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Mystery of the Ages: Applying Fair Use in Light of the Purposes of Copyright in *Worldwide Church of God v. Philadelphia Church of God, Inc.*

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Mystery of the Ages: Applying Fair Use in Light of the Purposes of Copyright in *Worldwide Church of God v. Philadelphia Church of God, Inc.*

Andrew Nelson*

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I. INTRODUCTION

The existence of copyright law reflects the notion that creative endeavors of the mind are highly valued in our society.¹ The copyright encourages such efforts by granting to authors of original expression certain exclusive rights to their works for a limited time.² The public, in turn, enjoys the benefit of these creations, both practical and intellectual.³

Nonetheless, the copyright grant is not without limits. Besides the basic limit on proper subject matter,⁴ several additional statutory sections further curtail the scope of copyright protection.⁵ The most important of these limitations on a copyright

1. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1109 (1990) [hereinafter Leval, *Fair Use Standard*] (noting that copyright law recognizes "creative intellectual activity" as "vital to the well-being of society").

2. See *id.* (suggesting that copyright is a "pragmatic measure" by which society grants a limited monopoly to authors in order to acquire creative products); see also 17 U.S.C. § 106 (1994) (listing the exclusive rights accruing to the copyright owner).

3. Leval, *Fair Use Standard*, *supra* note 1, at 1109 (positing that the public gives the copyright to authors so that it may secure "for itself the intellectual and practical enrichment that results from creative endeavors").

4. See 17 U.S.C. §§ 101-803 (compromising the 1976 Copyright Act. Unless otherwise indicated, all statutory citations and references in this Casenote are to the Copyright Act of 1976.) [hereinafter the 1976 Act]. The 1976 Act states that "[c]opyright protection subsists . . . in original works of authorship," and provides an illustrative list of what "works of authorship" include. 17 U.S.C. § 102(a) (1994). The 1976 Act further limits the subject matter of copyright, providing that "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." *Id.* § 102(b).

5. See 17 U.S.C. §§ 107-122 (1994) (containing the statutory limitations to the grant of exclusive rights in section 106); see also Leval, *Fair Use Standard*, *supra* note 1, at 1109-10 (listing judicially-developed limitations on the grant of the copyright, including the lack of copyright protection for ideas and facts).

owner's control over his work is the doctrine of "fair use."⁶ Fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster."⁷ When applying the fair use doctrine,⁸ the Supreme Court requires that all of the doctrine's statutory factors "be explored, and the results weighed together, in light of the purposes of copyright."⁹

Recently a three-judge panel of the United States Court of Appeal for the Ninth Circuit decided *Worldwide Church of God v. Philadelphia Church of God, Inc.*,¹⁰ determining, in part, whether the defendant was entitled to claim fair use of the plaintiff's copyrighted book.¹¹ The book—*Mystery of the Ages*—was written by the founder and "spiritual and temporal" leader of the Worldwide Church of God, being completed shortly before his death in 1986.¹² With the copyright passing to the church by will,¹³ the church stopped producing and distributing the book in 1988.¹⁴ It took this action because it considered the book, containing the deceased leader's views on various subjects, to be ecclesiastical error.¹⁵ The defendant, Philadelphia Church of God, Inc., formed by former Worldwide Church of God ministers in 1989, continued to use *Mystery of the Ages* in its religious practice.¹⁶ In 1997, after using existing copies, the defendant began producing, without permission, its own copy¹⁷ of *Mystery of the Ages*.¹⁸

Worldwide Church of God subsequently sued Philadelphia Church of God, Inc. for copyright infringement.¹⁹ In turn, the district court held that the defendant's use of the work was statutorily protected "fair use."²⁰ On appeal to the circuit court, two judges concluded that the defendant was not entitled to the protection of fair use,²¹

6. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 462 (1984) (Blackmun, J., dissenting) (asserting that fair use is the "most important" limitation on a copyright owner because it states that "the fair use of a copyrighted work . . . is not an infringement of copyright"). See generally *infra* Part II.B for a discussion of the history and current formulation of the current statutory fair use doctrine.

7. *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

8. 17 U.S.C. § 107 (1994); see *infra* Part II.B (discussing the fair use doctrine).

9. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

10. 227 F.3d 1110 (9th Cir. 2000). See *infra* Part III (discussing the facts of the case, including the district court opinion, as well as the circuit court's majority and dissenting opinions).

11. See *id.* at 1115-20 (analyzing Philadelphia Church of God's claim of fair use of the copyrighted book *Mystery of the Ages*).

12. *Id.* at 1113.

13. See *id.* at 1114 (finding that the copyright in *Mystery of the Ages* passed to Worldwide Church of God by bequest).

14. *Id.* at 1122 (Brunetti, J., dissenting).

15. See *id.* at 1113 (listing Worldwide Church of God's primary reason for removing *Mystery of the Ages* from distribution was that it "conveyed outdated views that were racist in nature").

16. *Worldwide Church of God*, 227 F.3d at 1113.

17. The defendant's version of *Mystery of the Ages* was essentially verbatim, removing only a "Suggested Reading" page, a warning against reproduction, and substituting Worldwide Church of God's name with that of the former leader on the copyright page. *Worldwide Church of God*, 227 F.3d at 1113.

18. *Id.*

19. See *id.* at 1113-14 (detailing Worldwide Church of God's complaint).

20. *Id.* at 1114.

21. See *id.* at 1115-20 (reasoning why the defendant's use was not statutorily protected).

while one judge dissented, reasoning quite forcefully that the defendant's use of *Mystery of the Ages* was indeed statutorily protected fair use.²² The judgment of the district court was thus reversed.²³

This Casenote critically analyzes the Ninth Circuit's decision in *Worldwide Church of God* in light of the overall purposes of copyright law. Part II reviews the foundation of copyright law in the United States, discussing in particular the underpinning goals of copyright law and the means chosen to further that goal.²⁴ It also describes the development of the doctrine of fair use, its current formulation, and how fair use is incorporated into the overall scheme of copyright law.²⁵ Part III discusses in detail the Ninth Circuit's opinion, including the district court's reasoning, the majority opinion reversing the district court's finding of fair use, and the dissent's analysis.²⁶ Part IV critically analyzes the majority's reasoning, discussing each of the statutory factors as well as other surrounding observations in light of the purposes of copyright law.²⁷ In Part V, this Casenote concludes that the district court and the Ninth Circuit panel's dissent were both correct in determining that Philadelphia Church of God, Inc.'s use of *Mystery of the Ages* was indeed a statutorily protected fair use, a use wholly consistent with the purposes of copyright.²⁸

II. FAIR USE BEFORE *WORLDWIDE CHURCH OF GOD*

A. *The Copyright and Its Goals*

"The copyright is not an inevitable, divine, or natural right"²⁹ Rather, the copyright today is a creature of federal statute,³⁰ with its foundation rooted in the United States Constitution.³¹ The Constitution explicitly provides that Congress has the power to give an author the exclusive right to his writings for a limited time.³² Flowing from this provision, Congress has the duty to determine what the

22. *Id.* at 1122-25 (Brunetti, J., dissenting) (discussing the equitable factors and statutory factors in concluding that Philadelphia Church of God's use was fair use).

23. *Id.* at 1121.

24. *Infra* Part II.A.

25. *Infra* Part II.B.

26. *Infra* Part III.

27. *Infra* Part IV.

28. *Infra* Part V.

29. Leval, *Fair Use Standard*, *supra* note 1, at 1107.

30. See 17 U.S.C. §§ 101-803 (1994).

31. See U.S. CONST. art. I, § 8, cl. 8. ("The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

32. *Id.*

parameters of the copyright monopoly will be.³³ Exercising this power, Congress passed and revised copyright legislation a number of times over the years.³⁴ The most recent comprehensive revision of the copyright statute was passed in 1976.³⁵

Though Congress has used its constitutional power, the grant it has given is a limited one. Copyright protection is conferred on a limited number of creations meeting particular criteria. First, copyright only protects the "expressive content of the work."³⁶ Conversely, no protection exists for ideas or facts contained within a work.³⁷ Additionally, only the portions of a work that "display the stamp of the author's originality" are protected.³⁸ Moreover, an author's original expression must be embodied in proper subject matter, a statutory "work of authorship."³⁹ While the statute provides an illustrative list⁴⁰ of what constitutes a "work of authorship," the list is not exclusive.⁴¹ Meeting these criteria, the copyright finally accrues to the author when the original work of expressive authorship is "fixed in any tangible medium of expression."⁴²

Once conferral of a copyright occurs, however, certain rights vest in the author. In section 106, the 1976 Act bestows upon an author of an original work a so-called

33. See *Sony*, 464 U.S. at 429 ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the public appropriate access to their work product. Because this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand, our patent and copyright statutes have been amended repeatedly.").

34. *Id.* at 460 (Blackmun, J., dissenting) (referring to the many amendments Congress has made to the Copyright Act, including "complete revisions in 1831, 1870, 1909, and 1976").

35. Copyright Revision Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

36. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985); *Salinger v. Random House, Inc.*, 811 F.2d 90, 95 (2d Cir. 1987).

37. *Salinger*, 811 F.2d at 95.

38. *Harper & Row*, 471 U.S. at 547; 17 U.S.C. § 102(a) (1994) (defining copyright protection as subsisting only in "original works of authorship"). See *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1494 (11th Cir. 1984) for an example of originality found in the "editorial judgment" in presenting factual events in a news broadcast. "Originality" is to be distinguished from "novelty": originality means only that a work is independently created, but not that it be novel, a more difficult threshold to meet. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01[A] at 2-7 (2001).

39. See 17 U.S.C. § 102(a) (1994) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

40. *Id.* The list includes: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. *Id.*

41. See *id.* § 102(a) (stating that works of authorship "include" the illustrative list). The statute defines the term "including" to mean "illustrative and not limitative." *Id.* § 101.

42. See *id.* § 102(a) (reading that a work of authorship must be "fixed in any tangible medium of expression now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device").

“bundle of rights” in that work.⁴³ These rights are exclusive to the copyright owner.⁴⁴ With such a broad monopoly given to authors, the reasons for such a grant need be explained.

The undergirding for such a broad grant of rights lies, at its heart, in the utilitarian purposes of copyright.

The monopoly privileges . . . are . . . [not] primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.⁴⁵

Besides the utilitarian purpose of encouraging creation of works of authorship, copyright law has the complementary goal of dissemination and use of protected works.⁴⁶ As a corollary of these public purposes, protection of one’s privacy is not a goal of copyright law.⁴⁷ Therefore, through this mechanism, copyright law

43. See *Harper & Row*, 471 U.S. at 546-47 (1985) (noting that section 106 “confers a bundle of exclusive rights to the owner of the copyright . . . [which] vest in the author of an original work from the time of its creation”). The statute grants to the copyright owner in a work, subject to sections 107 through 121, the exclusive rights to reproduce, distribute, publicly perform, display, and prepare derivative works; in the case of sound recordings, the right to publicly perform them by digital audio transmission is also granted. 17 U.S.C. § 106.

44. *Id.*

45. *Sony*, 464 U.S. at 429; see also *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (positing that “copyright law . . . makes reward to the owner a secondary consideration”); *Pacific & S.*, 744 F.2d at 1499 n.14 (noting that through copyright Congress developed a system that “encourages creativity by giving authors the exclusive rights to profit from their works in certain ways”). “Since authors most often profit by distributing their works to the public, society usually benefits.” *Id.*; H. R. REP. NO. 2222, 60th Cong., 2d Sess., 7 (1909)

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings

Michael G. Anderson et al., *Market Substitution and Copyrights: Predicting Fair Use Case Law*, 10 U. MIAMI ENT. & SPORTS L. REV. 33, 34 (1993) (noting that the “emphasis of copyright law is on the benefits derived by the public”); “Reward to copyright owners or authors is necessary, but of secondary consideration.” *Id.*; Leval, *Fair Use Standard*, *supra* note 1, at 1107 (arguing that the Supreme Court has summarized the purpose of copyright as being “to stimulate activity and progress in the art for the intellectual enrichment of the public”). “This utilitarian goal is achieved by permitting authors to reap the rewards of their creative efforts.” *Id.*

46. *Stewart*, 495 U.S. at 228; Jay Dratler, Jr., *Distilling the Witches’ Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 245 (1998).

47. See Leval, *Fair Use Standard*, *supra* note 1, at 1119 (stating that the law of privacy and not copyright law protects private documents); see *id.* n.67 (arguing that “[c]onstruing [copyright’s] rules as more solicitous of an intention to conceal than to publish contravenes its purposes”). Others have argued that copyright should indeed protect privacy interests. See Benjamin Ely Marks, Note, *Copyright Protection, Privacy Rights, and the Fair Use Doctrine: The Post-Salinger Decade Reconsidered*, 72 N.Y.U. L. REV. 1376 (1997) (arguing for a privacy-based exception to fair use for unpublished works not intended for publication).

encourages the flow of ideas,⁴⁸ the ultimate end being the increase of the public store of knowledge.⁴⁹

Support for this utilitarian construction is ample. Foremost is the Constitution itself. The clause permitting Congress to confer the monopoly further states that such monopoly exist "To promote the Progress of Science and useful Arts."⁵⁰ From this phrase, it follows that Congress may not even grant copyright protections *unless* such protections serve this goal.⁵¹ The "for limited times" language,⁵² limiting the duration of the monopoly, further supports the constitutional interpretation that the copyright is for the public purpose, and not inhering in the author as a natural right.⁵³ From the very beginning, Congress recognized this interpretation, entitling the first copyright act, "An Act for the encouragement of learning."⁵⁴

Thus, with this grand utilitarian purpose behind the constitutional and statutory scheme, the grant of the copyright to an author has never given an author a *complete* monopoly over his work.⁵⁵ An author's entitlement to the privileges under copyright are balanced against the "public's interest in the free and immediate access to materials essential to the development of society."⁵⁶ This reflects a recognition that circumstances exist in which mechanistic enforcement of the statutory monopoly would thwart the goals that copyright seeks to further.⁵⁷ By giving copyright holders the power to control, to reproduce, and disseminate their works, the free flow of information and subsequent creation of new works based upon them, may be impeded.⁵⁸ Hence, there are exceptions to an author's bundle of rights. These

48. See *Pacific & S.*, 744 F.2d at 1499 (noting that while the First Amendment "removes obstacles to the free flow of ideas, copyright law adds positive incentives to encourage the flow").

49. See *Harper & Row*, 471 U.S. at 545 (noting that copyright law is "intended to increase and not to impede the harvest of knowledge").

50. U.S. CONST. art. I, § 8, cl. 8.

51. *Pacific & S.*, 744 F.2d at 1498 (arguing that the "Constitution allows Congress to create copyright laws only if they benefit society as a whole rather than authors alone"). However, the Eleventh Circuit also posited that though this constitutional requirement exists, each copyright owner does not have to offer a benefit to *all* of society, "for the copyright is an incentive rather than a command." *Id.* at 1499.

52. See U.S. CONST., art. I, § 8, cl. 8 (stating that Congress may "secure" to "[a]uthors" exclusive rights "for limited [t]imes").

53. Leval, *Fair Use Standard*, *supra* note 1, at 1108.

54. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802).

55. See *Sony*, 464 U.S. at 432 (noting that the copyright monopoly has never given an owner of a copyright "complete control over all possible uses of his work"); *id.* at 462-63 (Blackmun, J., dissenting) ("The 1976 Act, like its predecessors, does *not* give the copyright owner full and complete control over all possible uses of his work.").

56. Marks, *supra* note 47, at 1377.

57. See *Sony*, 464 U.S. at 477 (Blackmun, J., dissenting) (arguing that "[t]here are situations . . . in which strict enforcement of this monopoly would inhibit the very 'Progress of Science and useful Arts' that copyright is intended to promote"); *Iowa State Univ. Research Found., Inc. v. Am. Broad. Companies, Inc.*, 621 F.2d 57, 60 (2d Cir. 1980) ("The doctrine of fair use, originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."); *Pacific & S.*, 744 F.2d at 1495 ("Where strict enforcement of the rights of a copyright holder . . . would conflict with the purpose of copyright or with some other important societal value, courts should be free to fashion an appropriate fair use exemption.").

58. Dratler, *supra* note 46, at 245.

exceptions immediately follow the grant of exclusive rights in section 106 in the 1976 Act.⁵⁹

B. Fair Use

The most important exception to the copyright monopoly, applying to all entitlements in the bundle of rights,⁶⁰ is the “fair use” doctrine.⁶¹ “From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts’”⁶² Briefly described, the doctrine protects from liability an infringing use of copyrighted material “where the benefit to society of permitting the unauthorized use outweighs the harm to society of reducing the incentive to create new works.”⁶³ Its application has the effect of softening the results of strict adhesion to copyright protections,⁶⁴ making the doctrine a “critical safety valve of copyright.”⁶⁵ Fair use, thus, is an integral part of copyright law,⁶⁶ itself serving the purpose of creating new works of authorship.⁶⁷

A fair use analysis addresses the inherent tensions arising as a result of the copyright monopoly. It “allows a court to resolve tensions between the ends of copyright law, public enjoyment of creative works, and the means chosen under copyright law, the conferral of economic benefits upon creators of original works.”⁶⁸ Put another way, fair use “is a means of balancing the need to provide individuals

59. See 17 U.S.C. §§ 107-122 (comprising the sections limiting the exclusive rights set forth in section 106).

60. *Salinger*, 811 F.2d at 95. See Dratler, *supra* note 46, at 244 (noting that the doctrine applies to any copyrighted work).

61. See *Sony*, 464 U.S. at 462 (Blackmun, J., dissenting) (asserting that section 107 is the “most important” limitation on the rights of a copyright owner).

62. *Campbell*, 510 U.S. at 575 (quoting U.S. CONST. art. I, § 8, cl. 8).

63. Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L. REV. 677, 678 (1995). See Anderson et al., *supra* note 45, at 39 (positing that fair use exists when enforcement of a copyright does not further copyright goals).

