



---

3-1-1990

## Fair Use in Jackson v. MPI Home Video: Why Bother?

Timothy Kevane

Follow this and additional works at: <https://digitalcommons.lmu.edu/elr>



Part of the [Law Commons](#)

---

### Recommended Citation

Timothy Kevane, *Fair Use in Jackson v. MPI Home Video: Why Bother?*, 10 Loy. L.A. Ent. L. Rev. 595 (1989).

Available at: <https://digitalcommons.lmu.edu/elr/vol10/iss2/6>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

## FAIR USE IN *JACKSON v. MPI HOME VIDEO*: WHY BOTHER?

Although Jesse Jackson ("Jackson") may have lost the 1988 Democratic primaries, he triumphed against a less daunting opponent in the courtroom. Shortly after the Democratic Convention in July 1988, Jackson sued MPI Home Video ("MPI"), a video producer, for copyright infringement of his convention speech.<sup>1</sup> A preliminary injunction was issued against MPI<sup>2</sup> and the parties subsequently reached an undisclosed, out-of-court settlement.<sup>3</sup>

One of the principal issues in *Jackson v. MPI Home Video*<sup>4</sup> ("*Jackson*") was the application of the fair use doctrine.<sup>5</sup> Fair use permits unauthorized uses of original, copyrighted work.<sup>6</sup> Fair use is an equitable doctrine that approaches an alleged infringement from four perspectives: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for the copyrighted work.<sup>7</sup> These factors address the ultimate question of a fair use analysis: the reasonableness of the use alleged to be an infringement.<sup>8</sup> Thus, the fair use doctrine provides a framework for intensive inquiry into the nature of the copyrighted work and its alleged infringement. Rather than offering a rigid formula designed to produce a precise solution, the doctrine puts forth general guideposts serving as a basis for decision. Given its special focus on the circumstances, practical application of fair use can result in a wide spectrum of answers to a fair use problem.<sup>9</sup>

Not surprisingly, the flexibility of fair use has resulted in various interpretations of the doctrine.<sup>10</sup> This vulnerability to analytical clashes supports the need for a less hurried fair use analysis, which is one of the

---

1. *Jackson v. MPI Home Video*, 694 F. Supp. 483 (N.D. Ill. 1988).

2. *Id.* at 492-93.

3. "Rev. Jesse Jackson Settles Lawsuit Against Video Company," ENT. L. REP., Vol. 10, No. 5, p. 19 (Oct. 1988).

4. 694 F. Supp. 483 (N.D. Ill. 1988).

5. *Id.* at 489-91.

6. 17 U.S.C. § 107 (1982).

7. 17 U.S.C. § 107(1)-(4) (1982).

8. N. BOORSTYN, COPYRIGHT LAW § 5:2 at 117 (1981 & Supp. 1988) [hereinafter BOORSTYN].

9. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.05[A] at 13-82-84 (1989) [hereinafter NIMMER].

10. *Id.*

arguments considered by this note.<sup>11</sup>

In particular, additional weight should be given a fair use claim at the preliminary injunction stage. The ease with which Jackson obtained an injunction was rooted in the self-effacing nature of the fair use doctrine when applied to "uses" which appear so unseemly that a fair use defense is dismissed as untenable.<sup>12</sup> Since preliminary injunctions may prejudge a case, the fair use defense should play a more worthwhile role when a preliminary injunction ruling is sought. Thus, this casenote will examine the suppressed role of fair use, including its relationship to plaintiff's burden.

Another problem concerning the fair use doctrine involves the heavy emphasis on the commercial nature of the infringement.<sup>13</sup> Based on a recent Supreme Court case,<sup>14</sup> this casenote will explain how this emphasis may be faulty since the application of the "market effect" factor is inconsistent. In one scenario the market effect is recognized while in another scenario it is swept under the rug because the circumstances appear to be different. This problem is highlighted because the courts have traditionally given more weight to the "market effect" factor, which examines the commercial opportunities being exploited by the fair use claimant. Both fair use problems—failure to play a meaningful role in a preliminary injunction suit and inconsistent application of the "market effect" factor—will be presented in the context of *Jackson*.

## I. STATEMENT OF THE CASE — *JACKSON V. MPI HOME VIDEO*

### A. *Statement of Facts*

On July 19, 1988, Jesse Jackson delivered a speech at the Democratic National Convention in Atlanta, Georgia.<sup>15</sup> At least 100 copies of the speech were distributed earlier to the press for media quoting purposes.<sup>16</sup> The copies did not contain a copyright notification, but did contain a statement restricting public use.<sup>17</sup> Among those listening to Jackson was Waleed Ali, president of Maljack Productions, Inc., d/b/a

11. *See infra*, note 88.

12. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). "[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . ." *Id.*

13. NIMMER at § 13.05[A] at 13-80-81.

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

15. Jesse Jackson was a presidential candidate for the Democratic Party, defeated by Michael Dukakis in the 1988 primaries. In his speech, Jackson appealed to his constituents to improve their socioeconomic status.

16. *Jackson*, 694 F. Supp. at 485.

17. *Id.*

MPI Home Video ("MPI").<sup>18</sup> Ali believed that the speech had commercial possibilities and purchased a license from Grinberg Film Libraries Inc. ("Grinberg") to use the American Broadcasting Company's ("ABC") news archive tape of Jackson's convention speech.<sup>19</sup> MPI paid \$6,750.00 for the license.<sup>20</sup>

Having secured a master copy of the ABC coverage and a photo of Jackson from World Wide Photos, MPI prepared the tape for distribution.<sup>21</sup> Commercials and other extraneous materials were edited out of the ABC master and packaging artwork was prepared.<sup>22</sup> The videotape package displayed, among other items: (1) a photograph of Jackson and his name; (2) two quotations from the speech; (3) a description of the tape as containing the "entire stirring Democratic National Convention speech, uncut and unedited"; and (4) the name of MPI Home Video.<sup>23</sup> At the bottom of the Grinberg licensing contract were written the following words: "The film footage licensed hereunder may be used only for the purpose specified . . . [T]he licensor warrants nothing except its title to the footage licensed and that the licensee assumes full responsibility for any use which it may make of such footage."<sup>24</sup> The World Wide Photos sales form contained the following warning: "It may not be used in such a manner as to violate the rights of any person, firm or corporation. It may not be used for advertising or purposes of trade unless written consent of each living person depicted . . . shall be obtained . . ."<sup>25</sup>

At an undetermined point, Jackson became aware of MPI's distribution of his speech for commercial purposes.<sup>26</sup> In response to Jackson's public objections to the use of his speech, Ali openly responded that (1) Jackson did not authorize the tape because Ali did not ask him to do so,

---

18. MPI's catalog of the videos it distributes is wide-ranging, including feature films, concert films and television series. There are also cassettes explaining public issues, including works on public figures, political events and U.S. military conflicts around the globe. *Jackson*, 694 F. Supp. at 485-86.

