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## The Good, the Bad, and the Ugly: Incorporating the Good or Bad Faith Consideration into the Fair Use Analysis

Alec Peden

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# The Good, the Bad, and the Ugly: Incorporating the Good or Bad Faith Consideration into the Fair Use Analysis

Alec Peden\*

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I. INTRODUCTION

On November 22, 1963, Lee Harvey Oswald assassinated President John F. Kennedy (JFK)—shocking the nation.<sup>1</sup> At the time of the fatal shooting, Abraham Zapruder filmed the JFK motorcade with his camera.<sup>2</sup> Zapruder unintentionally filmed the moments leading up to, during, and after JFK’s assassination.<sup>3</sup> A few days after the murder, Zapruder sold the film rights to Life Magazine (Life).<sup>4</sup>

Life obtained the copyright to the film and subsequently directed the National Archives to show the photos to researchers for only non-commercial use.<sup>5</sup> Thompson, an employee at Life, entered into a contract with Bernard Geis Associates (Bernard Geis) to write a book about the assassination.<sup>6</sup> Thompson made unauthorized copies of the footage by photographing certain frames of the video Zapruder had captured.<sup>7</sup> Soon after Thompson copied the photos, Thompson ended his employment with Life and sought permission from Life to use the illegally copied photos.<sup>8</sup> Life subsequently denied multiple requests by Bernard

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1. *See Assassination of John F. Kennedy*, HISTORY (June 14, 2019), <https://www.history.com/topics/us-presidents/jfk-assassination> (on file with the *University of the Pacific Law Review*) (describing how President John F. Kennedy was shot and killed while riding in a car in Dallas Texas); *see also* *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 131 (S.D.N.Y. 1968) (highlighting how President John F. Kennedy was assassinated while participating in a Texas motorcade).

2. *See Time Inc.*, 293 F. Supp. at 131 (describing how Abraham Zapruder unintentionally filmed the assassination of President John F. Kennedy).

3. *Id.* at 131. *See generally* Alex Pasternack, *The Other Shooter: The Saddest and Most Expensive 26 Seconds of Amateur Film Ever Made*, VICE (Nov. 22, 2012), <https://www.vice.com/en/article/3dddx5/the-other-shooter-the-saddest-and-most-expensive-26-seconds-of-amateur-film-ever-made> (on file with the *University of the Pacific Law Review*) (elaborating on how Abraham Zapruder used an 8mm camera that captured 486 frames within 26.6 seconds).

4. *Time Inc.*, 293 F. Supp. at 131. *See generally* Ron Rosenbaum, *What Does the Zapruder Film Really Tell Us?*, SMITHSONIAN MAG. (Oct. 2013), <https://www.smithsonianmag.com/history/what-does-the-zapruder-film-really-tell-us-14194/> (on file with the *University of the Pacific Law Review*) (describing how Zapruder sold the film footage to Life for 150,000 dollars); *see also* *Calculate the Value of 150,000 Dollars in 1963*, DOLLAR TIMES (2022), <https://www.dollartimes.com/inflation/inflation.php?amount=150000&year=1963> (on file with the *University of the Pacific Law Review*) (calculating \$150,000 in 1963 to be over \$1 million in 2022).

5. *See Time Inc.*, 293 F. Supp. at 134–35 (explaining how Life had explicitly told the National Archives that researchers could use the footage only for research).

6. *Id.* at 135.

7. *Id.* at 136; *See generally* Pasternack, *supra* note 3 (describing how frame 313 specifically showed the moment when Oswald inflicted the fatal headshot on President Kennedy).

8. *Time Inc.*, 293 F. Supp. at 137.

Geis to use the footage.<sup>9</sup> Despite this denial, Thompson authored a book that included numerous frames of the Zapruder film.<sup>10</sup> Life sued Thompson and Bernard Geis for the infringement of the copyrighted photos.<sup>11</sup> The Southern District Court of New York granted summary judgment in favor of Thompson and Bernard Geis.<sup>12</sup> Thompson and Bernard Geis claimed a fair use defense; which is a defense courts consider for alleged copyright infringements.<sup>13</sup> The court refused to consider Thompson's bad faith because it felt the consideration was irrelevant in a fair use analysis in this case.<sup>14</sup>

This case highlights a common problem for United States courts—the inconsistent application of the fair use standard.<sup>15</sup> In the United States, authors and other creators have an exclusive right to use their creative works.<sup>16</sup> Individuals who violate a creator's copyright may have a defense if the court determines their utilization of the copyrighted material falls under fair use.<sup>17</sup> However, courts inconsistently apply the fair use standard.<sup>18</sup> The fair use defense gives judges broad discretion in deciding cases.<sup>19</sup> This inconsistent application is likely due to the statute's vague language and emphasis on a fact-specific analysis.<sup>20</sup>

In the fair use analysis, judges consider four factors when determining if the fair use defense applies.<sup>21</sup> If the fair use defense applies, then the court will dismiss the suit in the defendant's favor.<sup>22</sup> These factors include the purpose and character of the use, nature of the work, amount and substantiality of the portion used, and

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9. *Id.* at 137–38.

10. *Id.* at 138–39.

11. *Id.* at 132.

12. *Id.* at 146.

13. *Time Inc.*, 293 F. Supp. at 146.

14. *See id.* (highlighting how the court argued that the illicit activities of the defendant were not relevant in the analysis).

15. *See* *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1204 (2021) (expressing skepticism with the good or bad faith consideration). *But see* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994) (highlighting how the good or bad faith consideration is not central to the fair use analysis).

16. *See generally* ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS, AND TRADEMARKS* 39–74 (1st ed. 2003) (detailing how copyright protection extends to many creative pieces including photos, literary pieces, videos, drawings/paintings, computer programs, and sound recordings).

17. *Id.*; *see also* *Campbell*, 510 U.S. at 594 (finding that the defendant's parody rap song fell under fair use). *But see* *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 842–43 (Fed. Cir. 1992) (“[F]air use of copyrighted work . . . is not infringement.”).

18. *See* *Google LLC*, 141 S. Ct. at 1204 (expressing skepticism with how to apply the good or bad faith consideration in the fair use analysis). *But see* *Campbell*, 510 U.S. at 585 (highlighting how the good or bad faith consideration is not central to a fair use analysis); *see also* *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 540 (1985) (utilizing the good or bad faith consideration in the first factor in the fair use analysis).

19. *See* Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 161 (2017) (explaining how the open-ended nature of fair use allows judges to be flexible in analyzing the fair use defense therefore allowing it to adapt to different cases and changing circumstances).

20. Lewis Hyde, *Freedom to Teach: Claiming Educational Fair Use*, HARVARD (July 2, 2018), <https://cyber.harvard.edu/research/freedomtoteach> (on file with the *University of the Pacific Law Review*).

21. *See* SCHECHTER, *supra* note 16, at 214 (explaining how there are four factors in the fair use analysis).

22. *See id.* (explaining how fair use is a defense to copyright infringements).

effect on the market.<sup>23</sup> One prevalent issue is the court’s use of a defendant’s good or bad faith when reviewing the first factor in the fair use analysis—the purpose and character of the use.<sup>24</sup>

This Comment proposes courts should always consider the good or bad faith of a defendant.<sup>25</sup> Judges should attempt to determine if the defending party had a subjective belief that their use of the copyrighted work was fair use through the defendant’s conduct.<sup>26</sup> Part II discusses the development of copyright law and the fair use analysis.<sup>27</sup> Part III addresses how the Supreme Court has inconsistently applied the good or bad faith consideration.<sup>28</sup> Part IV addresses the varying definitions of good or bad faith that the courts have adopted.<sup>29</sup> Part V proposes an analysis of how judges should review good or bad faith and analyzes how this will work in a real-life scenario.<sup>30</sup>

## II. BACKGROUND AND OVERVIEW OF COPYRIGHT AND FAIR USE

Throughout United States’ history, both case law and statutes have developed the fair use standard and copyright law.<sup>31</sup> Section A discusses the development of copyright law and the fair use standard.<sup>32</sup> Section B explains the current fair use standard as articulated by the Supreme Court.<sup>33</sup>

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23. *Id.* at 218–31.

24. *See id.* at 217 (describing how some but not all courts look to a defendant’s good or bad faith when looking at the fair use analysis).