64. See Dratler, *supra* note 46, at 245 (noting that fair use gives copyright “great flexibility” and “softens the contours of copyright law as circumstances demand”).

65. William F. Patry and Shira Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 11 CARDOZO ARTS & ENT. L.J. 667, 668 (1993).

66. See *Sony*, 464 U.S. at 477 (Blackmun, J., dissenting) (asserting that fair use “plays a crucial role in the law of copyright”); Leval, *Fair Use Standard*, *supra* note 1, at 1107 (arguing that fair use is “not . . . a disorderly basket of exception to the rule of copyright, nor as a departure from the principles governing that body of law, but . . . a rational, integral part of copyright, whose observance is necessary to achieve the objectives of that law”); *id.* at 1110 (“Fair use should not be considered a bizarre, occasionally tolerated departure from the grand conception of the copyright monopoly.”). Judge Leval argues that the doctrine indeed is a “necessary part of the overall design.” *Id.*

67. See *Sony*, 464 U.S. at 495 (Blackmun, J., dissenting) (arguing that the purpose of fair use is to create “new works”); Leval, *Fair Use Standard*, *supra* note 1, at 1110 (noting that fair use limits the copyright in “furtherance of its utilitarian objective”). But see L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 3 (1987) (arguing that fair use as codified has broadened the copyright monopoly by giving increased control of access to copyrighted works).

68. *Pacific & S.*, 744 F.2d at 1495.

with sufficient incentives to create public works with the public's interest in the dissemination of information."⁶⁹ Remembering that the doctrine itself seeks to produce new works, reduction of the "creative ability" of secondary users resulting from total monopolies is also weighed against the deprivation of an author's incentive to create.⁷⁰ Hence, the doctrine seeks to provide an exception, albeit a limited one, to the copyright owner's rights in his protected work in order to encourage particular productive uses of that work.⁷¹

Perhaps a result of the sensitive balancing inherent in a fair use evaluation, the doctrine has been described as an "equitable rule of reason."⁷² As such, characterizations of the doctrine vary widely. Some courts have labeled fair use a *privilege* to "use the copyrighted material in a reasonable manner without [the owner's] consent, notwithstanding the monopoly granted to the owner."⁷³ Another court has described the doctrine as tolerating secondary uses that are "*exceptions* to copyright protection."⁷⁴ That the doctrine "*excuses* an otherwise infringing use" is yet another characterization.⁷⁵ Despite these variations, however, the Supreme Court

69. *Hustler Magazine, Inc., v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986). See *Weissman v. Freeman*, 868 F.2d 1313, 1323 (2d Cir. 1989) (arguing that fair use "balances the exclusive right of copyright owners against 'the public's interest in the dissemination of information affecting areas of universal concern, such as art, science and industry'" (quoting *Wainright Sec., Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977)); *Dratler*, *supra* note 46, at 246-47 (positing that the fair use doctrine "strikes a balance between the policies of fostering creativity and encouraging wide dissemination and use of creative works").

70. See *Sony*, 464 U.S. at 479 (Blackmun, J., dissenting) ("The fair use doctrine must strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others.").

71. *Maxtone-Graham v. Burtchael*, 803 F.2d 1253, 1255 (2d Cir. 1986). See *Dratler*, *supra* note 46, at 234 (arguing that fair use has the purpose to "cushion the hard edges of copyright law and permit other to build upon the foundations of earlier copyrighted works, without negotiating a license in every case"); Anna M. Budde, Comment, *Photocopying for Research: A Fair Use Exception Favoring the Progress of Science and the Useful Arts*, 42 WAYNE L. REV. 1999, 2024 (1996) (arguing that the ultimate aim through the giving of the private incentive is to "stimulate artistic creativity for the public good") (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

72. *Hustler Magazine*, 796 F.2d at 1156; see *Pacific & S.*, 744 F.2d at 1495 (indicating that the fair use doctrine "function[s] as a 'rule of reason'"); *Iowa State*, 621 F.2d at 62 (noting that "the fair use doctrine 'is entirely equitable'" (quoting *Time Inc. v. Bernard Geis Assocs.*, 293 F.Supp. 130, 144 (S.D.N.Y. (1968))); see also *Harper & Row*, 471 U.S. at 553 (referring to a "balance of equities" in assessing a fair use claim). But see *Sony*, 464 U.S. at 495 (Blackmun, J., dissenting) (arguing that the majority's proposition that fair use is a "general" equitable rule of reason "mischaracterizes the doctrine, and simply ignores the language of the statute").

73. *Marcus v. Rowley*, 695 F.2d 1171, 1174 (9th Cir. 1983) (quoting *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967)). See also *Harper & Row*, 471 U.S. at 547 (noting that section 107 codified the "traditional privilege" of fair use); *Weissman*, 868 F.2d at 1323 (describing fair use as a "privilege for others to use the copyrighted material in a reasonable manner despite the lack of the owner's consent").

74. *Pacific & S.*, 744 F.2d at 1494 (emphasis added). But see *Leval*, *Fair Use Standard*, *supra* note 1, at 1107 (arguing that fair use should not be characterized as an exception to copyrighted protection, but an "integral part of copyright").

75. *Lape*, *supra* note 63, at 678 (emphasis added).

is clear that fair use is an affirmative defense to an action for copyright infringement.⁷⁶

Perhaps another result of the inherent balancing attached to any evaluation, the fair use doctrine has been accused of being “the most troublesome in the whole law of copyright.”⁷⁷ The truth of this accusation is no more apparent than when determining whether the doctrine should apply in a particular case. Application of fair use has enjoyed no precise definition.⁷⁸ This attribute is not from any failing by Congress or the judiciary, but due to its equitable nature.⁷⁹ Nevertheless, even if by design, courts have trouble applying this loosely defined doctrine in a consistent manner.⁸⁰

The doctrine of fair use has its American origins in court opinions of the nineteenth century,⁸¹ having been recognized since the passage of the first copyright legislation.⁸² Since its beginnings, “fair use has been refined, honed, and clarified in many Court decisions.”⁸³ Under these early opinions, courts determined whether

76. *Campbell*, 510 U.S. at 590; *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (1997); see *Dratler*, *supra* note 46, at 257 (labeling fair use as a “complete defense” to copyright infringement); *id.* at 235 (calling fair use the “paradigmatic ‘catch-all,’” relieving technical infringers of liability when it would not comport with the goals of copyright).

77. *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2nd Cir. 1939) (*per curiam*); see *Maxtone-Graham*, 803 F.2d at 1255 (reaffirming the validity of the statement made in *Dellar*); see also *Triangle Publ’ns Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1174 (5th Cir. 1980) (noting that “no definition of fair use that is ‘workable in every case has ever evolved’”); Stephen M. McJohn, *Fair Use and Privatization in Copyright*, 35 SAN DIEGO L. REV. 61, 73 (1998) (stating that the doctrine is “considered difficult and unpredictable”). Other commentators say that fair use is indeed a predictable doctrine. See *Anderson et al.*, *supra* note 45, at 34 (arguing that fair use is indeed predictable, found only when a secondary use does not amount to a market substitute for the original). The doctrine’s alleged unpredictability may not necessarily be an inherent flaw in its makeup. See *McJohn*, *supra* note 77, at 91 (suggesting that the elusive definition of fair use may be “key to its flexible role”); *id.* at 108-09 (explaining that the difficulty in defining fair use is a reflection of the overall difficulty in determining the parameters of copyright law).

78. See *Dratler*, *supra* note 46, at 235 (positing that fair use “has no crisp outlines, no precise standards, and no obvious center or core”); *Leval*, *Fair Use Standard*, *supra* note 1, at 1106 (noting that judges do not have a common view as to the doctrine’s meaning); *Patry & Perlmutter*, *supra* note 65, at 669 (noting that section 107 is “open-ended and flexible”); *id.* at 669 (stating that the 1976 Act does not define fair use).

79. See *Patry & Perlmutter*, *supra* note 65, at 68 (positing that the “thorniness of fair use . . . is inherent in the common law nature of the doctrine as a multifaceted process by which courts can finely calibrate not only the equities between the parties in a given case, but also the fundamental public policies at stake in drawing the line between private property and free use”).

80. See *Leval*, *Fair Use Standard*, *supra* note 1, at 1105 (arguing that in the development of fair use courts had failed to develop a “set of governing principles or values”). Judge Leval further criticized court decisions, arguing that decisions “seem . . . to result from intuitive reactions to individual fact patterns.” *Id.* Judge Leval argued that there was indeed an underlying framework of values from which to decide cases with consistency. *Id.*, *passim*.

81. *Patry & Perlmutter*, *supra* note 65, at 668.

82. See *Campbell*, 510 U.S. at 576 (arguing that “although the First Congress enacted our initial copyright statute . . . without any explicit reference to ‘fair use,’ . . . the doctrine was recognized by the American courts nonetheless”). Fair use has even deeper roots in the common law, where it was known as “abridgement.” *Maxtone-Graham*, 803 F.2d at 1259. An early case to raise this defense was *Gyles v. Wilcox*, 2 Atk. 141 (1740) (No. 130).

83. *Triangle Publ’ns*, 626 F.2d at 1174 (5th Cir. 1980). See *Pacific & S.*, 744 F.2d at 1494 (indicating that courts developed the fair use doctrine); *Marks*, *supra* note 47, at 1377 (noting that fair use “developed out of judicial recognition that certain acts of copying are defensible when the public interest in permitting the copying outweighs

one was allowed to make an unauthorized use of copyrighted material by engaging in a “case-specific analysis of all the relevant circumstances, taking into account the entire complex of facts and equities presented.”⁸⁴ The contours and development of fair use remained entirely within the province of the courts until it found statutory formulation.⁸⁵ Justice Story’s opinion in the 1841 case of *Folsom v. Marsh*⁸⁶ is often cited as the basis for the modern formulation of fair use.⁸⁷ In *Folsom*, Justice Story wrote that courts viewing the secondary work should consider: “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.”⁸⁸

Codification came about with the passage of the Copyright Act of 1976.⁸⁹ Possibly, by this Act, Congress wanted to move fair use from an “ad hoc balancing of policy to . . . the development of predictable standards.”⁹⁰ However, Congress was clear that its intent was to leave the doctrine as it had developed, and “not to change, narrow, or enlarge it in any way.”⁹¹ Codification thus reflected the evolution of the test as it developed in the courts.⁹² Beyond this, the development of fair use was to continue within the courts even after codification.⁹³ Thus, the 1976 Act was

the author’s interest in copyright protection”).

84. Patry & Perlmutter, *supra* note 65, at 668-69.

85. *Id.* at 669; *see Hustler Magazine*, 796 F.2d at 1151 (asserting that “Congress incorporated this common law doctrine into section 107 of the Copyright Act of 1976”).

86. 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901).

87. *See Campbell*, 510 U.S. at 576-91 (comparing the current doctrine with Justice Story’s language); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1452 (1997) (calling *Folsom v. Marsh* the “most important source” of fair use doctrine in America). *But see* L. Ray Patterson, *The Worst Intellectual Property Opinion Ever Written: Folsom v. Marsh and Its Legacy*, 5 J. INTEL. PROP. L. 431, 431 (1998) (arguing that *Folsom* did not create fair use, but instead redefined copyright infringement at that time).

88. *Folsom*, 9 F. Cas. at 348.

89. Copyright Revision Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

90. Dratler, *supra* note 46, at 253.

91. H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.A.N. 5659, 5679.

92. *Triangle Publ’ns*, 626 F.2d at 1174; *see Harper & Row*, 471 U.S. at 547 (listing section 107 as the codification of the “traditional privilege of other authors to make ‘fair use’ of an earlier writer’s work”); *id.* at 549 (noting that Congress codified the common-law doctrine in section 107); *Pacific & S.*, 744 F.2d at 1494 (indicating that the judicial formulation of fair use was codified in the 1976 Act without significant change); *Iowa State*, 621 F.2d at 60 (noting that evolution of the doctrine of fair use in the case law reveals that the four statutory factors had traditionally been examined); Dratler, *supra* note 46, at 235 (noting that Congress was clear that it did not intend to change fair use); McJohn, *supra* note 77, at 72 (suggesting that the statutory factors were “drawn” from Justice Story’s opinion in *Folsom*); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A] at 13-154 (2001) [hereinafter 4 NIMMER] (indicating that the four statutory factors were largely “culled from the prior case law”). *But see Pacific & S.*, 744 F.2d at 1495 n.7 (stating that the “House Committee on the Judiciary may have overstated its intention to leave the doctrine of fair use unchanged, because the statute clearly offers new guidance for courts considering fair use defense[s] . . . establish[ing] a minimum number of inquiries that a court must carry out”).

93. *See Campbell*, 510 U.S. at 596 (Kennedy, J., concurring) (arguing that the passing of section 107 “presumes that rules will emerge from the course of decisions”); *Triangle Publ’ns*, 626 F.2d at 1174 (arguing that Congress “made clear” that the codification of fair use was “in no way intended to depart from Court-created principles or to short-circuit further judicial development”); *Maxtone-Graham*, 803 F.2d at 1260 (illustrating that

merely a statutory recognition of the existing doctrine and instruction to the courts to the doctrine's continued development, rather than creation of a new body of rules.⁹⁴

The statute, in fact, largely reflects Justice Story's words in *Folsom*.⁹⁵ Section 107 of the 1976 Act contains the doctrine in its current formulation and reads in pertinent part:

[T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work[.]⁹⁶

Section 107 thus commands courts to consider four statutory factors in deciding whether fair use applies.⁹⁷ All four statutory factors must be considered together "in light of the purposes of copyright."⁹⁸ Every factor addresses a different aspect of the issue, each one asking the evaluator to decide how a finding of fair use would either further or impede the goals of copyright.⁹⁹

with the passage of section 107 Congress indicated its intent to "give courts the freedom to adapt the doctrine to particular situations on a case-by-case basis"); Dratler, *supra* note 46, at 253 (noting that Congress passed the four statutory factors in the hopes that courts would develop consistent rules); *see also* H.R. REP. NO. 1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679 (noting that "no real definition of the concept has ever emerged").

94. Patry & Perlmutter, *supra* note 65, at 674. "It is therefore misleading to characterize section 107 as a 'codification' of the doctrine." *Id.*

95. *See Campbell*, 510 U.S. *passim* (using Justice Story's language in *Folsom* in its illustration of the statutory factors); Leval, *Fair Use Standard*, *supra* note 1, at 1105 (arguing that the 1976 Act "largely adopted [Justice Story's] summary").

96. 17 U.S.C. § 107 (1994).

97. *See Pacific & S.*, 744 F.2d at 1495 (noting that section 107's use of "mandatory language" requires examination of all four factors). Arguing that all four factors must be analyzed, the *Pacific & Southern* court criticized the district court for essentially creating a rule that secondary uses must be "inherently productive or creative" to be considered fair use: "a doctrine meant to resolve unforeseen conflicts of values should not turn on such a narrow inquiry." *Id.* at 1495.

98. *Campbell*, 510 U.S. at 578.

99. Leval, *Fair Use Standard*, *supra* note 1, at 1111.

Apart from listing the factors to be considered, however, the statute itself does not give much guidance in their application to a given case.¹⁰⁰ Though all factors must be considered, they are not simply evaluated individually, with the party gathering the majority winning the fair use analysis.¹⁰¹ Application of fair use under the statute does not lend itself to such mechanistic application of the factors, but rather requires the court to engage in a fact-sensitive analysis.¹⁰² When Congress passed section 107, it gave no particular weight to any of the four statutory factors.¹⁰³ A factor may be analyzed, but then deemed unhelpful to the analysis in the context of the issue at hand.¹⁰⁴ In fact, varying the weight given to each factor with the specifics of the case and entertaining additional factors, is a consistent way to apply the doctrine.¹⁰⁵ Indeed, such flexibility in the doctrine is necessary for fair use to successfully operate.¹⁰⁶

Courts are therefore further allowed to entertain considerations other than the four statutory factors, as Congress did not intend that they be exclusive.¹⁰⁷ For

100. McJohn, *supra* note 77, at 73; see Leval, *Fair Use Standard*, *supra* note 1, at 1105-06 (noting that section 107 gives "little guidance on how to recognize fair use").

101. Leval, *Fair Use Standard*, *supra* note 1, at 1110.

102. See *Campbell*, 510 U.S. at 577 (noting that applying fair use "is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis"); *Sony*, 464 U.S. at 479-480 (Blackmun, J., dissenting) (noting that the fair use analysis is "necessarily a flexible one, and the endless variety of situations that may arise precludes the formulation of exact rules"); *Harper & Row*, 471 U.S. at 552 (positing that a fair use analysis "must always be tailored to the individual case"); *Hustler Magazine*, 796 F.2d at 1151-52 ("Courts balance these factors to determine whether the public interest in the free flow of information outweighs the copyright holder's interest in exclusive control over the work."); *Weissman*, 868 F.2d at 1323 (noting that a proposed application of fair use requires a case-sensitive analysis); *Maxtone-Graham*, 803 F.2d at 1254 (noting that fair use requires a "difficult case-by-case balancing of complex factors"); *Iowa State*, 621 F.2d at 60 (arguing that the case law has emphasized that a fair use determination depends on the facts of the case before the court and cannot be resolved through fixed criteria). Though Justice Blackmun warned against bright-line rules in fair use, he also stated that the legislative history suggesting that a case-by-case approach is correct was created only in the context of productive secondary uses. *Sony*, 464 U.S. at 497 (Blackmun, J., dissenting).

103. See *Triangle Publ'ns*, 626 F.2d at 1175 (indicating that the 1976 Act does not reveal how much weight is to be given each statutory factor); *Pacific & S.*, 744 F.2d at 1495 n.7 (suggesting that section 107 leaves it to the courts to decide how much weight to attribute each factor); 4 NIMMER, *supra* note 92, § 13.05 at 13-153 (noting that section 107 "gives no guidance as to the relative weight to be ascribed to each of the listed factors"); see also *Dr. Seuss*, 109 F.3d at 1402 (asserting that the second statutory factor "typically has not been terribly significant in the overall fair use balancing"). Illustrating the notion that courts can attribute uneven weight to the factors in a given case analysis, the *Pacific & Southern* court in fact noted in its own evaluation that the second statutory factor had "limited impact" on the outcome of its particular case. 744 F.2d at 1497.

