Cir. 1980). In *Triangle*, the plaintiff sought to enjoin the defendant's use in comparative advertisements of the plaintiff's copyrighted work. *Id.* The *Triangle* court, however, considered the comparative nature of the defendant's use a positive factor in the fair use examination. *Id.* at 1176 n.13.

49. 23 F. Supp. at 304; *see* Tennessee Fabricating Co. v. Moultrie Mfg. Co., 421 F.2d 279, 284 (5th Cir. 1970) (fair use doctrine not applicable to defendant's use because defendant's commercial use not for legitimate purpose); Associated Music Publishers, Inc. v. Debs Memorial Radio Fund, 141 F.2d 852, 855 (2d Cir. 1944) (defendant's use not within definition of fair use because defendant's use for commercial purposes).

In *Tennessee*, the plaintiff sought damages for the defendant's alleged infringement of photographic representations of a decorative screen divider that the plaintiff had developed. 421 F.2d 279, 280 (5th Cir. 1970). The defendant claimed that use of the photographic representations was not infringement but was fair use. *Id.* at 281. In considering whether the defendant's use was fair, the court stated that, to be fair, a use must be for some legitimate purpose. *Id.* at 284. The court then held that the defendant's use was not fair because the purpose of the defendant's use was not legitimate but only commercial. *Id.*

In *Associated Music Publishers, Inc. v. Debs Memorial Radio Fund*, the defendant broadcast excerpts from the plaintiff's copyrighted song on the defendant's radio station. 141 F.2d 252, 252-53 (2d Cir. 1944). The plaintiff brought suit seeking damages for infringement. *Id.* at 854. The defendant claimed that the use was a fair use because the defendant, a nonprofit organization, was not using the plaintiff's copyrighted work for commercial gain. *Id.* at 854-55. The court concluded, however, that the defendant was using the plaintiff's copyrighted work for commercial gain because the defendant used the work to increase the defendant's listening audience. *Id.* at 855. The court then held that the doctrine of fair use did not apply to the defendant's use since the purpose of the defendant's use was commercial. *Id.*

50. *See supra* text accompanying notes 45-49 (two rationales of early fair use commercial advertising cases mere copying and per se theories).

51. *See* 17 U.S.C. § 107 (1982) (codification of fair use).

that courts should apply in determining whether a particular use is a fair use.[52] The first factor section 107 includes is the purpose and character of the use, including whether the use is for commercial or nonprofit purposes.[53] The second factor of section 107 is the nature of the copyrighted work,[54] and the third factor is the amount used in relation to the whole copyrighted work.[55] Finally, courts should consider the economic effect of the use on the market value of the copyright.[56]

Section 107 does not define fair use,[57] but the drafters of section 107 indicated that section 107 does not change, narrow, or enlarge the doctrine of fair use in any way.[58] The drafters intended, instead, to leave the development of the doctrine to the courts.[59] Furthermore, section 107 does not indicate how much weight courts should give each factor,[60] and states that the four listed factors are not the only factors that courts should include in a fair use determination.[61] The Copyright Act, therefore, leaves courts with almost complete discretion in questions of fair use.[62]

The most important consideration of section 107 with regard to commercial advertising fair use cases, however, is that section 107 rejects the *Holt* court's reasoning that commercial advertising can never come within the scope of fair use.[63] The legislative history indicates that section 107 is not limited to nonprofit uses but that the commercial nature of a use is only relevant in a fair use determination.[64] The majority of commercial advertising fair use cases since 1976 implemented the section 107 approach by rejecting the *Holt* court's reasoning that a commercial use could never be a fair use.[65]

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52. *Id.*

53. *Id.* § 107(1).

54. *Id.* § 107(2).

55. *Id.* § 107(3).

56. *Id.* § 107(4).

57. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 65-66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679 (complexity of fair use doctrine precludes exact formulation).

58. *See id.* (§ 107 does not modify present fair use doctrine).

59. *See id.* (§ 107 leaves development of fair use doctrine to courts to apply on case-by-case basis).

60. *See* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980) (§ 107 does not indicate relative importance of four factors).

61. *See* 17 U.S.C. § 107 (1982) (factors courts should employ in fair use examination "include" four factors of § 107); *id.* § 101 (defining "including" as illustrative and not limiting).

62. *See* 3 M. NIMMER, *supra* note 23, § 13.05, at 13-56, 58 (criticizing § 107 as indecisive); L. SELTZER, *supra* note 4, at 20-21 (criticizing § 107 as overly general).

63. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679-80 (commercial purpose of use relevant but not conclusive to examination of fair use question); *see also* Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (defendant's commercial use not within scope of fair use).

64. *Id.*

65. *See* Consumers Union, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) (commercial nature of use merely relevant to fair use question); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1175 (5th Cir. 1980) (commercial nature of defendant's use not conclusive to fair use determination); Dr. Pepper Co. v. Sambo's Restaurants, Inc., 517 F. Supp. 1202, 1208 (N.D. Tex. 1981) (courts should not give too much weight to commercial

In *Consumers Union, Inc. v. General Signal Corporation*,[66] for example, the Second Circuit considered whether the defendant's use of excerpts from the plaintiff's magazine in several television commercials could be a fair use.[67] The court recognized that the defendant's use was clearly commercial.[68] The court determined, however, that the commercial purpose alone did not defeat the defendant's fair use claim.[69] The court stated instead that the character of the use, whether the use prompted some public interest, was more important.[70] The court concluded that the defendant's use was legitimate because the defendant's use, although commercial, conveyed useful information to the public[71] and did not merely advance the defendant's commercial

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nature of use). *But see* Rubin v. Boston Magazine Co., 645 F.2d 80, 84 (1st Cir. 1981) (fair use doctrine not applicable to uses solely for commercial gain); D.C. Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979) (defendant's use unjustified appropriation for personal gain so not fair use).

66. 724 F.2d 1044 (2d Cir. 1983).

67. *Id.* at 1046-47.

68. *Id.* at 1049.