25. *See infra* Part V (arguing that judges should always be considering the good or bad faith of a defendant when analyzing the first factor of fair use); *see also Campbell*, 510 U.S. at 585 (defining good faith to be when a party believes that their use of copyrighted material is fair). *But see* SCHECHTER, *supra* note 16, at 217 (describing the problem of how judges are inconsistent with considering the good or bad faith of defendants when looking to the fair use standard).

26. *See Infra* Part V (providing a definition for good or bad faith); *see also Campbell*, 510 U.S. at 586 (looking at a party’s belief to determine whether they acted in good or bad faith but ruling that good faith does not presuppose fair use).

27. *Infra* Part II; *see also* SCHECHTER, *supra* note 16, at 213–14 (explaining how the fair use defense started as a judicial ruling but later developed into statutory law in the Copyright Act of 1976).

28. *Infra* Part III.

29. *Infra* Part IV.

30. *Infra* Part V.

31. *See Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (laying out the language which legislatures would later use in the Copyright Act of 1976); *see also* L. Ray Patterson, *Folsom v. Marsh and Its Legacy*, 5 J. INTEL. PROP. L. 431, 431 (1998) (explaining how the case of *Folsom v. Marsh* supplied the statutory language for modern-day fair use law).

32. *Infra* Section II.A.

33. *Infra* Section II.B.

A. Development of Modern Copyright Law and the Fair Use Standard

Modern copyright law and the fair use standard are both statutory creatures and the products of case law.<sup>34</sup> The case of *Folsom v. Marsh* provided legislators with a framework for modern-day copyright law and the fair use standard.<sup>35</sup> Congress would later codify the language from this case in the Copyright Act of 1976—also creating the fair use defense for copyright claims.<sup>36</sup> Subsection 1 discusses the historical case of *Folsom v. Marsh* and how it helped lead to the development of modern copyright law.<sup>37</sup> Subsection 2 discusses the Copyright Act of 1976 and current copyright law.<sup>38</sup>

1. *Folsom v. Marsh: The Historical Prelude to Modern Copyright Law*

In *Folsom v. Marsh*, Jared Sparks compiled a collection of President George Washington's written works.<sup>39</sup> After, Charles Upham published a similar collection; plagiarizing almost half of Sparks' work.<sup>40</sup> Sparks sued Upham for infringement of his copyright.<sup>41</sup> Upham argued that George Washington's written works were not subject to copyright.<sup>42</sup>

The Court held Upham's use of the material was unfair, and Upham had violated Sparks' copyright.<sup>43</sup> The Court reasoned that judges should analyze the nature of the copyrighted objects, the quantity of the materials used, and the effect of the copied piece on sales.<sup>44</sup> This holding, although seemingly innocuous, would

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34. See *Folsom*, 9 F. Cas. at 348 (explaining the now modern-day fair use language); see also Patterson, *supra* note 31, at 431 (describing how the legislature drafted the Copyright Act of 1976 using the language that *Folsom v. Marsh* provided); see also Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541 (1976) (providing the statutory language of the fair use standard).

35. See *Folsom*, 9 F. Cas. at 348 (laying out the main factors that judges should consider in a fair use analysis).

36. See Patterson, *supra* note 31, at 449 (describing how the case of *Folsom v. Marsh* provided the framework for the Copyright Act of 1976 and the fair use analysis); see also SCHECHTER, *supra* note 16, at 213.

37. *Infra* Subsection II.A.1.

38. *Infra* Subsection II.A.2.

39. See Patterson, *supra* note 31, at 432–33 (stating that how the plaintiff had compiled over 7,000 pages of the written works of George Washington).

40. *Folsom*, 9 F. Cas. at 345.

41. See *Folsom*, 9 F. Cas. at 342 (explaining how the plaintiffs which include Jared Sparks, and his publishers sued the defendants which include Charles Upham and his publishers under a bill in equity); see generally *Bill of Equity*, Black's Law Dictionary (11th ed. 2019) (defining a bill of equity as a pleading where a plaintiff seeks equitable relief).

42. See *Folsom*, 9 F. Cas. at 345 (describing multiple arguments as to why the Court should not subject the material to copyright).

43. See *Folsom*, 9 F. Cas. at 348 (providing a 4-factor analysis which would later be the codified fair use defense).

44. See *Folsom*, 9 F. Cas. at 348 (“In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.”).

eventually provide the foundation upon which legislators built modern-day copyright law.<sup>45</sup> Not only did *Folsom v. Marsh* provide the language for modern-day fair use, but it also expanded copyright infringement to include plagiarism.<sup>46</sup>

## 2. *The Copyright Act of 1976*

The Copyright Act of 1976 governs modern-day copyright law in the United States.<sup>47</sup> Courts consider an author's creative piece, which can include a variety of forms, copyrighted material as soon as the author puts the material in a tangible form.<sup>48</sup>

Tangible forms include film, sheet music, books, or any other tangible medium.<sup>49</sup> Authors do not have to register their work for courts to protect it.<sup>50</sup> However, registration is necessary for an author to maintain a public record of the copyright and initiate an infringement lawsuit.<sup>51</sup>

Copyright registration is not permanent.<sup>52</sup> The term length of copyright registration has gradually changed throughout United States' history.<sup>53</sup> Today, copyright registration lasts for the creator's life plus 70 years after their death.<sup>54</sup> Once the term of the copyright registration expires, courts allow the general public to use the work.<sup>55</sup> At this time, the public can use works in the public domain

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45. See Patterson, *supra* note 31, at 431 (describing how *Folsom v. Marsh* provided what is now the fair use standard in copyright law).

46. See Patterson, *supra* note 31, at 446 (highlighting how the decision expanded copyright protection to protect authors from others trying to copy their literary works).

47. See *Copyright Law of the United States*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/title17/> (last visited Oct. 29, 2021) (on file with the *University of the Pacific Law Review*) (explaining how the Copyright Act of 1976 is the modern-day framework for copyright); see also Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541 (1976) (providing the 4-factor analysis for the fair use standard).

48. See Copyright Basics, COPYRIGHT SOC'Y OF THE U.S., <https://www.copyright.com/page/Basics#cb8> (last visited Oct. 22, 2021) (on file with the *University of the Pacific Law Review*) (describing how the copyright act of 1976 includes as tangible copyrighted materials: literary works; movies; paintings; photographs; etc.).

49. See *id.* (describing the different tangible forms that piece of art can take).

50. See *id.* (explaining how copyright protection does not require registration, but there are benefits to registering a copyright).

51. See *id.* (analyzing how there are benefits, such as the ability for an author to pursue damages for copyright infringement, for an author to register their copyright).

52. See *id.* (describing how a copyright license will last the creator's lifetime plus 70 years).

53. See *id.* (explaining how the term length of a copyright registration has increased throughout the years).

54. COPYRIGHT SOC'Y OF THE U.S., *supra* note 48.

55. *Id.*; see also *The Hottest Public Domain Properties for Writers*, HUFFINGTON POST, [https://www.huffpost.com/entry/the-hottest-public-domain-properties-for-writers\\_b\\_5a341656e4b0e7f1200cfa95?msclkid=ceedc071c01511ecb240a928f46e8208](https://www.huffpost.com/entry/the-hottest-public-domain-properties-for-writers_b_5a341656e4b0e7f1200cfa95?msclkid=ceedc071c01511ecb240a928f46e8208) (last updated Jan. 1, 2018) (on file with the *University of the Pacific Law Review*) (providing examples of popular literary works in the public domain including Sherlock Holmes, The Wizard of Oz, and The Phantom of the Opera).

without risking litigation.<sup>56</sup> Along with codifying many statutory copyright provisions, the Copyright Act of 1976 also codified the common law fair use standard.<sup>57</sup>

### *B. The Fair Use Standard*

Fair use is a defense parties may assert when copyright holders sue them for infringement.<sup>58</sup> This defense is a standard as opposed to a rule.<sup>59</sup> A standard gives more discretionary power to judges because it allows them to decide if a legal consequence will apply based on the specific facts in the case.<sup>60</sup> If a court deems the party's use of the copyrighted material meets fair use, the court will allow the party to use the material legally.<sup>61</sup> The rule contains established preconditions that if met; will lead to a legal consequence.<sup>62</sup> As a legal standard, judges analyze fair use and the validity of the defense using the four-factor analysis Congress codified.<sup>63</sup>

The first factor in the fair use analysis considers the purpose and nature of the copied work.<sup>64</sup> This factor observes how the defendant attempted to use the work and if the defendant added any creative value.<sup>65</sup> Although the Copyright Act of 1976 lists several examples of uses that satisfy this prong of fair use, the list is not exhaustive.<sup>66</sup> Under this factor, courts also consider if the use is for non-profit or commercial use.<sup>67</sup> Finally, some courts consider the good or bad faith of the defendant.<sup>68</sup>

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56. COPYRIGHT SOC'Y OF THE U.S., *supra* note 48.