104. See *Campbell*, 510 U.S. at 586 (analyzing briefly the second factor regarding the defendant's parody of the plaintiff's original song, terming it "not much help" in deciding the case, since parodies "almost invariably copy publicly known, expressive works").

105. See *Dratler*, *supra* note 46, at 259 (suggesting that such an approach would lead to more decisional consistency).

106. Patry & Perlmutter, *supra* note 65, at 668.

107. *Sony*, 464 U.S. at 476 (Blackmun, J., dissenting); *Maxtone-Graham*, 803 F.2d at 1260; but see *Harper & Row*, 471 U.S. at 588 (Brennan, J., dissenting) (noting that the four statutory factors "provide substantial guidance to courts undertaking the proper fact-specific inquiry," despite the case-sensitive analysis); *Hustler Magazine*, 796 F.2d at 1151 n.4 (positing that the legislative history of section 107 was clear that the four statutory factors are not exclusive considerations); *Pacific & S.*, 744 F.2d at 1495 n.7 (suggesting that section 107 leaves it to the court to

example, evaluating the equities surrounding the case may be an initial consideration.¹⁰⁸ Likewise, policy considerations may play into the broader analysis.¹⁰⁹ In fact, it is entirely possible that in some cases, factors other than the four statutory ones may be more important, given the set of facts before the court.¹¹⁰

Nevertheless, most courts rely almost exclusively on the four statutory factors.¹¹¹ Even if a court should decide to evaluate other considerations, each analysis should at the very least begin with the statutory factors.¹¹² Further illustration of these factors as they are interpreted by the courts will provide a better framework to assess the Ninth Circuit's opinion in *Worldwide Church of God*.

1. *The Purpose and Character of the Use*

The first factor—"the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"¹¹³—draws from Justice Story's statement, "the nature and objects of the selections made."¹¹⁴ This factor asks one to consider the justification for the secondary use of the copyrighted material.¹¹⁵ Answering this lies in deciding whether the secondary use "fulfill[s] the objective of copyright law to stimulate creativity for public illumination."¹¹⁶

decide how to "supplement" the statutory factors); *Triangle Publ'ns*, 626 F.2d at 1175 (arguing that "since the statutory formulation is simply a restatement of the case law, it is appropriate to look to the cases for guidance"). Further support comes from the text of section 107 itself, directing a fair use determination to "include" the statutory factors. 17 U.S.C. § 107 (1994). "Include" means "illustrative and not limitative." 17 U.S.C. § 101. *See generally Pacific & S.*, 744 F.2d at 1497-98 (analyzing plaintiff's alleged duty as a public trustee to provide public access to new broadcasts as a "fifth factor" in its fair use analysis); *id.* at 1498 n.13 (indicating that an analysis of an alleged conflict between the copyright monopoly and the goals of copyright in a particular case is proper to analyze under fair use); *Maxtone-Graham*, 803 F.2d at 1264 (assessing good faith of the secondary user in its fair use analysis).

108. *See Weissman*, 868 F.2d at 1323 (arguing that the fair use "[a]nalysis begins not by elevating the statutory guides into inflexible rules, but with a review of the underlying equities"). *See generally* *New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152, 160 (2d Cir. 1990) (considering "[o]ther [f]actors" apart from the statutory factors as part of its fair use inquiry); *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966) (balancing the public interest in having access to the plaintiff's original work against the plaintiff's interest in privacy).

109. *See* *Dratler*, *supra* note 46, at 250 (suggesting that two leading cases—*Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1974), and *Rosemont Enterprise v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966)—"illustrate the importance of policy in a fair use analysis"). In *Williams & Wilkins*, the interest in dissemination of the work centered on access to medical literature for the progress in medicine, while in *Rosemont* it was the public's right to know about a well-known figure. *Dratler*, *supra* note 46, at 249.

110. *See* *Dratler*, *supra* note 46, at 258 & n.121 (noting that in the *Nation* case the unpublished status of the original work was attributed great weight).

111. Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 ARIZ. ST. L.J. 1, 7 (1999).

112. *See* *Dratler*, *supra* note 46, at 260 (stating that the fair use analysis should not begin with policy and equity consideration).

113. 17 U.S.C. § 107(1) (1994).

114. *Campbell*, 510 U.S. at 578 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348).

115. Leval, *Fair Use Standard*, *supra* note 1, at 1111.

116. *Id.* Indeed, Judge Leval states that this question "lies at the heart of the fair user's case." *Id.*

Under the statutory formulation, many secondary uses of copyrighted material may constitute fair use of the original material, and fair uses are not limited to the listed uses in the preamble to section 107.¹¹⁷ However, a use consistent with one listed in the preamble by no means guarantees that it will be found to be fair.¹¹⁸ Nevertheless, the language of the statute in the preamble, the legislative history, and copyright policy all suggest that “productive” uses are favored under section 107.¹¹⁹ The way to determine how productive a use is, and one which the Supreme Court has adopted,¹²⁰ is to ask how “transformative” the secondary use is.¹²¹ This requires the evaluator to determine whether the secondary use simply “supersedes the objects”¹²² of the original or “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹²³ The less productive or transformative a use is, the less likely it will be found a fair use.¹²⁴ Productive/transformative uses are favored because they are more consistent with the underlying goal of furthering the science and arts.¹²⁵

As a starting point to determine more narrowly what types of secondary uses the doctrine seeks to protect, section 107’s illustrative list provides guidance.¹²⁶ These

117. See *Campbell*, 510 U.S. at 577-78. (noting that section 107 “employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses”) (internal citation omitted); see also *Pacific & S.*, 744 F.2d at 1496 (indicating that, based on the uses listed in the preamble, fair uses are only those which “contribute in some way to the public welfare”).

118. See McJohn, *supra* note 77, at 72 (suggesting that uses not in the preamble might be found to be fair use while uses listed in the preamble may not); Dratler, *supra* note 46, at 257 (noting that a preamble use is not “automatically fair”).

119. Dratler, *supra* note 46, at 294.

120. See *Campbell*, 510 U.S. at 578-79 (noting the favorable treatment given productive uses); see also Lape, *supra* note 63, at 677-78 (noting that the Supreme Court has “enthusiastically” adopted the productive use standard).

121. Leval, *Fair Use Standard*, *supra* note 1, at 1111. Judge Leval further illustrated what constitutes a transformative use: “quoted matter . . . used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings . . . is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.” *Id.* Uses may include “criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it.” *Id.*

122. *Campbell*, 510 U.S. at 579 (quoting *Folsom v. Marsh*).

123. *Id.* See *Dr. Seuss*, 109 F.3d at 1400 (illustrating that the first statutory factor requires determining whether a secondary use alters the original with “new expression, meaning or message”).

124. Leval, *Fair Use Standard*, *supra* note 1, at 1111 (arguing that mere republishing of the original work will not likely be found to be a fair use).

125. See *Campbell*, 510 U.S. at 579 (positing that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works”). The Court recognized that the “obvious statutory exception” to a transformative use requirement is the use of multiple copies for classroom distribution. *Id.* at 579 n.11. The Supreme Court has also noted that transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Id.* at 579 (internal citation omitted). See also *Sony*, 464 U.S. at 480 (Blackmun, J., dissenting) (arguing that “when a user reproduces an entire work and uses it for its original purpose, with no added benefit to the public, the doctrine of fair use usually does not apply”).

126. See Leval, *supra* note 1, at 1110 (suggesting that the preamble provides that “fair use may be made for generally educational or illuminating purposes”).

uses, with the exception of “multiple copies for classroom use,” contain the common theme of productive use.¹²⁷ Nevertheless, these examples are only a guide, not an exhaustive list.¹²⁸ Indeed, too much adhesion to the examples listed in the preamble would make the first factor superfluous.¹²⁹

Transformative/productive use is therefore not “absolutely necessary” to find fair use, though such a use is more consistent with copyright’s underlying goal of furthering science and the arts.¹³⁰ The inclusion of “multiple copies for classroom use” in the preamble is clearly indicative of the doctrine’s ability to exist when there is a nontransformative/nonproductive secondary use.¹³¹ As the Supreme Court has stated, “[t]he distinction between ‘productive’ and ‘unproductive’ uses may be helpful in calibrating the balance, but it cannot be wholly determinative.”¹³²

The first factor also suggests an inquiry into any “commercial nature” or “nonprofit educational purpose” of the secondary work.¹³³ However, this is only one question in the broader inquiry: “the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness.”¹³⁴ Indeed, the effect of a commercial secondary use of a work may be minimized if other countervailing interests are served by the secondary use, such as a public interest.¹³⁵ Similarly, a commercial secondary use may be less significant the more transformative the use is.¹³⁶ Hence, a commercial secondary use gives no rise to a presumption against fair use.¹³⁷

2. *Nature of the Copyrighted Work*

The second statutory factor—“the nature of the copyrighted work”¹³⁸—owes its origin to Justice Story’s “value of the materials used.”¹³⁹ Whereas the first factor

127. 17 U.S.C. § 107.

128. See *Pacific & S.*, 744 F.2d at 1495 (indicating that the preamble to section 107 “merely illustrates the sorts of uses likely to qualify as fair uses under the four listed factors”).

129. Patry & Perlmutter, *supra* note 65, at 675-76.

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

131. Patry & Perlmutter, *supra* note 65, at 675.

132. *Sony*, 464 U.S. at 455 n.40.

133. See 17 U.S.C. § 107(1) (1994).

134. *Campbell*, 510 U.S. at 584.

135. See *Triangle Publ'ns*, 626 F.2d at 1176 (noting that the commercial use surrounding the defendant’s use of the plaintiff’s magazine covers in advertisements for a competing magazine was minimized since the public benefited from comparative advertising); *Rosemont*, 366 F.2d at 307-308 (suggesting that commercial gain by the secondary user may nevertheless constitute fair use when there is a public benefit achieved).

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

137. See *id.* at 584 (arguing that if “commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble of section 107” since they are done with a profit motive); *Triangle Publ'ns*, 626 F.2d at 1175 (arguing that “commercial motive” in the secondary use of a copyrighted work is relevant, but “certainly not decisive”).

138. 17 U.S.C. § 107(2) (1994).

139. *Campbell*, 510 U.S. at 586.

focuses on whether the secondary use advances the public pool of knowledge,¹⁴⁰ this factor focuses on the incentives for the author to create.¹⁴¹ It recognizes that some works are more amenable to copying for fair use purposes than others.¹⁴²

Generally, this factor revolves around the factual or creative nature of the work. A court places the original work on the "spectrum from fact to fancy."¹⁴³ "The scope of fair use is greater when 'informational' as opposed to more 'creative' works are involved."¹⁴⁴ Deciding where a work falls on the spectrum is not a simple practice. One court suggests that what may be helpful in finding whether an original work is closer to the core of copyright protection is asking whether the work is "imaginative and original, or whether it represent[s] a substantial investment of time and labor made in anticipation of a financial return."¹⁴⁵ Regarding a work that is primarily factual, there is no "bright-line test."¹⁴⁶ The Second Circuit refers to factual works, somewhat circularly, as "essentially factual in nature"¹⁴⁷ and "primarily informational rather than creative."¹⁴⁸ This reduced protection for factual works stems from copyright law's refrain from protecting facts and ideas.¹⁴⁹

Factors other than the factual/creative nature of the work are relevant as well to the overall inquiry. One of these considerations is whether the original work, even if creative, is of the type copyright law intended to encourage.¹⁵⁰ Judge Pierre Leval of the Second Circuit points out that copyright law was not intended to encourage individuals to write shopping lists or love letters, even though these writings may enjoy the benefit of a copyright.¹⁵¹ Additionally, the published or unpublished nature

140. See *supra* notes 115-37 and accompanying text.

141. Leval, *Fair Use Standard*, *supra* note 1, at 1116. See *id.* at 1122 (noting that this factor "concerns the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that the copyright seeks to encourage").

142. *Id.* at 1116. See *Campbell*, 510 U.S. at 586 (illustrating that the second statutory factor "calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied").

143. Dratler, *supra* note 46, at 303.

144. *Hustler Magazine*, 796 F.2d at 1153-54. See *Harper & Row*, 471 U.S. at 563 (noting that the "law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy").

145. *Hustler Magazine*, 796 F.2d at 1154.

146. *New Era Publ'ns Int'l v. Carol Publ'g Group*, 904 F.2d 152, 157 (2d Cir. 1990); see Dratler, *supra* note 46, at 304 (noting that there is "no precise dividing line" between factual and creative works).

147. *Maxtone-Graham*, 803 F.2d at 1263.

148. *Consumers Union of United States, Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983).

149. See Dratler, *supra* note 46, at 304 (arguing that more liberal use of factual works is allowed not only because the law does not protect them, but also because some facts lend themselves to few forms of expression); 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

150. See Leval, *Fair Use Standard*, *supra* note 1, at 1119-20 (discussing that copyright law was not designed to encourage certain types of creations).

151. *Id.* at 1119.

of the original work may have weight.¹⁵² A work that is unpublished will likely enjoy greater protection from fair use than a work that is published.¹⁵³ Ultimately, however, evaluation of the second factor “concerns the protection of the reasonable expectations of one who engages in the kinds of creation/authorship that the copyright seeks to encourage.”¹⁵⁴

3. *Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*

“The amount and substantiality of the portion used in relation to the copyrighted work as a whole”¹⁵⁵ mimics Justice Story’s “the quantity and value of the materials used.”¹⁵⁶ Generally speaking, the greater amount used, the less likely there is fair use.¹⁵⁷ However, this factor is more than a simple exercise in comparing how much was taken in relation to the original as a whole: “[t]oo mechanical a rule . . . can be dangerously misleading.”¹⁵⁸ This factor thus requires quantitative and qualitative assessment.¹⁵⁹

Regarding the quantitative aspect—“the amount . . . used”—attention needs to be paid to the first statutory factor.¹⁶⁰ A court must determine if the amount used secondarily is reasonable in relation to the justification for copying the original.¹⁶¹ The amount of permissible use varies with the purpose and character of the secondary use.¹⁶² With this relationship in mind, there exists no absolute rule as to

152. See *Harper & Row*, 471 U.S. at 551 (noting the “scope of fair use is narrower with respect to unpublished works”); *Salinger*, 811 F.2d at 97 (noting the greater protection given to unpublished works); *Henry Holt*, 873 F.2d at 583 (attributing a dispositive nature against fair use to unpublished works). All three of these cases were decided before a 1992 amendment to section 107 was passed directly addressing the published nature of the work. After listing the four statutory factors, the section ends by reading: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified at 17 U.S.C. § 107 (1994)). This addition suggests that any consideration of a work’s unpublished status should not be dispositive.

153. *Henry Holt*, 873 F.2d at 583.

154. Leval, *Fair Use Standard*, *supra* note 1, at 1122.

155. 17 U.S.C. § 107(3).

156. *Campbell*, 510 U.S. at 586.

157. Leval, *Fair Use Standard*, *supra* note 1, at 1122.

158. Leval, *Fair Use Standard*, *supra* note 1, at 1122.

159. See *Campbell*, 510 U.S. at 587 (noting that the third statutory factor “calls for thought not only about the quantity of the materials used, but about their quality and importance, too”); *Harper & Row*, 471 U.S. at 569 (concluding that the Court of Appeals for the Second Circuit gave too little weight to the qualitative nature of the material defendant took from plaintiff’s work in its assessment of the third statutory factor).

160. See *Campbell*, 510 U.S. at 586-87 (noting that “[h]ere, attention turns to the persuasiveness of a parodist’s justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognized that the extent of permissible copying varies with the purpose and character of the use”).

161. *Id.* at 586; Leval, *Fair Use Standard*, *supra* note 1, at 1123.

162. *Campbell*, 510 U.S. at 586-87; see Leval, *Fair Use Standard*, *supra* note 1, at 1123 (“A solid transformative justification may exist for taking a few sentences that would not, however, justify a taking of larger quantities of material.”).

how much of a copyrighted work may be used and still be labeled a fair use.¹⁶³ In fact, even wholesale copying of an original work does not *per se* prevent a finding of fair use.¹⁶⁴

Therefore, evaluation of the third statutory factor may turn on the qualitative assessment—the “substantiality of the portion used.”¹⁶⁵ The facts considered under this aspect will likely be considered under the fourth factor in assessing how the secondary use will impact the market to the copyright owner of the original work.¹⁶⁶ A court considers here the “quality and importance” of the work taken.¹⁶⁷ For example, in *Harper & Row, Publishers v. Nation Enterprises*,¹⁶⁸ the Supreme Court held that the Nation’s verbatim use of three hundred words of an original work thousands of words long weighed against fair use because it was “the heart” of the original, the most exploitable part.¹⁶⁹ Under this formulation, the amount of a work copied verbatim is a relevant question for the court, since it may suggest the likelihood of market harm under the fourth factor.¹⁷⁰ Thus, “a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.”¹⁷¹ Nevertheless, the possibility remains that use of an entire work, which would ostensibly contain its “heart,” would not affect the market for the original.¹⁷²

4. *Effect of the Use Upon the Potential Market for or Value of the Copyrighted Work*

The fourth factor asks the evaluator to assess “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁷³ A number of courts have

163. *Maxtone-Graham*, 803 F.2d at 1263.

164. *Hustler Magazine*, 796 F.2d at 1155. See *Sony*, 464 U.S. at 449-50 (finding that wholesale copying through videotaping of television programs for purposes of time-shifting did not lean away from fair use); *Triangle Publ'ns*, 626 F.2d at 1177 n.15 (arguing that the position that reproduction of an entire work can “never be fair use” is an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice”) (quoting *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1353 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975)).