69. *Id.* In addition to the *Consumers Union* court, another court which held that the commercial nature of a use was not conclusive to a fair use examination was *Dr. Pepper Co. v. Sambo's, Restaurants, Inc.* 517 F. Supp. 1202, 1208 (N.D. Tex. 1981). In *Dr. Pepper*, the United States District Court for the Northern District of Texas considered whether the defendant's use of the plaintiff's copyrighted commercial in the defendant's commercial was a fair use. *Id.* at 1204. The plaintiff, Dr. Pepper, had developed a series of commercials centering around the theme "Be A Pepper." *Id.* The defendant, Sambo's, later developed a commercial with the name of "Dancing Seniors." *Id.* The defendant admitted to copying the plaintiff's commercials but claimed that the "Dancing Seniors" commercial was a parody of the "Be A Pepper" commercials and was therefore a fair use. *Id.* at 1208. In considering whether Sambo's "Dancing Seniors" commercial was a fair use of Dr. Pepper's "Be A Pepper" commercial, the court first stated that although Sambo's use was clearly commercial, the purpose of Sambo's use was not conclusive. *Id.* at 1208. The court concluded, however, that the commercial nature of the use would cut against the fair use defense. *Id.* The court instead examined whether the defendant's use harmed the economic value of the plaintiff's commercial. *Id.* The court concluded that the similarity of the "Dancing Seniors" commercials would detract from the value of the "Be A Pepper" commercial and therefore was not a fair use. *Id.* at 1208-09.

The parody defense that Sambo's claimed in *Dr. Pepper* is a well settled type of fair use. Yankwich, *Parody and Burlesque in the Law of Copyright*, 33 CAN. B. REV. 1130, 1130-31 (1955). A user may parody a copyrighted work and avoid an infringement action through the fair use doctrine. Benny v. Loew's, Inc., 239 F.2d 532, 536 (9th Cir. 1956), *aff'd sub nom.*, Columbia Broadcasting System v. Loew's, Inc., 356 U.S. 43 (1958). Courts allow parody as a type of fair use because courts reason that allowing parodies achieves the aim of copyright law to stimulate artistic creativity. MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981). The alleged parody, however, must fulfill at least two requirements. *Id.* at 182. First, the parody must comment critically on the copyrighted material. Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Co-op. Prod., 479 F. Supp. 351, 357 (N.D. Ga. 1979). Next, the parody must not reduce the demand for the copyrighted work. Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964). *See generally* Light, *Parody, Burlesque, and the Economic Rationale for Copyright*, 11 CONN. L. REV. 615 (1979) (discussing parody as fair use).

70. 724 F.2d at 1049.

71. *Id.* In concluding that the commercial purpose of the defendant's use alone would not defeat the fair use defense, the *Consumers Union* court distinguished between the purpose and character of the defendant's use. *Id.; see* 17 U.S.C. § 107(1) (1982) (first factor that court should include in determination of fair use is the purpose and character of use). The *Consumers Union*

interests.[72]

A majority of commercial advertising fair use cases since 1976 have followed the drafters' explanation of the first factor of section 107 that section 107 is not limited to noncommercial uses.[73] The courts, however, have not applied as consistently the three other factors of section 107.[74] Of the three other factors, courts have given the greatest weight to the fourth factor, the

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court stated that although the purpose of the defendant's use was commercial, the character of the use was the conveyance of useful information to the public. 724 F.2d at 1049. The court concluded, therefore, that the defendant's use was conducive to a finding of fair use because the advertisement conveyed factual information to the public. *Id.* at 1050.

72. 724 F.2d at 1050. In finding that defendant's television commercial did not merely advance the defendant's commercial interests, the *Consumers Union* court distinguished the instant case from *D.C. Comics, Inc. v. Crazy Eddie, Inc. Id.; see* D.C. Comics, 205 U.S.P.Q. 1177 (S.D.N.Y. 1979). In *D.C. Comics*, the defendant, Crazy Eddie, used the plaintiff D.C. Comics' Superman character in an advertisement for Crazy Eddie's home video store. 205 U.S.P.Q. at 1178. D.C. Comics filed suit against Crazy Eddie, seeking to enjoin Crazy Eddie from any further use of the Superman character in Crazy Eddie's advertisements. *Id.* Crazy Eddie claimed that the use of Superman was a parody of the character and therefore a fair use. *Id.; see* Berlin v. E.C. Publications, Inc., 329 F.2d 541, 545 (2d Cir.) (parody entitled to fair use finding) *cert. denied*, 379 U.S. 822 (1964); *supra* note 69 (discussing parody as fair use). The *D.C. Comics* court, however, held that Crazy Eddie's use was not a fair use because the defendant's use was an unjustified appropriation for commercial gain. 205 U.S.P.Q. at 1178.

73. *See supra* note 65 (citing cases following § 107's rule that commercial purpose of use not conclusive to fair use determination); H.R. REP. No. 1476, 94TH CONG., 2D SESS. 66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679-80 (commercial purpose of use relevant but not conclusive to examination of fair use question).

74. *See* 3 M. NIMMER, *supra* note 23, § 13.05, at 13-62 to 65 (discussing courts' application of three other factors of § 107, nature of copyrighted work, extent of use, and effect of use on copyrighted work); 17 U.S.C. § 107(2),(3),(4) (1982) (three fair use factors other than purpose and character of use). The second factor of section 107, the nature of the copyrighted work, is not a major factor in most recent fair use cases. 3 M. NIMMER, *supra* note 23, § 13.05, at 13-62. Traditionally, courts were more receptive to fair use when the copyrighted work was of a scientific nature, because the courts reasoned that authors of scientific works impliedly consented to the use. *See* Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (law readily permits fair use of scientific works because author impliedly consents to use). The courts employing the implied consent theory of fair use relied on the English case of *Sayre v. Moore*. 102 Eng. Rep. 361 (K.B. 1785). In *Sayre*, the defendant copied four sea charts that the plaintiff had compiled into one large sea chart. *Id.* The court found, however, that although the defendant had copied from the plaintiff's sea charts, the defendant had also corrected several material errors in the plaintiff's charts. *Id.* In considering whether the defendant had unjustifiably copied the plaintiff's work, the *Sayre* court stated that courts must balance plaintiff's interest in financial reward and society's interest that courts not deprive the world of scientific improvements. *Id.* The court concluded that the defendant's use was fair because the defendant had improved on the plaintiff's copyrighted work. *Id.* Early fair use cases relied on *Sayre* for the proposition that fair use is more readily available when the copyrighted work is scientific because the author would consent to a use that promotes the growth of knowledge. *See, e.g.*, Sampson & Murdock Co. v. Seaver-Radford Co., 140 F. 539, 541 (1st Cir. 1905) (author of scientific material impliedly consents to later scientific use); *Holt*, 23 F. Supp. at 304 (author consents to subsequent scientific use of copyrighted work).