57. *Id.*

58. See SCHECHTER, *supra* note 16, at 213 (describing how the fair use defense provides some "breathing room" in the copyright system).

59. Elkin-Koren & Fischman-Afori, *supra* note 19, at 161.

60. See *id.* at 167 (highlighting how a legal standard allows judges to set the preconditions for legal consequences as opposed to applying preconditions that another judge or the legislator has laid out).

61. See SCHECHTER, *supra* note 16, at 214 (defining fair use as a doctrine which provides "breathing space" within the field of copyright law).

62. See Elkin-Koren & Fischman-Afori, *supra* note 19, at 167 (elucidating the difference between standards and rules).

63. See SCHECHTER, *supra* note 16, at 216–14 (explaining how the fair use defense is an "equitable rule of reason" which requires judges to look at the specific facts of the case to make a ruling).

64. SCHECHTER, *supra* note 16, at 216–18.

65. See *id.* at 219 (listing out several items that may add creative value, including: news reporting; teaching; scholarship; etc.).

66. See *id.* at 218 (highlighting how an activity appearing or not appearing on the list does not guarantee that it will pass or fail the first factor in the fair use analysis).

67. *Id.* at 220.

68. See *id.* at 217 (explaining how some courts have used the bad faith of the defendant as justification for denying the fair use standard); see also *infra* Section V.A (arguing that courts should apply the good or bad faith consideration in the fair use analysis by looking at if a party had the genuine belief that their use of the copyrighted work fell under fair use).



The second factor considers the nature of the copied work.<sup>69</sup> Generally, the more unique the new derivative work is; the more likely a judge may deem the work as fair use.<sup>70</sup> Finally, this factor favors works reproducing already published works in contrast to works authors have not yet published.<sup>71</sup>

The third factor in the fair use analysis is the amount and substantiality of the work used.<sup>72</sup> Courts are more likely to deem a work fair use if it is a shorter use of the work than a comprehensive reproduction.<sup>73</sup> This factor examines the significance of the portion of the work individuals reproduce.<sup>74</sup>

The final enumerated factor in the fair use analysis surveys the effect upon the potential market.<sup>75</sup> Judges review whether the defendant's use of the material harms the future revenue of the original author's work.<sup>76</sup> Although Congress added these factors into the Copyright Act of 1976, the Legislature left the fair use analysis open for judicial interpretation.<sup>77</sup> Courts, in particular the Supreme Court, have inconsistently applied the good or bad faith consideration in their fair use analysis.<sup>79</sup>

### III. INCONSISTENT APPLICATION OF THE GOOD OR BAD FAITH CONSIDERATION BY THE SUPREME COURT

The Supreme Court has inconsistently applied the good or bad faith consideration.<sup>80</sup> In some cases, the Supreme Court expressed skepticism of the good or bad faith consideration, while it encouraged its use in other cases.<sup>81</sup> Section

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69. SCHECHTER, *supra* note 16, at 224.

70. *See id.* (explaining how creative works tend to transform the nature of the original copyright piece).

71. *See id.* at 225–26 (explaining how authors of unpublished works have not received compensation for their works, therefore they are more damaged by defendants reproducing their work).

72. *Id.* at 226.

73. *See id.* (discussing how judges are more likely to award fair use to shorter reproductions that only copy a relatively smaller portion of the work).

74. *See id.* at 226–27 (highlighting how if a defendant takes a small but critical piece of the plaintiff's work, then the court may find this factor in favor of the plaintiff).

75. U.S. COPYRIGHT OFF., *supra* note 47 (on file with the *University of the Pacific Law Review*).

76. *Id.*

77. *See* Copyright Act of 1976, Pub. L. No. 94-553, § 107, 90 Stat. 2541 (1976) (providing the statutory language for the fair use standard); *see also* SCHECHTER, *supra* note 16, at 217 (explaining how multiple judges will refer to other considerations than the ones specifically mentioned in the statute).

78. *See* SCHECHTER, *supra* note 16, at 217 (describing how some judges will consider bad faith to fair use while others will not).

79. *See* *Harper & Row Publishers, Inc.*, 471 U.S. at 564 (arguing that judges should use the good or bad faith analysis when looking at the fair use analysis). *But see* *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1204 (expressing skepticism with the bad faith consideration in the fair use analysis).

80. *See id.* at 1204 (explaining how the court system should be skeptical of the bad faith consideration in the fair use analysis); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (explaining the judge did not value considering faith of infringer). *But see* *Harper & Row Publishers, Inc.*, 471 U.S. at 540 (showing how the good or bad faith consideration is a critical aspect of the fair use analysis).

81. *See* *Harper & Row Publishers, Inc.*, 471 U.S. at 540 (providing an example for when the Supreme Court considered the good faith of the defendant when applying the fair use standard). *But see* *Google LLC*, 141

A discusses *Harper & Rowe, Publishers, Inc. v. Nation Enterprises*, where the Supreme Court considered the defendant's bad faith in the fair use analysis.<sup>82</sup> Section B discusses *Google LLC v. Oracle America, Inc.*, where the Supreme Court expressed skepticism of the good or bad faith consideration.<sup>83</sup>

A. Harper & Row, Publishers Inc. v. Nation Enterprises: *The U.S. Supreme Court Analyzes Good or Bad Faith*

In *Harper & Rowe*, President Gerald Ford gave Harper and Rowe Publishers (Harper and Rowe) permission to publish his unwritten memoirs.<sup>84</sup> As President Ford completed his memoirs, Harper and Rowe contracted with Time Magazine (Time) to publish an article using parts of the memoirs.<sup>85</sup> However, before the article's release, an unknown source provided The Nation Magazine ("The Nation") with Ford's unpublished manuscript.<sup>86</sup> The Nation then published an article using the manuscript.<sup>87</sup> Time canceled its contract with Harper and Rowe afterwards and refused to pay the remainder of the money.<sup>88</sup> Harper and Rowe then sued The Nation for copyright infringement.<sup>89</sup>

The Court held The Nation's use of the material did not fall under the fair use defense.<sup>90</sup> When analyzing the first factor of the fair use analysis, the Court explicitly looked to The Nation's bad faith.<sup>91</sup> The Court held The Nation's reproduction had the deliberate effect and the explicit purpose of displacing Harper and Rowe's copyright.<sup>92</sup> Therefore, the first factor did not favor The Nation.<sup>93</sup>

The Supreme Court explicitly considered the defendant's bad faith when analyzing the first factor of fair use in *Harper & Rowe*.<sup>94</sup> The Court concluded that since The Nation used the copyrighted material to supplant Harper and Rowe's

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S. Ct. at 1204 (showing a situation where the Supreme Court expressed skepticism with looking toward the good or bad faith of the defendant when applying the fair use analysis).

82. *Infra* Section III.A.

83. *Infra* Section III.B.

84. *Harper & Row Publishers, Inc.*, 471 U.S. at 539.

85. *See id.* (explaining how Time Magazine agreed to pay the Plaintiffs \$25,000 for the right to use part of the memoir).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Harper & Row Publishers, Inc.*, 471 U.S. at 540.

91. *See id.* at 564 (explaining how a crucial factor is the faith of a defendant in a fair use analysis because "fair use presupposes good faith").

92. *Id.* at 564 (highlighting how the Nation used the copyrighted material to avoid paying licensing fees and to profit off the work).

93. *See id.* ("A use that so clearly infringes the copyright holder's interests in confidentiality and creative control is difficult to characterize as 'fair.'").