165. *Maxtone-Graham*, 803 F.2d at 1260. Judge Leval suggests that this aspect may be the more important of the two under the third statutory factor. Leval, *Fair Use Standard*, *supra* note 1, at 1123.

166. *Campbell*, 510 U.S. at 587; Leval, *Fair Use Standard*, *supra* note 1, at 1123.

167. *Campbell*, 510 U.S. at 587.

168. 471 U.S. 539 (1985).

169. *Id.* at 569. However, using “the heart” will not always tend to negate fair use. The Supreme Court in *Campbell* noted that use of parody will likely employ use of the original’s heart in order to conjure up the original work. *Campbell*, 510 U.S. at 588.

170. *Id.* at 587. The amount taken verbatim may also suggest how transformative the secondary use is. *Id.*

171. *Id.* at 587-88.

172. Leval, *Fair Use Standard*, *supra* note 1, at 1123. Judge Leval uses as an example the incorporation of fragments of an entire sonnet into a critical work that, while using the entire original work, would not displace the market for the poem alone. *Id.* See *Sony*, 464 U.S. at 449-50 (concluding that wholesale copying for time-shifting purposes did not point away from a fair use finding).

173. *Campbell*, 510 U.S. at 590; 17 U.S.C. § 107(4) (1994).

considered this factor the most important of the statutory inquiry.¹⁷⁴ Attributing special importance to market effect is supportable given that this factor directly touches the incentives for creation that an author is to reap.¹⁷⁵ Nonetheless, “[m]arket harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.”¹⁷⁶

Generally, a court must determine whether widespread secondary use would detrimentally affect a potential market for the original work.¹⁷⁷ All that needs be shown is that “some meaningful likelihood of future harm exists.”¹⁷⁸ Aside from the market for the original, the determination must also take into account harm to the market for derivative works.¹⁷⁹ The derivative market that a court must consider is that which an author would “in general develop or license others to develop.”¹⁸⁰

Only if the secondary use is for commercial purposes and is nothing more than a mere duplication of the original work, may a court presume market harm.¹⁸¹ Commercial uses beyond mere reproductions, however, do not immediately point away from fair use. Many commercial uses may in fact weigh in favor of the secondary user.¹⁸²

Ultimately, a secondary use that significantly interferes with the potential market or value of the original work impacts the author’s incentives to create, and is contrary to the goals of copyright.¹⁸³ On the other hand, “a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create.”¹⁸⁴

174. See *Harper & Row*, 471 U.S. at 556 (1985) (asserting that without this factor—the “promise of copyright would be an empty one”); *Triangle Publ’ns*, 626 F.2d at 1175 (noting that the court’s research had revealed that courts generally emphasize potential market harm or value of the copyrighted work in application); *id.* at 1177 (noting that the fourth statutory factor is “widely accepted to be the most important”); see also *Religious Tech. Ctr. v. Netcom On-Line Com. Servs.* 9232 F.Supp. 1231, 1248 (N.D. Cal. 1995) (noting that though all statutory factors must be assessed, the fourth is “central”). But see *Patry & Perlmutter*, *supra* note 65, at 693-94 (stating that the significance of *Harper & Row*’s importance attached to the fourth factor is overstated); *Leval*, *Fair Use Standard*, *supra* note 1, at 1124 (suggesting that the Supreme Court has “somewhat overstated its importance”).

175. See *Dratler*, *supra* note 46, at 286 (asserting that harm to the potential market “directly implicates the incentives for creativity that copyright law provides and that the Constitution requires”).

176. *Campbell*, 510 U.S. at 590 n.21.

177. *Harper & Row*, 471 U.S. at 568.

178. *Sony*, 464 U.S. at 451.

179. *Harper & Row*, 471 U.S. at 568. See *Dr. Seuss*, 109 F.3d at 1403 (analyzing the potential market for both the original work and derivatives).

180. *Campbell*, 510 U.S. at 592.

181. See *Campbell*, 510 U.S. at 591 (noting that any presumption of market harm is not supportable in a case that “involv[es] something beyond mere duplication for commercial purposes”). The Court of Appeals for the Sixth Circuit presumed market harm because the defendant’s use of its parody was commercial. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1438 (6th Cir. 1992).

182. See, e.g., *Pacific & S. Co.*, 744 F.2d at 1496 (indicating that a commercial purpose where a secondary user may use a copyrighted work and not harm the incentives to create may exist when the secondary user “profits from an activity that the owner could not possibly take advantage of”).

183. *Leval*, *Fair Use Standard*, *supra* note 1, at 1124.

184. *Sony*, 464 U.S. at 450-51.

Indeed, prohibiting such harmless uses “would merely inhibit access to ideas without any countervailing benefit.”¹⁸⁵

III. WORLDWIDE CHURCH OF GOD V. PHILADELPHIA CHURCH OF GOD, INC.

A. The Facts

Herbert Armstrong founded Worldwide Church of God (WCG), a nonprofit religious organization,¹⁸⁶ in 1934.¹⁸⁷ Until his death in 1986, Armstrong led the church, holding the title of “Pastor General with the spiritual rank of Apostle.”¹⁸⁸ The church produced a magazine, *The Plain Truth*, for which Armstrong wrote more than three thousand articles.¹⁸⁹

Armstrong wrote the 380-page book,¹⁹⁰ *Mystery of the Ages (MOA)*, between 1984 and 1985.¹⁹¹ *MOA* was published both serially in the church’s magazine¹⁹² and in book form.¹⁹³ In all, WCG circulated over nine million copies of *MOA*, all of them free.¹⁹⁴ Upon Armstrong’s death, the copyright in *MOA* passed to WCG through Armstrong’s will.¹⁹⁵

WCG ceased distribution of *MOA* two years after Armstrong’s death, disposing of excess “inventory” copies, but keeping “archival and research” copies.¹⁹⁶ As reasons for the discontinued distribution, WCG cited changes in various church doctrines;¹⁹⁷ the church “hoped to ‘prevent a transgression of conscience by proclaiming what the Church considered ecclesiastical error’ espoused in *MOA*.”¹⁹⁸ It believed that Armstrong conveyed views in *MOA* that were “racist in nature,” and distribution stopped “because of ‘cultural standards of social sensitivity’ and to

185. *Id.*

186. *Worldwide Church of God*, 227 F.3d at 1113. Worldwide Church of God was originally named the Radio Church of God. *Id.*

187. *Id.*

188. *See id.* (describing Armstrong’s position in the church as the “undisputed spiritual and temporal leader”).

189. *Id.* The court described Ambassador College as the church’s “affiliate teaching arm.” *Id.*

190. *Id.*

191. *Id.* This was Armstrong’s final work, completed a short while prior to his death at the age of ninety-two.

Id.

192. *Id.*

193. *Id.* at 1122 (Brunetti, J., dissenting).

194. *See id.* at 1113 (breaking down *The Plain Truth*’s distribution to approximately eight million people, plus distribution of 1.24 million copies among viewers of Worldwide Church of God telecasts and employees). It is unclear from the court’s language whether the 1.24 million copies of *MOA* were distributed in its serial form in *The Plain Truth* or in a book format.

195. *See id.* at 1114-15 (discussing how the statute allows for transfer of copyright through will, and concluding that “Armstrong’s copyright passed to [Worldwide Church of God] through his Will”).

196. *Id.* at 1113.

197. *See id.* (indicating that the church’s positions had changed on such doctrines as divorce, remarriage, and “divine healing”).

198. *Id.*

avoid racial conflict.”¹⁹⁹ The church indicated that it was interested in publishing an annotated version of *MOA* in the future,²⁰⁰ though WCG had not yet begun work on one.

Philadelphia Church of God (“PCG”) was founded in 1989 by two former ministers of the WCG²⁰¹ to strictly “follow the teachings of Herbert Armstrong.”²⁰² Until 1997 existing copies of *MOA* were used, but then PCG began to make copies for its own use.²⁰³ PCG never requested permission, copying *MOA* verbatim; the only changes were the substitution of Herbert Armstrong’s name for Worldwide Church of God on the copyright page, deletion of a “Suggested Reading” page, and removal of a reproduction warning.²⁰⁴ In addition to foreign-language versions, PCG distributed about thirty thousand copies of *MOA* in English, advertised *MOA* in newspapers and periodicals, and received “substantial” contributions from those who received the work.²⁰⁵ When PCG did not respond to WCG’s demand to stop “infringing [WCG’s] copyright and continued distribution of its *MOA*,” WCG sued.²⁰⁶

B. *The District Court*

WCG’s complaint alleged that by “reproducing, distributing, promoting, advertising and offering unlawful and unauthorized copies of *MOA*,” PCG was infringing copyright.²⁰⁷ PCG’s answer asserted, *inter alia*,²⁰⁸ that it was protected by the defense of the fair use doctrine.²⁰⁹ WCG moved for partial summary judgment and a preliminary injunction, and PCG cross-motivated for summary adjudication.²¹⁰ The district court denied WCG’s motions and granted PCG’s motion, concluding

199. *Id.* The Church’s Advisory Council of Elders stated further that “[i]nsensitivity in this area is contrary to the doctrinal program of WCG to promote racial healing and reconciliation among the races.” *Id.*

200. *Id.*

201. *Id.* Gerald Flurry and John Amos were the two former ministers and founders of Philadelphia Church of God. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. PCG also denied WCG’s ownership of the copyright, asserted that the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 barred the claim, and also counterclaimed seeking a declaratory judgment regarding its right to reproduce and distribute *MOA*. *Id.* at 1113-14.

209. *Id.* at 1113.

210. *Id.*

that the use of *MOA* was fair use under the statute.²¹¹ Summarizing its finding, the Ninth Circuit wrote that the district court

found that PCG uses *MOA* “for non-profit religious and educational purposes,” that copying a complete religious text “is reasonable in relation to that use,” that WCG presented no evidence that it lost members due to PCG’s distribution, that a potential annotated *MOA* produced by WCG would not compete against PCG’s copies of *MOA*, and that *MOA*’s being out of print provided additional justification for PCG’s production of *MOA*.²¹²

WCG challenged the district court’s conclusion of fair use as both factually and legally erroneous.²¹³

C. *The Ninth Circuit Opinion*

1. *The Majority Opinion*

Recognizing that an appellate court may conclude as a matter of law whether a challenged use is fair use if the record is “sufficient” to weigh all of the statutory factors,²¹⁴ the Court of Appeals for the Ninth Circuit concluded that, under the undisputed facts, PCG’s use of *MOA* was not fair use.²¹⁵ The court reversed the district court’s judgment, holding that WCG was entitled to a permanent injunction against PCG for reproduction and distribution of *MOA*.²¹⁶

Before evaluating the fair use statutory factors, the court addressed a few preliminary issues concerning copyright law as it applied to WCG and *MOA* in particular.²¹⁷ The court first noted that WCG’s rights to reproduce and distribute copies of *MOA* were not affected by WCG’s status as a nonprofit organization, nor by its religious activity.²¹⁸ The majority also noted that PCG’s reproduction and distribution of *MOA* did not fall within the specific exemption given to religious uses of copyrighted works by section 110 of the 1976 Copyright Act, which is limited to certain performances and displays.²¹⁹ The court further indicated that it

211. *Id.* The district court also held that Armstrong was the author of *MOA* and that *MOA* was not a work for hire, which the Circuit Court thought implied that WCG did not own *MOA*’s copyright. *Id.*

212. *Id.* at 1115.

213. *Id.*

214. *Id.*

215. *Id.* at 1121.

216. *Id.*

217. *Id.* at 1114-16.

218. *Id.* at 1115.

219. *See id.* (noting that “Congress narrowly limited the privilege accorded religious uses to ‘performance of a . . . literary or musical work . . . or display of a work, in the course of services at a place of worship or other religious assembly’”) (citing 17 U.S.C. § 110(3) (1994)).

had to remain mindful of the problems that would arise under the Free Exercise Clause if courts were to prevent religious organizations from seeking civil law protections that are available to others.²²⁰ Addressing free speech concerns, the court concluded that the interest in the free flow of information did not support a fair use claim based on *MOA*'s withdrawal from distribution.²²¹ According to the majority, free speech concerns are served by the statute's refusal to allow a copyright in facts,²²² and that this case was not one of WCG abusing its copyright to hide facts.²²³ The court furthermore asserted that the statute does not prohibit a copyright owner's ability to keep all the copyrighted work private during its entire term.²²⁴ Dealing promptly with these concerns, the majority then analyzed PCG's use of *MOA* under section 107.

Using the precise order of section 107, the majority first addressed the purpose and character of PCG's use of *MOA*.²²⁵ The majority recognized the focus of this inquiry was whether the secondary use simply supersedes the purpose of the original, or to what extent the use is instead transformative.²²⁶ The court further explained its inquiry, quoting Justice Story in *Folsom*: "'There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.'"²²⁷ Applying this illustrative language to PCG, the court concluded that the copying of *MOA* in its entirety "bespeaks no 'intellectual labor and judgment,'" and "merely 'supersedes the object' of the original . . . to serve religious practice and education."²²⁸ Though recognizing that transformative use is not "'absolutely necessary,'" the court nonetheless asserted that the absence of transformative use substantially diminishes a claim of fair use.²²⁹

The court also rejected PCG's argument that the first factor nevertheless favored fair use because its use was not for profit and not commercial.²³⁰ Adopting the position of the Second Circuit, the majority agreed that "in weighing whether the

220. *Id.* The court further indicated that limiting protections for religious organizations would leave them "at the mercy of anyone who appropriated their property with an assertion of religious right to it." *Id.*

221. *Id.*

222. *See id.* (asserting that the public interest in the free flow of information is "assured by the law's refusal to recognize a valid copyright in facts").

223. *See id.* at 1116 (asserting that "[t]his is not a case of 'abuse of the copyright owner's monopoly as an instrument to suppress facts'" (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985))).

224. *See id.* (citing *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990)).

225. *Id.* at 1117.

226. *See id.* at 1117 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

227. *See id.* (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901)).

228. *Id.*

229. *See id.* (noting that "[a]lthough 'transformative use is not absolutely necessary for a finding of fair use, where the use is for the same intrinsic purpose as [the copyright holder's] ... such use seriously weakens a claimed fair use'" (citations omitted)).

230. *Id.* at 1117.

purpose was for 'profit,' 'monetary gain is not the sole criterion . . . particularly in [a] . . . setting [where] profit is ill-measured in dollars.'" ²³¹ Looking to the dictionary, the court found "profit" to broadly mean an "advantage," or "benefit." ²³² With this, the court reasoned that PCG "unquestionably profit[ed] . . . by providing [MOA] at no cost with the core text essential to its member's religious observance, by attracting through distribution of MOA new members who tithe ten percent of their income to PCG, and by enabling the ministry's growth." ²³³ Noting that PCG's membership grew to around seven thousand members during the time it made and distributed copies of MOA, the majority concluded that "[i]t is beyond dispute that PCG 'profited' from copying MOA—it gained an 'advantage' or 'benefit' from its distribution and use of MOA without having to account to the copyright holder." ²³⁴ Hence, PCG's nontransformative superseding and profiting use of MOA favored WCG under the first factor. ²³⁵

Next, the court analyzed the nature of MOA. ²³⁶ The majority recognized this factor to turn "on whether the work is informational or creative." ²³⁷ PCG described MOA in its brief as "'primarily a textual, historical account of [Armstrong's] views of 'the truth' of the Bible.'" ²³⁸ The court, however, concluded summarily that though MOA "may be viewed as 'factual' by readers who share Armstrong's religious beliefs, the creativity, imagination and originality embodied in MOA tilt[ed] the scale against fair use." ²³⁹

Turning to the third statutory factor, the majority next discussed the amount and substantiality of what was secondarily used in relation to MOA as a whole. ²⁴⁰ PCG argued that its wholesale copying of MOA was reasonable because of the religious use of the work. ²⁴¹ The majority did recognize that the amount of copying allowed varies with the "'purpose and character of the use.'" ²⁴² However, it found PCG to be in a different position than the secondary user in *Campbell v. Acuff-Rose Music, Inc.*, ²⁴³ stating that PCG's use was for the same purpose as WCG's, while in

231. *Id.* (quoting *Weissman*, 868 F.2d at 1324). The majority also cited *Harper & Row* to explain the "profit" inquiry: "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Worldwide Church of God*, 227 F.3d at 1117 (quoting *Harper & Row*, 471 U.S. at 562).

232. *See id.* at 1118 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1811 (3d ed. 1971)).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 1118.

237. *Id.*

238. *Id.* (alteration in original).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* (quoting *Campbell*, 510 U.S. at 586-87 (1994)).

243. *Campbell*, 510 U.S. 569 (1994).

Campbell the secondary use was a parodic use of the original work.²⁴⁴ Indicating the importance of this distinction, the court wrote that it had previously held that secondary use of a work for the same purpose as the copyright owner intended strongly suggests no fair use.²⁴⁵

The court further asserted that “reliance on *Sony [Corp. of America v. Universal City Studios, Inc.]*”²⁴⁶ would be misplaced.”²⁴⁷ While time-shifted viewing of television programs free of charge justified wholesale copying of videotapes in *Sony*, the majority asserted that no similar “unique circumstances” justified PCG’s reproduction of *MOA* in its entirety.²⁴⁸ Rather, the court reasoned that a “reasonable person would expect PCG to pay WCG for the right to copy and distribute *MOA* created by WCG with its resources.”²⁴⁹ With this, the court held that the third factor, too, weighed against PCG.²⁵⁰

The court’s consideration of the effect of PCG’s use on the WCG’s potential market for or the value of *MOA* was its final and most lengthy discussion.²⁵¹ The court noted from the outset that it was facing a novel application of the fair use doctrine where the copyright owner, here WCG, is a nonprofit organization.²⁵² Indicating that though existing case law dealt with “works marketed for profit,” the court vigorously asserted that such a history did not mean that the absence of a “conventional market” for a work removed copyright protection from the owner, as it would effectively prevent nonprofit organizations from holding copyrights.²⁵³ Pointing out that the statute addresses *value* of the work in addition to market effect,²⁵⁴ the court posited that the rewards that Congress intended a copyright owner to have need not be strictly monetary.²⁵⁵

WCG took the position that with a future annotated version of *MOA*, it “hope[d] to reach out to those familiar with Armstrong’s teachings and those in the broader Christian community.”²⁵⁶ WCG further argued that the individuals who respond to

244. *Worldwide Church of God*, 227 F.3d at 1118 (asserting that PCG was on a “different footing” than was the secondary user in *Campbell*).