19. ABC licenses Grinberg to license selected programs to third parties. Unless ABC restricts a license, Grinberg is free to license whatever it is given by ABC. The written agreement between them provides that Grinberg "shall have the right . . . to make duplicates of ABC film/cassettes and license said duplicates to third parties for stock footage purposes." See *Jackson*, 694 F. Supp. at 486.

20. *Jackson*, 694 F. Supp. at 485.

21. About eight thousand tapes were prepared. Prior to the court's order, about 7,100 had been shipped, another 1,000 remaining with MPI. MPI anticipated a \$3.00 profit per tape, selling to wholesalers for about \$7.50, retail price \$14.95. *Id.*

22. *Jackson*, 694 F. Supp. at 485.

23. *Id.*

24. *Id.* at 486.

25. *Id.*

26. *Id.* at 487.

(2) Jackson was not involved in any aspect of the project, and (3) it was permissible for MPI to profit from the words of a public figure.<sup>27</sup>

### B. *Holding of the Court*

The court based its skepticism of MPI's fair use defense on the sheer price of the license.<sup>28</sup> There was little possibility that Grinberg did not intend to "license a physical copy of some ABC news coverage to Mr. Ali's company"<sup>29</sup> and give MPI "rights to the content."<sup>30</sup> The court concluded that "under the circumstances here it is clear that MPI thought it bought and Grinberg thought it sold a valid license to duplicate and sell copies of the ABC tape."<sup>31</sup>

MPI did not succeed in defeating Jackson's motion for a preliminary injunction.<sup>32</sup> Based on the court's evaluation, Jackson satisfied the preliminary injunction requirements,<sup>33</sup> and MPI's fair use defense failed to rebut Jackson's satisfaction of the preliminary injunction test.<sup>34</sup> The court finally determined that Jackson was entitled to a preliminary injunction.<sup>35</sup> Thus, MPI was barred from distributing the tapes.<sup>36</sup> Jackson secured the sole right to market his speech and reap the financial benefits.

### C. *Trial Court's Reasoning*

#### 1. Does Jackson Meet the Requirements for Issuing a Preliminary Injunction?

To obtain a preliminary injunction, Jackson had to show: (1) a better than negligible probability of success on the merits; (2) irreparable injury; (3) lack of serious adverse effect on the defendants; and (4) that the injunction is not inconsistent with the public interest.<sup>37</sup> Because a final determination under part one of the test rested on the court's analysis of MPI's defenses, the court determined the likelihood of Jackson's success on the merits last.<sup>38</sup> It is this standard, the likelihood of success

---

27. *Jackson*, 694 F. Supp. at 487.

28. *Id.* at 486.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Jackson*, 694 F. Supp. at 492-93.

33. *Id.* at 487-88.

34. *Id.* at 489-90.

35. *Id.* at 493.

36. *Id.*

37. *Jackson*, 694 F. Supp. at 493.

38. *Id.* at 487.

on the merits, which part of this casenote questions.<sup>39</sup>

A showing of irreparable injury was not a difficult hurdle for Jackson to clear.<sup>40</sup> The "injury" is defined in terms of the speech's diminished market potential, as a result of competition with an infringing tape, and the effect the copyright controversy would have on consumer preferences.<sup>41</sup>

As for serious adverse effect on defendants, the court did not decide *what* effect the preliminary injunction would produce. A more in-depth analysis of this issue was left to a final injunction hearing.<sup>42</sup> The court placed the burden on the defendants to show that sales would be reduced by a "short additional delay in their distribution."<sup>43</sup>

Despite the defendants' efforts, the court found that the preliminary injunction was fully consistent with the public interest:

Protection of copyright and prevention of practices which have a tendency to deceive are clearly consistent with the public interest in the creation of other original works fostered by copyright protection and in the avoidance of deception of the public. Moreover, failure to protect copyright (by denying the preliminary injunction) is inconsistent with the public interest.<sup>44</sup>

MPI argued that an injunction would be inconsistent with the public interest because it would hinder news reporting of political events.<sup>45</sup> The court disagreed, noting that various alternatives to infringement existed.<sup>46</sup>

## 2. MPI's Defense of Fair Use of Jackson's Speech

Among its defenses,<sup>47</sup> MPI pleaded fair use of Jackson's copyrighted

---

39. See *infra* note 157 and accompanying text.

40. Irreparable injury "may normally be presumed from a showing of copyright infringement." *Atari, Inc. v. North American Philips Consumer Elec. Corp.*, 672 F.2d 607, 620 (7th Cir. 1982).

41. *Jackson*, 694 F. Supp. at 488. The effect on consumer preferences would, presumably, be to avoid buying a product "enmeshed in controversy." *Id.*

42. *Id.* at 488. The final injunction hearing, of course, never occurred because the parties reached an out-of-court settlement of the dispute. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Jackson*, 694 F. Supp. at 488. For example, Congress could amend the copyright law removing protection from candidate speeches or setting specific royalties, party committees could require speakers to waive copyright in order to speak, the media could negotiate royalty arrangements with the copyright holders, or the problem could simply be ignored, assuming no one has any time or incentive to block the distribution of their political stumping. *Id.*

47. MPI's first defense was that their videotape was protected by the First Amendment, the perennial thorn in copyright law. However, the court found no basis for MPI's claim,

speech.<sup>48</sup> The court assessed the defense based on the four factors set out by the statute—purpose and character of the use, nature of the copyrighted work, amount and substantiality of the use and effect on the market—and determined that the fair use doctrine was inapplicable to defendants' use.<sup>49</sup>

Subsection (1) of Section 107 of the 1976 Copyright Act provides that in determining whether the use made of a work in any particular case is a fair use, the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes, is to be considered.<sup>50</sup> The court found that the purpose was news reporting for profit.<sup>51</sup> Profit or not, news reporting has been deemed a proper use under the fair use doctrine.<sup>52</sup> MPI distinguished its conduct from the defendant's conduct in *Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>53</sup> ("*Nation*"). In the *Nation* case, Harper & Row obtained exclusive rights to publish former President Gerald Ford's memoirs, including pre-publication excerpts.<sup>54</sup> After illicitly obtaining the excerpts, The Nation magazine published them without authorization.<sup>55</sup> Justice

---

quoting from *Harper & Row v. Nation Enter.*, 451 U.S. 539, 559 (1985): "It is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public." *Jackson*, 694 F. Supp. at 489.