94. *See id.* (explaining how fair use necessitates a defendant's good faith). *But see Campbell*, 510 U.S. at 585 (choosing to not consider the good faith of a defendant in their fair use analysis).

copyright, The Nation acted in bad faith.<sup>95</sup> The Court did not grant the fair use defense due to The Nation's conduct.<sup>96</sup> However, the Supreme Court has inconsistently applied this consideration to cases where a defendant has asserted the fair use defense.<sup>97</sup>

*B. Google LLC v. Oracle America, Inc.: The U.S. Supreme Court Expresses Skepticism Toward Incorporating Good or Bad Faith into the Fair Use Analysis*

Oracle America, Inc. (Oracle) owned a copyright for a computer software language known as Java.<sup>98</sup> Google LLC (Google) copied around 11,500 lines of computer code from Java to allow programmers to work with Google's new Android program.<sup>99</sup> Oracle sued Google for infringement of its copyright.<sup>100</sup>

When deciding whether Google's use of the code was fair use, the Supreme Court expressed skepticism towards considering the bad faith of the defendant.<sup>101</sup> The Supreme Court felt fair use should not be exclusive to "well-behaved" parties.<sup>102</sup> However, the Supreme Court did not elaborate on the definition of well-behaved.<sup>103</sup> This case shows a departure from the use of the good or bad faith consideration in *Harper & Row Publishers Inc.*<sup>104</sup> These cases highlight how the Supreme Court inconsistently applies the good or bad faith consideration in the fair use analysis.<sup>105</sup>

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95. *Id.* at 540.

96. *See id.* (explaining how Nation had the purpose to supplant the copyright of Harper & Row).

97. *See Google LLC*, 141 S. Ct. at 1204 (describing how the Supreme Court was skeptical with applying the bad faith consideration).

98. *Id.* at 1190.

99. *Id.* at 1204.

100. *Id.* at 1194.

101. *See id.* at 1204 (explaining how the Supreme Court was skeptical with the bad faith consideration, but the Supreme Court did not condemn it).

102. *Id.* ("[C]opyright is not a privilege reserved for the well-behaved.").

103. *See id.* (showing the Court mentioned "well-behaved" regarding good faith, but not defining well-behaved).

104. *See Harper & Row Publishers, Inc.*, 471 U.S. at 562 (analyzing the good or bad faith of a defendant in the fair use analysis). *But see Google LLC*, 141 S. Ct. at 1204 (arguing that the Supreme Court should be skeptical when using the good or bad faith consideration in the fair use analysis).

105. *See Harper & Row Publishers, Inc.*, 471 U.S. at 540 (using the good or bad faith consideration in the fair use analysis). *But see Campbell*, 510 U.S. at 585 (explaining how the good faith consideration should not be critical in the fair use analysis); *see also Harper & Row Publishers, Inc.*, 471 U.S. at 540 (highlighting skepticism with, but not condemning the use of, the good/bad consideration in the fair use analysis).

#### IV. VARYING DEFINITIONS OF GOOD OR BAD FAITH

The Supreme Court has inconsistently applied the consideration of a defendant's faith.<sup>106</sup> Over the next decade, many courts—including the Supreme Court—have provided varying definitions of what constitutes good or bad faith.<sup>107</sup> Section A addresses the court's very narrow definition of good or bad faith in *Atari Games Corp. v. Nintendo of America Inc.*<sup>108</sup> Section B discusses *Campbell v. Acuff-Rose Music, Inc.*, where the Supreme Court provided a broader definition of good or bad faith.<sup>109</sup>

##### A. Atari Games Corp. v. Nintendo of America Inc.: A Narrow Definition

In *Atari Games Corp. v. Nintendo of America Inc.*, Atari Games Corporation (Atari) sued Nintendo of America (Nintendo) for various claims, including antitrust violations.<sup>110</sup> Nintendo countersued Atari for copyright violations.<sup>111</sup> The controversy began when Nintendo made and marketed the Nintendo Entertainment System (NES).<sup>112</sup> This system allowed individuals to play video games using a remote control and gaming cartridge from their television sets.<sup>113</sup> NES included a program called 10NES which prevented NES from accepting unauthorized game cartridges.<sup>114</sup> Atari attempted to replicate the code for this program, yet was unsuccessful.<sup>115</sup> Atari eventually purchased a license from Nintendo to gain access to NES, but the license strictly limited Atari's access to 10NES.<sup>116</sup>

Consequently, Atari applied for a reproduction copy of the 10NES program from the United States Copyright Office.<sup>117</sup> In the application, Atari falsely claimed to be a defendant in a lawsuit and needed the code to defend itself in the lawsuit.<sup>118</sup> The Copyright Office—believing Atari's misrepresentation—provided

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106. See *Campbell*, 510 U.S. at 585 (defining good or bad faith to include whether the copyright infringer held a genuine belief about if their utilization of the piece was fair use). *But see* *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 843 (Fed. Cir. 1992) (explaining how the fair use defense requires the alleged infringer to have an authorized copy of the work in order to be acting in good faith).

107. See *Campbell*, 510 U.S. at 585 (providing a broad definition of good or bad faith which requires a party to have the genuine belief that their use of the work was fair). *But see* *Atari Games Corp.*, 975 F.2d at 843 (requiring a party to obtain an authorized copy of the work in order to act in good faith).

108. *Infra* Section IV.A.

109. *Infra* Section IV.B.

110. *Atari Games Corp.*, 975 F.2d at 835.

111. *Id.*

112. *Id.* (illustrating how Atari initially sued Nintendo and Nintendo filed a counterclaim against Atari for copyright infringement).

113. *Id.*

114. *Id.* at 836.

115. *Id.*

116. *Atari Games Corp.*, 975 F.2d at 836.

117. *Id.*

118. See *id.* (highlighting the process Atari went through to gain an unauthorized copy of the copyrighted work).

Atari with the copy.<sup>119</sup> Atari then used this copy to create its own version of the 10NES.<sup>120</sup> After this misrepresentation, Atari sued Nintendo for antitrust violations, which Nintendo countersued for copyright infringement.<sup>121</sup>

Atari claimed multiple defenses in the countersuit for copyright infringement, including fair use.<sup>122</sup> The Federal Circuit Court held Atari must have acted in good faith for the fair use defense to apply.<sup>123</sup> However, since Atari gained a copy of the code through its misrepresentation to the Copyright Office, it was not an authorized copy.<sup>124</sup> The court found that because Atari did not have an authorized copy, it did not act in good faith.<sup>125</sup> The court concluded the fair use defense could not protect Atari's unauthorized copying of the code even though it obtained the code from the U.S. Copyright Office.<sup>126</sup>

Atari made a misrepresentation to gain a copy of the code.<sup>127</sup> Therefore, the company did not act in good faith when obtaining the copy; consequently, the court found the copy was unauthorized.<sup>128</sup> Atari's misrepresentation highlights that lying to gain use of copyrighted materials indicates bad faith, which can later exclude a fair use defense.<sup>129</sup> This case provided the following narrow definition of good faith: for a defendant to act in good faith, they must obtain an authorized copy through legal means without misrepresentation.<sup>130</sup> In contrast to this narrow definition, other courts have provided broader definitions of good or bad faith.<sup>131</sup>

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119. *Id.*

120. *Id.*

121. *Atari Games Corp.*, 975 F.2d at 837.

122. *See id.* at 842 (laying out the court's fair use analysis).

123. *See id.* at 842–43 (explaining how fair use presupposes good faith).

124. *See id.* at 842 (explaining how fair use cannot apply to the copying of the Copyright Office copy of the code, because Atari did not have an authorized copy).

125. *See id.* (describing how Atari did not have an authorized copy of the code, therefore fair use could not apply to the copying of the code).

126. *Id.* at 843.

127. *See id.* at 836 (illustrating how Atari's claim to the copyright office was false).

128. *See Atari Games Corp.*, 975 F.2d at 843 (explaining how the misrepresentation indicates that Atari did not have an authorized copy of the piece and subsequently could not claim fair use).

129. *See id.* (showing that Atari lied to gain a copy, and the Court deemed that copy to be unauthorized, therefore the Court precluded Atari from fair use).

130. *See id.* at 836–43 (showing that to act in good faith, a defendant must possess an authorized copy of the copyrighted piece); *see also* *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 479 (2d Cir. 2004) (holding that a defendant is not acting in good faith when they knowingly exploit a copyrighted work for the purpose of exploiting a copyright holder's "commercial value").

131. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (noting that good faith requires a defendant to hold a genuine belief that their use of the copyrighted work was fair).

B. *Campbell v. Acuff-Rose Music, Inc.: A Broad Definition*

*Campbell v. Acuff-Rose Music, Inc.* involved the music group “2 Live Crew” creating a parody of the song “Oh, Pretty Woman.”<sup>132</sup> Acuff-Rose Music, Inc. (Acuff-Rose) held the copyright to the initial song.<sup>133</sup> Following the parody, Acuff-Rose sued 2 Live Crew for copyright infringement.<sup>134</sup> 2 Live Crew claimed its actions fell under fair use.<sup>135</sup>

The Supreme Court held the good or bad faith of the defendant was not a critical issue in analyzing fair use.<sup>136</sup> However, the Court defined good faith as when a defendant has a genuine belief their use of the copyrighted work was fair.<sup>137</sup> This case took a different approach from *Atari Games Corp.* by focusing on the party’s subjective state of mind instead of how they gained access to the work.<sup>138</sup> This definition is broader than that from *Atari Games Corp. v. Nintendo of America Inc.* because it is likely to apply in more situations and it focuses on more than how a party acquires the material.<sup>139</sup> In reviewing the parties’ specific conduct, as the court did in *Atari Games Corp.*, courts limit their application of what constitutes good or bad faith to that specific definition.<sup>140</sup>

This case also differs from *Oracle* because the Supreme Court in *Oracle* expressed skepticism about looking at the bad faith of a defendant.<sup>141</sup> The Court held that the subjective faith of the defendant was not critical in determining if fair use applied.<sup>142</sup> In *Campbell*, the Court is suggested that good or bad faith should be considered while also providing a broad definition.<sup>143</sup>

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132. *Id.* at 572.

133. *Id.*

134. *Id.* at 573.

135. *See id.* at 577–79 (explaining how the defendant satisfied all four factors of the fair use analysis).

136. *See id.* at 585 (explaining how good or bad faith is not central in the fair use analysis).

137. *See Campbell*, 510 U.S. at 585 (illustrating how a defendant must know that their use of the copyrighted material was not fair for them to be acting in bad faith).

138. *See id.* (asserting that a defendant must have the belief that their use of the copyrighted work is fair use to act in good faith). *But see Atari Games Corp.*, 975 F.2d at 842 (specifying how a defendant must have an authorized copy that they legally gained to act in good faith).

139. *See Campbell*, 510 U.S. at 586 (explaining how a defendant must have the subjective belief that their use was fair to act in good faith, and not looking to specific actions taken by the defendant). *But see Atari Games Corp.*, 975 F.2d at 843 (discussing how having an authorized copy of the copyrighted work is required in order to act in good faith, thus looking to the specific conduct of the defendant).

140. *See Atari Games Corp.*, 975 F.2d at 843 (focusing the good or bad faith consideration specifically on whether a defendant has gained an authorized copy of the copyrighted work through legal means).

141. *See Infra* Part V.B. (providing a factual explanation of *Campbell v. Acuff-Rose Music, Inc.*); *Google LLC*, 141 S. Ct. at 1204. *But see Campbell*, 510 U.S. at 585 (highlighting how the good or bad faith consideration is not central to the fair use analysis).

142. *See Google LLC*, 141 S. Ct. at 1204 (discussing how courts should be wary about looking to the good or bad faith of the defendant when conducting a fair use analysis).

143. *See Campbell*, 510 U.S. at 585 (defining good faith to be when a defendant is acting with the subjective belief that their use of the copyrighted work is fair).

C. *NXIVM Corp. v. Ross Inst.: Looking at the Conduct of the Party to Gauge Good or Bad Faith*

In *NXIVM Corp. v. Ross Inst.*, NXIVM Corp. (NXIVM) released a course manual for an executive training program known as “Executive Success.”<sup>144</sup> The manual contained a copyright notice on almost every page.<sup>145</sup> The defendant in the case, Rick Ross, ran a website that provided information to the public about controversial groups.<sup>146</sup> Ross commissioned two reports based on the NXIVM manual.<sup>147</sup> These reports analyzed and critiqued the NXIVM manual.<sup>148</sup> NXIVM then sued Ross, as well as the individuals he commissioned, for copyright infringement.<sup>149</sup> The reports included quoted portions of the NXIVM manual, which Ross then made available on his website.<sup>150</sup> NXIVM moved for a preliminary injunction to force Ross to remove the material from his website.<sup>151</sup> The district court denied the preliminary injunction and held that Ross’ use of the manual would likely succeed under the fair use defense.<sup>152</sup>

NXIVM contends the district court did not fully analyze the defendant’s bad faith when making its ruling on the preliminary injunction.<sup>153</sup> The Court of Appeals held a defendant’s good or bad faith is crucial when analyzing the first factor of fair use.<sup>154</sup> The Court of Appeals used a broader definition of good or bad faith than the court in *Atari Games Corp.*<sup>155</sup> Here, the Court of Appeals determined a court should look at the conduct of a party to determine if they are acting in good or bad faith.<sup>156</sup> The Court determined that Ross’s conduct was relevant because

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144. *NXIVM Corp.*, 364 F.3d at 475.

145. *Id.*

146. *See id.* (discussing how the NXIVM group was purportedly engaging in mind control).

147. *See id.* at 475 (highlighting how Rick Ross had two individuals that were experts on groups such as NXIVM draft an analysis that critiqued the NXIVM manual). *See generally NXIVM Sex Cult Member Who Cooperated Avoids Prison Time*, ABC NEWS (July 28, 2021), <https://abcnews.go.com/US/wireStory/nxivm-sex-cult-member-cooperated-avoids-prison-time-79124704?msclid=fbe29df7c35411ec88e992992c1b8591> (on file with the *University of the Pacific Law Review*) (reporting on how NXIVM is a cult that participates in crimes such as human trafficking and abuse).

148. *NXIVM Corp.*, 364 F.3d at 475.

149. *Id.* at 476.

150. *Id.* at 475.

151. *Id.* at 476.

152. *Id.*

153. *See id.* at 477 (explaining how the district court needed a more in-depth analysis of the defendant’s good or bad faith when determining the first factor of fair use).

154. *See NXIVM Corp.*, 364 F.3d at 478 (explaining how looking at a defendant’s good or bad faith is an integral part of the first factor in fair use); *see also* SCHECHTER, *supra* note 16, at 218 (highlighting how the first factor in the fair use analysis is the purpose and nature of the work).

155. *See* 975 F.2d at 842 (explaining how a party is acting in good faith when they have in their possession an authorized copy of the work). *But see NXIVM Corp.*, 364 F.3d at 478 (holding that a court can look to the “propriety of a party’s conduct” to determine if they are acting in good or bad faith).

156. *NXIVM Corp.*, 364 F.3d at 478.

Ross may have exploited NXIVM's copyright to obtain free access to the work.<sup>157</sup> Despite considering Ross's bad faith, the court weighed the other factors of fair use in Ross's favor, and he would likely succeed in the case.<sup>158</sup>

This case provides additional considerations courts can implement into the good or bad faith consideration.<sup>159</sup> Specifically, the court in *NXIVM Corp. v. Ross Inst.* provided one potential way that judges may review a party's good or bad faith; by looking at a party's conduct.<sup>160</sup>

## V. MODEL RULE OF GOOD OR BAD FAITH

The fair use standard is not a bright-line rule, but rather, a standard used to look at each case on a fact-by-fact basis.<sup>161</sup> With a rule, legislators or common law establish the preconditions a party must meet before a court imposes legal consequences.<sup>162</sup> However, when the court uses a legal standard, a judge establishes the preconditions for the legal consequence on a fact-by-fact basis.<sup>163</sup> Rules define behaviors and outcomes, while standards merely provide the considerations for outcomes based on an overarching principle.<sup>164</sup> These definitions beg the question of if and when the courts should consider good or bad faith in the fair use analysis.<sup>165</sup> Part A explores the need to apply and define good or bad faith in the context of the fair use analysis.<sup>166</sup> Part B applies the proposed analysis to the facts in *Time Inc. v. Bernard Geis Assocs.*<sup>167</sup> Part C reviews the practical implications of the analysis.<sup>168</sup>

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157. *Id.*

158. *See id.* at 477 (explaining how Ross would likely succeed on the fair use defense and affirming the denial of the preliminary injunction).