245. *Id.* (stating that “this court has held ‘that a finding that the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indicia of no fair use’”) (quoting *Marcus*, 695 F.2d at 1175).

246. 464 U.S. 417 (1984).

247. *Worldwide Church of God*, 227 F.3d at 1118.

248. *See id.* (asserting that “no such circumstances exist here to justify PCG’s reproduction of the entire work”).

249. *Id.* at 1118-19.

250. *Id.* at 1119.

251. *Id.* at 1119-20.

252. *Id.*

253. *Id.* (arguing that “[i]f evidence of actual or potential monetary loss were required, copyrights held by nonprofits would be essentially worthless” and “[r]eligious, educational and other public interest institutions would suffer if their publications invested with an institution’s reputation and goodwill could be freely appropriated by anyone”).

254. *See id.* (citing 17 U.S.C. § 107(4) (1994)).

255. *See id.* (citing *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 447 n.28 (1984)).

256. *Id.*

PCG's ads are the same people who would have interest in any annotated version or republication of *MOA* by WCG, and that PCG's distribution hurt WCG's "goodwill by diverting potential members and contributions from WCG."²⁵⁷ The majority found that the "undisputed evidence" showed that those who had copies of *MOA* from PCG were "present or could be potential adherents of WCG," and that the value of *MOA* was its use as a "marketing device" utilized by both PCG and WCG in their evangelical efforts.²⁵⁸

Moreover, the majority disagreed with PCG's argument that WCG's ten-year failure to "exploit" *MOA*, as well as its absence of a "concrete" plan to produce a new version, showed that *MOA* had no economic value to WCG that PCG's distribution could affect.²⁵⁹ The court explained that the relevant inquiry is the potential market, and that one who has indicated an intention not to publish can change that intent.²⁶⁰ The court reasoned that because WCG planned to publish an annotated version some time in the future, WCG is "entitled to protection of its copyright."²⁶¹

Finally, the majority considered PCG's argument that any annotated version of *MOA* by WCG would be "so different as not to be competitive with PCG's *MOA*."²⁶² Believing PCG's position to be "speculative" and "miss[ing] the point," the court stated that PCG "unfairly appropriated" all of *MOA* "for the very purposes for which WCG created *MOA*," and that the court knew of no case that held fair use for verbatim copying of an entire written work without criticism.²⁶³ Though not firmly concluding that the fourth factor favored PCG, the majority argued that the fourth factor was, "at worst, neutral."²⁶⁴

Weighing all four statutory factors, the majority concluded that "[o]n balance, the defense of fair use of *MOA* fails."²⁶⁵ Three statutory factors weighed in WCG's favor, and the fourth leaned toward WCG, being neutral at worst.²⁶⁶ As such, the court determined that, as a matter of law, PCG was not protected by fair use, and reversed the district court's decision.²⁶⁷

257. *Id.*

258. *Id.*

259. *Id.*

260. *See id.* (explaining that "even an author who had disavowed any intention to publish his work during his lifetime was entitled to protection of his copyright, first, because the relevant consideration was the 'potential market' and, second, because he has the right to change his mind").

261. *Id.* at 1119 n.2.

262. *Id.* at 1120.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 1121. The court reversed judgment for PCG, and the denial of WCG's motion for preliminary injunction, and remanded "for entry of preliminary injunction pending a trial of any damages and final adjudication." *Id.*

2. *The Dissent*

Circuit Judge Melvin Brunetti authored the dissent, addressing solely the majority's determination of fair use.²⁶⁸ Judge Brunetti, like the majority, weighed the statutory factors in reaching a determination.²⁶⁹ Unlike the majority, however, Judge Brunetti gave a more thorough exposition of the equities existing between the parties before addressing the statutory analysis.²⁷⁰

Judge Brunetti began by noting that the copyright issue in the case arose from a doctrinal split in WCG that caused "defrocked" ministers to found PCG.²⁷¹ Adherents of Herbert Armstrong's views, PCG members believed *MOA* to be "divinely inspired text necessary for proper interpretation of the Bible . . . [and as] required reading for every member baptized into PCG and any prospective member prior to their attendance at church services."²⁷² The dissent also reiterated WCG's decision to cease its production of *MOA* and its lack of current plans to publish or distribute the work as *originally* written, noting in particular WCG's explanation that it was "a 'Christian duty' to keep Armstrong's doctrinal errors out of circulation."²⁷³ Regarding WCG's absence of plans to publish *MOA*, the dissent pointed out both the testimony of WCG leaders indicated that an "annotation of *MOA* was 'not something that [was] going to be decided or happen any time soon,'" and that WCG would, at the time the case was before the court, have to complete several tasks before any annotation could be produced.²⁷⁴ The dissent asserted that the members of PCG, as followers of Armstrong's teachings, were expunged from WCG as they "could no longer practice their religious belief as set forth in *MOA*," and it was this very situation that PCG was created and prompted the need to publish *MOA*.²⁷⁵ With these facts before the court, the dissent believed the court had to "decide whether PCG's publication and distribution of *MOA* to church members and the public without charge beginning January 1997 constitutes fair use."²⁷⁶

The dissent, as did the majority, looked to the framework of section 107. However, Judge Brunetti emphasized the character of fair use as an "equitable rule of reason," and that the section 107 factors were thus for guidance.²⁷⁷ As such, he stated that there were "no bright-line rules and 'each case raising the [fair use]

268. *Id.* at 1122.

269. *Id.* at 1122-25.

270. *Id.* at 1122-23.

271. *Id.* at 1122 (Brunetti, J., dissenting).

272. *Id.* (Brunetti, J., dissenting).

273. *Id.* (Brunetti, J., dissenting).

274. *See id.* (Brunetti, J., dissenting) (arguing that "[a]part from determining whether an annotation is financially feasible, WCG would need to take surveys of its membership, assess its priorities, determine the format, hire an author and researcher, and secure a publisher" before producing an annotation).

275. *See id.* (Brunetti, J., dissenting) (arguing that WCG's "doctrinal shift and renunciations" of Armstrong's views in *MOA* created PCG's need to publish).

276. *Id.* (Brunetti, J., dissenting).

277. *Id.* (Brunetti, J., dissenting).

question must be decided on its own facts.”²⁷⁸ Based on these observations Judge Brunetti conducted his section 107 analysis.

Assessing the first factor, the dissent described PCG as a nonprofit organization that reproduced and distributed *MOA* for the purpose of spreading a religious message.²⁷⁹ Judge Brunetti characterized this use of *MOA* as a “sharp contrast” to other cases where the secondary use was deemed a “commercial” use.²⁸⁰ Furthermore, the dissent downplayed the majority’s argument that the first factor weighed against fair use “because PCG’s use [was] not transformative and PCG [profited] by using *MOA* as a marketing tool to attract new tithing members.”²⁸¹ Stressing that a use need not necessarily be transformative to qualify as fair use, the dissent posited that in PCG’s case, “altering or adding to *MOA* would defeat PCG’s religious purpose because it believes that *MOA* is a divinely inspired text.”²⁸² Regarding any profit gained by PCG, the dissent took a more conventional “dollar” approach to the analysis. Judge Brunetti pointed out that WCG did not challenge PCG’s assertion that its unsolicited donations in connection with the distribution of *MOA* did not come close to meeting its printing costs.²⁸³ Thus, in Judge Brunetti’s view, the noncommercial and religious aspects to PCG’s purpose “overwhelm[ed]” any commercial facets of the use, and favored a finding of fair use.²⁸⁴

Moreover, the dissent also considered the availability of *MOA* to PCG. Judge Brunetti noted that *MOA* had been out of print for nearly nine years when PCG started its production, and that *MOA* could only be attained through a few sources.²⁸⁵ To Judge Brunetti, these facts gave additional justification for PCG’s use.²⁸⁶

The dissent analyzed the second and third statutory factors together, calling these two factors “mostly irrelevant” to the case.²⁸⁷ Citing conflicting case law, Judge Brunetti argued that *MOA*, as a religious text, was difficult to classify as either a creative or an informational work.²⁸⁸ Turning to the amount of copying by PCG, the dissent emphasized that copying a work in its entirety will “not weigh against a finding of fair use if it is consistent with the noncommercial purpose and character of the use.”²⁸⁹ According to Judge Brunetti, PCG’s purpose to “spread the religious message of Armstrong’s divinely inspired text” required copying of the entire

278. *Id.* (Brunetti, J., dissenting) (quoting *Sony*, 464 U.S. at 441 n.31, quoting H. REP. NO. 94-1476, at 65-66 (1976)) (alterations in original).

279. *Id.* (Brunetti, J., dissenting).

280. *Id.* at 1123 (Brunetti, J., dissenting).

281. *Id.* (Brunetti, J., dissenting).

282. *Id.* (Brunetti, J., dissenting).

283. *Id.* (Brunetti, J., dissenting).

284. *Id.* (Brunetti, J., dissenting).

285. *Id.* (Brunetti, J., dissenting).

286. *Id.* (Brunetti, J., dissenting).

287. *Id.* (Brunetti, J., dissenting).

288. *See id.* (Brunetti, J., dissenting) (arguing that *MOA* “defies easy classification under the second factor as either informational or creative”).

289. *Id.* (Brunetti, J., dissenting) (quoting *Sony*, 464 U.S. at 449-50).

text.²⁹⁰ Thus, the dissent concluded that neither the second nor third statutory factor weighed against a finding of fair use.²⁹¹

Judge Brunetti, too, gave his longest discussion to the fourth statutory factor.²⁹² Believing it the most important factor, he began with the proviso that although PCG's use may be "primarily noncommercial and religious," such use could not be fair use if it "impaired the value or marketability" of either the original *MOA* or an annotation.²⁹³

With this in mind, Judge Brunetti first addressed this issue with regard to *MOA* in its original form. He asserted that WCG had initially used *MOA* as an evangelical tool and for educational purposes by distributing it free, just as PCG had done, and as such may have received an "indirect financial benefit by attracting tithing members."²⁹⁴ However, by keeping *MOA* intentionally out of circulation for ten years by destroying the inventory copies and disavowing the religious message of *MOA*, Judge Brunetti concluded that, "regardless of PCG's actions," WCG has demonstrated that *MOA* is no longer of value to it for those religious purposes.²⁹⁵ Furthermore, because WCG had no plans to publish or distribute the original version of *MOA*, the dissent reasoned that PCG's use would not interfere with any market.²⁹⁶

As for the proposed annotation, the dissent concluded that WCG had failed to show any meaningful likelihood of future harm.²⁹⁷ Judge Brunetti looked to *Maxtone-Graham v. Burtchaell*,²⁹⁸ where the Second Circuit found that an anti-abortion book containing quotations from a book favoring abortion did not harm plans for a second edition of the original, since it was unlikely that potential customers for a work favorable to abortion would abate their requests for the second edition because some of the work was in an anti-abortion document.²⁹⁹ Analogizing *Maxtone-Graham*, the dissent reasoned that the "functions served by *MOA* and the proposed annotation as well as their potential markets are different."³⁰⁰ While PCG would continue to use *MOA* for its evangelical purpose, WCG would use an annotated version to point out the flaws in Armstrong's teachings.³⁰¹ Judge Brunetti wrote that it would "not make sense" for WCG to pursue wide distribution of the

290. *Id.* at 1123-24 (Brunetti, J., dissenting).

291. *Id.* (Brunetti, J., dissenting).

292. *Id.* (Brunetti, J., dissenting).

293. *Id.* (Brunetti, J., dissenting).

294. *Id.* (Brunetti, J., dissenting).

295. *Id.* at 1124 (Brunetti, J., dissenting).

296. *See id.* (Brunetti, J., dissenting) (arguing that "[b]ecause WCG has admitted that it has no plans to publish or distribute *MOA* as originally written, there can be no market interference").

297. *Id.* (Brunetti, J., dissenting) (referring to *Sony*, 464 U.S. at 451).

298. 803 F.2d 1253.

299. *See Worldwide Church of God*, 227 F.3d at 1124 (Brunetti, J., dissenting) (citing *Maxtone-Graham*, 803 F.2d at 1264).

300. *Id.* (Brunetti, J., dissenting).

301. *See id.* (Brunetti, J., dissenting) (arguing that the "central purpose" behind WCG's annotation was to point out Armstrong's "historical, doctrinal, and social errors").

annotation to the general public to recruit new members, since the annotated version would require the reader to already be familiar with Armstrong's teachings in order to understand WCG's doctrines.³⁰² Moreover, the dissent believed that PCG's distribution of the original *MOA* would in fact increase rather than interfere with the market for the annotation, since PCG would create a wider familiarity with Armstrong's teachings, which WCG would hope to target with the annotation.³⁰³ Judge Brunetti further cast doubt as to the sincerity of WCG's intent to publish any annotation in the future at all since it had made no "reasonable progress" toward publication in a decade. Judge Brunetti also relied on WCG's declaration of its "Christian duty" to keep Armstrong's teachings out of circulation.³⁰⁴ The dissent therefore believed the fourth statutory factor pointed toward fair use on PCG's part.³⁰⁵

The dissent also considered WCG's intent in enforcing its copyright. Judge Brunetti felt that WCG seemed "less interested in protecting its rights to exploit *MOA* than in suppressing Armstrong's ideas which now run counter to church doctrine."³⁰⁶ Noting that the Supreme Court has recognized that freedom of expression includes the right not to speak, Judge Brunetti also noted that the Supreme Court acknowledges that this right does not allow a copyright owner to abuse his copyright to suppress facts.³⁰⁷ With this final observation, in addition to his findings under section 107, Judge Brunetti concluded that the district court was correct in determining that PCG's secondary use was a statutorily protected fair use of WCG's *MOA*.³⁰⁸

IV. CRITIQUE OF THE *WORLDWIDE CHURCH OF GOD* DECISION

The fundamental tenet of copyright law, its utilitarian goal, must be kept at the forefront of any fair use analysis.³⁰⁹ To find a fair use, the use must be "of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity."³¹⁰ Keeping the utilitarian objective in constant mind, PCG's use of *MOA*, under the circumstances presented, clearly did not excessively diminish WCG's incentive to

302. See *id.* (Brunetti, J., dissenting) (arguing that the annotation is unlike a "straight-forward" explanation of doctrine, and requires the potential reader to already be familiar with the original *MOA*).

303. *Id.* (Brunetti, J., dissenting).

304. *Id.* (Brunetti, J., dissenting).

305. *Id.* at 1125 (Brunetti, J., dissenting).

306. *Id.* (Brunetti, J., dissenting).

307. *Id.* at 1118 (Brunetti, J., dissenting) (quoting *Harper & Row*, 471 U.S. at 559).

308. See *id.* at 1125 (Brunetti, J., dissenting).

309. Budde, *supra* note 71, at 2024; see *Campbell*, 510 U.S. at 578 (asserting that fair use is to be applied "in light of the purposes of copyright"); Leval, *Fair Use Standard*, *supra* note 1, at 1110 (arguing that "every issue in a fair use evaluation must be analyzed with the overall purpose of copyright in mind"); *supra* Part II.A (discussing the underlying goals of copyright law and the means employed to achieve it).

310. Leval, *Fair Use Standard*, *supra* note 1, at 1110.

create, and in fact furthered the public goals of education and dissemination. As such, Judge Brunetti and the district court reached the correct result in concluding that PCG's use of *MOA* was a statutory fair use of that work.

A. Preliminary Considerations

Justice O'Connor's statement that a "fair use analysis must always be tailored to the individual case,"³¹¹ implicates the additional circumstances a court may evaluate apart from the statutory factors.³¹² The Ninth Circuit panel did address some preliminary considerations before applying section 107 but, unlike the dissent, failed to display a common-sense evaluation of the equities and facts of the case before examining the statutory factors.

1. A Harmed Public Interest

One fact the panel did not consider was WCG's purpose in possessing the copyrights to *MOA*. Such an evaluation reveals that the public interest in the creation and dissemination of works is unduly prevented by disallowing PCG's secondary use. As discussed earlier, because comment and criticism are considered to be traditional uses that contribute to the utilitarian goal, section 107 and case law favor these secondary uses.³¹³ WCG was clear about its position regarding *MOA* in its original form. It saw Armstrong's views as "ecclesiastical error" and "hoped to prevent a transgression of conscience" by removing the work from distribution.³¹⁴ If the facts were such that WCG did not own the copyrights to *MOA*, and *MOA* continued to be produced and distributed after WCG's views of it reversed, WCG likely would have openly criticized or commented on the contents of *MOA*. Likewise WCG would have probably employed written forms as one mode of this criticism or comment, forms including portions of *MOA*. Such uses of *MOA* are encouraged by the fair use doctrine, and by copyright law in general, as the public pool of knowledge is increased.³¹⁵ WCG, however, has not been forced to pursue this route. Instead of creating a secondary work, WCG exercised its criticism and comment of *MOA* by possession of the copyright and subsequent stowing away of the book. In effect, it has privatized a previously public work. Such a design conflicts with the basic purpose of copyright law, to contribute to the public store of knowledge and subsequent dissemination of works.³¹⁶ Had this court recognized

311. *Harper & Row*, 471 U.S. at 552.

312. See *supra* notes 109-10 and accompanying text (illustrating that courts may consider factors apart from the statutory factors in section 107).

313. *Supra* note 46 and accompanying text.

314. *Worldwide Church of God*, 227 F.3d at 1113.

315. *Supra* Part II.B.1.