MPI questioned Jackson's copyright interest on grounds that it had been abandoned. Nevertheless, despite the absence of copyright notice, it was more probable than not that MPI would not prevail on this issue: Jackson's delay in obtaining copyright protection is not evidence of an intent to abandon his protectable interests, rather, the court viewed his neglect as "mere inaction," cured within a "short time." *Id.* at 490-91.

A related but doomed challenge to the copyright was forfeiture through publication without copyright notice. The Act provides that failure to notify does not invalidate the copyright if the notice has been omitted from no more than a relatively small number of copies. 17 U.S.C. § 405(a)(1) (1982). In addition to having more than a negligible probability of prevailing on this issue, the court deemed Jackson to have a reasonable probability of prevailing on the basis of § 405(a)(2) which saves a copyright where "a reasonable effort is made to add notice to all copies that are distributed to the public . . . after the omission has been discovered." *Id.* at 491 (citing 17 U.S.C. § 405(a)(2) (1982)).

Finally, MPI argued that it was an innocent infringer under § 405(b) of the Act. What on the surface looked like a "good chance" to win on this issue was quickly cast into doubt by the court, noting that MPI's responses to Jackson's protests are evidence of anything but the innocence which it so pleads. *Jackson*, 694 F. Supp. at 491-92.

48. *Jackson*, 694 F. Supp. at 489.

49. *Id.* at 490.

50. 17 U.S.C. § 107(1) (1982).

51. *Jackson*, 694 F. Supp. at 489.

52. See, e.g., *Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142, 147 (2d Cir. 1984), cert. denied, 469 U.S. 823 (1984); *Consumers Union v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1984).

53. 471 U.S. 539 (1985).

54. *Id.* at 542.

55. *Id.* at 543.

O'Connor held that The Nation's unauthorized publication of verbatim quotes from essentially the "heart" of unpublished presidential memoirs, which was to harm the copyright holder's right of first publication, was not a fair use.<sup>56</sup> However, unlike the defendant in that case, MPI did not know that the material was copyrighted, did not obtain the material by theft or any other improper means, and did not deliberately supplant the right of first publication.<sup>57</sup>

The court next examined the nature of the copyrighted work in relation to the alleged infringement:<sup>58</sup> Jackson's speech qualified as an original literary work.<sup>59</sup> But, as the Supreme Court noted in the *Nation* case, even "substantial quotations" of a publicly delivered speech may qualify as fair use.<sup>60</sup> Unfortunately for MPI, more than "substantial quotations" were used in its reproduction.<sup>61</sup>

The court treated the third factor, the amount and substantiality of the portion used in relation to the copyrighted work,<sup>62</sup> without elaboration. MPI used one of the derivative works protected under Jackson's copyright in its entirety.<sup>63</sup> The court stated that MPI's defense that fair use of an entire work is permissible failed because MPI based its defense on *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>64</sup> where the unadulterated use was non-commercial.<sup>65</sup>

Finally, the court applied the fourth factor determining fair use—the effect of the use upon the potential market value of the copyrighted work.<sup>66</sup> MPI attempted to argue that Jackson would remain unaffected by its fair use of the work because he had no plans to market the speech.<sup>67</sup> The court disagreed, observing Jackson's intention to market his copyrighted work and the statute's reference to "potential" as opposed to actual market.<sup>68</sup> Therefore, Jackson's failure to engage in marketing activities was irrelevant.<sup>69</sup>

---

56. *Id.*

57. *Jackson*, 694 F. Supp. at 489.

58. *Id.* at 489-90.

59. *Id.* at 490.

60. *Nation*, 451 U.S. at 564.

61. *Jackson*, 694 F. Supp. at 490.

62. 17 U.S.C. § 107(3) (1982).

63. *Jackson*, 694 F. Supp. at 490.

64. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

65. *Id.* at 449-51 (no copyright infringement involved in sale of video recorders to individuals who tape TV programs without authorization).

66. *Jackson*, 694 F. Supp. at 490.

67. *Id.* Defendants argued Jackson had manufactured no tapes himself, and that there was no indication of any packaging and distribution plans. *Id.*

68. *Id.*

69. *Id.*



## II. BACKGROUND ON THE DOCTRINE OF FAIR USE

### A. *The Meaning of Copyright*

Congress enacted the first copyright law in 1790 pursuant to a constitutional grant of power.<sup>70</sup> Following revisions to the 1790 law and a 1909 Act,<sup>71</sup> the Copyright Act of 1976 (the "Act") was passed.<sup>72</sup> One commentator stated that "the purpose of affording copyright protection is to grant valuable rights to authors thereby encouraging the production of literary and artistic works of lasting public benefit. This is the rationale for the limited copyright monopoly."<sup>73</sup>

The fundamental economic principle behind copyright law demonstrates why part of a fair use analysis consists of the commercial nature of the infringement.<sup>74</sup> This part of fair use analysis is in part a stopgap measure which preserves the economic underpinning of copyright law. That is, copyright law awards the right to exploit a work first and foremost to the original author of the work in question. This right is the economic incentive to publish ideas, knowing that one's expression of those ideas will be protected.<sup>75</sup> Were the expression unprotected, the incentive would be nonexistent: the value of the expression would dwindle if duplication of one's work went unchecked. For this reason our society has devised a concept such as "copyright" which is based in large part on commercial or economic philosophy—the result is a special focus on the commercial characteristics posed by the infringement.

Section 106 of the Act lists the rights to which the copyright holder is entitled.<sup>76</sup> "Subject to the complex and detailed limitations and ex-

70. U.S. CONST. art. I, § 8, cl.8. "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." *Id.*

71. L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 9 (1978). The 1909 Act provided no exceptions regarding copyright protection of printed works. However, it allowed a qualified exemption for copying anything else, and two exemptions for performances of protected work. Still uncodified, fair use governed some exceptions as a judicial doctrine. *Id.* at 12.