159. *See id.* (looking to a party's conduct to determine if they are acting in good or bad faith); *see also infra* Section V.A. (arguing that conduct should be used to determine if a party has a genuine belief that their use of a work falls under fair use).

160. *See infra* Section V.A. (highlighting how a party's conduct is essential to determine if they were acting in good or bad faith).

161. Elkin-Koren & Fischman-Afori, *supra* note 19, at 161.

162. *See id.* at 167 (describing how standards allow judges to decide factors and preconditions to establish legal consequences while judges apply rules as prior judges, or the legislature have provided).

163. *See id.* (defining a legal standard).

164. *Id.* ("Rules define behaviors and outcomes with sufficient accuracy, while standards simply define the considerations to be made. . .").

165. *See id.* at 180 (highlighting how the Supreme Court emphasizes the need to balance judicial discretion with the need for clarifying rules).

166. *Infra* Section V.A.

167. *Infra* Section V.B.

168. *Infra* Section V.C.



A. *Selecting the Analysis*

The fair use defense is a standard open for the court's broad interpretation.<sup>169</sup> When selecting an analysis, it is important to note the legislature created fair use with the intention of judges applying the law to factual circumstances.<sup>170</sup> However, as precedent has shown, the court is not entirely against the idea of applying specific definitions for a fair use standard.<sup>171</sup> The rule must not be too narrow to restrict judicial discretion, while simultaneously the rule must not be too broad to provide little or no guidance.<sup>172</sup> Fair use only works when users of copyrighted materials know the legality of their use.<sup>173</sup>

There are several definitions of good or bad faith that judges have provided.<sup>174</sup> The narrow definition the court provides in *Atari Games Corp.* is a very specific definition that only applies in that specific case.<sup>175</sup> The *Atari* definition may have worked given the circumstances of the case; however, the definition is likely too narrow to provide any guidance in other cases.<sup>176</sup> A narrow definition may hinder the ability of judges to adapt the fair use standard to new and developing areas of the law.<sup>177</sup> If courts have a narrow definition of good or bad faith crafted for a specific case, then courts may be underinclusive in applying the consideration.<sup>178</sup>

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169. Elkin-Koren & Fischman-Afori, *supra* note 19, at 167 (illustrating how standards are determined by looking at each situation's facts).

170. *See id.* at 176 (elaborating on how the legislator drafted the Copyright Act of 1976 with the intent to give judges the discretion necessary to adapt to changing technology and times).

171. *See id.* at 180 (signifying how the U.S. Supreme Court has a policy of balancing judicial discretion while not rejecting the establishment of rules for the fair use standard). *But see Campbell*, 510 U.S. at 577–79 (holding that the court should not rely on bright-line rules while simultaneously holding that courts should consider the transformative nature of the piece).

172. *See* Elkin-Koren & Fischman-Afori, *supra* note 19, at 180 (highlighting the balance between judicial discretion and the ability of courts to establish rules).

173. *See* Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1092 (2007) (explaining how the purpose of fair use, to support creative use of copyrighted works, can only be satisfied when users are reasonably certain of the legality of their use).

174. *See Campbell*, 510 U.S. at 585 (defining good faith to be when an alleged copyright infringer has a belief that his use is fair). *But see Atari Games Corp.*, 975 F.2d at 843 (explaining how fair use requires the alleged copyright infringer to have an authorized copy of the work to act in good faith); *see also NXIVM Corp.*, 364 F.3d at 479 (describing how bad faith occurs when a party knowingly uses a copyrighted work to usurp the holder's commercial value of the work).

175. *See Atari Games Corp.*, 975 F.2d at 843 (showing how Atari did not act in good faith because they did not hold an authorized copy of the work).

176. *See id.* (providing a narrow definition of good or bad faith); *see also* Elkin-Koren & Fischman-Afori, *supra* note 19, at 177 (highlighting how judges should still retain the ability to adapt the fair use standard to new and specific circumstances).

177. *See* Elkin-Koren & Fischman-Afori, *supra* note 19, at 177 (outlining the importance of allowing judges to adapt the fair use standard to new factual circumstances).

178. *See Campbell*, 510 U.S. at 585 (affirming a broad definition of good or bad faith).

There is a broader rule that the Supreme Court defined in a footnote in *Campbell*.<sup>179</sup> This definition states a party acts in good faith if they believe their use of the copyrighted material is fair use.<sup>180</sup> The definition is broad enough that it solves the problem in *Atari Games Corp.* as well as cases like *Time Inc.*<sup>181</sup> However, the rule is subjective and requires an analysis into what the offending party believed.<sup>182</sup> This definition is problematic because an entirely subjective analysis may fail to provide sufficient guidance for courts.<sup>183</sup> In these cases, courts can rectify this problem by adding additional considerations into the analysis, such as the conduct of the parties.<sup>184</sup> This proposal is not suggesting a mandatory two-factor analysis, but rather suggests courts may look at the defendant's conduct to help elucidate their subjective mental state.<sup>185</sup>

In *NXIVM Corp. v. Ross Inst.*, the court considered the defendant's good or bad faith by reviewing the offending party's conduct.<sup>186</sup> By reviewing the conduct of a party at the time they used the copyrighted work, judges can determine if the party acted in bad faith.<sup>187</sup> For example, if one party obtains the copyrighted work through misrepresentation, this could indicate the party knew their use was unfair.<sup>188</sup> On the other hand, if a party does not engage in deceptive activity, this might indicate their good faith subjective belief.<sup>189</sup> Accordingly, a broad rule that looks at a party's conduct would be the most helpful to judges while still respecting the fundamentals of fair use.<sup>190</sup>

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179. *See id.* (explaining how a party is acting in good faith if they genuinely believe that their use of the work is fair use).

180. *Id.*

181. *See id.* (providing a broad definition of good or bad faith which states that a person is acting in good faith if they have a belief that their use of the work is fair use). *But see Atari Games Corp.*, 975 F.2d at 843 (highlighting a narrower definition of good or bad faith which holds that a party is acting in good faith when they hold an authorized copy of the work); *see also* Elkin-Koren & Fischman-Afori, *supra* note 19, at 177 (explaining the importance of having rules that balance guidance with judicial discretion).

182. *See Campbell*, 510 U.S. at 585 (highlighting that a person's belief that their use is fair use may allow them to claim that they were acting in good faith).

183. *See id.* (holding that good faith requires a party to have a belief that their use is fair, therefore providing a subjective definition of good or bad faith).

184. *See NXIVM Corp.*, 364 F.3d at 478 (providing an example of a court reviewing the actions of a party to determine good or bad faith).

185. *See supra* Section V.A (proposing that courts should look to the subjective belief of the parties and courts could help this analysis by looking at the conduct of the parties when the party's subjective belief is not evident).

186. *See NXIVM Corp.*, 364 F.3d at 478 (explaining how a party was acting in bad faith when they knowingly purloin a copyrighted work for the purpose of usurping a copyright holder's commercial value).

187. *See Campbell*, 510 U.S. at 585 (looking to the belief of the party in determining whether the party was acting in good faith); *see also NXIVM Corp.*, 364 F.3d at 478 (considering the actions a party took to determine if the party was acting in good or bad faith).

188. *See id.* (observing a party's conduct in determining if they are acting in good faith); *see also Campbell*, 510 U.S. at 586 (looking to whether a party knew that their use was fair use).

189. *See NXIVM Corp.*, 364 F.3d at 478 (considering a party's conduct to determine whether they are acting in good or bad faith).