316. See *supra* Part II.A (illustrating the goals of copyright law).

the damage to the public interest and weighed it accordingly, the court's final fair use determination may have differed significantly.³¹⁷

2. No Damage to Incentive to Create

Likewise, it is difficult to argue that PCG's use of *MOA* damaged WCG's incentive to create works. When a copyright holder disavows an interest to exploit the copyrights, subsequent use of that copyright by a third party cannot be said to damage the copyright holder's incentives to create.³¹⁸ Here, Herbert Armstrong authored *MOA*.³¹⁹ WCG then used it to evangelize in the Christian community and attract church membership.³²⁰ Changing its position, WCG neither produced nor distributed further copies of *MOA* in the following ten years.³²¹ As the work was counter to church doctrine with outdated views, WCG's hope was to produce an annotated version of *MOA* in the future.³²² At the time the court heard the case, however, WCG had no plans to produce another version.³²³ As illustrated in Part IV.B.4.b, WCG has essentially disavowed any interest in *MOA*'s original form.³²⁴ Therefore, since WCG hopes to "prevent a transgression of conscience by proclaiming what the Church consider[s] to be ecclesiastical error,"³²⁵ further reproduction and distribution of the original *MOA* did not damage WCG's incentive to create. Absent is any interest in reproducing the original *MOA*, and without a present or future intent to exploit that copyright, WCG's incentive to create is not damaged. Moreover, continued dissemination of the original *MOA* would only increase WCG's incentives to further its "Christian duty"³²⁶ and produce its planned annotation. Again, because control of the copyright in the original version assures WCG that no new copies of the work will replenish the public stock, WCG has a diminished incentive to create a work that it considers to be the truth.

317. See *Rosemont*, 366 F.2d 303, *cert. denied*, 385 U.S. 1009 (1967) (providing an example of a court weighing the public interest against the potential damage to the copyright owner).

318. Judge Brunetti forwards a related argument in his dissent, positing that under the fourth section 107 factor, *Mystery of Ages* in its original form had no value to WCG. *Worldwide Church of God*, 227 F.3d at 1124 (Brunetti, J., dissenting).

319. *Id.* at 1113.

320. See *id.* at 1117-19 (discussing these purposes for evaluating the first and fourth section 107 factors).

321. *Id.* at 1122 (Brunetti, J., dissenting).

322. *Id.* at 1119.

323. *Id.* at 1113.

324. *Infra* Part IV.B.4.b.

325. *Worldwide Church of God*, 227 F.3d at 113.

326. Judge Brunetti notes that WCG explained that its position to keep *MOA* away was partially based on a "Christian duty." *Id.* at 1122 (Brunetti, J., dissenting).

3. *No Real Interest in Privacy*

Finally, the court should have heavily discounted any right to keep works private based on copyright control. Under the facts, WCG's apparent principal purpose in enforcing its copyrights is to keep *MOA* from the public eye.³²⁷ Such a case presents a hard argument for a narrow interpretation of fair use.³²⁸ The majority cited both *Harper & Row, Publishers, Inc. v. Nation Enterprises*³²⁹ and *Salinger v. Random House, Inc.*³³⁰ for the proposition that free speech considerations in copyright accord a right not to speak as well as the right to speak.³³¹ However, in both of those cases, neither of the original works was published at the time of the defendant's secondary use,³³² and the emphasis on the right to control expression through copyright must inevitably be viewed with that context in mind. Here there is no such concern. *MOA* had already been circulated in millions of copies.³³³

The current facts are much closer to those in *Rosemont Enterprises v. Random House, Inc.*³³⁴ There Howard Hughes formed a corporation which bought the copyrights to three, ten-year old magazine articles that were going to be used in a biography about him.³³⁵ He opposed their use and his corporation sued for infringement.³³⁶ Analyzing the defendant's fair use claim, the Second Circuit reasoned that the public interest in knowing about a prominent figure who entered the public arena outweighed the interest of Hughes in his privacy.³³⁷ Chief Judge Lumbard, joined by Judge Hays of the three-judge panel, concurred. Judge Lumbard believed it likely that Hughes's corporation was created mainly to suppress the biography, and stated:

It has never been the purpose of the copyright laws to restrict the dissemination of information about persons in the public eye even though those concerned may not welcome the resulting publicity. It is the purpose of those laws to give reasonable protection to the product of an author and

327. See *id.* at 1122-23, 1125 (Brunetti, J., dissenting) (discussing WCG's position regarding *MOA*); *id.* at 1113 (illustrating WCG's reasons for discontinuing production and distribution of *MOA*).

328. See Dratler, *supra* note 46, at 250 (arguing that in *Rosemont*, 366 F.2d at 306 (2d. Cir. 1966), since Howard Hughes' apparent intent for enforcing his copyright was to prevent further publication of a biography that had been published for ten years, the incentives for creativity did not require narrowly interpreting fair use).

329. 471 U.S. 539.

330. *Salinger*, 811 F.2d at 95.

331. *Worldwide Church of God*, 227 F.3d at 1116.

332. See *Harper & Row*, 471 U.S. at 554 (arguing that an author's right to choose a time for publishing her work deserves no less protection under the copyright statute); *Salinger*, 811 F.2d at 97 (noting that the unpublished works generally receive "complete protection" against copying). The emphasis in *Harper & Row* on the right to first publication came from a number of considerations, including preparation costs. *Harper & Row*, 471 U.S. at 554.

333. *Worldwide Church of God*, 227 F.3d at 1113.

334. *Rosemont*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

335. See *id.* at 304-07 (detailing the facts of the case).

336. *Id.*

337. *Id.* at 309.

his manner of expression where the author's proper interest in the product might suffer thereby. It would be contrary to the public interest to permit any man to buy up the copyright to anything written about himself and to use his copyright ownership to restrain others from publishing biographical material concerning him.³³⁸

The *Harper & Row* court expressed a similar view, noting that the right to refrain from speaking does not "sanction abuse of the copyright owner's monopoly as an instrument to suppress facts."³³⁹ Unlike the Rosemont corporation, WCG did not buy the copyrights to *MOA* in order to acquire control. Rather, the copyright passed innocently by will,³⁴⁰ and it was not until a few years after Armstrong's death that WCG changed its position and ceased its production.³⁴¹ Nevertheless, WCG's good fortune in acquiring the rights to *MOA* does not affect the state of facts as they existed at the time the case was before the court. WCG believed that continued distribution of Armstrong's work would perpetuate ecclesiastical error,³⁴² and it was its "Christian duty" to prevent that.³⁴³ WCG's reasons for ceasing publication and distribution, as well as the ten-year period that has passed with no plans to create an annotated version of *MOA*,³⁴⁴ indicate strongly that WCG's interest in *MOA* is continued suppression of the information conveyed through Herbert Armstrong's writings, rather than protecting its own incentive to create. Keeping in mind the likely damage to the public interest, the lack of damage to WCG's incentive to create, and WCG's questionable use of its copyright monopoly, the court should have addressed the statutory factors.

B. Assessing the Statutory Factors

1. Justified Copying and Distribution of *Mystery of the Ages*

Though effect on the potential market is often labeled the most important factor,³⁴⁵ perhaps most important of late has been the first factor. In fact, decisions coming after *Campbell* suggest that the first statutory factor has become dispositive

338. *Id.* at 311 (Lumbard, C.J., concurring).

339. *Harper & Row*, 471 U.S. at 559.

340. *Worldwide Church of God*, 227 F.3d at 1114-15.

341. *Id.* at 1113.

342. *Id.* at 1119.

343. *See id.* at 1122 (Brunetti, J., dissenting) (noting WCG's perceived duty "to keep Armstrong's doctrinal errors out of circulation").

344. *Id.* (Brunetti, J., dissenting); *id.* at 1113.

345. *See supra* note 174 and accompanying text (discussing the importance attributed by courts to the first factor).

in a fair use analysis.³⁴⁶ Nearly every one of the determinations regarding the court's ultimate conclusion on fair use has mirrored the court's conclusion reached under the first factor. Again, though the factors need not be given equal weight, all must be considered nonetheless.³⁴⁷ If the first factor has indeed attained such dispositive weight among courts, all the more reason exists for a court to give a full and detailed analysis when coming to a conclusion about the secondary user's purpose. That is precisely what the circuit courts majority failed to do in *Worldwide Church of God*.

The majority was clear that it believed the first statutory factor weighed against PCG in all respects. It found PCG's use of *MOA* simply to be a superseding use of the original under Justice Story's language, lacking any transformative or productive use.³⁴⁸ It also discounted PCG's claims of noncommercial, nonprofit use, adopting a broadened view of the "profit" concept.³⁴⁹ With that, the majority implied that PCG's use of *MOA* was more akin to a traditional, commercial use for profit, rather than a nonprofit use.³⁵⁰ Hence, the facts tilted the analysis against PCG. Unfortunately, the majority's analysis is flawed in a number of ways.

a. *PCG's Religious Purposes*

After *Campbell*, there is now no question that the presence of a productive use is a consideration under the first statutory factor, indeed it is the "central purpose" of the first prong inquiry.³⁵¹ But, the majority's consideration fell short of a full analysis. Quoting *Campbell*'s language framing the transformative use inquiry, the majority concluded that PCG's use merely superseded the purposes of WCG's use, that is, to "serve religious practice and education."³⁵² "[N]o intellectual labor and judgment" was thus evidenced by copying *MOA* in its entirety,³⁵³ and therefore such a non-transformative use favored WCG.³⁵⁴ The panel's reasoning, however, suffers from two mistakes. First, the panel gave undue importance to the productive use

346. See Jeremy Kudon, Note, *Form over Function: Expanding the Transformative Use Test For Fair Use*, 80 B.U.L. REV. 579, 583 (2000) (discovering that in the approximately thirty-eight fair use decisions published by the federal courts since *Campbell*, the determination of fair use corresponded in all but one case to the finding regarding transformative use). Kudon also argues that the results of this survey suggest that the transformative use test "could be labeled a presumptively dispositive factor." *Id.*; see also Lape, *supra* note 63, at 712 (noting that, since *Sony*, the weight attributed to productive use has increased).

347. See *supra* notes 97 to 104 and accompanying text (discussing proper application of section 107).

348. *Worldwide Church of God*, 227 F.3d at 1117.

349. *Id.* at 1118-19; see *infra* Part IV.B.1.b (analyzing the majority's discussion of PCG's "profit" gained).

350. See *infra* Part IV.B.1.b (analyzing the majority's reasoning in dismissing PCG's claim of non-commercial use).

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

352. *Worldwide Church of God*, 227 F.3d at 1117.

353. *Id.* 1117.

354. *Id.* The majority asserted that "where the 'use is for the same intrinsic purpose as [the copyright holder's] . . . such use seriously weakens a claimed fair use.'" *Worldwide Church of God*, 227 F.3d at 1117 (quoting *Weissman*, 868 F.2d at 1324) (alteration in original).

requirement. Second, the panel erred by limiting its view of what secondary uses may indeed be considered productive or transformative uses.

First, the majority overly narrowed the purpose prong of the first factor by focusing solely on a transformative use requirement for PCG's uses in education and religious practice. The majority did not discuss purposes for PCG's use under any other criteria apart from a transformative or productive character. Though the majority recognized *Campbell*'s statement that a productive use is not "absolutely necessary,"³⁵⁵ it tempered this concession by writing that the absence of a transformative use "seriously weakens a claimed fair use."³⁵⁶ It reasoned, borrowing some of Justice Story's other language in *Folsom*, that mere wholesale copying cannot be found to transform the work sufficiently to lean toward fair use.³⁵⁷ The import of the majority's reasoning, thus, is that a productive/transformative use is indeed a requirement under the purpose prong of the first statutory factor, notwithstanding *Campbell*'s admonition to the contrary. Hence, the court proceeded from an inaccurate, or at least an incomplete, premise.

Sole reliance on productive use is subject to criticism.³⁵⁸ Requiring productive or transformative uses presents the danger that the first factor inquiry will be unduly narrowed.³⁵⁹ By looking to productivity as an end in itself, the value in the exchange of ideas is discounted.³⁶⁰ Copyright's goal of enlightening the public through the dissemination of works of authorship is forgotten.³⁶¹ Furthermore, transformative/productive use, when equated with a nonsuperseding use, brings the fourth factor analysis concerning potential market displacement into the first factor analysis. In turn, this permits the fourth factor to be counted a second time, and prevents the first factor from being counted at all.³⁶²

Rather than solely transformative/productive use under *Campbell*, a more encompassing social beneficial use is the primary inquiry under the first factor.³⁶³ The foremost support for this comes from section 107 itself. Again, the uses listed in the preamble, such as criticism and comment, have been considered traditional productive uses of the type that fair use favors.³⁶⁴ However, this list was also expressly illustrative, intending "to suggest a larger class of uses that serve the public interest."³⁶⁵ There is no better example illustrating this truth than the

355. *Id.* (quoting *Campbell*, 510 U.S. at 579).

356. *Id.* (quoting *Weissman*, 868 F.2d at 1324).

357. *See id.* (arguing that "PCG's copying of WCG's *MOA* in its entirety bespeaks no 'intellectual labor and judgment[.]' [and] . . . merely 'supersedes the object' of the original").

358. *See Lape*, *supra* note 63, at 724 (arguing that the productive use doctrine should be abandoned, "stand[ing] in the way of sensible application of fair use").

359. *Id.* at 713.

360. *Id.* at 712-13.

361. *See id.* at 712.

362. *Id.* at 722.

363. *Id.*

364. *See supra* note 118 and accompanying text (discussing the significance of the preamble list).

365. *Lape*, *supra* note 63, at 713.

preamble's express inclusion of multiple copies for classroom use, a use that is nothing more than mere reproductions of originals. In the case law, the prime example is *Sony Corp. of America v. Universal City Studios, Inc.*,³⁶⁶ where the Supreme Court approved of wholesale copying of television programs for purposes of merely altering viewing times. Though of course this use fails to transform the original, it can certainly be deemed a socially beneficial use by allowing the dissemination of works through increased opportunities for viewing. Requiring transformative/productive use has the ultimate effect of narrowing the first factor, thereby excluding consideration of uses that have social utility.³⁶⁷

The majority erred in not recognizing that broader beneficial uses of works may serve as criteria from which to characterize a secondary use. Educational use through teaching is a purpose clearly recognized by section 107 in the preamble.³⁶⁸ The panel indeed labeled PCG's copying and distribution as for religious practice and education.³⁶⁹ However, the discussion ended there. The majority ceased further discussion about any educational purpose and benefit of PCG's use of *MOA*. Instead, the panel merely attached these labels to PCG's activity, but then framed the inquiry solely in transformative/productive use terms. It thus ignored any socially beneficial use of *MOA* by PCG apart from any transformative/productive use.

Assuming the majority correctly emphasized the requirement of transformative/productive use, the majority too narrowly applied it and should have found that PCG's mere copying and distributing actually was a transformative or productive use of the original *MOA*. Employing Justice Story's language that "intellectual labor and judgment [must be] bestowed" on the secondary use and not display "merely the facile use of the scissors,"³⁷⁰ the majority implied that simple reproduction is not a productive or transformative use of an original copyrighted work. The panel's conclusion is not surprising since in the decisions that have followed *Campbell*, only secondary uses that added expression constituting clear criticism, commentary, or scholarship have generally been found to be transformative uses.³⁷¹

366. 464 U.S. 417.

367. Lape, *supra* note 63, at 714.

368. 17 U.S.C. § 107 (1994).

369. *Worldwide Church of God*, 227 F.3d at 1117.

370. *Id.* (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4901)).

371. See Kudon, *supra* note 337, at 583 (concluding that a review of thirty-eight post-*Campbell* decisions suggests that only this category of uses generally pass this test). Kudon further concluded that the post-*Campbell* decisions have produced two other categories of works: (1) mere reproductions, (2) works that add expression to the original, but "not in the form of criticism, commentary or scholarship." *Id.* These categories, unlike those uses that add expression in the form of commentary, criticism, or scholarship, are not usually found to be transformative uses. *Id.* See *id.* at 605-06 (arguing "that the transformative use test has effectively foreclosed the fair use defense for those secondary works falling within either of the first two categories").

However, the definition of transformative/productive use has by no means been uniform.³⁷² For a secondary use to be productive, it need not necessarily add something that was not previously in the original. Another way to determine whether a use is transformative/productive is to compare the functions served by both the original and secondary work. A “function” test to determine whether a use is transformative or productive has basis in the law.³⁷³ As one commentator has noted, “if the transformative use test truly reflects copyright’s utilitarian objectives, it should not be restricted solely to works that add creative value . . . [but should] include an analysis of the function or purpose that the two works serve.”³⁷⁴ As a result, mere reproductions of original works may certainly be transformative, especially where the secondary use serves a different function than the original.³⁷⁵ Whether the secondary use supersedes the original is a function of how close the respective functions that both uses serve.³⁷⁶

An analysis of the majority’s productive/transformative use analysis reveals that both its analysis and conclusion are inaccurate. Again, PCG used *MOA*, according to the majority, to “serve religious practice and education,” which was for the same purpose as that of the original *MOA*.³⁷⁷ Originally, *MOA* was intended and used for the same purposes as PCG’s later use. However, the majority should not have compared PCG’s current purpose to *MOA*’s original purpose. Instead, the secondary use should have been compared to the current purpose of the original work. The panel appeared to recognize this, noting that a secondary use that is for the “same intrinsic purpose” as the *copyright holder* leans away from a fair use.³⁷⁸ What must be remembered is that the copyright holder in a work may change over time, and each holder may have different intentions for possessing a copyright. WCG’s purpose for *MOA* at the time of trial was clear. Feeling its “Christian duty” to keep Herbert Armstrong’s views from the public,³⁷⁹ WCG ended production and

372. Lape, *supra* note 63, at 712.

373. See Dratler, *supra* note 46, at 323 (noting that support for a functional test exists in both case law and, though of a limited nature, in the legislative history of the copyright statute); see also Kudon, *supra* note 337, at 608 (arguing that a proposal for a function analysis does not expand the fair use doctrine, but merely gives recognition to an additional factor in the transformative use analysis that courts have already used both expressly and implicitly). But see Dratler, *supra* note 46, at 323 n.481 (suggesting that the reasoning of courts applying the functionality test to the first statutory factor is better suited to the market effect factor).