At least one commercial advertising fair use case since 1976 has held that fair use is more readily available when the copyrighted work is scientific because the author impliedly consents to the use. *See* Rubin v. Boston Magazine Co., 645 F.2d 80, 84 (1st Cir. 1981) (scientific material

economic impact of the use on the market value of the copyrighted work.[75] In *Triangle Publications v. Knight-Ridder Newspapers*,[76] the Fifth Circuit considered whether the defendant's use of past covers of the plaintiff's magazine, *TV Guide*, in an advertisement was a fair use.[77] The defendant, intending to publish a television guide as a supplement to a local Sunday newspaper, printed certain advertisements that compared the relative merits of the plaintiff's and the defendant's television guides.[78] The *Triangle* court recognized that the defendant's use might cause economic harm to the plaintiff's magazine but

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has limited fair use protection). In *Rubin*, the defendant quoted from the plaintiff's philosophy dissertation in defendant's magazine, *Boston*. *Id.* at 82. The defendant attempted to justify the use by alleging that the plaintiff's writing was scientific. *Id.* at 84. The *Rubin* court rejected the defendant's argument because the court found that the defendant's use was purely for commercial reasons. *Id.* The *Rubin* court did not state expressly that the law allows fair use when the copyrighted work is scientific because the author impliedly consents. *Id.* The court, however, cited *Sampson & Murdock Co. v. Seaver-Radford Co.* in which the First Circuit stated that courts are more receptive to the fair use exemption when the copyrighted work is scientific because the law reasons that the author impliedly consents to the use. *See id.; Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 F. 539, 541 (1st Cir. 1905) (scientific mat;erial has limited copyright protection as first publisher of scientific material impliedly consents to subsequent use).

In *Rubin*, the First Circuit acknowledged the implied consent rationale with regard to the nature of the copyrighted work. 645 F.2d at 84. The majority of courts are more receptive to a fair use finding when the nature of the copyrighted work is informational. *See* Consumers Union, Inc. v. General Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983) (fair use of informational copyrighted work more readily available); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966) (broader fair use scope when copyrighted work informational), *cert. denied*, 385 U.S. 1009 (1967). The majority of courts reason, however, that the risk of inhibiting the free flow of information is greater than the normal tensions between the author's monopolistic rights and the public's interest in use when the copyrighted work is informational. *See* Consumers Union, 724 F.2d 1044, 1050 (2d Cir. 1983) (fair use scope greater when copyrighted work informational to prevent greater risk to free flow of information); Rosemont Enterprises, 366 F.2d 303, 307 (2d Cir. 1966) (greater risk to dissemination of useful information when copyrighted work informational justifies broader scope of fair use).

75. *See* 17 U.S.C. § 107(4) (1982) (fourth factor courts should include in fair use determination is economic effect of use on copyrighted work). The third fair use factor, the amount of the use, was not of great significance in the majority of recent commercial advertising cases. *See, e.g.*, Consumers Union, Inc. v. General Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983) (discussing third factor in one paragraph); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp 957, 961 (D.N.H. 1978) (discussing third factor in one phrase). Furthermore, the cases that considered the extent of the use did not apply the third factor consistently. 3 M. NIMMER, *supra* note 23, § 13.05, at 13-65 (discussing third fair use factor). Some courts considered only the physical quantity used, but a majority of the courts considering the third fair use factor examined whether the use copied the essence of the copyrighted material. *See* Rubin v. Boston Magazine Co., 645 F.2d 80, 84 (1st Cir. 1981) (defendant's use copied essential part of copyrighted work); Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1177 (5th Cir. 1980) (court found fair use in part because defendant's use did not copy essence of copyrighted work); Roy Export Co. v. Columbia Broadcasting System, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) (defendant's use of a one minute, fifteen seconds excerpt from one hour, twelve minute motion picture a significant taking because excerpt captured essence of plaintiff's work), *aff'd on other grounds*, 672 F.2d 1095, 1096 (2d Cir. 1982).

76. 626 F.2d at 1171 (5th Cir. 1980).

77. *Id.* at 1172.

78. *Id.* at 1172-73.

concluded that such harm was not within the scope of section 107.[79] The court stated that section 107 intended to protect authors only from uses that cause direct harm to the author's work by making use of the copyrighted material.[80] The court held that the defendant's use was a fair use because the court found that the use did not harm the value of the plaintiff's copyrighted work by exploiting the copyrighted work but only by demonstrating deficiencies in the plaintiff's work.[81]

Although the *Triangle* court determined that the defendant's use was a fair use primarily because the use had no immediate economic impact on the copyrighted work, other commercial advertising cases have interpreted the economic impact question differently.[82] In *Roy Export Co. v. Columbia Broadcasting System*,[83] the defendant used clips in a news biography of Charlie Chaplin from a compliation of excerpts from Charlie Chaplin films that the plaintiff previously had copyrighted.[84] In considering whether the defendant's use was fair, the United States District Court for the Southern District of New York examined the economic effect of the use on the market value not only of the plaintiff's compilation but also of the original Charlie Chaplin films that plaintiff also had copyrighted.[85] The court stated that the question regarding the economic impact of the use should be the effect of the use not only on the copied work but also on derivative copyrighted works because the use would affect each work equally.[86] The court concluded that the use would damage the market value of both the plaintiff's compilation and the plaintiff's original films, and therefore the defendant's use was not a fair use.[87]

The present fair use case law is insufficient with regard to commercial advertising because courts have failed to establish clear standards to determine whether a particular use is fair.[88] Furthermore, the continued growth

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79. *Id.* at 1177. In considering whether the defendant's use of the plaintiff's magazine covers in a comparative advertisement was fair, the *Triangle* court dealt cursorily with the first three fair use factors. *See id.* at 1175-77. The court noted that the defendant's use was commercial but concluded that the purpose of the defendant's use was only relevant and not conclusive to the fair use examination. *Id.* at 1175. The court further noted that the plaintiff's copyrighted work was also commercial but held that the nature of the copyrighted work is irrelevant to a fair use determination. *Id.* at 1176. In considering the amount of the copyrighted work that defendant's use had copied, the *Triangle* court stated that the amount copied was insignificant because the defendant's use did not copy the essence of the copyrighted work. *Id.* at 1177.