190. *See* Elkin-Koren & Fischman-Afori, *supra* note 19, at 177 (explaining the need to balance a rule of fair use with the requirement of judicial discretion); *see also NXIVM Corp.*, 364 F.3d at 478 (analyzing a party's

Courts can analyze a party's belief by reviewing the party's conduct at or around the time the alleged infringement occurred.<sup>191</sup> If a party is aware their actions do not fall under fair use, they act in bad faith.<sup>192</sup> If a party acts with the genuine belief their actions are fair use, then they acted in good faith.<sup>193</sup> Good or bad faith is not indicative of fair use, but rather a prerequisite for fair use.<sup>194</sup> This analysis, therefore, raises the question of how it would apply in a real-world situation.<sup>195</sup>

*B. Time Inc. v. Bernard Geis Assocs.: The Application of the Model Rule of Good or Bad Faith*

*Time Inc. v. Bernard Geis Assocs.* provides a factual scenario where the court addressed the defendant's good or bad faith but did not give significant weight to that factor.<sup>196</sup> If the court were to apply a good or bad faith consideration with the analysis proposed in this Comment, the case's outcome might have been different.<sup>197</sup> Here, Life purchased the exclusive rights to photos of JFK's assassination.<sup>198</sup> Thompson, a Life employee, illegally obtained multiple frames of the footage.<sup>199</sup> Thompson then wrote his book, which contained sketches of the stolen frames, and Bernard Geis subsequently published the book.<sup>200</sup> Life sued Bernard Geis and Thompson for violation of its copyright of the footage.<sup>201</sup> Bernard Geis and Thompson claimed their use of the footage was fair use.<sup>202</sup> In its analysis, the court did not look at the good or bad faith of the defendant or their conduct.<sup>203</sup>

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conduct in determining if they were acting in good or bad faith).

191. *See id.* (considering the conduct of a party to determine whether they are acting in good or bad faith).

192. *See Campbell*, 510 U.S. at 585 n.18 (incorporating a defendant's subjective belief into the good or bad faith consideration).

193. *See id.* (looking to a party's belief to determine whether they are acting in good or bad faith).

194. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 ("Fair use presupposes good faith.").

195. *See Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 146 (providing an example of when a court refused to consider the good or bad faith of a defendant).

196. *Time Inc.*, 293 F. Supp. at 146 (holding that the court would not look at the conduct of the defendant when determining fair use).

197. *See id.* (describing how the court refused to look at the good or bad faith and the conduct of the defendant); *see also Campbell*, 510 U.S. at 585 (providing an example where the court defined good or bad faith broadly). *But see Atari Games Corp.*, 975 F.2d at 843 (illustrating an example of when the court applied a narrow definition of good or bad faith).

198. *See Time Inc.*, 293 F. Supp. at 133–34 (highlighting how Life Magazine gained the exclusive rights to use the photos of JFK's assassination).

199. *See id.* at 136 (describing how another employee saw Thompson taking illegal photographs of the film late at night).

200. *See id.* at 138–39 (elaborating on the process that Thompson and Bernard Geis went through to copy the photographs).

201. *See id.* at 132 (explaining how Life sued Bernard Geis and Thompson for violation of its copyright).

202. *Id.* at 145 (analyzing the four factors in the fair use analysis).

203. *See id.* at 146 (not giving significant weight to the conduct of Thompson when he stole copies of the

This Comment proposes that courts should analyze good or bad faith by reviewing whether the alleged infringer genuinely believed their use was fair.<sup>204</sup> When necessary, courts may review the parties' conduct to help guide the analysis of the party's subjective belief.<sup>205</sup>

In *Time Inc. v. Bernard Geis Assocs.*, Thompson illegally copied the JFK assassination photos.<sup>206</sup> The court held that Thompson knew his use of the footage was improper.<sup>207</sup> If Thompson knew his actions were improper, then applying the proposed analysis could indicate he knew his actions were not fair use.<sup>208</sup> The fact that Life specifically denied permission for Thompson to use the footage further amplifies this point because it shows Thompson knew he did not have permission to use the footage.<sup>209</sup> Accordingly, Thompson likely knew his use of the photos was not fair use.<sup>210</sup> Under the proposed analysis, if a defendant does not believe that their use of the work is fair, then the defendant acted in bad faith.<sup>211</sup> Therefore, if the court had applied the proposed analysis of good or bad faith, the court may have denied fair use to Thompson.<sup>212</sup>

Regarding Bernard Geis, the publisher of Thompson's book, the court does not mention facts regarding whether Bernard Geis knew of the illegal photocopying.<sup>213</sup> However, similar to Thompson, Life did not provide Bernard Geis permission to use the footage.<sup>214</sup> The fact that Bernard Geis knew of the copyright denial might prove helpful in determining good or bad faith, but it is likely not dispositive of good or bath faith.<sup>215</sup> Accordingly, Bernard Geis's use of the photos may—or may

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film).

204. See *Campbell*, 510 U.S. at 585 (considering whether a defendant believes their use of the work is fair to determine whether they were acting in good faith); see also *NXIVM Corp.*, 364 F.3d at 478 (looking to the conduct of a defendant to determine if they are acting in good faith).

205. See *NXIVM Corp.*, 364 F.3d at 478 (looking to the conduct of a defendant to determine if they are acting in good faith).

206. See *Time Inc.*, 293 F. Supp. at 136 (highlighting how Thompson copied photos of the JFK assassination after the business had closed).

207. See *id.* (stipulating that Thompson knew his actions of copying were improper).

208. See *Campbell*, 510 U.S. at 585 (looking to a party's belief that their use of the work was fair use); see also *NXIVM Corp.*, 364 F.3d at 479 (observing the conduct of the parties to determine whether they acted in good faith). But see *Time Inc.*, 293 F. Supp. at 136 (holding that Thompson's actions indicated that he knew his copying of the photos was improper).

209. *Id.* at 137 (recounting how Thompson knew that Life had denied him permission to use the footage).

210. See *id.* (addressing how the court stipulated that Thompson knew his use of the work was not fair use).

211. See *Campbell*, 510 U.S. at 585 (explaining how the belief of a defendant indicates whether they acted in good or bad faith); see also *NXIVM Corp.*, 364 F.3d at 478 (observing the conduct of the defendant to determine whether they are acting in good faith). But see *Time Inc.*, 293 F. Supp. at 136 (determining that, based on his conduct, Thompson knew his conduct in copying the photos was improper).

212. See *id.* (addressing how Thompson's actions of sneaking into the building late at night indicate that he knew his actions were improper).

213. See *id.* (failing to mention if Bernard Geis knew of the illegal copying of the JFK photographs).

214. See *id.* at 138 (highlighting how both Thompson and Bernard Geis were denied permission to use the footage).

215. *Id.* (explaining how Bernard Geis knew they did not have permission to copy the photos, but not mentioning other facts that indicate that they knew their use was not fair).

not—have been in good faith.<sup>216</sup> The proposed analysis provides guidance while allowing for judicial discretion where courts may not have certain facts that highlight a party’s subjective belief.<sup>217</sup> Judicial discretion is one of the many practical implications of the proposed analysis.<sup>218</sup>

*C. Looking to the Future: Practical Implications of Defining Good or Bad Faith*

*Time Inc. v. Bernard Geis Assocs.* shows there are several practical implications with the proposed analysis of good or bad faith.<sup>219</sup> The aforementioned case highlights that this analysis will guide judges when one party acts in a way as to show they knew their use was not fair.<sup>220</sup> The fair use doctrine creates a “zone of acceptability” for using other people’s copyrighted works.<sup>221</sup> Fair use only functions if people are confident that their use of copyrighted works is legal.<sup>222</sup> This analysis, as applied to *Time Inc.*, narrows the zone of acceptability by highlighting activities indicative of a party’s knowledge of their fair use.<sup>223</sup> If an activity is indicative of a party’s knowledge that their use is not fair, then they acted in bad faith.<sup>224</sup> This analysis also provides discretion in situations where facts about the party’s activities or knowledge are unavailable.<sup>225</sup>

Even though Thompson’s activities indicated he knew his use of the photos was not fair use, there were fewer facts related to Bernard Geis.<sup>226</sup> With Bernard Geis, the definition would not provide definitive guidance, but would rather allow

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216. *See id.* (addressing how Bernard Geis knew that they had been denied permission to use the footage, therefore they may have known that their use was not fair).

217. *See Campbell*, 510 U.S. at 586 (providing that the belief of the party is what courts should consider when looking at if a party acted in good or bad faith); *see also NXIVM Corp.*, 364 F.3d at 479 (looking to the conduct of a party to determine whether they are acting in good or bad faith). *But see Time Inc.*, 293 F. Supp. at 138 (highlighting a factual situation where a party’s actions may not indicate that they acted in good or bad faith).