72. 17 U.S.C. §§ 101-810 (1982).

73. BOORSTYN § 1:2 at 3.

74. *See, e.g., Sony*, 464 U.S. at 450-51.

75. *Id.* at 432 (citations omitted).

76. 17 U.S.C. § 106 provides:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following-

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
- (3) to distribute copies or phonorecords of the copyrighted work;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes,

emptions set forth in sections 107 through 118 of the Act, the copyright owner has the sole right to exercise any of the exclusive rights of copyright and, conversely, to exclude others from exercising any of such rights."<sup>77</sup>

In *Jackson*, the specific right which concerned Jackson was the right "to prepare derivative works based upon the copyrighted work,"<sup>78</sup> in this case, a commercial, videotaped version of his convention speech.<sup>79</sup> To constitute an infringement of the copyrighted work, the derivative work must be *based* upon the copyrighted work—an adaptation which incorporates a portion of the copyrighted work in some form.<sup>80</sup> A simple, concise definition of infringement is, therefore, the unauthorized use of copyrighted material.<sup>81</sup>

### B. Fair Use in Copyright Law

The copyright holder's "bundle of rights" listed in section 106 is subject to a number of qualifications and exceptions. Among them is Section 107 of the Act<sup>82</sup> which codifies the judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive rights of copyright.<sup>83</sup> The defense of fair use has been raised in numerous cases on the ground that the defendant's use of plaintiff's work

and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1982).

77. BOORSTYN § 4:1 at 97.

78. 17 U.S.C. § 107(2) (1982).

79. *Jackson*, 694 F. Supp. at 492.

80. BOORSTYN § 4:3 at 100.

81. BLACK'S LAW DICTIONARY 702 (5th ed. 1979).

82. 17 U.S.C. § 107 states:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, 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.

17 U.S.C. § 107 (1982).

83. BOORSTYN § 5:2 at 117.

was fair and, thus, not an unlawful appropriation or infringement.<sup>84</sup> The principle of fair use is the most far-reaching of the restrictions on the exclusive rights when used as a defense.<sup>85</sup>

The concept is so flexible that it defies definition independent of a given fact pattern.<sup>86</sup> As an equitable rule of reason,<sup>87</sup> the doctrine has never been precisely defined. Cases dealing with the question of fair use have relied solely on the facts to define the limits of the doctrine.<sup>88</sup> Once a court has determined that the use made of a work was a "fair use" such use does not constitute an infringement of the copyright, despite the exclusive rights belonging to the copyright holder outlined in Section 106.<sup>89</sup>

The application of fair use usually constitutes a mixed issue of law and fact.<sup>90</sup> Determining the factual sufficiency of the defense, however, is a difficult undertaking. Part of the difficulty can be explained by the inconsistent interpretations derived from the doctrine prior to its codification.<sup>91</sup> One court held that an insubstantial similarity was not actionable and was therefore a "fair use."<sup>92</sup> Other courts have suggested that fair use arises when there is copying of the theme or ideas, but not of the expression of ideas.<sup>93</sup> At least prior to 1978,<sup>94</sup> it was possible to declare

84. See, e.g., *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57, 61 (2d Cir. 1980) ("While the fact that [television network] sought to profit financially from its telecasts of [sports events in connection with which the network used three short segments of plaintiff's film biography of a champion wrestler] does not, standing alone, deprive . . . [the network] of the fair use defense, it was relevant that the film was used by the network at least in part for commercial exploitation . . .") (citation omitted); *Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142, 148 (2d Cir. 1984) (Under copyright law's fair use provision, "informational . . . works may be more freely published than those of a creative nature.") (citation omitted); *Consumers Union v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1984) ("Since the risk of restraining free flow of information is more significant with informational work [rather than creative,] the scope of permissible fair use of copyrighted work is greater.") (citations omitted).

85. BOORSTYN § 5:2 at 117.

86. *Id.*

87. The term "equitable" refers to that which is in harmony with general principles and notions of fairness. BLACK'S LAW DICTIONARY 482 (5th ed. 1979).

88. *Diamond*, 745 F.2d at 147. The *Diamond* court stated:

[In determining whether the use made of a work in any particular case is a fair use,] the appraisal of these four statutory factors is obviously a fact specific inquiry for which summary judgment is ill-suited but not unknown where no material dispute of fact exists and a reasonable trier can reach only one conclusion.

*Id.* (citations omitted).

89. 17 U.S.C. § 106 (1982).

90. *Pacific and Southern Co. v. Duncan*, 744 F.2d 1490, 1495 n.8 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). The doctrine incorporates the specific activity and surrounding circumstances within the framework established by the four factors. *Id.*

91. NIMMER at § 13.05[A] at 13-64-65.

92. *Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579, 581 (9th Cir. 1944).

93. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

that fair use of a copyrighted work meant that the similarities between the original and derivative work were not substantial.<sup>95</sup> This definition was not helpful because it merely led the fact finder back to the substantial similarity inquiry. The inquiry begs the essential question of the doctrine: a finding of fair use does not necessitate an absence of substantial similarity; rather, the proper enunciation of the law is that *despite* a finding of substantial similarity, fair use may be properly invoked.<sup>96</sup>

The four factors listed in Section 107 (purpose and character of the use; nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for the copyrighted work) serve as guideposts, and do not represent an exhaustive list of means by which to find fair use.<sup>97</sup> In addition, the statute does not purport to assign any particular weight to any one factor.<sup>98</sup> Each factor is defined in general terms, and the courts have much discretion to determine whether any given factor applies to a given case.<sup>99</sup>

### 1. The First Factor: Purpose and Character of the Defendant's Use

The first factor listed in Section 107 is "the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes."<sup>100</sup> This factor alone does not specify which uses are "fair" and which are not. However, the preamble to Section 107 does make mention of certain "fair" purposes.<sup>101</sup> The first factor embodies, to a limited extent, the principle of "productive use,"<sup>102</sup>—a use which offers exceptional public benefit and is thus generally allowed. Productive use describes a work of authorship whereby the copier adds his or her own original contribution to that which is copied.<sup>103</sup>

The extent to which the "productive use" requirement limits the

---

94. The Copyright Act of 1976 became effective in 1978.

95. NIMMER § 13.05 at 13-64.

96. *Id.* at 13-65.