80. *Id.* at 1178 (quoting Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283, 305-06 (1979)).

81. 626 F.2d at 1178.

82. *See infra* notes 83-87 and accompanying text (discussing broader interpretation of economic impact question).

83. 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd on other grounds*, 672 F.2d 1095, 1096 (2d Cir. 1980).

84. *Id.* at 1142.

85. *Id.*

86. *Id.* at 1145.

87. *Id.; see infra* note 112 (proposed method to analyze effect of use on copyrighted work).

88. *See supra notes* 66-87 and accompanying text (discussing unsettled fair use case law under 1976 Act). The present fair use doctrine is ineffective with regard to commercial advertising because the present doctrine does not protect the rights of authors sufficiently. *See* Gordon,

of commercial advertising in recent years necessitates a clarification of the present doctrine to provide authors and potential users with more reliable guidelines of behavior.[89] The present Copyright Act, unfortunately, does little to resolve the confusion among the courts.[90] The four factors of section 107 are not a code of fair use, but merely a list of factors that past fair use cases have considered in examining whether a particular use was fair use.[91] Furthermore, section 107 does not require a court to consider all four factors in a fair use determination[92] nor does section 107 indicate which of the four factors courts should weigh most heavily.[93]

The major difficulty with present commercial advertising case law is the courts' perception of the copyright scheme.[94] The purpose of the copyright clause is to promote the growth of knowledge for the benefit of the public.[95] The Framers of the Constitution intended to achieve that goal by providing the author with the incentive to create by allowing the author to obtain a copyright and thereby receive payment for the use of his copyrighted work.[96] Courts developed the fair use doctrine to ensure that the author did not frustrate the purpose of the copyright clause by unreasonably preventing others from using his work.[97] Under the interpretation of the copyright clause that the author is the instrument that will provide new knowledge, then, courts should find fair use only when the author's interest in protecting the value of his copyrighted work is unreasonable, given society's interest in access to and use

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supra note 17, at 1619. Furthermore, the prejudice that the present fair use doctrine causes to authors' rights affects the public because the authors will have less incentive to produce works of public interest. *Id.* at 1618.

89. *See* R. POSNER, REGULATION OF ADVERTISING BY THE FTC 3-10 (1973) (discussing need for regulation of advertising); L. SELTZER, *supra* note 4, at 21-23 (discussing ineffectiveness of Copyright Act in providing clear standards of enforcement).

90. *See supra* text accompanying notes 88-89 (discussing deficiencies in Copyright Act's codification of fair use); *infra* text accompanying notes 91-98 (same).

91. 3 M. NIMMER, *supra* note 23, § 13.05, at 13-57. The four factors of section 107 are not necessarily the only factors that a court may consider in the fair use context. *Id.; see* Cohen, *supra* note 47, at 53 (discussing other factors that courts have considered in fair use context). The two other factors that courts have included involve the user. Cohen, *supra* note 47, at 53. The first is the intent of the user, which involves the relative good faith of the defendant in using the copyrighted work without the author's consent. *See* Iowa State University v. American Broadcasting Co., 621 F.2d 57, 62 (2d Cir. 1980) (fair use holding bolstered by finding that defendant acted in bad faith). Another factor that courts have considered is the amount of effort the user added to the use, aside from the copied portions. *See* Warner Brothers, Inc. v. American Broadcasting Co., 720 F.2d 231, 242 (2d Cir. 1983) (allowing users to add own contributions to copyrighted work is in interests of creativity).

92. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 65-66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5679-80 (bill not intended to freeze fair use doctrine but to allow courts to apply it on case-by-case basis).

93. *Id.*

94. *See infra* notes 100 & 101 (discussing cases that considered author impediment to and not instrument of free flow of information).

95. Mazer v. Stein, 347 U.S. 201, 219 (1964).

96. *Id.; see supra* text accompanying notes 15-22 (discussing copyright clause).

97. *See supra* text accompanying notes 22-28 (discussing origins of fair use doctrine).

of new knowledge.[98] In determining whether an author is unreasonable, courts should not act to reduce the author's legitimate incentive to produce because the author remains the copyright clause's instrument to produce useful knowledge.[99] The commercial advertising fair use case law, however, views the author not as the instrument of society's access to new knowledge but as an impediment to societal access.[100] Under this rationale, courts misconceive the equities of the fair use doctrine to find fair use when the use promotes some societal interest, assuming that the author unreasonably prevented access to his copyrighted work only because the use promoted a public interest.[101] The present rationale, therefore, actually undermines the purpose of the copyright clause because the present rationale reduces the incentive to create by unfairly ignoring the author's legitimate interest in remuneration.[102]

Any test of fair use should consider the fair use question in economic terms because the basis of the copyright scheme is economic.[103] An author

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98. *See infra* text accompanying notes 108-38 (fair use test under correct conception of fair use doctrine).

99. *See* U.S. CONST. art. I, § 8, cl. 8. (Congress empowered to grant copyright protection to encourage author to produce new works).