374. Kudon, *supra* note 337, at 606.

375. See *id.* at 597 (arguing that it is “unduly restrictive” to classify all mere reproductions of original works as non-transformative, particularly where the secondary use is for a different purpose other than that of the author); see also Anderson et al., *supra* note 45, at 42 (noting that comparison of the relative uses of the original and secondary work is relevant under the first statutory factor). But see Dratler, *supra* note 46, at 324 (suggesting that there is no basis in the statute for assessing the relative purposes of the original and secondary work, but only the absolute use of the secondary work).

376. Kudon, *supra* note 337, at 606.

377. *Worldwide Church of God*, 227 F.3d at 1117.

378. *Id.* (quoting *Weissman*, 868 F.2d at 1324).

379. *Id.* at 1122 (Brunetti, J., dissenting).

distribution of *MOA*, destroying almost all of the copies in its possession.³⁸⁰ As the dissent believed, and as discussed *supra*,³⁸¹ the evidence indicates that WCG's purpose for possessing Armstrong's work of authorship was to keep it out of view to suppress the work. Rather than exploiting the benefits of owning its copyrights, WCG used the inherent control arising from its bundle of rights to prevent further dissemination of the *MOA*. PCG's active utilization of *MOA*, both through copying and distribution for religious practice and education, does indeed functionally transform WCG's purpose of secreting away the expression. By not understanding that transformative/productive use is a much broader concept than mere alteration or addition to the original work, the court incorrectly characterized PCG's use of *MOA*, a use that was functionally a transformative/productive use of *MOA*.

b. The Majority's Unworkable "Profit" Consideration

The majority's flawed first factor analysis continued when considering PCG's claim that its use of *MOA* was not commercial and not-for-profit. This portion of the inquiry is perhaps more flawed than its productive use analysis. At the outset, the court mistakenly indicated that secondary uses other than noncommercial uses are presumptively unfair. Supporting this idea and thereby compounding this erroneous presumption, the panel embraced the notion that a for-profit use that fails to remunerate the copyright holder is not fair. Operating from this mistaken premise, the court committed its final error by adopting an unworkable definition of "profit" in an apparent attempt to liken PCG's use of *MOA* to that of a traditional for-profit operation. Stating that PCG "unquestionably" profited from its use in various ways, the court concluded that these facts further disfavored fair use under the first factor.³⁸²

First, the court mistakenly treated this part of the first factor inquiry as having a presumptive effect. The majority was initially correct, recognizing the Supreme Court's admonition that commercial or nonprofit educational use is only one aspect of a larger inquiry into the purposes for the secondary use of the work.³⁸³ The panel further illustrated this subtle relationship by suggesting that a commercial use merely "tends to weigh against fair use."³⁸⁴ However, immediately thereafter the court made a contrary assertion, stating that the absence of commercial use in a given case would only have the effect of removing a "*presumption* of unfairness."³⁸⁵ The import of this statement is that the court actually did view uses other than non-commercial uses as giving rise to a presumption of unfairness. The problem with

380. *Id.* at 1113.

381. *Supra* Part IV.A.3.

382. *Worldwide Church of God*, 227 F.3d at 1118.

383. *Id.* at 1117 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)).

384. *Id.*

385. *Id.* (emphasis added).

this assertion is that the law states the contrary. The Supreme Court was clear in *Campbell* that commercial secondary use carries with it no presumption of unfairness.³⁸⁶ Any nonprofit or commercial uses are merely factors to be evaluated among the others.³⁸⁷

Second, the court adopted the notion that uncompensated commercial uses are especially disfavored, or at least add to a presumption of unfairness. Included in the majority's rule statements is *Harper & Row's* exclamation that "[t]he crux of the profit/non-profit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."³⁸⁸ The court explicitly embraced this idea in its reasoning, stating that PCG enjoyed the use of *MOA* "without having to account to the copyright holder."³⁸⁹ Reliance on such an idea is problematic, however. The argument is inherently circular by referring to a failure to pay a "customary price."³⁹⁰ "By definition, if the defendant's use is fair, no fee, customary or not, is due."³⁹¹ Such a statement runs the risk of distracting a court from a broader focus on the overall secondary purpose. Hence, the court analyzed the nature of PCG's use from a premise that tended to unduly prejudice its use as presumptively unfair if labeled as a commercial use.

Unpersuaded by PCG's claim of nonprofit use, the majority delved into an analysis of what uses apart from "dollar" uses could actually be deemed for "profit."³⁹² In the end, the majority embraced a broad definition of "profit."³⁹³ Not confined to the mere want of pecuniary gain, the panel stated that PCG "unquestionably" profited in three ways using *MOA*: by providing to its constituents the essential text of *MOA* necessary for religious practice at no cost, by attracting new membership through distribution, and by allowing the ministry to expand.³⁹⁴ Certainly particular situations, where "profit" is not amenable to a dollar measurement, call for criteria apart from the mere pursuit of monetary gain to determine if a use is for "profit." However, the majority here provided no in-depth analysis. Citing the dictionary definition of "profit" as meaning either an "advantage" or "benefit,"³⁹⁵ the court reasoned that "it is beyond dispute that PCG 'profited' from copying *MOA*—it gained an 'advantage' or 'benefit' from its distribution and use of *MOA*."³⁹⁶ The problem with the court's reasoning is that it

386. See *Campbell*, 510 U.S. at 584 (arguing that neither the case law nor Congress intended a commercial use presumption against fair use).

387. *Id.* at 585.

388. *Worldwide Church of God*, 227 F.3d at 1117 (quoting *Harper & Row*, 471 U.S. at 562).

389. *Id.* at 1118.

390. Patry & Perlmutter, *supra* note 65, at 684.

391. *Id.*

392. *Worldwide Church of God*, 227 F.3d at 1118.

393. *Id.*

394. *Id.* It is unclear to the author how the majority's second reason differs from the third.

395. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1811 (3d ed. 1971)).

396. *Id.*

does not appear to have any bounds. It would be hard to imagine a situation where a court would not be able to find for “profit” use, finding neither a benefit nor advantage gained by the secondary user. Since a court following the panel’s reasoning can liken any use to a traditional commercial use by finding “profit” through an advantage or benefit gained, any distinction between a nonprofit use and for profit use is rendered ineffective. A plausible result given the breadth of the court’s statement, was articulated by Judge Whyte in *Religious Technology Center v. Netcom On-Line Services, Inc.*³⁹⁷ He suggested that allowing some “personal profit” outside of traditional dollar profit to defeat a noncommercial use would result in the discouragement of many otherwise fair uses.³⁹⁸

Rather, PCG’s use is better characterized as that of a nonprofit educational use. Nonprofit educational use is listed in opposition to commercial use in section 107, and educational use is exactly what the majority attributed to PCG’s activity.³⁹⁹ This use was furthermore non-profit and non-commercial. PCG distributed *MOA* free of charge, solicited no funds in connection with its distribution, and any funds donated in connection with *MOA*’s distribution did not even support printing costs.⁴⁰⁰ As the dissent pointed out, PCG’s use is clearly distinguishable from other cases where the secondary use was labeled commercial; in all of those cases the secondary use was clearly for “dollar” profit.⁴⁰¹ In light of this, PCG’s use can hardly be labeled as traditionally “commercial.”

Concerning broader for “profit” uses, the majority loosely analogized *Weissman v. Freeman*,⁴⁰² where a professor was not entitled to fair use of a journal article he copied in its entirety for distribution in connection with a course he was to teach, naming himself as the author.⁴⁰³ Though the majority may be correct in asserting that religion, like academia, is not dollar dominated, thereby justifying other “profit” criteria,⁴⁰⁴ *Weissman* is clearly distinguishable. There, the Second Circuit found that the defendant profited because he “stood to gain recognition among his peers in the profession and authorship credit,” and that what “is valuable is recognition because it so often influences professional advancement and academic tenure.”⁴⁰⁵ The court’s language reveals a concern for the defendant’s position to primarily bring accolades upon himself through his use of the plaintiff’s work. PCG’s use stands in contrast. PCG’s purpose in using *MOA* is to educate and evangelize.⁴⁰⁶ PCG believed in the

397. 923 F.Supp. 1231 (1995).

398. See *id.* at 1244 (arguing that “[i]f mere recognition by one’s peers constituted ‘personal profit’ to defeat a finding of a noncommercial use, courts would seldom find any criticism fair use, and much valuable criticism would be discouraged”).

399. *Worldwide Church of God*, 227 F.3d at 1117.

400. *Id.* at 1122-23 (Brunetti, J., dissenting).

401. *Id.* at 1123 (Brunetti, J., dissenting) (citing cases where the secondary use was clearly commercial).

402. 868 F.2d 1313.

403. *Id.* at 1316.

404. *Worldwide Church of God*, 227 F.3d at 1118.

405. *Weissman*, 868 F.2d at 1324.

406. *Worldwide Church of God*, 227 F.3d at 1119.

divine inspiration for Armstrong's writings—that his work was necessary for proper interpretation of the Bible.⁴⁰⁷ That PCG sought to spread the truth through Armstrong's words, though simultaneously attracting tithing church members, does not reflect the same intent to primarily reap a personal "profit" that existed in *Weissman*. Thus, in the circumstances here, the noncommercial or nonprofit elements for educational purposes overwhelm any for "profit" use and, in light of PCG's undisputed educational use of *MOA*, the first factor leans toward PCG.

2. *The True Nature of Mystery of the Ages*

The panel's treatment of the second factor is as troublesome as its analysis of PCG's purpose for its use—its reasoning consisted of a total of two sentences. The majority stated that the second statutory factor turns simply on whether a work is either creative or informational, and that *MOA*'s creative elements tilted the analysis in favor of WCG. While a court's to engage in an in-depth analysis of a statutory factor is not unheard of,⁴⁰⁸ the peculiar facts surrounding the particular character of *MOA* demanded a much deeper analysis.

a. *Primarily a Factual Work*

First, the panel too hastily labeled *MOA* as a predominately creative work. The court reasoned that although readers who share Armstrong's views may deem *MOA* as factual, the "creativity, imagination and originality" of the work dominated, placing the work more at the creative end of the spectrum and favoring WCG.⁴⁰⁹ At the same time, however, the majority did not reject PCG's claim that *MOA* was a textual, historical account of Armstrong's views of the Bible. It merely implied that Armstrong's creative input overshadowed any factual essence. The court should have avoided such a curtailed analysis, however, as even nonfiction works, including mere compilations of facts, contain authorial originality.⁴¹⁰ Bare recognition of the inclusion of creativity and a bald conclusion of its prevalence in a disputed work does little for the analysis.

MOA in particular requires a more in-depth analysis because of the religious heart. There is no dispute that *MOA* is indeed a religious work. The dissent describes *MOA* in precisely this term,⁴¹¹ and the majority implies it repeatedly through its reasoning.⁴¹² As the dissent illustrated, religious works do not lend themselves to

407. *Id.* at 1122 (Brunetti, J., dissenting).

408. *See Triangle Publ'ns*, 626 F.2d at 1176 & n.14 (concluding with essentially no analysis that the second statutory factor neither hurt nor helped the defendant's claim of fair use and was "not important" to the case).

409. *Worldwide Church of God*, 227 F.3d at 1118.

410. *Harper & Row*, 471 U.S. at 547.

411. *Worldwide Church of God*, 227 F.3d at 1123 (Brunetti, J., dissenting).

412. *See id. passim* (referring to the evangelical uses both churches had for *MOA* and the work's religious content).

easy classification.⁴¹³ Courts before have recognized this trouble when faced with the works of L. Ron Hubbard, reaching varying conclusions on how to properly treat such works under the second statutory factor. In *New Era Publications, International v. Carol Publishing Group*,⁴¹⁴ the Second Circuit reviewed some of Hubbard's works that, similar to *MOA*, purported to reflect the author's views on religion. The court believed that, though it had "some hesitation" in trying to place a religious work in a particular classification, the work "on balance" was "more properly viewed as factual or informational."⁴¹⁵ Likewise, in *Religious Technology Center v. Netcom On-Line Com. Services, Inc.*,⁴¹⁶ the district court found that Hubbard's works of religious philosophy, "although creative, are primarily functional or instructive."⁴¹⁷ Coming to the opposite conclusion, the district court in *Bridge Publications, Inc. v. Vien*⁴¹⁸ stated that "Hubbard's works [were] the product of his creative thought process, and not merely informational."⁴¹⁹ Even the overall wisdom of attempting classification has been questioned. Though ultimately making a classification, the *Religious Technology Center* court also noted that it was unconvinced that the second factor should play a significant role in questions regarding religious works, since they "do not easily fit into the creative/information dichotomy."⁴²⁰ Judge Brunetti reached a similar conclusion in *Worldwide Church of God*, asserting that the factor was mainly irrelevant to the analysis because of the difficulty of classification.⁴²¹

Though there is no consensus regarding religious works, the better conclusion under the facts of this case is that *MOA* should indeed be placed on the informational or factual end of the spectrum, rather than on the creative end. Factual works are those whose primary purpose is to convey information, with the manner of expression being a subordinate concern.⁴²² Armstrong's religious views in *MOA* touched a variety of doctrines. Both the majority and dissent referred to the religious purposes *MOA* had served at one time for both churches: it was an evangelical tool used to garner church membership.⁴²³ As such a device, *MOA*'s purpose is to spread and further the church doctrines contained within the work. *MOA*'s value is thus derived from its ability to convey Armstrong's doctrines to its readers, that is, to convey religious truths. In other words, *MOA* is informational. For the majority to say that the factual nature of *MOA* is undercut, because only readers who share

413. *Id.* at 1123 (Brunetti, J., dissenting).

414. 904 F.2d 152.

415. *Id.* at 157.

416. 923 F. Supp. 1231 (N.D. Cal. 1995).

417. *Id.* at 1246.

418. 827 F. Supp. 629 (S.D. Cal. 1993).

419. *Id.* at 635-36.

420. *Religious Tech. Ctr.*, 923 F.Supp. at 1246.

421. *Worldwide Church of God*, 227 F.3d at 1123 (Brunetti, J., dissenting).

422. Dratler, *supra* note 46, at 242.

423. *Worldwide Church of God*, 227 F.3d at 1117-20; *id.* at 1122-25 (Brunetti, J., dissenting).

Armstrong's views may view the book as factual,⁴²⁴ is a mistake. WCG's reasons for ceasing distribution centered around its belief in the doctrinal incorrectness of the book—its ecclesiastical errors.⁴²⁵ Put another way, WCG opposed Armstrong's work because it believed that *MOA*'s "truths" were in fact fallacies. Thus, even readers who did not share Armstrong's views would still see the work as a "factual" work, though an incorrect one. One only need to consider the Bible as an analog. Though undisputably containing flowery expression from cover to cover, the Bible at its core is valued for its ability to communicate factual truths, and is in turn criticized for its untruths. Thus, the expression attached to *MOA* is subsidiary to its core of containing factual truths or falsehoods. By this, *MOA* is a better fit in the informational category.⁴²⁶

Moreover, even if one concedes at first glance that *MOA* is primarily a creative work, a closer look at Armstrong's expressive aspects nevertheless supports its characterization as primarily a factual or informational work. Consideration of Armstrong's expression as fact in and of itself addresses this issue and is something neither the majority nor the dissent addressed. Biographies and other historical works provide the familiar examples where use of another's expression has its value as the factual material contained in the secondary work. For example, quotation of a subject's expression can be an important method for conveying accurate attributes of a person.⁴²⁷ In this sense, the expression derives its value as a fact, not from its creativity. In such a case, a court should determine whether the "particular manner of expression . . . is itself a fact, due to the significance or timing of the work or the expression, the nature and purpose of the work, or simply the importance of the author."⁴²⁸ Though PCG's use of *MOA* is not a conventional biography or history book, a similar analysis is appropriate. Herbert Armstrong was WCG's "undisputed spiritual and temporal leader" until his death.⁴²⁹ He had written thousands of articles for the church's magazine over the decades, and over nine million copies of his final work, *MOA*, were distributed and used at times by both churches in "evangelizing in the Christian community."⁴³⁰ To PCG, *MOA* was a divinely inspired text,⁴³¹ while WCG saw Armstrong's views as ecclesiastical error, removing it from circulation

424. *Id.* at 1118.

425. *Id.* at 1119.

426. See *Religious Tech. Ctr.*, 923 F.Supp. at 1246 (finding that copyrighted works of religious philosophy, "although creative, are primarily functional or instructive").

427. See Leval, *Fair Use Standard*, *supra* note 1, at 1112-13 (discussing the importance of quotation in biography). Judge Leval, however, noted that it is especially important in biographies to make a fair use determination for each passage quoted, and not the work as a whole. Some passages may indeed be fair, while others may not. *Id.* at 1112.

428. See Dratler, *supra* note 46, at 309 (arguing for a second inquiry if a work is facially deemed more creative than factual).

429. *Worldwide Church of God*, 227 F.3d at 1113.

430. *Id.* at 1113.