97. *Id.*

98. *Id.* at 13-66.

99. Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 549 (1985).

100. 17 U.S.C. § 107(1) (1982). "In so saying, the statute somewhat unrealistically paints the world into two corners—the venal commercial and the altruistic instructive. In fact, publishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers." *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 425 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 213 (1987).

101. *See supra* note 82.

102. *See Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 972 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

103. NIMMER § 13.05[A] at 13-68.

availability of a fair use defense was prescribed in *Universal City Studios, Inc. v. Sony Corp. of America*<sup>104</sup> (“*Sony*”). *Sony* involved a suit by the Universal-MCA production studios against Sony Corporation.<sup>105</sup> The complaint alleged that Sony was liable for copyright infringement for selling Betamax videotape recorders which were used by consumers to tape copyrighted television programs.<sup>106</sup> The *Sony* appeals court held that the defense of fair use may not be invoked, “[u]nless there [was] a ‘productive use’ in the sense that the copier himself is engaged in creating a work of authorship whereby he adds his own original contribution to that which is copied . . . .”<sup>107</sup>

The Supreme Court reversed the Ninth Circuit in *Sony*, stating that the defense of fair use is not “rigidly circumscribed” by the productive use requirement.<sup>108</sup> The Court held that neither private individuals in general nor Sony Corporation were liable for infringement based on the individual’s fair use defense.<sup>109</sup> Thus, the decision represents a compromise between “copyright” and the reality of private activity which cannot be practicably policed.

An additional consideration under the first factor examines the defendant’s conduct in view of the circumstances.<sup>110</sup> As an equitable doctrine, courts have held that where the defendant baldly denies any wrongdoing despite contrary evidence courts may deny the defendant the benefit of a “fair use” defense.<sup>111</sup> “Good faith and fair dealing” may also be additional considerations when examining the propriety of defendant’s conduct.<sup>112</sup> This particularly would apply where the defendant has direct contact with the plaintiff regarding use of a copyrighted work.

As with all standards dependent on factual inquiry, a court’s observations made under the first factor do not decide the fair use issue dispositively; rather, it is ultimately balanced against (or added to) the other factors before a final decision is reached. Perhaps the courts have given undue exclusionary powers to the issue of commerciality of the use: “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of

104. 659 F.2d 963 (9th Cir. 1981).

105. 464 U.S. 417 (1984).

106. *Id.*

107. NIMMER § 13.05[A] at 13-68.

108. *Sony*, 464 U.S. at 454 n.40.

109. *Id.* at 456.

110. NIMMER § 13.05[A] at 13-73.

111. See *Iowa State Univ. Research Found., Inc. v. American Broadcasting Co.*, 621 F.2d 57 (2d Cir. 1980).

112. Alternatively, a defendant’s good faith may provide stark contrast to the plaintiff’s questionable work. NIMMER, § 13.05[A] at 13-74.

the copyright."<sup>113</sup> It will become evident that the problem of commerciality is exacerbated by the entrenched approach to what appears to be a free transfer of interests: the fair use claimant may be viewed as borrowing an idea from someone else without obligation. Perhaps the bottom-line is this: copyright abhors freeriders and fair use claimants are prima facie freeriders if they have participated in the market.

## 2. The Second Factor: The Nature of the Copyrighted Work

The second factor listed in Section 107 is "the nature of the copyrighted work."<sup>114</sup> This factor "is meant to convey the thought that certain works by their very nature are more susceptible to copying or other uses, than others."<sup>115</sup> The idea is that the courts have realized that although some works are of such widespread use, the purpose for the use is so innocent and narrow that the use is deemed permissible. For example, textbooks and other material prepared primarily for the school markets would be more susceptible to reproduction for classroom use than material prepared for general public distribution.

## 3. The Third Factor: Amount and Substantiality of the Use

The third factor listed in Section 107 is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>116</sup> This factor requires review of both the quantity and quality of the "portion" used. The use of an entire work, or otherwise "wholesale" duplication, can never be fair use.<sup>117</sup> Generally speaking, as the amount and substantiality of the parts used increase, the likelihood that a court will find a fair use decreases.<sup>118</sup>

## 4. The Fourth Factor: The Use's Effect on the Market

The last factor considered is the "effect of the use upon the potential

113. *Sony*, 464 U.S. at 451:

A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated. *Id.* at 451.

114. 17 U.S.C. § 107(2) (1982).

115. BOORSTYN § 5:2 at 123.

116. 17 U.S.C. § 107(3) (1982).

117. BOORSTYN § 5:2 at 123.

118. *Id.* at 123-24.

market for or value of the copyrighted work."<sup>119</sup> This is probably the most important element of a fair use inquiry. "This factor . . . poses the issue of whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for or value of the plaintiff's present work."<sup>120</sup> The function of the use will be determinative depending upon whether the defendant's work essentially replaces the demand for plaintiff's original work or merely complements it.<sup>121</sup>

*C. The Supreme Court's Application of Fair Use in Harper & Row Publishers, Inc. v. Nation Enterprises*

One of the underlying themes of this article is that the fair use doctrine is, for better or worse, malleable. The doctrine's flexibility lent itself to pointed criticism by the dissent in the recent Supreme Court case, *Harper & Row, Publishers, Inc. v. Nation Enterprises*<sup>122</sup> ("*Nation*"), a presentation of which is critical to an understanding of fair use deficiencies. Former President Gerald Ford contracted with Harper & Row to publish his memoirs,<sup>123</sup> granting Harper & Row the "exclusive right to license prepublication excerpts, known in the trade as 'first serial rights.'"<sup>124</sup> Unbeknownst to Harper & Row, The Nation magazine surreptitiously obtained a copy of Ford's manuscript and gratuitously published a first serial on Ford's yet unpublished memoirs.<sup>125</sup> Harper & Row sued The Nation for infringement, seeking damages resulting from Time magazine's cancellation of its deal.<sup>126</sup> The Nation magazine raised the fair use defense.<sup>127</sup>

The district court rejected The Nation's fair use claim based on the diminished value of the copyright.<sup>128</sup> The Second Circuit reversed, recognizing the news-like value of The Nation's article and the relatively

119. 17 U.S.C. § 107(4) (1982).