100. *See* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1177 n.16 (5th Cir. 1980). In *Triangle*, the plaintiff, publisher of TV Guide magazine, sought to enjoin the defendant from using the covers of plaintiff's magazine in a comparative advertisement. *Id.* at 1172-73. In analyzing the defendant's fair use defense, the *Triangle* court found that the defendant's use did not cause a significant amount of harm to the value of the plaintiff's copyrighted work. *Id.* at 1177. The court stated, however, that the defendant's use did not harm plaintiff's copyrighted work because the plaintiff did not prove the harm. *Id.* at 1177 n.16. In other words, the court placed the burden on the copyright owner to prove economic harm to protect the copyright. *See id.*

101. *See* Consumers Union, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983). In *Consumers Union*, the plaintiff, Consumers Union, brought suit to enjoin the defendant, General Signal Corporation, from further use of Consumers Union's copyrighted material in defendant's television advertisements. *Id.* at 1046. In considering the defendant's fair use defense, the court noted that since Consumers Union's work was informational, the scope of fair use was greater because the risk of restraining the free flow of information was greater. *Id.* at 1050. The *Consumers Union* court's statement demonstrates the court's assumption that an author will be an impediment to societal access to copyrighted works. *See id.; see also* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966) (fair use doctrine broader when copyrighted work informational as greater assurance that information not restricted), *cert. denied*, 385 U.S. 1009 (1967).

102. *See* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966) (fair use based on point at which courts subordinate author's interest to society's), *cert. denied*, 385 U.S. 1009 (1967). By granting fair use when society's interest in access outweighs the author's interest in remuneration, courts are unfairly ignoring the author's legitimate interest in remuneration. Gordon, *supra* note 17, at 1615. An author's reasonable interest in remuneration reflects the legitimate value of the copyrighted work. *Id.* Value, however, is the aggregate consumer willingness to pay. R. POSNER, AN ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977). Consequently, when a court grants fair use because society's interest outweighs the author's, the court is denying the author the opportunity to sell the use at precisely the price society is willing to pay. Gordon, *supra* note 17, at 1615.

103. Mazer v. Stein, 347 U.S. 201, 219 (1954); *see* U.S. CONST. art. I., § 8, cl. 8.

is interested primarily in remuneration and a copyright fulfills that interest.[104] The fair use doctrine ensures that the author's interest in remuneration does not defeat society's interest in access to useful information.[105] Defined economically, the fair use doctrine ensures that an author does not frustrate the purpose of the copyright clause by demanding a price for use that is unreasonably higher than what society is willing to pay.[106]

The suggested fair use test, therefore, is a two step analysis.[107] A court should first determine the price an author expects from others for use of the author's copyrighted work.[108] A court should then determine the value that society places on the use.[109] If the author's price for a use is unreasonably higher than society's willingness to pay, then the court should find fair use because the author's interest in remuneration is defeating society's interest in access to useful information.[110]

In determining the price an author expects for use of his work, courts should examine the economic effect of the use on the copyrighted work.[111] The value of a copyrighted work decreases as use increases so an examination

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104. *Id.; see supra* note 17 and accompanying text (discussing "public goods" characteristic of writings).

105. *See supra* text accompanying notes 22-28 (discussing origins of fair use).

106. *See* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). Fair use balances the author's interest in remuneration with society's interest in access. *Id.* The author's copyright, however, grants the author monopolistic control over access. L. SELTZER, *supra* note 4, at 8; *see* 17 U.S.C. § 106 (1982) (copyright allows authors to control use). The danger of any monopolistic control is that the holder of the power may inflate the price for use. *See* R. POSNER, *supra* note 102, at 198-200 (discussing effect of monopolies on pricing). As a result of the artificially inflated price, however, the quantity demanded will decrease. *Id.* at 4-5. In terms of the copyright clause, the author's inflated price will mean that societal use will decrease. *See* Gordon, *supra* note 17, at 1614-15 (discussing effect of market failure on copyright system). The inflated price, therefore, defeats the purpose of the copyright clause to promote societal access to useful knowledge. *Id.; see* U.S. CONST., art. I, § 8, cl. 8. The correct value of any copyrighted work is the aggregate consumer willingness to pay for use of that work. Polinsky, *Economic Analysis As a Potentially Defective Product: A Buyer's Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655, 1679-81 (1974). When an author expects more for access than society is willing to pay, the author is defeating the constitutional purpose of the copyright clause and a court should find fair use. *See supra* note 23 (rationale of fair use doctrinej).

107. *See infra* text accompanying notes 108-110 (proposed fair use test).

108. *See infra* text accompanying notes 111-128 (discussing courts' examination of price author expects for use).

109. *See infra* text accompanying notes 130-144 (discussing court's examination of societal value of use).

110. *See supra* note 106 (discussing basis for economic test).

111. 3 M. NIMMER, *supra* note 23, § 13.05, at 13-65 (examination of effect of use on copyrighted work is examination of effect on market value of copyrighted work). The examination of the economic effect of the use on the copyrighted work reflects the author's price for use because the purpose of the copyright clause is to protect the author's interest in remuneration and the law assumes that the author will maximize his remuneration. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) (author will seek potential users to maximize profits); *supra* note 17 and accompanying text (one purpose of copyright is to ensure author's ability to obtain remuneration). The author, therefore, will charge a price that will reflect the corresponding decrease in market value of the work. *See* R. POSNER, *supra* note 107, at 4 (seller's price reflects opportunity cost).

of the economic effect of the use reflects the compensation an author should expect for the decreased value of the copyrighted work.[112] A court's examination of the economic effect of the use, however, should operate within certain guidelines to determine whether the price the author expects for use is reasonable.[113] Courts should distinguish between uses that expose deficiencies in or improve on the copyrighted work[114] and uses that merely serve as a substitute for the original work.[115] The price an author expects for a use that

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112. *See supra* note 111 (discussing economic effect reflecting price). In examining the economic effect of a use on the market value of the copyrighted work, courts should consider not only the effect of the particular use but also the effect of a fair use finding on the market value of the copyrighted work. 3 M. NIMMER, *supra* note 23, § 13.05, at 13-65. The majority of commercial advertising fair use cases consider only the effect of the particular use. *See supra* notes 76-81 and accompanying text (discussing cases applying limited interpretation of economic effect factor). A court examining the effect of only the particular use, however, does not gauge accurately the economic impact of the fair use finding. 3 M. NIMMER, *supra* note 23, § 13.05, at 13-66. A finding of fair use under a certain set of facts implies that a similar use in the future might also be fair use. *See* Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4,901) (finding defendant's use to be fair use destroys value of plaintiff's copyright and means others also may use).