218. *See id.* at 136 (illustrating how this comment’s analysis of good or bad faith provides room for judicial discretion in situations where the facts may not clearly indicate if a party believes that their use is fair).

219. *See id.* at 136–37 (describing how Thompson snuck into the Life building late at night to copy photos and how Life denied Thompson’s request to use the photos in his book).

220. *See id.* at 137–38 (laying out how Thompson’s actions led the court to presume that Thompson knew his actions were improper).

221. *See* Michael W. Carroll, *supra* note 173, at 1092 (elaborating on how the fair use doctrine creates a “zone of expressive opportunity”).

222. *Id.*

223. *See Campbell*, 510 U.S. at 585 (looking to the belief of a defendant to determine if they are acting in good or bad faith); *see also NXIVM Corp.*, 364 F.3d at 479 (observing the conduct of a defendant to determine if fair use applies).

224. *See NXIVM Corp.*, 364 F.3d at 479 (indicating that a party’s conduct is important in determining if fair use applies).

225. *See Time Inc.*, 293 F. Supp. at 138 (providing a factual situation where a party’s action may or may not indicate a belief that their use is fair, therefore providing room for judicial discretion).

226. *See id.* (showing how although Bernard Geis knew they did not have permission to use the footage, there were no facts that indicated that they knew Thompson had stolen the photos).

judges to use their discretion.<sup>227</sup> Accordingly, if there is a situation where the facts may not highlight a party's knowledge, the proposed analysis will still provide leeway for judicial discretion.<sup>228</sup>

In *Google LLC v. Oracle America Inc.*, the court expressed skepticism considering a defendant's bad faith.<sup>229</sup> In *Google LLC*, Google copied multiple lines of code from Oracle's computer program.<sup>230</sup> However, unlike in *Time Inc.*, there are no facts mentioned that Google engaged in any patently wrongful conduct.<sup>231</sup> Google only copied portions of Oracle's code and then used those portions to implement a different program entirely.<sup>232</sup> Google's conduct is not evidence of Google believing they were acting outside of fair use.<sup>233</sup> This case differs from *Time Inc.* because it shows what a party acting in good faith would look like under this analysis.<sup>234</sup> Even though the court did apply fair use in *Google LLC*; applying the proposed analysis of good or bad faith would have expanded what the court should look for regarding good or bad faith.<sup>235</sup>

## VI. CONCLUSION

The field of copyright law protects individuals and the works they create.<sup>236</sup> Modern copyright law comes from the Copyright Act, which protects literary, musical, oral, photographic, and choreographic pieces.<sup>237</sup> Copyright owners can sue those who use their works without permission.<sup>238</sup> However, Congress

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227. See *id.* at 146 (elucidating a situation where a defendant's actions may or may not indicate that they believed that their use of the work was fair use).

228. *Time Inc.*, 293 F. Supp. at 138 (revealing how using this comment's analysis would provide some judicial discretion in situations where a defendant's actions may or may not indicate that they believe that their use is fair use).

229. See *Google LLC*, 141 S. Ct. at 1204 (expressing skepticism with considering the bad faith of the defendant when analyzing fair use).

230. *Id.* at 1190.

231. See *Time Inc.*, 293 F. Supp. at 136 (showing how Thompson snuck into the Plaintiff's building late at night to take copies of footage that he knew he had no permission to use). *But see Google LLC*, 141 S. Ct. at 1204–05 (showing that all Google did was copy portions of Oracle's code that it needed to implement the program into its own system).

232. *Id.* at 1193.

233. See *id.* at 1204 (explaining how Google only copied specific portions of Oracle's code that it needed to create a completely new program).

234. See *id.* at 1205 (providing an example of a situation where a party is not acting in a manner which would suggest that they had a belief that their use of the work was not fair use). *But see Time Inc.*, 293 F. Supp. at 136 (highlighting conduct, stealing frames of footage, which would indicate to a court that a party believed that their use of the work was in bad faith).

235. See *Google LLC*, 141 S. Ct. at 1204 (describing how Google only copied specific portions of Oracle's code to create a new product, and how these actions are not indicative of Google acting in bad faith).

236. See SCHECHTER, *supra* note 16, at 11 (explaining how copyright law extends to any work of authorship).

237. *Id.*

238. See *id.* at 115–47 (highlighting the exclusive rights that copyright holders have including reproduction and adaptation).

incorporated the fair use defense into the statute to make copyright law more flexible.<sup>239</sup> The fair use defense is a standard that allows individuals to use copyrighted materials if courts deem their use fair.<sup>240</sup> Courts make this determination using a four-factor analysis.<sup>241</sup> These factors include the purpose and character of the use, the nature of the copyrighted work, the amount used, and the effect on the potential market.<sup>242</sup>

The fair use analysis is often unpredictable because it heavily relies on judicial discretion, which looks at cases on a factual basis.<sup>243</sup> This Comment suggests courts should always consider the defendant's good or bad faith to provide more consistency to the fair use analysis.<sup>244</sup> This analysis of good or bad faith highlights when a party acts with the belief their use of the material is fair use, then they are acting in good faith.<sup>245</sup> Although this is a subjective analysis, courts can look to the party's conduct to determine if they believed their use was fair.<sup>246</sup>

The practical implications of this analysis are evident in the case of *Time Inc. v. Bernard Geis Association*.<sup>247</sup> In that case, the court refused to consider the good or bad faith of the defendants.<sup>248</sup> By applying the proposed analysis, a court likely would have found at least one of the defendants, Thompson, acted in bad faith.<sup>249</sup> This analysis also provides flexibility in situations where a party's conduct may not lead to a clear indication of their belief.<sup>250</sup> In these situations, this analysis allows judges to adjust the analysis to different fields of innovation.<sup>251</sup>

Judges should analyze the defendant's belief at the time of the purported copyright infringement to determine whether they acted in good or bad faith.<sup>252</sup> This analysis can further clarify the first factor of the fair use analysis by narrowing

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239. *See id.* at 213 (showing how the fair use standard provides flexibility to the copyright system).

240. *See id.* at 214 (explaining how a party may be able to use copyrighted material if a court determines that their use is fair by looking at a four-factor analysis).

241. *Id.*

242. SCHECHTER, *supra* note 16, at 214.

243. *See id.* at 216–17 (defining fair use as an “equitable rule of reason” where judges look specifically to the facts of each case).

244. *See id.* at 217 (elaborating on how some courts consider the good or bad faith of the defendant while others do not make this consideration); *infra* Part V.

245. *See Campbell*, 510 U.S. at 585 (defining good faith as when a party acts with a belief that their use is fair use).

246. *See NXIVM Corp.*, 364 F.3d at 478 (considering the conduct of a party to determine if the party was acting in good or bad faith in this case).

247. *See Time Inc.*, 293 F. Supp. at 146 (providing an example where the court refused to apply the good or bad faith consideration).

248. *Id.*

249. *See id.* at 136–38 (explaining how the court presumed that Thompson knew his actions were improper).

250. *See id.* at 136 (providing an example of where a party's actions might not indicate that they knew they were acting in good or bad faith).

251. *See id.* at 146 (highlighting a situation where a judge is flexible to use judicial discretion in determining if fair use applies).

252. *See Campbell*, 510 U.S. at 585 (indicating that a party's belief that their use is fair use is important to determine whether they are acting in good or bad faith).

who qualifies for the fair use defense.<sup>253</sup> This analysis provides guidance and judicial flexibility when a party's conduct indicates they had a belief their use was fair.<sup>254</sup> By implementing the proposed analysis of good or bad faith, judges will be able to provide a more consistent application of the fair use analysis.<sup>255</sup>

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253. *See Time Inc.*, 293 F. Supp. at 138 (providing an example of a party acting in a manner where their actions were indicative that they did not believe that their actions were fair use).

254. *See NXIVM Corp.*, 364 F.3d at 479 (noting that a party's conduct is important in looking to fair use).

255. *See supra* Section V.A (arguing that the judges should consider the good or bad faith of defendants in a fair use analysis by looking to if the party had a genuine belief that their use of the copyrighted work was fair); *see also supra* Section IV (providing examples of how the court has inconsistently applied and defined good or bad faith when conducting a fair use analysis).



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