120. NIMMER § 13.05[A] at 13-81 (footnotes omitted). Diminution of market value in plaintiff's works "is not lessened by the fact that their author has disavowed the intention to publish them during his lifetime. \* \* \* He is entitled to protect his *opportunity* to sell his letters . . ." *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1987).

121. BOORSTYN § 5:2 at 124-25: "[A] book review, for example, will not as a rule satisfy the consumer demand or substitute for the original work, despite liberal quotations from the book, and is therefore generally accepted as a fair use." *Id.*

122. 471 U.S. 539 (1985).

123. *Id.* at 542.

124. *Id.*

125. *Id.* at 543.

126. *Id.*

127. *Nation*, 471 U.S. at 544.

128. 557 F. Supp. 1067, 1072-73 (S.D.N.Y. 1983).

minute verbatim quote from Ford's work.<sup>129</sup>

The Supreme Court, in a six to three vote<sup>130</sup> reversed the Second Circuit, and decided that The Nation's appropriation was not within fair use standards.<sup>131</sup> The Court's opinion was accompanied by a detailed dissent, which made equally credible counter-arguments for each of the majority's findings on fair use.<sup>132</sup>

In analyzing the first factor, the purpose of the use, the Court took a critical stance. It underscored the purloined nature of The Nation's source, the profit motive and the notable absence of any otherwise placating addition such as an independent analysis of Ford's work.<sup>133</sup> The dissent argued that The Nation's article fell under "news reporting"—a presumably "fair" category under Section 107.<sup>134</sup> As such, it required no complementary text by The Nation and profit seeking was perfectly acceptable.<sup>135</sup> This argument was based on the "news reporting" exception under Section 107,<sup>136</sup> which states that when news alone is being disseminated, the need to add independent commentary is unnecessary and the use is entirely fair.<sup>137</sup>

Secondly, the Court was sensitive to The Nation's uninhibited use of an unpublished and confidential document finding the unique nature of the excerpts worked against the fair use claim.<sup>138</sup> The dissent found this point irrelevant, stating that the public value of making available the thoughts of a former president far outweighed any marketing deals between Harper & Row and Time magazine.<sup>139</sup>

As for the amount of copying, the majority clung to the "heart of the book" view taken by the trial court.<sup>140</sup> The dissent implemented both a quantitative test, finding the verbatim quotes to be *de minimis*, and a qualitative test, declaring that the quotes were essential to the overall content and nature of the news report.<sup>141</sup>

---

129. 723 F.2d 195, 208-09 (2d Cir. 1983).

130. Justice O'Connor wrote the majority opinion; Justice Brennan, with whom Justices White and Marshall joined, dissented.

131. *Nation*, 471 U.S. at 569.

132. *Id.* at 579-605.

133. *Id.* at 561-62.

134. *Id.* at 590-91.

135. *Id.* at 590.

136. *See supra* note 82.

137. NIMMER § 13.05[A] at 13-68-69.

138. *Nation*, 471 U.S. at 564.

139. *Id.* at 595.

140. *Id.* at 564-65.

141. *Id.* at 598-99. The quantitative test looks to the volume of copying of the copyrighted work, ignoring the amount of non-infringing material appearing in the infringing work. The qualitative test, however, assesses the qualitative value of the copied material regardless of the



Regarding market effect, the majority relied on the causal link between The Nation's infringement and the cancellation by Time magazine of its serial licensing contract with Harper & Row, a \$12,500 loss suffered by Harper & Row.<sup>142</sup> The dissent's position on this issue was less vigorous. The dissent merely questioned causation between the publishing of an insubstantial quote and the purported, absolute ruin of the license's commercial potential.<sup>143</sup>

Nimmer offered harsh criticism of the *Nation* case:

[G]iven the general language of the factors contained in Section 107 and the absence of guidelines for their implementation, reasonable minds can look at different aspects of a single situation and reach opposite conclusions regarding purpose, nature, amount of copying, and market effect. Moreover, even if the factors are analyzed as above so that two favor a finding of fair use while two disfavor such a finding, there is no guidance as to which conflicting factors prevail over others. When combined with the emphasis on case-by-case adjudication in this area, the factors thus tend to degenerate into post-hoc rationales for antecedent conclusions, rather than serving as tools for analysis.<sup>144</sup>

Nimmer explains that because of the potential for divergence in a Section 107 analysis, perhaps an additional test is required, namely, the functional test:

In determining the effect of the defendant's use upon the potential market for or value of the plaintiff's work, a comparison must be made not merely of the media in which the two works may appear, but rather in terms of the function of each such work regardless of media.<sup>145</sup>

Medium aside, if the defendant's work contains substantially similar material but functions differently than that of plaintiff, the defense of fair use may be available.<sup>146</sup>

Applied to the *Nation* case, the functional test would assess the detrimental effect of The Nation's article on *any* of the rights in President

---

volume of copying done. Thus, the "heart of the book" view emphasizes the substance and nature of the copyrighted use in relation to the overall work. *Id.*

142. *Nation*, 471 U.S. at 567.

143. *Id.* at 602-03.

144. NIMMER § 13.05[B] at 13-83-84 (footnotes omitted).

145. *Id.* at 13-84 (footnotes omitted).

146. *See, e.g., Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 417 (1984).

Ford's work, regardless of the actual exercise of those rights.<sup>147</sup> Time magazine absorbed a loss<sup>148</sup> sufficient to deny any claim of fair use. The precise effect on the *book market* need not form a part of this conclusion.

Nimmer admits the resemblance of the functional test to the fourth factor under Section 107, but points out that the test can be used to further characterize the other factors, notably, the second one, which examines the nature of the copyrighted work.<sup>149</sup> In the *Nation* case, the court notes that "[u]nder ordinary circumstances, the author's right to control the first public appearance of his undissemated expression will outweigh a claim of fair use,"<sup>150</sup> without defining what circumstances would be "extraordinary" so as to overcome this presumption.<sup>151</sup> According to Nimmer, the functional test resolves this issue: in the *Nation* case, the court examined the copyrighted work, and all rights associated with it. Given the nature of the manuscript, pre-publication could not be excused as fair use.<sup>152</sup> However, the functional test theoretically would allow pre-publication as fair use, in "extraordinary" cases.<sup>153</sup> Nimmer's example of an extraordinary case is a pre-publication excerpt of a book dealing with a very technical subject—the publication of the excerpt presumably would have no detrimental impact on future sales of the book because the excerpt is otherwise useless to the particular consumer who needs the entire work regardless.<sup>154</sup> Accordingly, a work of such blandness which lacks any confidentiality such that unauthorized pre-publication excerpts would have little or no effect on the value of the unpublished work may serve to illustrate an "extraordinary" case.<sup>155</sup> Given the emergence of fair use debate at the Supreme Court level, this note suggests that a more thorough examination of specific fair use issues should begin not at the Supreme Court level, but at the district court level, including preliminary proceedings.