The future effects of a fair use finding, therefore, might impair seriously the incentive factor necessary to achieve the purpose of the copyright clause. *Id.; see supra* text accompanying notes 15-18 (incentive from copyright protection promotes growth of knowledge). For example, in *Consumers Union, Inc. v. General Signal Corp.*, the plaintiff sought to enjoin the defendant's use of excerpts from plaintiff's consumer magazine in the defendant's advertising. 724 F.2d 1044, 1046-48 (2d Cir. 1983). The plaintiff, Consumers Union, argued that the defendant's use would decrease the market value of future issues of *Consumer Reports. Id.* at 1051. The Second Circuit, however, rejected Consumers Union's argument, stating that the economic effect factor focuses only on the effect of the use on the copyrighted work from which defendant copied. *Id.* Arguably, the Second Circuit misapplied the economic effect factor because the court failed to consider how the fair use finding would affect CU's incentive to publish its magazine. *See id.* In *Consumers Union* the defendant received favorable ratings from *Consumer Reports* and used the ratings in a television commercial. *Id.* at 1045-46. The Second Circuit's fair use finding, however, could undermine the economic efficacy of *Consumer Reports* since the court's finding implies that future similar uses are also fair uses. *Cf.* Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4,901) (finding in instant case of fair use implies future similar uses also fair and thus destroys value of copyright). The increased exploitation of future issues of *Consumer Reports*, however, would decrease the consumer's desire to purchase future issues of *Consumer Reports. See* Gordon, *supra* note 17, at 1611 (public goods characteristics of intellectual property cause underproduction without copyright protection because use not controllable); Demsetz, *supra* note 7, at 295 (defining public goods). As a result, public access to *Consumer Reports*, a consumer information magazine, will decrease, and consequently will defeat the purpose of the copyright clause. *See* U.S. CONST. art. I, § 8, cl. 8 (purpose of copyright clause to promote growth of useful information).

113. *See infra* text accompanying notes 114-130 (guidelines of proposed analysis of work's value to author).

114. *See* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1177 (5th Cir. 1980) (defendant's use of covers from plaintiff's copyrighted magazine in comparative advertisement demonstrating relative superiority of defendant's product does not harm copyrighted work within contemplation of economic effect factor); Sayre v. Moore, 102 Eng. Rep. 361, 362 (K.B. 1785) (defendant's use not unfair because defendant corrected mistakes in plaintiff's copyright work).

115. *See* Martin Luther King, Jr., Center for Social Change, Inc. v. American Heritage Products, Inc. 508 F. Supp. 854, 861 (N.D. Ga. 1981) (defendant's use of copyrighted speeches in

exposes deficiencies in the copyrighted work will always be unreasonable, or at least greater than the price an author should expect for the use.[116] Courts should measure the price an author should expect for a use by the extent a use affects adversely the market value of the author's work by exploiting the market value of the copyrighted work.[117] A use that exposes deficiencies in the author's work will affect adversely the market value of the work without exploiting the market value of the copyrighted work.[118] The use will reduce the original work's value by demonstrating the relative superiority of the user's work.[119] The author's price for such a use, therefore, will always be greater than what the author should expect for the use.[120] Similarly, the price an author expects for uses that improve on the original work will always be unreasonable because such uses also reduce the work's market value but by presenting a superior product to the public.[121] Furthermore, courts should not reject uses that expose deficiencies in or improve on the copyrighted work because rejecting such uses would defeat in two ways the purpose of the copyright clause to promote the growth of useful knowledge.[122] First, uses that demonstrate the relative superiority of the user's work promote the growth of useful knowledge.[123] Second, uses that demonstrate the superiority of the user's work encourage the author to improve on the original and thereby further promote the growth of useful knowledge.[124]

In contrast to uses that expose deficiencies in or improve on the copyrighted work, courts should accept as reasonable the price an author expects for uses

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commercial advertising intended only to promote defendant's own financial interests); D.C. Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979) (defendant's use of Superman character in advertisement not fair use because use unjustified appropriation for personal gain).

116. *See infra* text accompanying notes 117-120 (author's price for use that criticizes copyrighted works always unreasonable).

117. *See supra* text accompanying note 111 (effect of use reflects price author should expect for use).

118. *See* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1177 (5th Cir. 1980) (use that truthfully criticizes copyrighted work is not mere copy).

119. *See id.* (defendant's use intended to show superiority of defendant's television magazine).

120. *See supra* text accompanying note 117 (price author expects is extent of adverse economic effect of use). In considering what price to charge, an author will consider the economic effects of a use. *Id.* The author's price for use, however, may be larger than what the law allows because the author may consider economic effects that the law does not consider in determining the price an author should expect for use. *Id.; see* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1177 (5th Cir. 1980) (truthfully critical use affects work in way law does not consider adverse).

121. *See* Warner Bros., Inc. v. American Broadcasting Co., 720 F.2d 231, 242 (2d Cir. 1983) (denying fair use when use improves on copyrighted work defeats growth of creativity); *Cf. supra*, text accompanying notes 35-43 (mere copying rationale provides that mere copies add nothing to useful knowledge).

122. *See infra* text accompanying notes 123-24 (rejecting uses that improve on or expose deficiencies in copyrighted works defeats purpose of copyright clause).

123. *See* 16 C.F.R. § 14.15 (1983) (comparative advertising fosters products improvement and educates society).