431. *Id.* at 1122 (Brunetti, J., dissenting).

to “prevent a transgression of conscience.”⁴³² Given Armstrong’s long centrality to church doctrine and the religious importance of *MOA*’s expression—education and practice for PCG and a work of doctrinal error to WCG—Armstrong’s expression in *MOA* is better labeled as fact. Consequently, these facts bolster *MOA*’s place on the factual end of the informational/creative spectrum.

b. The Likely Stimulus for Creation

The panel also unnecessarily limited its analysis to whether *MOA* was either predominately creative or informational. Given the admitted religious purposes of the work, inquiry into the impetus underlying Armstrong’s creation of *MOA* is worth consideration as well. There is a stronger argument for fair use when copyright protection is *not* what motivates an author to write.⁴³³ Judge Leval’s examples of such works are the shopping list and the loanshark’s note threatening his debtor.⁴³⁴ Having previously written over three thousand other works over the decades, Armstrong’s final work, the 380-page *Mystery of the Ages*, comprised Armstrong’s views on religious doctrine.⁴³⁵ The majority itself acknowledged that *MOA*’s purpose was evangelical,⁴³⁶ and that the millions of circulated copies were distributed at no cost to the recipient, either by WCG or PCG.⁴³⁷ WCG even admitted to the negatives associated with printing and distributing *MOA*.⁴³⁸ From these facts, it appears that *MOA* was not the type of work from which Armstrong hoped to benefit by exploiting copyrights.

432. *Id.* at 1113.

433. See Leval, *Fair Use Standard*, *supra* note 1, at 1116-17 (drawing distinctions between works intended for copyright protection and works written for reasons unrelated to the purposes of copyright law); *id.* at 1119 (stating that the second statutory factor requires a determination into “whether the work is the type of material that copyright was designed to stimulate”); Budde, *supra* note 71, at 2026 (arguing that copyright protection is not what motivates authors of scientific articles to write). Budde further argues that what authors of scientific articles seek is “renown” and want the “widest possible dissemination and use of their works.” *Id.*

434. Leval, *Fair Use Standard*, *supra* note 1, at 1116-17. Judge Leval elaborated by stating that when fair use is involved, there is a difference between works created for private purposes with no purpose of publication and those creations made in contemplation of publication. To Judge Leval, works of the latter type are less amenable to fair use. *Id.* at 1117. However, since judge Leval added that works of the former deserve less protection because they are written for reasons unrelated to the purposes of copyright, *id.*, there is no reason to rely on whether the work is intended for publication or not. Certainly one can create a work for the very purpose of publication, with the hopes that each recipient of that work will then copy it and distribute it further. A author’s witty political message contained in a flyer is a prime example. This is a work that could certainly qualify for copyright protection, but the author here does not create it for private purposes. Rather, he hopes that his message will reach the largest audience possible. Exploitation of copyrights were nevertheless the farthest thing from his mind when he wrote down his message. This work should also be more amenable to fair use since, though not created for private purposes, copyright was not what drove the creation.

435. *Worldwide Church of God*, 227 F.3d at 1113.

436. *Id.* at 1119.

437. *Id.* at 1113.

438. See *id.* at 1123 (Brunetti, J., dissenting) (noting that one of the reasons WCG ceased publication was because of the “costly production”).

Rather, *MOA*'s religious nature, having been used from its beginning to spread a religious message through the words of Herbert Armstrong at no cost, suggests strongly that *MOA* was not a work whose creation relied on the incentives created by copyright law. While the court's opinion demonstrates that *MOA* had the effect of increasing church membership, and increasing income to the church,⁴³⁹ to say that this end was the motivation that encouraged Herbert Armstrong to put pen to paper is a giant leap in reasoning. Though admittedly not a mere shopping list or artless threatening note, *MOA* nonetheless shares a similarity in that the reasons for creation among all three works are unrelated to the purposes of copyright law. A religious work is something which copyright law certainly can encourage, but is normally a type that, if the work is truly for spreading a religious message, does not need, or likely expect, the protections of copyright law. In conjunction with the informational and factual nature of the work, that copyright law is in all likelihood not what motivated Herbert Armstrong to write, the majority should have determined that the second factor weigh-in heavier in this analysis, and in favor of PCG.

3. *The Amount Congruent with the Justification*

Since the majority began with a mistaken premise under the first factor, its conclusion regarding the amount of *MOA* that was used by PCG was inevitably tainted. Noting *Campbell*'s admonition that the amount of copying permissible varies with the justification for the secondary use,⁴⁴⁰ it rejected PCG's claim that verbatim copying was reasonable because of its religious purpose.⁴⁴¹ First the panel distinguished *Campbell*'s secondary parodic use, stating that PCG was on a "different footing" because PCG used *MOA* for the same purpose used by WCG.⁴⁴² It also distinguished *Sony*, concluding that the "unique circumstances" there, that is, videotaping for time-shifted viewing of programs a viewer was already invited to watch, did not exist under these facts to permit PCG to copy *MOA* wholesale.⁴⁴³ The majority thus concluded that a "reasonable person would expect PCG to pay WCG for the right to copy and distribute *MOA* created by WCG with its resources."⁴⁴⁴ Accepting the religious purposes for *MOA*, a more thorough analysis reveals that reproduction of *MOA* in its entirety was reasonable under these facts.

The majority erred by its comparison with both *Sony* and *Campbell*. First, the majority was wrong to assert that this case was different from *Campbell* because there was productive use in *Campbell* where there was none here; as previously demonstrated,⁴⁴⁵ PCG's use was in fact a productive use of *MOA*, as WCG's purpose

439. See *id.* at 1118 (noting that PCG's use enabled it to attract tithing members to the church).

440. *Id.* (quoting *Campbell*, 510 U.S. at 586-87).

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.* at 1118-19.

445. See *supra* Part IV.B.1.a (illustrating that PCG's use of *MOA* was "productive").

of possessing the copyright was to suppress the work.⁴⁴⁶ Second, the majority's assertion that the absence of unique circumstances like those in *Sony* failed to justify wholesale copying is unsound. Since the Supreme Court has since stated that "the extent of permissible copying varies with the purpose and character of the use,"⁴⁴⁷ the majority should have more closely analyzed the facts of this case, rather than merely state that the case is unlike *Sony* for lack of similar unique circumstances. The amount of the original copied is not evaluated "in a vacuum, but [rather] in relation to the legitimate purpose claimed for the use."⁴⁴⁸ Absent here is analysis of the simple relationship between the amount PCG used to its justification for using that amount. The subtle antipathy towards PCG's uncompensated use revealed by the majority falls short of such an analysis.

Judge Brunetti, although concluding that the third factor was "largely irrelevant" to the analysis, actually makes a simple, yet strong argument in his dissent for PCG's verbatim copying of *MOA*.⁴⁴⁹ To him, wholesale copying, remaining consistent with PCG's religious purposes, did not weigh against fair use.⁴⁵⁰ Again, the need to quote an original work verbatim can be very important in the interest of accuracy.⁴⁵¹ Like revealing key aspects of the subject's character in a biography, accurate quotation to display a subject's original idea, used secondarily "as a part of a portrait of the subject," shares a similar importance.⁴⁵² There is no dispute that *MOA* is properly characterized as a religious work, being a central part of PCG's religious practice and evangelism in the community.⁴⁵³ *MOA* is required reading for all who wish to be baptized into PCG, and PCG believes *MOA* is "a divinely inspired text necessary for proper interpretation of the Bible."⁴⁵⁴ With such a belief as to the source of Armstrong's ideas and its role in PCG's religious practice, it is unrealistic to argue that verbatim quotation of those very words is unnecessary to fulfill PCG's religious purposes. Such a view would be akin to suggesting that one may only use something short of the entire Bible word-for-word in religious practice, perhaps a summary of its facts. Such a suggestion would be absurd. Copying *MOA* verbatim is thus a reasonable quantity used in relation to the purpose and character of PCG's use, the precise amount necessary to spread the religious message contained within it.

446. See *supra* Part IV.A.1 (discussing WCG's primary intent to hide away *MOA*).

447. *Campbell*, 510 U.S. at 586-87.

448. Dratler, *supra* note 46, at 314. Professor Dratler further argues that the first and third statutory factors are "inextricably related" and hence the third factor cannot be evaluated until the first is resolved. *Id.*

449. *Id.*

450. *Worldwide Church of God*, 227 F.3d at 1123 (Brunetti, J., dissenting).

451. See Leval, *Fair Use Standard*, *supra* note 1, at 1113-16 (discussing the importance of using direct quotation in secondary works).

452. *Id.* at 1114.

453. See *Worldwide Church of God*, 227 F.3d *passim* (referring to the doctrinal content of *MOA* and the religious purposes both churches had for the work).

454. *Id.* at 1122 (Brunetti, J., dissenting).

As to the qualitative amount of a copyrighted work which is taken, evaluation of this prong is where Judge Brunetti is correct in stating that the third statutory factor is largely irrelevant to the analysis. Perhaps recognizing this, neither the majority nor the dissent analyzed the qualitative aspect of the quantity taken. The majority did quote the Supreme Court's statement in *Harper & Row* that "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression."⁴⁵⁵ However, the majority used this statement in conjunction with its quantitative assessment, not with a separate qualitative inquiry.⁴⁵⁶ Since the entire work was used, and necessarily so to fulfill PCG's justified secondary use, it would not be helpful to discuss the "quality and importance" of the selection taken, or whether PCG took the most exploitable portions of *MOA*, taking its "heart." Since *MOA* was copied verbatim, a qualitative assessment to determine how PCG's *MOA* would interfere with WCG's market would merely duplicate the analysis under the fourth statutory factor, causing it to be counted twice. Under these facts, a strict quantitative assessment in relation to PCG's justification is all that is proper, and as demonstrated, shows that the amount used, though essentially all of the original, is consistent with PCG's justification for use.

4. No Significant Market Interference

Though the majority saved its longest discussion for the fourth statutory factor, the lengthier treatment did not reduce its analytical errors. First, the court accepted the argument that PCG's *MOA* and WCG's future republication or annotated version of *MOA* would both serve the same function as a marketing device.⁴⁵⁷ Second, the majority denied PCG's argument that WCG's ten years of inactivity and its lack of a definite plan to produce an annotation demonstrated "that *MOA* has no economic value to WCG."⁴⁵⁸ Though the majority conceded that the fourth factor was, "at worst, neutral,"⁴⁵⁹ applying the particular facts at hand here, in light of the purposes of copyright, reveals that the dissent had the better reasoned opinion regarding potential market effect or effect on the value of *MOA*. That is, the fourth factor does not weigh against fair use.

At the outset, the majority erred in its conclusion regarding the potential market displacement of PCG's use of *MOA*. The majority believed that PCG's version of *MOA*, with its value being a marketing device "in evangelizing in the Christian

455. *Id.* at 1118 (quoting *Harper & Row*, 471 U.S. at 565).

456. *Id.*

457. *Id.* at 1119.

458. *Id.*

459. *Id.* at 1120.

community,” had the same value to WCG.⁴⁶⁰ Both would thus serve identical functions.⁴⁶¹ A court must be careful, however, in applying a test discussing the congruence of functionality between the original and secondary work,⁴⁶² such as the court did here. The majority inferred market interference because the works served the same function. “Such reasoning does little more than allow a court to substitute facile labels for analysis and proof.”⁴⁶³ Here, the court did not separate *MOA* in its original form from the proposed annotation, providing as a result a muddled analysis.

a. No Displacement of an Annotation

Regarding any future annotation produced by WCG, there is good reason to believe that PCG’s *MOA* in original form would not compete with such a work. As the dissent argued,⁴⁶⁴ *Maxtone-Graham v. Burtchaell*⁴⁶⁵ provides a framework for analysis. In *Maxtone-Graham*, a book opposing abortion used lengthy quotations from another book that treated abortion favorably.⁴⁶⁶ The court held that the secondary use did not harm the potential market for a later edition of the plaintiff’s work partly because “it [was] unthinkable that potential customers for a series of sympathetic interviews on abortion . . . would withdraw their requests because a small portion of the work was used in an essay sharply critical of abortion.”⁴⁶⁷ That position was bolstered by the court’s finding that both the original and the secondary work “served fundamentally different functions, by virtue both of their opposing viewpoints and disparate editorial formats.”⁴⁶⁸ As Judge Brunetti pointed out, PCG’s evangelical use would stand in contrast to WCG’s use of an annotated version. Appending the text with critical or explanatory notes strongly points to a conclusion that such a version of *MOA* would indeed be used principally, as Judge Brunetti suggested, “to identify Armstrong’s historical, doctrinal, and social errors.”⁴⁶⁹ Given this, Judge Brunetti is correct in positing that evangelizing with an annotation is unlikely to occur.⁴⁷⁰ To attract members to its church with such a work, a reader would have to read Armstrong’s words—the material WCG views as its “Christian duty” to keep hidden—and then read the annotations for the critical or explanatory

460. *Id.* at 1119.

461. *Id.*

462. See Dratler, *supra* note 46, at 325 (arguing that a congruence of function analysis should not dominate the market effect analysis).

463. See *id.* at 326 (commenting on a case that merely presumed a market effect because a copyrighted song and its parody were commercialized similarly in the same medium, serving the same function).

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

465. 803 F.2d at 1254.

466. *Id.* at 1256-57.

467. *Id.* at 1264.

468. *Id.*

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

470. *Id.* (Brunetti, J., dissenting).

notes to cull WCG's doctrines.⁴⁷¹ Similar to the potential customers for the later edition of the original work in *Maxtone-Graham*, individuals who already adhere to WCG's doctrines, or who are unfamiliar but would be receptive to an annotation expounding them, would doubtfully withdraw interest for the work because there already exists PCG's work that, to them, constitutes ecclesiastical error. Hence, both the district court and the dissent were correct that under the facts before the court the two works would not compete.

b. Reproduction Unlikely

As to any later reproduction by WCG of *MOA* in its original form, though PCG's use would indeed likely serve a displacing function in the market, the court should have, under the circumstances presented, disregarded any such argument by WCG. The Supreme Court's discussion in *Campbell* of potential markets for parodies provides a basis for analysis. There the Court stated that the "market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."⁴⁷² As such, the Court suggested that parodies and criticisms of original works are not part of the potential licensing market to be considered.⁴⁷³ WCG, of course, presently has the copyright in *MOA*'s original form, and with that, an inquiry into whether the original is part of a potential derivative market is improper. However, the Supreme Court's argument in *Campbell* is nonetheless relevant here. WCG's position regarding Armstrong's original book is clear; it stopped distribution in part because it "would offend cultural standards of social sensitivity, and dissemination would perpetrate . . . ecclesiastical error."⁴⁷⁴ Any such reproduction and dissemination of *MOA* in its original form would stand as the opposition, the critical work, to any future annotation produced by WCG and its current doctrine. Given such a position, occurring as a product of WCG's doctrinal shift and its resulting "Christian duty" to keep Armstrong's views from circulation, it appears highly unlikely that WCG itself would develop a market for *MOA* in its original version, let alone license such a market to others, including PCG.

The majority's assertion that a copyright owner who has disavowed intention to publish his work has the "right to change his mind"⁴⁷⁵ does not change the analysis. The *Campbell* court certainly could have recognized that the creator of a work may over time become disenchanted with the original work, and in such a situation, would indeed consider either criticizing or lampooning the work or licensing others to do so. The mere possibility of that contingency, however remote,

471. *Id.*

472. *Campbell*, 510 U.S. at 592.

473. *Id.*

474. *Worldwide Church of God*, 227 F.3d at 1119.

475. *Id.*

would tend to suggest that those markets should in fact be part of the fourth-inquiry. Yet the Court did not discuss such a contingency. The absence of such analysis suggests that a court should evaluate the facts as they exist before the court, and not engage in speculative possibilities. As the facts exist here, *MOA* in its original form has no value to WCG beyond a source from which to write its annotation, and since the only evidence for future publication is WCG's indication of a desire to produce an annotation in the future, later reproduction of *MOA* as Armstrong originally wrote it appears highly improbable. Therefore, the majority improperly found that PCG's version would conflict with WCG's interest.

V. CONCLUSION

Copyright law has the principal purpose of encouraging the creation of works of authorship, with the subsequent dissemination of such works increasing the public pool of knowledge.⁴⁷⁶ Recognizing statutory fair uses of copyrighted works is thus an integral part of this overall scheme, as fair uses themselves encourage the creation of new works of authorship.⁴⁷⁷ As the Supreme Court stated in its last opportunity to write on the topic, a court is to analyze fair use "in light of the purposes of copyright."⁴⁷⁸

This is precisely what the majority in *Worldwide Church of God* failed to do when it applied section 107 of the 1976 Act. The majority analyzed the statutory fair use factors, but without regularly addressing the broader question of whether the goals of copyright would be served by allowing PCG to fairly use *MOA*.⁴⁷⁹ Furthermore, the court neither reasonably balanced the equities nor gave a common-sense evaluation in determining if the goals of copyright law would be furthered, or rather whether WCG's creativity would be stifled.⁴⁸⁰ Instead, the majority reasoned an opinion that misapplied fair use jurisprudence and quite simply defies an appeal to common sense regarding the situation.⁴⁸¹ The majority has simply allowed one church to blot out the religious writings observed by another, thereby diminishing the contribution to the public's store of knowledge. This decision has likewise decreased WCG's impulse to create its annotation to correct *MOA*'s errors, since, by its control, WCG is assured that no new copies will enter circulation. Forgetting the underlying goals of copyright law, the Ninth Circuit merely prohibited a harmless use without any countervailing benefit.

476. See *supra* Part II.A (discussing the goals of American copyright law).

477. *Supra* text accompanying notes 66-67.

478. *Campbell*, 510 U.S. at 578.

479. See *supra* Part IV (criticizing the majority's analysis of the section 107 statutory factors).

480. See *supra* Part IV.A (criticizing the majority's opinion concerning considerations apart from the section 107 factors).

481. See *supra* Part IV (reviewing the majority's opinion and arguing how the court should have applied the fair use analysis).

Recently, the United States Supreme Court denied PCG's petition for certiorari in this case.⁴⁸² Given the unsound application of fair use under the facts of this case, the Supreme Court's denial is a lamentable act. Hopefully, courts in the future will better consider the underpinning purposes of copyright law when determining whether a secondary user of a copyrighted work should be protected as a fair user. Only by this is an analysis done in light of the purposes of the copyright.

482. *Philadelphia Church of God v. Worldwide Church of God*, No. 00-1276, 2001 U.S. LEXIS 2734 (Apr. 2, 2001) (*cert. denied*).

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