---

147. NIMMER § 13.05[B] at 13-84.

148. The price of the first serial license was \$25,000. By the time of the *Nation's* publication, Time had paid the first of two equal installments, thus absorbing a \$12,500 loss upon cancellation of the licensing agreement. *Nation*, 471 U.S. at 542-43.

149. NIMMER § 13.05[B] at 13-89.

150. *Nation*, 471 U.S. at 555 (emphasis added).

151. *Id.*

152. NIMMER § 13.05[B] at 13-88.

153. *Id.* at 13-90.

154. *Id.*

155. *Id.*

### III. NEED FOR INCREASED INTERACTION BETWEEN THE FAIR USE DEFENSE AND THE PRELIMINARY INJUNCTION REQUIREMENTS IN *JACKSON*

Jackson only sought a preliminary injunction, pursuant to section 502(a) of the Copyright Act.<sup>156</sup> In a preliminary injunction suit, the issue before the court is not whether there has been infringement as a matter of law, but rather certainty of victory at trial, and whether the court is convinced by the prospects of that outcome.<sup>157</sup> The court may deny a preliminary injunction if the plaintiff's damages appear to be trivial, the defendant acted in reliance on the absence of copyright notice, the defendant would suffer undue hardship, or the plaintiff fails to show immediate irreparable injury.<sup>158</sup> Additionally, some courts hold that a preliminary injunction may issue despite the existence of a plausible defense, as long as the movant demonstrates a substantial likelihood of success.<sup>159</sup> The doctrine of fair use should enjoy a more meaningful degree of influence over adjudication of a claim seeking a preliminary injunction. The "negligible probability" standard imposes an insignificant burden on a plaintiff; the burden is lopsided when compared to the high standards imposed on a fair use claim and the ironic summary analysis it receives.

In order for a preliminary injunction motion to succeed, the movant must show a better than negligible probability of success on the merits.<sup>160</sup> It would seem that the "negligible probability" minimum is such that it virtually wipes out any effect a fair use defense could possibly have at the preliminary injunction stage. Perhaps the negligible probability test is too easy as it results in a superficial and oversimplified approval on the merits and ignores the possibility of a fair use defense as nothing more than a "plausible" but essentially harmless impediment to plaintiff's case.

A preliminary injunction claim should not be so facilitated by a "negligible probability" standard especially given the possibly preemptive effects of the doctrine. In evaluating the likelihood of plaintiff's success at trial on the copyright infringement issue, if the defendant's likelihood of prevailing on a fair use defense outweighs the plaintiff's likelihood, the burden on the plaintiff (to prove more than "negligible probability") is necessarily affected. Accepting the "plausibility" of a

---

156. 17 U.S.C. § 502(a) (1982).

157. NIMMER § 14:06[A] at 14-48.

158. *Id.* at § 13:05[A] at 14-50-53.

159. *See, e.g., Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184 (5th Cir. 1979).

160. *Jackson*, 694 F. Supp. at 487.

fair use defense while simultaneously stripping it of its power and effect in a preliminary injunction hearing may leave the fair use doctrine substantively wanting. If the defense is at least plausible, the likelihood of plaintiff's success at trial should be examined more thoroughly. Perhaps the issuing of a preliminary injunction should not be so readily granted and should require that the plaintiff make a more demanding but not impossible showing. While the issuance of an injunction is not wholly determinative, the injunction at times serves as an indication of the ultimate result based on a full-blown trial. For this reason, facile issuance of the injunction should be avoided, especially given the prominence and wide acceptance of the doctrine of fair use.

The *Nation* case does not simply exemplify semantical and academic skirmishing. The debate in *Nation* reflected the reality of endless and unanswered questioning of fair use defense limits and the need to give fair use more consideration from the defendant's standpoint by moving beyond judicial lip-service of congressional intent. This need is particularly true in a motion for preliminary injunction, where the requirements of plaintiff's burden are highlighted against the background of staunch copyright theory, thus overshadowing the doctrine of fair use. Thus, fair use, in order to command the legitimacy it is due, must be given a fair shot. If not revised, the negligible probability standard must be subjected to more scrutiny when confronted by a fair use defense.

#### IV. APPLYING THE *NATION* CASE AND *SONY* TO *JACKSON*: A HYPOTHETICAL DISSENT AND AN ILLUSORY "MARKET EFFECT" FACTOR

The first factor the *Jackson* court looked at was the purpose and character of MPI's use of Jackson's convention speech and whether it was commercial or noncommercial.<sup>161</sup> The court concluded that because Jackson lacked an argument against MPI he could not prevail on this factor.<sup>162</sup> The court's characterization of Jackson's argument as "weak" could conceivably mean "negligible." In addition, none of the "aggravating elements" present in the *Nation* case are present here: MPI did not obtain the video by theft and the absence of copyright notice along with its purchase of the license from Grinberg reveal good faith not present in the *Nation* case. Therefore, it appears that Jackson would have a *less* than negligible probability in prevailing on the first factor of fair use.

---

161. *Id.* at 489. See also *supra* note 100 and accompanying text.

162. *Jackson*, 694 F. Supp. at 489.

Indeed, it appears that MPI has more than a mere "probable" defense to the infringement.

The second fair use factor is the nature of the copyrighted work.<sup>163</sup> Unlike the *Nation* case, Jackson's speech was publicly delivered before a wide audience spanning the United States.<sup>164</sup> Around 150 copies were delivered to the press.<sup>165</sup> Jackson wanted his speech to be disseminated to maximize the public's knowledge of the speech, and obviously, of himself and his political beliefs.<sup>166</sup> Former President Ford, on the other hand, was not a public figure at the time he wrote his memoirs.<sup>167</sup> He was a private individual who prepared his yet unpublished and confidential memoirs. The monetary value of Ford's memoirs was probably more than Jackson's speech, which was anything but confidential. The dissent's rationale in the *Nation* case is more powerful: the public value of disseminating the thoughts of a presidential candidate conceivably outweighed Jackson's questionable need to maintain his speech on the shelf after delivering it before millions of people.