124. *See* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1176 n.13 (comparative advertising promotes competition); R. POSNER, *supra* note 102, at 501 (competition promotes growth and benefits public).

that merely copy from the author's work.[125] The price an author expects for such uses is the price the author should expect because uses that merely copy from the original reduce the market value of the copyrighted work by exploiting the value of the author's work.[126] Furthermore, finding that the price an author expects for such uses is unreasonable undermines the purpose of the copyright.[127] Allowing users to copy from the author's work reduces the author's incentive to create because such uses substitute for the author's work in the market and thereby deny the author remuneration for his creative efforts.[128]

After a court determines the price an author should expect for a use, the court should determine the societal benefits of the use because the societal benefits reflect the amount society would pay for a particular use.[129] In determining the value of the use, a court should examine the informational character of the use because as a general rule, the societal value of a use increases as the informational value of the use increases.[130] In the commercial advertising context, the societal value of a use often may be quite different from the price an advertiser would pay for use of a copyrighted work.[131] Many uses have no informational value and thus no societal value but nonetheless are valuable to an advertiser because of the notoriety of the copyrighted work that the defendant uses in the advertisement.[132] Conversely, a use may be of great value

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125. *See infra* text accompanying notes 126-128 (author's price for uses that merely copy are always reasonable). Even though a court should assume that an author's price for a use that merely copies the author's work is reasonable, a court should allow the defendant to prove that the author's price is, for some other reason, inflated. *See* Gordon, *supra* note 17, at 1633. The author may have what one commentator calls the antidissemination motive. *Id.; see* Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966) (copyright owner purchased copyrights to deny any access to copyrighted work), *cert. denied*, 385 U.S. 1009 (1967). This antidissemination motive is unreasonable because the author's motive is not to obtain payment but only to deny the public access to information and therefore is directly contrary to the purpose of the copyright clause. Gordon, *supra* note 17, at 1633. The antidissemination motive is prevalent in parody, criticism, and potentially hostile works. *Id.* at 1632-35. The motive may occur, however, in connection with mere copying. *See* D.C. Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979) (plaintiff objected to defendant's use because of damage to reputation of copyrighted work). The court, therefore, should attempt to determine the legally recognizable adverse economic effects of the use. Gordon, *supra* note 17, at 1633.

126. *See* D.C. Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177, 1178 (S.D.N.Y. 1979) (defendant's use unjustified appropriation of notoriety of plaintiff's work); *supra* note 111 (price reflects economic effect of use on market value of copyrighted work).

127. *See supra* note 102 (denying author's legitimate interest in remuneration undermines purpose of copyright clause).

128. *Id.*

129. Polinsky, *supra* note 106, at 1679-81 (value is aggregate consumer willingness to pay).

130. *See* R. POSNER, *supra* note 102, at 29 (monetary value of resource reflects benefit to society); *see also* Consumers Union, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) (informational works are of significant public interest); Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938) (defendant's use solely for personal profit advances no public interest).

131. *See, e.g.*, D.C. Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177, 1177 (S.D.N.Y. 1979) (defendants used cartoon character in advertisement for video equipment store).

132. *See, e.g.*, Conde Nast Publications, Inc. v. Vogue School of Fasion Modelling, Inc.,

to society but of little value to an advertiser because the copyrighted work is relatively unknown.[133] In determining whether a use in commercial advertising is fair, however, courts should examine only the societal value of the use and not the value to the advertiser since only a determination of the societal value of a use determines whether a fair use finding promotes the growth of useful knowledge.[134] Consequently, the value of a use to the advertiser is not relevant in the fair use context.[135] Once a court determines whether a use has societal value, the court should decide whether the author expects more for use than he should, given the societal value of the use.[136] If the price the author expects is unreasonably greater than the societal value of the use, then the court should find fair use.[137] Application of the proposed two step analysis to commercial advertising would provide results more simply and consistently than in past commercial advertising fair use cases.[138]

Commercial advertising consists of two main groups, comparative and noncomparative.[139] Comparative advertising uses a competitor's copyrighted work to demonstrate the superiority of the user's product.[140] Noncomparative advertising exists in two varieties, the first of which is use without acknowledgement of the copyrighted work solely to exploit the notoriety of the copyrighted work to the user's advantage.[141] The other variety, noncomparative advertising with acknowledgement, uses the copyrighted work to promote the user's product but only because the copyrighted work promotes the user's product in some specific way.[142]

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105 F. Supp., 325, 326-27 (S.D.N.Y. 1952) (defendants used covers from *Vogue* magazine in advertisement for modeling school).

133. *See, e.g.*, Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 303 (E.D. Pa. 1938) (defendants used excerpts from plaintiff's book discussing human voice mechanism in cigarette advertisement).

134. R. POSNER, *supra* note 102, at 29 (monetary value of resource reflects benefit to society).

135. *See id.*

136. *See supra* note 106 (discussing basis of economic analysis test).

137. *Id.*

138. *Compare infra* text accompanying notes 143-154 (discussing per se rule of fair use with regard to particular advertising) *with supra* text accompanying notes 87-89 (inconsistency of present fair use doctrine).

139. *See infra* text accompanying notes 140-142 (defining types of commercial advertising).

140. *See* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1172 (5th Cir. 1980). In *Triangle*, the defendant's use was a comparative advertisement. *Id.* at 1172. The defendant in *Triangle* was the publisher of a local newspaper. *Id.* In several television commercials, the defendant discussed the relative merits of the television supplement accompanying the defendant's newspaper and the plaintiff's magazine, *TV Guide*. *Id.* at 1172-73.

141. *See* D.C. Comics, Inc. v. Crazy Eddie, Inc., 205 U.S.P.Q. 1177, 1177 (S.D.N.Y. 1979). In *D.C. Comics*, the defendant, a retailer of home video equipment, used the plaintiff's copyrighted comic book character in several advertisements for the defendant's store. *Id.* The *D.C. Comics* court held that the defendant's use was an unjustified appropriation of the plaintiff's copyrighted work for personal gain. *Id.*

142. *See* Consumers Union, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983). In *Consumers Union*, the defendant used excerpts from the plaintiff's magazine in a television commercial for the defendant's product. *Id.* The defendant acknowledged the source of information. *Id.*

The application of the proposed fair use test to commercial advertising would result in two per se rules of fair use.[143] First, under the proposed fair use test, the price a copyright owner would expect for use in a comparative advertisement will always be unreasonably higher than the value society places on the use, and therefore courts should always find that comparative advertising is fair use.[144] The price a copyright owner should expect for a use in comparative advertising is negligible because comparative advertising does not challenge the copyrighted product's market by taking advantange of the creative efforts of the copyright owner.[145] Instead, comparative advertising challenges the copyrighted product's market by demonstrating to the public the relative advantages of the user's product, and therefore the price an author will expect for the use will be unreasonable.[146] The finding of fair use will encourage the copyright owner to improve on the original and thereby further benefit the public even though allowing comparative advertising uses as fair uses temporarily may reduce the value of the copyrighted work.[147] Furthermore, a use in comparative advertising is of substantial societal value because compartative advertising helps consumers make more informed choices by presenting the relative virtues of competing products.[148] Under the proposed fair use test, therefore, the use of copyrighted material in comparative advertising is always fair use.[149]

In contrast to comparative advertising, courts should never find that noncomparative advertising without acknowledgement is fair use.[150] The price an author should expect for a use in noncomparative advertising would be substantial since the use merely exploits the copyrighted work's notoriety.[151] In other words, the use acts as a substitute in the marketplace for the copyrighted work.[152] Finally, the use has no societal value because the use provides no new information to the public.[153] Noncomparative advertising without

143. *See infra* text accompanying notes 143-154 (per se rules of fair use).