The third factor is the amount and substantiality of the portion used in relation to the copyrighted work as a whole.<sup>168</sup> On the surface, it appears that Jackson wins: MPI reproduced the entire speech.<sup>169</sup> However, it has been held that fair use of an entire work is appropriate where the use is noncommercial.<sup>170</sup> The circumstances in *Jackson* trigger analysis under the fourth fair use factor, the market effect.<sup>171</sup> In *Universal City Studios, Inc. v. Sony Corp. of America*<sup>172</sup> ("Sony"), the Court noted that taping of television programs by individuals for private use did not constitute infringement, nor did Sony's sale of Betamax machines to these individuals have any copyright infringement implications by association or otherwise.<sup>173</sup>

Consider the following hypothetical: viewers 1 through 7,000

---

163. See *supra* note 114 and accompanying text.

164. *Jackson*, 694 F. Supp. at 485.

165. *Id.*

166. *Id.* at 487.

167. While admittedly a term of art, Ford is not deemed a public figure in the sense that he was not involved in any public pursuit the developments of which would be within the public domain.

168. See *supra* note 116 and accompanying text.

169. *Jackson*, 694 F. Supp. at 485.

170. *Sony*, 464 U.S. at 449-50. ("[W]hen one considers the nature of a televised copyrighted audiovisual work . . . and that [recording] merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge . . . that the entire work is reproduced . . . does not . . . militate against a finding of fair use.") (footnote omitted). *Id.*

171. See *supra* note 119 and accompanying text.

172. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

173. *Id.* at 456.

(roughly the number of videotapes MPI shipped) tape a movie on television, which is on videotape or will later be made available on videotape. Provided their recording is limited to personal use, none of the viewers is liable for any infringement, because the use is "noncommercial" under *Sony*.<sup>174</sup> But *cumulatively*, the use may not be so "noncommercial." Cumulatively, 7,000 copies of the television program have been made. The 7,000 viewers who otherwise would have bought or rented the tape (theoretically) are no longer potential customers in the manufacturer's market for the videotape. There seems to be clear economic impact, yet the Court held no infringement because the use is fair; therefore, there is no liability under *Sony*.<sup>175</sup> The *Sony* Court alluded to such a possibility, but backed down from endorsing a presumption of economic impact, which is otherwise present where the activity is plainly commercial.<sup>176</sup>

This argument may be relevant to MPI's enterprise. Instead of viewers 1 through 7,000 individually taping Jackson's speech with impunity, these viewers have instead chosen to either watch the speech without taping, or not watch the speech with the expectation that another individual will make Jackson's oratory available in the video market. The only difference between the scenarios in *Sony* and *Jackson* is that instead of the viewer taping, the viewer has "assigned" and paid someone else to do the job the viewer could have done independently without incurring liability. Thus, MPI made 7,000 or so copies of Jackson's speech and Jackson is out 7,000 customers. MPI alone is penalized, but the 7,000 viewers are not. Given the above example, it seems that the fourth factor, effect on the market, may be an inaccurate criterion because it may hold that there are two types of market effects—a diluted market effect as seen in *Sony* and a concentrated market effect in *Jackson*. This distinction, an illusory one, results in an inconsistent application of the market effect factor.

Thus, the essential question is whether there is any substantive difference between the market effect in *Sony* and the market effect here. By asking this question, the irrelevant defense MPI raised in the preliminary injunction hearing—that Jackson had no current plans to market his speech—is avoidable. If the net effects in *Sony* and *Jackson* are identical,

---

174. *Id.*

175. *Id.* at 454-55.

176. *Id.* at 451. ("A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the . . . work. . . . [If the intended use] is for a noncommercial purpose, the likelihood [of future harm] must be demonstrated.") *Id.*

the public's interest in being able to readily obtain a copy of a major public figure's speech is not to be dismissed.

To tie the above argument in with the fair use factors would be to say that at least two of the factors—purpose and character of the use and market effect—have helped perpetrate the illusion that commercial impact is an absolute principle. It is not. Given the interdependence of the four factors, one would think that other facts and aspects of a given defense would further bolster the argument that the doctrine must keep apace with an everchanging society.

The effect of this argument on current fair use theory, if accepted, would be enormous. The first factor of the doctrine, purpose and character of the use, may no longer sound the defendant's death knell in commercial scenarios. More important is the effect on the fourth factor, market effect. This criterion would necessarily be moot if the "diluted-concentrated" dichotomy explored above proves false. In the final analysis, the doctrine may need some revamping.

## VI. CONCLUSION

The fair use doctrine reflects the need to regulate the author's rights in his or her work amid the pressures of a technologically demanding environment. The nature of an information society, combined with a strong interest in facilitating unhindered dissemination of knowledge, inevitably produces compromises such as the doctrine of fair use.

Barring a change in the "negligible probability" standard for obtaining a preliminary injunction, the courts should be more careful in granting preliminary injunctions where a fair use defense is presented in good faith by the defendant. The standard as it stands indicates that the fair use defense must be absolute and indomitable for it to have effect in a preliminary injunction hearing. But court decisions exemplified by the *Nation* case have indicated that this is not so. The preliminary injunction in the "copyright vs. fair use" scenario should perhaps be barred altogether or the standard the plaintiff must meet should be modified.

In addition, courts' zealous concern with market effect and substantiality of the use has saturated cases involving fair use leaving the doctrine nowhere. Thus, perhaps fair use needs redefinition. Admittedly, balancing the competing interests involved—the author's exclusive rights vs. free flow of commerce and first amendment concerns—is a delicate task. However, the compromise between competing interests should not excuse continued application of a doctrine which suffers from inherent theoretical contradiction.

Nevertheless, *Sony* and the above hypothetical may be reconciled:

on its face, MPI's conduct is simply more blatant than the conduct of each individual viewer taping a program; the viewer did not "profit" from the taping. But what is the point of recognizing fair use on the one hand yet condemning its possible economic advantages and thus rejecting the defense? We may require a few more dissents such as the *Nation* case in order for fair use to claim a true victory.

*Timothy Kevane*