144. *See supra* text accompanying notes 108-110 (defining proposed fair use test).

145. *See* Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc., 626 F.2d 1171, 1177 (5th Cir. 1980) (comparative advertising harms copyrighted work in way not related to use of copyright but on market). Comparative advertising does not unfairly affect the market value of a copyrighted work since comparative advertising does not substitute itself for the copyrighted work. *See id.* A comparative advertisement is successful despite the copyrighted work because a comparative advertisement is an explanation of the relative advantages of the defendant's and plaintiff's products. *Id.*

146. *See id.*

147. *See id.* at 1176 n.13 (comparative advertising promotes competition); 16 C.F.R. § 14.15 (1983) (comparative advertising fosters product improvements).

148. *See* 16 C.F.R. § 14.15 (1983) (truthful comparative advertising benefits society by educating consumers of relative virtues of competing products).

149. *See supra* text accompanying notes 147-148 (inflated price for access and substantial public interest); *supra* text accompanying notes 108-110 (defining proposed fair use test).

150. *See infra* text accompanying notes 153-161 (per se rule against noncomparative advertising as fair use).

151. *See supra* note 141 (defining noncomparative advertising without acknowledgement).

152. *Id.; see supra* note 111 (explaining author's reasonable price for use).

153. *See supra* note 141 (defining noncomparative advertising without acknowledgement); *supra* note 112 (explaining societal value of use).

acknowledgement, therefore, is never fair use because the author's legitimate expectation in remuneration is always substantially greater than the societal value of the use.[154]

Noncomparative advertising with acknowledgement, adoptive advertising, is the most complex type of advertising with regard to the proposed fair use test.[155] Adoptive advertising with acknowledgement uses the copyrighted work to promote the user's product but only because the copyrighted work promotes the user's product in some way.[156] Adoptive advertising with acknowledgement can have a significant effect on the economic value of the copyrighted work since the advertising can act as a substitute for the copyrighted work.[157] This type of advertising, however, also provides the public with an unbiased opinion of the benefits of the user's product and thus helps consumers make a more informed choice in the market place.[158] Thus, both the author's legitimate expectation of remuneration and the societal value of the use are substantial.[159] Under the proposed fair use test, however, the presumption is in favor of the copyright owner as the copyright owner is the copyright clause's instrument in promoting the growth of useful knowledge.[160] Consequently, adoptive advertising with acknowledgement should never be fair use.[161]

Under the proposed fair use test, therefore, only comparative advertising should be fair use since allowing fair use for comparative advertising promotes societal access to useful information.[162] In contrast, noncomparative advertising should not be fair use because noncomparative advertising undermines the incentive of authors to create and thereby defeats the purpose of

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154. *See supra* notes 106-110 and accompanying text (defining proposed fair use test).

155. *See infra* text accompanying notes 157-59 (relative interests in noncomparative advertising with acknowledgement substantially similar).

156. *See* Consumers Union, Inc. v. General Signal Corp., 724 F.2d 1044, 1046-49 (2d Cir. 1983). In *Consumers Union*, the defendant used excerpts from the plaintiff's magazine, *Consumer Reports*, and acknowledged the source because *Consumer Reports* praised the defendant's product. *Id.*

157. *See id.* at 1047. In *Consumers Union*, the defendant used excerpts from the results of independent product testing in the plaintiff's magazine. *Id.* The sole purpose of the plaintiff's magazine, however, was to convey such information to the public. *Id.* The defendant's use, therefore, served as a substitute for the plaintiff's copyrighted work. *See id.*

158. *See id.* at 471 (defendant's use conveys valuable information to public).

159. *See supra* text accompanying notes 157-158 (economic effect and informational benefit of noncomparative advertising with acknowledgement); *supra* notes 111-124 (economic effect and informational benefit determine author's legitimate interest in remuneration and societal value of use).

160. *See supra* text accompanying notes 98-99 (proposed fair use test views author as instrument to achieve purpose of copyright clause).

161. *Id.* Noncomparative advertising should not be fair use because the author's incentives to produce new works would decrease if a court allowed a use that substituted for the copyrighted work in the market. *See supra* note 111 (author's interest in remuneration reflects anticipation of decreased value); *supra* text accompanying notes 16-18 (decreased valuation reduces author's incentive to produce new works).

162. *See supra* notes 145-148 and accompanying text (analyzing comparative advertising as fair use).

copyrights.[163] The proposed fair use test, therefore, simplifies and stabilizes[164] the law of fair use by proposing a less complex, more economically based test of fair use.[165] Furthermore, the proposed fair use test is more equitable than the present fair use case law in that the test considers authors instruments of, and not impediments to, the copyright clause.[166] As a result, the proposed fair use test would ensure the constitutional purpose of the copyright clause to promote the growth of useful knowledge while also accomodating the interests of copyright owners.[167]

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163. *See supra* notes 150-161 and accompanying text (discussing noncomparative advertising under proposed test).

164. *Compare supra* text accompanying notes 90-93 (instability of present fair use doctrine) *with supra* text accompanying 149-150 (per se fair use rules under proposed test).

165. *See supra* text accompanying notes 103-138 (economic basis of proposed fair use test).

166. *See supra* text accompanying notes 103-110 (authors' equities protected under proposed fair use test).

167. *See supra* note 106 (proposed fair use test ensures constitutional purpose of copyright).